STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v NEVIN HUGHES, Defendant-Appellee.	FOR PUBLICATION July 15, 2014 No. 316072 Wayne Circuit Court LC No. 13-001041-01-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v SEAN HARRIS, Defendant-Appellee.	No. 317158 Wayne Circuit Court LC No. 13-001620-02-AR
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v WILLIAM LITTLE, Defendant-Appellee.	No. 317272 Wayne Circuit Court LC No. 13-001620-03-AR

Before: METER, P.J., and JANSEN and WILDER, JJ.

WILDER, J (*concurring in part and dissenting in part*).

I concur with the majority's determination in Section II(B) that the district court abused its discretion by excluding the use of defendants' statements under the Fifth Amendment. I respectfully dissent from the majority's determination that the district court misinterpreted MCL

15.393 and abused its discretion by dismissing the charges of obstruction of justice against defendants. I would conclude that defendants' statements were protected under MCL 15.393.

I

MCL 15.393 provides, "An involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding." The Legislature defined "involuntary statement" as "information provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction, by the law enforcement agency that employs the law enforcement officer." MCL 15.391.

The principles of statutory interpretation are well established. The "goal in interpreting a statute 'is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written."' *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013), quoting *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008).

A

As is true with the Fifth Amendment, which, under *Garrity v State of NJ*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967), prohibits the state from using "the threat of discharge to secure incriminatory evidence against an employee," *id.* at 499, the protections of MCL 15.393 are triggered when law enforcement officers are faced with the choice "infected by . . . coercion" between their jobs and self-incrimination:

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in *Miranda v Arizona*, 384 U.S. 436, 464-465[; 86 S Ct 1602; 16 L Ed 2d 694 (1966)], is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions. [*Id.* at 497-498.]

While the Fifth Amendment protects witnesses only from incriminating themselves with respect to crimes already committed, *Lefkowitz v Turley*, 414 US 70, 77; 94 S Ct 316; 38 L Ed 2d 274 (1973), the broad language of MCL 15.393 is not so limited. The Legislature used the indefinite article "a," not "the," to modify the phrase "criminal proceeding." "'The' and 'a' have different meanings. 'The' is defined as 'definite article. 1. (used, [especially] before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an) . . . .'" *Robinson v City of Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010), quoting *Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000). By using the indefinite article, the Legislature did not limit the application of the statute to *the* criminal proceeding being investigated or *the* other crimes already committed. Rather, by choosing the

phrase "a criminal proceeding," the Legislature expressed its intention to require a more generalized application of the statute than the narrower protection the Fifth Amendment would afford, and therefore bars the use of involuntary statements in subsequent prosecutions for perjury or obstruction of justice. If the Legislature intended involuntary statements and information derived from them to be used in collateral proceedings for obstruction of justice or perjury, the Legislature could and would have expressly excluded those proceedings from the statute. *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008) ("[P]rovisions not included in a statute by the Legislature should not be included by the courts.").

B

Moreover, although the Fifth Amendment does not allow witnesses to swear falsely, *United States v Apfelbaum*, 445 US 115, 117, 131; 100 S Ct 948; 63 L Ed 2d 250 (1980), the Legislature did not define "involuntary statement" to include only true statements. MCL 15.393. On appeal, the prosecution, referencing the Legislature's definition of an "involuntary statement" as "information provided by a law enforcement officer . . . ," MCL 15.391, argues that defendants' false denials during their OCI interviews constituted misinformation that did not amount to "information" within the meaning of the statute. The majority agrees, relying on the *Random House Webster's College Dictionary* (1997), which defines "information" as "knowledge communicated or received concerning a particular fact or circumstance." The majority concludes that an officer's false denials do not impart any truths or facts, so they cannot constitute "information." I disagree.

The word "misinform" is defined as "giv[ing] false or misleading *information* to." *Random House Webster's College Dictionary* (1997) (emphasis added). Therefore, the term "information" as used in MCL 15.393 must be interpreted to include the giving of "misinformation." Our United States Supreme Court has ruled that similar language in the federal immunity statute, 18 USC 6002, "makes no distinction between truthful and untruthful statements made during the course of the immunized testimony." *Apfelbaum*, 445 US at 122. Section 6002 provides, in relevant part, "no testimony or other *information* compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case." (Emphasis added.)[1]

In addition to using the dictionary to give meaning to undefined statutory terms, we also look to the use by the Legislature of the same or similar terms in other statutes to divine Legislative intent. *Linton v Arenac Co Road Comm*, 273 Mich App 107, 118; 729 NW2d 883 (2006) ("Although the terms of one statute are not dispositive in determining the meaning of another, especially if the statutes were not designed to effectuate a common result, the terms of one statute may be taken as a factor in determining the interpretation of another statute.") (footnote omitted). We make every effort to interpret clear and unambiguous language in accordance with its plain meaning because "[c]ourts may not read or include provisions into a statute that the Legislature did not." *People v Haynes*, 281 Mich App 27, 32; 760 NW2d 283

[1] Section 6002 differs from MCL 15.393 in that it requires a witness granted immunity to testify and precludes the witness from invoking the privilege against self-incriminations.

(2008). "The omission of a provision in one statute that is included in another statute should be construed as intentional." *Underwood*, 278 Mich App at 338.

The Legislature has used the term "information" in a number of statutes. For example, in MCL 769.34(10), our Legislature provided that a sentence "within the appropriate guidelines sentence range" should be affirmed on appeal "absent an error in scoring the sentencing guidelines or *inaccurate information* relied upon in determining the defendant's sentence." (Emphasis added.) In MCL 750.492a(1), the Legislature provided, "a health care provider or other person, knowing that the *information is misleading or inaccurate*, shall not intentionally, willfully, or recklessly place or direct another to place in a patient's medical record or chart *misleading or inaccurate information* regarding the diagnosis, treatment, or cause of a patient's condition." (Emphasis added.) See also MCL 168.467b(6) (right to equitable relief for a candidate receiving "*incorrect or inaccurate information*") (emphasis added), MCL 487.2140 ("*information* . . . is no longer *accurate*") (emphasis added), and MCL 791.235(1)(b) ("*Information* that is determined by the parole board to be *inaccurate or irrelevant*") (emphasis added). The Legislature's specific references to inaccurate or misleading information in the above-cited provisions demonstrate that the distinction between accurate and inaccurate information was relevant to those legislative schemes, and that when such a distinction is important to the Legislature to make, it will do so. The Legislature's failure to make a distinction between accurate and inaccurate information here demonstrates its intent that MCL 15.393 broadly apply to defendants' involuntary statements, regardless of their accuracy. *Underwood*, 278 Mich App at 338.

C

Our United States Supreme Court, in 1967 in *Garrity*, and this Court, in 1968 in *People v Allen*, 15 Mich App 387, 388; 166 NW2d 664 (1968), held that the Fifth Amendment barred the admission of police officers' statements in subsequent prosecutions for obstruction and perjury, respectively. These holdings remained binding law in Michigan until the United States Supreme Court ruled differently in *Apfelbaum* (1980), *Wong* (1977), and *Lefkowitz* (1973). In addition, in *In re Morton*, 258 Mich App 507; 671 NW2d 570 (2003), this Court upheld an order requiring the production of three *Garrity* statements by police officers to the prosecutor, which resulted in concern that *Garrity* statements would be used in the determination whether to prosecute law enforcement officers. MCL 15.393 was enacted in the wake of *Morton*. See Senate Legislative Analysis, SB 647, February 20, 2007.[2] Despite the narrowing of Fifth Amendment protections afforded to law enforcement officers as the result of these cases (and the Legislature is presumed

[2] Although legislative analyses are not "an official form of legislative record in Michigan," and we acknowledge that "legislative analyses should be accorded very little significance by courts when construing a statute," *In re Certified Question (Kenneth Henes Special Projects Procurement v Continental Biomass Indus)*, 468 Mich 109, 115 n 5; 659 NW2d 597(2003), I cite the Senate Legislative Analysis here for the limited purpose of demonstrating the likely link between this Court's decision in *In re Morton*, 258 Mich App 507; 671 NW2d 570 (2003), and the Legislature's enactment of MCL 15.393.

to be aware of these cases),[3] our Legislature was nevertheless free to codify in Michigan law the more robust *Garrity* and *Allen* protections when it enacted MCL 15.393 in 2006.

D

When it crafted MCL 15.393, the Legislature used broad language that did not just protect factually true statements, but "involuntary statement[s]," and did not only protect statements made during the investigation of crimes already committed, but more generally, statements made "in a criminal proceeding."[4] MCL 15.393. Therefore, I would conclude that the Legislature intended MCL 15.393 to protect a law enforcement officer's false denials, even in a subsequent, collateral criminal proceeding such as perjury or obstruction of justice, and that the district court did not abuse its discretion by excluding defendants' statements under MCL 15.393.

II

Although the Fifth Amendment did not bar the use of defendants' statements in their prosecution for obstruction of justice, I would conclude MCL 15.393 does operate to bar such statements. I recognize it may seem an untenable result, to permit law enforcement officers to make false denials with impunity when giving involuntary statements under the threat of an employment sanction. The great majority of law enforcement officers, who perform their duties with honor and distinction, would neither need nor desire to take advantage of this anomaly in the law, which seems inconsistent with the design of our system of justice to seek out the truth. See *Polk County v Dodson*, 454 US 312, 318; 102 S Ct 445; 70 L Ed 2d 509 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness"). But we are bound to interpret the plain language set forth by the Legislature. We cannot rewrite the law and must apply the statutory text even if we disagree with the result. See *Hanson v Bd of Co Rd Comm'rs of Mecosta Co*, 465 Mich 492, 504; 638 NW2d 396 (2002).

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[3] See *Lewis v LeGrow*, 258 Mich App 175, 183-184; 670 NW2d 675 (2003) ("We presume that the Legislature is aware of the common law that legislation will affect; therefore, if the express language of legislation conflicts with the common law, the unambiguous language of the statute must control.")

[4] The Legislature's enactment of MCL 15.395 in the Disclosures By Law Enforcement Officers Act also demonstrates its intention to codify broader protections for officers' involuntary statements by making them confidential communications, except under limited circumstances. *Myers v City of Portage*, ___ Mich App ___; ___ NW2d ___ (2014). That statute also distinguishes between criminal actions, in which I conclude involuntary statements cannot be used against officers, and civil actions, in which they can be used. A prosecutor or attorney general may obtain a confidential involuntary statement in a criminal case, but the prosecutor or attorney general "shall not disclose the contents." MCL 15.395(b). In contrast, in a civil action, "the court shall preserve by reasonable means the confidentiality of the involuntary statement" only "[u]ntil the close of discovery." MCL 15.395(d).

Therefore, I would affirm the district court and urge the Legislature to revisit MCL 15.393 to address this anomaly. See *In re Talh*, 302 Mich App 594; 840 NW2d 398 (2013).

/s/ Kurtis T. Wilder