

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-002325-MR

ROGER ALAN BERKE

APPELLANT

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

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER AND VANMETER, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

KNOPF, SENIOR JUDGE: This is an appeal from the denial of a motion pursuant to RCr 11.42 alleging ineffective assistance of counsel. We affirm.

Appellant Roger Alan Berke was indicted on eighteen counts of using a minor in a sexual performance and on one count of tampering with physical evidence. He was acquitted on all eighteen counts, but was convicted of tampering with physical

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

evidence. Berke received a sentence of five years' imprisonment. This Court affirmed his conviction in case No. 2003-CA-001951-MR.<sup>2</sup> Further review on direct appeal was denied by both the United States and Kentucky Supreme Courts. Thereafter, Berke made a motion pursuant to RCr 11.42 alleging ineffective assistance of counsel on the basis that his trial counsel failed to renew a motion for directed verdict. The trial court denied the motion without an evidentiary hearing. This appeal follows.

Berke argues that trial counsel was ineffective for failing to renew a motion for directed verdict on the tampering with physical evidence charge. He claims that a directed verdict would have been granted because the jury acquitted him on the principal charge. We disagree.

The standard for ineffective assistance of counsel claims is well established. The defendant must demonstrate: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. McQueen v. Commonwealth, 721 S.W.2d 694, 698 (Ky. 1986). Further, the defendant must show that "there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the trial would have been different." Id. at 697.

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<sup>2</sup> A thorough exposition of the facts underlying this case is contained therein.

The record clearly demonstrates that trial counsel failed to renew the motion for a directed verdict. Noting that the issue of a directed verdict was unpreserved, this Court nonetheless discussed the merits of Berke's argument on direct appeal. This Court held that there was sufficient evidence to overcome a motion for directed verdict. Therefore, we agree with the trial court that the failure to renew the motion for directed verdict could not have prejudiced Berke because the motion clearly would have been denied.

Accordingly, the order of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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