

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 09CA009554

Appellee

v.

KHALED M. KANJ

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 07CR073675

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 22, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Khaled Kanj, appeals from his conviction in the Lorain County Court of Common Pleas. This Court affirms.

I

{¶2} In September 2006, while Kanj was employed at Harb’s Marathon gas station and convenience store in Lorain, he sold beer and cigarettes to a customer who paid with her food stamp Electronic Benefit Transfer (“EBT”) card. Additionally, Kanj gave the customer \$40 in cash after processing a \$50 charge against her food stamp EBT card. Based on this event and others like it, Kanj and three other employees of the gas station were charged in relation to unauthorized transactions involving food stamp cards.

{¶3} Kanj was indicted on June 7, 2007, on the following offenses: tampering with records, in violation of R.C. 2913.42(A)(1), a felony of the third degree; telecommunications fraud, in violation of R.C. 2913.05(A), a felony of the fifth degree; and illegal use of food stamps

or coupons, in violation of R.C. 2913.46(B), a felony of the fifth degree. The State later dismissed the records tampering count. Following a bench trial, the trial court found Kanj guilty of the remaining two offenses. The court determined that telecommunications fraud and illegal use of food stamps were allied offenses and merged the two counts, convicting and sentencing him on only the latter of the two. Kanj was sentenced to three years of community control, plus fines and costs, based on his conviction for illegal use of food stamps.

{¶4} Kanj timely appealed and asserts two assignments of error for our review.

II

Assignment of Error Number One

“THE VERDICTS IN THIS CASE ARE AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE AND SHOULD BE REVERSED BECAUSE THEY VIOLATE THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO.”

{¶5} In his first assignment of error, Kanj alleges that there was insufficient evidence to support his conviction and that his conviction is against the manifest weight of the evidence. We disagree.

{¶6} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1. “While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion.” *Id.*, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *Id.* at paragraph two of the syllabus; see, also, *Thompkins*, 78 Ohio St.3d at 386.

In determining whether a conviction is against the manifest weight of the evidence an appellate court:

“[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.* Therefore, this Court’s “discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶7} Kanj was convicted of illegal use of food stamps under R.C. 2913.46(B), which makes it a violation to “knowingly possess, buy, sell, use, alter, accept, or transfer supplemental nutrition assistance program benefits, WIC program benefits, or any electronically transferred benefit in any manner not authorized by the Food and Nutrition Act of 2008 (7 U.S.C. 2011 et seq.) *** as amended.” It is a violation of R.C. 2913.46(B) to exchange food stamps for cash. See *State v. Midtown Center Market* (Jan. 11, 1996), 8th Dist. No. 68508, at *5-6. Moreover,

both alcohol and tobacco are excluded as items eligible for purchase with food stamps under the Food and Nutrition Act of 2008. 7 U.S.C., § 2012(k), as amended. The trial court also found Kanj guilty of telecommunications fraud, but merged that count into his conviction for illegal use of food stamps because the misuse of food stamps necessarily results in the commission of telecommunications fraud. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at ¶30. Telecommunications fraud is committed when a person “knowingly [] transmit[s], or cause[s] to be [] transmitted by means of a wire, radio, satellite, telecommunication, telecommunications device, or telecommunications service any writing, data, sign, signal, picture, sound, or image with purpose to execute or otherwise further the scheme to defraud.” R.C. 2913.05(A).

{¶8} Kanj challenges the sufficiency of his conviction by arguing that there was no evidence that he was working on the day the State’s witness, Angela Massa, purchased prohibited items with her food stamp EBT card. He alleges that it was a different employee who conducted the unauthorized sale. The record reflects, however, that Massa testified that in the fall of 2006 she learned from a person named “Larry” that she could use her food stamps to purchase non-food items at Harb’s Marathon gas station and convenience store. “Larry” told Massa to ask for a man named “King” because he would sell her items which were prohibited for purchase with her food stamps EBT card and permit her to get cash back from the transaction. Based on this information, Massa went into the convenience store later that same night and made an \$80 purchase using her food stamps EBT card. She purchased beer and cigarettes and obtained \$40 in cash back from the transaction. Massa identified Kanj as the man she knew as “King” and the one who performed the transaction that night. Massa further testified that Kanj was the only person working the cash register that night at the store. When viewing the foregoing testimony in the light most favorable to the prosecution, we conclude there was

sufficient evidence to establish beyond a reasonable doubt that Kanj engaged in both the illegal use of food stamps and telecommunications fraud.

{¶9} Kanj also complains that his conviction is against the manifest weight of the evidence because there was no evidence to corroborate Massa's testimony that she purchased prohibited items from Kanj with her food stamp EBT card. He further asserts that Massa's testimony was contradicted by that of the State's undercover agent, Agent Fay White, who testified that Kanj refused to sell her cigarettes on two different occasions when she presented her food stamp EBT card.

{¶10} In addition to the testimony already recounted, Massa admitted that in exchange for her testimony against Kanj, the State had agreed that she would be immune from prosecution for her misconduct. She further admitted that she did not inform Ohio Department of Job and Family Services ("ODJFS"), the agency through which she obtained her food stamps EBT card, about the transaction. Instead, Agent White came to her house in December 2006 to discuss the \$80 purchase she made in September 2006. Massa also admitted that she has a felony conviction for possession of cocaine for which she was currently receiving treatment.

{¶11} At trial, Agent White testified that she was working as an undercover agent in an investigative unit of the Food Stamps Division under the Ohio Department of Safety when she received a complaint about illegal food stamp purchases at Harb's Marathon convenience store. Specifically, the complaint indicated that Massa had purchased beer and cigarettes there around September 8, 2006, and further noted that "[Harb's Marathon] will give \$40 in cash for \$50 in food stamps." Based on this information, Agent White contacted Massa to confirm the contents of the complaint. Based on her discussion with Massa, who verified the information contained in

the complaint, Agent White initiated an investigation of the convenience store. Agent White testified that she learned as part of her investigation that Kanj was known as “King.”

{¶12} Agent White explained at trial that the information being electronically submitted to the State of Ohio for payment using the food stamps EBT card includes only a total purchase amount to be paid to the seller; the EBT transaction does not include an itemization of the goods purchased or a breakdown of price by good.

{¶13} As part of her investigation, Agent White went to the convenience store at different times between December 2006 and March 2007 and purchased non-food items such as cigarettes and feminine napkins with a food stamps EBT card. Agent White was able to purchase these prohibited items from all three of Kanj’s co-defendants at different points in time. Agent White’s testimony was corroborated by the admission of receipts, audio recordings of the transactions, and the prohibited items she purchased during her undercover buys. She noted that while she requested employment records for all defendants in the case, she never received them from the store’s owner or his attorney.

{¶14} Agent White attempted to purchase cigarettes from Kanj on two different occasions, but Kanj would not sell the items to her. Agent White stated that once when Kanj was in the store, she tried to purchase cigarettes and laundry soap from a different sales clerk, Carlos Padin. Padin asked Kanj whether he could sell cigarettes to her, and Kanj told Padin not to, so Padin allowed her to purchase the laundry soap with her food stamps EBT card, but not the cigarettes.

{¶15} Kanj cites to no authority for his contention that Massa’s testimony must be corroborated in order for him to be convicted of illegal use of food stamps and telecommunications fraud. Compare *State v. Economo* (1996), 76 Ohio St.3d 56, syllabus

(defining the parameters for the corroborating evidence element which is requirement to support a sexual imposition charge under R.C. 2907.06(B)). Agent White's testimony was consistent with Massa's in terms of identifying Kanj as the person who went by the alias of "King." That Kanj refused to sell prohibited items to Agent White and advised others clerks not do so, but was willing make a similar sale to Massa, does not mean that his conviction was against the manifest weight of the evidence. Thus, the trial court did not lose its way in convicting Kanj of illegal use of food stamps and telecommunications fraud based on Massa's testimony alone. Kanj's argument to the contrary lacks merit and his first assignment or error is overruled.

Assignment of Error Number Two

"APPELLANT'S RIGHT TO COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO, WAS VIOLATED BY TRIAL COUNSEL'S JOINT REPRESENTATION OF HIM AND THREE OTHER CO-DEFENDANTS."

{¶16} In his second assignment of error, Kanj argues that he was denied the effective assistance of counsel because his trial counsel engaged in joint representation of Kanj and his three co-defendants. We disagree.

{¶17} The Ohio Supreme Court has concluded that "[a] trial court is not constitutionally mandated to inquire of criminal co-defendants whether they wish to be jointly represented by the same counsel." *State v. Manross* (1988), 40 Ohio St.3d 180, syllabus. "In the absence of special circumstances, it seems reasonable for the trial court to assume that multiple representation entails no conflict or that the lawyer and his clients knowingly accepted such risk of conflict as may be inherent in such a representation." *Id.* at 182, citing *Cuyler v. Sullivan* (1980), 446 U.S. 335, 346-47. A trial court is urged, however, to conduct a brief inquiry on the matter and to advise the defendants of their right to effective assistance of counsel, which includes separate

representation. *Manross*, 40 Ohio St.3d at syllabus. “Even though the court is not required to make this inquiry, its judgment will be reversed if an appealing defendant shows that an actual conflict adversely affected counsel’s representation of said defendant.” *Id.* The Court has further defined that:

“A *possible* conflict of interest exists where the interests of the defendants may diverge at some point so as to place the attorney under inconsistent duties. It follows, then, that an *actual* conflict of interest exists if, during the course of the representation, the defendants’ interests do diverge with respect to a material factual or legal issue or to a course of action. Indeed, we have said that a lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.” (Internal citations and quotations omitted.) (Emphasis in original.) *State v. Gillard* (1997), 78 Ohio St.3d 548, 552-53.

“To demonstrate an actual conflict of interest based upon what an attorney has failed to do, appellant must show *** some plausible alternative defense strategy or tactic [that] might have been pursued.” *Id.* at 553, quoting *United States v. Fahey* (C.A.1 1985), 769 F.2d 829, 836. Next, “he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.” *Gillard*, 78 Ohio St.3d at 553.

{¶18} The record reveals the trial court did not advise Kanj that he was entitled to separate representation. Because the court was not constitutionally obligated to do so, however, this omission does not amount to reversible error. *Manross*, 40 Ohio St.3d at syllabus. We note that the court did generally discuss on the record whether the representation of multiple defendants in this case would create any conflicts, and Kanj’s counsel responded it would not.

{¶19} Kanj argues on appeal that an actual conflict of interest existed in his case because his counsel could have challenged Massa’s testimony that Kanj was the person who sold her the prohibited items by issuing a subpoena for the store’s employment records to determine whether Kanj was working that day. The record reveals that despite Kanj’s assertions to the contrary, his

counsel pursued this defense strategy at trial. On cross examination, Kanj's counsel thoroughly questioned Agent White as to whether she had obtained employment records from the convenience store owner to corroborate Massa's testimony that Kanj was the only sales clerk working and was the one who conducted the unauthorized sale to Massa. Agent White responded that she had requested employment records from the attorney representing the store, but never received them. While the record omits any reference to what attempts Kanj's counsel may or may not have made to obtain this information, it is evident that his counsel did attempt to discredit Agent White's testimony on the basis that Kanj was not working at the time of Massa's purchase. Based on his counsel's attempts to challenge the evidence that Kanj was working on the day in question, Kanj has failed to set forth an alternative defense strategy which could have been pursued by his counsel. *Gillard*, 78 Ohio St.3d at 553.

{¶20} Kanj further asserts his counsel could have argued that Kanj was never informed of the rules surrounding food stamps purchases by the store's owner; therefore he could not have intentionally violated the statute. Kanj alleges that because the convenience store's owner, John Harb, was a relative of one of his co-defendants, Antione Harb, he was deprived of the opportunity to pursue this defense because doing so would have created an inherent conflict between Kanj and Antione, who had the same trial counsel. Such is not the case, however, because even if this defense could have been legitimately asserted, it would have been advantageous to the defense strategy of both Kanj and Antione. That is, if it were possible to assert a defense strategy alleging that Kanj and Antione were not properly trained on the legalities of conducting food stamp sales, both defendants would have benefitted from this course of action. While this defense may have adversely affected the personal relationship between Antione and his relative or may have implicated Antione's relative in other criminal

misconduct, it would not have created an actual conflict adversely affecting Kanj's counsel's ability to simultaneously represent Kanj and Antione's interests. *Manross*, 40 Ohio St.3d at syllabus; *Gillard*, 78 Ohio St.3d at 553. Moreover, Kanj's argument seems to suggest that his counsel had a duty to protect the interests of Antione's relative, which he did not. Accordingly, Kanj has not demonstrated that he was denied effective assistance of counsel due to an actual conflict of interest. Kanj's second assignment of error is overruled.

III

{¶21} Kanj's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

PAUL GRIFFIN, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.