**UNITED STATES COURT OF APPEALS**
**for the Fifth Circuit**

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No. 94-50669
Summary Calendar

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CARLOS E. GUTIERREZ,

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director TDC, ET AL.,

Respondents-Appellees.

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Appeal from the United States District Court
for the Western District of Texas
(SA-93-CV-995)

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(May 24, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:[1]

Having been convicted of burglary and sentenced to ninety-nine years of imprisonment as an habitual offender, Appellant seeks habeas relief claiming ineffective assistance of counsel. The district court denied relief. We affirm.[2]

We examine under the well-known standards of Strickland v. Washington, 466 U.S. 668, 688 (1984). To obtain habeas relief on

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[2] Gutierrez has abandoned his other contentions of error because he failed to brief them. See Evans v. City of Marlin, Texas, 986 F.2d 104, 106 n. 1 (5th Cir. 1993).

this ground, Appellant must show not only that counsel's performance was deficient but that these deficiencies prejudiced the defense. United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990). This Appellant has not done.

First, Appellant argues that trial counsel should have objected to a comment made during voir dire by the prosecutor to a prospective juror that Appellant was ineligible for and had not applied for probation. Appellant gives no reason or authority why counsel should have objected. Additionally, the juror in question was struck for cause and did not serve.

Next, Appellant argues that counsel was ineffective because he failed to object quickly enough to a question by the prosecutor. The record reveals the following:

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| [PROSECUTOR:] | Now you indicated that the way the steering column was broken is a common means of stealing a car? |
| [MORALES:] | Yes, sir. |
| [PROSECUTOR:] | Are you trying to tell this jury that that's all the defendant does, all he does is steal cars? |
| [MORALES:] | I wouldn't. I don't know whether he does or not, but from his record -- |
| [PROSECUTOR:] | So you don't know. Is that correct? |
| [DEFENSE COUNSEL:] | Objection, Your Honor. If we are going to get into the leading type of questions and narrative responses, if we can instruct the witness only to answer the questions that are asked. |

Counsel unsuccessfully moved for a mistrial and then requested that the jury be instructed to disregard the reference to Appellant's record. The trial court granted this request. No

further mention was made of the fact. Jurors are presumed to follow their instructions. Zafiro v. United States, 113 S. Ct. 933, 939 (1993). Appellant is unable to show any prejudice resulting from this incident.

Then Appellant argues that counsel was ineffective by failing to impeach witness Morales, and to object to Morales's allegedly perjurious statement that Morales had "picked up" the physical evidence and placed it in the property room. Gutierrez's argument misrepresents the trial testimony. Officer Morales testified that at the arrest was the last time he saw the burglary tools he had found in Gutierrez's possession. Although he later identified the weapons, he was unable to testify concerning the chain of custody. The contention that Officer Morales perjured himself is apparently based on an unfounded belief that Morales was testifying about how the tools came to be in the courtroom. This contention is simply without a factual basis.

Gutierrez argues that Detective Morals was "making things up as he was going" and that counsel should have objected to his references to Gutierrez's inculpatory statement that he has burglarized a building rather than a habitation. There is absolutely nothing in the record to support this argument and no showing that the officer perjured himself. Pointedly, Appellant does not argue that the admission of the statement was a violation of his Miranda rights or state law that amounted to a denial of due process.

Gutierrez argues that counsel should have objected to the trial court's failure to administer the oath to the witness Francisco Garcia. Gutierrez claims that the record demonstrates a failure to swear the witness but we do not read it that way. SOF II, 265. In any event, Appellant has shown no prejudice because he has not demonstrated that, had counsel raised an objection, witness Francisco Garcia's testimony would have been any different or would it have been stricken. Indeed this testimony was cumulative to testimony presented by witnesses Stacy Vasquez and Anita Garcia. The testimony was cumulative so there is no prejudice. Stokes v. Procunier, 744 F.2d 475, 482 n. 3 (5th Cir. 1984).

Likewise, Appellant's global arguments that counsel was unfamiliar with the law and facts relevant to the case and that he was prejudiced because there was a lack of fingerprint evidence are without factual basis.

Finally, Gutierrez contends that counsel was deficient during the punishment phase of the trial because he failed to object to the prosecutor's references to extraneous offenses. He apparently refers to the prosecutor's references to a potential juror who stated that he had been burglarized ten or fifteen times and to Appellant's prior conviction for unauthorized use of a motor vehicle. But he shows no prejudice. He must show that there is a reasonable probability that but for the failure of these objections his sentence would have been significantly less harsh. Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993). When we review all of the evidence against Appellant, we cannot say that, but for the

alleged errors, his sentence would have been significantly less harsh.

AFFIRMED.