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

No. 239074
Washtenaw Circuit Court
LC No. 01-001007-FH

Updated Copy
April 25, 2003

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

KELLY, J. (*dissenting.*)

I respectfully dissent from the majority's conclusion that the evidence presented at the preliminary examination would allow a reasonable person to infer that defendant violated MCL 750.122(6). Instead, I would affirm the circuit court's ruling that the district court abused its discretion in binding defendant over for trial.

Although the evidence showed that defendant did not want Hughbanks to attend the preliminary examination and stated this desire along with some reasons designed to persuade Hughbanks not to obey the subpoena, it did not demonstrate that defendant attempted to impair her *ability* to appear.

MCL 750.122(6) 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 majority held:

> 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 would 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 the 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. [*Ante* at ___ (emphasis in original).]

I find the majority's analysis somewhat strained and erroneous. The error is most evident in the majority's sentence: "Greene then willfully attempted to interfere with Hughbanks' intention to attend . . . this interference attempted to affect her ability to attend the hearing by impairing her ability to choose to do the right thing." Paring this sentence down, as I have here,[1] it becomes apparent that the majority essentially equates intention with ability. Thus, defendant's attempt to interfere with Hughbanks' *intention* to attend is erroneously equated with an attempt to impair her *ability* to attend.

As set forth by the majority, "ability" is defined as the "*power or capacity to do or act* physically, mentally, legally, morally, or financially." *Random House Webster's College Dictionary* (2d ed, 1997) (emphasis added). "Moral" is defined as "of, pertaining to, or concerned with the principles of right conduct or the distinction between right and wrong." *Id.* On the basis of these definitions, to render someone morally unable would render them powerless to choose between right and wrong. Contrary to the majority's belief, if a witness chooses to do wrong, she is not powerless or unable to choose. Rather, in exercising the ability to choose, she makes the wrong choice. Accordingly, in order to impair a witness's moral ability under subsection 6, a person would have to do something more than merely utter words of persuasion. In other words, subsection 6 is not directed to the result, i.e., that a witness chose not to fulfill her civic duty, but to the act of placing a barrier between the witness and the system.

Likewise, an attempt to impair ability would require an attempt to place a barrier between the witness and the system. An "attempt" has been defined as an overt act done with the intent to commit the crime, and which, except for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime. *People v Konrad*, 449 Mich 263, 291; 536 NW2d 517 (1995) (Brickley, C.J., dissenting). Here, there was no overt act that, except for interference, would have impaired Hughbanks' ability to appear in court. Rather, defendant spoke persuasively with the intent to persuade, but his persuasion fell short of his desired goal.

The majority's interpretation of subsection 6 also renders other portions of the statute nugatory. When construing a statute, we presume that every word has meaning; our interpretation should not render any part of the statute nugatory. *People v Randolph*, 466 Mich 532, 558; 648 NW2d 164 (2002). Provisions must be read in the context of the entire statute so as to produce a harmonious whole. *People v Williams*, 236 Mich App 610, 613; 601 NW2d 138 (1999). As the majority notes, the fact that "the Legislature chose *not* to place all these different

[1] Compare with full quote above.

types of tampering in the same subsection suggests that the Legislature considered them to be distinct." *Ante* at ___ (emphasis in original). It is incongruous that acts that do not satisfy the requirements of subsection 3, i.e., encouraged, influenced, or discouraged, but not by threats or intimidation, nonetheless satisfy the requirements of subsection 6. Had the Legislature intended to bar nonthreatening or nonintimidating encouragement, influence, or discouragement, it obviously would have excluded the threat or intimidation requirement from section 3.

In further support of this conclusion is the fact that the Legislature provided affirmative defenses to and exceptions from subsections 1 and 3, but did not apply them to subsection 6. MCL 750.122(4) and 750.122(5) provide:

> (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.

It does not stand to reason that the Legislature intended to protect lawful conduct under subsections 1 and 3, but, under subsection 6, prohibit lawful conduct that was not intimidating or threatening, but constituted encouragement, discouragement, or influence. It is more likely that the Legislature understood the acts prohibited in subsection 6 to be so egregious that they could not be considered lawful in any circumstances. Clearly, mere influence, encouragement, or discouragement, without more, would not rise to this level.

Aside from disagreeing with the majority's statutory interpretation, I also find that subsection 6, as interpreted, raises the specter of a First Amendment violation. US Const, Am I; Const 1963, art 1, § 5. For example, an otherwise legal political protest may willfully influence or encourage a listener to choose not to attend or give information at an official proceeding involving the protested political issue. Although the protester did not place a barrier between the witness and the system, he could nonetheless be punished for his expression because it influenced a person to make the "wrong" choice. Obviously, I do not condone disobeying subpoenas. However, I believe that the judicial interpretation of subsection 6 should avoid the risk of unconstitutional application by limiting it to cases where a defendant's attempt to interfere with a witness's ability is more than merely uttering persuasive words with the hope or desire that the persuasion be effective.

In conclusion, a plain reading of MCL 750.122(6) clearly establishes that it is limited to prohibiting conduct that places, or attempts to place, a barrier between the witness and the system. After reviewing the record, it is readily apparent that the evidence establishes nothing more than defendant's stated desire that Hughbanks not attend the preliminary examination. As

the majority concedes, a "stated desire" standing alone is insufficient for the district court to find probable cause to believe that defendant violated MCL 750.122(6). I would affirm the circuit court's decision to quash the information.

/s/ Kirsten Frank Kelly