PRESERVING APPELLATE ERROR

HOW TO AVOID WAIVER ARGUMENTS ON APPEAL

November 14, 2013

OUTLINE FOR COMMENTS BEFORE
THE ST. JOSEPH COUNTY BAR ASSOCIATION BY:

The Honorable Terry A. Crone
Judge, Indiana Court of Appeals

I. IN GENERAL

"As a general rule, a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court. This rule exists because trial courts have the authority to hear and weigh the evidence, to judge the credibility of witnesses, to apply the law to the facts found, and to decide questions raised by the parties. Appellate courts, on the other hand, have the authority to review questions of law and to judge the sufficiency of the evidence supporting a decision. The rule of waiver in part protects the integrity of the trial court; it cannot be found to have erred as to an issue or argument that it never had an opportunity to consider. Conversely, an intermediate court of appeals, for the most part, is not the forum for the initial decisions in a case. Consequently, an argument or issue not presented to the trial court is generally waived for appellate review." *GKC Indiana Theatres, Inc. v. Elk Retail Investors, LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002) (citations omitted).

Issues that are not raised before an administrative agency are generally waived for judicial review. *Indiana Horse Racing Comm'n v. Martin*, 990 N.E.2d 498, 506 n.3 (Ind. Ct. App. 2013).

II. JURISDICTION

In *K.S. v. State*, 849 N.E.2d 538 (Ind. 2006), the Indiana Supreme Court clarified that trial courts possess two kinds of jurisdiction: (1) subject matter jurisdiction, which is "the power to hear and determine cases of the general class to which any particular proceeding belongs"; and (2) personal jurisdiction, which "requires that appropriate process be effected over the parties." *Id.* at 540. The court stated that "[w]here these two exist, a court's decision may be set aside for legal error only through direct appeal and not through collateral attack. Other phrases recently common to Indiana practice, like 'jurisdiction over a particular case,' confuse actual jurisdiction with legal error …." *Id.* Unlike objections to subject matter jurisdiction, objections to personal jurisdiction and procedural errors may be waived as untimely. *See id.* at 542; *Truax v. State*, 856 N.E.2d 116, 122 (Ind. Ct. App. 2006).

In *Clark County Board of Aviation Commissioners v. Dreyer*, 993 N.E.2d 624 (Ind. 2013), our supreme court clarified its "inartful language" in *State v. Universal Outdoor, Inc.*, 880 N.E.2d 1188 (Ind. 2008), and explained that a property owner's failure to timely file exceptions to the court-appointed appraisers' report in an eminent domain proceeding "operated to preclude or foreclose the property owner from challenging the filed report" as a matter of legal error and "was not a matter of subject matter jurisdiction." *Id*. at 624.

III. DISCOVERY

A. Generally

"In cases where there has been a failure to comply with discovery procedures, the trial court is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated. If remedial measures are warranted, a continuance is usually the proper remedy. Failure to request a continuance, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the trial court's discovery order." *Fleming v. State*, 833 N.E.2d 84, 91 (Ind. Ct. App. 2005) (citations omitted).

B. Surprise Evidence & Witnesses

"When 'surprise' evidence appears at trial, the ordinary remedy is continuance, which is not favored in criminal trials, and can be had only upon a showing of good cause. A defendant who fails to move for a continuance will usually have waived any error, except where the State has blatantly and deliberately disregarded the court's order." *Moore v. State*, 569 N.E.2d 695, 700 (Ind. Ct. App. 1991) (citation and quotation marks omitted), *trans. denied*.

When confronted with a surprise witness, a party should ordinarily move for a continuance to depose the witness. *O'Connell v. State*, 742 N.E.2d 943, 948 (Ind. 2001). "This remedy allows time for the opposing party to depose the witness and examine the accuracy of the proposed testimony. The failure to move for a continuance may waive any error on appeal." *Id*.

In *Speedway SuperAmerica, LLC v. Holmes*, 885 N.E.2d 1265 (Ind. 2008), the Indiana Supreme Court set forth an exception to the general rule requiring a party to request a continuance. In *Holmes*, the Appellant was informed of the existence of certain evidence on the morning of trial. In excusing the Appellant's failure to request a continuance, our supreme court held, "Parties are understandably reluctant to request a continuance when the jury pool has already been assembled. A continuance at that point imposes a significant cost and inefficiency on the courts and the parties, and may be burdensome for other resources as well. Requiring such a motion to preserve remedies for an opponent's belated springing of evidence on the day of trial gives the party discovering new evidence the ability to force the opponent to choose between seeking a continuance or going to trial with the untested evidence. Such a requirement rewards failures of the discovering party, whether failure to make timely disclosure was intentional or inadvertent. If evidence is truly discovered on the eve of trial without fault of the discovering party, requiring that choice may be acceptable. But when, as here, it is discovered ten days before trial and kept from the opponent, the discovering party should not be permitted to gain this tactical advantage. We cannot say that failing to request a continuance was a failure to exercise due diligence to discover the new evidence developed in posttrial testing." *Id*. at 1273-74.

Failure to renew an objection to a surprise witness when the witness testified after a request to depose the witness was granted resulted in waiver on appeal. *O'Connell*, 742 N.E.2d at 948-49.

However, when a party was not advised in advance of a witness's change in testimony or prior statements and therefore had no time to evaluate whether to seek a continuance, move for a mistrial, or redepose the witness to explore the circumstances of the change of testimony, the party's decision to cross-examine the witness rather than seek continuance did not result in waiver in light of the opposing party's failure to supplement discovery regarding witness's prior statements. *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 78-79 (Ind. 2006).

IV. SUMMARY JUDGMENT

A. Designation of Evidence

"Indiana Trial Rule 56(C) requires each party to a summary judgment motion to 'designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for the purpose of the motion.'" *AutoXchange.com, Inc. v. Dreyer & Reinbold, Inc.*, 816 N.E.2d 40, 45 (Ind. Ct. App. 2004). "This designation requirement promotes the expeditious resolution of lawsuits and conserves judicial resources by relieving the trial courts from the burden of searching the record when considering summary judgment motions." *Id*. "More significantly, [Trial Rule] 56(H) specifically prohibits appellate courts from reversing a grant of summary judgment 'on the ground that there is a genuine issue of material fact unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court.'" *Id*. (quoting Ind. Trial Rule 56(H)).

In *Filip v. Block*, 879 N.E.2d 1076 (Ind. 2008), the Indiana Supreme Court addressed the requirement for designating evidence in summary judgment motion practice. Our supreme court held that the only requirement as to placement of the designation (either in support of or opposition to a summary judgment motion) is that it clearly identify listed materials as designated evidence. *Id*. at 1081. However, if the designation is not in the motion itself, it must be in a paper filed with the motion. *Id*. Furthermore, although a party can choose where to place the designation, it should be in a single place, whether as a separate document, appendix or other filing, so the court and opposing parties should not be required to shift through the various filings to locate evidence a party claims is relevant to the motion. *Id*.

B. Affirmative Defenses

In *H & G Ortho, Inc. v. Neodontics International, Inc.*, 823 N.E.2d 718 (Ind. Ct. App. 2005), the Court of Appeals reaffirmed that "failure to designate evidence to support an available affirmative defense waives that defense on remand, even where portions of the claim survive summary judgment." *Id*. at 731.

However, in *Reiswerg v. Statom*, 926 N.E.2d 26 (Ind. 2010), the Indiana Supreme Court held that "[a] party responding to a motion for summary judgment is entitled to take the motion as the moving party frames it" and respond accordingly. *Id*. at 30. Thus, the nonmoving party is under no obligation to raise its affirmative defenses in response to a motion for partial summary

judgment if the issue to which the affirmative defenses relates was not raised in the partial summary judgment. *Id*. at 30-31.

C. Motions to Strike

In *City of Gary v. McCrady*, 851 N.E.2d 359 (Ind. Ct. App. 2006), the Court of Appeals considered whether the trial court erred in denying the defendants' motion to strike certain designated affidavits which were not based on personal knowledge as is required by Trial Rule 56(E). "Affidavits in support of or in opposition to a motion for summary judgment are governed by Indiana Trial Rule 56(E), which provides, in relevant part: 'Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" *Id*. at 363. Defendants filed a motion to strike certain affidavits designated as evidence in support of the plaintiff's motion for summary judgment, which was denied by the trial court. On appeal, the plaintiff acknowledged that the challenged affidavits were not based on personal knowledge, but claimed that they were properly admitted because the information included in the affidavits fell within the hearsay exception outlined in Evidence Rule 803(8) ("public records and reports"). *Id*. at 364. The Court of Appeals concluded that the plaintiff waived this argument by not raising it before the trial court. *Id*.

The defendant's failure to file a motion to strike a survey report on hearsay grounds waived any claim regarding its admissibility on appeal. *Legacy Healthcare, Inc. v. Barnes & Thornburg*, 837 N.E.2d 619, 640 (Ind. Ct. App. 2005), *trans. denied* (2006).

V. GUILTY PLEAS

In *Borders v. State*, 854 N.E.2d 888 (Ind. Ct. App. 2006), *trans. denied*, the court reiterated, "Defendants who plead guilty to achieve favorable outcomes give up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy. Striking a favorable bargain including a consecutive sentence the court might otherwise not have the ability to impose falls within the category." *Id*. at 890 (citations omitted).

VI. JURY SELECTION/VOIR DIRE

A. Racial Composition of the Jury

Batson v. Kentucky, 476 U.S. 79 (1986), establishes that peremptory challenges to prospective jurors on the basis of race are impermissible. *Batson* challenges, however, can be waived. *See Lyles v. State*, 834 N.E.2d 1035, 1051 (Ind. Ct. App. 2005) (providing that defendant waived the claim that he was denied the right to an impartial jury by failing to object to the racial composition of the jury or the jury selection process), *trans. denied*.

B. Gender

J.E.B. v. Alabama, 511 U.S. 127 (1994), establishes that peremptory challenges to prospective jurors on the basis of gender are impermissible. It would appear that like a *Batson* claim, a claim under *J.E.B.* could also be waived if not raised at trial. *See generally Lyles*, 834 N.E.2d at 1051 (providing that defendant waived the claim that he was denied the right to an impartial jury by failing to object to the racial composition of the jury or the jury selection process).

C. Improper Questions

To preserve the issue of improper questions during voire dire, the complaining party must properly object to questions at the trial court level. *Rieth-Riley Constr. Co., Inc. v. McCarrell*, 325 N.E.2d 844, 854 (Ind. Ct. App. 1975).

D. Challenge to Prospective Juror for Cause

A claim of error arising from the denial of a challenge to a prospective juror for cause is waived unless the party challenging the prospective juror used any remaining peremptory challenges to remove the challenged juror or jurors. *Merritt v. Evansville-Vanderburgh Sch. Corp.*, 765 N.E.2d 1232, 1235 (Ind. 2002). However, "a claim is preserved where a party uses her last peremptory challenge to cure a trial court's erroneous denial of a challenge for cause and establishes for the record that she would have used that peremptory to strike another juror." *Id.* at 1237 n.8.

VII. ADMISSION OF EVIDENCE

A. Pre-Trial

1. Motions In Limine

"A motion in limine is used as a protective order against prejudicial questions and statements being asked during trial." *Earlywine v. State*, 847 N.E.2d 1011, 1013 (Ind. Ct. App. 2006). "The ruling [on a motion in limine] does not determine the ultimate admissibility of evidence; that determination is made by the trial court in the context of the trial itself. Because the pre-trial denial of a motion in limine is a preliminary ruling, this denial alone is insufficient to preserve error for an incorrect ruling on the motion. By requiring that an objection be made during the trial at the time when the testimony is offered into evidence, the trial court is able to consider the evidence in the context in which it is being offered and is able to make a final determination on admissibility." *Id.* (citing *Clausen v. State*, 622 N.E.2d 925, 927-28 (Ind. 1993)).

If, however, a motion in limine is granted, the proponent of the excluded evidence must make a proper offer of proof to preserve appellate review, unless the substance of the evidence was apparent from the context in which the questions are asked. *Baker v. State*, 750 N.E.2d 781, 785 (Ind. 2001).

2. Motions to Suppress

"Even where a defendant moves to suppress evidence prior to trial, he must reassert his objection at trial contemporaneously with the introduction of the evidence to preserve the error for appeal." *Lundquist v. State*, 834 N.E.2d 1061, 1067 (Ind. Ct. App. 2005). "Moreover, to preserve a challenge to the admission of evidence, the defendant must object each time the evidence is offered." *Id*.

"[O]nce the matter proceeds to trial, the denial of a motion to suppress is insufficient to preserve an issue for appeal." *Kelley v. State*, 825 N.E.2d 420, 424 (Ind. Ct. App. 2005). "Rather the defendant must make a contemporaneous objection to the admission of the evidence at trial." *Id*. "The logic behind this rule is that a ruling upon a pretrial motion to suppress is not intended to serve as the final expression concerning admissibility." *Id*. (citations and quotation omitted). "In other words, the preliminary ruling on the defendant's motion to suppress is subject to modification at trial." *Id*.

In *Merritt v. State*, 803 N.E.2d 257, 261 (Ind. Ct. App. 2004), the Court of Appeals concluded that the State waived its argument that evidence seized pursuant to a defective search warrant was admissible under the good faith exception to the Fourth Amendment's warrant requirement, where it failed to "advance this argument in its memorandum in opposition to the motion to suppress or at the suppression hearing."

B. During Trial

1. Generally

"It is the general rule that a party must object to evidence at the time it is offered into the record." *Everage v. N. Ind. Pub. Serv. Co.*, 825 N.E.2d 947, 948 (Ind. Ct. App. 2005) (citing *Reed v. Dillon*, 566 N.E.2d 585, 588 (Ind. Ct. App. 1991)). "A party that fails to make a timely objection or fails to file a timely motion to strike waives the right to have the evidence excluded at trial and the right on appeal to assert the admission of evidence as erroneous." *Id*. "'In failing to make a timely objection or motion, the party is, in effect, acquiescing in the admission of the evidence.'" *Id*. (quoting *Reed*, 566 N.E.2d at 588).

2. Offers Of Proof

"The purpose of an offer [of proof] is to preserve for appeal the trial court's allegedly erroneous exclusion of evidence." *Duso v. State*, 866 N.E.2d 321, 324 (Ind. Ct. App. 2007).

"'Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and ... [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.' Ind. Evidence Rule 103(a). In order to preserve the exclusion of evidence for appellate review, a defendant must make an offer of proof, setting forth the grounds for admission of the evidence and the relevance of the testimony." *Fowler v. State*, 929 N.E.2d 875, 881 (Ind. Ct. App. 2010), *trans. denied*.

An offer of proof "is necessary to enable both the trial court and the appellate court to determine the admissibility of the testimony and the prejudice which might result if the evidence is excluded." *Woods v. State*, 892 N.E.2d 637, 641-42 (Ind. 2008) (quoting *Wiseheart v. State*, 491 N.E.2d 985, 991 (Ind. 1986)).

"The proponent of excluded evidence must make a formal offer of proof at trial or the error is waived and not preserved for appeal." *State v. Snyder*, 732 N.E.2d 1240, 1246 (Ind. Ct. App. 2000).

The proponent of excluded evidence is limited to the specific grounds argued to the trial court and cannot assert new bases for admissibility for the first time on appeal. *Taylor v. State*, 710 N.E.2d 921, 923 (Ind. 1999).

3. Continuing Objections

"Indiana recognizes continuing objections." *Hayworth v. State*, 904 N.E.2d 684, 691 (Ind. Ct. App. 2009). "This is because continuing objections serve a useful purpose in trials. That is, they avoid the futility and waste of time inherent in requiring repetition of the same unsuccessful objection each time evidence of a given character is offered." *Id*. at 692. "However, … there are dangers to using continuing objections. As such, the proper procedure must be carefully followed if attorneys wish to use continuing objections and still properly preserve the admission of specific evidence as an issue on appeal. First, objecting counsel must ask the trial court to consider the same objection to be made and overruled each time a class of evidence is offered. It is within the trial court's discretion to grant counsel a continuing objection. If the trial court grants the continuing objection, then counsel does not have to object each time the class of evidence is subsequently offered. This is an exception to the general rule that a party must continue to object and obtain a ruling for each individual instance of inadmissible evidence. If, however, the trial court does not specifically grant the right to a continuing objection, it is counsel's duty to object to the evidence as it is offered in order to preserve the issue for appeal. If the class of evidence to which the continuing objection is lodged is sufficiently defined, the trial court is satisfied that repeated objections to the evidence would be futile, and the trial court grants the continuing objection, presentation of the evidence is enhanced and frustration and impatience is reduced. Objecting counsel must ensure, however, that the continuing objection fully and clearly advises the trial court of the specific grounds for the objection. If so, the issue is sufficiently preserved for appeal." *Id*. (citations and footnotes omitted).

4. "Connecting Up"

"Where evidence is admitted subject to being connected up later, and no subsequent motion to strike the evidence is made, any error in the admission of the evidence is waived." *Franciose v. Jones*, 907 N.E.2d 139, 145 (Ind. Ct. App. 2009), *trans. denied*.

VIII. CONDUCT OF COUNSEL

"When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury." *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). "If the party is not satisfied with the admonishment, then he or she should move for mistrial." *Id*. "Failure to request an admonishment or to move for mistrial results in waiver." *Id*. "Where a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim." *Id*. "More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error." *Id*. "To show fundamental error, a defendant must demonstrate error that caused actual and substantial disadvantage, infecting and tainting the entire proceeding. In other words, the error must so prejudice the rights of the defendant as to make a fair trial impossible." *Henriquez v. State*, 973 N.E.2d 1154, 1156 (Ind. Ct. App. 2012) (citation omitted), *trans. denied*.

IX. CONDUCT OF JUDGE

Generally, in order to preserve a claim that the trial court's comments indicate that the trial court has "crossed the barrier of impartiality," a contemporaneous objection is required. *Ruggieri v. State*, 804 N.E.2d 859, 863 (Ind. Ct. App. 2004). If a party fails to make a contemporaneous objection, its claim is reviewable on appeal only for fundamental error. *Id*. While, on rare occasions, comments of a judge may constitute fundamental error, Indiana has not recognized a rule establishing that any improper comment by a trial judge will constitute fundamental error and thereby avoid the need for contemporaneous objections. *Id.*

X. MOTIONS FOR JUDGMENT ON THE EVIDENCE

A Trial Rule 50 motion for judgment on the evidence is improper at a bench trial because it addresses the issue of whether there is sufficient evidence to justify submitting the case to a jury. *Taflinger Farm v. Uhl*, 815 N.E.2d 1015, 1017 n.2 (Ind. Ct. App. 2004).

The issue may be raised for the first time on appeal in criminal appeals but not in civil cases. Ind. Trial Rule 50(A)(5); *see also Henri v. Curto*, 908 N.E.2d 196, 208 (Ind. 2009).

A defendant waives any error in the denial of a motion for judgment on the evidence made at the close of plaintiff's case where defendant offers its own evidence and fails to renew motion at later stage of the proceedings under Trial Rule 50(A)(2)-(4). *Bd. of Comm'rs of Adams Cnty. v. Price*, 587 N.E.2d 1326, 1331-32 (Ind. Ct. App. 1992), *trans. denied*.

Defendant preserves error by renewing a denied motion for judgment on the evidence after presenting its own evidence. *Kelly v. Levandoski*, 825 N.E.2d 850, 861 n.5 (Ind. Ct. App. 2005), *trans. denied*.

XI. MOTIONS FOR INVOLUNTARY DISMISSAL

A motion for involuntary dismissal "must be raised at the completion of the presentation of evidence by the party having the burden of proof on the issue on which involuntary dismissal is sought." *McMahan v. Snap On Tool Corp.*, 478 N.E.2d 116, 119 n.1 (Ind. Ct. App. 1985).

A motion for involuntary dismissal is unavailable at a jury trial. Ind. Trial Rule 41(B).

Any error made in denying a motion for involuntary dismissal is waived by the movant's subsequent presentation of evidence. *Plesha v. Edmonds ex rel. Edmonds*, 717 N.E.2d 981, 985 (Ind. Ct. App. 1999), *trans. denied* (2000).

XII. JURY INSTRUCTIONS

Failure to object to an instruction in the trial court waives appellate review of that instruction. *Coachmen Indus., Inc. v. Dunn*, 719 N.E.2d 1271, 1275 (Ind. Ct. App. 1999), *trans. denied* (2000).

Pursuant to Trial Rule 51(C), "No party may claim as error the giving of an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." "The purpose of this trial rule is to protect the trial court from inadvertent error." *Southport Little League v. Vaughan*, 734 N.E.2d 261, 273 (Ind. Ct. App. 2000), *trans. denied* (2001).

"Objections to instructions must state why the instruction is misleading, confusing, incomplete, irrelevant, not supported by the evidence, or an incorrect statement of the law." *Vaughan*, 734 N.E.2d at 273. "An objection which is not specific preserves no error on appeal." *Id*. "In other words, failure to comply with the requirements of Trial Rule 51(C) results in the waiver of any error in the giving of the instruction." *Id.*

A party claiming error in the giving of an instruction is limited to the grounds stated in his objection at trial. *Weller v. Mack Trucks, Inc.*, 570 N.E.2d 1341, 1343 (Ind. Ct. App. 1991).

A party who fails to tender a correct instruction waives any error regarding an incomplete or omitted instruction, unless the error is fundamental. *Carson v. State*, 686 N.E.2d 864, 865 (Ind. Ct. App. 1997), *trans. denied* (1998). However, a party is only required to make a timely objection and is not required to tender a corrective instruction if the issue is whether the instruction given was an incorrect statement of law. *Id.*

If an instruction is tendered by a party and modified by the court, that party must object to the modification or the giving of the instruction as modified to the jury, otherwise the issue is waived on appeal. *Santini v. Consol. Rail Corp.*, 505 N.E.2d 832, 840 (Ind. Ct. App. 1987).

Pursuant to Indiana Appellate Rule 46(A)(8)(e), both the challenged instruction and the objection to the instruction must be set forth verbatim in the appellant's brief. Failure to do so will result in waiver of the issue on appeal. *Hall v. State*, 769 N.E.2d 250, 254 (Ind. Ct. App. 2002).

XIII. VERDICT

A defendant who has "raised no objection at trial to either the verdict forms or the verdict" waives appellate review of the argument that his conviction may have been returned by a non-unanimous jury or that some jurors may have relied on different evidence than the other to convict. *Scuro v. State*, 849 N.E.2d 682, 687-88 (Ind. Ct. App. 2006), *trans. denied*.

XIV. DAMAGES/ATTORNEY FEES

When a party fails to make an objection to the evidence designated before the trial court regarding damages or attorney's fees, it cannot raise the objection on appeal. *See Wilcox Lumber Co. v. The Andersons, Inc.*, 848 N.E.2d 1169, 1171 (Ind. Ct. App. 2006) (providing that a party's failure to object to the designated evidence relating to damages, present any evidence of its own, or request a hearing on the evidence resulted in waiver of any issue of fact pertaining to the damage award); *Lee and Mayfield, Inc. v. Lykowski House Moving Eng'rs, Inc.*, 489 N.E.2d 603, 611 (Ind. Ct. App. 1986) (providing that the failure to object to the admission at trial of evidence relating to attorney's fees constituted waiver of any contention on appeal with respect to the correctness and accuracy of that evidence), *trans. denied*.

XV. OPENING AND CLOSING STATEMENTS

Failure to object at trial to statements made in opening or closing statement waives issue on appeal, and any grounds not specified in objection are also waived. *Bellmore v. State*, 602 N.E.2d 111, 120-21 (Ind. 1992).

To seek appellate review of alleged improprieties in a closing argument, "a party 'must promptly interpose and state its objection to the language or argument and request the court to so instruct the jury as to counteract any harmful effect of such language or argument.'" *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1057 (Ind. 2003) (quoting *Ritter v. Stanton*, 745 N.E.2d 828. 856 (Ind. Ct. App. 2001)).

A "clear and unequivocal admission of fact" made by an attorney during opening statement is a judicial admission which is binding on the client. *Sans. v. Monticello Ins. Co.*, 718 N.E.2d 814, 816 n.3 (Ind. Ct. App. 1999), *trans. denied* (2000). However, where there is ambiguity or doubt in a statement, it is presumed that the attorney did not intend to make an admission. *Id.*

XVI. SENTENCING

Failure to object to the denial of a motion to continue a sentencing hearing waives the issue for appeal. *Jones v. State*, 957 N.E.2d 1033, 1042 (Ind. Ct. App. 2011).

"The information in the PSI [presentence investigation report] is presumed to be accurate unless the defendant registers an objection to the information contained therein, and the failure to so object waives appellate review of this issue." *Robeson v. State*, 834 N.E.2d 723, 725 (Ind. Ct. App. 2005), *trans. denied* (2006).

A defendant's failure to object to the State's cross-examination during his allocution at sentencing waives the issue for appeal. *Phelps v. State*, 914 N.E.2d 283, 290 (Ind. Ct. App. 2009).

"Failure to present a mitigating circumstance to the trial court waives consideration of the circumstance on appeal." *Bryant v. State*, 984 N.E.2d 240, 252 (Ind. Ct. App. 2013), *trans. denied*.

Failure to object to the conditions of probation at sentencing waives the issue for appeal. *Hale v. State*, 888 N.E.2d 314, 319 (Ind. Ct. App. 2008), *trans. denied*.

XVII. ARGUMENTS ON APPEAL

An argument raised for the first time in a reply brief is waived. *Erwin v. HSBC Mortg. Servs., Inc.*, 983 N.E.2d 174, 181 (Ind. Ct. App. 2013), *trans. denied*; *see also* Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief.").