

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001951-MR

ROGER BERKE

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 02-CR-00280

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: COMBS, Chief Judge; MINTON and VANMETER, Judges.

COMBS, CHIEF JUDGE. Roger Alan Berke has appealed from the final judgment and sentence of imprisonment entered by the Christian Circuit Court on September 4, 2003, which convicted him of tampering with physical evidence. We affirm.

On July 19, 2002, Berke was indicted on eighteen (18) counts of using a minor in a sexual performance and on one (1) count of tampering with physical evidence by concealing evidence that he believed was about to be produced or used in an official proceeding. He was tried by a jury on August 4, 2003.

The Commonwealth introduced into evidence eighteen (18) photographs. These photographs graphically depicted Berke and a young victim engaged in a variety of sex acts. The photographs were recovered during the execution of a search warrant in Clarksville, Tennessee. Special Agent Jason Williams of the Tennessee Bureau of Investigation testified that the photographs were found in a bank safety deposit box that had been leased by Berke on July 15, 2002.

At the close of the Commonwealth's case-in-chief, Berke moved for a directed verdict. He did not identify the charges upon which he based his motion nor the grounds upon which he believed he was entitled to relief. The trial court denied the motion.

Berke testified in his own defense. He admitted that he had initiated a sexual relationship with the victim when the victim was sixteen years of age and in need of food and shelter. But Berke denied that he had taken the explicit photographs before the victim's eighteenth birthday. Although he testified that he had been tipped-off about the impending search, he claimed that he had moved the explicit photographs from a storage unit in Hopkinsville to a safety deposit box in Tennessee in order to protect them from robbers and vandals.

The jury acquitted Berke of the multiple counts involving the use of a minor in a sexual performance, but it

convicted him of tampering with physical evidence. On September 4, 2003, the trial court entered its final judgment and sentenced Berke to serve five (5) years in the penitentiary. This appeal followed.

Berke argues on appeal that the trial court erred by denying his motion for a directed verdict. He contends that the evidence introduced by the Commonwealth at trial was insufficient to support his conviction for tampering with physical evidence. Berke asserts that in order to find him guilty of tampering with physical evidence, the jury had to be convinced that he believed at the time that he placed the photographs into the safety deposit box that an official proceeding was pending or might be instituted against him. Berke claims that the Commonwealth failed to prove this element of the offense beyond a reasonable doubt. The Commonwealth contends that the argument has not been properly preserved for our review, and we agree.

The record reflects that Berke's motion for directed verdict was general in nature. He did not identify the charges that he believed were pertinent to the motion nor did he specifically mention a lack of evidence as to any particular element of any of the charges. No mention was ever made of the Commonwealth's alleged failure to establish Berke's state of mind at the time that he placed the photographs into the safety

deposit box (*i.e.*, that an official proceeding was pending or might be instituted against him). Consequently, the trial court was never given an opportunity to address the question of whether there was a lack of evidence as to this element of the offense. Accordingly, this issue cannot be raised for the first time on appellate review. *McDonald v. Commonwealth*, Ky., 554 S.W.2d 84 (1977); *Anastasi v. Commonwealth*, Ky., 754 S.W.2d 860 (1988).

Additionally, and as the Commonwealth correctly notes, Berke failed to renew his motion for directed verdict at the close of all the evidence. A motion for a directed verdict not renewed at the close of all of the evidence cannot preserve issues of the insufficiency of the evidence for appellate review. *Kimbrough v. Commonwealth*, 550 S.W.2d 525 (1977). A defendant must renew his motion for a directed verdict, affording the trial court the opportunity to rule on the issue in light of all the evidence in order for it to be preserved for our review. *Baker v. Commonwealth*, 973 S.W.2d 54 (1998).

Nevertheless, even if we were to consider the merits of Berke's argument, we would be compelled to conclude that the Commonwealth presented evidence sufficient to overcome the motion for directed verdict. The testimony revealed that Berke was fully aware: (1) that allegations of criminal conduct had been made against him; (2) that his property was about to be

searched; (3) that he had violated a court order by traveling to Clarksville, Tennessee, where he leased the safety deposit box at a bank with which he had never before done business; (4) that he attempted to disguise his identity as owner of the leased box; and (5) that he utilized the box to deposit the photographs for safekeeping.

We must evaluate Berke's argument under the standard articulated in *Commonwealth v. Benham*, Ky., 816 S.W.2d 186, 187 (1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal.

In this case, the evidence against Berke was quite sufficient to overcome his motion. Both direct and circumstantial evidence presented at trial indicated that Berke was aware that a criminal investigation against him had been

launched and that he consequently transported the photographs to another jurisdiction in an effort to insure that the explicit photographs could not be recovered during a search of his premises. Berke's belief that criminal proceedings were about to be instituted against him was reasonably inferred from his actions and the surrounding circumstances. The jury was entitled to draw reasonable inferences from the evidence presented. The evidence was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Berke was guilty of tampering with physical evidence.

Therefore, we affirm the judgment of conviction.

ALL CONCUR.

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