IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1998 SESSION

FILED

April 9, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9702-CR-00061**
Appellee,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. ANN LACY JOHNS,**
DONALD TERRY MOORE,	)	**JUDGE**
	)	
Appellant.	)	(Rape of a child, aggravated assault, and simple assault)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The Davidson County Grand Jury returned an eleven count indictment against the defendant in April 1994. The defendant was charged with three counts of rape of a child, two counts of aggravated kidnapping, two counts of simple assault, one count of theft, one count of robbery, and two counts of aggravated assault in the alternative.[1] Following a jury trial, he was convicted of one count of rape of a child, one count of aggravated assault, and two counts of simple assault. He received an effective sentence of twenty-seven and a half years in the Tennessee Department of Correction and was fined a total of fifty-six thousand dollars ($56,000).

In this appeal as of right, the defendant raises the following issues:

1. Whether the trial court erred by allowing two witnesses to testify under the "fresh-complaint doctrine."

2. Whether the trial court erred in denying the defendant's motion to sever count eleven from the indictment.

3. Whether the trial court erred in denying the defendant's motion to dismiss counts seven and eight as being void for vagueness in violation of the United States and Tennessee constitutions.

4. Whether the evidence was sufficient to support the defendant's conviction for rape of a child.

5. Whether the defendant's constitutional rights were violated by the State's failure to perform a blood typing test and by the State's failure to preserve the semen sample for further testing.

6. Whether the trial court erred in denying the defendant's motion requesting that the State not refer to the two prosecutrix in this case as "victims."

After a review of the record and applicable law, we find no merit to any of the above

[1]Prior to trial, count ten, robbery, was dismissed. However, throughout this opinion, we will refer to the charged offenses as they appeared in the original indictment.

issues and therefore affirm the judgment of the court below.

While the defendant has challenged only one of his convictions on a sufficiency basis, we nevertheless find it useful to recite the facts of this case. The defendant and one of the victims, Ruth Moore, were married in 1990. In July 1993, the couple, along with Moore's children, Leon Gardner and the other victim, L.G.,[2] moved into a home at 818 Stockell Avenue in Nashville. Several witnesses testified that after the foursome moved to the Stockell address, Gardner and the defendant had had difficulties getting along.

In August of 1993, L.G. alleged that the defendant had forced her to engage in cunnilingus with him. This charge was the basis for count eleven of the indictment. At trial, L.G. testified that sometime in August of that year, she had been asleep in her bedroom when the defendant entered and put his hand over her mouth. She said that he had told her to be quiet, then he removed her shorts and underwear. L.G. then testified that the defendant had "put his tongue in [her] private." She further testified that the defendant had touched her breasts.

L.G. stated that after this had occurred, she went to the bathroom and called for her mother. She testified that she told her mother what had happened. Following this conversation, the defendant then forced L.G. and Ruth Moore into the car and drove them to Ruth Moore's sister's house. Moore testified that she had returned to her home two days later but that L.G. had remained with her sister at the instruction of the Department of Human Services (DHS). Moore further testified that she had spoken

[2]The policy of this Court is to withhold the identity of young children involved in sexual abuse cases, identifying them only by their initials. See State v. Schimpf, 782 S.W.2d 186, 188 n.1 (Tenn. Crim. App. 1989).

with officials at DHS and had told them that she suspected L.G. had made up the story in order to divert attention from the disputes between Leon Gardner and the defendant. Accordingly, Ruth Moore stated that she had been glad when DHS decided not to prosecute the defendant. L.G. returned home in mid-November shortly after Ruth Moore learned that DHS was not further pursuing L.G.'s allegations.

The remaining counts of the indictment stem from a series of events that occurred in the early morning hours of November 27, 1993. Testimony at trial established that the defendant, Ruth Moore, and two friends, Betty Douglas and Freddie West, had gathered at the Moore household. L.G. along with Douglas's son and nephew had also been present. Leon Gardner had been in and out of the house that evening. Moore testified that the adults, with the exception of Douglas, had been drinking beer that evening. While Moore testified that she had had two or three beers, Douglas testified that Moore had been drunk and "out of control." Both women testified that during the course of the evening several arguments had erupted. Moore testified that she had argued with the defendant and with her son, Leon Gardner. She further testified that after she and Gardner had argued, she had called the police. Apparently, by the time the police arrived, Gardner had left the house and no police action was taken. When Gardner later returned to the home, Douglas offered to take him home with her so that no more arguments would occur. Douglas, Freddie West, and Gardner then left the Moore home sometime between one and two o'clock on the morning of November 27, 1993. L.G. and Douglas' son and nephew were left sleeping in L.G.'s bedroom, and Ruth Moore was asleep on the couch.

L.G. testified that some time after she had fallen asleep, the defendant had entered her bedroom and had begun to choke her. She said that he then carried her into

her mother's bedroom where he continued to choke her. Ruth Moore testified that she had heard a strange noise and had left the couch to see what was happening. As she entered her bedroom, the defendant hit her in the head with a hammer. The defendant then forced Moore and L.G. to crawl out of the bedroom, down the hall, and into Leon Gardner's bedroom. Once there, the defendant forced Moore to crawl under the bed. Moore testified that she had been frightened and had urinated on herself because the defendant would not allow her to go to the bathroom. From this bedroom, the defendant then forced Moore and L.G. to crawl to the basement.

Moore testified that once they were in the basement, the defendant used an extension cord to tie her to a pole. She further testified that he had again hit her with the hammer and then left the basement taking L.G. with him. L.G. testified that the defendant had taken her to the top of the basement steps, had unbuttoned her pants, and had put his finger inside her vagina. She told the court that the defendant had then taken her into the dining room, had forced her down on her knees, and had put his penis in her mouth. Moore testified that she had been able to free herself from the pole and had emerged from the basement. L.G. testified that when the defendant had heard Moore coming, he stopped forcing her to perform fellatio. Moore testified that when she had encountered the defendant, the two struggled for the hammer, and she had been able to hit the defendant once before he regained possession of the tool. The defendant then forced L.G. and Moore into a corner of the dining room. Moore testified that her clothing had been covered in blood and that the blood had appeared to have come from her forehead. At this point, the defendant poured beer on L.G. and Moore and then urinated in their hair and faces.

L.G. and Moore then ran from the dining room into L.G.'s bedroom where

the other two children had been sleeping. The defendant then entered the room and began asking Moore for money. Moore testified that she told the defendant she had asked Betty Douglas to keep some money for her and that the money was with Douglas. The defendant forced Moore to call Douglas and then he forced Moore, L.G., and the two young boys into the car and drove them to Douglas' home. Once at Douglas' home, Douglas gave the defendant some of Moore's money. The defendant returned to his car and left the area. Douglas then called for an ambulance. Moore was taken to Vanderbilt Hospital by ambulance and L.G. was taken to General Hospital by Douglas.

I. Fresh-complaint

The defendant first contends that the trial court erred when it allowed two witnesses to testify under the "fresh-complaint doctrine." The trial court allowed Leon Gardner and Betty Douglas to repeat what L.G. told them had happened on the morning of November 27, 1993. Gardner testified that he had been asleep at Douglas' house when L.G. woke him up. He testified that L.G.'s hair had been wet and that her shirt had a little blood on it. He further stated that L.G. had said "[the defendant] had made her suck his thing and he peed in her hair and stuff."

Similarly, Douglas testified that L.G. had run to her screaming, "Auntie, he put his penis in my mouth." Douglas then testified, "[L.G.] said [the defendant] had drug her out of her bedroom and was trying to take her off into the basement and she said she managed to kick the table over to awaken her mom, and she said then he had fingered her real bad, put his hand into her panties and fingered her, and she said he took and put his penis in her mouth and then peed on her and poured beer all on her hair."

The trial court allowed these witnesses to testify under what had been

known as the “fresh-complaint doctrine.” Under this doctrine, as modified, the fact of complaint by a rape victim is admissible, but the details of the complaint are not admissible unless an attempt has been made to discredit the victim. State v. Kendricks, 891 S.W.2d 597 (Tenn. 1994). While Kendricks applied only to adult victims, the trial judge in the case sub judice stretched it to apply to child victims as well. At the time of the trial, the Tennessee Supreme Court had not ruled on the doctrine’s applicability to children. In 1995, however, the Court determined that “in cases where the victim is a child, neither the fact nor the details of the complaint to a third party is admissible under the fresh-complaint doctrine.” State v. Livingston, 907 S.W.2d 392, 395 (Tenn. 1995). The Court explained that while such evidence was not admissible under this doctrine, it may be admissible as substantive evidence if it meets some hearsay exception or as corroborative evidence if it satisfies the prior consistent statement rule. Livingston, 907 S.W.2d at 395. The State contends that the evidence is admissible under either theory, while the defendant argues it is admissible under neither.

First, the State argues that L.G.’s statements to Leon Gardner and Betty Douglas were excited utterances, which qualify as exceptions to the general hearsay rule. Tennessee Rule of Evidence 803(2) provides that an excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” The State argues L.G. had been in a state of fright and excitement when she talked to Gardner and Douglas shortly after the attack.

In State v. Smith, 857 S.W.2d 1, 9 (Tenn.1993), our Supreme Court stated that the "ultimate test" for determining the admissibility of such a statement is "spontaneity and logical relation to the main event and where an act or declaration

springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication." In a case which addressed this issue, a panel of this Court concluded that a victim's statement to her cousin and later to her mother met this test. State v. Binion, 947 S.W.2d 867, 873 (Tenn. Crim. App. 1996). In that case, the defendant attempted to rape the fifteen-year-old victim in his car after he offered to drive her to a friend's house. The defendant then returned the victim to her cousin's house, and the victim told her cousin and then her mother what had happened. The cousin and mother testified that the victim had been shaking and crying. They further testified that the victim had described the attempted rape by the defendant. The Court held that the victim's statements met the requisites of Rule 803(2) and stated:

> The attempted rape described by the victim certainly qualified as a "startling event." Further, the evidence illustrates the victim's continuing excitement and strain that resulted from the incident. Finally, the thirty to forty-five minute time lapse greatly diminished any likelihood of deliberation and fabrication where no proof exists to support either.

Binion, 947 S.W. 2d at 873. In the case now before this Court, there can be no doubt but that the events endured by L.G. were startling. Secondly, Gardner testified that L.G. had been scared and crying when she told him what had happened. Douglas also testified that L.G. had been screaming. This testimony certainly indicates that L.G. continued to be excited and upset by the incident. And finally, L.G. repeated the events within a very short time of their occurrence. As in Binion, the short lapse of time diminishes the possibility of L.G. having had time to fabricate a story. Thus, we conclude that L.G.'s statements to both witnesses were admissible as excited utterances.[3]

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[3]The defendant argues that because at trial the State argued that this evidence was admissible under the fresh-complaint doctrine, it has waived the issue of whether the evidence is admissible under any other theory. We do not agree. In Binion, 947 S.W.2d 867 (Tenn. Crim. App. 1996), and in Tilley, one of the cases consolidated under Livingston, 907 S.W.2d 392 (Tenn. 1995), the State was allowed to argue an alternative theory for admitting the evidence. At the time of trial in the case sub judice, the State had no reason to suspect that the Supreme Court would determine that the fresh-complaint doctrine did not apply to children.

II. Denial of Severance

The defendant next argues that the trial court erred in denying his motion to sever count eleven from the rest of the indictment. In count eleven, the defendant was charged with raping L.G. in August of 1993. The defendant contends that because this count was not related in time nor was it part of a common scheme, the count should have been severed.

Rule 8(b) of the Tennessee Rules of Criminal Procedure provides that two or more offenses may be joined in the same indictment if the offenses constitute "parts of a common scheme or plan or if they are of the same or similar character." If such offenses have been consolidated, however, a defendant maintains his right to a severance "unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others." Tenn. R. Crim. P. 14(b)(1).

Following a hearing on the defendant's motion to sever count eleven, the trial judge stated that the offenses "constitute a common scheme, not in the sense of signature crimes like we often see, but in the sense that it is a, in some cases, ongoing episode, and at all points, a serial situation, so I think that there is sufficient connection to characterize these as a common scheme or plan. . . . In this case, we have a clear temporal and factual connection among the offenses . . . ."

First, we must determine if the trial court were correct in concluding that a common scheme or plan did exist. There are three categories of common scheme or plan evidence: (1) distinctive designs, or signature crimes; (2) a larger, continuing plan or conspiracy; and (3) the same transaction. State v. Hoyt, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995). The first category encompasses those crimes in which a defendant's

modus operandi is so similar, or so unique and distinctive, as to show that the defendant probably committed the identical crimes. Hoyt, 928 S.W.2d at 943. The second category includes those crimes which are committed "in order to achieve a common ultimate goal or purpose", and the third category involves those crimes which occur within a single criminal episode or same transaction. State v. Hallock, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993). In the case before this Court, it appears that the defendant's crimes do not fit within the second or third category, therefore, in order to have been admissible, the crimes must be of a unique and distinctive character.

In Hoyt, the defendant had been indicted on two charges of aggravated rape and one charge of aggravated sexual battery. The offenses were committed against three young children. Two of the children were siblings and lived at the same household with the defendant at the time the offenses occurred. This Court found that the circumstances surrounding these two offenses were similar, that both offenses involved oral penetration, that they occurred in the defendant's home at times when the victims' grandmother was not present, and that the defendant was the sole caretaker of the children. 928 S.W.2d at 945. The Court found these similarities sufficient to establish a distinctive design or modus operandi, and thus they fell within the first category of common scheme or plan.[4] This Court further noted that "[a]lthough there are some differences between the two offenses, it is not necessary that the two crimes be identical in every detail." Hoyt, 928 S.W.2d at 944, citing Bunch v. State, 605 S.W.2d 227, 231 (Tenn. 1980). In the case now before us, the defendant was charged with three counts of raping a child. One offense occurred in August 1993 and the other two occurred on November 27, 1993. All offenses were committed against the same victim, the

[4]The Court determined that the circumstances surrounding the offense of aggravated sexual battery against the third child were dissimilar from the first two offenses. In the third offense, the victim did not live in the same household as the defendant and was not under the supervision of the defendant. Furthermore, the unlawful sexual contact was "wholly different" from that alleged in the first and second offenses. Hoyt, 928 S.W.2d at 945.

defendant's step-daughter. On both dates, the defendant entered the victim's room while she was sleeping. In the first, he removed her pants and underwear, instructed her not to tell anyone, and then forced her to engage in cunnilingus. In the other, after entering the victim's bedroom, he removed her to another place and a series of events occurred. Ultimately, the defendant removed the victim's pants and underwear. First, he penetrated the victim digitally and then he forced her to perform fellatio.

We find that the similarities in the offenses are sufficient to establish a distinctive design. The offenses involved the same victim, occurred in the same household at night while other family members were sleeping, occurred within a short period of time, and resulted in some form of penetration. Here, as in Hoyt, the similarities in the offenses far outweigh any differences. 928 S.W.2d at 944.

Thus, having determined that the offenses fit the definition of a common scheme or plan, we must now address the second part of the Rule 14 test: whether evidence of one offense would be admissible upon the trial of the others. Generally, evidence of other crimes is inadmissible because the evidence lacks relevance and may lead the jury to make an improper inference of guilt. Hallock, 875 S.W.2d at 290. However, such evidence is relevant if admitted to show motive, intent, guilty knowledge, identity, absence of mistake or accident, or "a common scheme or plan for commission of two or more crimes so related to each other that proof of one tends to establish the other." Hoyt, 928 S.W.2d at 944; State v. Edwards, 868 S.W.2d 682, 691 (Tenn. Crim. App. 1993); But cf. State v. Hallock, 875 S.W.2d 285, 292 (Tenn. Crim. App. 1993)(finding that the mere existence of a common scheme or plan is not a proper justification for admitting evidence of other crimes). In order to determine whether the evidence falls under any of these exceptions, a trial court is required to hold a pre-trial

hearing. Following the hearing, the judge must state the reason for allowing the evidence and then must conduct a balancing test weighing the probative value of the evidence against its unfair prejudicial effect. Tenn. R. Evid. 404(b). See also State v. McKnight, 900 S.W.2d 36, 51 (Tenn. Crim. App. 1994).

In the case now before this Court, the defendant made a motion prior to trial to sever count eleven from the other counts.[5] However, no hearing was held and thus, no testimony was taken. The trial judge heard argument from both sides and then ruled as outlined above. Rather than remand for a Rule 404(b) hearing, we find it appropriate to perform the analysis based on the testimony offered at trial. Hoyt, 928 S.W.2d at 945. In Hoyt, this Court concluded that because the offenses against the victims constituted a common scheme or plan, evidence of each offense "addresses an issue relevant to the other offense and is therefore admissible in the trial of the other." 928 S.W.2d at 945. In the case now before us, we reach the same conclusion.[6] Because the offenses were part of the defendant's common scheme or plan, evidence of all offenses is admissible. Now we must determine, despite the evidence's admissibility, whether the evidence should have been excluded on the basis that its probative value was outweighed by the danger of unfair prejudice. Tenn. R. Evid. 404(b). In general, the fact that the offenses are similar "makes the probative value particularly significant." Edwards, 868 S.W.2d at 691. In our view, because the offenses were so similar and were committed against the same victim within a short period of time, the trial court did not err by refusing to sever

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[5]Originally, the defendant had also asked the court to sever the counts involving L.G. from those counts involving her mother, Ruth Moore. On appeal, he only challenges the trial court's denial of his motion to sever count eleven.

[6]While the Hoyt court concluded the evidence would be admissible, it ultimately concluded that the admission of the evidence would unduly prejudice the defendant. The Court explained that because the indictment was not "date specific," the State would have been permitted to introduce other unindicted crimes committed by the defendant. The Court noted that the same result would not necessarily follow in a "date specific" indictment. In the case now before us, there are no allegations of any other crimes or bad acts committed by the defendant against L.G. other than the indicted offenses. Thus, the concern in Hoyt is not an issue in this case.

count eleven from the other counts. We further note that in this case the jury did not convict the defendant of count eleven nor of count one, the count most similar to count eleven. The jury convicted the defendant of only one count of rape of a child and that count, count two in the indictment, was sufficiently supported by physical evidence such that we can conclude the conviction was not the result of the jury having been influenced by hearing evidence related to count eleven. Thus, while we conclude that the trial court did not err by refusing to sever the charges, had it been error, it certainly would have been harmless as the evidence is entirely sufficient to support the defendant's conviction for rape of a child. See State v. Hallock, 875 S.W.2d 285, 293 (Tenn. Crim. App. 1993).

III. Void for Vagueness

The defendant next argues that the trial court erred in failing to dismiss counts seven and eight of the indictment as being void for vagueness in violation of state and federal constitutions. Counts seven and eight charged the defendant with committing simple assault against L.G. and her mother, Ruth Moore. The statute, in pertinent part, provides:

> A person commits assault who:
>
> (1) Intentionally, knowingly or recklessly causes bodily injury to another;
>
> (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or
>
> (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

T.C.A. § 39-13-101(a). The defendant contends that the statute is vague because of the terms "reasonable person," "offensive," and "provocative." He argues that none of these terms are clearly defined, and thus they are susceptible to different interpretations. We

do not agree.

It is well settled that if a statute does not clearly define the conduct it prohibits, then the statute is void for vagueness. Grayned v. Rockford, 408 U.S. 104, 108 (1972). A statute must fulfill the following two criteria in order to survive a challenge for vagueness. First, the statute must provide "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned, 408 U.S. at 108-09. Second, the statute "must provide explicit standards" to prevent "arbitrary and discriminatory application." Grayned, 408 U.S. at 108. See also State v. Lakatos, 900 S.W.2d 699 (Tenn. Crim. App. 1994).

In his brief, the defendant argues that simply by reading the assault statute, "no rational human could decide with any certainty what is permitted and that which is outlawed." To the contrary, we believe it quite simple to understand the statute. As a panel of this Court has stated, "What this statute clearly means is that a reasonable person who was the recipient of the physical contact would regard the contact as extremely offensive or provocative." State v. Michael Ray Porter, No. 01C01-9406-CR-00227, Davidson County (Tenn. Crim. App. filed May 30, 1995, at Nashville)(perm. app. denied Oct. 2, 1995). In the case before us, counts seven and eight stemmed from the defendant pouring beer and then urinating on the two victims. It is quite obvious that any reasonable person would find this type of contact extremely offensive. This issue is entirely without merit.

IV. Sufficiency of Evidence

As his next issue, the defendant contends that the evidence was insufficient to convict him of count two, rape of a child. As noted earlier, of the three charges of rape

of a child, the defendant was convicted of only one count. This count related to the victim being forced to perform fellatio on the defendant. The defendant contends that the evidence is insufficient because the victim offered conflicting testimony in that she said in an earlier statement the defendant did not ejaculate in her mouth and because the source of the semen found in the victim's mouth could not be successfully identified.

A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict

rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Rape of a child is defined as "the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." T.C.A. § 39-13-522. Fellatio is included within the definition of sexual penetration. T.C.A. § 39-13-501(7). At the time of the offense, L.G. was eleven years old.

At trial, L.G. testified to a string of horrific events that occurred during the early morning hours of November 27, 1993. With respect to this charge, she testified that the defendant had tied her mother to a pole in the basement and had then taken her [L.G.] upstairs, had forced her on her knees, and had put his penis in her mouth. Her testimony was corroborated by the testimony of Leon Gardner and Betty Douglas. As discussed above, these witnesses were allowed to testify as to what L.G. said shortly after the incident occurred. Both stated that L.G. had said the defendant had put his penis in her mouth.

Furthermore, Julie Rosof, a family nurse practitioner at Our Kids Center, testified that she had performed a physical examination of L.G. including taking mouth and throat swabs. These swabs were then sent to the TBI lab where forensic serologist Deane Johnson examined them. Johnson testified that she had found semen on the oral swab taken from L.G.

Joe Minor, who performs casework for the TBI in DNA matters, testified that

he had compared the semen sample found in L.G.'s mouth to a saliva sample provided by the defendant. He explained that he could make no match due to the insufficient amount of the semen sample.

From this evidence, we find it entirely permissible for the jury to have convicted the defendant of rape of a child by means of fellatio. The jury chose to credit the testimony of the victim, despite an earlier statement in which she had said the defendant did not actually ejaculate. The jury also chose to credit the testimony of Leon Gardner and Betty Douglas. In addition, physical evidence showed semen in the victim's mouth. That the small amount of semen could not be successfully matched to the defendant is of little consequence. The presence of the semen combined with the testimony of the victim and other witnesses is clearly sufficient to sustain the defendant's conviction on this count.[7] This issue is without merit.

V. Laboratory Testing

The defendant next contends that his constitutional rights were violated by the State's failure to perform a blood typing test and by the State's failure to preserve the semen sample for further testing. He submits that such failures amount to a suppression of evidence in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution. We do not agree.

The defendant voluntarily submitted saliva and blood samples so that his DNA might be compared to the DNA which was in the semen found in the victim's mouth. However, as pointed out above, the DNA tests performed by the TBI were inconclusive

[7]Within this issue the defendant again argued the severance issue. As we noted above, the evidence was sufficient to convict the defendant of count two. That the jury heard evidence of other alleged offenses and chose not to convict the defendant of those offenses is of no consequence. The jury had ample evidence related to count two to convict the defendant.

due to the small amount of DNA present in the semen sample. The defendant argues that the TBI lab should have performed an ABO blood typing test and should not have used all the semen sample on the DNA tests.

Joe Minor, who performs DNA testing for the TBI, testified that he had used the RFLP technique in testing the DNA found in the semen sample. However, because the amount of semen was small, he was unable to visualize the DNA using the RFLP process. Thus, he was unable to make a comparison between the DNA taken from the defendant's voluntary samples and the semen. He testified that after he performed his analysis, the remaining portion of the sample was sent to a second lab for PCR testing, the other technique now being used to identify DNA. He testified that the results of that test were inconclusive as well.

Minor further testified that an ABO blood typing test could have been performed prior to the DNA tests, but could not have been performed after because the sample had been depleted. However, he testified that the TBI lab was no longer performing the ABO test because of the large amount of sample it consumed and because DNA testing provided a better exclusionary tool than the ABO test. As a result, the ABO test was not performed.

This Court has previously held that the State is not required to perform any test. State v. Greg Lamont Turner, No. 01C01-9503-CR-00078, Davidson County (Tenn. Crim. App. filed Aug. 25, 1995, at Nashville)(no perm. app. filed). In that case, the defendant had argued that the State's failure to perform DNA testing and the failure to preserve blood samples violated his due process rights. This Court rejected that argument, stating:

> First, the state is not required to perform any type of test. However, the failure to perform a material test may be shown through the cross-examination of the appropriate state witness since it reflects upon the quality of the state's case. Second, there is nothing in the record that indicates the appellant sought to preserve the blood samples for possible testing prior to trial. Third, assuming the blood was available, the only evidence contained in the record establishes that the testing would be inconclusive.

Following this reasoning, we find that this issue has no merit. In the present case, the defendant did cross-examine Joe Minor about the availability of the ABO test and about the decision not to perform the test, thus, the defendant had the opportunity to attack the quality of the State's case. While the defendant did request preservation of the sample, the sample was so small that compliance was impossible. And finally, Minor testified that he had performed the DNA testing rather than the ABO testing because the DNA test is more exclusionary. Thus, it is reasonable to infer that if the DNA test could not produce a conclusive result, it is unlikely that the ABO test could have. Thus, we conclude that the State withheld no evidence and that the defendant's constitutional rights were not violated.

VI. Use of term "victims"

As his final issue, the defendant argues that the trial court erred when it denied the defendant's motion requesting that the State not refer to the two prosecutrix as "victims." He claims that by allowing the State to use the term "victims," the trial court invaded the fact-finding province of the jury.

First, we note that defense counsel failed to point to any place in the record where the prosecutrix were called victims by the State. A failure to make appropriate references to the record waives the issue. Tenn. Ct. of Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988); see also T.R.A.P. 27(a)(7) and

(g). Secondly, defense counsel provides no authority in support of his position. The authority cited by counsel stands for the proposition that judges are forbidden to comment on the evidence presented.[8] Allowing the State to use the term "victims" is not a comment by the trial judge on the evidence presented in the case. A failure to cite authority to support one's argument results in a waiver of that issue. Tenn. Ct. of Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988). In any case, we find that any use by the State of the term "victims" did not constitute an error such that a new trial is warranted. In our opinion, this issue has no merit.

In conclusion, we find that the trial court did not err in allowing testimony from witnesses Leon Gardner and Betty Douglas nor did the trial court err by refusing to sever count eleven from the other counts in the indictment. Further, we find that the statute defining simple assault is not void for vagueness in violation of the state and federal constitutions and that the evidence was sufficient to support the conviction of rape of a child by fellatio. We also conclude that the State's failure to perform a blood typing test and failure to preserve the semen sample for further testing did not amount to an improper suppression of evidence. And finally, the trial court did not err in denying the defendant's motion requesting that the State not use the term "victims." Therefore, the judgment of the court below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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[8] See State v. Odum, 928 S.W.2d 18, 32 (Tenn. 1996).

DAVID H. WELLES, Judge

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THOMAS T. WOODALL, Judge