HABEAS DENIAL COURT OF CRIMINAL APPEALS - APPENDIX-A

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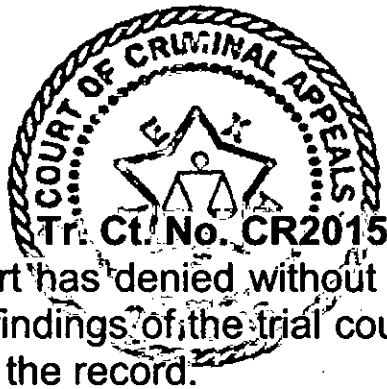

3/23/2022

WALDRON, LANE WALKER Tr. Ct. No. CR2015-178-001 WR-93,539-01

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing and on the Court's independent review of the record.

Deana Williamson, Clerk

LANE WALKER WALDRON
ALLRED UNIT - TDC # 2114784
2101 FM 369 NORTH
IOWA PARK, TX 76367

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Deana Williamson, Clerk

RANDY SCHAFFER
ATTORNEY AT LAW
1021 MAIN ST. #1440
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

DENIAL OF PETITION FOR DISCRETIONARY REVIEW - APPENDIX-B

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9/12/2018 COA No. 03-17-00065-CR
WALDRON, LANE WALKER Tr. Ct. No. CR2015-178 PD-0186-18
On this day, the Appellant's petition for discretionary review has been refused.
Deana Williamson, Clerk

SUSAN LEE SCHOON
ATTORNEY AT LAW
118 S. UNION AVE.
NEW BRAUNFELS, TX 78130
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APPEALS OPINION 3RD COURT OF APPEALS - APPENDIX-C

2018 WL 700047
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Do Not Publish
Court of Appeals of Texas, Austin.

Lane Walker WALDRON, Appellant

v.

The STATE of Texas, Appellee

NO. 03–17–00065–CR

Filed: February 1, 2018

Discretionary Review Refused September 12, 2018

FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT, NO. CR2015–178, HONORABLE JACK H. ROBISON, JUDGE PRESIDING

Attorneys and Law Firms

Richard E. Wetzel, 1411 West Avenue, Suite 100, Austin, TX 78701, for [appellant].

Jennifer A. Tharp, Joshua D. Presley, Comal County Criminal District Attorney, 150 N. Seguin, Suite 307, New Braunfels, TX 78130, for [State].

Before Justices Puryear, Field, and Bourland

MEMORANDUM OPINION

David Puryear, Justice

*1 Lane Walker Waldron was charged with capital murder for "intentionally caus[ing] the death of ... the female unborn child of [S.F.] while [the] unborn child was in gestation of ... [S.F.], by striking or punching ... [S.F.] in the abdomen with [his] hands or fists." *See* Tex. Penal Code § 19.03(a)(8) (providing that person commits offense of capital murder if he "murders an individual under 10 years of age"). At the end of the guilt-or-innocence phase of the trial, the jury found Waldron guilty of the charged offense. Waldron's punishment was automatically assessed at life imprisonment. *See id.* § 12.31 (setting out mandatory punishments for individuals convicted of capital felonies). In ten issues on appeal, Waldron challenges the district court's judgment of conviction. We will affirm the district court's judgment of conviction.

BACKGROUND

As set out above, Waldron was charged with capital murder for the death of S.F.'s unborn daughter. According to the undisputed evidence presented at trial, Waldron and S.F. were romantically involved and were living together at the time of the offense, and S.F. was pregnant with Waldron's twin children. One of the twins was male, and the other was female. On the day after the offense is alleged to have occurred, S.F. went to the hospital seeking treatment for injuries that she sustained, and S.F. was told that both of her unborn children had died. The twins were between 27 and 28 weeks old at the time of their deaths. According to the testimony given by the doctor who performed an autopsy on the female twin, the cause of death was a "placental abruption resulting from maternal trauma." In other words, the placenta separated from "the wall of the uterus" due to "a significant force" being applied to S.F.

A few days after the death of the twins and on the day that Waldron was arrested, Detective Frank Cockrell questioned Waldron about the death of the twins. During the interview, Waldron indicated that he was not going to say anything without a lawyer being present, and Detective Cockrell ended the interview and explained to Waldron that the interview had to end because Waldron had invoked his right to counsel. Several months later and after Waldron had been charged with the instant offense, Waldron sent Detective Cockrell a letter indicating that he wanted to speak with the officer about the incident and "perform a confession." In response, Detective Cockrell made arrangements to interview Waldron again, and that conversation was recorded.

Prior to trial, Waldron filed a motion to suppress arguing, among other things, that the recording should be suppressed because the statements in that recording were obtained in violation of his Fifth and Sixth Amendment rights to counsel. *See* U.S. Const. amends. V, VI. During a hearing on the motion to suppress, the recording as well as the letter that Waldron wrote to Detective Cockrell were admitted into evidence. At the beginning of the interview, Detective

EXHIBIT
tabbies
1

Cockrell explained that he had to read Waldron the *Miranda* warnings, gave Waldron a copy of those warnings, and read the warnings to Waldron. *See Miranda v. Arizona*, 384 U.S. 436, 467–73, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (setting out warnings that accused must be given before being questioned by police). After Detective Cockrell read each right, he asked Waldron if he understood that right, and Waldron indicated that he did and placed his initials next to each listed right where it appeared on the form. When explaining that Waldron had the right to have an attorney present, the following exchange occurred:

> *2 [Waldron]: I understand, but I have a question.... Could that mean at this specific time, or would it have to delay?
>
> [Detective Cockrell]: Whenever you want one.
>
> ....
>
> [Waldron]: Like right this second?
>
> [Detective Cockrell]: Well, I can't—you know it's, I don't know if your attorney can be here right now.
>
> [Waldron]: Yeah.
>
> [Detective Cockrell]: I mean that's up to you.
>
> [Waldron]: Right. I understand.
>
> [Detective Cockrell]: I just need to know that you understand you can have one for—
>
> [Waldron]: Yes sir, yes sir.
>
> ....
>
> [Detective Cockrell]: [J]ust as long as you understand you have that right to have an attorney present. If you are too poor, or are unable to employ a lawyer, you have the right to have a lawyer appointed by the Court to advise you prior to and during any questioning. Do you understand that?
>
> [Waldron]: Yes sir.
>
> [Detective Cockrell]: Number five—you have the right to terminate the interview at any time.
>
> [Waldron]: Yes sir.
>
> ....
>
> [Detective Cockrell]: And if you do want to sit here and talk to me if you could print your name in that line and then sign down here where it says "signature of person."
>
> [Waldron]: Yes sir.

In addition to the recording and the letter, the *Miranda* form with Waldron's initials next to each warning was admitted into evidence during the suppression hearing. That form also shows that Waldron signed below the statement acknowledging that he was "knowingly, intelligently[,] and voluntarily WAIV[ING] the above explained Rights and will make a Voluntary Statement."

At the end of the suppression hearing, the district court explained that it did not hear "an unequivocal invocation of his right in any way" and that Waldron waived his rights, and the district court denied the motion to suppress. Following the conclusion of the trial, the district court issued several findings of fact and conclusions of law regarding its ruling on the suppression motion, including the following ones relevant to this appeal:

> **Findings of Fact**
>
> ....
>
> 3. [Waldron] can speak, read, write[,] and understand English.
>
> ....
>
> 6. [Waldron] also had experience with the criminal justice system.
>
> ....
>
> 16. The Detective confirmed that [Waldron] sent him the letter stating that he wanted to confess.
>
> 17. The Detective explained that he had to again give the *Miranda* warning and make sure the Defendant understood it.
>
> 18. The Detective gave the Defendant a copy of the warning he was reading, and the Defendant followed along and initialed next to the waivers.
>
> 19. The Defendant indicated that "Yes, Sir," he understood his rights, and initialed next to the rights to indicate he understood them.

....

21. The Defendant understood that he could delay, cancel[,] or terminate the interview if he wanted to have counsel present, but he did not desire or request that his counsel be present, and in fact unequivocally waived his right to an attorney and continued with the interview.

....

Conclusions of Law

1. The Defendant was repeatedly given the *Miranda* warning, and the Defendant understood said warnings. The Defendant's decision to waive his rights and speak to the Detective was free and voluntary.

2. Prior to making the recorded statements, the Defendant was fully warned of his rights in compliance with Tex. Code Crim. Proc. art. 38.22 and *Miranda*, and he unequivocally, freely, deliberately, knowingly, intelligently[,] and voluntarily waived his rights. There was no Due Process or any other constitutional or statutory violation related to the Defendant's interview.

*3 3. The statements from the Defendant's interview[ ] were admissible.

After the suppression hearing, Waldron sought to question the jury panel during voir dire regarding the lesser-included-offense of manslaughter and regarding the punishment range for that lesser offense, but the district court denied that request.

During the trial, various witnesses were called to the stand, including S.F.; Detective Cockrell; Dr. Suzanna Dana, who performed an autopsy on the female twin; Dr. Barrett Blaue, who treated S.F. at the hospital; and Dr. Amy Gruszecki, who testified as an expert on Waldron's behalf. In addition, the recording of Waldron's interview by the police was admitted into evidence and played for the jury.

At the end of the trial, Waldron requested that the jury charge include instructions regarding whether the statements made during the interview were voluntarily made, and Waldron also requested a lesser-included-offense instruction for manslaughter. The district court denied both requests. After considering the evidence presented at trial, the jury found Waldron guilty of the charged offense, and the district court rendered its judgment of conviction accordingly.

DISCUSSION

In his first three issues on appeal, Waldron asserts that the district court erred by denying his motion to suppress. In his fourth through sixth issues on appeal, Waldron argues that the district court erred by failing to provide certain instructions in the jury charge. In his seventh issue on appeal, Waldron contends that the district court erred by failing to provide a lesser-included-offense instruction. In his eighth issue on appeal, Waldron argues that the district court erred by prohibiting him from questioning the jury panel regarding a potential lesser-included offense. Finally, in his last two issues on appeal, Waldron urges that the district court erred by commenting on evidence presented at trial. We will consider the issues in the order briefed but will address many of them jointly consistent with Waldron's briefing.

Motion to Suppress

In his first, second, and third issues, Waldron argues that the district court "abused its discretion by denying [his] motion to suppress" the recording of his interview with the police.

Appellate courts review a trial court's ruling on a motion to suppress for an abuse of discretion. *Arguellez v. State*, 409 S.W.3d 657, 662 (Tex. Crim. App. 2013). Under that standard, the record is "viewed in the light most favorable to the trial court's determination, and the judgment will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.' " *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (quoting *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)). In general, appellate courts apply "a bifurcated standard, giving almost total deference to the historical facts found by the trial court and analyzing *de novo* the trial court's application of the law." *See State v. Cuong Phu Le*, 463 S.W.3d 872, 876 (Tex. Crim. App. 2015); *see also Arguellez*, 409 S.W.3d at 662 (explaining that appellate courts afford "almost complete deference ... to [a trial court's] determination of historical facts, especially if those are based on an assessment of credibility and demeanor"). Moreover, courts "consider only the evidence adduced at the suppression hearing because the ruling was based on that evidence rather than evidence introduced later" unless "the suppression issue has been consensually relitigated by the parties during trial." *Herrera v. State*, 80 S.W.3d 283, 290–91 (Tex. App.–Texarkana 2002, pet. ref'd) (op. on reh'g). In addition, a trial court's ruling on

the motion will be upheld if it is correct under any theory of law applicable to the case regardless of whether the trial court based its ruling on that theory. *Story*, 445 S.W.3d at 732.

*4 In challenging the district court's denial of his motion, Waldron argues that the statements that he gave to the police were "obtained in violation of [his] invocation of his Fifth Amendment right to counsel" and "obtained in violation of [his] invocation of his Sixth Amendment right to counsel." In particular, Waldron notes that the interview occurred "while Waldron was represented" by counsel and contends that he made an unambiguous and unequivocal request for his attorney when he stated that he wanted his attorney "right this second" at the start of the interview. Further, Waldron asserts that the statements were "obtained in violation of Waldron's Fifth Amendment rights [because] [Detective Cockrell] misinformed [him] that his right to counsel at the interrogation was dependent on the availability of his appointed counsel." More specifically, Waldron argues that after he requested the immediate assistance of his attorney, Detective "Cockrell responded 'well, I don't know if your attorney can be here right now.' " Moreover, Waldron contends that the "right to have counsel present during interrogation is not dependent on counsel's schedule or immediate availability to prov[id]e legal services to the defendant" and that Detective Cockrell should not have "told Waldron he did not know if his counsel could be present." For all of these reasons, Waldron contends that the recording of his interview "was inadmissible under the Fifth and Sixth Amendments of the United States Constitution, and the [district] court abused its discretion by ruling otherwise" and "by finding Waldron was properly warned by Cockrell before waiving his rights."[1]

"[T]he Fifth Amendment right to interrogation counsel is triggered by the *Miranda* warnings that police must give before beginning any custodial questioning," and "[t]he Sixth Amendment right to trial counsel is triggered by judicial arraignment or Article 15.17 magistration." *Pecina v. State*, 361 S.W.3d 68, 71 (Tex. Crim. App. 2012). "Both the Fifth and Sixth Amendment rights to counsel apply to post-magistration custodial interrogation, but each is invoked and waived in exactly the same manner—under the Fifth Amendment prophylactic *Miranda* rules." *Id.* "Before questioning a suspect who is in custody, police must give that person *Miranda* warnings." *Id.* at 75. "Only if the person voluntarily and intelligently waives his *Miranda* rights, including the right to have an attorney present during questioning, may his statement be introduced into evidence against him at trial." *Id.* "Once formal adversary proceedings begin, the Sixth Amendment right to counsel applies in exactly the same way as the Fifth Amendment right applies to custodial interrogation." *Id.* at 76–77. If a defendant invokes his right to counsel, "police interrogation must cease until counsel has been provided or the suspect himself reinitiates a dialogue." *State v. Gobert*, 275 S.W.3d 888, 892 (Tex. Crim. App. 2009).

However, "[n]ot every mention of a lawyer will suffice, of course, to invoke the ... right to the presence of counsel during questioning." *Id.* "An ambiguous or equivocal statement with respect to counsel does not even require officers to seek clarification, much less halt their interrogation." *Id.* For determinations regarding whether an accused has invoked his right to counsel, reviewing courts should use an objective standard "[t]o avoid difficulties of proof and to provide guidance to officers conducting interrogations." *Davis v. United States*, 512 U.S. 452, 458–59, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). Under that standard, the accused "must unambiguously request counsel" during an interrogation. *Id.* at 459, 114 S.Ct. 2350. In other words, the accused "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* at 458–59, 114 S.Ct. 2350. Courts "view the totality of circumstances from the viewpoint of the objectively reasonable police officer conducting custodial interrogation," *Pecina*, 361 S.W.3d at 79, but courts "do *not* look to the totality of the circumstances ... to determine in retrospect whether the suspect really *meant* it when he unequivocally invoked his right to counsel," *Gobert*, 275 S.W.3d at 893. "Whether the particular mention of an attorney constitutes a clear invocation of the right to counsel during questioning depends on the statement itself and the totality of the surrounding circumstances." *Fuentes–Sanchez v. State*, No. 03-12-00281-CR, 2014 WL 1572448, at *5 (Tex. App.–Austin Apr. 17, 2014, no pet.) (mem. op., not designated for publication).

*5 As set out above, Waldron contends that he unambiguously requested the immediate assistance of his attorney, but the district court determined that Waldron did not invoke his right to counsel before making his statement to Detective Cockrell. When Waldron posed two questions after Detective Cockrell informed Waldron about his right to an attorney, he did not request the presence of his attorney and instead inquired how long it would take for a lawyer to arrive *if* he decided that he wanted counsel present. Those

questions were not unambiguous invocations of the right to counsel. *See Loredo v. State*, 130 S.W.3d 275, 284, 285 (Tex. App.–Houston [14th Dist.] 2004, pet. ref'd) (determining that question posed by defendant regarding when he could ask to see lawyer "was not an unambiguous invocation of his right to counsel"). Moreover, as set out above, Detective Cockrell was aware that Waldron knew how to invoke his right to counsel because Waldron did invoke his right to counsel in a prior interview with Detective Cockrell before subsequently writing a letter to Detective Cockrell stating that he wanted to confess. *Cf. Carson v. State*, Nos. 04–01–00761–CR, – 00769–00770–CR, 2002 WL 31116078, at *3, *4 (Tex. App.–San Antonio Sept. 25, 2002, no pet.) (not designated for publication) (noting that trial court determined that defendant wrote to police officer and expressed desire to talk with police again after invoking his right to counsel and determining that district court did not abuse its discretion by concluding that defendant knowingly waived right to counsel, in part, because record showed that defendant knew that he had constitutional right to counsel and how to invoke it).

Furthermore, after asking Detective Cockrell about how long it might take for a lawyer to arrive, Waldron told Detective Cockrell that he understood that he had the right to an attorney, placed his initials on the *Miranda* form next to that right, signed the bottom of the *Miranda* form indicating that he was knowingly and voluntarily waiving his *Miranda* rights, proceeded to talk with Detective Cockrell about the offense, and made no further mention of an attorney until near the end of the interview when he expressed dissatisfaction with how his attorney was handling his case. *Cf. Ashcraft v. State*, 934 S.W.2d 727, 737 (Tex. App.–Corpus Christi 1996, pet. ref'd) (noting that although "defendant's signing of a prepared statement which included pre-printed averments indicating that the signer understood his rights and freely waived them is not determinative of the question of affirmative waiver, it is significant evidence").

Under these circumstances, we cannot conclude that the district court abused its discretion by finding that Waldron did not unambiguously invoke his right to counsel for purposes of custodial interrogation. *See Davis*, 512 U.S. at 462, 114 S.Ct. 2350 (determining that statement " 'Maybe I should talk to a lawyer' " was not unambiguous request for counsel); *Davis v. State*, 313 S.W.3d 317, 339, 341 (Tex. Crim. App. 2010) (concluding that comment " 'I should have an attorney' " was not clear request, in part, because defendant kept talking and asking police questions); *Samuelson v. State*, No. 03-12-00837-CR, 2014 WL 4179440, at *3 (Tex. App.–Austin Aug. 21, 2014, no pet.) (mem. op., not designated for publication) (deciding that statement by defendant that " 'he probably shouldn't say any more without a lawyer' " was "not a request for counsel" and was instead "a statement of opinion regarding the wisdom of continuing to talk" and noting that defendant continued to talk without any prompting by police); *Fuentes–Sanchez*, 2014 WL 1572448, at *5 (determining that "appellant's reference to a lawyer to 'get out of this quickly' was not an unambiguous invocation of his right to have counsel present during questioning because a reasonable officer would not necessarily have understood such statements as a request for an attorney"); *Mbugua v. State*, 312 S.W.3d 657, 665 (Tex. App.–Houston [1st Dist.] 2009, pet. ref'd) (concluding that "appellant's question, 'Can I wait until my lawyer gets here?' did not clearly state a firm, unambiguous, and unqualified" invocation of right to counsel and "was more in the nature of an inquiry about the interview process and appellant's options in regard to that process"); *Gutierrez v. State*, 150 S.W.3d 827, 832 (Tex. App.–Houston [14th Dist.] 2004, no pet.) (determining that question " 'Can I have [my attorney] present now?' " was ambiguous question about his counsel and was "followed by his unambiguous rejection of an attorney's presence during the interview"); *Loredo*, 130 S.W.3d at 285 (noting when determining that no unambiguous invocation was made that defendant continued to answer questions during interview after asking when he could ask for lawyer).

*6 Turning to Waldron's contention that Detective Cockrell misinformed him about his right to an attorney, we note that when Detective Cockrell was responding to Waldron's statement regarding whether Waldron's attorney could be made immediately available if he invoked his right to counsel, Detective Cockrell did state that he did not know if Waldron's attorney could "be here right now." However, Detective Cockrell did not indicate that Waldron's ability to invoke his right to counsel or to terminate the interview was in any way dependent on the immediate availability of his attorney. On the contrary, Detective Cockrell clarified more than once after making the statement that Waldron had the right to have an attorney present and also stated that Waldron could "terminate the interview at any time." Moreover, Detective Cockrell informed Waldron about all of his *Miranda* rights before questioning Waldron about the offense. *See Miranda*, 384 U.S. at 467–73, 86 S.Ct. 1602; *see also* Tex. Code Crim. Proc. art. 38.22, §§ 2, 3 (listing statutory warnings similar to those required by *Miranda* that must be given before written or oral statement may be admitted). In light of the preceding, we cannot conclude that the district court abused its discretion

by determining that Waldron had been "fully warned of his rights" under *Miranda*.

For all the reasons previously given, we overrule Waldron's first three issues on appeal.

Requested Jury Instructions

In his fourth and fifth issues on appeal, Waldron contends that the district court erred by "refusing to submit his requested charge to the jury" regarding the voluntariness of his statement under article 38.22 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 38.22, §§ 6–7. In his sixth issue on appeal, Waldron argues that the district court erred by "refusing to submit his requested charge to the jury" regarding the legality of his statement to the police under article 38.23 of the Code of Criminal Procedure. *See id.* art. 38.23.[2]

"Under Texas statutory law, there are three types of instructions that relate to the taking of confessions." *Oursbourn v. State*, 259 S.W.3d 159, 173 (Tex. Crim. App. 2008). The first is "a 'general' Article 38.22, § 6 voluntariness instruction." *Id.* Section 6 of article 38.22 applies to "cases where a question is raised as to the voluntariness of a statement of an accused." Tex. Code Crim. Proc. art. 38.22, § 6. If the voluntariness of the statement is raised and if the trial court determines "as a matter of law and fact that the statement was voluntarily made," then "evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof." *Id.*

" 'If a reasonable jury could find that the facts, disputed or undisputed, rendered [a defendant] unable to make a voluntary statement, he is entitled to a general voluntariness instruction when he has raised a question of the voluntariness of his statement.' " *Taylor v. State*, 509 S.W.3d 468, 478 (Tex. App.–Austin 2015, pet. ref'd) (quoting *Oursbourn*, 259 S.W.3d at 176). "The defendant has the burden of producing 'evidence at trial from which a reasonable jury could conclude that the statement was not voluntary,' and 'there is no error in refusing to include a jury instruction where there is no evidence before the jury to raise the issue.' " *Id.* (quoting *Vasquez v. State*, 225 S.W.3d 541, 545 (Tex. Crim. App. 2007)). An instruction is required if, under the totality of the circumstances, a reasonable jury could have found that the statement was not made voluntarily. *Vasquez*, 225 S.W.3d at 544.

*7 Previously, the court of criminal appeals has explained that the following types of "fact scenarios" would "raise a state-law claim of involuntariness" and warrant an instruction under article 38.22: evidence that the suspect "was ill and on medication and that fact may have rendered his confession involuntary"; "was mentally retarded and may not have" voluntarily, intelligently, and knowingly waived his rights; did not have the capacity to comprehend his rights; was intoxicated, did not know what he was signing, and mistakenly believed that document that he was signing was something other than a confession; "was confronted by the brother-in-law of his murder victim and beaten"; and "was returned to the store he broke into" so that he could be questioned by individuals armed with pistols. *Oursbourn*, 259 S.W.3d at 172–73 (internal citations omitted); *see also id.* at 173 (explaining that although "youth, intoxication, mental retardation, and other disabilities are usually not enough, by themselves, to render a statement inadmissible under Article 38.22, they are factors that a jury, armed with a proper instruction, is entitled to consider"). In addition, this Court has explained that courts have found that facts that weigh against a voluntariness determination include "lengthy interrogation, threats of violence, and detention incommunicado without advice of counsel or friends" as well as an accused's "youth," "low intelligence," and "lack of education." *Vasquez v. State*, 179 S.W.3d 646, 658 (Tex. App.–Austin 2005), *aff'd*, 225 S.W.3d 541.

When arguing that the jury should have received an instruction under section 6 of article 38.22, Waldron repeats many of his same arguments regarding whether he invoked his right to counsel. For example, Waldron contends that the issue of the voluntariness of his statement was presented to the jury because the evidence established that "Waldron asked" during the police interview "if his counsel could be present at the time of the interview 'right this second,' " that Detective Cockrell responded that he did not "know if [Waldron's] attorney can be here right now," that Detective Cockrell knew that Waldron was represented by counsel when Waldron made the statement, that Detective Cockrell ignored Waldron's request for counsel, and that Detective Cockrell "misadvised Waldron when he told him that" his right to counsel "was subject to appointed counsel's availability."[3] In addition, Waldron contends that an instruction was warranted because evidence was presented during the trial establishing that he had counseling while he was in school, that he had

attempted to commit suicide in the past, that for several years he has been taking multiple medications for mood disorders and to control his violent behavior, that he was scheduled to take some medication approximately one-and-a-half hours into the interview, and that he was not given his medication prior to the conclusion of the interview five hours after he was scheduled to take the medicine.[4]

*8 As set out above, the police interview was requested by Waldron after he wrote a letter to Detective Cockrell stating that he wanted to talk about the offense and to confess, and that letter was admitted as an exhibit and presented to the jury. Moreover, at the start of the interview, Detective Cockrell verified that Waldron wrote the letter stating that he wanted to talk about the offense, and Waldron stated that he wrote the letter and wanted to talk and indicated that he was able to read and write English well. Immediately after that, Detective Cockrell informed Waldron about his *Miranda* rights, and Waldron answered that he understood each right and initialed next to each right on the *Miranda* form. Furthermore, Detective Cockrell told Waldron that if he would like to talk about the offense, he should sign the bottom of the form indicating that he understood his rights and agreed to waive them, and Waldron signed the form and thanked Detective Cockrell for talking to him. Although Waldron did ask if there would be a delay in time between when he asks for a lawyer and when he could consult with his attorney if he invoked his right and although Detective Cockrell stated that he did not know whether Waldron's attorney could be there at that particular moment, Detective Cockrell repeatedly told Waldron, as discussed previously, that Waldron could invoke his right to an attorney at any time and emphasized that he wanted Waldron to understand that he had the right to have an attorney present and to terminate the interview at any time. In addition, after the interview had been proceeding for some time, Detective Cockrell informed Waldron that he needed to insert a new disc for recording the remainder of the interview and read Waldron his *Miranda* rights again, and Waldron again stated that he wanted to waive those rights and to continue talking with Detective Cockrell. Accordingly, we cannot agree with Waldron's suggestion that there was a factual dispute regarding whether Waldron invoked his right to counsel and whether Detective Cockrell misadvised Waldron that his right to counsel was subject to his attorney's availability.

Although Waldron did not confess to the crime at issue until several hours into the interview, Waldron informed Detective Cockrell that he wanted to provide the background leading up to the events in question, provided extensive details about his relationship with S.F., and recounted several acts of domestic abuse that occurred before the offense at issue. In addition, Waldron repeatedly asked to continue the interview despite several suggestions by Detective Cockrell that they should wrap up their conversation. Moreover, Detective Cockrell acted professionally during the interview, did not threaten Waldron or employ abusive language, repeatedly asked Waldron if he needed anything to eat, sat across the room from Waldron, did not block the exit, allowed Waldron to use the restroom multiple times, and told Waldron that he could not make any promises regarding any benefit that Waldron might receive by confessing. In addition, Waldron described himself during the interview as a well-read and an intelligent man, stated that he had been studying the Penal Code, offered his own opinion regarding what he thought the proper charges against him should be, admitted that he had prior experience with the justice system stemming from a prior arrest in which he was ultimately placed on community supervision, told jokes to Detective Cockrell, and stated that he was there to tell the truth and to confess. *See Green v. State*, 934 S.W.2d 92, 100 (Tex. Crim. App. 1996) (explaining that defendant's "prior experience with the criminal justice system weighs in favor of finding ... confession voluntary"); *see also Ashcraft*, 934 S.W.2d at 738 (concluding that defendant was not under duress when *Miranda* warnings were given and noting that defendant "joked with the officers, stated that he understood his rights, and was eager to talk about the burglaries").

Regarding his mental health, Waldron intimated that he had engaged in suicidal behavior in the past. When Detective Cockrell asked Waldron if he was feeling "those urges anymore," Waldron denied having those feelings anymore and explained that it is "easy to drift into that mind set" but that that style of thinking is "selfish" and not "something that [he] intended to" act on. In addition, Waldron did state during the interview that he had been on various medications for years, that he has panic attacks, and that he had received counseling previously; however, when Detective Cockrell asked Waldron whether he needed to stop to take any medication, Waldron explained that he had missed one of his doses but that he was feeling fine, that missing one does was not "a huge deal," and that if he took the medicine, he would just "pass out." *Cf. Vasquez*, 179 S.W.3d at 653, 662 (determining that instruction on voluntariness should have been provided, in part, because there was evidence that defendant was on "psychiatric medication" and that police officers told defendant that they would only help him get

his medication if he told them "what happened"). Moreover, Waldron did not exhibit any symptoms during the interview or appear to be in any way mentally incapacitated, and no evidence was presented during the trial that missing his scheduled medication affected his ability to comprehend the import of his confession or otherwise affected his mental state. *Compare Akout v. State*, No. 05-13-01432-CR, 2015 WL 4362392, at *3 (Tex. App.–Dallas July 16, 2015, no pet.) (mem. op., not designated for publication) (concluding that trial court "did not err in failing to instruct the jury on voluntariness" even though there was evidence that defendant had been drinking before confessing because "no evidence showed [that the defendant] lacked the ability to make an independent, informed decision to confess"), *and Pierce v. State*, No. 14-11-00319-CR, 2012 WL 1964584, at *4 (Tex. App.–Houston [14th Dist.] May 31, 2012, no pet.) (mem. op., not designated for publication) (determining that "the trial court did not err in failing to sua sponte provide the jury with" instruction under article 38.22 even though there was "evidence that [the defendant] suffer[ed] from mental illness" because defendant "point[ed] to no evidence of a causal connection between his mental illness and his alleged inability to knowingly and voluntarily waive his constitutional rights" and noting that recording showed that defendant sounded "lucid, polite, and articulate" and that defendant "claimed to understand his legal rights" and "waived those rights before speaking with the police"), *with Oursbourn*, 259 S.W.3d at 167 & n.6, 181 (determining that "[t]he issue of voluntariness should have been submitted to the jury under Article 38.22, § 6" because expert testified "that persons with bipolar disorder might 'have trouble evaluating their constitutional rights and making a proper choice as to what to do with those in mind' " and because there was evidence that defendant "was manifesting symptoms of his bipolar disorder during his interrogation" and that defendant "was in a 'manic' state shortly before and after his arrest").

*9 Furthermore, during his testimony at trial, Detective Cockrell denied that Waldron invoked his right to counsel but explained that in a previous interview, Waldron had invoked his right to counsel and that all questioning stopped when the invocation was made. In addition, Detective Cockrell testified that Waldron voluntarily talked to him for hours, that Waldron wanted the conversation to continue even longer, that Waldron appeared to be coherent, and that Waldron showed "no signs of distress." *Cf. Small v. State*, No. 01-14-00421-CR, 2016 WL 4126725, at *20, *21 (Tex. App.–Houston [1st Dist.] Aug. 2, 2016, pet. ref'd) (mem. op., not designated for publication) (deciding "that no reasonable jury could have found from the evidence presented at trial that [the defendant] made his tape-recorded statement involuntarily," in part, because police officer "described [the defendant]'s speech during the unrecorded portion of the interview as 'clear' and 'not emotional' ").

In light of the preceding, we must conclude that a reasonable jury could not have determined that Waldron's statement to the police was involuntary and that the evidence relied on by Waldron, without more, was insufficient to warrant an instruction on voluntariness. *Cf. Taylor*, 509 S.W.3d at 480–82 (determining "that the district court did not err by denying [defendant's] request for an instruction on voluntariness" where evidence showed that length of interrogation was extended due to defendant's request to take polygraph test, where defendant was free to leave interview at any time, where defendant "never requested to stop the interview," where "no attempts were made to prevent [defendant] from leaving or to pressure him to stay," where no evidence showed that defendant "was on any medication or other drugs when he made the statements" or that defendant "lacked the mental capacity to understand the statements that he was making," and where evidence showed that defendant "had prior experience with law-enforcement interactions from a previous arrest and conviction"); *Morales v. State*, 371 S.W.3d 576, 580, 586 (Tex. App.–Houston [14th Dist.] 2012, pet. ref'd) (noting that defendant did "not point to any evidence suggesting that he was intoxicated, mentally impaired, of low intelligence, ignorant of the situation, or threatened with physical violence of any kind, or that the officers made promises or misrepresentations that were calculated to induce him to make a false statement" and holding "that the general voluntariness instruction did not become law applicable to the case because no reasonable jury, viewing the totality of the circumstances, could find from the evidence admitted at trial that appellant's statements were involuntarily made"). For all of these reasons, we conclude that the district court did not err by denying Waldron's request for an instruction on voluntariness under section 6 of article 38.22.

The second type of instruction relied on in this appeal is "a 'general' Article 38.22, § 7 warnings instruction" and pertains to whether a defendant was given the proper warnings under sections 2 and 3 of article 38.22 before a statement made by a defendant to law enforcement may be used at trial. *See Oursbourn*, 259 S.W.3d at 173. Section 2 states that "[n]o written statement made by an accused as a result of custodial interrogation" may be admitted "unless it is shown

on the face of the statement that" the accused was informed about certain rights similar to those set out in *Miranda*. Tex. Code Crim. Proc. art. 38.22, § 2. Section 3 contains similar protections and states, among other things, that "[n]o oral or sign language statement of an accused made as a result of custodial interrogation" may be used during the trial unless the accused was informed about the rights listed in section 2 and "knowingly, intelligently, and voluntarily" waived those rights before making the statement and unless "an electronic recording ... is made of the statement." *Id.* art. 38.22, § 3. Regarding those required warnings, section 7 states that "[w]hen the issue is raised by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to such statement." *Id.* art. 38.22, § 7. In other words, a defendant is entitled "to have the jury decide whether he was adequately warned of his rights and knowingly and intelligently waived [his] rights" "when the issue is raised by the evidence." *Oursbourn*, 259 S.W.3d at 176. "For it to be 'raised by the evidence' there must be a genuine factual dispute." *Id.*

*10 When asserting that there was a factual dispute necessitating an instruction under section 7 of article 38.22, Waldron relies on the same arguments from the previous issue and asserts that he presented "affirmative evidence ... warranting" an instruction. For the reasons previously expressed, we cannot conclude that a factual dispute existed regarding whether Waldron was informed about his rights and about whether Waldron knowingly, intelligently, and voluntarily waived those rights before making his statements to Detective Cockrell.

The final type of instruction pertaining to confessions is an "exclusionary-rule instruction" under article 38.23. *Id.* at 173. Article 38.23 provides that "[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case" and that "[i]n any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained." Tex. Code Crim. Proc. art. 38.23(a). "The Article 38.23(a) 'specific' instruction is fact-based: For example, 'Do you believe that Officer Obie held a gun to the defendant's head to extract his statement? If so, do not consider the defendant's confession.' " *Oursbourn*, 259 S.W.3d at 173–74. "Article 38.23 requires a jury instruction only if there is a genuine dispute about a material fact." *Id.* at 177. "To raise a disputed fact issue warranting an Article 38.23(a) jury instruction, there must be some affirmative evidence that puts the existence of that fact into question." *Madden v. State*, 242 S.W.3d 504, 513 (Tex. Crim. App. 2007). "A defendant must establish three foundation requirements to trigger an Article 38.23 instruction: (1) the evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested; and (3) the contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the statement claimed to be involuntary." *Oursbourn*, 259 S.W.3d at 177; *see also Contreras v. State*, 312 S.W.3d 566, 574 (Tex. Crim. App. 2010) (setting out circumstances in which trial court "has a duty to give an article 38.23 instruction sua sponte" (internal footnote omitted)). "[I]f there is no disputed factual issue ... [,] the legality of the conduct is determined by the trial judge alone, as a question of law." *Oursbourn*, 259 S.W.3d at 177–78.

"Normally, 'specific' exclusionary-rule instructions concerning the making of a confession are warranted only where an officer uses inherently coercive practices." *Id.* at 178; *see Contreras*, 312 S.W.3d at 574 (explaining that "[a] statement is obtained in violation of constitutional due process only if the statement is causally related to coercive government misconduct"); *see also State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999) (citing Note: Evidence–Criminal Law–Constitutional Law–Due Process–Confessions–Judge and Jury–Determination of Preliminary Fact of Voluntariness of Confession, 3 Baylor L. Rev. 561, 563–65 (1951) (describing inherently coercive practices as including following: taking accused to lonely and isolated places for questioning at night, subjecting accused to protracted and persistent questioning, threatening accused with violence, and detaining accused unlawfully)). "Coercive government misconduct renders a confession involuntary if the defendant's 'will has been overborne and his capacity for self-determination critically impaired.' " *Contreras*, 312 S.W.3d at 574 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). "Whether this has occurred is determined by assessing the 'totality of all the surrounding circumstances,' including 'the characteristics of the accused and the details of the interrogation.' " *Id.* (quoting *Schneckloth*, 412 U.S. at 226, 93 S.Ct. 2041).

*11 When arguing that an instruction should have been given under section 7 of article 38.23, Waldron references the same arguments that he made regarding the other two types

of instructions and does not otherwise identify any additional allegedly coercive tactic utilized by Detective Cockrell or other law-enforcement personnel.[5] To the extent that those arguments can serve as a basis for requesting an instruction under article 38.23, *see id.* at 583 (explaining that "*Miranda* or article 38.22, not article 38.23, is the vehicle for excluding statements obtained in violation of the *Miranda* guidelines"), for the reasons previously given, we cannot conclude that there was a factual dispute necessitating a jury instruction under article 38.23.

In light of the preceding, we overrule Waldron's fourth through sixth issues on appeal.

Lesser–Included–Offense Instruction

In his seventh issue on appeal, Waldron contends that the district court erred by "refusing to charge the jury on the lesser included offense of manslaughter."[6]

When deciding whether a lesser-included-instruction should have been given, courts must determine whether the offense listed in the requested instruction is actually a lesser-included offense of the offense that the defendant was charged with. *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011); *see Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007). "An offense is a lesser included offense if ... it is established by proof of the same or less than all the facts required to establish the commission of the offense charged" or if "it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission." Tex. Code Crim. Proc. art. 37.09(a)(1), (3). In analyzing whether a lesser-included-offense instruction was warranted, reviewing courts "do not consider what the evidence at trial may show but only what the State is required to prove to establish the charged offense." *Cannon v. State*, 401 S.W.3d 907, 910 (Tex. App.–Houston [14th Dist.] 2013, pet. ref'd). Reviewing courts then "compare these elements to those of the potential lesser-included offense ... and decide whether the elements of the lesser offense are functionally the same or less than those required to prove the charged offense." *Id.*; *see also* Tex. Code Crim. Proc. art. 37.09 (defining lesser-included offenses). "An offense is a lesser-included offense of another offense ... if the indictment for the greater-inclusive offense either: 1) alleges all of the elements of the lesser-included offense, or 2) alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced." *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009).

**12 If the reviewing court determines that the offense listed in the requested instruction is a lesser-included offense, the court must then determine whether the evidence presented during the trial supports the requested instruction. *Goad v. State*, 354 S.W.3d 443, 446 (Tex. Crim. App. 2011); *Rice*, 333 S.W.3d at 144. When deciding whether the evidence supports the requested instruction, the reviewing court considers "all of the evidence admitted at trial" and "not just the evidence presented by the defendant," *Goad*, 354 S.W.3d at 446; *see Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993), and must determine whether there is some evidence from which a rational jury could acquit the defendant of the greater offense and convict the defendant of the lesser offense, *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012). In other words, courts must evaluate whether there is some evidence that would allow the jury to rationally determine that if the defendant was guilty, he was only guilty of the lesser offense. *See Rice*, 333 S.W.3d at 145; *Guzman v. State*, 188 S.W.3d 185, 188–89 (Tex. Crim. App. 2006). "Meeting this threshold requires more than mere speculation —it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Cavazos*, 382 S.W.3d at 385. " 'Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge.' " *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011) (quoting *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994)). The "threshold showing is low," but " 'it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense' "; " 'rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted.' " *Id.* (quoting *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997)). In performing this analysis, the court may not consider the credibility of the evidence supporting the lesser charge or consider whether that evidence is controverted or conflicts with the other evidence. *Goad*, 354 S.W.3d at 446–47. Moreover, "the evidence produced must be sufficient to establish the lesser-included offense as a 'valid, rational alternative' to the charged offense." *Cavazos*, 382 S.W.3d at 385 (quoting *Hall*, 225 S.W.3d at 536).

As set out above, Waldron was charged with capital murder. *See* Tex. Penal Code § 19.03. Under the Penal Code, an individual commits capital murder if he "commits murder as defined under Section 19.02(b)(1) and" if the victim is

"under 10 years of age." *Id.* § 19.03(a)(8). Section 19.02(b)(1) specifies that an individual commits murder "if he ... intentionally or knowingly causes the death of an individual." *Id.* § 19.02(b)(1). In this case, the indictment alleged that Waldron caused the death of S.F.'s "unborn child ... by striking or punching ... S.F. in the abdomen with [his] hands or fists." In contrast to murder, the Penal Code specifies that an individual commits the offense of manslaughter "if he recklessly causes the death of an individual." *Id.* § 19.04(a).

When requesting a lesser-included instruction for the offense of manslaughter, Waldron alleged that he was entitled to the instruction because there was evidence that he recklessly caused the death of S.F.'s unborn child by having sex with S.F. after assaulting her. Ultimately, the district court determined that Waldron was not entitled to the instruction because the first prong of the test "requires the lesser-included offense be within the proof necessary to establish the offense charged, including the manner and means," and because the indictment required the State to prove that Waldron "caused the death by striking or punching" S.F.

This Court has been presented with a similar scenario before. *See Bohnet v. State*, 938 S.W.2d 532 (Tex. App.–Austin 1997, pet. ref'd). In *Bohnet*, the defendant was charged with capital murder for killing a child, and the indictment alleged that the defendant caused the death by " 'striking the [victim] in the head with his fist, with his hand, and with an object unknown ..., and by striking the head of [the victim] against an object unknown.' " *Id.* at 533. During the charge conference, the defendant requested "instructions on the lesser included offenses of manslaughter and criminally negligent homicide." *Id.* Essentially, the defendant argued that "because evidence was presented at trial that his reckless or negligent shaking caused [the victim]'s death, he was entitled to jury instructions on the lesser included offenses of manslaughter and criminally negligent homicide." *Id.* at 535. The trial court denied the request. *Id.* at 533. When determining whether an instruction should have been given, this Court noted that the State was not obligated "to plead the precise way in which appellant caused" the victim's death and that by "including a more specific description in the indictment, ... the State undertook the burden of proving these specific allegations to obtain a conviction." *Id.* at 535. Further, this Court observed that "appellant's shaking of [the victim] was not a required element of the offense charged in the indictment; rather, it was merely a fact that was presented at trial by appellant." *Id.* In addition, this Court reasoned that "[i]f the trial court had included an instruction on manslaughter or criminally negligent homicide as a result of evidence having been presented at trial that appellant recklessly or negligently shook his son, the effect would have been to require the State to prove facts not alleged in the indictment and not essential to a conviction." *Id.* Further, this Court recognized that this type of instruction was not warranted because "a lesser-included offense must be established by less or the same proof of facts required to establish the charged offense, not additional, unalleged matters presented at trial." *Id.* Finally, this Court determined that the defendant would have only been entitled to the instruction "under the indictment in the present case" if there had been "some evidence that he either recklessly or negligently *struck*" the victim and that in the absence of this evidence, "including manslaughter or criminally negligent homicide in the jury charge would have allowed the jury to convict appellant of a crime for which he was not indicted." *Id.* at 535, 536.

*13 Similarly to *Bohnet*, the State here specified in the indictment the manner of death by alleging that Waldron caused the death of S.F.'s "unborn child ... by striking or punching ... [S.F.] in the abdomen with [his] hands or fists." Although the State was not required to specify the particular manner in which S.F.'s unborn child died, the State did so, and providing an instruction that Waldron recklessly caused the death of the unborn child by having sex with S.F. after the assault would have required proof of additional facts and would have allowed the jury to convict Waldron of an offense for which he was not charged. Although evidence was introduced establishing that Waldron did in fact have sex with S.F. after the assault, that conduct was not required to be proven under the indictment in this case. In other words, for it to have been a lesser-included offense in this case, the instruction would have needed to allege that Waldron caused the death of the unborn child by recklessly striking or punching S.F. in the abdomen. Accordingly, the first prong of the test would not seem to be satisfied under the circumstances of this case.

On appeal, it is not entirely clear that Waldron is re-urging the arguments that he made to the district court asserting that a lesser-included-offense instruction was warranted because there was evidence that he recklessly caused the death of the unborn child by having sex with S.F. after the assault. *Cf. Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014) (stating that "the point of error on appeal must comport with the objection made at trial"); *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995) (noting that objection stating

one legal theory may not be used to support different legal theory on appeal). Instead, Waldron seems to be contending that an instruction for the lesser-included offense could have been given "without manner and means at variance with the indictment." In other words, Waldron urges that a general instruction alleging that he recklessly caused the death of the unborn child could have and should have been given. Building on that proposition, Waldron contends that the first prong of the test would have been satisfied because courts have generally concluded that manslaughter is a lesser-included offense of capital murder. *See Mathis v. State*, 67 S.W.3d 918, 925 (Tex. Crim. App. 2002) (determining that first prong was met after noting that court has "recognized that manslaughter is a lesser-included offense of capital murder").

Turning to the second prong, Waldron argues that this prong is also met because there was "evidence in the record showing he recklessly caused the death of the [unborn child] without an intent to kill." When arguing that this type of evidence is present in the record, Waldron notes that Detective Cockrell testified that Waldron was initially charged with the offense of manslaughter. Similarly, Waldron highlights testimony that the arrest warrant in this case was for the offense of manslaughter. Based on this testimony, Waldron contends that "[t]he evidence supports his requested charge on the lesser offense of manslaughter" because the testimony by the law-enforcement officers "constitutes evidence of recklessness and a lack of intent to kill."

Assuming for the sake of argument that the first prong of the test could be satisfied in the manner suggested by Waldron, we have been unable to find any support for Waldron's suggestion that testimony regarding a crime categorization made by investigating officers before an investigation properly gets underway and regarding a decision to initially charge a defendant with a less serious offense before charging him with a more serious offense that ultimately serves as the basis for a trial can, on their own, constitute evidence sufficient to warrant providing an instruction for a lesser-included offense. Moreover, as set out earlier, the evidence for the lesser offense would have to establish the same manner alleged in the indictment. As will be discussed in more detail in the portion of this opinion addressing Waldron's last two issues on appeal, the evidence regarding the actual conduct undertaken by Waldron established that he intentionally hit S.F. in the abdomen repeatedly and communicated his desire that his acts end S.F.'s pregnancy, and there is nothing in the record that would have supported a determination by the jury that if Waldron was guilty of an offense, he was only guilty of causing the death of S.F.'s unborn child by recklessly hitting or striking S.F. in the abdomen and that Waldron was not guilty of intentionally or knowingly causing the death of the unborn child by striking or hitting S.F. in the abdomen. Accordingly, the second prong is not satisfied in this case.

*14 For all of these reasons, we must conclude that Waldron has failed to show that he was entitled to an instruction for manslaughter. Accordingly, we overrule Waldron's seventh issue on appeal.

Questioning Jury Panel

Prior to the start of trial, Waldron filed a motion informing the district court that he wanted to question prospective jurors regarding the lesser-included offense of manslaughter and regarding the punishment range for that offense. Before Waldron questioned the panel, the district court repeatedly denied Waldron's request. In his eighth issue on appeal, Waldron contends that the district "court abused its discretion by refusing to allow [him] to question the prospective jurors on the lesser included offense of manslaughter and the punishment range for that offense" and argues that he was harmed by the district court's ruling. In its brief, the State contends that Waldron waived this issue for appellate purposes because although Waldron generally indicated that he wanted to question the panel regarding the lesser-included offense and its accompanying punishment range, he did not present "particular, proper questions for the [district] court to consider." *See Sells v. State*, 121 S.W.3d 748, 756 (Tex. Crim. App. 2003) (explaining that fact that "the trial court generally disapproved of an area of inquiry from which proper questions could have been formulated is not enough because the trial court might have allowed the proper question had it been submitted for the court's consideration"); *Mohammed v. State*, 127 S.W.3d 163, 170 (Tex. App.–Houston [1st Dist.] 2003, pet. ref'd) (concluding that defendant "failed to preserve error for review" when he "did not show that he was prevented from asking a particular, proper question").

Assuming for the sake of argument that this issue has been preserved and that the district court abused its discretion by prohibiting questioning regarding manslaughter and the punishment range for manslaughter, *see Sells*, 121 S.W.3d at 755 (noting that reviewing courts "will not disturb [a] trial court's decision" regarding "the propriety of a particular question" "absent an abuse of discretion"), we would still be unable to sustain this issue on appeal because Waldron was not harmed by the district court's ruling.

"[T]he right to pose proper questions during voir dire examination is included within the right to counsel under Article I, § 10, of the Texas Constitution." *Gonzales v. State*, 994 S.W.2d 170, 171 (Tex. Crim. App. 1999). Because of the constitutional nature of the right, appellate courts review violations of that right under Rule 44.2(a) of the Rules of Appellate Procedure. *See Hill v. State*, 426 S.W.3d 868, 877 (Tex. App.–Eastland 2014, pet. ref'd); *Rios v. State*, 4 S.W.3d 400, 403 (Tex. App.–Houston [1st Dist.] 1999, pet. dism'd). Under that Rule, a reviewing court "must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." Tex. R. App. P. 44.2(a). In assessing the harm caused by being prohibited from asking "questions during the group, voir-dire setting," reviewing courts consider "the entire record, including (1) any testimony or physical evidence admitted for the jury's consideration; (2) the nature of the evidence supporting the verdict; and (3) the character of the error and how it might be considered in connection with other evidence in the case, the jury instructions, the State's theory and any defensive theories, closing arguments, voir dire, and whether the State emphasized the error." *Wappler v. State*, 183 S.W.3d 765, 778 (Tex. App.–Houston [1st Dist.] 2005, pet. ref'd). In other words, reviewing courts must "calculate, as nearly as possible, the probable impact on the jury" stemming from a trial court's decision to prohibit the defendant from asking "voir-dire questions in light of the evidence adduced at trial." *Id.* at 777–78.

*15 On appeal, Waldron contends that he was harmed by the district court's ruling because he was prohibited from questioning the panel regarding a lesser-included offense and the punishment range for the offense even though "the evidence at trial [ultimately and] plainly raised the lesser included offense of manslaughter." However, as explained in the previous issue, no evidence presented at trial raised the issue of the lesser-included offense of manslaughter. Accordingly, we conclude beyond a reasonable doubt that the district court's ruling did not contribute to Waldron's conviction or punishment.

For these reasons, we overrule Waldron's eighth issue on appeal.

Comments by the District Court

In his ninth and tenth issues on appeal, Waldron asserts that the district court improperly commented on the evidence "in a manner calculated to convey to the jury [its] opinion of the case" in violation of article 38.05 of the Code of Criminal Procedure.[7] Article 38.05 provides that "[i]n ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case." Tex. Code Crim. Proc. art. 38.05.

When presenting this issue on appeal, Waldron refers to two sets of comments made by the district court. First, Waldron highlights that when a recording of a portion of his interview with Detective Cockrell was admitted into evidence, the district court made the following comment: "The defense made an objection earlier that there was no indication [in the edited version of the recording] that the defendant was *Mirandized*. In fact, he was earlier in the tape. That portion they agreed not to play to you. So he has been *Mirandized*." On appeal, Waldron contends that the district court's statement was a comment "on an item of evidence," "supplied the jury with information not contained within the admitted exhibit," and informed the jury that the district "court believed that Waldron had been properly warned in compliance with the ... law ... because he was *Mirandized*."

Second, Waldron points to an exchange that occurred during the testimony of defense expert Dr. Gruszecki, who was a forensic pathologist. In her testimony, Dr. Gruszecki explained that placental abruptions can have a number of causes, including being in an automobile accident, being assaulted, falling down stairs, and engaging in sexual activity. Then, the following exchange occurred:

> [Waldron]: Okay. So if you heard what you heard and yet there's other testimony that there was sex immediately after that that lasted a period of time and there was a reported fall that occurred within the time frame, in all reasonable—
>
> [State]: I'm going to object to that. The testimony is there was not a fall by both the defendant on his video and the victim, so—
>
> *16 [Court]: Agreed. Sustained.
>
> [Waldron]: There's evidence that she actually mentioned the fall. There's also—
>
> [Court]: She's also—there's also—need I add that she also retracted that.

[Waldron]: So if you—

[Court]: That's misleading the witness and you know it, Counsel. Stop doing it.

[Waldron]: Judge, that evidence is in the record. She may have recounted—recanted—

[Court]: Well, then, you need to—if you're going to ask a hypothetical, give her the whole hypothetical, including the recantation, Counsel.

In light of the above exchange, Waldron contends that the district court's comments were improper because the district court stated in front of the jury that it agreed with the State that S.F. had recanted her claim that she had fallen, because the district court commented on the weight of the evidence by repeatedly stating that S.F. recanted her prior statement about falling, and because the district court's discussion would have "led the jury to think [that] the [district] court believed" S.F.'s "recantation of the story [that] a fall brought about the demise of her fetus."

"To constitute reversible error, the trial court's comment to the jury must be such that it is reasonably calculated to benefit the State or to prejudice the rights of the defendant." *Fletcher v. State*, 960 S.W.2d 694, 701 (Tex. App.–Tyler 1997, no pet). "To determine whether the comment is either reasonably calculated to benefit the State or to prejudice the defendant, the appellate court must first examine whether the trial court's statement was material to the case." *Id.* Stated differently, " '[a] trial judge improperly comments on the weight of the evidence if he makes a statement that (1) implies approval of the State's argument; (2) indicates any disbelief in the defense position; or (3) diminishes the credibility of the defense's approach to the case.' " *Thien Quoc Nguyen v. State*, 506 S.W.3d 69, 83 (Tex. App.–Texarkana 2016, pet. ref'd) (quoting *Joung Youn Kim v. State*, 331 S.W.3d 156, 160 (Tex. App.–Houston [14th Dist.] 2011, pet. ref'd) (plurality op.)).

For purposes of addressing this issue, we will assume without deciding that the district court's comments did violate article 38.05. If a reviewing court determines that a trial court's comments violated article 38.05, the reviewing court must then perform a "non-constitutional harm analysis" under Rule of Appellate Procedure 44.2(b) to determine whether the statutory violation should result in a reversal. *Proenza v. State*, —— S.W.3d ——, ——, No. PD-1100-15, 2017 WL 5483135, at *10 (Tex. Crim. App. Nov. 15, 2017). Under Rule 44.2(b), any "error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Tex. R. App. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Ellis v. State*, 517 S.W.3d 922, 931 (Tex. App.–Fort Worth 2017, no pet.). Stated differently, an error does not affect a substantial right if the reviewing court has " 'fair assurance that the error did not influence the jury, or had but slight effect.' " *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001) (quoting *Reese v. State*, 33 S.W.3d 238, 243 (Tex. Crim. App. 2000)). "In making this determination, we review the record as a whole, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case." *Ellis*, 517 S.W.3d at 931–32. Reviewing courts "may also consider the jury instructions, the State's theory and any defensive theories, whether the State emphasized the error, closing arguments, and even voir dire, if applicable." *Id.* at 932.

***17** Regarding the comment that Waldron had been *Mirandized*, we note that during Waldron's case-in-chief, Waldron played the portion of his interview in which Detective Cockrell went over Waldron's *Miranda* rights, in which Waldron stated that he understood those rights, and in which Waldron agreed to waive those rights and to talk with Detective Cockrell. Although Waldron asserted on appeal that his confession was obtained in violation of his right to counsel under the Fifth and Sixth Amendments, we previously concluded that the district court did not abuse its discretion by denying his suppression motion and determining that Waldron did not invoke his right to counsel and that Waldron was properly informed of his rights under *Miranda*. Moreover, during the trial, Detective Cockrell explained that he read Waldron his *Miranda* rights at the beginning of the interview and that Waldron agreed to waive those rights by signing the *Miranda* form and by stating that he wanted to talk to Detective Cockrell. Moreover, neither party emphasized whether Waldron was *Mirandized* during their opening or closing statements.

Turning to the other comments made by the district court regarding whether S.F. stated that she fell down the stairs, we note that Detective Cockrell related in his testimony that both S.F. and Waldron initially told him that S.F.'s injuries were caused by her falling down the stairs; that S.F. testified that she initially told the police and the hospital personnel that she

injured herself falling down some stairs; that Dr. Gruszecki explained in her testimony that placental abruptions can be caused by different forms of trauma, including falling down stairs; and that Waldron argued in his opening statement that the placental abruption could have been caused by several events; however, we also note that although Waldron asserted in his closing arguments that the abruptions could have been caused by a car accident or the sexual activity that occurred after the assault, Waldron did not argue that the abruption was caused by S.F. falling down a flight of stairs.

In addition, S.F. testified that Waldron told her to tell the police and the staff at the hospital that she fell down the stairs, that Waldron was with her for much of the time that she talked with the police and the hospital staff, that she was afraid of what Waldron might do if she told the truth, and that she ultimately told the police what really happened when she was alone with one of the officers. Similarly, on the recording of Waldron's interview with the police, Waldron admitted that the story about S.F. falling down the stairs was not true. Regarding the injuries that S.F. had sustained, Detective Cockrell explained that S.F. did not have any "br[ ]aking injuries" from where she tried to stop herself from falling, and the doctor who treated S.F. at the hospital, Dr. Blaue, testified that S.F.'s injuries were "a little bit more than would be sustained in a ... trip-and-fall situation" and that "[t]he amount of bruising" and "the location of the injuries did not coincide with" her tripping and falling.

Moreover, overwhelming evidence of Waldron's guilt was introduced during the trial. Although Dr. Gruszecki and Dr. Dana both testified that placental abruptions can be caused by car accidents and sexual activity, Dr. Gruszecki explained that her assessment was that the twins died as a result of maternal trauma that was intentionally inflicted on S.F. Additionally, although S.F. explained that she and Waldron had sexual intercourse after the assault and that she had been in a car accident several days before the assault, S.F. also testified that she was not hurt in the car accident and that she could feel the twins moving around prior to the assault but did not feel the twins move again after the assault. In addition, Dr. Dana testified that the female twin had no abnormalities, that her weight was "within normal range" for her age, that there was no evidence of any malnutrition, and that the child died within 24 or 48 hours of the autopsy.

Furthermore, S.F. testified about the assault, and much of her testimony was corroborated by Waldron's statements during his interview with the police. In her testimony, S.F. recounted several prior instances of domestic abuse in which Waldron physically assaulted her. Regarding the charged offense, S.F. explained that Waldron had been drinking, that Waldron asked her to help him record a song, that she scrolled "through the lyrics on his phone," "that the phone screen went blank," that Waldron got upset by that because "it interrupted his recording," that Waldron started yelling at her, and that he told her that he "couldn't believe he was having children with" her. Next, S.F. related that Waldron hit her "in the face," that he told her that he had "waited a long time to do this" as she fell to the ground, that he kicked her "in the face and in the side of the head," that he told her to get up and get packing tape, that he wrapped the tape "around [her] mouth" and around the back of her head "multiple times," that he pushed her on her back, that he straddled her, that he stated that he did not want to have children with her, and that he punched her in the stomach. Further, S.F. recalled that she tried to protect her abdomen by blocking the punches with her arms and hands, that Waldron ordered her to move her arms, that he hit her at least fifteen times "all over [her] stomach," and that she felt like she lost consciousness. Moreover, S.F. testified that after Waldron stopped punching her, he said that they could not "afford two babies" and that they would "be better off without them." Additionally, S.F. recalled that Waldron asked to have sexual intercourse even though she did not want to and was injured and that he insisted on having sex with her. In addition, S.F. stated that she told Waldron that she wanted to go to the hospital "multiple times" but that Waldron did not want her to go until some of her visible injuries "cleared up" because "he didn't want to go to jail."

*18 On the recording of Waldron's interview, Waldron provided a similar summary of prior assaults that he committed against S.F. and regarding the events leading up to the offense in question. Regarding the offense, Waldron related that he banged S.F.'s head against the closet door causing her to fall, that he told her that he had "been waiting so long to do this," that he hit her on the eye, that he kicked her in the head, that he went crazy, that he wrapped tape around her head and covered her mouth, that he told her that he did not want to have kids with her, that he tackled her, that she covered her stomach with her hands, that he hit her hands before telling her to move her hands, that he hit her stomach repeatedly but did not know how many times, and that S.F. passed out. When describing the incident, Waldron stated that he viewed it as giving her an abortion. Further, Waldron recalled that they had sexual intercourse after the incident, that they went to the hospital the next day, and that he

returned home to clean up the apartment, including throwing away the tape that he had wrapped around her mouth.

In light of the preceding, we cannot conclude that the comments by the district court affected Waldron's substantial rights. Accordingly, we overrule Waldron's ninth and tenth issues on appeal.

CONCLUSION

Having overruled Waldron's ten issues on appeal, we affirm the district court's judgment of conviction.

All Citations

Not Reported in S.W. Rptr., 2018 WL 700047

Footnotes

1 We note that in its findings of fact and conclusions of law, the district court stated that all of Waldron's claims regarding the suppression ruling were insufficient to preserve those claims for appellate review. For the sake of resolving Waldron's issues on appeal, we will assume without deciding that his claims have been preserved for review.

2 At the outset, we note that, for various reasons, the parties disagree regarding the degree of harm that must be shown to warrant a reversal on these issues. However, because we ultimately conclude that the district court did not err by not providing the instructions at issue, we need not address whether Waldron was harmed by the lack of instructions in the jury charge. *See Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012) (explaining that reviewing courts only reach issue of harm if it first determines that there was error in jury charge); *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) (same).

3 On appeal, Waldron also asserts that Detective "Cockrell never specifically asked if he was willing to waive his rights and speak with Cockrell." Although Detective Cockrell did not ask the precise question posed by Waldron, Detective Cockrell went over Waldron's *Miranda* rights, ensured that Waldron understood those rights, and instructed Waldron that if he wanted "to sit here and talk," then he needed to sign at the bottom of the form indicating that he was "knowingly, intelligently[,] and voluntarily" waiving his rights. *See Joseph v. State*, 309 S.W.3d 20, 25 (Tex. Crim. App. 2010) (explaining that "[t]he question is not whether Appellant 'explicitly' waived his *Miranda* rights, but whether he did so knowingly, intelligently, and voluntarily").

4 In his brief, Waldron also asserts that evidence was presented to the jury establishing that he had attempted to commit suicide or otherwise engaged in self-harm after his arrest for this offense while he was in jail. As support for this proposition, Waldron points to portions of the recording of his interview by the police. During the first referenced exchange, Waldron comments on his appearance on the day of the interview, informs the officer that it is difficult to groom himself while in jail, and states that jail personnel will not provide access to razors because they are afraid the arrested individual might "cut [his] arm open," but Waldron does not state during that exchange that he had attempted to commit suicide or otherwise hurt himself while he was in jail. During the second referenced exchange, Waldron jokes that the scars on his wrist were from when he "got into a fight with a bear." However, Waldron did not indicate that he had attempted any type of self-harm during his confinement.

5 In his brief, Waldron "concedes [that] his objection to the charge at trial cited art. 38.22 rather than art. 38.23." However, Waldron contends that "[i]n view of the nature of the requested charge and the correlation of statutes, ... the trial court was put on notice that he was requesting charges under both 38.22 and 38.23." For the purpose of resolving this issue on appeal, we will assume for the sake of argument that Waldron raised an objection to the jury charge under article 38.23.

6 In its brief, the State contends that because Waldron stated that he had no objection to the proposed jury charge, this Court must review the issue to see whether there was egregious harm rather than some harm. *See Hodge v. State*, 500 S.W.3d 612, 629 (Tex. App.–Austin 2016, no pet.) (noting that degree of harm required to reverse for jury-charge error "depends on whether a" timely objection was made to trial court, that only some harm is required for reversal if objection was made, and that if no objection is made, reversal is only warranted if there is egregious harm); *cf. Stairhime v. State*, 463 S.W.3d 902, 906, 907 (Tex. Crim. App. 2015) (applying "the 'no-objection' waiver rule" in context of error objected to during voir dire); *Thomas v. State*, 408 S.W.3d 877, 881 (Tex. Crim. App. 2013) (discussing effect of "no objection" statement during trial after ruling on motion to suppress). Because we ultimately conclude that Waldron was not entitled to the lesser-included instruction, we need not determine the level of harm required to warrant a reversal in this case.

7 In his brief, Waldron acknowledges that he did not object to the comments made by the district court that he now claims on appeal were improper. However, Waldron notes that an objection is not required to preserve a claim regarding a violation

of article 38.05. *See Proenza v. State*, —— S.W.3d ——, ——, No. PD-1100-15, 2017 WL 5483135, at *10 (Tex. Crim. App. Nov. 15, 2017) (concluding that violation of article 38.05 does not fall "within *Marin's* third class of forfeitable rights" and "may be urged for the first time on appeal" in absence of evidence establishing that defendant "plainly, freely, and intelligently waived his right to his trial judge's compliance with Article 38.05").

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