

Charge in police shootout likely to be dropped, prosecutor says

Defense attorney says audio indicates that police officer fired first.

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A man accused of shooting at an Austin police officer has been released from jail, and an attempted capital murder charge against him will probably be dropped after an examination of an audio recording of the incident revealed inconsistencies about how many shots were fired and when, a Travis County assistant district attorney said.

In March 2007, David Lozano was arrested and charged with attempted capital murder after he was in a shootout with officer Roger Boudreau, who had responded to a domestic disturbance call at a home near Yager Lane. Bail was set at \$300,000.

At the time, Boudreau said Lozano fired first; now, Lozano's attorney, Ryan Deck, says new evidence shows the officer fired first.

An expert hired by Deck last month reported that Boudreau's account appeared to be inconsistent with an audio recording from his patrol car.

The Travis County district attorney's office had another expert examine the recording, and inconsistencies with what prosecutors believed was the sequence of events that night were found, Assistant District Attorney Karen Sage said. She would not elaborate on what those inconsistencies were but said they centered on the number of shots fired.

"Based on the results of their tests, it made us question the sequence of events," Sage said. "Based on that fact, the trial was set to go May 12, and we asked for a continuance. We also allowed the defendant to be let out" on a personal bond.

After about 13 months in jail, Lozano, who was shot three times and lost part of one leg, was released on May 2.

"Most likely, the attempted capital murder case against the defendant will be dismissed," Sage said.

She said a second charge of aggravated assault, which was included in the original indictment, will also

probably be dismissed.

The case will go before a new grand jury, which could exonerate Lozano or charge him with a crime, within the next few weeks, Sage said.

Sage said the district attorney's office is not accusing Boudreau of any wrongdoing, but the grand jury will examine the entire case anyway.

"Officer-involved shootings always go to the grand jury," Sage said. "And when there are new facts that involve any of the parties, we think it's only right for the grand jury to look at the entire matter again."

Boudreau, who was unharmed during the shootout, was awarded the medal of valor for his actions during the incident. He was placed on restricted duty, per department policy after a shooting, and has returned to regular duty.

Austin Police Chief Art Acevedo, through a spokeswoman, said the department "supports the actions of our officer in this case and the vigorous prosecution of the suspect." He added that the case is now in the hands of the district attorney's office.

Police spokeswoman Anna Sabana said Boudreau would not comment on the case because it's still open and going back to a grand jury.

At the time of the shooting, Boudreau told investigators that in the initial exchange of gunfire, Lozano fired at him once and he returned one shot, according to an arrest warrant affidavit. Deck, citing an internal affairs report unavailable to the public under state law, said Boudreau later told investigators that he fired two shots after Lozano fired once.

The shootout continued at the side of the house.

In April, Deck asked representatives from the Dallas-based forensic tape analysis company Yonovitz & Joe LLP to examine the audio. Herbert Joe said his firm found that two shots were fired from the same caliber weapon within 10 seconds of Boudreau's knock on Lozano's front door.

"We have determined that in the first 10 seconds, there are only two gunshots," Joe said. "And these two gunshots are very likely from the same caliber."

Joe said he is sure he did not hear a third shot. "We just did not find evidence of that whatsoever," Joe said.

Joe said his findings were based on a copy of the audio portion of the video from Boudreau's patrol car. Joe said his firm used computer software to determine the acoustic characteristics of the shots, along with various mathematical analyses.

He added that the analysis did not determine from which gun the two shots were fired, only that two shots were fired seconds after Boudreau arrived at the home.

Deck said the analysis proves that his client did not fire at Boudreau first because the two were carrying different caliber guns. He also said that no .45-caliber shell casings — the size Lozano was shooting — were found near the front door.

"My client has said from the very beginning that he had never fired first, but in fact the officer fired first," Deck said.

Sage said the district attorney's office on April 29 sent the patrol car audio to Corey Roberts of 501 Audio to present at the trial. The district attorney's office has used the company in the past as an expert audio witness, Sage said. She would not discuss details of that analysis.

Lt. George Vanderhule, president of the Austin Police Association, would not comment on the case because he said he didn't know all the facts.

However, speaking generally, Vanderhule said, "if you come out with a gun and point it at a police officer, it doesn't matter who fires first."

According to the arrest warrant affidavit, Miguel Salazar, the ex-boyfriend of David Lozano's wife, Rosemary, called police just after midnight on March 21 and said he thought Rosemary was in danger.

Deck said Salazar had threatened Lozano in a phone call about five minutes before Boudreau showed up at the home in the 1200 block of Silverton Court.

In a police affidavit, Boudreau said that when he arrived and knocked on the door, he heard "the distinct sound of a slide being sent forward on a gun" from inside the home.

When Lozano heard a knock on the door, Deck said, he cocked his gun loudly to make sure the person outside could hear. He thought it was Salazar, Deck said.

Boudreau moved off the porch after he heard Lozano's gun, the affidavit said. He took cover behind a porch pillar and drew his weapon, according to the affidavit.

Boudreau was wearing a police uniform along with a hat bearing a police department patch, according to the arrest warrant affidavit.

The affidavit doesn't indicate whether Boudreau verbally identified himself as a police officer.

After the initial shots were fired, Boudreau tried to keep cover, retreating to the back of the house, and Lozano said something like "I'm going to get you," according to Boudreau's account in an arrest affidavit.

Deck said Lozano couldn't see whom he was shooting at because it was dark, and he tried to shoot toward the flash of gunfire.

Boudreau told Lozano to show him his hands, and Lozano fired another shot, according to the affidavit.

Boudreau, who told investigators that he could hear bullets whizzing past him, was not hit during the shootout.

Lozano fell to the ground at one point and then managed to go back inside, the affidavit said. Moments later, Lozano came back outside with his hands in the air and lay down.

Police found 10 shell casings at the scene, three from Lozano and seven from Boudreau.

The affidavit said Lozano fired at least three times at Boudreau.

Deck said Lozano was shot in the abdomen and leg, and another bullet grazed his right arm. Half of his leg was amputated because of the injury, Deck said.

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