IN THE SUPREME COURT OF THE STATE OF NEVADA

ANNAMARIE ELIZABETH ZIRKEL A/K/A ANA MARIA ELIZABETH ZIRKEL,
Appellant,
vs.
WARDEN, NEVADA WOMEN'S CORRECTIONAL CENTER, SHERMAN HATCHER,
Respondent.

No. 43026

FILED

OCT 20 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Annamarie Zirkel's post-conviction petition for a writ of habeas corpus. Sixth Judicial District Court, Humboldt County; John M. Iroz, Judge.

On April 12, 2002, the district court convicted Zirkel, pursuant to a jury verdict, of battery with a deadly weapon. The district court sentenced Zirkel to serve a term of 24 to 60 months in the Nevada State Prison. This court affirmed Zirkel's judgment of conviction and sentence on direct appeal.[1] The remittitur issued on September 17, 2002.

On August 20, 2003, Zirkel filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Zirkel or to conduct an evidentiary hearing. On

[1]Zirkel v. State, Docket No. 39499 (Order of Affirmance, August 21, 2002).

October 9, 2003, the district court denied several of the claims Zirkel raised in her petition. On March 11, 2004, the district court entered a final order and denied Zirkel's remaining claims. This appeal followed.

In her petition, Zirkel raised multiple claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.[2] A petitioner must further establish a reasonable probability that, in the absence of counsel's errors, the results of the proceedings would have been different.[3] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[4]

First, Zirkel contended that her trial counsel was ineffective for failing to move for a mistrial. However, Zirkel's trial counsel unsuccessfully moved for a mistrial on three different occasions during the trial. Therefore, Zirkel's claim is belied by the record,[5] and the district court did not err in denying her relief on this claim.

Second, Zirkel claimed that her trial counsel was ineffective for failing to investigate witnesses who would have testified that the victim had a violent character. However, Zirkel did not provide any specific information concerning these witnesses, such as their names or

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[2]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]Id.

[4]Strickland, 466 U.S. at 697.

[5]Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

expected testimony. Because Zirkel did not support this claim with specific facts,[6] we affirm the order of the district court.

Third, Zirkel alleged that her trial counsel was ineffective for failing to properly inform her of the claim of self-defense. A review of the record reveals that Zirkel's theory of defense was that she was protecting herself and her dog from the victim. Zirkel failed to articulate how her attorney was deficient with respect to this defense.[7] As such, the district court did not err in denying Zirkel relief.

Zirkel next raised several of claims of ineffective assistance of appellate counsel.[8] To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.[9] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[10]

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[6]See id. at 502, 686 P.2d at 225.

[7]See id.

[8]To the extent that Zirkel raised any of the following issues independently from her ineffective assistance of counsel claims, we conclude that they are waived. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

[9]See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[10]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Appellate counsel is not required to raise every non-frivolous issue on appeal.[11]

First, Zirkel claimed that her appellate counsel was ineffective for failing to argue that she was not competent to stand trial. A defendant is competent to stand trial if she has sufficient ability to consult with her lawyer with a reasonable degree of rational understanding, and comprehends the proceedings against her.[12] The record reveals that Zirkel was evaluated by two doctors at Lake's Crossing, who concluded that she was competent to stand trial. Further, Zirkel acted in a rational and coherent manner during the proceedings against her. Zirkel therefore failed to establish that an appeal of this issue would have had a reasonable likelihood of success, and the district court did not err in denying her relief.

Second, Zirkel argued that her appellate counsel was ineffective for failing to appeal the district court's denial of a mistrial after the prosecutor discussed a prior bad act during his opening statement. A review of the record reveals that a Petrocelli hearing[13] was conducted prior to trial, and the district court determined that the State could present evidence of a previous confrontation between the parties during which Zirkel threatened the victim with a knife. During his opening statement, the prosecutor briefly discussed an incident involving Zirkel and the

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[11]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[12]Melchor-Gloria v. State, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983).

[13]See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

victim that had not been argued at the Petrocelli hearing, at which point Zirkel's trial counsel unsuccessfully moved for a mistrial.

We conclude that Zirkel failed to demonstrate that her appellate counsel was ineffective on this issue. During the opening statement, it is the duty of the prosecutor to fairly state facts he expects to prove, and to refrain from commenting on facts that he will not be able to establish.[14] Here, during his opening statement, the prosecutor briefly discussed an incident during which Zirkel allegedly drove onto the victim's property and threatened her. Our review of the record reveals that the State did not elicit witness testimony or otherwise introduce evidence to support this improper comment. However, prior to opening statements the district court cautioned the jury that arguments made by counsel were not to be treated as evidence. Further, the jury was instructed that their deliberations should be governed by their recollection of the evidence, rather than by counsel's arguments.[15] For these reasons, we conclude that Zirkel failed to establish that the district court abused its discretion in denying her motion for a mistrial,[16] such that an appeal of this issue would have had a reasonable likelihood of success. As such, we affirm the order of the district court with respect to this claim.

Third, Zirkel contended that her appellate counsel was ineffective for failing to argue that the district court erred in denying her motion for a mistrial when the prosecutor waved documents in front of the jury that were inadmissible at trial. The record reveals that the

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[14]Garner v. State, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962).

[15]See Lord v. State, 107 Nev. 28, 33, 806 P.2d 548, 551 (1991).

[16]See Lisle v. State, 113 Nev. 679, 700, 941 P.2d 459, 473 (1997).

prosecutor was holding several statements written by Zirkel when he was questioning the victim. One of these statements was not admissible at trial, but the district court ruled that the other two statements were not hearsay and therefore admissible.[17] Zirkel's trial counsel moved for a mistrial, but the district court denied the motion. We conclude that Zirkel did not establish that the district court's denial of her motion for a mistrial was an abuse of discretion, such that an appeal of this issue had a reasonable likelihood of success.[18] Consequently, Zirkel failed to demonstrate that her appellate counsel was ineffective on this issue, and we affirm the order of the district court with respect to this claim.

Fourth, Zirkel claimed that her appellate counsel was ineffective for failing to appeal the district court's denial of her motion for a mistrial when it was discovered that the victim violated the exclusionary rule.[19] The record reveals that after the victim testified during the State's case-in-chief, a secretary with the public defender's officer came upon the victim listening to Zirkel's testimony through a cracked door. The victim stated, "Oops, I better not be doing this." Zirkel's trial counsel moved for a mistrial, and after conducting an evidentiary hearing, the district court determined that the appropriate remedy was to preclude the victim from testifying during the State's rebuttal.[20] We conclude that Zirkel failed to establish that the district court abused its discretion in prohibiting the

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[17]See NRS 51.035(3)(a).

[18]See Lisle, 113 Nev. at 700, 941 P.2d at 473.

[19]See NRS 50.155.

[20]See Romo v. Keplinger, 115 Nev. 94, 96, 978 P.2d 964, 966 (1999).

victim from testifying, rather than granting her motion for a mistrial.[21] As such, Zirkel did not demonstrate that an appeal of this issue had a reasonable probability of success, and the district court did not err in denying the claim.

Fifth, Zirkel contended that her appellate counsel was ineffective for failing to argue that her sentence violated the Eighth Amendment prohibition against cruel and unusual punishment because it was grossly disproportionate to the severity of her crime. We conclude that this claim is without merit. Despite its severity, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate to the crime as to shock the conscience.[22] NRS 200.481(2)(e)(1) provides for a sentence of between two and ten years for the crime of battery with a deadly weapon; Zirkel's sentence fell within the statutory limits. Additionally, in light of evidence introduced at trial that Zirkel hit the victim with a claw hammer, she failed to demonstrate that her sentence was unreasonably disproportionate to the crime. Therefore, Zirkel did not establish that an appeal of this issue would have had a reasonable probability of success, and the district court did not err in denying her relief on this claim.

Sixth, Zirkel alleged that her appellate counsel was ineffective for failing to challenge the sufficiency of the evidence to uphold her conviction. We conclude that this claim is similarly meritless. Our review

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[21]See Lisle, 113 Nev. at 700, 941 P.2d at 473.

[22]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

of the record reveals adequate evidence from which a rational jury could find Zirkel guilty of battery with a deadly weapon,[23] such that her appellate counsel was not ineffective in failing to raise this issue on appeal. Evidence was introduced at trial that Zirkel hit the victim on the arm with a claw hammer. Thus, Zirkel failed to demonstrate that her appellate counsel was ineffective with respect to this issue, and we affirm the order of the district court.

Next, Zirkel claimed that the district court erred in failing to tailor the jury instructions concerning self-defense to the facts of her case. This claim is outside the scope of a post-conviction petition for a writ of habeas corpus and should have been raised on direct appeal.[24] Because Zirkel did not excuse her failure to do so, the district court did not err in denying her relief on this claim.

Lastly, Zirkel contended that the district court erred in permitting evidence of a prior confrontation between Zirkel and the victim, during which Zirkel threatened the victim with a knife. This court already considered and rejected this claim on direct appeal, however. The doctrine of the law of the case prevents further litigation of this issue and "cannot be avoided by a more detailed and precisely focused argument."[25] Thus, the district court did not err in denying this claim.

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[23]See Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

[24]See NRS 34.810(1)(b)(2).

[25]Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Zirkel is not entitled to relief and that briefing and oral argument are unwarranted.[26] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. John M. Iroz, District Judge
Annamarie Elizabeth Zirkel
Attorney General Brian Sandoval/Carson City
Humboldt County District Attorney
Humboldt County Clerk

[26]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).