STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NEVIN HUGHES,

Defendant-Appellee.

FOR PUBLICATION
July 15, 2014
9:00 a.m.

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.

JANSEN, J.

In these consolidated appeals, the prosecution appeals by leave granted the circuit court's order denying its motion to reinstate the obstruction-of-justice charge against defendant Nevin Hughes,[1] as well as the circuit court's ruling affirming the district court's dismissal of the obstruction-of-justice charges against defendants Sean Harris and William Little.[2] For the reasons set forth in this opinion, we reverse and remand to the district court for reinstatement of the obstruction-of-justice charges against all three defendants.

I

These appeals arise out of a police-citizen interaction on November 19, 2009, involving Dajuan James Hodges-Lamar and defendants. Defendant Hughes, a Detroit police officer, approached Hodges-Lamar at a Detroit gas station and asked him questions regarding his license, registration, and drugs in the car. Hughes then opened the door of Hodges-Lamar's automobile, pulled Hodges-Lamar out by his collar, slammed Hodges-Lamar against the car, and searched him. Defendants Harris and Little, also Detroit police officers, were standing nearby. Hughes pushed Hodges-Lamar toward Harris and Little. Hughes subsequently punched Hodges-Lamar with an open hand in the throat, punched him again, pushed him to the ground, picked him up by the collar several times, slammed him onto the car, and finally pushed him back toward Harris and Little. Hodges-Lamar never alleged that Harris and Little assaulted him.

Defendants arrested Hodges-Lamar and searched his car. Hodges-Lamar received a ticket for failure to wear a seatbelt, no proof of registration, and no proof of insurance. Eventually, the tickets were dismissed. Hodges-Lamar sought medical attention and another police officer took his statement at an area hospital.

The Detroit Board of Police Commissioners Office of Chief Investigator (OCI) investigated the incident and interviewed defendants in July and August 2010. The OCI provided defendants with a standard departmental constitutional-rights form. The form stated, in relevant part, "If I refuse . . . to answer questions . . . I will be subject to departmental charges which could result in my dismissal from the police department. . . . If I do answer . . . neither my statements nor any information or evidence which is gained by reason of such statements can be used against me in any subsequent criminal proceeding." Defendants also received a reservation of rights form, which provided in relevant part:

> It is my belief that this Statement and the Preliminary Complaint Report will not and cannot be used against me in any subsequent proceeding other than disciplinary proceedings within the confines of the Department itself. For any and all other purposes, I hereby reserve my Constitutional rights to remain silent

[1] *People v Hughes*, unpublished order of the Court of Appeals, entered June 3, 2013 (Docket No. 316072).

[2] *People v Harris*, unpublished order of the Court of Appeals, entered August 15, 2013 (Docket No. 317158); *People v Little*, unpublished order of the Court of Appeals, entered August 15, 2013 (Docket No. 317272).

> under the Fifth and Fourteenth Ammendments [sic] to the United States Constitution, and Article I, Section 17 of the Michigan Constitution.

Defendants made statements under the threat of dismissal from their jobs. Harris and Little denied that Hughes had any physical contact with Hodges-Lamar, with the exception of a pat-down search. Hughes admitted that he pulled Hodges-Lamar out of the car, but maintained that he did not use any force against Hodges-Lamar.

The investigation was closed. Hodges-Lamar hired an attorney, who ultimately obtained a video recording of the assault and battery from the security camera at the gas station. The video recording was provided to the Detroit Police Department Internal Affairs Section. The prosecution subsequently charged Hughes with felony misconduct in office, MCL 750.505, misdemeanor assault and battery, MCL 750.81, and obstruction of justice, MCL 750.505. The prosecution charged Harris and Little each with one count of obstruction of justice, MCL 750.505. The video recording was played for the district court by stipulation of the parties. The district court dismissed the obstruction-of-justice charges against all three defendants, relying on the Fifth Amendment of the United States Constitution and § 3 of the Disclosures by Law Enforcement Officers Act,[3] MCL 15.393. The circuit court affirmed the district court's dismissals and declined to reinstate the obstruction-of-justice charges.

II

The prosecution argues that the district court should have admitted defendants' statements made during the OCI investigation at the preliminary examination because neither *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967), nor MCL 15.393, prohibits the use of an officer's false denials in a subsequent obstruction-of-justice prosecution. We agree.

A

We review for an abuse of discretion the trial court's decision whether to admit evidence, but review de novo the trial court's decision on any preliminary question of law. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). "A trial court abuses its discretion when its decision falls 'outside the range of principled outcomes.' " *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010), quoting *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012). "A district court's ruling that alleged conduct falls within the scope of a criminal law is a question of law that is reviewed de novo . . . ." *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). We similarly review de novo questions of constitutional law and statutory interpretation. *People v Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011).

[3] MCL 15.391 *et seq*.

B

The district court abused its discretion by excluding defendants' statements under the Fifth Amendment of the United States Constitution.

> The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." This prohibition "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.' " [*People v Wyngaard*, 462 Mich 659, 671-672; 614 NW2d 143 (2000), quoting *Minnesota v Murphy*, 465 US 420, 426; 104 S Ct 1136; 79 L Ed 2d 409 (1984), in turn quoting *Lefkowitz v Turley*, 414 US 70, 77; 94 S Ct 316; 38 L Ed 2d 274 (1973).]

To invoke the protection of the Fifth Amendment, a witness must only possess a reasonable belief that the evidence could be used against him or her in a criminal prosecution. *Maness v Meyers*, 419 US 449, 461; 95 S Ct 584; 42 L Ed 2d 574 (1975); *People v Bassage*, 274 Mich App 321, 324-325; 733 NW2d 398 (2007). "The state constitutional right against self-incrimination is interpreted no differently than the federal right." *Bassage*, 274 Mich App at 324.

In *Garrity*, 385 US at 494, the New Jersey Attorney General's office interviewed police officers about fixing traffic tickets. Before the interviews, the Attorney General's office warned the police officers that anything they said might be used against them in subsequent criminal proceedings, and that they had the right to refuse to answer. *Id*. However, they were also warned that if they refused to answer, they would be subject to termination from their positions. *Id*. The Attorney General's office later used the police officers' answers to prosecute them for conspiracy to obstruct the administration of the traffic laws. *Id*. at 495. The United States Supreme Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." *Id*. at 500.

Since its decision in *Garrity*, the United States Supreme Court has held that the Fifth Amendment does not protect a defendant from a subsequent prosecution for perjury predicated on statements that the defendant made on the stand after being granted immunity from prosecution regarding the underlying crime. See *United States v Wong*, 431 US 174, 178; 97 S Ct 1823; 52 L Ed 2d 231 (1977) (holding that "[t]he Fifth Amendment privilege against self-incrimination does not condone perjury" and that "it grants a privilege to remain silent without risking contempt, but it 'does not endow the person who testifies with a license to commit perjury' ") (citation omitted); see also *United States v Apfelbaum*, 445 US 115, 117, 131; 100 S Ct 948; 63 L Ed 2d 250 (1980) (holding that "proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely" and that "neither the immunity statute nor the Fifth Amendment precludes the use of [a defendant's] immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence").

Similarly, the United States Court of Appeals for the Sixth Circuit has observed that, as a general rule, "the Fifth Amendment permits the government to use compelled statements obtained during an investigation if the use is limited to a prosecution for collateral crimes such as perjury or obstruction of justice." *McKinley v Mansfield*, 404 F3d 418, 427 (CA 6, 2005). "This rule applies with equal force when the statements at issue were made pursuant to a grant of *Garrity* immunity during the course of a public employer's investigation of its own." *Id*. In other words, although "*Garrity* precludes use of public employees' compelled incriminating statements in a later prosecution for the conduct under investigation. . . . , *Garrity* does not preclude use of such statements in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it." *McKinley*, 404 F3d at 427 (citation omitted).

This Court's precedent similarly instructs that we view a defendant's false statements as independent chargeable offenses, for which the allegedly false statements are not admitted to prove any underlying charge, but rather to prove the independent offense of lying. See *Bassage*, 274 Mich App at 325 (noting that "the right against self-incrimination only protects a witness from incriminating himself or herself *for crimes already committed*") (emphasis added). See also *Lefkowitz*, 414 US at 77.

We acknowledge that the case against Hughes differs from the cases against Harris and Little because the focus of the internal investigation was the assault and battery of Hodges-Lamar, which was committed exclusively by Hughes. Hodges-Lamar never accused Harris or Little of any assaultive behavior; Harris and Little were only interviewed as witnesses to Hughes's misconduct. At the same time, however, all three defendants could have reasonably believed that their statements during the OCI interviews might lead to criminal proceedings against them for various nonassaultive offenses, such as misconduct in office (including nonfeasance). See *Maness*, 419 US at 461; *Bassage*, 274 Mich App at 324-325; see also *Waterstone*, 296 Mich App at 126. For this reason, the officers' statements could not be used in any criminal prosecution against them "for crimes already committed," *Bassage*, 274 Mich App at 325, such as misconduct in office or assault and battery.

But, as noted previously, the Fifth Amendment did not prohibit the use of defendants' statements "in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it." *McKinley*, 404 F3d at 427. Nor did the Fifth Amendment entitle defendants to swear falsely. *Apfelbaum*, 445 US at 117; see also *Bassage*, 274 Mich App at 326. Thus, there was no Fifth Amendment bar to the admission of defendants' statements in the criminal proceedings (including the preliminary examination) pertaining to the independent obstruction-of-justice charges against them. See *McKinley*, 404 F3d at 427.

We recognize that our holding in this regard, as well as the post-*Garrity* federal caselaw, conflicts with this Court's decision in *People v Allen*, 15 Mich App 387, 388; 166 NW2d 664 (1968). In *Allen*, 15 Mich App at 396, this Court held that "the Fifth and Fourteenth Amendments' benefits of freedom from coerced waiver of the right to remain silent . . . must be respected," even in a subsequent perjury prosecution. In *Allen*, the defendant police officers, who were called to testify before a one-man grand jury about bribery, corruption, vice, and gambling involving the police department, were informed of their right to remain silent. *Id*. at 389-390. However, each of the defendants stated that he believed that if he invoked his right to

remain silent, he would be suspended from the police department. *Id.* at 391. After being advised of their rights, the defendants were asked whether they had accepted bribes, gifts, or gratuities from bar owners and liquor licensees in the city of Detroit. *Id*. at 389. The defendants denied that they had received any bribes, gifts, or gratuities. See *id.* at 389-390. After contrary testimony was received from the bar owners in question, the defendants were charged with perjury for having sworn falsely before the grand jury. *Id*. at 389-390. Defendants' grand-jury testimony, including their allegedly false denials, was admitted into evidence at their preliminary examinations. *Id*. Defendants were bound over for trial on charges of perjury. *Id*. at 390.

The *Allen* Court rejected the prosecution's argument that the principle announced in *Garrity* should not apply in prosecutions for perjury. *Allen*, 15 Mich App at 393-394. The Court held that the Fifth Amendment barred the admission of the defendants' grand-jury testimony in the subsequent perjury proceedings. *Id*. The *Allen* Court noted that the prosecution could not presume that the defendants' statements were false, and thereby escape the confines of *Garrity*, because the truth or falsity of a defendant's statement was ultimately an issue to be determined by the trier of fact in a perjury prosecution. *Allen*, 15 Mich App at 393.

Given the intervening developments in federal law, including *Apfelbaum*, 445 US at 117, and *McKinley*, 404 F3d at 427, the reasoning of *Allen* cannot stand. Even assuming that the prosecution treats a defendant's statements or denials as false from the inception of the investigation, the presumption of innocence remains intact and the prosecution is still required to prove the elements of perjury or obstruction of justice beyond a reasonable doubt. Moreover, the prosecution's decision to charge the officer with perjury or obstruction of justice does not run afoul of the Fifth Amendment guarantee because the allegedly false or perjurious statements would be introduced for the limited purpose of proving perjury or obstruction of justice, not other underlying crimes. See *McKinley*, 404 F3d at 427. Finally, we reiterate that untruths and false denials, such as those provided by defendants in the instant case, are not protected by the Fifth Amendment. *Apfelbaum*, 445 US at 117; *Wong*, 431 US at 178.

We are not bound to follow *Allen*, which was decided before November 1, 1990. MCR 7.215(J)(1); *People v Ford*, 262 Mich App 443, 452; 687 NW2d 119 (2004).[4] Indeed, in light of the post-*Garrity* caselaw permitting a witness's statements to be used against him or her in a subsequent criminal prosecution for a collateral offense such as perjury or obstruction of justice, we expressly disavow *Allen*'s reasoning.

The Fifth Amendment did not bar the admission of defendants' false statements in the instant prosecutions for obstruction of justice. The district court abused its discretion by relying on the Fifth Amendment to exclude defendants' false statements from evidence.

[4] We wish to make clear that the district court did not err insofar as it followed the reasoning of *Allen*. Lower courts are bound to follow this Court's published decisions unless and until they are overruled, vacated, or modified. MCR 7.215(C)(2); *People v Herrick*, 277 Mich App 255, 258; 744 NW2d 370 (2007).

C

The district court also abused its discretion by excluding defendants' false statements under MCL 15.393, which precludes the use of a police officer's "involuntary statement" against that officer in a criminal prosecution. Specifically, 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.

We recognize that whereas the Fifth Amendment only protects witnesses from incriminating themselves with respect to "crimes already committed," *Bassage*, 274 Mich App at 325, the broad language of MCL 15.393 appears to embrace *any* criminal proceeding, including prosecutions for the collateral offenses of perjury or obstruction of justice. However, we conclude that the statute internally limits the phrase "involuntary statement" to include true statements only, and that false statements and lies therefore fall outside the scope of the statute's protection.

The phrase "involuntary statement" is defined 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(a) (emphasis added). But when an officer is compelled to make a statement during an internal investigation, and provides only misinformation and lies, he or she has not provided any "information" at all within the commonly understood meaning of that word. Among other things, "information" is defined as "knowledge communicated or received concerning a particular fact or circumstance." *Random House Webster's College Dictionary* (1997). The word "knowledge," in turn, is defined as "the body of truths or facts accumulated in the course of time." *Id*. Because an officer's lies do not impart any truths or facts, they necessarily do not constitute "information." See MCL 15.391(a). In other words, an officer's lies and false statements do not qualify as "involuntary statement[s]" under MCL 15.393, and consequently may be used as evidence in a subsequent criminal prosecution.

We conclude that the Legislature's manifest intent was to create a mechanism for facilitating internal police investigations and to provide an incentive for officers who cooperate by providing needed facts. The Legislature certainly did not intend to immunize police officers by precluding the use of their lies and false statements in criminal proceedings. Indeed, such a strained construction of MCL 15.393 would be wholly contrary to the Legislature's purpose in enacting the statute. In sum, the plain language of MCL 15.391 establishes that an "involuntary statement" includes only truthful and factual information. Quite simply, when an officer lies, he or she provides no "information." Accordingly, MCL 15.393 does not preclude the use of the officer's lies in a criminal proceeding.

Defendants' lies during the OCI investigation were not entitled to the protection of MCL 15.393. The district court abused its discretion by relying on MCL 15.393 to exclude defendants' false statements from evidence in the prosecutions for obstruction of justice.

III

In sum, the district court erred by misconstruing the Fifth Amendment guarantee, as well as MCL 15.393. This error of law led the district court to abuse its discretion by excluding defendants' false statements from evidence and dismissing the obstruction-of-justice charges against them on this ground. The circuit court erred by affirming the district court's ruling. We reverse the decisions of the district court and circuit court in this regard. We remand to the district court for reinstatement of the obstruction-of-justice charges against all three defendants.

Reversed and remanded to the district court for reinstatement of the obstruction-of-justice charges against all three defendants. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Patrick M. Meter