IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY EZELL WALTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54233

FILED

MAY 26 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count each of robbery and burglary.[1] Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Walton contends that the district court erred by rejecting his proposed instructions on petit larceny because they supported his theory of defense. "A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it." Harris v. State, 106 Nev.

[1]We note that the judgment of conviction contains a clerical error; it incorrectly states that the conviction is pursuant to a guilty plea. Following this court's issuance of its remittitur, the district court shall enter a corrected judgment of conviction. See NRS 176.565 (providing that clerical errors in judgments may be corrected at any time); Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994) (explaining that the district court does not regain jurisdiction following an appeal until the supreme court issues its remittitur).

667, 670, 799 P.2d 1104, 1105-06 (1990) (internal quotation marks and brackets omitted). However, a defendant is not entitled to instructions that are "misleading, inaccurate or duplicitous." Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). Walton's proposed instructions are misleading and inaccurate because petit larceny is not a lesser-included offense of burglary, Walton was not charged with petit larceny, and the instructions incorrectly suggest that the jury could find Walton guilty of petit larceny. See NRS 175.501; Rosas v. State, 122 Nev. 1258, 1268, 147 P.3d 1101, 1108 (2006) (a defendant is entitled to an instruction on a lesser-included offense); Peck v. State, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000) (a defendant is not entitled to an instruction on a lesser-related offense), overruled on other grounds by Rosas, 122 Nev. at 1269, 147 P.3d at 1109; Puglisi v. State, 102 Nev. 491, 492, 728 P.2d 435, 436 (1986) ("Petit larceny is not a lesser included offense in a burglary charge."). Further, Walton's theory of defense "was that he did not enter the store with the intent to steal, but that he formed the intent, and did steal, after he got inside." Walton's proposed instructions did not lay out his position or theory of defense, see Brooks v. State, 103 Nev. 611, 614, 747 P.2d 893, 895 (1987), or discuss the significance of findings made under that position or theory, see Carter, 121 Nev. at 767, 121 P.3d at 597. Under these circumstances, Walton has not demonstrated that the district court erred by rejecting his proposed instructions.

Walton also contends that he was deprived of a fair trial due to prosecutorial misconduct because the prosecutor forced him to characterize the testimony of other witnesses as "mistaken" during cross-examination. Walton did not object to the alleged misconduct. "Generally,

to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this allows the district court to rule upon the objection, admonish the prosecutor, and instruct the jury." Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008) (internal quotation marks and brackets omitted). Nonetheless, we have discretion to address a forfeited error if it rises to the level of plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). It is well-established that a prosecutor may not ask a defendant whether other witnesses had lied or were mistaken unless the defendant has directly challenged the truthfulness of the witness on direct examination. Daniel v. State, 119 Nev. 498, 517-19, 78 P.3d 890, 903-04 (2003). Thus, the prosecutor erred by repeatedly questioning Walton on the veracity of the State's witnesses during cross-examination. However, the decision when to object "is inherently a matter of trial tactics," People v. Frierson, 808 P.2d 1197, 1207-08 (Cal. 1991), and defense counsel may have had a legitimate strategic or tactical reason for withholding an objection in this instance, see U.S. v. Ramirez, 537 F.3d 1075, 1085 (9th Cir. 2008) (explaining that failure to object to cross-examination compelling defendant to give opinion as to veracity of other witnesses "could have been part of a legitimate defense strategy"). Because defense counsel's reason for not objecting is not apparent from the record before us and the district court had no duty to object sua sponte on Walton's behalf, see id., we decline to exercise our discretion to reach this issue under a plain-error analysis. See Jezdik v. State, 121 Nev. 129, 140, 110 P.3d 1058, 1065 (2005) (declining to reach issue regarding lay opinion testimony that signature matched defendant's

signature because defense counsel's reason for not objecting was not apparent from record).

Having considered Walton's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Connie J. Steinheimer, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk