NUMBER 13-16-00224-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

THE STATE OF TEXAS, **Appellant,**

v.

CECILIA PARDO A/K/A CECILIA PRADO, **Appellee.**

On appeal from the County Court at Law No. 3
of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Contreras

By a single issue, the State appeals the trial court's order granting appellee, Cecilia Andrade Pardo a/k/a Cecilia Prado, a new trial.[1] The State contends that the trial court abused its discretion in granting appellee's motion for new trial because there was no

[1] Appellee identified herself as "Santa Cecilia Pardo Andrade."

evidence supporting any of the grounds alleged in appellee's motion. We affirm.

I. BACKGROUND

Appellee was charged with the sale of an alcoholic beverage to a minor, a Class A misdemeanor offense. *See* TEX. ALCO. BEV. CODE ANN. § 106.03(a), (c) (West, Westlaw through 2017 R.S.). Appellee waived a jury trial, pleaded not guilty, and proceeded to a trial before the court.

Testimony presented at trial reflected that, in March of 2015, appellee was employed part time at a Wingstop located in Port Isabel, Texas. Javier Hernandez, a minor who then worked as an agent for the Texas Alcohol and Beverage Commission (TABC) in a "sting" operation, entered the Wingstop and asked to purchase a beer. Appellee asked Hernandez for identification. Hernandez produced a Texas driver's license that accurately showed he was underage. Appellee sold Hernandez a beer, and was immediately arrested by other undercover TABC agents for sale of an alcoholic beverage to a minor.

Appellee testified that, at the time of the incident, she had worked at Wingstop for six months. She had received no training in the sale of alcohol from Wingstop or TABC. On the day of the sale, she was in charge of the store and was the only cashier. She testified that she looked at Hernandez's driver's license and mistakenly calculated that he was twenty-one. Appellee stated that she was fired from Wingstop because of the incident.

At trial, appellee's counsel did not dispute the facts of the incident. Appellee's counsel argued that (1) the State had not established the criminal negligence element of the offense; and (2) appellee established an entrapment defense. The trial court found appellee guilty and assessed court costs as punishment.

Appellee filed a motion for new trial, in which she argued: (1) she was entrapped by the State; (2) her trial counsel was ineffective for failing to explain the jury waiver to her; and (3) the evidence was insufficient to prove criminal negligence. The State filed a response to appellee's motion. Following a hearing, the trial court granted the motion. At the State's request, the trial court issued findings of fact and conclusions of law. This appeal followed.

II. Standard of Review and Applicable Law

A trial court's decision to grant a new trial is reviewed only for abuse of discretion, but that discretion is not unbounded or unfettered. *State v. Arizmendi*, 519 S.W.3d 143, 148 (Tex. Crim. App. 2017). A trial court may not grant a motion for new trial simply because it believes that the defendant has received a raw deal. *Id.* Granting a new trial for a "non-legal or legally invalid reason is an abuse of discretion." *Id.* The test for abuse of discretion is not whether, in the opinion of the appellate court, the facts present an appropriate case for the trial court's action, but rather, whether the trial court acted without reference to any guiding rules or principles. *State v. Thomas*, 428 S.W.3d 99, 103 (Tex. Crim. App. 2014) (quotations omitted). The mere fact that a trial court may decide a matter differently from an appellate court does not demonstrate an abuse of discretion. *Id*. at 103–04. We view the evidence in the light most favorable to the trial court's ruling, defer to the trial court's credibility determinations, and presume that all reasonable fact findings in support of the ruling have been made. *Id*. at 104.

A trial court generally does not abuse its discretion if the defendant (1) sets forth a specific and valid legal ground for relief in their motion, (2) points to evidence in the record (or sets forth evidence) that substantiates the same legal claim, and (3) shows prejudice under the harmless-error standards of the rules of appellate procedure. *State v. Zalman*,

400 S.W.3d 590, 591 (Tex. Crim. App. 2013).

When, as in this case, the trial court makes express findings of fact, we defer to those findings of fact if they are supported by the record. *See* TEX. R. APP. P. 21.8(b); *State v. Hernandez*, 363 S.W.3d 745, 750 (Tex. App.—Austin 2011, pet. ref'd); *Cueva v. State*, 339 S.W.3d 839, 856 (Tex. App.—Corpus Christi 2011, pet. ref'd). We review the trial court's conclusions of law de novo. *Hernandez*, 363 S.W.3d at 750.

III. DISCUSSION

The trial court's conclusions of law included the following: (1) "The Court concludes that in the present case, after further review of the case law presented, that the defendant was entrapped by the State"; (2) appellee's trial counsel was ineffective by failing to properly admonish appellee on the consequences of waiving a jury trial and proceeding to trial before the court; and (3) the evidence is insufficient to establish the criminal negligence element of the offense because "[appellee's] conduct was not as a result of criminal negligence, but a mistake or accident." We begin by examining appellee's claim of insufficient evidence of criminal negligence.

In her motion for new trial, appellee asserted that she was entitled to a new trial because "the evidence does not support the guilty verdic[t] due to the fact that the evidence introduced at trial did not prove, beyond a reasonable doubt, that she acted 'intentionally, knowingly or with reckless disregard['] to the conduct of having sold an alcoholic beverage to a minor."[2] We construe appellee's motion as raising a sufficiency challenge to the mens rea element of the offense. *See Zalman*, 400 S.W.3d at 593–94

[2] We note that the State did not allege that appellee acted "intentionally, knowingly, or with reckless disregard" in selling a beer to a minor. Instead, the State alleged appellee acted with criminal negligence, the least culpable mental state. *See* TEX. PENAL CODE ANN. § 6.02(d) (West, Westlaw through 2017 R.S.).

(holding that trial court must limit its ruling on a motion for new trial to grounds raised in the originally-filed or timely amended motion for new trial).

When deciding a motion for new trial on the grounds of legal sufficiency, the trial court applies the appellate legal sufficiency standard. *State v. Chavera*, 386 S.W.3d 334, 336–37 (Tex. App.—San Antonio 2012, no pet.); *State v. Provost*, 205 S.W.3d 561, 567 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The trial court must view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Chavera*, 386 S.W.3d at 336–37; *see also Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). If the evidence meets this standard, it is an abuse of discretion for the trial court to grant the motion for new trial. *Chavera*, 386 S.W.3d at 336–37.

Section 106.03(a) of the Texas Alcoholic Beverage Code provides that "[a] person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor." TEX. ALCO. BEV. CODE ANN. § 106.03(a). The penal code defines criminal negligence as follows:

> A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

TEX. PENAL CODE ANN. § 6.03(d) (West, Westlaw through 2017 R.S.).

The court of criminal appeals recently re-clarified the distinction between civil or simple negligence and criminal negligence:

> This Court has acknowledged that, under the law, criminal negligence is different from ordinary civil negligence. "Civil or 'simple' negligence 'means the failure to use ordinary care, that is, failing to do that which a person of

> ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.'" Conversely, "[c]onduct that constitutes criminal negligence involves a greater risk of harm to others, without any compensating social utility, than does simple negligence." "The carelessness required for criminal negligence is significantly higher than that for civil negligence; the seriousness of the negligence would be known by any reasonable person sharing the community's sense of right and wrong." The risk must be "substantial and unjustifiable," and the failure to perceive it must be a "gross deviation" from reasonable care as judged by general societal standards by ordinary people. "In finding a defendant criminally negligent, a jury is determining that the defendant's failure to perceive the associated risk is so great as to be worthy of a criminal punishment." "The degree of deviation from reasonable care 'is measured solely by the degree of negligence, not any element of actual awareness.'" "Whether a defendant's conduct involves 'an extreme degree of risk' must be determined by the conduct itself and not by the resultant harm." "Nor can criminal liability be predicated on every careless act merely because its carelessness results in death or injury to another."

Queeman v. State, 520 S.W.3d 616, 623 (Tex. Crim. App. 2017) (citations omitted). "The circumstances are viewed from the standpoint of the actor at the time that the allegedly negligent act occurred." *Id.* (citing *Montgomery v. State*, 369 S.W.3d 188, 193 (Tex. Crim. App. 2012)). "The key to criminal negligence is not the actor's being aware of a substantial risk and disregarding it, but rather it is the failure of the actor to perceive the risk at all." *Id*.

Here, appellee's conduct was examining an underaged minor's driver's license but failing to correctly calculate that the license's owner was a minor. Thus, the State was required to prove that appellee's conduct of examining a minor's driver's license but failing to correctly calculate that its bearer was underaged created a substantial and unjustifiable risk that a minor would purchase alcohol and that appellee's failure to perceive this risk was far from the standard of care an ordinary person would exercise. *See McKay v. State*, 474 S.W.3d 266, 270 (Tex. Crim. App. 2015).

The State argues that appellee "should have been aware of, but, by not carefully checking the minor's identification, failed to perceive" the risk that a minor would attempt to purchase an alcoholic beverage. According to the State, the facts that appellee asked the minor for identification, looked at the identification, failed to perceive that the customer was a minor, and sold the minor a beer "is evidence that [a]ppellee should have been aware of the risk surrounding her conduct (i.e., she should have been aware that the customer was a minor as reflected by the identification card), but she failed to perceive it." We disagree.

The fact that appellee requested the minor to produce identification and examined the minor's driver's license but failed to correctly calculate that he was a minor does not show that she failed to perceive the risk that a minor would attempt to purchase an alcoholic beverage. Rather, the fact that appellee asked the minor for identification and examined it—although she incorrectly calculated his age—shows that she *did* perceive the risk that a minor may attempt to purchase an alcoholic beverage. We are unpersuaded that the State showed that appellee failed to perceive the associated risk—that a minor might purchase alcohol. Therefore, we certainly could not find that her failure to perceive the associated risk was "so great as to be worthy of a criminal punishment." *See Queeman*, 520 S.W.3d at 623 (quoting *Montgomery*, 369 S.W.3d at 193).

Viewing the circumstances from appellee's standpoint at the time that the allegedly negligent act occurred, *see id.*, we agree with the trial court's conclusion that appellee's conduct "was not as a result of criminal negligence, but a mistake or accident." We hold that there is no evidence of a failure to perceive a substantial and unjustifiable risk that constituted a gross deviation from the standard of care that an ordinary person would have exercised under the circumstances, and thus, the evidence is legally insufficient to

establish criminal negligence. Accordingly, the trial court did not abuse its discretion in granting appellee's motion for new trial on the ground that the evidence was legally insufficient to support her conviction.

IV. CONCLUSION

We affirm the trial court's judgment.[3]

DORI CONTRERAS
Justice

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

Delivered and filed the
31st day of August, 2017.

[3] Because of the issue raised by the State and our disposition of that issue, we need not address the other grounds raised in appellee's motion. *See* TEX. R. APP. P. 47.1.