STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION December 21, 2021 9:05 a.m.
v	No. 354487 Ingham Circuit Court
KATHIE ANN KLAGES, Defendant-Appellant.	LC No. 18-000825-FH

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

GLEICHER, J.

The Michigan Attorney General charged Kathie Ann Klages with making a false statement to a peace officer investigating Michigan State University's knowledge of the sexual abuse perpetrated by Dr. Larry Nassar. Klages made the allegedly false statement in 2018, after Nassar had been convicted, sentenced, and imprisoned. The statement concerned Klages's memory of conversations with two gymnasts that had taken place 21 years earlier, in 1997. Klages denied any recollection of having been told by the gymnasts that Nassar's "treatment" had included digital-genital penetration. A jury disbelieved this testimony and convicted her of two counts of lying to a peace officer, MCL 750.479c.

Klages raises several challenges to her convictions. We find one dispositive. No evidence supported that Klages's false statement regarding the 1997 conversations was material to the criminal investigation conducted in 2018. We vacate her convictions and remand for dismissal of the charges.

I. BACKGROUND

Dr. Larry Nassar was employed by MSU from 1996 through 2016. He was fired after an article published in the Indianapolis Star revealed that he had sexually abused two Olympic gymnasts. Within weeks of the article's publication, hundreds of other gymnasts reported that Nassar had sexually abused them, too. Overwhelming evidence rapidly emerged that as an MSU physician and a consultant for USA Gymnastics, Nassar had brazenly preyed on young women by penetrating their genitals with an ungloved hand in the guise of treatment.

Kathy Klages began coaching gymnastics at MSU in 1990. Like everyone else in the gymnastics world at that time, Klages thought Nassar was an exceptionally skilled and caring physician. Indeed, Nassar had gained celebrity status as the physician who attended the most gifted gymnasts in the world. Klages and other coaches regularly referred young athletes to him for treatment. Klages sent her daughter, granddaughter, and son to Nasser for medical care and considered Nassar a friend, even after two young gymnasts allegedly informed her that he had sexually abused them.

In addition to coaching gymnastics at MSU, Klages worked as the administrator of Spartan Youth Gymnastics. Larissa Boyce, age 39 at the time of trial, participated in the Spartan Youth Gymnastics program as a teenager in the 1990s.[1] On Klages's recommendation, Boyce began seeing Nassar when she was 16 years old. Initially Boyce's parents accompanied her. Boyce explained that Nassar "was great," "very charismatic," and "we really loved him honestly." Nassar "was the Olympic doctor for . . . the gymnasts," Boyce continued, and "[w]e respected him." Nassar began sexually abusing Boyce after her parents stopped going into the exam room with her.

RF, age 37 at the time of trial, also participated in Spartan Youth Gymnastics. Klages's daughter was on RF's team, and Klages (as well as other coaches) referred RF to Nassar for treatment of a back injury. Nassar initially treated RF for three years, from 1994 through 1997.

In 1997, Boyce had a conversation with RF about her discomfort with Nassar's "treatments." RF confirmed that Nassar was touching her under her shirt and penetrating her, too. Boyce told RF that she was going to reveal this information to Klages, and asked RF to accompany her. RF resisted; she wanted to continue to see Nassar to get clearance to compete despite her back pain.

A few weeks or months later—Boyce could not recall which—she told Klages that Nassar "was sticking his fingers inside of me and it felt like he was fingering me." According to Boyce, Klages responded that she had known Nassar for years and " '[t]here's no way that he would do anything inappropriate.' " Boyce described that Klages then asked different gymnasts from the Spartan Youth program to enter the room and inquired of them whether Nassar had done anything that made them feel uncomfortable. Boyce recalled feeling mortified and embarrassed, like "a liar," "dirty," "destroyed," and as though Klages "thought [she] was making it up."

At Boyce's request, RF verified to Klages that Nassar had "fingered" her, too. Boyce testified that Klages did not believe them. According to Boyce, Klages

> 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?

[1] We use some of the complainants' names in this opinion because they have on several occasions publicly—and courageously—described their encounters with Nassar.

> *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 [Klages] because I wanted to be on her team.

Boyce testified that she then said that it was all a " 'big misunderstanding' " and left the room. She did not tell her parents because she "did not want to talk about it ever again." Boyce continued to see Nassar, and Nassar brought up Boyce's conversation with Klages when Boyce next saw him. Boyce testified:

> So I sat in [Nassar's] office and he came in and said, "So, I talked to [Klages]. 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. She estimated that she was about 20 years old the last time Nassar treated her.

RF provided similar testimony. She recollected that Klages had expressed that "he's a really good doctor," "we're not going to talk about this anymore," and that the girls "were really lucky to see" Nassar, who had just returned from the Olympics. According to RF, Klages had "some sort of 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.

After that meeting, RF made no further revelations about Nassar. She continued to see Nassar a "couple times a week," and Nassar continued to touch RF "[u]nderneath [her] shirt, underneath [her] shorts, anywhere he wanted to that he said it was okay for him to do." RF ultimately stopped seeing Nassar in 2012 when she was about 30 years old, and worked for Spartan Youth Gymnastics from 1998 to 2000.

As is now public knowledge, Boyce and RF were not the first nor the last young women to report Nassar's sexual abuse to people in authority. As discussed in detail in this Court's opinion in *People v Simon*, __ Mich App __; ___ NW2d ___ (202_), Amanda Thomashow reported Nassar's abuse to an MSU physician in 2014, and MSU immediately launched an investigation through its Office for Institutional Equity (OIE). As part of that investigation, three MSU physicians advised the OIE that Nassar's "treatment" was medically appropriate.[2] The OIE report

[2] Likely none of the physicians knew that Nassar's "treatment" involved digital-vaginal penetration with an ungloved hand, far exceeding that which they recognized as legitimate manipulation of the "sacrotuberous ligament."

concluded that Nassar's conduct was a recognized medical therapy and not sexual in nature. MSU's general counsel approved the report. Nevertheless, the MSU police department referred Nassar to the Ingham County prosecutor. The prosecutor declined to bring any charges. And during Klages' trial, the Attorney General's lead investigator revealed that two other reports of Nassar's sexual misconduct had been made "to Meridian Township" in 2004 and 2014. These complaints did not lead to Nassar's arrest because the police "dropped the ball," the investigator opined, by deeming Nassar's conduct a "medical procedure[]."

MSU, the Ingham County prosecutor, and the Meridian Township police department were not the only official entities duped by Nassar. A year before Thomashow's report, the Federal Bureau of Investigation received detailed and highly specific allegations of sexual assault involving Nassar yet failed to open a formal investigation and did not notify state or local authorities about the allegations. See 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). USA Gymnastics, too, has admitted to its substantial role in allowing Nassar to prey on young athletes. 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).

The tide finally turned in 2016, when Rachael Denhollander revealed the abuse she had suffered to reporters at the Indianapolis Star. After the IndyStar article appeared, Andrea Munford, a lieutenant with the MSU Police Department, began investigating sexual assault reports against Larry Nassar. Munford's investigation led to Nassar's prosecution. Munford's team conducted approximately 1,000 witness interviews, spoke to Boyce and RF in 2017, and questioned Klages four times that year.

By mid-January 2018, Nassar had been convicted of multiple crimes and sentenced to the equivalent of life in prison. That same month, Michigan Attorney General Bill Schuette launched a separate criminal investigation of MSU that led to this prosecution of Klages and to the prosecution of Dr. Lou-Anna K. Simon, MSU's former President. Both women were charged with lying to the investigating officers. One other MSU official was charged and convicted of crimes involving Nassar. Dr. William Strampel, the Dean of MSU's College of Osteopathic Medicine, was convicted of two counts of willful neglect of duty by a public officer, MCL 750.478, a misdemeanor, "for failing to properly oversee doctor Larry 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.

David Dwyre, the chief of investigations for the Michigan Department of Attorney General, testified that the goal of the Attorney General's 2018 investigation was 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 provided this further explanation:

> *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 . . . did anyone else know about it and did they do anything to . . . notify Michigan State University, because it was important. That was, kind of, like one of the main reasons of the investigation.

Criminal investigations, however, are intended to investigate crimes, not to punish or expose poor institutional decision-making. See ABA Standards for Criminal Justice: Prosecution Function (4th ed), Standard 1.2(c):

> The purposes of a criminal investigation are to:
>
> (i) develop sufficient factual information to enable the prosecutor to make a fair and objective determination of whether and what charges should be brought and to guard against prosecution of the innocent, and
>
> (ii) develop legally admissible evidence sufficient to obtain and sustain a conviction of those who are guilty and warrant prosecution.

The prosecution asserts that Dwyre was investigating "criminal sexual conduct in the first degree and misconduct in office" involving "public officers" at MSU. Dwyre admitted at Klages's preliminary examination that Klages was not the target of an active criminal sexual conduct or misconduct in office investigation.[3] And William Strampel had been charged with failing to properly supervise Nassar in 2018, the year before Dwyre's interview with Klages.

At Klages's trial, the prosecution never asked Dwyre to identify the specific crimes being investigated when he interviewed Klages. Rather, Dwyre told the jury that he interviewed Klages because he knew that in four previous police interviews she denied having had a conversation with Boyce or RF about Nassar's sexual abuse. Dwyre believed that her denials were lies, asserting that "it was important to interview her to see what she was going to say about that." He continued:

> 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 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.

[3] Klages could not have been charged with misconduct in office because she was not a "public officer" as that term is defined in MCL 750.505.

During the interview, Klages insisted that she had no memory of Larissa Boyce and agreed that if one of her gymnasts claimed to have been touched in a sexual way, she would not have been able to forget it. Klages denied ever coaching Boyce, leading to the following exchange:

> 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.

Klages also denied any memory of telling Boyce that if Boyce filed a complaint about Nassar that there would be serious consequences for Boyce and Nassar.

When asked if RF reported in 1997 that Nassar "penetrated her vaginally and anally," Klages responded, "I do not remember that either." Klages remembered that RF was not one of her gymnasts, but a Spartan Youth athlete and her daughter's teammate. The questioning continued:

> 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. . . . I was horrified when I saw what Larissa Boyce told her lawyer, I was just horrified.

She repeated that she did not recall RF ever discussing her treatment by Nassar. When asked if she would remember if RF had said something about "this is funny" or "this doesn't look right," Klages responded, "I would think I would remember that." Klages summarized: "Well, I don't recall any conversations with either one of those two young women. . . ."

The Attorney General charged Klages under MCL 750.479c(1)(b) 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" during Agent Dwyre's investigation of first-degree criminal sexual conduct, and one count of lying to a peace officer because "she lied when she denied that she was told by witnesses that they were sexually assaulted by Larry Nassar" related to the criminal investigation of misconduct in office. A jury convicted her of both charges.

Klages raises many issues on appeal. One is dispositive, and we limit our analysis to that issue.

II. ANALYSIS

MCL 750.479c(1)(b) provides in relevant part 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 r*egarding a material fact* in that criminal investigation." (Emphasis added.) Because the plain text of MCL 750.479c(1)(b) requires the prosecution to prove that the accused made a false "statement" "regarding a material fact" in a criminal investigation, it is critical to first identify the "statement" at issue to determine whether it regards "a material fact." In this case, the information charges that the false statement was Klages's denial "that she was told by witnesses that they were assaulted by Larry Nassar." In her interview, Klages denied having any memory of such conversations. But because Klages also declared that she did "not believe I would have ever forgot that," the prosecution interpreted Klages's answers to their questions as an outright denial that the conversations with Boyce and RF ever took place.

Thus, proof that Klages's statements constituted a felony under MCL 750.479c(1)(b) required the prosecution to prove that Klages falsely denied that Boyce and RF had revealed Nassar's sexual abuse in 1997, that Klages knowingly and willfully made a false statement regarding this fact to a peace officer, that the peace officer was conducting a criminal investigation and advised Klages to that effect, and that Klages's denial of the conversation constituted a material fact in the peace officer's criminal investigation.

Klages's brief on appeal takes issue with the sufficiency of the prosecution's proof of several elements of the crime. We find merit in her argument that the prosecution presented insufficient evidence that her denial of having taken part in a 1997 conversation about Nassar was a material fact under MCL 750.479c(1)(b).

Published Michigan caselaw construing MCL 750.479c(1)(b) is limited to one case: *People v Williams*, 318 Mich App 232; 899 NW2d 53 (2016). There, however, we focused on whether the statutory language "embraces *passive* failures to disclose material facts as well as outright lies." *Id*. at 238 (emphasis added). We concluded that "[s]tatements that omit material information may qualify as false" or misleading and thereby fall within the statute's ambit. *Id*. We did not examine

the meaning of the term "material fact." This case provides an opportunity to fill in that gap. Because federal law provides a rich and persuasive resource regarding the meaning of materiality in the context of statutes similar to MCL 750.479c(1)(b), we adopt the reasoning in the cases discussed below.

A. MATERIALITY, GENERALLY

United States v Gaudin, 515 US 506, 508; 115 S Ct 2310; 132 L Ed 2d 444 (1995), arose from an allegedly false statement made on federal loan documents. The defendant was charged with making false statements in a matter within the jurisdiction of a federal agency in violation of 18 USC 1001. *Gaudin*, at 507-508. The question presented was whether the materiality component of the statute constituted a jury question. *Id*. at 507. The United States Supreme Court began its analysis by reiterating the now widely accepted description of a "material" statement as one that has "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Id*. at 509 (quotation marks and citation omitted, brackets in original). Determining whether a statement is material, the Court elucidated, requires a "determination of at least two subsidiary questions of purely historical fact: (a) what statement was made? and (b) what decision was the [decisionmaker] trying to make?" *Id*. at 512 (quotation marks and citation omitted). And ultimately, the question boils down to: "whether the statement was material to the decision," which "requires applying the legal standard of materiality . . . to these historical facts." *Id*. (quotation marks and citation omitted).

Ordinarily, materiality is a mixed question of fact and law, ultimately resolved by a jury. *Id*. at 522-523. Although a judge may not rule that a statement *is* material as a matter of law, a judge may rule that it is not. See *United States v Serv Deli Inc*, 151 F3d 938, 941 (CA 9, 1998) ("However, a judge may rule that a false statement is *not* material as a matter of law, that is, that the evidence is insufficient for the jury to find the statement is material."). Here, the issue presented is whether the prosecution presented constitutionally sufficient evidence of the materiality of Klages's denial that she remembered conversations regarding Larry Nassar that took place 21 years earlier. Absent such evidence, Klages's conviction cannot stand. See *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992).

We review de novo whether sufficient evidence supports a conviction, viewing 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. *People v Miller*, 326 Mich App 719, 735; 929 NW2d 821 (2019). Constitutionally sufficient evidence of guilt exists where "a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (quotation marks and citation omitted). We review de novo questions of statutory interpretation, including the meaning of statutory terms. *People v Rodriguez*, 463 Mich 466, 471; 620 NW2d 13 (2000).

B. A CLOSER REVIEW OF THE MEANING OF MATERIALITY

As mentioned above, *Gaudin* defined materiality as "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." The Supreme Court borrowed that definition from *Kungys v United States*, 485 US 759, 770; 108

S Ct 1537; 99 L Ed 2d 839 (1988). In *Kungys*, the Court focused on the issue of consequence here: the meaning of materiality and how materiality principles should be applied.

Kungys involved the materiality standard applicable to two federal statutes, 8 USC 1451(a) and 8 USC 1101(f)(6). *Kungys*, 485 US at 763. The former statute relates to denaturalization proceedings while the latter criminalizes false testimony "for the purpose of obtaining any benefits" under the immigration and naturalization laws.[4] The petitioner in *Kungys* had been naturalized as a United States citizen for 34 years before the United States filed a denaturalization complaint alleging that he "had made false statements with respect to his date and place of birth, wartime occupations, and wartime residence." *Id*. at 764. The district court found the statements to have been misrepresentations but not material within the meaning of 8 USC 1451(a).[5] *Kungys*, 485 US at 764-765.

Justice Scalia, who authored *Kungys* for a plurality of the Court, began his discussion of materiality with the observation that "[t]he term 'material' in § 1451(a) is not a hapax legomenon," by which he meant that the term is frequently used.[6] *Id*. at 769. Justice Scalia continued:

> Its use in the context of false statements to public officials goes back as far as Lord Coke, who defined the crime of perjury as follows:
>
> > Perjury is a crime committed, when a lawful oath is ministred by any that hath authority, to any person, in any judicial proceeding, who sweareth absolutely, and falsly in a matter material to the issue, or cause in question, by their own act, or by the subornation of others." [*Id*., quoting 3 E Coke, Institutes 164 (6th ed 1680).]

Blackstone also used the term, Justice Scalia wrote, proclaiming that to constitute perjury, "the false statement 'must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid[.]' " *Kungys*, 485 US 716, quoting 4 Blackstone, Commentaries on the Laws of England, p *137. Given this history, Justice Scalia observed, "it is unsurprising" that many federal statutes involving perjury incorporate the term, and that the federal courts have a "quite uniform understanding of its meaning." *Kungys*, 485 US at 769-770. The definition quoted above, that a "concealment or misrepresentation is material if

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[4] The Court held in *Kungys v United States*, 485 US 759, 779-780; 108 S Ct 1537; 99 L Ed 2d 839 (1988), that 8 USC 1101(f)(6) did not contain a materiality provision. Therefore, our discussion of *Kungys* is limited to the Court's construction of 8 USC 1451(a).

[5] "8 USC 1451(a) provides for the denaturalization of citizens whose citizenship orders and certificates of naturalization 'were procured by concealment of a material fact or by willful misrepresentation.' " *Kungys*, 485 US at 767. The language of this statute differs from that of MCL 750.479c(1)(b), but both require that the statements at issue concern a "material fact." For that reason, *Kungys* is instructive.

[6] For those who are not scholars of ancient Greek, hapax legomenon means "a word or form occurring only once in a document. . . ." *Merriam-Webster's Collegiate Dictionary* (11th ed), p 566.

it has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed," represents "[t]he most common formulation" of the common-law understanding of a term's meaning, the Court concluded. *Id*. at 770. In *Kungys*, 485 US at 772, the Court applied that definition to hold "that the test of whether Kungys'[s] concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the Immigration and Naturalization Service."

The Supreme Court concluded that Kungys's misrepresentation regarding the date and place of his birth was not material because the government offered "no suggestion that those facts were themselves relevant to his qualifications for citizenship." *Id*. at 774. Only "if the true date and place of birth would predictably have disclosed other facts relevant to his qualifications" would the misrepresentation be material, the Court explained, "[b]ut not even that has been found here." *Id*. If Kungys had explained his initial misstatement regarding his date and place of birth, the Court reasoned, the discrepancy would have led to one of three results: a denial of the petition for denaturalization, "or an investigation, or . . . an investigation [that] would have produced the desired outcome." *Id*. at 775. But even if an investigation had been spurred by the discrepancy, that alone would not itself have established that the misrepresentation was material. Rather, the materiality analysis requires an examination of "what would have ensued from official knowledge of the misrepresented fact (in this case, Kungys'[s] true date and place of birth), not what would have ensued from official knowledge of inconsistency between a positive assertion of the truth and an earlier assertion of falsehood." *Id*.

C. THE MATERIALITY STANDARD, APPLIED TO THIS CASE

As proposed in *Gaudin*, 515 US at 512, to determine whether a statement is material we must first identify the false statement and then determine the decision that the decisionmaker was trying to make. Next, we apply the legal standards governing materiality to the facts of the case. Guided by this logical approach, we conclude that the statements at issue—Klages's denial of memory of the conversations with Boyce and RF and her denial that the conversations took place—were not material facts.

The false statements at issue center on whether Klages was aware in 1997 that Nassar had sexually abused Boyce and RF. According to the prosecution, the "the decision the decisionmaker was trying to make" was whether anyone at MSU had committed criminal sexual conduct or misconduct in office by allowing Nassar to prey on young athletes. Dwyre supplied no information or explanation, however, evidencing that Klages's 2018 lie regarding her 1997 awareness of Nassar's conduct influenced the Attorney General's charging decision. Alternatively stated, the prosecution failed to prove that Klages's failure to recall or to admit to the 1997 conversations was a fact material to the investigator's determination whether someone at MSU other than Larry Nassar had committed criminal sexual conduct or misconduct in office.

A material fact must have "a natural tendency to influence, or [be] capable of influencing, the *decision* of the *decisionmaking body* to which it was addressed." *Kungys*, 485 US at 770 (emphasis added). Dwyre's testimony on this score focused entirely on his personal "decisions" regarding "the direction of my questioning," and never mentioned or even alluded to the decision of the "decisionmaking body":

Q. Tell us, if you will Special Agent Dwyer [sic], if during the interview Ms. Klages had corroborated Ms. Boyce and [RF] in their statements that they told her back in 1997, what *might* you have done differently?

* * *

A. . . . [H]ad 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.[7] 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? [Emphasis added.][8]

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[7] This is an untrue statement; Klages was not a mandatory reporter under the statute in effect in 1997, and still is not. When Boyce and RF told Klages about Nassar, Klages was working as an administrator of a private gymnastics' organization and as a gymnastics coach at MSU. She was never a "school administrator, school counselor, or teacher" as a contemplated by MCL 722.623. The statute never included athletic coaches or even university professors as mandatory reporters.

[8] In his closing argument, the assistant prosecuting attorney attempted to explain why Klages's lie was material as follows:

> And is it material? Is it material? If the investigation is who knew what and when about Larry Nassar and we have information that says she knew back in '97 and she lies to the officers about that, how is that not material to the investigation? I submit to you that that is the question that was trying to be answered by the Attorney General Michigan State Police investigation. It is material. It is the entire investigation. It is the question that we were asked and tasked with answering.

This argument misstates the law in a critical respect. The investigation into "who knew what and when about Larry Nassar" was supposed to have been an investigation of potential criminal conduct, not a roving inquiry designed to expose MSU's mistakes and to further embarrass the institution. Tellingly, the assistant prosecuting attorney then admitted that a search warrant of Klages's electronics would not have revealed anything because, "You're not going to have something from 2017 talking about information from 1997."

That Dwyre "might" have asked different questions or pursued different leads is not equivalent to evidence that the "the decision of the decisionmaking body" was influenced, or even capable of being influenced, by Klages's denials. No evidence was presented that Klages's denials hampered the Attorney General's ability to conduct a complete and thorough investigation into whether others at MSU had committed criminal sexual conduct or misconduct in office. No evidence was presented that Klages's denials could have confused the Attorney General or steered the investigators in an inappropriate direction. Dwyre's speculation that other questions may have been asked says nothing about whether hypothetical answers to those questions were capable of influencing the ultimate decisions to be made. Indeed, had Klages refused to speak to the investigators for a fourth or fifth time, Dwyre and his team would have been in precisely the same position they were in after Klages denied the 1997 conversation.

That Klages theoretically may have told others about the revelations made by RF and Boyce does not render Klages's denials a "material fact" absent evidence that the "decisionmakers" would have been misled, misdirected, deflected from a target, or otherwise "influenced" by the absence of more information. No such evidence was produced. Indeed, no evidence was presented that Klages's false statements *could* have misled, misdirected, deflected, or otherwise hindered the Attorney General's investigation. Dwyre testified that his team re-interviewed every one of Nassar's victims, gathered all the reports regarding Nassar in MSU's custody as well as other police agency reports, executed "multiple search warrants at Michigan State University," and never attempted to obtain any others. After sifting through a vast amount of information the investigators never found any evidence that Klages had told anyone about the conversations she denied having with Boyce and RF:

> *Q.* But you had spoken to - - your team did, over 1,110 people and in none of those conversations and interviews did anybody say Mrs. Klages told me about these comments from 1997, right?
>
> *A.* That's true.
>
> *Q.* And you had search warrants for Mr. Nassar's computer, right?
>
> *A.* I didn't, but another agency did.
>
> *Q.* Another agency did, right. And you actually have computer and cell phones, those things, right?
>
> *A.* Correct.
>
> *Q.* And, in fact, you actually had somebody look in January of 2020 to try and find out if you could find a photo of Ms. Klages and Mr. Nassar, right?
>
> *A.* True.
>
> *Q.* Couldn't find that photo?
>
> *A.* We could not.

Q. Looked on there, couldn't find any evidence that Ms. Klages had made any comment to him about these comments from 1997?

A. That's true.

Q. And Ms. Klages actually gave her phone and computers during the investigation, right?

A. Not to us, but to Michigan State University.[9]

And as Dwyre admitted, Klages's denials did not throw the investigators off the trail of possible offenders for another reason: Dwyre never believed her. Dwyre knew that Klages had denied speaking to Boyce and RF about Nassar because she had said precisely the same thing during at least four previous police interviews. He conducted his own interview with Klages because "I was concerned that she potentially could have lied" in her previous statements—not because he sought information relevant to "a decision the decisionmaker was trying to make." In other words, Dwyre never testified that he interviewed Klages to obtain information relevant to criminal sexual conduct or misconduct in office; rather, he interviewed her to gather proof that Klages had previously stated, falsely, that she had no memory of the conversations with Boyce and RF.

The prosecution offered no witness other than Dwyre to support the materiality of Klages's denials. And instead of testifying that the *Attorney General's* decisionmaking regarding whom to charge had been thrown off-track by Klages's denial of the 1997 conversations, Dwyre offered only conjecture and supposition about his *personal* investigative methods, none of which described a materially different course of investigation. Like a skilled lawyer or judge, a skilled investigator can always identify, in retrospect, sources or leads not pursued. The materiality of those omissions depends on whether they made a difference in the final product. Like a single case not cited, a question not asked is unlikely to determine the outcome. If it did in Klages's case, that evidence was simply not presented to the jury.

Had Klages admitted to having participated in the conversation with Boyce and RF, no evidence supports that the investigation would have yielded a different decision regarding whether to charge others for criminal sexual conduct or misconduct in office. Accordingly, viewing the evidence and inferences in the light most favorable to the prosecution, Klages's lie regarding her memory of the 1997 conversations did not result in a different course of investigation, lead the investigators astray, or taint the decision made by the decisionmaker. Thus, it was inconsequential, rather than material.

[9] Dwyre claimed that he "believed" that he could not have gotten a search warrant for Klages's electronics. Klages had voluntarily turned over all her electronic devices to the MSU police department for inspection, thereby waiving any privacy interest she may have had. Dwyre's claim that he did not think he "had the probable cause to get the search warrant" is not credible or legally supportable. And Dwyre never explained why he had not just asked Klages for the devices.

We emphasize that the "material fact" requirement incorporated within MCL 750.479c(1)(b) requires proof of something more than an investigator's unsupported and speculative opinion that he may have asked different questions, particularly absent evidence that the "material fact" had any reasonable possibility of influencing the decision that matters—a charging decision. As in *Kungys*, when presented with the question of whether a false statement constitutes a material fact, materiality is not determined by an investigator's belief that more investigation would have been helpful. Rather, as this Court described in *Williams*, 318 Mich App at 240, a lie or "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." In those examples, misleading statements prevent the police from solving a crime and qualify as material because they deprive the decision makers of the information necessary to make an accurate and informed charging decision. Here, the prosecution never presented evidence of any underlying crime or even suggested that someone "got away." Klages's false statements therefore did not represent or misrepresent any facts material to the Attorney General's investigation.

We vacate Klages's convictions and remand for dismissal of the charges. We do not retain jurisdiction.

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