COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00175-CR

JIMMY ANTHONY MONTEZ — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM COUNTY CRIMINAL COURT NO. 9 OF TARRANT COUNTY
TRIAL COURT NO. 1406909

MEMORANDUM OPINION[1]

I. INTRODUCTION

A jury found Appellant Jimmy Anthony Montez guilty of the offense of driving while intoxicated. *See* Tex. Penal Code Ann. § 49.04(a), (b) (West Supp. 2016). The trial court assessed his punishment at ninety days' confinement, probated for eighteen months, and a $750 fine. In three issues, Montez argues

[1]*See* Tex. R. App. P. 47.4.

that the trial court erred by not declaring a mistrial after the State violated a motion in limine, by allowing the State to make improper jury argument, and by denying his motion for new trial. We will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

At approximately 1:49 a.m. on the morning of February 10, 2014, Corporal Christopher Aller of the Westworth Village Police Department observed Montez's vehicle traveling 22 miles per hour in a 40 miles-per-hour zone. The front passenger-side headlight of Montez's vehicle was shattered. Corporal Aller followed Montez's vehicle and observed Montez commit a traffic violation by failing to stop behind the marked intersection line at a red light. *See* Tex. Transp. Code Ann. § 544.007(d) (West Supp. 2016). Based on this traffic offense, Corporal Aller initiated a stop.

Corporal Aller approached Montez's vehicle. Montez seemed "very lethargic, out of it."[2] Corporal Aller testified that Montez's eyes appeared "almost glazed," that Montez's pupils were "exceptionally big," and that they did not shrink when he shined his flashlight in Montez's face. When Corporal Aller asked Montez about the damage to his vehicle, Montez said the damage had occurred a day or two earlier. When Montez exited his vehicle to inspect the damage, Corporal Aller observed that Montez "wasn't super stable on his feet in

[2]Corporal Aller's dashcam and bodycam recorded the traffic stop. Those videos are part of our record, and we have watched them. Corporal Aller's observations that Montez seemed "very lethargic" and "out of it" are supported by the videos.

walking around." Montez appeared surprised when he saw the damage. Corporal Aller saw broken glass from the headlight resting on the bumper itself, which he found inconsistent with Montez's statement that the damage had occurred a day or two earlier.

At Corporal Aller's request, Montez agreed to submit to field sobriety tests. Corporal Aller administered the walk-and-turn test and the one-leg-stand test. Montez failed both tests.[3] Based on his observations of Montez and on Montez's performance on the standard field sobriety tests, Corporal Aller placed Montez under arrest for driving while intoxicated.

After Montez was arrested, Corporal Aller searched Montez's vehicle. He found three packages of a substance called "Twilite." Two of the packages were sealed, but one of them was opened. The opened package contained "a leafy substance" that Corporal Aller believed was synthetic marijuana.

Montez was then taken to jail where he agreed to submit to a blood draw. He was transported to a hospital and a blood draw was performed. At trial, Montez and the State stipulated that the results of the blood draw showed no alcohol and no tested-for drugs in Montez's system.

Sarah Skiles, a senior forensic chemist with the Tarrant County Medical Examiner's Office, testified that she performed an analysis on the leafy

[3]Corporal Aller also administered the horizontal-gaze-nystagmus test, and Montez scored four out of six points. There was nothing in the record to indicate, however, whether a score of four out of six constitutes a failure of the horizontal-gaze-nystagmus test.

substance taken from the "Twilite" packages and determined that the substance contained AB-PINACA. Skiles testified that AB-PINACA was "one of the synthetic cannabinoid type substances that have been developed through the last several years that can mimic some of the properties of mari[j]uana." Skiles also testified that AB-PINACA was not a controlled substance when she conducted her analysis.

A jury ultimately found Montez guilty of driving while intoxicated, and the trial court assessed his punishment as described above. This appeal ensued.

III. Did the Trial Court Err by Failing to Grant a Mistrial?

In his first issue, Montez argues that the trial court should have granted a mistrial after the State's opening argument and Corporal Aller's testimony both violated a motion in limine allegedly granted by the trial court.

A. Standard of Review

We review the denial of a motion for mistrial under an abuse of discretion standard. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). The trial court's ruling must be upheld if it is within the zone of reasonable disagreement. *Id*. "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). A mistrial is appropriate only for a narrow class of highly prejudicial and incurable errors and may be used to end trial proceedings when the error is "so prejudicial that expenditure of further time and expense would be wasteful and

futile." *Id*. (quoting *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000)).

B. The Motion in Limine

Prior to trial, Montez filed a motion in limine that sought, among other things, an instruction that the State and its witnesses not mention any of Montez's extraneous offenses, including "the presence of any alleged synthetic marijuana or related paraphernalia." At a pretrial hearing on Montez's motion in limine, the following colloquy took place:[4]

> [The Court]: Well, of course, there's potentially some discussion of a possession matter where there's also a separate case filed on. Outside of that, is there any other -- I mean, I can't separate that one. Is there any other issues that the State is aware of?
>
> [State]: No, Your Honor.
>
> [Court]: Okay. Except for if the evidence shows that there's -- except for that one, granted.
>
> [Defense]: Okay. There was also a pipe found that I think would be subject to an extraneous offense motion in limine.
>
> [Court]: A pipe that is capable of use of the substances found?
>
> [Defense]: It could be. No substance in it was tested.
>
> [State]: There was residue found inside the pipe.
>
> [Court]: Okay. You can make an objection on that one.

[4]Judge Brent Carr presided over the pretrial hearing, while Judge Everett Young presided over Montez's trial and punishment.

After some discussion of other pretrial matters, Montez's counsel returned to his motion in limine regarding extraneous offenses:

> [Defense]: I think maybe then we need a ruling on the possession of the controlled substance as an extraneous offense then before the State plans to mention it, assuming the first witness, who is going to be the officer, is going to mention that he found something.
>
> [Court]: Well, that's also the basis of what -- and, again, without -- I'm not saying they can adequately prove it. I mean, that's the basis of their allegation that Mr. Montez was intoxicated . . . with this substance. Again, the whole case is about whether they can adequately prove that, but -- So I can't limine out what they -- what they found which is the basis of their -- of their accusation.
>
> [State]: We would just add, and reemphasizing that point, that what they found was the intoxicant. Whether or not it's a controlled substance as well is different from the initial issue of whether or not it's an intoxicant.
>
> [Court]: Well, the stuff that goes directly to the heart of the case I'm not granting a motion of limine on. I mean, the fact that it might be character -- that it resulted in the filing of an additional charge, I don't really think that's relevant. I mean, whether -- whether it got found or not and that's the focus of your allegation of intoxication, I mean, I can't -- I can't limine out at this point the very basis of their charge. So my ruling is that within the universe of the stop of this case, the items that are relevant that make something more likely than not that this offense happened is admissible without approaching the bench. Criminal record unconnected to this case, limined out.
>
> . . .
>
> [Defense]: We had talked about the pipe as an extraneous offense as well. I can't remember -- I thought you said maybe we would bring that up at the time it was introduced or -- because that's a paraphernalia extraneous offense.
>
> [State]: My understanding of your prior ruling is anything that goes to the heart of the matter including, in this case, intoxication. The pipe with the residue and the open packaging all point towards intoxication.

> [Court]: Well, again, I think that's -- that would be something of a relevance -- So overruled on the pipe. But that's a relevance question. If they don't ask adequate questions to connect it up, then I think that's subject to an objection.

The above excerpt from the record shows, as asserted by the State, that the trial court did not grant Montez's motion in limine regarding mention of the pipe.[5] Instead, the trial court simply ruled that if the State failed to connect the pipe to the offense, the trial court would entertain Montez's objection.

C. Reference to Pipe During State's Opening Statement

Montez argues that the trial court should have granted his motion for a mistrial when the State mentioned during opening statement that the arresting officer had found "a smoking pipe with burnt residue on it" inside of Montez's vehicle. After the conclusion of the State's opening statement and outside of the presence of the jury, Montez's counsel complained that the State had violated a motion in limine by referencing the pipe. Montez then requested a mistrial, which the trial court denied. The trial court later instructed the jury to disregard the reference to the pipe and reminded them that opening statements are not evidence.

Montez asserts that the trial court erred by denying his request for a mistrial because the State violated a motion in limine. But as set forth above, the trial court did not grant Montez's motion in limine with respect to the pipe. The

[5]The trial court did not make a written ruling on Montez's motion in limine.

trial court stated, “My ruling is that within the universe of the stop of this case, the items that are relevant that make something more likely than not that this offense happened is admissible without approaching the bench.” The trial court also specifically stated that the motion was “overruled on the pipe” and that if the State did not connect the pipe to the offense, Montez could object.

Because the State did not violate a motion in limine when it referenced the pipe during its opening statement, we hold that the trial court did not abuse its discretion by denying Montez’s request for a mistrial premised on such a violation by the State. *See Ocon*, 284 S.W.3d at 884; *Hawkins*, 135 S.W.3d at 77. We overrule this portion of Montez’s first issue.

D. Statements Made by Corporal Aller

Also in his first issue, Montez argues that the trial court erred by not declaring a mistrial when Corporal Aller testified that he had located a smoking device in Montez’s vehicle. On direct examination of Corporal Aller, the following exchange took place:

> [State]: Did you do an inventory on the defendant’s vehicle on this night?
>
> [Witness]: I did.
>
> [State]: What did your inventory turn up?
>
> [Witness]: During the inventory, I did locate a smoking device.

Montez objected that this testimony violated the motion in limine. The trial court then held a hearing, outside of the presence of the jury, to determine

whether the pipe was relevant and admissible. After the hearing, the trial court "sustain[ed] the objection to the testimony concerning the pipe until [it is] develop[ed] further." Montez did not request an instruction to disregard or a mistrial concerning this testimony by Corporal Aller. Thus, he did not obtain an adverse ruling.

To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. Tex. R. App. P. 33.1(a)(1); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1461 (2016). Further, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule. Tex. R. App. P. 33.1(a)(2); *Everitt v. State*, 407 S.W.3d 259, 262–63 (Tex. Crim. App. 2013). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009).

Because Montez did not request a mistrial after Corporal Aller's testimony, his complaint that the trial court erred by not granting a mistrial is not preserved for appellate review. *See* Tex. R. App. P. 33.1(a)(1); *Douds*, 472 S.W.3d at 674; *see also Smith v. State*, 436 S.W.3d 353, 374 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) ("Because appellant did not seek an instruction to disregard

the . . . statements or move for a mistrial, he has not preserved his complaint for appellate review."). We overrule this portion of Montez's first issue.

IV. WAS THE STATE'S CLOSING ARGUMENT IMPROPER?

In his second issue, Montez argues that three statements in the State's closing argument were improper: (1) a statement regarding the effects of K-2, a synthetic marijuana; (2) a statement that the State did not test for AB-PINACA because it was not a controlled substance at the time of testing; and (3) a statement referencing a comment made by a veniremember regarding the dangers of synthetic marijuana.

A. Standard of Review

To be permissible, the State's jury argument must fall within one of the following four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; or (4) plea for law enforcement. *Felder v. State*, 848 S.W.2d 85, 94–95 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 829 (1993); *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973).

B. Statement Regarding the Effects of K2

During closing argument, the State claimed that the evidence showed K-2, a synthetic marijuana, caused people to be "lethargic, slow, confused, [and] disoriented." Montez did not object. But on appeal Montez argues that the statement was improper because no evidence was admitted regarding the effects of K-2.

Again, to preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. Tex. R. App. P. 33.1(a)(1); *Douds*, 472 S.W.3d at 674. Because Montez did not object to the State's argument regarding the effects of K-2, his complaint on appeal is forfeited. *See* Tex. R. App. P. 33.1(a); *Threadgill v. State*, 146 S.W.3d 654, 670 (Tex. Crim. App. 2004) (holding appellant's failure to object to jury argument forfeited right to raise the issue on appeal). We overrule the portion of Montez's second issue complaining of the jury argument regarding the effects of K-2.

C. Statement that the State Did Not Test for AB-PINACA because It Was Not a Controlled Substance at the Time of Testing

Montez and the State stipulated that the results of the blood draw showed no alcohol and no tested-for drugs in Montez's system, and Skiles testified that AB-PINACA was not a controlled substance at the time she conducted her forensic analysis of the leafy substance taken from the "Twilite" packages. Putting these two facts together, the State made the following closing argument to the jury:

> What was stipulated to is that everything that they screened for in the blood test came back negative. Those were the exact words. That's what you heard. And that would make sense, wouldn't it? If Sarah Skiles testified that this was not a controlled substance at the time of the offense, why would that be something that they would screen for in the blood? Why would that be something that they specialize their equipment for, that they invest in a laboratory if, at the time of the offense,

> it's not a controlled substance? So, yes, everything that came back in the blood screening that was done came back negative. But that does not mean that there was still not AB-PINACA in his system and it just wasn't found.

Montez immediately objected to the above jury argument on the grounds that it was "arguing facts not in evidence." The trial court instructed the jury to "consider the evidence that they heard from the witness stand during the evidence portion of the trial."

On appeal, Montez complains that the State's argument suggesting that the blood draw did not include testing for AB-PINACA was improper. The State counters that this argument was a reasonable deduction from the evidence.

Even if we consider the trial court's instruction to the jury as a ruling adverse to Montez, proper jury argument includes reasonable deductions from the evidence. *Felder*, 848 S.W.2d at 94–95; *Alejandro*, 493 S.W.2d at 231. Because Skiles testified that AB-PINACA was not a controlled substance at the time she performed her forensic analysis of the leafy substance taken from the "Twilite" packages, it was a reasonable deduction from this evidence that Montez's blood would not have been tested for its presence. We overrule the portion of Montez's second issue complaining of the jury argument regarding the testing for AB-PINACA.

D. Statement Referencing Veniremember's Comment on the Dangers of Synthetic Marijuana

During voir dire, one of the veniremembers was asked by the State if he had an opinion on synthetic marijuana. The veniremember explained that he

used to work in a store that sold synthetic marijuana and that it was "terrible" and "just as bad as any terrible illegal drug you've heard for decades: coke, heroin, methamphetamine." When asked to compare synthetic marijuana to organic marijuana, the veniremember opined that "it's [a] night and day [difference]" and that while organic marijuana is "natural" and has "medical uses," synthetic marijuana is "more of a poison than anything."

During closing argument, the prosecutor referenced the veniremember's statement when she said, "Remember we talked about that in voir dire, how dangerous it was. I heard some[one] say that it was like poison. It was extremely, extremely . . . dangerous, not just like natural mari[j]uana." Montez immediately objected on the grounds that the State was arguing facts not in evidence. The trial court instructed the jury to "recall the evidence they heard during the evidence portion of the case."

On appeal, Montez argues that the prosecutor's reference to the veniremember's comment was improper and that he has suffered harm. Statements made during voir dire are not evidence. *Adams v. State*, 418 S.W.3d 803, 811 (Tex. App.—Texarkana 2013, pet ref'd) (citing *Fuller v. State*, 73 S.W.3d 250, 264 (Tex. Crim. App. 2002) (Keasler, J., dissenting)); *see also Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 753 (Tex. 2006) ("Statements during voir dire are not evidence."). Assuming, in the interest of justice, that Montez has preserved this complaint, as explained below, Montez was not harmed by the State's improper argument.

Improper jury argument is reviewed under a nonconstitutional harm analysis under rule 44.2(b) of the Texas Rules of Appellate Procedure, and it must be disregarded unless it affected the appellant's substantial rights. *See* Tex. R. App. P. 44.2(b); *Threadgill*, 146 S.W.3d at 666; *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g), *cert. denied*, 526 U.S. 1070 (1999). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. U.S.*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)). Conversely, an error does not affect a substantial right if we have "fair assurance that the error did not influence the jury, or had but a slight effect." *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). In determining whether Montez's substantial rights were affected, we consider: (1) the severity of the misconduct (i.e., the prejudicial effect of the prosecutor's remarks); (2) curative measures; and (3) the certainty of the punishment assessed absent the misconduct. *See Martinez v. State*, 17 S.W.3d 677, 692–93 (Tex. Crim. App. 2000); *Mosley*, 983 S.W.2d at 259.

The jury heard evidence regarding the deleterious effects of synthetic marijuana; Corporal Aller testified that he had seen individuals he believed to be under the influence of synthetic marijuana who had appeared lethargic and had trouble functioning. The jury also heard evidence that Montez failed two standard field sobriety tests, and the jury was able to view dashcam and

bodycam videos that demonstrated the failed tests and demonstrated Montez's appearance and demeanor. Thus, the misconduct—treating as evidence comments by a venireman during voir dire that synthetic marijuana was terrible and as bad as cocaine, heroin, or methamphetamine—did not have much, if any, prejudicial effect because evidence was introduced concerning the effects of synthetic marijuana. Concerning curative measures, after Montez objected to this statement, the trial court instructed the jury to "recall the evidence they heard during the evidence portion of the case[,]" thus minimizing the possibility that the jury would consider the venireman's comments referenced by the prosecutor. Concerning the certainty of the punishment assessed absent the misconduct, the trial court sentenced Montez to 90 days' confinement in the Tarrant County jail and imposed a $750 fine—a punishment well within the Class B misdemeanor punishment range. *See* Tex. Penal Code Ann. §§ 12.22 (West 2011) (setting forth Class B misdemeanor punishment range as up to 180 days in jail and up to a $2,000 fine), 49.04(b) (West Supp. 2016) (stating that, absent aggravating factors, initial DWI is a Class B misdemeanor).

Considering the severity of the misconduct, the curative instruction given by the trial court, and the certainty of the punishment assessed by the trial court absent the misconduct, in the context of the entire case against Montez, the State's erroneous jury argument did not have a substantial or injurious effect on the jury's verdict or on the trial court's punishment and did not affect Montez's substantial rights. *See King*, 953 S.W.2d at 271. We overrule the portion of

Montez's second issue complaining of the jury argument that relayed the veniremember's statement regarding the dangers of synthetic marijuana.

Having overruled all of Montez's complaints regarding improper jury argument, we overrule Montez's second issue.

V. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING MONTEZ'S MOTION FOR NEW TRIAL?

In his third issue, Montez asserts error in the denial of his motion for new trial because: (1) the State improperly introduced evidence of the pipe despite the existence of a motion in limine; and (2) the trial court should have entered a directed verdict in his favor.

A. Standards of Review

We review a trial court's ruling on a motion for new trial for an abuse of discretion. *Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014). "We do not substitute our judgment for that of the trial court; rather, we decide whether the trial court's decision was arbitrary or unreasonable." *Id*. (quoting *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006)). A trial court abuses its discretion by denying a motion for new trial when no reasonable view of the record could support its ruling. *Id*. We view the evidence in the light most favorable to the trial court's ruling, and we presume that all reasonable factual findings that could have been made against the losing party were made against the losing party. *Id*.

We apply the same standard of review to a directed-verdict motion as that used under a sufficiency review. *McDuff v. State*, 939 S.W.2d 607, 613 (Tex. Crim. App.), *cert. denied*, 522 U.S. 844 (1997); *Havard v. State*, 800 S.W.2d 195, 199 (Tex. Crim. App. 1989); *Pollock v. State*, 405 S.W.3d 396, 401 (Tex. App.—Fort Worth 2013, no pet.). In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016).

B. Analysis

Concerning Montez's complaint that he was entitled to a new trial because the State elicited testimony regarding the pipe despite the existence of a motion in limine, as set forth above, the trial court did not grant Montez's motion in limine regarding the pipe, and the State did not violate the motion in limine when it referenced the pipe. We hold that the trial court did not abuse its discretion by denying Montez's motion seeking a new trial on this ground.

Concerning Montez's complaint that he was entitled to a directed verdict because "aside from violations of the motion in limine," "there was no evidence that the substance tested was not a controlled substance," a person may be intoxicated by reason of the introduction of a substance that is not a controlled substance into their body. *See* Tex. Penal Code Ann. § 49.04(a) (providing that

a person commits the offense of driving while intoxicated if the person "is intoxicated while operating a motor vehicle in a public place."); *Id*. at § 49.01(2) (West 2011) (defining "intoxicated" as "not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body" or "having an alcohol concentration of 0.08 or more."). Proving the exact intoxicant is not an element of the offense of driving while intoxicated. *Gray v. State*, 152 S.W.3d 125, 132 (Tex. Crim. App. 2004); *Kiffe v. State*, 361 S.W.3d 104, 108 (Tex. App.—Houston [1st Dist.] pet. ref'd). Instead, circumstantial evidence may prove that a person has lost the normal use of his mental or physical faculties by reason of the introduction of a controlled substance, a drug, alcohol, or another substance into his body, without the necessity of identifying the exact substance or combination of substances causing the loss of normal use of mental or physical faculties. *Accord Kiffe*, 361 S.W.3d at 108. As a general rule, the testimony of an officer that a person is intoxicated provides sufficient evidence to establish the element of intoxication for the offense of driving while intoxicated. *Id*. (citing *Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979)).

Corporal Aller testified that Montez seemed "very lethargic, out of it," that Montez's eyes appeared "almost glazed," that Montez's pupils were "exceptionally big" and did not shrink when a flashlight was shined in his face, and that Montez "wasn't super stable on his feet in walking around." Montez

failed two standard field sobriety tests, and Corporal Aller testified that he determined Montez to be intoxicated. The jury viewed Montez's demeanor and coordination as reflected on the dashcam and bodycam videos, and the jury heard testimony from Sarah Skiles regarding the fact that the "Twilite" packages found in Montez's vehicle contained AB-PINACA, a synthetic marijuana.

Viewing all of the evidence in the light most favorable to the verdict, a rational trier of fact could have found the essential elements of driving while intoxicated beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599. Thus, we hold that the trial court did not abuse its discretion by denying Montez's motion for new trial based on the denial of his request for a directed verdict. We overrule Montez's third issue.

VI. CONCLUSION

Having overruled Montez's three issues, we affirm the trial court's judgment.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: June 29, 2017