PRESEVATION, PLAIN ERROR, AND INVITED ERROR: PITFALLS AND OPPORTUNITIES

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I. Overview

A. Preservation-Issues must be preserved with a specific timely objection and supported by citations to applicable legal authority.

1. Timeliness
   a. The timeliness requirement does not mean that if you fail to object at the very moment the error occurs you have not preserved the issue. Rather, the objection can be made at any time but the timing may affect how the trial court handles the problem.
   b. For example, if an attorney fails to object before the jury on an evidentiary matter and waits until the following day to request a mistrial, appellate review will be limited to the trial judge’s handling of the mistrial motion as opposed to the evidence that was admitted and which the jury heard.

2. Specificity-The objection must be raised with sufficient specificity to give the trial judge an adequate opportunity to address and correct the error.

3. Legal Authority-Although exact references to cases, statutes, rules, or constitutional provisions are not required, the trial judge must be able to discern the actual legal theory supporting the objection.

B. An exception to the preservation rule is plain error.

1. Plain error (in state appellate courts) requires:
   a. An error-this may seem redundant but appellants must show that someone had a duty to do something, a rule of law was not followed, or some actual legal mistake was made.
   b. Obviousness-existing law supported the error that would have required the judge to have acted sua sponte
   c. Prejudice-the error likely made a difference to the verdict, sentence, etc.

2. Federal Courts add a fourth element: the error must have affected the “substantial rights” of a party. This requirement tends to be quite fact-specific.

C. Invited Error Doctrine
1. Appellant courts will refuse to address an issue when the objecting party actually caused the trial court to err.

2. Invited error most commonly applies when defense counsel fails to object to a jury instruction. When counsel either submits an instruction or affirmatively informs the judge that counsel has no objections to any of the instructions that the prosecution has offered, appellate courts will conclude that counsel invited the error.

D. Ineffective Assistance of Counsel ("IAC") trumps both Preservation and Invited Error

1. IAC is a constitutional right while Preservation and Invited Error are merely appellate procedural doctrines.

2. One hitch is that IAC is difficult to raise on direct appeal because an appeal is limited to the existing trial court record. As a result, appellate courts will only review IAC claims on direct appeal when no conceivable strategic reason supports counsel’s actions.

E. Practice tips

1. The Utah Attorney General Office aggressively argues all of these issues in an effort to prevent appellate courts from addressing the merits of claims on appeal.

2. The AG’s Office raises preservation in almost every case even when trial counsel specifically and timely objected.

3. That office also commonly contends that any trivial act by trial counsel is grounds for invited error. Stated differently, the AG’s Office commonly claims that trial counsel’s actions “opened the door” and led the trial judge into err.

4. On IAC claims, the AG’s Office will label any plausible explanation for trial counsel’s actions as strategic and, therefore, reasonable.

5. A cynic might say that the AG’s Office, and prosecutors generally, view criminal defense lawyers as the worst lawyers around except when defending IAC claims. If you want to know how good of a lawyer you are, have someone raise an IAC claim against you and the prosecutor will suddenly compare you favorably to Gerry Spence.

6. A cynic might also claim that appellate courts use these doctrines to avoid addressing difficult issues or as case management tools to reduce courts’ caseloads.
II. Requirements for Preservation—Case Law

A. Purpose and Policy

The preservation rule serves two important policies. First, “in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it.” 

State v. Eldredge, 773 P.2d 29, 36 (Utah 1989). Second, a defendant should not be permitted to forego making an objection with the strategy of “enhanc[ing] the defendant's chances of acquittal and then, if that strategy fails, . . . claim[ing] on appeal that the Court should reverse.” State v. Bullock, 791 P.2d 155, 159 (Utah 1989). To serve these policies, we have held that the preservation rule applies to every claim, including constitutional questions, unless a defendant can demonstrate that “exceptional circumstances” exist or “plain error” occurred. See Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996); State v. Lopez, 886 P.2d 1105, 1113 (Utah 1994).


"'Utah courts require specific objections in order to bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate.'” State v. Low, 2008 UT 58, ¶ 17, 192 P.3d 867 (quoting State v. Brown, 856 P.2d 358, 361 (Utah Ct. App. 1993) (internal quotation marks omitted)).

B. Source of the Preservation Requirement

“The preservation requirement is found in rule 24(a) of the Utah Rules of Appellate Procedure, which provides, in relevant part, that for each issue raised on appeal, an appellant's brief must include a ""citation to the record showing that the issue was preserved in the trial court; or a statement of grounds for seeking review of an issue not preserved in the trial court.”” H.U.F. v. W.P.W., 2009 UT 10, ¶ 25, 203 P.3d 943 (quoting Utah R. App. P. 24(a)).

C. Required Elements to Preserve an Issue

"For a trial court to be afforded an opportunity to correct the error (1) the issue must be raised in a timely fashion[,] (2) the issue must be specifically raised[,] and (3) the challenging party must introduce supporting evidence or relevant legal authority.” State v. McDaniel, 2010 UT App 381, ¶ 2, 246 P.3d 162 (internal quotations omitted).

“To preserve an issue for appeal, the appellant must have raised a timely and specific objection before the trial court. We will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review.” H.U.F. v. W.P.W., 2009 UT 10, ¶ 25, 203 P.3d 943 (internal quotation omitted).

"Generally speaking, a timely and specific objection must be made [at trial] in order to preserve an issue for appeal." State v. Pinder, 2005 UT 15, ¶ 45, 114 P.3d 551.
D. Specificity Requirement

*State v. Richins*, 2004 UT App 36, ¶ 8, 86 P.3d 759—Specificity requires bringing the argument to the judge’s “consciousness.” Parties must then provide evidence or relevant legal authority for the objection.

An objection is adequate if the trial court is “given an opportunity to address a claimed error and, if appropriate, correct it.” *State v. Hobbs*, 2003 UT App 27, ¶ 33, 64 P.3d 1218 (quoting *State v. Eldredge*, 773 P.2d 29, 36 (Utah 1989)).

*State v. Dominguez*, 2003 UT App 158, ¶ 19, 72 P.3d 127—Appellate courts do not require exact citations to case law, constitutional provisions, statutes, or court rules. Rather, the objecting party need only state the correct legal theory supporting the objection. Even when objections “could have been clearer,” appellate courts will review errors if trial counsel adequately explains the applicable legal theory for the objection.

"Where there is no clear or specific objection and the specific ground for objection is not clear from the context[,] the theory cannot be raised on appeal." *State v. Low*, 2008 UT 58, ¶ 17, 192 P.3d 867 (quoting *State v. Johnson*, 2006 UT App 3, ¶ 13, 129 P.3d 282) (internal quotation marks omitted).

“Thus, if a party makes an objection at trial based on one ground, this objection does not preserve for appeal any alternative grounds for objection.” *State v. Low*, 2008 UT 58, ¶ 17, 192 P.3d 867.

*But see Hatch v. Davis*, 2004 UT App 378, ¶ 57, 102 P.3d 774 (“In his motion for summary judgment and his motion in limine, Plaintiff made a generalized argument that his conduct towards Defendant was protected by his First Amendment right to petition the government. However, in neither motion did Plaintiff cite to any relevant authority that supported this proposition. Moreover, Plaintiff did not argue that Defendant was required to prove that Plaintiff's statements were made with "actual malice." Therefore, Plaintiff's First Amendment argument was not properly preserved for appeal because it failed to meet the requirements of specificity and citation to authority. . . . Accordingly, we decline to address this argument on appeal.”)

*State v. Johnson*, 821 P.2d 1150, 1161 (Utah 1991)—An issue is considered preserved if the trial court considered the merits of an issue even if counsel failed to specifically preserve it.

E. Timeliness

Counsel must object at the “earliest opportunity.” *State v. Pierre*, 572 1338, 1353 (Utah 1977); *see also State v. Manchester*, 2004 UT App 248 (quoting Pierre). This phrase would appear to satisfy the timeliness requirement when counsel wishes to object outside the jury’s presence.
State v. Johnson, 748 P.2d 1069, 1071 (Utah 1987)-Parties need not renew pretrial motions at trial when the same trial judge presided at the motion hearing. **Practice Note:** But, it never hurts to remind the judge of previous objections throughout a trial when issues recur. For example, a denied motion in limine may allow evidence of prior bad acts to be admitted by more than one witness. An objection to each witness’s testimony may be wise.

**Practice Tip:** Always object late even if the objection is not timely. For example, if an attorney misses an objection during trial and realizes this mistake later, the attorney can always file an objection later and request specific relief. The one hitch is that the objection will be reviewed on appeal based on when the objection was made and whether the relief sought would have been effective. Thus, for example, a motion for a mistrial made the day following the erroneous admission of evidence will be reviewed based on the relief requested and whether the trial judge had an opportunity to effectively correct the prejudice resulting from the missed objection. The late objection may prove to be ineffective such as when a remedial jury instruction given days after the challenged err would simply serve to highlight the evidence for the jury rather than informing the jury not to consider some piece of evidence.

F. Prosecution Not Obligated to Object to Prevail on Appeal

Like almost every appellate court, we approve of the practice of affirming a lower court on alternative, unbriefed grounds. 5 C.J.S. Appeal & Error § 714 & nn.40-43 (1993). We have said that an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the [district] court to be the basis of its ruling [and] even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court. Bailey v. Bayles, 2002 UT 58, ¶ 10, 52 P.3d 1158 (internal quotation marks omitted).


III. **Exceptions to the Preservation Requirement**

A. Manifest Injustice/Exceptional Circumstances

We have said that the extraordinary circumstances doctrine applies to "rare procedural anomalies." Dunn, 850 P.2d at 1209 n.3. Recently, we have applied the exception sparingly, reserving it for the most unusual circumstances where our failure to consider an issue that was not properly preserved for appeal would have resulted in manifest injustice. The court of appeals has aptly characterized the concept as a "safety device" against such injustice. State v. Irwin, 924 P.2d 5, 8 (Utah Ct. App. 1996) (citing State v. Archambeau, 1991 Utah App. LEXIS (Utah Ct. App. 1991)).
B. Utah Plain Error Doctrine

“The plain error standard of review is also intended to avoid manifest injustice.” State v. Munguia, 2011 UT 5, ¶ 12, 253 P.3d 1082.

In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

State v. Dunn, 850 P.2d 1201, 1208-1209 (Utah 1993)

“An error is obvious when “the law governing the error was clear at the time the alleged error was made.” State v. Dean, 2004 UT 63, ¶ 16 (Utah 2004)

For further discussion of the plain error doctrine, see Robert J. Latham, Note, History and Application of the Plain Error Doctrine in Utah, 2000 Utah L. Rev. 537.

C. Federal Plain Error Doctrine

United States v. Westover, F.3d (10th Cir. 2006)-“This court has identified a number of non-exclusive factors which may show that a defendant has satisfied the fourth element of the plain error analysis: (1) a sentence increased substantially based on Booker error; (2) a showing that the district court would likely impose a significantly lighter sentence on remand; (3) a substantial lack of evidence to support the entire sentence the Guidelines required the court to impose; (4) a showing that objective consideration of the 18 U.S.C. _3553(a) factors warrants a departure from the suggested guidelines sentence, and (5) other evidence peculiar to the defendant which demonstrates a complete breakdown in the sentencing process.”

D. Futility of Objections

State v. Rothlisberger, 2004 UT App 226, 95 P.3d 1193-“[B]ecause the trial court first erred by concluding that the challenged testimony was admissible as lay witness testimony, we cannot say that Rothlisberger waived his right to challenge the admission of that testimony by then failing to request a continuance.” Id. at ¶ 29. “Under our law, parties are not required to make futile objections in order to preserve a future claim.” Id.

IV. Invited Error Doctrine
State v. Geukgeuzian, 2004 UT 16, ¶ 12, 86 P.3d 742-Defense counsel invited the trial judge to error and waived appellate review by presenting a jury instruction that did not include the mens rea requirement that defendant challenged on appeal. Even though counsel’s omission was likely inadvertent, affirmatively presenting the instruction and representing its accuracy deprived the trial judge of an “opportunity” to correct the erroneous instruction.

“[W]hen a trial court properly defers ruling on an issue that has been raised and plainly instructs the objecting party to re-raise the issue at a specific later time if its objection remains," the objecting party waives the issue by failing to re-raise it later. State v. Hansen, 2002 UT 114, ¶ 16, 61 P.3d 1062.

State v. Vail, 2002 UT App 176, ¶ 14, 51 P.3d 1285-Because defense counsel did not elicit testimony on the truthfulness of a witness under Rule of Evidence 608, he did not open the door to the prosecutor eliciting such improper testimony.

A party waives the opportunity to raise an issue on appeal when defense counsel “consciously chose not to object . . . and then affirmatively” represented the correctness of the trial court’s decision. State v. Anderson, 929 P.2d 1107, 1109 (Utah 1996).


V. Raising Waived Issues: Ineffective Assistance of Counsel

State v. Tueller, 2001 UT App 317, ¶21-Because defense counsel stipulated to a jury instruction, Court refused to apply the plain error doctrine to a challenge to the instruction (Citing State v. Litherland, 2000 UT 76, ¶31, 12 P.3d 92.) The Court would only review the failure to object to the instruction for ineffective assistance of counsel.

State v. Ison, 2004 UT App 252, 96 P.3d 374-The court refused to fault defendant for failing to preserve his trial counsel’s failure to object to an off the record discussion “because it would have been impossible for Defendant to document on appeal,” this failure to object. Id. at ¶20 n.7.

VI. Additional Tips for Utah State Courts

A. Marshaling Requirement

To adequately fulfill the marshaling requirement, the appellant must temporarily assume the role of his adversary, presenting us, "in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." Chen v. Stewart, 2004 UT 82, ¶ 77, 100 P.3d 1177 (quoting Neely v. Bennett, 2002 UT App 189, ¶ 11, 51 P.3d 724). A recital of the trial court's findings with which the appellant disagrees does not amount to marshaling. Rather, the appellant must educate the court as to exactly how the
trial court arrived at each of the challenged findings. This requires "a precisely focused summary of all the evidence supporting the findings," correlated to the location of that evidence in the record. Id. Failure to provide this summary amounts to an invitation to the appellate court to invest its time and resources to "go behind the trial court's factual findings" itself; an invitation which the appellate court may, in its discretion, refuse. Id. ¶ 82 n.16.

Friends of Maple Mt., Inc. v. Mapleton City, 2010 UT 11, 228 1238 (Utah 2010) (overruled on other grounds Carter v. Lehi City, 2012 UT 2, ¶ 2 n.1, ___ P.3d ___).

We have repeatedly warned of the risks assumed by an appellant who fails to marshal evidence because "when an appellant fails to meet the heavy burden of marshaling the evidence, appellate courts are bound to assume the record supports the trial court's factual findings." Justice Michael J. Wilkins et al., Utah Appellate Practice, 2000 Utah L. Rev. 111, 128 (citing Wade v. Stangl, 869 P.2d 9, 12 (Utah Ct. App. 1994)).

State v. Green, 2005 UT 9, ¶13, 108 P.3d 710.

B. Citation Format

Supreme Court Standing Order 4 requires parallel citations for all Utah Appellate decisions rendered on or after January 1, 1999:

http://www.utcourts.gov/resources/rules/urap/Supctso.htm#4