


IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant/Cross-Respondent,
vs.
MICHAEL JOSEPH MULDER,
Respondent/Cross-Appellant.

No. 46800

FILED

JUN 17 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal and cross appeal from a district court order granting in part and denying in part a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Respondent/cross-appellant Michael Joseph Mulder stands convicted of first-degree murder, robbery upon a victim over the age of 65, and burglary while in possession of a firearm.¹ A jury sentenced him to death. This court affirmed the conviction and sentence on appeal. Mulder v. State, 116 Nev. 1, 992 P.2d 845 (2000). Mulder filed a post-conviction petition for a writ of habeas corpus in district court, alleging ineffective assistance of trial and appellate counsel and that two aggravating circumstances relied on by the jury were invalid under this court's decision

¹An amended judgment of conviction was filed on June 5, 1998.

in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). The post-conviction petition also raised several direct appeal claims.

Shortly after filing the post-conviction petition, Mulder suffered a stroke, after which he filed two motions related to the effects of the stroke. The district court denied both motions and subsequently denied Mulder's claims of ineffective assistance of trial and appellate counsel as well as several claims the district court determined were procedurally barred because they should have been raised on direct appeal. However, the district court granted Mulder's request to vacate his death sentence after invalidating two of the aggravating circumstances pursuant to McConnell. Both Mulder and the State have appealed the district court's order.

The State appeals from that part of the order vacating the death sentence, arguing that the district court erroneously vacated the death sentence without first reweighing the remaining aggravating and mitigating factors.

Mulder appeals from that part of the order denying him any further relief from the judgment, arguing that: (1) the district court erred by refusing to vacate the death sentence based on his mental retardation caused by a stroke; (2) the district court erred by rejecting his claim that he was not competent to be executed; (3) the district court erred in finding him competent to assist post-conviction counsel; (4) the district court erred in rejecting his claims of ineffective assistance of trial counsel; (5) he was prejudiced by the use of an erroneous premeditation and deliberation

instruction; and (6) the district court erroneously denied several direct appeal claims as procedurally barred.

As to the State's appeal, we conclude that the record reveals that the district court reweighed the remaining aggravating and mitigating factors before deciding to vacate Mulder's death sentence. Nevertheless, we further conclude that the district court erred when it vacated the death sentence because a reweighing of the aggravators and mitigating evidence supports imposing the death penalty here. As to Mulder's cross appeal, we conclude that his contentions are either without merit or should not be addressed on appeal because they are procedurally barred. Therefore, we reverse the district court's order to the extent that it vacated Mulder's death sentence and affirm it in all other respects.

Factual and procedural background

On July 8, 1996, Mulder robbed and killed 77-year-old John Ahart in Ahart's home. Mulder and his girlfriend, Kimberly Van Heusen, visited the victim together, at which time Mulder looked through the victim's belongings and indicated his intent to return to the victim's home, presumably to rob him. Shortly thereafter, the victim left to do some errands. Ahart gave Mulder and Van Heusen a ride, dropping Mulder off a short distance away so he could look for a job and dropping Van Heusen off near her motel.

Mulder later arrived at the motel, sitting in a maroon 1990 Infiniti coupe with the motor running, honking, and yelling for Van Heusen to grab their stuff and hurry up. Mulder appeared upset and

nervous and told Van Heusen that he had stolen the car. Van Heusen noticed that Mulder was wearing a new watch and that a wooden jewelry box was in the back seat of the car. He later told Van Heusen that he had stolen a gun from the person with whom he struggled, but had disposed of the gun and had not used it.

A few days later, Ahart was found lying dead in a pool of blood on the dining/living room floor of his home with his hands and ankles bound with duct tape. A chair had been placed over Ahart's body in an attempt to conceal it from view. Ahart's gun, watch, jewelry box, and car were missing. There was no sign of forced entry into the home. The victim had suffered a crushed left cheekbone and several severe scalp lacerations, including a fifteen-inch hinge fracture from the front of the skull extending around back to the base of the skull. Mulder's fingerprints were found on the duct tape that was used to bind the victim.

At trial, the jury returned guilty verdicts on one count each of first-degree murder, robbery, and burglary while in possession of a firearm. The State had sought the first-degree murder conviction on alternative theories of felony murder and willful, deliberate, and premeditated murder. There was no special verdict form indicating the theory the jury had relied on for its guilty verdict.

After the penalty phase, the jury determined that no mitigating factors outweighed four aggravating circumstances: that the murder was committed (1) during the perpetration of a burglary; (2) during the perpetration of a robbery; (3) by a person who was previously

convicted of a felony involving the use or threat of violence to the person of another, to wit: bank robbery in Arizona in 1987; and (4) by a person who was previously convicted of a felony involving the use or threat of violence to the person of another, to wit: armed robbery in Arizona in 1980. The jury returned a verdict of death. The district court further sentenced Mulder to serve two consecutive terms in prison of 48 to 180 months for robbery of a victim 65 years of age or older, and a consecutive term of 40 to 180 months for burglary. All counts were ordered to run consecutively. On appeal, this court affirmed Mulder's judgment of conviction. Mulder v. State, 116 Nev. 1, 992 P.2d 845 (2000).

On May 7, 2001, Mulder filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition.

More than a year after filing the petition, Mulder filed a motion to vacate the death sentence because he had suffered a stroke due to his use of methamphetamine while in prison, leaving him mentally retarded. The State opposed the motion. The district court denied the motion after determining that Mulder failed to show that his mental deficiency manifested during the developmental period pursuant to NRS 174.098, which defines mental retardation.

On January 21, 2005, Mulder filed a motion to stay all habeas proceedings, arguing he was not competent to assist post-conviction counsel. The State opposed the motion. The district court conducted an evidentiary hearing, during which three mental health experts testified—one opining that Mulder was not competent and two opining that he was

competent. After the hearing, the district court denied Mulder's motion, concluding that he was competent to assist post-conviction counsel and continue with the post-conviction proceedings.

On August 30, 2005, the district court held an evidentiary hearing and addressed whether this court's decision in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), invalidated two of the four aggravating circumstances and whether, as a result, the death sentence should be vacated. Subsequently, the district court held another evidentiary hearing regarding the McConnell issue, determining that Mulder's death sentence should be vacated because the jury had improperly considered two invalid aggravating factors. The next month, the district court summarily denied the remaining claims in Mulder's petition. Both the State and Mulder filed notices of appeal.²

State's appeal

The State concedes that the district court properly struck two of the aggravators—those based on robbery and burglary—under McConnell because they were alleged as the predicate felonies to support a felony-murder theory of first-degree murder and the jury's verdict did not specify the theory upon which it convicted Mulder of first-degree murder.

²On December 22, 2006, this court denied the State's motion to remand for reweighing based upon this court's opinions in Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006) and Rippo v. State, 122 Nev. 1086, 1091, 146 P.3d 279, 283 (2006).

Nevertheless, the State complains that the district court failed to engage in the required reweighing of the valid aggravating circumstances and the mitigating circumstances before vacating the death sentence and erred in vacating Mulder's death sentence. We conclude that the record before us, in particular the district court's order, shows that the district court engaged in a reweighing analysis. However, we conclude that the district court erred by determining that the McConnell error was not harmless.³

When reweighing the remaining aggravating and mitigating circumstances, this court conducts a de novo review, State v. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003), because reweighing does not require any factual determinations. Rippo v. State, 122 Nev. 1086, 1091, 146 P.3d 279, 283 (2006) (acknowledging that review of "the McConnell issue presents questions of law that do not require factual determinations outside the record"). To uphold a death sentence after striking an invalid

³We further reject Mulder's contention that this court lacks the authority to reweigh the aggravating and mitigating factors. This court's authority to reweigh the aggravating and mitigating factors after an aggravator has been stricken is firmly established by case law from this court and the United States Supreme Court. See Browning v. State, 120 Nev. 347, 363, 91 P.3d 39, 51 (2004); Chappell v. State, 114 Nev. 1403, 1410, 972 P.2d 838, 842 (1998); see also Clemons v. Mississippi, 494 U.S. 738, 741 (1990) ("[T]he Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review.").

aggravator, this court must be able to conclude beyond a reasonable doubt that the jury would have: (1) found the defendant death eligible and (2) imposed death absent the erroneous aggravating circumstances. If the court cannot make that determination, then a new penalty hearing is required. See Browning v. State, 120 Nev. 347, 363-64, 91 P.3d 39, 51 (2004); Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002); Haberstroh, 119 Nev. at 183, 69 P.3d at 683.

First, the jury did not specifically find any mitigating circumstances and therefore, there are no mitigating circumstances to weigh against the two remaining valid aggravators in this case.⁴ After striking the robbery and burglary aggravating circumstances, two aggravating circumstances remain: Mulder's previous convictions for felonies involving the use or threat of violence against the person of another. See NRS 200.033(2)(b). The two remaining aggravators concern prior felony convictions involving the use or threat of violence—two armed robberies—and the State relied heavily on those aggravators in the

⁴We reject Mulder's contention that this court's decision in Haberstroh permits this court to consider additional mitigating evidence presented in the post-conviction proceedings. To the contrary, this court emphasized in Haberstroh that the reweighing analysis does not involve factual findings "other than those of the jury at the original penalty hearing." Id. at 184 n.23, 69 P.3d at 683 n.23. Thus, by its very nature, the reweighing analysis must focus on the evidence and factors considered by the jury. To the extent Mulder asks this court to consider any new mitigating evidence, we decline his invitation to do so.

penalty phase, contending that the victim's murder was the culmination of an increasingly violent criminal career. Moreover, the stricken aggravators involved the circumstances of the crime itself and thus, the jury would have been privy to all of the facts underlying these aggravators regardless of whether they were used as aggravators. See Rippo, 122 Nev. at 1093, 146 P.3d at 284 (noting that striking multiple felony aggravators that were based on the underlying circumstances of the crime eliminated "the weight of roughly one major aggravator"). Thus, because the prosecutor emphasized Mulder's prior felony convictions, we conclude that the invalid felony aggravators would have had less impact on the jury's decision than the two remaining valid factors. Therefore, we conclude that the jury would have found Mulder to be death eligible based on these two remaining aggravators.

Second, we conclude that the jury would have imposed a sentence of death absent the invalid aggravating factors because the facts of this crime are particularly heinous and involve the robbery and brutal murder of an elderly victim and the State presented victim impact testimony from Ahart's nephew and son describing the impact the crime had on them and their family. Under these circumstances, we conclude that the jury's consideration of the two invalid felony aggravators was harmless beyond a reasonable doubt and therefore we reverse the district court's order vacating the death sentence.

Mulder's Appeal

Motion to vacate pursuant to Atkins v. Virginia

Mulder argues that the district court erred by denying his request to vacate the death penalty pursuant to the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304, 321 (2002), which held that the execution of a mentally retarded defendant violates the Eighth Amendment. In particular, Mulder contends that it would be cruel and unusual punishment to execute him because, as a result of his stroke, he exhibits many of the criteria for mental retardation under accepted definitions of the condition. We disagree and conclude that Mulder's claim lacks merit because he is not mentally retarded, as that term is defined in Nevada.

Here, applying NRS 174.098(7), we conclude that Mulder failed to demonstrate that he is mentally retarded. Mulder suffered his stroke when he was 38 years old. And the evidence presented at the post-conviction hearing showed that he had average intellectual functioning and adaptive behavior before the stroke. Accordingly, we conclude that Mulder was certainly past the "developmental period" when he suffered the stroke that allegedly caused the loss of some intellectual functioning and adaptive skills. Thus, we conclude that the district court did not err in denying Mulder's motion to vacate the death penalty pursuant to the

Supreme Court's decision in Atkins, because Mulder failed to demonstrate he is mentally retarded pursuant to Nevada law.⁵

Competence

Mulder contends that the district court erred by finding him competent to assist post-conviction counsel and by denying his motion to stay the proceedings. Specifically, Mulder argues that the district court should have afforded more weight to his expert's testimony because the defense expert had more experience with stroke victims and conducted a more thorough examination than the State's experts. He contends that his expert's testimony proves that he suffers from mental deficiencies that

⁵Mulder also argues, in his reply brief, that his diminished capacity as a result of his stroke renders him unfit to be executed the same as insanity renders a defendant unfit to be executed and that in this respect his age at the time of the impairment is irrelevant. In so arguing, Mulder appears to urge this court to extend the reasoning in Ford v. Wainwright, 477 U.S. 399 (1986), which prohibits the execution of the insane, to create a new and separate category beyond insanity. We decline to address the merits of these issues here as they were raised for the first time in Mulder's reply brief. NRAP 28(c); Elvik v. State, 114 Nev. 883, 888, 965 P.2d 281, 284 (1998). Moreover, our review of the record reveals that Mulder abandoned his claim of insanity below. McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983) (failure to raise issue below generally bars consideration on appeal). Regarding Mulder's argument urging this court to apply the reasoning in Ford to the facts of this case, we note that Mulder failed to support his argument with relevant authority. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Accordingly, we also decline to reach this issue.

could potentially hurt his ability to communicate rationally with his counsel. For the reasons set forth below, we disagree.

At the outset, we acknowledge that the parties appear to agree that a capital defendant must be competent to proceed with a post-conviction petition, although they disagree on the standard of competency this court should apply. Notwithstanding the parties' agreement on this issue, we note that this court has never adopted a requirement that a capital defendant must be competent to assist post-conviction counsel when the appointment of that counsel is statutorily mandated. Even assuming that such a requirement exists in Nevada, we conclude that Mulder's claim lacks merit because substantial evidence exists to support the district court's determination of competence under either of the parties' proposed standards to determine competency. Calvin v. State, 122 Nev. 1178, 1182, 147 P.3d 1097, 1099 (2006) (stating that when this court reviews a district court's finding of competence it will afford deference to the district court's decision and will not disturb it on appeal so long as it is supported by substantial evidence).

Mulder contends that this court should employ the standard used by the Ninth Circuit in Rohan ex rel. Gates v. Woodford, 334 F.3d 803 (9th Cir. 2003), which provides that "where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to communicate rationally, refusing to stay proceedings pending restoration of competence denies him his statutory right to assistance of counsel, whether or not counsel can identify with precision the

information sought.” Id. at 819. The State, in contrast, urges the court to adopt the competency standard used by the Illinois Supreme Court in People v. Owens, 564 N.E.2d 1184 (Ill. 1990), that “a petitioner who is competent to communicate his allegations of constitutional deprivations to counsel is competent to participate in post-conviction proceedings.” Id. at 1190.

We conclude that substantial evidence exists to support the district court’s competency determination under either of these standards. Under either of the approaches advocated by the parties, the focus of the inquiry is on the defendant’s ability to communicate with counsel with no regard for his understanding of the proceedings. We conclude that the evidence adduced at the district court’s hearing on the matter supports the conclusion that Mulder was able to communicate with his post-conviction counsel.

At the evidentiary hearing regarding Mulder’s competence, the district court heard testimony from three experts—Drs. Kinsora, Milner, and Bishop. Dr. Kinsora, a clinical neuro-psychologist, testified that Mulder was not competent to assist his post-conviction counsel. In particular, Dr. Kinsora testified that Mulder likely could not understand the complexities of his case, make important decisions, or adequately comprehend communications from his attorney in court.

In contrast, Dr. Bishop, a neuro-psychiatrist at Ely State Prison, and Dr. Milner, a psychologist at Ely State Prison, testified that Mulder was competent to assist his counsel. Both of these experts agreed

that Mulder could communicate with his post-conviction counsel. In addition, Dr. Bishop testified that Mulder was malingering in order to escape punishment and that Mulder functioned normally in prison. Further, Dr. Milner testified that Mulder's claims of incompetence were inconsistent with his ordering of fairly complex works of fiction in prison.

Moreover, Mulder's own outburst at the evidentiary hearing, where he accused Dr. Bishop of lying when he testified that Mulder functioned normally as an inmate, is inconsistent with any claim that he is unable to follow the proceedings or to communicate with counsel in the manner required by the standards set forth above.

Finally, we note that Mulder's counsel was able to file his petition for a writ of habeas corpus without significant input from Mulder and has raised no claims that are dependent upon Mulder's memory of the trial.

Based on this evidence, we conclude that the district court did not err in denying Mulder's claim.

Claims of ineffective assistance of trial counsel

Mulder argues that the district court erred in summarily denying two claims of ineffective assistance of trial counsel: (1) counsel failed to adequately investigate the defense expert witness and should not have called an unqualified expert witness and (2) counsel failed to challenge a violation of Mulder's speedy trial rights.

"A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review." Evans v. State,

117 Nev. 609, 622, 28 P.3d 498, 508 (2001). However, the district court's purely factual findings regarding a claim of ineffective assistance of counsel are entitled to deference on subsequent review by this court. Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004). To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that counsel's performance was deficient and that prejudice resulted by showing a reasonable probability of a different result absent counsel's error. Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant bears the burden to "prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence," Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004), and "carries the affirmative burden of establishing prejudice." Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 278 (1994). We conclude that Mulder's claims lack merit and address each claim in turn below.

Defense expert witness

Mulder argues that the district court erred by denying his claim that trial counsel were ineffective for failing to properly investigate the qualifications of the only expert witness the defense called on Mulder's behalf. Specifically, Mulder argues that trial counsel were deficient for failing to ascertain that Howard Doulder was not qualified to offer expert testimony regarding fingerprint analysis. Mulder argues that this error, combined with trial counsel's "anemic" opening statement, which focused exclusively on that expert's testimony, resulted in prejudice. We disagree.

The trial court refused to qualify Doulder an expert after the State's voir dire examination revealed several inconsistencies in Doulder's previous voir dire statements to defense counsel. In particular, the State elicited testimony that other district court judges had refused to certify Doulder as a witness, contrary to Doulder's previous testimony. The State's questioning also revealed that Doulder had not been listed as a fingerprint expert by the International Association for Identification (IAI) since 1950. Although the district court declined to certify Doulder as an expert, he was allowed to testify along with instructions on the weight that should be given an expert's testimony and lay testimony. Doulder testified that he could not identify the fingerprints found on the duct tape used to bind the victim.

As to Mulder's challenge to an "anemic opening statement," trial counsel stated:

We will be presenting only one witness to you this morning and that witness is Mr. Howard Doulder. Mr. Doulder is a fingerprint examiner. He is an expert in that field. His testimony to you this morning will be that he also examined the exemplars and the photographs taken from the print and like the examiners from metro, Mr. Scarborough and the four others, he was unable to make a comparison. Thank you.

We conclude that Mulder was not prejudiced for the following three reasons.

First, on direct appeal, this court indicated that Mulder was not prejudiced by Doulder's testimony because it was still beneficial to his

case. Therefore, even assuming counsel was deficient, Mulder cannot demonstrate prejudice.

Second, Mulder failed to demonstrate prejudice because the evidence against him was overwhelming. Mulder and Van Heusen visited the victim together and Mulder indicated to Van Heusen that he planned to return to the victim's home, presumably to rob him. Mulder's fingerprints were found on the duct tape that was used to bind the victim. On the day of the murder, Mulder and Van Heusen hastily left Las Vegas for Phoenix, Arizona, in the victim's car. At the time, Mulder was wearing a watch that did not belong to him and told Van Heusen that he also took the victim's gun; the victim's watch and gun were missing from his home. Mulder told Van Heusen that he was involved in a struggle with a man he robbed and that the victim "should have done what he was told." Once Mulder and Van Heusen arrived in Phoenix, they met with Mulder's brother who testified that Mulder told him that the car they were driving was "hot."

Third, Mulder failed to allege or establish that another well qualified expert would have testified that the fingerprints found on the duct tape were not his despite his claim that "there are literally hundreds of exceptionally talented and qualified fingerprint experts in our country." Post-conviction counsel was allowed to seek a new fingerprint analysis by another expert; however, that analysis proved unhelpful to Mulder's case.

Because Mulder failed to demonstrate that further investigation would have altered the outcome of the proceeding, we conclude that the district court did not err in denying this claim.

Speedy trial

Mulder argues that the district court erred by denying his claim that trial counsel were ineffective for failing to challenge a violation of Mulder's constitutional and statutory rights to a speedy trial. Specifically, he contends that his trial was delayed by his own counsel over his repeated objections and that the delay was prejudicial because it allowed the State time (1) to find an expert who would testify that Mulder's fingerprints were on the duct tape used to bind the victim and (2) "to research and investigate the defenses' alleged expert on fingerprints in an effort to devastate his credibility before a jury." We disagree.

Pursuant to NRS 178.556(2), "[i]f a defendant whose trial has not been postponed upon his application is not brought to trial within 60 days after the arraignment on the complaint for an offense triable in a Justice or municipal Court, the court may dismiss the complaint." Under Nevada law, the right to a speedy trial may be waived either expressly, for example, upon filing a pretrial petition for a writ of habeas corpus (NRS 34.700), or by implication based on good cause, including continuances requested by the defendant. See, e.g., Heubner v. State, 103 Nev. 29, 731 P.2d 1330 (1987). Further, "failure to set a trial within 60 days is not per se equatable to a denial of a speedy trial." Rodriguez v. State, 91 Nev. 782, 784, 542 P.2d 1065, 1065 (1975). Factors to be considered in

assessing a speedy trial claim are the length of delay, the reason for delay, the assertion of the right, and prejudice to the accused. State v. Fain, 105 Nev. 567, 568, 779 P.2d 965, 966 (1989) (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)); Furbay v. State, 116 Nev. 481, 484-85, 998 P.2d 553, 555 (2000). The test for evaluating a claim based on a defendant's constitutional right to a speedy trial is the same. Barker, 407 U.S. at 530.

While it appears that Mulder invoked his right to a speedy trial on November 7, 1996 and again on December 19, 1996, we nevertheless conclude that he failed to demonstrate that a motion to dismiss the complaint based upon the district court's failure to bring the case to trial within 60 days would have been successful. See 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"). Under the circumstances involved here, a 16-month delay was not excessive considering the complexity of the issues involved. Moreover, the majority of the delay was caused by the need to appoint new defense counsel because Mulder's initial counsel had a conflict in the case. Therefore, it was reasonable to delay the trial because Mulder's newly appointed counsel needed time to prepare his defense. See Furbay, 116 Nev. at 485, 998 P.2d at 555-56. As a result, it was reasonable for trial counsel not to raise the issue of Mulder's right to a speedy trial because Mulder would have suffered greater prejudice if his attorneys were forced to go to trial without having the time to properly prepare. Thus, Mulder failed to demonstrate that he was prejudiced by the delay, especially

considering the fact that he was allowed to seek a new fingerprint analysis by another expert, which proved unhelpful to his case. Therefore, we conclude that a motion to dismiss did not enjoy a reasonable probability of success and the district court did not err in denying this claim.⁶

Direct appeal claims

First-degree murder instruction

Mulder argues that the district court erred by denying his claim that his conviction is invalid under the federal and state constitutional guarantees of due process and equal protection because he received an improper premeditation instruction, commonly known as the Kazalyn instruction. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).⁷ Mulder contends that this instruction was erroneous given this court's decision in Byford v. State, 116 Nev. 215, 994 P.2d 700.

⁶Mulder also contends that his appellate counsel was ineffective for failing to raise this claim on appeal. Because the delay in Mulder's case was acceptable, we conclude that Mulder failed to demonstrate that this claim would have had a reasonable probability of success on appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

⁷Mulder failed to provide this court with the jury instructions given at trial, but he contends that he received the following erroneous instruction:

Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.

continued on next page . . .

NRS 34.810(1)(b)(2) provides that a claim shall be dismissed if the petitioner's conviction was the result of a trial and the claim could have been raised on direct appeal. This procedural default may be excused by a showing of good cause for failing to raise the claim earlier and prejudice. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). While we agree with Mulder's contention that Byford should have applied to his appeal as a matter of due process, and therefore he demonstrated good cause for his failure to previously raise this claim, we conclude that he failed to demonstrate prejudice.

In Byford, this court concluded that "willfulness," "deliberation," and "premeditation" are distinct elements of the mens rea required to prove this category of first-degree murder. 116 Nev. at 234-35, 994 P.2d at 713-14. In so concluding, this court disapproved of the Kazalyn instruction which "underemphasized the element of deliberation" and set forth instructions with distinct definitions for each of the elements

... *continued*

Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate, and premeditated murder.

on the mens rea required for a first-degree murder conviction based on willful, deliberate, and premeditated murder. Id. at 234-36, 994 P.2d at 713-14.

In Nika v. State, 124 Nev. ___, ___, 198 P.3d 839, 859 (2008), this court concluded that Byford announced a new rule that constituted a change in state law, which did not implicate federal constitutional law, and therefore has no retroactive application to cases that became final before the new rule was announced. Id. at ___, 198 P.3d at 849. In making this determination, however, this court recognized that Byford should apply as a matter of due process to any cases that were not yet final at the time of the change in law. Id. at ___, 198 P.3d at 850.

In the instant case, Mulder's conviction became final several months after Byford was decided. Therefore, we conclude that under Nika, Byford would have applied to Mulder's appeal as a matter of due process.

Accordingly, we conclude that this court's decision in Nika provides good cause, pursuant to NRS 34.810, for Mulder's failure to raise this issue in his direct appeal because the legal basis for Mulder's claim was not yet reasonably available to him at the time he filed his direct appeal. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Nevertheless, in our view, Mulder cannot establish actual prejudice because, as explained above, there is ample evidence to establish

that he committed both a premeditated and deliberate murder as well as felony murder.⁸ NRS 34.810; Mazzan, 112 Nev. at 842, 921 P.2d at 922.

Remaining claims

Mulder argues that the district court erred by denying two additional claims that should have been raised on direct appeal: (1) prosecutorial misconduct during closing argument at the penalty phase and (2) constitutional challenges to the death penalty. Because Mulder should have raised these issues on direct appeal they are procedurally barred absent a demonstration of good cause and prejudice. NRS 34.810(1)(b)(2). We conclude that he failed to satisfy the requirements for

⁸We further conclude that Mulder failed to demonstrate that his trial and appellate counsel were ineffective. First, because Kazalyn was the accepted instruction at the time of Mulder's trial, we conclude that trial counsel were not deficient for failing to object to the instruction. Second, because sufficient evidence supports Mulder's conviction for premeditated, deliberate, and willful murder, Mulder failed to demonstrate that he was prejudiced by any purported failure on the part of his trial counsel. Likewise, we conclude that he was not prejudiced by his appellate counsel's failure to raise this issue on direct appeal. Strickland v. Washington, 466 U.S. 668, 694; Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). To the extent Mulder complains that the district court failed to consider his claims of ineffective assistance of trial and appellate counsel below, we disagree. We have reviewed the record and conclude that the district court determined that Mulder failed to demonstrate prejudice as to all of his ineffective assistance of counsel claims and was, therefore, not entitled to an evidentiary hearing on those matters.

overcoming the procedural bar. Therefore, the district court did not err by denying these claims as procedurally barred.

For the reasons set forth above, we reverse the district court's order to the extent that it vacated Mulder's death sentence and affirm it in all other respects. Accordingly we,

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.⁹

Hardesty, C.J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Saitta, J.
Saitta

Gibbons, J.
Gibbons

Pickering, J.
Pickering

⁹The Honorable Michael Cherry, Justice, voluntarily recused himself from participating in the decision in this matter.

cc: Hon. Michelle Leavitt, District Judge
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Christopher R. Oram
Eighth District Court Clerk