

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ASHLEY MARIE KUJIK,

Defendant-Appellant.

UNPUBLISHED

February 24, 2005

No. 252766

Wayne Circuit Court

LC No. 03-009100-01

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right her conviction following a jury trial of witness intimidation, MCL 750.122(8) (retaliation). She was sentenced to three years' probation, with the first thirty days to be served in jail. This case arose after defendant's friend Amanda Barnes claimed that defendant threatened and coerced her into recanting her statement, which implicated defendant in the vandalism of several cars in the school parking lot. We reverse.

Defendant first argues that the court improperly instructed the jury that MCL 750.122(8) applied regardless whether an official proceeding had actually taken place. We agree.

Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions must be read as a whole rather than extracted piecemeal to create error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002), citing *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Instructional error is not harmless if it undermines the reliability of the verdict. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000). To determine whether the instruction undermined the reliability in the instant case, we must interpret the language of the statute in question. Statutory interpretation is an issue of law that is reviewed de novo. *Id.* at 471. MCL 750.122(8) states:

(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, 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.

The goal of statutory interpretation is to find and effectuate legislative intent. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). The first step in discovering legislative intent is to look at the specific language of the statute. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). When the language of the statute is clear, judicial construction is not permitted. *Weeder, supra* at 497. The plain language of MCL 750.122(8) requires the prosecutor to prove (a) that the defendant either retaliated, attempted to retaliate, or threatened to retaliate against a person, (b) for *having been* a witness in an official proceeding. The Legislature is presumed to be aware of the rules of grammar. *People v Beardsley*, 263 Mich App 408, 412-413; 688 NW2d 304 (2004). The word “been” is the past participle of the verb “to be.” William A. Sabin, *The Gregg Reference Manual* (New York: Glencoe McGraw-Hill, 9th ed, 2001), §1030, p 245. When used in connection with the verb “have,” it forms the present perfect tense. *Id.* at §1033, p 247. The present perfect tense “indicates action that was started in the past and has recently been completed or is continuing up to the present time.” *Id.* Thus, the prosecutor was required to prove that Barnes was already a witness before defendant could have been found guilty of MCL 750.122(8).

The challenged instruction given by the court – that MCL 750.122(8) applied regardless whether an official proceeding had taken place – generally complied with MCL 750.122(9), which states:

- (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.

However, MCL 750.122(9) does not apply to MCL 750.122(8), because a person who *could be* a witness is not necessarily a person *having been* a witness. It could be argued that MCL 750.122(9) does apply to MCL 750.122(8) because “threatens to retaliate against another person for having been a witness in an official proceeding” can refer to the witness’ status not at the time the threat is communicated, but at the future time when the threat will be carried out. It is true that the word “threaten” can indicate an impending act. See *Random House Webster’s College Dictionary* (2001), p 1362. Were it not for MCL 750.122(3), we might have agreed. However, statutory provisions must be read in harmony with other provisions pertaining to the same subject or sharing a common purpose. *People v Izarraras-Placante*, 246 Mich App 490, 498; 633 NW2d 18 (2001). MCL 750.122(3) states:

- (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.

The plain language of MCL 750.122(3) prohibits tampering with present or future witness testimony by use of threats or intimidation, while MCL 750.122(8) does not contain the “present or future” language. We construe the omission of “present or future” from MCL 750.122(8) as intentional. See *People v Rahilly*, 247 Mich App 108, 112; 635 NW2d 227 (2001). Our interpretation is in accord with this Court’s interpretation in *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003):

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.

To construe MCL 750.122(8) in the manner suggested by our colleague would blur the distinction found by this Court in *Green, supra* and nullify much of MCL 750.122(3). And nullification of a part of a statute should be avoided if possible. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999). Our interpretation does not, however, nullify the portion of 750.122(8) referring to threats; instead, it limits the context to threats made after the witness testifies, which is in keeping with the plain language of the provision.

Because the court’s instruction permitted the jury to find defendant guilty of an offense without finding that the prosecutor established an element of the offense, and the prosecutor did not establish the element of the offense, the instruction was outcome determinative and was not harmless error. Moreover, because the prosecutor did not establish an element of the offense, the jury’s verdict was based on insufficient evidence, and defendant may not be retried for a violation of MCL 750.122(8). See *People v Watson*, 245 Mich App 572, 596; 629 NW2d 411 (2001). Nevertheless, a conviction may be entered with respect to a necessarily included lesser offense, *People v Bearss*, 463 Mich 623, 631-633; 625 NW2d 10 (2001), or defendant may be retried for a different offense, *Watson, supra* at 600-601.

Because we find that MCL 750.122(9) does not apply to MCL 750.122(8), we need not address defendant’s contention that interaction between the two subsections renders MCL 750.122(8) void for vagueness.

Reversed.

/s/ Donald S. Owens
/s/ Christopher M. Murray

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METER, J. (*dissenting*).

I respectfully dissent. Indeed, the application of MCL 750.122(8) to defendant's conduct was in accordance with the language of the statute. I would affirm.

Defendant claims that the trial court erred in instructing the jury that MCL 750.122(8) applied regardless of whether an official proceeding had actually taken place. This issue raises a question of statutory interpretation. "The fundamental rule of statutory construction is to discern and give effect to the intent of the Legislature." *People v Venticinque*, 459 Mich 90, 99; 586 NW2d 732 (1998). If the statute's language is clear and unambiguous, this Court must enforce the language as written. *Id.* at 99-100. Unless defined in the statute, every word or phrase "should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Phillips v Jordan*, 241 Mich App 17, 22 n 1; 614 NW2d 183 (2000). If a term is not expressly defined in the statute, this Court may consult dictionary definitions in order to construe the term "in accordance with [its] ordinary and generally accepted meaning[]." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

MCL 750.122(8) provides, in pertinent part:

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.

MCL 750.122(9) provides:

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.

Defendant maintains that the phrase “for having been a witness in an official proceeding” in subsection 8 restricts application of this statute to situations in which the official proceeding has already been held and the witness has already testified. She points to the language of MCL 750.122(6), which proscribes interference with “the ability of a witness to attend, testify, or provide information in or for a *present or future* official proceeding” (emphasis added), and argues that if the Legislature had also intended for subsection 8 to apply to future proceedings, it would have incorporated the “present or future” language. Defendant contends that an ambiguity arises when subsection 8 is read in conjunction with subsection 9 and that the ambiguity must be construed in her favor.

I disagree with defendant’s interpretation of subsection 8 and find no conflict or ambiguity when it is read in conjunction with subsection 9. In *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003), this Court explained that MCL 750.122 “identif[ies] and criminalize[s] the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding[.]” The Court explained:

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. [*Id.* (emphasis in original).]

Retaliation is unique among the four categories of witness tampering because it refers to conduct committed in reaction to a witness’ testimony, i.e., conduct committed *after* a witness has already testified. See *Random House Webster’s College Dictionary* (2d ed), p 1109, defining “retaliate” as “to return like for like, esp. evil for evil,” or “to requite or make return for (a wrong or injury) with the like.” Subsection 8 prohibits not only retaliation and attempts to retaliate, but also threats to retaliate. The Legislature’s inclusion of threats to retaliate in addition to retaliation and attempted retaliation clearly contemplates the act of threatening to retaliate against a person for being a witness in the future, after the witness has testified in an official proceeding. Accordingly, the phrase, “threatens to retaliate against another person for having been a witness in an official proceeding” can refer to the witness’ status not at the time the threat is communicated, but at the future time when the threat will be carried out. The statute penalizes threats against a person “for having been a witness in an official proceeding,” and this language encompasses a situation in which future harm is threatened against a person in anticipation of that person testifying in an official proceeding. Consequently, subsections 8 and 9 can be read in harmony with each other, without creating any ambiguity.

Defendant’s reliance on the language differences between subsections 6 and 8 is misplaced. Subsection 6 addresses conduct that interferes with a witness to prevent him from testifying. *Greene, supra* at 438. Subsection 6 contemplates conduct that occurs during or

before an official proceeding, not after, because it refers to *interference with testimony*. The language difference between the two subsections simply reflects the difference between interference and retaliation. It does not reflect a legislative intent to restrict subsection 8 to acts and threats committed against a witness who has already testified in an official proceeding. Moreover, contrary to the majority's suggestion, construing subsection 8 in the manner set forth above does not "blur the distinction found by this Court in *Green, supra* and nullify much of MCL 750.122(3)." Indeed, subsection 8 specifically deals with *retaliation*, while subsection 3 does not. Further, the Court of Appeals' language cited from *Green* should not be used to trump the plain language of MCL 750.122.

I conclude that the trial court properly instructed the jury that the statute applied regardless of whether the official proceeding had actually taken place.

Defendant's two remaining issues are based on her erroneous interpretation of MCL 750.122(8). She argues that the jury verdict was against the great weight of the evidence because there was no evidence that Barnes had been a witness in an official proceeding, and she additionally argues that subsection 8 is void for vagueness because it conflicts with subsection 9, leaving her unable to discern what conduct the statute proscribes. Because I have concluded that subsection 8 prohibits threats to retaliate against a witness for testifying in a future proceeding and does not conflict with subsection 9, I reject these claims of error.

I would affirm.

/s/ Patrick M. Meter