IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SCOTT MICHAEL GORDON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13637 Trial Court No. 3AN-18-03532 CR MEMORANDUM OPINION No. 7040 — February 8, 2023

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael R. Spaan, Judge.

Appearances: Michael Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

Judge HARBISON.

Scott Michael Gordon was convicted of second-degree forgery after he tried to cash a stolen check at a bank.[1] The check had been stolen in a burglary earlier that

[1] AS 11.46.505(a)(1).

same day. Because Gordon's possession of the check obviously implicated him in the earlier burglary, the superior court instructed the jury that Gordon was not on trial for the burglary, and that evidence of the burglary could only be used as evidence of Gordon's knowledge that the check was stolen.

On appeal, Gordon argues that the court's limiting instruction was improper, and that it requires reversal of his conviction. As we explain below, Gordon's brief contains inaccuracies and misrepresentations that are so pervasive we had difficulty understanding his arguments. Moreover, the underlying claim, as best we can discern it, is without merit. We therefore affirm his conviction.

Background facts

This case arose after Gordon walked into a bank and attempted to cash a check made out to him from an asphalt company. Earlier that day, the asphalt company reported that the check had been stolen, along with other items, during a burglary of its office.

Because of the suspicious activity associated with the check, the bank teller called the police and then tried to stall Gordon while waiting for the police to arrive. After about twenty minutes, Gordon abruptly left the bank without his identification card or the check. Video footage from outside the bank showed Gordon speaking with the driver of a green truck, which appeared to be the same truck that had been observed at the scene of the burglary.

Prior to trial, the State proposed a limiting instruction under Alaska Evidence Rule 404(b) in anticipation that it would elicit testimony about the earlier burglary. The instruction was modeled after Alaska Criminal Pattern Jury Instruction 1.29. The instruction reminded the jury that it had heard about the earlier burglary, and then noted that Gordon was not on trial for that conduct. The instruction

further explained that if the jury concluded that Gordon was responsible for the burglary, it should only consider that information as evidence of whether Gordon knew the check was stolen when he attempted to cash it and not for any other purpose.

Gordon subsequently objected to this instruction on two grounds. First, he challenged the sentence which read: "You have heard evidence that the defendant may have engaged in conduct other than the conduct for which he is on trial." Gordon argued that this was inaccurate because, according to Gordon, the jury had not heard any evidence that he engaged in the burglary. He proposed an alternative sentence that read: "You have heard evidence a person or persons other than the defendant may have engaged in [the burglary]." (This alternative sentence is taken from defense counsel's statements on the record. It appears that defense counsel also provided a proposed written instruction, but that instruction is not in the record on appeal.)

The State, however, objected to this language, arguing that the evidence was unclear as to who committed the burglary, and that the instruction should not categorically state that a person *other than* Gordon had committed the burglary — *i.e.*, it should not affirmatively assert that Gordon had no involvement in the burglary.

In response to these objections, the court rewrote the instruction so that it neither suggested that the jury had heard specific evidence that Gordon committed the burglary, nor categorically excluded Gordon as a possible suspect. The first sentence of the issued instruction thus read: "You have heard evidence concerning a burglary at the [asphalt company]. This is not conduct for which [Gordon] is on trial." After the court's rewrite, Gordon's trial attorney stated that he had "no objection" to this first part of the instruction.

Gordon's second objection was to the part of the instruction that told the jury that if it concluded that Gordon was involved in the burglary, it could consider that evidence only for the purpose of establishing Gordon's knowledge that the check was

stolen, and not for any other purpose. Gordon argued that this was an improper purpose, and that evidence regarding the burglary could only be used to establish that the check was, in fact, stolen — not Gordon's knowledge of whether the check was stolen. The court rejected this argument, concluding that the jury could rely on the burglary to prove Gordon's knowledge, especially since Gordon was seen talking to the driver of the truck involved in the burglary not long after the burglary occurred.

The jury found Gordon guilty of second-degree forgery. He now appeals.

Why we reject Gordon's argument on appeal

On appeal, Gordon argues that the superior court's limiting instruction was improper and prejudicial. But the relevant argument portion of Gordon's brief — which consists of three parts — is premised on Gordon's repeated misreading of the record.

Gordon's first argument is that the instruction was issued "[o]ver [his] objection" and that Evidence Rule 404(b) limiting instructions should only be issued when requested by the defendant. He repeats this assertion in his reply brief, claiming that the State "should not be allowed to foist an unwanted instruction upon defendants under Rule 404(b)."

But as we discussed above, Gordon's trial attorney only objected to some of the language in the proposed Rule 404(b) limiting instruction, and affirmatively did not object to other portions. Indeed, defense counsel even proposed his own version of the limiting instruction, which he referred to as an "instruction[] I'd like to be given." Furthermore, we have reviewed the transcript, and there is no indication that Gordon was generally opposed to the court providing the jury with a Rule 404(b) limiting instruction.

Gordon's brief also never acknowledges that Gordon himself sought such a limiting instruction.[2]

Gordon's second argument is that evidence of the burglary was not admitted as prior bad acts evidence, and thus the limiting instruction given by the court was improper. According to Gordon, the State initially "presented the burglary evidence [to show that] the check was stolen" but later sought to use the burglary evidence to show that "Gordon may have known that the check was stolen" — *i.e.*, to show Gordon's state of mind, not for propensity.

Like Gordon's first argument, this claim is based on a misreading of the record. As noted above, the State filed its proposed Rule 404(b) limiting instruction prior to trial. The proposed instruction, which was also provided to defense counsel, explicitly asked the jury to consider the burglary as evidence of Gordon's "knowledge that the check was stolen and/or [his] intent to defraud." Thus, contrary to Gordon's position on appeal, the parties and the court clearly understood before the trial began that the State intended to admit evidence of the burglary as prior bad acts evidence under Rule 404(b).

Gordon's final argument is that the instruction given by the court was unfairly prejudicial. But the instruction Gordon quoted in his brief is actually the State's

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[2] In the context of his argument that a Rule 404(b) limiting instruction should not be issued over a defendant's objection, appellate counsel's failure to acknowledge that Gordon did not, in fact, make a general objection to the instruction is affirmatively misleading. And in his reply brief, appellate counsel maintained that Gordon generally objected to the limiting instruction, pointing to a line in the transcript, never mentioned in his opening brief, where Gordon's trial attorney stated, "I don't want you to give this instruction." This attempt to resuscitate his misleading opening brief again affirmatively misrepresented the record. As evidenced by the debate in the superior court about the precise language of the instruction, it is clear that defense counsel was asking the court to give a different version of the instruction, not that Gordon was generally opposed to a limiting instruction.

proposed instruction, which was modified at the defense counsel's request before it was issued to the jury. As we explained above, the first sentence of the State's proposed instruction stated: "You have heard evidence that the defendant may have engaged in conduct other than the conduct for which he is on trial." After defense counsel objected, this sentence was modified so that it no longer implied that the jury had heard evidence that Gordon may have engaged in the burglary. After the court made this change, Gordon's trial attorney stated that he had no objection to the corrected language.

But in his opening brief, Gordon relied on the first sentence of the State's original instruction for his argument that the instruction was prejudicial. He claimed that no evidence was presented that Gordon participated in the burglary and argues: "Accordingly, the only 'evidence' that Gordon participated in the burglary was the trial court's instruction that the jury had indeed been presented with evidence from which the jury may conclude that Gordon participated in the burglary." Gordon did not otherwise explain why the instruction was prejudicial, so his argument for prejudice appears to rely entirely on language that was never provided to the jury.

The State pointed out this mistake in its brief, and Gordon's appellate counsel, to his credit, acknowledged the mistake in his reply brief. But counsel neither withdrew his prejudice argument nor provided any alternative explanation for why the instruction that was actually issued caused Gordon prejudice. Instead, his reply brief admitted that the given instruction was "less bad than the proposed instruction," but asserted, without any additional explanation, that "the given instruction was still erroneous and prejudicial."[3]

[3] Appellate counsel's misrepresentations of the record are serious, and we remind him of his duties of both competence and candor. Alaska R. Prof. Conduct 1.1 & 3.3.

Gordon's inaccurate descriptions of what happened in this case make it difficult to understand and evaluate his argument on appeal, and this inadequacy in his briefing alone is a sufficient basis for denying him relief.[4] But we need not rely on the briefing deficiencies to affirm the judgment of the superior court because Gordon's underlying claim has no merit. As we are about to explain, we conclude that the Rule 404(b) limiting instruction was not prejudicial, and that the superior court did not abuse its discretion in providing that instruction to the jury.[5]

The evidence presented to the jury strongly suggested that Gordon was either involved in or aware of the burglary at the time he tried to cash the check: Gordon was in unexplained possession of a stolen check hours after it was taken; the bank teller noticed that Gordon appeared nervous as soon as he entered the bank; Gordon left the bank without the check or his identification; Gordon was seen speaking to the driver of the green truck (seemingly the same truck involved in the burglary) immediately after he left the bank; and Gordon disappeared from the bank premises at the same time as the truck.

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[4] *See Petersen v. Mutual Life Ins. Co. of N.Y.*, 803 P.2d 406, 410 (Alaska 1990) ("Where a point is not given more than a cursory statement in the argument portion of a brief, the point will not be considered on appeal."); *see also, e.g.*, *Burton v. Dep't of Env't Prot.*, 256 A.3d 655, 669-71 (Conn. 2021) (noting that briefing is inadequate when it is "confusing, repetitive and disorganized" (internal quotation marks and citation omitted)); *Harrison v. Woods Super Markets, Inc.*, 115 S.W.3d 384, 387 (Mo. App. 2003) (concluding that briefing was inadequate when it was "so jumbled and unclear" that the court could not understand the nature of the appellant's claims).

[5] *See Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 29 (Alaska 1998) ("As long as the jury is properly instructed on the law, . . . the trial court has broad discretion to determine whether to give instructions specially tailored to the case at hand. Rulings on such instructions are reviewed for abuse of discretion." (citations omitted)).

A reasonable juror, upon hearing this evidence, would likely have surmised that Gordon was involved in the burglary. The superior court did not unfairly prejudice Gordon by instructing the jury that Gordon was not on trial for the burglary, and that the jury should only consider Gordon's potential involvement in the burglary for the limited purpose of establishing his knowledge that the check was stolen.

Conclusion

The judgment of the superior court is AFFIRMED.