

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellant,

v.

CARL ANTHONY CONDE,
Appellee.

Opinion
No. 20241010-CA
Filed October 8, 2026

Third District Court, West Jordan Department
The Honorable Richard Daynes
No. 241902894

Derek E. Brown, Jonathan S. Bauer, and Eric Thorne
Attorneys for Appellant

Nathalie S. Skibine, Attorney for Appellee

JUDGE JOHN D. LUTHY authored this Opinion, in which
JUDGES GREGORY K. ORME and RYAN M. HARRIS concurred.

LUTHY, Judge:

¶1 Carl Anthony Conde contracted with three different homeowners to construct outdoor swimming pools and related features at their homes. After receiving substantial payments from the homeowners, Conde failed to complete the projects. Conde was later charged with three counts of theft by deception and one count of engaging in a pattern of unlawful activity. After a preliminary hearing, a district court judge, acting as a magistrate, declined to bind Conde over for trial on any of the charges. The State appeals, asserting that it met its probable cause burden for each charge. We disagree and affirm the magistrate's decision.

BACKGROUND¹

Conde's Contract with Barbara

¶2 In July 2021, Conde contracted with Barbara² to construct a pool and related features at her home. Barbara chose Conde over other contractors because “he had some really great ideas.” Along with a pool, Conde agreed to install a custom slide, a splash pad, a jump rock, a decorative arch, and a fence with gates. Conde agreed to complete the work within eight months, and Barbara agreed to pay Conde “in phases.”

¶3 Barbara made her first payment to Conde in July 2021, at or around the time they signed the contract, and she made a second payment shortly thereafter. While Barbara worked to obtain a permit from the city, Conde began “dig[ging] away the land so [he could] get to the dirt and start the project.” The city did not issue a permit until the beginning of November, after which “the actual . . . digging [really] started.” As construction progressed, Barbara “continued to make phased payments.”

¶4 After “the initial dig,” there began to be “problems and delays” installing the pool. Conde also damaged Barbara’s lawn and sprinklers, her existing fence, and part of her neighbor’s yard. Through the autumn and winter, Conde worked on Barbara’s project only sporadically. Barbara would often call or text Conde to ask when he was coming back. He would respond that he was “coming this day or this day,” but then “he wouldn’t come” and “wouldn’t respond.” “Through the whole project,” there were

1. “In reviewing a magistrate’s bindover decision, we view all evidence in the light most favorable to the prosecution, draw all reasonable inferences in favor of the prosecution, and recite the facts with that standard in mind.” *State v. Nihells*, 2019 UT App 210, n.1, 457 P.3d 1121 (cleaned up).

2. We use pseudonyms for Conde’s customers.

“many” times when Conde “said he was going to come over and did not.” Eventually, “it was hard to [even] get ahold of him.”

¶5 By May 1, 2022, the gunite,³ plaster (with embedded glass beading), plumbing, electrical wiring, pumps, and heater for the pool had been installed; water had been put into the pool; a “little bit of plumbing” for the splash pad had been put in place; and Conde “had put some steps in” for the slide. However, the steps were not “in their final spot,” the pool’s pumps and heater were not working, the platform for the slide was not built, the slide was not on site, “there wasn’t any actual splash pad,” an anticipated rock wall was not constructed, the “decking [wasn’t] done,” only a temporary fence was in place, and the “[l]andscaping [wasn’t] fixed.” Barbara had paid Conde a total of \$197,000.

¶6 In mid-May, Barbara went to California to visit her daughter. While she was there, her son returned home from college and reported that “[a]ll of the temporary fencing had been taken down,” “all of [Conde’s] equipment was off the property,” and Conde appeared to have abandoned the project. Barbara texted Conde, saying, “I’m taking this [to mean] that you’re done, you’re walking off, you’re not going to correspond with me anymore.” Conde did not respond.

¶7 By the first part of June, both Barbara and her husband (who had been working out of the country) returned home. They “reached out again” to Conde, telling him they “would like to have a sit down” to talk about “a way to move forward.” Conde agreed to a meeting but “then didn’t come.” Barbara and her

3. Gunite is “a building material consisting of a mixture of cement, sand, and water that is sprayed onto a mold.” *Gunite*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/gunite> [<https://perma.cc/DH3R-TJST>]. Gunite is commonly used to create custom-shaped swimming pool shells. *See, e.g., What is a Gunite Pool?*, Swimmingpool.com, <https://www.swimmingpool.com/build-a-pool/pool-types/inground-pools/gunite/> [<https://perma.cc/TQ4X-Y6W9>].

husband hired an attorney, who sent Conde a letter, which prompted a meeting between Barbara and Conde in July.

¶8 At the meeting, Conde stated “that he really wanted to complete the project.” He reported that the slide for the pool “was ready to be shipped” but that “[h]e did not have the money to pay for [it]” —even though two of Barbara’s previous payments had included amounts for the slide. The meeting concluded with Conde and Barbara signing a new agreement. Under this agreement, Conde promised to finish the project, remedy “the things that hadn’t been done to standard,” and sign title to his truck over to Barbara as security for completion of the project. Barbara agreed to pay “around \$18,000” directly to the slide manufacturer and to pay Conde an additional \$10,000 “once [he had] finished everything.” At the conclusion of the meeting, Barbara took possession of Conde’s truck.

¶9 In the days following the July meeting, Conde signed over title to his truck to Barbara, Conde’s workers did “some work to get ready to [install] the slide,” Barbara paid the slide manufacturer, and the slide was delivered. Conde’s workers then “started trying to assemble the slide,” but the assembly was never completed. Around this time in July, Barbara also discovered that Conde had not paid a different manufacturer for a gate that had been completed and was ready for pickup, despite Conde’s prior representations to her that the gate was not yet completed. After August 29, 2022, Barbara “didn’t see . . . or hear from” Conde again. She later traded Conde’s truck for a \$5,000 credit toward her bill from another contractor.

Conde’s Contract with Ronald

¶10 In November 2021, Conde contracted to install a pool, hot tub, waterfall, and slide at Ronald’s house.⁴ Although the written

4. Ronald’s wife signed the written contract with Conde, but Ronald testified at the preliminary hearing, saying that he “hired (continued...) ”

contract did not contain a completion date, Conde's statements led Ronald to believe that the project would be completed "by that next summer." Ronald, like Barbara, agreed to pay Conde in phases.

¶11 During his first day working at Ronald's house, Conde damaged Ronald's driveway, fence, and basketball hoop. On the second day—the day before Thanksgiving—"none of [Conde's] employees showed up." This led Conde to insist, over Ronald's objection, that he would work on Thanksgiving. However, Conde "never showed up that next day," returning instead some few days later to continue digging a hole for the pool. But Conde dug the hole "incorrectly." And "there was no dump truck there" the day Conde returned, so Conde placed the dirt from the pool excavation on the footings of a garage Ronald was also building at the time, burying the footings.

¶12 Once the hole for the pool was dug, Conde "started to form the pool," using plywood "[b]ecause the hole was dug incorrectly." Conde and a worker also began to install plumbing. Soon, however, Conde and his worker "disappeared." Ronald contacted Conde and said that he "was okay" with Conde taking a break from the project since Ronald "had a garage going on at the same time" and that if Conde "need[ed] a week or so," that would be "fine."

¶13 "[W]ell over a month or so" later, Conde "finally showed back up with a completely different crew." The new crew "ripped everything out that had already been done" and "put[] new stuff in," including new plumbing, forms, and rebar. Then the project "sat for several months." By this time, Ronald had made two \$20,000 payments to Conde and another payment directly to

[Conde] to build a pool." Ronald's wife did not testify. For simplicity, we recite the facts regarding this contract as though it was between Ronald and Conde.

Conde's subcontractor because the subcontractor "was worried he wouldn't get the money" if he was not paid directly.

¶14 In April 2022, "a couple months after [the gunite phase] should have been done," Conde sprayed the gunite, making the "concrete form of the pool." Shortly thereafter, Ronald "received emails and phone calls" from Conde requesting "money for the gunite." Ronald replied, "I've paid you more than enough to this point to cover the cost of the gunite. Why am I having to pay you this?" Conde asked Ronald to send him "copies of the checks [he] had already paid [Conde]." Conde then visited Ronald at his home and "begg[ed]" for "a check to pay for [the] gunite." Ronald acquiesced and gave Conde a check for "probably at least \$20,000."

¶15 A month or two later, after that check had been cashed, Ronald "received a letter from a law firm stating that [the gunite company had] not [been] paid" and that if he did not pay, "a lien would be placed on [his] home." Ronald informed the gunite company that he had paid Conde for the gunite, and the gunite company "kind of backed off [Ronald] and seemed to put pressure on" Conde instead. When Ronald asked Conde whether he had paid the gunite company, Conde responded, "Could you pay him again? And then I will finish your pool because you will have basically paid for our contract, and I'll finish the rest of your pool out of my own money." Ronald refused to pay the gunite company.

¶16 Through the rest of the summer, the only other work Conde completed for Ronald was "a little bit of tile" and "the coping^[5] around the pool." Eventually, Ronald told Conde that if Conde would pay the gunite company the \$30,000 that Conde owed it, the coping company \$10,000 that Conde owed it, and

5. Coping is the "cap or top lip on [a] pool . . . wall that provides a finished edge around the pool." *Glossary*, Swimmingpool.com, <https://www.swimmingpool.com/resources/glossary/> [<https://perma.cc/48GW-GXBD>].

State v. Conde

Ronald \$25,000 for work Ronald had paid for but that had not been completed, Ronald would let Conde out of their contract. Conde declined this offer and “insisted that he wanted to complete [the project].”

¶17 At that point, Ronald and Conde signed a new agreement, under which Conde agreed to “start applying for loans” to complete the project, while Ronald agreed to pay for a “pool cover . . . to get things going” again. After signing that agreement, Ronald paid \$5,000 to a company for a pool cover, but the cover never arrived on site, and Conde never installed it. Conde did deliver a salt chlorinator to the job site, and he finished tiling “around the spa surround.” But he was unable to obtain a loan and did no more work on the project.

¶18 Ultimately, Ronald paid Conde \$102,900 of the \$107,000 amount anticipated under their original contract. By November 2022, Ronald was left with a damaged yard; pumps, heaters, and filters that had not been installed; a pool that still needed to be plastered; an unfinished rock wall and slide; and an anticipated “five feet of concrete all the way around the pool” that Conde never installed.

Conde’s Contract with Hank

¶19 Also in November 2021, Conde entered into a contract with Hank to install a pool, jumping rock, slide, and pool house in Hank’s backyard, as well as to perform landscaping. Like Barbara and Ronald, Hank agreed to pay Conde in phases, with an anticipated total payment of \$120,000. Conde agreed to complete the project by May 2022. The contract said that Hank would be responsible for obtaining any necessary permits, though Hank later testified that Conde had orally represented that he would “take care of permitting.”

¶20 Conde began working on Hank’s pool in the spring of 2022. He dug a hole for the pool and a hole underneath Hank’s driveway and sidewalk for the water tie-in. Conde also removed

trees and rocks and ran a “fresh waterline . . . from the house over to where the pool [was to] eventually have a deck.” In August, however, an inspector shut down the project because the necessary permits had not been obtained. By that time, Hank had paid Conde \$64,400. Shortly after the inspector shut down the project, Hank lost contact with Conde. Hank ended up paying “other contractors” to finish the pool.

The Preliminary Hearing

¶21 In 2024, Conde was charged with three counts of theft by deception and one count of engaging in a pattern of unlawful activity. A preliminary hearing was held in August of that year.

¶22 At the preliminary hearing, the State presented testimony from Barbara, Ronald, and Hank, who related the facts set forth above. The State also called an investigator from the Utah Division of Professional Licensing, who testified that he had led an investigation into Conde and that his findings revealed “job abandonment issues, gross negligence, hiring unlicensed persons, and failure to pay subcontractors.” Conde did not testify.

¶23 After hearing the evidence and arguments by the parties, the magistrate declined to bind Conde over on any of the charges. Regarding the charges of theft by deception, the magistrate acknowledged that Conde “did obtain or exercise control over property of another.” But the magistrate determined that there was insufficient evidence that Conde acted with the requisite criminal intent. The magistrate explained:

What I have heard is that as time went on, . . . this business started to fail and that subcontractors were not being paid, employees were not being paid, and providers of the slide and the . . . gunite [were] . . . not being paid.

. . . [It] is apparent that this business was failing and that money was going out the door faster

than it was coming in, which is when [Conde] asked if he could be paid for the work, and he would come back and do it. And there [were] agreements with the parties that that would happen.

I don't see that there was an intent even at that stage when things were starting to fall apart because that is a very common occurrence for businesses that are starting to go under, to try and renegotiate, . . . which is what he did, and he did make attempts, even at that point in time, to do work, which was shoddy . . . [and] not up to par.

But in a criminal case, there has to be a finding of criminal intent. And to this point, while I find there was a pattern . . . of bad business activity . . . and he did take money in that bad business activity, . . . I can't find that there was the purpose to deprive them of the value, that there was an intent to deceive, which are elements of these offenses.

On that basis, the magistrate dismissed the charges, and the State now appeals.

ISSUE AND STANDARD OF REVIEW

¶24 The State contends that the magistrate erred by not binding Conde over for trial. "This matter presents a mixed question of law and fact because a decision to bind a defendant over for trial includes the application of the appropriate bindover standard to the facts presented in this case. Accordingly, in reviewing a bindover decision, we should afford the [magistrate's] decision limited deference." *State v. Droesbeke*, 2010 UT App 275, ¶ 14, 241 P.3d 772 (cleaned up).

ANALYSIS

¶25 “[T]he function of [a preliminary hearing] is limited to determining whether probable cause exists.” Utah Const. art. I, § 12. At a preliminary hearing, the magistrate must “view all evidence in the light most favorable to the prosecution and must draw all reasonable inferences in favor of the prosecution.” *State v. Nihells*, 2019 UT App 210, ¶ 11, 457 P.3d 1121 (cleaned up). “Under the probable cause standard, the prosecution has the burden of producing believable evidence of all the elements of the crime charged, but this evidence does not need to be capable of supporting a finding of guilt beyond a reasonable doubt.” *State v. Virgin*, 2006 UT 29, ¶ 20, 137 P.3d 787 (cleaned up). “Properly construed and applied, the probable cause standard does not constitute a rubber stamp for the prosecution but, rather, provides a meaningful opportunity for magistrates to ferret out groundless and improvident prosecutions.” *Id.* ¶ 19. “This relieves the accused from the substantial degradation and expense incident to a modern criminal trial when the charges against [the accused] are unwarranted or the evidence insufficient.” *Id.* ¶ 20 (cleaned up).

I. Theft by Deception

¶26 Here, Conde was charged with three counts of theft by deception. “An actor commits theft by deception if the actor obtains or exercises control over property of another person: (i) by deception; and (ii) with a purpose to deprive the other person of property.” Utah Code § 76-6-405(2)(a). The Utah Code provides five scenarios under which deception occurs for purposes of this crime. *See id.* § 76-6-401(1). The State contends that two of those scenarios are applicable here. The first of those scenarios is where

a person intentionally . . . promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed, except that failure to perform the promise in issue without other evidence of intent or knowledge is not

sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

Id. § 76-6-401(1)(e). The other scenario is where “a person intentionally . . . fails to correct a false impression of . . . fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true.” *Id.* § 76-6-401(1)(b).

¶27 The deception created by these scenarios “must exist at the time the property is obtained.” *State v. Lakey*, 659 P.2d 1061, 1064 (Utah 1983). Moreover, “[m]ere negligence” in the performance of a promise “is insufficient” to establish deception, and “[c]ommercial misfortune is not a crime.” *Id.*

¶28 The three theft by deception charges in this case correspond, respectively, to Conde’s conduct toward Barbara, Ronald, and Hank. We address, in turn, Conde’s conduct as to each of these individuals. We then address Conde’s conduct cumulatively. Ultimately, we affirm the magistrate’s ruling that the State failed to establish probable cause for any of the theft by deception charges.

A. Conde’s Conduct Toward Barbara

¶29 In July 2021, Conde promised to construct a pool, custom slide, splash pad, jump rock, decorative arch, and fence with gates on Barbara’s property. He agreed to complete the work within eight months, and Barbara agreed to pay him “in phases.” By May 1, 2022—about nine months later—Barbara had paid Conde a total of \$197,000, while Conde had installed the plumbing, wiring, pumps, heater, and gunite for the pool; plastered the pool with embedded glass beading; installed some plumbing for the splash pad; and constructed some steps for the slide. Yet the project was still far from complete.

¶30 In July 2022, Conde and Barbara had a meeting and exchanged new promises to perform. Conde said “that he really wanted to complete the project.” At the conclusion of the meeting, he signed a new agreement, promising to finish the project, remedy “the things that hadn’t been done to standard,” and sign title to his truck over to Barbara as security for completion of the project. Barbara agreed to pay “around \$18,000” directly to the slide manufacturer and to pay Conde an additional \$10,000 when he finished the project. After Conde and Barbara made these promises, Conde signed over title to his truck to Barbara; his workers did “some work to get ready to [install] the slide”; and after the slide was delivered, they “started trying to assemble the slide.” But Conde never finished the project.

¶31 The State acknowledges—as it must—that Conde’s “failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that [he] did not intend to perform or knew the promise would not be performed.” Utah Code § 76-6-401(1)(e). Thus, Conde’s failure to complete the promised project by May 1, 2022, does not support a finding of probable cause that Conde obtained Barbara’s \$197,000 in phased payments by deception. Additionally, Conde’s failure to keep his July 2022 promise to finish the project and “remedy the things that hadn’t been done to standard” also does not support a finding of probable cause that Conde obtained Barbara’s money by deception. This is especially so where Conde personally obtained no additional money from Barbara after making his July 2022 promises.

¶32 Essentially acknowledging that Conde’s failure to perform as promised cannot alone support a finding of probable cause of deception, the State asserts that it “presented much more testimony from the homeowners”—including Barbara—“than Conde’s mere non-performance.” Specifically, it points to the homeowners’ testimony about Conde’s “unsatisfactory and unpermitted work, . . . failure to direct funds as agreed, false statements, lack of communication, and abandonment.” We are

not persuaded that any of this testimony established probable cause that Conde obtained money from Barbara by deception.

¶33 There is no evidence that Conde performed unpermitted work for Barbara, and Barbara's testimony that he eventually abandoned her project amounts merely to evidence that Conde failed to perform as promised. Likewise, the evidence that Conde failed to direct funds earmarked for a slide to the slide manufacturer is only evidence of a failure to perform as agreed.

¶34 Additionally, Barbara's testimony that Conde's work was faulty and unsatisfactory does not support a reasonable inference of deception. "Evidence of conduct which shows merely that the defendant was inept or that [the defendant] failed to diligently pursue the accomplishment of his [or her] promise, is insufficient to allow an inference that the promise was made without the present intention to comply with it." *State v. Compton*, 367 S.E.2d 353, 355 (N.C. Ct. App. 1988); *see also State v. Lakey*, 659 P.2d 1061, 1064 (Utah 1983) (holding that "[m]ere negligence is insufficient" to demonstrate deception); *State v. Morse*, 753 N.W.2d 915, 921 (S.D. 2008) (holding that there was "no evidence that [the defendant] had a purpose to deceive" despite evidence that he did "faulty work" that "was not up to code").⁶ Where the State did not suggest below and has not argued on appeal that Conde intentionally performed substandard work, we conclude that his substandard work cannot support an inference of deception.

¶35 We place Conde's failures to communicate with Barbara in the same category. Where a person timely commences on-the-

6. The State urges us not to rely on cases like these three because they reviewed denials of motions for a directed verdict, for which the underlying burden of proof is beyond a reasonable doubt, not bindover decisions under the probable cause standard. However, the holding that negligent or faulty performance of a construction contract does not support an inference of a prior intention not to perform remains true regardless of the applicable burden of proof.

ground performance of a construction contract, his or her subsequent failure to timely communicate with the customer does not support a reasonable inference that at the time of contracting, the person did not intend to perform or knew that he or she would not later perform as promised. *Cf. Commonwealth v. Horton*, 348 A.2d 728, 729–30 (Pa. 1975) (holding in a prosecution for “passing a worthless check,” which crime required an “intent to defraud,” that no “inference of guilt [was] justified because of [the defendant’s] reluctance to respond to [the complainant’s] attempts to communicate with [the defendant]”).

¶36 Finally, as to the State’s assertion that Conde made “false statements,” this appears to be a reference to Conde telling Barbara that the gate for her fence was not yet completed, when it was actually ready for pickup. Here again, we conclude that Conde’s false statements—made months into the job—about the readiness of a single and relatively minor component of the project cannot support a reasonable inference that he knew from the outset that he was not going to perform or intended not to perform the original promise.

¶37 Having concluded that the State failed to present evidence to support a finding of probable cause that Conde used deception under the first statutory scenario relied on by the State—namely, that he intentionally promised performance that he did not intend to perform or knew would not be performed, *see* Utah Code § 76-6-401(1)(e)—we turn to the second statutory scenario relied on by the State. That other scenario of deception is the failure of an actor “to correct a false impression of . . . fact that the actor previously created or confirmed by words or conduct . . . that the actor does not now believe to be true.” *Id.* § 76-6-401(1)(b).

¶38 Regarding this scenario, the State points to the magistrate’s finding that by mid-2022, Conde’s “business was failing and . . . money was going out the door faster than it was coming in.” The State argues that “against this backdrop,” “Conde’s renegotiation attempts failed ‘to correct a false impression of . . . fact that the actor previously created or confirmed by words or conduct’ —that

[Conde's business] was an ongoing operation that was financially able to complete the contracted work." (Quoting *id.*) In other words, the State contends that "at least by inference," when Conde was renegotiating his contract with Barbara, he no longer believed he could complete the project, he failed to tell her as much, and he thereby engaged in theft by deception. We are not persuaded.

¶39 Barbara testified that when she met with Conde in July 2022, he told her that he did not have money to pay for the slide. When that meeting concluded, Barbara knew enough about Conde's situation for her to demand that he sign title to his truck over to her as security for completion of the project. She also understood that she would need to personally pay the slide manufacturer \$18,000 in order for the project to be completed, and she agreed to pay Conde an additional \$10,000 upon completion of the project. This evidence does not support a reasonable inference that Conde failed to adequately inform Barbara of his business's financial condition. Moreover, despite the business's financial condition, Conde stated that he still "really wanted to complete the project." He then signed over title to his truck; his workers performed "some work to get ready to [install] the slide"; and, after the slide was delivered, his workers "started trying to assemble the slide." Given these uncontroverted facts, the magistrate was understandably reluctant to credit an inference that in July 2022 Conde no longer believed he could finish the project.

¶40 More importantly, even if such an inference could be credited, Conde received no additional funds from Barbara after mid-2022—the time at which the State says Conde must have no longer believed he could finish her project. "Since the crime [at issue] is obtaining property 'by deception,' the deception must exist at the time the property is obtained." *State v. Lakey*, 659 P.2d 1061, 1064 (Utah 1983). Because Conde obtained no money from Barbara after the point at which the State contends he must have believed he could not finish her project and was required to so inform her, there is no probable cause that Conde obtained

Barbara's money by deception under this second scenario of deception.

¶41 For the foregoing reasons, we affirm the magistrate's determination that the State failed to present evidence sufficient to establish probable cause for the theft by deception charge based on Conde's conduct toward Barbara.

B. Conde's Conduct Toward Ronald

¶42 In November 2021, Conde contracted to install a pool, a hot tub, a waterfall, and a slide at Ronald's house, and he led Ronald to believe that the project would be completed "by that next summer." Ronald, like Barbara, agreed to pay Conde in phases. By the end of the following summer, Conde had installed plumbing and the gunite shell for the pool, "a little bit of tile," and "the coping around the pool." Some additional components of the project were on site but had not been installed. But the project was still far from complete. Toward the end of that summer, Conde declined Ronald's offer to allow Conde to pay his unpaid suppliers, refund \$25,000 to Ronald, and walk away from the project. Instead, Conde "insisted that he wanted to complete [the project]," and he signed a new agreement promising to "start applying for loans" so that he could do so. Yet Conde was unable to obtain a loan and did little additional work before abandoning the project. As with Conde's conduct toward Barbara, Conde's failure to complete the project promised to Ronald cannot alone support a finding of probable cause that Conde obtained Ronald's money by deception. *See* Utah Code § 76-6-401(1)(e).

¶43 The result here is also the same with respect to the issues of unsatisfactory and unpermitted work, failure to direct funds as agreed, false statements, lack of communication, and abandonment. There is no evidence that Conde performed unpermitted work on Ronald's project and no evidence that Conde made knowingly false statements to Ronald as he did to Barbara regarding the gate for her project. The evidence that Conde ultimately abandoned Ronald's project shows only that he

failed to perform as promised. And, as with Barbara's project, the evidence that Conde performed substandard work for Ronald and failed to timely communicate with Ronald does not support an inference that at the time of contracting, Conde knew he would not perform or intended not to do so. *See supra* ¶¶ 34–35.

¶44 The evidence that after the gunite shell for Ronald's pool was complete, Conde asked Ronald for money specifically to pay the gunite supplier, obtained money from Ronald for that express purpose, and then did not deliver the earmarked money to the gunite supplier poses a closer question. But even here, Conde's failure to use the earmarked money as promised cannot alone support a finding of probable cause of theft by deception because it ultimately amounts to nothing more than Conde's failure to perform as promised. *See* Utah Code § 76-6-401(1)(e). And other than Conde's failure to pay the earmarked funds to the gunite supplier, the State has pointed to no evidence that would support an inference that Conde took the money intending or knowing he would not deliver it as promised. We must therefore conclude that this episode does not support a finding of probable cause that Conde obtained those funds by deception.

¶45 Finally, just as with Barbara, Conde obtained no money from Ronald after mid-2022—the time at which the State contends Conde must have believed he could no longer finish Ronald's project. Thus, the State's reliance on the second scenario of deception fails with respect to Ronald as well. *See* Utah Code § 76-6-401(1)(b); *State v. Lakey*, 659 P.2d 1061, 1064 (Utah 1983).

¶46 Given the foregoing, we affirm the magistrate's determination that the State failed to present evidence sufficient to establish probable cause for the theft by deception charge based on Conde's conduct toward Ronald.

C. Conde's Conduct Toward Hank

¶47 In November 2021, Conde also entered into a contract with Hank to build a pool and related features in Hank's backyard.

Like Barbara and Ronald, Hank agreed to pay Conde in phases, and Conde agreed to complete the project by May 2022. Conde began working on Hank's pool in the spring of 2022, but in August, an inspector shut down the project because the necessary permits had not been obtained. Shortly after that, Hank lost contact with Conde, and Conde performed no additional work on Hank's project.

¶48 As with the projects for Barbara and Ronald, Conde's failure to complete the project as promised cannot alone support a finding of probable cause that he obtained Hank's money by deception. *See* Utah Code § 76-6-401(1)(e). Regarding the State's other arguments as they relate to Hank, we again observe that evidence of abandonment of the project amounts merely to evidence of a failure to perform. And there is no evidence that Conde's work for Hank was substandard, that Conde misdirected any earmarked funds, that Conde failed to communicate with Hank before the inspector shut down the project, or that Conde obtained funds from Hank after mid-2022. Thus, the State's arguments on these points are unavailing with respect to Conde's conduct related to Hank.

¶49 The State's only additional argument that is unique to Hank's case is the argument based on Conde performing unpermitted work. However, Conde's contract with Hank stated that Hank would be responsible for obtaining any necessary permits. And to the extent that a factfinder might credit Hank's testimony that Conde nevertheless orally represented that he would "take care of permitting," Conde's failure to take care of the permitting would amount only to a failure to perform as promised, which cannot alone support a charge of theft by deception. *See id.*

¶50 For the foregoing reasons, we affirm the magistrate's determination that the State failed to present evidence sufficient to establish probable cause for the theft by deception charge based on Conde's conduct toward Hank.

D. Conde's Cumulative Failures to Perform

¶51 For the first time in its reply brief, the State contends that “the essence” of its argument is that “an act that seems innocuous in isolation can appear more nefarious when repeated enough times.” Elaborating, the State explains, “Perhaps Conde’s failure to perform any one individual business commitment could be characterized as ‘commercial misfortune’ rather than theft by deception. . . . But Conde’s repeated failed promises to the three homeowners in this case gives rise to a reasonable inference that he eventually obtained at least some money from each homeowner through intentional deception under Utah Code [section] 76-6-401.” In other words, the State contends that although an actor’s failure to perform a particular promise cannot alone support a finding of deception as to that promise, an actor’s failure to perform other similar or related promises can be used as evidence that the actor was deceptive as to the initial promise.

¶52 In support of this argument, the State points solely to the logic underlying the now-retired doctrine of chances, which was a principle our supreme court formerly employed in the admission-of-evidence context and which “rests on the objective improbability of the same rare misfortune befalling one individual over and over.” *State v. Verde*, 2012 UT 60, ¶¶ 47–49, 296 P.3d 673 (cleaned up); *see also State v. Green*, 2023 UT 10, ¶ 62, 532 P.3d 930 (overruling the use of the doctrine of chances in the context of evidence law). The State does not discuss the interplay between this logic and the statutory directive that “failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.” Utah Code § 76-6-401(1)(e). Specifically, the State does not explain how section 76-6-401(1)(e) should be read when multiple promises to different individuals about different projects are “in issue” at the same time and in the same case. Nor does the State address whether the doctrine-of-chances logic is sufficient to support a reasonable inference of deception where the multiple failures to perform business contracts are largely contemporaneous with

each other and not indicative of a repeating pattern over an extended period of time.

¶53 More fundamentally, the State’s foregoing argument—that an actor’s failure to perform multiple similar or related promises that are all “in issue” at the same time supports a permissible inference of deception—raises a new issue not addressed in the State’s opening brief. “It is well settled that issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court.” *Allen v. Friel*, 2008 UT 56, ¶ 8, 194 P.3d 903 (cleaned up). Accordingly, we do not consider this argument.

II. Pattern of Unlawful Activity

¶54 Conde was also charged with one count of engaging in a pattern of unlawful activity. To commit this crime, an actor must, among other things, “engag[e] in conduct that constitutes the commission of at least three episodes of unlawful activity, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics.” Utah Code § 76-17-401(2); *see also id.* § 76-17-407(2). Here, the State asserted that the three episodes of unlawful activity in which Conde engaged were the three alleged crimes of theft by deception addressed above. Because we have determined that there was a lack of probable cause to bind Conde over on those three charges, we must likewise conclude that there was a lack of probable cause to bind him over on the charge of engaging in a pattern of unlawful activity tied to those charges. We therefore affirm the magistrate’s decision in this regard.

CONCLUSION

¶55 We affirm the magistrate’s decision to not bind Conde over on any of the charges. We therefore also affirm the magistrate’s dismissal of the charges.
