**Opinion issued October 6, 2011.**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-10-00821-CR,**

**NO. 01-10-00822-CR**

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**NATHANIEL JONES, III, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 228th District Court**
**Harris County, Texas**
**Trial Court Case Nos. 1267896 and 1267897**

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## MEMORANDUM OPINION

A jury convicted Nathaniel Jones, III of murder and aggravated assault and sentenced him to 45 years' confinement for each conviction. Jones raises two issues on appeal: (1) whether the trial court erred by denying his trial counsel's

motion to withdraw based on a potential conflict of interests and (2) whether the trial court erred in refusing to allow him to poll the jury after the guilt phase of the trial. We conclude that Jones has not demonstrated any actual conflict of interest between himself and his trial counsel and that he has not demonstrated any harm from the trial court's denial of his request to poll the jury on their guilty verdicts. We therefore affirm.

## Background

The State maintains that Jones was involved in a check fraud scheme with Timothy Lee and Earnest Green. Jones fabricated an employment identification card that was to be used in cashing a stolen check. Lee agreed to pay Jones $400 for the falsified identification card. Lee paid Jones $200, but still owed him $200. On November 24, 2008, Jones went to a garage warehouse where Lee and Green were having a few beers with William Marshall and Brent Powell. When Jones arrived, Lee went out to the parking lot to meet him. Jones and Lee had a heated discussion about the money Lee owed Jones. Marshall and Green then went out to the parking lot to try to break up the argument. Jones pulled out a gun and shot Lee. Lee turned to run, and Jones continued shooting. One of the additional shots hit Lee, and another one hit Marshall. Jones picked up the ejected shell casings and fled the scene. Lee suffered serious injuries, including an open fracture to his skull, nose bones, and long arm bone. Marshall died.

The State maintains that Jones, in violation of his probation from prior offenses, fled to Louisiana. He was eventually arrested there and brought back to Texas. In Texas, he was indicted for murder and aggravated assault. He pled not guilty. The trial court appointed Kyle Johnson to represent Jones. A few weeks before trial, Johnson filed a motion to withdraw, stating that Jones had filed a legal malpractice action against him based on Johnson's representation of Jones in a previous criminal matter. Johnson contended that this created a conflict of interest under Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct and that withdrawal was required by Rule 1.15(a)(1). *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15, 3.08, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (West 2005) (Tex. State Bar R. art. X, § 9). At the pretrial hearing on the motion to withdraw, Jones also requested that he be appointed new counsel. The trial court denied Johnson's motion to withdraw and Jones's request for appointment of a new attorney.

A jury found Jones guilty of murdering Marshall and committing aggravated assault against Lee. The trial judge read the jury's verdict aloud. No juror dissented or otherwise voiced disagreement with the verdict. After the judge sent the jury back to the jury room, Johnson requested that the jury be polled. He stated:

> I've had a few minutes to think about what's been going on this week and about how it seemed like [the jury was] locked up. And it occurs to me I probably should have asked on the spot to have them polled. They've only been out of the courtroom minutes. And I would request

> at this time that the jury come back in and be polled as to their verdict. Because I'm a little concerned that maybe some people cratered and aren't comfortable with their verdict.

The trial judge denied the request as untimely. He then brought the jury back in and dismissed them until the following Monday, when they would return for the punishment phase of the trial. After the jury was dismissed, Johnson renewed his request to poll the jury, stating that one of the jurors appeared to be crying as she left and he was concerned that she was not comfortable with the verdict. The trial court again denied the request.

Jones pled true to two enhancement paragraphs based on prior felony convictions. They jury assessed punishment at 45 years for murder and 45 years for aggravated assault. Johnson requested the jury be polled regarding their punishment verdicts. The court granted the request and polled the jurors on their punishment verdicts. All twelve jurors indicated that the two punishment verdicts were their verdicts.

**Ineffective Assistance of Counsel**

In his first issue, Jones contends that the trial court erred when it denied his trial attorney's motion to withdraw. Jones asserts that, as a result, he did not receive effective, conflict-free representation at trial. Jones does not disclose the nature of the alleged conflict or identify any manner in which the alleged conflict adversely affected his representation.

## A. Standard of Review for Motion to Withdraw

An attorney may not withdraw without the permission of the trial court. *Ward v. State*, 740 S.W.2d 794, 797 (Tex. Crim. App. 1987). The decision whether to permit counsel to withdraw is within the trial court's sound discretion. *Green v. State*, 840 S.W.2d 394, 408 (Tex. Crim. App. 1992), *cert. denied*, 507 U.S. 1020, 113 S. Ct. 1819 (1993). A court of appeals will not disturb that decision absent an abuse of discretion. *See id.*

## B. Conflict-Free Assistance of Counsel

The Sixth Amendment of the United States Constitution guarantees Jones the right to reasonably effective, conflict-free assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 344–45,100 S. Ct. 1708, 1716–17 (1980). But Jones does not have the right to his choice of court-appointed counsel: if he seeks court-appointed representation, he must accept the attorney selected by the court unless he can show adequate reason for the appointment of new counsel. *McKinny v. State*, 76 S.W.3d 463, 477 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (citing *Garner v. State*, 864 S.W.2d 92, 98 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd)). A trial court is under no duty to search until it finds an attorney agreeable to the defendant. *Id.* When there is an adequate reason for the appointment of new

counsel, the defendant must bring the matter to the trial court's attention and carry his burden of proving that he is entitled to new counsel. *Id.*

The parties agree that Jones's first issue is governed by the standard set forth by the United States Supreme Court in *Cuyler v. Sullivan*. Under the *Sullivan* standard, a criminal defendant asserting that he did not receive effective assistance of counsel due to a conflict of interest must show that (1) counsel "actively represented conflicting interests" and (2) counsel's performance at trial was "adversely affected" by the conflict of interest. *Sullivan*, 446 U.S. at 349–50, 100 S. Ct. at 1719; *Acosta v. State*, 233 S.W.3d 349, 352–53 (Tex. Crim. App. 2007). The mere possibility of conflict is not sufficient to impugn a jury's conviction; instead, a defendant must establish an actual conflict. *Sullivan*, 446 U.S. at 350, 100 S. Ct. 1719. Once the defendant shows an actual conflict and that the conflict adversely affected the adequacy of his representation, the defendant need not demonstrate prejudice. *Sullivan*, 446 U.S. at 349–50, 100 S. Ct. 1719; *Acosta*, 233 S.W.3d at 353.

**1. Actual Conflict of Interest**

An actual conflict of interest exists "if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of his client's interest." *Acosta*, 233 S.W.3d at 355 (quoting *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App.

1997)). When a criminal defendant files a grievance or other legal proceeding against his court-appointed counsel, it does not necessarily give rise to an actual conflict of interest, even though the defendant and his counsel may be adversaries in other legal proceedings. *See Dunn v. State*, 819 S.W.2d 510, 519 (Tex. Crim. App. 1991) (rejecting defendant's conflict of interest claim based on defendant's malpractice action against attorneys); *Perry v. State*, 464 S.W.2d 660, 664 (Tex. Crim. App. 1971) (holding that defendant did not establish actual conflict of interest based on civil rights action against attorney); *McKinny*, 76 S.W.3d at 477–78 (holding that defendant did not establish actual conflict of interest or adverse affect when defendant filed grievance against counsel); *see also Garner*, 864 S.W.2d at 99 (holding that defendant did not establish actual conflict in prosecution with respect to which defendant claimed to have filed complaint with bar association). Courts of appeals have been weary of the possibility of defendants filing lawsuits and grievances to delay legal proceedings or force a change of counsel. *Perry*, 464 S.W.2d at 664 ("[I]f appellant's contention were upheld, a defendant could effectively delay or prevent an appeal (or trial) by filing a civil suit against his appointed counsel.").

To establish a conflict of interest, Jones relies exclusively on the civil action he filed against Johnson based on Johnson's representation of Jones in an unrelated prosecution for theft. But Jones's civil suit against Johnson does not create a *per se*

actual conflict. *See Dunn*, 819 S.W.2d at 519; *Perry*, 464 S.W.2d at 664; *McKinny*, 76 S.W.3d at 477–78. Instead, Jones has the burden of establishing the existence of an actual conflict between Johnson's interest in the civil action and Jones's interest in his murder and assault prosecution. *See Dunn*, 819 S.W.2d at 519; *Perry*, 464 S.W.2d at 664; *McKinny*, 76 S.W.3d at 477–78. Jones fails to meet that burden. He does not identify any instance in which he claims Johnson was "required to make a choice between advancing [Jones's] interest in a fair trial or advancing [Johnson's own interest in the civil litigation] to the detriment of [Jones's] interest." *Acosta*, 233 S.W.3d at 355. Moreover, our review of the record has not revealed any such instance. Johnson filed pretrial motions, cross-examined each of the State's witnesses, presented testimony from Jones regarding his version of events, and at the punishment phase, offered a statement as to why Jones's punishments should be on the lower end of the statutorily-defined punishment ranges. Johnson's defense of Jones on the basis of self-defense resulted in jury deliberations that spanned three days and included numerous questions and requests to have testimony read back.

Jones's only citation to the record in support of his conflict assertion is to Johnson's motion to withdraw, in which Johnson states that there is a conflict of interest under Rule 3.08 of the Texas Disciplinary Rules because Johnson could be called to give testimony adverse to Jones in the civil action. Rule 3.08 governs

situations when an attorney in a case is or becomes a material witness in the case. *See* Tex. DISCIPLINARY R. PROF'L CONDUCT 3.08, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, Subtit. G, app. A (West 2005). Under Rule 3.08(b), an attorney may not continue to represent a client when the attorney believes the he will be compelled to furnish testimony that will be substantially adverse to the client, unless the client gives informed consent. *Id.* Rule 3.08 applies to a situation when an attorney provides testimony in a case in which he also acts as an advocate. *See, e.g., Powers v. State*, 165 S.W.3d 357, 359 (Tex. Crim. App. 2005); *Gonzalez v. State*, 117 S.W.3d 831, 841 (Tex. Crim. App. 2003). The rule addresses two concerns that arise when an attorney becomes a likely witness in a proceeding in which he represents a client: (1) the client's case may be harmed by counsel assuming the dual roles of advocate and witness and (2) jury confusion may arise when an attorney in the case testifies. *Gonzalez v. State*, 63 S.W.3d 865, 876 (Tex. App.—Houston [14th Dist.] 2001), *aff'd*, 117 S.W.3d at 843; *see also Powers*, 165 S.W.3d at 359.

Jones does not assert, or cite any authority for the proposition, that Rule 3.08 is implicated when an attorney may be called as a witness in another, unrelated proceeding in which the client is a party. Nor does Jones identify any harm that might result from Johnson's role as a potential witness in the civil proceeding and an advocate in this separate criminal matter. Because Johnson was only an

advocate and not a witness in this matter, there was no risk of the prejudice or jury confusion that may arise when an attorney plays the dual roles of advocate and witness in a single proceeding. *Cf. Powers*, 165 S.W.3d at 359; *Gonzalez*, 117 S.W.3d at 843. The harms against which Rule 3.08 protects are not threatened here.

We therefore conclude that Jones has not established that Johnson actually represented conflicting interests, a "constitutional predicate" for asserting ineffective assistance of counsel on the basis of an alleged conflict of interests. *See Sullivan*, 446 U.S. at 350, 100 S. Ct. 1719; *see also McKinny*, 76 S.W.3d at 478.

**2. Inquiry by the Trial Court**

Jones also asserts that the trial court failed to make an adequate inquiry into the potential conflict created by Jones's lawsuit against Johnson. When a criminal defendant brings a potential conflict of interest to the attention of the trial court, the trial court has an obligation to investigate and determine whether the risk of the conflict of interest warrants remedial action. *Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S. Ct. 1173, 1179 (1978) (addressing potential conflict created by joint representation of three codefendants); *Dunn*, 819 S.W.2d at 519 (extending *Holloway* beyond multiple representations). The failure to conduct such an inquiry, when necessary, is reversible error if the defendant establishes that the conflict of interest adversely affected his counsel's performance. *Mickens v. Taylor*, 535 U.S.

162, 173–74, 122 S. Ct. 1237, 1244–45 (2002); *see also Routier v. State*, 112 S.W.3d 554, 582 (Tex. Crim. App. 2003).

The trial court had actual knowledge of the alleged conflict of interest between Johnson and Jones because of Johnsons' motion to withdraw. The trial court conducted a very brief hearing on Johnson's motion to withdraw, during which Jones also individually requested appointment of new counsel. But neither Jones nor Johnson raised any new or additional arguments or evidence at the hearing beyond that put forth in Johnson's two-page motion for withdrawal.

We have already concluded that the evidence and argument advanced here and before the trial court do not establish the existence of an actual conflict of interest. Johnson and Jones had an opportunity to present additional evidence or argument at their pretrial hearing. Jones does not contend that he was prevented from doing so. Nor does Jones identify on appeal any additional evidence of conflict that the trial court could have discovered upon further investigation. We therefore conclude that the trial court did not commit reversible error in failing to take further action with respect to the alleged potential conflict created by Jones's civil action against Johnson. *See Dunn*, 819 S.W.2d at 520 (observing that, despite defendant's many objections to appointed counsel, he "never made any claim that there existed a conflict of interest which actually affected the adequacy of his representation by [his court-appointed counsel].").

We overrule Jones's first issue.

## Failure to Poll the Jury After Guilt Phase

In his second issue, Jones argues that the trial court erred when it refused to poll the jury shortly after its verdict in the guilt phase of the trial. Jones asserts that the trial court's denial of his request to poll the jury caused him some unspecified harm, such that his conviction should be overturned.

### A. Polling the Jury

Article 37.04 of the Texas Code of Criminal Procedure provides for the reading and entry of the jury's verdict by the trial court. TEX. CODE CRIM. PROC. ANN. art. 37.04 (West 2006). Under article 37.04, the verdict is entered into the minutes of the court if it is in proper form, no juror dissents, and neither party requests a poll of the jury. *Id.* Article 37.05 establishes the parties' right to have the jury polled and governs the process for entry of the jury's verdict when a poll is conducted. *Id.* art. 37.05 (West 2006). Under article 37.05, each juror is asked if the verdict is his or her verdict. *Id.* If each juror answers affirmatively, then the verdict is entered into the minutes of the court. *Id.* If a juror answers in the negative, the jury must retire again to consider its verdict. *Id.*

The purpose of the jury poll is to ensure the unanimity of the jury verdict by establishing that each juror agrees with the verdict as announced. *See Andrews v. State*, No. 05-92-00411, 1993 WL 19931, at *3 (Tex. App.—Dallas Jan. 29, 1993,

no pet.) (not designated for publication); *see also Humphries v. Dist. of Columbia*, 174 U.S. 190, 194, 19 S. Ct. 637, 638–39 (1899) (stating that object of jury poll is "to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent."). Although article 37.05 endows a criminal defendant with "the right to have the jury polled," TEX. CODE CRIM. PROC. art. 37.05, that right is waived if the defendant fails to properly request the poll. *Mathis v. State*, 471 S.W.2d 396, 398 (Tex. Crim. App. 1971).

Article 37.05 does not provide a deadline for such a request, but our law establishes that a jury should not be reassembled after "their identity as an organized body ha[s] ceased." *Perryman v. State*, 102 Tex. Crim. 531, 533–34, 278 S.W. 439, 440 (Tex. Crim. App. 1925). "To give a verdict the vitality that will authorize the imprisonment of an individual, it is essential that it be by a jury selected and impaneled under the forms of law, and that the verdict be rendered before the jury is dissolved." *Id.* The Court of Criminal Appeals has held that the trial court may recall the jury to correct their verdict if the jury "has not separated or have only momentarily separated and are still in the presence of the court and it appears that no one has talked to the jurors about the case." *Webber v. State*, 652 S.W.2d 781, 782 (Tex. Crim. App. 1983). This court has held that, when a jury was discharged and had been separated over night, it would have been improper

for the trial court to recall the jurors for a jury poll requested by the defendant. *Phan v. State*, No. 01-96-01228-CR, 2000 WL 730655, at *3 (Tex. App.—Houston [1st Dist.] June 8, 2000, no pet.) (not designated for publication).

Here, the jury was not dissolved, and retained its unity of identity as a jury. Although the jurors had completed the guilt-innocence phase of the trial, they retained their identity as a jury for the punishment phase of the trial. At the time of Johnson's first request to poll the jury, the record indicates that the jurors had been out of the court room for only a short time and had been sent together to the jury room. When the judge sent the jury to the jury room, he stated that further instructions would follow. He did not expressly release the jury from any of the instructions that they had been given with respect to the deliberative process. The trial judge stated on the record that he went to the jury room and admonished the jurors not to talk about the case and that they were still in trial.[1] He stated that they indicated that "they understood my instructions, the same instructions I have been giving all week." Under these circumstances, we conclude that Johnson's request to poll the jury was not so untimely as to waive Jones's "right to have the jury polled" under article 37.05. TEX. CODE CRIM. PROC. art. 37.05. The trial court therefore erred in denying the request to poll the jury.

[1] It is not clear from the record whether this occurred before or after Johnson's first request to poll the jury.

### A. Harmless Error

Having determined that the trial court erred in denying Jones's request to poll the jury, we must now consider whether the error requires reversal. The state contends that the trial court's error in failing to poll the jury is non-constitutional error, which entitles Jones to reversal only if he meets his burden of demonstrating harm. *See* TEX. R. APP. P. 44.2(b). Jones does not argue that a failure to poll the jury is constitutional error or that he need not show harm. Instead, he asserts in a single sentence that he "was harmed by [the trial court's] denial [of his request to poll the jury] and his conviction should be overturned." But Jones provides no specific allegations, authority, or citations to the record to support this contention. Thus, we must determine whether the denial of a request to poll the jury is constitutional or non-constitutional error. If it is non-constitutional error for which Jones must demonstrate harm, he has not satisfied that burden. *See id.*

We agree with the State that the denial of the right to poll the jury is not constitutional error. Within the meaning of rule 44.2(a), constitutional error is an error that directly offends the United States Constitution or the Texas Constitution, without regard to any statute or rule that might also apply. *Thompson v. State*, 95 S.W.3d 537 (Tex. App. —Houston [1st Dist.] 2002, no pet.). "That is, an error is constitutional only if the correct ruling was constitutionally required." *Id.* Although the constitution guarantees Jones the right to conviction by a unanimous jury, *Ngo*

*v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005), the jury-polling process in article 37.05 merely provides a procedural means of verifying that right. Jones has not identified any constitutional provision that would require polling of the jury, and jury polling is not the only means by which the jury's unanimity can be tested. *See, e.g.*, *Thomley v. State*, 987 S.W.2d 906, 911 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (observing that defendant with reason to believe jury's verdict is not unanimous "could have conducted his own polling of the jury" through juror testimony upon motion for new trial).

In *Thomley*, we held that the criminal defendant's request to poll the jury the day after the reading of the verdict was timely under the "peculiar circumstances" of the case but that the trial court's error in denying the request did not require reversal because the defendant failed to show that he was harmed by the error. *Thomley*, 987 S.W.2d at 911. We observed that, "if there were any substance to appellant's complaint, he could have preserved it by filing a motion for new trial. A motion for new trial is necessary to adduce facts of a matter not otherwise shown on the record." *Id.* "In a motion for new trial, appellant could have brought jurors to testify what their verdict was. Appellant could have conducted his own polling of the jury. This is the only way we could determine whether any harm resulted from the trial court's misreading of the verdicts." *Id.* Here too, if Jones had serious concern about the unanimity of the jury's verdict, those doubts could have been

dispelled or substantiated through a motion for new trial.[2] But in the absence of any basis for concluding that Jones was harmed by the trial court's denial of his request to poll the jury after the guilt phase of his trial, we cannot reverse his convictions. *See* TEX. R. APP. P. 44.2(b).

Appellant's second issue is overruled.

**Conclusion**

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

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

[2] It is worth noting that the jury was polled during the punishment phase of the trial, and each juror answered affirmatively to the forty-five-year sentences imposed for each of Jones's convictions. It is possible that the jury's demeanor during the punishment phase and subsequent polling quelled any concerns Johnson had about the individual jurors' agreement with the guilty verdicts.