IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE,	)	FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	KNOX CRIMINAL
	)	
ANDREW LEE MOATS,	)	Hon. Mary Beth Leibowitz, Judge
	)	
Appellee.	)	
	)	No. 03S01-9401-CR-00095

DISSENTING O P I N I O N

DROWOTA, J.

In its opinion the majority holds that an appellate court must automatically grant a new trial whenever the record contains evidence that the trial court misunderstood its role as "thirteenth juror" or otherwise failed to perform that role. The majority rejects the obvious alternative remedy -- that the case be remanded to the trial court for the purpose of fulfilling this duty – by reasoning that:

> The trial judge is in a difficult position to make a thirteenth juror determination after a remand which would not occur until after the case works its way through the appellate courts. By that time, the trial judge is unlikely to have an independent recollection of the demeanor and credibility of all the witnesses. The 'human atmosphere' of the trial forum would be lost, and the trial court would be in no better position to evaluate the weight of the evidence than an appellate court.
>
> ...
>
> Accordingly, ... a new trial is the only practically effective remedy to insure that the purpose and protection of the thirteenth juror rule is preserved.

First, I agree that in order to perform its duty as thirteenth juror, the trial court must have an independent recollection of the trial proceedings; simply reading the record on remand will not suffice. However, I also believe that the majority errs in assuming that the trial court's recollection will, in every case, fade to such a degree so as to render the court unable to perform its duty. From my experience on the trial bench, I know that some cases and witnesses are indelibly etched in a trial court's mind, so that the passage of a few weeks or even months would not significantly impair the court's ability to assess the weight and credibility of the evidence upon remand. In these situations, the important interests of judicial economy and expediency in the criminal justice system would be greatly furthered by the remand remedy.

On the other hand, it is certainly true that some cases do not leave such a vivid impression, and the trial court would therefore be unable to adequately perform its duty. However, this is not, standing alone, sufficient reason to reject the remand remedy. I do not understand what harm could be caused by remanding the case and giving the trial court the opportunity to determine if its recollection is in fact sufficient to perform its duty as thirteenth juror. If the trial court concludes that it does not have sufficient independent recollection, it only need order a new trial. Because there is no reason to believe that trial courts will not conscientiously and carefully make this determination, and because the remand remedy unquestionably furthers the interests of judicial economy and expediency, I respectfully dissent from the holding of the majority.

_____
FRANK F. DROWOTA III
JUSTICE