

**STATE OF MICHIGAN  
IN THE SUPREME COURT  
Appeal from the Court of Appeals  
Cynthia Diane Stephens, P.J.,  
and Michael J. Talbot and Christopher M. Murray, J.J.**

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**THE PEOPLE OF THE STATE OF MICHIGAN,**

**Plaintiff-Appellant,**

**vs**

**Supreme Court  
No. 149259**

**BRANDON LEWIS CAIN,**

**Defendant-Appellee.**

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**Court of Appeals No. 314342  
Lower Court No. 12-005176-FC**

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**The People's Appellant's Brief on Appeal  
on Leave Granted**

**Oral Argument Requested**

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### **Statement of Jurisdiction**

By Order of September 17, 2014, this Court granted the People's Application for Leave to Appeal the Court of Appeals's Order of May 2, 2014, which granted Defendant's Motion for Peremptory Reversal, reversing Defendant's conviction and sentence, and remanding the matter for a new trial "with a properly sworn jury." The Court of Appeals, in its Order, gave as its reason for reversal, that "[t]he failure to properly swear the jury is a structural error requiring a new trial. *People v Allan*, 299 Mich App 205; 829 NW2d 319 (2013)."

This Court, in its September 17, 2014 Order, directed that, "[t]he parties shall address whether the Court of Appeals erred in determining that the failure to properly swear the jury, even in the absence of a timely objection, is a structural error requiring a new trial."

### **Statement of Pertinent Facts**

Defendants Brandon Cain, Brian Lee, Reginald Brown, and Jeremy Brown (who will hereafter be referred to simply as "Cain, "Lee, "R. Brown," and "J. Brown") were all charged in the Wayne County Circuit Court (Third Judicial Circuit), Criminal Division with two counts of first-degree premeditated murder as to Ashley Conaway and Abreeya Brown, in violation of MCL 750.316, two counts of first-degree felony murder as to the same two persons, also in violation of MCL 750.316, and two counts of torture as to the same two persons, in violation of MCL 750.85. Additionally, Cain and R. Brown were charged with two counts of unlawful imprisonment as to the same two persons, in violation of MCL 750.349b, and both were both charged with felony firearm, in violation of MCL 750.227b. Finally, Cain alone was charged with being a felon in possession of a firearm, in violation of MCL 750.227f.

All four Defendants were tried in one trial, with Cain and Lee having one jury, and R. Brown and J. Brown having another.

Following a jury trial that lasted almost seven weeks to the day, commencing on October 23, 2012, and concluding on December 10, 2012, all four Defendants were found guilty as follows:

#### **The Cain/Lee jury**

Cain was found guilty of two counts of first-degree premeditated murder as to victims Abreeya Brown and Ashley Conaway, two counts of first-degree felony murder (same victims) (these four counts of first-degree murder were consolidated into two counts of first-degree murder with alternate theories), two counts of torture (same victims), two counts of unlawful imprisonment (same victims), and one count of felon in possession of a firearm, and one count of felony firearm.

Lee was found guilty of four counts of second-degree murder, which were consolidated into two counts, one for each of the victims.

**The R. Brown/J. Brown jury**

R. Brown was found guilty of all the same offenses that Cain's jury found Cain guilty of, except felon in possession of a firearm.

J. Brown was found guilty of all the same offenses as R. Brown, except the two counts of unlawful imprisonment and felony firearm.

**The Jury Oath Given to the Cain/Lee Jury**

After the Cain/Lee jury was selected, the trial court said to the jurors:

Ladies and gentlemen, you have been chosen to decide a criminal charge made by the State of Michigan against one of your fellow citizens.

*I will now ask you to stand and swear to perform your duty to try the case justly, and to reach a true verdict.*

If your religious beliefs do not permit you to take an oath, you may instead affirm to try the case and reach a true verdict.

(People's Appellant's Appendix, 20a) (italics added).

The court clerk, rather than reciting the correct oath,<sup>1</sup> recited the oath that is given before voir dire:

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<sup>1</sup> The correct oath would, according to MCR 2.511(H)(1), have been:

Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.



You do solemnly swear or affirm that you will true answers make to such questions as may be put to you touching upon your qualifications to serve as jurors in the cause now pending before the Court?

(People's Appellant's Appendix, 20a-21a).<sup>2</sup>

There was no objection.

Again, the Court of Appeals, by Order of May 2, 2014, granted Defendant's Motion for Peremptory Reversal, reversing Cain's conviction and sentence, and remanding the matter for a new trial "with a properly sworn jury." The Court of Appeals, in its Order, gave as its reason for reversal, that "[t]he failure to properly swear the jury is a structural error requiring a new trial. *People v Allan*, 299 Mich App 205; 829 NW2d 319 (2013)."

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<sup>2</sup> The error was not repeated relative to the R. Brown/J. Brown jury, which was given the proper oath by the court clerk following jury selection:

THE CLERK: Um hmm.

You do solemnly swear or affirm that you will well and truly try, and true deliverance make, between the People of the State, and the defendant at the bar, whom you shall have in charge, according to the evidence and the laws of this State?

THE BROWN/BROWN JURORS: (Collectively) I do.

(People's Appellant's Appendix, 54a).

## Argument

**Failure to *properly* swear a jury is not structural error; rather, whether Cain's substantial rights were affected by the oath given is determined by taking that oath in context with other comments and instructions of the trial court; further, even if the error is viewed as structural, it does not necessarily constitute plain error, and did not in this case.**

### Introduction

By Order of September 17, 2014, this Court granted the People's Application for Leave to Appeal the Court of Appeals's Order of May 2, 2014, which granted Cain's Motion for Peremptory Reversal, reversing Defendant's conviction and sentence, and remanding the matter for a new trial "with a properly sworn jury." The Court of Appeals, in its Order, gave as its reason for reversal, that "[t]he failure to properly swear the jury is a structural error requiring a new trial. *People v Allan*, 299 Mich App 205; 829 NW2d 319 (2013)."

This Court, in its September 17, 2014 Order, directed that, "[t]he parties shall address whether the Court of Appeals erred in determining that the failure to properly swear the jury, even in the absence of a timely objection, is a structural error requiring a new trial." Because there was no objection, the matter must be reviewed under the standard of plain error, considering whether, be the error structural or not, reversal is compelled under that standard. The People answer that 1) error occurred in the swearing of the jury; 2) the error was plain; 3) the error was not structural, and 4) whether structural or not, the error does not constitute plain error requiring reversal.<sup>3</sup>

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<sup>3</sup> See *People v Vaughn*, 491 Mich 642; 821 NW2d 288 (2012) (to be discussed subsequently).

## **Discussion**

### **A) Statement of Standard of Review**

Whether the failure to properly swear the jury, even in the absence of a timely objection, is a structural error that in this case constitutes plain error requiring reversal is a question of law, and questions of law are reviewed de novo by this Court. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003).

### **B) The People's Position**

#### **i) The inquiry is as to plain error, an inquiry the Court of Appeals failed to undertake**

It seems logical to break this Court's inquiry, "whether the Court of Appeals erred in determining that the failure to properly swear the jury, even in the absence of a timely objection, is a structural error requiring a new trial," into component parts.

The easy answer to the first part of this Court's inquiry "*whether the Court of Appeals erred in determining that the failure to properly swear the jury, even in the absence of a timely objection, [was] a structural error requiring a new trial*" is that the Court of Appeals's Order, on its face, is erroneous, and clearly so, in that it makes no mention of the fact that the error here was not preserved. One might gather from just the language of the Court of Appeals's Order that where an error is "structural," whether preserved for review or unpreserved, the inquiry is over, because reversal is automatic; that is to say, plain error analysis does not enter into the picture even if there was no contemporaneous objection to the error. Such a resolution as that suggested by the language of the Court of Appeals's Order is contrary to this Court's recent observation in *People v Vaughn*, 491 Mich 642; 821 NW2d 288 (2012):

The concurring justice appears to favor a general rule of automatic reversal for *all* unpreserved structural errors, subject to exceptions when the ultimate determination of guilt remains reliable despite the structural error. Yet this distinction fails fully to acknowledge the importance of issue preservation to this state's jurisprudence and would situate most *forfeited* structural errors identically with preserved structural errors.

\* \* \* \*

While the concurring justice recognizes that a structural error may “defy analysis by ‘harmless-error’ standards,” *United States v Gonzalez-Lopez*, 548 US 140, 148-149; 126 S Ct 2557; 165 L Ed 2d 409 (2006) (citation and quotation marks omitted), he fails to take into account that the caselaw of the Supreme Court of the United States has expressly distinguished plain-error analysis from harmless-error analysis. For instance, the Court has repeatedly withheld judgment on whether a structural error automatically satisfies the third prong of plain-error analysis, *Puckett v United States*, 556 US 129, 140; 129 S Ct 1423; 173 L Ed 2d 266 (2009), implying that structural errors do not entirely defy plain-error analysis, even if they do defy harmless-error analysis. Nor does this Court's opinion in *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000), compel the rule that the concurring justice would adopt. While *Duncan* acknowledged that “[s]tructural errors ... are intrinsically harmful,” *id.* at 51, this statement is consistent with applying our forfeiture rules because we explicitly follow *Duncan* when applying the third *Carines* [*People v Carines*, 460 Mich 750; 597 NW2d 130 (1999)] prong, as discussed later in this opinion, and *Duncan* does not expressly state that structural errors defy application of plain-error analysis.

491 Mich at 655, fn 42 (italics in original).

The reasoning above is in line with a pertinent case from the 10<sup>th</sup> Circuit, where it was observed:

Turrietta's claim of "structural" error has little bearing on the application of the plain error test. Rule 52(b) does not permit exceptions based on the gravity of the asserted error. See Puckett [*Puckett v United States*, 556 US 129; 129 S Ct 1423; 173 L Ed 2d 266 (2009)], 556 US at 135-136; *Johnson v United States*, 520 US 461, 466; 117 S Ct 1544; 137 L Ed 2d 718 (1997) ("the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure."). Whether an error can be properly characterized as "structural" has nothing to do with plain error review under Rule 52(b), and everything to do with harmless error review under Rule 52(a). See *Puckett*, 556 US at 139 ("Whether an error can be found harmless is simply a different question from whether it can be subjected to plain-error review."). *Stated differently, if a forfeited error is structural, it cannot be harmless because we will presume prejudice. But that does not foreclose application of plain error review. At most, it may impact the third step of plain error analysis.* See discussion in part C, *infra*.

*United States v Turrietta*, 676 F3d 972, 976, fn 9 (CA 10, 2012) (italics added).

Clearly then, that an error is deemed "structural error" does not exempt it from plain error analysis, where the error has not been objected to, making it unpreserved for full appellate review.

One could, of course, surmise that the Court of Appeals's citation to *People v Allan*, 299 Mich App 205; 829 NW2d 319 (2013), a case which *did* recognize the lack of an objection to the unsworn jury issue, and which did apply plain error analysis, means that the Court of Appeals in this case likewise was aware of the lack of an objection, and did, even though not specifically saying so, apply plain error analysis. If that can be read into the Court of Appeals's Order in this case, the People still take issue with it, because the situation in this case is factually distinguishable from that presented in *Allan*, making the Court of Appeals's reliance on *Allan* in this case unsound. Nevertheless, the People take exception to the Court of Appeals's resolution of the issue in *Allan*,

in any event, which will also be discussed later. Suffice it to say now, however, there is what the People believe to be persuasive federal authority which conflicts with the Court of Appeals's resolution of the issue in *Allan*.<sup>4</sup>

Review for plain error being required, then, what are its components? Following federal law, this Court in *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994) held that unpreserved, nonconstitutional errors are reviewed under the "plain error" standard of review of *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Following up on *Grant*, this Court stated later in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999) that "the specific language of the federal rules themselves, and of the *Olano* majority's formulation from earlier precedent, make no distinction between constitutional and nonconstitutional error," such that, "it is the forfeiture aspect and not the actual constitutional status that drives the federal standard." 460 Mich at 764, quoting *Grant, supra*, 445 Mich at 550. Thus, this Court held that the plain error rule also applies to unpreserved claims of constitutional error, as well as nonconstitutional error.

Under the plain error standard, the defendant has the burden of showing: 1) that error occurred, 2) that the error was plain, i.e., clear or obvious, 3) and that the plain error affected substantial rights; this generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. *People v Hawthorne*, 474 Mich 174, 181-182; 713 NW2d 724 (2006). Furthermore, once a defendant satisfies these three requirements, an appellate court must still exercise its discretion in deciding whether to reverse, and so there is a fourth

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<sup>4</sup> That federal authority is *United States v Turrietta*, 696 F3d 972 (CA 10, 2012), which will be discussed in detail later.

component to the test. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Carines, supra*, 460 Mich at 763.

**ii) Application of review for plain error to the error here**

The People do not dispute that the trial court's administration of the wrong oath to the jury was error, and that the error was plain, in that it clearly did not comply with MCR 2.511(H)(1).<sup>5</sup>

Returning to this Court's inquiry, "whether the Court of Appeals erred in determining that the failure to properly swear the jury, even in the absence of a timely objection, is a structural error requiring a new trial," seems to beg the question whether the failure to properly swear the jury is a *structural* error, and whether an *error* in the swearing of the jury differs from failing, as in *Allan*, to swear the jury at all. The answer to this question would affect the application of the third *Carines* prong. Indeed, as this Court observed in *Vaughn, supra*, 491 Mich at 666, the United States Supreme Court "has specifically reserved judgment on whether an unpreserved structural error automatically affects a defendant's substantial rights [so as to satisfy the third *Carines* prong], but Michigan's "caselaw suggests that a plain structural error satisfies the third *Carines* prong."

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<sup>5</sup> There is some question as to whether the oath mandated by the court rule is required, or by statute. See MCL 768.14: "The following oath shall be administered to the jurors for the trial of all criminal cases: "You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of this state; so help you God." Given the promulgation in the court rule of an oath differing from the statutory oath, it may be that this Court is of the view that this is a matter of procedure; that is, while that *an* oath must be given is a matter of substance (otherwise it's absence could never affect a defendant's "substantial rights), the content of that oath is a matter of procedure, over which this Court governs. This Court need not decide that question in this case.

The Court of Appeals, in *Allan, supra*, found that the trial court's failure to swear in the jury *at all* was structural error. 299 Mich App at 213-218. And so, following this Court's lead in *Vaughn*, the Court of Appeals, in *Allan*, found that the third *Carines* prong had been satisfied

**a) What is structural error?**

In *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000), this Court noted, referring to the United States Supreme Court's explanation of structural error in *Neder v United States*, 527 US 1, 7; 119 S.Ct 1827, 1833; 144 L Ed 2d 35 (1999), that structural errors are intrinsically harmful, without regard to their outcome, that such errors necessarily render unfair or unreliable the determining of guilt or innocence, and that they deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. *Duncan*, citing *Rose v Clark*, 478 US 570, 577-578; 106 S Ct 3101; 92 L Ed 2d 460 (1986). A structural error is a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. It is not simply an error the effect of which is unquantifiable, but one that deprives a defendant of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.<sup>6</sup>

The United States Supreme Court has found an error to be structural in a limited class of cases, as set forth in *Neder, supra*: complete denial of counsel, biased trial judge, racial discrimination in selection of grand jury, denial of self-representation at trial, denial of public trial, and defective reasonable doubt instruction. 527 US at 8; 119 S Ct at 1833. What this suggests

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<sup>6</sup> “. . . not all unquantifiable errors are structural; the Supreme Court has stressed that errors which do not contribute to the verdict should not be reversed unless their effect is fundamentally unfair, with fundamental fairness being a question of whether the defendant has been provided an impartial adjudicator and an attorney to help him defend the charges.” *United States v Turrietta*, 696 F3d at 984.



is that whether an error will be deemed “structural” will occur when a given situation presents itself, that is, on a “wait and see” basis. Indeed, as this Court aptly observed in *Vaughn*, 491 Mich at 666, structural error is a “category of cases *yet to be clearly defined.*”

**b) A failure to swear in the jury pursuant to MCR 2.511(H)(1) is not structural error, and was not plain error under the facts here**

This Court has no occasion here to determine whether failure to swear the jury *at all*, as in *Allan*, is plain error requiring reversal, for the jury was sworn here; the question is whether failure to swear the jury *properly* was plain error requiring reversal in the context of the facts of *this* case.

The People know of no case where either this Court or the United States Supreme Court has held that the failure to properly swear a jury is structural error. The Court of Appeals in *Allan*, *supra*, of course, found that it was. 299 Mich App at 211. Interestingly, another panel of the Court of Appeals, in an opinion rendered before the one in *Allan*, observed, albeit in an unpublished opinion, that other jurisdictions had found that errors relating to the administration of juror oaths were *not* structural errors. *People v Thompson*, unpublished opinion per curiam of the Court of Appeals, decided August 25, 2009 (Docket No. 284160), *lv den* 485 Mich 1081; 777 NW2ed 195 (2010), pp 4-5 (People’s Appellant’s Appendix, 109a-110a), citing cases from other jurisdictions, one of which, *State v Vogh*, 179 Or App 585; 41 P3d 421 (2002), addressed the issue head-on.

*Vogh* was a case where the jury was not sworn in at all. The Oregon Court of Appeals made these observations:

No Oregon case is directly on point. As already discussed, *Barone* [*State v Barone*, 329 Or 210; 986 P2d 5 (1999), *cert den* 528 US 1086; 120 S Ct 813; 145 L Ed 2d 685 (2000)] involved an untimely swearing of a jury in a criminal case, not a complete failure to do so. As for authority in other jurisdictions, some sources suggest that the case law holds uniformly that a criminal verdict from

an unsworn jury is a nullity. (Footnote omitted). Our review, however, reveals that the authority is divided and that no particular consensus exists.

179 Or App at 591-592; 41 P3d at 425.

\* \* \* \*

Most importantly, in recent years, some courts have squarely rejected the proposition that a criminal verdict by an unsworn jury is a nullity, concluding instead that a complete failure to swear the jury is akin to other objections to the jury's competency or the impartiality of its deliberations, and likewise must be raised timely and must be prejudicial. See, e.g., *State v Arellano*, 125 NM 709, 712; 965 P2d 293 (1998); *Sides v State*, 693 NE2d 1310, 1312 (Ind, 1998); see also *United States v Pinero*, 948 F2d 698, 700 (CA 11, 1991) (per curiam) (questioning the existence of a requirement to swear the jury in criminal cases tried in federal courts).

179 Or App at 593; 41 P3d at 426.

\* \* \* \*

We can conceive of no reason to treat a failure to administer the oath to the jury as more fundamental in nature – and thus, “structural” – than the jurors’ actual performance of their duties in conformance with that oath, or the jurors’ eligibility or competence to be jurors. In so observing we do not denigrate the significance of the jury’s oath or its value in “vindicat[ing] a defendant’s fundamental constitutional rights to a fair trial before an impartial jury.” *Barone*, 329 Or at 226. But neither do we elevate it above the other aspects of our trial procedures that serve the same ends. The absence of the oath does not mean – at least not in any necessary way – that the defendant was unfairly tried. The oath does not stand alone as the sole procedure that guarantees that the jury will try the case based on the admissible evidence and the applicable law. To the contrary, numerous additional mechanisms serve the same purpose, including but not limited to voir dire, peremptory juror challenges, precautionary instructions channeling the jury’s deliberations, the vigilance of an unbiased trial judge, and representation by competent counsel. (Footnote omitted).

179 Or App at 428; 41 P3d at 596-597.

*Vogh* was, as the above language indicates, a case where there was a complete failure to swear the jury, just as was *Allan*. Here, an oath was given, albeit the wrong one, that is, the one that is supposed to be given before jury voir dire. But the entire context of the trial must be viewed, and just before the court clerk administered the wrong oath, the trial court told the selected jury members:

I will now *ask you to stand **and swear to perform your duty to try the case justly, and to reach a true verdict.***

If your religious beliefs do not permit you to take an oath, you may instead affirm to try the case justly, and to reach a true verdict.

(People's Appellant's Appendix, 20a) (italics and bold added).

Just before standing and taking the oath given by the clerk, then, the jurors were told that the oath would include – that which they *were* swearing to – “trying the case justly” to reach a “true verdict.” Further, on the heels of the oath that was administered to the jury, the jurors were instructed that they must take the law as the court gave them, that it was their responsibility to decide what the facts of the case were, based solely on the evidence presented in the case, about what was and was not evidence (People's Appellant's Appendix, 23a-24a; 25a-26a), that they should not discuss the case among themselves or with others until they began their deliberations (27a; 31a), that they should not consider anything that was not presented in the courtroom, and that if any one juror violated any of the court's instructions, that juror should be reported to the court (32a), and then the court instructed the jury on the elements of the offenses, all of which, the court instructed, must be proven beyond a reasonable doubt (33a-43a), about what was meant by the term “reasonable doubt” (46a), that any verdict must be unanimous (46a), about the presumption of innocence (46a), and to

keep an open mind and not make any decision until the jury was sent to decide the case (47a).<sup>7</sup>

Also, before the giving of the *final* instructions, the jury was told this:

Remember that *you have taken an oath to return a true and just verdict based only on the evidence and my instructions on the law.*

(People's Appellant's Appendix, 52a) (italics added).

Not only is it appropriate to consider the wrong oath *together with* the trial court's prefatory comments to that wrong oath in the context of plain error review,<sup>8</sup> the prefatory comments here, along with the trial court's instructions on how to consider the evidence presented, the burden of proof, the presumption of innocence, all make the error of giving the wrong oath one that did not necessarily render unfair or unreliable the determining of guilt or innocence, nor did it deprive Cain of the basic protections without which a criminal trial could reliably serve its function as a vehicle for the determination of guilt or innocence. This is so because all of the trial court's instructions as well as the court's reminder to the jury that they had taken an oath to return a true and just verdict

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<sup>7</sup> And of course, the trial court repeated many of these instructions in its final instructions to the jury (People's Appellant's Appendix, 58a-102a).

<sup>8</sup> See e.g. *People v Hubbert*, unpublished opinion per curiam of the Court of Appeals, decided December 3, 2002 (Docket No. 226318), lv den 468 Mich 940; 664 NW2d 218 (2003), p 4 (People's Appellant's Appendix, 115a), in which this Court stated:

*After reviewing the oath in context with the judge's preceding comments, it is apparent that it substantially complied with MCR 2.511(G). The substance of the oath informed the jurors of their duties and the important role they were serving, and the jurors swore that they would truthfully deliberate the case according to the laws and the evidence. (Italics added).*

based only on the evidence and the court's instructions on the law had to have the effect of imparting on the jury the seriousness and solemnity of their mission. In short, under the circumstances of this case, those circumstances again being the trial court's prefatory comments to the wrong oath as well as all of the other instructions given to the jury by the court, the giving of the wrong oath should not qualify as structural error. And, for the same reasons, it was not error that "affected defendant's substantial rights." The third prong of review for plain error not having been met, the conviction should be affirmed.

**c) Even if the failure to properly swear the jury was structural error, reversal is unwarranted.**

A definitive answer to whether the failure to properly swear the jury pursuant to MCR 2.511(H)(1) is structural error is unnecessary to a resolution in this case, just as it was unnecessary to this Court's resolution in *Vaughn, supra*, on the question of closure of the courtroom during jury voir dire/selection, and was unnecessary in *Turrietta*, 696 F3d at 984, a case which, again, dealt squarely with the issue presented here of an unsworn jury ("We can postpone resolution of this question."). Indeed, in *Vaughn*, this Court noted:

Nevertheless, even if defendant can show that the error satisfied the first three *Carines* requirements, we "must exercise ... discretion" and only grant defendant a new trial if the error "resulted in the conviction of an actually innocent defendant" or seriously affected the fairness, integrity, or public reputation of judicial proceedings. (Footnote omitted). Although denial of the right to a public trial is a structural error (footnote omitted), it is still subject to this requirement. (Footnote omitted). While "any error that is 'structural' is likely to have an effect on the fairness, integrity or public reputation of judicial proceedings," the plain-error analysis requires us to "consider whether an error 'seriously' affected those factors."

491 Mich at 666-667.

Such was the tact also taken in *United States v Turrietta*, *supra*, 696 F3d at 984.

The Court of Appeals in *Allan* found quite obviously, because it reversed Allan's conviction, that Allan had satisfied the fourth *Carines* prong:

Because the trial court did not administer the oath to the jury, the jury did not undertake the solemn promise to act in accordance with the law at all stages of defendant's trial. The trial court's failure to administer the oath to the jury in this case affected the integrity of the proceedings because it resulted in an invalid verdict under Michigan law. (Citations omitted). The absence of the oath deprived defendant of a means to ensure that the jury would decide the case honestly in accordance with the law and on the basis of the evidence. Administration of the oath was necessary to protect defendant's fundamental right to a trial by an impartial jury.

Accordingly, defendant's claim of error satisfies the requirements of the plain-error test, and we will exercise our discretion to afford defendant relief.

299 Mich App at 218-219.

In *Turrietta*, *supra*, the Court reached a different conclusion:

*Turrietta* starts from behind on this step because he does not even assert in his appeal brief that, had the jury been duly sworn, the outcome of trial would have been different. Harm flowing from jury error often defies measurement and we recognize that the integrity of the system may suffer, even if only in theory, each time a defendant is convicted by an unsworn jury; but it is not enough at this stage to simply identify an error that is categorically serious. The Supreme Court has rejected a "per se approach" to the fourth prong, stressing that if the inquiry is to be of any use, it must be applied "on a case-specific and fact-intensive basis," and must account for "countervailing factors" that may arise in a particular case. *Puckett* [*Puckett v United States*, 556 US 129, 129 S Ct 1423; 173 L Ed 2d 266 (2009)], 556 US at 142-143; 129 S Ct 1423 [at 1433].

\* \* \* \*

Quite apart from the evidence of Turrietta's guilt, any threat to the integrity of the proceedings was mitigated by an otherwise fair and procedurally rigorous trial. The jury was fairly selected and clearly instructed, and the trial was open to the public and administered by an unbiased judge. Turrietta availed himself of his right to counsel and received an unfettered opportunity to put on evidence and make arguments in defense of his innocence.

Moreover, the record supports the government's contention that the jury understood the thrust of what the oath was designed to impart. The jurors were all sworn to tell the truth during voir dire and were on several occasions reminded by the court of their "sworn duty" to try the case truly and in accordance with the law. The admonition was reinforced over the course of the trial by a steady drumbeat of instructions stressing the importance of rendering a verdict in light of the burden of proof and based solely on the evidence presented. Between the instructions, the oath at voir dire, and the repeated references to the oath at trial, the jurors had plenty to remind them of the importance of their task. If, owing to some overpowering prejudice or belief in jury nullification, a juror was still unwilling to decide the case based on the law and evidence, it is doubtful the oath would have made a difference.

696 F3d at 984-985.

Here, as noted previously, the jury was informed by the trial court that they were being asked to "stand and perform [their] duty to try the case justly, and to reach a true verdict," even though the court clerk then gave them the wrong oath. But given the jury was told that it was being asked to stand and "swear to perform" its duty to "try the case justly and reach a true verdict," that language can fairly be considered either as part of the oath, or as rendering the error that did occur not to be plain error. This is so particularly where, on the heels of the wrong oath administered to the jury, the jury was instructed that they must take the law as the court gave them, that it was their responsibility to decide what the facts of the case were, based solely on the evidence presented in the case, about what was and was not evidence (People's Appellant's Appendix, 23a-24a; 25a-26a),

that they should not discuss the case among themselves or with others until they began their deliberations (27a; 31a), that they should not consider anything that was not presented in the courtroom, and that if any one juror violated any of the court's instructions, that juror should be reported to the court (32a), and then the court instructed the jury on the elements of the offenses, all of which, the court instructed, must be proven beyond a reasonable doubt (33a-43a), about what was meant by the term "reasonable doubt" (46a), that any verdict must be unanimous (46a), about the presumption of innocence (46a), and to keep an open mind and not make any decision until the jury was sent to decide the case (47a).<sup>9</sup> Also, before the giving of any of the substantive final instructions, the jury was told this:

Remember that you have taken an oath to return a true and just verdict based only on the evidence and my instructions on the law.

(People's Appellant's Appendix, 52a).

Here, the jury understood the thrust of what the oath was designed to impart, just as was the case in *Turrietta*. What this Court observed in *Vaughn, supra*, bears repeating: "While 'any error that is 'structural' is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings,' the plain-error analysis requires us to 'consider whether an error '*seriously*' affected those factors.'" (Italics added). The failure to administer the proper oath to the jury in this case did not *seriously* affect the fairness, integrity, or public reputation of the judicial proceedings, when the matter is viewed in the context of the trial judge's immediate preface to the jurors as they stood to swear to the oath, the instructions immediately following, and the judge's instruction to the jurors

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<sup>9</sup> And of course, the trial court repeated many of these instructions in its final instructions to the jury (Jury Trial Transcript, 12/06/12, 67-111).



before deliberations that they *had* taken an oath to render “a true and just verdict based only on the evidence and my instructions on the law.”

### C. Conclusion

No structural error occurred here, and Cain’s “substantial rights” were thus not affected. But if the error that occurred is viewed as structural, then though structural error satisfies the first three *Carines* prongs, the inquiry remains as to whether the structural error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Here, it did not, because the jury, in light of the prefatory comments of the trial court and all of the trial court’s instructions as to what the jury could and could not consider along with the burden of proof and presumption of innocence instructions, knew the seriousness and solemnity of its mission. Furthermore, it is highly unlikely that had the jury been given the proper oath, any one of the jurors would have refused to swear or affirm the oath.<sup>10</sup>

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<sup>10</sup> And, course, enforcement of contemporaneous-objection rules is critical so that “the defendant cannot ‘game’ the system, ‘wait[ing] to see if the [outcome is] satisfactory,” . . . , and then seeking a second bite at the apple by raising the claim.” *Puckett v United States*, 556 US 129, 140; 129 S Ct 1423, 1431-1432; 173 L Ed 2d 266 (2009). While such “gaming” very likely did not occur here, it *did* in *Turrietta*, and that case is the rare circumstance where the reviewing court could know that gaming is occurred, as counsel admitted it. In almost every case, the court simply will not know, and enforcement of plain error is necessary to avoid such gaming from occurring.

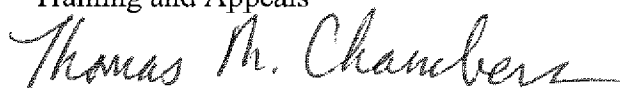
**Relief**

The People respectfully request that this Honorable Court reverse the Court of Appeals's order that granted Defendant Cain's Motion for Peremptory Reversal.

Respectfully submitted,

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