

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20050791-CA
v.)	
)	F I L E D
A. Paul Schwenke,)	(November 1, 2007)
)	
Defendant and Appellant.)	2007 UT App 354

Third District, Salt Lake Department, 031902460
The Honorable Leslie A. Lewis

Attorneys: A. Paul Schwenke, Draper, Appellant Pro Se
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake
City, for Appellee

Before Judges Bench, McHugh, and Thorne.

THORNE, Judge:

Defendant A. Paul Schwenke appeals from his jury trial convictions of securities fraud, see Utah Code Ann. § 61-1-1 (2006), attempted theft by deception, see Utah Code Ann. § 76-6-405 (2003), communications fraud, see id. § 76-10-1801 (Supp. 2007), and pattern of unlawful activity, see id. § 76-10-1603 (2003). Because Defendant's brief is inadequate under rule 24 of the Utah Rules of Appellate Procedure, we decline to review his claims. Accordingly, we affirm.

"It is well established that Utah appellate courts will not consider claims that are inadequately briefed." State v. Garner, 2002 UT App 234, ¶ 8, 52 P.3d 467. Utah Rule of Appellate Procedure 24(a)(9) states that the appellant's brief "shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on." Utah R. App. P. 24(a)(9). Although appellate courts are generally lenient with pro se litigants, see Lundahl v. Quinn, 2003 UT 11, ¶ 4, 67 P.3d 1000, such parties must still comply with the rules. Even taking into account Defendant's circumstances in preparing his brief while incarcerated, considering references to well

settled principles of law without citation, and giving him the leniency generally afforded pro se litigants,¹ Defendant's brief is nonetheless inadequate for failure to substantially comply with rule 24.

We initially note that Defendant failed to demonstrate grounds for reviewing issues not preserved in the trial court. Defendant argues for the first time on appeal that (1) his convictions violate his constitutional right against double jeopardy; (2) the trial court erred in its jury instructions on the elements of attempted theft by deception and communications fraud; and (3) the evidence presented at trial was insufficient to support his convictions of securities fraud, communications fraud, and pattern of unlawful activity. "'Under ordinary circumstances, we will not consider an issue brought for the first time on appeal unless the trial court committed plain error or exceptional circumstances exist.'" State v. Pinder, 2005 UT 15, ¶ 45, 114 P.3d 551 (quoting State v. Nelson-Waggoner, 2004 UT 29, ¶ 16, 94 P.3d 186). Defendant did not, in his opening brief, argue that plain error or exceptional circumstances existed to justify a review of these issues.² Defendant did assert, in his reply brief, that the issues raised on appeal were questions of law and plain error. However, "we will not consider matters raised for the first time in the reply brief." Coleman v. Stevens, 2000 UT 98, ¶ 9, 17 P.3d 1122. Because Defendant failed to argue that plain error or exceptional circumstances exist to justify a review of those issues, we decline to consider them on appeal. See State v. Pledger, 896 P.2d 1226, 1229 n.5 (Utah 1995).

Even if Defendant's issues were properly preserved, we would nonetheless decline to review his issues because Defendant's brief is, in large part, devoid of any meaningful legal analysis.

"[T]o permit meaningful appellate review, briefs must comply with the briefing requirements sufficiently to enable us to understand . . . what particular errors were allegedly made, where in the record those errors can be found, and why, under

1. We do note that Defendant is not in the same position as most pro se litigants in that, as a disbarred attorney, he is law trained.

2. Defendant, in his statement of the issues presented in his opening brief, identified the standard of review for the first two issues as plain error, but did not argue plain error in his opening brief.

applicable authorities, those errors are material ones necessitating reversal or other relief."

Garner, 2002 UT App 234, ¶ 13 (alteration and omission in original) (quoting State v. Lucero, 2002 UT App 135, ¶ 13, 47 P.3d 107). "This analysis 'requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority.'" Id. ¶ 12 (quoting State v. Thomas, 961 P.2d 299, 305 (Utah 1998)).

Defendant's arguments on appeal consist, in large part, of conclusory statements without relevant legal citations and reasoned analysis based on that authority. Defendant's argument that the trial court erred in its jury instructions on attempted theft by deception and communications fraud provides an illustration of his inadequate briefing. Defendant asserts that the jury instructions reduced the State's burden of proof because the instructions improperly state the elements of attempted theft by deception and communications fraud. However, the jury instructions track the statutory language, and Defendant fails to address or otherwise identify the manner in which either of the jury instructions conflict with the statutory language to reduce the State's burden. See Utah Code Ann. §§ 76-6-405, 76-10-1801. Because the relevant jury instructions track the statutory language and Defendant demonstrates no conflict, we conclude that Defendant has failed to brief a challenge to the jury instruction issue sufficient to permit review.

Similarly, Defendant also failed to adequately brief his argument that the evidence was insufficient to support his jury trial convictions of securities fraud, communications fraud, and pattern of unlawful activity. In arguing that the State failed to prove various elements, Defendant provides few relevant citations to legal authority and no legal basis for his contention that the evidence presented was insufficient to support his convictions. For example, Defendant provides one citation pertaining to his securities fraud argument that the stock at issue was not a security. However, the case cited, Securities & Exchange Commission v. W.J. Howey Co., 328 U.S. 293 (1946), which addresses federal securities fraud law, does not provide support for Defendant's argument that the stock at issue was only a "paper transfer" and therefore was not a security. Neither does Defendant provide any supporting legal analysis for this contention. Likewise, other citations pertaining to communications fraud and pattern of unlawful activity are similarly afflicted. Because Defendant fails to provide meaningful analysis or supporting legal citation for his insufficiency of the evidence arguments, we decline to review them.

Defendant also failed to adequately brief his argument that defense counsel was ineffective. To demonstrate ineffective assistance of counsel, Defendant must show that his counsel "rendered deficient performance which fell below an objective standard of reasonable professional judgment, and . . . counsel's deficient performance prejudiced him." State v. Hernandez, 2005 UT App 546, ¶ 17, 128 P.3d 556 (internal quotation marks omitted). Although Defendant references the two-part test previously stated, he fails to challenge the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See Strickland v. Washington, 466 U.S. 668, 689 (1984). Defendant also makes no attempt to demonstrate how defense counsel's actions or inactions fell below an objective standard of reasonableness or prejudiced Defendant in any manner. Instead, Defendant merely lists defense counsel's alleged failings and concludes that the various failings constitute ineffective assistance of counsel. However, "[a] brief must go beyond providing conclusory statements and 'fully identify, analyze, and cite its legal arguments.'" West Jordan City v. Goodman, 2006 UT 27, ¶ 29, 135 P.3d 874 (quoting State v. Green, 2005 UT 9, ¶ 11, 108 P.3d 710). Because Defendant's ineffective assistance of counsel argument provides no relevant legal citation or meaningful analysis, we decline to review this issue based on inadequate briefing.

Likewise, Defendant fails to adequately analyze the issues pertaining to his argument that the trial court erred in permitting the State to amend the charge of theft to attempted theft by deception. An indictment or information may be amended with the trial court's permission at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. See Utah R. Crim. P. 4(d). Defendant asserts that, because the attempted theft by deception charge involves different elements of proof than the original charge³ of theft, the theft by deception charge is a new and separate offense for which he was not properly charged. Therefore he contends that he was convicted in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

Although the two theft charges at issue involve different elements, this does not in and of itself demonstrate that attempted theft by deception is a new and separate offense. Utah's consolidated theft statute provides that a theft by

3. Theft by deception requires a misrepresentation, which is not necessary for a theft conviction. See Utah Code Ann. §§ 76-6-404 (2003), 76-6-405.

deception charge is a theory of theft and not a separate offense. See Utah Code Ann. § 76-6-403 (2003). Neither does the information's amendment to charge a different theory of theft necessarily offend the procedural safeguards in the criminal process. Under Utah's consolidated theft statute, allowing an information's amendment to charge a different theory of theft, even though the theory being advanced involves different elements of proof, "does not offend the procedural safeguards in the criminal process, so long as defendant is adequately notified of the theory being used and given ample time to prepare a defense to the charge." State v. Bush, 2001 UT App 10, ¶ 16, 47 P.3d 69. Defendant does not claim that he was inadequately notified of the alternate theory of theft by deception or that he had inadequate time to prepare a defense. Rather, he simply argues, without addressing the contrary holding in Bush, that theft by deception is a new charge that violates his due process rights. Because Defendant does not challenge the Bush holding or claim that he was not afforded sufficient time to prepare a defense to the amended charge of theft by deception, his brief is inadequate to allow review. We therefore decline to address this issue.

Finally, we address Defendant's motion to strike an addendum in the State's brief, which contained a typed copy of Defendant's handwritten brief. The State did not purport to provide the typed copy as a substitute for Defendant's brief, rather the State provided it as a courtesy, which is appreciated. Although Defendant directs our attention to some minor differences between the typed and handwritten versions, he does not point to any errors that affect the meaning of his brief. Because Defendant does not identify any substantial errors that would affect the meaning of his brief, we deny Defendant's motion to strike.

Affirmed.

William A. Thorne Jr., Judge

WE CONCUR:

Russell W. Bench,
Presiding Judge

Carolyn B. McHugh, Judge