STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JIMMY ERIC GREENE, JR., Defendant-Appellee.	FOR PUBLICATION February 21, 2003 9:00 a.m. No. 239074 Washtenaw Circuit Court LC No. 01-001007-FH Updated Copy April 25, 2003

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

WHITBECK, C.J.

This is a case of first impression in which we must construe and apply MCL 50.122(6), a relatively new witness-tampering statute, to determine whether the circuit court erred in quashing the information. The prosecutor appeals by right. We reverse and remand for further proceedings.

I. Basic Facts And Procedural History

The prosecutor originally charged defendant Jimmy Eric Greene, Jr., with manslaughter for the willful killing of an unborn quick child[1] after he allegedly physically assaulted his pregnant girlfriend, Christa Hughbanks. At his arraignment, the district court ordered Greene not to have any contact with Hughbanks.

Greene moved to adjourn the preliminary examination so his attorney could study medical records regarding the death. During the discussion of the motion, the prosecutor expressed concern that Hughbanks, who was present and available to testify, might not return to court for future proceedings. The prosecutor revealed that Greene had contacted Hughbanks from jail and told her not to come to court, and that those conversations had been recorded. The district court ruled that the preliminary examination would commence that day with Hughbanks' testimony, but the examination of other witnesses would be adjourned to allow Greene time to

[1] MCL 750.322.

prepare. Hughbanks testified about a fight she had with Greene, as well as her reluctance to testify against him because she still loved him. She also admitted that she had talked with Greene on the telephone while he was incarcerated.

A few days later, the prosecutor filed a new criminal information charging Greene with witness intimidation and reciting the language of MCL 750.122(3), which prohibits using threats or intimidation to tamper with a witness. When the district court reconvened for the second part of the preliminary examination, this charge was added to the scope of the examination. The testimony previously presented was, by stipulation, applied to the new charge, and Hughbanks was questioned again.

The district court received in evidence the taped conversation and a transcript of the conversation. Greene did not challenge that evidence. The transcript reflected many inaudible parts, evidently because Greene called an acquaintance from the jail, and the acquaintance used three-way calling on the telephone to bring Hughbanks into the conversation.

In the telephone call, Greene asked Hughbanks about what her sister, who had witnessed the altercation at the center of the prosecution, planned to testify. There was some difficulty hearing all three callers, so sometimes Greene told his acquaintance to pass messages to Hughbanks rather than attempt to speak directly with her. When informed that Hughbanks' sister planned to testify that she saw Greene hit Hughbanks, Greene said:

> J [defendant Jimmy Greene]: Tell her if her sister's gonna say that tell her on the 13th don't even show up.
>
> F [unknown female]: Okay—hold on.
>
> F: Christie—Christie—Christie . . .
>
> Inaudible discussion
>
> J: Krisha—No—tell her not to come.
>
> F: Christa?
>
> J: Yeah
>
> F: *Christa—you don't come on the 13th.*
>
> C [Christa Hughbanks]: Me—*I'll get a warrant for my arrest.*
>
> F: *She said she subpoenaead [sic], too.*
>
> J: *Tell her it's only a $150 fine.*
>
> F: He said it's only a $150 fine.

C: *That it?*

F: Yeah

J: *Tell her that's the only way I'm gonna get up off of it.*

* * *

J: Tell her if her sister gonna say—*I ain't touch it tell her don't even show up*.

F: He said if your sister do show up—don't show up on the 13th.

C: *But they gonna have a warrant for my arrest.*

J: *No they won't.*

C: No they won't—he says—

J: *I already talked to my lawyer*.

F: He already talked to his lawyer.

C: *I don't know what to do—I was subpoenaed to come to court on Wednesday*.

F: She said she was—I was subpoenaed today—to come on Wednesday.

J: *That don't matter, that subpoena ain't shit*.

F: He said it don't matter that subpoena ain't nothing.

* * *

J: Tell her all she gotta do is lay low until after 5:00.

F: All you gotta do is lay low until after 5:00.

C: They're gonna know where to find me. Tell him that they know—I got an appointment at The Corner [medical clinic] at 3:45.

F: They know she's got an appointment at The Corner at 3:45.

J: But the court is at 1:00—tell them fucked up on the appointment.

F: She said she don't care about her health now.

J: Just tell her go over to Pigeon's house and chill out until after 5:00 when the court close.

F: Inaudible

J: Hello?

F: Whose house?

J: Tell her to go to Pigeon Toe's house and chill out until after 5:00.[2]

Greene twice repeated that Hughbanks should stay away from court until after 5:00, when the court would close, and that Hughbanks only had to say "she forgot." Greene also said that, wherever Hughbanks went, she could not be in her car.

In another conversation, Greene repeated his desire that Hughbanks stay away from court:

J: You gotta wait—I gotta get my probation transferred and shit . . . but look, when the time comes, you gotta just leave early that morning and stay gone until after 5:00—straight up.

C: Okay.

J: Just say your people—

C: She told me herself.

J: What?

C: _____ Inaudible . . . and I was tellin' people _____ grabbed her and _____ pulled her _____ it's in her statement _____

J: They even—got it out that I beat her up.

C: Yeah, they tried to ask me that, I said "No—_____"

J: They gotta say she called cryin', and I beat her up.

C: _____

J: You know ol' girl not black—

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[2] Emphasis added.

C: Who?

J: My peeps—all you gotta do is walk over there early—and just stay gone until the court closes about 5:00—

Greene also said that his lawyer visited and "he said they're gonna try to break you in court so it's best that you just lay low."

At the preliminary examination, Hughbanks testified that she did not feel intimidated by Greene, she did not think he was going to harm her, and she was not afraid to come to court. She confirmed that she still wanted to have contact with him.

At the close of proofs, the prosecutor moved to amend the information to conform to the proofs and charge Greene under a different subsection of the witness intimidation statute, MCL 750.122(6), which provides:

> A person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding

The district court granted the motion to amend and bound Greene over for trial, explaining:

> In terms of the witness intimidation, looking at the statute and the amended provision, subsection 6 and the language therein, I do find based on Exhibit 14 [the telephone transcript] and the stipulation as to where and when that occurred, that the defendant did willfully interfere or attempt to interfere with the ability of Christa Hughbanks to attend and or testify at the preliminary examination in clear violation of a no contact provision. The testimony convinces me that on June 6th, from the jail, the defendant took elaborate steps, according to the transcript, he knew he couldn't directly so he worked through third parties to call her and convince her that she shouldn't attend, even tell her where she should go and how long to stay and despite her questions about being under subpoena told her that was worthless, in clearer terms, and tried to in fact convince her and interfere with her ability to attend and testify at the preliminary examination.

The prosecutor subsequently filed a new information alleging that Greene had violated MCL 750.122(6).

In the circuit court, Greene moved to quash the information, arguing that the prosecution's evidence at the preliminary examination, if true, did not demonstrate that he violated the statute. The circuit court heard arguments and granted the motion, reasoning:

> [T]he Court grants a great deal of leeway to Magistrates in reviewing the evidence and making decisions as to bind over, however, in this case, I believe

> that accepting all of the evidence as asserted by the prosecution, there was not evidence from which the Magistrate could have found probable cause to believe that the contact of the defendant on the date alleged falls within the provisions of this narrowly drawn statute, so I'm going to grant the motion to quash . . . .

II. Standard Of Review

The prosecutor has presented us with a single issue to decide in this case, but this appeal really exists at two levels. At the procedural level, the prosecutor challenges the circuit court's decision to quash the information. The prosecutor argues that the circuit court improperly substituted its judgment for the district court in concluding that the evidence was insufficient to support bindover on the witness tampering charge. In reviewing this aspect of the appeal, we do not defer to the circuit court's determination to any extent; instead, we examine the district court's decision to determine whether it abused its discretion in ordering the bindover.[3] However, we must first interpret the witness tampering statute at issue in this case. At this substantive level, our task is a legal one, meriting review de novo.[4]

III. Witness Tampering

The rules governing statutory construction that we apply to the witness tampering statute are well known:

> The lodestar principle of statutory construction is that courts must ascertain and give effect to the Legislature's intent in enacting a statute. "The task of discerning our Legislature's intent begins by examining the language of the statute itself." Using a dictionary if necessary, we construe "[a]ll words and phrases" "according to the common and approved usage of the language," but give terms of art and "technical words and phrases" any "peculiar and appropriate meaning" ascribed by the Legislature or acquired in common usage in the absence of legislative definition. If "the language of the statute is unambiguous, the plain meaning reflects the Legislature's intent and this Court applies the statute as written." Yet, "[w]hen reasonable minds may differ regarding the meaning of a statute, the courts must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute."[5]

To be clear, we do not intend to define the entire universe of actions that constitute the criminal conduct prohibited by MCL 750.122. Nevertheless, understanding the statute as a

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[3] See *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000).

[4] See *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002).

[5] *People v Meyers*, 250 Mich App 637, 643-644; 649 NW2d 123 (2002) (citations omitted).

whole is helpful in our analysis of subsection 6, which the prosecutor claims Greene violated. MCL 750.122 provides:

> (1) A person shall not give, offer to give, or promise anything of value to an individual for any of the following purposes:
>
> (a) To discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> (b) To influence any individual's testimony at a present or future official proceeding.
>
> (c) To encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.
>
> (2) Subsection (1) does not apply to the reimbursement or payment of reasonable costs for any witness to provide a statement to testify truthfully or provide truthful information in an official proceeding as provided for under section 16 of the uniform condemnation procedures act, 1980 PA 87, MCL 213.66, or section 2164 of the revised judicature act of 1961, 1961 PA 236, MCL 600.2164, or court rule.
>
> (3) A person shall not do any of the following by threat or intimidation:
>
> (a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> (b) Influence or attempt to influence testimony at a present or future official proceeding.
>
> (c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.
>
> (4) It is an affirmative defense under subsections (1) and (3), for which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify or provide evidence truthfully.
>
> (5) Subsections (1) and (3) do not apply to any of the following:

(a) The lawful conduct of an attorney in the performance of his or her duties, such as advising a client.

(b) The lawful conduct or communications of a person as permitted by statute or other lawful privilege.

(6) A person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding.

(7) A person who violates this section is guilty of a crime as follows:

(a) Except as provided in subdivisions (b) and (c), the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both.

(b) If the violation is committed in a criminal case for which the maximum term of imprisonment for the violation is more than 10 years, or the violation is punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both.

(c) If the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $25,000.00, or both.

(8) A person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both. As used in this subsection, "retaliate" means to do any of the following:

(a) Commit or attempt to commit a crime against any person.

(b) Threaten to kill or injure any person or threaten to cause property damage.

(9) This section applies regardless of whether an official proceeding actually takes place or is pending or whether the individual has been subpoenaed or otherwise ordered to appear at the official proceeding if the person knows or has reason to know the other person could be a witness at any official proceeding.

(10) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same transaction as the violation of this section.

(11) The court may order a term of imprisonment imposed for violating this section to be served consecutively to a term of imprisonment imposed for the commission of any other crime including any other violation of law arising out of the same transaction as the violation of this section.

(12) As used in this section:

(a) "Official proceeding" means a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.

(b) "Threaten or intimidate" does not mean a communication regarding the otherwise lawful access to courts or other branches of government, such as the otherwise lawful filing of any civil action or police report of which the purpose is not to harass the other person in violation of section 2907 of the revised judicature act of 1961, 1961 PA 236, MCL 600.2907.

The unifying theme among these subsections is an attempt to identify and criminalize the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding, as defined in subsection 12(a). In the most general sense, the Legislature identified four different categories of witness tampering: bribery (subsection 1), threats or intimidation (subsection 3), interference (subsection 6), and retaliation (subsection 8). That the Legislature chose *not* to place all these different types of tampering in the same subsection suggests that the Legislature considered them to be distinct. Conduct that violates one subsection in MCL 750.122 may not necessarily violate another subsection in the statute; conduct necessary to violate one subsection may be unnecessary to violate another. Thus, as we examine the language used in MCL 750.122(6), we are mindful that the precise statutory description of the prohibited criminal conduct, not necessarily notions of witness tampering that existed at common law,[6] under other statutes, or even under other subsections of MCL 750.122, guides our interpretation.

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[6] This Court in *People v Milstead*, 250 Mich App 391, 406 n 9; 648 NW2d 648 (2002), and *People v Sexton*, 250 Mich App 211, 224 n 5; 646 NW2d 875 (2002), recently noted that, in enacting MCL 750.122(6), the Legislature codified the common-law crime of obstruction of justice. Notably, that statement was obiter dictum, and therefore lacks the force of law because the statute was not at issue in *Milstead* or *Sexton*, which were related cases. See *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001). Additionally, we are not persuaded

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Truth be told, subsection 6 is easily understandable. The Legislature used simple, but comprehensive, language in describing this crime. More in-depth scrutiny bears out this observation. The most eye-catching language in MCL 750.122(6) borders on the redundant. Identifying the *actus reus*, the criminal act, subsection 6 first refers to impeding, interfering with, preventing, or obstructing "the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding." In everyday speech, these verbs are used as synonyms. For instance, a person who impedes another person may also be described as having obstructed or interfered with that other person. However, we are not at liberty to "ignore" the words used in subsection 6 by treating them as "surplusage," thereby rendering them "nugatory."[7] Consequently, we turn to a dictionary to determine whether there are, perhaps, any formal meanings to these words that might explain how they differ, contrary to their ordinary usages.

According to the dictionary, to "impede" means "to retard in movement or progress by means of obstacles or hindrances."[8] The dictionary uses "obstruct" and "hinder" as alternative definitions, and refers to the word "prevent" as a synonym for "impede."[9] In relevant part, to "interfere" means "to come into opposition or collision so as to hamper, hinder, or obstruct someone or something," or "to take part in the affairs of others," as in to "meddle."[10] Some of the definitions offered for "prevent" include "to keep [something] from occurring," to "stop from doing something," and "to interpose a hindrance."[11] Finally, to "obstruct" means "to block or close up with an obstacle" or "to hinder, interrupt, or delay the passage, progress, course, etc." of something.[12]

If there are significantly distinct meanings to these words, which even the dictionary uses as synonyms for each other, they are not the least apparent. At most, the definitions of these words present only degrees of difference in the same conduct. For example, someone who *impedes* a witness may not actually *prevent* the witness from testifying, but may only delay the testimony. Note, however, that the language in subsection 6 that criminalizes both a completed and attempted offense makes these extremely subtle shades of difference irrelevant in determining whether a defendant committed this crime. Consequently, we infer that, in using

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(…continued)

that, contrary to the plain language in the statute but as Greene argues, MCL 750.122(6) follows any common-law approach to obstruction of justice that would require threats, intimidation, or physical interference as elements of this offense.

[7] *People v Randolph*, 466 Mich 532, 558; 648 NW2d 164 (2002).

[8] *Random House Webster's College Dictionary* (2d ed, 1997).

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *Id*.

these four terms to describe what is effectively the same conduct, the Legislature intended to bar the tampering conduct, no matter how it is described, including in degrees of success.

Unlike some other crimes that a person can commit without involving anyone else, such as crimes against property, witness tampering self-evidently involves at least two people: the witness and the person committing the tampering. The words describing the prohibited conduct—impeding, interfering with, preventing, or obstructing—do not, alone, connect these two individuals. Rather, the word "ability" in subsection 6 is what ties the witness and, for lack of a better word, the tamperer to each other. "Ability" is the "power or capacity to do or act physically, mentally, legally, morally, or financially."[13] This is a broad description of the human facility to act, not at all limited to the logical ways in which a tamperer might try to interfere with a witness, including the witness's ability to travel, appear at the place designated for an "official proceeding,"[14] or biological ability to recall information or provide testimony, whether spoken, written, signed, or communicated in another manner. This breadth implies that subsection 6 makes illegal *any* act or attempt, no matter its form, to keep the witness from "attend[ing], testify[ing], or provid[ing] information in or for a present or future official proceeding"[15] by affecting the witness's ability to do so.

The only logical exceptions from these otherwise unlimited ways in which to achieve or attempt to achieve this interference are identified in subsections 1, 3, and 8. In other words, as long as the interference at issue does not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, any act or attempt to impair the witness's *capacity* to "attend, testify, or provide information in or for a present or future official proceeding" violates subsection 6. Greene submits a number of committee reports in support of his contrary argument that the prosecutor had to prove that he threatened or intimidated Hughbanks to be guilty of violating MCL 750.122(6). However, this sort of extra-textual attempt to interpret MCL 750.122(6) is inappropriate in this case given the plain language in the statute, and the comprehensive inclusion of that sort of witness tampering in MCL 750.122(3).[16]

We cannot, of course, ignore that the Legislature included the word "willfully" in subsection 6. Willfulness, though having been defined in a number of ways over the years, essentially "implies knowledge and a purpose to do wrong."[17] This definition of willfulness incorporating knowledge is particularly appropriate for the way that term is used in subsection 6 because subsection 9, which applies to MCL 750.122 as a whole, makes clear that criminal liability attaches "if the person [committing the witness tampering] *knows or has reason to know*

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[13] *Id.*.

[14] See MCL 750.122(12)(a).

[15] MCL 750.122(6).

[16] See *In re Complaint of MCTA*, 241 Mich App 344, 371-374; 615 NW2d 255 (2000).

[17] *People v Lerma*, 66 Mich App 566, 570; 239 NW2d 424 (1976).

the other person could be a witness at any official proceeding."[18] This intent element provides an important safeguard against criminalizing innocent conduct not aimed at affecting the witness's ability to "attend, testify, or provide information in or for a present or future official proceeding," but which nevertheless has that effect.

In summary, to prove that a defendant has violated MCL 750.122(6), applying the explanations of various terms provided in this opinion, the prosecutor must prove that the defendant (1) committed or attempted to commit (2) an act that did not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, (3) but was any act or attempt that was done willfully (4) to impede, interfere with, prevent, or obstruct (5) a witness's ability (6) to attend, testify, or provide information in or for a present or future official proceeding (7) having the knowledge or the reason to know that the person subjected to the interference could be a witness at any official proceeding. In this last part of the definition we use the word interference to include all types of conduct proscribed in subsection 6.

IV. Bindover

MCL 766.13 sets forth the criteria for bindover in terms of the district court's factual determinations following a preliminary examination:

> If it shall appear to the magistrate at the conclusion of the preliminary examination either that an offense has not been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause for charging the defendant therewith, the magistrate shall forthwith bind the defendant to appear before the circuit court of such county, or other court having jurisdiction of the cause, for trial.

As the prosecutor correctly emphasizes, at the preliminary examination, the prosecution need not prove beyond a reasonable doubt that the defendant committed the crime charged.[19] The threshold for the evidence necessary to bind over a defendant for trial is much lower than the evidenced needed to convict a defendant of the crime at trial.[20]

> If the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate must let the factfinder at trial resolve those questions of fact. This requires binding the defendant over for trial. In other words, the magistrate may not weigh the

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[18] Emphasis added.

[19] See *People v Justice (After Remand)*, 454 Mich 334, 343-344; 562 NW2d 652 (1997).

[20] *Id*. at 344.

> evidence to determine the likelihood of conviction, but must restrict his or her attention to whether there is evidence regarding each of the elements of the offense, after examining the whole matter.[21]

"'Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support the bindover of the defendant if such evidence establishes probable cause.'"[22] The evidence satisfies "the 'probable cause' standard when, 'by a reasonable ground of suspicion, [it is] supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged.'"[23]

The prosecutor advances two arguments concerning the evidence presented in the preliminary examination and why it met the bindover standard. First, the prosecutor contends that MCL 750.122(6) does not require evidence of threats or intimidation, which the evidence at the preliminary examination suggested did not exist in this case. On this point, we agree. Our interpretation of MCL 750.122(6), which considered the content and structure of MCL 750.122 as a whole, leads us to believe that the Legislature intended to punish witness tampering that takes the form of bribery, threats or intimidation, or retaliation under different subsections, not under subsection 6. However, contrary to the prosecutor's contention, nothing in the record reveals that the circuit court was looking for evidence of threats or intimidation when examining the district court's decision to bind over Greene. In fact, the circuit court indicated that it was aware of the evidence on the record and its obligation to afford the district court "a great deal of leeway," meaning discretion, in making the bindover decision. The record plainly reflected that the prosecutor had changed the charge from witness tampering involving threats and intimidation contrary to MCL 750.122(3) to witness tampering that involved interference contrary to MCL 750.122(6). This may explain why the circuit court referred to the "narrowly drawn statute" at issue in this case, meaning that the circuit court was likely aware of the language and meaning of subsection 6. Without more, we cannot conclude that the circuit court applied the incorrect statutory language when examining the bindover decision.

The prosecutor's second argument is that interference can be inferred from the fact that Greene made an "end run around the system" by engaging in an complicated plan to speak with Hughbanks in violation of the no contact order by calling a third-party. That third-party then helped Greene and Hughbanks communicate. In other words, the prosecutor claims that evidence clearly existed that Greene attempted to interfere with Hughbanks' appearance at the preliminary examination, which is an official proceeding, by appealing to her feelings for him.

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[21] *Hudson*, *supra* at 278 (citations omitted).

[22] *People v Brown*, 239 Mich App 735, 741; 610 NW2d 234 (2000), quoting *People v Whipple*, 202 Mich App 428, 432; 509 NW2d 837 (1993).

[23] *Hudson*, *supra* at 279, quoting *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993).

We agree that the evidence adduced at the preliminary examination presented a factual question concerning whether Greene's appeals to Hughbanks not to attend the preliminary examination constituted interference. As we noted, the dictionary includes among the definitions of the word "ability" the "capacity" to act "morally."[24] The transcripts of the telephone conversations include several statements from Hughbanks indicating that she had received a subpoena to appear at a hearing (presumably the preliminary examination) that she knew she was supposed to appear at the hearing, and she was concerned about the consequences of failing to appear as ordered. Greene, however, dismissed Hughbanks' fear that the district court would issue an arrest warrant if she failed to appear at the hearing, saying that failing to appear would only result in a $150 fine. This comment arguably had an effect on Hughbanks at the moment; despite her early hesitation to comply with Greene's request not to appear at the hearing, after Greene minimized the potential consequence of disobeying the subpoena, she replied, "That's it?" This suggested that the result of failing to appear would be sufficiently insignificant for her to comply with Greene's directive and disobey the subpoena. When, later in the telephone conversation, Hughbanks appeared to be unconvinced that not showing up at the preliminary examination was what she should do, Greene resorted to a different tactic. He told her that he had consulted his attorney and that the subpoena issued to her was ineffective, therefore implying that missing the hearing would not get Hughbanks into any trouble with the law. This evidence created a question of fact concerning whether Greene's conduct was an attempt to convince Hughbanks to ignore the "distinction between right"—obeying the subpoena—"and wrong"—failing to appear at the hearing—and thereby overcome her initial, moral inclination to appear at the preliminary examination.[25]

We do not hold that a request, alone, not to attend a hearing or a stated desire that a witness not attend a hearing would be unlawful under MCL 750.122(6). Neither act would necessarily affect a witness's *ability* to attend a hearing. Nor do we intend to imply that Greene will be convicted of this offense. Rather, in sum, the evidence presented at the preliminary examination would allow a reasonable person to infer that Greene knew Hughbanks would be attending the preliminary examination to provide testimony against him; Greene did not want Hughbanks to attend the hearing; Greene chose not to use bribery, threats or intimidation, or retaliation to dissuade Hughbanks from attending the hearing; Greene then willfully attempted to interfere with Hughbanks' intention to attend that hearing by telling her explicitly not to attend, playing to her feelings for him, and assuring her that the consequences would be minor or nonexistent; and this interference attempted to affect her ability to attend the hearing by impairing her ability to choose to do the right thing, which was to obey the subpoena. Ultimately, of course, Hughbanks did attend the preliminary examination. However, because a question of fact exists regarding whether Greene's conduct fit the attempt language in MCL 750.122(6), the district court properly bound Greene over for trial.

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[24] See *Random House*, *supra*.

[25] See *id*. (the adjective "moral" means "of, pertaining to, or concerned with the principles of right conduct or the distinction between right and wrong").

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Hood, J., concurred.

/s/ William C. Whitbeck
/s/ Harold Hood