

STATE OF OHIO                    )  
  )ss:  
COUNTY OF LORAIN            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.       09CA009642

Appellee

v.

JAMAL MOUJIB

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No.     07CR073673

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 9, 2010

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CARR, Judge.

{¶1} Appellant, Jamal Moujib, appeals the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} On June 7, 2007, Jamal Moujib was indicted by the Lorain County Grand Jury on counts of tampering with records in violation of R.C. 2913.42(A), a felony of the third degree; telecommunications fraud in violation of R.C. 2913.05(A), a felony of the third degree; and illegal use of supplemental nutrition assistance program benefits or WIC program benefits in violation of R.C. 2913.46(B), a felony of the fifth degree. On December 1, 2008, Moujib appeared in open court with counsel and executed a written waiver of his right to a jury trial. Moujib's case was consolidated with the cases of three co-defendants, Khaled Kanj, Darnell Hooks, and Antoine Harb. Prior to the commencement of trial, the State moved to dismiss the tampering with records charge in all four cases.

{¶3} On December 12, 2008, the trial court returned guilty verdicts on the charges of telecommunications fraud and illegal use of supplemental nutrition assistance program benefits or WIC program benefits. Prior to sentencing, Moujib filed a motion for new trial pursuant to Crim.R. 33. The basis for the motion was that there was irregularity in the proceedings due to defense counsel’s joint representation of all four defendants. The motion was denied on January 26, 2009. The trial court subsequently ruled that telecommunications fraud and illegal use of supplemental nutrition assistance program benefits or WIC program benefits were allied offenses. Pursuant to the State’s election, the trial court sentenced Moujib on the illegal use of supplemental nutrition assistance program benefits or WIC program benefits conviction to a three-year term of community control.

{¶4} On appeal, Moujib raises five assignments of error. This Court has rearranged the assignments of error to facilitate review.

## II.

### **ASSIGNMENT OF ERROR IV**

“THE APPELLANT’S CONVICTION FOR TELECOMMUNICATIONS FRAUD AND ILLEGAL USE OF FOOD STAMPS IS NOT SUPPORTED BY SUFFICIENT EVIDENCE WHERE THE RECORD REVEALS THAT THERE WAS NO EVIDENCE SHOWING KNOWLEDGE OF VIOLATION OF THE LAW, AND WHERE EVIDENCE THAT THE TRANSACTION EVEN TOOK PLACE IS INADEQUATE.” (sic)

{¶5} In his fourth assignment of error, Moujib argues that his convictions for telecommunications fraud and illegal use of supplemental nutrition assistance program benefits or WIC program benefits were not supported by sufficient evidence. This Court disagrees.

{¶6} The law pertaining to a challenge to the sufficiency of the evidence is well settled:

“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." *State v. Galloway* (Jan. 31, 2001), 9th Dist. No. 19752.

The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *State v. Walker* (Dec. 12, 2001), 9th Dist. No. 20559; See, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390.

{¶7} Moujib was convicted of illegal use of supplemental nutrition assistance program benefits or WIC program benefits in violation of R.C. 2913.46(B), which states: "No individual shall 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." 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.

{¶8} R.C. 2901.22(B) states:

"A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶9} "Electronically transferred benefit" is defined as "the transfer of supplemental nutrition assistance programs or WIC program benefits through the use of an access device." R.C. 2913.46(A)(1)(a).

{¶10} "Access device" is defined as:

"any card, place, code, account number, or other means of access that can be used, alone or in conjunction with another access device, to obtain payments, allotments, benefits, money, goods, or other things of value or that can be used to initiate a transfer of funds pursuant to section 5101.33 of the Revised Code and the Food and Nutrition Act of 2008 (7 U.S.C. 2011 et seq.), or any supplemental

food program administered by any department of this state or any county or local agency pursuant to section 17 of the ‘Child Nutrition Act of 1966,’ 80 Stat. 885, 42 U.S.C.A. 1786, as amended. An ‘access device’ may include any electronic debit card or other means authorized by section 5101.33 of the Revised Code.” R.C. 2913.46(A)(1)(c).

{¶11} Moujib was also convicted of telecommunications fraud in violation of R.C. 2913.05, which states: “No person, having devised a scheme to defraud, shall knowingly disseminate, transmit, or cause to be disseminated or 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.” The trial court merged this conviction into his conviction for illegal use of supplemental nutrition assistance program benefits or WIC program benefits because the misuse of food stamps necessarily results in the commission of telecommunications fraud. See, generally, *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at ¶22.

{¶12} In this case, Angela Massa testified on behalf of the State at trial. Ms. Massa indicated she understood that her food stamp card could be used to buy food products but not other items such as cigarettes, beer, or paper products. Ms. Massa testified that she learned through a friend that illegal food stamp purchases could be made at the Marathon gas station on Broadway in Lorain, Ohio. Ms. Massa testified that on one occasion between August and December of 2006, she used her food stamp card to obtain cigarettes, beer, and \$40 cash from the Marathon station. At trial, she identified the clerk who processed the transaction in court as Khaled Kanj. Ms. Massa testified that agents came to her house several weeks later to investigate the incident. Ms. Massa indicated that she gave the agents a written statement detailing what had happened at the Marathon station.

{¶13} Agent Eileen Fay White also testified on behalf of the State at trial. Agent White worked as an undercover agent in the investigative unit of the Food Stamp Division of the Ohio Department of Safety at the time of the investigation into this matter. Agent White testified as follows. She initiated an investigation of the Marathon station on Broadway in Lorain, Ohio, in response to a complaint she received from Lorain County Job and Family Services. The complaint stated that an individual named Angela Massa received cash and beer in exchange for food stamps benefits at the Marathon station on Broadway in Lorain. Agent White went to Ms. Massa's residence to conduct an interview. After interviewing Ms. Massa and obtaining a written statement, Agent White requested and obtained permission from the Secret Service to do an investigation for fraudulent use of food stamps. Agent White then began the process of familiarizing herself with the Marathon station. This involved entering the store, looking around, and making a cash purchase. As Agent White observed the store, she noticed it was very small and contained a high number of video cameras. She also noticed that many of the food products on the shelves were expired.

{¶14} On December 8, 2006, Agent White made an undercover purchase using a food stamp card. Agent White entered the Marathon store and browsed while waiting for the number of people in the store to decrease. She then went to the cash register and asked the clerk for a pack of Marlboro Menthol Lights. She proceeded to use her food stamp card as a form of payment, which the clerk accepted. Agent White described the transaction in her testimony, stating "I handed the clerk my EBT card, and he showed me where the PIN pad was at. Once the EBT card was swiped by the clerk I entered my PIN number, then he handed me back the EBT card, then he handed me the receipt." Agent White identified the clerk as Antoine Harb.

{¶15} On December 21, 2006, Agent White made a second undercover purchase. After picking up a Nutri-Grain bar, a Gatorade, and a pack of feminine napkins, Agent White approached the clerk and asked for a pack of cigarettes. When Agent White informed the clerk that she could only pay with her EBT card, the clerk told her he could not help with that transaction until a “couple hours” later. The clerk permitted Agent White to purchase the feminine napkins, a paper product, along with the Nutri-Grain bar and Gatorade with her food stamp card. Agent White identified the clerk from that day as Darnell Hooks. She did not return later on December 21, 2006, in order to purchase cigarettes.

{¶16} Agent White returned to the store on March 30, 2007. Agent White testified that she again picked up a Nutri-Grain bar and a Gatorade and then proceeded to the counter. Agent White requested a pack of cigarettes from the clerk. When the clerk requested payment, Agent White gave him a food stamp card and stated it was all that she had. Agent White testified that while the clerk was initially hesitant, he “accepted the EBT card and swiped it[.]” Agent White then entered her PIN and left with the three items. The EBT receipt, depicting a \$9.66 transaction, as well as the three items which were purchased, were admitted into evidence at trial. Agent White identified Jamal Moujib in open court as the clerk who performed the transaction.

{¶17} Agent White testified that she was not able to make her initial identification of Moujib until law enforcement executed a search warrant for the Marathon station. Agent White testified that she knew the clerk involved in the March 30, 2007, transaction was referred to as “J” but she did not know his full name at the time of the transaction. When the search warrant was being executed approximately a week later, one of the other agents obtained Moujib’s identification card and brought it to a vehicle where Agent White was located. Agent White testified that upon seeing the identification card, she said, “That’s the individual that sold to me

on the 30th.” Agent White further testified that subsequent to each purchase, she placed the items in an evidence bag and took them to the Ohio Investigative Unit office and entered them into evidence.

{¶18} In support of his assignment of error, Moujib argues that the State failed to prove that he was the clerk who performed the March 30, 2007 transaction or that the transaction ever took place. Moujib also contends that because the State did not present evidence that he received training regarding which items were eligible for purchase, the State could not have proved that he acted knowingly.

{¶19} In addition to identifying Moujib during the execution of the search warrant, Agent White positively identified Moujib in open court as the individual who sold her cigarettes on March 30, 2007. Agent White specifically testified that she purchased the cigarettes using her food stamp card. The EBT receipt, which showed the date and time of the purchase, as well as the total cost of the transaction, was admitted as evidence at trial. The items purchased by Agent White on March 30, 2007, including the pack of Marlboro Lights, were also admitted as evidence at trial. This evidence was sufficient to show that Moujib was the clerk who processed the purchase of cigarettes with food stamps on March 30, 2007. Agent White also testified that when Moujib requested payment for the cigarettes, she “gave him [her] food stamp card and told him it was all [she] had.” She testified that Moujib was “hesitant” to process the transaction. This testimony, when viewed in the light most favorable to the State, tended to show that Moujib knew that the food stamp card could not lawfully be used to purchase cigarettes.

{¶20} We, therefore, overrule the fourth assignment of error.

### **ASSIGNMENT OF ERROR V**

“THE APPELLANTS (sic) CONVICTIONS FOR TELECOMMUNICATIONS FRAUD AND ILLEGAL USE OF FOOD STAMPS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHERE THE RECORD REVEALS THAT THE EVIDENCE PRESENTED IS UNRELIABLE, FRAGMENTED, AND FAILS TO PROVE EITHER IDENTITY OF THE DEFENDANT OR THAT THE ALLEGED TRANSACTION ACTUALLY OCCURRED.”

{¶21} In his fifth assignment of error, Moujib argues that his convictions were against the manifest weight of the evidence. This Court disagrees.

{¶22} An appellate court’s review of the sufficiency of the evidence and the manifest weight of the evidence adduced at trial are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600. “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 *Thompkins*, 78 Ohio St.3d at 390 (Cook J., concurring).

{¶23} A determination of whether a conviction is against the manifest weight of the evidence, however, does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

“an appellate court must 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.

“Weight of the evidence concerns the tendency of a greater amount of credible evidence to support one side of the issue more than the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that it was against the manifest weight of the evidence, an appellate court sits as a ‘thirteenth



juror,’ and disagrees with the factfinder’s resolution of the conflicting testimony. Id.” *State v. Tucker*, 9th Dist. No. 06CA0035-M, 2006-Ohio-6914, at ¶5.

{¶24} This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶25} In support of his fifth assignment of error, Moujib argues that the evidence presented which tended to show that he was the clerk who processed the March 30, 2007 transaction was unreliable and fragmented in nature. Moujib emphasizes that Agent White was unable to identify Moujib before the execution of the search warrant and, even then, was only able confirm his identity from a distance. Moujib also notes that the EBT receipt did not prove that an illegal transaction took place because it only showed the total amount paid, not the individual items purchased. As discussed above, Agent White testified that Moujib was the clerk who allowed her to purchase cigarettes with her food stamp card on March 30, 2007. On cross-examination, Agent White testified that she did not stand “face to face” with Moujib on the day that the search warrant was executed. Instead, she identified Moujib “from a distance” while sitting in the van as well as in the photograph on his identification card. Moujib’s argument does not account for the fact that Agent White would have initially observed Moujib on the day the transaction took place. While she admitted to not knowing his full name on March 30, 2007, Agent White would have been much closer when, according to her testimony, she gave Moujib her food stamp card to purchase the cigarettes. Thus, her subsequent identification of Moujib at trial was based not just on her observations on the day the search warrant was executed, but also the day that the transaction occurred.

{¶26} With regard to whether the transaction actually took place, Moujib correctly notes that the State did not introduce a cash register receipt which itemized the purchase, nor did the

State introduce security video evidence. However, while such evidence may have been helpful, its absence does not undermine the credibility of the testimony given by Agent White. It should also be noted that the information on the EBT receipt introduced into evidence, which showed the date and time of the purchase, as well as the total cost of the purchase, did not conflict with the testimony of Agent White.

{¶27} Moujib has not demonstrated that this is the exceptional case where the trier of fact clearly lost its way. The fifth assignment of error is overruled.

### **ASSIGNMENT OF ERROR I**

“THE APPELLANT’S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED BY TRIAL COUNSEL’S JOINT REPRESENTATION OF APPELLANT WHERE THE APPELLANT WAS NOT DIRECTLY ADDRESSED BY THE COURT, WAS NOT FULLY INFORMED OF POTENTIAL CONFLICTS, AND WHERE AN ACTUAL CONFLICT AROSE AT DURING THE COURSE OF THE TRIAL.” (sic)

{¶28} In his first assignment of error, Moujib argues that his Sixth Amendment right to counsel was violated due to a conflict of interest that arose when defense counsel represented both Moujib and his co-defendants at trial. We disagree.

{¶29} In support of his assignment of error, Moujib argues that the trial court did not directly advise the defendants regarding the waiver of potential conflict that may arise during the course of the trial. While Moujib acknowledges that the record shows that defense counsel and the trial court discussed whether any conflicts might surface during trial, Moujib contends in his merit brief that the defendants themselves never made “a knowing, voluntary, and intelligent waiver of [their] right to effective counsel.” Moujib further argues that the joint representation resulted in an actual conflict of interest for defense counsel.

### **Waiver by Defendant**

{¶30} “A trial court is not constitutionally mandated to inquire of criminal co-defendants whether they wish to be jointly represented by the same counsel. \*\*\* 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.” *State v. Manross* (1988), 40 Ohio St3d 180, syllabus.

“Absent special circumstances, it is reasonable for a trial court to assume that multiple representation entails no conflict or that the lawyer and his or her clients knowingly accepted the risk of conflict that may be inherent in such representation. *Manross*, 40 Ohio St.3d at 182, citing *Cuyler v. Sullivan* (1980), 446 U.S. 335, 346-347. Consequently, a trial court is not obligated in every case involving multiple representation to conduct an inquiry into the possibility that a conflict of interest exists. *Manross*, 40 Ohio St.3d at 181.” *State v. Mohrman*, 9th Dist. No. 02CA008053, 2002-Ohio-6610, at ¶11.

{¶31} Prior to the commencement of trial, the trial judge inquired as to whether defense counsel anticipated any *Bruton v. United States* (1968), 391 U.S. 123 problems or issues involving conflicts between the parties. Defense counsel indicated on the record that he did not anticipate any such problems. While the trial court did not address each co-defendant regarding their rights to separate representation, failing to do so does not result in error. *Manross*, 40 Ohio St.3d at syllabus. Moujib must demonstrate that an actual conflict of interest adversely affected trial counsel’s performance. *Id.*

### **Actual Conflict**

{¶32} Moujib asserts that an actual conflict did arise during the course of the joint representation in this case. The Supreme Court of Ohio has stated:

“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.) *State v. Gillard* (1997), 78 Ohio St.3d 548, 552-53.

{¶33} “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.” *Gilliard*, 78 Ohio St.3d at 553, quoting *Fahey*, 769 F.2d at 836.

{¶34} At trial, Agent White testified that she engaged in a transaction on March 30, 2007. During the execution of the search warrant which occurred approximately a week later, Agent White identified Moujib as the individual who sold her the cigarettes. Moujib argues that due to an actual conflict, defense counsel was prevented from challenging the identification by suggesting that it was one of the other co-defendants who sold Agent White the goods. Moujib further contends that had defense counsel been able to call the co-defendants as witnesses, they could have testified as to whether the cash register gave a receipt that itemized the purchase and, also, whether the cash register receipt identified the employee who rang up the purchase.

{¶35} In order to prevail on his claim that an actual conflict arose during the course of the joint representation, Moujib must establish that the alternative defense was inherently in conflict with, or not undertaken due to, the attorney’s other loyalties or interests. *Gilliard*, 78 Ohio St.3d at 553. The record reveals that the co-defendants’ interests did not diverge with respect to a material factual or legal issue during the course of the trial. During her testimony, Agent White identified Harb as the clerk who performed the December 8, 2006 transaction and Hooks as the individual who performed the December 21, 2006 transaction. Agent White also

testified that Kanj “denied” all of her requests to perform unlawful food stamp purchases. Moujib has not pointed to any evidence in the record which would establish the viability of a theory suggesting it was actually Kanj, Hooks, or Harb who performed the transaction on March 30, 2007. Moujib’s contention that the testimony of the co-defendants would have contradicted the testimony of Agent White is merely speculative. The Supreme Court has stated:

“A reviewing court cannot presume that the possibility for conflict resulted in ineffective assistance of counsel. The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. Further, a presumption of ineffective assistance of counsel in every instance of multiple representation would preclude multiple representation in cases where a common defense gives strength against a common attack.” *Manross*, 40 Ohio St.3d at 182, citing *Glasser v. United States* (1942), 315 U.S. 60, 92.

In light of the fact that Agent White clearly identified Moujib as the individual who processed an unlawful food stamp transaction on March 30, 2007, Moujib cannot prevail on his argument that defense counsel was placed in a position where it is his duty to contend on behalf of one client that which his duty to another client required him to oppose.

{¶36} Furthermore, the viability of a strategy which would have involved calling the co-defendants to testify is suspect given that each co-defendant, including Moujib, had a testimonial privilege against self-incrimination under the Fifth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution. Even if all of the co-defendants had been represented separately, each co-defendant could have asserted this privilege if called to testify at trial.

{¶37} The first assignment of error is overruled.

### **ASSIGNMENT OF ERROR III**

“TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHERE JOINT REPRESENTATION AND FAILURE TO PURSUE A MORE EFFECTIVE TRIAL STRATEGY RESULTED IN INADEQUATE REPRESENTATION.”

{¶38} In his third assignment of error, Moujib argues that defense counsel was ineffective at trial. This Court disagrees.

{¶39} In order to prevail on a claim of ineffective assistance of counsel, Moujib must show that “counsel’s performance fell below an objective standard of reasonableness and that prejudice arose from counsel’s performance.” *State v. Reynolds* (1998), 80 Ohio St.3d 670, 674, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. Thus, a two-prong test is necessary to examine such claims. First, Moujib must show that counsel’s performance was objectively deficient by producing evidence that counsel acted unreasonably. *State v. Keith* (1997), 79 Ohio St.3d 514, 534, citing *Strickland*, 466 U.S. at 687. Second, Moujib must demonstrate that but for counsel’s errors, there is a reasonable probability that the results of the trial would have been different. *Id.*

{¶40} The Supreme Court of Ohio has recognized that a court need not analyze both prongs of the *Strickland* test, where the issue may be disposed upon consideration of one of the factors. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143. Specifically,

“Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing in one. In particular, a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the

defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.” *Bradley*, 42 Ohio St.3d at 143, quoting *Strickland*, 466 U.S. at 697.

{¶41} It is well-settled that, “debatable trial tactics do not give rise to a claim for ineffective assistance of counsel.” *State v. Hoehn*, 9th Dist. No. 03CA0076-M, 2004-Ohio-1419, at ¶45, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Even if this Court questions trial counsel's strategic decisions, we must defer to his judgment. *Id.* The Ohio Supreme Court has stated:

“‘We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the best of available practices in the defense field.’ \*\*\* Counsel chose a strategy that proved ineffective, but the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client.” *Id.*, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396.

{¶42} In support of his ineffective assistance claim, Moujib contends that trial counsel recognized that an actual conflict arose during the course of the joint representation and failed to take the appropriate action to protect Moujib's interest. It follows, according to Moujib, that if it were not for the conflict which arose, defense counsel could have offered evidence that undoubtedly would have bolstered his case and likely resulted in an acquittal.

{¶43} Initially, as stated in our resolution of Moujib's first assignment of error, this Court has concluded that an actual conflict did not arise during the course of the joint representation in the case. With regard to Moujib's claim that defense counsel knew that an actual conflict existed, the record indicates that prior to the commencement of trial, defense counsel contemplated whether any *Bruton* issues or other issues involving conflicting interests might arise during the course of his joint representation. Defense counsel informed the trial

court he did not anticipate any such issues. Moujib has not pointed to anything in the record which would support his claim that the testimony of the co-defendants would likely have contradicted the testimony of Agent White. In light of Agent White's testimony in which she specifically identified Moujib as the individual who performed the unlawful March 30, 2007 transaction, Moujib's claim that the outcome of trial would have been different had it not been for the joint representation must be rejected. The third assignment of error is overruled.

### **ASSIGNMENT OF ERROR II**

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED THE APPELLANT’S MOTION FOR A NEW TRIAL WHERE THE TRIAL WAS MATERIALLY AFFECTED BY THE JOINT REPRESENTATION OF THE APPELLANT.”

{¶44} In his second assignment of error, Moujib argues that the trial court erred in denying his motion for new trial. This Court disagrees.

{¶45} In support of his assignment of error, Moujib argues that the trial court's inquiry into whether a potential conflict could arise between the co-defendants was deficient and resulted in Moujib being denied a fair trial. Moujib asserts that the joint representation resulted in an actual conflict of interest because it prevented valid testimony from the co-defendants being brought to light and prevented defense counsel from adequately questioning and rebutting the State's testimony. Moujib further contends that this conflict materially affected his substantial rights in that he was deprived of a fair trial.

{¶46} Crim.R. 33(A) states:

“(A) A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

“(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial[.]”



{¶47} While the better practice is for the trial court to inquire of co-defendants whether they wish to exercise their right to separate counsel, making such an inquiry is not constitutionally mandated. *Manross*, 40 Ohio St.3d at syllabus. As discussed in the resolution of his first and third assignments of error, Moujib has not demonstrated that an actual conflict arose in this case. Thus, in the absence of an actual conflict, Moujib cannot prevail on his claim that irregularity in the proceedings prevented a fair trial.

{¶48} The second assignment of error is overruled.

### III.

{¶49} Moujib's assignments of error are overruled. The Judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

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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.

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DONNA J. CARR  
FOR THE COURT

DICKINSON, P. J.  
WHITMORE, J.  
CONCUR

APPEARANCES:

ZACHARY B. SIMONOFF, Attorney at Law, for Appellant.

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