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CRIMINAL PROCEDURE-JUROR MISCONDUCT AND BIAS- ASSESSING THE PREJUDICIAL EFFECT OF EXTRA-JUDICIAL COMMUNICATIONS BY JURORS IN A TECHNOLOGICALLY ADVANCED SOCIETY

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CRIMINAL PROCEDURE—JUROR MISCONDUCT
AND BIAS—ASSESSING THE PREJUDICIAL
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State v. Smith, 418 S.W.3d 38 (Tenn. 2013).

RACQUEL MARTIN*

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I. INTRODUCTION

In March 2010, a Davidson County grand jury indicted the defendant for the first-degree murder of Zurisaday Villanueva.¹ Before jury selection began on March 8, 2010, the trial court informed prospective jurors that using their cell phones to communicate and learn about a trial would be “highly improper” and that their decision should only be based on the law and evidence that would be presented in the courtroom.² During the jury-selection

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1. *State v. Smith*, 418 S.W.3d 38, 42 (Tenn. 2013).
2. *Id.* The trial court stated:

Over the country of late . . . there’s been some difficulty and it’s going to force a change in the law with regard to jurors taking their cell phone and texting and trying to find out about a trial or things like that. That would be highly improper on a juror’s part to do anything like that. As I say, you’re required to make your decision solely upon the law and the evidence as you hear it in the courtroom.

process, the trial court, prosecutors, and defense attorneys questioned the prospective jurors about whether they knew various individuals that were involved in the investigation or would be involved in the trial.³ Despite the attorneys' knowledge that Dr. Adele Lewis, an assistant medical examiner and witness for the State, had trained at Vanderbilt University, neither the attorneys nor the trial court asked any of the jurors if they knew Dr. Lewis.⁴ Consequently, three of the prospective jurors who were eventually seated on the jury worked at Vanderbilt University Medical Center.⁵ After the jury was selected, the trial court instructed the jurors to not speak to anyone involved in the case about any matter until the conclusion of the trial.⁶

On March 9, 2010, Dr. Lewis testified about the two gun shot wounds that the victim had received.⁷ Although Dr. Lewis could not determine which shot had been fired first, she concluded that the death of the victim was a homicide.⁸ After the State rested, the defendant moved for a judgment of acquittal, but the trial court denied the motion.⁹ Subsequently, the defense rested, the parties

Id.

3. *Id.* These individuals included the defendant, the prosecutors, the defense attorneys and several of the investigating officers. *Id.*

4. *Id.*

5. *Id.* These jurors included a physician, registered nurse, and Glenn Scott Mitchell, a grants manager and the subject of the principal case. *Id.* at n.1.

6. *Id.* The trial court provided the following preliminary instructions:

During the course of the trial, you should not talk with any witnesses, defendants, or attorneys involved in this case. Please do not talk with them about any subject whatsoever. You may see them in the hallway, on an elevator, or at some other location. If you do, perhaps the best standing rule is not to say anything.

Id. This was the only time that the trial court specifically charged the jury not to speak with any participants in the trial. *Id.* at n.2. The trial court did not sequester the jury, and when the court excused the jury for the day on March 8 and 9, it merely reminded the jurors to remember the instructions that it had previously given. *Id.* Furthermore, the trial court failed to include a "warning against communications between the jurors and the defendant, the attorneys, the witnesses, or other third parties or a warning against the use of electronic technologies" in its final instructions to the jury immediately preceding the jury's deliberations. *Id.*

7. *Id.* at 43. The defendant allegedly shot the victim twice, once in the chest and once in the back of the head. *Id.*

8. *Id.* The victim could have survived the chest wound with proper medical care, but she would not have survived the head wound. *Id.*

9. *Id.*

made their closing arguments, and the court adjourned the proceedings for the day.¹⁰

When the trial resumed the following day, the trial court charged the jury and then instructed the jury to begin deliberating.¹¹ Approximately one hour after deliberations began, the trial judge received an email from Dr. Lewis explaining that one of the jurors had communicated with her via Facebook after her testimony the previous day.¹² In the email, Dr. Lewis included a transcript of the conversation between her and Juror Mitchell in which Juror Mitchell stated that he recognized Dr. Lewis from Vanderbilt, and that he knew there was a risk of a mistrial if the court discovered that they knew one another.¹³ Despite the fact that the trial court provided

10. *Id.*

11. *Id.*

12. *Id.* Because the trial court did not hold an evidentiary hearing to question the juror about the nature of his postings on Dr. Lewis's Facebook page, there is no indication as to whether the communications were public postings which others could see and add comments or whether they were private messages from one Facebook user to another. *Id.* at n.3 (citing Ryan A. Ward, Note, *Discovering Facebook: Social Network Subpoenas and the Stored Communications Act*, 24 HARV. J.L. & TECH. 563, 571-74 (2011) (discussing the differences between public postings and private messages on social networking sites).

13. *Id.* The email stated:

Judge Norman,

I can't send you actual copies of the emails since Facebook is blocked from my computer here at work, but here is a transcript:

Scott Mitchell: "A-dele!! I thought you did a great job today on the witness stand . . . I was in the jury . . . not sure if you recognized me or not!! You really explained things so great!!"

Adele Maurer Lewis: "I was thinking that was you. There is a risk of a mistrial if that gets out."

Scott Mitchell: "I know . . . I didn't say anything about you . . . there are 3 of us on the jury from Vandy and one is a physician (cardiologist) so you may know him as well. It has been an interesting case to say the least."

I regret responding to his email at all, but regardless I felt that this was a fairly serious violation of his responsibilities as a juror and that I needed to make you and General Miller aware. I did not recognize the above-referenced cardiologist or any other jurors.

Adele Lewis, MD

copies of the email to both trial attorneys,¹⁴ the trial record contained no information regarding when the trial judge distributed the email, whether the trial judge and the attorneys discussed the email during the jury's deliberations, or what was said during the discussion, if one occurred.¹⁵

At the conclusion of their deliberations, the jury found the defendant guilty of first-degree murder.¹⁶ After the trial court excused the jury, the defense counsel asked the trial judge if the court could question Juror Mitchell about his communication with Dr. Lewis and inquire about any information that he might have obtained other than what had been disclosed to the court.¹⁷ The trial court stated that it was satisfied with the communication that it had received from Dr. Lewis and refused to question Juror Mitchell, Dr. Lewis, or any other jurors in open court.¹⁸ The trial judge then sentenced the defendant to life in prison.¹⁹

The defendant moved for a new trial, arguing that he was denied a fair trial because the court forbade him from questioning Juror Mitchell about his extra-judicial communication with Dr. Lewis and any other potential violations of the instructions that the trial court gave to the jury.²⁰ Following the denial of the motion for a new trial by the trial court,²¹ the defendant raised the issue of possible juror misconduct again on appeal.²² The Tennessee Court of Criminal Appeals upheld the decision of the trial court not to question Juror Mitchell.²³ The appellate court characterized the Facebook exchange as "mere interactions" between a juror and a third person and reasoned that "the trial court has the discretion to determine whether a jury has acted impartially."²⁴ On grant of the defendant's

Id.

14. *State v. Smith*, No. M2010-01384-CCA-R3-CD, 2012, WL 8502564, at *1, *10 (Tenn. Crim. App. Mar. 2, 2012), *vacated*, 418 S.W.3d 38 (2013).

15. *Smith*, 418 S.W.3d at 44.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* "The trial court denied the motion without comment." *Id.*

22. *Id.* On appeal, the defendant also claimed that the trial court erred when it allowed the defendant's girlfriend to testify about threatening statements that the defendant made to her a few days prior to the murder of the victim. *State v. Smith*, No. M2010-01384-CCA-R3-CD, WL 8502564, at *1, *5 (Tenn. Crim. App. Mar. 2, 2012), *vacated*, 418 S.W.3d 38 (2013). Moreover, he asserted that the evidence was insufficient to support his convictions. *Id.*

23. *Smith*, 418 S.W.3d at 44.

24. *Id.* (quoting *Smith*, WL 8502564, at *11). *But see Smith*, 2012 WL 8502564,

application for permission to appeal to the Supreme Court of Tennessee, *held*, vacated and remanded.²⁵

The trial court erred in its decision not to immediately conduct an evidentiary hearing after learning of the Facebook communication between Juror Mitchell and Dr. Lewis because: (1) Dr. Lewis's email proved that an extra-judicial communication between her and Juror Mitchell had occurred; (2) the contents of the email were admissible under the Tennessee Rule of Evidence 606(b); (3) the email triggered a rebuttable presumption of prejudice to the defendant, which thereby required the State to explain the conduct or to demonstrate that it was harmless; and (4) the record was inadequate for the court to determine whether the extra-judicial communication between Dr. Lewis and Juror Mitchell was not prejudicial. *State v. Smith*, 418 S.W.3d 38 (Tenn. 2013).

II. PREVENTING EXTRA-JUDICIAL COMMUNICATIONS BY JURORS IN AN EVOLVING SOCIETY

The fundamental issue faced by the Tennessee Supreme Court in *Smith* concerned the appropriate response of the trial court upon receiving reliable information during the jury's deliberations that one of the jurors used a social networking site to exchange messages with one of the witnesses of the State during the trial.²⁶ The *Smith* court aimed to determine whether the trial court properly refused the request of the defendant to conduct an evidentiary hearing despite learning of an extra-judicial communication between one of the jurors and a witness.²⁷ Because the decision to refuse an investigation of juror misconduct may constitute prejudice to the judicial process²⁸ and infringe upon a defendant's constitutional right to be tried by a fair and impartial jury,²⁹ the assessment of

at *12 (Woodall, J., concurring) ("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.").

25. *Smith*, 418 S.W.3d at 51.

26. *Id.* at 48. Although the juror's use of social media to communicate with a witness presented an unprecedented form of juror misconduct in Tennessee, the Tennessee Supreme Court and appellate courts had ruled on issues regarding extra-judicial communications between jurors and third parties for over 140 years, beginning with *Odle v. State*, 65 Tenn. 159, 163 (Tenn. 1873). *Smith*, 418 S.W.3d at 46-47.

27. *Id.* at 48.

28. *Id.*

29. *Smith*, 2012 WL 8502564, at *11 (quoting TENN. CONST. art. I, § 9).

such a judgment substantially affects the procedure followed by a trial court when confronted with unconventional examples of juror misconduct. By granting the defendant's appeal, the *Smith* court not only needed to guarantee the defendant's right to a fair trial but also needed to remind jurors of the importance of their role in the criminal justice system.³⁰

As a procedural matter, when an allegation of juror misconduct arises in a criminal case, it is best for the court to question the juror about his behavior in the presence of trial counsel and the defendant.³¹ Furthermore, when the trial court learns of an extra-judicial communication of a juror, the trial judge should question the juror about what was said to determine if a reasonable possibility exists that the communication affected the verdict.³² In *Smith*, the defendant challenged the discretion of the trial court to deny his request for an evidentiary hearing and his motion for a new trial.³³ Thus, the heart of the issue before the court was whether knowledge of an extra-judicial communication between Juror Mitchell and Dr. Lewis warranted an evidentiary hearing despite the fact that Dr. Lewis had disclosed the contents of the communication to the trial judge.³⁴

Tennessee precedent regarding extra-judicial communications demonstrates the significance that the supreme and appellate courts place on ensuring a fair trial by an impartial jury and the great lengths to which Tennessee courts have gone to investigate allegations of juror misconduct.³⁵ Nevertheless, as sequestration

30. *Smith*, 418 S.W.3d at 50.

31. See *Whitmore v. Ball*, 77 Tenn. 35, 37 (1882) (noting the court's multiple assertions that it is best to "examine the juror in open court").

32. See *Walsh v. State*, 166 S.W.3d 641, 648 (Tenn. 2005) ("The judge posed questions such as '[F]or what purpose did you [render this verdict], because you believed the verdict or because you wanted to go home?'" (quoting *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 918 (7th Cir. 1991))).

33. *Smith*, 418 S.W.3d at 44.

34. *Id.* at 48.

35. See *State v. Adams*, 405 S.W.3d 641, 650 (Tenn. 2013) (explaining the extensive procedure through which a court must examine juror misconduct); *Walsh*, 166 S.W.3d 641, 646 (Tenn. 2005) (nothing the common law history of the rule against juror misconduct and its eventual codification); *State v. Blackwell*, 664 S.W.2d 686, 689 (Tenn. 1984) (explaining that "for more than one hundred years" Tennessee has held that juror misconduct can justify a mistrial if unexplained); *Whitmore*, 77 Tenn. 35, 37 (Tenn. 1882) (noting Tennessee's history of allowing a verdict to be challenged due o juror misconduct); *Odle v. State*, 65 Tenn. 159, 163-64 (Tenn. 1873) (noting that the explanation required to disprove juror misconduct must be "ample and satisfactory" and must erase "the slightest imputation" of misconduct); *Carruthers v. State*, 145 S.W.3d 85, (Tenn. Crim. App. 2003)

became less common in Tennessee, courts began to implement a burden shifting analysis to decide the fate of cases involving extra-judicial communications.³⁶ Under this framework, the defendant bore the initial burden to prove that an extra-judicial communication occurred, resulted in prejudicial information being imparted to one or more jurors, and impacted the verdict.³⁷

In an attempt to adhere to the Tennessee Supreme Court's holding in *State v. Blackwell*, the appellate court in *Smith*—focusing on the content of the communication and the burden of the defendant—affirmed the denial of an evidentiary hearing.³⁸ However, the appellate court's emphasis on *Blackwell* resulted in a straying from its own precedent regarding juror misconduct.³⁹ In *Smith*, the Tennessee Supreme Court was tasked with determining whether the defendant had sufficiently met the burden established in *Blackwell* and whether the trial court had erred in refusing to hold an evidentiary hearing after ascertaining the contents of the extra-judicial communication.⁴⁰ Ultimately, the *Smith* court reached its decision by adhering to the rulings of precedential cases that considered what actually happened during an extra-judicial communication, as well as what may have happened.⁴¹

(explaining the application and significance of the Tennessee rule against juror misconduct); *Shew v. Bailey*, 260 S.W.2d 362, 368 (Tenn. Ct. App. 1951) (noting that a judge has the power to “launch a full scale investigation” to determine if any juror misconduct occurred).

36. See *Blackwell*, 664 S.W.2d at 689 (noting that when the jury is not sequestered, the defense must show more than “mingling with the general public” to shift the burden of showing no prejudice to the State).

37. See *id.* (explaining what a party must show to meet the initial burden of proof, thus shifting the burden to the party opposing the claim of juror misconduct).

38. *State v. Smith*, No. M2010-01384-CCA-R3-CD, WL 8502564, at *1, *10, *11 (Tenn. Crim. App. Mar. 2, 2012), *vacated*, 418 S.W.3d 38 (2013).

39. See *Carruthers*, 145 S.W.3d at 96 (discussing the appropriate procedures to take when determining whether a jury misconduct claim exists); *Smith v. State*, 566 S.W.2d 553, 560 (Tenn. Crim. App. 1978) (emphasizing that “all contacts with deliberating jurors should be conducted in open court with all parties and their counsel present”); *Shew*, 260 S.W.2d at 368 (discussing the appropriate rule when reasonable grounds exist to overturn a verdict because of an improper but inadvertent act upon the jury).

40. See *State v. Smith*, 418 S.W.3d 38, 48 (Tenn. 2013).

41. See *id.* at 47–49; *State v. Adams*, 405 S.W.3d 641, 654 (Tenn. 2013) (discussing the factors to consider when determining whether the presumption of prejudice has been rebutted in cases where a juror has been exposed to either extraneous prejudicial information or an improper outside influence); *Walsh v. State*, 166 S.W.3d 641, 649 (Tenn. 2005) (discussing Tennessee Rule of Evidence 606(b)); *Blackwell*, 664 S.W.2d at 689 (requiring more than “a bare showing of a mingling

A. *Originally Confronting Extra-Judicial Communications
Between Jurors and Third Parties*

At common law, Tennessee courts sought to prevent extra-judicial communications between jurors and third parties by sequestering jurors.⁴² The purpose of the sequestration rule was “to preserve a defendant’s right to a fair trial and impartial jury by protecting jurors from outside influences so that the verdict [would] be based only upon evidence developed at trial.”⁴³ The Tennessee Supreme Court first encountered the possibility of extra-judicial communications between jurors and third parties in *Odle v. State*.⁴⁴ During a homicide trial, each of the jurors, an officer of the court, the prosecutors, and two of the prosecutor’s witnesses resided in a small home together.⁴⁵ Because there were only two rooms in the home, the jury could not remain together as the court had ordered.⁴⁶ Relying on the precedent established in *Hines v. State*,⁴⁷ the court

with the general public” to establish the possibility of improper influence on a juror); *Whitmore v. Ball*, 77 Tenn. 35, 38 (Tenn. 1882) (discussing that lower courts should examine the jurors in cases involving the possibility of improper influence); *supra* note 39 and accompanying text.

42. See *State v. Bondurant*, 4 S.W.3d 662, 671 (Tenn. 1999). Under this sequestration rule, the court ordered jurors to be “physically kept together within the presence of each other without food, drink, fire or light until” the jury reached a verdict. *Id.* (citing *Gonzales v. State*, 593 S.W.2d 288, 292 (Tenn. 1980)). Since 1975, with the exclusion of cases involving the death penalty, jurors in criminal cases have only been sequestered at the sound discretion of the trial judge. TENN. CODE ANN. § 40-18-116 (2013); *Blackwell*, 664 S.W.2d at 689. When a jury is sequestered, jurors are prohibited “from separating at times when they are not engaged upon actual trial or deliberation of the case.” TENN. CODE ANN. § 40-18-116 (2013).

43. *Bondurant*, 4 S.W.3d at 671 (citing 23A C.J.S. *Criminal Law* § 1363(a) (1989)).

44. *Odle v. State*, 65 Tenn. 159, 161 (1873).

45. *Id.* at 160.

46. *Id.* The rooms in the home were so small that the jury would separate when eating—thereby violating the order of the court—such that at least part of the jury was always in a room with the prosecutor and both witnesses. *Id.* at 162.

47. *Hines v. State*, 27 Tenn. 597, 602 (1848). The Tennessee Supreme Court stated:

1. [T]he fact of separation having been established by the prisoner, the possibility that the juror has been tampered with, and has received other impressions than those derived from the testimony in court, exists; and, *prima facie*, the verdict is vicious.

2. [The] separation may be explained by the prosecution, showing that the juror had no communication with other persons, or that such

reiterated the procedural rules governing the requisite course of action that a court must follow upon discovering that a jury had separated.⁴⁸ Although the separation of the jury was clearly shown, the court found that the separation would have been adequately explained by the small nature of their living quarters if the prosecutor and his witnesses had not resided in the same home as the jurors.⁴⁹ However, because of the presence of non-jurors in the home, Tennessee law required the State to provide a satisfactory explanation to the court.⁵⁰ The court concluded that the explanations given by the prosecutors and the two witnesses were insufficient because they failed to “exonerate the prosecutor from the slightest imputation of either an intention or attempt to influence the jury, directly or indirectly.”⁵¹ While there appeared to be no direct evidence of extra-judicial communications between the jurors and third parties, the Tennessee Supreme Court emphasized the importance of what may have occurred under the circumstances and the necessity of the prosecutor to refute any inclination that he may have used non-verbal means to influence the jury.⁵²

Five years following its decision in *Odle*, the Tennessee Supreme Court revisited its rationale due to an allegation of juror misconduct in *Whitmore v. Ball*.⁵³ The *Whitmore* court directly confronted an accusation by the appellant that one of the jurors had made negative statements about the appellant in the jury room after deliberations

communication was up on subjects foreign to the trial, and that, in fact, no impressions, other than those derived from the testimony were made upon his mind.

3. [I]n the absence of such explanation, the mere fact of separation is sufficient ground for a new trial.

Id.

48. *Odle*, 65 Tenn. at 161.

49. *Id.*

50. *Id.* at 162.

51. *Id.* at 163 (quoting *McElrath v. State*, 32 Tenn. 378, 382 (1852)). The prosecutor contended that he was never in the room with the jury without the officer and that he never spoke to any of the jurors during the trial. *Id.* at 162. Nevertheless, the court stated that the prosecutor did not explain why he chose for himself and both witnesses to remain at the same house as the jury despite the fact that there was already insufficient room for the jury. *Id.* Furthermore, the witnesses did not assert that they were never in the room with any of the jurors. *Id.* at 163. Although they claimed that they never spoke to any members of the jury, they did not state that they never spoke to the officer or others in the presence of the jury. *Id.*

52. *Id.* at 162.

53. *Whitmore v. Ball*, 77 Tenn. 35, 38 (1882).

had begun in order to mislead and prejudice the jury.⁵⁴ Abandoning its rationale from *Odle* in which the court was instructed to consider what information could have been imparted to the jury,⁵⁵ the *Whitmore* court held that when an express allegation of juror misconduct arose, the more appropriate procedure was to examine the juror in open court.⁵⁶ Through such a proceeding, both parties receive an opportunity to learn the truth behind the circumstances surrounding the alleged misconduct by questioning the juror and other witnesses in the presence of the court.⁵⁷ In confronting primitive examples of juror bias and misconduct, the *Whitmore* court moved away from abstract possibilities and highlighted the potential consequences of intentionally violating or carelessly disregarding orders of the trial court.⁵⁸ Despite the court's affirmation of the trial judge's authority and responsibility to investigate actual and probable instances of juror misconduct,⁵⁹ the court did not foresee the corollaries of such an opinion in the face of non-sequestered juries, increased occurrences of extra-judicial communications between jurors and third parties, and expensive mistrials resulting from juror misconduct.⁶⁰ It was not until over a century later, after

54. *Id.* at 35–36. Three other jurors had informed the plaintiff in error of the misconduct of the juror in question. *Id.* at 36.

55. *See supra* notes 51–52 and accompanying text.

56. *Whitmore*, 77 Tenn. at 37. The lower court refused to allow defense counsel to question the juror who had acted improperly, or any of the three jurors that had disclosed the misconduct, in open court. *Id.* at 36. The lower court also refused to question any of the jurors about what had occurred during the deliberations. *Id.*

57. *Id.* at 37. The Tennessee Supreme Court held:

Under all the circumstances, we are of [the] opinion the court should have examined the jurors offered, or a sufficient number of them, . . . to have shown the truth or falsehood of the facts charged, and their influence upon the jury in arriving at its verdict. It was within the legitimate power of the court to have compelled the attendance and deposition of each juror.

Id. at 38. Additionally, the court noted that a verdict may be attacked and set aside for juror misconduct. *Id.* at 37; *see also* *Shew v. Bailey*, 260 S.W.2d 362, 368 (Tenn. Ct. App. 1951).

58. *Whitmore*, 77 Tenn. at 37.

59. *Id.* at 38.

60. *See State v. Blackwell*, 664 S.W.2d 686, 689 (Tenn. 1984) (explaining the burden of a defendant who presents evidence of the occurrence of an extra-judicial communication between a juror and a third party when the jury has not been sequestered); Carey Myers Morrison, *Can the Jury Trial Survive Google?*, 25 CRIM. JUST. 4, 11 (2011) (discussing the growing problem of improper communications between jurors and third parties); Amanda McGee, Note, *Juror Misconduct in the*

the sequestration of juries had become a discretionary practice of the trial judge,⁶¹ that the Tennessee Supreme Court was forced to modify its procedural ruling regarding the investigation of extra-judicial communications and juror misconduct in *State v. Blackwell*.⁶²

B. *The Burden Shifting Analysis of State v. Blackwell*

In *Blackwell*, the defendant appealed his conviction for selling alcohol to a minor, arguing that extraneous prejudicial information was improperly brought to bear upon the jury after one of the jurors had an extra-judicial communication with a third party.⁶³ Reversing the trial court's decision to overrule the motion for a new trial,⁶⁴ the *Blackwell* court ruled that such juror misconduct was sufficient to require a new trial.⁶⁵ In making its determination, the court officially ruled that Federal Rule of Evidence 606(b) governed the exclusion and admissibility of evidence to impeach a jury verdict in Tennessee.⁶⁶ Using the rule as the framework for its rationale, the

Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms, 30 LOY. L.A. ENT. L. REV. 301, 306–07 (2010) (discussing the effects of a mistrial resulting from a violation of jury instructions).

61. See *supra* note 42 and accompanying text.

62. *Blackwell*, 664 S.W.2d at 689.

63. *Id.* at 687–88. Two jurors testified during a motion for a new trial that they witnessed another juror talking to the mother of the minor involved in the case. *Id.* at 688. The jurors did not know the details of what was said in the conversation, but when the jury returned to the jury room for deliberations, the juror who had engaged in the conversation explained who the mother was and stated that the defendant was guilty. *Id.*

64. *Id.* The appellate court ruled that “because [the juror] quoted no specific information imported to her by the [mother of the minor, neither] the extraneous prejudicial information exception [of Rule 606(b) of the Tennessee Rules of Evidence] nor the outside influence exception was invoked.” *Id.* Thus, the trial court properly overruled the motion denying a new trial. *Id.*

65. *Id.* at 689.

66. *Id.* at 688. Aside from an additional exception regarding a gambling or quotient verdict, Federal Rule of Evidence 606(b) mirrors Tennessee Rule of Evidence 606(b), which states:

Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, *except that a juror may testify on the question of whether extraneous prejudicial information was improperly*

court noted that the record unambiguously established that before deliberations began, one juror had engaged in a conversation with a third party who had a vital interest in the outcome of the case that was adverse to the defendant.⁶⁷ Based on the circumstantial evidence obtained from the testimony of other jurors,⁶⁸ the communication constituted an improper contact during which the merits of the case were discussed.⁶⁹

Upon concluding that an analysis of the juror misconduct was necessary to determine whether the trial court should have granted a new trial, the *Blackwell* court echoed the holdings of previous Tennessee Supreme Court opinions which stated that a single juror conversation with a third party must be explained.⁷⁰ Such an explanation allowed the court to adequately evaluate whether the juror had been improperly influenced and to ensure that no prejudice had affected the verdict.⁷¹ Although the *Blackwell* court concurred with the rulings of various federal courts regarding both the burdens of proof of the State and the defendant following the admission of evidence of a private extra-judicial communication between a juror and a third party, it did so in relation to trials involving a sequestered jury.⁷² With regard to non-sequestered juries, the court

brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id. (emphasis added).

67. *Id.* at 688.

68. See *supra* note 63. The court stated: "The inescapable inference conveyed to the jurors who knew Juror Smith had talked to the girl's mother and heard her exclaim defendant's guilt, was that convincing information supporting that conclusion had been conveyed to Ms. Smith." *Blackwell*, 664 S.W.2d at 688.

69. *Id.*

70. See *id.* at 689 (citing *Brown v. Pippin*, 59 Tenn. 657 (Tenn. 1874); *Davidson v. Manlove*, 42 Tenn. 346 (Tenn. 1865); *McElrath v. State*, 32 Tenn. 378 (Tenn. 1852); *Riley v. State*, 28 Tenn. 646 (1849)).

71. *Id.*

72. *Id.* Both the Supreme Court of the United States and federal appellate courts have held that when a party admits evidence of a private extra-judicial communication between a juror and a third party under Rule 606(b) in a criminal matter, a rebuttable presumption of prejudice arises, and the burden shifts to the State to explain the conduct or to demonstrate its harmlessness to the defendant. *Id.* (citing *Remmer v. United States*, 347 U.S. 227 (1954); *United States ex rel. Tobe v. Bensinger*, 492 F.2d 232 (7th Cir. 1974); *Richardson v. United States*; 360 F.2d 366

ultimately agreed with the reasoning of the Court of Criminal Appeals: “[S]omething more than a bare showing of a mingling with the general public [was] required where the jury [was] not sequestered [in order] to shift the burden of proof to the State of showing no prejudice.”⁷³ Clarifying this requirement, the *Blackwell* court ruled that as a result of a juror’s communication with a third party, one or more jurors must have been exposed to some extraneous prejudicial information or some outside improper influence.⁷⁴

Applying this rule to the evidence of the case, the court held that the fact that the juror quoted no specific information imparted to her by the third party did not mean that the communication did not invoke either the extraneous prejudicial information or the improper outside influence exception that would impeach the verdict.⁷⁵ Further, the extra-judicial communication between the juror and third party resulted in the transmission of extraneous prejudicial information to a non-sequestered jury.⁷⁶ Evidence of such improper contact was admissible to impeach the verdict and afford the defendant a new trial.⁷⁷ Despite this singular victory by the defendant in *Blackwell*, the burden-shifting analysis affirmed by the Tennessee Supreme Court increased the difficulty of defendants to acquire new trials on the basis of extra-judicial communications between jurors and third parties. Because the law prevented parties from asking jurors whether a communication between a fellow juror and another individual impacted their assent to or dissent from the verdict,⁷⁸ defendants were obliged to prove that a communication most likely influenced the deliberations of at least one juror solely based on the existence of the communication and, if possible, additional circumstances indicating some form of prejudice or bias on the part of the juror.⁷⁹ Despite the seemingly unequivocal language of Tennessee Rule of Evidence (606)(b), appellate courts did not uniformly apply the rule when allowing jurors to be

(5th Cir. 1966)); *see also* *Gonzales v. State*, 593 S.W.2d 288, 292 (Tenn. 1980) (stating that upon a showing that a *sequestered* jury had been separated, the State had the burden of proving that no prejudice occurred during the separation) (emphasis added).

73. *Blackwell*, 664 S.W.2d at 689.

74. *Id.*

75. *Id.* at 688.

76. *Id.* at 689.

77. *Id.* at 689–90.

78. *See supra* note 66.

79. *State v. Blackwell*, 664 S.W.2d 686, 689 (Tenn. 1984).

questioned by trial counsel concerning extra-judicial communications between jurors and third parties.⁸⁰

C. *Walsh and Adams: Applying State v. Blackwell in the Twenty-First Century*

Over twenty years after the *Blackwell* decision, the Tennessee Supreme Court in *Walsh v. State* refined its explanation of Tennessee Rule of Evidence 606(b) to emphasize the type of information that jurors could and could not provide when testifying in regard to an extra-judicial communication between a juror and a third party.⁸¹ Confronted with the issue of whether a juror could testify about the effect of an improper communication on his deliberative process, the *Walsh* court stated that Rule 606(b) prevented a juror from testifying about anything that occurred during the jury's deliberations, "including the juror's own internal thoughts, motivations, or emotions."⁸² Upon reviewing decisions from both Tennessee appellate courts, numerous federal appellate courts, and various state supreme and appellate courts,⁸³ the Tennessee Supreme Court reasoned that a court should not permit juror testimony regarding the subjective effect of extraneous information or outside influence on the juror's deliberations.⁸⁴ The court explained that a judge must limit inquiries directed at jurors regarding extra-judicial communications to "whether a communication was made and what it contained . . ."⁸⁵ After confirming that a communication occurred and learning exactly

80. See *Carruthers v. State*, 145 S.W.3d 85, 96 (Tenn. Crim. App. 2003) (permitting juror testimony only as to the existence of extraneous information or outside influence and not to the subjective effect of that information or influence on the juror's deliberative process); *Montgomery v. State*, 556 S.W.2d 559, 561-62 (Tenn. Crim. App. 1977). But see *Cavalier Metal Corp. v. Johnson Metal Controls*, 124 S.W.3d 122, 130 (Tenn. Ct. App. 2003) (permitting juror testimony to establish the existence of extraneous information or outside influence and to describe the effect of that information or influence on the juror's deliberative process); *State v. Parchman*, 973 S.W.2d 607, 613 (Tenn. Crim. App. 1997).

81. *Walsh v. State*, 166 S.W.3d 641, 643 (Tenn. 2005).

82. *Id.* at 647 (citing TENN. R. EVID. 606(b); *Blackwell*, 664 S.W.2d at 688).

83. *Id.* at 647-49.

84. *Id.* at 649. The *Walsh* court also noted that at the end of the nineteenth century, the Supreme Court of the United States held that a juror "may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind." *Id.* (quoting *Mattox v. United States*, 146 U.S. 140, 149 (1892)).

85. *Id.* at 649 (quoting *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (7th Cir. 1991)).

what was said, the court must determine whether there was a reasonable possibility that the communication altered the jury verdict without asking any of the jurors what role the communication played in their thoughts or discussions.⁸⁶

Adhering to the precedent established in state and federal jurisdictions throughout the country, the Tennessee Supreme Court held that while Tennessee Rule of Evidence 606(b) allowed jurors to testify about the existence of extraneous information or improper influence on the juror, it prohibited testimony concerning the effect of such information or influence on juror deliberations.⁸⁷ Thus, the trial court erred when it considered the juror's testimony regarding the effect of a third party's statement on the juror's decision-making process during deliberations.⁸⁸ Nevertheless, the trial court properly admitted the juror's testimony that a third party had made a statement to the jury during deliberations.⁸⁹ The improper communication raised a presumption of prejudice to the defendant that the law required the State to rebut in order to prevent the trial court from granting a new trial.⁹⁰

Solidifying precedent established in *Blackwell* and *Walsh*, the Tennessee Supreme Court used *State v. Adams* not only to apply its rulings to a non-verbal extra-judicial communication⁹¹ between a juror and a third party but also to expound upon the factors that a court should consider in determining whether the State has successfully rebutted the presumption of prejudice created by the communication.⁹² Unlike previous courts, the *Adams* court affirmed the judgment of the appellate court despite its recognition that the appellate court had not adhered to the requirements of Tennessee Rule of Evidence 606(b).⁹³ Beginning its analysis by explicitly defining the terms extraneous prejudicial information and improper

86. *Id.* (quoting *Haugh*, 949 F.2d at 917).

87. *Id.*

88. *Id.* at 649.

89. *Id.*

90. *Id.* The third party, a court officer, made a statement to the effect that the jury had to reach a decision. *Id.* at 644. Because one of the jurors told the officer that the jury could not reach a decision immediately preceding the officer's statement and the jury returned a unanimous verdict soon after hearing the officer's statement, the statement created a presumption of prejudice to the defendant. *Id.* at 649.

91. *State v. Adams*, 405 S.W.3d 641, 651 (Tenn. 2013). After the announcement of the verdict, the jury foreman informed the trial court that one of the alternate jurors who had been discharged had left the foreman a note the previous day stating that both of the alternate jurors believed that the defendant was guilty. *Id.* at 649.

92. *Id.* at 653-54.

93. *Id.* at 652.

outside influence, the court stated that extraneous prejudicial information was “information in the form of either fact or opinion that was not admitted into evidence but nevertheless [affected] a fact at issue in the case.”⁹⁴ On the contrary, an improper outside influence included “any unauthorized ‘private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury.’”⁹⁵ The *Adams* court continued its rationale by restating the burden shifting analysis that governs the production of admissible evidence in Tennessee cases involving the possibility of extraneous prejudicial information or an improper outside influence affecting the deliberations of a juror.⁹⁶ Using the definitions and procedural framework previously established, the court determined that the communication between the jury foreman and the discharged juror qualified as an improper outside influence because the discharged alternate juror was no longer a member of the jury and therefore could not discuss the case with any of the remaining jurors prior to the delivery of a verdict.⁹⁷ Because the defendant fulfilled his obligation to demonstrate that “a member of the jury was subjected to an improper outside influence,” he was entitled to a presumption of prejudice that the law required the State to rebut.⁹⁸

Following this determination, the court ruled that the trial court erred by permitting the State to ask the jury foreman any and all questions that the State deemed necessary to obtain all relevant information regarding the note that he had received from the discharged juror.⁹⁹ The trial court also erroneously allowed the

94. *Id.* at 650 (citing *Robinson v. Polk*, 438 F.3d 350, 363 (4th Cir. 2006); *State v. Blackwell*, 664 S.W.2d 686, 688–89 (Tenn. 1984); 27 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 6075 (2d ed. 2012)).

95. *Id.* at 650–51 (citing *Remmer v. United States*, 347 U.S. 227, 229 (1954); *Blackwell*, 664 S.W.2d at 689; 27 WRIGHT ET AL., *supra* note 94).

96. *Id.* at 651. “A party challenging the validity of a verdict must produce admissible evidence to make an initial showing that the jury was exposed to extraneous prejudicial information or subjected to an improper outside influence.” *Id.* (citing *Caldararo ex rel. Caldararo v. Vanderbilt Univ.*, 794 S.W.2d 738, 740–41 (Tenn. Ct. App. 1990)). “[O]nce the challenging party has made the initial showing that the jury was exposed to extraneous prejudicial information or an improper outside influence, a rebuttable presumption of prejudice arises and the burden shifts to the State to introduce admissible evidence to explain the conduct or demonstrate [its harmlessness].” *Id.* (citing *Walsh v. State*, 166 S.W.3d 641, 647 (Tenn. 2005); *Blackwell*, 664 S.W.2d at 689; *State v. Parchman*, 973 S.W.2d 607, 612 (Tenn. Crim. App. 1997)).

97. *Id.*

98. *Id.*

99. *Id.* at 652.

foreman to testify about the impact of the extra-judicial communication on the jury's deliberative process.¹⁰⁰ Despite these blatant errors of the trial court, the *Adams* court held that the errors were harmless, and that "the State presented sufficient admissible evidence to rebut the presumption of prejudice" created by the extra-judicial communication.¹⁰¹ The court supplemented its holding by examining a variety of tests that the federal circuit courts of appeals utilize when applying Federal Rule of Evidence 606(b).¹⁰² The Tennessee Supreme Court concluded that trial courts should consider the following factors when determining whether the State has rebutted the presumption of prejudice in cases involving evidence of extra-judicial communications between jurors and third parties:

- (1) the nature and content of the information or influence, including whether the content was cumulative of other evidence adduced at trial;
- (2) the number of jurors exposed to the information or influence;
- (3) the manner and timing of the exposure to the juror(s); and
- (4) the weight of the evidence adduced at trial.¹⁰³

The court resolved that "the nature and content of the [extraneous] information or [improper outside] influence [was] best determined by an inquiry into the identities of the parties involved, the substance of the communication, and how the exchange of information occurred."¹⁰⁴ Further, the court noted that "when

100. *Id.*

101. *Id.* at 663. Admissible evidence included: (1) "the jury foreman's testimony as to the circumstances surrounding the receipt of the note;" (2) the foreman's "recollection of the contents of the note;" and (3) information detailing "what [the foreman] did with the note after he read it and whether he told anyone else, [particularly another juror,] about the note or its contents." *Id.* at 653.

102. *Id.*; see *United States v. Farhane*, 634 F.3d 127, 169 (2d Cir. 2011) (focusing on the "nature of the information or contact at issue . . . and [the] probable effect [of the external influence] on a hypothetical average jur[or]"); *United States v. Blumeyer*, 62 F.3d 1013, 1017 (8th Cir. 1995) (employing a detailed objective test consisting of five factors to determine whether an external influence likely affected a typical juror); *United States v. Console*, 13 F.3d 641, 666-68 (3d Cir. 1993) ("considering the probable effect of the [external influence] on a hypothetical average juror" by inquiring into the nature of the external influence, the timing of the juror's exposure, and the identities of the involved parties).

103. *Adams*, 405 S.W.3d at 654.

104. *Id.* In *Adams*, this factor favored the State because the improper communication only reflected the opinion of the two discharged alternate jurors and did not convey any extra-judicial evidence to the jury foreman. *Id.* Additionally, the

extraneous prejudicial information or an improper outside influence is brought to bear upon even one juror it may be sufficient to set aside a verdict if there is a reasonable possibility that the verdict was tainted.”¹⁰⁵ In assessing the impact of the manner and timing of the exposure to a juror, the court discussed additional considerations of the trial court, including: whether the communication was verbal or non-verbal, whether the communication occurred before, during, or after jury deliberations, whether the communication occurred in the jury room, and whether the communication involved more than one juror.¹⁰⁶

In contrast to the federal circuit courts’ application of similar objective tests to a hypothetical average juror, the *Adams* court reasoned that Tennessee trial courts should assess each of the “factors in light of the specific jurors, facts, evidence, and [unique] circumstances of each case.”¹⁰⁷ Moreover, trial courts should evaluate all of the factors in light of whether a “reasonable possibility exists that the extraneous prejudicial information or improper outside influence altered the verdict.”¹⁰⁸ Upon establishing the objective test in *Adams*, the Tennessee Supreme Court appeared to have finally formulated a set of comprehensive procedural and analytical guidelines for trial courts to use in cases involving evidence of extra-judicial communications between jurors and third parties.¹⁰⁹ However, the court failed to anticipate issues arising from the discretion of a trial judge to grant or deny an evidentiary hearing after learning of an extra-judicial communication that occurred between a juror and a third party via social media.¹¹⁰

foreman did not initiate the communication and did not seek the alternate jurors’ opinions. *Id.* at 655.

105. *Id.* (citing *Parker v. Gladden*, 385 U.S. 363, 366 (1966); *Fullwood v. Lee*, 290 F.3d 663, 678 (4th Cir. 2002); *State v. Blackwell*, 664 S.W.2d 686, 689 (Tenn. 1984)).

106. *See id.* (citing *Walsh v. State*, 166 S.W.3d 641, 644–45, 50 (Tenn. 2005) (granting the defendant a new trial when a court officer interfered with jury deliberations); *Blackwell*, 664 S.W.2d at 688, 690 (granting the defendant a new trial when a juror discussed the case with a third party and subsequently proclaimed the defendant’s guilt in the jury room)).

107. *Id.* at 654 n.7.

108. *Id.* at 654 (citing *Walsh*, 166 S.W.3d at 649).

109. *See Adams*, 405 S.W.3d at 650–56 (finding that juror testimony may be admissible to show influence or establish extraneous information but not to show its effect on the juror); *see also Walsh*, 166 S.W.3d at 646–69; *Blackwell*, 664 S.W.2d at 688–89.

110. *See generally State v. Smith*, 418 S.W.3d 38 (Tenn. 2013) (evidencing how the Tennessee Supreme Court chose to confront this issue).

III. ANALYSIS OF *STATE V. SMITH*

In *State v. Smith*, the Tennessee Supreme Court unanimously held¹¹¹ that the trial court erred by failing to conduct an evidentiary hearing after learning that a juror had communicated with one of the witnesses in the trial via Facebook.¹¹² Despite the technological nuance created by the manner in which the extra-judicial communication occurred, the court reached its decision by applying the principles and procedures established in the precedent of three Tennessee Supreme Court cases: *Adams*, *Walsh*, and *Blackwell*.¹¹³ In each of these rulings, the trial court held a hearing in open court before deciding whether the extra-judicial communication in question resulted in extraneous prejudicial information or an improper outside influence that prejudiced the verdict of the jury.¹¹⁴

Justice William C. Koch, Jr. authored the opinion in *Smith* and began his analysis by determining “whether the trial court received reliable and admissible evidence that an extra-judicial communication between a juror and third party occurred.”¹¹⁵ He confirmed that Dr. Lewis’s email to the trial court proved that an extra-judicial communication between her and Juror Mitchell had actually occurred.¹¹⁶ Additionally, Justice Koch explained that the contents of the email were admissible evidence under Tennessee Rule of Evidence 606(b) because they referred “to potentially prejudicial external influences, [as opposed to] the jury’s deliberations or [Juror Mitchell’s] thought processes.”¹¹⁷ Based on these determinations, he concluded that the “evidence was sufficient to trigger the rebuttable presumption of prejudice to [the

111. *Id.* at 41.

112. *Id.* at 51.

113. *Id.* at 47–48.

114. *See Adams*, 405 S.W.3d at 649 (evidencing the hearing held on the defendant’s motion for a new trial after the jury foreman informed the trial court of an extra-judicial communication that he received); *Walsh*, 166 S.W.3d at 643 (evidencing the hearing held on the defendant’s motion for post-conviction relief after the trial court learned of an improper communication to the jury by a court officer); *Blackwell*, 664 S.W.2d at 688 (evidencing the testimony provided by two jurors regarding an extra-judicial communication between another juror and a third party during the defendant’s motion for a new trial).

115. *Smith*, 418 S.W.3d at 48.

116. *Id.*

117. *Id.* (citing *Adams*, 405 S.W.3d at 651). Potentially prejudicial influences include communications between a juror and non-juror about the case. *Id.* at n.6 (citing *Carruthers v. State*, 145 S.W.3d 85, 92 (Tenn. Crim. App. 2003) (quoting *Caldararo ex rel. Caldararo v. Vanderbilt Univ.*, 794 S.W.2d 738, 742 (Tenn. Ct. App. 1990)).

defendant].”¹¹⁸ Consequently, the law required the State to either explain the conduct of the juror or demonstrate that such conduct did not harm the defendant.¹¹⁹

After establishing “that the potential risk of prejudice to the judicial process requires appellate courts to review de novo¹²⁰ the trial court’s decision not to conduct a[n evidentiary hearing],” Justice Koch continued his analysis by illuminating the errors of the trial court.¹²¹ He explained that because the trial court was obligated to do more than merely inform both parties about the email sent by Dr. Lewis, it erred by failing to immediately conduct an evidentiary hearing in open court regarding the extra-judicial communication.¹²² Justice Koch noted that if the trial court had conducted a hearing, trial counsel may have requested that Juror Mitchell and Dr. Lewis discuss their relationship and the effect of the communication on Juror Mitchell’s ability to serve as a juror.¹²³ Additionally, since “the contents of the email focus[ed] only on events occurring before the jury received its [final] instructions” and began deliberations, Justice Koch maintained that trial counsel may have also questioned other jurors “to determine whether Juror Mitchell shared any extraneous information with [any of them].”¹²⁴

Justice Koch summarized and affirmed the procedure and rationale employed in *Blackwell*¹²⁵ before asserting that extreme

118. *Id.* at 48.

119. *Id.*

120. *Id.* This standard contrasts the abuse of discretion standard used when appellate courts review a trial court’s decision regarding the disqualification of a particular juror. *Id.*

121. *Id.*

122. *Id.* The court found:

When the trial received competent and reliable evidence that an extra-judicial communication between a juror and a State’s witness had taken place during the trial, it was required to do more than simply inform the parties about the email and then await the jury’s verdict. The trial court erred by failing to immediately conduct a hearing in open court to obtain all the relevant facts surrounding the extra-judicial communication between Dr. Lewis and Juror Mitchell.

Id.

123. *Id.*

124. *Id.*

125. *Id.* After two jurors had revealed that an extra-judicial communication had occurred between another juror and a third party, “the trial court permitted the two jurors to testify during the hearing on the motion for a new trial.” *Id.* (citing *State v. Blackwell*, 664 S.W.2d 686, 688 (Tenn. 1984)).

remedies in cases involving extra-judicial communications between a juror and a third party are only required when the communication prejudices the defendant and does not constitute harmless error.¹²⁶ Nevertheless, Justice Koch stated that due to the trial court's erroneous denial of a hearing and its failure to make findings of fact and conclusions of law, the record was insufficient for the court to determine that the extra-judicial communication between Dr. Lewis and Juror Mitchell did not prejudice the defendant.¹²⁷ He admitted that the court did not know "the full nature of the relationship" between Dr. Lewis and Juror Mitchell or "whether their relationship would have required Juror Mitchell's disqualification."¹²⁸ Furthermore, because none of the jurors were questioned, "the record contain[ed] no information regarding whether Juror Mitchell passed along extraneous prejudicial information to the other members of the jury."¹²⁹

Adhering to the procedural rulings of federal courts, Justice Koch concluded that "when a trial court fails to hold an evidentiary hearing to inquire into juror misconduct, the proper remedy is to remand the case for such a hearing."¹³⁰ If the hearing reveals that juror misconduct resulted in prejudice, the trial court must grant a new trial.¹³¹ Thus, Justice Koch vacated the judgment of the appellate court and the order of the trial court denying the defendant's motion for a new trial based on Juror Mitchell's improper extra-judicial communication with Dr. Lewis.¹³² By

126. *Id.* at 49. Extreme remedies include "disqualify[ing] a juror, declar[ing] a mistrial, or grant[ing] a new trial." *Id.* This rule is true regardless of whether the non-juror is a party, witness, or someone otherwise interested in the case. *Id.* (citing *State v. Pappas*, 754 S.W.2d 620, 625 (Tenn. Crim. App. 1987)).

127. *Id.*

128. *Id.* The court has historically excused from jury service people whose associations, experiences, and interest could impact judgment. *Id.* at n.7 (citing *Durham v. State*, 188 S.W.2d 555, 559 (Tenn. 1945)).

129. *Id.* at 49.

130. *Id.* (citing *Remmer v. United States*, 347 U.S. 227, 229–30 (1954); *United States v. Guthrie*, 387 F.2d 569, 572 (4th Cir. 1967); *State v. Roman*, 817 A.2d 100, 107 (Conn. 2003)). "At the hearing, questioning of the juror [and other relevant parties] should include: '(1) the subject matter of the contact, (2) to whom it was directed, (3) the medium of the exchange, (4) whether any responses were received, and (5) the content of the communications.'" *Id.* (quoting J. Paul Zimmerman, *A Practical Guide to the Development of Jury Charges Regarding Social Media*, 36 AM. J. TRIAL ADVOC. 641, 651 (2013)).

131. *Id.* (citing *Remmer*, 347 U.S. at 230; *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 699 (9th Cir. 2004); *Simants v. State*, 277 N.W.2d 217, 223 (Neb. 1979)).

132. *Id.*

remanding the case to the trial court to determine whether Juror Mitchell's Facebook message to Dr. Lewis disqualified him from continuing to serve on the jury,¹³³ the Tennessee Supreme Court limited the discretion of the trial court to ascertain the impartiality of a jury. It also reminded prospective jurors about the adverse consequences that could result if they chose to disregard their oath to follow the orders of the court.¹³⁴ Most importantly, the court dispelled the notion that a departure from pre-internet precedent governing juror misconduct would be necessary to effectively adapt to technological advances that have exponentially increased the risk of juror misconduct in the American criminal justice system.¹³⁵

IV. THE IMPLICATIONS OF *STATE V. SMITH*

After 140 years of developing a procedural framework that governed the appropriate response of trial courts when confronting extra-judicial communications between jurors and third parties,¹³⁶ the *Smith* court fortified established precedent by upholding the

133. *Id.* The court provided the following instructions for trial court:

Following this hearing, the trial court shall make findings of fact and conclusions of law regarding whether the challenged communication requires Juror Mitchell's disqualification or whether Juror Mitchell's misconduct was harmless beyond a reasonable doubt. If, for any reason, the trial court is unable to conduct a full and fair hearing with regard to Juror Mitchell's improper extra-judicial communication with Dr. Lewis, then the trial court shall grant Mr. Smith a new trial.

Id.

134. *See id.* at 50 (finding that trial courts should give jurors clear instructions that prohibit communication with third parties including communication through electronic means, and also stating that trial courts should advise jurors about a possible mistrial and contempt charges for juror violations).

135. *See id.* at 46–47 (finding that current procedures and established precedent provide adequate guidance for courts).

136. *See State v. Adams*, 405 S.W.3d 641, 663 (Tenn. 2013) (finding that the state may present “evidence to repute the presumption of prejudice”); *Walsh v. State*, 166 S.W.3d 641, 650 (Tenn. 2005) (finding that a juror cannot testify about the effect of an outside statement); *State v. Blackwell*, 664 S.W.2d 686, 689–96 (Tenn. 1984) (finding that juror testimony about statements invoking emotion of the jurors during deliberations is inadmissible); *Whitmore v. Ball*, 77 Tenn. 35, 37–39 (1882) (finding that the court is powerless to compel a juror to answer a written affidavit about possible prejudice and influence during jury deliberations); *Odle v. State*, 65 Tenn. 159, 163–64 (1873) (finding that the defendant was entitled to a new trial when the prosecutor could not provide ample evidence or a sufficient explanation to show that he did not influence jurors residing in the same house with him during a trial).

necessity of an evidentiary hearing upon the discovery of an extra-judicial communication between a juror and third party before the conclusion of a trial.¹³⁷ Although the Tennessee Supreme Court acknowledged that technological advances have substantially increased the risk of extra-judicial communications between jurors and third parties,¹³⁸ it assuaged the apprehension of those who may have believed that new policies and procedures would have to be created to successfully prevent a proliferation of internet-related juror misconduct.¹³⁹ By keeping the purpose of an impartial and unbiased jury at the forefront of its decisions and adhering to the policies and procedures developed in previous judicial opinions, the *Smith* court affirmed its commitment to the judgments that have governed the state of Tennessee for over a century.¹⁴⁰ The court conceded that technological innovations such as social media undeniably require courts to be more diligent in ensuring “that jurors understand their obligation to base their decisions only on the evidence admitted in court.”¹⁴¹ However, additional precautionary measures should consist of courts aggressively enforcing statutory and common laws that efficiently regulate the criminal justice system and adequately educate American citizens on the purpose and importance of such rules.

Because the denial of an evidentiary hearing following the discovery of an extra-judicial communication between a juror and a third party may cause a potential risk of prejudice to the judicial process,¹⁴² the court in *Smith* should not limit the holding to the facts of the case. “The right to a trial by jury in both civil and criminal cases is a foundational right protected by both the federal and state constitutions.”¹⁴³ To ensure that an individual is not deprived of this right, jurors must be unbiased and impartial when deciding contested factual issues in a case.¹⁴⁴ Therefore, trial courts must preserve the integrity of the jury system by discharging any

137. *Smith*, 418 S.W.3d at 51.

138. *Id.* at 47.

139. See McGee, *supra* note 60, at 302 (“Although instantaneous accessibility to the Internet may allow the misconduct to come about through more novel means, such behavior should continue to be analyzed in accordance with the traditional rules and standards governing general juror misconduct.”).

140. See *supra* note 136.

141. *Smith*, 418 S.W.3d at 50.

142. *Id.* at 48.

143. *Id.* at 44 (citing U.S. CONST. amends. VI–VII; TENN. CONST. art I, §§ 6, 9).

144. *Id.* at 45 (“An unbiased and impartial jury is one that begins the trial with an impartial frame of mind, that is influenced only by the competent evidence admitted during the trial, and that bases its verdict on that evidence.”).

juror who, for any reason, becomes disqualified to perform his or her duty.¹⁴⁵

In *Smith*, the defendant was convicted of first-degree murder and sentenced to life imprisonment despite the trial court's knowledge that a juror had blatantly disregarded its order and communicated with one of the State's witnesses.¹⁴⁶ Because the juror violated the court's instructions and recognized the State's witness, he may have held a biased view based on his relationship with the State's witness, received extraneous prejudicial information through other Internet or social media usage, or imparted extraneous prejudicial information to another juror.¹⁴⁷ Limiting the holding to the specific facts of the *Smith* case could result in other trial judges continuing to prematurely determine the effect of an extra-judicial communication on a jury verdict without adequately investigating the circumstances surrounding the improper communication. Furthermore, because of the ease with which jurors can secretly engage in extra-judicial communications and intentionally remain undetected,¹⁴⁸ a brief communication that does not expressly discuss the details of a trial and appears to be a trivial exchange between a juror and third party may actually be one of a number of additional conversations that the trial court fails to discover. By restricting the trial court's discretion to making findings of fact and conclusions of law after an evidentiary hearing,¹⁴⁹ the *Smith* court concluded that a trial judge could not determine the impartiality of a jury or the validity of a jury verdict without an ample investigation of the extra-judicial communication in question.¹⁵⁰ Due to its protections of a defendant's right to a trial by an impartial jury and its assurance of an objective criminal justice system, the holding in *Smith* should be extended to all cases involving similar substantive and procedural issues.

Despite comprehensively delineating how a trial court should confront an extra-judicial communication between a juror and third party, the *Smith* court only briefly discussed the inadequate jury

145. *Id.* (citing *State v. Jackson*, 173 S.W.3d 401, 411 (Tenn. 2005); *Ricketts v. Carter*, 918 S.W.2d 419, 422 (Tenn. 1996); *Boyd v. State*, 82 Tenn. 161, 167 (Tenn. 1884); *Walden v. State*, 542 S.W.2d 635, 637 (Tenn. Crim. App. 1976)).

146. *Id.* at 43–44.

147. *See id.* at 48.

148. *See United States v. Fumo*, 655 F.3d 288, 332 (3d. Cir. 2011) (describing how modern technology has made it easier for jurors to privately engage in misconduct).

149. *Smith*, 418 S.W.3d at 49.

150. *Id.* at 48–49.

instructions provided by the trial court regarding social media.¹⁵¹ Although the use of social media continues to be a relatively new phenomenon, the occurrences of juror misconduct involving social media throughout the country have compelled trial judges to address the use of social media in the courtroom.¹⁵² The most common strategy consistently used by trial judges to minimize the risk of juror misconduct involving social media is providing a social media jury instruction to jurors.¹⁵³ A trial court should give jurors detailed, specific, and understandable jury instructions that prohibit engaging in social networking activities, communicating with any party involved in a trial, and using technology to obtain facts that have not been presented at trial.¹⁵⁴ Trial courts should also deliver jury instructions and admonitions to jurors before trial, during trial, and before deliberations.¹⁵⁵ Most importantly, trial courts must educate

151. *Id.* at 42.

152. MEGHAN DUNN, FED. JUDICIAL CTR., JURORS' USE OF SOCIAL MEDIA DURING TRIALS AND DELIBERATIONS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT 10 (2011).

153. *Id.* at 1; John G. Browning, *When All that Twitters Is Not Told: Dangers of the Online Juror*, 73 TEX. B. J. 216, 219 (2010); Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 18 (2012). Other methods employed by trial judges include: questioning prospective jurors about their social networking habits and Internet usage during voir dire proceedings, threats of fining a juror or holding a juror in contempt of court, banning technology from courthouses, requiring jurors to sign pledges not to communicate about the case through social media, confiscating cell phones and other handheld devices prior to courtroom entry, and limiting use of electronic devices during trial and deliberations. See *Fumo*, 655 F.3d at 333; McGee, *supra* note 60, at 314–15; St. Eve & Zuckerman, *supra* note, at 19–20.

154. *Fumo*, 655 F.3d at 332 (Stevens, J., concurring and dissenting); *Smith*, 418 S.W.3d at 50; St. Eve & Zuckerman, *supra* note 153, at 27–28 (explaining that a social media jury instruction should specifically enumerate the most popular social networking services that jurors may use to commit misconduct).

155. See *Smith*, 418 S.W.3d at 51; St. Eve & Zuckerman, *supra* note 153, at 26 (detailing that a trial judge should provide an instruction in his opening remarks to the jury, as part of his closing instructions before the jury begins deliberations, and at reasonable intervals during trial). After the trial discussed in *Smith* ended in 2010, the Committees on Pattern jury instructions approved instructions for civil and criminal proceedings in order to deter jurors from using electronic technologies to engage in juror misconduct. *Smith*, 418 S.W.3d at 50 n.9. The jury instruction provided for criminal cases states:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case outside the jury deliberation room. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the

jurors regarding the significance of their role in the criminal justice system and the effect of juror misconduct on a trial.¹⁵⁶ Jurors must be aware that violating court orders “could result in a mistrial, inflicting additional costs and burdens on the parties specifically and the judicial system generally.”¹⁵⁷ Moreover, courts must explain to jurors how their misconduct could deprive an American citizen of his constitutional right to a fair trial.¹⁵⁸ By adhering to the Tennessee Supreme Court suggestion in *Smith*, trial courts can actively reduce the likelihood that jurors will engage in extra-judicial communications with third parties or other juror misconduct.

In addition to its succinct discussion of the necessity of social media jury instructions, the *Smith* court failed to adequately assess Juror Mitchell’s blatant violation of the trial court’s order or the evidence that Juror Mitchell knew that his relationship with Dr. Lewis could result in a mistrial.¹⁵⁹ After Juror Mitchell sent Dr. Lewis a message via Facebook regarding her testimony, Dr. Lewis informed him that there could be a mistrial if someone discovered that he had recognized her from Vanderbilt.¹⁶⁰ Juror Mitchell responded that he knew of that possibility, and that he had not said anything about being acquainted with Dr. Lewis.¹⁶¹ Based on the communication between Juror Mitchell and Dr. Lewis, the *Smith* court should have found that Juror Mitchell intentionally withheld information about knowing Dr. Lewis, and that the defendant could proceed with his claim of juror misconduct.

internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website, including, but not limited to, Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until you have returned your verdict and the trial has concluded.

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156. See *Fumo*, 655 F.3d 288, 332 (Stevens, J., concurring and dissenting); Browning, *supra* note 153, at 219; McGee, *supra* note 60, at 302; St. Eve & Zuckerman, *supra* note 153, at 28.

157. *Fumo*, 655 F.3d 288 at 332 (Stevens, J., concurring and dissenting); see McGee, *supra* note 60, at 303; St. Eve & Zuckerman, *supra* note 153, at 28.

158. McGee, *supra* note 60, at 302. “For our system to work, judges must be able to control jurors’ access to information. The adversarial system works [primarily because] of cross-examination, and counsel has no way to challenge extra-judicial information a juror secretly obtains, since it is impossible to cross-examine what they cannot see or hear.” *Id.* at 314; see also Browning, *supra* note 153, at 220; St. Eve & Zuckerman, *supra* note 153, at 28.

159. *Smith*, 418 S.W.3d at 43.

160. *Id.*

161. *Id.*

In addition to the federal constitutional right to a trial by an impartial jury, the Tennessee Constitution guarantees “a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the other of the litigation.”¹⁶² “Thus, when a juror conceals or misrepresents information tending to indicate a lack of impartiality, a challenge may be properly made [by a party] in a motion for new trial.”¹⁶³ A presumption of prejudice arises when a juror willfully conceals, or fails to disclose, information during voir dire proceedings that would indicate the juror’s lack of impartiality.¹⁶⁴ “[T]he Defendant bears the burden of [establishing] a prima facie case of bias or partiality.¹⁶⁵ Additionally, “an extraneous influence on a juror is one derived from specific knowledge about or a relationship with either the parties or their witnesses.”¹⁶⁶ In *Carruthers v. State*, one of the jurors in a homicide trial recognized that he knew the defendant “but failed to communicate that fact to the trial court.”¹⁶⁷ The *Carruthers* court concluded that if questioning during voir dire should have reasonably solicited the information concerning the juror’s recognition of the defendant, then the defendant could initiate a claim for juror misconduct.¹⁶⁸ Furthermore, the court ruled that the defense could interview the juror in question; if the attorney then believed that he had a basis for moving forward, the trial court would conduct a hearing in which the juror could testify and other relevant witness could be presented.¹⁶⁹

The law established in *Carruthers* demonstrates that the trial court in *Smith* should have permitted the defendant to question Juror Mitchell because of Juror Mitchell’s knowledge that a mistrial could result from his recognition of Dr. Lewis.¹⁷⁰ Although neither the trial counsel nor the trial court asked Juror Mitchell if he knew

162. *Carruthers v. State*, 145 S.W.3d 85, 94 (Tenn. Crim. App. 2003) (quoting *Toombs v. State*, 270 S.W.2d 649, 650 (Tenn. 1954)).

163. *Id.* (citing *State v. Akins*, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993)).

164. *Id.* at 95 (quoting *Akins*, 867 S.W.2d at 355).

165. *Id.* (citing *Akins*, 867 S.W.2d at 355).

166. *Id.* (quoting *United States v. Herndon*, 156 F.3d 629, 636 (6th Cir. 1998)).

167. *Id.* at 91 (Tenn. Crim. App. 2003). Like the trial court in *Smith*, the trial court in *Carruthers* did not inquire about the juror’s knowledge of the defendant and whether the juror recognized the defendant and maintained any bias toward the defendant. *Id.*

168. *Id.*

169. *Id.* at 96.

170. *See State v. Smith*, 418 S.W.3d 38, 43 (Tenn. 2013) (describing a Facebook conversation in which Juror Mitchell responded to Dr. Lewis’ statement “There is a risk of a mistrial if that goes out” with the comment “I know”).

Dr. Lewis during the voir dire proceedings,¹⁷¹ once Juror Mitchell learned that Dr. Lewis was a witness for the State, he should have immediately informed the trial court. The fact that the trial court only learned of the relationship between Juror Mitchell and Dr. Lewis because of the email sent by Dr. Lewis to the trial judge suggests that Juror Mitchell willfully concealed, or failed to disclose, his recognition of Dr. Lewis. Moreover, it significantly indicates Juror Mitchell's probable lack of impartiality. Upon learning of the contents of the extra-judicial communication from Dr. Lewis, the court should have permitted the defense counsel to question Juror Mitchell in order to ascertain whether the defense had enough information to proceed with a claim for juror misconduct.¹⁷² If the defense counsel had found that there was adequate information to conduct a hearing, the trial court would have had to grant the requisite hearing.¹⁷³ Thus, whether the *Smith* court focused on the extra-judicial communication itself or the contents of the communication indicating an improper intention by Juror Mitchell to conceal prejudicial information, the law still required the trial court to hold an evidentiary hearing in which the court and both parties uncovered all of the facts surrounding the juror misconduct.

V. CONCLUSION

The Tennessee Supreme Court's decision in *State v. Smith* illustrates the judiciary's determination to protect the judicial process by securing a defendant's right to a trial by an impartial and unbiased jury. In *Smith*, the court upheld Tennessee precedent that firmly established the necessary procedures for a trial court to follow when confronted with an extra-judicial communication between a juror and a third party.¹⁷⁴ Despite affirming the principles and procedures of previous supreme and appellate court decisions, the *Smith* court acknowledged that technological advances such as the Internet and social networking sites require courts to be vigilant in ensuring that all participants in the judicial process continue to respect the authority of the court and comply with the statutes,

171. *Id.* at 42.

172. *See Carruthers*, 145 S.W.3d at 96 (describing the proper procedure that should be observed for defense counsel's initial interview and evaluation of potential claims of juror misconduct).

173. *Id.*

174. *See Smith*, 418 S.W.3d at 48–51 (describing the steps the trial court should have taken regarding the extra-judicial communication, the potential prejudice as a result of this communication, and the extra precautions that should be implemented as a result of technological innovation).

regulations, and policies that successfully maintain the criminal justice system.¹⁷⁵ By ultimately ruling that a trial court is obligated to conduct an evidentiary hearing after a party has presented evidence of an improper extra-judicial communication, the *Smith* court also limited the discretion of the trial court to determine the impartiality of a jury prior to a full investigation of alleged juror misconduct.¹⁷⁶ *State v. Smith* illustrates that as the technological era continues to flourish, courts must actively minimize the risk of juror misconduct encouraged by social media by effectively educating jurors on the prejudicial effects of social networking as it relates to the judicial system. The integrity of the American jury system in a perpetually progressive society lies in the court's ability to treat jurors as their partners in the ultimate quest to preserve justice, equality, and truth in our criminal justice system. Only then will jurors begin to believe that their social responsibility is a privilege that deserves the utmost pride and respect.

175. *Id.* at 50.

176. *See id.* at 51 (stating that “the trial court erred by failing to hold an evidentiary hearing to ascertain the nature and extent of the improper communications exchanged between Juror Mitchell and Dr. Lewis”).

