

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

**STATE OF TENNESSEE v. KENNY KIMBLE**

**Direct Appeal from the Criminal Court for Shelby County  
No. 10-04024 Paula Skahan, Judge**

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**No. W2012-00407-CCA-R3-CD - Filed July 22, 2013**

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JUDGE JERRY L. SMITH, Concurring in Results.

**CONCURRING OPINION**

I am writing separately to express my disagreement with the majority opinion's assertion that a trial judge's ruling with regard to hearsay is subject to review under an abuse of discretion standard. I am persuaded that the analysis of *State v. Gilley*, 297 S.W.3d 739 (Tenn. Crim. App. 2008), *perm. app. denied*, (Tenn. Feb. 17, 2009), is the appropriate method for reviewing issues involving hearsay. Although this analysis has been questioned by our supreme court in the *Pylant* and *Franklin* decisions cited by the majority, *Gilley* has never been overruled by that court. Until such time as our supreme court sees fit to overrule *Gilley*, I feel compelled to follow it. *See* Tenn. Sup. Ct. R. 4(G)(2) (requiring that published appellate opinions be considered controlling authority unless reversed or modified by a court of competent jurisdiction).

In the instant case, in my opinion, the victim's statement to his mother concerning the soiled shirt clearly falls under Tennessee Rule of Evidence 803(2) and is admissible as an excited utterance exception to the rule against the admission of hearsay. Thus, I am able to concur with the results reached by the majority with respect to this issue. In all other respects I concur fully with the judgment of the Court.

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JERRY L. SMITH, JUDGE