

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEVE GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70364

FILED

APR 19 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Steve Garcia argues the district court erred in dismissing his postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

Garcia argues the district court erred in denying his claims of ineffective assistance of trial counsel raised in his December 13, 2013, petition, and November 7, 2014, supplement. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

Garcia argued his trial counsel was ineffective for failing to exclude evidence related to gang activities. Garcia asserted the State was

improperly permitted to question a detective regarding his status as a member of the gang unit and the detective's conclusion that the victims were not involved in gang activity, which left the impression that Garcia was involved with a gang. Garcia acknowledged his counsel filed a motion in limine regarding this issue, but argued it was improperly filed shortly before the beginning of trial and the district court would have afforded the motion greater consideration if it had been filed in a timely manner. Garcia failed to demonstrate his counsel's performance was deficient or resulting prejudice.

Shortly before the start of trial, Garcia's counsel filed a motion in limine requesting the district court to exclude any reference to gang or gang affiliations. The State urged the district court not to consider the motion because it did not comply with local rules governing the timely filing deadline and the inclusion of points and authorities. The State further asserted it would not introduce evidence of Garcia's gang activity, but wished to dispel any inference the victims had any involvement with gangs given that they were in a group when the shooting occurred. The district court considered the motion on its merits, and concluded it would only permit the State to introduce testimony informing the jury that the victims in this matter were not involved with gangs. The district court directed trial counsel to object if the questions or testimony went outside of that limitation.

Because the district court considered the motion on its merits, Garcia cannot demonstrate any prejudice related to the timeliness of the motion in limine. Given the district court's ruling permitting the State to pose questions regarding the victim's lack of gang ties, Garcia failed to demonstrate objectively reasonable counsel would have objected or


otherwise attempted to exclude testimony that complied with the district court's ruling. Further, a review of the detective's testimony reveals the detective acknowledged his assignment to the gang unit, that he had examined the deceased body and reviewed the surviving victims' information, and concluded they were not involved in gang activity. Accordingly, the challenged comments were brief, were limited to the victims' lack of gang involvement, and did not create an improper inference that Garcia was a gang member. Under these circumstances, Garcia failed to demonstrate a reasonable probability of a different outcome at trial had counsel performed further actions with respect to this issue. Therefore, we conclude the district court did not err in dismissing this claim.

Next, Garcia argued his trial counsel was ineffective for failing to object when a State's witness testified to hearing Garcia's group of people use "obscenities like telling them things as if they were in a gang." Garcia failed to demonstrate his counsel's performance was deficient or resulting prejudice. A review of the record reveals that this statement occurred during cross-examination and trial counsel posed additional questions to ask the witness to clarify that statement and to clarify what the witness had actually heard Garcia say, as opposed to the group as a whole. During the additional questions, the witness made no further reference to gangs and acknowledged he did not hear very much of what had been said. Given the clarifying questions posed by trial counsel during cross-examination, Garcia failed to demonstrate his counsel reacted to the challenged statement in an objectively unreasonable manner. Given the brief nature of this statement and the clarifying questions, Garcia failed to demonstrate a reasonable probability of a

different outcome had counsel objected or otherwise sought to strike this testimony. Therefore, we conclude the district court did not err in dismissing this claim.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Jerome M. Polaha, District Judge
Troy Curtis Jordan
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk