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STATE OF MICHIGAN  
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,

vs

No.

BRANDON LEWIS CAIN.  
Defendant-Appellee.

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

OK  
Wayne CR7 V. ERAL

149259  
APPL

APPLICATION FOR LEAVE TO APPEAL

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**FILED**

MAY 8 2014

LARRY S. ROYSTER  
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MICHIGAN SUPREME COURT

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**Statement of Jurisdiction**

The Court of Appeals granted the defendant's motion for preemptory reversal on May 2, 2014. The People timely seek leave.

**Statement of the Question**

**I.**

**Did the Court of Appeals wrongly find that a mis-giving of the jury oath was, in this case, structural error, and that this conclusion automatically required a finding of plain error and a new trial?**

**The People answer "YES"**

## Statement of Facts

Defendants Brandon Cain, Brian Lee, Reginald Brown, and Jeremy 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, two counts of first-degree felony murder as to the same two persons, and two counts of torture as to the same two persons. Additionally, Cain, R. Brown, and J. Brown were charged with two counts of unlawful imprisonment as to the same two persons. Cain and R. Brown were both charged with felony firearm. And finally, Cain was charged with being a felon in possession of a firearm. All four Defendants were tried in one trial, with Cain and Lee having one jury, and R. Brown and J. Brown having another. Defendant was convicted of two counts of first-degree murder; two counts of torture; two counts of unlawful imprisonment, and the weapons charges.

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

Ladies and gentlemen of the jury, 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 justly and reach a true verdict.<sup>1</sup>

The clerk, rather than reciting the required oath, recited the oath given before 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?"<sup>2</sup>

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<sup>1</sup> 10-24, 16.

<sup>2</sup> 10-24, 16-17.

The Court of Appeals granted defendant's motion for peremptory reversal, ordering a new trial, saying in a sentence that "The 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)," and directing that the order was to have immediate effect.

The People seek leave.

## Argument

### I.

**The Court of Appeals wrongly found that a mis-giving of the jury oath was, in this case, structural error, and that this conclusion required a finding of plain error and a new trial.**

#### A. Introduction

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

Ladies and gentlemen of the jury, 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 justly and reach a true verdict.<sup>3</sup>

This statement to the jury is verbatim from M Crim JI 2.1, paragraphs 1 and 2. Paragraph 3 of that model instruction contains the jury oath:

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.<sup>4</sup>

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<sup>3</sup> 10-24, 16.

<sup>4</sup> And see MCR 2.511(H)(1).

The clerk, rather than reciting that oath, recited the oath given before 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?”<sup>5</sup>

The Court of Appeals granted defendant’s motion for peremptory reversal, ordering a new trial, saying in a sentence that “The 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),” and directing that the order was to have immediate effect.<sup>6</sup> The order raises issues that require this Court’s attention. First, the order assumes that identification of an error as “structural” automatically meets the requirements for reversal under plain-error review, for there was no objection made here. Second, the order expands the *Allan*<sup>7</sup> holding by saying that the “failure to properly swear the jury is a structural error,” as in *Allan*, unlike the present case, there was *no* oath given at all; this distinction makes a difference, in the context of this case. And third, the order assumes, as it must under the “first-out” rule, that *Allan* was correctly decided; there is, however, persuasive federal authority to the contrary of *Allan*. This Court should grant leave.

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<sup>5</sup> 10-24, 16-17.

<sup>6</sup> Court of Appeals order of 5-2-2014, attached.

<sup>7</sup> *People v Allan*, 299 Mich App 205 (2013).

**B. Leave to Appeal Should Be Granted**

- (1) There was no objection raised here by the defense, and identification of an error as “structural” does not, as the Court of Appeals appears to have assumed, automatically meet the requirements for reversal under plain-error review**

The Court of Appeals here said simply that the “failure to properly swear the jury is a structural error requiring a new trial.” No mention was made of the fact that the error here was not preserved, and so review is for plain error. The assumption seems to be that identification of an error as “structural” is the end of the inquiry. But that is not necessarily so.

Unpreserved error, be it constitutional or nonconstitutional, is reviewed in Michigan under the standard of plain error enunciated by the United States Supreme Court in *United States v. Olano*.<sup>8</sup> Where there has been no objection, three initial requirements must be met, leading to a final fourth requirement:

1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Id.*, pp. 731-734, 113 S.Ct. 1770. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . “It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted *only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.”*<sup>9</sup>

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<sup>8</sup> *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), followed by this Court in *People v. Carines*, 460 Mich. 750, 763-764 (1999).

<sup>9</sup> *People v. Carines*, 460 Mich. 750, 763-764 (1999) (emphasis supplied).

There is no question that the first two requirements to show plain error have been met, for the court rule requires the giving of the oath that the clerk failed to give. Error occurred in the giving of the oath, which was plain. Did it “affect substantial rights”? The Court of Appeals, following *Allan*, where no oath at all was given, said that the error was “structural,” which it appears to have viewed as a sufficient finding for both requirements three and four of plain error. An error is structural if it constitutes a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself,” such as the denial of counsel, or trial before a biased judge.<sup>10</sup> The United States Supreme Court on multiple occasions has declined to resolve where structural errors automatically satisfy the third prong of the plain-error test,<sup>11</sup> a point that this Court has noted, taking it to imply that “structural errors do not entirely defy plain-error analysis, even if they *do* defy *harmless-error* analysis.”<sup>12</sup> And federal circuits have made the point as well:

- A defendant claiming deprivation of the right to a public trial need not demonstrate specific prejudice in order to obtain relief, for a violation of that right is a structural error that is not subject to harmless-error review. *See, e.g., Johnson v. United States*, 520 U.S. 461, 468–69, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); *Waller*, 467 U.S. at 49–50, 104 S.Ct. 2210. “Whether an error can be found harmless,” however, “is simply a different question from whether it can be subjected to plain-error review.” *Puckett v. United States*, 556

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<sup>10</sup> *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991).

<sup>11</sup> *Olano, supra*, at 735, 113 S.Ct. 1770; *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); ; *United States v. Cotton*, 535 U.S. 625, 632, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002); *Puckett v. United States*, 556 U.S. 129, 140–141, 129 S.Ct. 1423, 1432, 173 L.Ed.2d 266 (2009).

<sup>12</sup> *People v. Vaughn*, 491 Mich. 642, 657 (2012).

U.S. 129, 139, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009).<sup>13</sup>

- Charboneau's emphasis on the "structural error" aspect of public trial issues does not affect this inquiry. "Whether an error can be properly characterized as 'structural' has nothing to do with plain error review...." *United States v. Turrietta*, 696 F.3d 972, 976 n. 9 (10th Cir.2012); accord *Neder v. United States*, 527 U.S. 1, 34–35, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (Scalia, J., concurring in part and dissenting in part); *United States v. Phipps*, 319 F.3d 177, 189 n. 14 (5th Cir.2003).<sup>14</sup>

This Court has suggested that structural error satisfies the third plain-error requirement;<sup>15</sup> it should now consider that question directly (the People are here assuming, for the sake of argument only, that the error that occurred here was structural).

The *Allan* opinion concluded that the complete failure there to swear the jury "seriously affected the fairness, integrity, and public reputation of the judicial proceedings," but reached that conclusion essentially because it found the error structural ("Administration of the oath was necessary to protect defendant's fundamental right to a trial by an impartial jury").<sup>16</sup> In *United States v. Turrietta*,<sup>17</sup> on the other hand, where there was a complete failure to swear the jury, the court observed that "not all unquantifiable errors are structural."<sup>18</sup> But even spotting defendant the first three prongs of plain error by assuming that the error was structural, and that structural error affects

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<sup>13</sup> *United States v. Gomez*, 705 F.3d 68, 74 (CA 2, 2013).

<sup>14</sup> *Charboneau v. United States*, 702 F.3d 1132, 1138 (CA 8, 2013).

<sup>15</sup> *Vaughn*, 491 Mich at 666.

<sup>16</sup> *Allan*, at 218.

<sup>17</sup> *United States v. Turrietta*, 696 F.3d 972 (CA 10, 2012).

<sup>18</sup> *Turrietta*, at 984.

the defendant's substantial rights, the court found that defendant could not meet the final requirement of plain error, pointing to the "otherwise fair and procedurally rigorous trial," with a "fairly selected and clearly instructed" jury, in a trial "open to the public and administered by an unbiased judge" and with defendant represented by counsel and receiving "an unfettered opportunity to put on evidence and make arguments in defense of his innocence."<sup>19</sup> Further, said the court, 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."<sup>20</sup> The court concluded that the integrity of judicial proceedings was not compromised by affirmance, and indeed would have been compromised by reversal.<sup>21</sup> So also here.

This Court should grant leave on the applicability of plain-error review to arguably structural error.

- (2) **The order expands the *Allan* holding in saying that the "failure to properly swear the jury is a structural error," as in *Allan*, unlike the present case, there was no oath given at all; this distinction makes a difference, in the context of this case**

In *Allan* no oath was given at all. Here, the wrong oath was given, that given before voir dire, but also, in preface to the oath, the trial judge said "*I will now ask you to stand and swear to perform your duty to try the case justly, and to reach a true verdict.*" The actions of the court clerk should not be isolated from the trial court's admonition that the jurors were to "swear to perform you duty to try the case justly and to reach a true verdict." And it is this fact that distinguishes this case

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<sup>19</sup> *Turrietta*, at 985.

<sup>20</sup> *Turrietta*, at 985. See the instructions in this case.

<sup>21</sup> *Turrietta*, at 985.

factually from *Allan*, where the jury was *never* sworn, not “improperly” sworn, as here. It is entirely appropriate, in the context of review for plain error, to consider the oath given in context with the judge’s prefatory comments, which the jurors could reasonably have taken to be part of that to which they were swearing.<sup>22</sup> Further, at the end of the trial the trial judge told the jurors “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.”<sup>23</sup>

The error here was different than that in *Allan*, was *not* structural, and the claim cannot meet the requirements for plain error. This Court should grant leave on the point.

- (3) **The order assumes, as it must under the “first-out” rule, that *Allen* was correctly decided; there is, however, persuasive federal authority to the contrary of *Allan***

The People have conceded the first two prongs of plain error, for a court rule requirement—the oath to the jury—was violated, though, the People argue, not, in context with the court’s prefatory remarks and the rest of the trial, in a way that affects defendant’s substantial rights. But the error arguably is not constitutional. While it is certainly possible in a particular case for a nonconstitutional error to constitute plain error, and a constitutional error not, the nature of the error

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<sup>22</sup> See e.g. *People v Hubbert*, unpublished opinion per curiam of the Court of Appeals, decided December 3, 2002 (Docket No. 226318), p 4, in which the 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). (A copy of this Opinion is attached as **Appendix B**).*

<sup>23</sup> Jury Trial Transcript, 12/06/12, 66.

is relevant to the prejudice inquiry, and the court in *Turrietta* found that the error there was not plain because, after a fascinating historical review, that while it was likely the error was constitutional (there being no federal court rule or statute requiring an oath to the jury), it could not “say it is obvious . . . that failure to administer the oath was constitutional error . . . The issue is one of first impression in the federal courts . . . [a]t least one leading treating has concluded the question whether the oath is required in federal courts is up in the air.”<sup>24</sup> Indeed, said the court, “no federal court in the history of American jurisprudence has held the constitutional guarantee of trial by jury to necessarily included trial by sworn jury.”<sup>25</sup>

*Allan*'s conclusion, then, that plain structural error occurred is open to question. And here the jurors were informed by the trial court, as noted previously, that they were being asked to “stand and perform [their] duty to try the case justly, and to reach a true verdict.” On the heels of the wrong oath stated by the clerk, 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, and about what was and was not evidence;<sup>26</sup> that they should not discuss the case among themselves or with others until they began their deliberations;<sup>27</sup> 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;<sup>28</sup> on the elements of the offenses,

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<sup>24</sup> *Turrietta*, at 981-982.

<sup>25</sup> *Turrietta*, at 982

<sup>26</sup> Jury Trial Transcript, 11/24/12, 19-20; 21-22.

<sup>27</sup> 11/24/12, 23; 27.

<sup>28</sup> 11/24/12, 28.

all of which, the court instructed, must be proven beyond a reasonable doubt;<sup>29</sup> about what was meant by the term “reasonable doubt”;<sup>30</sup> that any verdict must be unanimous;<sup>31</sup> about the presumption of innocence;<sup>32</sup> and to keep an open mind and not make any decision until sent to decide the case.<sup>33</sup> Also, as previously noted, before the giving of any of the substantive final instructions, the jury was told “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.”

Plain error has not been shown. This Court should grant leave.

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<sup>29</sup> 11/24/12, 29..

<sup>30</sup> 11/24/12, 42.

<sup>31</sup> 11/24/12, 42.

<sup>32</sup> 11/24/12, 43.

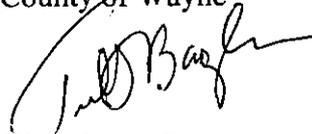
<sup>33</sup> 11/24/12, 43. And of course, the trial court repeated many of these instructions in its final instructions to the jury (Jury Trial Transcript, 12/06/12, 67-111).

**Relief**

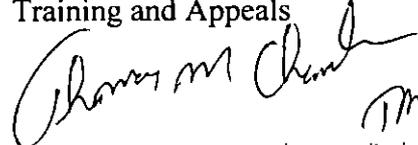
Wherefore, the People respectfully requests that this Honorable Court grant leave to appeal.

Respectfully submitted,

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APPENDIX A

Court of Appeals, State of Michigan

ORDER

People of MI v Brandon Lewis Cain

Docket No. 314342

LC No. 12-005176-01-FC

Cynthia Diane Stephens  
Presiding Judge

Michael J. Talbot

Christopher M. Murray  
Judges

The Court orders that the motion for peremptory reversal pursuant to MCR 7.211(C)(4) is GRANTED. Defendant-appellant's conviction and sentence are REVERSED and the matter is REMANDED for a new trial with a properly sworn jury. The 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 order is to have immediate effect. MCR 7.215(F)(2).

The Court retains no further jurisdiction.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAY - 2 2014

Date

Chief Clerk

Not Reported in N.W.2d, 2002 WL 31949769 (Mich.App.)

(Cite as: 2002 WL 31949769 (Mich.App.))

## H

Only the Westlaw citation is currently available.  
UNPUBLISHED OPINION. CHECK COURT RULES  
BEFORE CITING.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,  
v.  
Kumara K. HUBBERT, Defendant-Appellant.  
No. 226318.

Dec. 3, 2002.

Before: JANSEN, P.J., and HOLBROOK, Jr. and  
COOPER, JJ.

[UNPUBLISHED]

PER CURIAM.

\*1 Following a jury trial, defendant was convicted of second-degree murder, M.C.L. § 750.317; assault with intent to rob while armed, M.C.L. § 750.89; and possession of a firearm during the commission of a felony, M.C.L. § 750.227b. He was sentenced to concurrent prison terms of forty to sixty years for the murder conviction and five to fifteen years for the assault conviction. These sentences were to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was tried jointly with codefendant Hubert Marshall, before a separate jury, for the shooting death of Carl Higginson. Evidence at trial indicated that Mr. Higginson, who was in an automobile, stopped at an apartment complex to ask for directions from the two defendants. According to witnesses, when Mr. Higginson stopped, defendant made a statement about robbing him. Witnesses saw Marshall pass a gun to defendant shortly before hearing shots fired. However, Marshall subsequently claimed responsibility for shooting and killing Mr. Higginson.

### I. Removal of A Juror

Defendant initially argues that the trial court improperly removed a seated juror during trial. We disagree. A trial court's decision to remove a juror is reviewed for a clear abuse of discretion. People v. Tate, 244 Mich.App 553, 559; 624 NW2d 524 (2001). Such an abuse exists "only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *Id.* Further, to obtain appellate relief the defendant must show prejudice as a result of the court's decision. People v. Weatherspoon, 171 Mich.App 549, 560; 431 NW2d 75 (1988).

A trial court's decision to dismiss a juror is governed by M.C.L. § 768.18, which provides, in relevant part:

Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12.

The removal of a juror is warranted if "the interests of the public or of the individual juror will be materially injured by his attendance." Weatherspoon, *supra* at 560, quoting M.C.L. § 600.1335. The reasons for removing a juror must be similar in character to those which would permit excusing a person during voir dire. People v. Van Camp, 356 Mich. 593, 605; 97 NW2d 726 (1959). A trial court should weigh "a defendant's fundamental right to a fair and impartial jury with his right to retain the jury originally chosen to decide his fate." Tate, *supra* at 562.

In this case, the trial court dismissed the juror because: (1) the juror was acquainted with an employee of defense counsel's law firm; and (2) the juror disregarded the court's instructions not to speak with anyone while the trial was pending. We cannot conclude that the trial court abused its discretion. The juror's acquaintance with a member of the defense team was adequate justification for the trial court's decision. See People v. Beasley, 55 Mich.App 583, 587-588; 223 NW2d 77 (1974). Further, by refusing to follow the trial court's instructions, the

Not Reported in N.W.2d, 2002 WL 31949769 (Mich.App.)

(Cite as: 2002 WL 31949769 (Mich.App.))

juror's continued participation in the trial might have adversely affected the case. See *Weatherspoon, supra* at 560. Contrary to defendant's assertion, the trial court did not dismiss this juror because it believed he was only an alternate juror. Rather, the trial court observed that dismissal of the juror would still leave twelve jurors, as required by M.C.L. § 768.18.

\*2 Defendant has also failed to demonstrate that he was prejudiced because the dismissed juror was the only African-American selected for the jury. The racial composition of the remaining jurors is not apparent from the record. Moreover, defendant has failed to identify the factual basis for his claim that none of the remaining jurors were African-American. Although defense counsel asserted below that the dismissed juror was the only African-American male, he never indicated that he was the only African-American to serve on the jury. Thus, the record does not factually support defendant's assertion that the trial court's decision prejudiced him in this regard.

## II. Prosecutorial Misconduct

Defendant next asserts that the prosecutor engaged in misconduct during closing argument by referring to witness statements that were not admitted into evidence and disparaging defense counsel. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v. Aldrich*, 246 Mich.App 101, 110; 631 NW2d 67 (2001). "Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice." *People v. Rodriguez*, 251 Mich.App 10, 30; 650 NW2d 96 (2002). Unpreserved constitutional error only warrants reversal if it is plain error affecting defendant's substantial rights. *People v. Carines*, 460 Mich. 750, 763-764; 597 NW2d 130 (1999).

Viewing the prosecutor's comments in context, it is apparent that his remarks were in response to defense counsel's arguments regarding the witness' statements. Considered in this light, the remarks did not constitute plain error. *People v. Kennebrew*, 220 Mich.App 601, 608; 560 NW2d 354 (1996). Further, we do not believe

that the prosecutor's use of the term "legal trickery" in reference to defense counsel was so prejudicial that it amounted to plain error requiring reversal. *Carines, supra* at 763-764.

## III. Admission of Evidence

Defendant further argues that the trial court erred in admitting certain evidence. A trial court's decision to admit evidence is reviewed on appeal for an abuse of discretion. *People v. Layher*, 464 Mich. 756, 761; 631 NW2d 281 (2001). "However, where decisions regarding the admission of evidence involve preliminary questions of law such as whether a rule of evidence or statute precludes admissibility, our review is de novo." *Id.*

### A. Consistent Prior Statement

Defendant opines that the trial court erred when it permitted the prosecutor to elicit testimony that a witness' preliminary examination testimony was consistent with her trial testimony. We disagree.

In this case, the prosecutor read select questions and responses from a witness' preliminary examination testimony to rebut defense counsel's implications that she was lying. Under MRE 801(d)(1)(B), the prior statement of a witness is not considered hearsay if the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication...." Moreover, defendant has not shown that he was prejudiced by this line of questioning given the overwhelming evidence against him. MCL 769.26; *People v. Lukity*, 460 Mich. 484, 495-496; 596 NW2d 607 (1999).

### B. Past Recollection Recorded

\*3 Defendant also claims the trial court erroneously permitted the prosecutor to refresh a witness' recollection by reading portions of the witness' previous statement to the jury, despite the fact that the witness initially denied his memory was refreshed by that statement. We disagree.

We find that the prosecutor properly offered the statement into evidence. Contrary to defendant's claim on appeal, the witness read the statement to himself and not aloud to the jury. There is also no foundation in the record for defendant's claim that the prosecution extensively read

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from the witness' prior statement to the jury. Further, when the relevant portion of the transcript is reviewed, it is apparent that the witness eventually admitted that his memory was refreshed by the prior statement and that the statement was accurate. Because the witness adopted the substance of the prior statement, it could properly be considered as substantive evidence. Thus, defendant was not prejudiced by having a portion of the statement read into the record. *Lukity, supra* at 495-496.<sup>FN1</sup>

<sup>FN1</sup>. We also note that during cross examination, the defense attorney questioned the witness about the same portion of the statement that the prosecutor brought out during redirect examination.

#### IV. Ineffective Assistance of Counsel

Defendant claims that his attorney was ineffective for not objecting to the prosecutor's remarks discussed in part II of this opinion. We disagree. Because defendant did not raise this issue before the trial court, our review is limited to error apparent on the record. *People v. Snider*, 239 Mich.App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it is plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

Based on our analysis, we conclude that a defense objection would not have affected the result of this proceeding. Accordingly, defendant has not established that counsel was ineffective. See *People v. Carbin*, 463 Mich. 590, 599-600; 623 NW2d 884 (2001). Because we are satisfied that this issue may be decided on the basis of the existing record, and defendant's failure to explain what additional evidence would support an ineffective assistance of counsel claim, we deny defendant's request to remand for an evidentiary hearing on this issue.

#### V. Jury Oath

Defendant next asserts that the oath administered to the jury at the beginning of the trial was improper. Specifically, defendant claims that the oath failed to comport with either M.C.L. § 768.14 or MCR 2.511(G). Because defendant did not object to the oath that was administered at trial, we review this unpreserved issue for

plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

Matters of practice and procedure are controlled by court rule. *Staff v. Johnson*, 242 Mich.App 521, 530-531; 619 NW2d 57 (2000). Thus, the oath prescribed by MCR 2.511(G) controls over that set forth in M.C.L. § 768.14. 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. Accordingly, we find that the oath protected defendant's fundamental right to a trial by jury. See *People v. Pribble*, 72 Mich.App 219, 224-225; 249 NW2d 363 (1976). Defendant has failed to establish plain error. *Carines, supra* at 763-764.

#### VI. Reasonable Doubt Instruction

\*4 Defendant further contends that the standard reasonable doubt instruction given by the trial court mandates reversal because it was structural error. Specifically defendant notes that the instruction lacked the required "moral certainty" language or "hesitate to act" language. This argument is meritless. As recognized by this Court in *Snider, supra* at 420-421, the standard jury instruction, CJ12d 3.2, properly and sufficiently conveys the concept of reasonable doubt. See also *People v. Allen*, 466 Mich. 86, 90-92; 643 NW2d 227 (2002) (recognizing that the concept of reasonable doubt is commonly understood). Consequently, defendant has failed to establish plain error. *Carines, supra* at 763-764.

#### VII. Cumulative Error Doctrine

In light of the foregoing, we find no merit to defendant's claim that the cumulative effect of multiple errors deprived him of a fair trial. See *People v. Daoust*, 228 Mich.App 1, 16; 577 NW2d 179 (1998).

#### VIII. Sentencing

Defendant also claims that the trial court erred when it made an independent finding at sentencing that he was actually guilty of felony-murder, even though the jury found him guilty only of the lesser offense of second-degree murder.<sup>FN2</sup> We disagree. We review this

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issue de novo. People v. Sierb, 456 Mich. 519, 522; 581 NW2d 219 (1998).

FN2. Because the crimes in question occurred before January 1, 1999, the former judicial sentencing guidelines were in effect. MCL 769.34(1).

At sentencing, the trial court observed that all the elements of felony murder were essentially established by the jury's determination that defendant was guilty of second-degree murder and the underlying felony. The trial court then announced that it was going to exceed the sentencing guidelines recommended minimum sentence range because of the serious nature of the offense, which the court characterized as a "[c]old-blooded crime of opportunity." Defendant claims that this violated the rule established in People v. Grimmitt, 388 Mich. 590, 607-608; 202 NW2d 278 (1972), overruled on other grounds in People v. White, 390 Mich. 245, 258; 212 NW2d 222 (1973), prohibiting courts from sentencing a defendant based upon an independent finding of guilt on another matter. However, in the instant case the trial court's sentencing decision was based only on the facts of the charged offense. A trial court may consider whether the defendant committed a more serious offense in its sentencing decision without violating Grimmitt. See People v. Shavers, 448 Mich. 389, 393-394; 531 NW2d 165 (1995); People v. Compagnari, 233 Mich.App. 233, 236; 590 NW2d 302 (1998).

Affirmed.

Mich. App., 2002.

People v. Hubbert  
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(Mich.App.)  
END OF DOCUMENT

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs

No:

BRANDON LEWIS CAIN

Defendant-Appellee.

Lower Court No: 12-005176  
COA: 314342

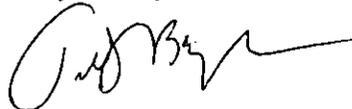
NOTICE OF HEARING

TO: Kristina Larson Dunne  
Attorney at Law  
P.O. Box 97  
Northville, MI 48167

PLEASE TAKE NOTICE that the attached **Application for Leave to Appeal** will be brought on for hearing in the Michigan Supreme Court on Tuesday, **June 3, 2014** or a time to be set by the Court.

Respectfully submitted,

KYM L. WORTHY  
Prosecuting Attorney  
County of Wayne



TIMOTHY A. BAUGHMAN  
Chief of Research,  
Training, and Appeals  
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Detroit, MI 48226  
(313) 224-5792

TAB/jf

STATE OF MICHIGAN  
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PROOF OF SERVICE

STATE OF MICHIGAN )  
COUNTY OF WAYNE )<sup>SS</sup>

The undersigned deponent, being duly sworn, deposes and says that [he/she] served a true copy of **Notice of Hearing, Plaintiff's Application for Leave to Appeal**

upon: Kristina Larson Dunne

the above named attorney for defendant, by  PERSONAL SERVICE or by  DEPOSITING SAID PLEADING IN THE U.S. MAIL IN THE CITY OF DETROIT, ENCLOSED IN AN ENVELOPE BEARING POSTAGE FULLY PREPAID, on **May 7**, 2014, plainly addressed as follows:

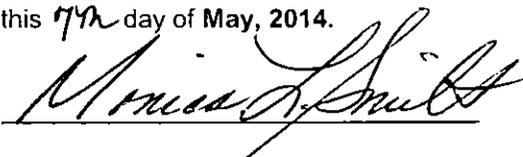
Kristina Larson Dunne  
Attorney at Law  
P.O. Box 97  
Northville, MI 48167

  
Joycelyn Frederick

said pleading was filed in the SUPREME COURT, by  U.S. Mail Service,  Next Day Service or  PERSONAL SERVICE at the following address:

LARRY ROYSTER, Clerk  
Michigan Supreme Court  
2<sup>nd</sup> Floor, Law Building  
925 Ottawa Street  
Lansing, Michigan 48902

Subscribed and sworn to before me  
this **7<sup>th</sup>** day of **May**, 2014.



Notary Public, Wayne County, Michigan  
My commission expires: **01-06-19**