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Preserving Your Issues

This is exactly how concerned the Court of Criminal Appeals is about your unpreserved constitutional violations on direct appeal.



GENERAL PRESERVATION ISSUES

EX PARTE COULLIETTE

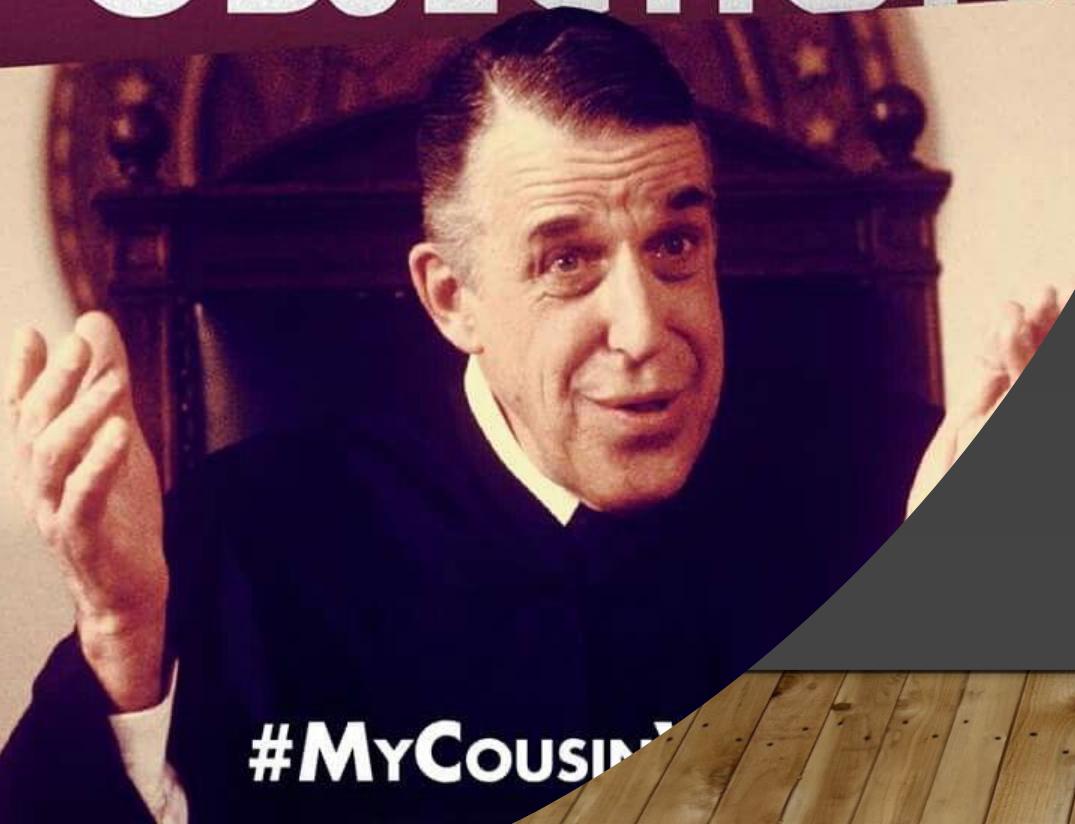
- Preservation issues begin and end with this case.
- The basic principle is this: if it isn't preserved, the Court will not address it.

The greatest appellate attorney in the world can't do anything with a bad record.

OBJECT ON THE RECORD

Pretrial motions are your friend.

**THAT IS A LUCID,
INTELLIGENT,
WELL THOUGHT-OUT
OBJECTION.**



#MyCousin

**BE
SPECIFIC**

go for the gold star
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WHY BE SPECIFIC?

- Because if the judge says this, anything you didn't specific argue is waived for appeal and not preserved.



My Cousin Vinny Judge memes |
quickmeme

21 of this conversation on the grounds of hearsay.
22 THE COURT: Which conversation?
23 MS. BAKER: The -- all of this is hearsay.
24 It's an out-of-court statement offered for the
25 truth of the matter asserted.

1 MR. ROBERTSON: I agree.
2 MS. WILLIAMS: Your Honor, this would
3 constitute an exception to hearsay in that the
4 declarant in the video has been declared
5 unavailable to testify.

In addition to that, we would submit that this is a statement against the interest of the declarant being Kathy Robertson in that on the whole, it is much more damaging to her position in regard to the charges against her than it is helpful to her. And I believe that meets all the criteria necessary for its admission.

13 THE COURT: Overruled. You may play it.
14 (State's Exhibit Number 2 was played

In the present case, R.E.R.'s initial hearsay objection failed to preserve for our review his claim that his confrontation rights had been violated. "Even constitutional claims may be waived on appeal if not specifically presented to the trial court." Brown v. State, 705 So. 2d 871, 875 (Ala. Crim. App. 1997). Although after the recorded statement was played for the jury there was an attempt by R.E.R. to amend his earlier objection to include the constitutional claims, R.E.R.'s objection was untimely at that point, and it failed to preserve his issue for review. See Roper v. State, 695 So. 2d 244, 246 (Ala. Crim. App. 1996), cert. denied, 695 So. 2d 249 (Ala. 1997) ("'An objection to a question, made after an answer is given, is not timely and will not preserve the issue for review.'") (quoting Scott v. State, 624 So. 2d 230, 234 (Ala. Crim. App. 1993)). See also Ex parte Crymes, 630 So. 2d 125, 127 (Ala. 1993) (holding that "[a] proper objection must be made after the question calling for objectionable testimony is asked and before the witness answers."). Accordingly, R.E.R. did not preserve his issue for this Court's review.

When Blake testified that Stovall came to his mobile home weekly to purchase Oxycodone, Stovall failed to object until the State had asked another question and Blake had begun to answer the question. Therefore, the objection was not timely. Furthermore, Stovall's only objection was, "That's prejudicial." (R. 253-54.) That general objection did not put the trial court on notice that Stovall was challenging the testimony on the ground that it violated Rule 404(b), which is the argument Stovall is now making.

When Blake testified that Stovall was at the mobile home on the day before the robbery and he purchased Oxycodone that day, Stovall stated, "Objection, prejudicial." (R. 266.) The objection was timely, but it was a general objection that did not put the trial court on notice that he was challenging the testimony on the ground that it violated Rule 404(b).

Stovall's claims regarding Blake's testimony about Stovall's drug purchases were not preserved for review.

frame to review the report when it considered his motion to exclude the report. (Hill's brief, p. 21.)

"Review on appeal is restricted to questions and issues properly and timely raised at trial." Newsome v. State, 750

So. 2d 703, 717 (Ala. Crim. App. 1989). 'An issue raised for the first time on appeal is not subject to appellate review because it has not been properly preserved and presented.' Pate v. State, 601 So. 2d 210, 213 (Ala. Crim. App. 1992)." Ex parte Coulliette, 857 So. 2d 793, 94-95 (Ala. 2003). "The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial." Ex parte Frith, 526 So. 2d 880, 882 (Ala. 1987). "A defendant is bound by the grounds of objection stated at trial and may not expand those grounds on appeal." Griffin v. State, 591 So. 2d 547, 550 (Ala. Crim. App. 1991).

In his motion for a new trial, Hill argued that the circuit court's "denial of his request for a continuance prevented him from [independently analyzing the State's DNA evidence]." (C. 215.) However, the record indicates that Hill never filed a motion to continue after coming into possession of the DNA evidence report. Moreover, in his motion to exclude, Hill did not request a continuance as an alternative remedy to exclusion. Since Hill never filed a motion to continue, there is no adverse ruling from which Hill can appeal. Accordingly, this argument is not preserved for our review.

violence. Specifically, Smith argues that motive was not a "real and open issue" and that the evidence served no purpose other than to "inflame the jury" against him. (Smith's brief, pp. 28-31.)

Initially, we question whether Smith's objection actually preserved his issue for appellate review. In the record, the State moved to admit the Facebook post (State's Exhibit 152) and Smith objected based on lack-of-foundation and relevancy grounds. (R. 133-35.) Thus, Smith did not raise the specific argument he now raises on appeal. "'The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial.'" Ex parte Coulliette, 857 So. 2d 793, 794-95 (Ala. 2003) (quoting Ex parte Frith, 526 So. 2d 880, 882 (Ala. 1987)). Therefore, the issue is not properly before this Court.

Even so, the evidence of Smith's Facebook post made three days before the burglaries was admissible under Rule 404(b).

CR-17-0393

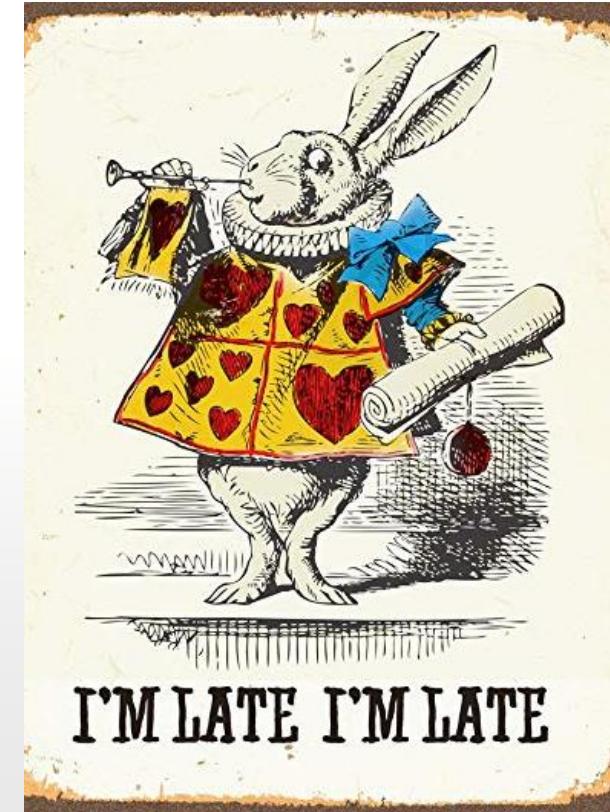
Ex parte Coulliette, 857 So. 2d 793, 794 (Ala. 2003). Thus, because Thrasher did not raise a collateral-estoppel defense below, he failed to preserve that issue for appellate review. See Weeks v. Herlong, 951 So. 2d 670, 678-79 (Ala. 2006) (failure to assert collateral-estoppel defense at trial constituted waiver of the defense).

Moreover, even if Thrasher had preserved this argument, we would not find it persuasive. The doctrine of collateral

TIMELY OBJECT

Don't be like the rabbit.

If you object after the
fact, it is too late.



its opening statement that it would present evidence that he had purchased Oxycodone pills from Blake, and that the trial court should have granted his motion for a mistrial. Stovall did not preserve this argument for review. He did not object to that portion of the argument when the State made it and he waited instead to object after the State had concluded its opening statement, and he then made a motion for a mistrial which the trial court denied. A timely objection must be made in order to preserve an issue for appellate review. E.g., Lucas v. State, 204 So. 3d 929, 939 (Ala. Crim. App. 2016), and cases cited therein. The Alabama Supreme Court has held that a motion for a mistrial must be made "immediately after the question or questions are asked that are the grounds made the basis of the motion for the mistrial." Ex parte Marek, 556 So. 2d 375, 379 (Ala. 1989). "The motion is untimely if it is not made until the conclusion of the witness's testimony or counsel's argument." Wilson v. State, 651 So. 2d 1119, 1121 (Ala. Crim. App. 1994). See also Vann v. State, 880 So. 2d 105 (Ala. Crim. Ann. 2002). Stovall's motion for a

"In addition to that, we would submit that this is a statement against the interest of the declarant being [K.R.] in that on the whole, it is much more damaging to her position in regard to the charges against her than it is helpful to her. And I believe that meets all the criteria necessary for its admission.

"[The Court]: Overruled. You may play it.

"(State's Exhibit Number 2 was played in open court to the jury.)"

(R. 125-26.) After the State's exhibit was played for the jury, defense counsel for R.E.R. made the objection as follows:

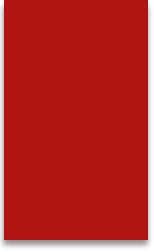
"[Defense Counsel]: I want to go on record as renewing our objection to the admissibility of this tape and specifically add the grounds that it violates the Defendant's right to confront his accuser under the Confrontation Clause of the United States Constitution.

"[The Court]: It's overruled."

(R. 126.)

On appeal, R.E.R. claims that the admission of K.R.'s recorded statement violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. The State, however, argues that R.E.R. failed

In the present case, R.E.R.'s initial hearsay objection failed to preserve for our review his claim that his confrontation rights had been violated. "Even constitutional claims may be waived on appeal if not specifically presented to the trial court." Brown v. State, 705 So. 2d 871, 875 (Ala. Crim. App. 1997). Although after the recorded statement was played for the jury there was an attempt by R.E.R. to amend his earlier objection to include the constitutional claims, R.E.R.'s objection was untimely at that point, and it failed to preserve his issue for review. See Roper v. State, 695 So. 2d 244, 246 (Ala. Crim. App. 1996), cert. denied, 695 So. 2d 249 (Ala. 1997) ("'An objection to a question, made after an answer is given, is not timely and will not preserve the issue for review.'") (quoting Scott v. State, 624 So. 2d 230, 234 (Ala. Crim. App. 1993)). See also Ex parte Crymes, 630 So. 2d 125, 127 (Ala. 1993) (holding that "[a] proper objection must be made after the question calling for objectionable testimony is asked and before the witness answers."). Accordingly, R.E.R. did not preserve his issue for this Court's review.



Specific Preservation Issues

Jury Instructions

Jury instructions do not require the magic words, but please use them.

The most important thing is making sure the trial court understands what you are asking for and why.



Felder v. State, 593 So. 2d 121, 122 (Ala. Crim. App. 1991)

Although the “magic words” were never employed, and although defense counsel should have been specific in stating the grounds of his objection, **it is apparent that both defense counsel and the trial court understood that the appellant's constitutional right against self-incrimination was involved.** At the hearing on the motion for new trial, defense counsel argued that both “Alabama and U.S. Constitutional law” guaranteed that the appellant was “entitled” to this charge. Defense counsel cited the case of *Perry v. State*, 368 So.2d 310, 312 (Ala.1979), to the trial court. A reading of the trial court's response to this argument, set forth above, strongly indicates that, even had this argument been made at trial, the request would still have been denied. Indeed, under the particular facts of this case, it would be unreasonable and both realistically and practically indefensible to hold that the appellant waived this issue. In this case, substance must prevail over form.

Rule 404(b)

Everyone has that client who is an innocent angel until the 404(b) notice arrives



404(b) checklist

- ▶ Request notice
- ▶ Raise hell if the notice isn't timely
- ▶ What kind of case do you have?
- ▶ Does the 404(b) evidence fit an exception?
- ▶ Is there a real and open issue that the exception addresses?
- ▶ Is the evidence necessary to address that issue and the state's case?
- ▶ Does the probative value outweigh the inherent prejudicial value of the evidence?
- ▶ Get a specific limiting instruction

Self-Defense Immunity



William Marbury,
attributed to Rembrandt Peale
Collection of the Supreme Court

James Madison,
attributed to James Frothingham
University of Michigan
Museum of Art

Smith v. State, 279 So. 3d 1199 (Ala. Crim. App. 2018)

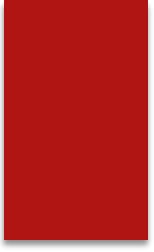
- ▶ Self-defense immunity denials must be challenged in a writ of mandamus
- ▶ Have the hearing well before the trial because you waive the issue if you don't mandamus

Get a
transcript!!!!!!

Guilty Pleas

- If your client pleads but has an issue for appeal, you have to reserve the right to appeal and preserve the issue. Two very different things but both are necessary





Motions for judgment of acquittal and for a new trial

Motion for judgment of acquittal

- ▶ Under Rule 20.1, these motions are used for one purpose and one purpose only:
- ▶ “The court, on motion of the defendant stating the grounds therefor, or on its own motion, shall direct the entry of a judgment of acquittal as to any charged offense, or as to any lesser included offense, for which **the evidence is insufficient to support a finding of guilty beyond a reasonable doubt**”.
- ▶ These motions preserve nothing else, but without them sufficiency claims are not preserved.

Motion for new trial

- ▶ Motions for new trial don't preserve much of anything other than weight of the evidence claims, newly-discovered evidence claims, or ineffective assistance of counsel claims.
- ▶ A motion for new trial cannot preserve an issue that you didn't object to during trial.
- ▶ Technically, Rule 24.1(c)(2) allows relief "for any other reason the defendant has not received a fair or impartial trial," but don't expect the court to consider anything other than IAC claims to be preserved.