

# McHugh, C.J., Dissenting Opinion, Case No.23257 State v. Michael D. Hicks

State v. Michael D. Hicks

No. 23257

McHugh, Chief Justice, dissenting:

It is quite clearly a most basic tenet of our criminal courts system that a defendant is afforded the right to be present at all critical stages of criminal proceedings. See W. Va. Const. art. III, 14. On this fundamental point of law, the majority and I unquestionably agree. We further agree that when a defendant is absent during a critical stage, the State must prove that what transpired during such absence was harmless. Syl. pt. 6, State v. Boyd, 160 W. Va. 234, 233 S.E.2d 710 (1977). It is the majority's application of this principle to the facts of this case, resulting in the unjustified reversal of defendant's conviction, with which I cannot agree.

As described in the majority opinion, at least two jurors overheard comments by trial spectators which suggested that the anonymous phone calls to police, apparently fingering the defendant in the murder, were not trustworthy. Not surprisingly, defendant's counsel expressed no concern regarding these comments, as they obviously reflected badly on the credibility of the State's evidence and were, more importantly, favorable to the defendant. In contrast, the prosecutor understandably indicated its concern to the court about what possibly transpired between the spectators and the jurors. The court's clerk, at the direction of the trial judge, subsequently spoke with jurors about the comments, out of the presence of the prosecutor, defendant and defendant's counsel. Obviously, the procedure used by the court to determine the nature and substance of the comments was less than desirable. However, defendant's counsel failed to make any objection to this ex parte communication.

Clearly, the trial spectators' comments, if anything, benefitted defendant's case, rather than prejudiced it. I therefore believe that defendant's absence during the ensuing conversation between the clerk and jurors on the matter was harmless and, in no way, constituted reversible error. In that I would have affirmed defendant's conviction of first degree murder, I respectfully dissent.

I am authorized to state that Justice Workman joins in this dissenting opinion.