STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KATHIE ANN KLAGES,

Defendant-Appellant.

FOR PUBLICATION
December 21, 2021

No. 354487
Ingham Circuit Court
LC No. 18-000825-FH

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

BORRELLO, J. (*dissenting*).

I respectfully dissent from the majority's erroneous conclusion that the evidence submitted at trial was insufficient to support defendant's convictions. The error, I believe, lies in the majority's assertion there was no evidence that defendant's "false statement regarding the 1997 conversations was material to the criminal investigation conducted in 2018." In reaching this conclusion, the majority infers that a false statement is only material if it actually impacted the prosecution's charging decision. I do not believe the language of MCL 750.479c requires such a precise level of specificity given its focus on prohibiting false and misleading statements during the *investigative* stage. "The plain language of the statute conveys the Legislature's intent to hold fully responsible for accuracy and candor those who provide information to peace officers in the course of a criminal investigation." *People v Williams*, 318 Mich App 232, 241; 899 NW2d 53 (2016).

I also disagree with the majority's insinuation that this investigation could not have truly been a *criminal* investigation merely because it also involved allegations of institutional failures within Michigan State University. Because I believe there was constitutionally sufficient evidence to support the jury's verdict convicting defendant in this case, I dissent.

I. BACKGROUND

This case stems from allegations that defendant was told in 1997 about sexually assaultive acts committed by Larry Nassar and lied to law enforcement during a 2018 interview by denying that she had received such information.

Defendant began coaching gymnastics at MSU in 1990. She had previously been a "club coach," and coached at Great Lakes Gymnastics from 1985 to 1990. During that time while she was coaching at Great Lakes Gymnastics, defendant met Nassar. Defendant and Nassar initially had a professional relationship that developed into a friendship. Defendant did not see Nassar "outside of the gymnastics world," but she had considered him a very good friend, professionally.

Spartan Youth Gymnastics used MSU facilities and began operating in approximately 1992 or 1993. Defendant and Rick Atkinson, who was the MSU men's gymnastics coach at the time, started Spartan Youth Gymnastics to help raise funds for the MSU programs. Defendant's involvement with the Spartan Youth Gymnastics program ended in approximately 2000.

Both Boyce and RF provided detailed testimony about their 1997 conversation with defendant, during which they disclosed Nassar's abuse to defendant.

Boyce testified that in 1997, she told defendant about what Nassar was doing to her. The conversation took place in defendant's office at Jenison Field House. Boyce told defendant that Nassar "was sticking his fingers inside of me, and it felt like he was fingering me." Defendant told Boyce that she had known Nassar for years and " '[t]here's no way that he would do anything inappropriate.' " According to Boyce, defendant then had different gymnasts from the Spartan Youth program enter the room one, two, or three at a time, and defendant asked them if Nassar was doing anything inappropriate or that felt uncomfortable. Boyce did not remember the details of how defendant called them in, or how many people came and went. Boyce felt mortified and embarrassed that others were being brought into a private conversation she was having with defendant. When defendant brought in other gymnasts who said that they did not feel uncomfortable with Nassar, Boyce felt like "a liar," "dirty," "destroyed," and like defendant "thought [she] was making it up."

Boyce told defendant that Nassar was doing the same types of things to RF too.[1] Defendant called RF into the room, and RF verified that it was happening to her. Boyce testified that defendant did not believe them or did not want to believe them. Boyce further testified that defendant "called in a couple of the college age gymnasts that happened to still be there." Boyce stated:

> Well, I always looked up to them, so when they came in I—I felt a little intimidated. But I also knew the truth of what I was saying. So I remember us sitting on the floor on the green carpet in [defendant's] office and I remember them saying, "You know, his hands will get close to certain areas, but he's never inappropriate." And I said, "Well, that's not what's happening to me. His fingers are going inside of me and it feels like he's fingering me."

[1] Both Boyce and RF had different last names at the time. Their current last names are their respective married names.

Boyce testified that RF responded by indicating that maybe she had misunderstood, after which RF left the room. According to Boyce, defendant spoke to the college gymnasts in the hallway and then returned to the office and asked Boyce what was happening. Boyce testified:

> And I said "It feels like he's fingering me." And she said she would—she raised a piece of paper and said, "I can file this, but there's going to be very serious consequences for you and Larry Nassar."
>
> *Q.* How'd that make you feel?
>
> *A.* I mean, I was 16. I didn't want to cause problems. I wasn't trying to get anybody in trouble, so I just felt defeated. I felt like I was trying to do the right thing, but then I also felt like I must have a dirty mind. I must be thinking of this wrong. What's wrong with me? And, as a 16 year old you don't want to feel that way. And I wanted to impress [defendant] because I wanted to be on her team.

Boyce testified that she replied that it was all a " 'big misunderstanding' " and left the room. Boyce did not discuss the matter with her parents because she "did not want to talk about it ever again." Boyce continued to see Nassar, who brought up Boyce's conversation with defendant at Boyce's next meeting with Nassar. Boyce testified:

> So I sat in [Nassar's] office and he came in and said, "So, I talked to [defendant]. She told me you had concerns." And I remember sitting there feeling mortified. And I remember raising my hands up and saying, "I'm so sorry. It's all my fault. It's a big misunderstanding." And so I hopped back up on his table and continued to be abused by him because I wanted to prove that I was not dirty. That I didn't have—I wasn't thinking of it wrong. That I didn't have a dirty mind.

Boyce stopped participating in Spartan Youth Gymnastics in 1998 because she "ended up hating gymnastics after that point" and felt as if others looked at her like she was a troublemaker.

RF also testified about the 1997 conversation in defendant's office. She stated that a girl from another team came up to RF during practice and told her to go to defendant's office for a meeting. Defendant and Boyce were in the office, and RF sat down. Other girls from the Spartan Youth Gymnastics program and the college team, as well as coaches, were going in and out of the office.[2]

According to RF, she sat on the floor in defendant's office and defendant said that Boyce told her that Nassar had touched her under her shirt and shorts. Defendant also said that Boyce told her that she did not like what Nassar had done. RF testified that defendant asked her if the same thing was happening to her when she saw Nassar for treatments, and RF indicated that it was. Defendant then said that "he's a really good doctor" and that "we're not going to talk about this anymore." Defendant further indicated that the girls were "really lucky" to see Nassar and that Nassar had just come back from the Olympics. According to RF, defendant had "some piece of

[2] RF later testified that the other people were from the Spartan Youth Gymnastics team.

paper" and was indicating that "a lot could go wrong if we continue to talk about—it and there would be problems for everybody involved." RF testified, "that made me feel like the—all the treatment that Dr. Nassar was doing was actual treatment, even though I was trying to say that I didn't like the treatment." RF "felt like [she] was in trouble and everything stopped," and she was told to go back to practice.

RF did not talk to anybody else about what Nassar was doing to her, but she continued to see Nassar until approximately 2012. Nassar continued to touch RF "[u]nder [her] shirt, underneath [her] shorts, anywhere he wanted to that he said it was okay for him to do." However, RF stopped participating in the Spartan Youth Gymnastics Program shortly after the 1997 meeting with defendant because Nassar said that RF's back was too injured for her to compete anymore.

In 2016, RF read the IndyStar article about Nassar and she thought, "I could have written it myself." She eventually spoke to law enforcement about what happened with Nassar and defendant. Boyce also saw the IndyStar article in 2016. She testified as follows about her reaction:

> I thought oh my gosh, this absolutely happened to me. Oh my gosh, this really was sexual assault. This—how is this happening? I was right. I was right all those years ago. But I didn't—I also wasn't sure what to do with it because I had come forward before and I was told that I was wrong. So I was afraid at first to come forward.

Boyce also eventually came forward and spoke with law enforcement about the matter, including what had happened with defendant.

As noted by the majority, David Dwyre testified that one goal of the Attorney General's investigation into MSU was to find out "who knew about Larry Nassar, when did you know it, and what was done about it, essentially." Dwyre provided further explanation of this goal of the investigation:

> *Q.* That being individuals from Michigan State University included in that group?
>
> *A.* Yes.
>
> *Q.* Okay. And the sexual assaults of Ms. Boyce and [RF], were they another facet of your investigation?
>
> *A.* Not as it pertained to criminal prosecution of Larry Nassar, because he had already been prosecuted by that point. *But was anyone else in—did anyone else know about it and did they do anything to notify—notify Michigan State University, because it was important. That was, kind of, like one of the main reasons of the investigation*. [Emphasis added.]

Dwyre testified that during the course of this investigation, he sought to interview defendant because he had "information that two student athletes had disclosed being sexually abused by Larry Nassar to her," and "it was important to interview her to see what she was going

to say about that." Dwyre was also concerned that defendant may have lied during a previous statement she made about the matter. He explained:

> I wanted to know what was told to her, and then what did she do with that information. Who did she tell that the victims had sexually—had disclosed sexual assault, what did you tell them, when did you tell them, did you—because that was going to change, really, the course of—it potentially could change the course of my direction of my investigation.

Dwyre and Mary Sclabassi, another special agent with the Department of Attorney General, interviewed defendant, whose counsel was present, on June 21, 2018. The interview was recorded and transcribed. The audio recording and transcript were admitted as exhibits at trial. The audio recording was played for the jury, and the jurors received copies of the transcript.

At the beginning of defendant's interview, Dwyer told defendant that he was conducting a criminal investigation of MSU to determine whether any other individuals had committed criminal misconduct related to Nassar's criminal activity. During the interview, defendant was asked if Larissa Boyce made a complaint to her about Nassar in 1997 and defendant stated, "I don't recall Larissa Boyce." Defendant was subsequently asked regarding that subject, "You know what we're talking about, right?" Defendant responded, "Because of the media, yes." Defendant agreed that if one of her gymnasts claimed to have been touched in a sexual way, she would not be able to forget it. However, defendant stated that Boyce "was not a gymnast of mine" and that "I never coached her." The following exchange took place:

> MR. DWYRE: You never coached her.
>
> MS. KLAGES: She keeps saying that I was her coach. I was the administrator of Spartan Youth Gymnastics. I did not coach out on the competition floor.
>
> MR. DWYRE: Perfect. If a student athlete came to you and said they were sexually assaulted by a—would you—
>
> MS. KLAGES: Absolutely.
>
> MR. DWYRE: You couldn't forget that, would you agree?
>
> MS. KLAGES: Right.
>
> MR. DWYRE: I just want to lock that down, okay, perfect.
>
> MS. KLAGES: Yes.
>
> MR. DWYRE: And you're saying that you don't recall—do you even recall who she is?
>
> MS. KLAGES: No, I do not.

MR. DWYRE: Okay. You have no i- -- not until this all blew up did you even know who she was?

MS. KLAGES: Correct. And when she first came out as a Jane Doe and I had heard her (inaudible) I had no idea, and then when she came out with her name I still had no idea.

Defendant also indicated that she did not remember ever telling Boyce that if Boyce filed a complaint about Nassar that there would be serious consequences for Boyce and Nassar.

In response to being asked if RF told defendant in 1997 that Nassar "penetrated her vaginally and anally," defendant stated, "I don't remember that either." Defendant explained that RF was not one of defendant's gymnasts, but she was a Spartan Youth athlete. Defendant also affirmatively indicated that she remembered RF because RF was on the team with defendant's daughter. The following exchange took then place:

MR. DWYRE: So you wouldn't have forgotten if she would have came to you about Larry Nassar and said somebody stuck his fingers inside of her, you wouldn't have forgotten that, correct?

MS. KLAGES: I do not believe I would have ever forgot that.

However, when asked if RF told her about a sexual assault, defendant stated, "No, that I recall." She repeated that she did not recall RF ever discussing her treatment by Nassar with defendant. When asked if she would remember if RF had said something about "this is funny" or "this doesn't look right," defendant responded, "I would think I would remember that." Defendant stated that she did not recall any conversations with Boyce or RF.

Dwyre was asked at defendant's trial what he would have done differently if defendant had corroborated Boyce's and RF's accounts when he interviewed defendant. Dwyre testified:

Had she corroborated, had Kathie Klages corroborated what Larissa Boyce and [RF] had said previously to investigators, it would have changed the direction of my questioning. I would have immediately began questioning who did you tell. Recognizing that Ms. Klages potentially could become a Defendant. She had a duty to report. So I would have wanted to know who she reported this information to, and it would have changed that type of direction of my questioning. Had she told me that she told other people, I would have wanted to know more about that. I would have questioned her more vigorously about that because I would have tried to obtain, if possible, search warrants about their two conversations, if they would have been in text or any type of social media or anything like that. I also would have—had she not—had she told me I never—I was given this information, but I never told anyone, I would have then changed again my direction of questioning and I would have asked her why didn't you, and did—and knowing this, why did you continue to send athletes to Dr. Nassar?

Defendant was charged with one count of lying to a peace officer on the basis that "she lied when she denied that she was told by witnesses that they were assaulted by Larry Nassar"

when Agent Dwyre was investigating first-degree criminal sexual conduct (CSC-I), and one count of lying to a peace officer on the basis that "she lied when she denied that she was told by witnesses that they were sexually assaulted by Larry Nassar" related to the officers' criminal investigation for misconduct in office.

At trial, defendant testified in her own defense and maintained that she did not remember any comments made to her in 1997 by Boyce or RF. Defendant testified that when she first learned of Boyce's claim about disclosing the abuse to defendant in 1997 and learned of Boyce's identity, defendant did not remember Boyce by either her former or current last name. Further, defendant testified that even after having observed Boyce at trial, "I don't remember her nor her like gymnastics like some athletes you might be, ah, she was working on a back handspring on beam, I don't remember any of that with her." Defendant testified that she remembered RF, however, because RF was on a Spartan Youth team with defendant's daughter. When she was asked if she remembered any conversation in 1997 with RF, defendant testified:

> Not casual hello, type of things, but, no, I mean if I happened to see somebody I would speak as I was sitting on the table, young ladies were walking in I would say hello, I wasn't rude or nasty but I just, I don't recall any conversation.

Defendant indicated during her trial testimony that she answered the questions during her interview with Dwyre and Sclabassi to the best of her ability. Defendant also testified that Nassar had treated defendant's children and granddaughter for various injuries after 1997. Defendant had personally referred her children and granddaughter to Nassar for those treatments. Defendant also testified that there was no form to fill out if an athlete reported a sexual assault.

On cross-examination, defendant testified as follows:

> *Q.* Let's talk a little bit about, ah, I mean, you're, you're essentially what you're telling the jury is you don't remember, correct?
>
> *A.* Correct.
>
> *Q.* Okay. The, ah, I mean would you agree with me that something like, ah, Larissa Boyce telling you about, um, what Nassar is doing to me, it feels like he's fingering me, is that something you'd be likely to forget?
>
> *A.* I don't know that the conversation occurred as she recalls if a conversation even did occur, but I would think that I wouldn't (sic) remember something like that. I would think I would.

Apparently, the jury did not believe defendant's testimony as they convicted her of both counts of lying to a peace officer.

II. ANALYSIS

The majority vacates defendant's convictions based on defendant's argument that there was insufficient evidence that defendant's denial of having taken part in a 1997 conversation about Nassar constituted a material fact under MCL 750.479c(1)(b). Defendant argued that there was

no evidence that her statements involved facts material to the investigation because Agent Dwyre's testimony that he would have acted differently was speculative and his search-warrant testimony was specious.

"This Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction." *People v Miller*, 326 Mich App 719, 735; 929 NW2d 821 (2019). This Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the crime's elements proven beyond a reasonable doubt. *Id*. "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). "Conflicting evidence and disputed facts are to be resolved by the trier of fact." *Miller*, 326 Mich App at 735. Issues of statutory interpretation are reviewed de novo as a matter of law. *People v Van Tubbergen*, 249 Mich App 354, 360; 642 NW2d 368 (2002).

MCL 750.479c(1)(b) provides that "a person who is informed by a peace officer that he or she is conducting a criminal investigation shall not . . . [k]nowingly 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*." (Emphasis added.)[3] In general, a " 'material fact' " is one that is " 'significant or essential to the issue or matter at hand.' " *McCormick v Carrier*, 487 Mich 180, 194; 795 NW2d 517 (2010), quoting *Black's Law Dictionary* (8th ed); see also *People v Katt*, 468 Mich 272, 292; 662 NW2d 12 (2003) ("A material fact is '[a] fact that is significant or essential to the issue or matter at hand.' ") (quoting *Black's Law Dictionary* (7th ed); alteration in original).

Consistent with the general rule, the Model Criminal Jury Instructions for misleading the police provide:

> A material fact is information that a reasonable person would use to decide whether to do or not do something. A fact is material if it has the capacity or natural tendency to influence an officer's decision how to proceed with an investigation. [M Crim JI 13.20(7).]

The Model Criminal Jury Instructions further provide regarding this specific crime:

> (8) You may consider whether the officer relied on the information in deciding whether it was a material fact. However, it is not a defense to the charge that the officer did not rely on the information if you determine beyond a reasonable doubt that the defendant intended to [conceal the information from the officer by trick, scheme, or device / provide false information].
>
> (9) It is not a defense to the charge that the officer was able to obtain the information from another source or by different means if you determine beyond a

[3] An investigator for the Department of the Attorney General is a peace officer. MCL 750.479c(5)(b)(*xii*).

> reasonable doubt that the defendant intended to [conceal the information from the officer by trick, scheme, or device / provide false information]. [M Crim JI 13.20(8) and (9).][4]

Accordingly, the question becomes whether defendant's false statement involved a fact that was significant or essential to the criminal investigation Dwyre was conducting, which is determined by considering whether the false statement related to a fact that had the capacity or natural tendency to influence the officer's decisions about how to proceed with the investigation. In this case, Dwyre informed defendant at the outset of defendant's interview that Dwyre was conducting a criminal investigation to determine whether any other individuals at MSU had committed criminal misconduct related to Nassar's criminal activity.[5] At trial, Dwyre explained that the investigation was intended to identify any new Nassar victims and to find out "who knew about Larry Nassar, when did you know it, and what was done about it, essentially." Dwyre also testified at trial that in interviewing defendant, he "wanted to know what was told to her, and then what did she do with that information," as well as "[w]ho did she tell that the victims had sexually—had disclosed sexual assault, what did you tell them, when did you tell them."

Dwyre testified that if defendant had corroborated what Boyce and RF said, it would have "changed the direction of [his] questioning." He would have wanted to know whom defendant told, because she had a duty to report the allegations.[6] He "would have questioned her more

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[4] The jury in this case was instructed consistently with the above quoted provisions of M Crim JI 13.20.

[5] At the beginning of defendant's interview, Dwyer stated in relevant part as follows:

> MR. DWYRE: All right wonderful. We are police detectives so this is a criminal investigation, so it's maybe just a little bit different in what—because you probably would have talked to a handful of investigators by now, right, you probably have given your story a zillion times?
>
> MS. KLAGES: Two, not too many, though, I'm kind of surprised.
>
> MR. DWYRE: Okay. We got asked by MSU to conduct an investigation, independent investigation. And so it's a criminal investigation in that in the event that we found criminal misconduct by anyone involving the MSU allegations as—because we were tasked with investigating MSU as it pertains to Larry Nassar. But there's branches that go off, so we had a branch of Dean Strampel, you probably followed that a little bit in the media, so he got charged. So there is a—we don't know but if we find—if there's something that is criminal we will pursue it.

[6] Even assuming that defendant was not a mandatory reporter, that does not mean that she was absolved of all responsibility to take steps to protect the gymnasts in her program from sexual abuse if such allegations were brought to her attention. To this point: Had defendant properly reported the victim's assertions, it is possible that countless young women would have been spared

vigorously about that because I would have tried to obtain, if possible, search warrants . . . ." He agreed that defendant had already given over her phone and computers to MSU during the investigation, but he testified that he did not believe that he had probable cause at the time of defendant's interview to obtain search warrants for those devices or defendant's "communications" because he did not have any evidence of whom she may have communicated with about Nassar. Dwyre also would have asked defendant why she continued to send athletes to Nassar after the disclosures by Boyce and RF. However, Dwyre testified that when defendant denied having been told about Nassar's misconduct, there was "nothing I could do at that point."

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that defendant's statements that she did not remember the disclosures made by Boyce and RF were false with respect to facts that were "material" because they were significant or essential to the criminal investigation Dwyre was conducting and influenced his decisions about how to proceed with the *investigation*. MCL 750.479c(1)(b); *Miller*, 326 Mich App at 735; *Katt*, 468 Mich at 292; M Crim JI 13.20(7).

Contrary to the holding by the majority, the statutory language does not require the prosecution to prove that the false statement prevented a specific criminal charge from being filed. The statutory language also does not require that the criminal investigation at issue pertain to criminal activity by the person alleged to have made the false or misleading statement, nor does the statutory language require that the false or misleading statement be material to that person's own potential criminal liability. There is no requirement in the statute that the peace officer must be investigating a crime of which the person alleged to have provided the false or misleading statement could potentially be charged. MCL 750.479c(1)(b) criminalizes "[k]nowingly and willfully mak[ing] any statement to the peace officer that the person knows is false or misleading regarding a material fact" in the criminal investigation that the peace officer is conducting if that person was "informed by a peace officer that he or she is conducting a criminal investigation." As previously stated, "[t]he plain language of the statute conveys the Legislature's intent to hold fully responsible for accuracy and candor those who provide information to peace officers in the course of a criminal investigation." *Williams*, 318 Mich App at 241.

Viewing the evidence in a light most favorable to the prosecution, the jury could have found the testimony of Boyce and RF credible with respect to whether the conversation occurred and what transpired during the conversation, and the jury could also have found defendant's claim that she did not remember the conversation not to be credible. It would also have been reasonable for the jury to believe, as defendant testified, that defendant would have remembered such disclosures as those Boyce and RF testified they made to defendant. The evidence, viewed in a light most favorable to the prosecution, permits a rational inference that defendant falsely claimed not to remember the conversation in response to the allegations that she had been told about Nassar's sexual misconduct long before Nassar was finally held criminally responsible. Viewing the evidence in this light also permits the rational inference that the false statement was material

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the catastrophes of torture, rape and criminal sexual assault to which they were subjected to by Nassar. There were, as the victim's asserted, adults at MSU who could have stopped Nassar. Clearly, the jury viewed defendant was one of those adults.

for purposes of this statute. The resolution of conflicting evidence and disputed facts is a task not for this Court, but for the jury. *Miller*, 326 Mich App at 735.

It is also left to the jury in a prosecution under MCL 750.479c to determine whether a person's claim that he or she did not remember a fact is a falsehood or an innocent statement. See *Williams*, 318 Mich App at 241 ("At trial, [the defendant's] claim that he simply forgot about the [facts omitted in his statement to police] due to physical and emotional exhaustion may prevail."). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Kanaan*, 278 Mich App at 619. Here, the evidence was sufficient to establish defendant's knowledge and intent. A defendant's state of mind on issues such as knowledge and intent can be difficult to prove and, consequently, "minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *Id*. at 622.

Because I find no error in this case, I dissent. I would affirm defendant's convictions.

/s/ Stephen L. Borrello