Welcome!

The program will begin shortly.

FLORIDA APPEALS

Don’t Waive Goodbye:

Preserving Error for Appellate Review

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Disclaimer

This presentation is provided for informational purposes only. The information provided does not constitute legal advice.

While Florida Appeals has made every effort to ensure the accuracy of the information in this presentation reasonable people may differ as to the analysis and recommendations made.

For brevity, the opinions quoted in this presentation do not include internal quotation marks, internal citations, pinpoint citations, or explanatory parentheticals.

Most of the opinions here arise in the civil context, and some of the concepts discussed may differ in criminal cases.

The examples provided here are non-exhaustive. Always conduct independent research.

Winning on Appeal

Generally, preserving harmful legal error is the key to success on appeal.

Assessing Error

Florida appellate courts generally assess error in 7 ways:

- Preserved
- Unpreserved
- Harmful
- Harmless
- Invited
- Fundamental
- Cumulative

The Appellant *Always* Loses

Harmless Error: Results in affirmance even where an error occurred

- § 59.041, Fla. Stat. (2022).
- Error must have been preserved: *Johnson v. State*, 53 So. 3d 1003 (Fla. 2010).
- Its purpose is to "conserve judicial labor."
- Applicability: Where the error "do[es] not vitiate the right to a fair trial"—i.e., harmful error.
- "[T]he beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict."

Special v. West Boca Med. Ctr., 160 So. 3d 1251 (Fla. 2014).

More on *Special* in a bit.

The Appellant *Always* Loses

Invited Error: Fatal to appellate review

An Invited error is "foreclosed from review" and "prevents a party from . . . attempting to make th[e] error an issue on appeal." *Mora v. State*, 964 So. 2d 881 (Fla. 3d DCA 2007); *see also Bender v. Shatz*, 300 So. 3d 193 (Fla. 4th DCA 2020).

- "This doctrine holds true whether the error was invited solely by appellant's counsel being unaware of the governing law[.]" *Alexander v. Quail Pointe II Condo.*, 170 So. 3d 817 (Fla. 5th DCA 2015).

The Appellant *Maybe* Wins

Fundamental Error: Can result in reversal even where the error was not preserved

- § 90.104(3), Fla. Stat. (2022): "Nothing in this section shall preclude a judge from taking notice of fundamental errors affecting substantial rights, even though such errors were not brought to the attention of the trial judge."
- § 924.051(3), Fla. Stat. (2022) (criminal fundamental error).
- The error must "reach[] down to the validity of the trial itself." *Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47 (Fla. 2012). The error must "go[] to the foundation of the case." *Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970).
- Fundamental error is waived if the error was invited. *Warfel; see also Baptiste v. State*, 324 So. 3d 453 (Fla. 2021).
- Exceedingly rare in civil cases. One example is the denial of the right to be heard. *Weiser v. Weiser*, 132 So. 3d 309 (Fla. 4th DCA 2014).

The Appellant *Maybe* Wins

Cumulative Error: Lots of little mistakes, taken together, results in reversal

- "A cumulative error claim asks an appellate court to evaluate claims of error cumulatively to determine if the errors collectively warrant a new trial." *Harrison v. Gregory*, 221 So. 3d 1273 (Fla. 5th DCA 2017).
- "[W]here individual claims of error fail, a related cumulative error claim must likewise fail. *London v. Dubrovin*, 165 So. 3d 30 (Fla. 3d DCA 2015); see also *Pham v. State*, 177 So. 3d 955 (Fla. 2015).

Federal Land

Plain Error: Federal doctrine similar to fundamental error

- Allows for review of an unpreserved error if: an error occurred; the error was plain; it affected substantial rights; and not correcting the error would seriously affect the fairness of the judicial proceeding. *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322 (11th Cir. 1999).

Structural Error: Limited to criminal cases - DOJ always loses

- Structural error is rare. It involves a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process[.]" *Arizona v. Fulminante*, 499 U.S. 279 (1991).
- Differs from plain error in that the criminal defendant does not have to establish prejudice. *United States v. Dominguez Benitez*, 542 U.S. 74 (2004).
- *See Neder v. United States*, 527 U.S. 1 (1999), for examples of when the U.S. Supreme Court has found structural error.

The Fundamentals: Why is Preservation Required?

- Appellate courts are "error correcting" courts.
- Trial courts should have a chance to correct errors.
- Preservation asks: Did the party claiming error give the trial court an opportunity to correct its mistake?

Exceptions

Fundamental Error (examples):

- Denial of due process to enter summary judgment without holding a hearing: *Chiu v. Wells Fargo Bank*, 242 So. 3d 461 (Fla. 3d DCA 2018).
- Impermissible, inflammatory statements during closing argument, "directly appealing to the juror's passions and prejudices and calculated to produce a verdict based on fear and self-interest": *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016 (Fla. 4th DCA 1996).
- Being twice put in jeopardy: *State v. Johnson*, 483 So. 2d 420 (Fla. 1986).

Florida Statute: Preservation of Evidentiary Error

§ 90.104, Fla. Stat. (2022) – Rulings on Evidence

- Provides courts with the authority to correct errors where a "substantive right . . . is adversely affected."
- Explains counsel's obligation when objection is based on admitting evidence: timely object or move to strike, state specific grounds (unless specific grounds are apparent from the context).
- Explains counsel's obligation when objection is based on the exclusion of evidence: make an offer of proof, unless the substance of the evidence is apparent from the context.
- Explains that once "a definitive ruling on the record admitting or excluding evidence" has been made, "either at or before trial, a party need not renew an objection or offer of proof to preserve" the error for appeal.

Florida Rule: Preservation of Evidentiary Error

Florida Rule of Civil Procedure 1.450(a)

"In an action tried by a jury if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what the attorney expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed except that the court upon request shall take and report the evidence in full unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."

Preserving an Objection

"Careful you must be." - Yoda

1. Make a timely objection.
2. State your objection with specificity.
3. If the ruling excludes evidence, make an offer of proof (unless substance of evidence is apparent from the record).

Motion for rehearing?

What is Timely?

Contemporaneous: "*at the time* of the alleged error." *Aills v. Boemi*, 29 So. 3d 1105 (Fla. 2010) (emphasis added).

- The purpose of the contemporaneous objection rule is to put the trial court on notice of the error, give the count a chance to correct the error, "and to prevent a litigant from not challenging an error so that he or she may later use it as a tactical advantage." *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182 (Fla. 3d DCA 2005).
- Wiggle room? An objection made "four or five questions" after objectionable statement was "sufficiently timely" to preserve the error." *Castroneves*.

Don't risk it. Make a contemporaneous objection.

How Specific?

"A specific objection provides the trial judge with a clear-cut issue upon which to rule and the adverse party with an opportunity to meet the objection[.]" *Nat Harrison Ass'ns, Inc. v. Byrd*, 256 So. 2d 50 (Fla. 4th DCA 1971).

- Objection must be "sufficiently specific to inform the court of the perceived error." *Boemi*, *supra.*
- So long as the objection is "specific enough to apprise the trial court of the putative error," no "magic words" are required to preserve the issue. *A.P.R. v. State*, 894 So. 2d 282 (Fla. 5th DCA 2005).

Not specific enough (examples):

- Objection "for the record": *Mansingh v. State*, 68 So. 3d 383, 384 (Fla. 5th DCA 2011).
- Objection for "lack of foundation" or "improper predicate": *Couzo v. State*, 830 So. 2d 177, 179 (Fla. 4th DCA 2002).

Caselaw Gloss

- Failing to get a timely ruling on the objection constitutes waiver on appeal. *Carratelli v. State*, 832 So. 2d 850 (Fla. 4th DCA 2002).
- Generally, a motion in limine to exclude testimony is insufficient to preserve the objection for appeal. *Fincke v. Peeples*, 476 So. 2d 1319 (Fla. 4th DCA 1985).
- But a renewed objection is not required where the trial court is "aware of a real and continuing" objection. *Id.*
- The prior ruling must be "*definitive*" "to avoid the standard contemporaneous objection requirement." *Collins v. State*, 211 So. 3d 214 (Fla. 4th DCA 2017) (emphasis original).
- Motion for mistrial not necessary where party objects and court overrules the objection. *Simmons v. Baptist Hosp.*, 454 So. 2d 681 (Fla. 3d DCA 1984).

Offer of Proof

Comes in two varieties:

- Attorney narrative
- Q&A with witness outside of the presence of the jury

The primary purpose of an offer of proof is to put on the record what the testimony would have been so the appellate court can determine whether the trial court erred and, if so, to consider whether the error had an impact on the result. *Finney v. State*, 660 So. 2d 674 (Fla. 1995).

An offer of proof also gives the trial court an opportunity to reevaluate its ruling.

Along Came *Special*

Special v. West Boca Medical Center changed the game.

- Shifted the burden for showing harmless error.
- Now, the beneficiary of the error must show the error was harmless.
- What does this mean for offers of proof?

But see

May v. State, 6D23-179, 2023 WL 2194999 (Fla. 6th DCA Feb. 24, 2023).

"Because there was no proffer of the testimony May believes should have been allowed, we cannot determine that the testimony, if disallowed in error, would have had any effect on the result."

What about *Special*?

Making an Offer of Proof

Once evidence has been excluded, as the proponent you should:

1. Ask for a side-bar or a hearing outside the presense of the jury.
2. Explain what the witness would have testified to, or call the witness.
3. Explain the purpose for the evidence and how it is relevant.
4. If the judge sustains the objection, articulate why the evidence is admissible.
5. If the evidence is a document, mark if for identification and file it with the court so it becomes part of the record for appeal.

Note: It is error to refuse to allow an offer of proof. *Rozier v. State*, 636 So. 2d 1386 (Fla. 4th DCA 1994).

Motions for New Trial and Rehearing

Fla. R. Civ. P. 1.530 (Motions for New Trial and Rehearing; Amendments of Judgments).

Fla. Fam. L. R. P. 12.530 (Motions for New Trial and Rehearing; Amendments of Judgments).

- Exception to finality
- Differs from the trial court's inherent authority to reconsider interlocutory rulings

Fla. R. Crim. P. 3.192 (Motion for Rehearing) (state's right to seek rehearing).

2022 Amendment

The Supreme Court of Florida sua sponte amended rules 1.530 and 12.530 to clarify that "filing a motion for rehearing is required to preserve an objection to insufficient trial court findings in a final judgment order." *In Re Amends. to Fla. Rule of Civ. Proc. 1.530*, 346 So. 3d 1161 (Fla. 2022).

Effective August 25, 2022.

Rules 1.530 & 12.530

COURT COMMENTARY

2022 Amendments.

"The amendment to subdivision (a) does not address or affect, by negative implication, any other instance in which a motion for rehearing is or might be necessary to preserve an issue for appellate review."

2023 Amendment

The Supreme Court of Florida further amended rules 1.530 and 12.530 and replaced "sufficiency of a trial court's findings in the final judgment" with "failure of the trial court to make required findings of fact."

In re Amends. to Fla. Rule of Civ. Proc. 1.530 & Fla. Fam. Law Rule of Proc. 12.530, SC2022-0756, 2023 WL 3104357 (Fla. Apr. 27, 2023).

Effective April 27, 2023.

2023 Amendment

Rule 1.530(a): "A new trial may be granted to all or any of the parties and on all or a part of the issues. To preserve for appeal a challenge to the ~~sufficiency of a trial court's findings in the final judgment~~ failure of the trial court to make required findings of fact, a party must raise that issue in a motion for rehearing under this rule. On a motion for a rehearing of matters heard without a jury, including summary judgments, the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment."

Rule 12.530(a) is identical except for the first sentence: "A new trial or rehearing may be granted to all or any of the parties on all or a part of the issues."

In re Amends. to Fla. Rule of Civ. Proc. 1.530 & Fla. Fam. Law Rule of Proc., (2023), supra.

2023 Amendment

"This change makes both rules applicable to all orders, not just final judgments, and makes clear that the rules apply only when a judge is required to make specific findings of fact and not when a party seeks to make other challenges to a trial court's order."

In re Amends. to Fla. Rule of Civ. Proc., (2023), *supra*.

Preservation Requirement

The preservation requirement of rules 1.530(a) and 12.530(a) apply:

- Where the trial court fails to make "required" findings of fact; and
- To all orders, not just final judgments.

Issues concerning the sufficiency of a trial court's findings do not trigger the preservation requirement.

Timing is Everything

"A motion for rehearing must be filed not later than 15 days after the return of the verdict in a jury action or the date of filing of the judgment in a non-jury action." Fla. R. Civ. P. 1.530(b); Fla. Fam. L. R. P. 12.530(b).

"A trial court loses jurisdiction to alter or amend a final judgment after the time for filing a rule 1.530 motion has elapsed." *ARP Acquisitions Corp. v. PHH Mortg. Corp.*, 337 So. 3d 873 (Fla. 3d DCA 2022).

Timing is Everything

Filing an authorized and timely motion for rehearing tolls the time for filing a notice of appeal. Fla. R. App. P. 9.020(h)(1)(B).

Does not toll non-final orders.

An untimely motion for rehearing does not toll the time for filing a notice of appeal. *Clara P. Diamond, Inc. v. Tam-Bay Realty, Inc.*, 462 So. 2d 1168 (Fla. 2d DCA 1984); *see also Watkins v. State*, 217 So. 3d 1135 (Fla. 3d DCA 2017) (same).

A motion for rehearing from an appealable non-final order will not toll the time to file a notice of appeal and therefore a notice of appeal filed after 30 days will be treated as untimely and result in dismissal of the appeal. *Blattman v. Williams Island Assocs, Ltd.*, 592 So. 2d 269 (Fla. 3d DCA 1991).

New Rules [Almost] in Action

- *Hiatt v. Mathieu*,
  350 So. 3d 387 (Fla. 4th DCA 2022).
- *McGill v. McGill*,
  355 So. 3d 563 (Fla. 2d DCA 2023).
- *Jackson v. City of S. Bay*,
  48 Fla. L. Weekly D371, 2023 WL 2027556 (Fla. 4th DCA Feb. 15, 2023).

When a Motion for Rehearing is Unnecessary for Preservation

"In a non-jury action, the sufficiency of the evidence to support the judgment may be raised on appeal whether or not the party raising the question has made any objection thereto in the trial court or made a motion for rehearing, for new trial, or to alter or amend the judgment." Fla. R. Civ. P. 1.530(e).

"When an action has been tried by the court without a jury, the sufficiency of the evidence to support the judgment may be raised on appeal whether or not the party raising the question has made any objection to it in the trial court or made a motion for rehearing, for new trial, or to alter or amend the judgment." Fla. Fam. L. R. P. 12.530(e).

When a Motion *is or Might be* Necessary for Preservation

Where findings are required by a procedural rule, statute, or other authority.

- *Neustein v. Miami Shores Village*, 837 So. 2d 1054 (Fla. 3d DCA 2002) (finding challenge to sufficiency of findings in order awarding fees under section 57.105 waived).
- *Mathieu v. Mathieu*, 877 So. 2d 740 (Fla. 5th DCA 2004) ("[A] party cannot complain on appeal about inadequate findings in a dissolution case unless the alleged defect was brought to the trial court's attention in a motion for rehearing.").

When a Motion *is or Might be* Necessary for Preservation

Where the court does not state the basis of its decision.

"Where orders do not contain sufficient findings of fact, appellate courts typically deem them incapable of meaningful review and they remand with directions to the issuing courts to make the necessary findings." *Featured Props., LLC v. BLKY, LLC,* 65 So. 3d 135 (Fla. 1st DCA 2011) (cleaned up); *see also Ford v. Ford,* 351 So. 3d 261 (Fla. 5th DCA 2022).

"Even where factual findings are not required by a procedural rule, statute, or other authority, remand may be appropriate where effective appellate review is made impossible by the absence of specific findings." *Featured Props.*

Move it or Lose it

"[T]he standard to be applied in trial courts is much broader than the one that applies on appeal. Rule 1.530 is not limited to a mistake the court has made. To the contrary, rehearing may be granted in an appropriate case to prevent an injustice that would be caused by an error or omission by one of the lawyers." *Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc.*, 88 So. 3d 269 (Fla. 1st DCA 2012).

"We do not suggest that trial judges are required to consider new issues presented for the first time on rehearing. Our point is simply that they have the authority to hear new issues." *Id.*

Notice of Appeal

You MUST file a notice of appeal "within 30 days of rendition of the order to be reviewed." Fla. R. App. P. 9.110(b). This rule applies to final orders and orders granting a new trial in jury and non-jury cases.

In criminal cases, a notice of appeal MUST be filed "any time between rendition of a final judgment and 30 days following rendition of a written order imposing sentence." Fla. R. App. P. 9.140(b)(3).

- A criminal defendant may petition an appellate court for belated appeal. Fla. R. App. P. 9.141(c).

Questions?

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THANK YOU!

THAT'S A WRAP!

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