STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v LOU ANNA K. SIMON, Defendant-Appellee.	FOR PUBLICATION December 21, 2021 9:00 a.m. No. 354013 Eaton Circuit Court LC No. 19-020329-FH Advance Sheets Version

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

BORRELLO, J.

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

I. FACTUAL BACKGROUND

In 2014, a victim initiated a complaint with Michigan State University (MSU) that Larry Nassar, who was at that time a doctor in the MSU College of Osteopathic Medicine, had sexually assaulted her during an examination. Kristine Moore, who was an MSU employee in the office that investigated Title IX complaints (including sexual assault complaints), eventually received the complaint for investigation and spoke to the victim by telephone on May 15, 2014, at approximately 6:00 p.m. Moore testified[1] that at some point the next morning, she informed her supervisor, Paulette Granberry Russell, by telephone about the victim's complaint.[2] Russell was the Title IX coordinator and chief advisor on diversity to defendant, who was the president of MSU

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

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

at that time. Moore further testified that she did not recall the specific conversation or exactly what she said to Russell at that time when she told her about the complaint.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. STANDARD OF REVIEW

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

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

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

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

III. ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Affirmed.

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

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