Opinion issued April 23, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00906-CR

KIARA TAYLOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Case No. 1501826

MEMORANDUM OPINION

A jury convicted appellant, Kiara Taylor, of the offense of capital murder.[1] Because the State did not seek the death penalty, the trial court automatically

[1] *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (providing that person commits offense of capital murder if they intentionally or knowingly cause death of individual in course of committing or attempting to commit robbery).

assessed appellant's punishment at confinement for life without parole. In one issue, appellant contends that the trial court erred by failing to submit a requested instruction on the lesser-included offense of murder.

We affirm.

Background

On the evening of February 21, 2016, a shooting occurred at Reginelli's Pizzeria in Bellaire, Texas. The restaurant closed at 10:00 p.m., and by 9:00 p.m. the "rush hour" was over and the shift manager, Courtney Lazo, sent several employees home. After 9:00 p.m., five employees remained at the restaurant: Lazo; Tristan Davis, a delivery driver; Andy Campos, a dishwasher; Jack Firmin, a cook; and Peter Mielke, the complainant, who was working as a server. No customers were in the restaurant after 9:00 p.m.

Reginelli's had surveillance cameras throughout the restaurant. The video feeds from these cameras could be viewed on a monitor in the manager's office in the back of the restaurant, but the cameras did not record audio. Other security measures included a bell that would chime whenever one of the two front doors opened. The restaurant had two cash registers, which were equipped to handle both credit card and cash transactions, and which were located in a circular "pod" at the front of the restaurant. A server could easily conduct a credit card transaction, but servers did not have access to the cash drawer. If a customer wanted to pay in cash,

the server needed to contact the shift manager, who had access to the cash drawer and who could handle the transaction.

Around 9:25 p.m., Lazo was in the manager's office preparing to close out the cash registers for the day when the bell on the front door chimed, and she saw on the monitor in her office that a customer had arrived. On the monitor, Lazo saw Mielke approach the customer, and she remained in her office to finish a report. Moments later, Firmin ran back to the office looking panicked and fearful, and he told Lazo that the restaurant was "being robbed." Lazo looked at the camera but could only see "someone pointing in that direction where [Mielke] was," and she considered going to the front of the restaurant because she knew that Mielke did not have access to the cash drawer on the register. She told Firmin to call 9-1-1, and, as she stepped out of the office, she heard a gunshot and a scream from Mielke. When a second gunshot sounded, Lazo "shoved" Firmin and Davis "out the back door" into an alley behind the restaurant, and all three of them ran to the nearby dumpsters. Lazo called 9-1-1 and then informed a neighboring restaurant what had occurred. By the time she walked back to the front of Reginelli's, police officers had arrived and Lazo was unable to re-enter the restaurant.

Lazo testified that she could not see the shooter's face because of the way the surveillance cameras were positioned inside the restaurant. In her 9-1-1 call, a recording of which was admitted into evidence, Lazo stated that the shooter was

"possibly a white or Hispanic person." She testified that she thought this based on her initial glance at the monitor—due to a particular tint, the monitor did not "decipher . . . colors very well."

Firmin testified that his shift as a cook started around 5:00 or 6:00 p.m. on February 21, and it was a slow night. Because there were no customers after 9:00 p.m., he and Mielke watched a basketball game on a television mounted on a wall in the main seating area of the restaurant. Around 9:25 p.m., he heard the bell on the front door chime, indicating a customer had entered Reginelli's, and he started walking back to the kitchen because, as a cook, he was not supposed to be in the front of the restaurant when customers were present. Mielke began walking to the cash registers, but his attention was still on the game on television.

Firmin saw a young black man come into the restaurant, wearing all black and a bandana over the lower part of his face. The man was pointing a gun, although Firmin was not sure if the man was pointing the gun at him or at Mielke. Firmin could not see this man's entire face, but he could see the man's forehead and eyes. Firmin testified that he could not recall if he heard the man say anything. In response to this testimony, the State showed Firmin the written statement that he had made to police on the night of the shooting. In his statement, Firmin wrote "that the guy

point[ed] the gun at him and told him to give him the money." At trial, Firmin did not remember those words being used, but he remembered the man pointing the gun.[2]

When Firmin saw the man pointing a gun, he ran to tell Lazo what was happening, and he and Lazo heard a gunshot and a scream from Mielke. Firmin testified that he told Lazo that "we [were] being robbed." Firmin, Lazo, and Davis all ran towards the back exit and into the alley. When they stepped outside of the restaurant, Firmin heard two more gunshots. Firmin jumped a fence and hid behind a truck for about ten minutes. He later spoke with police officers at the scene.

Davis was a delivery driver for Reginelli's, but he also helped clean up the restaurant and cook. Around 9:25 p.m. on February 21, Davis was in the alley behind Reginelli's taking trash to the dumpster. While outside, he heard a loud noise, which he did not immediately identify as a gunshot. He thought the noise might have been cooking trays falling to the floor, so he continued to walk back towards the restaurant. He heard two more gunshots and then Lazo came out of the back door "with just a petrified look on her face." Firmin ran out of the building as well, and both he and Lazo appeared in shock and scared. Firmin told Davis to run, and both

[2] On cross-examination, when asked by defense counsel what the man was doing with the gun, Firmin testified, "He was pointing at the cash register, but I can't remember." He later stated, "I couldn't remember him pointing the gun at [Mielke] or the register, but I remember him pointing the gun."

of them jumped over a fence. By the time Davis returned to Reginelli's, police had arrived.

Campos, who was in high school at the time of the shooting, was primarily a dishwasher at Reginelli's, but he also worked cleaning the restrooms and the back part of the restaurant. Around 9:25 p.m., he was in the restroom. While he was there, he heard the bell on the front door ring. Campos testified, "I couldn't make out what [was] said because it sounded muffled, but there was a scream followed by gunshots followed by a scream of [Mielke] in pain." Campos heard more than three gunshots. Campos used his cell phone to call his mother, and he told her "that somebody is shooting in the restaurant," and he asked her to call the police. Campos's mother called 9-1-1, and this recording was admitted into evidence. Campos stayed inside the restroom until the police arrived.

Bellaire Police Department officers arrived at Reginelli's within minutes of the shooting. Mielke had already passed away. An autopsy revealed that he had suffered 15 gunshot wounds. Officers recovered seven spent shell casings and several bullet fragments from the scene. Officers also obtained the surveillance videos from Reginelli's, as well as surveillance footage from Memorial Hermann Medical Group, located adjacent to Reginelli's, and Amegy Bank, located in the same shopping development as Reginelli's. The trial court admitted the surveillance videos, as well as still photographs from the videos.

Bellaire Police Department Detective M. Lacy testified concerning the contents of the surveillance videos. The camera from the ATM at Amegy Bank faced the shopping center in which Reginelli's was located. The Amegy Bank camera captured the suspect, who was wearing a jacket, walking towards the building where Reginelli's was located at 9:01 p.m. The same camera showed the suspect walking towards Reginelli's again at 9:12 p.m., but the suspect was no longer wearing a jacket and was now wearing "something bagg[y] around his neck area." Surveillance footage from Memorial Hermann's cameras also showed the suspect walking past the Amegy Bank ATM at 9:01 p.m. and 9:12 p.m. Beginning at around 9:17 p.m., the Memorial Hermann cameras showed the suspect repeatedly pacing back and forth on the sidewalk in front of the building that housed both Memorial Hermann and Reginelli's. At 9:25 p.m., the camera showed the suspect stopping in front of Reginelli's and showed a glare on the sidewalk, consistent with a glass door being opened. Detective Lacy testified that at 9:27 p.m., the cameras showed the door to Reginelli's open partially and the suspect "[m]ask up with gun in hand." The suspect then walked away from the shopping center into the nearby neighborhood carrying something that appeared to be the jacket he was originally wearing.

The surveillance footage from Reginelli's showed the suspect walking into the restaurant with a gun in his hand. Detective Lacy testified that it appeared as though the suspect was "commanding [Mielke] to come to the counter area" and that

the suspect was pointing to the cash register. After the first shot was fired, the suspect walked to the front door, which opened slightly, and then the suspect walked back to the counter. The suspect fired additional gunshots, walked back to the front door, then walked back to the counter once more and fired one more gunshot. At 9:27 p.m., the suspect ran off to the nearby neighborhood. Officers released still photographs from the Amegy Bank footage to the media.

Tarrell Taylor is appellant's older sister. In February 2016, appellant had been living in the Houston area for three or four months, and he had been staying with their father for approximately a month at the time of the shooting. On February 20, 2016, the day before the shooting, Tarrell and appellant went to a pawn shop in north Houston to purchase a firearm. Appellant had asked Tarrell to purchase the gun for him, and he promised to pay her $500 plus the price of the gun. Both Tarrell and appellant were present at the purchase, and appellant picked out the gun that he wanted.

The trial court admitted surveillance video, still photographs, and a receipt dated February 20, 2016, from a Cash America pawn shop located in north Houston. This evidence reflected that, on February 20, 2016, Tarrell purchased a .40 caliber, Taurus PT24/7 semi-automatic firearm, and that appellant was present with her at the time of this purchase. The trial court also admitted surveillance footage and a receipt time-stamped approximately thirty minutes after the Cash America

transaction on February 20, 2016, from a Wal-Mart in north Houston. This evidence reflected that Tarrell and appellant purchased .40 caliber Federal brand ammunition. Appellant picked out the particular bullets, but Tarrell paid for them.[3]

On February 22, 2016, the day after the shooting, appellant came to Tarrell's apartment. He started looking through Tarrell's phone, which she stated was unusual. While appellant was present, a news broadcast showed still photographs from the Amegy Bank surveillance footage, and Tarrell recognized appellant. She testified that she was "[a] hundred percent sure" that the person shown on the news was appellant. Minutes later, after appellant had returned her phone, Tarrell saw appellant's picture on her phone as well, and she testified that appellant had been "looking up what was on the news." Tarrell recognized appellant from his face and his clothing.

Tarrell asked appellant, "[I]s that you?" At first, appellant denied that he was the person shown in the surveillance pictures, but after Tarrell kept asking, appellant admitted that he was the person in the pictures. Tarrell asked appellant "why did he shoot the guy," and appellant responded, "[B]ecause he didn't give him the money" and that "[I]f he had gave him the money, then he would have still been here." Appellant also told Tarrell that he had sold the gun to someone, but he did not

[3] Tarrell Taylor entered into an immunity agreement with the State concerning her testimony.

provide any further information to her. Tarrell spoke with appellant on several occasions over the next few days, trying to convince him to turn himself in, and she also spoke with family members. On February 27, 2016, nearly one week after the shooting, Tarrell called Crime Stoppers and provided appellant's name. On March 3, 2016, Tarrell called 9-1-1. She met with Bellaire Police Department officers the next day. Tarrell provided her cell phone to forensic investigators, who extracted all of the data from her phone, including her emails, text messages, and Internet searches.

On cross-examination, Tarrell testified that, during her grand jury testimony, she told the grand jury that appellant admitted his involvement in the shooting to her several days after she first confronted him, not during the same conversation, as she testified at trial. She testified that appellant admitted to committing the offense. The parties also stipulated that the following exchange occurred during Tarrell's grand jury testimony:

Tarrell:	Uh, I did ask [appellant] why he shot [Mielke].
Question:	Did he ever respond to that?
Tarrell:	And [appellant] said, because [Mielke] didn't do what I told him to do.

The parties further stipulated that, during Tarrell's interview with Detective Lacy, Lacy asked her if appellant gave her "any kind of detail as far as how it happened or why it happened?" Tarrell responded, "[H]e said that, he told you, he did everything

you told him to do, he said he didn't. That if he would have gave him what he wanted he would still be here, those were his words."

Milton Harris lived in the same apartment complex as appellant's father. On March 1, 2016, more than a week after the shooting, he was approached by appellant and another man who asked him if he wanted to purchase a firearm. Harris's girlfriend persuaded him not to purchase the gun. Several days later, Harris spoke with Bellaire Police Department officers who inquired about the gun. Harris said that he did not have the gun, but he would help the officers find it. Harris eventually learned the location of the gun, and when he found the gun and a plastic bag with bullets, he notified Bellaire Police Department officers. Harris later identified appellant in a photo-array as the person who tried to sell him the gun. Harris stated that he was "a thousand percent sure" about his identification. The serial number for this firearm matched that of the gun purchased by Tarrell. Ballistics testing revealed that the fired cartridge casings recovered from Reginelli's were fired by the firearm that Harris provided to the police officers.

Don Taylor is Tarrell's and appellant's father. Appellant stayed with him for approximately two weeks in February 2016. Appellant did not have many clothing items of his own, so he would often wear Don's clothes. At some point after the shooting, Don saw video surveillance and still photographs of the Amegy Bank footage on the news. He recognized appellant's face and manner of walking, as well

as the shoes and jacket appellant was wearing, as they both belonged to Don. Don did not immediately call police, but he did speak with Tarrell, his girlfriend, and other family members. He eventually called Crime Stoppers. Sometime during the period between the shooting and appellant's arrest in early March, Don saw appellant at his apartment removing bullets from the magazine of a semi-automatic firearm. Don did not own a gun, and there was no reason for ammunition to be in his apartment.

Officers conducted a search of Don's house and took several photographs, including photographs of ammunition and clothing located in the room in which appellant had been staying. The ammunition matched the brand that Tarrell and appellant had purchased from Wal-Mart the day before the shooting. A pair of pants had embroidery similar to that shown on the pants appellant was wearing in the Amegy Bank surveillance photographs, and officers also recovered a jacket that matched the one appellant wore in the surveillance photographs. Don identified the jacket as his jacket, which he had let appellant borrow.

Defense counsel requested that, in addition to the charged offense of capital murder, the trial court submit in the jury charge an instruction on the lesser-included offense of murder. The trial court refused to give the instruction on murder. Ultimately, the jury convicted appellant of the charged offense of capital murder. Because the State did not seek the death penalty, the trial court automatically

assessed appellant's sentence at confinement for life without parole. This appeal followed.

Lesser-Included Offense Instruction

In his sole issue on appeal, appellant contends that the trial court erred by refusing to submit a requested instruction on the lesser-included offense of murder.

A. Governing Law

The Code of Criminal Procedure provides that an offense is a lesser-included offense of a charged offense if:

> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. ANN. art. 37.09; *Ritcherson v. State*, 568 S.W.3d 667, 670 (Tex. Crim. App. 2018).

We use a two-step analysis to determine whether a defendant is entitled to an instruction on a lesser-included offense. *Ritcherson*, 568 S.W.3d at 670; *Brooks v. State*, 590 S.W.3d 35, 50 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd). First, we compare the statutory elements of the alleged lesser offense and the statutory

elements of the charged offense plus any descriptive averments in the indictment. *Ritcherson*, 568 S.W.3d at 670–71; *Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012) ("First, the court determines if the proof necessary to establish the charged offense also includes the lesser offense."). This step of the analysis is a question of law that does not depend on the evidence raised at trial. *Cavazos*, 382 S.W.3d at 382.

Second, for a defendant to be entitled to a lesser-included offense instruction, there must be some evidence in the record from which a rational jury could find the defendant guilty of only the lesser offense. *Ritcherson*, 568 S.W.3d at 671. This requirement is met if there is (1) evidence that directly refutes or negates other evidence establishing the greater offense and raises the lesser-included offense or (2) evidence that is susceptible to different interpretations, one of which refutes or negates an element of the greater offense and raises the lesser offense. *Id.* "The evidence must establish that the lesser-included offense is a valid, rational alternative to the charged offense." *Bullock v. State*, 509 S.W.3d 921, 925 (Tex. Crim. App. 2016). This step of the analysis is a question of fact and is based on the evidence presented at trial. *Cavazos*, 382 S.W.3d at 383.

The evidence raising the lesser offense must be affirmatively in the record. *Ritcherson*, 568 S.W.3d at 671. That means that a defendant is not entitled to a lesser-included offense instruction based on the absence of evidence, and the evidence must

be "directly germane to the lesser-included offense." *Id.* (quoting *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997)); *Bullock*, 509 S.W.3d at 925 (stating that "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense," but there must be "some evidence directly germane to the lesser-included offense for the finder of fact to consider" before instruction is warranted); *Cavazos*, 382 S.W.3d at 385 ("Meeting this threshold requires more than mere speculation . . . ."). In conducting this step of the analysis, we consider all of the evidence admitted at trial, not just evidence presented by the defendant, and if there is more than a scintilla of evidence raising the lesser offense and negating or rebutting an element of the greater offense, the defendant is entitled to the lesser-included offense instruction. *Ritcherson*, 568 S.W.3d at 671. We consider the entire record; evidence "cannot be plucked out of the record and examined in a vacuum." *Bullock*, 509 S.W.3d at 925. The evidence raising the lesser offense and rebutting or negating the greater offense may be weak, impeached, or contradicted. *Cavazos*, 382 S.W.3d at 383; *see Ritcherson*, 568 S.W.3d at 671 ("It does not matter whether the evidence is controverted or even credible."); *Goad v. State*, 354 S.W.3d 443, 446–47 (Tex. Crim. App. 2011) ("[W]e may not consider '[t]he credibility of the evidence and whether it conflicts with other evidence or is controverted.'").

B. Analysis

Neither party challenges the first step of the lesser-included offense analysis: whether, when comparing the statutory elements of the alleged lesser offense of murder and the charged offense of capital murder, murder is a lesser-included offense of capital murder. *See Smith v. State*, 297 S.W.3d 260, 275 (Tex. Crim. App. 2009) ("This Court has long held that murder is a lesser-included offense of capital murder."); *Gomez v. State*, 499 S.W.3d 558, 562 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). We therefore turn to the second step of the analysis: whether the evidence presented at trial entitled appellant to an instruction on the lesser-included offense of murder.

When a defendant requests an instruction on the lesser-included offense of murder based on a dispute about the "aggravating" element that elevates the offense to capital murder, the defendant is entitled to an instruction on the lesser offense of murder if (1) "there is some evidence which negates the aggravating element" or (2) "the evidence of such aggravating element is so weak that a rational jury might interpret it in such a way as to give it no probative value." *Wolfe v. State*, 917 S.W.2d 270, 278 (Tex. Crim. App. 1996) (quoting *Robertson v. State*, 871 S.W.2d 701, 706–07 (Tex. Crim. App. 1993)).

Appellant argues that "meaningful evidence runs counter to the idea that the assailant was committing a robbery." Specifically, appellant points out that neither

Firmin nor Campos, who both testified that they could hear the shooter speak to Mielke, could remember the shooter demanding money. Appellant also points to the testimony of his sister, Tarrell, who stated that appellant told her that Mielke "would still be here" if "he had just done what [appellant] said," and he argues that this testimony could be interpreted as meaning that something other than a robbery was taking place and that appellant "was simply angry with [Mielke] for being disobedient." Appellant also points out that no money was actually stolen from Reginelli's, suggesting that robbery was not the motive for the murder. We disagree that this is affirmative evidence that negates or rebuts an element of the charged offense of capital murder and raises the lesser offense of murder.

Firmin testified at trial that he could not recall if the shooter said anything when he came into Reginelli's while pointing a gun. After the State showed him the written statement that he made to police on the night of the shooting, Firmin acknowledged that he told police that the shooter "point[ed] the gun at him and told him to give him the money." He testified that he could not remember those words being used. Campos, who was in the restroom at the time of the shooting, testified, "I couldn't make out what [was] said because it sounded muffled," but he heard the shooter scream, followed by gunshots and then Mielke screaming in pain. The other two Reginelli's employees who were present at the time—Lazo and Davis—were in the manager's office and the alleyway, respectively, at the time of the shooting and

did not hear anything that was said. No witness to the incident heard the shooter say anything to suggest an alternate motivation, aside from robbery, for the shooting. *See Wolfe*, 917 S.W.2d at 278 ("The record suggests no motive other than robbery for the commission of the murder. There is no evidence even tending to show that [the defendant] committed the murder simply for the sake of killing."). Firmin's and Campos's testimony is not affirmative evidence in the record that both negates or rebuts an element of the charged offense of capital murder *and* raises the lesser offense of murder. *See Ritcherson*, 568 S.W.3d at 671 (stating that defendant is not entitled to lesser-included offense instruction based on absence of evidence and that evidence must be "directly germane to the lesser-included offense"); *Cavazos*, 382 S.W.3d at 385 ("Meeting this threshold requires more than mere speculation . . . ."); *see also Edwards v. State*, 497 S.W.3d 147, 159 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (noting, in context of challenge to sufficiency of evidence in aggravated robbery case, that jury may infer intent to obtain or maintain control over property from defendant's actions "and a verbal demand for money or property is not required").

With respect to Tarrell's testimony, we disagree that her testimony can be interpreted in any manner other than that appellant made a demand for money, Mielke either refused or was unable to comply with the demand, and appellant shot him in response. At trial, Tarrell testified that when she asked appellant why he

committed the shooting, appellant stated, "[B]ecause he didn't give him the money" and that "[I]f he had gave him the money, then he would have still been here." The parties stipulated that, during her interview with Detective Lacy, Tarrell stated that appellant told her, "That if [Mielke] would have gave [appellant] what he wanted [Mielke] would still be here." The parties also stipulated that Tarrell testified to the grand jury that she asked appellant why he shot Mielke and appellant responded, "because he didn't do what I told him to do."

When considering whether a defendant is entitled to a lesser-included offense instruction, we review the entire record and evidence "cannot be plucked out of the record and examined in a vacuum." *See Bullock,* 509 S.W.3d at 925. In the context of all of the evidence presented in this case—which includes surveillance footage depicting the shooter gesturing at the Reginelli's cash register, Mielke's inability to open the cash register because Reginelli's servers do not have access to the cash drawer, and Firmin's statement to Lazo once the shooting began that the restaurant was being robbed—the only reasonable interpretation of Tarrell's three slightly different but consistent statements concerning what appellant had told her about why he committed the shooting is that appellant intended to rob Reginelli's, he was thwarted when Mielke could not open the cash register, and he shot Mielke in response. As with Firmin's and Campos's testimony, Tarrell's testimony is not affirmative evidence that negates or rebuts an element of the charged offense and

raises the lesser offense. *See Ritcherson*, 568 S.W.3d at 671; *Cavazos*, 382 S.W.3d at 385 ("Meeting this threshold requires more than mere speculation . . . .").

Finally, appellant argues that the fact that nothing was stolen from Reginelli's "lends credence to an alternative possibility that the dispute between the complainant and the assailant was not related to a robbery." "Proof of a completed theft is not required to establish the underlying offense of robbery." *Maldonado v. State*, 998 S.W.2d 239, 243 (Tex. Crim. App. 1999); *Wolfe*, 917 S.W.2d at 275; *Edwards*, 497 S.W.3d at 159; *see also* TEX. PENAL CODE ANN. § 19.03(a)(2) (providing that person commits offense of capital murder if person intentionally or knowingly causes death of another and person intentionally commits murder "in the course of committing *or attempting to commit*" one of several offenses, including robbery) (emphasis added). The jury charge in this case authorized appellant's conviction if, "while in the course of committing or attempting to commit the robbery of" Mielke, appellant intentionally caused Mielke's death. The record also contained evidence that Mielke, as a server at Reginelli's, lacked access to the register's cash drawer and therefore could not open the drawer at the demand of the shooter. The fact that the shooter did not actually take anything from Reginelli's does not negate or rebut an element of the charged offense of capital murder. *See Ritcherson*, 568 S.W.3d at 671.

We hold that the trial court did not err by refusing to submit appellant's requested instruction on the lesser-included offense of murder. *See id.*; *Bullock*, 509

S.W.3d at 925 ("The evidence must establish that the lesser-included offense is a valid, rational alternative to the charged offense.").

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

Do not publish. TEX. R. APP. P. 47.2(b).