



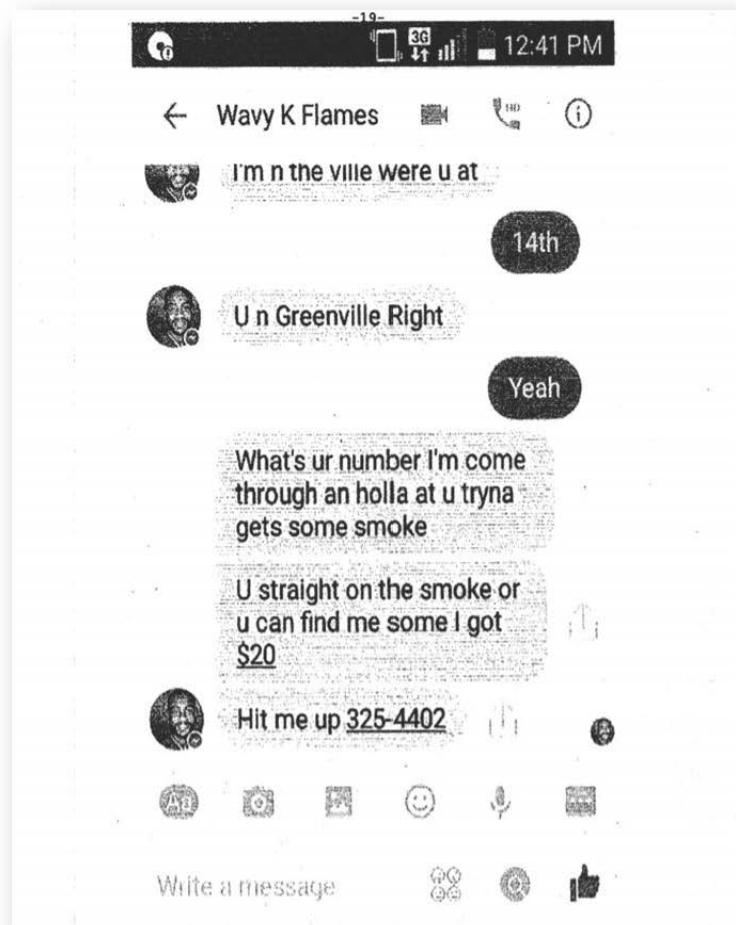
## State v. Thompson Tells a Tale of Two Facebook Screenshots

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After Roshawn Thompson picked up his cousin Kendall Rascoe from the Greenville mall in November 2014, Thompson and a friend, Andre Grey, robbed Rascoe at gunpoint. At Thompson's armed robbery trial, his defense attorney sought to cross examine Rascoe about Facebook messages he sent to Thompson earlier in the day asking whether Thompson could get some marijuana for him while he was in Greenville. Rascoe denied sending the message and testified that he just happened to run into Thompson at the mall. The State objected to the admission of the screenshot of the messages.

Later in the trial, the State sought to introduce a screenshot of a picture of Thompson and Grey copied from

Thompson's Facebook page. Rascoe showed the investigating detective the picture for purposes of identifying Thompson and Grey. Thompson objected to the admission of the screenshot, in which both of his middle fingers were extended.

How did the trial court rule? Did it make the right call?

**At trial.** The State objected to the screenshot of the Facebook messages on two grounds. First, it said it had not received the screenshot in reciprocal discovery. Second, it said that the message had not been authenticated. Defense counsel responded by stating that he did not seek to admit the document but only wanted to use it to "hit [Rascoe's] incredibility, impeach his testimony and ask him some questions." The trial court sustained the objection. The judge told defense counsel that he could ask Rascoe about the messages, but he could not hold the screenshot in his hand while doing so.

Thompson objected to the admission of the Facebook photo on the basis that it had not been authenticated. The detective described using a snipping tool to copy the photo that Rascoe showed him and then printing the photo. The trial court allowed the photo to be admitted to illustrate the detective's testimony.

Thompson was convicted and appealed.

**On appeal.** Thompson argued on appeal that the trial court erred by excluding the screenshot of the Facebook messages from evidence and by barring defense counsel from holding them during cross-examination. He also argued that the trial court committed plain error in admitting the screenshot of the photograph as it was not relevant and had a prejudicial effect.

**The Facebook messages.** The court of appeals in [State v. Thompson](#), \_\_ N.C. App. \_\_\_, 801 S.E.2d 689 (2017), affirmed the trial court's ruling excluding the screenshot containing the messages, reasoning that the defendant failed to authenticate the evidence or establish its materiality. (Moreover, the court noted that the defendant never actually sought to admit the screenshot.)

The court explained that extrinsic evidence may be introduced to [impeach a witness](#) only when the prior inconsistent statement involves a matter material to the instant proceeding. Because the Facebook messages could have been deemed collateral "and Defendant did not argue otherwise," the court of appeals concluded that the trial court did not err in excluding the screenshot or abuse its discretion in prohibiting the defendant from using it as a prop during cross examination.

**The Facebook photo.** The court of appeals held that the trial court properly admitted the screenshot of the photograph of Thompson and Grey. The photograph was not admitted as substantive evidence of the crime. It was instead admitted to illustrate how Rascoe identified to the detective the men who robbed him. The detective's testimony that the screenshot was an exact copy of the photograph Rascoe referenced thus was sufficient to authenticate the evidence. (In contrast to cases in which the photograph itself is substantive evidence, the circumstances underlying the taking and posting of the photograph of Thompson and Grey were not relevant.) In addition, the jury was instructed that the photograph was admitted for the limited purpose of illustrating and explaining the detective's testimony.

The appellate court further rejected the defendant's argument that the admission of the photograph was unduly prejudicial as it depicted him giving the middle finger. Considering the evidence in the case and the plain error standard, the court did not find that the admission of the photograph had a probable impact on the jury's verdict.

**Additional thoughts.** Had the defendant been able to lay a foundation for the admission of the screenshot of the Facebook messages, I think he would have had a decent argument that they were admissible. The matter of how Thompson and Rascoe wound up in the car together that November day arguably *is* material to the determination of

what happened during the car ride. But how could the defendant have authenticated the messages? Had Thompson testified, he could have authenticated them based on his knowledge of Rascoe's screen name and picture and his practice of corresponding with Rascoe through Facebook messaging. Without Thompson's testimony or Rascoe's cooperation, however, authenticating the messages is challenging. The messages came from an account identified as "Wavy K Flames" and referenced a phone number. Evidence that this was Rascoe's nickname, that he used the phone number, and that the accompanying picture featured Rascoe likely would be sufficient to establish that Rascoe sent the messages, but it isn't obvious who could testify to those matters.

As for the photograph showing Thompson giving the middle finger, the defendant cited case law from other jurisdictions addressing the negative connotations associated with this gesture. He noted that one academic had described extending the middle finger as "a nonverbal equivalent of the f-word." Defendant-Appellant's Brief at 24 (citing Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. Davis L. Rev. 1403, 1403, 1447 (2008)). He also pointed to the media coverage of Boston marathon bomber's Dzhokhar Tsarnaev's unrepentant attitude, demonstrated by a photograph of him giving the middle finger that was admitted at his sentencing hearing. Maybe I've just spent too much time on the internet, but my reaction to these arguments is, "meh." I've seen so much worse behavior. I share the appellate court's skepticism that the photograph was unlikely to affect the verdict. Had the defendant objected at trial, however, I do think the trial court could reasonably have concluded that the danger of unfair prejudice substantially outweighed the screenshot's probative value. There was no question as to the defendant's identity. He and Rascoe were cousins. Had it been asked to do so, the trial court could have struck a compromise by ordering the State to redact the bottom half of the screenshot. Thompson and Grey's identities still would have been clear.