

IN THE SUPREME COURT OF THE STATE OF NEVADA

JESSICA BARRAZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62289

FILED

MAR 12 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant argues that the district court erred in denying her claims of ineffective assistance of counsel raised in her August 19, 2010, petition. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle her to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, appellant argues that her trial counsel was ineffective for failing to object when the district court instructed the jury that a knife is a deadly weapon and when the State referred to that instruction in its closing argument. Appellant fails to demonstrate that she was prejudiced. Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the instruction or to the State's reference to the instruction as the evidence demonstrated that appellant intentionally used the knife in a deadly and dangerous manner, as she stabbed the victim causing the victim to die. *See* NRS 193.165(6)(b); *see also* *Barraza v. State*, Docket No. 50623 (Order of Affirmance, August 3, 2009). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, appellant argues that her trial counsel was ineffective for failing to object to instruction 15, which she asserts improperly instructed the jury regarding voluntary and involuntary manslaughter. Appellant argues that the instruction improperly allowed the jury to convict appellant without finding that she acted with malice and that the instruction relieved the State from its burden to prove malice. Appellant also argues that counsel was ineffective for failing to object when the State referred to the challenged instruction in its closing argument in a confusing manner. Appellant fails to demonstrate that her counsel's performance was deficient or that she was prejudiced. The challenged instruction was a recitation of NRS 200.070, which defines involuntary manslaughter. Moreover, additional instructions correctly instructed the jury regarding voluntary manslaughter, malice, and the State's burden of proving the charges beyond a reasonable doubt. *See* NRS 175.211; NRS 200.020; NRS 200.040; NRS 200.050; NRS 200.060. As jury instructions

are meant to be read together, *see Butler v. State*, 120 Nev. 879, 903, 102 P.3d 71, 88 (2004), and the additional instructions correctly informed the jury regarding the challenged topics, appellant fails to demonstrate that her counsel was objectively unreasonable for declining to object to instruction 15 on these bases. In addition, counsel objected to the challenged statements made by the State in closing arguments and the objection was sustained. Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the challenged instruction as there was substantial evidence presented that appellant acted with malice when stabbing the victim. *See Keys v. State*, 104 Nev. 736, 738, 766 P.2d 270, 271-72 (1988). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, appellant argues that her trial counsel was ineffective for failing to argue that instruction 15 erroneously permitted the jury to find her guilty based upon a misapplication of second-degree-felony-murder doctrine. Appellant also argues that counsel should have explained the second-degree-felony-murder doctrine to the jury in closing arguments. Appellant fails to demonstrate that her counsel's performance was deficient or that she was prejudiced. The challenged instruction correctly defined involuntary manslaughter. *See NRS 200.070*. Moreover, as acknowledged by appellant, there was no reference at trial by either party to second-degree felony murder. As the challenged instruction was a correct statement of the law and second-degree felony murder was not espoused as a theory of liability by the State, appellant fails to demonstrate objectively reasonable counsel would have objected to the challenged instruction on the basis that it could lead to a misapplication of

a doctrine not discussed in the instruction and not discussed at trial. Appellant also fails to demonstrate that objectively reasonable counsel would have attempted to explain second-degree felony murder in closing arguments under these circumstances. Appellant fails to demonstrate a reasonable probability of a different outcome at trial had she objected to instruction 15 on this basis as there was substantial evidence that she committed second-degree murder, especially in light of appellant's own statements indicating she stabbed the victim in retaliation for verbal insults. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fourth, appellant argues that her trial counsel was ineffective for failing to argue that the second-degree murder instruction was improper as the theory espoused in the instruction was not noticed. Appellant fails to demonstrate either deficiency or prejudice. Appellant fails to demonstrate that she did not receive notice of the State's theory of second-degree murder as the information provided a plain and concise statement of the essential facts as well as a citation to the statutes discussing the crime of murder with the use of a deadly weapon. *See* NRS 173.075; NRS 193.165; NRS 200.010; NRS 200.030. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fifth, appellant argues that her counsel was ineffective for failing to request a voluntary manslaughter instruction informing the jury that it was the State's burden to prove the absence of heat of passion. Appellant fails to demonstrate that her counsel's performance was deficient or that she was prejudiced. As stated previously, the district court properly instructed the jury regarding voluntary manslaughter and

the State's burden to prove the charges beyond a reasonable doubt. See NRS 175.211; NRS 200.040; NRS 200.050; NRS 200.060. As jury instructions are meant to be read together, see *Butler*, 120 Nev. at 903, 102 P.3d at 88, appellant fails to demonstrate that her counsel was objectively unreasonable for failing to request an additional instruction regarding proof of the absence of heat of passion. Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel requested a specific instruction regarding proof of the absence of heat of passion, as there was substantial evidence that appellant did not act under an "irresistible impulse of passion . . . caused by a serious and highly provoking injury, or attempted injury, sufficient to excite such passion in a reasonable person." *Allen v. State*, 98 Nev. 354, 356, 647 P.2d 389, 390-91 (1982). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Sixth, appellant argues that her counsel was ineffective for failing to object when a State's witness commented on her truthfulness and her state of mind during a police interrogation. Appellant fails to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. The challenged testimony was considered on direct appeal and this court concluded that the underlying claim was without merit. *Barraza v. State*, Docket No. 50623 (Order of Affirmance, August 3, 2009). Given the substantial evidence of appellant's guilt, including appellant's own statements that she stabbed the victim because she could not allow a person to talk to her in such a disrespectful manner, appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the challenged statements. Therefore, the district

court did not err in denying this claim without conducting an evidentiary hearing.

Next, appellant argues that her appellate counsel was ineffective. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

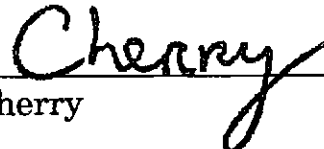
Appellant argues that her appellate counsel was ineffective for failing to "federalize" claims regarding the deadly weapon and voluntary manslaughter instructions on direct appeal, and thereby failed to preserve these claims for federal court review. Appellant fails to demonstrate that her counsel's performance was deficient or that she was prejudiced. Appellant fails to demonstrate that she would have gained a more favorable standard of review on direct appeal had her appellate counsel raised arguments under federal laws. *See Browning v. State*, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004). Appellant fails to demonstrate a reasonable likelihood of success on appeal had counsel raised further arguments based upon federal laws. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Finally, appellant argues that the district court erred by denying claims of ineffective assistance of counsel based upon the law of the case because appellant did not raise claims on direct appeal as ineffective-assistance-of-counsel claims. Appellant is correct that the law of the case was not correctly applied by the district court, as the claims she raised on direct appeal were not raised as claims of counsel error, and therefore, were not the same as the claims raised in her post-conviction petition for a writ of habeas corpus. See *Wheeler Springs Plaza, L.L.C. v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003) (stating “[t]he doctrine only applies to issues previously determined, not to matters left open by the appellate court”); *Dictor v. Creative Mgmt. Servs. L.L.C.*, 126 Nev. ___, ___, 223 P.3d 332, 334 (2003) (stating “[s]ubjects an appellate court does not discuss, because the parties did not raise them, do not become the law of the case by default” (quoting *Bone v. City of Lafayette, Ind.*, 919 F.2d 64, 66 (7th Cir. 1990))). However, as discussed previously, appellant fails to demonstrate she was entitled to relief, and therefore, we affirm the decision of the district court denying the petition. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

Having concluded that appellant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Michael Villani, District Judge
Oronoz & Ericsson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk