

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-3261-CR
STATE OF WISCONSIN**

Cir. Ct. No. 98-CM-1573

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK W. ROOB,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Waukesha County: DONALD J. HASSIN, JR., and MICHAEL O. BOHREN, Judges. *Affirmed.*

¶1 BROWN, J.¹ Mark W. Roob, a professional photographer, appeals from a judgment convicting him of unfair home solicitation selling practices in

¹ This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02).

violation of WIS. STAT. § 100.20(2) (1997-98)² as implemented by WIS. ADMIN. CODE § ATCP 127.03(5) (1993-94),³ and two postconviction orders denying his motion challenging the sufficiency of the evidence and his motion both challenging the jury instructions and alleging ineffective assistance of counsel. We hold that the trial court properly concluded that § ATCP 127.03(5) applies to the undisputed facts of this case, the jury was properly instructed and Roob's counsel was not ineffective. We affirm.

¶2 The following facts are relevant to this appeal. Roob is a wedding photographer. He had two locations for his photography business, one of which was in his home. His home office was the only location with phones and customer files. Roob's home was insured on his business policy.

¶3 To develop his business, Roob had arrangements with various specialty publishers for referrals through their magazine reply cards and bridal shows. Melanie Buellesbach attended two such bridal shows and filled out request cards stating that she would be interested in more information about photography. Roob was given a referral list by the event sponsor that contained Buellesbach's name, address and telephone number. He telephoned Buellesbach at her home on March 2, 1997. At Buellesbach's request, Roob sent her an informational fax at her place of employment on March 3. In the fax, a disclaimer noted that the \$450 reservation deposit, or photographer's fee, was nonrefundable. Buellesbach and her fiancé met with Roob at his home on March 5 to discuss the information Roob

² All further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

³ All further references to the Wisconsin Administrative Code are to the 1993-94 revision unless otherwise noted.

had faxed to them and to look at other albums. In early April, Buellesbach sent Roob a check for the photographer's fee in the amount of \$450. On April 29, the parties signed a formal contract. The contract was for photography services, a minimum of eighty 5 x 7 photographs at \$15 each, for a total of \$1200, and an album. The contract specified a photographer's fee of \$500, which is \$50 more than was listed in the March 3 informational fax. When Buellesbach objected to the photographer's fee being raised and asked for the check back, Roob refused, claiming that the check was nonrefundable. Because the wedding was only three months away and they did not want to lose the \$450 deposit, Buellesbach and her fiancé agreed to pay the extra \$50.

¶4 Buellesbach and her fiancé were married in August. Roob photographed the wedding and was paid an additional \$1345.20. On August 27, the Buellesbachs met with Roob at his house for a design session for the wedding album. During the session, Roob presented the couple with a design layout. Buellesbach testified that there were between 100 and 110 photographs in the design layout and some of the photographs were 8 x 10's and 10 x 10's. Roob told them that they would have to pay for these photographs separately, in addition to the amount due for the eighty 5 x 7 photographs. The Buellesbachs told Roob that they wanted to pick out an eighty-picture photo album, but Roob would not permit them to do so. Roob informed the couple that if they wanted the eighty 5 x 7 photographs they contracted for, they would have to pay the a la cart price, which was \$25.95 for each photograph. The Buellesbachs then refused to purchase the album Roob proposed and left the design session.

¶5 When Roob refused to produce photographs, the Buellesbachs contacted the Department of Agriculture, Trade and Consumer Protection (DATCP). Elmer Prenzlow, who later testified at trial and submitted documents

obtained from Roob during that investigation, investigated the complaint for the DATCP. After investigating, DATCP referred the case to the district attorney's office for prosecution. On June 4, 1998, Roob was charged with three misdemeanor counts of unfair home solicitation selling practices in violation of WIS. STAT. §§ 100.20(2) and 100.26(3), as implemented by WIS. ADMIN. CODE ch. ATCP 127. On January 12, 2000, a jury found Roob guilty on one count of unfair trade practices, concluding that Roob had made statements or representations inconsistent with or contradictory to a contract document in connection with a home solicitation sale in violation of WIS. ADMIN. CODE § ATCP 127.03(5).

¶6 In July 2001, Roob filed a postconviction motion challenging the sufficiency of the evidence. The motion was denied. In December 2002, Roob, proceeding pro se, filed a supplemental motion for postconviction relief, challenging the jury instructions and alleging ineffective assistance of counsel. This motion was also denied. This appeal followed.

¶7 Roob challenges the trial court's rulings on three grounds. First, he asserts that WIS. ADMIN. CODE ch. ATCP 127 does not apply to the undisputed facts of this case. Second, he argues that his right to due process was violated by an erroneous jury instruction. Third, he contends that his counsel was ineffective for failing to object to the erroneous jury instruction and for failing to object to certain testimony and exhibits based on use immunity pursuant to WIS. STAT. § 93.17. We address each argument in turn.

¶8 Roob argues that WIS. ADMIN. CODE ch. ATCP 127 does not apply for two reasons. He contends that because the initial telephone call and fax originated from his residence, which he alleges was a regular place of business,

ch. ATCP 127 does not apply. Roob also asserts that the plain language of ch. ATCP 127 requires that “contact between the seller and buyer be initiated by the seller” and that Buellesbach invited his telephone call by completing an attendance card at a bridal show.

¶9 Although Roob frames his first argument in terms of a challenge to the sufficiency of the evidence, thereby mandating a deferential review, Roob is actually raising a question of law. Interpretation of a statute and application of that statute to a set of undisputed facts are questions of law this court reviews de novo. *State v. Briggs*, 214 Wis. 2d 281, 285, 571 N.W.2d 881 (Ct. App. 1997). This standard also applies to the interpretation and application of administrative rules. *Huff & Morse, Inc. v. Riordon*, 118 Wis. 2d 1, 4, 345 N.W.2d 504 (Ct. App. 1984).

¶10 For Roob to have engaged in unfair trade practices contrary to WIS. STAT. § 100.20(2), his conduct must fit the statutory definition of a home solicitation sale contained in WIS. ADMIN. CODE § ATCP 127.01(1). Section ATCP 127.01(1) defines “[h]ome solicitation selling” as

the selling or leasing, or the offering for sale or lease, of goods or services primarily for personal, family, or household purposes, including courses of instruction or training, where the sale, lease, or offer thereof is either personally solicited or consummated by a seller at the residence or place of business or employment of the buyer, at a seller’s transient quarters, or away from seller’s regular place of business. Personal solicitation includes solicitation made directly or indirectly by telephone, person-to-person contact, or by written or printed communication other than general advertising indicating a clear intent to sell goods or services at a regular place of business, and other than catalog or mail solicitation not accompanied by any other solicitation. Transient quarters includes hotel or motel rooms, or any other place utilized as a temporary business location.

¶11 The fact that the March 1997 telephone call and fax originated from Roob's home, his alleged "regular place of business," is not dispositive. The rule specifically governs transactions that are personally solicited "by a seller *at the residence or place of business or employment of the buyer*, at a seller's transient quarters or away from seller's regular place of business." According to its plain language, the rule is concerned with where a solicitation is received and not where it originates. Here, Roob contacted Buellesbach at her residence by telephone and at her place of employment by fax. Roob's conduct therefore is specifically covered by WIS. ADMIN. CODE ch. ATCP 127.

¶12 Furthermore, Roob's claim that Buellesbach initiated the contact between the parties by completing an attendance card at a bridal show is misleading. In order to develop his business, Roob submitted his name to specialty publishers so that he could receive a list of names of individuals who, like Buellesbach, attended bridal shows and expressed an interest in wedding photography on their attendance cards. In this case, when Roob received Buellesbach's contact information from the specialty publisher, it was Roob who initiated the communication between the two parties by directly contacting Buellesbach at her residence and offering his services. This is exactly the type of personal solicitation that WIS. ADMIN. CODE ch. ATCP 127 targeted. Accordingly, we reject Roob's argument that ch. ATCP 127 does not apply to his conduct.

¶13 We now turn to Roob's second contention—that the jury instructions misstated the law. Roob observes that the definition of home solicitation selling in the jury instructions included sales that were either personally solicited or consummated "by the defendant at the residence of the buyer or away from the defendant's regular place of business." Roob argues that presenting the jury with

these two alternative means of committing the charged offense violated his right to due process because in *Reusch v. Roob*, 2000 WI App 76, ¶¶18-19, 234 Wis. 2d 270, 610 N.W.2d 168, we established as a matter of law that Roob’s residence was a “regular place of business.” Whether the jury instructions given by a trial court violated the defendant’s right to due process is a question of law that an appeals court reviews independently of the lower court. *State v. Howard*, 211 Wis. 2d 269, 277, 564 N.W.2d 753 (1997), *overruled on other grounds by State v. Groth*, 2002 WI App 299, ¶9, 258 Wis. 2d 889, 655 N.W.2d 163.

¶14 We note that the jury trial in this case was held in January 2000 and the *Reusch* opinion was not released until March 2000, making it impossible to give jury instructions based on that decision. Regardless, the holding in *Reusch* is based solely on the facts presented in that case and not on any principle of law. *See Reusch*, 234 Wis. 2d 270, ¶¶18-19 (holding that Roob’s residence was his “regular place of business” because the buyer had solicited Roob’s services by calling him at his home and making an appointment to meet at his residence, the parties had signed the agreement at his residence, Roob had a business permit for his residence, and the contract and other written communication between the parties contained the telephone number and address for Roob’s residence). Thus, our decision in *Reusch* did not establish as a matter of law that Roob’s residence was a regular place of business.

¶15 The jury instruction given in this case fully and fairly explained the applicable law. The definition of home solicitation selling in the instruction was taken virtually verbatim from WIS. ADMIN. CODE § ATCP 127.01(1). Further, based on the evidence before it, the jury reasonably could have concluded that Roob had personally solicited Buellesbach by placing a telephone call to her residence and faxing her place of employment or that Roob’s residence was not a

regular place of business, meaning that WIS. ADMIN. CODE ch. ATCP 127 applied to any transaction that occurred there. Accordingly, we conclude that the jury instructions did not deprive Roob of his right to due process.

¶16 Finally, we turn to Roob's ineffective assistance of counsel claim. The familiar two-pronged test for an ineffective assistance of counsel claim requires a defendant to prove (1) deficient performance and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel, which are outside the wide range of professionally competent assistance. *Id.* at 690. There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Id.* at 687. In order to succeed, 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. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

¶17 Our standard for reviewing an ineffective assistance of counsel claim involves a mixed question of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Findings of fact will not be disturbed unless clearly erroneous. *Id.* The legal conclusions as to whether counsel's performance was deficient and prejudicial, however, are questions of law that we review de novo. *Id.* at 128. We need not address both *Strickland* prongs if the defendant fails to make a sufficient showing on either one. *Strickland*, 466 U.S. at 697.

¶18 Roob alleges that his counsel was ineffective for two reasons. First, Roob contends that his counsel should have objected to the aforementioned jury instruction. In support of this argument, Roob once again cites to this court's conclusion in *Reusch* that Roob's home office is "alternate regular place of business." *Reusch*, 234 Wis. 2d 270, ¶¶18-19. However, as stated earlier, the jury trial was held in January 2000 and the *Reusch* decision was not released until March 2000. It is impossible to raise an objection based on a decision released two months after trial. Furthermore, for reasons previously stated, the jury instructions fully and fairly explained the applicable law. Hence, Roob's counsel had no basis for objecting to the jury instructions and was not deficient for failing to do so.

¶19 Roob also argues that his counsel was ineffective for failing to object to Prenzlów's testimony and the admission of the documents obtained during the investigation based on use immunity provided by WIS. STAT. § 93.17. Roob appears to believe that § 93.17 should apply because he felt compelled to respond to the DATCP's investigation.

¶20 WISCONSIN STAT. §§ 93.14 and 93.15 allow the DATCP to conduct hearings, subpoena witnesses and take testimony and, by general or special order, to require individuals engaged in business to turn over relevant business information. WISCONSIN STAT. § 93.17 grants immunity as to answers given or documents turned over to DATCP in the course of the investigation, but only in certain circumstances.⁴ The applicability of § 93.17 is specifically limited to those demands "made under WIS. STAT. §§ 93.14 and 93.15."

⁴ WISCONSIN STAT. § 93.17 provides:

(continued)

¶21 In its analysis at the *Machner*⁵ hearing, the trial court noted that Roob offered no evidence at trial or during subsequent hearings that the DATCP ever requested specific documents or demanded any statements from Roob. It is evident that the DATCP simply informed Roob that a complaint had been filed and offered him an opportunity to respond. Any information Roob provided was volunteered and not compelled pursuant to WIS. STAT. §§ 93.14 or 93.15. Consequently, WIS. STAT. § 93.17 did not bar the testimony of Prenzlou or any exhibits relating to the investigation. As there were no grounds for an objection to the testimony or exhibits based on immunity, Roob's counsel's performance was not deficient. *See State v. Elm*, 201 Wis. 2d 452, 462-63, 549 N.W.2d 471 (Ct. App. 1996) (concluding that trial counsel was not ineffective for failing to object to admissible evidence). We therefore reject Roob's final contention that he is entitled to a new trial based on ineffective assistance of counsel. We affirm.

Immunity; perjury. (1) Except as to a hearing or proceeding under s. 93.06(3) or as to an investigation preliminary thereto, no person may be excused from testifying or rendering a report or answer or producing or submitting a document, in response to a demand made under s. 93.14 or 93.15, upon the ground or for the reason that the testimony or report or answer or document required of him or her may tend to incriminate him or her or subject him or her to a penalty or forfeiture; but no natural person may be prosecuted or subjected to any penalty or forfeiture for or on account of testifying or rendering a report or answer or producing or submitting a document, in response to a demand made under s. 93.14 or 93.15, and no testimony so given or report or answer so rendered or document so produced or submitted may be received against him or her in any criminal action, investigation or proceeding; provided, that no natural person so testifying may be exempt from prosecution and punishment for perjury committed by him or her in so testifying or for misrepresentation or concealment committed by him or her in so rendering a report or answer or so producing or submitting a document.

⁵ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

By the Court.—Judgment and orders affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

