IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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No. A-1-CA-41566

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

GUILLERMO JACOBO-PEREZ,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
Daylene A. Marsh, District Court Judge

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for Appellee

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for Appellant

OPINION

HENDERSON, Judge.

{1} Defendant Guillermo Jacobo-Perez appeals his convictions for criminal sexual penetration (CSPM) in the first degree (child under thirteen years of age), contrary to NMSA 1978, Section 30-9-11(D)(1) (2009); and criminal sexual contact (CSCM) in the second degree (child under thirteen years of age), contrary to NMSA 1978, Section 30-9-13(B)(1) (2003), following retrial after Defendant's first trial ended in a mistrial. On appeal, Defendant argues that (1) his retrial violated his right to be free from double jeopardy; (2) the State's reliance on multiple sexual acts to prove the charged conduct in the second trial violated Defendant's right to verdict unanimity; and (3) the admission of testimony about uncharged sexual misconduct in the second trial was impermissible propensity evidence. We hold that Defendant's retrial was barred by the double jeopardy principles articulated in *State v. Breit*, 1996-NMSC-067,122 N.M. 655, 930 P.2d 792, due to prosecutorial misconduct that necessitated the mistrial. We accordingly vacate Defendant's convictions.

BACKGROUND

{2} This case arose from allegations that Defendant sexually abused his stepdaughter (X.C.) one to two times a week between December 2013 and January 2017. Defendant was initially charged with 165 counts of CSPM and 164 counts of CSCM before ultimately being tried on a single count of CSPM and a single count

of CSCM based on a continuing course of conduct, following a reduction in the number of charges after a preliminary hearing and amended criminal informations.

{3} Defendant's first jury trial began in January 2022. The State elicited X.C.'s testimony about the course of abuse over the three-year period with reference to a school-year-based timeline. During Defendant's cross-examination of X.C., defense counsel sought to attack X.C.'s credibility by impeaching her trial testimony with statements she made in an interview with a detective after first disclosing the sexual abuse, in a safe house interview shortly after her disclosure, and under oath during the preliminary hearing examination.

{4} A series of speaking objections followed for improper impeachment, with the State challenging the scope of Defendant's impeachment and defense counsel's desire to walk through the instances of abuse "month by month, like [was done] at the preliminary examination" rather than by the school-year-based timeline used during direct examination, and claiming that defense counsel was "creating" inconsistencies in X.C.'s trial testimony. The State also made objections regarding what the prosecutor seemingly characterized as lack of foundation and mischaracterizing prior testimony as defense counsel attempted to impeach X.C.; but instead of using formal objections, the prosecutor made multiple long speaking objections blending scope and form objections. Defense counsel made several arguments in response to the objections, arguing that the defense was entitled to

impeach X.C. for inconsistent statements, but seemed confused as to what the defense was in fact allowed to do at times, often asking the court for clarification as to the form of his questions. The impeachment was interspersed with defense counsel's attempts to follow the district court's guidance in impeaching X.C., the State's growing frustration and increasingly frequent objections, multiple sidebar conferences, and two lengthy bench conferences outside the jury's presence. The district court spent much of its time trying to determine the actual basis for the objections, both sustaining and overruling objections from the State. At one point, the district court noted that the State's objection to defense counsel creating an inconsistent statement was wrong, as X.C.'s trial testimony was in fact consistent with the prior statement. And in an attempt to control the proceedings, the district court alerted both parties that the jury was showing physical signs of frustration with the repeated sidebars that were occurring.

{5} During the second bench conference outside the jury's presence, defense counsel moved for a mistrial because defense counsel believed that the district court was limiting his ability to impeach X.C. in the manner he had prepared, which the district court denied after a lengthy discussion about the scope and form of impeachment.

{6} Following a short recess, the confusion continued in the last minutes of trial when defense counsel sought to impeach X.C.'s trial testimony, by using the

preliminary hearing transcript that Defendant "put his tongue on [X.C.'s] vagina" twice between December 2013 and January 2017. After confirming X.C.'s testimony from earlier in the day on direct examination, defense counsel asked X.C. to read a "question out loud and [her] answer" from the preliminary hearing transcript. The State immediately objected, again citing inappropriate impeachment.

{7} A brief bench conference ensued, during which the State argued that the impeachment was improper based on an apparent discrepancy in the use of "on" and "in" between the trial testimony and preliminary hearing transcript. The district court sustained the objection and asked defense counsel "to repeat the question so it's consistent with [inaudible]."

{8} Defense counsel resumed, "Let's change a word. When you, when [the defense attorney at the preliminary hearing] asked you or when you talked to [the detective] let's start there, okay." The State again objected and another bench conference ensued, during which defense counsel asserted that "[X.C.]'s given . . . inconsistent statements and if I can't ask her about that, this trial is really unfair." After the district court instructed that the statement has "got to show inconsistency with the prior statement made here at trial," defense counsel stated that he confirmed the statement X.C. made at trial when "she said he put his tongue in her vagina two times." The State then interjected, "That's not what she said—on, not in." Defense counsel responded, "Do you want me to change it to on?" before the State asserted,

"No, you can't now change it." The district court and defense counsel both expressed confusion at the State's assertion before the State again argued that defense counsel was creating the inconsistencies in X.C.'s testimony. With frustration building, defense counsel suggested he just "sit down and stop cross-examining" before arguing that "this is about [X.C.'s] recollection of what happened."

{9} The district court attempted to instruct defense counsel, but when defense counsel stated, "I'm sorry, I cannot hear you," the district court responded, "Oh never mind. Go back and ask the question correctly [inaudible]." The district court then sustained the objection and Defendant asked the district court, "I'm sorry. I'm confused. What am I supposed to do now?" The district court admonished defense counsel to "go back and ask the question correctly." Defense counsel again confirmed X.C.'s earlier testimony "that [Defendant]'s tongue touched [X.C.]'s vagina twice between December 2013 and January 2017," and as he asked X.C. to read from the preliminary hearing transcript, the State objected yet again. This time the district court overruled the objection and told defense counsel he "can ask the question."

{10} But as defense counsel again asked X.C. to "read line six from page 144" of the preliminary hearing transcript, the district court interjected and asked defense counsel to clarify what from the transcript he was having X.C. read, as the district court did not have a copy of the transcript. The district court asked, "Line six [of the

transcript] is her statement, is that correct?" and defense counsel responded, "It's the question." This led to another bench conference at which the district court questioned without prompting from the prosecutor whether the statement was hearsay, defense counsel asserted it was not, and there was more confusion about the use of "in," "on," and "touched":

> Prosecution: [Inaudible] in, and he's still on—on. I don't know what I have to . . . .
>
> Judge: Touched.
>
> Prosecution: Well, that's not in.
>
> Judge: You need to read it directly what it says in the prior statement.
>
> Defense: Okay.

{11} Following the bench conference, defense counsel asked, "Just to be clear, did [Defendant], according to you, put his tongue in your vagina," and the State immediately objected, stating, "*I call for a mistrial for misconduct* by [defense counsel]!"

{12} After the jury withdrew from the courtroom, the district court gave each side an opportunity to argue their position before ruling on the State's motion for a mistrial:

> Prosecution: Your Honor. You ruled this morning when we had the jury out for over an hour, after lunch when we had the jury out for over an hour, and just a moment ago when we were at the bench, that [defense counsel] is not allowed to ask a question of the witness in order to create the inconsistency. And he just did it.

> The testimony that came in earlier this morning through [defense counsel]'s cross-examination question was, "Did you tell [the detective] that [Defendant] 'touched' your vagina with his tongue?" He then tried to impeach [X.C.] with questions from the preliminary hearing that [defense counsel] asked, "Did [Defendant] put his tongue 'in' your vagina?" The word "on" and the word "in" have two distinct meanings, different meanings. "In" doesn't impeach "on." I objected. You said that you can't ask a question to create the inconsistency in order to impeach her. He just did it. He changed, he didn't like that he was being shut down and not being allowed, not following the court's ruling, and he's asked [X.C.] on cross-examination, "Did [Defendant] put his tongue 'in' your vagina?" I don't know what else to say, but that's violating three orders of the court in this trial. Thank you.

Defense: Your Honor, I think a mistrial is probably the best course of action at this point in time. [The prosecution] *accused me of misconduct in front of the jury. I think that's probably, there's frustration but then there's being accused of misconduct and I don't think that I can come back from that. I think I've lost credibility now in front of the jury.* And also, I think before we go any further with this case, I think that we need to have a clear understanding of what the law is. And you may be right and [the prosecutor] may be right. I disagree at this point in time. I would at least like to make a presentation to the court about why I am correct and then have a real good trial.

Judge: Well, and I guess my concern is intentionally creating a mistrial.

Defense: If I may, Your Honor. That was absolutely not intentional on my part. I thought I understood what was going on and all I can say to the court, as an officer of the court my conscience is clear as far as whether I intentionally created a mistrial. I did not.

Judge: Alright, [defense], you got your mistrial.

. . . .

> Prosecution: Your Honor, if you could just make the record clear that the mistrial doesn't foreclose the State from doing another trial because it's based on a question asked by the defense, which the court specifically said he could not ask.
>
> Judge: I'll grant that. The State is not foreclosed from retrying this case.

{13} After orally granting a mistrial, the district court later issued a written order granting a mistrial "due to manifest necessity" and ruling that "the State is not precluded from retrying this matter." The district court concluded that "defense counsel persisted in attempting to sidestep the [c]ourt's rulings in using the witness's prior statements and the preliminary hearing transcript in a manner the [c]ourt had ruled was impermissible." The district court further determined that "[u]pon the motion of the prosecution and with the consent of both parties, the [c]ourt declared a mistrial in open court due to manifest necessity created by defense counsel's defiance of the [c]ourt's rulings." The district court never addressed the reasoning given by the State for its request for the mistrial in front of the jury—that being misconduct by defense counsel—orally or in its written order. After Defendant's second trial and conviction, he appeals.

DISCUSSION

{14} Defendant argues that his right to be free from double jeopardy was violated when he was retried after the district court granted a mistrial in the first trial based on its erroneous manifest necessity determination. The State argues that Defendant's retrial was not barred because he consented to the mistrial. We set this matter for

oral argument to have the parties address two questions not raised in the briefing: (1) focusing on the language used by the State for requesting a mistrial in the presence of the jury—"I call for a mistrial for misconduct by [defense counsel]!"—should this Court consider whether Defendant's retrial was barred by double jeopardy principles under *Breit*, 1996-NMSC-067, ¶ 32; and (2) if this Court does rule under *Breit*, must we make a determination regarding manifest necessity based upon the reasoning given by the district court for granting a mistrial? Because we conclude that under *Breit*, the prosecutor's willful and deliberate misconduct in admonishing the defense attorney for engaging in misconduct in front of the jury is so egregious that it left no alternative but to terminate Defendant's first trial, retrial is barred. Therefore, we do not consider Defendant's double jeopardy manifest necessity argument or claims of error related to the second trial. We explain below.

I. The Double Jeopardy Bar Against Multiple Prosecutions in General

{15} The New Mexico Constitution, like its federal counterpart, protects any person from being twice put in jeopardy for the same offense. *See* N.M. Const. art. II, § 15; U.S. Const. amend. V. "The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment." NMSA 1978, § 30-1-10 (1963). "The [D]ouble [J]eopardy [C]lause protects defendants from being subjected to multiple prosecutions for a single infraction." *Breit*, 1996-NMSC-067, ¶ 8. This protection attaches "once a jury

has been selected and sworn," such that "a criminal defendant has a vested right to have [their] guilt or innocence decided by that jury." *State v. Yazzie*, 2010-NMCA-028, ¶ 9, 147 N.M. 768, 228 P.3d 1188; *see Arizona v. Washington*, 434 U.S. 497, 503 (1978) (stating that the constitutional protection against double jeopardy recognizes a defendant's "valued right to have [their] trial completed by a particular tribunal" (internal quotation marks omitted)). "The discretion to discharge the jury before it has reached a verdict is to be exercised only in very extraordinary and striking circumstances." *Downum v. United States*, 372 U.S. 734, 736 (1963) (internal quotation marks and citation omitted).

{16} Generally, when the district court terminates a defendant's trial before the jury has rendered a verdict on a charged offense, double jeopardy principles "prohibit[] the [s]tate from retrying the defendant for that offense unless the defendant consents to the termination or there is a manifest necessity for the termination." *State v. Paul*, 2021-NMCA-041, ¶ 7, 495 P.3d 610. We recognize that a defendant's consent to a mistrial is usually not a bar to retrial. *See id.* ¶ 20 ("Our Supreme Court has long recognized that manifest necessity and consent independently remove the double jeopardy bar to retrial."). "To say that a mistrial is required because of 'manifest necessity' means that in order to preserve the ends of public justice, it is clear and evident that terminating the trial is necessary because of something extraordinary which occurred in the trial." *Yazzie*, 2010-NMCA-028, ¶ 11.

II. The *Breit* Double Jeopardy Test

{17} The general rule—that reprosecution is permitted when a defendant consents to a mistrial or manifest necessity exists—may yield when the mistrial is necessitated by prosecutorial misconduct. *See Breit*, 1996-NMSC-067, ¶ 14. In *Breit*, our Supreme Court adopted the following three factor test to determine whether retrial is barred under Article II, Section 15, of the New Mexico Constitution, because of prosecutorial misconduct. *See Breit*, 1996-NMSC-067, ¶ 32. "Retrial is barred . . . when [(1)] improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and [(2)] if the official knows that the conduct is improper and prejudicial, and [(3)] if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal." *Id.* Our Supreme Court further held that "[i]t makes little difference, when the constitutional rights of the defendant are at stake, whether the prosecutor deliberately pursues an improper course of conduct because [they] mean[] to goad a defendant into demanding a mistrial or because [they are] willing to accept a mistrial and start over." *Id.* ¶ 35 (internal quotation marks and citation omitted).

{18} While normally *Breit* is invoked by a defendant moving for mistrial due to prosecutorial misconduct, *see id.*, we conclude that *Breit* is also the proper lens through which to review the double jeopardy issue before us where the State's

motion for a mistrial is the basis for the misconduct. *Cf. id.* ¶ 15 ("[E]mphasiz[ing] that when a trial is severely prejudiced by prosecutorial misconduct, the double-jeopardy analysis is identical, whether the defendant requests a mistrial, a new trial, or, on appeal, a reversal."); *State v. Lucero*, 1999-NMCA-102, ¶¶ 11-12, 18, 127 N.M. 672, 986 P.2d 468 (addressing a defendant's prosecutorial misconduct claim where the factual basis for the argument can be found in the record even though the parties' briefing cited the incorrect manifest necessity standard, which this Court clarified applies when a mistrial is declared sua sponte by the district court rather than at a party's behest). Therefore, we decline to address this double jeopardy issue for manifest necessity and proceed in analyzing the prosecutor's conduct applying the *Breit* test. *See* 1996-NMSC-067, ¶ 32.

III. Application of the *Breit* Test

{19} "An appellate review of a prosecutorial misconduct claim presents a mixed question of law and fact. The appellate court will defer to the district court when it has made findings of fact that are supported by substantial evidence and reviews de novo the district court's application of the law to the facts." *State v. McClaugherty*, 2008-NMSC-044, ¶ 39, 144 N.M. 483, 188 P.3d 1234. Under *Breit*, "we will carefully examine the prosecutor's conduct in light of the totality of the circumstances of the trial." 1996-NMSC-067, ¶ 40. "If the prosecutor's conduct

demonstrates willful disregard of the defendant's right to a fair trial, then a second trial is barred." *Id.*

{20} We turn to the first *Breit* factor—whether "improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial." *Id.* ¶ 32. Looking at what lead to the State's motion for mistrial, we note that the record proper does not contain the preliminary hearing transcript for our review on appeal. Thus, it is unclear exactly what Defendant was trying to impeach that forms the basis for the State's objections. But even without the preliminary hearing transcript, the record is clear that Defendant's cross-examination was full of chaos and confusion. There were multiple lengthy speaking objections on behalf of the State, which regularly blended multiple scope and form objections. Defense counsel's responses and the district court's rulings did not always seem to parse out and resolve the objections made, which seemingly led to more confusion and frustration as the trial continued.

{21} The record also reflects that before the State moved for mistrial, the district court and parties discussed the parameters of Defendant's cross-examination multiple times during two lengthy bench conferences outside the presence of the jury and numerous sidebars and bench conferences in front of the jury. Defense counsel appears to have attempted to abide by those parameters by asking the district court for guidance in rephrasing his question, the district court's overruling of a

subsequent objection from the State to defense counsel's rephrased question, the district court's own confusion about the use of the preliminary hearing transcript, and defense counsel again rephrasing his question following the district court's instruction to read the question directly from the "prior statement."[1] Defendant's first trial then ended after the State "call[ed] for a mistrial *for misconduct* by [defense counsel]" in the jury's presence.

{22} Defendant ultimately agreed with the district court's oral granting of the State's motion for mistrial, asserting that "a mistrial is probably the best course of action at this point in time." Defense counsel explained why he agreed with a mistrial at that point: "[the State] *accused me of misconduct in front of the jury*. I think that's probably, there's frustration but *then there's being accused of misconduct* and I don't think that I can come back from that. I think I've lost credibility now in front of the jury." Defendant was essentially left with a Hobson's choice—with no choice but to

[1]We note that upon our review and despite the cross-examination chaos, the record does not support the district court's written order concluding that the reason for the mistrial declaration was "defense counsel['s] persiste[nce] in attempting to sidestep the [c]ourt's rulings in using the witness's prior statements and the preliminary hearing transcript in a manner the [c]ourt had ruled was impermissible." Nor does our review of the record support the district court's oral determination that Defendant was "intentionally creating a mistrial." Rather, the chaos caused by the State's unclear compound speaking objections support Defendant's assertion that this "was absolutely not intentional on my part. I thought I understood what was going on and all I can say to the court, as an officer of the court my conscience is clear as far as whether I intentionally created a mistrial. I did not." In sum, the record does not reflect that Defendant's actions were aimed at intentionally creating a mistrial.

consent as the State's assertion of misconduct severely prejudiced Defendant's case and prospects for a fair trial regardless of whether he objected to the State's mistrial motion or not. *Cf. State v. Sedillo*, 1975-NMCA-089, ¶ 4, 88 N.M. 240, 539 P.2d 630 (asserting that it "would offend our sense of justice to construe [the] defendant's silence," after his counsel was held in contempt, as a consent to a mistrial); *Breit*, 1996-NMSC-067, ¶ 14 ("[W]hen a defendant's mistrial motion or request for reversal on appeal is necessitated by prosecutorial misconduct, reprosecution may be barred. Though not at fault, defendants in such situations must choose between two equally objectionable alternatives: they must either relinquish the opportunity of having their fate determined by the jury first impaneled and endure the expense and anxiety of a second trial, or they must continue with a proceeding that has been prejudiced by prosecutorial misconduct." (citation omitted)). At that point, no curative instruction or other alternative could have fixed the damage done by the State's accusation, in the jury's presence, that defense counsel had committed misconduct—defense counsel was left with no choice but to abort the trial as defense counsel had lost all credibility with the jury.

{23} At oral argument, the State argued that the situation in this case is similar to that in *State v. Torres*, 2012-NMSC-016, 279 P.3d 740, a case in which our Supreme Court declined to find prosecutorial misconduct after the prosecutor, during rebuttal, "told the jury that defense counsel had lied when commenting on the absence of a

seatbelt citation during closing argument." *Id.* ¶ 2.[2] However, we find *Torres* factually distinguishable from this case given our Supreme Court's reasoning in that case, which is supportive of our disposition here. In *Torres*, our Supreme Court analyzed the prosecutor's conduct employing the factors articulated in *State v. Sosa*, 2009-NMSC-056, 147 N.M. 351, 223 P.3d 348, to review statements made during closing arguments for reversible error. Our Supreme Court determined that the district court had properly denied the defendant's mistrial motion because the "prosecutor's improper actions were limited in scope and duration" *and* "the seatbelt violation [at] issue was peripheral to the evidence presented and the elements of the crime [(driving while intoxicated)] for which [the d]efendant was on trial." *Torres*, 2012-NMSC-016, ¶ 24. The district court also promptly gave a curative instruction. *Id.* While it is true that, similar to *Torres*, the prosecutor's attack here was not on a witness or Defendant, but on defense counsel, *see id.* ¶ 13, this is where the similarities end. Unlike the peripheral statements about the lack of a seatbelt citation that was not a charge up for consideration by the jury in *Torres*, *see id.* ¶ 12 ("Importantly, as the trial court noted, the references to the existence of a seatbelt

[2]The State also argued during oral argument that the fact that defense counsel in *Torres* was called a liar is worse than defense counsel being accused of engaging in misconduct in this case, because the jury would not understand what misconduct means. We decline to assume that a jury cannot understand what the word misconduct means, especially in a circumstance where frustrations with defense counsel's attempts to impeach X.C. were, as the district court judge advised trial counsel, evident to the jury.

citation did not touch on the elements the jury was required to find in order to convict [the d]efendant of [d]riving [w]hile [i]ntoxicated."), here the accusation of misconduct before the jury was specifically related to Defendant's attempt to impeach X.C. to establish that her earlier testimony about the only two charges Defendant faced lacked credibility. As noted above, the jury had witnessed the parties argue ad nauseam about defense counsel's attempt to impeach X.C., which led the district court to express its concern over the jury's reaction to the numerous and protracted interruptions. In these circumstances, for the State to move for a mistrial claiming it was due to defense counsel's misconduct, stripped defense counsel of any credibility he had before the jury, severely thwarting Defendant's attempt to defend his case. And, as discussed, no instruction from the district court could have cured the prejudice caused Defendant by the manner in which the prosecutor made his motion for mistrial in front of the jury in this case.

{24} Next, we examine the second *Breit* factor—whether "the official knows that the conduct is improper and prejudicial." 1996-NMSC-067, ¶ 32. There can be no question that the prosecutor was presumed to know his conduct was improper and prejudicial. *See McClaugherty*, 2008-NMSC-044, ¶¶ 49-50 (explaining the objective test applied to determine whether a prosecutor's conduct was improper and prejudicial). Indeed, so egregious and prejudicial to Defendant's case was the prosecutor's act of accusing defense counsel of misconduct before the jury, that we

cannot imagine that any prosecutor could reasonably claim that such action is acceptable, nor has such a claim been made before this Court. Any attorney should be aware that accusing opposing counsel of misconduct in front of a jury is inappropriate and objectionable. *Cf. Breit*, 1996-NMSC-067, ¶ 33 ("Rare are the instances of misconduct that are not violations of rules that every legal professional, no matter how inexperienced, is charged with knowing."); *McClaugherty*, 2008-NMSC-044, ¶ 49 ("There must be a point at which lawyers are conclusively presumed to know what is proper and what is not." (alteration, internal quotation marks, and citation omitted)). To be sure, there are very few cases with circumstances even somewhat similar to what occurred in this case.[3] To bring home

[3] *People v. Ward*, 93 Cal. Rptr. 3d 871, 874 (Ct. App. 2009), is a noteworthy case for its factual similarity. In *Ward*, defense counsel objected and claimed prosecutorial misconduct in front of a jury; rather than involving a double jeopardy bar to retrial, as here, *Ward* concerned the trial court's discretion to impose monetary sanctions after the prosecutor's only requested remedy was admonition to the jury. *See id.* at 873-74. In *Ward*, after granting the prosecutor's requested admonition, the trial court went a step further and ordered sanctions against defense counsel, explaining that even if the prosecutor was engaging in prosecutorial misconduct, "you don't say that in front of a jury, ever. It's not a matter for the jury to be aware of or to deal with. If I found prosecutorial misconduct, I would probably dismiss the case, but that's what I think the court's remedy would be. For the jury to hear that, it's highly inappropriate, no matter what the circumstances are. That's my job to deal with conduct by counsel. And I think it was misconduct by you, sir, to say it in front of the jury. It's highly prejudicial." *Id.* (internal quotation marks omitted). The appellate court affirmed the imposition of sanctions but remanded to the trial court to prepare a written order explaining its issuance of sanctions, as required under California's Code of Civil Procedure. *Id.* at 880. We mention this case as it highlights the common knowledge among attorneys that accusing opposing counsel of engaging in misconduct in front of a jury is misconduct in and of itself.

the point of how the prosecutor's conduct in this case went beyond the norms of acceptable behavior by a prosecutor at trial, we reiterate a few of those principles and rules below. *See generally Torres*, 2012-NMSC-016, ¶¶ 16-23 (providing a discussion of the bedrock principles and rules governing prosecutors, given their position in acting on behalf of a sovereign).

{25} First and foremost, "[a] prosecutor represents the public interest and must ensure above all else that a criminal defendant receives a fair trial." *Id.* ¶ 3 (internal quotation marks and citation omitted). "While a prosecutor is allowed to strike hard blows, [they are] not at liberty to strike foul ones." *Id.* ¶ 17 (internal quotation marks and citations omitted). The average juror is already more likely to place confidence in a prosecutor as a representative of the government, therefore "improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should carry none." *Id.* (internal quotation marks and citations omitted). "It is the essence of a fair trial that reasonable latitude be given the cross-examiner in putting the weight of the witnesses' testimony and credibility to a test" and that even given the wide latitude afforded counsel during closing arguments a prosecutor "may not employ argument to denigrate the role of defense counsel" by injecting personal frustrations. *Walker v. State*, 790 A.2d 1214, 1218-19 (Del. 2002) (internal quotation marks and citation omitted). Accordingly, "an attorney is never exempt from treating opposing counsel

with respect or permitted to denigrate adversaries, especially in front of a jury. . . . This behavior has no place in the courtroom and reflects negatively on the profession as a whole." *Torres*, 2012-NMSC-016, ¶ 23; *see Breit*, 1996-NMSC-067, ¶ 82 ("Counsel for the [s]tate needs also to be reminded that [their] personal belief in the guilt of the defendant, the veracity of the witnesses, the competency and honesty of opposing counsel are absolutely irrelevant, and have no place *at any time* in the courtroom and *cannot* be stated or implied."); *Davis v. Sams*, 1975 OK 157, ¶¶ 6-10, 542 P.2d 943, 944-45 (explaining that when an attorney attacks opposing counsel in the presence of the jury, prejudice results from the possibility of undue influence because the administration of justice requires that jurors be shielded from misconduct that may influence their verdict).

{26} Additionally, our rules of criminal procedure establish the parameters for appropriate courtroom conduct in providing that "[j]udicial proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice." Rule 5-115(A) NMRA; *see* Appendix J. ABA Criminal Justice Standards for the Prosecution Function, Standard 3-6.2(a) (instructing prosecutors to "support the . . . dignity of the courtroom by adherence to codes of professionalism and civility, and by manifesting a professional and courteous

attitude toward the judge, opposing counsel, witnesses, defendants, jurors, court staff and others"). Similarly, our rules of professional conduct instruct that it constitutes misconduct for attorneys to "engage in conduct that is prejudicial to the administration of justice," Rule 16-804(D) NMRA, and prohibit a lawyer from "engag[ing] in conduct intended to disrupt a tribunal." Rule 16-305(D) NMRA. In sum, based on the totality of circumstances at trial, we conclude the second *Breit* factor is met.

{27} Finally, we turn to the third *Breit* factor—whether "the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal." 1996-NMSC-067, ¶ 32. In light of our above discussion, we conclude that the prosecutor, at a minimum, willfully disregarded the consequences of his actions in requesting the mistrial. *See id.* ¶ 34 (noting that the term willful disregard "connotes a conscious and purposeful decision by the prosecutor to dismiss any concern that [their] conduct may lead to a mistrial or reversal"). There is no suggestion, nor does the record reflect, that the prosecutor acted out of error or mistake. *See id.* ¶ 48. Rather, his conduct appeared calculated and deliberate in undermining defense counsel's credibility in front of the jury, as increasingly frequent and aggressive objections culminated in an accusation of defense counsel engaging in misconduct. As analyzed above, the district court granted a mistrial upon the State's motion after defense counsel noted that mistrial was appropriate because

he could not "come back" from being accused of misconduct and that he had "lost credibility now in front of the jury." The circumstances of the mistrial motion, here, lead us to one conclusion—that the prosecutor intended to and did provoke the mistrial through the deliberate invocation of his motion and subsequent accusation of defense counsel's misconduct in the jury's presence. *See McClaugherty*, 2008-NMSC-044, ¶ 69 ("[D]ouble jeopardy barred retrial when the prosecutor engaged in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment and inconvenience of successive trials." (internal quotation marks and citation omitted)). "The unavoidable conclusion from such egregious misconduct, is that the prosecutor was fully aware that his actions would deprive [Defendant] of his right to a fair trial." *See Breit*, 1996-NMSC-067, ¶ 48. "Under minimal legal, ethical, and professional standards, we can only conclude that he acted knowingly and intentionally." *Id*. Accordingly, the prosecutor acted in willful disregard of Defendant's right to a fair trial.

{28} While we recognize that "double jeopardy will rarely bar reprosecution if the misconduct is an isolated instance," *Id.* ¶ 33, we conclude that the prosecutor's misconduct under the circumstances in this case is, without a doubt, the sort of isolated instance when retrial is barred because of the extreme prejudice caused to Defendant's case and his right to a fair trial. *See McClaugherty*, 2008-NMSC-044,

¶ 72 ("The prosecutorial misconduct in this case can be described as a single event in front of the jury that, alone and isolated, completely denied th[e d]efendant the due process of law to which he is afforded through our state and federal constitutions."). Thus, Defendant's second trial was barred and his convictions must be vacated.

CONCLUSION

{29} Based on the foregoing reasons, Defendant's second trial was barred by double jeopardy under Article II, Section 15 of the New Mexico Constitution. We remand to the district court to vacate Defendant's convictions and discharge Defendant from any further prosecution in this matter.

{30} **IT IS SO ORDERED.**

SHAMMARA H. HENDERSON, Judge

WE CONCUR:

JENNIFER L. ATTREP, Judge

GERALD E. BACA, Judge