Opinion issued October 20, 2011.

In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00539-CR

IRVIN RAY DAVIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1193809

MEMORANDUM OPINION

A jury convicted Irvin Ray Davis of his wife's murder and assessed his punishment at thirty-five years' confinement. *See* TEX. PENAL CODE

ANN. § 19.02(b) (West 2011). On appeal, Davis contends that the trial court erred in: (1) denying his *Batson* challenge, (2) permitting the State to conduct an in-court demonstration of the murder during the guilt-innocence phase of trial, (3) admitting evidence of his subsequent marriage, and (4) denying his requests for the jury to disregard the State's improper question and statements. In addition, Davis maintains that the evidence was insufficient to support the jury's finding that he did not act as the result of sudden passion.

We hold that the trial court did not err in denying Davis's *Batson* challenge, in permitting the State's in-court demonstration, or in admitting evidence of Davis's subsequent marriage. Any error in denying Davis's requests for jury instructions to disregard was harmless. We also hold that the evidence is sufficient to support the jury's finding against sudden passion. We therefore affirm.

Background

Davis and his wife, Sandra Sue Clark Davis, shared a townhome with Sandra's two sons, DJ and Xavier. Sandra and Davis had a tumultuous relationship, and they repeatedly had separated and reconciled.

In November 2008, on the Friday after Thanksgiving, the family shopped for Christmas gifts at a local mall. During the trip, Sandra received

a phone call from her male cousin, and they discussed exchanging gifts. Davis overheard the call. He became upset because he did not want Sandra to exchange gifts with another man even if he was a relative. Davis and Sandra argued until they returned home. DJ thought that Davis remained angry. DJ spent the rest of the weekend at his father's home.

Sandra went out with her friends on Saturday evening. Davis expected her to return home by 2:00 a.m. but she did not until 11:00 a.m. the next morning. Sandra again went out with friends on Sunday evening. DJ returned to Sandra and Davis's home that night. Davis called Sandra's older son, Xavier, to determine whether he intended to come home. Xavier found this conversation unusual, but told Davis that he did not intend to come home. Later that night, Xavier sneaked into the house to avoid waking anyone. Sandra returned home at 1:30 a.m. that night.

Around 6:30 a.m., DJ woke Sandra to ask for lunch money. He then left for school. Davis kept two knives on his side of the bed as a defense against burglars. When Davis awoke, he confronted Sandra. He was concerned that she was seeing another man and would leave him. He questioned her about it. She became angry.

Davis testified that Sandra grabbed a knife from her nightstand and moved toward him. He also grabbed a knife, and he stabbed her twenty-one

times as she approached him. Davis stated that his mind went blank. He claimed he was intensely angry, and he did not know how many times he stabbed her. He told the jury that Sandra had overreacted during the argument because she knew he was going to leave her for another woman. Davis married this woman after Sandra's death.

Other witnesses testified about the events leading to Sandra's death. Xavier heard a noise, left his bedroom, and found his mother in the hallway at the top of the staircase. Sandra was crying, and Xavier ran to her. He grabbed her, and he realized she was bleeding. Xavier then saw Davis, and Xavier testified that Davis looked surprised, because Davis did not expect Xavier to be home. Xavier returned to his room to search for his cell phone. He heard a loud noise, returned to the hallway, and saw Davis standing at the top of the stairs. Sandra was lying at the bottom of the staircase. Xavier pushed Davis out of the way and ran to his mother. His mother was moaning, crying, and trying to move toward the front door.

Xavier returned upstairs, retrieved his cell phone, and then returned to Sandra. Davis was standing over her, punching her. Sandra was crying for Davis to stop. Xavier pushed Davis off of his mother and moved her outside. Xavier heard Davis say at some point during the attack, "I told you I will kill you before I let you leave me again." Xavier noticed many

injuries to his mother, including missing teeth and stab wounds to her side, and he called 911. Xavier remained outside with Sandra, and a neighbor stopped and attempted to help. Emergency personnel soon arrived and tended to Sandra. Davis walked out of the house, appearing distraught, confused and dazed. Officers handcuffed Davis and placed him in a patrol car.

Police recovered three knives from the crime scene. The autopsy report revealed twenty-one stab wounds on Sandra's body, as well as abrasions, scrapes, lacerations and tearing of the skin on her face, hands and right knee. The medical examiner testified that these injuries were consistent with defensive wounds, and that the facial injuries were consistent with being struck with a fist. Sandra died from stab wounds to her lungs and heart.

BATSON **CHALLENGE**

Davis first contends that the trial court erred in denying his *Batson* challenge. *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). After the voir dire examination in Davis's trial, the State exercised one of its ten peremptory strikes against prospective juror number 18, the only African-American within the "strike zone" of remaining venirepersons. Davis challenged the peremptory strike of number 18, arguing that the State

impermissibly struck the venireperson on the basis of race. The trial court asked the State to explain its rationale for striking number 18. The State responded that number 18 told the prosecutor about a bad experience with a police officer, that he had received and fought a traffic ticket for an offense of which he was not guilty, had been convicted of writing a bad check in 1983, and that he had wavered when asked if he thought the criminal justice system was for punishment or rehabilitation. After the State explained its rationale, the trial court asked if Davis wanted to put forth any other evidence or argument. Davis's defense counsel responded, "That's everything, Judge. We wanted an explanation." The court denied Davis's *Batson* motion.

Standard of Review and Applicable Law

A reviewing court examines jury selection from a cold record. *Satterwhite v. State*, 858 S.W.2d 412, 415 (Tex. Crim. App. 1993). In other words, it is the trial court that has the opportunity to view each venireperson's demeanor and to evaluate his or her credibility and, ultimately, is in the better position to pass on the strikes for cause presented. *Id.* (citing *Smith v. State*, 676 S.W.2d 379, 387 (Tex. Crim. App. 1984)). Consequently, we cannot reverse a trial court's ruling on a *Batson* challenge unless it is clearly erroneous. *See Gibson v. State*, 144 S.W.3d 530, 534

(Tex. Crim. App. 2004). To hold that a trial court clearly erred, we must have a "definite and firm conviction that a mistake has been committed." *Goldberg v. State*, 95 S.W.3d 345, 385 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (quoting *Vargas v. State*, 838 S.W.2d 552, 554 (Tex. Crim. App. 1992). We may not substitute our opinion for the trial court's factual assessment of the neutrality of the prosecutor's explanation for exercising strikes, and we focus on the genuineness, rather than the reasonableness, of the prosecutor's asserted nonracial motive. *Gibson*, 144 S.W.3d at 534 & n.5 (citing *Purkett v. Elem*, 514 U.S. 765, 769, 115 S. Ct. 1769, 1771–72 (1995)). In reviewing the record for clear error, we consider the entire record of voir dire, and we need not limit ourselves to arguments or considerations that the parties specifically called to the trial court's attention so long as our reasoning is manifestly grounded in the appellate record. *Watkins v. State*, 245 S.W.3d 444, 448 (Tex. Crim. App. 2008).

A *Batson* challenge gives rise to a three-step process. *Purkett*, 514 U.S. at 767, 115 S. Ct. at 1770–71. First, the opponent of a peremptory challenge must make a prima facie case of racial discrimination. *Id.*, 115 S. Ct. at 1770. Second, if the first step is satisfied, the burden of production shifts to the proponent of the strike to provide a racially neutral explanation for the strike. *Id.* Third, if a sufficient explanation is provided, the court

must decide whether the opponent of the strike has proven purposeful racial discrimination. *Id.*, 115 S. Ct. at 1771.

Analysis

Because the burden of persuasion is on the party opposing the strike, the failure to challenge the State's facially neutral explanation renders the claim untenable. *Johnson v. State*, 68 S.W.3d 644, 649 (Tex. Crim. App. 2002); *see Ford v. State*, 1 S.W.3d 691, 693–94 (Tex. Crim. App. 1999) (holding that defendant failed to prove prosecutor's explanation was pretext when he failed to cross-examine prosecutor and did not offer evidence rebutting explanation); *see also Pitte v. State*, 102 S.W.3d 786, 791 (Tex. App.—Texarkana 2003, no pet.) (holding that defendant did not carry his burden of persuasion because he offered nothing to prove prosecutor's explanation was pretext); *Flores v. State*, 33 S.W.3d 907, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (holding that because defendant did not ask to cross-examine prosecutor or offer evidence refuting race-neutral explanation for strikes, and she did not object to lack of opportunity to do same, she forfeited review of issue on appeal). Here, the State offered a number of reasons for the strike: the venireperson's bad experience with a police officer, a traffic ticket, a bad check, and a wavering answer. Discriminatory intent was not inherent in the State's reasons. Davis

offered no response to the State's race-neutral explanations for the strike. Because Davis did not renew his *Batson* challenge after the State offered its race-neutral reasons, we hold that the trial court did not abuse its discretion in rejecting Davis's challenge. *See Ford*, 1 S.W.3d at 693–94; *see also Pitte*, 102 S.W.3d at 791; *Flores*, 33 S.W.3d at 926.

EVIDENTIARY ISSUES

Davis contends that the trial court abused its discretion in allowing the State to conduct a misleading demonstration of Sandra's stabbing. Davis also maintains that the trial court abused its discretion in allowing the State to introduce evidence of his subsequent marriage.

Standard of Review

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Torres v. State,* 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). We will not reverse a trial court's ruling unless that ruling falls outside the zone of reasonable disagreement. *Burden v. State,* 55 S.W.3d 608, 615 (Tex. Crim. App. 2001). We must uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *State v. Ross,* 32 S.W.3d 853, 856 (Tex. Crim. App. 2000).

In-Court Demonstration

Davis testified that he did not know the number of times he stabbed Sandra or the time that elapsed during the stabbing because his mind was blank after the first stabbing. The prosecutor instructed Davis to stab the air twenty times while the prosecutor positioned himself in the place of Sandra. The prosecutor counted each stab up to twenty. Davis's counsel objected to the accuracy of the demonstration because it did not reflect Davis's state of mind at the time of the attack. The trial court overruled the objection.

It is proper to permit relevant courtroom demonstrations that accurately depict the events they seek to illustrate. *Lewis v. State*, 486 S.W.2d 104, 106 (Tex. Crim. App. 1972). Case law focuses on whether the demonstration was substantially similar to the event. *See, e.g., Valdez v. State,* 776 S.W.2d 162, 168 (Tex. Crim. App. 1989) (en banc); *Wright v. State*, 178 S.W.3d 905, 919 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd); *Cantu v. State,* 738 S.W.2d 249, 255 (Tex. Crim. App. 1987) (en banc); *Key v. State,* 149 Tex. Crim. 200, 205, 192 S.W.2d 563, 566 (1946). The proponent of the demonstration must show that the conditions under which the demonstration is conducted are sufficiently similar to the event in question. *Valdez,* 776 S.W.2d at 168; *Cantu,* 738 S.W.2d at 255.

It is not essential that the conditions of the demonstration be identical—dissimilarities should be weighed, but do not necessarily render a demonstration inadmissible. *See Valdez,* 776 S.W.2d at 168. All parts of the demonstration must be supported by the evidence or testimony. *See Cantu,* 738 S.W.2d at 255.

Here, during the demonstration, Davis positioned himself in relation to the prosecutor, and the prosecutor acted as Sandra. The men re-enacted the stabbing motions. The State's purpose of illustrating the time required to make twenty stabbing motions was to negate Davis's claims of self-defense and sudden passion. The autopsy report indicated the number of stab wounds, which is the same evidentiary support for the number of stabs Davis made. The State's demonstration was based on evidence and reasonable inferences from the evidence. *See Valdez,* 776 S.W.2d at 168; *Wright*, 178 S.W.3d at 919; *see also Henricks v. State*, 293 S.W.3d 267 (Tex. App.—Eastland 2009, pet. ref'd) (demonstration of investigator's theory on how victim was murdered was admissible as it was supported by facts in evidence). We hold that the trial court did not abuse its discretion in allowing the demonstration.

Because Davis objected only to the accuracy of the demonstration, his claims of error based on Texas Rule of Evidence 401 and 403 are not

preserved for appeal. *See* TEX. R. APP. P. 33.1; *Goff v. State*, 931 S.W.2d 537, 551 (Tex. Crim. App. 1996) (en banc) ("Where his trial objections do not comport with his arguments on appeal, appellant has failed to preserve error on those issues."); *Martinez v. State*, 867 S.W.2d 30, 35 (Tex. Crim. App. 1993) (affirming that issues on appeal must correspond to objection raised in trial court); *Lopez v. State*, 200 S.W.3d 246, 251 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (requiring a specific objection in the trial court based on Rule 403 to preserve error for appeal). Because the evidence raises an inference that Davis had a motive to murder Sandra, we hold that the evidence is relevant. The trial court thus did not abuse its discretion in admitting it.

Evidence of Subsequent Marriage

Davis next maintains that the trial court abused its discretion in admitting evidence of his marriage to another woman after Sandra's death. During one of his separations from Sandra, Davis had a relationship with a woman. Davis married this woman about one month after he was released on bond for Sandra's murder. The State produced documentation proving Davis's marriage. Davis objected to the relevancy of this evidence.

Any evidence that is both material and probative is relevant. TEX. R. EVID. 401. Evidence is material if it influences consequential facts. *Mayes*

v. State, 816 S.W.2d 79, 84 (Tex. Crim. App. 1991). Evidence is probative if it tends to make the existence of a material fact more or less probable than it would be without the evidence. *Miller v. State,* **36 S.W.3d 503, 507 (Tex. Crim. App. 2001**). It does not have to be prima facie evidence that some fact exists or establish that it is more likely than not that the fact exists. *City of Dallas v. Cox*, 793 S.W.2d 701, 730–31 (Tex. App.—Dallas 1990, no writ). If evidence alters the probabilities involved to any degree, it is relevant. *Montgomery v. State*, 810 S.W.2d 372, 376 (Tex. Crim. App. 1990). Evidence which is not relevant is inadmissible. TEX. R. EVID. 402.

The State offered evidence of the marriage to show Davis's motive and refute his claims of self-defense and sudden passion. Davis began his relationship with his new wife while he was separated but still married to Sandra. The State contended that this relationship made Davis's claims of self-defense and sudden passion less likely because his desire to be free of his marriage to Sandra and to marry his new wife provided motive for murdering Sandra. Although motive is not itself an element of a crime, it is relevant because it tends to make it more likely that the accused committed the crime. *Massey v. State*, 933 S.W.2d 141, 154 (Tex. Crim. App. 1996); *see, e.g.*, *Temple v. State*, 342 S.W.3d 572 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that evidence of defendant's affair

during marriage may provide motive for murder of spouse); *Reaves v. State*, 970 S.W.2d 111, 118 (Tex. App.—Dallas 1998, no pet.) (holding that evidence of wife's extramarital affair was admissible under Rules 401 and 403 to show motive to kill and to show wife had reason to murder her husband and claim self-defense). Davis objected only to the relevancy of the evidence in the trial court; therefore, any claim of error based on Rule 403 or on Rule 404 that the evidence was unduly prejudicial is not preserved for appeal. *See* TEX. R. APP. P. 33.1; *Goff*, 931 S.W.2d at 551; *Martinez*, 867 S.W.2d at 35.

DENIED REQUESTS FOR JURY INSTRUCTION

Davis claims the trial court erred in denying his requests that the trial court instruct the jury to disregard several questions for which the trial court had sustained objections.

Improper Question and Statement during Testimony

The prosecutor asked Davis if he was aware that the jury's job was to determine if he acted in self-defense. Davis objected that this question was improper. The trial court sustained the objection, but denied Davis's request to instruct the jury to disregard. Later, during cross-examination, the prosecutor stated that Davis's testimony had not been consistent during the trial, and Davis objected that the prosecutor's statement was argumentative

and a misstatement. Again, the trial court sustained the objection, but denied Davis's request to instruct the jury to disregard.

We hold that any error in refusing to ask the jury to disregard matters to which the court had sustained objections was harmless, because it did not affect Davis's substantial rights. We disregard any non-constitutional error unless the error affects the defendant's substantial rights. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). A substantial right is affected when the error had a substantial injurious effect or influence in determining the juror's verdict. *Id.* If we have a fair assurance that the error did not influence the jury, or had only a slight effect, then we must not reverse the conviction. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

Here, the prosecutor's question asked Davis whether it was the jury's job to determine if Davis acted in self-defense. Davis did not answer the question; although argumentative, nothing about the question was inherently influential in determining the verdict. We hold that Davis has failed to show harm from the trial court's refusal to instruct the jury to disregard.

Similarly, Davis has not shown that the prosecutor's statement that Davis's testimony about the murder had changed many times had an injurious effect. When the prosecutor first asked Davis about his argument with Sandra, Davis stated that she was angry over their financial issues and

because he suspected she was seeing another man. Davis later testified that Sandra was upset because she found out Davis had been with another woman. Davis admitted this discrepancy. We hold that this statement did not influence the jury's verdict so as to affect Davis's substantial rights. Davis admitted to stabbing his wife and continuing to stab her as she tried to escape, and he testified that no one else could have stabbed her. Some evidence existed that Davis gave different accounts about the reason for the fight. Any error in refusing to tell the jury to disregard the statement was harmless.

Closing Argument

Finally, Davis observes that the prosecutor attacked him over the shoulders of his defense counsel during the State's closing argument. When speaking to the jury, the prosecutor said, "if [defense counsel] is going to tell you with a straight face…" and Davis objected. The trial court sustained the objection, but again denied Davis's request to instruct the jury to disregard the statement. Also, during the State's closing argument, when he referred to Davis's testimony, the prosecutor said, "He told you himself, one of the only things I believe on this witness stand out of his mouth—," and Davis objected to the prosecutor giving his personal opinion. The trial court sustained this objection and once again denied Davis's request to instruct the

jury to disregard it.

In closing arguments, the approved general areas of argument are: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of opposing counsel, and (4) plea for law enforcement. *Hathorn v. State*, 848 S.W.2d 101, 117 (Tex. Crim. App. 1992), *cert. denied*, 509 U.S. 932, 113 S. Ct. 3062 (1993). Even when an argument exceeds the permissible bounds of these approved areas, it will not constitute reversible error unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceeding. *Todd v. State*, 598 S.W.2d 286, 296–97 (Tex. Crim. App. 1980). The remarks must have been a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000) (en banc). The Court of Criminal Appeals held that "the harm standard for nonconstitutional errors—found in Texas Rule of Appellate Procedure 44.2(b)—applies." *Martinez v. State*, 17 S.W.3d 677, 692 (Tex. Crim. App. 2000).

Davis's objections cut off the prosecutor mid-sentence, and the prosecutor did not introduce any new facts to the jury in making the statements. In both statements, the prosecutor attacks the veracity of Davis's

testimony. *See Smith v. State*, 898 S.W.2d 838, 846 n.8 (Tex. Crim. App. 1995) (noting that State has right during closing argument to "attack the veracity of a defendant who takes the stand"); *Greer v. State,* 523 S.W.2d 687, 690–691 (Tex. Crim. App. 1975) (holding that where defendant takes witness stand and his testimony is clearly contrary to State's evidence, it is not reversible error for prosecutor to attack veracity of defendant). The prosecutor's statements were not the result of a willful and calculated effort by the State to deprive Davis of a fair trial. We conclude that any error in refusing to instruct the jury to disregard them was harmless error.

SUFFICIENCY OF EVIDENCE OF JURY'S NEGATIVE FINDING ON THE ISSUE OF SUDDEN PASSION

Davis contends the evidence is factually insufficient to support the jury's finding that he did not act under the influence of sudden passion.

Standard of Review and Applicable Law

At the punishment phase of a murder trial, a defendant may reduce a murder charge from a first-degree felony to a second-degree felony by proving by a preponderance of the evidence that "he caused the death under the immediate influence of sudden passion arising from an adequate cause." *See* TEX. PENAL CODE ANN. § 19.02(d) (West 2011); *see also Hernandez v. State*, 127 S.W.3d 206, 211–12 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding that defendant bears burden at punishment phase to prove

issue of sudden passion by preponderance of evidence). "'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 ANN. § 19.02(a)(2). "'Adequate cause' means 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); *see also Hernandez*, 127 S.W. 3d at 211 (holding that ordinary anger or causes of defendant's own making are not legally adequate causes).

In *Brooks*, the Criminal Court of Appeals held that the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply 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. *Brooks v. State*, 323 S.W. 3d 893, 895 (Tex. Crim. App. 2010). However, the *Jackson v. Virginia* standard does not apply to a criminal defendant's factual sufficiency challenge to the jury's negative finding of an issue that the defendant had to prove by a preponderance of the evidence; rather, the factual sufficiency standard announced in *Meraz* is appropriate for review of issues, such as affirmative defenses, on which the defendant

has the burden of proof by the preponderance of the evidence. *See Brooks*, 323 S.W.3d at 924 n.67 (Cochran, J., concurring); *see also Meraz v. State*, 785 S.W.2d 146, 154–55 (Tex. Crim. App. 1990) (holding that the proper standard for review of factual sufficiency challenges to negative finding on issue that defendant had to prove by preponderance of the evidence is not *Jackson v. Virginia* standard); *Zuniga v. State*, 144 S.W.3d 477, 482 (Tex. Crim. App. 2004) (holding that *Meraz* standard was suitable for sufficiency reviews regarding affirmative defenses because burden of proof on defendant is preponderance of evidence), *overruled on other grounds by Watson v. State*, 204 S.W.3d 404, 416–17 (Tex. Crim. App. 2006). Accordingly, we apply the *Meraz* standard of review to a jury's negative answer on sudden passion. *Cleveland*, 177 S.W.3d 374, 390–91 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (applying the *Meraz* standard as cited in *Zuniga*, 144 S.W.3d at 482); *see also Brooks*, 323 S.W.3d at 924 n.67.

We consider whether the judgment is so against the great weight and preponderance of the evidence so as to be manifestly unjust. *Meraz*, 785 S.W.2d at 154–55. We review all of the evidence neutrally, but we do not intrude on the factfinder's role as the sole judge of the weight and credibility given to any witness's testimony. *Cleveland*, 177 S.W.3d at 390–91.

Analysis

Davis contends that he stabbed Sandra during an argument between the couple, because he was intensely angry over her suspected infidelity. Davis admitted that Sandra had not acknowledged any infidelity, and he also described his argument with Sandra as "minor." Davis also claimed that he stabbed Sandra in self-defense. He testified that Sandra retrieved a knife and moved toward him. He feared Sandra was going to stab him, so he grabbed a knife and stabbed her.

The jury's finding against sudden passion here depended largely on rejecting Davis's version of the events. The jury was free to disbelieve Davis's account. The jury is the sole judge of the weight and credibility given to any witness's testimony. *See Cleveland*, 177 S.W.3d at 390–91; *see also Trevino v. State*, 157 S.W.3d 818, 822 (Tex. App.—Fort Worth 2005, no pet.) (holding that jury is free to make its own determination of defendant's credibility and reject defendant's version of events if it did not believe he was telling truth). Evidence of Davis's actions before and during the stabbing support a finding of premeditation and planning, not sudden passion. *Nance v. State*, 807 S.W.2d 855, 861 (Tex. App.—Corpus Christi 1991, pet. ref'd) (holding evidence of premeditation is sufficient to support finding of no sudden passion). In particular, Davis called Xavier to

determine if Xavier planned to return home on Sunday evening, and he waited until DJ had left for school to attack Sandra. He had two knives in his bedside table. During the attack on Sandra, he was surprised to see Xavier and said to Sandra, "I told you I will kill you before I let you leave me again." Given this evidence, the jury reasonably could have found that Davis did not act out of a degree of anger, rage, resentment, or terror sufficient to render the mind incapable of cool reflection. *See Bradshaw v. State*, 244 S.W.3d 490, 503 (Tex. App.—Texarkana 2007, pet. ref'd) (the discovery of a spouse's extramarital affair was not adequate cause for murder); *see also Cleveland*, 177 S.W.3d at 390 (no adequate cause arising from the immediate influence of sudden passion was found where a defendant's wife served him with divorce papers, and he subsequently stabbed her to death). The jury's finding is not so against the great weight and preponderance of the evidence so as to be manifestly unjust. *See Meraz*, 785 S.W.2d at 54–55. Accordingly, we hold that sufficient evidence supports the jury's negative finding on the issue of sudden passion.

Conclusion

We hold that the trial court did not err in denying Davis's *Batson* challenge or in admitting the demonstration evidence and evidence of Davis's subsequent marriage. We further hold that the trial court did not commit reversible error in failing to instruct the jury to disregard questions and statements to which it had sustained objections. Finally, we hold that the evidence supports the jury's negative finding on the issue of sudden passion. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

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