

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL LAMONT MITCHELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 54588

FILED

MAY 07 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Ingold*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

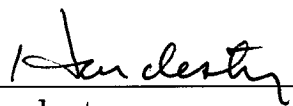
Appellant Michael Lamont Mitchell contends that the district court erred by rejecting his proposed instruction on petit larceny because it supported his theory of defense. We disagree. “[A] defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it.” Harris v. State, 106 Nev. 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). Mitchell’s proposed instruction is misleading and inaccurate because petit larceny is not a lesser-included offense of burglary, Mitchell was not charged with petit larceny, and the proffered instruction incorrectly suggests that the jury could find Mitchell guilty of petit larceny. See Puglisi v. State, 102 Nev. 491, 492, 728 P.2d 435, 436 (1986). Further, Mitchell’s theory of defense was that he did not enter the

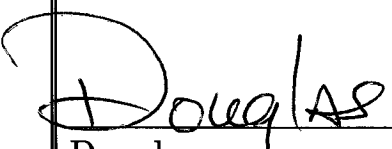
store with the intent to commit larceny, and that he decided to steal once he entered the store. Mitchell's proposed instruction did not lay out his position or theory of defense, see Brooks v. State, 103 Nev. 611, 614, 747 P.2d 893, 895 (1987), or discuss the significance of findings made under that position or theory, see Carter, 121 Nev. at 767, 121 P.3d at 597, and Mitchell did not request such an instruction. Under these circumstances, Mitchell has not demonstrated that the district court erred in rejecting his proposed instruction.


Mitchell maintains that the district court erred in allowing the prosecutor to elicit testimony from a police officer as to his opinion about Mitchell's guilt for the crime of burglary. As Mitchell failed to object to the evidence on this ground below, we review for plain error. See NRS 178.602; Diomampo v. State, 124 Nev. 414, 430, 185 P.3d 1031, 1041 (2008). We conclude that in light of the overwhelming evidence of Mitchell's guilt, this testimony, even if inadmissible, did not prejudicially affect Mitchell's substantial rights. See Diomampo, 124 Nev. at 430, 185 P.3d at 1041 (providing the defendant has the burden to show actual prejudice under plain error review). As such, we conclude that no relief is warranted on this basis.

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

ORDER the judgment of conviction AFFIRMED.

  
Hardesty, J.

  
Douglas, J.

  
Pickering, J.

cc: Hon. Patrick Flanagan, District Judge  
Washoe County Public Defender  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk