Affirmed and Memorandum Opinion filed October 7, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00936-CR

VINCENTE GONZALES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 48206

MEMORANDUM OPINION

A jury found the appellant Vincente Gonzales guilty of robbery and assessed his punishment at eight years' confinement in the Texas Department of Criminal Justice, Institutional Division, and a $2,000 fine. In a single issue, the appellant contends he received ineffective assistance of counsel because he and his co-defendant brother were represented by the same law firm, which created an actual conflict of interest that adversely affected his lawyer's performance. Based on the record before us, we affirm.

The Facts

On Thanksgiving Day 2007, at around 1:30 or 1:45 in the afternoon, Christos Vastakis went to an Exxon station in Fort Bend to pick up drinks and beer for his family. Vastakis's fifteen-year-old daughter and twelve-year-old niece were with him. Vastakis stood in line to pay for his items, and when he reached the cashier he paid in cash, leaving between $70 and $75 in his wallet. As he placed his wallet in his back pocket, he felt someone grab him by his neck and say, "Give me your wallet, nigger." At first Vastakis thought it was a joke, but then he felt pain and the wallet being removed from his pocket. Vastakis turned and grabbed the appellant, who pushed Vastakis into some shelving, again causing him pain.

As his daughter and niece screamed and shouted in the ensuing commotion, Vastakis chased the appellant out of the store. Vastakis grabbed the appellant and held him down as he tried to retrieve the wallet. As Vastakis was wrestling with the appellant, the appellant's brother, Marcos Gonzales, came to the appellant's defense. Marcos hit and kicked Vastakis several times in the head, saying "Leave my little brother alone, you nigger." Vastakis, fearing he would pass out from the blows, let the appellant go. The appellant and Marcos then drove away in a blue Cadillac limousine that was parked outside. Vastakis chased the limousine in his pickup truck. Eventually, Vastakis found the limousine in a ditch and the police holding the appellant and Marcos in handcuffs. Vastakis's wallet was located at the scene, but his money and driver's license were no longer in it.

Procedural and Appellate Background

The appellant and Marcos were both charged with robbery.[1] On the State's unopposed motion to consolidate, the two were tried together. At trial, the appellant was

[1] The record does not contain an indictment or jury charge pertaining to Marcos; therefore, we have drawn information pertaining to him from the reporter's record. The State's motion for joinder of prosecution also reflects that both the appellant and Marcos were charged with the same robbery.

represented by Peter DeLeef, and Marcos was represented by Charles Thompson. DeLeef and Thompson were partners in the same law firm. On appeal, the appellant contends DeLeef and Thompson, as members of the same firm, actively represented conflicting interests and this conflict adversely affected DeLeef's representation of the appellant. Specifically, the appellant contends he was sacrificed at trial for the sake of Marcos, who was presented as the older, more successful brother. The appellant contends he was harmed by the lawyers' trial strategy designed to convince the jury that Marcos was a college student who merely came to his brother's defense, while the appellant, on the other hand, was intoxicated, high, and made a bad decision for which he alone should be punished. The appellant contends the lawyers presented this strategy even though it was Marcos, not the appellant, who inflicted the most grievous injuries on Vastakis.

The State responds that the appellant waived any conflict of interest, because he stated specifically on the record that he was satisfied with his defense strategy and then actively participated in that strategy at trial. The State asserts the appellant cannot show that an actual conflict adversely affected his counsel's performance because his counsel worked diligently throughout the trial to present the strategy appellant specifically consented to use; namely, that he would seek a lesser-included punishment for the appellant because the evidence of the appellant's guilt for some offense was overwhelming, and Marcos's counsel would likewise seek a lesser punishment for Marcos, against whom there was less damning evidence. Even if a conflict existed, the State concludes, the appellant's counsel effectuated the trial strategy the appellant himself stated he desired and the appellant was not denied effective assistance of counsel. Although we acknowledge this a difficult case, for the reasons stated below, we affirm.

Standard of Review

A defendant in a criminal trial is entitled to effective assistance of counsel under both the United States and Texas Constitutions. U.S. Const. Amend. VI; Tex. Const. art.

I, § 10; *see also* Tex. Code Crim. P. Ann. Art. 1.051. A defendant who does not object at trial to joint representation cannot obtain a reversal on appeal unless he shows that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *Acosta v. State*, 233 S.W.3d 349, 352–53 (Tex. Crim. App. 2007). A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. *Cuyler*, 446 U.S. at 349–50; *Routier v. State*, 112 S.W.3d 554, 581–82 (Tex. Crim. App. 2003). But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. *Cuyler*, 446 U.S. at 350. The mere possibility of conflict is insufficient to impugn a criminal conviction. *Id.*; *James v. State*, 763 S.W.2d 776, 778–79 (Tex. Crim. App. 1989). Further, assuming without deciding that joint representation by two law partners is considered as one attorney, requiring or permitting a single attorney to represent codefendants is not *per se* violative of constitutional guarantees of effective assistance of counsel. *Burger v. Kemp*, 483 U.S. 776, 783 (1987).

An actual conflict of interest requiring reversal exists when one defendant stands to gain significantly by adducing evidence or advancing arguments that are damaging to the cause of a codefendant whom counsel is also representing. *James*, 763S.W.2d at 779. Potential or speculative conflicts identified by an appellate court in hindsight do not rise to the level of actual conflicts requiring reversal. *Id.* at 780. The mere fact that each codefendant would have been willing to accuse the other of nefarious conduct, but chose not to at trial while both were represented by the same law firm, does not automatically mean that the attorney either had an actual conflict or that the attorney's performance was adversely affected by it. *See id.*; *Routier*, 112 S.W.3d at 584–85; *see also Mickens v. Taylor*, 535 U.S. 162, 171 (2002) (explaining that a "mere theoretical division of loyalties" cannot establish a right to relief because an actual conflict means a conflict that affected counsel's performance).

Analysis

Before the start of trial, the trial court granted the prosecutor's unopposed motion to consolidate the two brothers' cases. The court also permitted DeLeef to question the appellant on the record concerning the waiver of any conflict. DeLeef stated he and Thompson had spoken with both defendants on the day of trial and the day before and both defendants had waived any conflict. The appellant was then sworn and DeLeef questioned him concerning their discussions. The appellant agreed that he and DeLeef had discussed the potential for conflict and he did not believe that there was any conflict, but if there were, he waived it.[2] After voir dire, but before the beginning of the State's case, the prosecutor again raised the issue of conflict and asked the appellant if he understood that he could have an attorney from another firm represent him, to which he answered affirmatively. The prosecutor then asked specifically:

> Q . . . You are aware of the possible consequences of having lawyers from the same firm represent you, correct?
>
> A (No response.)
>
> Q That there might be a conflict with regards to one of you taking the fall versus the other one saying they are innocent - - that might be a detriment to one or the other? Now, you are aware of that, correct, Vincente?
>
> A Yes, sir.

DeLeef interjected that he had explained to the brothers that one of the situations that could occur is when one client would "throw the other client under the bus." The court then specifically informed the appellant and Marcos that they could have different counsel represent them. The appellant replied that he was "satisfied" with the representation he had.

[2] Marcos was similarly questioned and also waived any conflict.

The appellant suggests that the record does not support that he, a nineteen-year-old high-school student with no prior experience in the adult criminal justice system, made a knowing, intelligent, and voluntary waiver. *See Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997); *United States v. Greig*, 967 F.2d 1018, 1021 (5th Cir. 1992).[3] But the appellant concedes that his failure to object below requires that he demonstrate (1) an actual conflict of interest (2) that adversely affected his attorney's performance. *See Burger*, 483 U.S. at 783; *Routier*, 112 S.W.3d at 582.

The appellant complains that an actual conflict adversely affected his counsel's performance because the strategy DeLeef and Thompson used throughout the trial was to minimize his brother Marcos's conduct and to stress the appellant's own responsibility for the incident. He also contends that his attorney went so far as to absolve Marcos of all blame in his opening statement and conceded during his closing argument that the State had met its entire burden of proof and proven every element of robbery against him. The appellant also asserts that the only defense even attempted on his behalf was that he was intoxicated at the time of the incident, and he testified that he did not know whether intoxication was a defense to prosecution. Having carefully reviewed the record, we disagree with the appellant's characterization of the record and his conclusion that he has demonstrated an actual conflict that adversely affected his counsel's performance.

The evidence against the appellant was extremely strong. The complainant, Vastakis, testified in detail concerning the incident and positively identified the appellant at trial. Vastakis's niece and the cashier who assisted Vastakis also testified and identified the appellant as the person who assaulted Vastakis and took his wallet. There

[3] The appellant does not assert that the trial court should have held a hearing of the type the Fifth Circuit outlined in *United States v. Garcia*, 517 F.2d 272, 277–78 (5th Cir. 1975). *See Greig*, 967 F.2d at 1021–22. Texas trial courts may find *Garcia* more instructive than current state law, however, to the extent that *Garcia* suggests specific inquiries that should be asked of a defendant if the trial court discerns a conflict of interest. *See Garcia*, 517 F.2d at 277 (instructing trial courts to "carefully evaluate the persistent efforts of the defendants to waive any imperfections in such representation which may be apparent to the court").

also was a videotape showing him committing the offense. And the appellant was found, within minutes of the robbery, with an amount of money matching that taken from the victim, as well as the victim's wallet, social security card, and driver's license.[4]

In the face of this overwhelming evidence, trial counsel's strategy, contrary to the appellant's characterization, was to attempt to obtain a jury finding on a lesser-included offense of assault. The appellant complains, however, that in opening argument DeLeef argued at length that Marcos was not guilty of any offense, but argued that the appellant was guilty and should be punished. The appellant specifically points to the following excerpt from DeLeef's opening statement:

> Vincente, on the other hand, you make the judgment call. You decide whatever. You watch the facts . . . my client, Vincente, was messed up, been drinking, smoking marijuana, some Xanax. He didn't know what he was doing. Unexcusable [sic]. . . . I'm not saying he didn't do anything. He did. And he needs to be punished for something that involved a robbery case.

The appellant also points to Thompson's opening statement following the State's case, in which he stated, "The evidence is going to show you that Vincente Gonzales had been using Xanax, marijuana, and alcohol. And that when he is, frankly, drunk and high, the evidence is going to show that in the past he has done stupid things, and made stupid decisions."[5] The appellant contends there was no evidence presented that in the past he did stupid things or made stupid decisions.

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[4] In contrast, there was far less evidence against Marcos. The testimony showed that Marcos never entered the store and that he became involved only after Vastakis began wrestling with the appellant outside the store. Vastakis identified Marcos and testified that he told Marcos that the appellant had taken his wallet, but Marcos continued to hit and kick him anyway. The evidence also showed that Marcos drove the Cadillac in which he and the appellant fled.

[5] The appellant also points to DeLeef's cross-examination of Vastakis, in which he states, in referring to the appellant, "He is not a young guy. He is not a teenager. I mean, he is a big guy" and "He is young. He is going to fight, he can fight. He is strong." Viewed in context, however, it becomes apparent that DeLeef was attempting to get Vastakis to concede that he would have gotten the better of the appellant as they struggled outside the store if Marcos had not intervened. And, on further questioning, Vastakis agreed that he was "strangling" the appellant until his brother joined in.

Viewed in isolation, these snippets of argument do reflect unfavorably on the appellant. But the record shows that these statements were not merely an attempt to benefit Marcos to the appellant's detriment, as the appellant contends. Placed in context, they were consistent with an overall trial strategy to undermine the intent element of robbery by portraying the appellant as someone who did not intend to commit robbery, but merely made a bad judgment call while impaired. Given the overwhelming evidence of the appellant's guilt, it was not an unreasonable strategy to have the appellant accept some fault, and by denying premeditation, possibly obtain a finding of a lesser-included offense. Because no motion for new trial was made to inquire into counsel's trial strategy or his discussions with the appellant regarding trial strategy, we do not know the reasoning behind the strategy. It is possible that the appellant considered and rejected a strategy of arguing that he was not guilty of any offense out of concern that, in light of the evidence, such a strategy risked impairing his or his counsel's credibility with the jury. Or the appellant could have considered an alternative strategy of arguing that Marcos was more culpable, and rejected it as too inconsistent with the evidence to be plausible.

DeLeef's actions throughout the trial were consistent with the strategy of seeking a jury finding on a lesser-included offense rather than robbery. DeLeef began his opening statement by arguing that this was not a robbery case but a misdemeanor assault case. On cross-examination of the State's witnesses, DeLeef and Thompson both suggested through cross-examination several factors militating against premeditation, including the appellant's intoxication, the brothers' distinctive blue Cadillac limousine that had "For Sale" signs with phone numbers in the windows, and evidence that the incident occurred during the middle of the day and there were many customers in and around the store at the time.[6] And, in Thompson's opening statement, he argued, "what the evidence is going to show you is that Vincente didn't commit a robbery, and that Marcos didn't have

[6] Counsel also prevented the admission of a possible extraneous offense by successfully arguing that evidence of four bags of marijuana found near the Cadillac should not be admitted into evidence.

any knowledge of the robbery. . . . And we're going to request that you find both of them not guilty of the allegations."

Also consistent with this strategy, the appellant testified that he did not plan to rob the complainant, and that, although he took responsibility for his actions, it was for the jury to decide whether he was guilty of a felony or a misdemeanor. The appellant testified that he had gone into the store to get ice and there was no plan to rob anyone. He also testified that he intended only to play a joke on Vastakis but got scared when Vastakis turned around. He admitted that he was drinking, taking Xanax, and using marijuana, and did not remember much of that day's events. DeLeef also elicited testimony from the appellant that he was nineteen, was still in high school, and wanted to go to college. The appellant also testified that he suffered from depression and that this had contributed to his substance abuse. Reinforcing the theme that the appellant was guilty of only a lesser offense, the appellant also testified that he did not remember taking Vastakis's wallet, he did not intend to rob Vastakis, and he had made a "stupid decision."

DeLeef's strategy was at least initially successful because he requested and received instructions on two lesser-included offenses, theft and assault, and he argued that the appellant should be found guilty of a lesser-included offense in light of his intoxication and lack of premeditation. DeLeef also moved for a directed verdict based on a lack of evidence of intent to rob at the end of the State's case and again at the end of the defense case, but the trial court denied both motions.

The appellant also contends the trial strategy of convincing the jury that the appellant acted alone conflicts with the evidence that "the only actual injuries" sustained by Vastakis were inflicted by Marcos. But the record refutes this assertion. Although Vastakis testified that Marcos kicked him several times causing injuries to his eye and head, the evidence also supported a finding that the appellant assaulted Vastakis. Vastakis testified that the appellant squeezed his neck and he felt pain as his wallet was being taken, and when Vastakis turned around and grabbed him, the appellant pushed

him into some shelving and he again felt pain. Similarly, the cashier testified that the appellant "got him around the throat and pulled him back" and then "threw him down on the ground." She also testified that Vastakis and the appellant struggled, and the appellant threw Vastakis against a metal rack of Hostess pastries before leaving with Vastakis's wallet. The jury also was able to view the incident on the surveillance video, which the cashier testified accurately depicted the day's events. Thus, although conceivably the appellant's counsel could have stressed the more severe injuries Marcos inflicted, the evidence was more than sufficient to demonstrate at least a theft and an assault. Further, during the punishment stage, the appellant's counsel did argue that it was Marcos, not Vincente, who inflicted Vastakis' injuries.

The appellant also complains about DeLeef's closing argument, in which he began, "Vincente Gonzales, my client, is an idiot. You'll agree with me, I can't find one of the twelve of you that doesn't think he is an idiot. I think he is an idiot." Shortly after this, DeLeef argued that the video was the best evidence and stated, "You have got to look at the elements as the way they are filmed. And it does look like the State has met all of their elements for robbery. No question about it." He also mentioned that it sounded like he was arguing for the State and said, "I hope it does." The appellant contends that, in effect, DeLeef argued that the State had met its burden to prove robbery, but the jury should not convict him of that because it would brand him as a felon for the rest of his life. However, immediately after DeLeef stated that it "does look like" the State met its burden to prove robbery, he explained that he would "come back to this in a second." In context, the record shows that what DeLeef meant was that although it may appear that the State had met its burden, the jury was to decide whether it had actually succeeded. In that vein, DeLeef continued, explaining:

> You can find Vincente guilty of robbery. You can find him guilty of assault. Or you can find him guilty of theft. I think this is an assault case. I don't think it is a robbery case. I don't necessarily think it is a theft case, but we have three choices in there because you guys make the decision as to the outcome.

DeLeef went on to argue that the appellant was not contending that he should be found not guilty because he was intoxicated; rather, his argument was that the State was required to meet every element of the offense of robbery beyond a reasonable doubt, which was a very high burden, and the jury could weigh the evidence of intoxication when determining whether the State proved the element of intent.

The appellant also complains that in his closing argument, DeLeef argued, "Yeah, he hit him. You saw it on the video. No question about it. Was it an outright beating? No. Does it make any difference? No. He screwed up. In front of his [Vastakis's] kids. It is inexcusable. Wanting to punish him for something - - I'm not here to say walk the guy, find him not guilty of anything." But just before these statements, DeLeef argued "They have to prove intent. They have to prove knowledge beyond a reasonable doubt. High burden, extremely high burden." He again stressed that this was not a robbery case and the jury should find the appellant guilty only of assault. DeLeef also repeated this theme when discussing the evidence tending to show the appellant's actions were not premeditated, including the evidence that the appellant and Marcos came to the store in a distinctive Cadillac limousine with phone numbers in the windows, it was the middle of the day, the appellant had no weapon, and he left the store without taking money from the registers. Ultimately, however, the jury found the appellant guilty of robbery, and found Marcos guilty of the lesser-included offense of assault.

At the punishment stage, DeLeef argued that the appropriate punishment for the appellant was probation. He elicited testimony from the appellant's mother and father and from the appellant himself that he could successfully complete probation and that he would be better rehabilitated on probation than in prison. The appellant also testified, and he admitted responsibility, apologized to Vastakis and his family, and offered to pay Vastakis's medical bills incurred as a result of the offense. DeLeef, in closing, argued that although the jury had found that the appellant had committed robbery, there was no weapon used or other aggravating circumstances. He also argued that the underlying

theft and assault were misdemeanors, "because we know [Vastakis's] injuries came from Marcos." The State argued that the appellant should receive the maximum punishment of twenty years' confinement in prison, and that Marcos should receive the maximum of one year in jail. The jury assessed punishment against Vincente of eight years in prison, and assessed punishment against Marcos of 365 days in state jail. Both were assessed fines of $2,000 each.

The appellant's complaint is essentially that he was compared unfavorably with his codefendant, which alone does not rise to the level of constitutionally ineffective assistance of counsel. Viewed in context, his counsel's performance reflected a logical strategy given the evidence at trial. The appellant does not explain how trial counsel should have defended him, or what evidence or arguments he should have advanced but did not. On this record, the strategy of seeking and accepting responsibility for a lesser-included offense was a legitimate one. It was also potentially beneficial to both brothers, as the State also argued that at the very least Marcos should be found guilty of robbery as a party to the appellant's commission of the offense.

In reaching this conclusion, we are guided primarily by two cases, *James v. State* and *Gaston v. State*. In *James v. State*, two brothers were accused of aggravated robbery, were represented at trial by the same counsel, and pursued a joint defensive strategy. 763 S.W.2d at 777. The brothers were convicted, and on appeal one brother claimed a conflict of interest had denied him the right to effective counsel. *Id.* at 776–77. The intermediate appellate court overturned the conviction on the ground that because the brothers could have chosen to accuse each other of committing the offense, their counsel was operating under a conflict of interest. *See id*. at 780–82. The Texas Court of Criminal Appeals overruled the intermediate court, holding that the mere possibility that the brothers could have chosen to accuse each other of committing the crime did not mean that an actual conflict existed. *Id.* at 782.

More recently, in *Gaston v. State*, the First Court of Appeals similarly concluded that the fact that codefendants may choose joint representation when they could have instead implicated each other does not necessarily create a conflict of interest. 136 S.W.3d 315 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd). In *Gaston*, two codefendants were found in a hotel room with cocaine. *Id.* at 317–18. Either could have implicated the other, but instead they chose to be represented by one attorney and present a joint defense, primarily attacking the recovery of the cocaine evidence as the product of an illegal search. *See id* at 319. When this argument failed and the appellant was convicted, she asserted her counsel was operating under a conflict of interest that denied her effective assistance of counsel. *Id.* at 318. In her motion-for-new-trial hearing, the appellant claimed that her codefendant actually possessed the cocaine and she was merely present. *Id.* at 320–21. The court of appeals upheld her conviction despite this testimony, noting that the trial court was not required to take the testimony as true. *Id.* The court also noted that because her trial counsel did not testify at this hearing, it was possible that her counsel had informed her of the potential conflict and she may have waived it, choosing instead to pursue the joint defense. *Id.* at 321. Further, the court concluded that the chosen strategy advanced arguments helpful to both codefendants under the particular facts of the case, and although the strategy ultimately failed, the failure was not due to an actual conflict of interest. *Id.* As the court explained, "Trial counsel was making the argument with the best possible chance of success in asking the jury to assess minimal punishments based on the lack of aggravating circumstances surrounding the present offense. One may disagree with that strategy, but there is no conflict of interest in the strategy at all." *Id.*

These cases illustrate that the mere possibility that a defendant could have pursued a different defensive strategy, including choosing to accuse his codefendant of committing the charged offense, does not necessarily mean that some conflict of interest adversely affected the defense attorney's performance. Here, even assuming that there was a conflict of interest, the appellant has not demonstrated that the pursuit of a joint

defensive theory that potentially could have benefitted both defendants—rather than some other, speculative strategy identified in hindsight—adversely affected the appellant's counsel's performance. *See Mickens*, 535 U.S. at 171; *Cuyler*, 446 U.S. at 350; *James*, 763 S.W.2d at 782. Further, the appellant was put on notice of potential conflicts of interest and actively participated in the chosen strategy. *See James*, 763 S.W.2d at 782. Given the overwhelming evidence that he was guilty of some offense, trial counsel's strategy was logical and was consistently implemented throughout the trial. Merely because the strategy was ultimately unsuccessful does not mean that any actual conflict adversely affected the appellant's counsel's performance. *See Gaston*, 136 S.W.3d at 321.[7]

Finally, to the extent the appellant contends he received ineffective assistance of counsel because trial counsel argued that Marcos was less culpable than the appellant, this court has held in similar circumstances that a trial counsel's argument that one codefendant is less culpable than the other does not demonstrate an actual conflict because counsel's remarks would not necessarily cause the fact finder to assess a harsher punishment against the other. *Kegler v. State*, 16 S.W.3d 908, 913 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). In *Kegler*, two brothers, Kedric and Terry, were charged with aggravated robbery and tried together. *Id.* at 910. They pleaded guilty and the trial court sentenced Kedric to thirty years in prison and Terry to forty years in prison. *Id.* One attorney represented both Kedric and Terry at the plea and sentencing hearings. *Id.* at 911. On appeal, Terry argued that he received ineffective assistance of counsel based on his attorney's actions in emphasizing Kedric's lesser role in the offense. *Id.* at 914. The court noted that "the trial court did not necessarily assess a harsher punishment against Terry merely because defense counsel pointed out that Kedric stayed in the car, did not know anyone had been shot, and would have felt differently had his brother been 'on the scene and had a gun.'" *Id.* Further noting that the trial court had all the relevant

[7] We do not hold that there was no conflict of interest. Instead, we assume that there was a conflict, but hold that such conflict did not adversely affect the appellant's trial counsel's performance.

facts of the case before it, the court held that defense counsel's summary of the evidence did not unfairly prejudice either brother or manifest a conflict of interest. *Id.*; *see also Gonzales v. State*, 14-99-00893-CR, 2001 WL 837949, *2–3 (Tex. App.—Houston [14th Dist.] July 26, 2001, pet. ref'd) (not designated for publication) (holding that joint representation of two brothers charged with aggravated robbery did not create an actual conflict of interest when counsel argued that appellant's brother was less culpable than appellant).

We therefore hold that, on this record, the appellant has failed to demonstrate that he received ineffective assistance of counsel because an actual conflict of interest adversely affected his counsel's performance.

* * *

We overrule the appellant's issue and affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Brown, Sullivan, and Christopher.
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