

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 10, 2011

STATE OF TENNESSEE v. WILLIAM DARELLE SMITH

**Direct Appeal from the Criminal Court for Davidson County
No. 2007-C-2675 Seth Norman, Judge**

No. M2010-01384-CCA-R3-CD - Filed March 2, 2012

THOMAS T. WOODALL, J., concurring.

I concur in Judge Wedemeyer’s opinion. I write separately to express my concern of how the trial court dealt with the issue of a juror’s communication with the witness Dr. Adele Lewis. The appellate record indicates that when the fact of the communication was made known to the trial court, there was no discussion of the matter on the record. Any instructions to the jury concerning appropriate juror conduct during the trial are not included in the transcripts, although the jury voir dire was added in a supplement to the record. Direct communication by a juror to a witness during the course of a trial in the nature of the “Facebook” message in this case could never be considered appropriate.

Further disturbing is the implication in the communication that both the witness and the juror understood that the communication was improper; in addition, the option of a cover up is also alluded to.

At a minimum, the juror and the witness should have both been summoned before the trial court and examined under oath concerning the possibility of any other similar communication during the trial, and to be admonished in open court for their improper conduct. In this case there is nothing apparent in the record to indicate Defendant is entitled to a new trial based upon the highly improper conduct of the juror and the witness. Also, Defendant did not move for a mistrial when the communication was made known to the trial court and the parties. Courts must be vigilant to insure that there is never “prejudice to the judicial process,” Tennessee Rule of Appellate Procedure 36(b), caused by improper communications from or to jurors during the course of a trial.

THOMAS T. WOODALL, JUDGE