

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY JOWSKE,

Defendant-Appellant.

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UNPUBLISHED  
October 18, 1996

No. 164624  
LC No. 92-1840-FC

Before: Michael J. Kelly, P.J., and Hoekstra and E.A. Quinnell,\*JJ.

PER CURIAM.

Defendant appeals by right from his conviction by jury of first-degree premeditated and deliberate murder, MCL 750.316; MSA 28.548, conspiracy to commit first-degree premeditated and deliberate murder, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment on the murder and conspiracy convictions and, consecutively, to two years' imprisonment for felony-firearm. We reverse.

We hold that the trial court committed error requiring reversal by abusing its discretion and violating defendant's Sixth Amendment right to confrontation when it refused to allow defendant to impeach a prosecution witness by reference to criminal charges pending against him. *People v Sesson*, 45 Mich App 288, 301; 206 NW2d 495 (1973), cf. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). Such impeachment is relevant to the witness' interest in testifying. *People v Hall*, 174 Mich App 686, 690-691; 436 NW2d 446 (1989); *People v Whitty*, 96 Mich App 403, 417-418; 292 NW2d 214 (1980). Any corroborating evidence could have tipped the scale in the credibility contest between defendant and codefendant Freeman, who was tried separately. Cf. *People v Gee*, 406 Mich 279, 283; 278 NW2d 304 (1979); *People v Scobey*, 153 Mich App 82, 86; 395 NW2d 247 (1986). The witness testified that defendant bought a gun from him and told him that he shot his father; both assertions were denied by defendant. We have no definite or firm conviction that the jury would have convicted defendant of the instant offenses had it known that the witness faced

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\* Circuit judge, sitting on the Court of Appeals by assignment.

pending charges, giving him a significant motive to testify favorably to the prosecution. *Olden v Kentucky*, 488 US 227, 232-233; 109 S Ct 480; 102 L Ed 2d 513 (1988).

Defendant also argues that reversal is required because the prosecution apprised the jury that Freeman had been acquitted of murdering Michael. The trial court abused its discretion in admitting this evidence. *People v Lytal*, 415 Mich 603; 329 NW2d 738 (1982). The jury could have improperly imputed guilt to defendant because Freeman was acquitted. *People v Dowdy*, 211 Mich App 562, 571; 536 NW2d 794 (1995). Moreover, the trial court erred in instructing the jury that it had appointed a lawyer for Freeman who advised him that it was in his best interest to testify truthfully. These comments by the trial court could have influenced the jury to defendant's detriment by leading the jury to believe that Freeman had no adverse legal consequences to fear from testimony implicating himself. *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 479 (1992). Although Freeman could not be retried for Michael's murder on the grounds of double jeopardy, see e.g. *People v Harrington*, 194 Mich App 424, 487 NW2d 479I(1992), if he deliberately gave false testimony at his own trial, he would have had a motive to tell consistent lies at defendant's trial to avoid prosecution for perjury, MCL 750.422; MSA 28.664.

Reversal is also required because the trial court failed to sua sponte give the jury a specific instruction on accomplice testimony with regard to Freeman's testimony as the issue of defendant's guilt was closely drawn. *People v Smith*, 158 Mich App 220, 228-230, 405 NW2d 156 (1987); see also *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974).

Finally, we conclude that reversal is also required due to the introduction of evidence by the prosecution that defendant asserted his right to counsel and, accordingly, his right to remain silent during custodial interrogation when he was questioned by police officers on April 17, 1992. *People v Schollaert*, 194 Mich App 158, 162; 486 NW2d 312 (1992). We might not have concluded that this warranted reversal solely due to Freeman's testifying that defendant told him that he requested an attorney during this questioning because the prosecution might not have reasonably anticipated this testimony. *People v Sain*, 407 Mich 412, 414-415; 285 NW2d 772 (1979). However, the prosecution also offered a tape-recorded statement of defendant's questioning by a federal agent that included reference to his prior assertion of the right to counsel. Unlike Freeman's testimony, the prosecution had complete control of the portions of the tape-recorded statement that it offered. This error cannot properly be regarded as harmless. *Gee, supra*; *Scobey, supra*.

We also conclude that defendant's trial counsel denied him effective assistance of counsel by failing to request a cautionary instruction on accomplice testimony. As developed above, the court's failure to give this instruction sua sponte warrants reversal because this case presented a close credibility contest. Accordingly, counsel's failure to request this instruction was also below an objective standard of reasonableness and so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303 (1994). Additionally, counsel failed to object to inadmissible testimony regarding defendant's exercise of the right to counsel while in police custody and failed to object to trial court comments that inappropriately bolstered Freeman's credibility by informing the jury that a court-appointed attorney had advised Freeman to testify truthfully.

We disagree with defendant's contention that his interrogation by a federal agent was inadmissible in its entirety because of his earlier invocation of the right to counsel during police questioning. Because defendant was not in government custody at the time of the interrogation, we conclude that the agent was not precluded from requesting defendant to voluntarily submit to questioning. *Minnick v Mississippi*, 498US 146, 150;111 S Ct 486; 112 L Ed 489 (1990); *Edwards v Arizona*, 451 US 477, 485; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *People v Paintman*, 412 Mich 518, 529; 315 NW2d 418 (1982).

We also reject defendant's contention that the prosecution violated due process by asserting conflicting theories in Freeman's trial and in the instant trial. Accepting this argument would lead to the absurd result that a prosecutor would be precluded from prosecuting someone who was factually guilty of a crime because another who was actually innocent had previously been acquitted at a trial in which the prosecutor advanced an erroneous theory. Unlike the situations addressed in *Nichols v Collins*, 802 F Supp 66, 72-74 (SD Tex, 1992) and the concurrence in *Drake v Kemp*, 762 F 2d 1449, 1479 (CA 11, 1985) (Clark, J., specially concurring), which are cited by defendant, the prosecution did not seek to sustain convictions of different individuals based on contradictory findings of fact. There was no evidence presented showing that the prosecution brought the instant case without a good-faith, subjective belief in defendant's guilt.

Reversed and remanded.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

/s/ Edward A. Quinnell