

Preserving and Developing Issues for Appeal

What Every Trial Lawyer Should Know

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What is Preservation?

Legal requirement that an issue be raised in and decided by a lower court or tribunal to be considered by an appellate court

What is Preservation?

“Most trial court or administrative agency rulings on the facts, the evidence, procedural matters or legal issues must have been challenged by a timely motion, opposition or objection in the trial court or administrative agency for any challenge to the ruling to be “preserved” so it may be considered on appeal.”

Donald G. Alexander, *Maine Appellate Practice* (6th ed. 2022), p. 237

What is Preservation?

“The preservation rule has two purposes. First, it gives the trial court and other parties notice and opportunity to correct any perceived error during the trial to avoid the result being vacated or remanded for further proceedings after appeal. Second it is to ensure that any review on appeal will be informed by a ruling made in the first instance by the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impact.”

Donald G. Alexander, *Maine Appellate Practice* (6th ed. 2022), p 238

What is required to preserve an issue?

“An issue is deemed to be raised or preserved if there is a sufficient basis in the record to alert the trial court or administrative agency and any opposing party of the existence of that issue.”

Donald G. Alexander, *Maine Appellate Practice* (6th ed. 2022), p 237

Preserving Evidentiary Issues – Evidence Admitted

(a) Preserving a claim of error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) If the ruling admits evidence, a party, on the record:

(A) Timely objects or moves to strike; and

(B) States the specific ground, unless it was apparent from the context;...

Preserving Evidentiary Issues – Evidence Excluded

(2) If the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

Me. R. Evid. 103

Preserving Evidentiary Issues – Offer of Proof

Prosecution's objection is sustained (e.g. the court rules that your expert is not qualified to testify):

You must make an offer of proof!

“Your honor, I need to make an offer of proof outside the presence of the jury”

This will make sure that the substance of the excluded testimony is part of the record for appeal.

Preserving Evidentiary Issues – Offer of Proof

In order to preserve an issue for appeal, “M.R. Evid. 103(a)(2) requires the proponent of [the] evidence to make its substance known to the court by an offer of proof, unless the substance was apparent from the context of the question.” *State v. Howe*, 2001 ME 181, ¶ 9, 788 A.2d 161, 163. “An offer of proof should contain not only the facts that are sought to be elicited, but also reference to the facts, circumstances, or legal grounds on which the testimony is admissible.” *Field & Murray*, *Maine Evidence* § 103.4 at 15 (2000 ed. 1999). Similarly, when a party eschews an explicit offer of proof and relies on the context of a question to preserve the issue for appeal, both the substance and the legal grounds on which the testimony is admissible must be apparent from that context.

State v. Snow, 2007 ME 26, ¶ 5, 916 A.2d 957, 959–960

Preserving Evidentiary Issues – Offer of Proof

Accordingly, we find that although the substance of the Harringtons' testimony was apparent from the context of their examination, the legal theory on which the testimony was admissible was not.

Therefore, because Snow failed to make an explicit offer of proof regarding the admissibility of the testimony, he failed to preserve the issue for appeal under M.R. Evid. 103(a)(2).

State v. Snow, 2007 ME 26, ¶ 10, 916 A.2d 957, 960

Preserving Evidentiary Issues – Motion in Limine

(e) Effect of pretrial ruling. A pretrial objection to or proffer of evidence must be timely renewed at trial unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final.

Me. R. Evid. 103

Preserving Evidentiary Issues – Motion in Limine

“Generally, an objection to the admission of evidence based on M.R. Evid. 403 must be made at trial in order to preserve the error. See *State v. Thomes*, 1997 ME 146, ¶ 7, 697 A.2d 1262, 1264.”

State v. Allen, 2006 ME 21, 892 A.2d 456, 459

Preserving Evidentiary Issues – Motion in Limine

“However, we have held that a motion in limine may preserve a Rule 403 objection to the admission of evidence when the court's ruling on the motion is “unequivocally” final. *State v. Thongsavanh*, 2004 ME 126, ¶ 8 n. 8, 861 A.2d 39, 42.”

State v. Allen, 2006 ME 21, 892 A.2d 456, 459

Preserving Evidentiary Issues – Motion in Limine

As an initial matter, the State contends that Thongsavanh failed to preserve for appeal the issue of the offensive T-shirt because he did not raise an objection each time the phrase was mentioned during the trial. The State relies primarily on two cases in which we held that a defense motion in limine failed to preserve an issue when the defendant did not later object to the admission of the evidence at trial. *State v. Thomes*, 1997 ME 146, ¶ 7, 697 A.2d 1262, 1264; *State v. Knight*, 623 A.2d 1292, 1293 (Me.1993). In both cases, however, the trial court made it clear that its ruling on the preliminary motions did not entirely resolve the issues. In *Knight*, the court made it clear that its ruling was not final, and in *Thomes* the court admitted evidence for a limited purpose and the defendant did not later object that the evidence presented at trial exceeded that purpose. *Knight*, 623 A.2d at 1293; *Thomes*, 1997 ME 146, ¶¶ 3-4, 697 A.2d at 1264.

State v. Thongsavanh, 2004 ME 126, 861 A.2d 39, 42

Preserving Evidentiary Issues – Motion in Limine

“Therefore, those cases present a very different scenario than the instant case, in which the court unequivocally admitted the phrase for any purpose just moments before the State highlighted it in its opening statement. Thongsavanh's objection served the underlying purposes of the preserved error rule, and the issue is thus preserved for appeal.”

State v. Thongsavanh, 2004 ME 126, 861 A.2d 39, 42

Even when the issue is raised in limine, object at trial!

“Despite the fact that Thomes filed a motion in limine to exclude the sexual statements, he did not object at the trial when the statements were offered in evidence. A court cannot evaluate the probative value of contested evidence in a vacuum. By failing to object at the trial, Thomes did not give the court an opportunity to weigh the probative value of the evidence against its potential for unfair prejudice within the context of other evidence addressed at the trial. His attempt to raise this objection on appeal comes too late. Because Thomes's challenge to the court's in limine ruling is not preserved, we must review for obvious error affecting his substantial rights.”

State v. Thomes, 1997 ME 146, ¶ 7, 697 A.2d 1262, 1264

Review of Unpreserved Issues

What's the big deal?

What are the consequences of failing to preserve an issue?

Review of Unpreserved Issues

The general rule is that issues that are not preserved are deemed waived and will not be heard by the Law Court.

However, the exception to the rule is for “obvious error”

Review of Unpreserved Issues

“For us to vacate a conviction based on the obvious error standard of review, there must be (1) an error, (2) that is plain, and (3) that affects substantial rights. If these conditions are met, we will exercise our discretion to notice an unpreserved error only if we also conclude that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings.”

State v. Fahnley, 2015 ME 82, ¶ 15, 119 A.3d 727, 733 (Citations and internal quotation marks omitted. Emphasis added).

Review of Unpreserved Issues

“We are particularly cautious in our review for error that is unpreserved in appeals from jury verdicts. ‘The judicial deference owed jury decisions demands an appellate standard of review more rigorous than one narrowly focused on whether it was reasonably possible that the jury would have returned a different verdict.’”

State v. Hall, 2017 ME 210, ¶ 27, 172 A.3d 467, 474–475 (quoting State v. Pabon, 2011 ME 100, ¶ 24, 28 A.3d 1147, 1153).

Review of Unpreserved Issues

The Law Court views its obvious error standard as “similar to” the federal courts’ plain error standard, *State v. Pabon*, 2011 ME 100, ¶ 35, 28 A.3d 1147, 1155.

Donald G. Alexander, *Maine Appellate Practice* (6th ed. 2022), p 240

Review of Unpreserved Issues

“Today we affirmatively adopt the federal reasonable probability standard as part of the third element of the [obvious error] test. *State v. Pabon*, 2011 ME 100, ¶ 35, 28 A.3d 1147, 1155.

Party asserting error must show reasonable probability that but for the error the result would have been different.

Obvious Error or Harmless Error?

“A trial court ruling, even if in error, will not result in reversal of the judgment if the Law Court determines that the error was “harmless” – that is, that the error did not result in substantial injustice or affect substantial rights.”

Donald G. Alexander, *Maine Appellate Practice* (6th ed. 2022), p 242

Obvious Error or Harmless Error?

“In criminal cases, the State has the burden of persuasion on appeal to demonstrate that an error, properly objected to, was harmless.”

Donald G. Alexander, *Maine Appellate Practice* (6th ed. 2022), p 243

Obvious Error or Harmless Error?

Properly preserved non-constitutional issues:

State must prove that it was highly probable that the error did not affect the judgment

Properly preserved constitutional issues:

Court must be satisfied beyond a reasonable doubt that the error did not affect the defendant's substantial rights or contribute to the verdict obtained.

Obvious Error or Harmless Error?

“The obvious error standard addressing unpreserved claims of error and the harmless error standard addressing preserved claims of error are sometimes applied using similar terminology, but with differing burdens and emphasis. Thus, preserved error is reversible and not harmless if a “substantial right” of the party is affected. Unpreserved error is obvious and reversible if the error affects “substantial rights” or results in a substantial injustice.”

In re Joshua B., 2001 ME 115, ¶ 10, 776 A.2d 1240, 1243 (citations omitted).

Obvious Error or Harmless Error?

“Although clear distinction between the two may not be possible, the threshold for reversal based on preserved error is much lower. Thus, preserved error is reversible if any substantial right is compromised, to the prejudice of the objecting party, and the supporting party cannot convince the court that the error was harmless in the context of the other events and evidence in the proceeding. For obvious error to require reversal, the error must be such as to deprive the party of a fair trial or to result in such a serious injustice that, in good conscience, the judgment cannot be allowed to stand”

In re Joshua B., 2001 ME 115, ¶ 11, 776 A.2d 1240, 1243-1244

State v. Jandreau 2022 ME 59, A.3d 371

“Jandreau's written motion to suppress included a section on what he asserted to be the overbreadth and lack of particularity of all four of the search warrants issued. However, the motion did not differentiate among the four warrants, did not quote or refer to any specific portion of any of the warrants, and did not link its boilerplate recitations of law and citations to cases to any specific portion of any of the four warrants or affidavits.”

State v. Jandreau, 2022 ME 59, ¶ 23, 288 A.3d 371, 381

State v. Jandreau 2022 ME 59, A.3d 371

“We conclude that the motion court correctly determined that Jandreau's arguments regarding overbreadth and lack of particularity in the September 2017 warrant were raised perfunctorily but never developed. Despite the trial court's clear decision to “disregard these arguments” for purposes of Jandreau's motion, Jandreau did not seek to revisit the issues or otherwise rectify the deficiency at any time in the trial court. We conclude that the issues of lack of particularity and overbreadth in the September 2017 warrant were abandoned, and we do not address them further.”

State v. Jandreau, 2022 ME 59, ¶ 27, 288 A.3d 371, 382 (Emphasis Added)

Abandonment of Issues

“An issue may be viewed as waived or forfeited for lack of appellate development if it is addressed in briefing only in a perfunctory manner that does not demonstrate some effort to articulate the argument.”

Donald G. Alexander, *Maine Appellate Practice* (6th ed. 2022), p. 242

Preserve and Develop All the Issues!

- File Written Motions
- Make Objections
- Brief the Issues
- Put it on the Record!