

Affirmed and Opinion filed November 30, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00863-CR

KIRK ALLAN SILWEDEL, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from 176th District Court
Harris County, Texas
Trial Court Cause No. 798,453**

O P I N I O N

Kirk Allan Silwedel appeals a conviction for murder on the grounds that: (1) the trial court erred by failing to conduct a hearing to determine the voluntariness of his statement to the police; (2) he received ineffective assistance of counsel; and (3) the trial court failed to properly instruct the jury regarding his statement. We affirm.

Background

Appellant was charged by indictment with murder, found guilty by a jury, and sentenced to fifty years confinement.

Voluntariness

Appellant's first point of error contends that the trial court erred in failing to conduct a hearing, outside the presence of the jury, regarding the voluntariness of appellant's written statement to the police. However, because the record does not reflect that appellant raised a question in the trial court regarding the voluntariness of his statement, the trial court was not required to conduct a hearing. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 6 (Vernon 1979) (“[W]here a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions.”). Accordingly, appellant's first point of error is overruled.

Ineffective Assistance of Counsel

Appellant's second point of error contends that he was denied effective assistance of counsel because his trial counsel failed to object to appellant's written statement in which he admitted he may have choked the complainant a little bit. To prevail on a claim of ineffective assistance for failing to object to evidence, an appellant must demonstrate that the evidence was not admissible. *See McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992). In this case, appellant claims his statement was inadmissible because it was false and materially inaccurate. Appellant further contends that he lied to police when he stated that his hands were around the complainant's neck and choking him and that he was induced to sign the statement. However, appellant has not developed a record to show that he was induced or coerced in any way or that the statement was otherwise not voluntary. Additionally, the trial court was free to disbelieve appellant's testimony that his statement to the police was false. Because appellant's second point of error thus fails to establish that his statement was inadmissible, it is overruled.

Jury Instruction

Appellant's third point of error complains that the trial court erred in failing to instruct the jury on the voluntariness of his statement to the police. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 7 (Vernon 1979). However, in order for such an instruction to be required, some evidence must be presented to the jury which raises the issue of voluntariness. *See id.*; *Rocha v. State*, 16 S.W.3d 1, 20 (Tex. Crim. App. 2000). The evidence cited by appellant suggests that his statement was, at most, untrue,

but not involuntary. Because appellant's third point of error thus fails to demonstrate that appellant was entitled to a jury instruction on the voluntariness of his statement, it is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
 Justice

Judgment rendered and Opinion filed November 30, 2000.

Panel consists of Justices Anderson, Fowler, and Edelman.

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