

FILED

March 17, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE**

**STATE OF TENNESSEE,
Appellee,**

V.

No. E1999-00274-CCA-R3-CD

**DOUGLAS BRYAN BORUFF,
Appellant.**

CONCURRING OPINION

I fully concur with Judge Riley's opinion. The only purpose for this separate opinion is to note my belief that, in this case, aggravated sexual battery and sexual battery are lesser-included offenses of rape of a child under part (a) of State v. Burns, 6 S.w.3d 453, 466-67 (Tenn. 1999), see Tenn. Code Ann. §§ 39-13-504, -505 (1997), and that under the scheme of the Burns test for determining lesser-included offenses, the application of part (a) should be determined before analyzing part (b). I agree that, pursuant to the Burns test for determining whether the proof justifies an instruction on a lesser-included offense, the proof in the present case did not warrant an instruction on aggravated sexual battery. Neither did it warrant an instruction on sexual battery.

JAMES CURWOOD WITT, JR., JUDGE