

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 2004

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. 03-0982-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00CF000253

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK W. ROOB,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Mark W. Roob appeals *pro se* from judgments entered after a jury convicted him of four counts of fraudulent representations, and four counts of fraudulent writings, contrary to WIS. STAT. §§ 100.18(1), (9) and

943.39(2) (1999-2000).¹ He also appeals from an order denying his postconviction motion. Roob claims: (1) there was insufficient evidence to support the jury's verdict; (2) the jury instructions were incomplete and improper; (3) trial counsel provided ineffective assistance; (4) the trial court violated copyright law by requiring him to turn over to the victims photographs, proofs and negatives; and (5) the restitution award overcompensated the victims and improperly included attorney fees. Because we resolve each claim in favor of upholding the judgments and order, we affirm.

BACKGROUND

¶2 Roob was a wedding photographer. The charges in this case arise from his conduct relative to four couples: Matthew and Elizabeth Hackett, Duane and Laura Reusch, Neal and Anne Grintjes, and Scott and Cindy Biesterveld.

¶3 When the Hacketts met with Roob, he estimated that his "minimum package" would cost \$1700. This included the photographer's fee, eighty 5x7 photos, and a four-hour "design session." Ultimately, the Hacketts signed a contract reflecting the minimum package, plus an additional one hundred 5x5 original proofs. The contract price was \$2146.93.

¶4 At the Hackett wedding on July 22, 1995, Roob refused to allow Elizabeth's mother to take a snapshot of the couple. Roob insisted that he was the "exclusive" photographer and no one else would be permitted to take any pictures. At the end of the evening, Roob was paid the balance owed on the contract.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶5 The Hackett design session occurred on August 12, 1995, at Roob's home. The Hacketts were presented with about 250 photographs. Roob began laying the best pictures on the floor, as they would appear in the wedding album. When Elizabeth noticed that the array would greatly exceed eighty pictures, she attempted to remove or limit the pictures. Roob resisted these attempts, stating that removing any pictures would offset the whole album and ruin the artistic flow. He indicated that removing any pictures from his array would result in having to start all over. When the original four-hour time period expired, Roob told the Hacketts that he would charge them an additional \$80/hour.

¶6 The Hacketts asked if they could take the proofs home to review. Roob refused. He also told them that if they did not purchase the pictures at that time, he would charge them "a la carte" prices for all the photos, which would be much more expensive. The Hacketts had three choices—agree to the array of approximately 130 pictures, which would cost an additional \$1917.78; pay Roob \$80/hour to continue to try to reduce the number; or leave and pay a la carte prices the next day. The Hacketts agreed to purchase the array Roob had designed and gave him a \$500 deposit check.

¶7 Elizabeth returned the next day with a list of eighty photos she had made from memory and requested that Roob change the order to those eighty photos. Roob said he could make the change, but Elizabeth would have to pay a la carte prices for the eighty photos, which would exceed the \$1917.78 price. The Hacketts eventually paid the balance and received their wedding album. They paid a total of \$4152.11.

¶8 The second couple involved in this matter was the Reusches. Laura's mother procured Roob's services, agreeing to purchase eighty 5x7 photos.

She gave Roob a check for \$425 as a deposit on September 12, 1995. The contract, signed later, included the eighty photos plus one hundred proofs for a total of \$2286.24. The Reusch wedding occurred on October 19, 1996. Roob refused to let anyone take any pictures. The contract price, plus a charge of \$168.96 for Roob's "overtime," was paid.

¶9 The Reusches appeared for their design session with Roob on November 11, 1996. As they reviewed the photos, Roob set the good photos in an array on the floor. Duane testified that Roob had set down eighty pictures before they even walked "down the aisle." When the Reusches attempted to remove pictures, Roob objected saying that it would "mess up" the story of their wedding. Duane testified that Roob's demeanor was condescending and overbearing.

¶10 Roob told the Reusches that if they did not select an album at the design session, they would have to pay a la carte prices, which were about twice as expensive. At the conclusion of the session, the Reusches ended up with an additional cost of \$2666.82. Roob told them their four-hour design session was over, and that he charges \$80/hour for overtime. Duane testified that their only option was to take all the additional pictures or leave with nothing.

¶11 The next day, Duane contacted Roob to try to amend the order, offering to pay the extra \$80/hour fee. Roob refused. Duane paid a \$500 deposit and was permitted to take the proofs home. The Reusches again contacted Roob to cancel the order and he again refused. Duane stopped payment on the \$500 deposit check and initiated civil proceedings.

¶12 The third couple involved was the Grintjeses. Anne and her mother met with Roob and hired him to photograph the wedding. They agreed to a contract calling for eighty 5x7 photos for an estimated \$1500. The Grintjeses

signed the contract Roob sent to them agreeing to pay \$1763.52. Two weeks before the wedding, Roob notified the Grintjeses that prices had increased. Anne testified that Roob said if they did not also agree to order 5x5 photos, the prices would be much higher after the wedding. Anne agreed to purchase 250 5x5 proofs and signed a new contract for \$2671.68.

¶13 Anne testified during the trial that Roob yelled at guests who tried to take photographs. At the end of the evening, Roob told the Grintjeses he had worked 3.25 hours overtime and demanded payment. Despite not having had agreed to pay for overtime, Anne's father paid Roob \$2496.24, which was the balance on the contract, plus overtime.

¶14 At the design session, Roob set forth an array of photos for the Grintjeses, which ended up totaling around \$4000 over what had already been paid. The Grintjeses became upset and indicated this was unaffordable. They began pulling out pictures. Roob resisted removal of the photos and told them if they did not agree at the design session, they would have to pay a much higher price, plus overtime. After a couple hours, the total was reduced to \$3200 and two albums. Anne said she begged Roob to reduce it further, to one album, but he refused, saying it would "destroy" the artwork that he put together.

¶15 Sometime after midnight, six hours into the design session, the Grintjeses signed a purchase order for \$3255.17 and gave Roob a \$500 deposit. Neal said that Anne was upset and crying about never seeing their wedding pictures if they did not agree to the order. The next day, the Grintjeses phoned Roob to try to reduce the order. He refused. The Grintjeses made periodic payments to Roob over the course of the next year and finally, four days before

their first anniversary, they made the last payment and received their wedding pictures.

¶16 The fourth couple was the Biestervelds. They agreed to pay \$1784.64 for the photography fee and eighty 5x7 photos. Cindy testified that she told Roob they had a \$1500 budget for photos, and he assured her that the only extra cost would be for the album, which would run around \$300. The Biestervelds signed a contract and paid a \$450 deposit. Shortly before the wedding date, Roob notified them of price increases, and a new contract for \$1879.68 was signed.

¶17 On October 4, 1997, the Biestervelds were married. Roob refused to allow anyone else to take photos at the wedding. At the design session on October 21, 1997, the Biestervelds reviewed photos for three hours. Roob then laid out the pictures on the floor. When Cindy tried to remove pictures, Roob refused, saying she would ruin his artistry and destroy the story of the event. At the end of the session, the photo array priced out at \$3221.38 above what had already been paid. Scott told Roob that this price was way beyond what they intended to spend. Roob told them they could pay the \$3221.38, or come back the next day and pay a la carte prices, or let Roob keep the \$1879.68, which had already been paid. He also said that if the Biestervelds continued to look at the pictures, he would charge them an hourly rate. The Biestervelds signed the contract and gave Roob a \$1700 deposit.

¶18 After they left Roob's studio, the Biestervelds agreed that they did not want the additional photos. They returned and tried to cancel. Roob refused. Scott testified that Roob indicated they did not have the right to cancel because the contract was signed in his home, not a business, that Roob said he had "tied every

loophole” and he would not lose in court. The next day, Scott stopped payment on the \$1700 check and began civil proceedings against Roob.

¶19 As a result of these incidents, the State charged Roob with four counts of fraudulent representations and four counts of fraudulent writings. The case was tried to a jury, which found Roob guilty on all eight counts. He was fined \$100 on each of the fraudulent representation counts, and he was sentenced to three years’ imprisonment on each of two counts of fraudulent writings, to be served concurrently, and to five years’ probation on the remaining two counts of fraudulent writings, to be served concurrently to each other and consecutively to the term of imprisonment.

¶20 As a condition of probation, Roob was ordered to pay restitution to each couple and ordered to turn over to each couple all proofs, photographs and negatives of their wedding. He was also prohibited from working as a self-employed photographer or from involving himself in photography negotiations.

¶21 Although Roob was represented by counsel during trial, he filed his postconviction motion *pro se*. The trial court summarily denied Roob’s motion. Roob now appeals.

DISCUSSION

¶22 Roob raises five issues for our consideration, whether: (1) the evidence was insufficient to support the jury’s verdict; (2) the trial court erroneously instructed the jury; (3) the order to surrender all photos, negatives and proofs to the victims violated copyright law; (4) the trial court erroneously exercised its discretion in ordering restitution; and (5) Roob received ineffective

assistance of counsel. We resolve each issue in favor of upholding the judgment and order.

A. Insufficiency of the Evidence.

¶23 Roob first argues that the evidence adduced at trial was insufficient to support the jury's verdict. We disagree.

¶24 In reviewing sufficiency claims, we will uphold a conviction “unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶25 Here, the record reflects that a reasonable jury could have found Roob guilty on all eight counts. In order to prove fraudulent representation, three elements are required: (1) that a representation was made; (2) there was a plan or scheme attached to the representation; and (3) the purpose or effect of the plan or scheme was to not sell the product as represented. WIS. STAT. § 100.18(1), (9); *State v. American TV & Appliance of Madison, Inc.*, 146 Wis. 2d 292, 303, 430 N.W.2d 709 (1988). In order to prove the crime of fraudulent writings, the State had to prove that Roob, with intent to injure or defraud by means of deceit, obtained a signature to a writing which was subject to forgery under WIS. STAT. § 943.38(1). WIS. STAT. § 943.39(2).

¶26 Roob challenges the third element of fraudulent representation, and argues that if as long as he followed the terms of the contract, he is not guilty of scheming to sell something other than the represented product. Likewise, he

contends that if he is not guilty of the fraudulent misrepresentation charges, he cannot be guilty of the fraudulent writing charges. We reject Roob's contentions.

¶27 The evidence demonstrates that Roob represented to each of the four couples that they would be purchasing a minimum order of eighty 5x7's at a specified price per photograph. However, the record reflects that Roob never intended to allow any couple to purchase only the minimum. He intended to require them to purchase *much* more than the minimum. Roob refused to allow any of the couples to have even the eighty pictures they had already purchased, unless they agreed to purchase many more.

¶28 The "design session," which was presented as an extra free service to the clients, in actuality was a vehicle used to coerce the clients into spending a great deal more than what they had contracted to spend. Each of the four couples testified as to Roob's refusal to allow them to remove pictures from his array to attempt to get down to eighty photos. Roob then wrote up purchase orders for thousands of dollars more than the couples had contracted to pay. He refused to allow the couples to take the proofs home; he told them if they did not agree to the purchase at the design session, they would have to pay much higher "a la carte" prices; and he refused to let anyone cancel or rescind the contract.

¶29 Moreover, Roob refused to allow any other photos to be taken at the wedding. He therefore had the only photographic records for each of these couples. In two cases, he was even told that the budget for photos was limited. He assured one couple that the only cost in addition to the original contract price would be \$300 for an album.

¶30 Viewing Roob's conduct with these four couples, this is not a close case. There is simply no question that a reasonable jury could find that Roob

planned and schemed to present an eighty-picture package, which would never be available. At the design session, the eighty-picture package was not an option. In fact, the couples would not get the original eighty pictures at all unless each agreed to buy a more expensive package. This is clearly the “bait and switch” prohibited by WIS. STAT. § 943.39(2) (1999-2000).

¶31 Likewise, there is sufficient evidence to uphold the fraudulent writings crimes as well. The jury could infer from the facts that Roob intended to injure or defraud by utilizing the “bait and switch” tactic, and that he used deceit to obtain the couples’ signatures. There was testimony that he told the victims that he had “tied every loophole” and would win in court. Roob told the victims that if they did not agree to purchase the design session package, they would get nothing and he would keep the contract money already paid. As a result, the victims provided Roob with a personal check—the required “writing subject to forgery.”

¶32 Based on the foregoing, we conclude that the evidence is sufficient to support the judgments; accordingly, we affirm.

B. Jury Instructions.

¶33 Roob raises several challenges to the jury instructions, arguing that they are both incorrect and incomplete. Roob concedes that no objection was made during the jury instruction conference. Accordingly, he waived his right to challenge the jury instructions under WIS. STAT. § 805.15(3). *See State v. Perkins*, 2001 WI 46, ¶11, 243 Wis. 2d 141, 626 N.W.2d 762. Therefore, his claim fails.

C. Ineffective Assistance.

¶34 Roob contends that trial counsel was ineffective for failing to challenge the jury instructions. We are not persuaded.

¶35 In order to establish ineffective assistance, a defendant is required to show both that counsel's performance was deficient and that he or she suffered actual prejudice as a result of the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, the movant must show that counsel's representation was below objective standards of reasonableness. *State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the movant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. If the movant fails to prove either prong, the claim fails. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶36 Here, Roob contends that the fraudulent representations instruction improperly stated the law and, therefore, his attorney should have objected to it. As a result, he claims he did not receive due process. Whether a jury instruction correctly states the law, and whether a jury instruction violates due process, are both legal questions, which we review *de novo*. *State v. Krawczyk*, 2003 WI App 6, ¶10, 259 Wis. 2d 843, 657 N.W.2d 77; *State v. Tomlinson*, 2002 WI 91, ¶53, 254 Wis. 2d 502, 648 N.W.2d 367.

¶37 Roob challenges the instruction to the jury on the second element, arguing that it permitted the jury to find guilt without linking the misrepresentation to the plan or scheme. The instruction provided:

The second element of this offense requires that there must have been a plan or scheme by the defendant at the time that he made the representation to the prospective customer. Plan or scheme means that the defendant must have already determined the purpose of his representation to the customer at the time that this representation was given.

¶38 We conclude that this instruction, when read in context, sufficiently establishes the required nexus between the elements. As the State points out, the above-quoted portion of the jury instruction was not provided to the jury in isolation, but as a part of the general instruction on fraudulent representations. The first paragraph of this instruction provided:

Fraudulent Representations as defined in Section 100.18(9) of the Wisconsin Statutes is committed by one who places before the public a representation concerning the sale of a product or service *which is part of a plan or scheme* which purpose is not to sell the product or service as advertised.

(Emphasis supplied.)

¶39 Accordingly, we conclude that the instruction, when taken in context, adequately states the law that the representation must be a part of the plan. Because the instruction was a correct statement of the law, Roob's counsel cannot be considered deficient for failing to object. Therefore, Roob failed to demonstrate that he received ineffective assistance of counsel on this basis.

¶40 Roob's second objection to the jury instructions is that the fraudulent writings instruction relieved the State of the burden of proving the third element of the crime—that the writing was subject to forgery under statute. The instruction pertinent to this claim provided:

The third element of this offense requires that the writing signed by a person is a writing subject to forgery under Wisconsin Statutes Section 943.38(1). Fraudulent

[w]ritings do not require the proof of [a]n actual forgery on the writings, but only that the writing is a document covered by the forgery statute. A personal bank check is a writing subject to forgery under Section 943.38(1) of the Wisconsin Statutes.

¶41 Roob argues that the final sentence relieved the State of having to prove the third element of the fraudulent writings counts. We reject Roob's contention that this instruction was improper. The model jury instruction for forgery includes the words, "a bank check is such a writing." By logical extension, the final sentence in the above-quoted instruction was not improper. A "check" is, as a matter of law, subject to forgery. Therefore, instructing the jury of this did not relieve the State of its burden of proving the third element of the crime. Based on this analysis, we conclude that Roob's counsel was not deficient for failing to object to this instruction.

¶42 Roob's final objection to the jury instructions is that his counsel should have requested an instruction on contract interpretation. Roob's defense was that he did not breach the contract and, therefore, he was not guilty. He contends that if trial counsel would have made the request, the trial court would have granted the request and the case would have turned out differently. We are not persuaded.

¶43 Whether to submit a requested jury instruction is left to the discretion of the trial court. *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). A trial court should give an instruction when the following four requirements are satisfied: (1) "the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence"; (2) "the request is timely made"; (3) "the defense is not adequately covered by other instructions"; and (4) "the defense is supported by sufficient evidence." *Id.* at 212-13 (citation omitted).

¶44 Here, Roob’s “theory of defense” was not a legal theory of defense. Thus, Roob’s claim fails on the first factor, and the trial court would not have given a “contract” instruction even if counsel had requested it. Moreover, Roob fails to establish that a “contract” instruction would have made a difference in the outcome of this case. Whether Roob complied with the contracts was not determinative of whether he was guilty of the crimes charged.

¶45 Because Roob has failed to establish that his trial counsel was ineffective with respect to the jury instructions, we reject his claim and affirm the judgment.

D. Copyright Law.

¶46 Roob contends that the court’s order for him to turn over proofs, pictures and negatives to the four victim couples in this case violates copyright law. We disagree.

¶47 The trial court has discretion under WIS. STAT. § 973.09(1)(a) to impose upon a probationer “any conditions which appear reasonable and appropriate.” *State v. Heyn*, 155 Wis. 2d 621, 627, 456 N.W.2d 157 (1990) (citation omitted). Conditions imposed by the trial court are reviewed under the erroneous exercise of discretion standard. *State v. Oakley*, 2000 WI 37, ¶8, 234 Wis. 2d 528, 609 N.W.2d 786. As long as the trial court applied the correct law to the pertinent facts and reached a reasonable determination, we will affirm its decision.

¶48 Roob bases his claim of copyright violation on paragraph eleven of the contracts:

Studio maintains exclusive right to all images, negatives, prints and their production, reproduction, duplication, alteration and use. Contractee agrees to pay a minimum of \$1,000 per infringement which is any unauthorized copy or use of STUDIO'S image, negative or prints plus all legal cost incurred to secure our rights. IT IS ILLEGAL TO COPY, REPRODUCE OR USE without Studio's written permission.

¶49 The copyright law is contained in Title 17 of the United States Code. It prohibits the involuntary transfer of an individual author's ownership of a copyright:

(e) Involuntary Transfer.--When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

17 U.S.C. § 201(e).

¶50 17 U.S.C. § 202 explicitly distinguishes between the copyright itself and material objects:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ... any material object ... does not of itself convey any rights in the copyrighted work embodied in the object

17 U.S.C. § 202.

¶51 The committee notes make clear that the material objects referred to in 17 U.S.C. § 202 include copies and negatives. *See* H.R. REP. NO. 94-1476, at 124 (1976) ("this includes transfer of the copy ... [and] the photographic negative").

¶52 The trial court's order required the transfer of material objects—proofs, pictures and negatives. It did not order the transfer of the copyright itself. Accordingly, Roob's argument to the contrary fails. We conclude that the trial court's ordered condition of probation was not unreasonable or inappropriate. It prevents Roob from destroying or altering the objects, it safeguards the victims and their property relating to their wedding, and it provides the victims with protection for any future reproductions from Roob.

E. Restitution.

¶53 Roob's final challenge is to the restitution award ordered by the trial court. He claims the trial court erroneously exercised its discretion because the awards compensate certain victims for merchandise they have retained, and that attorney fees were improperly awarded to certain victims. We affirm the restitution award.

¶54 Each couple was awarded restitution. The Hacketts were awarded \$2000, the Reuschses were awarded \$1551.32, the Biestervelds were awarded \$10,303.10, and the Grintjeses were awarded \$15,143.17.

¶55 Pursuant to WIS. STAT. § 973.20, a defendant sentenced to probation is required to pay restitution to the victims, unless there is a substantial reason not to. WIS. STAT. § 973.20(1r). A trial court's restitution order is reviewed under the erroneous exercise of discretion standard. *State v. Kayon*, 2002 WI App 178, ¶6, 256 Wis. 2d 577, 649 N.W.2d 334.

¶56 Here, the trial court awarded the Hacketts and the Grintjeses restitution in the amount each paid in excess of the original contract price. Roob argues that this amount should have been offset by the pictures that the couples

wanted to purchase. We reject Roob's argument. The victim of a crime has the burden of proving by a preponderance of the evidence, "the amount of loss sustained by a victim as a result of a crime." WIS. STAT. § 973.20(14)(a). Here, Roob essentially forced the victims to buy the entire package he put together and refused to let them remove the pictures they did not want or to purchase solely the originally contracted for eighty pictures. Thus, in a sense, all of the excess pictures were unwanted. Roob forced the couples to pay a substantial amount above the original contract price. His crime resulted in this loss sustained by the victims. Thus, it was appropriate for the trial court to award that amount as restitution.

¶57 Roob also argues that the trial court should have offset the restitution amount by the extra pictures, which the victims would have ordered if he had not committed these crimes. Roob, however, has failed to provide any evidence to demonstrate what amount of offset, if any, was appropriate. Accordingly, the trial court could not have offset the amounts submitted by the victims.

¶58 Roob also challenges the award of attorney fees. The court made the award because it was satisfied with the documentation provided by the victims identifying which attorney fees fell into the category of special damages. Roob argues that attorney fees do not constitute special damages and he should not be ordered to pay such as restitution because it violates the rule against using the criminal justice system "as an enforcer for the civil courts." We are not persuaded.

¶59 Attorney fees are recoverable as special damages pursuant to WIS. STAT. § 973.20(5)(a) because they can be recovered in a civil action against a defendant for his or her conduct in the commission of a crime. *State v. Anderson*,

215 Wis. 2d 673, 682-83, 573 N.W.2d 872 (Ct. App. 1997). We held in *Anderson*:

It follows naturally that when a defendant defrauds people, reasonable attorney fees expended to recover their losses from parties who are civilly or criminally liable may be awarded as restitution.... It also follows that litigation costs could be recovered in a civil action against Anderson for his conduct in the commission of the crimes for which he was convicted.

Id. By ordering Roob to pay attorney fees expended by the victims in this case, the trial court was able to fulfill the purpose of restitution—to return the victims to the position they were in before the wrongdoing. *See id.* at 682. If Roob had not committed these crimes, the victims would not have been forced to initiate civil litigation or defend themselves from civil actions he initiated. They would not have incurred the attorney fees. Based on the foregoing, we conclude that the trial court did not erroneously exercise its discretion in making the restitution award to the victims.

By the Court.—Judgments and order affirmed.

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

