

IN THE SUPREME COURT OF THE STATE OF NEVADA

HAROLD L. FURBAY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 37078

**FILED**

APR 14 2004

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Harold Furbay's post-conviction petition for a writ of habeas corpus.

On February 12, 1998, the district court convicted Furbay, pursuant to a jury verdict, of one count of first-degree murder and one count of robbery. The district court sentenced Furbay to life in the Nevada State Prison without the possibility of parole, and a consecutive sentence of fifteen years. This court affirmed Furbay's judgment of conviction and sentence.<sup>1</sup> The remittitur issued on May 31, 2000.

On July 17, 2000, Furbay filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Furbay filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Furbay or to conduct an evidentiary hearing. On December 8, 2000, the district court denied Furbay's petition. This appeal followed.

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<sup>1</sup>Furbay v. State, 116 Nev. 481, 998 P.2d 553 (2000).

In his petition, Furbay raised a substantial number of claims of ineffective assistance of trial counsel.<sup>2</sup> 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 there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.<sup>3</sup> The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.<sup>4</sup>

First, Furbay contended that his trial counsel were ineffective for failing to file a pretrial writ of habeas corpus because Furbay was not brought before a magistrate judge within forty-eight hours of his arrest. The record on appeal reveals that Furbay was extradited, pursuant to a warrant, from Utah to Nevada on April 29, 1992. Furbay was arraigned in the justice's court on May 1, 1992. Therefore, the record belies Furbay's allegation that he was not brought before a court within forty-eight hours of his arrest.<sup>5</sup> Consequently, Furbay failed to demonstrate that his trial

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<sup>2</sup>Furbay alleged ineffective assistance of appellate counsel on several of the following claims as well. Consistent with the reasoning discussed below, we conclude that Furbay failed to demonstrate that his appellate counsel were ineffective on these issues. Additionally, to the extent that Furbay raised any of these claims independently from his ineffective assistance of counsel claims, they are waived. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

<sup>3</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>4</sup>Strickland, 466 U.S. at 697.

<sup>5</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

counsel were ineffective for failing to file a pre-trial writ of habeas corpus on this issue.

Second, Furbay claimed that his trial counsel were ineffective for failing to obtain a deposition or sworn statement from Bonnie Hammond to use at trial. Hammond testified at the preliminary hearing that Furbay called her from jail and told her that he and the victim had been drinking alcohol and Furbay passed out. When Furbay awoke, the victim's hand was down Furbay's pants, and Furbay hit the victim and left with the victim's truck.

Testimony given in a prior proceeding involving the same parties is admissible if the declarant is unavailable as a witness in the present proceeding.<sup>6</sup> A review of the record reveals that Hammond could not be located for trial by either the State or the defense. Although the State wished to use Hammond's preliminary hearing testimony in rebuttal, Furbay's trial counsel did not attempt to use this testimony. We conclude that this was a reasonable tactical choice, and as such is entitled to deference.<sup>7</sup> Trial counsel's theory of defense was that another individual murdered the victim. Therefore, it is unlikely that Hammond's testimony would have aided his defense. Thus, Furbay did not establish that his trial counsel were ineffective on this issue.

Third, Furbay asserted that his trial counsel were ineffective for continuing to negotiate a plea with the State after Furbay informed his counsel that he was unwilling to accept a plea that required him to serve a life sentence. Furbay contended that this caused his trial to be delayed

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<sup>6</sup>See NRS 51.055; NRS 51.325.

<sup>7</sup>See Riley v. State, 110 Nev. 638, 653, 878 P.2d 272, 281-82 (1994).

and he subsequently lost contact with potential defense witnesses. Furbay failed to demonstrate that his trial counsel were attempting to negotiate a plea with the State in which Furbay would be required to serve a life sentence. Consequently, he did not establish that his trial counsel acted unreasonably in this instance.

Fourth, Furbay claimed that his trial counsel were ineffective for failing to research the criminal history of the victim to determine if he had ever been charged with sexual assault against a male victim. A review of the record reveals that trial counsel filed a motion to compel discovery, in which the defense requested criminal information concerning the victim. Specifically, trial counsel requested complaints, prior arrests or convictions involving the victim "as the perpetrator of any homosexual advances or assaults." The district court granted the motion. Therefore, Furbay's allegation is belied by the record,<sup>8</sup> and he failed to demonstrate that his counsel were ineffective on this issue.

Fifth, Furbay alleged that his trial counsel were ineffective for failing to utilize an expert in forensic pathology who would testify that the victim was killed by a single blow from a fist. Dr. Jordan, an expert in forensic pathology, testified for the State. He stated that the victim had three blunt lacerations on his head, including a laceration that partially severed his left ear. Dr. Jordan testified that the amount of force necessary to produce the lacerations "would be more than striking the side of the head with a fist." Additionally, the victim had a neck injury consistent with manual strangulation. Dr. Jordan determined that the lacerations and strangulation were administered contemporaneously and

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<sup>8</sup>See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

he was unable to conclude which injury actually caused the victim's death. Furbay failed to demonstrate that his trial counsel could have procured an expert in forensic pathology who would have testified that the victim died from a single blow from a fist. Additionally, we note that Furbay's trial counsel vigorously cross-examined Dr. Jordan concerning the cause of the victim's injuries. Accordingly, Furbay did not establish that his counsel were ineffective in this regard.

Sixth, Furbay alleged that his trial counsel were ineffective for failing to notify the court that there was a breakdown of communication between Furbay and his trial counsel. The record on appeal, however, reveals that the district court was well aware of Furbay's unhappiness with his trial counsel, as he filed numerous motions to dismiss his counsel. The district court conducted several hearings concerning Furbay's dissatisfaction, and ultimately dismissed the Public Defender's Office after Furbay filed a complaint with the State Bar of Nevada. Furbay was appointed new trial counsel, and he subsequently filed several motions to dismiss them as well. The court denied these motions. Therefore, we conclude that Furbay failed to demonstrate that his trial counsel were ineffective for failing to notify the court of communication problems.

Seventh, Furbay contended that his trial counsel were ineffective for failing to inform him of the range of sentencing he would face if convicted. The district court stated on numerous occasions, in the presence of Furbay, that he could receive the death penalty if convicted. Furbay did not demonstrate that he was prejudiced by any failure of his trial counsel to inform him of the range of sentencing he would face if convicted. Therefore, the district court did not err in denying this claim.

Eighth, Furbay contended that his trial counsel were ineffective for misrepresenting to the district court that they had just become aware of an allegation that Furbay committed a homicide in Alabama, when trial counsel had known of this allegation for over two years. Furbay stated that this prejudiced his defense because it delayed his trial and he was unable to locate several defense witnesses. The record reveals that trial counsel requested a continuance because they had received their first piece of solid information concerning a homicide in Alabama allegedly committed by Furbay. Trial counsel stated that they had requested information from authorities in Alabama months ago, but had just received it. Further, trial counsel believed that evidence of the Alabama homicide would be admissible in both the guilt and the penalty phases of Furbay's trial, and therefore needed to conduct further investigation. Furbay failed to demonstrate that trial counsel acted unreasonably in this situation.

Ninth, Furbay claimed that his trial counsel were ineffective for failing to join his proper person motion to dismiss his indictment based on a violation of his right to a speedy trial. The district court declined to hear the motion because Furbay was represented by counsel. Furbay failed to demonstrate that he was prejudiced by trial counsels' failure to join his proper person motion. On direct appeal, this court determined that Furbay's speedy trial rights were not violated. Consequently, Furbay failed to establish that his trial counsel were ineffective on this issue.

Tenth, Furbay alleged that his trial counsel were ineffective for failing to request that his alias be removed from the information. Furbay contended that this led the jury to believe that he was a career criminal. A review of the record on appeal reveals that the victim and

several of the witnesses believed that Furbay's name was David Lee Hammond. Furbay failed to demonstrate that his alias was improperly included on the information. Thus, he failed to establish that his trial counsel were ineffective for failing to request that it be removed.

Eleventh, Furbay contended that his trial counsel were ineffective for failing to present an opening statement. Furbay argued that this left the jury without knowledge of the theory of defense in this case. Furbay failed to demonstrate that counsel's failure to give an opening statement prejudiced his defense. Trial counsel argued against the adequacy of the State's evidence through extensive cross-examination of the State's witnesses, the presentation of several witnesses for the defense, and a closing argument. Thus, Furbay did not establish that his trial counsel were ineffective on this issue.

Twelfth, Furbay claimed that his trial counsel were ineffective for failing to object to the prosecutor's vouching for the State's witnesses. We have reviewed the pages of the record that Furbay cited in support of his claim, and conclude that the prosecutor did not improperly vouch for the State's witnesses. Therefore, Furbay did not establish that his trial counsel were ineffective in this regard.

Thirteenth, Furbay alleged that his trial counsel were ineffective for failing to question witnesses Edna Mitchell, Don Schamanek, and Neil Rymer about prior threats made against the victim. Specifically, Furbay contended that there was evidence that Gregory Beard, Bill Patterson, and Mark Thomas made threats against the victim. A review of the record, however, reveals that trial counsel questioned Schamanek and Rymer about these men. Therefore, this claim is partially

belied by the record.<sup>9</sup> Additionally, Furbay failed to provide any specific facts concerning his claim that threats were made against the victim, or that the witnesses were aware of these threats.<sup>10</sup> Therefore, Furbay failed to demonstrate that his counsel were ineffective on this issue.

Fourteenth, Furbay contended that his trial counsel were ineffective for failing to question the police officer concerning complaints filed by the victim against Beard, Patterson, and Thomas. Furbay alleged that Beard, Patterson, and Thomas made death threats against the victim, and were in the area when the victim was killed. We initially note that several police officers testified at trial, and Furbay did not specify which officer should have been questioned regarding Beard, Patterson, and Thomas. Moreover, Furbay did not provide specific facts concerning his allegation that death threats were made against the victim, or that the three men were in the area when the victim was killed.<sup>11</sup> Therefore, Furbay did not establish that his trial counsel were ineffective, and the district court did not err in denying this claim.

Fifteenth, Furbay claimed that his trial counsel were ineffective for advising him not to testify at trial. He argued that he wanted to testify and explain his version of the events, but instead followed the advice of counsel. A review of the record reveals that if Furbay had testified, evidence of prior crimes would possibly have been admitted. Additionally, the preliminary hearing testimony of Bonnie

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<sup>9</sup>See id.

<sup>10</sup>See id. at 502, 686 P.2d at 225.

<sup>11</sup>Id.



Hammond could have been admitted for impeachment purposes.<sup>12</sup> Therefore, we conclude that it was not unreasonable for trial counsel to advise Furbay against testifying, and Furbay failed to demonstrate that his counsel were ineffective in this regard.

Sixteenth, Furbay alleged that his trial counsel were ineffective for failing to object to the prosecutor's leading of the State's witnesses. We have reviewed the pages of the record that Furbay cited in support of his claim. We conclude that Furbay failed to demonstrate that the outcome of his trial would have been altered if trial counsel had objected to the prosecutor's questions. Accordingly, Furbay did not establish that his trial counsel were ineffective, and the district court did not err in denying this claim.

Seventeenth, Furbay claimed that his trial counsel were ineffective for failing to object to the testimony of witnesses Sheree Norman and Michael Perkins concerning blood splatter. Furbay argued that this testimony should only have been elicited from an expert witness. Both witnesses were Las Vegas Metropolitan Police Department (LVMPD) crime scene analysts. A review of the record on appeal reveals that trial counsel objected to the relevance of the prosecutor's question concerning Norman's training in blood splatter. The district court overruled the objection. Further, trial counsel objected to the relevance of a photograph illustrating blood splatter. The district court overruled this objection and admitted the photograph. Furbay failed to describe what further actions counsel should have taken. Additionally, Furbay did not establish that he

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<sup>12</sup>The district court declined to rule on the admissibility of Furbay's prior crimes and Hammond's preliminary hearing testimony until Furbay actually testified.

was prejudiced by the admission of testimony concerning blood splatter, such that the outcome of the trial would have been altered if his trial counsel had made a successful objection. Therefore, Furbay did not establish that his trial counsel were ineffective on this issue

Eighteenth, Furbay alleged that his trial counsel were ineffective for failing to request a hearing after there were statements during the trial suggesting that the prosecutor had encouraged the State's witnesses to talk with one another. The record reveals that the prosecutor asked witness Kenneth Mitchell to describe an individual. After Mitchell provided a description, the prosecutor stated:

Q. Okay. After being out in the hallway the last couple of days, you familiar with a fellow named Max Combs?

A. Yeah.

Q. You saw him in and out of here today?

A. Mm-hmm.

Q. Was it that fellow? Was he the guy?

A. No.

We conclude that Furbay's claim is without merit. Furbay failed to provide any evidence that the prosecutor encouraged the State's witnesses to speak to one another about the case. Mitchell's mere recognition of Combs does not demonstrate that the State encouraged the two witnesses to speak to one another. Moreover, Furbay failed to articulate how his defense was prejudiced, such that the outcome of the trial would have been altered if trial counsel had requested a hearing on the issue. Therefore, Furbay did not establish that his trial counsel were ineffective on this issue.

Nineteenth, Furbay claimed that his trial counsel were ineffective for failing to object to the jury instruction regarding flight.<sup>13</sup> Furbay argued that this instruction shifted the burden of proof and required him to prove his actual innocence. An instruction may be given regarding flight if evidence of flight has been admitted.<sup>14</sup> Here, evidence introduced at trial indicated that Furbay drove the victim's truck from Las Vegas to Elko shortly after killing the victim. Soon after arriving in Elko, Furbay drove the victim's truck to Murray City, Utah, where he was subsequently arrested. Furbay did not establish that the jury instruction regarding flight was inappropriate in light of the facts of his case. Consequently, Furbay failed to demonstrate that his trial counsel acted unreasonably.

Twentieth, Furbay contended that his trial counsel were ineffective for failing to object to the jury instruction regarding implied

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<sup>13</sup>The district court instructed the jury as follows:

The flight of a person immediately after the commission of a crime, after he is accused of a crime, or contemporaneous with a significant event during the prosecution of said crime, is not sufficient in itself to establish guilt, but is a fact which, if proved, may be considered by you in the light of all other proven facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilty, and the significance to be attached to such a circumstance, are matters for your determination.

<sup>14</sup>Potter v. State, 96 Nev. 875, 875-76, 619 P.2d 1222, 1222 (1980); see also Guy v. State, 108 Nev. 770, 777, 839 P.2d 578, 583 (1992).

malice.<sup>15</sup> Furbay argued that the implied malice definition was unconstitutional and relieved the State of the burden of proof. This court, however, has upheld the validity of the implied malice jury instruction.<sup>16</sup> Therefore, Furbay did not establish that his trial counsel were ineffective in this regard.

Twenty-first, Furbay claimed that his trial counsel were ineffective for failing to object to the prosecutor's use of personal opinion, speculation, and hypothetical comments. We have reviewed the pages of the record that Furbay cited in support of his claim, and conclude that his trial counsel did not act unreasonably in failing to object to the prosecutor's comments.

Twenty-second, Furbay contended that his trial counsel were ineffective when they "opened the door" for the State to impermissibly comment on the reasonable doubt jury instruction. Trial counsel stated that the decision to purchase a home, have a child, or get married is not a "weighty affair" because those decisions can be altered. As discussed below, however, Furbay failed to demonstrate that he was prejudiced by the prosecutor's reasonable doubt comments. Therefore, he did not establish that trial counsel were ineffective for "opening the door."

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<sup>15</sup>The district court instructed the jury as follows:

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

<sup>16</sup>See Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

Twenty-third, Furbay alleged that his trial counsel were ineffective for failing to object to remarks concerning reasonable doubt made by the prosecutor during his closing argument. The prosecutor, referring to the jury instruction concerning reasonable doubt, stated, "[w]eighted affairs of life means just that, it means marriage. Is that a weighty affair of life to you? Getting a job, having a baby, buying a house. Those are weighty affairs . . . and they should be considered by you folks in deciding." Furbay claimed that equating minor life decisions with reasonable doubt was prejudicial and improperly shifted the burden of proof.

We conclude that there is no reasonable probability that the outcome of the trial would have been altered if Furbay's trial counsel had objected to this statement. The jury was given the proper instruction concerning reasonable doubt.<sup>17</sup> Further, the prosecutor quoted the correct statutory definition of reasonable doubt immediately before making the allegedly improper statement.<sup>18</sup> Therefore, Furbay did not establish that his trial counsel were ineffective, and the district court did not err in denying this claim.

Twenty-fourth, Furbay claimed that his trial counsel were ineffective for failing to object to remarks made by the prosecutor during his closing argument. Specifically, Furbay alleged that it was improper for the prosecutor to state that Furbay had confessed to the crime when he had not done so. A review of the record reveals that the prosecutor stated that the jury should infer that Furbay confessed to the crime based on two

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<sup>17</sup>See NRS 175.211.

<sup>18</sup>See Lord v. State, 107 Nev. 28, 35, 806 P.2d 548, 552 (1991).

of his statements admitted at trial.<sup>19</sup> Further, the prosecutor informed the jury that Furbay had not explicitly stated that he killed the victim. Because the prosecutor based his argument on evidence admitted at trial and did not mislead the jury, we conclude that Furbay did not demonstrate that his trial counsel were ineffective for failing to object to the prosecutor's comments.

Twenty-fifth, Furbay contended that his trial counsel were ineffective for failing to request a directed verdict after the State rested its case. Although the district court may enter a judgment of acquittal pursuant to NRS 175.381(2), there is no provision in Nevada law for the entry of a directed verdict in a criminal case.<sup>20</sup> Additionally, on direct appeal this court determined that sufficient evidence was introduced at trial to convict Furbay of first-degree murder and robbery beyond a reasonable doubt. Therefore, Furbay did not demonstrate that his trial counsel were ineffective in this regard.

Twenty-sixth, Furbay claimed that his trial counsel were ineffective for arguing that he should receive life without the possibility of parole during the penalty hearing. Furbay contended that the jury would likely have returned a sentence of life with the possibility of parole if his trial counsel had argued for it. A review of the record reveals that the State argued that Furbay should receive the death penalty. The State also introduced evidence of a pending murder charge against Furbay in

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<sup>19</sup>The prosecutor relied on the following statements allegedly made by Furbay: "Partners do kill partners over bullshit," and "I'm going to F up your world, old man. I'm going to put you with the other old man."

<sup>20</sup>See State v. Combs, 116 Nev. 1178, 1180, 14 P.3d 520, 521 (2000).

Alabama. We conclude that trial counsel's argument that Furbay should receive life without the possibility was a reasonable tactical choice, as it allowed him to escape the death penalty. Because this choice was within the range of reasonable effective assistance of counsel,<sup>21</sup> the district court did not err in denying this claim.

Lastly, Furbay contended that his trial counsel were ineffective for: (1) failing to investigate allegations of sexual assault made against the victim by Thomas, Beard, Patterson, and "a number of other individuals," (2) failing to inform Furbay of the nature of the proceedings, (3) failing to present any defense, and (4) failing to support the closing argument with any evidence. Furbay failed to provide specific facts to support each of these allegations.<sup>22</sup> Therefore, he did not demonstrate that his trial counsel were ineffective in these areas.

Next, Furbay made numerous allegations of 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*."<sup>23</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>24</sup> To demonstrate prejudice based on the deficient assistance of appellate counsel, the

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<sup>21</sup>See Riley, 110 Nev. at 653, 878 P.2d at 281-82.

<sup>22</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

<sup>23</sup>Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1113 (1996).

<sup>24</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

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

First, Furbay contended that his appellate counsel were ineffective for failing to argue that the State listed over ninety potential witnesses. Furbay argued that his trial counsel were unable to investigate all of the potential witnesses, and the sheer number of witnesses led the jury to believe that there was overwhelming evidence against him. We conclude that Furbay failed to demonstrate that his appellate counsel were ineffective on this issue. The State is required to disclose the names of all witnesses it intends to call during its case in chief.<sup>26</sup> Furbay did not establish that the State listed an excessive number of witnesses for an improper purpose. Accordingly, the district court did not err in denying this claim.

Second, Furbay alleged that his appellate counsel were ineffective for failing to challenge multiple occasions when the prosecutor misrepresented evidence during his closing argument. We have reviewed the pages of the record that Furbay cited in support of his claim. We conclude that Furbay failed to demonstrate that an appeal based on any of these allegedly improper comments would have had a reasonable likelihood of success. Accordingly, the district court did not err in denying this claim.

Third, Furbay claimed that his appellate counsel were ineffective for failing to challenge the prosecutor's argument that a weapon was used during the murder, as the evidence did not support this

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

<sup>26</sup>See NRS 174.234(1)(a)(2).



allegation. A review of the record reveals that during his closing argument, the prosecutor highlighted evidence that indicated a weapon had been used in the commission of the murder. The primary evidence to support this claim was the testimony of an expert in forensic pathology, who stated that the injuries to the victim were unlikely to have been caused by a fist. Additionally, an LVMPD crime analyst stated that various items in the victim's home, such as a hammer, could have been used to create the blunt trauma to the victim's head. Consequently, Furbay failed to demonstrate that a challenge to the prosecutor's argument that a weapon was used during the murder would have had a reasonable likelihood of success on appeal. Therefore, Furbay failed to demonstrate that his appellate counsel were ineffective, and the district court did not err in denying this claim.

Fourth, Furbay contended that his appellate counsel were ineffective for failing to argue that the prosecutor made an improper comment concerning Furbay's failure to testify. During his closing argument the prosecutor stated:

Remember I mentioned that there was a—there were two eyewitnesses to the killing, one was [the victim], he, of course, can't testify for us, there was another and his name is Harold Furbay, and Mr. Furbay then, if talks about the crime is a direct—has direct testimony as opposed to circumstantial evidence, and ladies and gentlemen, slight though it may be, short though it was, he confesses to these crimes. You have confessions before you.

An express reference to a defendant's failure to testify is a violation of his constitutional right against self-incrimination.<sup>27</sup> Even an indirect reference to the defendant's failure to testify is impermissible if "the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify."<sup>28</sup> Here, the prosecutor's remark was in the context of a discussion concerning statements Furbay allegedly made to other witnesses. We conclude that the prosecutor's statement was not one that the jury would "naturally and necessarily" construe as a comment on Furbay's failure to testify at trial. Therefore, Furbay did not demonstrate that his appellate counsel were ineffective on this issue.

Fifth, Furbay claimed that his appellate counsel were ineffective for failing to challenge the prosecutorial misconduct that occurred when the State called FBI agent William Scobie to testify. Furbay contended that Scobie's testimony had no connection to the homicide of the victim, and led the jury to believe that the FBI was investigating Furbay for independent reasons. A review of the record reveals that Agent Scobie testified about phone calls Furbay allegedly made to his relatives in Maryland using the victim's long distance calling card. The calls were likely made after the victim was killed. Furbay's allegation that Agent Scobie's testimony was unrelated to the case is

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<sup>27</sup>Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991); see also U.S. Const. Amend. V; Nev. Const. Art. I, § 8.

<sup>28</sup>Barron v. State, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989) (internal quotations and citations omitted); see also Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979).

belied by the record.<sup>29</sup> Therefore, Furbay failed to demonstrate that his appellate counsel were ineffective in this regard.

Sixth, Furbay alleged that his appellate counsel were ineffective for failing to appeal the use of the jury instruction regarding premeditation and deliberation.<sup>30</sup> Furbay contended that this jury instruction left the jury with no rational way to distinguish between first and second-degree murder. In Kazalyn v. State,<sup>31</sup> this court approved a jury instruction regarding premeditation that is almost identical to the one given by the district court in the instant case. In Byford v. State,<sup>32</sup> however, this court expressly disapproved of the Kazalyn instruction and set forth an alternative jury instruction for future use. Notably, Furbay's conviction predated our decision in Byford. Consequently, the district

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<sup>29</sup>See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

<sup>30</sup>The district court instructed the jury as follows:

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

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.

<sup>31</sup>108 Nev. 67, 75, 825 P.2d 578, 583 (1992) overruled in part by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

<sup>32</sup>116 Nev. 215, 994 P.2d 700 (2000).

court's use of the Kazalyn instruction is not a ground for relief.<sup>33</sup> Thus, Furbay did not establish that his appellate counsel were ineffective on this issue.

Seventh, Furbay claimed that his appellate counsel were ineffective for failing to challenge the State's use of prior bad acts during the penalty hearing. Specifically, Furbay argued that the district court erred in admitting testimony concerning a homicide he allegedly committed in Alabama. Evidence of a defendant's prior bad acts, even if ordinarily inadmissible, is permitted at a penalty hearing.<sup>34</sup> "[Q]uestions of admissibility during the penalty phase of a capital murder trial are largely left to the discretion of the trial judge."<sup>35</sup> Information concerning a prior bad act may not be admitted, however, if it is supported "solely by impalpable or highly suspect evidence."<sup>36</sup> Furbay has not argued, and the record does not show, that testimony concerning the alleged Alabama homicide was based on "impalpable or highly suspect evidence." Accordingly, Furbay failed to demonstrate that an appeal of this issue would have had a reasonable likelihood of success.

Eighth, Furbay contended that his appellate counsel were ineffective for failing to: (1) challenge the State's false offers to negotiate a

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<sup>33</sup>See Garner v. State, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. \_\_\_, 56 P.3d 868 (2002).

<sup>34</sup>NRS 175.552(3) (permitting admission in a penalty hearing of evidence regarding the defendant, victim, offense, and any other relevant matter, "whether or not the evidence is ordinarily admissible").

<sup>35</sup>Milligan v. State, 101 Nev. 627, 636, 708 P.2d 289, 295 (1985).

<sup>36</sup>Young v. State, 103 Nev. 233, 236-37, 737 P.2d 512, 515 (1987).

plea in order to delay his trial, (2) challenge the prosecutor's representation to the jury that there was no evidence that anyone else had a motive to kill the victim because there were police reports that stated otherwise, and (3) withdraw as appellate counsel because there was an actual conflict of interest. Furbay failed to support these claims with specific facts, however, and articulate how appellate counsel were deficient in these areas.<sup>37</sup> Thus, the district court did not err in denying these claims.

Next, Furbay argued that: (1) he was denied his right to a fast and speedy trial and was prejudiced by the loss of several defense witnesses due to the delay, (2) he was improperly denied his right to self-representation, (3) there was insufficient evidence adduced at trial to support his robbery and murder convictions, and (4) he was denied a fair penalty hearing when the prosecutor failed to turn over the investigator's reports concerning an alleged homicide in Alabama. This court addressed these issues on direct appeal, however, and found them to be without merit. The doctrine of the law of the case prevents further litigation of these issues and "cannot be avoided by a more detailed and precisely focused argument."<sup>38</sup> Therefore, we affirm the order of the district court with respect to these claims.

Finally, Furbay raised approximately sixteen claims involving district court error. Many of these allegations were also raised as ineffective assistance of counsel claims. To the extent that they were not, we have declined to address them because they are outside the scope of a

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<sup>37</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

<sup>38</sup>See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

post-conviction petition for a writ of habeas corpus.<sup>39</sup> Therefore, the district court did not err in denying these claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Furbay is not entitled to relief and that briefing and oral argument are unwarranted.<sup>40</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.  
Becker

Agosti, J.  
Agosti

Gibbons, J.  
Gibbons

cc: Hon. Jackie Glass, District Judge  
Harold L. Furbay  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>39</sup>See NRS 34.810(1)(b)(2) (providing that the court shall dismiss a post-conviction petition for a writ of habeas corpus when the petitioner's conviction was the result of a trial and the claims could have been raised on direct appeal).

<sup>40</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).