

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL M. DEJESUS,

Defendant-Appellant.

UNPUBLISHED

January 15, 2004

No. 241438

Wayne Circuit Court

LC No. 01-001632-01

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

BANDSTRA, J. (*concurring*).

In contrast to the majority, I would conclude that the testimony of Jesus that defendant remained silent when Jesus asked him whether he had killed the victim was inadmissible. The majority concludes that this case is more like *People v Hackett*, 460 Mich 202; 596 NW2d 107 (1999) than it is like *People v Bigge*, 288 Mich 417; 285 NW 5 (1939) because there was no direct statement alleging guilt to which defendant failed to respond. While Jesus' question to defendant was not a declaratory statement, it certainly directly confronted defendant with at least an implicit accusation of guilt. An inference that this was, in fact, an accusation could also be drawn from the further testimony that, in response, defendant not only remained silent but began to cry. Thus, Jesus' testimony constituted evidence of defendant's "confession of guilt by silence" in contravention of *Bigge*. *Id.* at 420.

Nonetheless, I agree with the majority's conclusion that defendant has failed to show ineffective assistance of counsel as the decision to allow the questioning of Jesus may have been a matter of trial strategy and, had that testimony not occurred, there is no reasonable probability that the result of the proceedings would have been different. Accordingly, I concur in the decision to affirm defendant's conviction.

/s/ Richard A. Bandstra