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MEMORANDUM OPINION
Do Not Publish-Tex. R.App. P. 47.2(b).

Court of Appeals of Texas,
Houston (14th Dist.).

Richard Vashawn REDD, Appellant

v.

The STATE of Texas, Appellee.

No. 14-08-01089-CR.
Dec. 15, 2009.

On Appeal from the 338th District Court Harris County, Texas, Trial Court Cause No. 1138407.
Casey Garrett, for Richard Vashawn Redd.

Donald W. Rogers, Jr., for the State of Texas.

Panel consists of Chief Justice HEDGES, Justices ANDERSON and BOYCE.

MEMORANDUM OPINION

WILLIAM J. BOYCE, Justice.

*1 Appellant Richard Vashawn Redd challenges his capital murder conviction. After the jury found appellant guilty, the trial court assessed punishment at life imprisonment. Appellant appeals contending that (1) the trial court erred by not including an instruction on the voluntariness of his statements in the jury charge; (2) the trial court erred in admitting appellant's statements into evidence; and (3) he received ineffective assistance of counsel. We affirm.

Background

On October 21, 2007, appellant and Malcom Isler drove from Louisana to Baytown, Texas, to purchase marijuana. Once in Baytown, they met with Travis Black. All three men then went to meet Brian Williams, a local drug dealer, at the Boardwalk Apartments. Appellant, Isler, and Black planned to take the marijuana without paying for it. Williams was later found dead in his vehicle parked outside of the Boardwalk Apartments. He had been shot three times.

Appellant and Isler were pulled over for driving without working taillights later that night by a Harris County Sherriff's deputy. The Baytown Police Department was called to the scene because appellant's vehicle matched the description of the vehicle involved in Williams's murder. Isler fled the scene and was not apprehended. Appellant was detained and taken to the Baytown Police Department, where he was questioned by Detectives Elizondo and Dew. During appellant's first interview, appellant maintained his innocence and did not confess to the murder. After a break, Elizondo and Dew interviewed appellant again.

During this second interview, appellant confessed to Williams's murder. Both interviews were recorded on videotapes.

The trial court admitted appellant's videotaped statements at trial. Appellant did not object to their admission. A jury found appellant guilty of murdering Williams during the commission of a robbery. The trial court sentenced appellant to life imprisonment in an order signed on November 21, 2008. Appellant appeals from this judgment.

Analysis

Appellant advances three issues on appeal: (1) the trial court erred in failing to include an instruction regarding the voluntariness of appellant's statements under Texas Code of Criminal Procedure article 38.22 sections 6 and 7 in the jury charge; (2) the trial court erred in admitting appellant's involuntary statements in violation of the Fifth Amendment of the United States Constitution; and (3) appellant received ineffective assistance of counsel.

I. Charge Error

Appellant first contends that the trial court erred in failing "to instruct the jury on the voluntariness of his statements under" Texas Code of Criminal Procedure article 38.22 sections 6 and 7.

In reviewing alleged jury charge error, we first decide whether the trial court erred. *Warner v. State*, 245 S.W.3d 458, 461 (Tex.Crim.App.2008); *Middleton v. State*, 125 S.W.3d 450, 453 (Tex.Crim.App.2003). To determine whether error occurred, we examine "the entire charge, the state of the evidence, including the contested issues and weight of the probative evidence, the arguments of counsel, and any other relevant information revealed in the record of the trial as a whole." *Warner*, 245 S.W.3d at 461. If error occurred, we then determine whether the defendant was harmed. *Middleton*, 125 S.W.3d at 453. If a proper objection was made at trial, reversal is required if the error was harmful or was "calculated to injure the rights of defendant." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App.1984), *overruled on other grounds by Rodriguez v. State*, 758 S.W.2d 787 (Tex.Crim.App.1988). If appellant failed to properly object at trial, reversal is required "only if the error was so egregious ... that [defendant] has not had a fair and impartial trial[.]" *Id.; see Warner*, 245 S.W.3d at 461. "Egregious harm" occurs when the jury charge error affects "the very basis of the case;" "deprives the defendant of a valuable right;" or "vitally affect[s] a defensive theory." *Warner*, 245 S.W.3d at 462.

*2 Appellant did not properly request that an instruction on the voluntariness of his statements be included in the jury charge, and he did not object to the absence of such an instruction before the charge was read to the jury. Therefore, reversal is required "only if the error was so egregious ... that [defendant] has not had a fair and impartial trial[.]" *Almanza*, 686 S.W.2d at 171; *see Warner*, 245 S.W.3d at 461.

A trial court "has an absolute *sua sponte* duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged." *Delgado v. State*, 235 S.W.3d 244, 249 (Tex.Crim.App.2007); *see* Tex.Code Crim. Proc. Ann. art. 36.14 (Vernon 2007). A trial court generally has no duty to include an instruction *sua sponte* on a defensive issue in the jury charge. *See Bennett v. State*, 235 S.W.3d 241, 243 (Tex.Crim.App.2007) ("Defensive instructions must be requested in order to be considered applicable law of the case requiring submission to the jury."); *Posey v. State*, 966 S.W.2d 57, 61-64 (Tex.Crim.App.1998) ("[A] defensive issue is not [the law] applicable to the case ... unless the defendant timely requests the issue or objects to the omission of the issue in the jury charge ."). However, when a rule or statute requires an instruction under the particular circumstance, that instruction is law applicable to the case, and the trial court must include the required instruction, even if it is not requested. *Oursbourn v. State*, 259 S.W.3d 159, 180 (Tex.Crim.App.2008).

Texas Code of Criminal Procedure article 38.22 requires a trial court to include an instruction in the jury charge in certain circumstances. *Id.* Article 38.22 contains "legislatively mandated procedures governing the admission and consideration of a defendant's statements." *Id.; see* Tex.Code Crim. Proc. Ann. article 38.22 (Vernon 2005). Article 38.22 section 6 requires a trial court to include an instruction in the jury charge when a question is raised and litigated as to the general voluntariness of a statement of an accused.

Oursbourn, 259 S.W.3d at 180. Article 38.22 section 7 requires a trial court to include an instruction in the jury charge when the evidence raises a genuine factual dispute regarding whether a defendant "was adequately warned of his rights and knowingly and intelligently waived" those rights. *Id.* at 176, 180.

Appellant first contends that the trial court should have issued an instruction on the voluntariness of his statements under article 38.22 section 6. The trial court's duty to include an instruction *sua sponte* under section 6 is trigged by (1) a party notifying the trial court, or (2) the trial court raising the issue on its own. *Id.* at 175. The trial court is required to include a section 6 instruction *sua sponte* only if the parties actually litigate a section 6 voluntariness issue before the trial court. *Id.*

Appellant contends that the trial court raised an issue regarding the voluntariness of appellant's statements on its own by stating as follows at a pretrial hearing: "Now, I do notice we had some prior discussions, not on the record this morning, but I noticed that there are motions to suppress illegally obtained evidence and a motion to suppress oral and written statements...." The motions to suppress had been filed by appellant's original attorney, Mr. Leitner. The trial court granted appellant's motion to substitute counsel replacing Mr. Leitner as his attorney of record with Mr. Davenport in an order signed on December 28, 2007. At the same pretrial hearing the following dialogue occurred:

*3 THE COURT: But despite that fact that you've had a motion to suppress that the State's given notice that they intend to introduce those, you don't have an objection to those, is that correct?

MR. DAVENPORT: That is correct, Your Honor. I do not have an objection.

THE COURT: So with regard to those motions to suppress, those three statements, you're not asking that those be heard at this time?

MR. DAVENPORT: That is correct, Your Honor.

Appellant did not pursue his motion to suppress and did not object to the admission of his statements at any time during trial.

In *Oursbourn*, the court stated that section 6 contemplated the following sequence of events:

(1) a party notifies the trial judge that there is an issue about the voluntariness of the confession (or the trial judge raises the issue on his own); (2) the trial judge holds a hearing outside the presence of the jury; (3) the trial judge decides whether the confession was voluntary; (4) if the trial judge decides that the confession was voluntary, it will be admitted, and a party may offer evidence before the jury suggesting that the confession was not in fact voluntary; (5) if such evidence is offered before the jury, the trial judge shall give the jury a voluntariness instruction.

Id. In this case, the trial court merely inquired whether appellant desired to pursue his motions to suppress. Appellant stated that he did not. Accordingly, the trial court did not hold a hearing regarding appellant's motion to suppress and did not hear evidence regarding the voluntariness of appellant's statements. The trial court was required to include a section 6 instruction *sua sponte* only if the parties actually litigated a section 6 voluntariness issue before it. *See id.* Because appellant did not pursue his motion to suppress and failed to object to the admission of his statements, the parties did not litigate a section 6 voluntariness issue before the trial court. Therefore, the trial court did not err in failing to include a section 6 instruction *sua sponte* in the jury charge. *See id.*

Appellant also contends that the trial court should have issued an instruction on the voluntariness of his statements under article 38.22 section 7. Section 7 applies to statements made as the result of custodial interrogation. Tex.Code Crim. Proc. Ann. article 38.22 § 7; *Oursbourn*, 259 S.W.3d at 176. The trial court's duty to include an instruction *sua sponte* under section 7 arises when the evidence raises an issue regarding (1) law enforcement's compliance with the statutory warnings set out in Texas Code of Criminal Procedure articles 15.17 and 38.22 sections 2-3, and (2) the voluntariness of a defendant's waiver of his rights. *Oursbourn*, 259 S.W.3d at 176. An issue is "raised by the evidence" if there is a genuine factual dispute. *Id.*

Although appellant's statements were clearly made as a result of a custodial interrogation, appellant cites no facts to support his argument that the trial court should have included a section 7 instruction *sua sponte*. Rather, appellant concedes that there was not a genuine factual dispute regarding appellant's statement: "[D]espite the fact that there was no issue of fact regarding the confession, the jury should have had an opportunity to judge the voluntariness of it themselves." Further, the appellate record contains no evidence disputing law enforcement's compliance with the statutory warnings set out in article 15.17 and 38.22 sections 2-3, or the voluntariness of appellant's waiver of those rights. The trial court did not err by failing to include a section 7 instruction *sua sponte* in the jury charge.

*4 We overrule appellant's first issue.

II. Fifth Amendment

Appellant next contends his "rights under the Fifth Amendment to the United States Constitution were violated when the trial court allowed the jury to consider his involuntary statements made on the basis of illegal promises of leniency and nonprosecution." Appellant advances this argument for the first time on appeal. Appellant did not object to the admission of his statements at trial; rather, he stated "no objection" when each statement was offered and admitted into evidence. Further, appellant did not obtain a hearing and ruling on his motion to suppress relating to these statements.

A party must preserve error for appeal by a proper objection and an adverse ruling on that objection. Tex.R.App. P. 33.1; Tex.R. Evid. 103(a). A party waives its claim that evidence was inadmissible if the party fails to object at trial. *Saldano v. State*, 70 S.W.3d 873, 889 (Tex.Crim.App.2002). Waiver applies even if the claimed error concerns a violation of a constitutional right. *Id*. ("We have consistently held that the failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence. This is true even though the error may concern a constitutional right of the defendant ."); *Saldivar v. State*, 980 S.W.2d 475, 490 (Tex.App.-Houston [14th Dist.] 1998, pet. ref'd) (defendant waived claim that confession was involuntary, and thus inadmissible under state and federal constitutions, because defendant failed to object at trial on these grounds). Further, a defendant who affirmatively states "no objection" to the admission of evidence during trial waives any error. *Mikel v. State*, 167 S.W.3d 556, 558 (Tex.App.-Houston [14th Dist.] 2005, no pet.).

Appellant failed to raise a proper objection during trial. Further, appellant stated "no objection" when his statements were offered and admitted into evidence. Therefore, the claimed error is waived. *See Saldano*, 70 S.W.3d at 889; *Mikel*, 167 S.W.3d at 558; *Saldivar*, 980 S.W.2d at 490.

Nonetheless, even if appellant had preserved error for appeal, the trial court did not err in admitting appellant's statements. When determining whether a confession should have been excluded as a matter of federal constitutional law, we decide whether the confession was voluntary or coerced. *Arizona v. Fulminante*, 499 U.S. 279, 285-86, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *see also Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (coercive police activity is necessary predicate to finding a confession involuntary). A confession is coerced if the defendant's will was overborne by the circumstances surrounding the confession. *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). To make this determination, we examine the totality of the circumstances surrounding the interrogation including the characteristics of the accused and the details of the interrogation. *Id.; Fulminante*, 499 U.S. at 286.

*5 Appellant argues that his statements were involuntary because his "will was overborne by false promises and threats" made by Detectives Elizondo and Dew in violation of the Fifth Amendment of the United States Constitution. [FN1] Appellant claims statements made by Elizondo and Dew during the first interview caused appellant to make an involuntary confession in the second interview. Specifically, appellant argues that Elizondo and Dew promised appellant that (1) he would not get life in prison if he cooperated; (2) they were there to help him; and (3) they were the only ones who could help him.

FN1. Appellant does not assert a claim under the Texas Constitution or Texas statutory law. Therefore, we do not conduct the separate analysis required to determine whether the statements of Detectives Elizondo and Dew constitute improper inducements under state law. *See Muniz v. State*, 851 S.W.2d 238, 251-52 (Tex.Crim.App.1993) (requiring state and federal claims of involuntariness to be argued on separate grounds with separate substantive analysis or argument provided for each ground); *see also Martinez v. State*, 127 S.W.3d 792, 794 (Tex.Crim.App.2004) (applying four-prong test to determine whether a promise rendered a confession involuntary pursuant to Texas Code of Criminal Procedure article 38.21); *Herrera v. State*, 194 S.W.3d 656, 659-60 (Tex.App.Houston [14th Dist.] 2006, pet. refd) (applying "totality of the circumstances" test to claim asserted under federal constitutional law, and four-prong test to claim asserted under state law).

We first address appellant's argument that Elizondo and Dew promised him they were there to help him and were the only ones who could help him. Appellant does not specify the exact promises made by Elizondo and Dew that he assails. General statements by an officer that he is there to help defendant and is the only one who can help defendant do not indicate the "if-then" relationship required to establish a promise. *See Chambers v. State*, 866 S.W.2d 9, 20 (Tex.Crim.App.1993); *see also Dykes v. State*, 657 S.W.2d 796, 797 (Tex.Crim.App.1983) (holding officer's general but unspecific offers to help are not likely to induce an untruthful statement).

Appellant next argues that Elizondo and Dew promised him he would not get life in prison if he cooperated. Specifically, appellant argues that he was induced to confess by the following statement made by Elizondo: "I guarantee that you're not going to do life [in prison] like he is. Or who ever." In determining the voluntariness of a confession, police falsehoods are relevant. *See Frazier v. Cupp*, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969); *Green v. State*, 934 S.W.2d 92, 99 (Tex.Crim.App.1996). "Trickery or deception does not make a statement involuntary unless the method [is] calculated to produce an untruthful confession or was offensive to due process." *Creager v. State*, 952 S.W.2d 852, 856 (Tex.Crim.App.1997). There also must be a causal relationship between the complained of conduct and the defendant's confession: "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Connelly*, 479 U.S. at 164. The effect of a lie must be analyzed in the context of all the circumstances of the interrogation. *Mason v. State*, 116 S.W.3d 248, 257-58 (Tex.App.-Houston [14th Dist.] 2003, pet. ref'd).

Elizondo's "guarantee" was part of a larger statement in which Elizondo attempted to persuade appellant to tell his "side of the story" before Isler was detained and blamed everything on appellant:

Somebody made a big ass mistake tonight. The only way to save your ass is to tell us what happened. Your side of the story. I already told you my partner told you when Malcolm comes in here he's gonna blame everything on you man. He's been to prison dude ... he knows how to work the system. He knows how to work the damn system. You need to talk right now tell us your side of the story. Cause I can guarantee you man he's been down brother he ain't gonna go down again. I'll tell you right now. He's not gonna go down again. I'm gonna let you know that. He knows what's next for him. He is going to go down for life. That's up to you. You care about your daughter and shit. Well shit I got a daughter too man. I want to see my daughter graduate from school and do all of that. Cause the way your going right now man. You ain't gonna let that happen. That's not gonna happen. You're not gonna see your daughter again. I guarantee you. I'm here to help you. I'm the only person around here's gonna be able to help you. The only one. And you could think I'm blowing smoke. I don't lie man. I don't blow smoke up nobody's ass. I'm not lying. I'll do whatever I can man. I'll call the DA right now and say look this is what we got. This is what this guy told me this is what he did. How can we help him? Are you going to get charged with something. I don't know? I'm not going to promise you that. But I guarantee that you're not going to go do life like he is. Or who ever. But you need to start talking be straight. I have 15 years experience doing this. He's got 20 years. We're not stupid man. We've been at this all night. And you know what? And it ain't gonna be done brother we'll be out here all morning.

*6 This statement was made approximately one hour into the first interview. Throughout the first interview, Elizondo and Dew repeatedly urged appellant to "just tell us what happened" and "tell me your side of the

story." Appellant maintained his innocence throughout the first interview and did not confess. Appellant confessed in the second interview after Elizondo and Dew confronted him with evidence regarding the location of the shooter in the car. None of the "promises or threats" appellant alleges induced him into involuntarily confessing were made during the second interview. Appellant has failed to establish a causal relationship between the alleged promises and his confession. *See* *Connelly*, 479 U.S. at 164.

In evaluating the totality of the circumstances, we also must consider the characteristics of the suspect. *Mason*, 116 S.W.3d at 261. A suspect's ability to resist pressure is very relevant to the issue of whether his confession is voluntary. *Id*. Here, appellant does not claim he was mentally unstable, physically ill, or intoxicated at the time of his confession. *See* *Greenwald v. Wisconsin*, 390 U.S. 519, 520, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968) (physical illness); *Columbe v. Connecticut*, 367 U.S. 568, 620-21, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (mental instability); *Jones v. State*, 944 S.W.2d 642, 651 (Tex.Crim.App.1996) (intoxication). The record does indicate that appellant was inexperienced in dealing with the police. *See* *Haynes v. Washington*, 373 U.S. 503, 522, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963) (considering suspect's experience with police). Based on these facts, appellant's will does not appear to have been overborne.

This case is similar to *Penaflor v. State*, Nos. 14-05-00569-CR, 14-05-00570-CR, 2006 WL 3360550 (Tex.App.-Houston [14th Dist.] Nov. 21, 2006, pet. ref'd) (mem. op., not designated for publication). Penaflor was convicted of aggravated kidnapping and aggravated sexual assault of A.R., a child. *Id*. at *2. Officers Heidi Ruiz and Alfonso Yanez interviewed Penaflor twice after his arrest. *Id*. at *1. Penaflor did not confess during the first interview, but he did confess during the second interview. *Id*. Penaflor filed a motion to suppress his confession. *Id*. at *2. The trial court denied Penaflor's motion to suppress and admitted the confession into evidence. *Id*. Penaflor appealed, arguing that "the trial court erred in denying his motion to suppress his confession because it was induced by direct or indirect promises in violation of the Fifth Amendment of the United States Constitution." *Id*.

The court held that Penaflor's confession was given voluntarily. *Id*. at *5. In analyzing whether there was a causal relationship between the alleged promises and Penaflor's confession, the court noted that Penaflor maintained his innocence throughout the first interview and did not confess. *Id*. at *4. Rather, Penaflor confessed during the second interview. *Id*. All of the alleged promises were made during the first interview; none were made during the second interview. *Id*. at *4-5. As a result, the court concluded that there was no causal relationship between the alleged promises and Penaflor's confession. *Id*.

*7 The court also concluded that Penaflor's will was not overborne by the alleged promises because Penaflor did not argue that he was mentally unstable, physically ill, or intoxicated when he confessed and, because he had been arrested before, he had experience in dealing with police. *Id*. at *4.

The circumstances here parallel *Penaflor*. Appellant was interviewed by Elizondo and Dew twice. All of the alleged promises appellant complains of on appeal were made during the first interview. Appellant maintained his innocence throughout the first interview and did not confess; he confessed during the second interview. Further, appellant did not argue that he was mentally unstable, physically ill, or intoxicated when he confessed.

After reviewing the totality of the circumstances surrounding appellant's confession, we conclude that appellant's confession was voluntary. *See* *Dickerson*, 530 U.S. at 434; *Fulminante*, 499 U.S. at 286. Therefore, even if appellant had preserved error on this issue for appeal, it would have been overruled.

We overrule appellant's second issue.

III. Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See* *Stafford v. State*, 813 S.W.2d 503, 506 (Tex.Crim.App.1991) (en banc). An appellant must establish that (1) his trial counsel's representation was deficient; and (2) the deficient performance was so serious that it deprived the appellant of a fair trial. *Strickland*, 466 U.S. at 687. To establish these prongs, the appellant must establish by a preponderance of

the evidence that (1) counsel's representation fell below the objective standard of prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Id.* at 690-94. A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. *Id.* at 694; *Ex parte Ellis*, 233 S.W.3d 324, 330-31 (Tex.Crim.App.2007). This test is applied to claims arising under the Texas Constitution as well as those arising under the United States Constitution. *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex.Crim.App.1986) (en banc).

A criminal defendant is entitled to effective assistance of counsel. *Strickland*, 466 U.S. at 680; *Stafford*, 813 S.W.2d at 506; *see also* U.S. CONST. amend VI. But this right does not entitle a defendant to errorless counsel or counsel whose competency is judged by hindsight. *Stafford*, 813 S.W.2d at 506. Rather, this right affords a criminal defendant an attorney reasonably likely to render reasonably effective assistance. *Strickland*, 466 U.S. at 680; *Stafford*, 813 S.W.2d at 506. When reviewing a claim of ineffective assistance of counsel, we look to the totality of the representation and not to isolated instances of error or to a single portion of the trial. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App.1999); *Rivera-Reyes v. State*, 252 S.W.3d 781, 788-89 (Tex.App.-Houston [14th Dist.] 2008, no pet.). Appellate review of trial counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance. *Garza v. State*, 213 S.W.3d 338, 348 (Tex.Crim.App.2007).

*8 If the reasons for counsel's conduct at trial do not appear in the record and it is at least possible that the conduct could have been grounded in legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal. *Id.* To warrant reversal when trial counsel has not been afforded an opportunity to explain those reasons, the challenged conduct must be " 'so outrageous that no competent attorney would have engaged in it.' " *Roberts v. State*, 220 S.W.3d 521, 533-34 (Tex.Crim.App.2007), *cert. denied*, 552 U.S. 920, 128 S.Ct. 282, 169 L.Ed.2d 206 (2007) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex.Crim.App.2005)). A vague, inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally deficient. *Bone v. State*, 77 S.W.3d 828, 836 (Tex.Crim.App.2002).

Appellant did not file a motion for new trial based on ineffective assistance of counsel and did not develop evidence of trial counsel's strategy for appellate review. Therefore, to warrant reversal, the challenged conduct must be "so outrageous that no competent attorney would have engaged in it." *Roberts*, 220 S.W.3d at 533-34.

Appellant argues his trial counsel was ineffective because "he failed to object to the admission of [appellant's] confessions, failed to raise the voluntariness of [appellant's] statements, and failed to request instructions to the jury about the voluntariness of [appellant's] confessions that [appellant was] clearly entitled to...."

As discussed above, appellant was not entitled to submission of an instruction on the voluntariness of his statements under article 38.22 section 6 or 7. *Oursbourn*, 259 S.W.3d at 176, 180; *Posey*, 966 S.W.2d at 61-64. Therefore, appellant's trial counsel was not deficient for failing to request or object to the omission of the instructions in the jury charge. *See generally Hardin v. State*, 951 S.W.2d 208, 211 (Tex.App.-Houston [14th Dist.] 1997, no pet.) (rejecting appellant's claim for ineffective assistance when trial counsel failed to request article 38.23 instruction when appellant was not entitled to instruction); *see also Randall v. State*, No. 14-06-00468-CR, 2008 WL 5262738, at *8 (Tex.App.-Houston [14th Dist.] Dec. 18, 2008, no pet.) (mem. op., not designated for publication) (rejecting ineffective assistance claim for failure to secure instructions under article 38.22 sections 6 and 7 when the accused was not entitled to the instructions).

Also, appellant's statements were admissible. Before this court may conclude counsel was ineffective for failure to make an objection, appellant must show the trial court would have erred in overruling the objection. *See Ex parte White*, 160 S.W.3d 46, 53 (Tex.Crim.App.2004); *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex.Crim.App.1996); *Jagaroo v. State*, 180 S.W.3d 793, 800 (Tex.App.-Houston [14th Dist.] 2005, pet. ref'd) (trial counsel's failure to object did not amount to ineffective assistance of counsel where objection would have been futile); *Edmond v. State*, 116 S.W.3d 110, 115 (Tex.App.-Houston [14th Dist.] 2002, pet. ref'd) (trial counsel is not ineffective for failing to make a frivolous objection); *Cooper v. State*,

707 S.W.2d 686, 689 (Tex.App.-Houston [1st Dist.] 1986, pet. ref'd) (failure to object to admissible evidence is not ineffective assistance of counsel). Therefore, trial counsel was not ineffective for failing to object to the admission of appellant's statements.

*9 With regard to appellant's claims that his trial counsel failed "to raise the voluntariness of [appellant's] statements[,]" appellant cannot satisfy *Strickland's* first prong by showing by a preponderance of the evidence that trial counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms. *See* *Rivera-Reyes*, 252 S.W.3d at 788-89. The record contains no evidence regarding the trial strategy of appellant's counsel. Therefore, the record does not rebut the presumption that trial counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See id*.

Based on the record before us, we cannot say that the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *See* *Roberts*, 220 S.W.3d at 533-34; *Rivera-Reyes*, 252 S.W.3d at 788-90. Appellant has not shown by a preponderance of the evidence that trial counsel's representation fell below an objective standard of reasonableness on the record in this case. *See* *Rivera-Reyes*, 252 S.W.3d at 788-90.

We overrule appellant's third issue.

Conclusion

We affirm the trial court's judgment.

Tex.App.-Houston [14 Dist.],2009.
Redd v. State
Not Reported in S.W.3d, 2009 WL 4810190 (Tex.App.-Hous. (14 Dist.))

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