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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000150-MR

KEVIN WAYNE JOHNSON — APPELLANT

v.

APPEAL FROM HANCOCK CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 10-CR-00038

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND NICKELL, JUDGES.

NICKELL, JUDGE: Kevin Johnson stands convicted of manufacturing methamphetamine; unlawful possession of anhydrous ammonia with intent to manufacture methamphetamine, subsequent offense; first-degree possession of a controlled substance; and, being a first-degree persistent felony offender (PFO I).[1]

[1] Prior to beginning jury deliberations, the Commonwealth dismissed a fourth count, possession of methamphetamine precursor, second or greater offense.

Conviction resulted from a two-day trial in which jurors found him guilty of operating a methamphetamine lab in a Hawesville, Kentucky, home owned by his father. The Hancock Circuit Court sentenced Johnson to serve twenty-three years in conformity with the jury's decision. The Supreme Court of Kentucky upheld the conviction on direct appeal.[2] Johnson then moved to vacate the conviction under RCr[3] 11.42, claiming he was found guilty because his trial attorney provided ineffective assistance of counsel. After a hearing—at which Johnson and his trial attorney, J. Stewart Wheeler—were the sole witnesses, the trial court denied the motion to vacate, entering a succinct written order memorializing the denial. We now consider whether the trial court abused its discretion in reaching that result. After thorough review, we affirm.

Johnson's indictment in Hancock County came on the heels of his arrest in Daviess County three months earlier. Police were advised a person possessing drugs and wanted on outstanding warrants was staying at the Owensboro Days Inn. An officer went to the room on August 31, 2010, found Xanax and marijuana during a search, arrested Johnson, and transported him to the police station for questioning. A convicted felon, Johnson hired Wheeler to represent him on three trafficking offenses resulting from the arrest.[4] On July 27,

[2] *Johnson v. Commonwealth*, 2014 WL 4160215, (Ky. August 21, 2014, unpublished).

[3] Kentucky Rules of Criminal Procedure.

[4] Daviess Circuit Court Action No. 10-CR-00528.

2011, Johnson pled guilty to trafficking in marijuana—less than eight ounces, first offense, for which he received a six-month suspended jail sentence. The two other charges were dismissed.

Though present during the Days Inn search, Holly Gillespie, Johnson's girlfriend, was not arrested. When interviewed by police, she revealed Johnson had told her he was operating a methamphetamine lab in a Hawesville home. Officers secured a search warrant and Gillespie took them to the site.

Upon arriving at the home, officers immediately smelled anhydrous ammonia and found numerous items used to manufacture methamphetamine including seven tanks of anhydrous ammonia (all leaking), a detailed manual on manufacturing methamphetamine, enough pseudoephedrine to make $26,000 worth of meth, stripped lithium batteries, digital scales with white residue, Mason jars and baggies. Also found was a substantial amount of marijuana and finished methamphetamine. Crushed pills were found in organic solvent—an indication methamphetamine was actively "cooking" when police began their search. Underneath the batteries, which were laying on a kitchen counter, officers found Johnson's vehicle tax notice dated July 15, 2010, and a union letter addressed to him. A detective described the entire house as a methamphetamine lab.

Johnson's father owned the home, but based upon information supplied by Gillespie, and discovery of items belonging to Johnson inside the home, police believed Johnson was occupying the home and using it as a meth lab.

Officers also surmised Johnson was staying at the Owensboro Days Inn during the hazardous first phase of meth production. On December 27, 2010, Johnson was indicted on five charges in Hancock County: manufacturing methamphetamine, second offense; being a PFO I; knowingly possessing anhydrous ammonia with intent to manufacture methamphetamine, second offense; unlawful possession of a methamphetamine precursor, second offense; and possession of a controlled substance in the first degree, second offense. Wheeler represented Johnson on the Hancock County charges.

While obvious the Hancock County home was being used to cook methamphetamine, Johnson was adamant he was not involved. In exchange for a guilty plea, the Commonwealth offered to recommend a sentence of twenty years. The Commonwealth also threatened to charge Johnson's father and uncle with manufacturing methamphetamine. Johnson rejected the deal and demanded a trial.

The Commonwealth gave notice it intended to offer KRE[5] 404(b) evidence against Johnson—specifically, prior drug convictions—each the result of a guilty plea. Included were convictions from Daviess County in 2000 and 2002, and one from Ohio County in 2010. Johnson also had charges pending in Daviess County in 2012 for attempted possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, first offense, and trafficking in methamphetamine, first offense. Citing *Hayes v. Commonwealth,*

[5] Kentucky Rules of Evidence.

175 S.W.3d 574 (Ky. 2005), the Commonwealth intended to offer the prior convictions to show Johnson's knowledge of methamphetamine, its manufacture, and his intent to make meth based on his previous actions. Six months later, the Commonwealth filed a supplemental notice providing greater detail about the above-mentioned priors, disclosing guilty pleas had been entered in both the 2010 Daviess County case, and in a recent 2012 Daviess County case for attempting to buy anhydrous ammonia during an undercover sting while in possession of both methamphetamine and cash.

The admissibility of Johnson's prior convictions was unresolved until trial began. Wheeler met with the prosecutor and trial judge in chambers before *voir dire* commenced. Because the supplemental notice had just been filed, Wheeler had not had an opportunity to file a written response. His request for a continuance was denied. Wheeler did not challenge the Daviess County guilty plea because it led directly to discovery of the meth lab in Hancock County. However, he argued the 2000 and 2002 cases should be excluded due to age. The trial court ruled the 2010 Daviess County case was inextricably intertwined with the Hancock County charges being tried and was, therefore, admissible. The court withheld ruling on the 2000 and 2002 convictions until jury selection had been completed. Once testimony was well underway, the court ruled the 2000 and 2002 cases would be excluded, but the 2010 Ohio County and 2012 Daviess County convictions could be admitted.

Wheeler viewed the case against Johnson as strong—but wholly circumstantial—because no one could place Johnson inside the Hawesville home. Furthermore, Johnson staunchly maintained he had never set foot inside the home. He insisted the only time he had even been on the property was the Saturday before his arrest at the Days Inn on Tuesday. According to Johnson, at his father's direction, he drove his father's truck and trailer[6] from Owensboro to the house in Hawesville, parked the vehicle at the home to make it appear someone lived there, and immediately returned to Owensboro in a vehicle driven by his cousin, Shanna Wright. Gillespie was with Johnson that day, but according to Johnson, neither entered the home. In Wheeler's view, but for a single black bag[7] containing Johnson's belongings—which police found while searching the Hawesville residence—nothing linked Johnson to the clandestine meth lab.

In preparing for trial, Wheeler knew Johnson wanted to testify. He also knew the Commonwealth would expose Johnson's criminal record if his testimony opened the door. If Johnson testified, it was critical he admit knowing how to manufacture methamphetamine—a question Wheeler knew in advance the Commonwealth intended to ask. If Johnson lied, the prosecutor would impeach

[6] According to testimony from both Johnson and his father, the truck was filled with the belongings of Jennifer Grant, another of Johnson's girlfriends. Johnson had custody of Grant's possessions while she was in prison. On the trailer was a lawn mower Johnson's father testified he had purchased. Found in the truck were Johnson's wallet containing more than $1,000 in cash and his driver's license.

[7] In the RCr 11.42 motion, this black bag is described as a "meth kit."

him with his prior convictions. Wheeler weighed this possibility against Johnson's strong desire to take the stand and tell his side of the story. According to Wheeler, he and Johnson discussed the risks and benefits of Johnson testifying on multiple occasions. Once Johnson made the decision to testify, Wheeler's looming concern was Johnson not perjuring himself.

As the Commonwealth's case-in-chief unfolded, an officer testified Johnson was stopped for speeding in 2010. After seeing a meth pipe in a cup holder, a search of the vehicle uncovered six grams of methamphetamine and more than $2,000 in cash. A detective then testified Johnson was arrested in 2011, while trying to buy anhydrous ammonia in an undercover operation. At the time of arrest, Johnson had six grams of meth in his pocket and additional cash. Johnson entered guilty pleas in both cases.

The Commonwealth offered Gillespie as a witness on the second day of trial. Her whereabouts—and what she would say—were questionable when trial began. Gillespie testified she had gone to the Days Inn the day Johnson was arrested to get methamphetamine from him and to deliver marijuana to him. She said Johnson had provided meth to her previously but had none with him that day at the motel. Gillespie confirmed Johnson had told her he was manufacturing methamphetamine in his father's Hawesville home, but she never saw the actual meth operation.

Gillespie, a convicted felon, testified she regretted revealing Johnson's involvement with the meth lab to police. After he was indicted in Hancock County, she wrote letters trying to absolve him of responsibility for the meth lab and blame it on Brandon Mattingly—a man she claimed had gotten her convicted years earlier. At trial, she testified Mattingly had no ties to the Hancock County home. Wheeler successfully argued for Gillespie to read aloud a letter she had written to Johnson in an attempt to clear his name. After reading the letter, she said it was untrue and she was not in her right mind when she wrote it, although she was sober. She testified she had been promised nothing for her testimony, but under cross-examination by Wheeler, acknowledged she had charges pending in Daviess County and was trying to regain custody of her children.

Wheeler began the defense case with testimony from Johnson's uncle and father. Johnson then took the stand in his own defense, testifying he went to the Hancock County house for the first time the weekend before his arrest at the Days Inn. He said he drove his father's truck to Hawesville pulling a trailer to deliver a lawn mower and other items belonging to Grant. Johnson admitted being involved in the "meth scene" for "many years," but denied any role in the Hancock County lab. He claimed Gillespie had lied, had set him up, and "had some guy cooking meth for her." Johnson told jurors he was a drug addict and traded anhydrous ammonia to acquire "good dope." He also admitted selling "pot" to make money and support his drug habit.

When Wheeler asked Johnson if he had seen meth being "cooked," he answered, "Yes, I have." When Wheeler asked if he knew how to make meth, he replied, "I could probably manufacture meth, yes." When defense counsel asked whether he was involved in the $26,000 meth lab discovered by police in his father's Hawesville home, Johnson responded, "No."

On cross-examination, the prosecutor delved further, pointedly asking, "You know how to cook methamphetamine, don't you," to which Johnson responded, "Yes, I do." Continuing, the prosecutor stated, it's "not 'probably' as you told this jury, but you know how to cook methamphetamine, don't you," eliciting "Yeah" from Johnson. The prosecutor then asked whether in 2002 he had admitted possessing anhydrous ammonia with intent to manufacture methamphetamine, to which Johnson replied, "Yes." The Commonwealth went on to say, "and you admitted you were attempting to manufacture meth at that time," which drew an immediate objection from Wheeler. At the bench, defense counsel requested a mistrial because the trial court had ruled the 2002 conviction could not be introduced due to its age. Wheeler strenuously argued had Johnson denied knowing how to cook meth, he could have been impeached, but he had *not* denied knowing how, he had truthfully testified he could "probably" make meth. The Commonwealth argued Johnson had opened the door to its use of the 2002 conviction. The trial court overruled the defense objection—determining Johnson's direct testimony had been equivocal. No admonition was given and the

Commonwealth was directed to move to something else. Wheeler had not requested an admonition, believing jurors would be more likely to consider the testimony if told to disregard it. After two days of testimony, jurors deliberated about ninety minutes before announcing their guilty verdict.

A different attorney represented Johnson at sentencing and on direct appeal. Post-conviction counsel filed a twenty-page RCr 11.42 motion, alleging trial counsel had committed about a dozen guilt phase errors—the most egregious being allowing Johnson to testify, and the second being not objecting to a prosecutor's comment during closing argument. The motion was general rather than specific and short on facts, prompting the Commonwealth to seek summary dismissal[8] or alternatively, eliminate the factually unsupported claims. Following a hearing, the trial court overruled the motion to vacate noting: testimony at trial against Johnson had been very persuasive; Wheeler was the easiest person for Johnson to blame; and, no attorney deficiency had affected the trial's outcome. This appeal follows.

ANALYSIS

[8] RCr 11.42(2) directs, "[t]he motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion."

We note at the outset Johnson's brief is non-compliant with CR 76.12(4)(c)(v). It is deficient because it lacks any statement of preservation. The rule requires inclusion of

> [a]n "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which *shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.*

[Emphasis added]. A statement of preservation is required because we are a Court of review and must be confident the trial court had an opportunity to consider and rule upon the claims raised on appeal. *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012). When a brief is non-compliant, we may strike it or review the claims for manifest injustice only. *Mullins v. Ashland Oil, Inc*., 389 S.W.3d 149, 154 (Ky. App. 2012) (quoting *J.M. v. Com., Cabinet For Health and Family Services*, 325 S.W.3d 901, 902 n.2 (Ky. App. 2010)). We have chosen to review the claims for manifest injustice despite the deficiency.

This Court reviews a trial court's judgment on an RCr 11.42 motion for abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

To prove ineffective assistance of counsel, Johnson must prove two elements: (1) Wheeler's representation fell below an objective standard of reasonableness, measured against prevailing professional norms; and (2) Johnson was prejudiced by Wheeler's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Accord, Gall v. Commonwealth,* 702 S.W.2d 37, 39 (Ky. 1985). In the trial court, "[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by . . . RCr 11.42." *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). In other words, something happened to undermine confidence in the jury's verdict. *Strickland,* 466 U.S. at 694-95. On appeal, we review *de novo* counsel's performance and any potential deficiency caused by counsel's performance. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008). "In appealing from the trial court's grant or denial of relief based on ineffective assistance of counsel the appealing party has the burden of showing that the trial court committed an error in reaching its decision." *Id*. With these standards in mind, we review Johnson's claims.

Johnson begins by alleging Wheeler erroneously allowed him to testify. According to Johnson, prior to trial he spoke to Wheeler only briefly and only once—when he hired Wheeler to represent him on the Daviess County charges arising from the Days Inn arrest on August 31, 2010—before being

indicted in Hancock County on December 27, 2010. He claims he never spoke to counsel again until trial in 2013; counsel never prepared him to testify; counsel never advised him testifying was not mandatory; and counsel did not conduct his direct examination of Johnson in a competent manner. The veracity of Johnson's claim is immediately dubious because he pled guilty to the Daviess County charges on July 27, 2011—while the Hancock County charges were pending. Since Wheeler represented him on both the Daviess County and Hancock County charges, Johnson had face-to-face contact with defense counsel well before trial began on the Hancock County charges on February 4, 2013.

Additionally, Johnson's own testimony at the RCr 11.42 hearing contradicts his claim. He insisted Wheeler never spoke to him during the fourteen months before trial other than a brief phone call he made to Wheeler's office on the eve of trial when his father—and perhaps his uncle—were with Wheeler. According to Johnson, during that conversation Wheeler told him to think about whether he would testify. Then, on the second day of trial, Wheeler asked him how he would answer when asked if he knew how to manufacture meth. Johnson said he would say, "No," prompting Wheeler to explain if he said "No," the prosecutor would challenge his testimony and impeach him—thus squandering any advantage gained by Johnson personally addressing the jury. By Johnson's own words, Wheeler discussed testifying with him and prepared him to testify before he

took the witness stand. Johnson could have abandoned the trial strategy at any time, but did not.

In Johnson's view, his hopes of acquittal were doomed when Wheeler asked him on direct examination whether he knew how to manufacture methamphetamine. In reality, it was not Wheeler's question, but rather Johnson's phrasing of his answer to the question, that opened the door for the prosecutor to inquire further and reveal Johnson was not "probably," but rather intimately, familiar with manufacturing methamphetamine. Based on testimony from two officers who preceded Johnson on the witness stand, jurors already knew he had convictions related to methamphetamine in 2010 and 2012. Mentioning he knew how to make methamphetamine was not shocking. As a matter of trial strategy, Wheeler revealed Johnson's knowledge before the prosecutor did.

> [A] court's review of counsel's performance must be highly deferential. [*Strickland*], 466 U.S. at 689, 104 S.Ct. at 2065. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*; *Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003) [as amended (Aug. 25, 2003), *overruled by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)]. Hence, the defendant must overcome the presumption that counsel provided a reasonable trial strategy. [*Strickland*]. Counsel's trial actions can reasonably be based on strategic choices made by the defendant and on information supplied by the defendant, *Id*., 466 U.S. at 691, 104 S.Ct. at 2066, and "when a defendant has given counsel reason to

> believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.*

Brown, 253 S.W.3d at 498–99. This was sound trial strategy.

Wheeler, a practicing criminal defense lawyer since 1979, remembers his representation of Johnson differently. Wheeler testified he gave his thumbprint and bar card to jail authorities the first time he visited Johnson—leading Johnson to claim Wheeler met with him only once between 2010 and the commencement of trial in early 2013. However, according to Wheeler, after their first visit, no future meetings were ever documented by the jail. Uncertain how many times he visited his client in jail, Wheeler estimated he met with Johnson three to five times, but confirmed most of his work on the case occurred with Johnson's father and uncle.

According to Wheeler's testimony during the RCr 11.42 hearing, Johnson was adamant he was not guilty; had no intention of pleading guilty; and, had never been inside his father's Hancock County home. Wheeler recalled the prosecutor offering Johnson a sentence of twenty years,[9] an offer he thought was too harsh, but one from which he knew the prosecutor would not budge. Wheeler acknowledged the Commonwealth had a strong circumstantial case against his client since it was obvious someone was operating a meth lab in that home.

[9] It is unclear whether serving eighty-five percent of the twenty year term before becoming parole eligible was part of the Commonwealth's offer. Initially, Wheeler agreed it was, but later stated he did not recall discussing Kentucky Revised Statutes (KRS) 439.3401(3) with the prosecutor.

Wheeler testified he knew the prosecutor intended to ask Johnson about his knowledge of cooking methamphetamine and spoke with him numerous times about whether he would testify. According to Wheeler, Johnson wanted to testify and Wheeler believed he should—absent some good reason not to do so. Wheeler described Johnson as "articulate" and believed he would make a good impression on jurors. Plus, testifying would allow jurors to hear Johnson tell his own story in his own way. It would also remove some of the sting from the prosecutor's anticipated cross-examination.

Contrary to Johnson's claims, Wheeler fully informed him of his choice to testify or not; discussed his testimony with him; cautioned him about potential traps; and, conducted the direct examination so as to allow Johnson to reveal his version without perjuring himself. As expressed by Wheeler, he and Johnson weighed the risks and benefits, and as a matter of trial strategy, Johnson decided he would testify. Whether to testify is personal and "ultimately lies with the defendant," even if the decision is detrimental to his case. *Quarels v. Commonwealth*, 142 S.W.3d 73, 78 (Ky. 2004). Johnson has not "overcome the presumption that counsel provided a reasonable trial strategy." *Brown,* 253 S.W.3d at 499. We discern no error.

Johnson next alleges Wheeler failed to investigate the case, subpoena witnesses and share discovery with him prior to trial. The Commonwealth argues the claim should be summarily dismissed because five potential witnesses

identified by Johnson on appeal, were not mentioned in the motion to vacate. There was also no allegation Wheeler failed to provide a copy of the Commonwealth's discovery to Johnson before trial.

Inspection of the lengthy motion prepared by post-conviction counsel shows the Commonwealth is correct. Johnson argued:

> [t]rial counsel failed to properly conduct a proper investigation prior to trial and present exculpatory evidence. A thorough investigation would have lead (sic) to the discovery and introduction at trial, of exculpatory evidence.

This superficial language gave the trial court no indication five entities[10] mentioned in writing for the first time on appeal should have been contacted as potential witnesses, nor that Wheeler failed to provide discovery[11] to Johnson while he was jailed awaiting trial. This Court reviews "for errors, and a nonruling is not reviewable when the issue has not been presented to the trial court for decision." *Turner v. Commonwealth,* 460 S.W.2d 345, 346 (Ky. 1970). Having failed to comply with RCr 11.42(2)—requiring the written motion to specifically state the grounds on which the conviction is being challenged and its supporting facts—there is nothing for us to review.

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[10] Wright, Grant, Gillespie, Mattingly and Bio-Meth Management.

[11] Wheeler testified he requested and received a paper copy of discovery from the Commonwealth, which he shared with Johnson. He recalled this because the prosecutor had initially provided multiple CDs which Johnson had no means of viewing while jailed. Johnson denied receiving any discovery before trial.

Post-conviction counsel did ask both Wheeler and Johnson about the five potential witnesses during the RCr 11.42 hearing, and also asked whether discovery had been provided to Johnson, but questioning during a hearing does not excuse the failure to file a motion stating "specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." *Id.*

Johnson's next claim is Wheeler did not move to exclude KRE 404(b) evidence. While no written motion *in limine* was filed, Wheeler vigorously argued the 2000 and 2002 convictions should be excluded due to age. The trial court agreed and so ruled. It was only because of the way Johnson worded his response when asked whether he knew how to manufacture methamphetamine, that the 2002 conviction was mentioned. Wheeler quickly objected and requested a mistrial at the bench. The trial court overruled the motion, but directed the prosecutor to move to another topic. As determined previously, the complained of testimony resulted from deliberate, reasonable trial strategy. While that strategy failed, it did not constitute ineffective assistance of trial counsel. *Brown v. Commonwealth*, 253 S.W.3d at 499.

Johnson's last claim is trial counsel failed to object, seek a mistrial or request an admonition when the prosecutor stated in closing argument, "the epidemic of methamphetamine in this community is rampant, and if we don't

address it, it's gonna get worse." Johnson argues this sentence urged the jury to impose a harsh sentence to "send a message" to the community. We disagree.

The claim was raised on direct appeal but was not deemed so egregious as to require reversal. While our Supreme Court disapproved of the statement, because counsel sought no corrective action during trial, it was considered only in terms of manifest injustice.

Counsel enjoys wide latitude in both opening and closing argument. *Lynem v. Commonwealth*, 565 S.W.2d 141 (Ky. 1978). There is no harm in a prosecutor urging jurors not to deal lightly with a serious matter. *Harness v. Commonwealth*, 475 S.W.2d 485, 490 (Ky. 1971), *cert. denied*, 409 U.S. 844, 93 S.Ct. 46, 34 L.Ed.2d 84 (1972). However, a prosecutor may not make jurors the protectors of the community. *King v. Commonwealth*, 253 Ky. 775, 70 S.W.2d 667 (1934); *see also Stasel v. Commonwealth*, 278 S.W.2d 727 (Ky. 1955). The prosecutor must "advance the Commonwealth's case with persuasiveness and force," but without jeopardizing the fairness of "a fair and impartial criminal proceeding." *McMahan v. Commonwealth*, 242 S.W.3d 348, 350–51 (Ky. App. 2007) (quoting *Commonwealth v. Mitchell*, 165 S.W.3d 129, 132-33 (Ky. 2005)).

So-called "send a message" arguments are criticized and should be avoided, *Ordway v. Commonwealth*, 391 S.W.3d 762, 797 (Ky. 2013). Wheeler argued the Commonwealth had not taken the case seriously and despite having had thirty months to build its case, had offered testimony from no one but Gillespie

placing Johnson inside the home. Wheeler chastised the Commonwealth for not doing the simple task of submitting items for fingerprint analysis. In response, the Commonwealth began its closing argument by stating the case was important—not only for Johnson—as Wheeler had argued, but for the Commonwealth, and the prosecution had taken the case seriously.

The challenged statement consumed less than eighteen seconds in a closing argument lasting nearly half an hour. In light of Gillespie testifying Johnson had told her he was manufacturing methamphetamine inside his father's Hawesville home, and Johnson's driver's license and mail being found on the property, Johnson has not shown a reasonable probability he would have been acquitted but for Wheeler not objecting and requesting an admonition or mistrial.

In conclusion, Johnson has demonstrated neither sub-par attorney performance, nor prejudice therefrom—two items required for relief on a claim of ineffective assistance of counsel. *Strickland.* Furthermore, we discern no abuse of discretion in the trial court's ruling. *Bowling.* The decision of the Hancock Circuit Court is affirmed.

LAMBERT, D., JUDGE, CONCURS.

KRAMER, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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