Affirmed and Memorandum Opinion filed July 14, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00992-CR

TERRY BRYAN THOMPSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 1555078

M E M O R A N D U M O P I N I O N

Appellant Terry Bryan Thompson appeals his conviction and sentence for murder. He challenges the jury's guilt finding in three issues. Appellant argues that the State failed to prove beyond a reasonable doubt that he had the requisite culpable mental state when committing the offense; that the trial court erred in excluding appellant's statement to police made shortly after the offense; and that

the State violated *Brady*[1] during trial by withholding impeachment evidence. We overrule the first issue because the evidence is legally sufficient to support the jury's finding that appellant knowingly caused the complainant's death or intended to cause serious bodily injury to the complainant and knowingly committed an act clearly dangerous to human life. We overrule the second argument because the trial court's exclusion of appellant's statement, even if error, was rendered harmless by the admission of similar evidence. Finally, we reject the third argument because appellant cannot demonstrate any prejudice or harm from the alleged *Brady* violation.

Appellant also challenges the jury's negative finding during the punishment phase on the defensive issue of sudden passion. According to appellant, the jury's failure to find sudden passion is unsupported by legally or factually sufficient evidence. We disagree because there is some evidence that appellant was not under the immediate influence of sudden passion when he murdered the complainant, thus defeating appellant's legal sufficiency challenge, and because the jury's rejection of appellant's sudden passion issue was not against the great weight and preponderance of all the evidence, thus defeating his factual sufficiency challenge.

We affirm the trial court's judgment.

Background

A Harris County grand jury indicted appellant for murder. He pleaded not guilty. The case proceeded to trial, where the following facts were established.

Near midnight on a Sunday night, the complainant went to a restaurant with his wife and daughter. Two of the restaurant's servers, Israel Jaquez and Bryan

[1] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Riefkohl, had finished their shifts and were eating at a table by a large window. Jaquez saw the complainant and his family enter the restaurant. According to Jaquez, the complainant was visibly intoxicated. After the family was seated at a table, the complainant stood up and walked outside, where he urinated in the parking lot.

Appellant, having just arrived in the parking lot with his daughters, saw the complainant urinating. Appellant told the complainant that he should not do that in open view of children. A verbal altercation ensued. Matters quickly escalated to a physical fight when the complainant struck appellant in the eye.

"[O]ut of nowhere," Jaquez saw the complainant's wife grab her child and run outside, prompting Jaquez to stand up and look out the window. Jaquez saw the complainant fighting with appellant. "They were standing, like, fighting each other, grabbing onto each other." Jaquez went outside and saw the complainant on his back on the ground, with appellant "on top of him." The complainant "was covering his face with his arms, and [appellant] was hitting him with his forearm." The restaurant manager, Mercedes Romero, also testified that she saw appellant on top of the complainant, hitting him. Romero testified that she called 911 and told the dispatcher, "if you don't hurry up, [appellant's] going to kill [the complainant]."

Jaquez and Riefkohl unsuccessfully attempted to pull appellant off of the complainant. According to Jaquez, "He's just a way bigger man than we are." Bystanders formed a circle around the two men and yelled at appellant "[t]o get -- get off of him and to stop, stop fighting." When Jaquez was trying to pull appellant away from the complainant, appellant said, "he hit me first. Look at my eye." Jaquez also heard appellant say to the complainant, "Do you want me to hit you again?"

Riefkohl told appellant, "just stop, bro. You don't want to get involved with the cops. That's what my manager is doing, she's calling the cops." Appellant responded, "Go ahead and call them. [The complainant] should have thought about this before he punched me." Romero also told appellant to let go of the complainant, but appellant refused, saying "No, I'm not going to let him go because he punched me on my eye first."

Jaquez went back inside the restaurant briefly. When he returned, he saw the complainant still under appellant, but now "belly down." Appellant had the complainant in a "chokehold," with appellant's arm wrapped around the complainant's neck. The complainant was making noises, "like he couldn't breathe." Jaquez saw the complainant "tapping on the floor," as though he was "trying to break free." Riefkohl testified similarly, that the complainant was "tapping out . . . the universal sign of somebody tapping out, just let him go, have some mercy, show mercy." According to Jaquez, appellant "was always in control of the situation."

Jaquez believed that appellant was only trying to restrain the complainant and did not intend to kill him or cause serious bodily harm. Riefkohl also did not think that appellant intended to kill the complainant, but he was "worried about [the complainant's] life."

A licensed security officer, Selvin Young, walked over from a gas station next door. Young saw appellant "choking" the complainant and immediately called 911. Young told appellant to "Get off [the complainant] . . . [b]ecause he was choking [the complainant], and [the complainant] was gasping for some air." Appellant did not release the complainant or respond. Another bystander, Ryan Staiger, testified that he saw appellant "on top of [the complainant] . . . holding [the complainant] down . . . with [appellant's] body weight."

At some point during the altercation, appellant's wife, who was an off-duty law enforcement officer, arrived at the restaurant. She told appellant to get off of the complainant. Appellant let go, and appellant and his wife rolled the complainant onto his back. The complainant was unresponsive.

The State introduced videos purporting to show the altercation, including a surveillance video from inside the restaurant showing part of the altercation as seen through the restaurant's front doors, as well as several bystander videos showing limited portions of the altercation. One bystander video showed the complainant prostrate, and appellant laying on the complainant's back with one arm wrapped around the complainant's neck or head. None of the videos clearly show the complete altercation from start-to-finish, and it is not evident precisely how long appellant was on top of the complainant, how long appellant's arm was positioned around the complainant's neck, or at what point the complainant became unresponsive.

When paramedics arrived, the complainant was not breathing and did not have a pulse, but they were able to induce a pulse in the ambulance. The complainant later died at a nearby hospital.

The jury found appellant guilty of murder as charged in the indictment. *See* Tex. Penal Code § 19.02. During the punishment phase, the jury was asked to find whether appellant was acting under a sudden passion during the commission of the offense. The jury did not find sudden passion and sentenced appellant to twenty-five years in prison.

Appellant timely appealed.

Analysis

Appellant presents three issues challenging the jury's guilt finding. He argues that: (1) the evidence was insufficient as a matter of law to establish beyond a reasonable doubt that appellant possessed the requisite mental state for murder; (2) the trial court erred in excluding appellant's statement to the police as an excited utterance or present sense impression; and (3) the State violated *Brady v. Maryland* to deny appellant a fair trial.

Appellant also raises one issue regarding the punishment phase. He contends that the jury erred in rejecting sudden passion during the punishment phase because more than a preponderance of evidence exists to support an affirmative finding of sudden passion.

A. Did the State prove appellant's culpable mental state beyond a reasonable doubt?

In his first issue, appellant argues that the State failed to prove that he had the requisite intent to kill or to commit serious bodily injury. Because this issue, if sustained, would entitle appellant to the greatest relief, we address it first. *See Finley v. State*, 529 S.W.3d 198, 202 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

We must first determine the culpable mental state applicable to the charged offense. The State charged appellant with murder. *See* Tex. Penal Code § 19.02. As relevant here, a person commits murder if he: (1) intentionally or knowingly causes the death of an individual; or (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. *Id.* § 19.02(b)(1), (b)(2).

In the indictment, the State alleged that appellant committed the offense of murder by either of two means: (1) intentionally and knowingly causing the

complainant's death by impeding the complainant's normal breathing and circulation of the blood by applying pressure to the complainant's neck while placing the weight of appellant's body on the complainant; or (2) intending to cause serious bodily injury to complainant and causing the complainant's death by intentionally and knowingly committing an act clearly dangerous to human life, namely by impeding the complainant's normal breathing and circulation of the blood by applying pressure to the complainant's neck while placing the weight of appellant's body on the complainant.

The jury charge tracked the language in the indictment, except that the charge phrased appellant's mental state regarding the second alleged means in the disjunctive:

> You are further instructed that before a person can be guilty of murder he must have intentionally or knowingly caused the death, or he must have intended to cause serious bodily injury and have intentionally or knowingly committed an act clearly dangerous to human life that caused the death of the deceased.

"It is well established that the State may plead in the conjunctive and charge in the disjunctive," whenever, as here, the statutory language is disjunctive. *Cada v. State*, 334 S.W.3d 766, 771 (Tex. Crim. App. 2011). The jury charge conformed to the Penal Code. Therefore, the State needed to prove that appellant:

- intentionally caused the complainant's death; or
- knowingly caused the complainant's death; or
- intended to cause serious bodily injury to the complainant and intentionally committed an act clearly dangerous to human life that caused the complainant's death; or
- intended to cause serious bodily injury to the complainant and knowingly committed an act clearly dangerous to human life that caused the complainant's death.

Murder is a "result of conduct" offense. *See Young v. State*, 341 S.W.3d 417, 423 (Tex. Crim. App. 2011). This means that the culpable mental state relates not to the nature or circumstances surrounding the charged conduct, but to the result of that conduct. *See Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008). A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result. Tex. Penal Code § 6.03(a). A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b). "Knowingly" is a lesser-degree mental state than "intentionally." *Id.* § 6.02(d).

As a reviewing court, we need only consider the evidence supporting the lesser-degree mental state. *See Howard v. State*, 333 S.W.3d 137, 139 (Tex. Crim. App. 2011) ("Because the jury could have found the appellant guilty for either of these culpable mental states, we need only address the less-culpable mental state of knowingly."). Therefore, we will consider whether the evidence supports the jury's finding that either (1) appellant knowingly caused the complainant's death, or (2) appellant intended to cause serious bodily injury to the complainant and knowingly committed an act clearly dangerous to human life that caused the complainant's death.

We apply a legal sufficiency standard in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt, including whether the defendant acted with a culpable mental state. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.). Under this standard, we examine all the evidence adduced at trial in the light most favorable to the verdict to determine whether a jury was rationally justified in finding guilt

beyond a reasonable doubt. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *Criff v. State*, 438 S.W.3d 134, 136-37 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). Because the State may prove a defendant's criminal culpability by either direct or circumstantial evidence coupled with all reasonable inferences from that evidence, *see Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009), the legal sufficiency standard applies to both direct and circumstantial evidence, *see Criff*, 438 S.W.3d at 137. Accordingly, we will uphold the jury's verdict unless a rational fact finder must have had a reasonable doubt as to any essential element. *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009); *West v. State*, 406 S.W.3d 748, 756 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

Multiple witnesses testified that appellant wrapped his arm around the complainant's neck. The medical examiner who performed an autopsy testified that she "saw obvious signs of strangulation" and that the complainant's external injuries were "consistent with an arm around the neck area . . . [w]ith significant force." The medical examiner also testified that "[i]t could be from a few seconds to within 2 minutes" for a human to lose consciousness after being deprived of air, and that "by the time the person actually passes out, the brain has already determined or suffered an injury to the point where it shuts down," ultimately leading to death "[i]f the lack of oxygen is maintained."

Witnesses also testified that appellant's arm seemed to impede or prevent the complainant's ability to breathe. Jaquez testified that the complainant was "trying to break free . . . trying to move [appellant's] hand away from him" and "was making noises like, (sounds by witness,) like he couldn't breathe." Similarly, Young testified that the complainant "was just trying to move [appellant] from his front to at least get some air." Riefkohl testified that he attempted to pull appellant

off of the complainant because he was "worried about [the complainant's] life." Staiger testified that appellant held the complainant down with appellant's body weight and that he believed the complainant's life was "threatened" or "in danger." Staiger's cell phone video showed appellant on top of the complainant while asking "Do you want me to hit you again?" and the complainant groaning and struggling under appellant's body.

Appellant was on top of and choking the complainant for a significant amount of time. Romero testified that appellant's arm was wrapped around the complainant's neck for what seemed to be a "long time." Young, the security guard who walked over from a gas station in response to a patron's request for assistance with the altercation, testified that he was outside for about fifteen minutes that night but that it seemed like "[f]orever." Although no witness definitively testified to the length of the altercation, the surveillance video captured from inside the restaurant lobby shows that appellant and the complainant were on the ground for approximately ten minutes. During this time, appellant ignored or refused witnesses' repeated urgings to let go of the complainant out of concern that the complainant was unable to breathe.

Viewed in the light most favorable to the jury's verdict, we conclude that the jury was rationally justified in finding beyond a reasonable doubt that appellant either (1) knowingly caused the complainant's death by impeding the complainant's normal breathing and circulation of the blood by applying pressure to the complainant's neck while placing the weight of appellant's body on the complainant, or (2) intended to cause serious bodily injury to the complainant and knowingly committed an act clearly dangerous to human life. *See, e.g.*, *Roberts v. State*, No. 03-14-00637-CR, 2016 WL 6408004, at *10 (Tex. App.—Austin Oct. 26, 2016, pet. ref'd) (mem. op., not designated for publication) (appellant's

confession that he choked complainant because he "lost it" and the medical examiner's testimony about the significant force and length of time required to produce the injuries complainant suffered and to cause death by manual strangulation supported a rational finding that appellant acted intentionally or knowingly when he choked complainant to death); *Jackson v. State*, No. 01-11-00772-CR, 2013 WL 396264, at *5 (Tex. App.—Houston [1st Dist.] Jan. 31, 2013, pet. ref'd) (mem. op., not designated for publication) (choking someone is an act clearly dangerous to human life; concluding that a rational jury could have determined that appellant caused complainant's death either intentionally or knowingly by choking her or, at the least, that he intended to cause serious bodily injury and committed an act clearly dangerous to human life that resulted in death).

To the extent that some witnesses testified that they did not think appellant intended to harm the complainant or that appellant was merely restraining the complainant until police arrived, we defer to the jury's reconciliation of any potentially conflicting testimony. *See Temple*, 390 S.W.3d at 360 (jury is the sole judge of credibility and weight to be attached to the testimony of witnesses); *Kolb v. State*, 523 S.W.3d 211, 214 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (reviewing court defers to the jury's responsibility to fairly resolve or reconcile conflicts in the evidence).

We overrule appellant's first issue.

B. Did the trial court err by excluding appellant's statement to police?

In his third issue, appellant argues that the trial court erred in excluding appellant's statement to police.

We review a trial court's ruling on the admission or exclusion of evidence under an abuse of discretion standard. *Gonzalez v. State*, 544 S.W.3d 363, 370

(Tex. Crim. App. 2018); *Neale v. State*, 525 S.W.3d 800, 809 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Even if a trial court errs, however, we will not reverse the judgment unless the appellant demonstrates that the erroneous evidentiary ruling affected his substantial rights. *See* Tex. R. App. P. 44.2(b); *Blount v. State*, No. 14-17-00988-CR, 2019 WL 1768609, at *10 (Tex. App.—Houston [14th Dist.] Apr. 23, 2019, pet. ref'd) (mem. op., not designated for publication).

Appellant made a statement to Deputy Sean Daniels, approximately five to ten minutes after police arrived at the scene, which we excerpt in pertinent part:

> I asked Mr. Thompson what had happened today, and he stated he had pulled into the Denny's parking lot with his daughters when he observed Mr. Hernandez Urinating in the parking lot. Mr. Thompson stated he became upset and told Mr. Hernandez to stop peeing in front of them and asked him what his problem was, stating he had his daughters with him, and stated something to the effect of "I don't appreciate you doing that."
>
> Mr. Thompson stated Mr. Hernandez immediately became aggressive towards him, shoved him and struck him on the face with a closed fist causing him pain and physical injury. Mr. Thompson stated after Mr. Hernandez punched him, he began trying to defend himself and ultimately put Mr. Hernandez in a choke hold, due to Mr. Hernandez's aggressive nature in an attempt to overcome his aggression.
>
> Mr. Thompson stated after he placed Mr. Hernandez in a choke hold Mr. Hernandez was continuing his attempts to fight him. Mr. Thompson said eventually, Mr. Hernandez stopped moving, and he discovered Mr. Hernandez had passed out and stopped breathing.

At trial, Deputy Daniels testified that appellant was "[a]bsolutely" "under the stress of the event" when making the statement. Appellant sought to admit his statement to police as a present sense impression or an excited utterance, but the State objected on hearsay grounds, and the trial court sustained the objection and excluded the evidence.

Hearsay is a statement that the declarant does not make while testifying at the current trial or hearing that is offered to prove the truth of the matter asserted in the statement. Tex. R. Evid. 801(d). Hearsay is inadmissible unless it falls under one of the exceptions to the hearsay rule. Tex. R. Evid. 802. The following are not excluded by the rule against hearsay:

> **(1)** ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
>
> **(2)** ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

Tex. R. Evid. 803(1), (2).

We need not decide whether the trial court abused its discretion in excluding the statement on hearsay grounds, because the substance of the statement was admitted through other sources. We address the testimony supporting each assertion:

- Excluded statement: "[Appellant] observed Mr. Hernandez Urinating in the parking lot. Mr. Thompson stated he became upset and told Mr. Hernandez to stop peeing in front of them and asked him what his problem was, stating he had his daughters with him, and stated something to the effect of 'I don't appreciate you doing that.'"

Young testified that "one of the busboys" told him that the complainant had urinated outside. Young also testified that he told the 911 dispatcher that appellant was "holding a guy who was peeing outside in front of some kids."

- Excluded statement: "Mr. Thompson stated Mr. Hernandez immediately became aggressive towards him, shoved him and struck him on the face with a closed fist causing him pain and physical injury."

The complainant's wife testified that she "thought [she] saw a push, like maybe [the complainant] pushed [appellant]." Jaquez testified that as he and Riefkohl "were trying to pull [appellant] away, he was just saying, '[the complainant] hit me first. Look at my eye.'" Similarly, when asked "And you heard Terry Thompson also say that Mr. Hernandez struck him first, correct?", Jaquez responded "Yes, sir, that's what he had told us." Riefkohl also testified that "[appellant] said [the complainant] punched him, meaning Terry Thompson said John Hernandez punched him." Photos introduced at trial showed Thompson with a swollen and bruised eye.

- Excluded statement: "Mr. Thompson stated after Mr. Hernandez punched him, he began trying to defend himself and ultimately put Mr. Hernandez in a choke hold, due to Mr. Hernandez's aggressive nature in an attempt to overcome his aggression."
- Excluded statement: "Mr. Thompson stated after he placed Mr. Hernandez in a choke hold Mr. Hernandez was continuing his attempts to fight him."

A defense witness, James Leon Keith, characterized the complainant as "cursing" and "aggressive." Jaquez testified that appellant put the complainant in a "chokehold" or "submission hold." Staiger also testified that appellant had the complainant in a chokehold.

Jaquez testified that appellant stated that he "wasn't going to let [the complainant] up until the cops came" and appellant "kept telling [the complainant] . . . 'Stay . . . down. Stop fighting.'" Young also testified that he believed appellant was holding the complainant down until police could arrive. Keith testified that the complainant "had not submitted. He did not submit."

- Excluded statement: "Mr. Thompson said eventually, Mr. Hernandez stopped moving, and he discovered Mr. Hernandez had passed out and stopped breathing."

Young testified that, at the end of the altercation, the complainant was not breathing and appellant's wife asked Young to perform CPR, which Young did.

The crux of appellant's defense—that he was attacked first, that he was merely attempting to restrain or subdue the complainant, that the complainant continued to be aggressive, and that he did not intend to kill the complainant—was squarely before the jury, often in appellant's own words as recounted by witnesses. Any error, therefore, in excluding appellant's statement to Deputy Daniels was harmless. *See Mosley v. State*, 983 S.W.2d 249, 258 (Tex. Crim. App. 1998) (op. on reh'g) (explaining that harm from the erroneous exclusion of evidence may be mitigated by the admission of similar evidence); *Blount*, 2019 WL 1768609, at *11 ("The erroneous admission or exclusion of evidence does not affect a defendant's substantial rights and is harmless if the evidence is cumulative of other evidence admitted to prove the same fact."); *Alvarez v. State*, No. 02-05-00376-CR, 2007 WL 117700, at *1 (Tex. App.—Fort Worth Jan. 18, 2007, no pet.) (mem. op., not designated for publication) ("[T]he trial court's exclusion of the evidence was harmless because similar evidence was admitted through the same witness and two other witnesses later in the trial."); *see also Berry v. State*, No. 09-11-00183-CR, 2012 WL 759053, at *4 (Tex. App.—Beaumont Mar. 7, 2012, no pet.) (mem. op., not designated for publication) (exclusion of defendant's statement to police at scene was harmless because substantially similar evidence was admitted); *Berry v. State*, 759 S.W.2d 12, 14 (Tex. App.—Texarkana 1988, no pet.) (exclusion of defendant's statement to police was harmless because defendant and another witness testified to "the essential elements of the statement").

We overrule appellant's third issue.

C. Did the State violate *Brady*?

In his fourth issue, appellant argues that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). The crux of appellant's complaint is that the State did not timely disclose impeachment evidence.

The State's suppression of evidence favorable to a defendant violates due process if the evidence is material to either guilt or punishment. *Id.* at 87; *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). Material evidence is evidence which, in reasonable probability, if disclosed, would have altered the outcome of the trial. *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002). The State has a duty to disclose material evidence even if the defendant has not requested the evidence; this duty to disclose encompasses both impeachment and exculpatory evidence. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). For a defendant to establish reversible error under *Brady* as a result of the State's failure to disclose evidence, he must show that: (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to him; and (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *See Hampton*, 86 S.W.3d at 612. Under *Brady*, the defendant bears the burden of showing that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure: "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.*

Blake Wise testified for the defense. Wise was present at the restaurant on the night in question before appellant arrived. Wise said that he encountered the

complainant and his family in the restaurant's parking lot and that the complainant tried to engage him in a fight. The complainant's wife grabbed the complainant and urged him to enter the restaurant. Ignoring his wife, the complainant walked toward Wise and asked "if [he] want[ed] to fight." According to Wise, the complainant said that he had a gun in his truck. Wise characterized the complainant's behavior as aggressive and threatening.

On cross-examination, the State asked Wise if he had a history of altercations with Hispanic men.[2] Specifically, the prosecutor asked whether Wise had been "involved in about 13 to 15 fights" and if "most, if not all, [of those fights] were against Hispanic men." Wise initially said yes, then said no. Appellant's counsel objected and, at a bench conference, requested "a hearing outside the presence of this jury to develop what *Brady* material the State has that they're now impeaching their witness with that has never been turned over to [appellant]." Counsel further stated, "I'm asking for an inquiry of the information," and "If there is any kind of information regarding a racial bias, we should be given it." The judge responded, "I think he's just given it to you in this cross-examination." At the conclusion of the bench conference, appellant's counsel stated, "Now I will make a legal objection now that I know what's going on. I would object to them bringing that up. They are using it to suggest there is a racial bias in his testimony and in him being present and seeing an individual who threatened him." The judge overruled appellant's objection, "find[ing] that it goes toward weight not admissibility." Appellant's counsel then moved for a continuance "to investigate the Brady statements that the Government has now given us an opportunity to rebut the evidence that they're going to put on with Blake Wise."

[2] The complainant was a Hispanic male.

After a recess, the trial judge stated:

> After evaluating and listening to both Defense and State arguments, I do find that the evidence that [Wise] picks fights or whatever the State has is admissible. However, based upon what I've seen, because it's dealing with racial motive, prejudice is very high. So I do find it more prejudice than probative to bring out any reference to race.

Appellant's attorney then requested an instruction to the jury to disregard. The judge agreed and instructed the jury "to disregard the last statement from this witness."

Neither side made further reference to Wise's alleged racial prejudice or bias.

Appellant's *Brady* complaint has no merit. He has not established that, at a minimum, the withheld evidence was material to the outcome of the trial. The allegedly withheld impeachment evidence—i.e., Wise's purported racial bias—was not material to the central issue at trial—whether appellant was criminally responsible for the complainant's death. Regardless, appellant has not demonstrated any prejudice from the State's alleged *Brady* violation. Appellant received all the relief he sought—exclusion of any further reference to Wise's alleged bias and a jury instruction to disregard Wise's answer. Therefore, we conclude that any potential *Brady* violation based on the late disclosure of Wise's alleged bias was harmless. *See Marshall v. State*, 210 S.W.3d 618, 636 (Tex. Crim. App. 2006).[3]

[3] In his brief, appellant also alludes to other alleged prosecutorial misconduct: (1) the State's failure to turn over a police report from a domestic-disturbance incident involving appellant and his son, which was referenced during the punishment phase of trial; (2) the State's failure to turn over a proper business records affidavit; and (3) the prosecutor's placement of a box labeled "Terry Thompson Murder" where the jury could see it. Appellant generally alleges that these actions or omissions cumulatively contributed to an unfair trial, but he does not explain with any specificity how these alleged actions or omissions contributed to an improper verdict.

We overrule appellant's fourth issue.

D. Is there legally and factually sufficient evidence to support the jury's negative finding on appellant's sudden passion defense?

Finally, appellant challenges both the legal and factual sufficiency of the evidence supporting the jury's negative finding on sudden passion when assessing punishment.

If a defendant is convicted of murder, he may argue at punishment that he caused the death of the victim while under the immediate influence of sudden passion arising from an adequate cause. Tex. Penal Code § 19.02(d). If a defendant establishes by a preponderance of the evidence that he did so, and if the jury so finds, the offense level is reduced from a first-degree felony to a second-degree felony. *Id.*; *Trevino v. State*, 100 S.W.3d 232, 237 (Tex. Crim. App. 2003).

"Sudden passion" means "passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation." Tex. Penal Code § 19.02(a)(2). "Adequate cause" means a "cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." *Id.* § 19.02(a)(1)

The charge on punishment asked the jurors whether they found that appellant proved by a preponderance of the evidence that appellant, having committed the offense of murder, caused the complainant's death "under the immediate influence of sudden passion arising from an adequate cause." The jury answered, "We do not."

Appellant has waived these additional complaints due to inadequate briefing. *See* Tex. R. App. P. 38.1(i).

For a challenge to the legal sufficiency of the evidence when the issue is one where the defendant had the burden of proof by a preponderance of the evidence, like sudden passion, we utilize the legal sufficiency standard utilized in civil cases. *Matlock v. State*, 392 S.W.3d 662, 669 (Tex. Crim. App. 2013) (adopting civil legal sufficiency test from *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005)); *see also Smith v. State*, 355 S.W.3d 138, 147 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd); *Cleveland v. State*, 177 S.W.3d 374, 387-88 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd); *Nolan v. State*, 102 S.W.3d 231, 237-38 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). The civil legal sufficiency standard requires a two-step analysis. First, we examine the record for any evidence that supports the jury's negative finding while disregarding all evidence to the contrary unless a reasonable fact finder could not. *See Matlock*, 392 S.W.3d at 669; *Smith*, 355 S.W.3d at 147; *Cleveland*, 177 S.W.3d at 387. Second, if no evidence supports the negative finding, then we examine the entire record to determine whether the evidence establishes the affirmative defense as a matter of law. *See Smith*, 355 S.W.3d at 147. We must defer to the fact finder's determination of the weight and credibility to give the testimony and the evidence at trial. *See Cleveland*, 177 S.W.3d at 388-89.

In examining the record under the first prong of the civil legal sufficiency standard, we conclude that some evidence exists to support the jury's negative finding on the issue of sudden passion. Several witnesses testified that appellant held the complainant down for an extended period of time, that appellant rejected bystanders' pleas to release the complainant, and that appellant blamed the complainant for appellant's response (i.e., that the complainant "should have thought" of the consequences before punching appellant). A rational jury could have concluded that appellant's actions continued long after any "sudden passion"

would have subsided in a person of ordinary temper, and therefore appellant did not cause the complainant's death while under the "immediate" influence of any sudden passion. *See, e.g.*, *Johnson v. State*, 815 S.W.2d 707, 712 (Tex. Crim. App. 1991) (even if jury believed wife's taunts were sufficient to provoke appellant initially, a rational fact finder could still determine that appellant continued to inflict the injuries leading to his wife's death long after "sudden passion" would have subsided in a person of ordinary temper); *see also Ruiz v. State*, No. 05-17-00669-CR, 2018 WL 6261502, at *6 (Tex. App.—Dallas Nov. 30, 2018, no pet.) (mem. op., not designated for publication) (rejecting appellant's argument that he acted in fear when he pushed complainant away with knife in appellant's hand after complainant punched him; neither ordinary anger nor fear alone raises an issue on sudden passion arising from adequate cause); *Goff v. State*, 681 S.W.2d 619, 625 (Tex. App.—Houston [14th Dist.] 1983) (finding no evidence of sudden passion where appellant agreed to "go outside" to settle differences with victim after verbal altercation in club, and, after attempting to knock victim off balance, appellant felt stab in leg, got scared and feared future stabbing, and used own knife to stab victim to death), *aff'd on other grounds*, 720 S.W.2d 94 (Tex. Crim. App. 1986).

The record satisfies the first prong of the civil legal sufficiency standard of review because some evidence exists that appellant was not under the immediate influence of sudden passion when he murdered the complainant. *See Cleveland*, 177 S.W.3d at 390. Therefore, we need not address the second prong of the civil legal sufficiency standard—whether appellant proved sudden passion as a matter of law—because that prong only applies in the absence of any evidence to support the jury's finding. *See id.* at 389. We hold that the evidence is legally sufficient to

support the jury's negative finding of sudden passion. *See Smith*, 355 S.W.3d at 147.

For appellant's factual sufficiency challenge, we apply the standard announced in *Meraz v. State*, 785 S.W.2d 146, 154-55 (Tex. Crim. App. 1990), to review an issue on which the defendant had the burden of proof by a preponderance of the evidence. *Matlock*, 392 S.W.3d at 671; *Moncivais v. State*, 425 S.W.3d 403, 408 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (holding that *Meraz* standard is applicable to factual sufficiency review regarding affirmative defenses because burden of proof on defendant is preponderance of evidence); *Cleveland*, 177 S.W.3d at 390-91 (applying *Meraz* standard to review factual sufficiency of jury's negative sudden passion finding). Under *Meraz*, we consider all the evidence neutrally to determine if the jury's finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003); *Meraz*, 785 S.W.2d at 154-55; *Smith*, 355 S.W.3d at 150. We may not, however, intrude on the fact finder's role as the sole judge of the weight and credibility of the witnesses' testimony. *See Meraz*, 785 S.W.2d at 154-55; *Cleveland*, 177 S.W.3d at 390-91.

There was evidence to support appellant's defensive theory that the complainant was the initial aggressor because he punched appellant first, and because appellant had a black eye—in appellant's words, "He was attacked by a mean and drunk man." It is undisputed that the complainant was intoxicated, and several witnesses recounted that appellant told them that the complainant punched him first. The two restaurant servers, Jaquez and Riefkohl, testified that they did not think appellant was intending to harm the complainant, and Jaquez testified that appellant said he was restraining the complainant until police arrived. There

was testimony that appellant told the complainant to "stop resisting" and that the complainant "did not submit" to appellant's attempts to subdue him.

The evidence also showed, however, that appellant held the complainant in a chokehold for several minutes with significant force, to the point that the complainant was gasping for air. Witnesses said that the complainant repeatedly hit the ground with his hand much like a wrestler would "tap out," which indicated to them that the complainant could not breathe and that appellant should let him go. Bystanders urged appellant to release the complainant, but appellant either ignored them or stated why he believed his actions were justified. Jaquez testified that appellant "was always in control of the situation."

Crediting appellant's assertion that the complainant punched first without provocation, a rational fact finder could have believed nonetheless that appellant had time for rational reflection instead of continuing to choke the complainant. Our conclusion is based on the evidence that appellant was "in control," held the complainant down for an extended period of time during which the complainant continued to make choking sounds and hit the ground, and rejected bystanders' pleas to release the complainant. *See, e.g.*, *Perez-Vasquez v. State*, No. 01-15-00882-CR, 2018 WL 2727761, at *15 (Tex. App.—Houston [1st Dist.] June 7, 2018, pet. ref'd) (mem. op., not designated for publication) ("Further, a rational jury could conclude from the evidence that there was a reasonable opportunity for cool reflection during the significant passage of time between when Perez-Vasquez was punched by Calvillo in the club and when Perez-Vasquez attacked Calvillo."); *see also Gonzales*, 717 S.W.2d at 357; *Thomas v. State*, No. 05-95-01546-CR, 1997 WL 206795, at *3 (Tex. App.—Dallas Apr. 29, 1997, no pet.) (not designated for publication).

Moreover, a rational jury could have concluded that the complainant's actions would not ordinarily produce such a feeling of anger, rage, resentment, or terror sufficient to render appellant's mind incapable of cool reflection for the duration of time necessary to result in the complainant's death. *See, e.g., Dukes v. State*, 486 S.W.3d 170, 180-81 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (ordinary anger is not sufficient to support an affirmative sudden passion finding); *Smith v. State*, 881 S.W.2d 727, 735 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (holding that victim's actions of cursing at defendant and pulling defendant's hair are not conduct that would ordinarily produce degree of anger, rage, resentment, or terror in person of ordinary temper).

Considering all the evidence adduced at trial in a neutral light, we cannot say that the jury's rejection of appellant's sudden passion issue is so against the great weight and preponderance of the evidence as to be manifestly unjust.

We reject appellant's legal and factual sufficiency challenges, and we overrule his second issue.

Conclusion

We affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Christopher, Jewell, and Spain (Spain, J., concurring as he would reach the issue of error before considering harm, but otherwise joins the opinion).

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