

# **Making the Record and Avoiding Trial Mistakes**

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## Preserving Record for Appeal and Avoiding Trial Mistakes

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- **Objections. The specific basis for all objections, and the basis for the district court's rulings, must be placed on the record. Objection to errors in district court is often a condition to review by an appellate court.**

Minn. R. Evid. 103(a)(1): An error may not be predicated upon a ruling admitting evidence unless “a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.”

Examples:

- Speedy trial.*
- Evidence obtained in violation of constitution*
- Other evidence, Spreigl* (other bad acts evidence)
- *Relationship evidence* (Minn. Stat. § 634.20)
- Voir Dire.*
- State's questions of witnesses.*
- Improper argument.*

If the district court's ruling is unclear, ask the court to clarify the basis for the ruling for the record.

State v. Campbell, 861 N.W.2d 95, 100–01 (Minn. 2015): Defense attorney raises a general objection to the admission of interview statements, but the basis for the objection is not apparent based on context or on the record. As in State v. Brown, 792 N.W.2d 815 (Minn. 2011), the Minnesota Supreme Court reviewed whether the admission of the statement was error, but did so under the plain error standard. *See also, State v. Rossberg*, 851 N.W.2d 609 (Minn. 2014) (Court unable to determine specific ground for objection in question; reviewed under plain error standard)

State v. Washington, 693 N.W.2d 195 (Minn. 2005): Although the defense attorney objected to the admissibility of Spreigl evidence, when the objection was overruled she did not object to the scope of the evidence—the inflammatory details surrounding the incident, which were arguably inadmissible. And after those details were testified to, counsel did not move to strike, seek a curative instruction or request a mistrial. The Minnesota Supreme Court ultimately reviewed the admissibility of the details, but it did so under the plain error standard. *See also, State v. Manthey*, 711 N.W.2d 498, 505 (Minn. 2006).

State v. Holt, 772 N.W.2d 470 (Minn. 2009): Examination of juror for bias should be on record.

State v. Wren, 738 N.W.2d 378, 393–94 (Minn. 2007): A modified plain error test should be applied to unobjected-to prosecutorial misconduct, while a harmless error test based on the severity of the misconduct should be applied to objected-to prosecutorial misconduct.

State v. Ramey, 721 N.W.2d 294, 296–301 (Minn. 2006): When prosecutorial misconduct was not objected but is in plain error, “the state bears the burden of showing that the error did not affect the defendant's substantial rights.”

State v. Kelley, 855 N.W.2d 269, 277 (Minn. 2014): The appellate court will apply the law in existence at the time of appeal when determining whether the trial judge committed plain error.

***\*\*Always ensure that the court reporter is recording your objections, particularly with bench conferences and in-chambers discussions.***

- **To get evidence admitted, make concise offers of proof that specify the nature of the evidence that the party seeks admitted.**

Minn. R. Evid. 103(a)(2): Error cannot be predicated on a ruling excluding evidence unless “the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked.”

Even when not required by a rule or a case, an offer of proof should be made when there is a dispute about the admissibility of a piece of evidence. The better the offer is, the more likely the evidence will be admitted at trial.

Offers of proof are typically required under the following circumstances:

*-Alternative perpetrator claims:* The defense must lay a foundation “by offering evidence that has an inherent tendency to connect the alternative perpetrator to commission of the charged crime.” State v. Atkinson, 774 N.W.2d 584 (Minn. 2009); State v. Nissalke, 801 N.W.2d 82 (Minn. 2011); State v. Ferguson, 804 N.W.2d 586 (Minn. 2011) (reversal where foundation sufficient to allow defense to present evidence of alternative perpetrator).

*-Other-Acts Evidence:* An offer of proof under the clear and convincing standard is required to admit other-acts or reverse-Spreigl evidence. Minn. R. Evid. 404(b); State v. Gutierrez, 667 N.W.2d 426, 437 (Minn. 2003). The purpose of other-acts evidence must be to prove a fact consequential to a disputed issue of the case. State v. Ness, 707 N.W.2d 676 (Minn. 2006).

*-Self-Defense:* If the defendant knew about the victim's prior acts of violence, evidence of the victim's reputation may be admitted to show that the defendant was reasonably in

apprehension of serious bodily harm. State v. Penkaty, 708 N.W.2d 185 (Minn. 2006). Evidence of the victim's reputation for violence is admissible to show that the victim was the aggressor even if the defendant was not aware of the reputation. Penkaty, 708 N.W.2d at 201; *see also* State v. Charles, 634 N.W.2d 425 (Minn. App. 2001).

**-Rape Shield:** An offer of proof is required where a defendant seeks to introduce evidence of a victim's prior sexual conduct. Minn. R. Evid. 412; Minn. Stat. § 609.347; State v. Olson, 824 N.W.2d 334 (Minn. App. 2012).

An offer of proof may be made by:

- 1) submitting a written summary of testimony, or
- 2) questioning a witness outside the presence of the jury, or
- 3) explaining to the judge what a witness would say.

Appellate courts generally review the offer of proof to determine whether trial court erred. But sometimes the court refuses to consider the claim at all on appeal. State v. Lee, 494 N.W.2d 475 (Minn. 1992) (Supreme Court declined to consider the defendant's claim of improperly excluded testimony of victim's husband pursuant to marital privilege because the defense had failed to make an adequate offer of proof showing the nature of the alleged testimony).

- **Make a comprehensive record regarding impeachment evidence.**

-When attempting to impeach a witness with a conviction, counsel should make a record that includes the date of the conviction, the specific offense of conviction, and, if possible, a summary of the conduct underlying the conviction.

State v. Sims, 526 N.W.2d 201 (Minn. 1994): Convictions are only automatically admissible under Minn. R. Evid. 609 if they involve dishonest or false statements. Some offenses, such as theft, may (shoplifting) or may not (swindle) be crimes of dishonesty depending on "what kind of act of thievery was involved[.]"

-When challenging state's motion to impeach the defendant with prior convictions, make a motion in limine before trial to exclude the evidence and object again when the state offers during trial. Also, make a record of whether the defendant's decision to testify turns on the ruling. State v. Gassler, 505 N.W.2d 52 (Minn. 1993) (indicating erroneous admission of prior convictions for impeachment may infringe on a defendant's right to testify); *see also*, State v. Swanson, 707 N.W.2d 645 (Minn. 2006).

- **Create a transcript of audiotaped or videotaped statements that will be offered at trial, and make a record that both parties stipulate to the accuracy of the transcript. That transcript should then be admitted as a court exhibit, regardless of whether the jury views it.**

Minn. R. Crim. P. 28.02, subd. 9: “If the parties have stipulated to the accuracy of a transcript of videotape or audiotape exhibits and made it part of the district court record, it becomes part of the record on appeal and it is not necessary for the court reporter to transcribe the exhibits. If no such transcript exists, a transcript need not be prepared unless expressly requested by the appellant or the respondent. If the exhibit must be transcribed, the court reporter need not certify the correctness of this transcript.”

State v. Green, 747 N.W.2d 912 (Minn. 2008): Only after the defendant was convicted of criminal sexual conduct involving penetration, did defense counsel realize that the defendant’s statement to the police had been inaccurately transcribed, and the word “in,” should have been “um.” Court denied new trial because defense counsel had responsibility to ensure accuracy of transcribed statement to police before admission at trial.

- **Provide written proposed jury instructions and make a record of any discussions about or objections to jury instructions to be given.**

Minn. R. Crim. P. 26.03, subd. 19(1): “Any party may request specific jury instructions at or before the close of evidence. The request must be provided to all parties.”

State v. White, 684 N.W.2d 500 (Minn. 2004) (failure to object to jury instructions or to propose specific instructions generally waives the issue for the appeal; court ultimately reviewed the alleged error under the plain error standard); *see also State v. Yang*, 774 N.W.2d 539 (Minn. 2009).

State v. Landa, 642 N.W.2d 720 (Minn. 2002) (defense counsel’s failure to provide a proposed alibi instruction where no standard jury instruction existed was a factor that the Minnesota Supreme Court considered in holding that the district court did not abuse its discretion in denying the defendant’s request for an alibi instruction).

State v. Bustos, 861 N.W.2d 655 (Minn. 2015) (jury instruction erroneous because broader than the statutory definition of “domestic abuse”).

State v. Ihle, 640 N.W.2d 910 (Minn. 2002) (jury instruction erroneous because not reflect narrow limits of prior Supreme Court opinions).

- **When defense stipulates to an element of the offense to remove it from the jury’s consideration,**
  - 1) **The defendant must personally waive the right to a jury trial on that element of the offense;**
  - 2) **The stipulation should mirror the language of the statute in effect at the time of the offense; and**

**3) The jury should not consider the element that is the subject of the stipulation.**

State v. Hinton, 702 N.W.2d 278 (Minn. App. 2005) (district court erred in failing to obtain defendant's personal waiver of the right to a jury trial on stipulated element of an offense, but found error to be harmless).

State v. Kuhlman, 806 N.W.2d 844 (Minn. 2011) (failure to obtain defendant's personal waiver of jury trial rights for stipulated element not structural error; Court reviewed for plain error).

State v. Davidson, 351 N.W.2d 8 (Minn. 1984) (Supreme Court noted that purpose of a stipulation to an element of an offense is to remove inflammatory evidence from jury's consideration).

- Counsel should make the proper records in Stipulated-Facts/Stipulated-Evidence court trials.**

The type of trial you elect will govern the waivers required in the district court and the scope of appellate review.

*Stipulated-facts court trial, Minn. R. Crim. P. 26.01, subd. 3.*

- Full scope of appellate review is available, including sufficiency of the evidence.
- A “super waiver” of rights is required (orally on the record or in writing, or both). The rule lists all of the rights that a defendant must waive, which include the right to confront witnesses and the right to testify.
- A separate waiver is necessary if the defendant is also waiving a sentencing jury.

**NEW:** *Stipulated-evidence court trial, Minn. R. Crim. P. 26.01, subd. 3.* Amended in 2017.

- Same requirements as above.
- New provision added to Rules after decision in Dereje v. State, 837 N.W.2d 714 (Minn. 2013), where Supreme Court held that Rule 26.01, subd. 3, doesn't apply to a court trial on stipulated evidence.

*Stipulated-facts court trial to preserve a dispositive issue, Minn. R. Crim. P. 26.01, subd. 4 (a.k.a. Lothenbach proceeding)*

- Appellate review is limited to the dispositive issue (suppression of the evidence, for example), and a defendant cannot challenge the sufficiency of the evidence.
- A “super waiver” of rights is required (orally on the record or in writing).
- In addition to the waiver, the parties must agree on the record that the pretrial issue is dispositive, and the defendant must acknowledge the limited scope of appellate review.
- A separate waiver is necessary if the defendant is also waiving a sentencing jury.

State v. Antrim, 764 N.W.2d 67 (Minn. App. 2009) (the waiver requirements of Minn. R. Crim. P. 26.01 are strictly enforced).

- ***Make sure exhibits, including demonstrative exhibits, power points, emails, etc. are included in the record, even if court exhibits.***
- **Make record on any Sentencing Challenges.**
  - Departure reasons, dispositional vs durational.
  - Criminal history score/prior record
  - Jail credit