No. 125959

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF, ILLINOIS Plaintiff-Appellee v. OMEGA MOON, Defendant-Appellant	)))))))))))	Appeal from the Appellate Court of Illinois, First District, No. 1-17-0675 There on Appeal from the Circuit Court of Cook County, No. 14 DV 74336 The Honorable Caroline Kate Moreland, Judge Presiding.

BRIEF PLAINTIFF-APPELLEE
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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

NATURE OF THE CASE

The People appeal from the judgment of the Illinois Appellate Court, First District, affirming defendant Omega Moon's conviction, entered upon a jury verdict, for domestic battery, 720 ILCS 5/12-3.2(a)(1). C196-97.[1]

ISSUE PRESENTED FOR REVIEW

Whether swearing a jury with the voir dire oath rather than a trial oath is second prong plain error, where the record shows that the error violated neither defendant's Sixth Amendment right to an impartial jury nor her double jeopardy rights, and a trial oath is not jurisdictional under Illinois law.

JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rules 315, 604(d), and 612(b), as this Court allowed defendant's timely petition for leave to appeal.

STATEMENT OF FACTS

Defendant was charged with striking her eight-year-old, adopted son, S.M., with a belt, which left buckle-shaped marks on his body. C14, 25.

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[1] "C_," "R_," and "A_" denote the common law record, report of proceedings, and defendant's appendix, respectively.

Pretrial

Prior to voir dire, the circuit court instructed the prospective jurors on the Rule 431(b) principles: (1) that defendant is presumed innocent of the charge against or her; (2) that before defendant can be convicted the State must prove her guilty beyond a reasonable doubt; (3) that defendant is not required to offer any evidence on her own behalf; and (4) that if defendant does not testify it cannot be held against her. R97-99.[2] The court then instructed each prospective juror that it was "essential" that they not "arrive at any decisions or conclusions of any kind" until after hearing all the evidence, closing arguments, and the court's instructions on the law; that they were not to conduct any research or read materials that may touch upon the case; and that they "must rely on the evidence" that they see and hear in court and the law provided. R99-101. The court told prospective jurors that the purpose of voir dire questioning was to determine if they would be fair and impartial and instructed them "to be . . . candid and honest in [their] responses to all questions as [they would] be under oath." R102.

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[2] The trial court correctly articulated the first three principles articulated in Rule 431(b), but the appellate court held that its articulation of the fourth principle — a defendant's right not to testify – was erroneous. *People v. Moon*, 2020 IL App (1st) 170675, ¶ 53. Nevertheless, it found the error did not rise to the level of plain error because the evidence was not closely balanced. *Id.* Defendant does not challenge this determination in this Court.

During voir dire, the court asked each prospective juror if they could "decide this case without sympathy, bias, or prejudice to either side"; if they would "wait for all the evidence, the arguments of counsel, and the Court's instructions on the law" before deciding; if they would "follow the law" the court gave them, even if they personally disagreed with it; and if they could "be fair to both sides." *See, e.g.*, R105. Every prospective juror answered the court's questions in the affirmative, R103-10, 113, 116, 122-50, 158-83, and clearly stated that he or she could decide the case without sympathy, bias, or prejudice, R105-09, 155-56.

Before opening statements, the court instructed the clerk to swear in the jury. R190. The parties later stipulated that the oath — read without objection — asked: "Do you solemnly swear or affirm you'll truthfully answer all questions asked concerning your qualifications as jurors in this case[?]" R349. Defendant and her counsel were present when the clerk administered this oath. R190, 194. After the oath, the court instructed jurors that they would deliberate and arrive at a verdict after the conclusion of the evidence and arguments, and after it instructed them on the applicable law, which they had a duty to follow. R190-91.

Trial

The trial evidence showed that on June 22, 2014, 8-year-old S.M. was living with defendant, whom he referred to as "mom." R199-200. That morning, S.M.'s, "other mom," Angel, drove S.M. from defendant's home to her house, with defendant's permission. R201-02. Later that afternoon, defendant went to Angel's house and told S.M. it was time to come home, which he did. R203. S.M. had his bike at Angel's house, so he rode the bike to defendant's home. *Id.* When S.M. arrived, defendant whipped him on the back and arms with a belt buckle. R204-05. Defendant sent S.M. to his room, where he remained until police arrived that night. R205.

Chicago police officer Kimberly Nelson arrived at defendant's home that night in response to a missing child report. R216. Though S.M. testified that he was in his room at the time, defendant told police S.M. was missing, and that neighborhood kids told her that S.M.'s "stepmother" had come and taken S.M. and his bike away in her car. R217. Nelson and defendant drove to several locations — including the "stepmother's" house — looking for S.M. R218-19. Eventually, defendant received a call informing her that S.M. was at her home, and they returned there. R219.

S.M. spoke to police at defendant's home. R206-07. He told Nelson that "Momma Moon" "gave him a whipping" with a belt buckle. R221-22,

225. Nelson saw a bruise on S.M.'s arm and asked defendant how S.M. got the bruise; she told Nelson that S.M. had fallen playing basketball the previous day. R223. Nelson arrested defendant, and S.M. was taken to the hospital. R224.

At the hospital, S.M. spoke with Karen Dixon from the Department of Child and Family Services. R206-07, 249-50. S.M. told Dixon that he had been out riding his bike when he saw "Mom Angel," who drove S.M. and his bike to her house. R252. "Mom Angel," whose name is Tara Sahara (Sahara), was S.M.'s biological mother. *Id.* The substance of S.M.'s statement to Dixon was essentially identical to his trial testimony: that defendant came to Angel's house and told him to go home, he rode his bike home and, once home, defendant whipped him with a belt. R252-54.

A few days later, Dixon spoke with defendant. R258. Defendant told Dixon that she had allowed S.M. to ride his bike, but then was unable to find him. R259. When she eventually located him, she told him to go home, where — she admitted to Dixon — she whipped him with a belt. R260.

Defendant's adult daughter, Ariel Gray, testified for the defense. R285-86. Gray was visiting defendant's house on the day of the crime. R286. She testified that defendant was still out looking for S.M. when he returned home that evening. R289. Gray testified that she called defendant when

S.M. got home. *Id.* She testified that she was at the home when the officers arrived, but assumed it was defendant coming home, and never emerged from the back room of the house to speak with them. R291.

Sahara also testified for the defense. R295. She denied picking S.M. up in her car that day and denied being home or seeing him at any point that day. R296.

In closing argument, defense counsel argued, in relevant part:

> The State has to prove that to you beyond a reasonable doubt, that it was [defendant] that caused those injuries. Ladies and gentlemen, they haven't done that. And I ask you to uphold and fulfill your oath you took as jurors to only convict if the State had proven — provided proof beyond a reasonable doubt. Because they haven't, I ask you to find [defendant] not guilty.

R311.

Jury Instructions and Post-Trial Proceedings

After closing arguments, the court instructed jurors, *inter alia*:

> Neither sympathy nor prejudice should influence you . . . . The evidence which you should consider consists only of the testimony of the witnesses which the Court has received. You should consider all of the evidence in the light of your own observations and experience in life. . . . Faithful performance by you of your duty as jurors is vital to the administration of justice. Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. . . . Each juror should rely on his or her recollection of the evidence. . . . The defendant is presumed innocent of the charge against her. The presumption remains with her throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence

> in this case you are convinced beyond a reasonable doubt that the defendant is guilty. . . . If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty. If you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

R315-20. The jury found defendant guilty. R323.

A month later, defendant filed a motion for a new trial, arguing that the jury was not properly sworn and that this fact deprived her of her right to a trial by an impartial jury. Sup2C 22, 25-26. The People stipulated that the jury was sworn with the voir dire oath. R348-49. The circuit court denied defendant's motion. R356-64, 368. The court acknowledged that jurors were not given the trial oath, but noted that no specific form of oath is prescribed by Illinois law. R357. It further held that a failure to properly swear the jury could be forfeited and did not require automatic reversal, R358-63, and that the improper oath was not reversible error in this case because "[o]ther than the improper oath, the jurors were given notice as to these things and the importance of their role," R363-64.

The circuit court sentenced defendant to one year of probation. R368, 373-74.

Direct Appeal

On appeal, defendant argued, in relevant part, that her conviction was a "nullity" because the jury was not properly sworn before trial. *Moon*, 2020 IL App (1st) 170675, ¶ 36. Noting that defendant had forfeited this claim because she did not object to the oath contemporaneously, *id.*, the appellate court reviewed the forfeited claim for plain error, *id.* at ¶ 44. The court first held that defendant failed to establish first prong plain error because the evidence was not closely balanced. *Id.* at ¶ 45. The court further held that an improper jury oath did not constitute second prong plain error because it "did not affect the fairness of the trial or challenge the integrity of the judicial process." *Id.* at ¶ 46. Justice Conners dissented, arguing that "the failure of the jury to receive the trial oath is structural plain error." *Id.* at ¶ 69 (Connors, J., dissenting).

ARGUMENT

I. Standard of Review and Plain Error Principles

Before this Court, defendant argues that the trial court erred in giving the jury the voir dire oath, rather than a trial oath, before defendant's jury trial commenced. It is undisputed that defendant forfeited this argument by failing to object at trial. Accordingly, this Court may review defendant's forfeited claim under the plain error doctrine only if a clear or obvious error

occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Birge*, 2021 IL 125644, ¶ 24 (citing *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007)).

Under the second prong of the plain error doctrine, "[p]rejudice to the defendant is presumed because of the importance of the right involved, '*regardless* of the strength of the evidence.'" *People v. Herron,* 215 Ill. 2d 167, 187 (2005) (quoting *People v. Blue,* 189 Ill. 2d 99, 138 (Ill. 2000) (emphasis in *Blue*)); *see also People v. Thompson*, 238 Ill. 2d 598, 613 (2010). This Court has equated second prong plain error with structural error, explaining that "automatic reversal is only required where an error is deemed 'structural,' *i.e.,* a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.'" *People v. Glasper,* 234 Ill. 2d 173, 197-98 (2007) (quoting *Herron,* 215 Ill. 2d at 186).

Under either prong of the plain error doctrine, defendant bears the burden of persuasion. *Birge*, 2021 IL 125644, ¶ 24 (citing *Thompson*, 238 Ill. 2d at 613). The ultimate question of whether a forfeited claim is

reviewable as plain error is a question of law that is reviewed de novo. *People v. Johnson*, 238 Ill. 2d 478, 485 (2010).

II. The Error in the Trial Oath Affected Neither the Fairness of the Trial nor the Integrity of the Judicial Process.

Defendant does not argue that the evidence was closely balanced. Instead, she argues this Court should excuse her forfeiture as second prong plain error. *See* Def. Br. 19-21, 26. But defendant has not met her burden of presenting evidence showing that the jury was biased in her case, and this Court should not presume that the jury was biased merely because the clerk mistakenly administered the voir dire oath instead of the trial oath.

"A criminal defendant has a constitutional right to trial by an impartial jury." *People v. Encalado*, 2018 IL 122059, ¶ 24 (citing *Morgan v. Illinois*, 504 U.S. 719, 727 (1992)). The trial oath is one means of safeguarding this right. It does so, primarily, by seeking to ensure that "jurors [are] conscious of the gravity of the task before them and the manner in which that task [is] to be carried out[.]" *People v. Cain*, 869 N.W.2d 829, 839 (Mich. 2015); *accord*, *e.g.*, *State v. Oddi-Smith*, 878 N.E.2d 1245, 1248 (Ind. 2008); *Wilburn v. State*, 608 So. 2d 702, 705 (Miss. 1992). The trial oath is "essentially a promise to lay aside one's 'impression or opinion and render a verdict based on the evidence presented in court.'" *People v. Abadia*, 328 Ill.

App. 3d 669, 677 (1st Dist. 2001); *accord People v. Nelson*, 2021 IL App (1st) 181483, ¶ 29.

Although the trial oath is a means ensuring trial by an impartial jury, it is not the only means. On the contrary, our judicial system features numerous safeguards to ensure that a defendant is not tried by a biased jury, including: the inquiry required by Rule 431(b), the availability of peremptory challenges, and the voir dire oath. And this Court has held that an error or shortcoming in one of these other safeguards does not by itself affect the right to a fair trial or the integrity of the judicial process.

For example, in *Thompson*, this Court held that an error in conducting the inquiry mandated by Rule 431(b), which "help[s] ensure a fair and impartial jury," is not structural error because it "does not automatically result in a biased jury." 238 Ill. 2d at 609-10 (citing *Glasper*, 234 Ill. 2d at 195-96). Rather, Rule 431(b) questioning "is only one method of helping to ensure the selection of an impartial jury[.]" *Id.* at 614-15 (citing *Glasper*, 234 Ill. 2d at 194-95); *see also Birge*, 2021 IL 125644, ¶ 24 (reaffirming *Thompson's* holding that violation of Rule 431(b) is not plain or structural error); *People v. Sebby*, 2017 IL 119445, ¶¶ 76-77 (same); *People v. Belknap*, 2014 IL 117094, ¶ 47 (same); *People v. Wilmington*, 2013 IL 112938, ¶ 33 (same).

This Court has similarly rejected arguments that other safeguards of the right to an impartial jury constitute structural error. For example, the Court has held that the mistaken denial of a peremptory challenge is not structural error because peremptory challenges are only one way to ensure that a jury is unbiased. *See People v. Rivera,* 227 Ill. 2d 1, 26 (2009), *aff'd, Rivera v. Illinois,* 556 U.S. 148, 161 (2009) (affirming this Court's implicit holding that mistaken denial of peremptory challenge was not structural error); *see also United States v. Martinez-Salazar,* 528 U.S. 304, 311 (2000) (peremptory challenges play role in reinforcing right to trial by impartial jury, but such challenges are auxiliary; "unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension").

Similarly, the Court has reasoned that while the administration of a statutory voir dire oath before questioning jurors may aid in the selection of an impartial jury, it is not indispensable; thus, the Court rejected the argument that a forfeited challenge to a trial court's failure to administer this oath required reversal of the defendant's conviction. *See People v. Towns*, 157 Ill. 2d 90, 99-100 (1993) (omission of voir dire oath did not warrant presumption that prospective jurors' statements were unreliable; where defendant failed to object, "failed to point to any evidence which call[ed] into

question the veracity of the answers given by the potential jurors[,]" and "[t]he totality of the record . . . [otherwise showed] that the trial court conducted a meaningful and thorough voir dire and that the jurors who were ultimately selected fairly and impartially rendered a verdict[,]" defendant was not denied fair trial or impartial jury).

Defendant can make no compelling case that the trial oath should be deemed more fundamental to ensuring an unbiased jury than these other safeguards, the misapplication of which, as explained, is not structural or second prong plain error. This is confirmed by the fact that there is no universal agreement about what constitutes the trial oath. While Rule 434(e) and 725 ILCS 5/115-4(g) require that a jury be "impaneled and sworn[,]" neither they nor any decision of this Court prescribes any specific form of the trial oath. Nor is there a "national consensus" about what a trial oath should contain; defendant argues that "the essential concepts of solemnity, a decision based on the *evidence and the law*, and a fair or *true verdict* are consistent across jurisdictions[,]" Def. Br. 12 (emphasis in original), but her own appendix shows otherwise. A28-36. For example, 17 States have criminal trial oaths containing no reference to deciding a case according to

the law or the jury instructions.[3] Of those 17, three States additionally do not swear criminal jurors to decide according to the law or the evidence and, of those three, two require only that jurors "well and truly try" and render a "true verdict" (or "true deliverance."). *See* Ark. Code Ann. § 18-89-109 and Neb. Rev. Stat. Ann. § 29-2009 (quoted in A28, 32); *see also, e.g.*, *United States v. Spurgeon*, 671 F.2d 1198, 1199 & n.3 (8th Cir. 1982) (describing the "usual" oath in the Eighth Circuit).[4]

In short, then, there is considerable variation in the form the trial oath takes and, in any event, it is just one of several safeguards that help ensure trial before an unbiased jury. Defendant received the benefit of these and other safeguards here. In addition to undertaking the Rule 431 inquiry,

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[3] *See* Colo. St. Cty. R. Crim. P. 347(i); Del. Code Ann. tit. 25, § 5713(b); Idaho Code Ann. § 19-3913; Mass. Gen. Laws, ch. 278, § 4; Miss. Code. Ann. § 13-5-71; Mont. Code Ann. § 25-7-207; Neb. Rev. Stat. Ann. § 29-2009; Nev. Rev. Stat. Ann. § 175.111; N.J. Stat. Ann. § 2B:23-6; N.C. Gen. Stat. Ann. § 11-11; N.D. R. Ct. 6.10(2); Ohio Rev. Code Ann.§ 2945.28; Pa. R. Crim. P. 640; S.D. Codified Laws § 15-14-11; Wyo. Stat. Ann. § 7-11-107. Arkansas and Oklahoma do not require that jurors swear to decide according to law in criminal cases. *See O'Neal v. State*, 907 S.W.2d 116, 119 (Ark. 1995) (citing Ark. Code Ann. § 18-89-109) (version without reference to law applies in criminal cases); *Salazar v. State*, 852 P.2d 729, 733 (Okla. Ct. Crim. App. 1993) (citing Okla. Stat. Ann. tit. 22, § 601) (same); *see also* Ark. Code Ann. § 16-30-103(b) and Okla. Stat. Ann. tit. 12, § 576 (cited at A28-29, 34).

[4] The third State with a trial oath that lacks reference to evidence or law is Ohio's. *See* Ohio Rev. Code Ann. § 2945.28 (cited at A34) (requiring that jurors "diligently inquire into and carefully deliberate" the case "to the best of [their] skill and understanding, without bias or prejudice").

providing defendant with peremptory challenges, and securing the voir dire oath, the trial court ensured that each prospective juror promised during voir dire to "wait for all the evidence, the arguments of counsel, and the court's instructions on the law before . . . mak[ing] up [their] mind[s] one way or the other," to "follow the law" as instructed "even if [they] personally disagree[ed] with it[,]" and to be "fair to both sides"; further, each testified to the satisfaction of the court and counsel that they could decide the case without sympathy, bias, or prejudice. R103-05; 105-09; 110, 149; 113, 149; 116, 149-50; 119, 150; 122-25; 126-30; 130-33; 133-36; 136-39; 139-44; 144-48; 158-61; 162-65; 166-70; 170-73; 174-78; 178-83. These were the last questions asked of every prospective juror, and impressed upon them the importance of their duties. *See, e.g.*, R105.

In addition, after the jury was impaneled, the trial court reminded jurors that they should deliberate and decide only after hearing all the evidence and the instructions, which would provide the applicable law and which they had a duty to follow. R191. Defendant's counsel further highlighted that duty in his closing argument to the jury that their "oath . . . as jurors" to follow the law required them to hold the People to their burden of proof. R311. Finally, the court's instructions directed the jury to decide, without sympathy or prejudice, whether the evidence proved defendant's

guilt of the charged offense beyond reasonable doubt. R315-21; *see People v. Taylor*, 166 Ill. 2d 414, 438 (1995) (presumed that jurors follow their instructions). Defendant's jury thus had numerous reminders, and the absence of one more did not affect the fairness of defendant's trial or the integrity of the judicial process, as the appellate court below correctly held.

Indeed, the only other court to have considered the precise question presented by this case similarly held that use of the voir dire oath instead of the trial oath did not necessarily require reversal because the record showed that the trial oath's purposes were satisfied by other means. *Cain*, 869 N.W.2d at 836-37. The Michigan Supreme Court reasoned that the trial oath's purpose of "impart[ing] to jurors their duties" was "alternatively fulfilled" during voir dire and by the trial court's instructions, which both emphasized the significance of the jurors' role and the "gravity of [their] task[.]" *Id.* at 836-39. Thus, the court held, the error did not "seriously affect[ ] the fairness, integrity, or public reputation of the judicial proceedings." *Id.* at 831, 837-39. "[A]s important and as symbolic as it may be," the trial oath was "but one component . . . in a larger process of fair and impartial adjudication[,]" and the record showed that "defendant was actually ensured a fair and impartial jury." *Id.* at 840.

Other States have similarly refused to elevate trial oaths above other safeguards that seek to ensure trial by an impartial jury. *See, e.g.*, *State v. Vogh*, 41 P.3d 421, 427-28 (Or. App. 2002) ("The absence of the oath does not mean—at least not in any necessary way—that the defendant was unfairly tried."); *State v. Arellano*, 965 P.2d 293, 295 (N.M. 1998) (failure to swear the jury until after it returned verdict was not per se reversible error where voir dire procedures and jury instructions showed that "the jury understood the spirit of the oath," as well as "their duty to determine facts of the case only from the evidence presented in court, and to deliver a verdict free from prejudice"). Indeed, the Tenth Circuit has held that even a complete failure to swear the jury was not plain error. *Turrietta*, 696 F.3d 972. Although recognizing the historic importance of the oath, the court noted that no federal statute or court rule requires it, and that "[n]o federal court in the history of American jurisprudence has held that the constitutional guarantee of trial by jury to necessarily include trial by sworn jury." *Id.* Thus, the court concluded, the failure to swear the jury "did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings," where the trial court's instructions, the voir dire oath, and references to the oath at trial showed that "the jury understood the thrust of what the oath was designed to impart." *Id.* at 985.

III. The Lack of a Trial Oath Does Not Deprive the Circuit Court of Jurisdiction in Illinois.

For her part, defendant relies on foreign cases that treat an unsworn jury as "structural error." *See* Def. Br. 22. This reliance is misplaced. Most of these cases rely on state laws unique to their jurisdictions that provide that the swearing in of the jury is "jurisdictional" or otherwise necessary for a "legal jury" that is "authorized" to convict. *See Brown v. State*, 220 S.W. 3d 552, 554 (Tex. App. 2007) (verdict by an unsworn jury is a nullity, but verdict by belatedly sworn jury is not "void"); *Spencer v. State*, 640 S.E.2d 267, 268 (Ga. 2007) (statutory oath is "jurisdictional in character"; thus, unsworn jury is not "legally constituted" and lacks "authority") (citation and internal quotations omitted); *Ex parte Benford*, 935 So. 2d 421, 430 (Ala. 2006) (failure to swear jury with both voir dire and trial oaths presents "jurisdictional" issue, but omission of one of the two does not); *State v. Mitchell*, 97 S.W. 561, 562 (Mo. 1906) (jury not impaneled and sworn as required by statute is not "legally constituted"); *State v. Moore*, 49 S.E. 1015, 1016 (W.Va. 1905) (jury must be sworn according to state law for a "legal conviction.").

Illinois law, by contrast, does not treat a properly sworn jury as a jurisdictional prerequisite. In Illinois, "[t]o invoke the circuit court's subject matter jurisdiction, a party need only present a justiciable matter, *i.e.,* 'a controversy appropriate for review by the court, in that it is definite and

concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests.'" *People v. Castleberry*, 2015 IL 116916, ¶ 15 (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335 (Ill. 2002). In short, while some States treat the trial oath as a jurisdictional prerequisite, Illinois does not. And no federal law requires it to do so, as now explained.

IV. The Sixth Amendment Does Not Require that a Deficient Oath Be Treated as Structural Error.

Defendant's argument that the Sixth Amendment requires the giving of a voir dire rather than a trial oath to be treated as structural error, Def. Br. 8-11, is incorrect. Even if a Sixth Amendment right to a trial oath exists, which is doubtful, it would not warrant treating a defective oath as structural error.

To the extent that defendant suggests that the text or history of the Sixth Amendment shows otherwise, Def. Br. 10, it does not. The Supreme Court has made clear that adoption of the Sixth Amendment did not preserve every aspect of common-law juries. *See Williams v. Florida*, 399 U.S. 78, 98-102 (1970) (Sixth Amendment's drafting history "cast[] considerable doubt on the easy assumption" that the Framers intended to constitutionalize every common-law feature of the jury trial); *see also Turrietta*, 696 F.3d at 977-78.

Moreover, it is not true that "[f]rom the inception of the jury trial, '[i]t was the power of the oath which decided the case.'" Def. Br. 9 (citations omitted). The sources defendant quotes were not talking about jury trials, but rather "trials by oath" (also called "trial by compurgation" or "wager of law"), an older, medieval form of "trial" where an oath literally "decided the case," in that a defendant could be acquitted by swearing his or her innocence. Helen Silving, *The Oath: I*, 68 Yale L.J. 1329, 1365-67 (1959); *see also* James B. Thayer, *"Law and Fact" in Jury Trials*, 4 Harv. L. Rev. 147, 157 (1890) (explaining that trial by oath was a "mechanical 'trial," not based on a "rational ascertainment of facts" like the jury trial).

Nor has "[t]he" trial oath "been an integral part of the jury trial at least since . . . 1015," as defendant maintains. Def. Br. 9 (citation omitted). "The general consensus is that . . . the model of the English jury was founded upon the Norman inquisition[,]" which was introduced into England after the Conquest in 1066 and did not become widespread until the reign of Henry II (1154-1189). *See, e.g.*, Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 392-94, 396 (1996); James B. Thayer, A PRELIMINARY TREATISE ON EVIDENCE 7 (1898) ("Thayer") (explaining that the Norman inquisition "was the parent of the modern jury"). Under this model, the original jurors were selected from the

community for their knowledge of the contested matters, or their ability to easily find it, and were essentially witnesses. *See*, *e.g.*, *People ex rel. Swanson v. Fisher*, 340 Ill. 250, 252 (1930) (quoting 1 HOLDSWORTH'S HISTORY OF ENGLISH LAW 317-19 (3d ed.)) (explaining how "the primitive jury were witnesses to rather than judges of the facts" and retained this character for centuries); Smith, 25 Hofstra L. Rev. at 392, 395; *see also* Thomas P. Gallanis, *Reasonable Doubt and the History of the Criminal Trial*, 76 U. Chi. L. Rev. 941, 957 (2009) (explaining that, despite some skeptics, "the longstanding conventional wisdom," reinforced by recent scholarship, is that the first juries were "substantially self-informing."). Because of the "ancient identity of jurors as witnesses," the original "jury" oath was testimonial, and "for centuries . . . jurors both in civil and criminal cases were sworn merely to *speak the truth*." Maximus A. Lesser, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM 119 & n.44 (1894) (citations omitted) (emphasis in the original). In sum, then, a trial oath like the one typically administered in Illinois today was not an "integral part" of the original jury, Def. Br. 9, in the same way that a testimonial oath, like a voir dire oath, was.

The only evidence defendant offers for a historical requirement of a "sworn jury" is definitions from Founding-era are dictionaries, Def. Br. 8-11, but these are, at best, inconclusive. *See, e.g.*, Nathan Bailey, AN UNIVERSAL

ETYMOLOGICAL ENGLISH DICTIONARY 482 (24th ed. 1782) (containing both a definition of "Jury" labeled "at common-law," which noted swearing, and also a contemporary definition of "Petty Jury," which did not but rather was defined, in relevant part, as "consist[ing] of twelve men, *impaneled upon* criminal and civil cases.") (emphasis added, other formatting modified); Richard Burn, A NEW LAW DICTIONARY 407-411 (1792) (definition of "jury" that describes voir dire process in detail, mentions a voir dire oath, quotes a "trier's oath" used in voir dire procedure, and notes in passing 12 persons being "sworn of the jury" but does not discuss the jury oath's content). Nor does every modern dictionary mention swearing. *See, e.g.*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "jury" as "[a] group of persons selected according to law and given the power to decide questions of fact and return a verdict in the case submitted to them").

Defendant's argument that that "the term 'jury' in the Sixth Amendment naturally referred to a 'sworn' jury," Def. Br. 10, thus stretches the sources on which she relies beyond their breaking point. And to the extent the Sixth Amendment incorporated the common-law jury oath at the time, the relevant oath was not the "trial oath" that defendant demands. *See* Def. Br. 12. It did not contain a promise to decide the case according to the law, but instead to "well and truly . . . try the issue between the parties, and"

give "a true verdict . . . according to the evidence." 3 William Blackstone, *Commentaries* *365.

In any event, this Court need not decide whether the original meaning of the word "jury" included a requirement that the jury be "sworn," or whether a trial oath is required by the Sixth Amendment. Even if it that were so, it would not follow that a defective oath "renders a criminal trial fundamentally unfair or unreliable in determining guilt or innocence." *People v. Averett*, 237 Ill. 2d 1, 12-13 (2010); *see also Rivera*, 227 Ill. 2d at 26-27 (declining to address whether erroneous denial of peremptory challenge was an error of constitutional dimension where it would not be structural error regardless). Rather, "'if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are [not structural].'" *Averett*, 237 Ill. 2d at 12-13 (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)).

The reluctance to identify errors as structural is well founded. Allowing a defendant to reap a windfall after having silently watched a curable error would undermine the integrity of the judicial proceedings. *See, e.g.*, *Turrietta*, 696 F.3d 985 ("If anything would imperil the integrity of the judicial proceedings, it would be a decision rewarding [defense counsel] for holding his objection in his back pocket hoping it might ultimately work in

his client's favor."); *see also Johnson v. United States,* 520 U.S. 461, 470 (1997) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it."). The unfairness of a defendant attacking a jury's legitimacy based on a defective oath only after the jury rules against her has been long recognized. *See, e.g.*, *People v. Kuhn*, 291 Ill. 154, 164 (1919) (defendant could not raise the claim that a juror was unsworn for the first time on appeal, for "it is the plain duty of any party to object . . . [when witnessing such an error], and if he does not, but chooses to speculate on the chance of a favorable verdict, he should not be heard afterward to make the objection that a juror acted without being sworn"); *McKinney v. People*, 7 Ill. 540, 555 (1845) (any irregularity in allowing witnesses and jurors to swear by raising hands, rather than on a Bible, "took place in the presence of the prisoner and his counsel, and they should have objected to it at the time").

This case perfectly illustrates the concern. As the circuit court observed, R364, if anyone — defendant, her attorneys, or the other public defenders who witnessed the clerk give the wrong oath — had notified the court at the time, it would have resworn the jury, rendering the prior error harmless. *See, e.g.*, *Abadia*, 328 Ill. App. 3d at 677 (delayed swearing of jury was harmless). Even if defendant's silence here was not tactical, treating a

defective jury oath as per se reversible error creates a perverse incentive for such gamesmanship. This Court "ha[s] stressed" that "the failure to raise a claim properly denies the trial court an opportunity to correct an error . . . thus wasting time and judicial resources." *Thompson*, 238 Ill. 2d at 612 (citing *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009)); *see also, e.g.*, *People v. Radford*, 2020 IL 123975, ¶ 37 ("Th[e] need to lodge a contemporaneous objection . . . prevents a defendant from potentially remaining silent about a possible error and waiting to raise the issue, seeking automatic reversal only if the case does not conclude in his favor.") (citing *People v. Hampton*, 149 Ill. 2d 71, 100 (1992)). There is nothing in the Sixth Amendment or its history that requires such a result here.

V. An Error In the Trial Oath Raises No Double Jeopardy Concerns.

Finally, defendant argues that the improper oath prevented jeopardy from attaching. Def. Br. 17-20. To be sure, "jeopardy attaches when 'a defendant is put to trial,' and in a jury trial, that is 'when a jury is empaneled and sworn.'" *Martinez v. Illinois*, 572 U.S. 833, 839-40 (2014) (quoting *United States v. Serfass*, 420 U.S. 377, 388 (1975)). And "[t]he reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury." *Crist v. Bretz*, 437 U.S. 28, 35-36 (1978); *see also Wade v. Hunter*, 336 U.S. 684, 688

(1949). A trial oath thus marks the start of trial by providing an official recognition that the jury is fully "chosen" and beginning its "solemn task," and therefore that the defendant has acquired an interest in its decision. *See Crist*, 437 U.S. at 35-36.

It is clear that double jeopardy can attach only after voir dire, when the jury is fully "chosen." *Crist*, 437 U.S. at 35-36; *see also, e.g.*, *People v. Palen*, 2016 IL App (4th) 140228, ¶¶ 38-52 (holding that jeopardy did not attach where only eight jurors were sworn; collecting cases from other States to similar effect). However, the United States Supreme Court has never suggested that the content of the trial oath precludes jeopardy from attaching once the full jury is impaneled. In this case, there was an oath marking the moment when the fully selected jury began its "solemn task" (and therefore when defendant acquired an interest in "retaining [the] chosen jury"). *See Crist*, 437 U.S. at 35-36. Defendant does not explain how an error in the content of the oath undermined confidence in when jeopardy attached.

But whether jeopardy attached is not relevant in any event. Even if, as defendant argues, jeopardy did not attach, she has not explained why that would violate her double jeopardy rights (much less affect the fairness of her trial). Nor can she credibly do so. If defendant is correct, and jeopardy did not attach, that would mean there was no prior jeopardy, and retrial — the

remedy she seeks — would not violate her double jeopardy rights. By contrast, if jeopardy did attach, defendant is not at any risk that the People would seek to try her again for a crime of which she has already been convicted. *See United States v. Wilson*, 420 U.S. 332, 344 (1975) ("[W]here there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended."). In sum, even if jeopardy did not attach based on the content of the trial oath, it would not raise any double jeopardy concerns.

For all of these reasons, this Court should decline to excuse defendant's forfeiture, and should hold that a defective trial oath is not second prong plain error. Where, as here, the requirements of Rule 431(b), the administration of the voir dire oath, the jury instructions, and defendant's counsel's closing argument all acted as reliable safeguards to ensure that the jurors performed their duties impartially, the error is subject to forfeiture and can only be reviewed where the evidence is closely balanced. Defendant does not argue that is the case here, and so his forfeited trial oath claim must fail.

CONCLUSION

This Court should affirm the appellate court's judgment.

July 22, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 28 pages.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 22, 2021, the foregoing **Plaintiff-Appellee's Brief** was electronically filed with the Clerk, Illinois Supreme Court, through the Odyssey eFileIL system, which will serve the following, counsel for defendant:

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