

STATE OF MICHIGAN  
IN THE SUPREME COURT

Prosecutor's Appeal from the Court of Appeals  
Cynthia Diane Stephens, P.J. and Michael J. Talbot and Christopher M. Murray, J.J.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

SCT# 149259

Lower Court No. 12-003375-FC

COA# 314342

BRANDON LEWIS CAIN

Defendant-Appellant.

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**DEFENDANT-APPELLEE'S BRIEF**

**Oral Argument Requested**

**PROOF OF SERVICE**

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**DEFENDANT'S STATEMENT OF QUESTION PRESENTED**

I. Should this Court affirm the Order of the Court of Appeals where the trial court violated Defendant's due process jury trial rights by failing to swear the jury, where the People failed to object at trial, and should this Court should follow the recently established precedent *People v David Lee Allan*. 299 Mich App 205 (2013)?

The People Answer "No"

The Defendant Answers "Yes"

**STATEMENT OF THE JURISDICTION**

Defendant –Appellee Brandon Cain adopts the jurisdictional statement of the Appellant.

## COUNTER STATEMENT OF FACTS

In this highly publicized case, five men including Defendant Brandon Cain were charged with the premeditated murder, torture, and unlawful imprisonment of Ashley Conaway and Abreeya Brown. The prosecutor theorized that although Brandon Cain may not have been directly involved, he organized and planned the crimes as a means to keep the young women from testifying in a prior assault case. The prior assault involved a man named Brian Lee, who fired shots at a car occupied by Ms. Conaway and Ms. Brown, damaging their car. Again the prosecutor's theory was that Defendant-Appellee Cain was not the shooter but had "directed" Lee to shoot. After jury selection was complete, the jury was excused for the day. The next morning, the following exchange took place: (Jury Trial Transcript of 10/24/12 p. 16-17, from People's Appendix p. 20a and 21a):

**The Clerk:** You need to put your books down.

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?

**The Cain /Lee Jurors:**(collectively) I do.

(At about 11:23 a.m.-panel of 16 jurors sworn in the Cain/Lee trial)

At no other time during trial was the appropriate oath given. In other words, when it came time to swear in the jury, they were asked to re-swear the oath that they were given prior to voir dire. The prosecutors did not object, and neither did the defense.

The jury returned guilty as charged verdicts on December 10, 2012. Defendant Cain was sentenced on December 21, 2012 to serve life in prison for the homicide, and terms of years for the lesser counts, plus felony firearm.

12/21/12). Presently incarcerated, Defendant appealed as of right MCR 7.203. Defendant Cain moved for Peremptory Reversal. MCR 7.211(C)(4) in light of recent caselaw supporting reversal where, as in his case, the jury was not sworn. Peremptory Reversal was granted. This Court granted the Prosecutor's Application for Leave to Appeal, stating "The 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." (S CT Order 9/17/14)

Defendant respectfully requests, based on the arguments herein, that this Court affirm the finding of the Court of Appeals.

## COUNTER ARGUMENT

- I. This Court should affirm the order of the Court of Appeals where the trial court violated Defendant's due process jury trial rights by failing to swear the jury, where the People failed to object at trial, and this Court should follow the recently established precedent *People v David Lee Allan*. 299 Mich App 205 (2013).

**Issue Preservation:** Defendant raised this issue in the court below. The prosecutor did not object at trial to the failure to swear the jury properly, nor did the defense.

**Standard of Review:** A claim of instructional error is usually reviewed *de novo*. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). However, the error claimed here was not *instructional* but involved the jury oath. A review of the case law including *People v Allan* 299 Mich App 205 (2013) citing *People v Carines*, 460 Mich. 750, 763–764(1999), reveals that the inquiry is a mixed question of fact [was the integrity of the jury verdict compromised?] and law, with the findings of fact reviewed for clear error and the questions of law reviewed *de novo*. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

**Introduction:** MCL 768.14 provides that the following oath must be administered to jurors in 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.” MCL 768.15 permits substitution of the words “[t]his you do under the pains and penalties of perjury” for “so help you God.”

Similarly, MCR 6.412(F) provides that, “[a]fter the jury is selected and before trial begins, the court must have the jurors sworn.” Under MCR 6.412(A), MCR 2.511 governs the procedure for impaneling the jury. MCR 2.511(H)(1) states the following:(1) The jury must be sworn by the clerk substantially as follows:

*“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.”*

Courts have opined that the oath that must be administered at the beginning of trial pursuant to statute and court rule protects the fundamental right to a trial by a fair and impartial jury. *People v. Pribble*, 72 Mich App 219, 224 (1976); U.S. Const, Am XIV; *Groppi v. Wisconsin*, 400 US 505, 509 (1971).

***Defendant-Appellee’s Jury:***

This is the oath that was given to the jurors after voir dire: “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?”

The trial court did not administer the oath to the jury as provided for by statute and court rule. The trial court's obligation to do so was clearly established by law. Thus, the trial court's failure to swear in the jury was plain error. See *Carines*, 460 Mich. at 763.

***The People's argument:***

The Wayne County prosecutor argues that this Court should find that the improper oath here was not “preserved” and although it was “plain” it was not structural and cannot meet the plain error test set forth in *Carines*. Essentially, the People ask this Court to find that *Allan* and thus *Carines* were incorrectly decided. The People would have this Court disregard and overturn the long-established *Carines* plain error analysis and re-examine the lower court’s factual findings.

***The Defendant's argument:***

The Court of Appeals, in the instant case, used the standard established plain error analysis as prescribed by *Allan* and *Carines*. In its order granting peremptory reversal, the court below cited *Allan* in ordering grant a new trial. Where the Defendant’s trial counsel and all of the prosecutors in the room failed to object to jury oath due to inattention, oversight and incompetence, that the error was not retained as an appellate parachute, and that the jury oath is a *plain error* which meets all three of the *Carines* prongs *and* it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. In *United States v. Turrietta* 676 F 3d 972 (CA 10, 2012) the defendant’s trial counsel *knew* that the jury had not been sworn and did not mention it in an attempt to create a true “appellate parachute”. Case law in abundance prohibits and condemns the appellate parachute, see *People v Carines*, 460 at 750 at 763 (1999) citing *United States v Olano* 507 US 725; 113 S.Ct 1770; 123 L Ed 2d 508 (1993) Defense counsel’s failure to object in *Turrietta* when he knew no oath was given created a situation where the public was not *offended*. The *Turrietta* verdict did not seriously affect the fairness, integrity, and public

reputation of the judicial proceedings because counsel *chose* not to object and the federal court was correct to affirm.

There exist very few situations where even a structural error, absent a contemporaneous objection, must lead to reversal of a conviction, but, as the *Allan* court explained:

“We also conclude that the trial court's error was structural because the absence of a sworn jury rendered defendant's trial fundamentally unfair and an unreliable vehicle for determining guilt or innocence. Finally, defendant's trial by an unsworn jury seriously affected the fairness, integrity, and public reputation of the judicial proceedings because it rendered the jury's verdict invalid under Michigan law. We, therefore, hold that defendant is entitled to relief under the plain-error framework for being tried by an unsworn jury.”

The failure to swear a jury is one of these rarified situations. *Allan* was not only correctly decided but its legal reasoning is sound.

***What kind of errors can be deemed “structural”?***

A *structural* error is a subtype of *plain* error. There are sparse cases in Michigan jurisprudence that define what constitutes structural error, and only a few types of plain procedural omissions at trial have been deemed *structural*. *Structural* error is an error which meets the final requirement of *Carines* as carefully explained by the *Allan* court: “We also conclude that the trial court's error *was structural because the absence of a sworn jury rendered defendant's trial fundamentally unfair and an unreliable vehicle for determining guilt or innocence.*

The Courts have found structural errors to include:

- a) Total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring reversal, limited to cases in which the effect of the deprivation of counsel “pervade[s] the entire proceeding”. *People v Willing* 704 N.W.2d 472, 267 Mich. App. 208 (2005)
- b) A trial court’s failure to fully instruct the jury on the charged offense. *People v. Kowalski*, 489 Mich. 488, 504–505, 803 N.W.2d 200 (2011). [Although structural, reversal was not required in *Kowalski* given that the defendant affirmatively approved the jury instructions]
- c) Failure to instruct the jury on the elements of the crime: *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). In *Duncan* this Court held structural error mandating reversal exists where the trial court failed to instruct the jury regarding the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt.
- d) Failure to properly instruct the jury as to “reasonable doubt”: The United States Supreme Court has classified a seriously defective reasonable doubt instruction as a structural error which mandates reversal, *Sullivan v Louisiana* 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993)
- e) The right to a public trial. *Neder v United States* 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999). *People v Vaughn*, 491 Mich 642; 821 NW2d 288 (2012) [In *Vaughn*, reversal was not required due to unique mitigating circumstances]
- f) Failure to administer the jury oath as required by statute and court rule. *People v Allan* 299 Mich App 205; 829 NW 2d 319 (2013) *lv app den* (2013)

Thus, the analysis is straightforward: in some situations a plain *structural* error could still be found to *not* seriously affect the fairness, integrity or public reputation of judicial proceedings (Such as in *Turrietta, Vaughn*) Or, a plain structural error can be forfeited when a defendant, through counsel, *formally* approves the court's actions even if the court acted in error. (*Kowalski*)

***Why is trial court's failure to properly swear a jury a "structural" error?***

Courts have held that where an error affected the integrity of the trial process, it is structural and the jury's verdict is a nullity, absent special circumstances. *Allan, infra.*  
*Turrietta, infra.*

***How does the improper oath in the current case meet the requirements of Allan and Carines and compel an appellate court to reverse?***

The Court of Appeals was correct in its decision below to grant peremptory reversal and grant a new trial where the oath given in to Defendant Cain's jury did not comply at all with the oath required by statute and by court rule. The jury was given the oath for prospective jurors, the same oath it was given prior to voir dire. This oath did not discuss *any* of the duties given to a deliberating jury: their duty to justly decide the questions submitted, their duty to render a true verdict, their duty to rely only on the evidence introduced, or their duty to follow the instructions of the court. It was an oath not compliant with the rules. There was error and it was plain. The People argue that Defendant Cain's case is different than *Allan* because *no* oath was given in *Allan*. Defendant Cain asserts that the oath given in his case, a mere repetition of the voir dire oath, had the same actual effect as no oath, as no additional discussion of the jury's duties

were relayed to the jurors by the mistaken oath. The *Allan* case is truly exactly the same case as the case at bar. Any unrelated random oath or random language cannot act as a substitute for the specific, detailed oath required by court rule and statute.

The plain error caused by the lack of an oath affected Defendant's substantial rights. The prosecutor argues that in order to affect substantial rights, such an error must be "outcome determinative". However, the cases cited herein which involve structural error *all* allow for a reversal even if it cannot be proven that the structural error was outcome determinative. (*Willing, infra, Neder, infra, Duncan, infra, and, Allan, infra.*)

In *People v. Vaughn*, 491 Mich 642; 821 NW2d 288 (2012) this Court did not hold that in order to reverse the error must be outcome determinative. – This Court found there were special mitigating circumstances. *Vaughn* held that closing the voir dire proceedings to the public absent an objection was a *structural* error but not one that required reversal because "the presence of the venire lessens the extent to which [the court's] closure implicates the defendant's public trial right because the venire derived from and representative of the public, guarantees that the voir dire proceedings will be subject to a substantial degree of continued public review." Because the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that the closure "seriously affected the fairness ... Defendant is not entitled to a new trial on the basis of his forfeited claim of error." (*footnotes omitted*)

Importantly, the *Vaughn* Court reasoned that while the "Supreme Court of the United States has specifically reserved judgment on whether an unpreserved structural error automatically affects a defendant's substantial rights, this Court, in *People v Duncan*,

*infra*, has explained that structural errors “are intrinsically harmful, without regard to their effect on the outcome . . . .” Accordingly, our caselaw suggests that a plain structural error satisfies the third *Carines* prong. 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**. Although denial of the right to a public trial is a structural error, it is still subject to this requirement. 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. (emphasis added, footnotes omitted). In short, *Vaughn* involved the right to a public trial, and so even though voir dire was closed to the public, the “public” in the form of the jury venire was present, which mitigated the structural plain error. **There are no such mitigating factors here.** An oath that was substantially compliant might have been a mitigating factor, but such an oath was not given. Perhaps if the parties noticed the lack of an oath and the proper oath was given mid-trial, that would have ameliorated the error. The People argue that a passing reference during final jury instructions to the oath the jurors gave at the beginning of trial is not mitigating. First of all, the passing comment does not enumerate the four points of the prescribed statutory oath. It also merely *mentions* an oath- no jurors are required to swear or affirm the oath again at the conclusion of trial.

This analysis follows current federal jurisprudence. The federal plain error rule requires that to obtain appellate relief “an error not raised at trial, there must be (1) ‘error,’

(2) that is 'plain,' and (3) that 'affects substantial rights,' [and if] all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if(4) the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson v United States* 520 US 461-467-468; 117 S Ct 1544; 137 L Ed 2d 718 (1997), quoting *United States v Olano, supra* (in turn quoting *United States v Young*, 470 US 1, 15; 105 S Ct 1038; 84 L Ed 2d 1 (1985), quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 (1936)). The *Johnson* Court noted that under *Olano*, the word "plain" is "synonymous with 'clear' or, equivalently, 'obvious,'" *Johnson, supra* at 467, citing *Olano, supra* at 734. This Court relied upon *Johnson* in holding that the plain error rule applies to unpreserved non-structural constitutional error. *Carines, supra* at 765-766. Where *non- structural* constitutional error is unpreserved, the defendant must show that plain error affected substantial rights and "the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines, supra* at 774.

It appears then, **that it is ultimately unnecessary for this Court to parse the meaning of the words structural or non-structural**, because for both types of error a Defendant must show that there was plain error affecting substantial rights and "the reviewing court should reverse only when the ..... the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines, supra* at 774. As discussed above, the *Allan* court held specifically that the lack of jury oath was *structural* error, but when on to apply the *Carines* test. Defendant Cain asserts that absent an extenuating or mitigating circumstance, a trial court's failure to administer the jury oath prescribed by statute and court rule will almost certainly be found to integrity, or public

reputation of judicial proceedings and demand a new trial to preserve faith in the judicial system.

***Conclusions:***

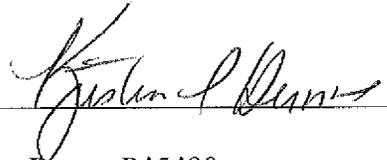
This Court should consider its basic duty as an appellate court to preserve the *fairness, integrity or public reputation* of judicial proceedings. This is what is at stake. Defendant Cain's trial was perhaps the most publicized trial in Wayne County in 2012, with a team of prosecutors, five defendants, five defense attorneys, members of the media, and a trial Court Judge supposedly controlling the proceedings. It is hard to fathom how everyone from the clerk who gave the wrong oath, to the experienced prosecutors, to the trial court judge who had presided at numerous other trials large and small all failed to note the improper oath- and yet that is exactly what occurred. The word circus comes to mind. Such a glaring error and a gaping hole in procedure went unnoticed. To blame the Defendant for this error, or even his attorney, seems wholly misplaced. The trial judge clearly bears the burden. Faith in our judicial system, faith in its fairness, faith in its integrity, and belief in its reputation as a vehicle for properly determining guilt has been seriously compromised. What other court rules or statutes might trial courts be allowed to forget or ignore? Trial courts are charged with the grave task of determining whether or not someone is guilty of a crime that mandates a life sentence without parole. The legislature and this Court have promulgated statutes and rules for a reason. This Court should expect compliance by trial courts of these minimal safeguards meant to ensure that defendants receive a fair jury trial as guaranteed by the United States and Michigan Constitutions.

Defendant Cain's right to a jury trial was tainted. This case involves a heinous series of crimes, but the jury's task of determining Defendant Cain's guilt beyond a reasonable doubt was not an easy one based on the facts presented. Defendant Cain was accused of being the ringleader, and yet his actual substantiated involvement was tangential. The Defendant has raised numerous other errors on appeal, any one of which might be dispositive, but none of which have been yet considered. The error here involved his basic constitutional right to a jury trial, Mich Const 1963 Art I sect. 14, US Const. AM VI.

**RELIEF REQUESTED**

Defendant **Brandon Cain** respectfully requests this Court affirm the Order of the court below and allow its Order to have immediate effect.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kristina L. Dunne", is written over a horizontal line.

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Date: December 15, 2014