

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS SHELDON BARNETT,

Defendant-Appellant.

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UNPUBLISHED

May 3, 2011

No. 295845

Kent Circuit Court

LC No. 09-000469-FH

09-000470-FH

Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

SHAPIRO, J. (*concurring*).

I concur in the majority's affirmance of defendant's conviction. I write separately, however, because I agree with defendant's argument that, in *People v Greene*, 255 Mich App 426; 661 NW2d 616 (2003), this Court erroneously interpreted MCL 750.122(6).

Under MCL 755.122(3), a defendant may be convicted of witness tampering by "discourag[ing] a person from testifying" only if he does so by "threat or intimidation." Under MCL 750.122(6), a person may be convicted without a finding of "threat or intimidation" if he acts to "willfully impede, interfere with, prevent or obstruct . . . the ability of a witness" to attend. In *Greene*, this Court held that a defendant guilty only of "discouraging" a witness without any threat or intimidation, and so not guilty of a violation of subsection (1), could nevertheless be convicted under subsection (6) for acting to discourage the witness without threat or intimidation. I would reject the reasoning in *Greene* because it results in the conclusion that the Legislature's inclusion of subsection (6) was intended to wholly vitiate the "threat or intimidation" requirement set forth in subsection (1) where the only action by the defendant is to discourage a witness from appearing.

I agree, however, that defendant's conviction in this case should be affirmed. Defendant did not merely discourage the witness when he spoke with her, as was the case in *Greene*. Here, defendant contacted a third party, one who bore substantial ill will towards the witness, and attempted to arrange for this third party to physically intercept the witness outside the courthouse

prior on the date of her testimony. Such an action does rise to the level of an “attempt to willfully impede . . . prevent or obstruct the ability of a witness to attend.”<sup>1</sup>

/s/ Douglas B. Shapiro

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<sup>1</sup> I also note that, when speaking to the witness who was his former girlfriend, defendant made reference to O.J. Simpson, which could certainly be read as a threat, although given that defendant was not charged under MCL 750.122(3), it should not serve as the basis for his conviction.