

IN THE SUPREME COURT OF THE STATE OF NEVADA

CRYSTAL FUENTES A/K/A CRYSTAL  
ELAINA FUENTES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49232

**FILED**

NOV 13 2007

JANE M. BLOOM  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person 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; Sally L. Loehrer, Judge.

On June 22, 2005, the district court convicted appellant, pursuant to a jury verdict, of first-degree kidnapping (count IX), pandering of a child (count X), and pandering, furnishing transportation (counts XII-XIII). The district court sentenced appellant Crystal Fuentes to serve a prison term of 60 to 180 months for count IX, a consecutive prison term of 48 to 120 months for count X, and two concurrent prison terms of 12 to 60 months for counts XII-XIII. This court affirmed appellant's judgment of conviction on appeal.<sup>1</sup> The remittitur issued on March 21, 2006.

On September 18, 2006 appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

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<sup>1</sup>Fuentes v. State, Docket No. 45412 (Order of Affirmance, February 23, 2006).

State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. Pursuant to NRS 34.770, the district court conducted a limited evidentiary hearing, on the issue of whether appellant received ineffective assistance of appellate counsel. On March 13, 2007, the district court denied appellant's petition. This appeal followed.

In her petition, appellant raised thirteen claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and resulting prejudice such that there is a reasonable probability of a different outcome but for counsel's errors.<sup>2</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>3</sup> A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>4</sup>

First, appellant appeared to claim that her trial counsel was ineffective for telling her that it was "too late" when she expressed a desire

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

<sup>3</sup>Strickland, 466 U.S. at 697.

<sup>4</sup>Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

to obtain alternative counsel. Appellant alleged that when she asked the judge for reduced bail, her trial counsel became upset and advised her to never make him look bad in front of the judge again. Appellant alleged that trial counsel told her that he was not there to defend her but to make sure that the legal process goes right. Appellant alleged that she then told her trial counsel that she felt prejudiced by his representation because she felt he was not there to protect her best interests and that she wanted different counsel to represent her. Allegedly, trial counsel told her it was "too late." Appellant failed to allege facts sufficient to demonstrate that the district court would have granted her request for alternate counsel even if she had made such a request.<sup>5</sup> Appellant failed to state at what point temporally in the proceedings this dialogue occurred. Moreover, she failed to present any facts demonstrating a significant breakdown in the attorney-client relationship. It follows logically then that appellant failed to show that she was prejudiced by trial counsel's statement that it was "too late." Therefore, appellant failed to demonstrate that trial counsel was ineffective on this issue, and the district court did not err in denying this claim.

Second, appellant claimed that her trial counsel was ineffective for failing to attempt to suppress a videotape which showed

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<sup>5</sup>Hargrove v. State, 100 Nev. 498, 502-3, 686 P.2d 222, 225 (1984); see Young v. State, 120 Nev. 963, 969, 102 P.3d 572, 576-77 (2004) (recognizing that there must be a significant breakdown in the attorney-client relationship before new counsel will be appointed).

Mandalay Bay Hotel and Casino security supervisor, Eric Emord, interviewing both appellant and the minor victim. Because appellant failed to demonstrate how trial counsel's performance was deficient or how she was prejudiced by his failure to attempt to suppress the admission of the videotape, appellant failed to demonstrate that trial counsel was ineffective on this issue.<sup>6</sup> Appellant claimed that this videotape was irrelevant to the charges at issue in her case. We disagree. Mr. Emord testified that the videotape showed appellant admitting to working for an "out-call service" in the hotel. Mr. Emord further testified that an "out-call service" is a method of "getting a prostitute up to your room, rather than picking them up in a bar." Mr. Emord testified that during the interview he asked appellant why she had a young girl working with her. Appellant did not deny that she was working with the minor victim; instead, she merely stated that she did not know the minor victim's age.<sup>7</sup> Mr. Emord's testimony accurately reflected the content of the videotape. As a result, this videotape was relevant as it revealed that appellant was working as a prostitute and that she did not deny that she was working as a prostitute with the minor victim at Mandalay Bay.<sup>8</sup> Thus, appellant failed to demonstrate that this tape would have been suppressed had trial

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<sup>6</sup>Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

<sup>7</sup>The videotape was admitted at trial but not recorded on the record.

<sup>8</sup>NRS 48.015.

counsel pursued its exclusion based upon an argument of irrelevancy.<sup>9</sup> Therefore, the district court did not err in denying this claim.

Third, appellant claimed that her trial counsel was ineffective for failing to adequately investigate the aforementioned videotape that was offered into evidence. Appellant failed to demonstrate the trial counsel was deficient or that she suffered prejudice. At the evidentiary hearing, appellant's trial counsel admitted that he had not received the videotape prior to trial. Nevertheless, the testimony also revealed that trial counsel did get to review the videotape when it was introduced into evidence and played at trial. Moreover, appellant's contention that had trial counsel watched the videotape, he could have properly cross-examined Mr. Emord by asking him if appellant ever admitted to having the minor child working with her was without merit. At trial, Mr. Emord did not testify that appellant admitted to having the minor child working with her; instead, Mr. Emord testified that appellant failed to deny that the minor child was working with her. As a result, appellant had failed to demonstrate that trial counsel's further review of the tape or cross-examination of Mr. Emord on this issue would have changed the outcome of the jury's verdict. Therefore, the district court did not err in denying appellant's claim.

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<sup>9</sup>Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (noting that trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims).

Fourth, appellant claimed that her trial counsel was ineffective for failing to adequately investigate the victim. Appellant claimed that her trial counsel was ineffective for failing to find a motive for the "false accusations" of the victim, for failing to investigate and disclose the prior bad acts of the minor victim, and for failing to discover and disclose the fact that the minor victim was pregnant. Appellant failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. Appellant failed to indicate how such an investigation and disclosure would have resulted in a reasonable probability of a different outcome.<sup>10</sup> Therefore, the district court did not err in denying appellant's claim.

Fifth, appellant claimed that her trial counsel was ineffective for failing to cross-examine Mr. Emord. Appellant failed to demonstrate that trial counsel was ineffective on this issue. Trial counsel's theory of defense was that appellant lacked the requisite intent to commit the crimes at issue because co-defendant Gregory Jefferson exercised complete control over appellant. Therefore, it is unlikely that cross-examination of Mr. Emord would have aided her defense. Moreover, because the videotape entered into evidence contained much of the information presented in Mr. Emord's testimony, there is not a reasonable probability that cross-examination of Mr. Emord would have changed the outcome in the trial. The decision not to cross-examine Mr. Emord was a reasonable

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<sup>10</sup>Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

tactical choice, and as such is entitled to deference.<sup>11</sup> Therefore, the district court did not err in denying appellant's claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to submit telephone records demonstrating that she let the minor victim use her cellular phone to call the minor victim's mother on the evening of the Mandalay Bay incident. Appellant contended that this evidence would have raised doubt in the minds of the jury as to the first degree kidnapping charge. Appellant failed to demonstrate that her trial counsel was deficient or that she was prejudiced. Notably, one of the State's theories of the case was that appellant enticed the victim away from her mother for the purpose of committing a crime. The State did not allege that the appellant used force to kidnap the minor victim. Thus, the mere fact the minor victim called her mother from appellant's phone does nothing to demonstrate that appellant did not entice the minor victim away from her mother for the purpose of committing a crime. This is especially true considering the fact that the phone records would not indicate what the minor victim said to her mother during the phone call. Appellant failed to discuss the details of the conversation in her petition; therefore, it is unknown how that conversation would have impacted the jury's verdict.<sup>12</sup> Moreover, appellant conceded in her petition that the jury was aware of the phone call because the videotape revealed that she told

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<sup>11</sup>See Riley, 110 Nev. at 653, 878 P.2d at 281-82.

<sup>12</sup>Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

Mr. Emord that she had allowed the minor victim to use her cellular phone to call her mother. Therefore, district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to suppress the admission into evidence of a hat, skirt, and shirt seized from appellant's residence pursuant to a search warrant. Appellant claimed that these items were irrelevant because they only proved what the minor child wore on the evening of the Mandalay Bay incident and should therefore have been suppressed. Appellant failed to demonstrate that her trial counsel was deficient or that she was prejudiced. The record reveals that three hats and two pairs of shoes were admitted into evidence at trial. Appellant's claim that this evidence is irrelevant is without merit. The video tape showed that the minor child was wearing a similar hat and high heeled shoes when she was with appellant at Mandalay Bay. That these items were later found at appellant's residence made it more probable than not that appellant gave the minor victim these or similar items of clothing.<sup>13</sup> For that reason, it is unlikely that the evidence would have been suppressed on the basis of relevancy, and trial counsel was not

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<sup>13</sup>NRS 48.015; Geary v. State, 91 Nev. 784, 791, 544 P.2d 417, 422 (1975) (noting that "[i]tems offered in evidence have relevancy and materiality if they are connected with the perpetrator, the victim or the crime.")



required to make such an objection.<sup>14</sup> Therefore, the district court did not err in denying appellant's claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to correct errors in her presentence report. Appellant does not state what factual errors were contained in the presentence report.<sup>15</sup> Therefore, appellant failed to demonstrate that she was prejudiced by trial counsel's alleged error. Thus, the district court did not err in denying appellant's claim.

Ninth, appellant claimed that trial counsel was ineffective for failing to advise petitioner of her right to be sentenced by the jury. In Nevada, jury sentencing is only available when the defendant is convicted of first degree murder.<sup>16</sup> Therefore, this claim was patently without merit, and the district court did not err in denying appellant's claim.

Tenth, appellant claimed that trial counsel was ineffective for failing to present any mitigating factors. Appellant failed to state what mitigating factors trial counsel should have presented on her behalf.<sup>17</sup> Therefore, appellant failed to demonstrate that trial counsel was ineffective on this issue, and the district court did not err in denying appellant's claim.

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<sup>14</sup>Ennis, 122 Nev. at 706, 137 P.3d at 1103.

<sup>15</sup>Hargrove, 100 Nev. at 502, 686 P.2d at 225.

<sup>16</sup>NRS 175.552(1).

<sup>17</sup>Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

Eleventh, appellant claimed that trial counsel was ineffective for failing to argue effectively on her behalf in his closing argument. Appellant alleged that right before closing arguments trial counsel asked her what he could say on her behalf and then told her that he would just "make up something." Appellant failed to demonstrate that her trial counsel was deficient or that she was prejudiced. In his closing argument, trial counsel argued that appellant lacked the requisite intent to commit the crimes for which she was charged because of the influence appellant's co-defendant Gregory Jefferson had over appellant. Trial counsel's decision to argue duress was a tactical decision. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."<sup>18</sup> Appellant did not demonstrate extraordinary circumstances as she failed to set forth any facts showing that this argument was deficient or what arguments trial counsel could have made that would have changed the outcome of the jury's verdict.<sup>19</sup> Therefore, appellant failed to demonstrate that trial counsel was ineffective on this issue. Thus, the district court did not err in denying appellant's claim.

Twelfth, appellant claimed that trial counsel was ineffective for omitting questions to the victim in his cross-examination which would have impeached the victim. Appellant failed to state any facts to support

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<sup>18</sup>Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated in part on other grounds as recognized by Harte v. State, 116 Nev. 1054, 1072, n.6, 13 P.3d 420, 432 n.6 (2000).

<sup>19</sup>Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

this claim.<sup>20</sup> Therefore, appellant failed to demonstrate that trial counsel was ineffective on this issue, and the district court did not err in denying appellant's claim.

Thirteenth, appellant claimed that trial counsel was ineffective for failing to challenge the jury instruction for kidnapping. Appellant failed to state any facts to support this claim.<sup>21</sup> Therefore, appellant failed to demonstrate that trial counsel was ineffective on this issue, and the district court did not err in denying appellant's claim.

In her petition, appellant also claimed ineffective assistance of appellate counsel. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)."<sup>22</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>23</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>24</sup> "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that

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<sup>20</sup>Id.

<sup>21</sup>Id.

<sup>22</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

<sup>23</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>24</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

the omitted issue would have a reasonable probability of success on appeal."<sup>25</sup>

First, appellant claimed that appellate counsel was ineffective for failing to communicate with petitioner during her appeal and that he failed to mail to her copies of her fast track statement, fast track response, or the order of affirmance. Appellant failed to demonstrate that her trial counsel was deficient or that she was prejudiced. During the evidentiary hearing, Mr. Wommer, appellant's trial and appellate counsel, testified that he talked to appellant about the appeal as soon as appellant was found guilty by the jury. Mr. Wommer testified that he explained the appellate procedure to appellant and discussed his plans regarding the appeal. Mr. Wommer testified that once he reviewed the transcripts of the trial he "prepared the appropriate appellate briefs raising the viable issues." Moreover, Mr. Wommer testified that at appellant's sentencing hearing he specifically discussed his plans to raise a claim of insufficiency of the evidence on appeal. Mr. Wommer testified further that when he received the order of affirmance from this court, he immediately mailed a copy of that order to appellant. Appellant failed to set forth any facts demonstrating how any additional communication would have had a reasonable probability of changing the outcome of her appeal.<sup>26</sup> Thus, the district court did not err in denying this claim.

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<sup>25</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>26</sup>Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

Second, appellant claimed that appellate counsel was ineffective because he inappropriately claimed that she conceded that she engaged in prostitution and that she acted under duress and "zombie-like allegiance to her pimp" when she committed the crimes involved herein. Appellant claimed that if appellate counsel had properly communicated with her she could have fully litigated her claim that there was a complete lack of corroborative evidence to sustain her convictions. Appellant failed to demonstrate that her appellate counsel was deficient or that she was prejudiced. Appellate counsel argued extensively on appeal that the evidence presented at trial was insufficient to support the jury's finding that appellant was guilty beyond a reasonable doubt. This court rejected that claim specifically stating that sufficient evidence supported the jury's verdict and noting that circumstantial evidence alone may sustain a conviction. Therefore, appellant has failed demonstrate that further arguments regarding the lack of corroborative evidence would have had a reasonable probability of success on appeal. Thus, the district court did not err in denying this claim.

Finally, appellant claimed that there was insufficient corroborating evidence adduced at trial to sustain her convictions for first degree kidnapping, pandering, and furnishing transportation. This issue was fully litigated and rejected by this court on appeal and is therefore barred by the doctrine of law of the case.<sup>27</sup> Furthermore, to extent that


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<sup>27</sup>Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 798-99 (1975).

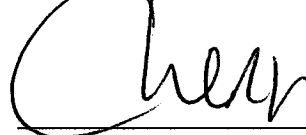
appellant's arguments vary with those actually raised on appeal we conclude that these claims are waived. They should have been raised on direct appeal, and appellant did not demonstrate good cause for her failure to do so.<sup>28</sup> Therefore, the district court did not err in denying this claim.

Having reviewed the records on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>29</sup> Accordingly, we


ORDER the judgment of the district court AFFIRMED.<sup>30</sup>

 \_\_\_\_\_, J.

Gibbons

 \_\_\_\_\_, J.

Cherry

 \_\_\_\_\_, J.

Saitta

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<sup>28</sup>See NRS 34.810(1)(b).

<sup>29</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>30</sup>We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Sally L. Loehrer, District Judge  
Crystal Fuentes  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk