Affirmed and Memorandum Opinion filed January 13, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00972-CR

ALFREDO RAMOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 913663

MEMORANDUM OPINION

In this appeal of his conviction for aggravated robbery, appellant Alfredo Ramos argues that the trial court erred in excluding evidence he characterizes as a statement against penal interest tending to show that someone else committed the offense. We affirm.

I. BACKGROUND

In the early morning hours of May 25, 2002, John Mendez Jr. and Ovidio Rodriguez Jr. were seated on the porch of Rodriguez's residence when Rodriguez received a

telephone call from Cynthia Fierro. Fierro asked Rodriguez to sell cocaine on credit to Fierro's boyfriend, Victor Ramos, but Rodriguez declined. Fierro relayed this information to Victor, who seemed upset.

Within an hour after this phone call, Mendez saw a Chevrolet Suburban drive past Rodriguez's house repeatedly. The driver eventually stopped the vehicle outside Rodriguez's house and Mendez heard the door on the passenger side of the vehicle slam. Both Rodriguez and Mendez saw appellant, Victor's brother Alfredo Ramos, approach the house using a peculiar walk. As Mendez described it, appellant walked to the gate of the yard keeping one leg straight "as if he had something on the side of his leg." When Rodriguez went to appellant to see what he wanted, appellant raised an AK-47, pointed it at Rodriguez, and told him, "Give me everything." Mendez asked what was going on, and as he came up to the men, appellant pointed the gun at Mendez. Mendez grabbed the barrel of the gun and struggled to wrest it from appellant, but appellant shot Mendez twice. When Mendez fell to the ground, appellant shot him again. Rodriguez ran to the other side of the house, and as appellant followed, Mendez heard additional shots fired from the direction of the Suburban. Appellant stopped pursuing Rodriguez and returned to Mendez, where he pointed the gun at Mendez's face while Mendez begged for his life. Rodriguez's pit bull terrier then grabbed appellant's leg, and appellant shot the dog. The dog "took off," and appellant walked back to the Suburban. When Rodriguez emerged from the side of the house, appellant and the Suburban had left. By this time, Mendez had been shot "at least six or seven times."

Mendez survived, and both he and Rodriguez identified appellant as the assailant. Specifically, both Mendez and Rodriguez stated that the assailant was Victor Ramos's brother, selected appellant's photograph from an array, and identified appellant by his name or nickname. The jury found appellant guilty as charged in the indictment, used a deadly weapon in committing the offense, and had two prior final felony convictions.

Based on these findings, the jury assessed punishment at thirty-five years' confinement in the Texas Department of Criminal Justice, Institutional Division.

II. ISSUE PRESENTED

In a single issue, appellant contends the trial court erred in excluding testimony that someone else had implicated himself as the person who committed the aggravated robbery. Specifically, Fierro offered testimony that two or three months after the shooting, she overheard someone at a party state that he shot a pit bull. The relevant portion of the proffered testimony is as follows:

> Q: Steven Davilla was a high school classmate of yours, right?
>
> A: Yes. Not a classmate, but I knew who he was at school.
>
> Q: Certainly someone that was in your class and you knew him. He was there that night partying with everybody?
>
> A: Yes.
>
> Q: But you had a conversation where you heard him, some point later, and he was bragging or talking about the fact that he had shot and killed a pit bull, correct?
>
> A: Correct.
>
> Q: And he was referring back to the date and time on May 25, 2002, the shooting?
>
> A: Correct.
>
> Q: Correct?
>
> A: Yes.
>
> Q: And then he went on further to state and brag that he was the one that shot John Mendez, correct?

A: I don't remember the part of him saying he shot John Mendez, but I do remember when he said that he did shoot the dog.

Q: That he shot the dog?

A: The pit bull.

Q: Do you remember telling my investigator that you recall that [he] was bragging about the fact that he was the shooter?

A: No.

Q: So, all you remember is him talking about shooting the dog?

A: I wasn't exactly in that conversation, but I just heard him say that the dog bit his shoe. So, he shot the dog.

Q: And you knew he was referring to the May 25, 2002, event?

A: Yes.

According to appellant, this testimony was admissible as a statement against penal interest, *see* TEX. R. EVID. 803(24), and its exclusion violated his due process right to put on a proper defense at trial. We review the trial court's decision for abuse of discretion. *Walter v. State*, 267 S.W.3d 883, 900 (Tex. Crim. App. 2008); *Prince v. State*, 192 S.W.3d 49, 59 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

III. ANALYSIS

Before a statement against penal interest becomes admissible, the trial court must determine (1) whether the statement, considering all the circumstances, subjects the declarant to criminal liability and whether the declarant realized this when he made that statement; and (2) whether corroborating circumstances clearly indicate the trustworthiness of the statement. *Walter v. State*, 267 S.W.3d 883, 890–91 (Tex. Crim. App. 2008). The determination of whether corroborating circumstances clearly indicate trustworthiness lies within the trial court's sound discretion. *Cunningham v. State*, 877 S.W.2d 310, 313 (Tex. Crim. App. 1994) (en banc). When analyzing the sufficiency of

corroborating circumstances, factors that may be considered include, but are not limited to, (1) whether the declarant's guilt is inconsistent with the defendant's guilt, (2) whether the declarant was so situated that he or she might have committed the crime, (3) the timing of the declaration, (4) the spontaneity of the declaration, (5) the relationship between the declarant and the party to whom the statement was made, and (6) the existence of independent corroborating facts. *Dewberry v. State*, 4 S.W.3d 735, 751 (Tex. Crim. App. 1999); *Davis v. State*, 872 S.W.2d 743, 749 (Tex. Crim. App. 1994).

It is helpful in this case to view the proffered testimony in context. When appellant offered Ms. Fierro's testimony, no eyewitnesses had testified. Officer Steven Gage of the Houston Police Department had testified that when he arrived on the scene, paramedics were attending to a man with serious injuries, and ten to twelve feet away, a dog lay dead from a gunshot wound. Eleven shell casings were recovered from the scene, and were found as far as fifty feet from the victim. Gage stated that an AK-47 was the only type of weapon used, but it was not known how many weapons were used in the offense. Gage also explained that appellant was identified as the assailant, and that Rodriguez told him Victor Ramos might have been in the Suburban as well. The area where Rodriguez indicated that the Suburban was parked was approximately fifty feet from where Mendez fell.

Out of the jury's presence, appellant then offered Fierro's testimony that two or three months after the shooting, she overheard a man at a party say that he shot and killed a pit bull that bit his shoe. Although Fierro agreed with appellant's counsel that she understood Davilla to have been referring to the events of May 25, 2002, the reason for this belief is unknown. She stated that appellant's brothers Victor and Carlos were at the same party but appellant was not, and she did not identify the persons to whom Davilla was speaking. She further stated that based on statements made by appellant and his brothers, she believed other people were in the Suburban and that appellant was present during the

crime, but she believed appellant was innocent; however, she also stated that after the shooting, appellant came frantically into Victor's house. He appeared nervous and was "running around" carrying something that looked like a large firearm, but she couldn't be sure because the object was wrapped in a blanket.

The trial court excluded her testimony about the overheard conversation, stating, "[A]t this point in the trial, I'm going to not allow its admission. I will listen to more testimony. If anything changes, you can make your argument again. But I have problems with its admission at this point." Although Mendez and Rodriguez subsequently testified that appellant shot Rodriguez's pit bull bit after it bit him, appellant did not renew his motion for the admission of Fierro's testimony about Davilla's statement.

Even if we assume that Davilla made the statement described by Fierro with the knowledge that it could subject him to criminal liability, such an admission does not tend to exculpate appellant of the offense of aggravated robbery. The witnesses testified that the dog attacked appellant when he stopped pursuing Rodriguez and returned to where Mendez lay on the ground, but the evidence does not indicate the dog's location when Mendez heard shots fired from the direction of the Suburban while appellant was chasing Rodriguez, and it does not appear from the record that anyone examined the dog's body to determine if it had been shot more than once.

Davilla's purported admission also was not shown to be trustworthy. We have no information as to whether Davilla was so situated that he might have shot the dog or Mendez. We do not know the identity of the person to whom Davilla was speaking, the relationship between them, or whether the declaration was spontaneous. We know only that Davilla's statement was made months after the offense. And although appellant infers that the aggravated robbery could have been committed only by Davilla, that inference is undermined by a wealth of evidence of appellant's guilt, regardless of whether

anyone else shot a pit bull terrier that day. Thus, we overrule the sole issue presented in this appeal.

IV. CONCLUSION

On this record, we cannot conclude that the trial court abused its discretion in excluding the offered testimony. *See Davis*, 872 S.W.2d at 749. We therefore affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.
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