

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1134

COMMONWEALTH

vs.

ELADIO SANTOS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from the order denying his third motion for new trial, specifically arguing that the judge abused his discretion in denying the motion without an evidentiary hearing and in concluding that the defendant had failed to demonstrate that trial counsel was ineffective for failing to hire an expert.<sup>1</sup> We affirm.

The defendant was convicted, after a jury trial, of committing multiple sexual acts against his two youngest daughters. A panel of this court affirmed those convictions.

Commonwealth v. Santos, 66 Mass. App. Ct. 1116 (2006).

Subsequently, the order denying his first motion for new trial

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<sup>1</sup> The defendant's new trial motion also argued that he had been effectively excluded from attending a pretrial conference on April 23, 2002, and that there was an error in the reasonable doubt instruction. He presses neither of these arguments on appeal.

was affirmed, Commonwealth v. Santos, 83 Mass. App. Ct. 1126 (2013), as was the order denying his second motion for new trial. Commonwealth v. Santos, 88 Mass. App. Ct. 1117 (2015). In neither of those earlier motions did the defendant argue that trial counsel had been ineffective for failing to retain an expert.

Setting aside the fact that this argument was waived for not having been raised in the defendant's previous motions for new trial, see Rodwell v. Commonwealth, 432 Mass. 1016, 1018 (2000); Mass. R. Crim. P. 30 (c) (2), as appearing in 435 Mass. 1501 (2001), the defendant has not shown that the judge erred in rejecting the claim on its merits. The record does not disclose how an expert would have helped the defendant's case,<sup>2</sup> and there was no affidavit from counsel supporting the motion for new trial. A claim of ineffective assistance of counsel "is not established merely by showing that the defendant's counsel did not call additional witnesses. . . . To prevail, the defendant must show that the purported testimony would have been relevant or helpful" (citation omitted). Commonwealth v. Ortega, 441 Mass. 170, 178 (2004). No such explanation was provided here.

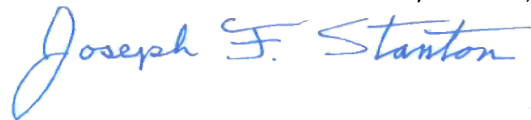
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<sup>2</sup> Our review is significantly hampered by the fact that the defendant did not include his motion in the record appendix, nor the affidavit that the judge's decision indicates was filed with it. The record does contain the defendant's supplemental memorandum to his motion for new trial, which discusses the issue of an expert witness.

In these circumstances, we discern no error in the judge's denial of the defendant's third motion for new trial without an evidentiary hearing.

Order denying motion for new  
trial affirmed.

By the Court (Wolohojian,  
Maldonado & Ditzkoff, JJ.<sup>3</sup>),



Clerk

Entered: June 5, 2020.

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<sup>3</sup> The panelists are listed in order of seniority.