

During Drew's argument at the Court of Appeals yesterday, Judge Smith made an observation which I think is worth passing along, even though it's not a part of any published decision.

The argument pertained to the sufficiency of evidence of depraved indifference. Smith noted that many cases featuring this argument are counter-intuitive, wherein the defense, on appeal, argues that the defendant's murder conviction must be vacated because he obviously intended to cause death. Inasmuch as Drew's case involved a standard argument that the proof was merely insufficient to prove depravity - the defendant fled from police and a car crash resulted - Judge Smith's question and observation helped us. He noted that the Court had been very strict where the argument on appeal was incongruous or unexpected, and less so where the argument on appeal was a natural and obvious explanation of the objection below. The DA's response, that the TOD motion here was the same as another case which was ruled unpreserved by the Court didn't help, since the unpreserved argument in that case was that the murder was intentional, i.e. the opposite of what Judge Smith was saying.

I think Judge Smith's observation is correct and worth remembering. When you make an argument to the court which is unusual - such as saying that an alleged murder was obviously intentional - you need to be especially certain that the argument is laid out clearly. This doesn't mean that I encourage you to cut ordinary arguments short, but it does reflect a rationality in the appellate requirements of preservation. If the argument on appeal is precisely what you'd expect given the motion below - hey, the proof here was factually insufficient to show depravity because there's not enough proof of depravity - you need to be less worried that the court will parse your objection or TOD motion. However, when you're arguing something unusual, counter-intuitive, or just plain weird, spell it out in painful detail.