NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4432-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEPHEN A. ZADROGA,

Defendant-Appellant.

APPROVED FOR PUBLICATION

April 26, 2022

APPELLATE DIVISION

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Argued April 4, 2022 – Decided April 26, 2022

Before Judges Sabatino, Rothstadt and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 18-07-550.

Peter R. Willis argued[1] the cause for appellant (Willis & Novel, LLC, attorneys; Peter R. Willis and Maximillian A. Novel, on the briefs).

Leonardo V. Rinaldi, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County Prosecutor, attorney; Stephanie Davis Elson and Colleen Kristan Signorelli, Assistant Prosecutors, on the briefs).

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[1] Due to travel restrictions, defense counsel participated in the appellate oral argument remotely with his consent. Counsel also accepted and took advantage of the court's invitation to file a supplemental post-argument brief, which the court has duly considered along with the State's responsive supplemental brief.

William P. Cooper-Daub, Deputy Attorney General, argued the cause for amicus curiae Attorney General (Matthew J. Platkin, Acting Attorney General, attorney; William P. Cooper-Daub, of counsel and on the brief).

Scott M. Welfel, Assistant Deputy Public Defender, argued the cause for amicus curiae Office of the Public Defender (Joseph E. Krakora, Public Defender, attorney; Scott M. Welfel, of counsel and on the brief).

The opinion of the court was delivered by

SABATINO, P.J.A.D.

This criminal prosecution arises out of a head-on collision that killed a passenger in defendant's car. Defendant, Stephen A. Zadroga, had driven his car into oncoming traffic, and an accident reconstruction expert estimated he had been speeding at over 80 miles per hour in a 25 mile per hour zone at the moment of impact. His blood sample was extracted at a hospital later that day, yielding apparent test results from the State Police laboratory of blood alcohol content ("BAC") well over the legal limit.

A grand jury charged defendant with aggravated manslaughter, death by auto, and three intoxication-based assault offenses. A few days after the ensuing jury trial commenced, and following the testimony of seven witnesses for the

State, a testifying hospital nurse identified an inconsistency in the lab results.[2] That disclosure, in turn, revealed the State had inadvertently misattributed the blood sample of a deceased hospital patient to defendant, which the hospital had mistakenly released, and which the State then failed to authenticate. In addition, it came to light that defendant's own blood sample had been irretrievably lost.

The trial judge declared a mistrial and found that, pursuant to Arizona v. Youngblood, 488 U.S. 51 (1988), the State had acted in bad faith in its misattribution of the blood sample. The judge denied defendant's motion to dismiss all five charges with prejudice, but he did dismiss with prejudice the three counts of the indictment that hinged on defendant's intoxication, and thus his BAC level. Defendant appealed; the State did not cross-appeal the judge's finding of bad faith.

We hold the proper remedy in this situation is to re-present the matter to a new grand jury, solely based on the reckless driving evidence without proof or contentions of defendant's intoxication or impairment. We reject defendant's claim of a double jeopardy violation, as the mistrial was justified on the grounds

[2] As the record before us does not include the trial transcripts except for motion proceedings, we rely on the parties' and the trial judge's recitations of the events culminating in the mistrial.

of manifest necessity. In addition, we reject defendant's argument that it is fundamentally unfair to maintain any charges against him.

I.

The unusual circumstances of this appeal arose out of the following facts and events.

The Collision

On November 16, 2017, at around 2:00 a.m., two cars collided head-on on Paterson Plank Road in Jersey City. One car, an Acura, was driven by Steven Carvache, with Nicole Krygoski in the passenger seat. The other car, a Mazda, was driven by defendant, with Evadne Figueroa in the front passenger seat and Matthew Nierstedt in the back seat.

Following the crash, Carvache, Krygoski, Figueroa, and Nierstedt were all transported to nearby hospitals for treatment from the scene of the accident. Defendant, meanwhile, was first released to the custody of his parents before going into the Jersey City Medical Center ("JCMC") for treatment that same morning. At 3:00 a.m., about an hour after the accident, Nierstedt, defendant's rear passenger, was pronounced dead at the JCMC due to blunt trauma injuries he sustained during the car collision.

The Grand Jury Proceedings

The State presented its case to a grand jury in June 2018. At the hearing, the prosecutor questioned two police detectives who investigated the collision, Detective Tony Espaillat and Detective Joe Bisone. Much of the grand jury evidence dwelled upon defendant and others drinking alcohol on the night of the collision, and whether the drivers were under the influence at the time of the crash.

Detective Espaillat's Investigation

Detective Espaillat mostly testified about the statements he had taken from witnesses, including the other passengers in defendant's and Carvache's cars. He stated that, following a first visit to the collision site, he went to Christ Hospital where he questioned Krygoski, the passenger in Carvache's car. Krygoski told the detective she worked at Corkscrew Bar in Jersey City and had served Carvache "approximately two to three" twelve-ounce cans of beer earlier the night of the accident before Carvache offered to give her a ride home. Krygoski also told the detective she remembers a "dark-colored vehicle," understood as being defendant's car, going over the double solid lines into her and Carvache's lane just before the collision.

The detective later took a formal statement from Krygoski, who reiterated that she remembered Carvache drinking two twelve-ounce cans of beer at Corkscrew Bar at approximately 1:30 a.m. on November 16. Krygoski stated Carvache did not seem drunk, and that she would not have gotten into a car with him if it appeared otherwise. She accepted his offer of a ride home at about 2:00 a.m.

Krygoski told the detective that she remembered the headlights of another vehicle coming toward them on Paterson Plank Road, that the vehicle appeared to be driving "really, really fast," and that it appeared to be on their side of the center line when the cars collided. Krygoski recalled that Carvache tried to swerve out of the way to avoid the oncoming vehicle, but that "there was limited room since there isn't a shoulder at that location."

Detective Espaillat then discussed Figueroa's police statement. Figueroa worked with defendant's sister and his ex-girlfriend, and she lived in the same building as defendant. She remembered defendant drinking "two or three . . . draft beers and two shots of a dark-colored alcohol[.]" While Figueroa admitted she "did not pay much attention to everyone" that night, she recalled Nierstedt "buying lots of rounds[.]"

According to Figueroa, she planned on being taken home by defendant, who asked her to first "take a ride with him so he could drive Nierstedt home" to Jersey City. Figueroa accepted the ride from defendant. She told the detective she would not have gotten into his car if she had suspected he was intoxicated. Figueroa stated she was nevertheless "scared" during the ride because defendant was "speeding" and that he and Nierstedt "just laughed at her" when she asked him to slow down.

Figueroa initially told Detective Espaillat that she saw a vehicle—evidently Carvache's—driving toward them and "go over the double solid lines" just before the collision. When pressed about this, Figueroa recanted the allegation about Carvache, but maintained she did not recall defendant driving over the double lines, either.

Detective Espaillat also took a statement from Venicio Rojas, a driver for a charter bus company. Rojas stated he was stopped at a light facing north on Paterson Plank Road at approximately 1:50 a.m., with a Port Authority pickup truck ahead of him, and a black Mazda—defendant's car—behind him.

Rojas recounted that when the light turned green, the Mazda accelerated past Rojas, passing him on the left side "at a high rate of speed." Rojas then

briefly lost sight of both the Mazda and the Port Authority pickup truck before coming upon the collision site.

According to Rojas, at that point, Rojas got out of the bus to help, and saw defendant "acting crazy" and "punching the rear passenger window to get his friend out of the vehicle[.]" Once police arrived on the scene, Rojas stated he overheard defendant tell them Carvache had lost control of his car, which Rojas then told the officers he believed was inaccurate. Rojas told the officers he thought defendant was drunk "because of the way he was acting." He also stated that when he attempted to prevent defendant from touching Nierstedt, he smelled alcohol.

Detective Espaillat also took a statement from Leon Sergeant, a Port Authority worker who had been riding in the front seat of a Port Authority vehicle the night of the accident. Sergeant stated that defendant tried overtaking their vehicle on the right, "before the [two] lanes merged into one." He explained that he did not see defendant's car again until he and his colleagues came upon the collision, after taking their time driving up the road "because it has a lot of curves[.]" Sergeant also recalled briefly seeing defendant in his car unconscious before coming to and screaming "Mike" (Nierstedt's first name). His colleagues called 9-1-1.

Detective Espaillat also informed the grand jurors about statements given by defendant's three friends who had accompanied him, Nierstedt, and Figueroa at various bars the evening of November 15. All three friends told Detective Espaillat that defendant, as far as they could recall, had only had approximately one to three beers between about 10:45 p.m. and 1:30 a.m. the night of the accident. They all denied that defendant drank liquor or showed any signs of inebriation that evening, but acknowledged that they themselves had all consumed liquor.

Video Surveillance and Other Evidence of Drinking

Detective Espaillat also informed the grand jurors about video surveillance footage he had obtained from the East LA Bar. The detective testified that defendant could be seen on the video being served two twelve-ounce bottles of beer, one at 10:10 p.m., the second at 10:31 p.m. The video also revealed the group departing East LA Bar at 11:26 p.m. on November 15.

Detective Espaillat further recounted his interview with a bartender at Village Pourhouse in Hoboken, where defendant and his friends had also been that evening. Village Pourhouse did not have a functioning video surveillance system the evening of November 15. The bartender stated that she recalled Nierstedt starting a bar tab with his credit card, ordering a round of drinks and

shots, and everyone in the group—including defendant—having a shot. She further stated that defendant drank "about three or four" sixteen-ounce draft beers, and "approximately" two shots of whiskey throughout the night.

Detective Espaillat interviewed the manager of the Village Pourhouse, particularly about two bar tab receipts: one for $90 paid with Nierstedt's credit card, the other for $75 paid for in cash by another friend of defendant's. Both tabs were opened around 11:40 p.m. on November 15, and closed out around 2:00 a.m. on November 16. That bar tab included two bottles of beer, seven whiskey shots, a draft beer, and three other $3 drinks.

Detective Espaillat also referred to video surveillance footage collected from the Corkscrew Bar in Jersey City the night of the collision. That footage showed Carvache enter the bar at approximately 1:09 a.m., and him being served twelve-ounce cans of beer upon arrival; again at 1:15 a.m.; again at 1:31 a.m.; and again at 1:45 a.m., for a total of four beers. Carvache is seen on the video leaving the bar with Krygoski at 1:56 a.m.

The Autopsy and the BAC Evidence

Detective Espaillat conveyed to the grand jurors the results of Nierstedt's autopsy. The medical examiner concluded that his cause of death was "blunt trauma injuries of the head" due to the collision.

The detective testified that a forensic scientist for the State Police had analyzed blood samples taken from defendant and Carvache. He told the grand jurors that the State lab reported BAC levels of 0.131% for Carvache's sample, and a much higher 0.376% level for defendant's sample.[3]

Detective Bisone's Investigation

Detective Bisone, the State's other grand jury witness, was questioned by the prosecutor about the "fatal collision report" he prepared, which he described as a "summary of all supporting documentation, witness interviews, roadway evidence and field evidence." That evidence included hospital treatment reports of the passengers in both defendant's and Carvache's cars, evidence from the collision site, vehicle inspections, and imaging data obtained from defendant's car.

The Black Box Data

Detective Bisone conveyed to the grand jurors the readings collected from defendant's car's "airbag control module," also known as its "black box." According to Bisone, computer data downloaded from the black box revealed that defendant's car had been driving at "85 to 88 miles per hour until

[3] We take judicial notice that the legal limit for BAC under the State's drunk driving laws is 0.08%. N.J.S.A. 39:4-50. Hence, the reported BAC for defendant was more than four times that limit.

approximately three seconds prior to impact[,]" which fell to approximately 68 miles per hour at one-and-a-half seconds before impact, and 43 miles per hour at the point of impact.

Detective Bisone noted that black box data was not available from Carvache's car. However, he was able to determine from a reconstruction of the collision that Carvache's car had been driving approximately 27 to 33 miles per hour at the point of impact. He told the grand jurors that the speed limit on Paterson Plank Road at the crash location is 25 miles per hour.

Detective Bisone found liquid splatter documented at the collision site, consistent with the collision occurring "predominately in the southbound lane," meaning in Carvache's lane. Based on photographs of the crash site and the physical evidence in both lanes, Bisone determined that defendant's car, before the impact, had been "straddling the double yellow lines with the front of the [car] halfway over the line[.]" Detective Bisone testified that he had been made aware of both defendant's and Carvache's respective BAC level analyses, the results of which he repeated to the grand jury. He also explained to the grand jurors the "physics" of Paterson Park Road itself, and opined that weather was not a factor in the collision.

Notably, no officer that reported to the scene of the accident administered field sobriety tests to defendant.

The Indictment

The grand jury returned a five-count indictment against defendant, charging him with, most severely, aggravated manslaughter in the first degree, N.J.S.A. 2C:11-4(a)(1) (count one); and death by auto in the second degree, N.J.S.A. 2C:11-5(a) (count two). Counts three, four, and five charged defendant with victim-specific charges of assault by auto in the third degree, N.J.S.A. 2C:12-1(c)(2), for the injuries respectively sustained by Carvache, Krygoski, and Figueroa. Those three counts charged that defendant drove his car while in violation of N.J.S.A. 39:4-50, which elevates the assault to a third-degree offense, where, as here, serious bodily injury results.

Carvache, the other driver, was not criminally charged.

Defendant's Trial and the Sudden Revelation of the Mistaken BAC Evidence

Defendant's jury trial commenced on July 8, 2019. After seven of the State's witnesses had testified, the State became aware that the blood sample it had submitted into evidence with an associated record of defendant's BAC was not, in fact, collected from defendant. The BAC level of the incorrect sample that was offered by the State was 0.376%, over four times the legal limit.

This stunning revelation emerged during the testimony of Melissa Rosario, R.N., the JCMC emergency room nurse who had collected the blood sample in question. Nurse Rosario testified that she had drawn two vials of blood from defendant. By contrast, the Hudson County Prosecutor's Office investigative report reflected the State was in possession of five, not two, vials of defendant's blood.

Following an investigation on July 12, 2019, the day after Rosario testified, the State discovered that the five vials of blood it had admitted into evidence had been drawn from another, since-deceased JCMC patient, not from defendant. The prosecutor duly informed the court and defense counsel of this mistake.

Defendant's Motion to Dismiss the Indictment with Prejudice

In the wake of the "wrong blood sample" revelation, defendant moved to dismiss his entire indictment with prejudice. After a hearing on July 15, 2019, the trial judge partially granted defendant's motion, but dismissed the whole indictment without prejudice. The court thereafter declared a mistrial, without objection from either party, and disbanded the jury.

Defendant moved for reconsideration, arguing, among other points, that the State had violated his right against double jeopardy. The judge asked the

parties to submit briefs on the double jeopardy issue, which was argued at a hearing before the trial court on February 21, 2020.

The February 21, 2020 Motion Hearing

At the hearing on his motion for reconsideration, defendant presented three arguments as to why the entire indictment should have been dismissed with prejudice: fundamental fairness; double jeopardy; and a violation of his rights under Brady v. Maryland, 373 U.S. 83 (1963).

Defendant argued the State's grand jury presentation emphasized two evidentiary cornerstones supporting all five counts of the indictment: "alcohol and . . . speed." Defendant contended that his alcohol consumption was essential to the State's case against him, arguing that "alcohol permeates the entire case up until the point . . . they're driving on the highway," and yet the State cannot provide blood sample evidence "used to indict" defendant.

As to double jeopardy, defendant argued that he had been placed in an "untenable position" after suddenly being made aware of the inaccurate BAC report. He contended that his options were either potentially waiving a double jeopardy defense by moving to dismiss the indictment, or maintaining the double jeopardy defense by risking a guilty verdict for charges predicated at least partly on false information. Further, defendant argued that the State could not, or at

least should not be allowed to, "indict based upon speed alone" without any BAC or alcohol-related evidence.

Relatedly, defendant argued that principles of fundamental fairness should protect him "where the rights implicated do not squarely fall within the scope of an identifiable constitutional protection." Citing State v. Yoskowitz, 116 N.J. 697 (1989), defendant asserted that "pain and suffering and financial issues" should be considered before the trial court gives the State an avenue to re-try its case, particularly as it had been two years since the original indictment.

The State, in turn, argued to the trial judge that there can be no Brady violation with regard to evidence "it never had in its possession," namely defendant's actual blood samples lost at the JCMC. Instead, the State argues that the blood sample debacle is a matter of "spoilation" rather than a Brady violation.

Further, the State insisted that none of the three doctrines offered by defendant—Brady, fundamental fairness, or double jeopardy—could sustain the dismissal of an indictment with prejudice under our State's case law, which establishes a presumption against such dismissals. Citing State v. Farmer, 48 N.J. 145, 175 (1966), the prosecutor stressed the general public's interest in seeing serious crimes tried, as a consideration to be weighed against the

defendant's due process rights. The State also stressed that defendant has not been in custody as he awaits the possibility of a revived indictment, pending this proceeding. The State further urged that "[t]here needs to be some bad faith or willful misconduct on the part of the . . . prosecutor for the Court to grant the dismissal with prejudice."

The State also reminded the court of its non-alcohol related evidence indicative of defendant's recklessness. Specifically, according to black box data, defendant had been driving up to 88 miles per hour in a 25 mile per hour zone within seconds of the collision; eyewitness testimony also corroborated defendant's speed and reckless driving; and lastly, a reconstruction of the collision suggested he had driven over the double solid line into Carvache's lane right before impact.

The Trial Judge's June 29, 2020 Written Opinion

Judge Patrick J. Arre declined to dismiss the entire indictment with prejudice, and preserved the first two counts. The judge issued a written opinion on June 29, 2020 that rejected the arguments posed by defendant.

First, the judge concluded that defendant's motion for reconsideration was neither procedurally barred nor time barred under Rule 4:49-2, as argued by the State.[4]

Second, the judge rejected defendant's argument that the State's admission of an inaccurate blood sample violated his due process rights under Brady v. Maryland. The judge found that Brady does not apply because this is not an instance where the State withheld "evidence favorable to an accused." 373 U.S. at 87. Nevertheless, the judge relied upon a related Supreme Court due process case, Youngblood, 488 U.S. at 51, to justify the partial dismissal of defendant's indictment.

In Youngblood, a defendant was convicted of child molestation, sexual assault, and kidnapping, though a police criminologist was unable to obtain information about the victim's assailant from evidence collected with a "sexual assault kit." 488 U.S. at 52. The Arizona Court of Appeals reversed the conviction on the ground that the State had breached a constitutional duty to preserve evidence collected from the victim's body and clothing. Ibid. The

[4] Because the trial judge was plainly correct in his application of Rule 4:49-2, we need not comment further about this alleged procedural bar to reconsideration. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990).

United States Supreme Court reversed because the record did not show bad faith on the part of the State. As the Court held:

> Unless a criminal defendant can show bad faith on the part of the police, the state's failure to preserve potentially useful evidence—of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant—does not constitute a violation of the due process clause of the United States Constitution's Fourteenth Amendment.
>
> [Ibid. (emphasis added).]

The trial judge observed that our State's Supreme Court, since State v. Marshall, 123 N.J. 1 (1991), has consistently applied the Youngblood "bad faith" standard for deeming unconstitutional a prosecutor's failure to preserve "potentially" exculpatory evidence.

Applying Youngblood's bad faith test, Judge Arre found that "the conduct of the State is shocking to a universal sense of justice and resulted in a denial of due process to the defendant." The judge noted that the "detectives here cannot be said to have followed their protocols or policies in good faith, and their failure to do so warrants a finding of bad faith." (Emphasis added).

In addition, the judge found "there was a significant likelihood that [the blood sample evidence] was exculpatory." The judge perceived that the "only evidence" the State had relevant to defendant's alcohol use, aside from the blood

sample, were statements by witnesses who could mostly recall defendant drinking a few beers the evening of the accident, and the "speed and direction of the car at the time of impact." In the trial judge's estimation, depriving defendant a chance to examine or "meaningfully challenge" the strongest evidence on record—his reported BAC—amounted to a due process violation.

Turning to the question of a remedy for the due process violation, the judge concluded the appropriate recourse was to bar the State from proceeding under the three counts defendant was charged with pursuant to N.J.S.A. 2C:12-1(c)(2) (assault by auto in the third degree). The judge dismissed those three counts with prejudice, as the defendant's intoxication and, therefore, his BAC, constituted a fundamental element of those charges.

By contrast, the judge preserved the State's ability to prosecute defendant under counts one and two. In this regard, the judge noted that "one can be reckless while driving and not be intoxicated." Implicitly, the judge's ruling signifies that the State's evidence of defendant's high speed and veering over the center line—even without incriminating BAC evidence—could satisfy its prima facie burden to establish the elements of first-degree aggravated manslaughter under count one and second-degree death by auto under count two.

Finally, the judge rejected defendant's arguments that his further prosecution on counts one and two should be disallowed due to principles of double jeopardy and fundamental fairness. Weighing the "unfairness and prejudice suffered by defendant extending beyond his reasonable expectation in this case" against "the public interest in having the charges prosecuted[,]" the judge concluded that counts one and two of the indictment should not be dismissed with prejudice.

The trial judge emphasized that the court must consider the "public right to have the accused tried and punished if found guilty . . . especially . . . when looking at the seriousness of the crime charged." Despite what the judge termed the State's "inexcusable conduct" in its misattribution of the blood samples needed to support counts three, four, and five, defendant, according to the judge, had not been "subjected to the quantum of oppression, harassment or egregious deprivation necessary to warrant a dismissal" with prejudice of the remaining two counts.

Defendant now appeals. The State notably has not cross-appealed the dismissal with prejudice of counts three through five.

At our invitation, we received helpful amicus briefs from the Attorney General and the Public Defender on these issues, and we heard oral arguments from the amici along with those presented by counsel of record.

II.

Through his initial and numerous supplemental briefs on appeal, defendant essentially advances two core arguments: first, that the trial judge erred in rejecting his claim of a double jeopardy violation, and, second, that allowing the State to proceed on charges of aggravated manslaughter and death by auto is fundamentally unfair. We address these arguments in turn.

As a preface to our analysis, we are mindful that a determination of whether to dismiss an indictment generally is left to the sound discretion of the trial court and will be reversed only for an abuse of discretion. State v. Warmbrun, 277 N.J. Super. 51, 59 (App. Div. 1994). The court's decision to dismiss an indictment will constitute an abuse of discretion only "where 'the decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Triestman, 416 N.J. Super. 195, 202 (App. Div. 2010) (quoting United States v. Scurry, 193 N.J. 492, 504 (2008)) (alteration in original). Here, the judge's reasonable

decision to dismiss with prejudice the last three counts of the indictment, but not the first two, was an appropriate exercise of discretion.

A.

We first consider defendant's claim that his constitutional right to be free from double jeopardy was violated when the trial judge granted a mistrial and preserved the first two counts of the indictment.[5] Defendant and the Public Defender contend that the trial judge, having found that the State mishandled the blood sample evidence in bad faith, should have offered defendant the option of proceeding with the same jury to a verdict if it was unwilling to dismiss the indictment in its entirety as he had requested. We disagree.

The Fifth Amendment of the United States Constitution instructs that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. Similarly, the New Jersey Constitution states that "No person shall, after acquittal, be tried for the same offense." N.J. Const. art. I, ¶ 11. Despite these differences in wording, our courts have treated these

[5] We recognize that defendant's opening brief on appeal mentioned but did not contain a substantive discussion of double jeopardy. However, his subsequent briefs in this appeal, including his response to the amici, explicitly argued the issue. Because of the importance of the issue, we choose to reach and resolve it.

federal and state constitutional Double Jeopardy clauses synonymously. State v. Miles, 229 N.J. 83, 92 (2017).

Jeopardy "attached" in this case when the trial jurors were sworn. State v. Allah, 170 N.J. 269, 279 (2002). After that moment, a defendant generally has a double jeopardy right to have that jury trial proceed to a verdict. Id. at 280 (citing State v. Lynch, 79 N.J. 327, 340-41 (1979)). That does not end the analysis, however. Not all mistrials bar a new trial; only an improper termination of a trial by the court precludes a defendant's re-prosecution. Ibid.

One of the recognized exceptions to the double jeopardy bar to a re-trial is whether the court declared a mistrial in circumstances where there was a "manifest necessity." United States v. Dinitz, 424 U.S. 600, 606-07 (1976); State v. Kelly, 201 N.J. 471, 485 (2010); Allah, 170 N.J. at 280. "Where the court finds a sufficient legal reason and manifest necessity to terminate a trial, the defendant's right to have his initial trial completed is subordinated to the public's interest in fair trials and reliable judgments." State v. Loyal, 164 N.J. 418, 435 (2000); see also Allah, 170 N.J. at 280. The presence of such manifest necessity is highly fact-specific and contextual, and there are "no rigid rules" about what rises to that level. State v. Smith, 465 N.J. Super. 515, 536-37 (App.

Div. 2020) (finding, albeit in a different procedural context arising out of the COVID-19 pandemic, "manifest necessity" to terminate an ongoing jury trial).

We are persuaded the judge here reasonably terminated the trial and discharged the jury once the sudden bombshell about the mistaken blood sample was revealed. Although we have not been provided with the trial transcripts, we presume the prosecution in its opening statement presented the trial jurors with the same theme it had presented to the grand jurors, i.e., that defendant was heavily intoxicated at the time of the collision. It is also likely that some of the testifying witnesses before the hospital nurse took the stand provided testimony in support of that theme. The parties have not shown otherwise.[6]

Once the testifying nurse's records revealed that the blood samples tested at the State's lab were not attributable to defendant, there was no realistic way for the jurors to ignore that enormous mistake. A limiting instruction would not have sufficed to cure the massive prejudice to the State that defense counsel would surely exploit. See, e.g., State v. Manning, 82 N.J. 417, 421-22 (1980) (finding that the prejudicial effect of testimony that should not have been admitted was "devastating" and constituted reversible error despite prompt and

[6] As we noted above, in advocating for dismissal with prejudice after the blood sample snafu had come to light, defense counsel argued to the court that the State's case thus far had been centered on "alcohol" and "speed."

emphatic limiting instructions from the trial court); State v. Herbert, 457 N.J. Super. 490, 504-08 (App. Div. 2019) (recognizing that "jury compliance with curative and limiting instructions" cannot always be presumed, and that such an instruction sometimes may be ineffective when it concerns evidence that "bears directly on the ultimate issue"). The trial simply could not be salvaged.

Moreover, defendant did not voice to the trial judge any objection to a mistrial after partially losing his motion for dismissal with prejudice of all charges. Although his attorney did not affirmatively assent to the mistrial, the lack of an objection deprived the judge of an opportunity to consider the matter more deeply. In any event, there simply were no realistic options other than to end the trial and plan for a fresh start.

Defendant urges that he was entitled to a bar on re-prosecution because the judge found that the State's misattribution of the blood samples, while not deliberate, was done in bad faith. But not all findings of the government's bad faith inexorably preclude re-prosecution. The trial court must examine the comparative interests and equities on a case-by-case basis, just as it does in the analogous context of a Brady violation. See, e.g., State v. Brown, 236 N.J. 497, 527-28 (2019). The question is whether the State's conduct is "so outrageous"

as to "absolutely bar" it from involving judicial processes to obtain a conviction. Id. at 528 (quoting United States v. Russell, 411 U.S. 423, 431-32 (1973)).

In Brown, the State belatedly turned over nineteen reports to the defense one week into a jury trial, but there was no evidence of "willful misconduct." Ibid. Accordingly, the Supreme Court discerned no constitutional barrier to allowing the State to proceed with the case. Ibid.

Here, although we surely do not condone the misattribution of the blood samples and the loss of defendant's own vials, we likewise are satisfied that the mistakes were not sufficiently outrageous to bar the State completely from going forward with portions of the charges that are not dependent on defendant's BAC level or proof of intoxication. The Double Jeopardy clauses do not mandate total dismissal here.

B.

In a related argument, defendant contends that his re-prosecution on counts one and two would contravene principles of fundamental fairness. The trial judge soundly rejected that argument.

The New Jersey Supreme Court has characterized the doctrine of fundamental fairness as "'an integral part of due process'" which "'protect[s] citizens . . . against unjust and arbitrary governmental action[.]'" State v. Shaw,

241 N.J. 223, 239-40 (2020) (quoting State v. Saavedra, 222 N.J. 39, 67 (2015) and Doe v. Poritz, 142 N.J. 1, 108 (1995)). The doctrine is "applied 'sparingly,' only when 'the interests involved are especially compelling.'" Ibid. (quoting Doe, 142 N.J. at 108).

Defendant rightfully points out the anxiety, uncertainty, embarrassment, and additional expenses he will sustain due to the further delay of this case. See State v. Abbati, 99 N.J. 418, 430 (1985) (recognizing these considerations as "a proper subject for the application of traditional notions of fundamental fairness and substantial justice"). The trial judge duly considered those concerns, but carefully weighed them against the public's countervailing interest in seeing to it that allegedly criminal behavior that caused a loss of life, if proven beyond a reasonable doubt, does not go unpunished. Even without BAC results or circumstantial proof of defendant's inebriation, as the judge recognized, there is ample non-alcohol-related evidence here of his criminally reckless driving to justify his re-prosecution on counts one and two. The judge reasonably balanced the competing interests and reached a just determination to dismiss some counts with prejudice but preserve others. His ruling was not fundamentally unfair.

Also on the subject of fairness, we note the acknowledgments of both the County Prosecutor and the amicus Attorney General that the case should not

proceed under the existing indictment and that the matter should be presented to a different grand jury. That concession is consistent with well settled principles warranting a presentation to a new grand jury where the original grand jury was tainted by improper evidence or other infirmities. See, e.g., State v. Jeannotte-Rodriguez, 469 N.J. Super. 69 (App. Div. 2021); State v. Lisa, 391 N.J. Super. 556 (App. Div. 2007), aff'd, 194 N.J. 409 (2008). Here, the original grand jury was repeatedly exposed to evidence of defendant's alleged intoxication and his misreported, whopping BAC level of 0.376%. The taint is manifestly clear.

As a final point of clarification, we reject the State's request to be permitted on a re-prosecution to present evidence of defendant's "impairment" in lieu of proving his "intoxication," including evidence of him drinking at bars on the night of the incident. This should not be allowed.

For one thing, our case law has noted, in the context of applying the Interstate Driver License Compact, N.J.S.A. 39:5D-1 to -14, the close overlap between the concepts of motorist impairment and intoxication. See State v. Zeikel, 423 N.J. Super. 34, 45-46 (App. Div. 2011). In addition, the trial judge's reasons for prohibiting the State from prosecuting defendant on counts three through five due to the misattribution of his blood sample logically preclude the State from trying to show his inebriation through other means. That would be

particularly unfair to defendant, whose actual—and irretrievable—blood sample might have shown, as the trial judge recognized, he was below the legal limit.

To be clear: before a new grand jury and at any subsequent trial, the State may not offer proof of any kind to show that defendant was under the influence of alcohol at the time of the collision. The trial court's decision is hereby modified to include this evidentiary prohibition.

We have considered all of the other arguments raised on appeal and have determined they lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed, as modified.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION