If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LOU-ANNA K. SIMON,

Defendant-Appellee.

FOR PUBLICATION
December 21, 2021
9:00 a.m.

No. 354013
Eaton Circuit Court
LC No. 19-020329-FH

Before: STEPHENS, P.J., and BORRELLO and GLEICHER, JJ.

BORRELLO, J.

The prosecution appeals by right an order quashing the bind over of defendant, who is the former president of Michigan State University, on four counts of making a false or misleading statement to a peace officer, MCL 750.479c(1)(b), and dismissing defendant's felony information. For the reasons set forth in this opinion, we affirm.

I. FACTUAL BACKGROUND

In 2014, a victim initiated a complaint with Michigan State University (MSU) that Larry Nassar, who was at that time a doctor in the College of Osteopathic Medicine at MSU, had sexually assaulted her during an examination. Kristine Moore, who was a Michigan State University (MSU) employee in the office that investigated Title IX complaints (including sexual assault complaints), eventually received the complaint for investigation and spoke to the victim by telephone on May 15, 2014, at approximately 6:00 p.m. Moore testified[1] that at some point the next morning, she informed her supervisor, Paulette Granberry Russell, by telephone about the victim's complaint.[2] Russell was the Title IX coordinator and chief advisor on diversity to defendant, who was the president of MSU at that time. Moore further testified that she did not

[1] Because of the procedural posture of this case, where a preliminary examination has been conducted but not a trial, we refer to the preliminary examination testimony.

[2] Moore testified that she also informed the Office of the General Counsel and the MSU Police Department.

recall the specific conversation or exactly what she said to Russell at that time when she told her about the complaint.

Russell sent an email on the morning of May 16, 2014, to defendant stating only that "We have an incident involving a sports medicine doc." Russell testified that she sent this email after she had been told by Moore about the victim's complaint. Russell explained that Moore's telephone call to her had occurred either on May 15 or very early on May 16. Russell did not recall the specific details of her conversation with Moore. Russell further testified that she did not even remember having a conversation with Moore but was merely assuming that they spoke "because there was an email from me to the president alerting her to allegations." After having her memory refreshed by a transcript of her 2018 interview at the attorney general's office, Russell testified that she had a telephone conversation with Moore, during which Moore relayed that she had received a complaint regarding allegations of sexual assault by a doctor in the College of Osteopathic Medicine. Russell believed that she asked Moore to send her more details by email.

Moore subsequently sent an email to Russell on the afternoon of May 16, 2014, as a follow up to their earlier telephone conversation. In that email, Moore summarized the nature of the victim's complaint and mentioned that the complaint was against Nassar. The email indicated that the victim alleged that Nassar had massaged the victim's breasts, buttocks, and vagina. Moore testified that she never sent this email to defendant. Russell testified that she did not recall providing defendant with the details of the victim's complaint against Nassar as set forth in the May 16 email Russell received from Moore.

In her position reporting directly to defendant, Russell generally had monthly individual meetings with defendant to provide updates on various matters as necessary. Russell testified that she typically created the agendas for these meetings, which usually included items of "university-wide impact."

On May 19, 2014, Russell had a scheduled one-on-one meeting with defendant. On the typewritten agenda that Russell prepared for this meeting, Russell had included "COM incident." Russell indicated that "COM" stood for "College of Osteopathic Medicine" and that the Nassar complaint was the only incident involving the COM during May 2014 of which Russell was aware. There was conflicting evidence regarding whether the May 19, 2014 meeting was held in person or over the telephone. According to Russell, her calendar indicated that it was scheduled as an in-person meeting, but her agenda indicated that it was to be conducted by telephone call. Nobody else was involved in the meeting; Russell and defendant were the only participants. Russell testified that she did not "independently recall if it was in person or by phone." Russell testified that she could not independently remember the details of the conversation during that meeting and that she did not remember "bringing up the matter involving Larry Nassar at that meeting." When asked if she thought she would have brought this up, Russell testified as follows:

> It's possible; but again, I cannot recall stating to President Simon the matter involving Larry Nassar at that meeting. I don't have any notes that would cause me to trigger a memory of that. It was two thousand and, you know, fourteen. I can't remember.

Another version of Russell's agenda for the May 19 meeting that also included Russell's handwritten notes from the meeting was admitted as an exhibit at the preliminary examination. Russell's handwritten notes contained nine specific names related to various agenda items, but Nassar's name was not one of them and did not appear in any of Russell's handwritten notes on the agenda. There were also no handwritten notes pertaining to the COM incident on the agenda. She could not recall whether the COM incident was discussed during the meeting or what was discussed about Nassar. Russell admitted it was possible that she discussed the Nassar investigation with defendant. Russell also testified that it was very possible that she did not discuss Nassar with defendant in the May 19 meeting. Russell stated further that she had no independent recollection of specifically discussing Nassar with defendant during the May 19 meeting, that it was possible that she discussed the COM incident in terms of an incident involving a sports medicine doctor without discussing Nassar by name, and that she did not recall mentioning Nassar's name to defendant in 2014.

Russell's calendar also indicated that she had a meeting scheduled with defendant on May 14, 2014. However, Russell testified that she did not remember if that meeting actually occurred; she subsequently testified in relation to other documentary evidence that the May 14 meeting occurred but involved multiple other people and was held with respect to a specific congressional sexual assault survey that MSU was completing. The prosecution admitted into evidence a file folder that was labeled with the date, time, and subject of the May 14, 2014 meeting. The folder contained background materials relevant to the congressional sexual assault survey that was the subject of that meeting. The May 14 meeting folder also contained a copy of the agenda for the May 19, 2014 meeting between Russell and defendant, with no handwriting on it. On the outside of the May 14 folder, there were handwritten notes that stated, "sports med, Dr. Nassar SA" and "Estell[e] MCG, age discrim." Russell testified that the handwriting appeared to be her own, that "SA" meant "sexual assault," and that she assumed that she made the note so she would raise this issue in her conversation with defendant.

However, Russell testified that she had no recollection of discussing this May 14 folder with defendant and that she could not be certain whether she had this folder with her during the May 19 conversation with defendant. Russell could not recall when she wrote the note about Nassar on the folder, but she indicated that she was not aware of the allegations against Nassar until after the May 14 meeting when she was contacted by Moore on May 15 or 16. Russell thus assumed that she must have written the note sometime between May 15 and May 19, 2014. Russell's handwritten notes from the May 19 meeting, which appeared on her copy of the May 19 agenda, did not include any notes indicating that she discussed Nassar or an age discrimination matter with defendant during the May 19 meeting. Russell did not independently recall discussing any of the items on her agenda or folder with defendant. Russell could not recall ever telling defendant Nassar's name. According to Russell, defendant never inquired and was never told the name of the individual involved in the COM investigation.

Marti Howe, who worked at MSU in 2014 as defendant's assistant and reported directly to defendant, was primarily responsible for keeping defendant's calendar, scheduling her appointments, preparing her materials for appointments, and arranging defendant's travel. Howe testified that she also prepared a written agenda for defendant pertaining to the May 19, 2014

meeting between defendant and Russell. Howe identified a copy of this agenda,[3] which was admitted into evidence. The agenda also contained handwritten notes in addition to the typed items on the agenda, and Howe identified the handwriting as defendant's handwriting. The agenda contained a typed item, "Sexual Assault Cases." There was a handwritten checkmark next to this item. Also next to this item, were the following handwritten notes: "COM/Both Issues/Court Case." Howe testified that she was not present at the meeting and did not know the substance of what was discussed regarding these items, nor did she have any additional knowledge about what these notes meant. Nassar's name did not appear on the May 19, 2014 agenda. Howe testified that under the system used by defendant, a checkmark meant that the item was discussed but would carry over to the next meeting to be discussed again. There was also documentary and testimonial evidence that "Sexual Assault Cases" appeared as an agenda item on multiple agendas for meetings between defendant and Russell, including agendas for the March, April, June, July, and August 2014 meetings between defendant and Russell.

The 2014 investigation concluded that there was no finding of a Title IX or MSU policy violation by Nassar. Moore testified that before 2016, she never had any conversation with defendant about the 2014 victim's complaint, the investigation in that matter, or Nassar. Moore also testified that she did not recall whether she provided a copy of her final report to Russell before 2016. Moore did not provide a copy or draft of her final report to defendant before 2016.

Russell testified that there was no written protocol to report Title IX investigations to the president, that she did not know of Title IX investigative reports being shared with the president, and that the "president would be aware that we had Title IX investigations, but the detail of those were not typically disclosed to the president." Russell was told verbally by Moore about the no-finding conclusion of the investigation but was not given a copy of the final report. Russell testified that there were no writings or emails between her and defendant during 2014, 2015, or the majority of 2016 mentioning Nassar by name. Nassar's name did not appear on any of Russell's meeting agendas. As previously noted, Russell testified that she did not recall ever specifically mentioning Nassar's name to defendant. Russell testified that she did not believe that she ever asked defendant to be involved in the 2014 investigation of Nassar in any way. Moore testified that defendant was not involved in the 2014 Nassar investigation. June Youatt, who was the provost at MSU, testified that the MSU procedures did not require the provost or president to be involved in sexual assault complaints or investigations unless there was a finding of responsibility.

In early 2018, after additional allegations of sexual misconduct by Nassar led to his criminal prosecution and conviction, a law enforcement investigation into MSU's handling of the Nassar matter was initiated. Detective Joseph Cavanaugh and Detective Sergeant William Arndt both employed by the Michigan State Police, were involved in the investigation. According to Cavanaugh, the investigation was intended to find out "who knew what and when, if anything, at the university related to Narry—or Larry Nassar from 2014 on, as well as other issues at the university such as Dean Strampel."

[3] This agenda was different from the one prepared by Russell.

As part of the investigation, the detectives interviewed defendant on May 1, 2018. During that interview, the following exchange took place:

> MR. ARNDT: So I mean specifically to Nassar, were you aware of any prior investigation, you know, before the story broke in the news, were you aware of any prior investigation with Larry Nassar, or, you know, misconduct for that matter, anything?
>
> [Defendant]. I was aware that in 2014 there . . . was a sports medicine doc who was subject to a review. But I was not aware of any of the substance of that review, the nature of the complaint, that was all learned in '16 after it became clear in the newspaper regarding the—
>
> MR. ARNDT: I think that's going to boil right into our next questions.
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> [Defendant]. The national piece?
>
> BY MR. CAVANAUGH:
>
> *Q.* Sure. Well, how did you become aware of it in 2014? Is that something that's part of a briefing or—
>
> *A.* I was told by one of the staff members that there was a sports medicine—
>
> *Q.* I see.
>
> *A.* —physician who was going through OIE [the Office of Institutional Equity], none of the substance. And I don't involve myself in the OIE investigations.

Both Arndt and Cavanaugh acknowledged during their respective preliminary examination testimony that they did not ask defendant follow-up questions regarding who informed her that there was a sports medicine doctor under review, when she had been informed, or whether she had asked for additional information.

Defendant was subsequently charged with four counts of making a false or misleading statement to a peace officer in a criminal investigation, contrary to MCL 750.479c. Specifically, defendant was charged with one count based on the allegation that the interviewing officers were investigating first-degree criminal sexual conduct (CSC-I) and defendant knowingly and willfully made a false or misleading statement regarding her knowledge of who was the subject of the 2014 Title IX investigation involving Nassar. Defendant was also charged with one count based on the same allegedly false or misleading statement with respect to the interviewing officers' investigation of misconduct of a public official. Defendant was charged with an additional count based on the allegation that with respect to the CSC-I investigation, defendant knowingly and willfully made a false or misleading statement regarding her knowledge of the nature and substance of the 2014 Title IX investigation. Finally, defendant was charged with another count based on this same allegedly false or misleading statement with respect to the investigation of misconduct of a public official.

Following the preliminary examination, the district court found that there was probable cause to believe that defendant committed these crimes and bound defendant over on all four charges. As relevant to the resolution of this appeal, the district court concluded that "evidence suggests" that the victim's 2014 allegations against Nassar were a "topic of conversation in a meeting between [defendant] and Russell." The district court essentially inferred that Russell must have told Simon in their May 19, 2014 meeting about the details of the allegations and provided defendant with Nassar's name as the alleged perpetrator.

Defendant moved the circuit court to quash the bind over. In a thorough and well-reasoned written opinion, the circuit court determined that the district court had abused its discretion by finding that probable cause supported multiple elements of the offenses. The circuit court ruled in relevant part that "[t]he district court abused its discretion in finding probable cause to believe Dr. Simon knowingly and willfully made false or misleading statements." In support of this conclusion, the circuit court reasoned that there was no evidence that anyone communicated Nassar's name or the specific nature of the allegations to defendant in 2014. The circuit court further stated that the prosecution's argument required the court to speculate without evidentiary support that defendant was informed in 2014 of Nassar's name and the nature of the complaint against him and that defendant remembered in 2018 that she had known that information in 2014. The court reiterated that there was no evidence that would permit such an inference without improperly resorting to speculation. The circuit court quashed the bind over and dismissed the case. The prosecution now appeals.

II. STANDARD OF REVIEW

"A district court magistrate's decision to bind over a defendant and a trial court's decision on a motion to quash an information are reviewed for an abuse of discretion." *People v Bass*, 317 Mich App 241, 279; 893 NW2d 140 (2016) (quotation marks and citation omitted). "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Anderson*, 501 Mich 175, 189; 912 NW2d 503 (2018) (quotation marks and citation omitted). An abuse of discretion occurs if the court does not select a reasonable and principled outcome. *Id*. The district court abuses its discretion by binding over a defendant when the prosecution has failed to present sufficient evidence to support each element of the charged offense. *People v Perkins*, 468 Mich 448, 452, 454-455, 458; 662 NW2d 727 (2003). "[T]o the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *Bass*, 317 Mich App at 279 (quotation marks and citation omitted).

"In order to bind a defendant over for trial in the circuit court, the district court must find probable cause that the defendant committed a felony" based on there being "evidence of each element of the crime charged or evidence from which the elements may be inferred." *Anderson*, 501 Mich at 181-182 (quotation marks and citation omitted). Further,

> a magistrate's duty at a preliminary examination is to consider all the evidence presented, including the credibility of witnesses' testimony, and to determine on that basis whether there is probable cause to believe that the defendant committed a crime, i.e., whether the evidence presented is sufficient to cause a person of

ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. [*Id*. at 178 (quotation marks and citation omitted).]

III. ANALYSIS

The statute under which defendant was charged, MCL 750.479c, provides in pertinent part as follows:

> (1) Except as provided in this section, a person who is informed by a peace officer that he or she is conducting a criminal investigation shall not do any of the following:
>
> * * *
>
> (b) Knowingly and willfully make any statement to the peace officer that the person knows is false or misleading regarding a material fact in that criminal investigation.

As this Court has previously stated, this statute "prohibits knowingly and willfully making a statement regarding a material fact 'that the person knows is false or misleading.' " *People v Williams*, 318 Mich App 232, 239; 899 NW2d 53 (2016). For purposes of this statute, mislead means "1. to lead or guide in the wrong direction. 2. to lead into error of conduct, thought, or judgment; lead astray." *Id*. at 240 (quotation marks and citation omitted). Additionally, false statements are misleading as well because "[a]n affirmatively false statement—a bald-faced lie—may turn an investigator's attention away from the true perpetrator or the source of valuable evidence." *Id*.

In this case, the prosecution asserted that defendant knowingly and willfully made false or misleading statements with respect to whether, before the 2016 media reporting on Nassar's misconduct, defendant (1) knew that Nassar was the sports medicine doctor under review in 2014 and (2) knew the nature of the allegation or the substance of the review. These two allegedly false or misleading statements formed the basis for four charged offenses under MCL 750.479c because the officers were investigating both CSC-I and misconduct of a public official.

The prosecution essentially contends that defendant lied about (1) whether she knew that Nassar was the specific individual being investigated in the 2014 Title IX investigation and (2) whether she knew the details of those allegations or that the allegations involved sexual assault. The prosecution maintains that the evidence and inferences from that evidence show that defendant was informed in 2014 of Nassar's name and the nature of the allegations against him.

However, the prosecution did not introduce any evidence that defendant was actually informed in 2014, or at any time prior to 2016 of Nassar's *name* or the details of the allegations against him. At most, there was evidence that defendant was notified of an incident involving an unnamed "sports medicine doc" and that Russell may have had some general discussion with defendant about this incident during their May 19, 2014 meeting. The fact that defendant was aware of this level of information is not inconsistent with her statements during the 2018 police interview that she "was aware that in 2014 there . . . was a sports medicine doc who was subject to a review" but "was not aware of any of the substance of that review, the nature of the complaint,

that was all learned in '16 after it became clear in the newspaper regarding the . . . national piece[.]"

The evidence that defendant wrote "COM" on her May 19, 2014 meeting agenda next to the agenda item "Sexual Assaults" supports the reasonable inference that this incident was at least brought up during the meeting. It also supports the inference that defendant was, at a minimum, provided with information that the incident involved allegations of sexual assault. However, this knowledge is also not inconsistent with defendant's statements during her 2018 police interview. As quoted above, the questioning was as follows:

> MR. ARNDT: So I mean specifically to Nassar, were you aware of any prior investigation, you know, before the story broke in the news, were you aware of any prior investigation with Larry Nassar, or, you know, misconduct for that matter, anything?
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> [Defendant]. I was aware that in 2014 there . . . was a sports medicine doc who was subject to a review. But I was not aware of any of the substance of that review, the nature of the complaint, that was all learned in '16 after it became clear in the newspaper regarding the—
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> MR. ARNDT: I think that's going to boil right into our next questions.
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> [Defendant]. The national piece?
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> BY MR. CAVANAUGH:
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> *Q.* Sure. Well, how did you become aware of it in 2014? Is that something that's part of a briefing or—
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> *A.* I was told by one of the staff members that there was a sports medicine—
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> *Q.* I see.
>
> *A.* —physician who was going through OIE [the Office of Institutional Equity], none of the substance. And I don't involve myself in the OIE investigations.

Thus, in defendant's very next answer after stating that she "was not aware of any of the substance of that review, the nature of the complaint," defendant clarified that she had been told that this doctor was being investigated by OIE. Arndt testified at the preliminary examination that he understood defendant's reference to indicate that there was a Title IX investigation and that he assumed defendant was saying that the investigation involved matters of a sexual nature.[4] It is not

[4] Russell testified that "OIE evolved in 2015, late 2015, as a separate office from the Office for Inclusion and Intercultural Initiatives." OIE was responsible for "All of the compliance functions, particularly around the university's non-discrimination, anti-discrimination policy, as well as the

clear what defendant meant by stating that she was not aware of the substance of the review or nature of the complaint, and the interviewing officers did not ask any follow-up questions to clarify or probe what defendant meant. Arndt testified that he assumed defendant meant that she was not aware of the details of the complaint. As we have already stated, there was no evidence presented by the prosecution that defendant was actually apprised of the details of the allegations or complaint against Nassar in 2014 until after Nassar's misconduct garnered national media attention in 2016. On this record, we cannot say that defendant's statements during the 2018 police interview were affirmatively false or misled law enforcement in this regard. *Williams*, 318 Mich App at 240.

Without evidence that defendant was provided with Nassar's name or details about the nature and substance of the allegations in 2014, there was no evidence that defendant's 2018 statements to the police were affirmatively false or misleading as required by the statute. *Id*. The prosecution has essentially argued that defendant made false or misleading statements because Russell *must* have provided more details to defendant considering the seriousness of the allegations and the amount of information Russell possessed.

However, that conclusion simply is not supported by the evidence and instead rests on mere speculation and suspicion. We cannot impute that knowledge to defendant without some evidence that this information actually made its way to defendant or from which we could legitimately infer, rather than assume, that fact. Although "a district court may . . . rely on inferences to establish probable cause for a bindover," a "person of ordinary prudence and caution [may] not infer" a fact "absent any actual evidence" to support the inference of that fact because "[m]ere suspicion is not the same as probable cause." *People v Fairey*, 325 Mich App 645, 651-652; 928 NW2d 705 (2018). A district court abuses its discretion if its bindover decision is based on a "fail[re] to distinguish between a suspicion of guilt and a reasonable belief" of guilt. *Id*. at 651. Despite that the probable cause standard is a "rather low level of proof, the magistrate must always find that there is evidence regarding each element of the crime charged or evidence from which the elements may be inferred in order to bind over a defendant. *People v Hudson*, 241 Mich App 268, 278; 615 NW2d 784 (2000) (quotation marks and citation omitted).

For the above reasons, the evidence was insufficient for a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that defendant made a false or misleading statement, such that the district court abused its discretion by finding that there was probable cause of this element of the crime and by instead binding defendant over for trial based on mere

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Title IX responsibilities." Russell explained that Title IX responsibilities included "complaints involving sex discrimination, the Relationship Violation Sexual Misconduct Policy." Russell was in charge of the Inclusion and Intercultural Initiatives Office in 2014, and was still in charge of this office at the time of trial. She stated that the functions of OIE were under her supervision until 2014.

speculation. *Id.*; *Anderson*, 501 Mich at 178, 181-182. Accordingly, we affirm the circuit court's decision quashing the bindover and dismissing the case.[5]

Affirmed.

/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher

[5] Because our conclusion effectively disposes of this case, we decline to reach the remainder of the parties' arguments. See *People v Graves*, 207 Mich App 217, 220; 523 NW2d 876 (1994).

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LC No. 19-020329-FH

Before: STEPHENS, P.J., and BORRELLO and GLEICHER, JJ.

GLEICHER. J. (*concurring*).

The Michigan Attorney General charged Lou-Anna K. Simon with making two false statements to police officers investigating Michigan State University's (MSU) handling of the horrific sexual abuse perpetrated by Dr. Larry Nassar. The majority opinion correctly holds that the prosecution failed to produce any evidence supporting that Dr. Simon's statements were false or misleading and affirms the circuit court's decision to quash the bind-over. There are additional reasons to affirm the circuit court. Dr. Simon's allegedly false statements were immaterial to the prosecution's sham investigation, and her literally true answers cannot be subject to prosecution. Furthermore, the record reveals that Dr. Simon was charged for reasons that have nothing to do with bringing justice to Nassar's victims or to vindicating legal principles. On those added bases, I concur with the majority.

Sixty years ago, then-United States Attorney General Robert Jackson, later a Justice of the United States Supreme Court, declared that "the most dangerous power of the prosecutor [is] that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted." Jackson, *The Federal Prosecutor*, 24 J of American Judicature Soc 18, 19 (1940). This prosecution imbues Justice Jackson's words with life. Multiple institutions—including the Federal Bureau of Investigation, the Ingham County Prosecutor's office, USA Gymnastics, and MSU—failed Nassar's victims. By readily accepting that Nassar engaged in a recognized medical treatment rather than flagrant sexual abuse, people who could and should have stopped Nassar lost the opportunity to protect hundreds of women. Dr. Simon was not one of those people. Despite her periphery to the abysmal decisions made by her institution, Dr. Simon was a high-profile target, selected to assuage public anger rather than to protect the integrity of the law.

I. THE SHAM INVESTIGATION BY MSU

By mid-January 2018, Larry Nassar had been convicted of multiple crimes and sentenced to the equivalent of life in prison. That same month, the then-Michigan Attorney General Bill Schuette launched the criminal investigation that yielded this prosecution.

There can be no debate about one central fact: MSU grossly mishandled complaints about Nassar beginning as early as 1997, and continuing until 2016. MSU's malfeasance allowed an unconstrained Nasser to molest hundreds of young victims. As a partial recompense MSU created a $500 million fund to compensate victims, and the civil justice system continues to consider claims.

Several detailed examinations of the widespread institutional failures contributing to Nassar's success in deceiving authorities have been published and are discussed below. MSU has scrutinized its failures and publicly admitted to many of them. So why did the Attorney General get involved in a criminal investigation of MSU *after* Nassar had been sentenced and the civil litigation commenced? The historical background supports that the goal was to exact retribution for MSU's failure to stop Nassar rather than to pursue justice for criminal wrongdoing. Dr. Simon was the one of the scapegoats selected to justify that effort.

A. THE 2014 INVESTIGATION

In 2014, Amanda Thomashow contacted Dr. Jeffrey Kovan, a physician in the MSU Sports Medicine Clinic, to report that she had been sexually assaulted by Dr. Nassar during a March 2014 medical examination.[1] Dr. Kovan met with Ms. Thomashow and immediately brought her concerns about the exam to MSU's Office for Institutional Equity (OIE). At the time, the OIE was charged with investigating potential violations of Title IX, which prohibits sex discrimination in education, including investigations of sexual assault.

Thomashow spoke by phone with Kristine Moore, an attorney and an investigator for the OIE. Moore testified at Dr. Simon's preliminary examination that she understood that Thomashow had reported a sexual assault. This was not a difficult conclusion to reach, as Thomashow described that in response to her complaint of hip pain Nassar had "massaged" her breasts, buttocks and vaginal area with an ungloved hand in a manner that seemed sexual in nature. Moore notified MSU's Office of the General Counsel, the MSU police department, and her superior, Paulette Grandberry-Russell. Moore then met with Thomashow and a detective in the MSU police department. An investigation ensued in which Moore interviewed Nassar and several other physicians. Nassar told Moore that "touching in the vaginal area" was an appropriate treatment of the "sacrotuberous ligament," and that he had been performing that procedure "for a long time" and on hundreds of young women.

Moore then consulted with Dr. Brooke Lemmen, a physician board certified in family and sports medicine who worked as a full-time physician at MSU. Dr. Lemmen was also a friend and

[1] I use Ms. Thomashow's name because she has on several occasions publicly—and courageously—described her encounter with Nassar.

colleague of Nassar. Dr. Lemmen advised that Nassar's manipulation of "areas very close to the vaginal area" was medically appropriate. Similarly, Dr. Lisa DeStafano (another board-certified physician and a friend and colleague of Nassar) told Moore that the "treatment" administered by Nassar, described by the physicians as a manipulation of areas close to the vagina, was medically appropriate. Dr. Jennifer Gilmore, who told Moore that she and Nassar had known each other since their residencies and that Nassar treated her daughter, echoed those opinions. None of these physicians knew that Nassar's "treatment" went far beyond that which they recognized as a legitimate osteopathic therapy, and the inaccuracy of their understanding of Nassar's actual conduct emerged during the criminal proceedings. But given the united front of expert opinion exculpating Nassar at the time, Moore's report concluded that Nassar's conduct was medically appropriate and not sexual in nature. MSU's general counsel approved the report. Dr. Simon was never provided with a copy of the investigative report nor informed of the result.

Nevertheless, the MSU police department referred Nassar to the Ingham County prosecutor. The prosecutor declined to bring any charges.

Of course, Nassar's "treatment technique" was *not* a recognized or appropriate medical procedure; it was sexual abuse. As others have opined, Moore's investigation should have sought input from physicians outside of MSU rather than from Nassar's colleagues and friends. The 2014 MSU investigation was deeply flawed.[2] The physicians and others who vouched for Nassar—including Nassar himself—led the investigation astray.

The OIE was not the only entity that failed to pursue evidence that Nassar's "treatments" of his victims were sexual assaults. Thanks to a comprehensive report issued by the Inspector General of the United States in 2021, we know that the Federal Bureau of Investigation received detailed and highly specific allegations of sexual assault involving Nassar in 2015, yet failed to open a formal investigation "and did not advise state or local authorities about the allegations and did not take any action to mitigate the risk to gymnasts that Nassar continued to treat." Department of Justice, Office of the Inspector General, *Investigation and Review of the Federal Bureau of Investigation's Handling of Allegations of Sexual Abuse by Former USA Gymnastics Physician Lawrence Gerard Nassar*, p ii (July 2021), available at <https://oig.justice.gov/sites/default/files/reports/21-093.pdf> (accessed October 19, 2021). The failures of USA Gymnastics, Inc., to meaningfully follow up on reports of sexual abuse are also well documented in after-the-fact reports. See McPhee & Dowden, *Report of the Independent Investigation: The Constellation of Factors Underlying Larry Nassar's Abuse of Athletes* (December 10, 2018), available at <https://www.nassarinvestigation.com/en> (accessed October 19, 2021).

[2] Multiple additional deficiencies in the handling of Thomashow's complaint against Nassar were identified by the United States Department of Education Office for Civil Rights in a lengthy report prepared. See United States Department of Education, Office for Civil Rights, *Report Re: OCR Docket No. 15-18-6901: Michigan State University*, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15186901-a.pdf> (accessed October 19, 2021).

B. FAST-FORWARD FOUR YEARS, TO 2018

Against an inexcusable backdrop of multi-institutional malpractice characterized by the minimization of sexual assault complaints, disbelief of the young women, and countless missed opportunities to stop the abuse, then-Attorney General Bill Schuette undertook his own criminal investigation of MSU. William Arndt, a Michigan State Police detective sergeant and a lead investigator in this effort, testified at the preliminary hearing, "We were investigating not so much Nassar's CSC [criminal sexual conduct], because he had already been convicted. We were investigating the CSC as it relates to the aiding and abetting by other employees at the university; not specifically including Ms. Simon, but other or any employee at the university and/or misconduct in office."

This "explanation" of the basis for a criminal investigation of an entire university is difficult to take seriously. To establish that anyone aided or abetted Nassar in the perpetration of criminal sexual assaults, the prosecution would have to prove that the person "performed acts or gave encouragement" that assisted Nassar in committing the crime, and that the person *intended* the commission of the crime at the time he or she gave the aid or encouragement. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). None of the young women reported that others had "performed acts or given encouragement" to Nassar. By the time the Attorney General's investigation commenced, hundreds of young women had given statements or testimony that during the assaults only Nassar, and occasionally parents, were in the room. Further, the investigators knew that the medical "culture" at MSU condoned Nassar's "treatment" of the "sacrotuberous ligament" and that physicians were on record as attesting to its usefulness. It defies reason (and the extensive factual record available in January 2018) that before 2016, anyone at the university believed that Nassar was routinely penetrating the vaginas of his patients or understood that the treatment he claimed to be performing was actually sexual assault. Searching for evidence of "aiding and abetting" was a complete waste of time, and no evidence supports that the detectives believed they would stumble on an "aider and abetter."

The misconduct in office statute, MCL 750.505, addresses "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999) (quotation marks and citation omitted). The Supreme Court has set forth five factors for establishing a "public office" under the statute:

> (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. [*Id*. at 354 (citation omitted).]

Dr. Simon likely qualified as a "public officer," as did a handful of other MSU officials.

Arndt claimed that he was specifically investigating Dr. Simon regarding a possible charge of misconduct in office based on a "potential coverup of the CSC with Mr. Nasser." Superficially, this makes sense. But Arndt's explanation dissolves in the light of his awareness that the MSU police had referred Nassar to the Ingham County prosecutor in 2014 with a recommendation that he be charged. It is inconceivable that Simon intended to corruptly cover up Nassar's "crimes" given the opinions of three physicians exculpating him from criminal activity, and the conclusions of the university's OIE and legal counsel that no sexual assault had occurred. What was Dr. Simon allegedly covering up?

Unsurprisingly, the Attorney General's "investigation" yielded no evidence of aiding or abetting. The Dean of the College of Osteopathic Medicine (COM), William Strampel, was convicted of two misdemeanor counts of willful neglect of duty by a public officer, MCL 750.478, "for failing to properly oversee" Nassar "and for permitting Nassar to return to work before completion of the Title IX investigation of an allegation that Nassar engaged in sexual misconduct." *People v Strampel*, unpublished opinion of the Court of Appeals, issued January, 14, 2021 (Docket No. 350527), p 1 n 1. But Strampel was charged with these crimes approximately six weeks *before* the detectives interviewed Dr. Simon.

As to Dr. Simon, the investigation revealed not even a shred of evidence of any crime. Absent evidence of "aiding or abetting" or misconduct in office, the investigators seized on the crime with which they charged Dr. Simon: lying to them.

II. THE 2018 INTERVIEW WITH DR. SIMON—FOUR YEARS AFTER THE UNDERLYING EVENTS

Dr. Simon told the investigators that she was aware of the 2014 OIE investigation, but that pursuant to university policy, she was not involved in it. Because no finding implicating an MSU employee was made, she was never informed of the result. Dr. Simon told the investigators that she did not know Larry Nassar personally and had no role whatsoever in the investigation after being apprised of its existence. These facts have never been refuted.

So why are we here? Why was Dr. Simon charged with four felony counts carrying a penalty of up to four years' imprisonment? As Justice Jackson warned in 1940, "With the lawbooks filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone." Jackson, p 19. In such circumstances, "it is not a question of discovering the commission of a crime and then looking for the man who committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him." *Id*. That is precisely what happened here. This prosecution is designed to punish and humiliate Dr. Simon for the sins of MSU, not to provide justice for Nassar's victims or to vindicate the legitimate purposes of the law penalizing those who lie to the police.

The felony information charges that Dr. Simon lied to a peace office in violation of MCL 750.479c(1)(b) in two different respects: she made a statement during the 2018 interview that "she knew was false or misleading" related to "her knowledge of who was the subject of the 2014 MSU Title IX investigation into the Amanda Thomashow complaint against Larry Nassar," and that she

falsely stated "that she was not aware of the nature and substance of the 2014 MSU Title IX investigation into the Amanda Thomashow complaint against Larry Nassar."

The majority opinion elucidates the facts surrounding the voluntary interview conducted with Dr. Simon by Arndt and another Michigan State Police officer, William Cavanagh. And the majority accurately discerns that "the prosecution did not introduce any evidence that [Dr. Simon] was actually informed in 2014, or at any time prior to 2016 of Nassar's *name* or the details of the allegations against him." Accordingly, the majority holds that because there was no evidence that Dr. Simon was provided with Nassar's name or any details regarding the 2014 investigation, the prosecution failed to establish probable cause supporting a bind-over for lying to the police about these subjects.

The prosecution's claim that Dr. Simon made a false statement regarding her awareness of Nassar's name is utterly fallacious for several more reasons. First and foremost, everyone in the interview room knew—and openly acknowledged—that the subject of the discussion that day was Larry Nassar. Dr. Simon deceived no one by failing to utter Nassar's name. The whole point of the meeting was to discuss Nassar. At the very outset of the meeting the following interchange took place:

> BY MR. CAVANAGH:
>
> *Q*. We can get right into the meat and potatoes of what we'd like to ask today and I guess we'll start today with Larry Nassar.
>
> *A*. Okay.
>
> *Q*. Did you know Larry Nassar personally?
>
> *A*. No.
>
> *Q*. At all?
>
> *A*. No.

Cavanagh then presented Dr. Simon with Nassar's "personnel form," asked her a few questions about it, read aloud from it, and established that the "provost's office" and the dean had responsibility for overseeing the assignments given to tenured faculty such as Nassar. This conversation referenced Nassar's work for MSU Gymnastics and his volunteer work for USA Gymnastics. The discussion regarding Nassar triggered by his personnel form went on for 10 pages, concluding with Dr. Simon's explanation that the university did not independently keep track of the voluntary work faculty members provide to "outside entities." It then segued directly into one of the two answers that the prosecution alleges was false or misleading:

> MR. ARNDT: *So I mean specifically to Nassar*, were you aware of any prior investigation, you know, before the story broke in the news, were you aware of any prior investigation with Larry Nassar or, you know, misconduct for that matter, anything?

[DR.] SIMON. I was aware that in 2014 there . . . was a sports medicine doc who was subject to a review. But I was not aware of any of the substance of that review, the nature of the complaint, that was all learned in '16 after it became clear in the newspaper regarding the - -

MR. ARNDT: I think that's going to boil right into our next questions.

[DR.] SIMON. The national piece?

BY MR. CAVANAUGH:

Q. Sure. Well, how did you become aware of it in 2014? Is that something that's part of a briefing or - -

A. I was told by one of the staff members that there was a sports medicine - -

Q. I see.

A. - - physician who was going through OIE, none of the substance. And I don't involve myself in the OIE investigations.

Q. And that's a standard practice?

A. That's a standard practice. It has nothing to do with the substance of the case.

* * *

Standard practice is not to be involved because they need to be done in a straightforward way without any political pressure one way or the other.

Q. Sure, absolutely.

MR. ARNDT: So as part of the Title IX, . . . though, investigation do they report back to the provost, you, vice-president? Do they ever bring those findings back or is that confidential information? How does that work?

[DR.] SIMON: The process is such that if there are significant issues that arise as a result of that that implicate policy or education, those are typically brought forward. But in this case I can tell you straightforwardly that since there was no finding as I learned in 2016, not then, I had no knowledge of what happened in the Title IX investigation in 2014. [Emphasis added.]

The context of this discussion makes it abundantly clear that everyone in the room knew that Dr. Simon was talking about the OIE investigation into Larry Nassar. Nassar was the sole subject of the discussion preceding the interchange about the "sports medicine doc," the follow-up questions specifically focused on Nassar, and the prosecution has never contended that *another*

doctor was also sexually assaulting patients. Indeed, a few pages after the allegedly false or misleading answer, Dr. Simon reiterated that she first learned of the concerns about Nassar after the Indianapolis Star published an exposé implicating Nassar in 2016. She then learned the result of the 2014 investigation and its conclusion that "[i]t was a legitimate medical procedure[.]"

But regardless of whether Dr. Simon was or was not told Nassar's name in 2014, or knew or did not know the details of Thomashow's allegations at that time, her 2018 answers to the investigators' questions did not fall within the ambit of MCL 750.479c(1)(b) for two legal reasons. First, even if she somehow misled the investigators—a fanciful proposition at best—her answers were literally true. A literally true answer cannot sustain a prosecution for making a false or misleading statement. Second, Dr. Simon's answers were incapable of influencing the decision-making process, and therefore were immaterial.

A. LITERALLY TRUE STATEMENTS CANNOT SUPPORT A CONVICTION

In *Bronston v United States*, 409 US 352, 352-353; 93 S Ct 595; 34 L Ed 2d 568 (1973), the United States Supreme Court addressed "whether a witness may be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication."[3] Samuel Bronston owned a company that sought bankruptcy protection and he testified at a creditors' hearing as follows:

Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

A. No, sir.

Q. Have you ever?

A. The company had an account there for about six months, in Zurich.

Q. Have you any nominees who have bank accounts in Swiss banks?

A. No, sir.

Q. Have you ever?

A. No, sir. [*Id*. at 354.]

[3] The federal perjury statute, 18 USC § 1621(1), provides that one who takes an oath and "willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true" commits perjury. Although textually different from MCL 750.479c(1)(b), both statutes require a false statement and an intent to mislead or deceive. *Bronston*'s reasoning and logic are equally applicable to a voluntary interview with police officers. Judge Alex Kozinski has observed that "due process calls for prudential limitations on the government's power to prosecute under" the perjury statute. *United States v Bonds*, 784 F3d 582, 585 (CA 9, 2015) (Kozinski, J., concurring). *Bronston* supplies one such limitation.

Bronston had, in fact, maintained a personal bank account in Switzerland but did not have the account at the time of inquiry. *Id*. The government contended that Bronston's answer to the second question, although literally true, "unresponsively addressed his answer to the company's assets and not to his own," "implying that he had no personal Swiss bank account." *Id*. at 355.

A unanimous Supreme Court acknowledged that Bronston's answer to the question posed to him was not responsive and could be interpreted as implying an untruth. The Court observed, however, that the perjury statute "does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true." *Id*. at 357-358. Moreover, the Court explained that "the drastic sanction of a perjury prosecution" could not have been intended "to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of petitioner's unresponsive answer." *Id*. at 358. In short, "[t]he burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id*. at 360. A questioner who suspects that a witness has answered unresponsively should "press another question or reframe his initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury." *Id*. at 362.[4]

Dr. Simon was asked how she became aware of the 2014 investigation; no evidence refutes her answer that she "was told by one of the staff members that there was a sports medicine . . . physician who was going through OIE." And Dr. Simon was never asked whether she knew the name of the "sports medicine doc," because it was obvious to everyone in the room that the name was Nassar. Like the witness in *Bronston*, Dr. Simon gave answers that were literally true.[5] While in *Bronston* the answer at issue was not completely responsive to the question and was arguably misleading, Dr. Simon's answers *were* responsive. And even if a witness deliberately sidesteps answering a question, the duty falls on the inquisitor to detect the evasion and "to flush out the whole truth with the tools of adversary examination." *Id*. at 358-359.

If Arndt and Cavanagh wanted to know whether Dr. Simon was aware in 2014 of Nassar's name or the details of the OIE investigation, it was their obligation to probe more deeply. This prosecution is a legally improper vehicle for remedying the investigators' poor technique.

[4] That the investigators failed to ask precise questions, failed to follow up Dr. Simon's answers, and failed to follow the script that they had been handed by attorneys in the Attorney General's office also substantiates that none of the information they neglected to obtain was material, discussed in more detail below. The information was immaterial to the investigation because the investigators *knew* what the answers to their questions would be, and therefore they had no reason to question Dr. Simon with more acuity.

[5] Arndt admitted during his preliminary examination testimony that Dr. Simon's answers were true.

B. THE ALLEGEDLY FALSE OR MISLEADING STATEMENTS WERE IMMATERIAL AS A MATTER OF LAW

In *United States v Gaudin*, 515 US 506, 509; 115 S Ct 2310; 132 L Ed 2d 444 (1995), a case involving an allegedly false statement made on federal loan documents, the United States Supreme Court offered a now widely accepted definition of materiality: "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." (Quotation marks and citation omitted, brackets in original.)[6] Ordinarily, materiality is a jury question. *Id*. at 522-523. In the context of this case, however, the question presented is whether the prosecution presented *any* evidence of materiality. To warrant a bind-over, "there must be evidence on each element of the crime charged or evidence from which those elements may be inferred." *People v Doss*, 406 Mich 90, 101; 276 NW2d 9 (1979) (quotation marks, citation, and emphasis omitted).

The prosecution did not establish that Dr. Simon's statements were material to its investigation of MSU. Dr. Simon's failure to name Nassar as the person "who was the subject of the 2014 MSU Title IX investigation into the Amanda Thomashow complaint" had not a shred of influence on any decision made in this case. Similarly, the prosecution brought forward no evidence that Dr. Simon's denial of her personal awareness "of the nature and substance of the 2014 MSU Title IX investigation into the Amanda Thomashow complaint against Larry Nassar" impacted the decisions under consideration by the investigators.

The prosecution witnesses never put forward a plausible explanation of why Dr. Simon's failure to say Nassar's name aloud instead of referring to him as "a sports medicine physician who was going through the OIE" influenced or affected their investigation into "aiders and abetters" or officials guilty of misconduct in office. Instead, when asked this question the investigators offered a word salad suggesting that if Dr. Simon had said Nassar's name, the investigators would have had to do less work—to find the nothing that they ultimately found, presumably. As Arndt testified:

> *Q*. If the defendant would have told you in 2018 that she knew about the investigation regarding Larry Nassar in 2014, would it have materially affected the investigation you were conducting in 2018?
>
> *A*. Yes.
>
> *Q*. How?
>
> *A*. We would have been able to pinpoint the timeline to one, for her interview, but for others; more specifically, pinpoint that time line and the search warrants that we did were broad, and there were - - I don't even know how many - - hundreds of thousands of documents we would have, we went through or the

[6] Here is another definition: "Material information is information that, if believed, would tend to influence or affect the issue under determination." *United States v Crousore*, 1 F3d 382, 385 (CA 6, 1993).

attorney general went through. We could have pinpointed time lines, agendas, calendars. That information would have been, would have been useful to us as investigators so we didn't have to go through hundreds of thousands of documents, we could have obtained a calendar appointment for a specific day or conducted a search warrant for a specific day or person regarding a specific time line.

This answer is difficult to parse. I assume that Arndt's version of a "material" misstatement or falsehood is anything that allegedly makes his job more difficult—resulting from his own failure to ask follow-up questions. Any extra work involved in "pinpoint[ing] time lines, agendas, calendars" or "narrowing the focus" of the investigation resulted directly from poor questioning. But that is not the only legal impediment to prosecution. That the detectives had to work harder (in hindsight) than they felt was necessary to construct "time lines" or to review documents does not transform even a blatantly false statement into a material one.

According to the prosecution, the material "facts" about which Simon misled the investigators were (1) her 2014 knowledge of Nassar's name, and (2) her 2014 knowledge of the substance of the OIE investigation. Let's assume that Dr. Simon knew both things and deliberately failed to share that knowledge with the investigators. No evidence supports that her silence regarding these two "facts" influenced or could have influenced the pertinent *decisions* made during the investigation—that no one had aided or abetted Nassar, and that Dr. Simon had not obstructed justice. Statements that waste an investigator's time or result in more investigation may be material if the wasted time or the extra effort distract an investigator from the true culprit, lead to the destruction of evidence, or trigger the arrest of an innocent person. None of those things happened here, nothing even close.

During the preliminary examination, counsel for Dr. Simon repeatedly returned to the subject of materiality, laboring to elicit testimony from Arndt and Cavanagh that would illuminate the prosecution's argument for this essential element of the charges. Each time, they hit the same roadblock: elusive answers asserting, in essence, that the investigators would have had less work to do had Dr. Simon volunteered more information.

Here is another example:

> *Q.* . . . But . . . here's my question, Detective Arndt. And this is really important cause it's an element of the offense and I wanna make sure everybody understands this.
>
> When you say that she impeded a criminal investigation into CSC first degree by virtue of the fact that she said, 'I was aware that in 2014 there was a sports medicine doc who was subject to a review', you knew that the sports medicine doc that she was referring to was Larry Nassar; correct?
>
> *A.* I assumed that's who she was discussing, yes.
>
> *Q.* So then explain to us . . . how that answer given by Dr. Simon that she was aware in 2014 that there was a sports medicine doc who was subject to a review, which you already said was a true statement, but nonetheless, explain to us how that statement impeded a criminal investigation into CSC first degree.

A. Again, I think it's one of those where she, based on the interview and the comments made, what a month later, we then come across documents that contradict what we felt that, believed that she knew. And it would have been easier for us, or it did impede our investigation going through hundreds of thousands of documents produced by Michigan State. It would have been easier for us to, one, question Dr. Simon, Paulette Russell . . . and those other people about specific dates, times, even so far as search warrants to narrow the time line down.

Q. I don't understand at all. Are you suggesting to us, Detective Arndt, that if Lou-Anna Simon had said, 'Oh, and by the way, I knew that the sports medicine doctor's name was Larry Nassar', you wouldn't have reviewed all of those documents that you subpoenaed from Michigan State?

A. I think we would have been able to better focus the investigation to certain days, documents, calendar appointments, those types of things.

* * *

Q. And regardless of what Dr. Simon said or didn't say in her interview, you or somebody that was part of this team would have reviewed the documents produced by Michigan State in response to your subpoena; correct?

A. Eventually, yes.

Evidently, Arndt and the prosecution are unaware of the legal definition of materiality. As described above, a false statement is material when it has a natural tendency to influence, or is capable of influencing, the decision of a decision-making body. Decisions about when to issue a subpoena or which subpoenas to issue are simply not material in a legal sense. Arndt's belief that he had to work harder (to find no evidence of any actual crime) says nothing about whether Dr. Simon's answers influenced or were capable of influencing the relevant decision: whom to charge with a crime, and what to charge.

This Court has explained that "a willful, knowing omission of pertinent information about a crime may lead the police down a fruitless path, permit the destruction of evidence while the police look in another direction, enable the escape of the actual culprit, or precipitate the arrest of an innocent person." *People v Williams*, 318 Mich App 232, 240; 899 NW2d 53 (2016). In those examples, misleading statements prevented the police from solving a crime, and qualified as material because they deprived the decision makers of the information necessary to make an accurate and informed charging decision. Here, there is no crime, no evidence of aiding and abetting, and no evidence of misconduct in office on the part of Dr. Simon. Her statements had no bearing on the decision not to charge anyone with aiding and abetting, or (other than Strampel who had already been charged) with misconduct in office.

The prosecution's concept of materiality would fling open the door to prosecuting every trivial misstatement (or trivial falsehood) offered during a police interrogation that in an officer's subjective calculation, caused extra work—even those that had no impact on any decision-making. According to the prosecution's reasoning, despite that a witness deceives no one and her statement bears no importance whatsoever to the ultimate outcome of the investigation, she may be

prosecuted if an investigator feels aggrieved. Such a rule counsels strongly against voluntary cooperation. And surely the materiality requirement incorporated within MCL 750.479c(1)(b) requires proof of something more than an investigator's opinion that he had to work harder to find no evidence of a crime.

United States v Fiala, 929 F2d 285, 289 (CA 7, 1991), involving a challenge to a federal sentencing enhancement for impeding or obstructing justice, is somewhat analogous and makes the same point. Under Note 3(g) to the federal sentencing guidelines commentary, a sentence enhancement was deemed appropriate "if a defendant made a 'materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation.' " *Id*. at 290. Fiala was stopped by the police and asked if he had anything illegal in the car. He responded that he did not. *Id*. at 289. The police decided to search the car anyway, and called for a K–9 unit. It took 1 ½ hours for the unit to arrive. *Id*. at 286. The dog alerted to the possible presence of drugs and the police found two large bags of marijuana and two handguns in the car. *Id*. at 286-287. The prosecution sought enhancement based on Fiala's denial that he had drugs in the car, arguing that the statement impeded the investigation. The United States Court of Appeals for the Seventh Circuit held that "Fiala's statement clearly does not meet the standards of Note 3(g): his denial of guilt was neither material nor could it possibly be said to have significantly obstructed the troopers' investigation." *Id*. at 290. In other words, the extra time and effort expended by the officers to find the contraband did not transform a denial of guilt into a materially false statement.

III. WHY ARE WE HERE?

From its inception, the investigation culminating in the charges against Dr. Simon was a hunt for someone at MSU on whom the Attorney General could pin blame for Nassar's crimes. In an opening statement at the preliminary examination, the assistant attorney general handling this case repeatedly betrayed the true object of this prosecution. "Great institutions like great people have to do more than just look good," he declared, "they have to be good." Later he expounded, "our theory of the case is that from 2011 through 2014, under the defendant's control, . . . Michigan State University had a culture of protect the brand. From 2005 to 2018, as president, her mission was for MSU to look good." "The truth," he continued, was that "MSU had an extremely poor record in handling sexual misconduct and sexual assault, and that's been well established."

Throughout the preliminary examination, the assistant attorney general accused Dr. Simon of having lied to "the media," "the victims," "Congress," and countless others. Vilifying Dr. Simon was the centerpiece of the assistant attorney general's strategy to achieve a bind-over, and he succeeded in the district court. What got lost, however, was that this is a *criminal* prosecution, not a civil lawsuit. Dr. Simon's negligence, if any, and her efforts to shield MSU from blame, if any, are not crimes.

Justice Jackson taught us that when a prosecutor "picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies." Jackson, p 19. Foreshadowing this case, Jackson explained, "It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group[.]" *Id*. The danger of abuse is greatest when the times "cry for the scalps of individuals or groups" because those in

power dislike their views. *Id*. While Justice Jackson was specifically referencing those targeted for political reasons, the point resonates here, as well.

There can be no doubt but that MSU and many others betrayed Nassar's victims and caused incalculable harm. MSU and other institutions failed to do their jobs and failed to protect vulnerable young women from a vicious predator. The question facing this Court is whether Dr. Lou-Anna Simon should bear *criminal* responsibility for this tragedy. The answer, directly and unevasively stated, is no.

/s/ Elizabeth L. Gleicher

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LOU-ANNA K. SIMON,

Defendant-Appellee.

FOR PUBLICATION
December 21, 2021

No. 354013
Eaton Circuit Court
LC No. 19-020329-FH

Before: STEPHENS, P.J., and BORRELLO and GLEICHER, JJ.

STEPHENS, P.J. (*concurring*).

I concur with the majority opinion. I additionally agree with the concurring judge that Dr. Simon's alleged falsehoods were not material under MCL 750.479c(1)(b).

/s/ Cynthia Diane Stephens