COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-421

COMMONWEALTH

vs.

RUSSELL K. REZENDES.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A Superior Court jury convicted the defendant of seventeen counts of various sex offenses, including six counts of rape of a child with force and two counts of disseminating harmful matter to a minor. A different panel of this court affirmed the convictions in an unpublished memorandum and order pursuant to our rule 1:28. See Commonwealth v. Rezendes, 78 Mass. App. Ct. 1122 (2011). Further appellate review was denied. See Commonwealth v. Rezendes, 459 Mass. 1105 (2011). After the defendant's first motion for new trial was denied, a different panel of this court again affirmed, see Commonwealth v. Rezendes, 84 Mass. App. Ct. 1116 (2013), and further appellate review again was denied. See Commonwealth v. Rezendes, 467 Mass. 1101 (2014). Before us now is the defendant's appeal from the order denying his second motion for a new trial. We affirm.

The defendant argues that the trial judge erred in denying his motion in limine to exclude the case of a pornographic digital video disc (DVD) without watching the DVD itself, and in striking a portion of the victim's mother's testimony under the rape shield statute (G. L. c. 233, § 21B). The defendant further argues that he received ineffective assistance from both his trial and appellate counsel in several respects. We disagree.

We initially note that most of the contentions the defendant has raised in his pro se appellate brief do not rise to the level of appellate argument required by Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975),[1] and fail for that reason alone. See Commonwealth v. Weaver, 474 Mass. 787, 793 (2016) (improper treatment of issues in appellate brief render issues waived). For example, almost all of the defendant's claims alleging ineffective assistance by his appellate counsel are mentioned only in the argument headings. See Commonwealth v. Bowler, 407 Mass. 304, 310 (1990) (single sentence alleging

[1] We cite to the Massachusetts Rules of Appellate Procedure in effect during the relevant time period. The rules were revised, effective March 1, 2019. See Reporter's Notes to Rule 1, Mass. Ann. Laws Court Rules, Rules of Appellate Procedure, at 446 (LexisNexis 2019). The substantive requirements of the rule at issue in this case are unchanged. See Mass. R. A. P. 16 (a) (9), as amended, 481 Mass. 1628 (2019).

ineffective assistance of counsel insufficient argument under Mass. R. A. P. 16 [a] [4]).

Moreover, to the extent that the issues raised in the second motion for new trial could have been raised in the earlier motion (or in his direct appeal), the defendant has waived them. See Mass. R. Crim. P. 30 (c) (2), 378 Mass. 900 (1979) ("All grounds for relief claimed by a defendant under . . . this rule shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion"); Commonwealth v. Deeran, 397 Mass. 136, 139 (1986) ("a defendant must assert all reasonably available grounds for postconviction relief in his first rule 30 motion, or those claims are lost"). Assuming we have discretion to review the defendant's claims for a substantial risk of a miscarriage of justice, see Commonwealth v. Murphy, 73 Mass. App. Ct. 57, 60 (2008), we would discern no such risk here for the reasons set forth infra.

DVD. At trial the prosecution sought to introduce the case of a pornographic DVD found at the defendant's home to "corroborate the anticipated testimony from [the victim] that he and Mr. Rezendes watched this movie with this title on a few occasions during the sex acts that were allegedly committed upon

[the victim]." At no time did either party seek to play the DVD before the jury. The judge admitted the DVD case over the defendant's objection, instructing the jury that the DVD case was admissible only "to the extent that [it] might tend to corroborate the testimony of a witness and/or to the extent that [it] might constitute direct evidence of a crime . . . charged in this case." A judge has substantial discretion in determining whether evidence is relevant and, if so, whether its probative value outweighs any prejudicial effect. See Commonwealth v. Tobin, 392 Mass. 604, 613 (1984). Such decisions "will be upheld on appeal absent palpable error." Commonwealth v. Dunn, 407 Mass. 798, 807 (1990). We discern no such error. The judge reviewed the DVD case before making his ruling and provided a limiting instruction to the jury. The evidence both corroborated the victim's testimony and constituted evidence of one of the charges, dissemination of harmful matter to a minor (G. L. c. 272, § 28). As the DVD itself was never played to the jury, and the jury were not permitted to play it, the judge was under no obligation to watch it.

Stricken testimony. The defendant next argues that the trial judge erred in striking testimony by the victim's mother that suggested that the victim had alleged that another individual also had sexually assaulted him. This line of

inquiry was barred by G. L. c. 233, § 21B, and the defendant has not demonstrated that an exception applies. To the extent that the defendant claims that he was deprived of the opportunity to impeach the victim about whether he had falsely accused someone else of sexual assault, the defendant made no offer of proof to support any claim that the victim's other allegation was fabricated.[2] See Commonwealth v. Pearce 427 Mass. 642, 648-649 (1998). To the extent that the defendant claims that he was deprived of presenting a third-party culprit defense, he is unable to point to evidence that had "a rational tendency to prove the issue" that was not "too remote or speculative."[3] Commonwealth v. Silva-Santiago, 453 Mass. 782, 801 (2009), quoting Commonwealth v. Rosa, 422 Mass. 18, 22 (1996). See

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[2] We are unpersuaded by the defendant's suggestions that he is entitled to discovery as to whether the victim in fact falsely claimed to have been sexually assaulted by someone else. Such discovery would amount to a fishing expedition.

[3] Indeed, the only evidence of any potential sexual contact between the victim and someone else was a vague reference in the direct examination testimony of the victim's mother:

> Defense counsel: "At the time that [the victim] disclosed to you [that the defendant had committed sexual acts], was [the victim] intoxicated?"
>
> Witness: "No . . . . He was intoxicated when he told me about somebody else he used to work with. He was not intoxicated when he told me about [the defendant]."
>
> Defense counsel: "He was intoxicated when he told you about what?"
>
> Prosecutor: "Objection."

generally Commonwealth v. Thevenin, 33 Mass. App. Ct. 588, 592-593 (1992), quoting Commonwealth v. Chretien, 383 Mass. 123, 138 (1981) ("A defendant's constitutional right to put forth his full defense outweighs the interests underlying the rape-shield statute . . . only if he shows 'that the theory under which he proceeds is based on more than vague hope or mere speculation,' and he may not 'engage in an unbounded and freewheeling cross-examination in which the jury are invited to indulge in conjecture and supposition'"). Given that there was no permissible basis for the testimony elicited from the victim's mother, the trial judge did not err in striking it from the record.

Ineffective assistance of counsel. The defendant argues that both his trial and appellate counsel rendered ineffective assistance in a number of ways. We are unpersuaded. As an initial matter, many of the defendant's claims are unsubstantiated or, in some instances, contrary to the record. For example, the defendant argues that his trial counsel was ineffective for failing to object to the admission of the case of the pornographic DVD even though the transcript reveals that he did object.

Where the defendant's description of the trial is not contradicted by the record, he has failed to show either that his counsel's behavior fell "measurably below that which might

be expected from an ordinary fallible lawyer," or that this performance "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). An illustrative example will suffice. The defendant argues that his trial attorney was deficient in failing to object when the prosecutor elicited testimony from the first complaint witness that he had seen the victim's poster in the defendant's bedroom. However, whether such testimony fell within the scope of the first complaint doctrine is beside the point. See Commonwealth v. Arana, 453 Mass. 214, 220-221 (2009) (first complaint doctrine "does not, of course, prohibit the admissibility of evidence that, while barred by that doctrine, is otherwise independently admissible"). The defendant's counsel was not ineffective for declining to object to evidence that plainly was admissible. See Commonwealth v. McLaughlin, 79 Mass. App. Ct. 670, 678 (2011) ("The absence of an unmeritorious or futile objection cannot constitute ineffectiveness").

For these reasons, we affirm the order denying the

defendant's second motion for new trial.

So ordered.

By the Court (Milkey, Sullivan & Ditkoff, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: December 10, 2019.

[4] The panelists are listed in order of seniority.