NO. COA01-1454

NORTH CAROLINA COURT OF APPEALS

File: 01 October 2002

STATE OF NORTH CAROLINA

v. Durham County
Nos. 00 CRS 52046
00 CRS 52049

MELCHOR ZAGADA RANGEL

Appeal by defendant from judgments entered 9 April 2001 by Judge Stafford G. Bullock in Durham County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Anita LeVeaux, for the State.

The Law Firm of Charles L. Alston, Jr., by Charles L. Alston, Jr., for defendant-appellant.

THOMAS, Judge.

Defendant appeals convictions of first-degree rape of a child, indecent liberties with a child, and felony incest. For the reasons discussed herein, we find no error.

The State's evidence tends to show the following: The nine-year-old victim testified she and her three brothers were sleeping on the bedroom floor at the home of defendant and Gudelia Parroquin Garcia on 17 February 2000. Defendant awakened her when he put his penis in her vagina, and he was on top of her and whispering to her. After Garcia awakened, she pulled defendant off the victim. When the victim's mother arrived later that morning, the victim

went with her to a nearby gas station and called police. After the police arrived, the victim told them defendant had raped her. She was then transported to a hospital and was admitted to the emergency room at 2:42 p.m.

During testimony by a police identification technician about a "walk-through" of defendant's residence, defendant made a motion to suppress evidence obtained as a result of the search. During *voir dire*, the State argued it had notified defendant on 20 July 2000 pursuant to N.C. Gen. Stat. § 15A-975 of its intention to introduce evidence obtained in a warrantless search. Defendant asserted he was unaware the State did not intend to call the individual who consented to the search as a witness. The trial court denied the motion to suppress.

A sexual assault nurse examiner testified that she performed a pelvic examination of the victim. The victim's labia minora and majora were extremely swollen and red, such that the nurse was unable to see the opening to the vagina or the hymen. She also observed a white discharge outside the vaginal area. The nurse prepared a rape kit and gave it to police.

A forensic serologist with the North Carolina State Bureau of Investigation (S.B.I.) who examined the victim's rape kit confirmed the presence of semen and sperm on the vaginal swabs. A forensic DNA analyst with the S.B.I. subsequently compared the sample from the vaginal swabs with the known blood samples from the victim and defendant. She determined "[i]t is 3.41 million trillion times more likely that the DNA profile that was observed on the male of

the sperm fraction [from the vaginal swabs] came from Melchor Rangel than if it came from another unrelated individual in the North Carolina Hispanic population." The analyst concluded it was "scientifically unreasonable to assume that the sperm came from any other individual other than Melchor Rangel, unless Melchor Rangel had an identical twin." Defendant later testified he did not have an identical twin.

Gudelia Parroquin Garcia testified as a defense witness. She had previously claimed that she had seen defendant's oldest son, not defendant, on top of the victim. Garcia subsequently admitted her initial statement to police was the truth, however, and that she had told an untruth when she said she had seen the boy on the victim. Garcia said defendant was sleeping on the bedroom floor with his four children on the morning of the 17th. At about 4:00 a.m., Garcia awakened upon hearing "[t]he same noise that my husband makes when we have sex." She sat up in bed looking for defendant. She saw him kissing his nine-year-old daughter (victim) around the neck. When she asked what he was doing, defendant got off the victim and "covered himself and his private parts with the blanket." Defendant's zipper was down and his pants were around his knees. Garcia then uncovered the victim, who was naked and whose dress was pulled up to her breasts. After defendant fell asleep, Garcia called the victim's mother and told her what had happened.

In defendant's evidence at trial, he testified that he and Garcia, whom he referred to as his wife, had argued on 16 February

2000, after she learned he had been seeing another woman. He began drinking that afternoon and continued until 4:00 or 5:00 a.m. Defendant could only recall arguing with Garcia and that she had said she would seek revenge. When asked if he stuck his penis inside the victim, defendant said "I am telling you I don't remember."

Defendant's cousin, who was living in the same home as defendant in February of 2000, said she did not hear any noise after 1:00 a.m. until the next morning. She said defendant told her nothing happened between him and the victim, and she also stated defendant "remembers what happened. He was not too drunk."

At the close of evidence, defendant made a motion to dismiss the charges, which the trial court denied. The case was submitted to the jury, which subsequently found defendant to be guilty of the three charges. The trial court imposed a term of 240 to 297 months imprisonment for the charge of first-degree rape of a child. After consolidating the two remaining charges for judgment, the trial court imposed a consecutive term of sixteen to twenty months imprisonment. From the trial court's judgments, defendant appeals.

By his first argument, defendant contends the trial court erred by denying his motion to suppress evidence seized from his residence without a search warrant. He asserts the State failed to make a proper showing at trial that consent to search was given, and he argues his motion to suppress was therefore timely. We disagree.

Generally, a defendant may only move to suppress evidence

prior to trial. *See* N.C. Gen. Stat. § 15A-975(a) (1999). However, a defendant may move to suppress evidence if he "did not have reasonable opportunity to make the motion before trial," or if "the State has failed to notify the defendant's counsel . . . sooner than 20 working days before trial, of its intention to use the evidence, and the evidence is . . . obtained by virtue of a search without a search warrant[.]" *Id.*; N.C. Gen. Stat. § 15A-975(b)(2). Here the State notified defendant on 20 July 2000 of its intent to use the evidence obtained by the warrantless search, but defendant made his oral motion to suppress more than eight months later at trial. Defendant has not shown either that he did not have a reasonable opportunity to make the motion before trial or that he did not receive timely notice of the State's intention to use the evidence. *See* N.C. Gen. Stat. § 15A-975(a) and (b); *see also State v. Hill*, 294 N.C. 320, 333-34, 240 S.E.2d 794, 803 (1978). We therefore reject this argument.

By his second assignment of error, defendant argues the trial court erred by denying his motion to dismiss the charges due to insufficiency of the evidence. He does not dispute that the offenses occurred, but instead argues the State failed to prove he committed the offenses because his oldest son also had access to the victim and because the victim did not immediately report the abuse. We disagree.

When ruling on a defendant's motion to dismiss, the trial court must consider the evidence in the light most favorable to the State. *State v. Abernathy*, 295 N.C. 147, 165, 244 S.E.2d 373, 384-

85 (1978). The State is entitled to every reasonable inference which can be drawn from the evidence presented, and all contradictions and discrepancies are resolved in the State's favor. *Id.* "If there is substantial evidence - whether direct, circumstantial, or both - to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 582 (1975).

Defendant here only challenges the sufficiency of the evidence supporting his identification as the perpetrator of the offense. When viewed in the light most favorable to the State, the State presented testimony by Garcia that she saw defendant kissing the victim, that he got off the victim when she asked what he was doing, and that his zipper was down and his pants were around his knees. The victim, who was nine years old at the time of the offenses, testified that she was awakened when defendant put his penis in her vagina and that he was on top of her and whispering. A forensic DNA analyst with the S.B.I. testified it was "scientifically unreasonable to assume that the sperm [from the vaginal swab in the victim's rape kit] came from any other individual other than [defendant], unless [defendant] had an identical twin." When viewed in the light most favorable to the State, sufficient evidence that defendant was the perpetrator was produced in order for the trial court to deny his motion. We therefore reject defendant's argument.

Defendant failed to set out his nine remaining assignments of

error in his brief. Because he has neither cited authority nor stated any reason or argument in support of those assignments of error, they are deemed abandoned. N.C.R. App. P. 28(b)(6) (2001).

NO ERROR.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).