**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 25, 2013**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal Nos. 2012AP2749-CR**
**2012AP2750-CR**

**Cir. Ct. Nos. 2009CF111**
**2009CF131**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PATRICK SCOTTY ERICKSON,**

**DEFENDANT-APPELLANT.**

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APPEALS from judgments and orders of the circuit court for Marinette County: JAMES A. MORRISON and TIM A. DUKET, Judges. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. In these consolidated appeals, Patrick Erickson challenges judgments convicting him of armed robbery and receiving stolen

property, and orders denying his motions for postconviction relief. Erickson makes two arguments on appeal: (1) his attorneys were ineffective for failing to request substitution or recusal when Judge Duket disclosed the mother of one of the robbery victims was the county clerk, whom Judge Duket knew; and (2) he is entitled to withdraw his plea because he was confused about whether the BB gun used in the robbery was a "dangerous weapon." We affirm.

## BACKGROUND

¶2 In Marinette County Case No. 2009CF131, Erickson was charged with burglary, felony theft, and criminal damage to property arising out of a July 4, 2009 break-in at a home in Peshtigo. In Marinette County Case No. 2009CF111, Erickson was charged with the armed robberies of two Marinette businesses. Victims and witnesses of both armed robberies told police the perpetrator brandished a gun.

¶3 Erickson made his initial appearance with Attorney Edward Burke, Jr. The preliminary hearing in both cases was scheduled for February 3, 2010. At the hearing, which ultimately resulted in waiver of the proceedings, Judge Duket disclosed that the county clerk was the mother of one of the robbery victims:

> As I understand it, and I haven't studied these complaints very well, Kathy Brandt is in the courtroom, and she is a long-term friend, and I think she's the mother of one of the victims in this case. Talk to her on occasion, send her emails and things like that. I don't think that matters one bit to me. I'm not going to treat the case any differently than if it was somebody else's daughter, but I thought that I should disclose that on the record, so if there's any problems, I can be subbed against or asked to recuse or whatever. Mr. Burke can have more time, if he needs to discuss that with Mr. Erickson.

Burke did not request more time or ask for substitution or recusal.

¶4 Erickson pleaded not guilty to all charges. Attorney Burke was relieved at Erickson's request on May 18, 2010, and Attorney Leonard Kachinsky was appointed by the State Public Defender. At a June status conference, Judge Duket made the same disclosure to Kachinsky he had made to Burke:

> Mr. Kachinsky, I made this record with Mr. Burke, and I'll make it with you again at this time regarding somebody that works at the courthouse here. Her daughter was the alleged victim of the gas station robbery. Her name is Kathy Brandt. She is the county clerk, and I deal with her on a number of different things, like elections and marriages, and I send her emails, and you know, we see each other in the courthouse.
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> So I said with Mr. Burke on board that I didn't have a problem with it. I'm confident I can be fair and neutral, and if there were a conviction, I wouldn't be sentencing any different than if it was some teacher I don't know at Marinette High School who had a daughter that was working at the gas station at the time. … [T]hat's something I want to make a record on so you're aware of it.

Judge Duket was not asked to recuse himself, nor was substitution requested.

¶5 Pursuant to a global plea agreement, Erickson pleaded no contest to one count of armed robbery and an amended charge in No. 2009CF131 of misdemeanor receiving stolen property. The remaining counts in both cases were dismissed and read in. The State agreed to recommend a twenty-year sentence for armed robbery consisting of twelve years' initial confinement and eight years' extended supervision, with a concurrent sentence for receiving stolen property. The State also agreed not to charge Erickson with attempted uttering of a forged writing, which arose out of events at Stephenson National Bank on July 8, 2009.

¶6 At the plea hearing, the court discussed the elements of armed robbery with Erickson. Referring to WIS JI—CRIMINAL 1480 (2009), the court described the "dangerous weapon" component of the crime:[1]

> The fifth element is at the time of the [robbery] the defendant used or threatened to use a dangerous weapon. A dangerous weapon is any firearm, whether loaded or not, any device designed as a weapon and capable of producing death or great bodily harm, any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm.

The parties agreed the complaint would be used as the factual basis for the plea. Erickson stated he had reviewed the elements of armed robbery, understood those elements, and did not have any questions.

¶7 At sentencing, the prosecutor revealed that the gun used in the robberies was not a firearm but a BB gun. Out of a possible forty-year maximum sentence on the armed robbery conviction, *see* WIS. STAT. § 939.50(3)(c), Erickson was sentenced to thirty years' imprisonment, consisting of twenty years' initial confinement and ten years' extended supervision. He was also sentenced to nine months' incarceration for misdemeanor receiving stolen property, concurrent to the armed robbery sentence.

¶8 Erickson filed a motion for postconviction relief, alleging both his attorneys were ineffective and he was not properly advised of the elements of

[1] WISCONSIN STAT. § 943.32(2) states that one who commits robbery "by use or threat of use of a dangerous weapon … or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon … is guilty of a Class C felony."

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

armed robbery during the plea hearing.[2] Specifically, Erickson argued Burke and Kachinsky performed deficiently by failing to request substitution or recusal of Judge Duket. Erickson also claimed he was entitled to plea withdrawal because he did not understand whether a BB gun was a dangerous weapon.

¶9 A ***Machner***[3] hearing was held before Judge Morrison.[4] Kachinsky and Erickson testified on the first day of the hearing. The hearing was continued because Burke was not available on the original hearing date.

¶10 Burke recalled discussing with Erickson Judge Duket's disclosure that he knew the county clerk. When asked his strategic reason for keeping Judge Duket on the case, Burke responded he believed the disclosure was potentially beneficial to his client. Burke stated he believed Judge Duket would hand down a more lenient sentence to avoid having his impartiality questioned on appeal. Burke also believed Judge Duket would have been more lenient than Judge Miron, the other judge in Marinette County.[5]

¶11 Kachinsky also recalled Judge Duket's disclosure. Kachinsky agreed that by the time he took over representation the time to request substitution as a matter of right had passed, so any request would had to have been for cause. With respect to a potential recusal motion, Kachinsky testified:

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[2] The motion included several other grounds not at issue in this appeal.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[4] Judge Duket retired January 3, 2012.

[5] Marinette County has only two circuit court branches. *See* WIS. STAT. § 753.06(8)(d).

> First of all, the relationship was of course not to the victim of the offense itself but to a relative of the victim, and second of all, Judge Duket indicated he felt that he could be fair and impartial in the case and didn't feel that that would affect his judgment.
>
> My conclusion was based on his statements and the facts that there would not have been grounds to ask him to recuse himself. If he subjectively felt that he could be fair and impartial because of their relationship, it's not direct enough for mandatory recusal.

Kachinsky continued that his reaction was "if Duket was taken off the case, we'd have Judge Miron who in my professional opinion would have been harsher on the sentencing end than Duket …." Kachinsky acknowledged Erickson's sentence was harsher than he anticipated. Kachinsky also testified that he was not concerned Erickson used a BB gun during the robberies, because Kachinsky's opinion was that a BB gun was a "dangerous weapon" in that it could cause "substantial bodily harm, loss of sight, and other sorts of injuries."

¶12 Erickson testified he was very concerned about Judge Duket's disclosure. He testified inconsistently about whether he discussed removing Judge Duket with Burke. However, Erickson acknowledged discussing the matter briefly with Kachinsky, who told him that Judge Miron might be harsher. Erickson stated a BB gun was used in both robberies, and he recalled being concerned at the plea hearing whether a BB gun was a dangerous weapon. However, Erickson acknowledged he confirmed his understanding of the offense

elements at the plea hearing, declined the court's invitation to ask questions, and signed the plea form, which included WIS JI—CRIMINAL 1480.[6]

¶13 The postconviction court denied Erickson's motion. It concluded Erickson's attorneys twice made the reasonable strategic decision to keep Judge Duket on, and it discounted any possible prejudice by observing Judge Duket exceeded the plea recommendation only after careful consideration of many appropriate factors. The court also concluded Erickson was not entitled to plea withdrawal because he agreed to the factual predicate for the charges and had every opportunity during the plea hearing to question the elements or indicate his lack of understanding.

## DISCUSSION

¶14 Erickson first asserts his trial attorneys were ineffective for failing to seek recusal or substitution of Judge Duket. Whether a defendant received ineffective assistance of counsel is determined using a two-pronged test. ***State v. Franklin***, 2001 WI 104, ¶11, 245 Wis. 2d 582, 629 N.W.2d 289. First, the defendant must show that counsel's representation was deficient. ***Id.*** Second, the defendant must establish that the deficient performance resulted in prejudice to the defense. ***Id.***

[6] The plea questionnaire also apparently included WIS JI—CRIMINAL 1480A (2009), entitled "ARMED ROBBERY: BY USE OF AN ARTICLE THE VICTIM REASONABLY BELIEVES IS A DANGEROUS WEAPON." However, defense counsel stated at the plea hearing that instruction was inapplicable, and the plea was accepted based on the elements contained in WIS JI—CRIMINAL 1480 (2009).

¶15 "A claim of ineffective assistance of counsel presents a mixed question of fact and law." ***Id.***, ¶12. We will not overturn the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether counsel's performance was deficient and whether it was prejudicial to the defense are questions of law this court decides de novo. ***Id.*** We need not address both components of the ineffective assistance inquiry if the defendant makes an insufficient showing on one. ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583.

¶16 We first examine whether there was deficient performance. "Under the deficient performance prong, we examine whether 'counsel's representation fell below an objective standard of reasonableness.'" ***Franklin***, 245 Wis. 2d 581, ¶13 (quoting ***Strickland v. Washington***, 466 U.S. 668, 688 (1984)). Our review of counsel's performance is highly deferential. ***Strickland***, 466 U.S. at 689. We presume counsel's conduct "falls within the wide range of reasonable professional assistance." ***Id.*** "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶17 Erickson has failed to demonstrate his attorneys performed deficiently by failing to request substitution or recusal of Judge Duket. Attorneys Burke and Kachinsky both testified they had strategic reasons for not seeking Judge Duket's removal. Specifically, Burke stated he believed Judge Duket would be more lenient than Judge Miron and might impose a lighter sentence to avoid appellate scrutiny. Kachinsky similarly believed that Judge Miron would have penalized Erickson more harshly than Judge Duket. "An appellate court will not second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by

trial counsel.'" ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (quoting ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983)).

¶18 Erickson's primary argument appears to be that if his two attorneys had discussed the matter with him, they would have brought a motion under the disqualification statute, WIS. STAT. § 757.19(2)(g). This argument is nonsensical. The premise of Erickson's argument is flawed because, as Erickson acknowledged at the postconviction hearing, he did discuss attempting to remove Judge Duket with at least one of his attorneys. Even so, disqualification under § 757.19(2)(g) is "up to the judge's own determination." ***State v. Carprue***, 2004 WI 111, ¶61, 274 Wis. 2d 656, 683 N.W.2d 31. Our review is limited to an objective determination of whether the judge went through the required exercise of making a subjective determination. ***Id.***, ¶62. We can infer from Judge Duket's statements that he made the requisite finding; as Kachinsky testified, Judge Duket "stated quite clearly … that he didn't think it would affect him." Counsel does not perform deficiently by failing to bring a meritless motion. ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

¶19 Erickson appears to argue his attorneys' failures to seek recusal based on the appearance of bias should be more heavily scrutinized because he has a constitutional right to be tried by an impartial and unbiased judge. *See* ***State v. Walberg***, 109 Wis. 2d 96, 105, 325 N.W.2d 687 (1982). However, as the State observes, Erickson's argument is deficient because his brief ignores the body of case law that has developed in recent years regarding the appearance of bias. As a result, Erickson's brief-in-chief fails to recite or apply the applicable standard in an appearance of bias case—whether a reasonable person, taking into account human psychological tendencies and weaknesses, could conclude that the average

judge could not be trusted to hold the balance nice, clear, and true under all the circumstances. *See* ***State v. Goodson***, 2009 WI App 107, ¶9, 320 Wis. 2d 166, 771 N.W.2d 385; ***State v. Gudgeon***, 2006 WI App 143, ¶24, 295 Wis. 2d 189, 720 N.W.2d 114. We need not address undeveloped arguments, and we are particularly loath to take up insufficient constitutional claims.[7] *See* ***Cemetery Servs., Inc. v. Wisconsin Dep't of Regulation & Licensing***, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998).

¶20 Erickson also asserts that he either misunderstood or was improperly advised of the elements of armed robbery. However, his argument is difficult to discern. Erickson mentions the fact that both WIS JI—CRIMINAL 1480 and 1480A were attached to the plea questionnaire, but everyone agreed at the plea hearing that 1480A was inapplicable. As best we can tell, any potential confusion stemmed from the parties' use of the criminal complaint as the factual basis for the plea. The complaint indicated the use of a firearm was threatened, whereas Erickson was actually carrying a BB gun.

¶21 Whether to grant a motion for plea withdrawal lies in the sound discretion of the circuit court. ***State v. Cain***, 2012 WI 68, ¶20, 342 Wis. 2d 1, 816 N.W.2d 177. When a defendant moves to withdraw a plea after sentencing, the defendant must establish, by clear and convincing evidence, that withdrawal is

[7] Erickson, in reply, states that because WIS. STAT. § 757.19(2)(g) "is applicable in this case, and [because it] is not deemed worth mentioning in the ***Gudgeon*** and ***Goodson*** decisions, a deeper analysis invoking their doctrines does not appear to be required." *See* ***State v. Goodson***, 2009 WI App 107, 320 Wis. 2d 166, 771 N.W.2d 385; ***State v. Gudgeon***, 2006 WI App 143, 295 Wis. 2d 189, 720 N.W.2d 114. In essence, Erickson places all his eggs in the § 757.19(2)(g) basket under the assumption that the circuit court failed to comply with the statute. That assumption was incorrect; we have concluded the court effectively made the requisite subjective determination.

necessary to correct a manifest injustice. ***Id.***, ¶25. "Therefore, in order to disturb the finality of an accepted plea, the defendant must show 'a serious flaw in the fundamental integrity of the plea.'" ***Id.*** (quoting ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836).

¶22 We conclude Erickson is not entitled to plea withdrawal because the distinction between a firearm and a BB gun is immaterial for purposes of his plea. Armed robbery requires, as relevant here, the "use or threat of use of a dangerous weapon …." WIS. STAT. § 943.32(2). A firearm is a "dangerous weapon," but so is "any device designed as a weapon and capable of producing death or great bodily harm." WIS. STAT. § 939.22(10). A BB gun fits the latter definition. *See* ***State v. Michelle A.D.***, 181 Wis. 2d 917, 924-26, 512 N.W.2d 248 (Ct. App. 1994) (citing ***Rafferty v. State***, 29 Wis. 2d 470, 474-78, 138 N.W.2d 741 (1966)). Accordingly, Erickson has failed to establish manifest injustice arising from any potential confusion about whether a BB gun qualifies as a "dangerous weapon;" as a matter of law, it does.

*By the Court.*—Judgments and orders affirmed.

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