Circuit Court for Washington County
Case No. 21-K-10-45181

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2227

September Term, 2013

BASHAWN M. MONTGOMERY

v.

STATE OF MARYLAND

Berger,
Friedman,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 1, 2019

Appellant Bashawn Montgomery sought post-conviction relief in the Circuit Court for Washington County after this Court affirmed in part, reversed in part, and vacated in part, his convictions for robbery, second-degree assault, theft, unauthorized use of a credit card to obtain property over $500, and unauthorized use of a credit card.[1]

In his petition, Montgomery claimed ineffective assistance of both his trial and appellate counsel. The post-conviction court denied relief, and Montgomery was granted leave to appeal.

He raises two issues for our consideration:

1. Whether the post-conviction court erred in finding that prior appellate counsel's deficiency was not prejudicial to Appellant where [his] conviction was rendered by a jury that was never sworn and appellate counsel failed to rebut the presumption of regularity on appeal?

2. Whether the post-conviction court erred in finding that Appellant's trial counsel was not constitutionally ineffective in failing to investigate and call a witness who would have impacted the outcome of his case?

We shall affirm the judgment of the circuit court.

Subsequent to briefing, and scheduled oral argument before this Court in February 2017, the Supreme Court granted certiorari in *Weaver v. Massachusetts*, 582 U.S. _____, 137 S. Ct. 1899 (2017), to address the following issue:

> [W]hether a defendant asserting ineffective assistance that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's ineffectiveness[ ]…; or whether prejudice is presumed in such cases[.]"

[1] The reversal was for resentencing. Those issues are not implicated in this appeal. *Montgomery v. State*, 206 Md. App. 357 (2012).

Recognizing that Montgomery's claim for entitlement to post-conviction relief could be impacted by the anticipated holding of the Supreme Court in *Weaver*, this Court, *sua sponte*, ordered a stay of the instant appeal. After the Supreme Court's opinion in *Weaver* was filed on June 22, 2017, we ordered supplemental briefing to address the following issues:

1. Whether a defendant asserting ineffective assistance of counsel that results in a structural error must, in addition to demonstrating deficient performance, show prejudice; or

2. Whether prejudice is presumed; and

3. The relevance of *Weaver v. Massachusetts.*

BACKGROUND

The genesis of Montgomery's convictions was his conduct in a jewelry store with two other individuals, a man and a woman, in Washington County. After a confrontation with the sales clerk, Montgomery eventually purchased a $2,000 bridal ring set, using a credit card number written on a piece of paper by the other man. He did not, however, show the card. In order to successfully charge the card, the clerk made separate charges of $1,000 each. Ultimately, the charge was rejected by the credit card issuer. After her card was later declined, the cardholder, Joan Lamoy, contacted her credit card company and learned about the charges at the jewelry store. Lamoy was not present at the time and had not given anyone permission to use her card.

On May 16, 2011, based on the evidence presented at trial, a jury convicted Montgomery of robbery, second-degree assault, two counts of theft over $500, two counts

of unauthorized use of a credit card to obtain property over $500, and two counts of unauthorized use or disclosure of a credit card number.[2]

Direct Appeal

The basis of direct appeal was his assertion that he was entitled to a new trial because the jury before which the charges were tried was not sworn. In our discussion, we shall assume, *arguendo*, that the jury was not sworn.

Montgomery appealed his convictions, retaining separate appellate counsel. His appellate counsel moved successfully to amend the record to clarify that the trial transcript, which stated "(JURY PANEL SWORN)," was incorrect. In fact, the swearing referred to in the transcript was the oath given to the entire jury pool prior to jury selection. The trial transcript contains no reference to the empaneled jury being sworn, nor was there any discussion of it by counsel, the clerk, or the court. Montgomery's appellate counsel did not obtain an affidavit from the court reporter that the transcript was a true representation of what occurred at trial, relying instead on the court reporter's certifications that appeared with the original transcript and with the amendment. That, Montgomery now asserts, amounts to ineffective representation, which was prejudicial to his case, and warrants reversal. The State, in its response, relying on the presumption of regularity that the jury

[2] Montgomery was sentenced to 15 years' imprisonment, all but ten suspended, for the robbery and each of the two counts of unauthorized use of a credit card, with two sentences to run consecutively and one to run concurrently, in addition to concurrent sentences of 18 months for each of the two counts of unlawfully disclosing credit card information, followed by a period of probation and restitution. The second-degree assault and theft counts merged with the robbery count for sentencing purposes. *See also Montgomery*, 206 Md. App. at 363 n.6.

was sworn, argued that Montgomery had failed to satisfy his burden of rebutting the presumption, having argued only that there was no affirmative statement in the transcript that the jury had been sworn. *Montgomery*, 206 Md. App. at 371.

This Court agreed with the State:

> Having determined that the presumption of regularity applies to the issue of whether or not a jury has been sworn, we conclude that appellant failed to rebut the presumption. The record is devoid of any affirmative indication that the jury was unsworn. Neither the docket entries nor the transcript contain [sic] an affirmative statement that the jury was unsworn. The record is devoid of any mention by the attorneys or the courtroom clerk as to the jury not being sworn. According to the instant case's transcript, the circuit court took a twenty-four-minute recess before proceeding to opening statements. The record leaves open the possibility that the jury was sworn during that twenty-four-minute timeframe – or at some other time not on the record. Appellant points us to no affirmative evidence – and we find none in the record – that the jury was unsworn. For the reasons discussed above, appellant failed to rebut the presumption that the jury was sworn, and thus, has failed to show any error on the part of the circuit court.

Montgomery, 206 Md. App. at 380-81 (footnotes omitted).

We opined further in a footnote to this passage that, because Montgomery failed to raise the issue of swearing the jury at the trial court level, the question would be considered under plain error review, and that his claim would fail plain error review. *Id.* at 381 n.17.[3]

Post-Conviction

On November 13, 2012, Montgomery filed a *pro se* petition for post-conviction relief, pursuant to Md. Code (2001, 2008 Repl. Vol.) Criminal Procedure Title 7, claiming

[3] On other grounds, we reversed the convictions on the second counts of theft and using a stolen credit card to obtain property, vacated the sentence for the conviction on the second count of using a stolen credit card to obtain property, and affirmed the remaining convictions and sentences. 206 Md. App. at 413.

that his trial counsel provided ineffective assistance for, *inter alia*, having failed to interview and subpoena a police officer, Deputy James Clay, to testify at trial. Subsequently, after obtaining counsel, Montgomery amended his petition to allege as well that his appellate counsel provided ineffective assistance for failing to adequately rebut the presumption of regularity that the jury had been sworn.[4]

At the post-conviction hearing, Montgomery submitted an affidavit from the trial court reporter who had prepared the transcript and the subsequent amendment. In her affidavit, the reporter detailed her practice of being present in the courtroom "during all proceedings," ensuring the recording equipment operates properly, and that she transcribes "everything that was recorded while the court was in session[,]" when preparing a transcript. The reporter affirmed that there were "no problems or malfunctions with the recording equipment" during Montgomery's trial and testified that, to her recollection, the empaneled jury had not been sworn.

Montgomery's appellate counsel testified that she did not obtain such an affidavit from the court reporter because she did not believe that the presumption of regularity applied to the swearing of the jury. Further, she testified that she believed the court reporter's certification that the transcript was a verbatim representation of the proceedings would be sufficient to rebut the presumption of regularity if it did apply.

Although the post-conviction court found that Montgomery's appellate counsel's representation was deficient, the court relied on the language of footnote 17 in *Montgomery*

[4] Montgomery's original and amended petitions for post-conviction relief included other claims of deficiency on the part of his trial counsel that are not at issue in this appeal.

v. State to conclude that, because we "indicated that the instant case 'would fail plain error review's fourth prong'," Montgomery suffered no prejudice because of appellate counsel's deficiency. As to the second claim, insufficiency of trial counsel's representation, the court found that "[t]he decision to use the CAD report rather than investigate or call Detective Clay as a witness was a valid trial strategy, and a professionally reasonable decision that did not rise to the level of ineffective performance."

Montgomery's application for leave to appeal was granted on January 8, 2016.

DISCUSSION

Standard of Review

The Court of Appeals recently reiterated the standard under which we review the findings and rulings of a post-conviction court:

> The review of a postconviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact. Because we are not finders of fact, we defer to the factual findings of the postconviction court unless clearly erroneous. But we review the court's legal conclusion regarding whether the defendant's Sixth Amendment rights were violated without deference. We "re-weigh" the facts in light of the law to determine whether a constitutional violation has occurred.

Newton v. State, 455 Md. 341, 351-52 (2017) (citing *Harris v. State*, 303 Md. 685, 698 (1985)).

Ineffective assistance of counsel claims are analyzed under the test established in *Strickland v. Washington*, 466 U.S. 668 (1984). The right to counsel guaranteed by the Sixth Amendment and made applicable to the States by the Fourteenth Amendment, is the right to *effective* assistance of counsel, "the benchmark of which is whether counsel's advocacy was sufficient to maintain confidence that the adversarial process was capable of

producing a just result." *Cirincione v. State*, 119 Md. App. 471, 484 (1998) (citing *Strickland*, 466 U.S. at 686).

It is a post-conviction petitioner's burden to show, first, that counsel's performance was deficient, making "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" and second, that the deficient performance prejudiced the defense so as to "deprive the defendant of a fair trial[.]" *Strickland*, 466 U.S. at 687. "Unless a defendant makes both showings, it cannot be said that the conviction … resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

Under the performance prong of the test, we evaluate counsel's performance after the fact, applying a strong presumption that counsel provided reasonable assistance. 466 U.S. at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

If ineffective assistance is found, the defendant must then affirmatively prove prejudice; "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Finally, "our review of the two *Strickland* elements of ineffective assistance need not be taken up in any particular order. In other words, we need not find deficiency of counsel in order to dispose of a claim on the grounds of a lack of prejudice." *Cirincione*, 119 Md. App. at 485-86 (citing *Strickland*, 466 U.S. at 697).

1. Appellate Counsel

As we discuss the issues related to the jury oath, we keep in mind that the asserted ineffective assistance relates to Montgomery's appellate counsel. Any claims relating to asserted ineffective assistance of trial counsel, *vis-à-vis* the jury-swearing issue, were withdrawn before the post-conviction court.

Montgomery asserts that the post-conviction court erred in concluding that his appeal was not prejudiced by his appellate counsel's deficient performance because, he argues, a verdict by an unsworn jury requires automatic reversal. Therefore, he posits, he is relieved of the burden of showing prejudice. He asserts that our intention, stated in footnote 17 of *Montgomery v. State*, *supra*, to apply a plain error standard of review had his counsel rebutted the presumption of regularity was wrong, and therefore not indicative of the prejudice flowing from his counsel's purported errors. In other words, Montgomery maintains that, because his appellate counsel failed to show that the jury had not been sworn, we were unable to reverse his convictions as nullities. He secondarily argues that, even if plain error is the correct standard of review, his appeal would have passed plain error review because the error affected his substantial rights.

In response, the State argues that the swearing of a jury is subject to the preservation requirement of Md. Rule 8-131. Thus, the State argues, the post-conviction court did not

err in relying on footnote 17, stating that his unsworn jury claim would fail plain error review to determine that no prejudice flowed to Montgomery from appellate counsel's performance, deficient or not.

In footnote 17, we said:

> Although appellant failed to raise the issue of the purportedly unsworn jury at trial as required by Maryland Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court [.]"), the State does not argue that the issue is not preserved for appellate review. Nonetheless, we observe that the issue of an unsworn jury, although structural error, would be subject to plain error review where the issue is unpreserved. *See Savoy v. State*, 420 Md. 232, 241-42, 243 n. 4 (2011) (The Court of Appeals applied the Maryland Rule 8-131(a) requirement of preservation to a structural error and stated: "[U]n-preserved structural errors are not automatically reversible, but, instead, are subject to plain error review.").
>
> Although in *Harris*, 406 Md. [115,] 129 [(2008)], the Court of Appeals stated that the "principle[ ] of waiver [is] inapplicable when a jury in a criminal case has never been sworn[,]" this statement was *dicta* because the issue of the unsworn jury had been preserved for appellate review. *Id.* at 130 ("[T]here would be no waiver in the present case [because defense] counsel twice called the trial [court]'s attention to the failure to swear the jury."); *see also id.* at 122 ("**We shall hold** ... **that there was no waiver** of [the defendant]'s objection to the unsworn jury[.]" (Emphasis added)). In contrast, the Court's statement in *Savoy*, 420 Md. at 243 n. 4 – "[U]n-preserved structural error[is] not automatically reversible, but, instead, [is] subject to plain error review" – is binding because it applied to the facts in *Savoy*, in which the defendant – as did [Montgomery] – failed to object to a structural error. *Id.* at 243. In any event, the holding of *Savoy* – which postdates *Harris* by three years – supersedes *Harris.* Where the issue of whether the jury has been sworn is not preserved – even if the presumption of regularity is overcome – rather than automatically reversing, we would determine whether to

> exercise plain error review. *Savoy*, 420 Md. at 243 n. 4.
>
> The instant case's circumstances would fail plain error review's fourth prong, as set forth in *State v. Rich*, 415 Md. 567, 578 (2010), because an unsworn jury may be readily corrected. As evidenced by *Alston*, 414 Md. [92,] 96 [(2010)], an unsworn jury may be readily corrected by a belated administration of the oath – and we should "not exercise our right to take cognizance of and correct any plain error material to the rights of [appellant], of our own motion, **if the alleged error was one that might have been readily corrected if it had been called to the [circuit court]'s attention.**" *Morris v. State*, 153 Md. App. 480, 510 (2003) (emphasis added) (citation and internal quotation marks omitted).

Montgomery v. State, 206 Md. App. 357, 381 n.17 (2012) (emphasis and changes to quotations in *Montgomery*).

Montgomery relies primarily on *Harris v. State*, 406 Md. 115 (2008),[5] to support his argument that his appeal would have required automatic reversal had his counsel rebutted the presumption of regularity. In *Harris*, there was no indication in the transcript, docket entries, or elsewhere in the record that the jury had been sworn; in fact, on the first day of trial, the clerk made a note that "jury not sworn." 406 Md. at 119. The record was sufficient to overcome the presumption of regularity that attaches to trial proceedings, and to establish that the jury was not sworn. *Id.* at 122, 123-24. As a result, the *Harris* Court, over a dissent, concluded that "the jury in this case was never sworn."[6] 406 Md. at 123-

[5] *Harris* was heard by this Court on direct appeal. *Harris v. State*, 173 Md. App. 71 (2007). The Court of Appeals granted certiorari and reversed this Court on the question of whether the jury had been sworn. *Harris v. State*, 406 Md. 115 (2008).

[6] Apparently overlooking the trial judge's on-the-record statement that "the jury was sworn." 406 Md. at 123-24.

24, 132-34. Because "a sworn jury is an element of an 'impartial' jury and is necessary for a 'legally constituted' jury[,]" *id.* at 126, the Court of Appeals ruled that the trial court had erred in not granting Harris a new trial based on his argument that the jury had not been sworn. *Id.* at 127.

Although the Court agreed "that principles of waiver and harmless error are inapplicable when a jury in a criminal case has never been sworn[,]" *id.* at 129, there was no waiver of the issue in *Harris* because defense counsel had twice called the failure to swear the jury to the trial court's attention. *Id.* at 129-30.

We premise our analysis on the basis that a trial conducted before a properly empaneled, but unsworn, jury gives rise to structural error and that, if preserved and raised on direct appeal, reversal would be mandated. And, "[w]e do agree with the great majority of cases that principles of waiver and harmless error are inapplicable when a jury in a criminal case has never been sworn." *Harris*, 406 Md. at 129.

Recent Case Law

We begin with a consideration of *Weaver v. Massachusetts, supra*. Justice Kennedy stated the background and issue before the Court:

> During petitioner's trial on state criminal charges, the courtroom was occupied by potential jurors and closed to the public for two days of the jury selection process. Defense counsel neither objected to the closure at trial no raised the issue on direct review. And the case comes to the Court on the assumption that, in failing to object, defense counsel provided ineffective assistance.
>
> In the direct review context, the underlying constitutional violation – the courtroom closure – has been treated by this Court as a structural error, i.e., an error entitling the defendant to automatic reversal without any inquiry into prejudice. The question is whether invalidation of the conviction is

> required here as well, or if the prejudice inquiry is altered when the structural error is raised in the contest of an ineffective-assistance-of-counsel claim.

137 S. Ct. at 1905.

Thus, the Court began with a recognition that the courtroom closure was a fundamental or structural error. The Court clarified that the term "structural error" carries "no talismanic significance as a doctrinal matter[;]" rather, "[i]t means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable doubt.'" *Weaver*, 137 S. Ct. at 1910. Further, "in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" *Id.* (citing *Neder v. United States*, 527 U.S. 1, 7 (1999)). Finally, the Court observed:

> Thus, when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or[ ] … to show that the particular … violation was so serious as to render his or her trial fundamentally unfair."

137 S. Ct. at 1911.

In *Weaver*, the Supreme Court essentially concluded that, even in the case of structural or fundamental error, when the post-conviction challenge is based on deficient performance of appellate counsel, a petitioner is not excused from satisfying the *Strickland* prejudice prong. *Id.* at 1911-13.

Recently, in *Newton v. State*, 455 Md. 341 (2017), the Court of Appeals had occasion to consider *Weaver*. The asserted structural error in *Newton* was the presence of

an alternate juror with the empaneled jurors during deliberations. 455 Md. at 352-53. The Court found that circumstance not to have been fundamental error, recounting that trial counsel acquiesced in the alternate juror's attendance at deliberations and that counsel requested, and the trial court granted, a supplemental instruction delineating and circumscribing the alternate juror's attendance. *Id.* at 361.

Newton's asserted deficiency of representation by appellate counsel is that appellate counsel did not argue that the alternate juror's presence during deliberations was plain error. 455 Md. at 362. The Court then recited the established standards of plain error and concluded that the Court had not yet opined as to whether the presence of an alternate juror during deliberations is plain error, but hinted that such may not constitute plain error. *Id.* at 364-66. The Court, referring to the paucity of evidence before the post-conviction court, concluded that Newton had failed to satisfy the prejudice prong of the *Strickland* standard. *Id.* at 366.

Thus, we agree with the State in its supplemental brief to this Court that, although cited by the *Newton* court, *Weaver v. Massachusetts* did not control the Court's opinion.

We proceed on the premise that the failure to swear a criminal trial jury is a structural error. Because we are dealing with a claim of entitlement to post-conviction relief based on a structural error, we do not engage in a traditional harmless error review. As Judge Adkins observed in *Newton*:

> [T]he U.S. Supreme Court has acknowledged that certain constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." These errors are known as structural errors because they "affect[ ] the framework within which the trial proceeds" and are not "simply an error in the trial process itself." If a structural error is objected to at trial

> and raised on direct appeal, "the defendant [ ] is entitled to automatic reversal regardless of the error's actual effect on the outcome." Even when an error is deemed "structural," however, a defendant *must preserve the issue for appellate review to be entitled to an automatic reversal*.

455 Md. at 353-54 (emphasis added) (internal citations omitted).

As relevant to this discussion, the Court of Appeals explained in *Harris v. State* 406 Md. 115 (2008):

> Turning to the matter of harmless error, the appellate courts in other states, almost unanimously, hold that the complete failure to swear the jury can never be harmless error. In this regard, a jury which has never been sworn falls into the same "structural error" category as a defective reasonable doubt instruction, the denial of a right to a jury trial, the total deprivation of counsel, discrimination in the selection of juries, etc.

406 Md. at 130.

We agree with Montgomery that *Harris* established that failure to swear a jury is a structural error and that, on direct appeal, reversal is to be automatic. However, *Harris* does not address the question, nor could it have, of entitlement to post-conviction relief for ineffective assistance of appellate counsel when the unsworn jury error, unpreserved at trial, was raised on direct appeal, but appellate counsel failed to produce sufficient evidence on appeal to demonstrate that the jury had not been sworn.

We conclude, therefore, that:

1. Failure to swear a jury is structural or fundamental error (*Harris*).

2. If error is preserved, raised on direct appeal, and clearly established, the error is presumptively prejudicial and appellant is entitled to automatic reversal and a new trial (*Newton*).

3. If error is unpreserved, whether raised on direct appeal or on post-conviction, the error will be subject to discretionary plain error review (*Montgomery*).

4. If raised on post-conviction asserting error by appellate counsel, there is no presumption of prejudice and, assuming deficient performance by appellate counsel, petitioner must show prejudice under the *Strickland* standards (*Weaver*).

Performance of Appellate Counsel

Applying the conclusions from the above case law to the instant case, we revisit the post-conviction court's deficiency finding and legal conclusions.

There is "[a] presumption of regularity [that] attaches to criminal proceedings, which means that we 'presume[ ] that the trial court proceedings were correct and the burden rests on the challenger to show otherwise.'" *Rich v. State*, 230 Md. App. 537, 554 (2016) (quoting *Harris*, 406 Md. at 122), *aff'd*, 454 Md. 448 (2017). *Accord Schowgurow v. State*, 240 Md. 121, 126 (1965) (explaining that "[t]here is a strong presumption that judges and court clerks, like other public officers, properly perform their duties" (citing *Lewis v. United States*, 279 U.S. 63, 73 (1929))). In Montgomery's direct appeal, we held that "the presumption of regularity applies to the issue of whether or not a jury has been sworn." *Montgomery*, 206 Md. App. at 380. As such, in order "[t]o overcome the presumption of regularity or correctness, the appellant or petitioner has the burden of producing a sufficient factual record for the appellate court to determine whether error was committed." *Nicolas v. State*, 426 Md. 385, 416 (2012) (quoting *Black v. State*, 426 Md. 328, 337 (2012)).

Maryland Rule 4-312, concerning jury selection, provides in relevant part that "[t]he individuals to be impaneled as sworn jurors, including any alternates, shall be called from the qualified jurors remaining on the jury list in the order previously designated by the trial

judge and *shall be sworn*." Rule 4-312(g)(1) (emphasis added). Further, "[a]ll sworn jurors, including any alternates, shall take the same oath …." Rule 4-312(g)(2). Therefore, the presumption to be rebutted on Montgomery's direct appeal was that the empaneled jury was sworn under the same oath.

Prior to this Court's consideration of the appeal, Montgomery's appellate counsel moved to correct the record with an amended page 8 of the trial transcript, reflecting the clarification from the phrase "(JURY PANEL SWORN)," to the colloquy with the courtroom clerk of the full oath given to the jury panel pool prior to *voir dire*. Counsel offered the court reporter's renewed certification that the original transcript and subsequent amendment were complete and accurate. Throughout the entire record, the representative statement "(JURY PANEL SWORN)" on page 8 of the original transcript was the only mention of the jury being sworn. Not believing that the presumption of regularity applied to the swearing of juries, appellate counsel relied solely on the amended transcript, which clarified that it was not the empaneled jury, but only the jury venire, or jury pool, that had been sworn, and the certification from the court reporter that the transcript is complete and accurate, to demonstrate that the final empaneled jury had not been sworn.

After holding that the presumption of regularity did apply, this Court ultimately found that Montgomery had failed to rebut the presumption of regularity, noting that:

> The record is devoid of any affirmative indication that the jury was unsworn. Neither the docket entries nor the transcript contain an affirmative statement that the jury was unsworn. The record is devoid of any mention by the attorneys or the courtroom clerk as to the jury not being sworn. According to the instant case's transcript, the circuit court took a twenty-four-minute recess before proceeding to opening statements. The record leaves open the possibility that the jury was sworn during that twenty-four-minute timeframe

> – or at some other time not on the record. Appellant points us to no affirmative evidence – and we find none in the record – that the jury was unsworn.

206 Md. App. at 380–81.

At the post-conviction hearing, Montgomery offered an affidavit from the court reporter attesting to her standard procedures as court reporter, and that there had been no problems with the recording system during the trial. The reporter testified to the same. In its Memorandum Opinion and Statement of Reasons and Ruling on Petition for Post Conviction Relief, the post-conviction court concluded that:

> [Appellate counsel's] representation was deficient under *Strickland* because she failed to secure an affidavit from the court reporter that *all* court proceedings were properly recorded and that the prepared transcript accurately reflected those proceedings. Had such an affidavit been included in the Motion to Correct Record, there is a substantial possibility that the appellate court would have concluded that the presumption of regularity had been rebutted. If the presumption were rebutted, the Petitioner would have ostensibly been entitled to a new trial on the ground that the jury was not sworn….

(Emphasis in original).

We agree with the post-conviction court's conclusion that, had appellate counsel rebutted the presumption of regularity, on direct appeal, under *Harris*, Montgomery might have been entitled to reversal. We concur in the court's finding of deficient performance.

Prejudice

Appellate counsel's deficient performance did not establish the structural error complained of. Therefore, the *Strickland* prejudice is not presumed. *See Newton*, 455 Md. at 357 (explaining that "[i]f the error is structural because it is fundamentally unfair, then it will satisfy the prejudice prong of *Strickland*").

The post-conviction court determined that "the appellate counsel's deficiency in this case was not prejudicial to [Montgomery][,]" because he "would not have succeeded on the unsworn jury issue." The court reached that conclusion by its reliance on our comment in footnote 17 of the opinion in Montgomery's direct appeal, wherein we found that he would have failed the fourth prong of the discretionary plain error review, "because an unsworn jury may be readily corrected." 206 Md. App. at 381 n.17.

We explained further that:

> As evidenced by [*Alston*, 414 Md. at 96], an unsworn jury may be readily corrected by a belated administration of the oath – and we should "not exercise our right to take cognizance of and correct any plain error material to the rights of [appellant], of our own motion, **if the alleged error was one that might have been readily corrected if it had been called to the [circuit court]'s attention.**" [*Morris v. State*, 153 Md. App. 480, 510 (2003)].

Id. (emphasis in *Montgomery*).

The *Newton* Court reiterated that "[p]lain error review is 'reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial.'" 455 Md. at 364 (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)). However, the Court explained that

> [b]efore we can exercise our discretion to find plain error, four conditions must be met: (1) "there must be an error or defect – some sort of 'deviation from a legal rule' – that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant"; (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings' "; and (4) the error must "seriously affect[] the fairness, integrity or public reputation of judicial proceedings."

455 Md. at 364 (quoting *Rich*, 415 Md. at 578).

Moreover, as Judge Moylan explained in *Morris v. State*, 153 Md. App. 480 (2003), a reviewing court's decision to decline plain error review, "would be … all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation." 153 Md. App. at 507. He also emphasized that "[w]hen all is said and done about an appellate court's discretionary option to indulge the 'plain error' exemption from the preservation requirement, the only hard and fast rule is that there are no hard and fast rules." 153 Md. App. at 524.

Nevertheless, we explained the rationale for our holding in Montgomery's direct appeal:

> Our holding discourages "defense gamesmanship" by ensuring that a defendant will not be able to get "a 'free look' at the State's case-in-chief" by deliberately not objecting to the trial court's failure to swear the jury. To hold otherwise would allow – and even encourage – defendants to refrain from calling readily corrected errors to the trial court's attention, and to attempt to avail themselves of automatic reversals on appeal.

Montgomery, 206 Md. App. at 381–82 (footnote omitted) (internal citations omitted).

We conclude that, because the structural error was not preserved at trial, prejudice is not presumed and a new trial is not automatic. If, and when, an unpreserved structural error is established on appeal, an appellant must then persuade the reviewing court to exercise its discretion to find plain error.

In the end, as the State posits, the question before us is whether Montgomery was prejudiced by his appellate counsel's performance, "which requires asking whether there was reasonable probability that, but for counsel's deficient performance, [he] would have prevailed in his direct appeal before this Court." In our view, we would not have. Thus,

having failed to preserve the error, Montgomery was required to show that he was prejudiced by appellate counsel's failure to rebut the presumption establishing the existence a structural error, thereby precluding a plain error review. Montgomery has failed to do so.

2. Trial Counsel

Montgomery also argues that his trial counsel provided ineffective assistance by not calling Deputy James Clay as a witness, because he believes that Clay would have contradicted the testimony of the two store employees as well as other aspects of the State's evidence underlying the crimes charged. He argues that counsel's performance was deficient – and not a strategic decision – because she failed to even interview Clay, deciding instead to rely on evidence related to the time of the call to police and the police response through the report generated by police dispatch.

The State disagrees, arguing that this was a reasonable trial strategy, based on trial counsel's testimony at the post-conviction hearing explaining why she did not call Clay. The State further asserts that counsel's decision not to interview Clay was reasonable, as there was another police witness on the State's witness list to cross-examine.

Trial counsel testified at the post-conviction hearing that she had considered calling Clay, the responding officer, but chose not to for strategic reasons, including that she did not want to risk drawing the prosecutor's attention to a witness, *i.e.* Clay, whom the State may have overlooked. She further testified that she was confident she could get into evidence the information she wanted from Clay through the dispatch report or through other witnesses. "[A] particular decision not to investigate must be directly assessed for

reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. Such decisions "made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.*

We cannot conclude that that counsel's decision to not interview Clay was an unreasonable professional judgment. Not only did counsel have the dispatch report to enter into evidence,[7] she knew she would be able to cross-examine the store's employees as well as the State's police witness about what took place and the investigation that followed. Clay's role in the investigation was limited to responding to the initial call approximately two hours after the transaction, the events of which the store employees could describe in cross-examination. Clay was neither an eye witness nor an alibi witness. Counsel weighed the risk of alerting the State to Clay as a witness against the other evidence she already had at her disposal and determined that Clay's testimony would likely be cumulative and therefore insignificant – and potentially harmful to the defense.

Counsel's trial decisions regarding Clay were strategic; accordingly, we need not reach the issue of whether Montgomery was prejudiced by her performance.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.

[7] Although counsel was ultimately unsuccessful in getting the dispatch report into evidence, she was able to have the police officer who testified read relevant parts of it into the record on cross-examination.