Affirmed and Opinion on Remand filed September 14, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-94-01265-CR

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JOHN BAPTIST VIE LE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 670610

O P I N I O N O N R E M A N D

Appellant, John Baptist Vie Le, was convicted by a jury of capital murder. On original submission, appellant appealed his conviction on the following grounds: (1) his written confession should not have been admitted into evidence; (2) the evidence was legally and factually insufficient to prove intent and an aggravating felony; (3) the jury charge was erroneous; (4) the weapons used in the offense were illegally seized; (5) challenges of two juror for cause were erroneously denied; and (6) section 51.09 of the Texas Family Code and the provision mandating a life sentence for capital murder are unconstitutional. Finding no reversible error, we affirmed the judgment of the trial court in an unpublished opinion. *See*

Le v. State, No. 14-94-01265-CR, 1997 WL 665902 (Tex. App.—Houston [14th Dist.], October 23, 1997).

The Court of Criminal Appeals granted appellant's petition for discretionary review and concluded that we erred in upholding the admissibility of appellant's written statement. *See Le v. State*, 993 S.W.2d 650, 653 (Tex. Crim. App. 1999). The Court found that Le's statement was inadmissible because the interrogating officer obtained the statement before taking Le to a juvenile officer or a detention facility "without unnecessary delay" as required by Section 52.02(a) of the Family Code. *See id.* at 655-56. The Court remanded this case to us to consider whether the admission of the written statement harmed Le. *See id.* at 656. We conclude that it did not.

The Court of Criminal Appeals held that appellant's statement was inadmissible under Article 38.23 of the Texas Code of Criminal Procedure because the statement was obtained in violation of section 52.02(a) of the Family Code. *See id.* at 656 & n.14. Because the violation of section 52.02(a) is a statutory violation; the harmless error rule for non-constitutional errors under Rule 44.2(b) of the Texas Rules of Appellate Procedure governs our review of this error. *See Aguirre-Mata v. State*, 992 S.W.2d 495, 498, Rule 44.2(b) requires us to disregard error unless it affects a substantial right of the appellant. *See* 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. *See Llamas v. State*, 12 S.W.3rd 469, 471 n.2 (Tex.Crim.App.2000); *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). A criminal conviction should not be overturned for such error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). The United States Supreme Court has construed the nearly identical federal harmless error rule as follows:

> If, when all is said and done, the [court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, *or if one is left in grave doubt*, the conviction cannot stand.

O'Neal v. McAninch, 513 U.S. 432, 437-38 (1995) (emphasis in original). "Grave doubt" means "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* at 435.

In this case, appellant gave the following written statement, in pertinent part:

> A little over two months ago I was at Anh "Nick" Viet Tran's house with my girlfriend, Caroline Le, Alvin, Lee, Javed, Serina, and I think that is about it. Nick was talking about aggravating a house for a lot of money and he asked me if I wanted to do it, but I didn't because the house was in my neighborhood. The next week I asked Alvin to take me to get something to eat and after we went to the Burger King we drove by the house once and then we drove by it again and then we parked in front of the next house. The garage was between Alvin's car and the front door when we parked the car. Nick asked me to go with him to the door so I did.
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> When we got to the front door the burglar bar gate was wide open. When we got to the front door, Nick had two guns in the front of his pants. He gave me a chrome .380 pistol and then knocked on the door. He had a 9 mm black gun. Nick knocked on the door about two times and then a man answered the door.
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> Nick pointed the gun at the man and kicked the door in and told the man to get down on the floor. The man struggled with Nick and kind of jumped on top of him and then the man grabbed my arm. I was standing there kind of scared while Nick tried to get him on the floor when he grabbed my left arm with his right arm. Then I accidently pulled the trigger and it went off. That suprised [sic] me because Nick had told me the gun was not loaded. When I jerked my arm back to try to get away from the man I accidently pulled the trigger again. I heard Nick shoot two or three times and then we ran back to Alvin's car. The man was yelling and Alvin told me later that he fell down by where his (the man's) car was parked in the driveway. As we ran back to the car Lee was walking toward the house and he had another gun with him. Nick told me that later.

> When we got back to the car I sat behind Alvin, who was in the driver's seat and Lee got in the back seat with me. Nick sat in the front passenger seat. Then we left and went to Nick's house. When we got back there we didn't talk about it because Serina and my girlfriend was there.
>
> Last time I didn't tell the truth in my statement because I was scared because it was the first time I ever shot someone. I didn't want to kill him. I didn't know someone was going to die.

In his brief on remand, appellant argues his substantial rights were affected because the jury heard evidence that they would never had heard otherwise; *i.e.*, appellant's version of the "events which happened during those fateful seconds at the front doorway of the home of the complainant." Appellant further argues that his admission in the written statement that he accidently shot complainant two times is "the type of evidence the jury could have reasonably based its guilty verdict, in finding specific intent to kill complainant." Appellant contends that because other evidence at trial was circumstantial and his confession supplied the missing link as to his state of mind, the confession was the most effective witness against him at trial. He maintains that the harmful effect of his written statement was devastating and that the prosecutor greatly emphasized the incriminating evidence in the confession.

In most cases, a written confession has a potentially dramatic effect on the decision-making process of a jury that casts grave doubt on the outcome of the proceeding. *See in re C.R.*, 995 S.W.2d 778, 786-87 (Tex. App.—Austin 1999, pet. ref'd). However, error from the admission of a confession can be harmless in light of independent evidence of guilt in the case. *See Sterling v. State*, 800 S.W.2d 513, 520 (Tex.Crim.App.1990), *cert denied*, 501 U.S. 1213(1991). After examining the record in this case as a whole, we find that the admission of appellant's written statement did not have a substantial influence on the jury's verdict for the following reasons:

First, appellant's statement is cumulative of other evidence implicating him in the murder. Although more detailed, the statement was cumulative of evidence that: (1) appellant discussed robbing complainant's house with Tran and others; (2) he rode in a car to

complainant's house with Tran with the intent to rob it; (3) he had a gun; and (4) the complainant was shot in the botched robbery.[1]

Second, the potential harm of the statement was defused by other properly admitted evidence, albeit circumstantial, that supports appellant's conviction as a party or a co-conspirator to the offense. *See Le*, No. 14-94-01265-CR, slip op. at 7-11, 1997 WL 665902 at *4-8 (Tex. App.—Houston [14th Dist.], October 23, 1997), *reversed and remanded in part*, 993 S.W.2d 650 (Tex. Crim. App. 1999). A rational jury could infer that appellant intended to kill complainant from the use of a deadly weapon without reference to the written statement. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). A rational jury could also convict appellant as a co-conspirator to the capital murder without finding that he specifically intended to cause complainant's death. *See* TEX. PEN. CODE ANN. § 7.02(b) (Vernon 1994); *Koonce v. State*, 654 S.W.2d 705, 710 (Tex.—App.—Houston [14th Dist.] 1983, pet. ref'd); *Wood v. State*, 4 S.W.3d 85, 88 (Tex. App.—Fort Worth 1999, pet. filed). Importantly, none of the other evidence of appellant's guilt, either as a principal actor or as a party, was controverted at trial.

Finally, even though the State emphasized appellant's written statement in its opening and closing arguments, the prosecutor also properly argued that jurors could find appellant guilty of capital murder or one of several other offenses as a party or a conspirator to the

[1] The guns used to murder complainant were found by police in Syed Ahmed's car. Ahmed stole the guns in another robbery with Nick Tran. Appellant was a passenger in Syed's car at the time the police took the car and guns into possession. Ahmed testified that a few days before the shooting, he and appellant discussed robbing a person from India because his house was supposed to have a lot of gold and silver in it. On the day of the offense, Ahmed saw appellant get into a silver sports car with Nick Tran, Alvin Cristomo, and Huy Tui. Both Tran and appellant were carrying guns, the same guns Ahmed acquired in an earlier robbery. Ahmed estimated that the group was gone about fifteen minutes. When they returned, appellant seemed frustrated and angry and was yelling, "We shot him. He's dead. We shot him. It went wrong." Complainant's neighbor testified that complainant told him one of the men in the silver sports car shot him. The neighbor observed a silver sports car pass by his house shortly after the shooting.

offense from other evidence presented at trial. The prosecutor explained as follows, in pertinent part:

> John Baptist Le is guilty if he engaged in the conspiracy or if he was a party and someone else did it. The evidence is that he took the hands (sic) and shot him, but even if you believe that Nick Tran was the man standing out there with the hands on that silver .380, if you believe against all the evidence that that was happening, he is still guilty of capital murder because he conspired together to commit one felony and should have anticipated that another one would be committed. He is still guilty even if you don't believe that and how could you not believe it? But there is no need to consider that because he is guilty either way of capital murder. Not felony murder, not involuntary manslaughter, not some car accident, he is guilty of capital murder.

For these reasons, we find the admission of appellant's written statement to be harmless. Accordingly, we affirm the judgment of the court below.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed September 14, 2000.

Panel consists of Justices Amidei, Edelman, and Lee.[2]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Senior Justice Norman R. Lee sitting by assignment.