In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00423-CR

THE STATE OF TEXAS, Appellant

V.

DANTE TYRONE RUSHING, Appellee

On Appeal from the 253rd District Court
Liberty County, Texas
Trial Cause No. CR31430

OPINION

In this appeal, we are asked to decide whether the trial court abused its discretion by granting Dante Tyrone Rushing's habeas application on the basis that the Double Jeopardy Clause barred the State from retrying him after the trial court granted his request for a mistrial and then ordered that his indictment be dismissed.[1]

[1] Because the trial court granted Rushing's application seeking a pretrial writ of habeas corpus, we have jurisdiction over the State's appeal. *See* Tex. Code Crim. Proc. Ann. art. 44.01(a)(1) (West Supp. 2016).

See U.S. CONST. amend. V; Tex. Const. art. I, § 14. We conclude the evidence and circumstances showing why the mistrial occurred fails to support the trial court's conclusion that anyone on the prosecutor's team engaged in conduct intended to provoke or goad Rushing's attorney into seeking the mistrial. We sustain the State's issues on appeal, and we reverse the trial court's order granting Rushing's application for habeas relief.

Background

In December 2014, the State indicted Rushing for possession, with the intent to deliver, 400 or more grams of cocaine including adulterants and dilutants. *See* Tex. Health & Safety Code Ann. § 481.112(f) (West 2017). The record of the proceedings in the trial court show that Rushing was arrested after police found him standing near a couch inside Cedrick Bass's residence on the day they executed a warrant to search Bass's home. Police found approximately 725 grams of crack and powder cocaine in Bass's home. The police arrested Rushing, Bass, and some other individuals they found inside Bass's house when they executed the search warrant. The evidence before us also shows that the police obtained the warrant that authorized Bass's home to be searched based on information that police had developed the day before when a confidential informant approached Bass's house and purchased two rocks of crack cocaine from Bass. Subsequently, Bass and

Rushing were indicted for possession with intent to deliver the cocaine discovered inside Bass's home.

The same trial judge that presided over Rushing's case presided over Bass's case. One of the issues that arose in Bass's case concerned whether Bass was entitled to discover the identity of the confidential informant who purchased drugs from him on the day before the search occurred. At Bass's request, the trial court ordered the prosecutors handling Bass's case to give Bass's attorney the confidential informant's name and the audio recording that captured the transaction between the confidential informant and Bass involving Bass's sale of the two rocks of crack cocaine. *In re State of Tex.*, Nos. 09-15-00192-CR, 09-15-00193-CR, 2015 Tex. App. LEXIS 12083 (Tex. App.—Beaumont Nov. 25, 2015, orig. proceeding) (mem. op., not released for publication) (granting the State's request to set aside the trial court's discovery order, which required the State to produce a copy of a recording made by the confidential informant to defense counsel for Bass). The State sought relief from the order requiring it to disclose the information involving its confidential informant. At the State's request, we overturned the trial court's discovery order. *Id*. Subsequently, Bass pleaded guilty to possession with intent to deliver, but he reserved his right to appeal his convictions on the basis that the State failed to reveal the confidential informant's name, the audio recording from the transaction

involving the confidential informant, or a written transcription of the recording. *See Bass v. State*, Nos. 09-16-00144-CR, 09-16-00145-CR, 2017 Tex. App. LEXIS 6646, *6 (Tex. App.—Beaumont July 19, 2017, no pet. h.) (mem. op., not released for publication). Bass appealed from the judgment convicting him of being in possession of the cocaine discovered by police in the search of his house, and we rejected Bass's complaints after concluding that the confidential informant's identity and the recording were not exculpatory evidence in Bass's case on the basis that Bass had not been "charged with the offense of selling drugs to the confidential informant, which is what the recording captured." *Id*.

When Rushing's case was tried, it became apparent to the trial court that the prosecutors handling Rushing's case had failed to provide Rushing's attorney with the confidential informant's identity, disclose that an audio recording existed of the transaction between Bass and the confidential informant, or provide Rushing's attorney with excerpts from the recording to show that the confidential informant told the police that only Bass was present when the confidential informant purchased the drugs from Bass. In Rushing's case, nothing in the proceedings from the trial court show that the State ever charged Rushing with possessing the two rocks of crack cocaine purchased by the confidential informant, or that the prosecutor intended to claim that Rushing was being charged with possessing the drugs that

Bass sold to the confidential informant. Additionally, nothing in the record indicates that Rushing ever raised any issues challenging the validity of the search warrant that authorized the search conducted on Bass's home.

Only two witnesses testified in Rushing's case before the trial court declared a mistrial. Officer Paul Young was the first witness called in Rushing's trial. Officer Young provided the information used to obtain the search warrant on Bass's home. In Rushing's trial, Officer Young testified that he was one of the officers involved in the search that led to Rushing's arrest. At an early stage in Officer Young's testimony, the lead prosecutor showed Officer Young a box that contained several exhibits, which was marked Exhibit 90. Officer Young indicated that Exhibit 90 was a box that Peggy Bourgeois, an evidence technician employed by the Sherriff's Office, sent to a lab in Houston so that its contents could be tested. The testimony in the trial shows that Exhibit 90 contained packages of drugs that were marked as three separate exhibits: Exhibits 90A, 90B, and 90C. The testimony showed that Exhibit 90A contained two rocks of crack cocaine, Exhibit 90B contained eleven bags of crack cocaine and four bags of powder cocaine weighing a total of 725 grams, and Exhibit 90C contained crack cocaine that weighed approximately ten grams. Neither of the State's witnesses mentioned the weight of the two rocks of crack cocaine in Exhibit 90A. Peggy Bourgeois, the State's other witness, confirmed that she put the

various packages of drugs gathered by the police in their investigation of the four individuals arrested at Bass's home into one box which she then sent to Houston for testing.

While Officer Young was on the stand, the lead prosecutor asked him to explain what was in Exhibit 90A. Officer Young testified that the package appeared to be two rocks of crack cocaine that "we purchased through our confidential informant[,]" and used "to get the search warrant for the residence." The record shows that the jury did not learn about the confidential informant for the first time based on Officer Young's reference to the confidential informant during his testimony. Instead, the record shows that Rushing's attorney first introduced the fact that a confidential informant had been involved with the police, as he told the jury in opening statement that on the day before Bass's home was searched, Bass sold the confidential informant cocaine at Bass's house. Rushing's attorney also implied in his opening statement that the transaction with the confidential informant is the reason that police obtained the warrant used to search Bass's home.

Officer Young briefly described the search conducted on Bass's home before the trial court declared the mistrial. Officer Young testified that police recovered cocaine in several rooms of Bass's house, and that they placed the drugs found in the house in a container marked for trial as Exhibit 90B. Officer Young explained

that the drugs contained in the exhibit marked as Exhibit 90B weigh approximately 725 grams. According to Officer Young, the drugs placed into Exhibit 90B were found in different rooms of Bass's house. Officer Young also indicated in his testimony that the drugs the police placed into Exhibit 90B were "[a]dded together."

When Officer Young mentioned that the police added the drugs together that they placed in Exhibit 90B, the trial court interrupted and asked the lead prosecutor whether the drugs in State's Exhibit 90A were tested. In response, the prosecutor advised the trial court that the contents of Exhibit 90A had been tested. At that point, the trial court excused the jury, and outside the jury's presence asked Rushing's attorney "Do you see the problem yet?" Rushing's attorney responded, stating that had the State attempted to introduce Exhibit 90A into evidence there might be a chain-of-custody problem, but he also noted that the State had not yet offered Exhibit 90A into evidence. The trial court stated: "Well, it hasn't been introduced, so you're kind of getting at the problem." Next, the trial court asked the lead prosecutor in charge of Rushing's case whether he saw the problem. The lead prosecutor responded: "No, sir."

After the attorneys involved in the trial failed to demonstrate they were aware of any problem, the trial court explained its view that a discovery and disclosure problem had been created when the lead prosecutor had Officer Young discuss

Exhibit 90A in the jury's presence when the State had not disclosed to Rushing's attorney the confidential informant's name, a copy of the audio recording of the confidential buy, or the fact that the prosecutor knew that Rushing was not present when Bass sold the confidential informant the crack cocaine in Exhibit 90A. The record reflects that the trial court viewed the details of the confidential buy as exculpatory with respect to the charges against Rushing, and that the State should have disclosed the details of the confidential buy even though the State had not charged Rushing with being in possession of the two rocks of crack cocaine purchased by the confidential informant. When the trial court declared the mistrial, Exhibits 90, 90A, 90B and 90C had not been offered into evidence.

When it became apparent to the lead prosecutor that the trial court was implying that he intended to offer drugs into evidence that were not fruits obtained during the search of Bass's home, the lead prosecutor informed the trial court that he did not actually know that the cocaine in Exhibit 90A came from a confidential buy and was not included in the drugs discovered during the search. The trial court responded:

> The State did know. Maybe you didn't know. Hell, I knew. I mean, that's why I asked the question. Of course, I've tried all of these cases or I've been involved in some of the suppression hearings and things like that. The State knew. Now, you might not have known. The State knew.

The trial court advised the attorneys that Exhibit 90A would not be admitted into evidence (despite the fact that it had never been tendered for admission). In addressing its view of the State's disclosure and discovery obligations to Rushing, the trial court referred to the Michael Morton Act and stated: "I'm telling you, this should have all - - he (referring to Rushing's attorney) should have known all of this before trial, before the middle of trial." *See* Tex. Code Crim. Proc. Ann. art. 39.14(h) (West Supp. 2016) (requiring that the State "disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the [S]tate that tends to negate the guilt of the defendant"); *but see Bass*, 2017 Tex. App. LEXIS 6646, at *5 (explaining that the recording was not exculpatory in Bass's case because Bass was not charged with selling drugs to the confidential informant). After the trial court made its view of the State's discovery obligations clear, Rushing's attorney asked the trial court for a mistrial. The State responded that it had no objection, and the trial court granted Rushing's motion for mistrial. Officer Young never completed his testimony, which might have explained why the State ultimately charged Rushing with being in possession of all of the drugs that police found in all of the rooms in Bass's home.

Approximately one week after the mistrial occurred, Rushing filed his application for a pretrial writ of habeas corpus. In his application, Rushing claimed

that double jeopardy barred the State from retrying him on the charges of possessing the cocaine in the house. In his application, Rushing argued that the double jeopardy provisions of the United States and Texas constitutions prohibited the State from retrying him under circumstances showing that Exhibit 90A contained cocaine from a source that was not a product of the search police conducted on Bass's home.

In late October 2016, the trial court conducted a hearing on Rushing's habeas application. No witnesses were called during the hearing, and the trial court advised the State when the hearing began that rather than merely presenting argument, it should file a written response to Rushing's application for habeas relief. In the written response that the State subsequently filed, it argued that Officer Young testified about the contents in Exhibit 90A because the container of drugs from the search and the container of drugs purchased by the confidential informant were all placed together in one box. According to the State, Officer Young realized for the first time while testifying in Rushing's case that not all of the drugs in the box marked Exhibit 90 came from the search conducted on Bass's home. The State also suggested that its lead prosecutor, in preparing the case, failed to have the State's witnesses "empty each evidence bag **pre-trial**, and identify each item of evidence contained in the evidence bag, to make sure that there were **no** items that were not obtained during the execution of the search warrant." According to the State, the

circumstances surrounding Exhibit 90A showed that the actions of the prosecutor were inadvertent, not intentional.

We note that no affidavits accompanied either Rushing's application for habeas relief or the State's response. After considering the State's response, the trial court granted Rushing's application and ordered that Rushing's indictment be dismissed. Subsequently, the trial court provided the parties with its written findings of fact and conclusions of law. The findings that are most relevant to the double jeopardy issue provide, as follows:

- The State caused Exhibit 90A, which contained the two rocks of crack cocaine purchased by the confidential informant, to be marked as an exhibit in the presence of the jury.
- During the testimony of Officer Young, "the Court realized that the State had commingled the two crack rocks that were used to obtain the search warrant, with the 725 grams of crack and cocaine that were seized during the execution of the search warrant."
- The trial court knew from a case involving Bass that the rocks of crack cocaine were purchased by a confidential informant, and that based on an *in camera* inspection of the audio recording of the confidential informant's purchase of the drugs from Bass, the recording indicated

that only Bass was present during that transaction and that Rushing was not present when the confidential informant's purchase occurred.

- Rushing's absence from the location of the confidential transaction is either exculpatory or mitigating evidence that should have been disclosed to Rushing and his attorney prior to trial.
- The State did not reveal to Rushing or his attorney that the crack cocaine in Exhibit 90A "were commingled with the drugs seized during the execution of the search warrant."
- When the State marked the drugs as Exhibit 90A in the presence of the jury, the confidential informant "became a necessary fact witness to prove up the chain of custody. The State thus waived any informant privilege of confidentiality."
- The State should have revealed that Rushing was not present during the confidential informant's purchase of the drug, which is information that could have been revealed without revealing the identity of the confidential informant. Rushing's attorney should have been informed that the State had possession of an audio recording that showed Rushing was not present when the confidential buy occurred, and a copy of the recording should have been given to Rushing's attorney or the State

should have informed Rushing's attorney that it was claiming the recording was privileged. Regardless of any privilege, the State was obligated to disclose that Rushing was not present when the confidential informant purchased the drugs that are in Exhibit 90A.

- The lead prosecutor handling Rushing's case suggested that he was unaware of the contents of the audio recording, but the trial court was aware that other prosecutors in the district attorney's office had been involved in Bass's case and that they knew about the statements in the recording.
- The existence of the audio recording is material to matters involved in the action against Rushing because the transaction between Bass and the confidential informant led to the search warrant that resulted in Rushing's arrest.
- "When the State marked the drugs as Exhibit No. 90A, [in the presence of the jury,] the State waived any informant confidentiality privilege and the State should have disclosed the Confidential Informant's name as a witness[]" and "provided a copy of the audio recording to Defendant Rushing and his attorney."

The trial court concluded that the State commingled the drugs in Exhibit 90A and Exhibit 90B, that it had caused the exhibits to be marked in the presence of the jury, and that it had failed to disclose to Rushing's attorney mitigating evidence in the State's possession before Rushing's trial. The trial court concluded that the State's misconduct "provoked or goaded the defense attorney to move for a mistrial."

Issues

On appeal, the State argues the trial court abused its discretion by granting Rushing's application for habeas relief.[2] According to the State, the trial court abused its discretion by ruling on Rushing's application without properly applying

[2] Although Rushing's application for habeas relief argued that allowing his retrial would violate his double jeopardy rights under both the United States and Texas constitutions, his application does not explain whether his double jeopardy claims are based on any differences he perceives exist in his rights under the state or federal constitutions. The cases cited in the parties' briefs discuss a defendant's rights under the Fifth Amendment Double Jeopardy Clause. The cases Rushing cites in his brief do not discuss whether the double jeopardy provision found in the Texas Constitution provides rights greater than the rights he has under the Fifth Amendment. Since the Court of Criminal appeals adopted Fifth Amendment standards in evaluating double jeopardy claims, regardless of whether a defendant's claims are based on the United States or Texas constitutions, we do not distinguish between Rushing's federal and state claims in resolving the arguments raised in Rushing's appeal. *See Ex parte Lewis*, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007) (adopting Fifth Amendment standards for double jeopardy claims to determine whether jeopardy applies following a defense-requested mistrial that is based on the double jeopardy clause in article one, section fourteen of the Texas Constitution).

the factors courts have been instructed to use to evaluate whether double jeopardy attaches to a defendant's case and bars the defendant from being retried.

Standard of Review

Generally, a defendant in a criminal case may not be put in jeopardy by the State twice for the same offense. U.S. CONST. amend. V; Tex. Const. art. I, § 14; *see also Pierson v. State*, 426 S.W.3d 763, 769 (Tex. Crim. App. 2014). Because a defendant has a right to have the jury empaneled and sworn in his case to try it, the protection provided to defendants under the Double Jeopardy Clause attaches after the jury is sworn. *See Pierson*, 426 S.W.3d at 769. Absent exceptional circumstances that show the prosecutor intentionally provoked a mistrial, the Double Jeopardy Clause is not violated if the trial ends prematurely. *Id.* at 770. The United States Supreme Court has explained that when the defendant is the party requesting the mistrial, the Double Jeopardy Clause generally does not bar the State from trying the defendant again. *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982); *Ex parte Lewis*, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007). Nonetheless, a retrial may be barred by double jeopardy if the defendant presents objective facts and circumstances to demonstrate that the prosecutor's misconduct in the case occurred because the prosecutor "intended to 'goad' the defendant into moving for a mistrial[.]" *Kennedy*, 456 U.S. at 676.

In a hearing on an application seeking pretrial habeas relief, the defendant bears the burden of proving his double jeopardy claim by a preponderance of the evidence. *Ex parte Coleman*, 350 S.W.3d 155, 160 (Tex. App.—San Antonio 2011, no pet.); *see also Ex parte Chandler*, 182 S.W.3d 350, 353 n.2 (Tex. Crim. App. 2005). When the defendant is the party who requested the mistrial, as is the case here, the record must show that the State intentionally provoked the defendant into requesting the mistrial. *See Ex parte Chandler*, 182 S.W.3d at 353 n.2. In reviewing the trial court's ruling on a request for habeas relief, we review the evidence in the light that is most favorable to the trial court's ruling. *See Ex parte Masonheimer*, 220 S.W.3d 494, 506 (Tex. Crim. App. 2007). Consequently, we will reverse the ruling only if the record shows the trial court abused its discretion based on the decision it made when ruling on the defendant's application seeking habeas relief. *See Ex parte Wheeler*, 203 S.W.3d 317, 319-20 (Tex. Crim. App. 2006).

In *Ex parte Wheeler*, the Court of Criminal Appeals addressed the matters a court should consider in assessing whether the prosecutor's misconduct goaded or provoked the defendant into requesting a mistrial:

> 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 or reckless misconduct? [3]

Id. at 323-24. These factors are not exclusive. *Id*. at 323.

Analysis

In the hearing conducted on his application for habeas relief, Rushing was required to prove under a preponderance of the evidence standard that at least one member of the prosecutor's team intentionally engaged in conduct to provoke or goad Rushing's attorney into requesting a mistrial. *See Ex part Chandler*, 182 S.W.3d at 353 n.2. Although Rushing bore the burden of proof on his application, he called no witnesses in the hearing. Additionally, in his application, Rushing argued that the State had recklessly violated its discovery obligations to him under

[3] The Court of Criminal Appeals in *Ex parte Wheeler* referred to reckless or intentional misconduct. *See Ex parte Wheeler*, 203 S.W.3d 317, 323-24 (Tex. Crim. App. 2006). However, it subsequently clarified *Wheeler*, explaining that double jeopardy arises only if the misconduct of the members comprising the prosecution team intentionally goaded or provoked the defendant's attorney into making a request for a mistrial. *Ex parte Lewis*, 219 S.W.3d at 336-37, 371.

the Michael Morton Act: He did not suggest that any member of the prosecutor's team engaged in the conduct that had been intended to provoke a mistrial. *See* Tex. Code Crim. Proc. Ann. art. 39.14 (West Supp. 2016).

The trial court's findings and conclusions fail to distinguish between the conduct of Officer Young and Peggy Bourgeois in investigating Rushing's case and the conduct of the attorneys who were on the prosecutor's team. *See Ex parte Masonheimer,* 220 S.W.3d at 506 (indicating that the prosecutor's office is viewed as an entity, so that claims involving misconduct extend to all who are in the prosecutor's office); *Ex parte Roberson*, 455 S.W.3d 257, 259 (Tex. App.—Fort Worth 2015) (evaluating the conduct of an investigator in the district attorney's office, who spoke to a juror during the defendant's trial, in evaluating whether double jeopardy barred the defendant's retrial); *Washington v. State*, 326 S.W.3d 701, 706-07 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (refusing to attribute witness's conduct to prosecution for double jeopardy purposes where prosecutor had no advance notice that its witness would engage in an "outburst" when he testified); *Ex parte Washington*, 168 S.W.3d 227, 237-38 (Tex. App.—Fort Worth 2005, no pet.) (refusing to attribute witness's conduct to the prosecution for double jeopardy purposes where the State had no advance notice that the witness intended to provide improper testimony about the defendant's extraneous offenses); *but see State v.*

Mutei, 2017 Tex. App. LEXIS 1194, **16-18 (Tex. App.—El Paso Feb. 10, 2017, pet. ref'd) (considering conduct of detective who testified in its double jeopardy analysis because "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"). While the trial court appears to have considered what it perceived to be police misconduct in handling the drugs in its double jeopardy analysis, we do not agree that the conduct of employees in the Sheriff's Office could be attributed to the State from the evidence before the trial court in Rushing's case. For instance, no evidence was presented in Rushing's trial or during the hearing on Rushing's application showing that Officer Young or Peggy Bourgeois were employed by the District Attorney's Office. There was also no evidence before the trial court showing that the prosecutor handling Rushing's case or any of those on the prosecutor's team had advance notice that either of the State's witnesses might mention that the rocks of crack cocaine in Exhibit 90A were obtained by police through a transaction that occurred involving Bass and a confidential informant. While the trial court's findings reflect that it perceived that the police mishandled the drugs they found in their investigation, its double jeopardy analysis is unclear regarding whether the trial court attributed what it perceived to be police misconduct to the prosecutor's team.

Since Rushing called no witnesses in the hearing that it conducted on Rushing's application for habeas relief, the trial court based its ruling on the circumstances and evidence presented during Rushing's trial. Those circumstances include the fact that Exhibits 90, 90A, 90B and 90C were marked but never offered. The circumstances include that Officer Young's testimony about Exhibit 90A occurred when he was attempting to respond to a broad question asked by the lead prosecutor about where the drugs in Exhibit 90A were recovered. The circumstances include the lead prosecutor's explanation during the trial regarding the questions he asked about Exhibit 90A indicating that before the trial, he was unaware that the drugs in the Exhibit 90A were not among the drugs that were found by police when they searched Bass's home.

While the trial court's findings state that the drugs in Exhibit 90A and Exhibit 90B were commingled, the record from the trial does not support that finding. Instead, the record from the trial shows that the police placed the drugs seized from Bass's home in a container marked Exhibit 90B, and that the police placed the drugs from the confidential buy in a container marked Exhibit 90A. It is also clear that Exhibit 90A was then placed in a box with other exhibits, including Exhibit 90B. Therefore, while a container that included drugs from the search of Bass's home and a container that included the drugs Bass sold to the confidential informant were all

placed within one box, which was marked Exhibit 90, the record does not show that the drugs in Exhibits 90A and 90B were added together or commingled.

Based on the evidence from the trial, the trial court could not have properly imputed any alleged police misconduct in their handling of the drugs from the investigation and the choice to place the containers holding the drugs from the investigation of all of the individuals arrested into one box for testing to the State's prosecutor's team charged with handling Rushing's prosecution. In the trial, Officer Young never testified that he was part of the prosecutor's team or indicated that he was an investigator assigned to the District Attorney's Office. Instead, the evidence that is before us in the appeal shows that Officer Young and Peggy Bourgeois work for the Sheriff's Office, and no evidence shows that either worked under the direction of the District Attorney's Office in Rushing's case. *See generally Ex parte Masonheimer,* 220 S.W.3d at 506.

Moreover, even if the trial court was aware that prosecutors in the District Attorney's Office, although not present during Rushing's trial, knew that Exhibit 90A contained the two rocks of crack cocaine that Bass sold the confidential informant, there is nothing showing that the lead prosecutor questioned Officer Young about Exhibit 90A with the intent to cause a mistrial. Instead, the explanation the lead prosecutor provided the trial court to explain why he had questioned the two

witnesses about Exhibit 90A shows that he was not aware that the drugs in Exhibit 90A were not products from the search executed on Bass's home. Additionally, nothing in the record shows that any of the other prosecutors in the District Attorney's office knew that the lead prosecutor intended to question Officer Young about Exhibit 90A in Rushing's trial before it occurred. Without testimony or circumstances showing that the purpose of introducing background evidence about the source of Exhibit 90A was to provoke a mistrial, the circumstances from the trial showing why the exhibit was discussed before the jury do not support the trial court's finding that the prosecutor's conduct in Rushing's case occurred because the lead prosecutor intended to cause a mistrial. Here, the actions of the lead prosecutor regarding Exhibit 90A show that the conduct occurred because he lacked knowledge about it, not that he intended to cause a mistrial. *See Wheeler*, 203 S.W.3d at 320.

The trial court's findings also make it clear that the trial court thought detailed information about the confidential buy was exculpatory information that Rushing's attorney was entitled to have before Rushing was tried. However, the record is undeveloped about whether any members of the prosecutor's team realized *before* Rushing's trial that information from the confidential informant's purchase of drugs from Bass was actually exculpatory of Rushing's guilt. Like Bass, Rushing was not charged with possessing or with selling the two rocks of crack cocaine that Bass sold

from his home on the day before the search occurred. In *Bass*, we explained that the evidence about the confidential buy was not exculpatory in Bass's case because the State did not charge Bass with selling drugs to its confidential informant. *Bass*, 2017 Tex. App. LEXIS 6646, at *6.

In our opinion, the exculpatory value of the evidence regarding the confidential buy is not clearly obvious, and nothing in the record from the trial or the hearing shows that the members of the team prosecuting Rushing knew the information had exculpatory value *before* Rushing was tried. Moreover, even if the evidence had established that the prosecution team in Rushing's case knew the evidence had exculpatory value *before* Rushing's trial, Rushing was still required to prove that the prosecutors withheld the information from him for the purpose of causing a mistrial and not because they thought the information was privileged. The circumstances in this case show the information was withheld because it was not perceived as exculpatory and because it was privileged under Rule 508 of the Texas Rules of Evidence. Finally, Rushing's attorney was aware that a confidential informant purchased drugs from Bass on the day before the search occurred. Under the circumstances, the State's failure to disclose was at best negligent or inadvertent conduct and the evidence fails to support the trial court's conclusion that the information was intentionally not disclosed because someone on the prosecutor's

team wanted to provoke Rushing's attorney into asking for a mistrial. *See Wheeler*, 203 S.W.3d at 320.

The fact that the mistrial occurred at a very early stage in the proceedings further supports our view that double jeopardy does not bar Rushing from being retried on the allegations in the indictment that he was found in possession of drugs weighing more than 400 grams on July 29, 2014, which is the day the house was searched. In his brief, Rushing agrees the trial was not going badly for the State when the mistrial occurred. *See Ex parte Wheeler*, 203 S.W.3d at 324. The trial court declared a mistrial after Peggy Bourgeois completed her testimony and Officer Young had partially completed his. When the mistrial occurred, the evidence before the jury had not yet explained how Rushing was tied to Bass's house, or how Rushing was tied to crack cocaine found in rooms other than the room that he was in when the police entered Bass's home. The trial court interrupted the trial before anyone on the prosecutor's team ever claimed that Rushing was associated with the drugs that Bass sold to the confidential informant, so nothing in the record shows that the prosecutor handling Bass's case was attempting to include the two rocks of crack cocaine in the cocaine he claimed Bass possessed. The record in Rushing's trial fails to show that the confidential informant's purchase of drugs came out in the trial for the purpose of causing a mistrial; instead, the circumstances show that the

information about the confidential informant's purchase were inadvertently mentioned by the witnesses during the trial in responding to the questions they were asked about the exhibits that contained drugs. *Id*.

The trial court's findings reflect that it also found the State waived the confidential informer's privilege in the course of reaching its conclusion that Rushing should not be subjected to another trial for possessing the cocaine in the house. According to its written findings, the trial court found the prosecutor's decision to mark Exhibit 90 and 90A in the presence of the jury made the confidential informant a "necessary fact witness to prove up the chain of custody." We disagree with the trial court's conclusion that the confidential informant became a chain of custody witness based on the marking of the exhibits.

Exhibits 90A and 90B were never offered into evidence, and merely marking them in the jury's presence did not result in a waiver of the informer's identity privilege, which is found in Rule 508 of the Texas Rules of Evidence. *See* Tex. R. Evid. 508 (Informer's Identity Privilege). Under Rule 508(a), the State may refuse to disclose a person's identity if the person (1) has furnished information to a law enforcement officer who is investigating a possible violation of the law, and (2) the information provided relates to or assists in the investigation. Tex. R. Evid. 508(a). Rule 508(c)(2)(A) provides the following exception to the privilege: "In a criminal

case, this privilege does not apply if the court finds a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence." Tex. R. Evid. 508(c)(2)(A).

In Rushing's case, the trial court clearly viewed the fact that the State knew Rushing was not present when Bass sold the cocaine in Exhibit 90A as exculpatory. However, the circumstances in Rushing's case do not show that he was charged with possessing or selling the cocaine involved in the transaction between Bass and the confidential informant, and nothing in the record shows that the State intended to argue that the two rocks of crack cocaine that Bass sold should be included among the drugs the State claimed that Rushing possessed. Moreover, given the fact that Rushing's attorney told the jury in opening statement that Bass and the confidential informant were the individuals involved in a sale that occurred before Bass's house was searched, its appears highly unlikely that the jury would have assumed that the State was attempting to tie Rushing to that transaction. The record also does not show that Rushing was indicted as a party to the transaction involving Bass and the confidential informant. Therefore, the confidential informant was not needed as a chain of custody witness where the circumstances show the State did not offer Exhibit 90A into evidence. The fact that Rushing was not present when that transaction occurred is also not a fact necessary to fairly determine Rushing's

innocence or guilt on charges that concern drugs found in Bass's home when it was searched.

We conclude the trial court's finding that the State waived the confidential informer's privilege is not supported by the record from Rushing's trial. We further conclude that the circumstances show that the State's nondisclosure regarding the details of the transaction that occurred involving Bass and the confidential informant were privileged based on the evidence presented during Rushing's trial. Therefore, in the hearing on his application for habeas relief complaining about the nondisclosure of privileged information, Rushing was required to demonstrate that the information that was withheld was not privileged, or to prove that someone on the prosecutor's team withheld privileged information that was necessary to a fair determination of his guilt or innocence from the charges alleged in the indictment, and that, in either case, the information had been withheld with the intent of provoking Rushing's attorney into requesting a mistrial.

In this case, the circumstances and evidence from the trial fail to show (1) that anyone on the prosecutor's team recognized the exculpatory potential of the evidence surrounding the confidential buy *before* Rushing's trial occurred; (2) that anyone on the prosecutor's team recognized that detailed information about the confidential buy was necessary to a fair determination of Rushing's guilt or

innocence of possessing the drugs in Bass's home, not those that police obtained in the confidential buy; and (3) that the information was intentionally and not inadvertently withheld for the purpose of causing a mistrial. After viewing the ruling in the light most favorable to the trial court's decision granting habeas relief, the evidence and circumstances do not support the trial court's conclusion that the nondisclosures occurred because anyone on the prosecutor's team intended to goad or provoke a mistrial. *See Kennedy*, 456 U.S. at 672-73; *Ex parte Lewis*, 219 S.W.3d at 336-37; *see also Ex parte Wheeler*, 203 S.W.3d at 323-24.

We hold the trial court abused its discretion by granting Rushing's application for habeas relief. *Id*. Because Rushing's retrial is not barred by double jeopardy, we reverse and set aside the trial court's order granting Rushing's application for habeas relief, and we remand the case to the trial court for proceedings consistent with the opinion.

REVERSED AND REMANDED.

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HOLLIS HORTON
Justice

Submitted on April 19, 2017
Opinion Delivered September 20, 2017
Publish

Before McKeithen, C.J., Kreger and Horton, JJ.