69 S.W.3d 590
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Court of Appeals of Texas,
Corpus Christi.
Jaime Charles NONN, Appellant,
v.
The STATE of Texas, Appellee.

No. 13–97–658–CR.
Nov. 21, 2001.
Rehearing Overruled March 28, 2002.

Defendant was convicted in the 92nd District Court, Hidalgo County, Edward G. Aparicio, J., of capital murder, and was sentenced to life in prison. Defendant appealed. The Corpus Christi Court of Appeals, 13 S.W.3d 434, affirmed. Defendant petitioned for discretionary review. After grant of petition, the Court of Criminal Appeals, 41 S.W.3d 677, vacated and remanded. On remand, the Corpus Christi Court of Appeals, Dorsey, J., held that: (1) warnings given to defendant before statement was taken by prosecutor in another state did not substantially comply with requirements of statute governing admissibility of written statement made by an accused as a result of custodial interrogation, but (2) admitting statement was not reversible error.

Affirmed.

West Headnotes

[1] Criminal Law 110 411.10

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)10 Warnings
110k411.10 k. Right to remain silent. Most Cited Cases
(Formerly 110k530, 110k518(3))

Warnings given to defendant before statement was taken by prosecutor while defendant was in custody in another state did not substantially comply with requirements of statute governing admissibility of written statement made by an accused as a result of custodial interrogation; warning that defendant had the right to terminate interview at any time was not contained on the face of the confession, even though evidence indicated defendant received that warning. Vernon's Ann.Texas C.C.P. art. 38.22, § 2.

[2] Criminal Law 110 1169.12

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.12 k. Acts, admissions, declarations, and confessions of accused. Most Cited Cases

Admitting defendant's statements to prosecutor while in custody in another state, even though defendant was not warned in writing that he was entitled to stop the interrogation at any time, was not reversible error; taking of statement did not violate defendant's *Miranda* rights and missing warning was given orally. Vernon's Ann.Texas C.C.P. art. 38.22, § 2; U.S.C.A. Const.Amend. 5; Rules App.Proc., Rule 44.2.

[3] Criminal Law 110 1165(1)

110 Criminal Law
110XXIV Review

110XXIV(Q) Harmless and Reversible Error
110k1165 Prejudice to Defendant in General
110k1165(1) k. In general. Most Cited Cases

When conducting a harm analysis, the court of appeals need only determine whether or not the error affected a substantial right of the defendant. Rules App.Proc., Rule 44.2(b).

[4] Criminal Law 110 1165(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1165 Prejudice to Defendant in General
110k1165(1) k. In general. Most Cited Cases

To determine whether or not an error affected a substantial right of the defendant, appellate courts must decide whether the error had a substantial or injurious affect on the jury verdict. Rules App.Proc., Rule 44.2(b).

[5] Criminal Law 110 411.7

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)10 Warnings
110k411.7 k. Form and sufficiency. Most Cited Cases
(Formerly 110k412.2(2))

When a statement is taken from a defendant as a result of custodial interrogation in another state, and the evidence is undisputed that the *Miranda* warnings were given to the defendant in writing and the additional warning that the defendant was entitled to stop the interrogation at any time was given orally, the substantial rights of the defendant are not implicated. U.S.C.A. Const.Amend. 5; Vernon's Ann.Texas C.C.P. art. 38.22, §§ 2, 5.

***591** Norman E. McInnis, McAllen, for appellant.

Rene A. Guerra, Crim. Dist. Atty., Rolando Garza, Edinburg, for state.

Before: Justices DORSEY, YAÑEZ, and RODRIGUEZ.

OPINION ON REMAND

DORSEY, Justice.

On remand, we address the discrete issue of whether the oral statements made by the appellant in this case were obtained in **substantial compliance** with the dictates of article **38**. **22** of the code of criminal procedure. *See* TEX.CODE CRIM.PROC.ANN. art. **38**. **22** (Vernon 1979).[FN1] We hold that they were not; but that such error did not affect a **substantial right** of the appellant. *See* TEX.R.APP.P. 44.2. Accordingly, we affirm the judgment of the trial court.

FN1. For the facts and analysis of the six issues remaining in this appeal, see *Nonn v. State*, 13 S.W.3d 434, 436–37, 440–44 (Tex.App.—Corpus Christi 2000), *rev'd*, 41 S.W.3d 677 (Tex.Crim.App.2001).

The issue in this case is whether the trial court erred in admitting written statements made by appellant which were taken by a prosecutor while appellant was in custody in Illinois. In our original opinion, we held that the trial court did not err in admitting the statements for various public policy reasons. *See Nonn v. State*, 13 S.W.3d 434, 435–36 (Tex.App.—Corpus Christi 2000), *vacated*, 41 S.W.3d 677 (Tex.Crim.App.2001). We reasoned that because the

Illinois agency which took Nonn's confession was not acting as an agent for any Texas agency when it took Nonn's confession, the Illinois law-enforcement officials were not bound by our confession rules. *Nonn*, 13 S.W.3d at 440. We also reasoned that since the dictates of *Miranda* are not generally imposed upon foreign officials, neither should the dictates of our more strict rule of procedure regarding confessions, Rule 38.22, be imposed on confessions taken in foreign jurisdictions. *Id.* at 438–40 (citing to *Alvarado v. State*, 853 S.W.2d 17, 20–23 (Tex.Crim.App.1993)). Finally, we reasoned that because Nonn was given both his *Miranda* warnings *and* the additional warning required by article 38.22 (that he had the right to terminate the interview at any time)—even though the additional warning was given to him orally rather than in writing—the trial court was not required to suppress Nonn's statements.

The court of criminal appeals, noting that article 38.22 is a "procedural evidentiary rule," pointed out that under basic conflicts-of-law principles, "the law of the forum in which the judicial proceeding is held determines the admissibility of evidence." *Nonn*, 41 S.W.3d at 679 (citing *Davidson v. State*, 25 S.W.3d 183, 185–6 (Tex.Crim.App.2000)). Thus, article 38.22 applies to a confession taken in another jurisdiction when the confession is sought to be admitted in a judicial proceeding in Texas. *Id.; see also Davidson*, 25 S.W.3d at 186. Thus, the court held that "the relevant inquiry in the instant case is whether the oral statements made by appellant as a result of custodial interrogation were obtained in **compliance** with the dictates of art. **38**. **22**." *Nonn*, 41 S.W.3d at 679.

However, the court also pointed out that strict **compliance** with **38**. **22** is not required,***592** but rather, "**substantial compliance**" will suffice. *Id.* (citing *Cockrell v. State*, 933 S.W.2d 73, 90–91 (Tex.Crim.App.1996); *Sosa v. State*, 769 S.W.2d 909, 915–6 (Tex.Crim.App.1989); *Bennett v. State*, 766 S.W.2d 227, 230–1 (Tex.Crim.App.1989), *cert. denied*, 492 U.S. 911, 109 S.Ct. 3229, 106 L.Ed.2d 578 (1989)). However, because one of the warnings was not given to the defendant in writing, we hold that the warnings given to Nonn prior to his giving his written statements failed to substantially comply with article 38.22.

[1] Article 38.22(2) states:

> Sec. 2. No written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:
>
> (a) the accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of this code or received from the person to whom the statement is made a warning that:
>
> (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
>
> (2) any statement he makes may be used as evidence against him in court;
>
> (3) he has the **right** to have a lawyer present to advise him prior to and during any questioning;
>
> (4) if he is unable to employ a lawyer, he has the **right** to have a lawyer appointed to advise him prior to and during any questioning; and
>
> (5) he has the **right** to **terminate** the **interview** at any time; and
>
> (b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the **rights** set out in the warning prescribed by Subsection (a) of this section.

TEX.CODE CRIM.PROC.ANN. art. **38**. **22** (Vernon 1979). The warnings appearing on the face of Nonn's written statement are:

> I understand that I have the **right** to remain silent and that anything I say can be used against me in a court of law. I understand that I have the **right** to talk to a lawyer and have him present with me during questioning, and if I cannot afford to hire a lawyer one will be appointed by the court to represent me before any questioning. Understanding these **rights**, I wish to give a statement.

Missing is the warning listed in section 2(5) that Nonn had the **right** to **terminate** the **interview** at any time. *See id*. art. **38**. **22**, § 2(5).

Even though that warning was not contained on the face of the confession, evidence was admitted indicating that Nonn did receive that warning. Michael Falagario, the assistant state's attorney who took appellant's written statement, testified on direct-examination that he explained to Nonn prior to taking his statement that he could stop the questioning at any time, that Nonn understood this, and that Nonn went ahead and gave the confession anyway.

Still, we cannot say that the complete failure to give one of the five warnings contained in article **38**. **22** amounts to "**substantial compliance**" with the statute. The statute requires that five warnings be given, and that the fact that they were given be apparent from the statement itself. *See* TEX.CODE CRIM.PROC.ANN. art. **38**. **22**, § 2 (Vernon 1979). The cases regarding **substantial compliance** reveal that while different wording may be used to convey the meaning of the five warnings, the complete failure to give one of them will not **substantially** comply with article **38**. **22**. *See*, ***593** *e.g.*, *Cockrell v. State*, 933 S.W.2d 73, 91 (Tex.Crim.App.1996) (warning that contained all warnings, but said "any statement may be used in evidence against me at *trail* " rather than stating that it could be used against him at "trial" or in "court" substantially complied with 38.22); *White v. State*, 779 S.W.2d 809, 826–27 (Tex.Crim.App.1989) (warnings contained on different form signed by appellant contemporaneously with taking the statements which contained "functional equivalent" of statutory warnings held sufficient); *Penry v. State*, 691 S.W.2d 636, 643 (Tex.Crim.App.1985) ("prior to *or* during any questioning" sufficiently similar to "prior to *and* during any questioning"); *Clark v. State*, 627 S.W.2d 693, 701 (Tex.Crim.App.1981) ("functional equivalent" of the precise words of the statute sufficient); *Hernandez v. State*, 13 S.W.3d 78, 82 (Tex.App.—Texarkana 2000, no pet.) (complete failure to warn that **interview** can be **terminated** at any time does not **substantially** comply with **38**. **22**); *State v. Subke*, 918 S.W.2d 11, 14–15 (Tex.App.—Dallas 1995, pet. ref'd.) (officer's warning that "any statement may be used against you at your trial" not **substantial** equivalent of section 2(a)(2) language that "anything you say may be used against you in court"). Accordingly, we hold that the warnings in this case did not **substantially** comply with article **38**. **22**.

[2] Having determined that the trial court erred in admitting the statements that were not in **substantial compliance** with article **38**. **22**, we now turn to the question of whether such error is reversible. Under Texas Rule of Appellate Procedure 44.2, only cases involving constitutional error or error implicating a "**substantial right**" will be reversed. *See* TEX.R.APP.P. 44.2. **Compliance** with article **38**. **22** is not a constitutional issue. *See Davidson v. State*, 25 S.W.3d 183, 191 n. 4 (Tex.Crim.App.2000) (stating that the fact that article **38**. **22**'s requirements are not met "does not mean that the statement was necessarily obtained as a result of any legal or constitutional violation" and that article **38**. **22** "is more appropriately characterized as a procedural evidentiary rule"). The constitutional **right** at issue is *Miranda*, and we have already held that the statement did not run afoul of those constitutional principles. *See Nonn*, 13 S.W.3d at 439. Thus, we must determine whether the court's admission of the confession affected a "substantial

right" belonging to Nonn. *See* TEX.R.APP.P. 44.2 (noting that error that is not constitutional and does not affect a substantial right must be disregarded).

[3][4][5] When conducting a harm analysis under rule 44.2(b), the court of appeals "need only determine whether or not the error affected a substantial right of the defendant." *Morales v. State*, 32 S.W.3d 862, 867 (Tex.Crim.App.2000). To make this determination, appellate courts "must decide whether the error had a substantial or injurious affect on the jury verdict." *Id.* We hold that when, as here, a statement is taken from a defendant as a result of custodial interrogation in another state, and the evidence is undisputed that the *Miranda* warnings were given to the defendant in writing and the additional warning provided by article 38.22, that the defendant was entitled to stop the interrogation at any time, was given orally, the substantial rights of the defendant are not implicated. Accordingly, we affirm the trial court's judgment. *Cf. Davidson v. State*, 42 S.W.3d 165, 166–67 (Tex.App.—Fort Worth 2001, pet. denied) (holding that violation of 38.22 did not affect substantial right); ***594***Pina v. State*, 38 S.W.3d 730, 735 (Tex.App.—Texarkana 2001, pet. ref'd.) (violation of 38.22 did not affect substantial right).

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