COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP677-CR **Cir. Ct. No. 2008CF59**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICOLE M. KLOTTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Nicole Klotter appeals a judgment of conviction for burglary while armed with a dangerous weapon and attempted armed robbery, both as a party to the crime. Klotter argues the circuit court should have granted a mistrial after learning a juror failed to disclose pending charges against the juror's

sons. She also contends the verdict form for the burglary charge was confusing. We reject Klotter's arguments and affirm.

BACKGROUND

¶2 During voir dire, Michael Hansen was added to Klotter's jury panel after another potential juror was stricken for cause. When asked, Hansen told the court he heard the questions posed earlier to the panel, and that his only "yes" answer would have been that he was a prior juror.[1] Door County District Attorney Ray Pelrine then inquired whether Hansen had "any loved ones or friends involved in recent litigation or involved in litigation right now," or "any involvement, you or any family or friends involved in anything involved with my office right now." Hansen responded, "No."

¶3 The jury found Klotter guilty. Prior to sentencing, Pelrine informed the court he had learned Hansen failed to disclose that he had one or two relatives with pending criminal charges with his office. Pelrine's letter also stated the police officer seated with him during Klotter's trial recognized Hansen's name during voir dire and suspected Hansen may be related to two young men recently arrested on drug charges in Door County. Klotter requested an evidentiary hearing and moved for a mistrial.

¶4 At a hearing on Klotter's motion, Pelrine and the officer both acknowledged the officer had shared her suspicions about Hansen with Pelrine

[1] Klotter does not discuss what questions were previously posed to the jury panel. Our review of the transcript, however, reveals only the following two relevant questions: "Any of you involved in any kind of lawsuit at the present time, have direct involvement with the legal system?" "Anybody have any immediate family members that have any kind of litigation going that you're, you know, personally involved in?"

during voir dire. Hansen testified that he knew his sons had been arrested, that he had posted bail for one of them, and that he had not forgotten about posting bail by the time of Klotter's trial two weeks later.

¶5 However, Hansen also stated he thought he was testifying truthfully during voir dire, did not purposefully withhold any information or lie, never thought about his sons' legal problems during voir dire or the trial, and was not biased against either party at the time of jury selection.

¶6 The circuit court found Hansen's explanation credible, noting Hansen also tended to interject and answer questions before they were completely asked. Further, the court held Klotter did not demonstrate it was more probable than not that Hansen was biased against Klotter, observing it was equally plausible that any bias would have been against the State. Klotter now appeals.

DISCUSSION

¶7 A defendant who seeks a new trial on the ground that a juror lacked candor at the voir dire must demonstrate that the juror responded incorrectly or incompletely to a material question, and that it is more probable than not that the juror was biased against the defendant under the facts and circumstances of the particular case. ***State v. Faucher***, 227 Wis. 2d 700, 726, 596 N.W.2d 770 (1999). Bias may be statutory, subjective or objective. ***Id.*** at 716. On appeal, Klotter argues only that Hansen was objectively biased.[2]

[2] Objective bias was previously referred to as either implied or inferred bias. ***State v. Faucher***, 227 Wis. 2d 700, 716-17, 596 N.W.2d 770 (1999).

¶8 "[T]he focus of the inquiry into 'objective bias' is not upon the individual prospective juror's state of mind, but rather upon whether the reasonable person in the individual prospective juror's position could be impartial." ***Id.*** at 718. When assessing objective bias, a circuit court must consider the facts and circumstances surrounding the voir dire and the facts involved in the case. ***Id.*** However, the emphasis of the assessment remains on the reasonable person in light of those facts and circumstances. ***Id.*** at 718-19. In determining whether a person is biased, a circuit court should consider the following factors:

> (1) did the question asked sufficiently inquire into the subject matter to be disclosed by the juror;
>
> (2) were the responses of other jurors to the same question sufficient to put a reasonable person on notice that an answer was required;
>
> (3) did the juror become aware of his or her false or misleading answers at anytime during the trial and fail to notify the trial court?

Id. at 727. We give weight to the court's conclusion that a prospective juror is or is not objectively biased, and will reverse only if, as a matter of law, a reasonable judge could not have reached such a conclusion. ***Id.*** at 721.

¶9 Here, the circuit court found Hansen credible when he testified he was not thinking of his sons' legal problems during jury selection or trial. While it might also have been reasonable to conclude Hansen did recall the matter at some point during the three-day proceeding, the court's credibility finding is not clearly erroneous. *See* ***id.*** at 720.

¶10 Further, weighing the facts and circumstances of the case, the court concluded it was not more probable than not that Hansen was biased against

Klotter. The court reasoned that, even if Hansen did recall his sons' legal problems, it was just as likely that Hansen would be biased against the State. As Klotter concedes in her brief, it would also be reasonable to assume Hansen held no bias either way, and was merely embarrassed by the matter.

¶11 Regardless, we need not resolve whether a person with pending charges against family members would likely be biased, because the court concluded Hansen had no awareness of the issue during Klotter's trial. The court's credibility determination forecloses Klotter's argument.

¶12 We next address, and reject, Klotter's assertion that she is entitled to a new trial because a special verdict question was confusing. Specifically, Klotter challenges the question inquiring whether the burglary was committed while armed with a dangerous weapon. However, Klotter did not object to that question's form during trial. She has thus forfeited her right to raise the issue. *See* WIS. STAT. § 805.13(3);[3] ***State v. Lippold***, 2008 WI App 130, ¶10 n.9, 313 Wis. 2d 699, 757 N.W.2d 825. In any event, were we to reach the issue, we would agree with the State's argument and conclude the jury instructions and verdict question were, as a whole, not confusing.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.