

RENDERED: July 28, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-001317-MR

JAMES MONROE WOMBLES

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT  
HONORABLE R. CLETUS MARICLE, JUDGE  
ACTION NO. 98-CR-00005 AND 98-CR-00005-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; KNOPF,<sup>1</sup> JUDGE; AND BUCKINGHAM,<sup>2</sup>  
SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: James Monroe Wombles appeals from an  
order of the Clay Circuit Court denying his motion to vacate his  
conviction and sentence under RCr<sup>3</sup> 11.42. We affirm.

In September 1998, a jury convicted Wombles of second-  
degree burglary, theft by unlawful taking over \$300, and second-

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<sup>1</sup> Judge William L. Knopf concurred in this opinion prior to his retirement effective June 30, 2006. Release of the opinion was delayed by administrative handling.

<sup>2</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>3</sup> Kentucky Rules of Criminal Procedure.

degree persistent felony offender (PFO). In accordance with the jury's recommendation, the court sentenced Wombles on October 1, 1998, to 20 years in prison.

On March 13, 2001, Wombles filed a motion to vacate his conviction and sentence pursuant to RCr 11.42. An evidentiary hearing was held, and the court denied the motion in an order entered on January 12, 2003. This appeal followed.<sup>4</sup>

Wombles' first argument is that he received the ineffective assistance of counsel during his trial when his attorney cross-examined Doyle Gay, a co-defendant who had pled guilty. Gay had been called as a witness by the Commonwealth to testify as to Wombles' involvement in the burglary and theft. On cross-examination, Wombles' counsel sought to elicit testimony from Gay that he had entered into a plea bargain with the Commonwealth whereby he would receive only a five-year sentence for these crimes as well as additional burglaries that he committed after confessing to law officers his involvement herein.

Wombles' counsel's motive in eliciting this testimony was obviously to show that Gay had entered into a favorable plea agreement with the Commonwealth in exchange for his testimony against Wombles in this case. However, as counsel was cross-

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<sup>4</sup> Although the order appealed from in this case was entered by the trial court over three years ago, briefing was not complete and the case was not submitted to this panel until earlier this year.

examining Gay, Gay gave answers indicating Wombles' involvement in the later burglaries that were not the subject of this case. Wombles argues on appeal that his counsel rendered ineffective assistance by "opening the door" to evidence of other burglaries in which Wombles was alleged to have been involved when such evidence was otherwise inadmissible.

When the trial court ruled on Wombles' RCr 11.42 motion, it held that counsel "knew exactly what he was doing and that he developed a trial strategy of trying to expose that Mr. Gay had been involved in many burglaries; that he had no desire necessarily to keep James Monroe Wombles' name out of that[,] thinking that that would have been a way of impeaching Mr. Gay." Thus, the court determined that counsel's action could be considered to be sound trial strategy. Further, the court noted that even if it was not sound trial strategy, there was no reasonable probability that under the evidence the jury's verdict would have been any different.

In reviewing the record of the cross-examination of Gay by Wombles' attorney, we do not conclude, as the trial court did, that counsel was unconcerned about Wombles' name being mentioned in connection with the other burglaries. In fact, it is apparent to us that counsel did not want Gay to inject Wombles' name into the answers that he gave to the questions that were asked. It is clear to us that counsel did not "open

the door" to Gay's testimony. Rather, Gay suddenly injected Wombles' name before he could be stopped from doing so.

We conclude that counsel engaged in sound trial strategy by attempting to impeach Gay's testimony by showing he had received a favorable plea agreement. Counsel did not render ineffective assistance in this regard since Gay's statements of Wombles' involvement in other burglaries was not in response to the questions he was being asked. Thus, counsel cannot be said to have "opened the door" to the admission of prejudicial evidence that would otherwise have been inadmissible.

Wombles' second argument is that he was denied his right to a fair trial due to juror misconduct. He contends that the jury foreperson, Anthony Gilbert, did not respond candidly to questions asked in the jury selection process. Gilbert had been charged on a warrant with the crime of rape. On the day before Wombles' trial began, the court dismissed the charge against Gilbert because the charge had been pending for more than 60 days and the grand jury had not indicted him.<sup>5</sup> See RCr 5.22(2).

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<sup>5</sup> Wombles' trial began on September 10, 1998. The court signed an order dismissing the rape charge against Gilbert on September 9, 1998. However, that order was not actually entered into the court record until September 29, 1998.

KRS<sup>6</sup> 29A.080(2)(f) states that a prospective juror is disqualified to serve on a jury if he or she is presently under an indictment. Because Gilbert was not under an indictment, he was not disqualified from serving on the jury. Citing Lowrey v. State, 705 So.2d 1367 (Fla. 1998), Wombles argues that his conviction should be vacated because Gilbert was still subject to prosecution by the Commonwealth's attorney who could nevertheless submit the case to a grand jury despite the fact the charge had been dismissed. The Lowrey case is distinguishable, however, since the juror in that case was under prosecution at the time of his jury service. See 705 So.2d at 1368.

Wombles asserts that Gilbert deceived the court by not answering affirmatively when the jurors were asked whether any of them had been on the same or opposite side of any of the attorneys in any legal proceeding. When the question was asked of the prospective jurors, the court had already signed an order dismissing the charges against Gilbert. We find no deception in his answer even though the dismissal order was not entered in the court record until September 29, 1998. Even assuming the charge was still pending, Gilbert had not been indicted and was not being actively prosecuted by the Commonwealth's attorney. In short, we find no error in this regard.

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<sup>6</sup> Kentucky Revised Statutes.

Finally, Wombles suggests that he was deprived of his right to a fair trial because Gilbert was in jail with Wombles and his co-defendants and that one or more of them discussed the case with him. The court made fact findings adverse to Wombles in this regard. Furthermore, Wombles has declined in his brief to assert any error in this regard.

The order of the Clay Circuit Court is affirmed.

ALL CONCUR.

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