

# The Appellate Perspective



Should you ever count on winning on appeal?

- High rate of affirmances
- Emphasis on “finality”

*Although postconviction forensic DNA testing is important, and although a crime victim assuredly has an interest in seeing that the true criminal offender in a case is prosecuted, it is not difficult to imagine why such testing might cause significant distress to victims of Wis. Stat. § 974.07 movants and prevent these victims from obtaining some amount of closure following the infliction of harm upon them.*

*State v. Denny, 373 Wis.2d 390*

- The Appellate Perspective –
  - The Standard of Review

**Preserving the Issue**

**Making a thorough record**

# Preserving the issue and Making a record

- Important to have any meaningful chance on appeal
- Increases odds of winning before the trial court

- If it's not raised correctly, then it's forfeited
- State v. Danny Waters example
- Or, it has to be raised as IAC

# Preserved v. Unpreserved

- IAC: burden is on defense to prove prejudice

*It is not enough for a defendant to merely show that the error “had some conceivable effect on the outcome” of the trial. Strickland, 466 U.S. at 693, 104 S.Ct. 2052. Rather, the defendant must demonstrate that but for his trial attorney's error there is a reasonable probability—a “probability sufficient to undermine confidence in the outcome” —that the result of his trial would have been different.*

- Properly preserved: burden is on the beneficiary to show error was harmless

*A harmless error analysis asks whether, based on the totality of the circumstances, it is clear beyond a reasonable doubt that a rational jury, properly instructed, would have found the defendant guilty.*

- A brief note about IAC claims

Must file a motion or object to preserve issue  
The court needs an opportunity to decide the  
issue



# Be specific

If federal Constitution applies, or SCOTUS caselaw, use that also.



# Jury Instructions

- “A [trial] court has wide discretion in determining which jury instructions to give.... If the given jury instructions adequately communicated the law and were applicable to the facts, no grounds for reversal exist.” 260 *North 12th Street, LLC v. DOT*, 2011 WI 103, ¶ 66

# Jury Instructions, cont.

- The failure to object to a proposed jury instruction constitutes waiver of any error. Wis.Stat. § 805.13(3). *In Interest of C.E.W.*, 124 Wis.2d 47, 54, 368 N.W.2d 47 (1985).
- even when a substantive constitutional right is involved, § 805.13(3) requires an objection to the proposed jury instructions be made or any error is waived. *State v. Damon*, 140 Wis.2d 297, 302, 409 N.W.2d 444 (Ct.App.1987).

# Voir Dire/Jury Selection

- Objective bias: mixed question of fact and law.
- Subjective bias: upheld unless clearly erroneous
- Batson: clearly erroneous

# Self-Defense

- whether a reasonable construction of the evidence will support the defendant's theory “viewed in the most favorable light it will ‘reasonably admit of from the standpoint of the accused.’
- Whether there are sufficient facts to allow the giving of an instruction is a question of law which we review de novo.
- Error doesn’t affect substantial rights of D, if clear BARD that rational jury would have found D guilty.

State v. Head, 2002 WI 99, ¶ 44

# Lesser-Included Offenses

- The trial court must submit a lesser-included offense instruction only when there are reasonable grounds in the evidence for acquittal on the original offense *and* conviction on the lesser offense.
- In deciding whether this evidentiary standard is met, the evidence is viewed in the light most favorable to the defendant.

State v. Chapman, 175 Wis. 2d 231, 241, 499 N.W.2d 222, 226 (Ct. App. 1993)

# Closing Argument

- We conclude Haskins has waived any objection to the prosecutor's closing argument by his failure to move for a mistrial. In *Davis*, as here, the defendant “objected to the prosecutorial comment, (but) did not move for a mistrial.” Applying well-established law, we held the objection had been waived.

Haskins v. State, 97 Wis. 2d 408, 424, 294 N.W.2d 25, 36 (1980)