# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 30, 2002 |
| v | No. 228026<br>Wayne Circuit Court |
| PATRICK BURTON,<br><br>Defendant-Appellant. | LC No. 99-008219 |

Before: O'Connell, P.J., and White and Cooper, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

Regarding the issue whether the trial court intimidated Williams into remaining silent (Issue I), I do not agree with the majority that the issue was unpreserved.[1] Nor do I agree that the trial court's action was proper.

At the outset, I note that defendant was bound over based on Williams' preliminary examination testimony *alone,* and that Williams was the only alleged eyewitness to the murder. On the record discussions pertinent to this issue began before jury selection, when both counsel brought to the trial court's attention that Williams had stated that the actual events were different than as stated at the preliminary examination, that he had inquired into the penalties for various offenses, and had asked about the Fifth Amendment. Both counsel asked that counsel be appointed for Williams.

Counsel was appointed for Williams, was fully informed of the situation, and was given time to advise and consult with Williams. Counsel for Williams then addressed the court:

> I've been appointed to represent Mr. Williams and to counsel him in the case presently pending before the court.
>
> *I have had an opportunity to discuss the matter with him, and advise Mr. Williams of those rights, constitutional rights, and applicable statutes that I think would be – may impact on his decision to testify here today.*

[1] Trial counsel objected that the court was creating a "chilling effect" on the witness's testimony.

> *He does intend to give testimony in this matter. He does understand, in my opinion, that should his testimony –that he can remain silent should his testimony implicate him in matters pending before the court.*
>
> *Understanding that, Mr. Williams is prepared to go forward and offer testimony today*. [Emphasis added.]

The court then proceeded to question Williams, establishing that he had had an opportunity to discuss the matter with his attorney, and that he was not on trial. In response to the court's questioning Williams stated that he intended to tell the truth and that he had not been threatened by anyone. The court elicited testimony that Williams intended to testify differently than at the preliminary examination and that he had lied at the preliminary examination. The court then addressed the matter of the penalty for perjury and continued to inquire into Williams' relationship with defendant. After the court again asked whether defendant was under oath at the preliminary examination and whether he lied, Williams' counsel intervened, consulted with Williams, and Williams invoked the Fifth Amendment. The court continued to question Williams and to stress the threat of perjury.

The record establishes that *before* the trial court made its remarks to Williams, counsel had already been appointed for Williams and appointed counsel had stated on the record that he had discussed Williams' Fifth Amendment rights with Williams, and Williams had decided to testify. Viewed in their full context, the court's remarks, which were addressed directly to Williams, improperly encouraged Williams not to testify, and went considerably beyond warning Williams about the possibility of incriminating himself. Indeed, after Williams stated to the trial court his intent to testify at trial, the trial court told Williams that he could receive up to fifteen years imprisonment for perjury,[2] and later stated: "If the Court determines that you, in fact, have committed perjury, I can guarantee you what's going to happen, Mr. Williams."

Williams should have been allowed to testify at trial as he intended. The prosecution would have been able to inquire into Williams' relationship and interactions with defendant, and to impeach him with his prior testimony and statements, using the prior testimony as substantive evidence. MRE 801(d)(1)(A). The jury would have been left to decide which version was credible. See e.g., *United States v Arthur*, 949 F2d 211, 215-216 (CA 6, 1991), in which the court stated:

> The district court has the discretion to warn a witness about the possibility of incriminating himself. *United States v Silverstein*, 732 F.2d 1338 (7th Cir. 1984), *cert. denied,* 469 U.S. 1111, 105 S.Ct. 792, 83 L.Ed.2d 785 (1985). An abuse of that discretion can occur, however, when the district court actively encourages a witness not to testify or badgers a witness into remaining silent. Indeed, *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), holds that such is a violation of due process. Larry Fields was represented by counsel and stated to the district court that he wanted to testify after he had been informed by the court of his right to remain silent. The district court repeatedly informed Fields of his

[2] The court later corrected itself and stated that the penalty was actually life.

> right to remain silent and stated to him that to testify was against his interest. Under these circumstances, we think it was an abuse of the district court's discretion to so induce Larry Fields to exercise his fifth amendment rights. *Id.* at 97, 93 S.Ct. at 353.

See also, Anno: *Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error*, 88 ALR4th 388, § 13 (1991) (discussing *Arthur, supra*, and additional cases in which "the trial judge's alleged conduct either constituted prejudicial error or could support a finding of prejudicial error on remand.")

I agree with the majority on the remaining issues.

/s/ Helene N. White