COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS, Appellant,	§	No. 08-15-00056-CR
v.	§	Appeal from the
FRANCES MUTEI, Appellee.	§	205th District Court
	§	of El Paso County, Texas
	§	(TC# 20140D03917)

O P I N I O N

Frances Mutei was indicted on two counts of sexual assault of a child younger than seventeen years of age, and one count of indecency with a child under the age of seventeen by sexual conduct, involving his then-sixteen-year-old niece, "J. M." [1] Prior to his jury trial, the trial court granted Mutei's motion *in limine* prohibiting the State from presenting evidence that Mutei had retained an attorney while the police were investigating the allegations, and that this attorney had sent a letter to the chief of police stating that Mutei did not intend to cooperate in the department's investigation. On the third day of trial, the trial court granted Mutei's motion for mistrial based on the State's alleged violation of that order. The trial court thereafter granted Mutei's application for a pretrial writ of habeas corpus, dismissing all of the pending charges

[1] The indictment alleged that on or about May 28, 2012, Mutei had "intentionally and knowingly" penetrated J.M.'s sexual organ with both his sexual organ and his fingers, and that he touched J.M.'s breast with his mouth and hand.

against him on the ground that the Double Jeopardy Clause prohibited his retrial. We hold that Mutei's retrial is not barred by the Double Jeopardy Clause because Mutei failed to establish that the State intentionally provoked defense counsel into requesting the mistrial to avoid an acquittal. For the reasons that follow, we reverse and remand.

FACTUAL SUMMARY

At trial, J. M. testified that she and her sister spent the 2012 Memorial Day weekend at her grandmother's house in El Paso, where her aunt and her aunt's husband, Mutei, were living at the time. During the evening of May 26, 2012, Mutei and his wife returned to the grandparents' home from a party, and J.M. asked Mutei if she could have a drink from a bottle of Crown Royal that they had brought with them. Mutei told J.M. to "wait a while," and later that night, after J.M.'s aunt had gone to bed, Mutai gave J.M. a total of four shots of whiskey, as well as a beer. At the time, the two of them were sitting on a couch in the grandparents' living room, and were alone with the exception J.M.'s sister, who was asleep on a nearby couch. According to J.M., after she became intoxicated, Mutei began kissing her, placed his hands on her breasts, inserted his finger into her vagina, and inserted his penis into her vagina.

J.M. did not initially report the incident to anyone, as she felt uncomfortable about the situation, and was concerned that if she made an outcry, it would disrupt her mother's upcoming wedding plans. However, when she returned home a day or two later, J.M. gave her mother a general description of what had occurred. Her mother went to the grandparents' home and confronted Mutei, who denied that the incident had occurred. At the grandfather's request, J.M.'s mother decided not to report the matter to the police. However, she did allow a family friend to

take J.M. to be examined by her aunt, a doctor in Juarez, who upon examining J.M., found "scratches" and "tearing to the vaginal area."

When J.M.'s father learned of the incident a few days later, he immediately contacted the police and took J.M. to a hospital in El Paso, where a sexual assault examination was performed on her by a Sexual Assault Nurse Examiner (SANE) nurse. The nurse testified that she did not find any injuries or physical evidence of an assault, but explained that the negative findings were not necessarily inconsistent with a finding of sexual assault, particularly given the delay that had occurred in conducting the examination. El Paso Police Officer Frederick Gomez testified that he conducted an interview with J.M. and her father that same day. J.M. reported that Mutei had forcibly pulled down her pants, placed his finger in her vagina, and had forced her to have sexual intercourse with him. Gomez spoke with J.M.'s mother, who reported that the child's aunt examined her earlier and had found "tearing to the vaginal area[.]" As discussed in more detail below, Detective Cory Balke was assigned to investigate the case on June 4, 2012, and attempted to make contact with the various family members who had been at the grandparents' house at the time of the assault.

The Motion in Limine

Apparently learning of the police department's investigation, Mutei retained counsel who sent a letter to the El Paso Chief of Police informing him that Mutei had retained counsel, that he would not be speaking with the police about the matter, and that he would not be cooperating with the department's investigation. Prior to trial, Mutei filed a motion entitled, "Motion in Limine re: Evidence Relating to Retaining Attorney," seeking to prohibit the State from making any reference to the letter at trial, because it would violate both his Fifth Amendment rights and Article 38.38 of

the Texas Code of Criminal Procedure, which prohibits the State from introducing evidence of a defendant's decision to retain counsel and further prohibits it from commenting on that decision.[2] At a pretrial hearing on the motion, defense counsel pointed out that the letter was referenced in three different police reports, and explained that he wanted to ensure that the detectives who investigated the case were aware that they could not refer to the letter in their trial testimony. The trial court granted the motion, concluding that the State would not be permitted to "go into any of that," as it was "not fair game." The trial court further announced that if the State introduced any such evidence, it would declare a "mistrial due to prosecutorial misconduct."

Detective Balke's Testimony

At trial, Detective Balke testified at length regarding his investigative efforts, which began with an interview that he conducted with both J.M. and her father the day after he received the case. Based on his interview and his review of Officer Gomez's report, Balke believed that J.M. had made a credible outcry. However, he noted there were several impediments to his investigation, including the fact that J.M. had delayed in making her outcry and had washed the clothes she had been wearing at the time of the assault. He explained that J.M. and her father informed him of their belief that someone at the grandparents' house had either shampooed or removed the couch where the assault had taken place. Based on this information, Detective Balke believed there was no reason to obtain a search warrant of the residence, and determined that the next step in his investigation would be to interview and obtain statements from the individuals who

[2] Article 38.38 of the Code provides that, "Evidence that a person has contacted or retained an attorney is not admissible on the issue of whether the person committed a criminal offense[,]" and further provides that "neither the judge nor the attorney representing the state may comment on the fact that the defendant has contacted or retained an attorney in the case." TEX. CODE CRIM. PROC.ANN. art. 38.38 (West 2005); *see also Hardie v. State*, 807 S.W.2d 319, 322 (Tex.Crim.App. 1991) (*Hardie II*) (recognizing that "evidence of an accused invoking his or her right to counsel may indeed be construed adversely to a defendant and may improperly be considered as an inference of guilt").

had been present on the night of the assault. Balke made several attempts to speak with these potential witnesses. He went to the home on two occasions and left phone messages with the witnesses, all of which met with "negative results." Believing the witnesses were being uncooperative, Balke terminated his investigation, and the matter was turned over to the district attorney's office, which submitted the matter to the grand jury without further investigation.

In response to the prosecutor's questioning regarding the investigative steps he took prior to turning the matter over to the district attorney's office, Balke testified that he also tried to speak with Mutei, but that this effort similarly "met negative results." Defense counsel objected to that statement, and the trial court sustained the objection. In a bench conference, the prosecutor argued that Balke's testimony did not violate the order *in limine*, beause the order only prohibited the State from referencing the fact that Mutei had retained an attorney who had sent a letter to the police chief, and that Balke had not mentioned either of those facts. The prosecutor also sought permission to continue questioning Balke about his investigation, arguing that Mutei had attacked the integrity of the police department's investigation, and that it was necessary to allow the detective to explain why he terminated his investigation prematurely.[3] The trial court agreed to allow the State to continue that line of questioning, to "see where it goes." The trial court did not admonish either the prosecutor or the detective at that time.

Upon further examination by the prosecutor, Detective Balke once again described his unsuccessful efforts to contact the potential witnesses, adding that he "tried to reach the other involved party to get both sides of the story" before obtaining a warrant for Mutei's arrest. The prosecutor advised Balke that he was "going to stop [him] right there," and the detective did not

[3] In his opening statement, defense counsel criticized the police department's investigation, including its failure to search the grandparents' house for evidence, and its failure to speak with the other family members who were in the house at the time of the alleged assault.

elaborate any further on his attempts to speak to Mutei. Defense counsel did not object to that testimony, and the trial court provided no admonitions to the State or to the detective.

Defense counsel cross-examined Detective Balke, focusing primarily on the manner in which he conducted his investigation, eliciting testimony in which Balke acknowledged that he did not get a search warrant for the grandparents' house, did not dust for fingerprints, and did not get a DNA sample from Mutei. Defense counsel then asked if it was possible to "get a search warrant for someone's DNA," to which Detective Balke responded in the affirmative. Counsel asked the detective whether he had done "that in this case," and if he had obtained any DNA from Mutei. In response, Detective Balke replied, "Mr. Mutei wouldn't speak with me."

Motion for Mistrial

Defense counsel objected that the detective's response -- which he pointed out was not directly responsive to the prosecutor's question -- was an intentional violation of the trial court's order *in limine*, and then moved for a mistrial, contending that the detective's testimony had "poisoned the whole jury." The trial court expressed its agreement that Detective Balke had deliberately and intentionally violated the order *in limine* and that his testimony was "unresponsive" to the prosecutor's question; he further opined that the detective knew "exactly what he [was] doing" when he gave his response, finding it significant that Balke was experienced with testifying in court, and had been cautioned "not to volunteer information."

In an attempt to ascertain Balke's intent, the trial court allowed the prosecutor to question him about his knowledge of the order *in limine*. Balke recalled that the prosecutor had spoken with him about the order before trial, and then expressed his belief that it related to the fact that Mutei had retained defense counsel to represent him and his "Fifth Amendment right not to

incriminate himself[.]" When asked if he had intended to testify about "anything having to do with the defendant testifying, cooperating, or anything having to do with his Fifth Amendment right," the detective responded, "No. My response [to] the question---." At that point, the trial court cut Balke off, admonishing him that the court did not believe his testimony was in fact "responsive to the question [he was] asked." Balke explained that he did not intend to violate the trial court's order, and that his intent was to try to explain that DNA can be obtained either voluntarily or through a warrant, and that he was unable to obtain Mutei's DNA voluntarily, as he was "never in contact with him." The trial court once again cut him off, admonishing him that he believed his testimony had been non-responsive to defense counsel's question. The trial court informed the parties that it was taking the motion under advisement, and after informing the jury to disregard Detective Balke's testimony, the court allowed the trial to proceed for the remainder of that day.

The next morning, the trial court heard additional arguments from counsel and granted a mistrial. The court explained that he believed Detective Balke had "deliberately" violated the order *in limine*, with the "intention of harming" the defendant's case, and that it was granting the motion for mistrial in order to "punish[] the deliberate, intentional conduct of that officer," adding that it would not allow witnesses to "flagrantly disregard the orders of the Court[.]"

Dismissal of the Charges

Mutei then filed an application for a pretrial writ of habeas corpus, in which he argued that a retrial of his case was prohibited by the Double Jeopardy Clause, and that all of the pending charges against him should be dismissed. At the hearing on the application, the trial court once again stated its belief that Balke's testimony was a "deliberate" violation of the order *in limine*, and

that the detective had intentionally "goad[ed]" defense counsel into requesting a mistrial. The court signed a written order granting the writ, but did not include any findings of fact or conclusions of law in its order. It is from this order that the State appeals.

MUTEI'S MOTION TO DISMISS THE STATE'S APPEAL

Before addressing the merits of the State's appeal, it is necessary to resolve a jurisdictional issue. Mutei has filed a motion to dismiss the State's appeal, arguing that the State filed its notice of appeal in the wrong cause number, and that its appeal should therefore be dismissed for lack of jurisdiction. The confusion appears to have been caused by the actions of the El Paso County District Clerk's Office, which placed a handwritten civil cause number on Mutei's pretrial writ application, 2015DCV0070, despite the fact that Mutei captioned it with the original criminal cause number, 20140D03917. The record does not reflect the basis for the assignment of a civil number to the application filed in the criminal case. We note that in contrast to a post-conviction writ, a pretrial writ based on a double jeopardy claim of this nature should be filed and heard in the pending criminal case. *See generally Ex parte Perry*, 483 S.W.3d 884, 895 (Tex.Crim.App. 2016) (noting that double jeopardy claims may be raised in pretrial habeas proceedings).

Throughout the pretrial writ proceedings, the trial court and both parties recognized that Mutei's application had been properly filed in the original criminal cause number, and they properly referenced that number throughout the proceedings. Mutei filed a brief in support of his application, referencing only the criminal cause number in the caption, and it appears that Mutei's brief was filed solely in the criminal case. At the hearing, the trial court called the matter of the criminal case, and both Mutei and the State announced ready for the hearing. The caption on the

order granting the writ application reflects the criminal cause number only, and appears to have been filed solely in that case.

The State thereafter filed its notice of appeal referencing the criminal cause number, and clearly indicating its intent to appeal from the trial court's order in that same cause number.[4] We conclude that the State's notice of appeal was properly and timely filed, thereby properly invoking our jurisdiction. [5] Mutei's motion to dismiss is denied.

DECISION TO GRANT MUTEI'S HABEAS PETITION

In a single issue, the State contends that the trial court erred by granting Mutei's application for a pretrial writ of habeas corpus and dismissing the charges against him, contending that Mutei's retrial is not prohibited by the Double Jeopardy Cause.

Standard of Review

An applicant for a writ of habeas corpus bears the burden of proving his allegations by a preponderance of the evidence. *Ex parte Thomas,* 906 S.W.2d 22, 24 (Tex.Crim.App. 1995). The applicant also bears the burden of ensuring that a sufficient record is presented to show error requiring reversal on appeal. *See Ex parte Chandler,* 182 S.W.3d 350, 353 n.2 (Tex.Crim.App. 2005); *Ex parte Kimes,* 872 S.W.2d 700, 703 (Tex.Crim.App. 1993).

Generally, a trial court's decision denying habeas relief will be upheld absent an abuse of discretion. *Ex parte Wheeler,* 203 S.W.3d 317, 324 (Tex.Crim.App. 2006). In reviewing a trial

[4] The State's notice of appeal was filed pursuant to Article 44.01(a)(1), which authorizes the State to appeal an order that dismisses an indictment, and Article 44.01(a)(4), which authorizes the State to appeal an order that sustains a claim of former jeopardy. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(1),(4) (West Supp. 2016). To perfect an appeal of this nature, the State must file its notice of appeal within twenty days after the trial court enters its appealable order. *See* TEX. R. APP. P. 26.2(b); TEX.CODE CRIM.PROC.ANN. art. 44.01(a)(1),(4). If the State does not perfect its appeal by filing a timely notice, it fails to invoke the jurisdiction of the appellate court. *State v. Muller*, 829 S.W.2d 805, 812 (Tex.Crim.App. 1992). In the present case, the State filed its notice of appeal on February 19, 2015, indicating its intent to appeal the trial court's order of January 30, 2015, well within the 20-day allotted timeframe.

[5] Mutei does not allege and the record does not reflect that the order was also filed in cause number 2015DCV0070.

court's decision to grant or deny habeas relief, we review the evidence in the light most favorable to the trial court's ruling, and defer to the determinations of historical fact that are supported by the record. *Id*; *see also Ex parte Masonheimer*, 220 S.W.3d 494, 507 (Tex.Crim.App. 2007). Nevertheless, we review *de novo* the application of the law to the facts found by the trial court. *State v. Moff*, 154 S.W.3d 599, 601 (Tex.Crim.App. 2004); *State v. Lee*, 437 S.W.3d 910, 911 (Tex.App.—El Paso 2014, pet. ref'd).

The Double Jeopardy Clause

The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense. U.S. CONST. amend. V; *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083, 2087, 72 L.Ed.2d 416 (1982)*; see also Stephens v. State,* 806 S.W.2d 812, 814-15 (Tex.Crim.App. 1990), *cert. denied,* 502 U.S. 929, 112 S.Ct. 350, 116 L.Ed.2d 289 (1991). Jeopardy attaches once a jury is empaneled and sworn. *Martinez v. Illinois,* ___ U.S. ___, 134 S.Ct. 2070, 2072, 188 L.Ed.2d 1112 (2014); *State v. Blackshere*, 344 S.W.3d 400, 404 (Tex.Crim.App. 2011). The Double Jeopardy Clause affords a criminal defendant a "valued right to have his trial completed by a particular tribunal." *Kennedy,* 456 U.S. at 671–72, 102 S.Ct. at 2087; *see also Ex parte Lewis,* 219 S.W.3d 335, 371 (Tex.Crim.App. 2007). As a general rule, after a jury has been impaneled and sworn, thus placing the defendant in jeopardy, double jeopardy bars a re-trial if the jury is discharged without reaching a verdict. *Ex parte Fierro,* 79 S.W.3d 54, 56 (Tex.Crim.App. 2002).

However, when a criminal defendant deliberately elects to "forgo his valued right to have his guilt or innocence determined before the first trier of fact" by voluntarily moving for and receiving a mistrial, the Double Jeopardy Clause does not bar a subsequent prosecution, subject to

a narrow exception when the prosecution engaged in conduct that was specifically intended to "provoke" or "goad" the defendant into moving for the mistrial to avoid an acquittal. *See Kennedy*, 456 U.S. at 675-76, 678-79, 102 S.Ct. at 2089, 2091; *Ex parte Lewis*, 219 S.W.3d at 371 (expressly adopting *Kennedy* standard for determining when to grant double jeopardy relief under Texas constitution after a defense-requested mistrial, requiring intentional, rather than merely reckless, conduct on the part of the prosecution).[6] To establish the existence of this exception, the defendant has the burden of demonstrating that the State acted with a "specific intent" to avoid the prospect of an acquittal at the first proceeding. *Ex parte Masonheimer*, 220 S.W.3d at 499, 507–08 (double jeopardy prohibited a retrial after the trial court granted the defendant's motion for mistrial, after finding that the State had intentionally refused to turn over *Brady* materials to the defense which led to a mistrial).

To differentiate the kind of intentional goading conduct that invokes the Double Jeopardy Clause from the inevitable mistakes that are made during the heat of a typical criminal trial, the Court of Criminal Appeals has set out a nonexclusive list of objective factors, which we consider in our analysis:

[6] As the court recognized in *Lewis*, prior to adopting the *Kennedy* standard it utilized a number of different tests over the years for determining whether double jeopardy barred a retrial following a defense-requested mistrial. *Ex parte Lewis*, 219 S.W.3d at 367-71. One included a three-part test established in *Ex parte Peterson*, 117 S.W. 3d 804 (Tex.Crim.App. 2003) ("*Peterson II*") which required a court to determine whether: (1) the mistrial was provoked by "manifestly improper prosecutorial misconduct"; (2) the mistrial was required because the prejudice produced from the misconduct could not be cured by an instruction to disregard; and (3) the prosecutor engaged in conduct with either the intent to goad the defense into requesting a mistrial or with a conscious disregard that its conduct posed a substantial risk that a mistrial would be declared. *Peterson II*, 117 S.W.3d at 816-17. The Court of Criminal Appeals in *Ex parte Lewis*, however, expressly overruled *Peterson II*, and adopted the more straightforward test utilized by the Supreme Court in *Kennedy*, which requires a showing that the prosecution had the specific intent to goad the defense into requesting a mistrial to avoid an acquittal, and not whether it acted with conscious disregard of the possibility of a mistrial. *Ex parte Lewis*, 219 S.W.3d at 371. Mutei points out that the State's brief nevertheless relies on the three-part test of *Peterson II*, and contends that because the State relies on a test no longer used by the court, we should conclude that the State's brief presents "nothing for review," and reject the State's appeal on that basis alone. We note that the third prong of the *Peterson II* test significantly mirrors the current test adopted in *Lewis*, and the State's brief adequately addresses the key issue of whether the State intentionally goaded Mutei into requesting a mistrial. We decline Mutei's invitation to reject the State's appeal for alleged briefing deficiency.

1) Was the misconduct a reaction to abort a trial that was 'going badly for the State?' In other words, at the time that the prosecutor acted, did it reasonably appear that the defendant would likely obtain an acquittal?

2) Was the misconduct repeated despite admonitions from the trial court?

3) Did the prosecutor provide a reasonable, 'good faith' explanation for the conduct?

4) Was the conduct 'clearly erroneous'?

5) Was there a legally or factually plausible basis for the conduct, despite its ultimate impropriety?

6) Were the prosecutor's actions leading up to the mistrial consistent with inadvertence, lack of judgment, or negligence, or were they consistent with intentional . . . misconduct?

Ex parte Ahn, No. 08-14-00082-CR, 2015 WL 4940053, at *6 (Tex.App.—El Paso Aug. 19, 2015, no pet.) (not designated for publication) (citing *Ex parte Wheeler,* 203 S.W.3d 317, 323–24 (Tex.Crim.App. 2006)).[7]

Can the Detective's Testimony be Imputed to the State?

As a preliminary matter, the State argues that any wrongdoing was committed solely by Detective Balke rather than the prosecutors, pointing out that the trial court repeatedly stated that it was the detective who provoked the mistrial when he intentionally violated its order *in limine*, despite the fact that the prosecutors had cautioned him about the order. At least two of our sister courts have found that when a State's witness has engaged in improper conduct resulting in a

[7] In *Wheeler*, the court described the sixth factor as being whether the State's conduct was consistent with either "intentional or reckless misconduct." *Ex parte Wheeler,* 203 S.W.3d at 323-24. *Wheeler* was decided before the court determined in *Lewis* that Double Jeopardy only prohibits a retrial when the State has engaged in intentional, rather merely reckless or negligent, conduct in provoking a mistrial. *Ex parte Lewis,* 219 S.W.3d at 371. Nevertheless, as we recently noted, these factors are still helpful in analyzing the key question of whether the State engaged in intentional conduct directed at provoking a defense-requested mistrial, and we therefore believe it is appropriate to apply these factors in resolving that question under the standard set forth in *Lewis*. *See, e.g.*, *Ex parte Ahn*, No. 08-14-00082-CR, 2015 WL 4940053, at *6, n.4 (Tex.App.—El Paso Aug. 19, 2015, no pet.) (not designated for publication); *see also Ex parte Roberson,* 455 S.W.3d 257, 260 (Tex.App.—Fort Worth 2015), *cert. denied sub nom. Roberson v. Texas*, 136 S.Ct. 490, 193 L.Ed.2d 358 (2015) (applying *Wheeler* factors in a post-*Lewis* case, in analyzing the question of whether the State intentionally goaded a defendant into requesting a mistrial).

defense-requested mistrial, the witness's conduct could not be imputed to the prosecution, absent a showing that the prosecutor had advance notice that the witness intended to engage in the misconduct. *See, e.g., Washington v. State,* 326 S.W.3d 701, 706-07 (Tex.App.—Houston [1st Dist.] 2010, no pet.) (where the prosecutor had no advance notice that its witness, a burglary victim, intended to engage in an "outburst" in front of the jury, which prompted a defense-requested mistrial, the witness's conduct could not be attributed to the prosecution for purposes of barring a retrial on Double Jeopardy grounds); *Ex parte Washington,* 168 S.W.3d 227, 237–38 (Tex.App.—Fort Worth 2005, no pet.) (where the State had no advance notice that its witnesses intended to provide improper testimony relating to the defendant's extraneous offenses which prompted a defense-requested mistrial, the witness's conduct could not be imputed to the prosecution for purposes of determining whether a retrial was barred for double jeopardy purposes). Some courts have recognized that in certain instances, the State's witnesses can be considered part of the "prosecutorial team" such that their intentional conduct can be attributed to the prosecution. *See, e.g., Ex parte Roberson,* 455 S.W.3d 257, 260-61 (Tex.App.—Fort Worth 2015), *cert. denied sub nom. Roberson v. Texas,* 136 S.Ct. 490, 193 L.Ed.2d 358 (2015) (court analyzed question of whether the conduct of a State's investigator in speaking with a jury venireman intentionally provoked defense counsel into requesting a mistrial in determining whether a retrial was barred, but concluded that the investigator had not acted intentionally); *see also Ex parte Masonheimer,* 220 S.W.3d at 506 (court must look to the "entire prosecutorial team," including all prosecutors in the case, in determining whether the State goaded the defendant into requesting a mistrial); *Ex parte Castellano,* 863 S.W.2d 476, 485 (Tex.Crim.App. 1993) (police officer "acted under color of law and was, therefore, a member of the prosecution team in the

investigation . . . and as such his knowledge of the perjured testimony was imputable to the prosecution").

As there does not appear to be a bright line rule that would prohibit a trial court from imputing the wrongful conduct of a State's witness to the prosecution in each and every instance, this issue is best addressed in our overall analysis of the *Wheeler* factors to which we now turn our attention.

Whether the State was Facing the Prospect of an Acquittal

Mutei argues that the detective's trial testimony came at a time when the State's case was going badly, asserting that there were "glaring deficiencies" and claiming that the defense had already "essentially destroyed the credibility of every aspect of the State's case" before the challenged testimony was given. Mutei believes that these alleged deficiencies motivated Detective Balke to intentionally provoke a defense-requested mistrial and thereby avoid the prospect of an acquittal. There are several problems with this argument.

First, Mutei's attorney failed to address the question of whether Detective Balke testified with the intent to provoke a mistrial to avoid the prospect of an acquittal, and instead argued at length that the detective had testified with the intent to "harass and prejudice the defendant."[8] The trial court was never asked to address that particular question, and it never expressed an opinion on whether the State was facing the prospect of an acquittal. To the contrary, the court's only finding on the issue of the State's intent was his finding that Detective Balke had provided the testimony

[8] At the hearing, Mutei did refer in passing to the correct standard, i.e., that the defense was required to demonstrate that the State acted with the intent to avoid the prospect of an acquittal. But his entire argument was based on the prejudice he was allegedly suffering by not having his case resolved by the first jury that was empaneled, such as the fact that he was still on bond and had the charges "hanging over his head."

with the intent of "harming" the defendant -- a standard that has no bearing on the question of whether the State acted with the intent of avoiding the prospect of an acquittal.

Moreover, our independent review of the record fails to reveal the existence of any "glaring deficiencies" in the State's case that would have supported a finding that the State was in fear of an acquittal. J.M. provided detailed and graphic testimony concerning Mutei's assault from which a reasonable jury could have convicted Mutei of all three charges. While Mutei contends that there were inconsistencies in J.M.'s testimony and the reports that she gave to the SANE nurse and police officers, he has failed to convince us that these were of such a magnitude that the State would have been in fear of the possibility of an acquittal.[9] And despite his belief that J.M.'s credibility was destroyed because she delayed in making her outcry and the SANE nurse found no evidence of physical trauma, we do not believe that these factors would have put the State in fear of an acquittal. J.M. adequately explained her reasons for delaying her outcry, and the SANE nurse testified that the lack of physical trauma was not inconsistent with a finding of sexual assault. *See also Garcia v. State*, 563 S.W.2d 925, 928 (Tex.Crim.App. 1978) (physical evidence is not required when the complainant provides ample testimony to establish that the sexual assault occurred); *Bargas v. State*, 252 S.W.3d 876, 889 (Tex.App.—Houston [14th Dist.] 2008, no pet.) (concluding that medical evidence is not required when complainant provides detailed testimony sufficient to establish that the accused committed aggravated sexual assault). In virtually any criminal proceeding, there will be inconsistencies and attacks on the credibility of the State's

[9] In particular, Mutei contends that the evidence revealed that J.M. gave conflicting factual accounts at trial and to the SANE nurse and police officers, including whether her sister was present in the living room when the assault occurred; whether she was wearing a sanitary napkin at the time of the assault; the type of undergarments she was wearing at the time of the assault; the manner in which Mutei was able to penetrate her vagina, either by pushing aside her clothing or penetrating her through an opening in her undergarments; her failure to report to the SANE nurse that Mutei used his fingers to penetrate her, and/or that he touched her breast; and discrepancies in terms of how many minutes the actual assault lasted.

witness, which the jury will be called upon to resolve. *See, generally Bargas*, 252 S.W.3d at 888 (it is the role of the jury to reconcile conflicts, contradictions, and inconsistencies in the evidence); *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex.Crim.App. 1999) (the jury is the sole judge of witness credibility, and is free to believe or disbelieve any portion). At the time the mistrial was declared, the State's case was proceeding along in an ordinary manner, with no "smoking gun" inconsistencies. We disagree that the State's case was going so badly that it would have been motivated to intentionally provide a mistrial.

Moreover, Detective Balke had been placed under the "Rule," and therefore would have had no idea what was occurring during the trial prior to his testimony. In other words, he would not have known whether the trial was going poorly for the State or whether the possibility of an acquittal was looming on the horizon. *See generally Russell v. State*, 155 S.W.3d 176, 179 (Tex.Crim.App. 2005) (the procedure of excluding witnesses from the courtroom is commonly called putting witnesses "under the rule," in order to prevent the testimony of one witness from influencing the testimony of another). To find intentional wrongdoing on the State's part, the trial court would have been required to assume that the prosecutors -- who had been in courtroom throughout the trial -- believed that the trial was going so badly that they conspired with Detective Balke in a coordinated and intentional effort to provoke defense counsel into requesting the mistrial to avoid an acquittal. Mutei never made this argument in the trial court, and the trial court made no finding of collusion, nor does the record suggest that any collusion occurred. Nevertheless, Mutei appears to believe that the prosecutors were to blame for Balke's testimony because they failed to caution him about the order *in limine.* The record reveals that the prosecutors did speak with Balke and told him that the order pertained to Mutei's decision to retain

counsel and his refusal to cooperate with the investigation. The trial court's wrath was directed at the detective and it made no findings that the prosecutors engaged in any intentional wrongdoing in this regard, nor do we find any basis in the record for such a finding. We conclude that this first factor weighs heavily in favor of the State.

Whether the Trial Court Repeatedly Admonished the State or Detective Balke to Avoid Violating the Order *In Limine*

Mutei next contends, without citation to the record, that the trial court repeatedly admonished the State to avoid violating the order *in limine* before Detective Balke testified.[10] The record reveals otherwise. Before Detective Balke testified, defense counsel lodged only one objection to his testimony. This occurred when the detective testified that his attempts to speak with Mutai had led to negative results, and although the trial court initially sustained the objection, it did not admonish Detective Balke or the prosecutor about violating the order *in limine*. Instead, the court allowed the State to continue questioning the detective about his investigation.[11] Where the record indicates that the trial court did not once admonish the State to avoid violating the order *in limine* prior to granting a mistrial, this factor weighs in favor of the State. S*ee, e.g.*, *Ex parte Wheeler*, 203 S.W.3d at 328 (holding that this factor weighed in the State's favor where there was no evidence that the prosecutor engaged in repeated misconduct, concluding that a single violation of an order *in limine* is insufficient to demonstrate that the prosecutor's conduct was intentional).

Whether the State's Conduct was "Clearly Erroneous" or Alternatively, Whether the State Acted in "Good Faith" and with a "Legally or Factually Plausible" Basis in Mind

[10] Mutei further claims, again with no citation to the record, that one of the prosecutors "violated the motion [sic] in limine no less than 8 times" before the trial court entertained the defense motion for a mistrial.

[11] During redirect, *after* the challenged testimony was given, defense counsel objected one time that Detective Balke was violating the order *in limine* when he testified that the grandparents were being "evasive," but the trial court overruled his objection.

We examine the last three factors together, given their related nature. We emphasize that the key question in examining all three factors turns on whether Detective Balke's testimony clearly violated the order *in limine*. This requires a closer examination of both the motion *in limine* and the trial court's order thereon. Mutei's motion was focused exclusively on prohibiting any testimony regarding Mutei's decision to retain an attorney and the letter his attorney sent to the police chief indicating that Mutei did not intend to cooperate with the department's investigation.[12] At the pretrial hearing, the trial court confirmed that this was indeed the focus of the motion, noting that the motion related to the communications that Mutei's attorney had with the police chief, and thereafter announced that the State was not to introduce any such evidence or it would risk a mistrial.

Detective Balke's testimony did not mention either the fact that Mutei had retained an attorney or that his attorney had sent the letter in question; instead, his testimony was limited to one simple statement, i.e., that Mutei would not speak to him. The trial court nevertheless concluded that this testimony was a deliberate and intentional violation of its order. We believe that this conclusion was based, at least in part, on the trial court's failure to recall the exact parameters of the order and/or the scope of the detective's testimony. In turn, defense counsel appears to have contributed to this confusion, when he argued that the trial court had ordered the State's prosecutors and all of its witnesses to "refrain from alluding to or commenting on the fact that [Mutei] had exercised his right to remain silent when questioned by the police regarding the sexual assault incident for which he was on trial"). Defense counsel further took similar liberties

[12] Although Mutei's motion was directed solely at prohibiting any reference to the letter his counsel sent to the police chief, he argued that he was also seeking to prohibit the State from referencing Mutei's actions in "hiring an attorney and exercising a right not to discuss the case with anyone."

with his description of Detective Balke's testimony in his writ application, claiming that the detective violated the order *in limine* when he allegedly volunteered to the jury that Mutei had "refused to answer questions posed to him by the police regarding the alleged sexual assault incident for which he was on trial." Neither the motion nor the trial court's order were addressed to any police questioning, and Detective Balke never indicated that he had "questioned" Mutei -- only that Mutei "wouldn't speak with [him]" with no indication of the circumstances under which this refusal occurred.

When explaining his reason for granting the writ, the trial court expressed his belief that Detective Balke had done more than just comment on Mutei's "silence," and had instead "interfer[ed] with [Mutei's] right to have a lawyer involved in the matter." But the detective never mentioned that Mutei had retained an attorney and we fail to see how his testimony interfered with, or in any way implicated, his right to do so. We also disagree with the trial court's conclusion that Detective Balke's testimony violated Mutei's Fifth Amendment right to remain silent. The Fifth Amendment only protects a defendant against compulsory self-incrimination *after* a defendant has been arrested or when he is the subject of custodial interrogation; the Fifth Amendment does not prohibit the State from introducing evidence of a defendant's pre-arrest, pre-*Miranda* silence. *Salinas v. State*, 369 S.W.3d 176, 178-179 (Tex.Crim.App. 2012), *aff'd*, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013) (citing *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982); J*enkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980); *Cisneros v. State*, 692 S.W.2d 78 (Tex.Crim.App. 1985)). To the contrary, the Fifth Amendment right against compulsory self-incrimination is "simply irrelevant to a citizen's decision to remain

silent when he is under no official compulsion to speak." *Id*. Mutei's silence was not entitled to Fifth Amendment protection, and the State was permitted to introduce evidence of that silence. *Id.* at 179.

Because Detective Balke's testimony only related to Mutei's pre-arrest and pre-*Miranda* silence, and did not relate to Mutei's decision to retain counsel -- the only topic that was prohibited by the order *in limine* -- we conclude it was not clearly erroneous, as it did not violate either the order *in limine* or Mutei's Fifth Amendment rights. When the State's conduct cannot be considered clearly erroneous in the first instance, it logically follows that its conduct was provided in good faith belief, and without the intent to provoke a mistrial. *See e.g., State v. Lee,* 15 S.W.3d 921, 926 (Tex.Crim.App. 2000) ("*Lee II*"), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex.Crim.App. 2007) (as the prosecutor was allowed to comment on the defendant's pre-arrest, pre-*Miranda* silence, the comments were not clearly erroneous, and the prosecution could not be said to have acted with the wrongful intent of seeking a mistrial, the Double Jeopardy Clause did not bar a retrial of the defendant's case).[13] We find that the last three *Wheeler* factors also weigh in favor of the State.

Having found that all six *Wheeler* factors weigh in the State's favor, we conclude that there is insufficient evidence to support a finding that the State intentionally provoked a mistrial to avoid an acquittal. Because the trial court abused its discretion in granting the application for a writ of habeas corpus, we reverse and remand for further proceedings in accordance with our opinion.

[13] Although the Court of Criminal Appeals expressly overruled its holding in *Lee II*, it appears to have done did so only because that opinion used the now-rejected standard of allowing double jeopardy to bar a retrial based on a finding that the State provoked a mistrial in either an intentional or reckless manner. *Ex parte Lewis,* 219 S.W.3d 335, 367 (Tex.Crim.App. 2007) (criticizing *Lee II*'s discussion of the definitions of both intentional and reckless conduct). We believe that despite the *Lewis c*ourt's criticisms of *Lee II*, the court's analysis in *Lee II* that a prosecutor could not be accused of clearly erroneous or otherwise wrongful conduct where the conduct was legally permissible, still holds true.

ANN CRAWFORD McCLURE, Chief Justice

February 10, 2017

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

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