

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000026-MR

JOSEPH KEITH

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE DOUGLAS M. STEPHENS, JUDGE  
ACTION NO. 05-CR-00512

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

ACREE, JUDGE: Joseph Keith appeals from a judgment of the Kenton Circuit Court convicting him of first-degree assault and first-degree burglary and sentencing him to eleven years' imprisonment. He argues that the trial court improperly allowed a detective to give hearsay testimony regarding the victim's prior identification of him as the assailant. The Commonwealth properly points out that Keith failed to preserve this issue for review. Thus, we affirm the trial court.

Cupertino Lopez, a non-English speaking native of Guatemala, was living and working in Kenton County. On July 7, 2005, he returned to the house that he shared with numerous relatives after completing a shift at a local restaurant at 2:00 a.m. Shortly after going to bed, and before falling asleep, Lopez heard three loud bangs on the front door. The locked door gave way and two men, one white and one black, entered the house. Lopez recognized the white man having seen him on the streets of his neighborhood frequently. The white man, who was carrying a gun, fired two shots. One went into the television set; the other hit Lopez in the lower abdomen.

At the hospital, Lopez was interviewed by Detective Bryan Frodge. Through an interpreter, he described his assailant and told the detective that he knew him and would be able to identify him. Frodge took Lopez's description and circulated it among other police officers. Some of the street-patrol officers recognized Keith and obtained photographs of him. Frodge placed a photo of Keith in a photopak containing other young men with similar physical characteristics and showed it to Lopez who had no trouble identifying Keith as his assailant.

Frodge obtained a warrant for Keith's arrest, but the identity of the second assailant remained unknown. Keith was indicted for first-degree assault and first-degree possession of a controlled substance. A second indictment charge him with first-degree burglary, also related to his assault on Lopez. Keith filed a motion to suppress the photopak identification on the grounds that it was too suggestive. At a hearing on the suppression motion, Lopez again identified Keith as the man who shot him. A jury trial was held in November 2005 on the assault and burglary charges.<sup>1</sup>

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<sup>1</sup> At some point in time, the Commonwealth dismissed the possession charge which was unrelated to the attack on Lopez.

During his testimony at trial, Lopez was unable to identify Keith in the courtroom. After the assault, Lopez described his attacker as wearing his hair in cornrows. This description matched the photo of Keith taken shortly afterwards and used to confirm his identity. On the day of the suppression hearing, Keith wore his hair long, but unbraided, and Lopez had no trouble identifying him. At the time of his trial, Keith wore a short hairstyle which significantly altered his appearance. Lopez stood by his prior identifications of Keith's photo and of Keith himself on the day of the suppression hearing.

Keith called Frodge as a witness during his case in chief for the purpose of introducing taped witness statements. During cross-examination, the Commonwealth asked to approach the bench and informed the trial court and opposing counsel that he planned to ask Frodge about Lopez's prior identifications of Keith. Defense counsel objected on the grounds that the Commonwealth was seeking to go beyond the scope of the questions asked on direct examination. The trial court overruled the objection and allowed the testimony.

The jury convicted Keith, and, after sentencing, he appealed the verdict to this Court. His first brief, filed March 6, 2005, was stricken for failure to comply with the Kentucky Rules of Civil Procedure (CR). Keith filed a second brief on June 19, 2006, after being given leave to correct his deficiencies.

This corrected brief includes neither an introduction, nor a statement concerning oral argument as required by CR 76.12(4)(c)(i-ii). The Certificate of Service refers to Keith's brief as "Respondent's Brief" and fails to note service on the Attorney General. CR 76.12(6). Further, his case citations fail to comply with CR 76.12(4)(g),

including a citation to an opinion of the Kentucky Supreme Court which lacks a page number or any reference to the year and authoring court.

We remind counsel that the Rules of the Supreme Court (SCR) 3.130(1.1) require a lawyer to “provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Counsel's reluctance to file a brief which meets the bare minimum requirements contained in our rules governing appellate procedure causes this Court to question whether counsel has properly considered his obligation under the rule. Despite these failings, the Commonwealth declined to file a motion to strike Keith's second brief noting the substantial lack of merit to his arguments on appeal. Consequently, we have reviewed Keith's counsel's arguments on appeal in order to avoid prejudice to his client.

On appeal, Keith argues the trial court erred in allowing hearsay evidence of Lopez's prior identifications of Keith after he failed to make an in court identification during the trial. He cites case law from the United States and Kentucky Supreme Courts, as well as the Kentucky Rules of Evidence. The Commonwealth responds by pointing out that Keith failed to raise these grounds with the trial court. Nor has Keith requested this Court to review the issue under the palpable error rule. Kentucky Rule of Criminal Procedure 10.26. It is a long-standing rule of our appellate courts that an appellant “will not be permitted to feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). On appeal, Keith has abandoned his argument before the trial court that the Commonwealth's cross-examination of Frodge exceeded its permissible scope. Further, we will not “address any

other theories under which this evidence might have been excluded at trial, as such claims were not presented to the trial court and therefore are not preserved for review by this Court.” *Hillsmeier v. Chapman*, 193 S.W.3d 340, 345 (Ky. 2006) (Citation omitted.) Keith fails to present any argument upon which we may base a review of the trial court's ruling. Nevertheless, we have considered the issue of the admission of hearsay testimony in this case and deem it meritless.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KELLER, JUDGE, CONCURRING: I concur with the majority in affirming the trial court. However, I believe that any deficiencies in Keith's brief are not so significant as to raise issues regarding whether his counsel considered his obligations under the Rules of the Supreme Court. Furthermore, I do not believe that it is incumbent upon this Court to point out possible ethical violations of counsel, especially when no such violations have been raised by the parties.

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