

Affirmed and Opinion filed March 29, 2001.



In The

Fourteenth Court of Appeals

NO. 14-98-01349-CR

DENNIS ALAN JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 775,100**

OPINION

Dennis Alan Johnson appeals his jury conviction for aggravated robbery. The jury assessed his punishment at fifteen years' imprisonment. In two points of error, appellant contends (1) the trial court erred in admitting into evidence a co-conspirator's hearsay statement implicating him, which (2) violated appellant's right to effective confrontation under the Sixth Amendment. We affirm.

FACTS

On August 30, 1994, appellant's brother, Terry Johnson, picked appellant up at their mother's house. Terry asked appellant to drive his blue Cadillac because appellant had a driver's license. Appellant drove them to Michael Pipkin's house where they visited for a short time. Either Terry or Pipkin said, "Let's go score some weed." Appellant then drove the trio to Loop 610, where he let Pipkin out. From there, appellant and Terry went to Wille Carson's house, and appellant parked the Cadillac in Carson's driveway while Terry went in the house.

Once in the house, Terry pointed a .380 automatic at Carson and demanded that Carson give him his keys to his marijuana closet. Carson and Terry struggled, and Terry shot Carson once in the neck area. Carson died at the scene. After shooting Carson, Terry let appellant in the house. Terry and appellant then picked up Carson's body, turned it upside down and shook it in an effort to get the key to the marijuana closet.

On the way out of Carson's house, Terry encountered Eddie Jones and his friend, "Motor." Jones managed rental properties and stated that he came to Carson's house to pick up rent or to fix something. As soon as Motor and Jones drove in Carson's driveway, Terry came out of the house and approached the pick-up truck. Terry told both Jones and Motor to empty their pockets, and Jones gave Terry \$1,800.00 he had in his pocket. Jones stated he then saw another black man run out of the house and get in the Cadillac. Terry shot one of the tires on Jones' pick-up truck before leaving with appellant. After Jones found Carson's body he stated he notified the police.

The police were unable to determine who killed Carson until Pipkin was arrested more than three years later. Pipkin told the police that he set up Carson's robbery and provided a .380 pistol for use during the robbery. Based on information furnished by Pipkin, the police interviewed Pipkin's common-law wife, Julie Neuman, who testified that she overheard Pipkin

talking about the robbery with appellant and Terry. Ms. Neuman said that Pipkin, Terry, and appellant grew up together. Ms. Neuman and Pipkin were visiting Terry Johnson and appellant at Terry's apartment. Terry, appellant, and Pipkin were in the living room talking, and Ms. Neuman was in the adjoining kitchen. Ms. Neuman overheard Terry tell appellant and Pipkin that he asked Carson for a set of keys, and Carson refused to give them to him. Terry said he pulled out a gun, struggled with Carson, and shot him in the "neck." Terry said he then got the keys from Carson, unlocked the "burglar bar," and allowed appellant to come in. Ms. Neuman related that Terry said the keys that opened the "burglar bar" did not open the door "that held the dope in it." Terry then said he and appellant turned Carson upside down and shook him. Ms. Neuman heard appellant laughing when Terry said they shook Carson. She stated that either appellant or Terry said that Carson attempted to escape after he had been shot and "they" pulled him back in the house. On cross-examination, Ms. Neuman stated that when Pipkin, Terry, and appellant first sat down in the living room, Pipkin asked Terry and appellant why they killed Carson.

Terry Johnson's Statement Implicating Appellant

In his first point error, appellant contends the trial court erred in admitting a statement made by one of appellant's codefendants, Terry Johnson, to Pipkin and appellant, which detailed the events of the crime. Appellant argues the trial court should have excluded the statement because its inclusion violated the hearsay rule. TEX. R. EVID. 803. The State argues that Terry's statement was admissible as a statement against interest under rule 803(24), Texas Rules of Evidence, and cites *Dewberry v. State*, 4 S.W.3d 735, 748-751 (Tex. Crim. App. 1999), *cert. denied*, 120 S.Ct. 2008 (2000), as authority for this proposition.

Standard of Review

The appellate court reviews a trial court's decision to admit or exclude a statement under rule 803(24) for abuse of discretion. *See Dewberry v. State*, 4 S.W.3d at 751; *Holiday*

v. State, 14 S.W.3d 784, 787 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). The trial court’s decision must not be so arbitrary or irrational as to fall outside the “zone of reasonable disagreement.” *See Head v. State*, 4 S.W.3d 258, 263 (Tex. Crim. App. 1999).

Statement Against Interest

For a statement to be admissible under rule 803(24), the trial court must determine two issues. *See Dewberry*, 4 S.W.3d at 751. First, the statement in question must expose the declarant to criminal liability. *See id.* Second, corroborating circumstances must clearly show the trustworthiness of the statement. *See id.* When the trial court resolves both issues favorably, the hearsay statement can be admitted. In this instance, the statement meets both requirements.

Terry told Pipkin and appellant that he pulled a gun on Carson, and demanded the keys to the “dope room.” Carson refused, a struggle ensued, and Terry shot Carson in the “neck.” Terry then let appellant into the house, and they shook Carson’s body to get the key to the dope room. Carson was not quite dead and tried to get away, and Terry stated that both he and appellant dragged him back into the house. Terry and appellant ran from the house, and Terry robbed Jones and Motor on the way out of Carson’s house.

Corroborating circumstances support admission of the statement. The factors to be considered when deciding corroborating circumstances include (1) whether declarant’s guilt is inconsistent with appellant’s guilt, (2) whether declarant was situated so he 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 is made, and (6) the existence of independent corroborative facts. *See Dewberry*, 4 S.W.3d at 751.

First, Terry’s guilt is consistent with appellant’s guilt because it shows they acted in concert and implicates both equally. Second, the evidence shows Terry was situated so he could have committed the offense. Jones stated that Terry came out of the house with the gun

in his hand; Terry robbed Jones and Motor while appellant ran to Terry's car; Terry shot one of Jones' tires; two .380 shell casings were recovered. Third, Terry made these incriminating statements before he was a suspect in the murder. Fourth, he made the statements either spontaneously or in response to casual inquiries from Pipkin, who helped organize the robbery. Finally, the State developed independent corroborative facts including Jones's identification of Terry as one of two black men fleeing Carson's house immediately after the murder; appellant's statement admitting he drove Terry's Cadillac to "an unknown house"; appellant's statement that Terry went into the house when they arrived and came out a few minutes later; testimony of the medical examiner that one bullet entered Carson's body near the neck area; the recovery by the police of one spent .380 shell inside Carson's house, and one .380 shell outside the house.

We find the trial court's ruling on the statement was not sufficiently outside the zone of reasonable disagreement to be an abuse of discretion. *See also Graham v. State*, 3 S.W.3d 272, 274-275 (Tex. App.—Fort Worth 1999, pet. ref'd) (defendant's girlfriend's boasting to friends that she helped defendant plan and carry out kidnaping and murder admissible under 803(24)). We overrule appellant's point of error one.

Denial of Right of Confrontation

In his second point, appellant contends that admitting Terry's statement violated his constitutional right to confront the witnesses against him. Prior to Ms. Neuman's testimony, appellant objected that her statements were hearsay and not in furtherance of the conspiracy.

By failing to object to the proffered testimony on constitutional grounds, appellant presents nothing for us to review. *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996). We overrule appellant's point of error two.

We affirm the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed March 29, 2001.

Panel consists of Justices Draughn, Amidei, and Hutson-Dunn.*

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

* Senior Justices Joe L. Draughn and Camille Hutson-Dunn, and Former Justice Maurice Amidei sitting by assignment.