

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs April 29, 2008

**STATE OF TENNESSEE v. ERICA LYNN WYMA**

**Appeal from the Criminal Court for Hamblen County**  
**Nos. 04CR395                      John F. Dugger, Jr., Judge**

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**No. E2007-01999-CCA-R3-CD - Filed September 10, 2008**

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JOSEPH M. TIPTON, P.J., concurring.

I concur in the result and most of the reasoning in the majority opinion. I question, though, whether we can firmly say that the victim's saying, "No, No," and "Mommy hit me" was sufficiently relevant and not too prejudicial in the context of the trial.

The evidence primarily indicates that the victim was injured by the defendant's shaking her. Such was the main thrust of the expert testimony. The statements were shown to be excited utterances, but the difficulty is relating the statements to the trauma proven in the trial. There was no independent proof that the defendant hit the victim, as opposed to shaking her, and thereby caused the victim's injuries. The potential existed that the victim's statements referred to another incident not on trial. If such were the case, the defendant would have reason to complain.

The record, though, is insufficient for us regarding prejudice. Although the state's expert witnesses focused on the injuries being consistent with the defendant's shaking the victim, they also indicated that the trauma could occur by other violent means. The record does not include the jury selection or the closing arguments. We have no way of knowing whether the state focused only on shaking as the cause of the victim's injuries. If the case was presented in more general terms, I believe the trial court properly allowed the statements into evidence. Under the circumstances, I concur in affirming the defendant's conviction.

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JOSEPH M. TIPTON, PRESIDING JUDGE