

FILED

OCT 29 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSHUA LEE ANDREW MERRITT,

Defendant-Appellant.

No. 17-10133

D.C. No.

4:14-cr-02147-RCC-EJM-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted September 11, 2018
San Francisco, California

Before: WALLACE, RAWLINSON, and WATFORD, Circuit Judges.

Appellant Joshua Lee Andrew Merritt (Merritt) challenges his convictions for distribution of child pornography and possession of child pornography in violation of 18 U.S.C. § 2252 and 18 U.S.C. § 2252A. Merritt contends that he was deprived of his Sixth Amendment right to an impartial jury because the district

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

court erroneously permitted a juror who admitted actual bias to be seated and serve as the jury's foreperson.

The seating of a biased juror “introduces a structural defect not subject to harmless error analysis.” *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc) (citation omitted); *see also United States v. Kechedzian*, 902 F.3d 1023, 1027 (9th Cir. 2018) (explaining that “the presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice”) (citation and alteration omitted). Even under plain error review, Merritt is entitled to a new trial. *See United States v. Chavez-Cuevas*, 862 F.3d 729, 734 (9th Cir. 2017) (stating that “[w]hen an error is constitutional in nature and implicates a structural right, the error affects substantial rights, and undermines the fairness of a criminal proceeding as a whole”) (citations, alteration, and internal quotation marks omitted).

During voir dire, Juror No. 30 stated that it “would be very hard for [him] to be fair” due to the nature of the charges alleged against Merritt. The juror was not directly asked any additional questions concerning his inability to be fair and impartial, and questions posed by the district court to the entire venire did not resolve any lingering doubts concerning the juror's bias. *See Kechedzian*, 902 F.3d at 1031 (concluding that, after a prospective juror made equivocal statements

concerning potential bias, questions posed to the entire venire did not serve to ameliorate doubts concerning the juror's bias). The district court stated its intention to dismiss Juror No. 30, along with several other prospective jurors, who conveyed that "they couldn't be fair." Despite the district court's stated intention, it was not brought to the district court's attention by either defense counsel or the government that the juror was not only erroneously seated on the jury, but became the jury's foreperson. Based on the district court's determination that the juror should have been dismissed due to bias, the seating of the juror requires a new trial. *See id.* (granting a new trial because "the district court was obligated to excuse [the prospective juror] for cause under an actual bias theory"); *see also United States v. Brugnara*, 856 F.3d 1198, 1211 (9th Cir. 2017) ("The Sixth Amendment guarantees a criminal defendant the right to a trial by impartial jurors. The presence of even one biased juror affects that right. . . .") (citations omitted).¹

REVERSED and REMANDED for a new trial.

¹ We do not address Merritt's contention that the district court plainly erred in imposing certain special conditions of supervised release. We leave any challenge related to supervised release conditions for the district court to resolve in the first instance should further proceedings so require.

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WALLACE, Circuit Judge, concurring:

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I reluctantly agree with the court that Merritt's conviction must be vacated under our precedent. But I have grave doubts about whether that result is warranted in this case, and fear that the expansion of our case law has removed jury selection from the province of the trial court and trial attorneys, who are best situated to make juror determinations.

My initial concern is with the scope of our review on appeal. The parties dispute whether plain error review should apply, and the court determines that it does not have to resolve that dispute because Merritt would be entitled to a new trial even under plain error review. In my view, plain error review is clearly appropriate. Merritt's lawyer has the duty to protect him, and his lawyer could have objected when the district court failed to dismiss Juror 30, as he now claims all parties agreed was proper, or when the district court continued to voir dire Juror 30 thereafter, or during his opportunity for strikes, or when the jury was empaneled. He did not. Instead, Merritt offered no objection at all until he raised the issue for the first time on appeal. In fact, when Merritt did appeal, the first version of the transcript actually reflected that Juror 30 was not on the list of biased jurors at all. Then at this late date the court reporter was apparently asked to review the original notes and apparently decided that Juror 30 was on that list. Merritt then

raised the issue only in his reply brief in this court. All said, it was Merritt's responsibility to inform the district court that he objected to Juror 30's presence on the panel, and he failed to do so. We therefore may correct the argued error only if it was plain.

Under plain error review, and assuming the accuracy of the so-called corrected transcript, I agree that an obvious error was committed under *United States v. Kechedzian*, 902 F.3d 1023 (9th Cir. 2018), which is law at the time of our review. See *Henderson v. United States*, 568 U.S. 266, 279 (2013) (holding that error is plain if obvious at time of appellate review). *Kechedzian* holds that once a prospective juror makes "initial responses suggesting bias," the district court has no discretion not to excuse the juror, even if the initial responses were equivocal, and even if the juror had no difficulty understanding the presumption of innocence and the burden of proof, unless the juror states she could have been impartial. 902 F.3d at 1027, 1029-31. Thus here, the court concludes that Juror 30's statement "it would be very hard for me to be fair" obliged the court to exclude him for cause.

I am skeptical that this result has any reasoned justification. Jurors are charged with the responsibility of putting their feelings aside in the hard cases and judging a case fairly. In the most difficult cases, such as prosecutions for child pornography, I do not doubt that most jurors would find it "hard to be fair." But

saying it is “hard” to be fair is not the same thing as saying one cannot be fair, and Juror 30 never said that he could not so be. Apparently Merritt’s lawyer agreed, as no questions were asked by the district judge or any attorney to flesh out this important distinction. Nonetheless, *Kechedzian* apparently instructs that such statements require the juror to make an affirmative statement of impartiality, even though there was no question asked on the issue. I suppose that, even if the lawyers representing the parties fail to ask the obvious questions, we must assume the illogical position that Juror 30 would state he cannot decide the case fairly.

Unfortunately, because we have held that “[w]hen an error is constitutional in nature and implicates a “structural” right, the error affects substantial rights, and ‘undermines the fairness of a criminal proceeding as a whole’” *United States v. Chavez-Cuevas*, 862 F.3d 729, 734 (9th Cir. 2017) (citations and alterations removed), plain error review is functionally equivalent to review as if Merritt had objected. The combination of *Kechedzian* and our plain error review jurisprudence thus has the effect of requiring district courts to obtain a clear statement of impartiality or to excuse the juror, once a juror says anything suggesting he *might* not be able to be fair. Such a rule improperly removes responsibility for juror selection from trial attorneys and encourages defendants not to object. I cannot agree that this is what the Sixth Amendment requires.

For these reasons, I concur, but only with grave reluctance.