ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION III

CACR08-484

November 19, 2008

	APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT,
SERAPIO T. GARCIA APPELLANT	[CR-07-598]
V.	HONORABLE RALPH WILSON, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

A Crittenden County Circuit Court jury convicted appellant, Serapio Garcia, of one count of sexual assault in the second degree but was unable to determine a sentence; therefore, the trial court sentenced Garcia to fifteen years in prison. Garcia now brings this appeal, arguing that the trial court erred in refusing to (1) suppress evidence obtained from a search of his apartment, (2) instruct on a lesser-included offense, (3) instruct on alternative sentencing, and (4) allow argument on parole eligibility. We affirm Garcia's conviction.

Garcia does not contest the sufficiency of the evidence to support his conviction; therefore, only a brief recitation of the facts is necessary. Garcia, an illegal alien, allowed one of his acquaintances, a male named Hugo, to leave his alleged girlfriend, J.G., at

Garcia's apartment in Memphis, Tennessee. Shortly thereafter, Garcia moved to West Memphis, Arkansas, and J.G. moved with him. Garcia claimed that he thought J.G. was sixteen years old; in reality, she was a twelve-year-old runaway. Garcia acknowledged that he knew she was a runaway because he said he had seen posted street flyers with J.G.'s picture.

On May 12, 2007, the assistant manager of Garcia's apartment building called 911 because he saw Garcia grab J.G. from behind and drag her into Garcia's apartment. He then heard "boom, boom, boom," and "hollering and screaming," and he thought J.G. was being raped. Officers responded, but could get no one to come to the door. The officers testified that when they broke into the apartment through a back window, Garcia came around the corner into the kitchen, shirtless and trying to put on his pants. Although J.G. initially gave police a false name and claimed that she and Garcia had been playing, she later told officers that Garcia had pulled her into the apartment and then into the bedroom, and that when she tried to get out, Garcia blocked her way. J.G. testified that Garcia pushed her to the ground, and because she was screaming, he forcibly stuffed a rag into her mouth. She said that Garcia took her to the bedroom, tried to tie the rag around her mouth, and then got on top of her. She stated that Garcia took off his underwear and pants, took off her pants, laid on top of her, and then put his mouth on her "private spot." According to her, he did not stop until he heard the window break. He then pulled on his pants and told her to say that they were just playing, although J.G. said that they were not playing and that it was not a joke.

Garcia's first argument is that the trial court erred when it refused to suppress evidence obtained from a search of his apartment. Pursuant to Garcia's consent, which was given after he was arrested and transported to the police department, the police returned to Garcia's apartment. J.G. had claimed that Garcia had stuffed a rag in her mouth; the rag was found and forensic testing indicated the presence of J.G.'s DNA on the rag. Additionally, police took pictures of Garcia's apartment.

In *Davis v. State*, 351 Ark. 406, 413, 94 S.W.3d 892, 896 (2003), the supreme court clarified the appellate court's standard of review for a suppression challenge: "Our standard is that we conduct a *de novo* review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court."

Rule 11.1 of the Arkansas Rules of Criminal Procedure provides:

> (a) An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search.
>
> (b) The state has the burden of proving by clear and positive evidence that consent to a search was freely and voluntarily given and that there was no actual or implied duress or coercion.
>
> (c) A search of a dwelling based on consent shall not be valid under this rule unless the person giving the consent was advised of the right to refuse consent. For purposes of this subsection, a "dwelling" means a building or other structure where any person lives or which is customarily used for overnight accommodation of persons. Each unit of a structure divided into separately occupied units is itself a dwelling.

Garcia's first language was Spanish. The *Miranda* rights form used for Garcia was written in Spanish; however, the consent to search Garcia's apartment was written in English. There was testimony at the suppression hearing that a Spanish-speaking officer translated the consent form into Spanish for Garcia; however, the only testimony on this issue came from the non-Spanish speaking officer who interrogated Garcia, because at the time of trial, the Spanish-speaking officer who provided the translation was serving overseas in the military. Although the initial reading of the consent form was not recorded, after Garcia signed the consent-to-search form, the officers began to record the conversation. The non-Spanish speaking officer testified that the Spanish-speaking officer had gone over the entire consent document prior to beginning the recording and that he did it again after they began taping the conversation. Although the investigating officer had never used this Spanish-speaking officer for purposes of translation prior to this conversation, he testified that to his knowledge, the officer was reliable in his translation.

We hold that this testimony is not sufficient to ensure that Garcia was given notice of his right to refuse consent to search his apartment. The initial reading of the consent form was not taped, and the Spanish-speaking officer was unavailable to testify, so we cannot know how the consent form was translated. We are unable to rely on the non-Spanish speaking officer's testimony that Garcia was notified of his right to refuse consent, as that officer did not speak Spanish and therefore could not know what the other officer was saying to Garcia.

Even though it was error for the trial court to rely upon the non-Spanish speaking officer's statements that the Spanish-speaking officer had read Garcia the consent form and informed him of his right to refuse consent to search, we affirm on this point because we hold that in this case, the error was harmless. The State points out that the supreme court has not declared the measure of harmless error for a Rule 11.1 violation—for constitutional errors, the measure is whether the error did not contribute to the verdict beyond a reasonable doubt, *e.g.*, *Riggs v. State*, 339 Ark. 111, 3 S.W.3d 305 (1999), and for other trial errors, a lower standard is used, *i.e.*, whether the error is slight and the evidence is overwhelming, *e.g.*, *Barr v. State*, 336 Ark. 220, 984 S.W.2d 792 (1999); *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994). However, the State contends that we need not make this determination, as the higher standard is clearly met, given the evidence set forth above. We agree that the higher standard—that the error did not contribute to the verdict beyond a reasonable doubt—is applicable here, because Rule 11.1 has its genesis in the Fourth Amendment right for a person to be free of unreasonable searches and seizures, and we further hold that this higher standard has been met in this case. Given J.G.'s testimony, as well as the testimony of the assistant manager of the apartment building and the testimony of the police officers who responded to the assistant manager's 911 call, we hold that the error did not contribute to the verdict beyond a reasonable doubt.

Garcia's second argument is that the trial court erred in refusing to instruct the jury on a lesser-included offense. Garcia contends that sexual assault in the fourth degree is a lesser-included offense of sexual assault in the second degree, the offense for which he was

convicted, and that the jury should have been instructed on sexual assault in the fourth degree. Arkansas Code Annotated section 5-1-110(b) (Supp. 2007) delineates the three ways in which an offense can be a lesser-included offense:

> (b) A defendant may be convicted of one (1) offense included in another offense with which he or she is charged. An offense is included in an offense charged if the offense:
>
> (1) Is established by proof of the same or less than all of the elements required to establish the commission of the offense charged;
>
> (2) Consists of an attempt to commit the offense charged or to commit an offense otherwise included within the offense charged; or
>
> (3) Differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish the offense's commission.

We need not determine if sexual assault in the fourth degree is a lesser-included offense of sexual assault in the second degree. Arkansas Code Annotated section 5-1-110(c) provides that a trial court is not required to instruct a jury with respect to a lesser-included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him or her of the included offense.

Here, Garcia denied that he had any sexual encounter with the victim; therefore, there was no rational basis for giving a lesser-included offense instruction. *Fry v. State*, 309 Ark. 316, 829 S.W.2d 415 (1992). Garcia argues that this requirement places an unreasonable burden upon him, contending that if he did not confess to some type of sexual contact, he was not entitled to have a lesser-included offense instruction given to the jury. We disagree. Garcia denied that he had any sexual contact with the twelve-

year-old victim; therefore, there can be no rational basis for giving a lesser-included instruction on another sexual offense.

Garcia's third argument is that the trial court erred in refusing to instruct on alternative sentencing, specifically in this case, either probation or a suspended sentence. Arkansas Code Annotated section 16-97-101(4) (Repl. 2006) provides:

> The court, in its discretion, may also instruct the jury that counsel may argue as to alternative sentences for which the defendant may qualify. The jury, in its discretion, may make a recommendation as to an alternative sentence. However, this recommendation shall not be binding on the court[.]

The trial court, in denying Garcia's request, stated that it had to exercise discretion, and that because of the seriousness of the offense, the fact that it was a Class B felony, and the ages of the victim (12) and defendant (42), it did not think that the giving of alternative sanctions was proper. The trial court also stated that even if it had given the instruction and the jury had recommended alternative sanctions, it in all likelihood would not have abided by the jury's recommendation for the reasons stated above.

Garcia concedes that the trial court set forth its rationale for denying the proffered instruction. Nevertheless, he argues that the trial court's reasoning was not sufficient, but he fails to explain why he believes it to be insufficient. We hold that there was no abuse of discretion on the part of the trial court in giving its well-reasoned bases for refusing to give an instruction on alternative sanctions.

Garcia's fourth argument is that the trial court erred in not allowing him to argue parole eligibility to the jury. Specifically, he argues that illegal aliens, of which he is one,

end up serving their entire sentences because they often have difficulty obtaining approved parole plans. Garcia fails to cite any authority to support this argument. When an appellant fails to cite authority or fails to provide convincing argument, the appellate court will not consider the merits of the argument. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Affirmed.

ROBBINS and HEFFLEY, JJ., agree.