IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

SHAUN ERIC MARTINEZ,
Defendant-Appellant.

Supreme Court Case No.: CRA15-028
Superior Court Case No.: CF0355-14

OPINION

Cite as: 2017 Guam 23

Appeal from the Superior Court of Guam
Argued and submitted on July 20, 2016
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.[1]

MARAMAN, J.:

[1] Defendant-Appellant Shaun Eric Martinez appeals his judgment of conviction for Theft of Property (as a Second Degree Felony), Conspiracy to Commit Robbery (as a Second Degree Felony), Robbery (as a Third Degree Felony), and one count of Assault (as a Misdemeanor). On appeal, Martinez argues that the trial court erred in admitting fingerprint evidence and improperly submitting the issue of a felon on felony release to the jury.

[2] For the reasons stated below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] The two victims in this case, Young Sul Kim ("Young Sul"), and his wife, Ok Ja Kim ("Ok Ja"), testified that on the night of July 12, 2014, they noticed that a sedan followed them to their residence in Barrigada. When the couple parked their vehicle, two men from the sedan approached them. The man who approached Young Sul claimed to be a police officer. The other man approached Ok Ja, sprayed a substance on her, and forcibly took her purse. Both men fled the scene in the same sedan.

[4] When the police arrived, they noticed there were security cameras around the residence. Officer Jasen M. Dodd reviewed the surveillance video, which captured the assault and showed that one of the assailants placed his hands on the victims' car. After reviewing the video, Officer Dodd contacted a Crime Scene Investigation ("CSI") unit to test the vehicle for fingerprints. CSI

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

lifted a fingerprint from the victims' vehicle and found that the lifted fingerprints belonged to Martinez. Detectives Joseph Aguon and Joel Terlaje located Martinez and informed him that the police were investigating a robbery that happened in Barrigada. Martinez was then taken to the Guam Police Department's ("GPD") Tiyan office, where he was read his Miranda rights and interviewed by Detective Terlaje.

[5] During the interview, Martinez confessed to the crime and provided significant detail in describing his and his co-defendants' actions. Detective Terlaje testified that Martinez confessed to meeting up with his two co-defendants, that co-defendant Johnny Atalig informed them that "they were going to rob some Koreans," and confessed to following the victims from a bar in Harmon to their residence in Barrigada. Transcript ("Tr.") at 42-44 (Jury Trial, Dec. 30, 2014). Martinez also confessed that he and Atalig approached the two victims as they were still inside their vehicle parked at their residence. Further, he confessed that he sprayed mace on Ok Ja, chased her to the front of the vehicle, grabbed her purse, and fled the area with Atalig. Martinez added that, during their escape, he threw the canister of mace into the jungle and received a share of the contents of the stolen purse.

[6] In addition to his confession, Martinez agreed to assist the police in their search for the mace canister—which was ultimately unsuccessful—and turned over his clothing worn during the robbery. After the interview, the police asked Martinez if he was willing to do a video reenactment of the robbery. Martinez agreed, and that video was played for the jury at his trial.

[7] Before Martinez's trial began, he served a discovery request upon the Office of the Attorney General ("OAG"). Two days later, the People transmitted discovery consisting of 78 pages of documents and two compact discs containing electronic files. Included in this

discovery was some indication that fingerprints were obtained during the investigation. *See* Excerpts of Record ("ER") at 56 (indicating that officer "received information . . . that Finger Print Analyst PO III Gilbert J. Mondia informed [another officer] that the latent print lifted from the vehicle matched the fingerprint" from Martinez).[2] But, no report regarding an analysis of those fingerprints was contained in this initial discovery.

[8] Jury selection began on December 3, 2014, but a superseding indictment was returned adding an additional charge of theft. Further discovery was provided to Martinez on December 10, 2014, which included additional materials regarding the fingerprint evidence the People intended to use at trial. At a conference the next day, Martinez moved to exclude this newly-produced evidence based upon the People's failure to disclose it in a timely fashion and because he had "been apprised of no expert testimony, no expert report, [and] no one is designated as an expert on the fingerprints on the Government's witness list." Tr. at 6 (Pretrial Conference, Dec. 11, 2014). Martinez argued that the People's actions were a "clear discovery violation." *Id.* at 7-8. In response, the People acknowledged that Martinez submitted a discovery request for any expert report regarding fingerprints, but stated that no such report existed. Rather, the People claimed that GPD only provided the OAG with copies of the file print and latent print for comparison, which the People provided to Martinez in discovery. The trial court made no definitive ruling on the record that a discovery violation occurred, but it stated that it would not

[2] The court takes judicial notice of the discovery produced by the People to the extent that discovery is not contained in the record on appeal and the fact of such discovery is not subject to reasonable dispute. *See generally* Guam R. Evid. 201(a); *see also People v. Diaz*, 2007 Guam 3 ¶ 60 (recognizing that judicial notice may be taken during appeal). In this instance, the court takes judicial notice only of the fact that Martinez was on notice of the existence of other fingerprint evidence; the court draws no factual inferences from the documents themselves. *Accord Bounds v. Superior Court*, 177 Cal. Rptr. 3d 320, 326 (Ct. App. 2014) (judicial notice cannot be used as guise to settle contested factual dispute or as substitute for evidentiary hearing (citation omitted)).

"deny completely" the use of the fingerprint evidence and gave Martinez's counsel five days to prepare to address it. *Id.* at 9.

[9] The next day, Martinez filed a written motion asserting the same arguments. In response, the People submitted an amended witness list designating Officer Mondia as an expert witness. A continued conference was held on December 17, 2014. Although no transcript of these proceedings exists, both parties agree that at this conference the court effectively denied Martinez's motion by permitting the People to use the late-disclosed evidence during trial.

[10] During Martinez's jury trial, the parties stipulated to the fact that Martinez was still on felony pretrial release during the date in question. After the People rested their case, Martinez moved for a mistrial or, alternatively, to strike all reference to fingerprint evidence found at the scene of the incident. The trial court denied Martinez's motion.

[11] At the charging conference, the parties discussed the jury instruction regarding felony pretrial release. During that conference, Martinez objected to any reference to the issue in the jury instructions and verdict forms. The court overruled Martinez's objection. The jury ultimately returned guilty verdicts on four counts. Martinez was sentenced to fifteen years' imprisonment. He timely filed a notice of appeal.

II. JURISDICTION

[12] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-90 (2017)); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

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III. ANALYSIS

A. The Trial Court Properly Denied Martinez's Pretrial Motion to Exclude Fingerprint Evidence on the Basis of the People's Discovery Violation

[13] Martinez first argues on appeal that the trial court erred in allowing the People to introduce fingerprint evidence despite the People's failure to disclose it in a timely manner. Appellant's Br. at 13 (Oct. 26, 2015). In particular, he asserts that the trial court abused its discretion when it failed to consider the four factors used to determine the appropriate sanction for discovery violations as set forth in our prior decision in *People v. Tuncap*, 1998 Guam 13 ¶ 25. *See* Appellant's Br. at 15 (citing *Tuncap*, 1998 Guam 13 ¶ 25). In response, the People admit that a discovery violation occurred. Appellee's Br. at 10 (Nov. 25, 2015). They contend, however, that our decision in *People v. Naich* "characterizes the four [*Tuncap*] factors as appropriate for appellate review but does not direct trial courts to apply all four factors for each violation." Appellee's Br. at 10. Moreover, the People assert that the trial court's decision to grant a five-day continuance was sufficient to rectify any discovery violation. *Id.* "We review . . . sanctions imposed for violations of discovery orders, for an abuse of discretion." *People v. Naich*, 2013 Guam 7 ¶ 22.

[14] Where a discovery violation occurs, "the court must determine whether the sanction employed to remedy the infraction was appropriate." *Tuncap*, 1998 Guam 13 ¶ 23. "[T]he sanction chosen must be proportionate to the misconduct." *Id.* ¶ 24 (citation omitted). Generally speaking, "[t]he sanction of dismissal is a disfavored remedy." *Id.* ¶ 26 (citing *People v. Marada*, No. CR94-00070A, 1995 WL 604365 (D. Guam App. Div. Sept. 18, 1995)). Indeed, "dismissal of an indictment is inappropriate 'absent flagrant and prejudicial prosecutorial

misconduct.'" *Naich*, 2013 Guam 7 ¶ 33 (quoting *United States v. Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988)). We have found it better policy to apply sanctions that "affect the evidence at trial and the merits of the case as little as possible." *Tuncap*, 1998 Guam 13 ¶ 23 (citation and internal quotation marks omitted); *see also Naich*, 2013 Guam 7 ¶¶ 31-32 ("[T]he goal of sanctions [is] 'to get prompt and full compliance with the discovery order,'" and dismissing a case "d[oes] not achieve that end." (citation omitted)). This usually requires that the court "impose the least severe sanction that will accomplish the desired result [of] prompt and full compliance with the" parties' discovery obligations. *Tuncap*, 1998 Guam 13 ¶ 24 (quoting *United States v. Sarcinelli*, 667 F.2d 5, 7 (5th Cir. 1982)).

[15] We address the appropriateness of imposed sanctions for discovery violations using the factors set out by the Fifth Circuit in *Sarcinelli*. *See Naich*, 2013 Guam 7 ¶ 31; *see also Tuncap*, 1998 Guam 13 ¶¶ 25-29. The relevant factors for courts to consider in imposing a sanction are: (1) the reasons why the disclosure was not made; (2) the extent of prejudice, if any, to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant circumstances. *See Naich*, 2013 Guam 7 ¶ 31.

[16] Although the trial court below did not specifically analyze each of these factors, we do not find that dispositive for purposes of this appeal. In *Tuncap*, we found that because the trial court made no meaningful inquiry into the underlying specific items of discovery, most of the *Sarcinelli* factors could not be analyzed. *See Tuncap*, 1998 Guam 13 ¶ 29. That is not the case here. The trial court inquired about specific items of discovery that the People initially failed to produce and heard arguments as to why specific fingerprint reports requested in follow-up discovery were not produced. *See* Tr. at 6-9, 12 (Pretrial Conference); *see also* Tr. at 18-23 (Jury

Trial, Jan. 2, 2015). Once that material was produced, the trial court granted a five-day continuance so that Martinez could properly prepare to address this late-produced evidence. Upon a review of the *Sarcinelli* factors, as articulated in *Tuncap*, we find that the trial court did not abuse its discretion in denying Martinez's request to exclude the fingerprint evidence in its entirety and granting a five-day continuance to allow Martinez time to prepare to address the new evidence.

[17] To begin our analysis, we first inquire into the reasons why disclosure was not made. *See Naich*, 2013 Guam 7 ¶ 35. In *Naich*, we agreed with the trial court's finding that the errors were not made in bad faith but rather resulted from a series of mistakes. *Id.* ¶¶ 35-36. That appears to be the case here as well. The trial court expressly addressed this issue, finding that "[i]f there [are] faults, it doesn't appear that it lies with the Government. They seemed to exercise diligence in trying to acquire the discovery." Tr. at 19 (Jury Trial, Jan. 2, 2015). The initial discovery transmitted on August 8, 2014, referenced the fingerprint analysis report. In other words, Martinez was made aware of the fingerprint reports at issue; we cannot find that the People purposefully hid materials from Martinez. Moreover, it is undisputed that the prosecution turned over further discovery nearly as soon as they received it and, as the People note, "it's not really standard to get copies of the cards or anything from the crime lab . . . unless and until trial is proceeding." Tr. at 7 (Pretrial Conference). Although we have cautioned that "the People be more diligent in seeking to comply with discovery requests and orders, even if this requires proactive efforts," *see Naich*, 2013 Guam 7 ¶ 36, the shortcomings here cannot be attributable to bad faith or misconduct.

[18] The next factor we consider in our analysis is the extent of any prejudice to the opposing party. *See Naich*, 2013 Guam 7 ¶ 37. The prejudice referred to in analyzing this factor is "prejudice to the defendants' *substantial rights*, that is, injury to their right to a fair trial, and that prejudice does not encompass putting trial preparation into minor disarray." *United States v. Garrett*, 238 F.3d 293, 299 (5th Cir. 2000) (citations omitted).[3] If the defendant had time to put the newly disclosed discovery to use, then there should be no finding of prejudice. *See id.* "Whether some extra effort was required by the defense counsel" is irrelevant to our consideration of this factor. *See id.* In *Naich*, this court found that having fifteen days from receipt of the discovery until the trial began was sufficient time to prepare to use the late-produced material. 2013 Guam 7 ¶¶ 37-39; *see also Tuncap*, 1998 Guam 13 ¶ 29 (finding that eight days was likely sufficient time to cure prejudice). Moreover, the defendant in *Naich* did "not suggest[] any different strategic actions he might have taken had he had more time to prepare and utilize the delayed discovery material." *Naich*, 2013 Guam 7 ¶ 38. The same is true here.

[19] In contemplation of Martinez's initial motion at the December 11th pretrial conference, the trial court granted the parties a five-day continuance. *See* Tr. at 9-12 (Pretrial Conference). Moreover, the alleged report in dispute was turned over on December 10, but Martinez's trial did not commence until December 19, thus suggesting defense counsel had nine days to prepare for

[3] Martinez argues in his reply that "no prejudice would have resulted in [the evidence's] exclusion." Appellant's Reply Br. at 1 (Dec. 9, 2015). This prong of the *Tuncap* analysis, however, is concerned with prejudice to the party who must deal with the ramifications of a discovery violation, not prejudice to the disclosing party in the event that the evidence is ultimately excluded. *See, e.g.*, *Naich*, 2013 Guam 7 ¶¶ 37-39 (analyzing prejudice to defendant who received late disclosure of evidence).

the presentation of the fingerprint evidence during the trial.[4] *Cf. Tuncap*, 1998 Guam 13 ¶ 29 (noting that "the trial was not scheduled to begin for another eight days," and "[t]hus, time was still available to remedy the actual prejudice, if any, suffered by the defendant"). On this basis, the trial court found that "there was sufficient time for preparation." Tr. at 75 (Jury Trial, Dec. 31, 2014). Although Martinez notes that he was unable to secure an expert witness in this short time frame, *see* Appellant's Br. at 6, like the defendant in *Naich*, he has not indicated what "different strategic actions he might have taken" or "what he would have done differently had he received the information earlier," *Naich*, 2013 Guam 7 ¶¶ 38-39. In *People v. Quinata*, we rejected a defendant's argument that the late disclosure of expert evidence prejudiced his defense where the defendant on appeal "d[id] not actually question the integrity of the evidence." 2010 Guam 17 ¶ 47. Here, Martinez makes only the cursory argument that the evidence "was material to the jury's consideration and subsequent guilty verdicts." Appellant's Br. at 16. He articulates no specific arguments why the fingerprint evidence was unreliable or otherwise lacked integrity. On the other hand, substantial evidence other than the fingerprints linked Martinez to the crime, including, among other things, his oral confession detailing the facts as shown by the video evidence, the clothing he gave to police that was used during the robbery, the fact that he took the police to the victims' residence, and the video reenactment of the robbery. *See, e.g.*, Tr. at 42-44, 46-47 (Jury Trial, Dec. 30, 2014); Tr. at 8 (Jury Trial, Dec. 31, 2014). Because of Martinez's failure to articulate how he believes he was prejudiced and the other significant

[4] It was not until December 31, 2014, that the fingerprint evidence was presented by the People, thus suggesting that Martinez actually had twenty-one days to prepare. *See* Tr. at 27 (Jury Trial, Dec. 31, 2014).

inculpatory evidence admitted at trial, we are unable to find that Martinez was prejudiced by the late production of this evidence.

[20] In the third portion of our analysis, we examine the feasibility of rectifying prejudice by granting a continuance. *See Tuncap*, 1998 Guam 13 ¶ 25. Here, the court did grant a continuance when Martinez raised his initial oral motion. There is no indication in the record that Martinez asked for an additional continuance to secure an expert witness or to better prepare to address the newly disclosed material—this, despite the fact that Martinez had already waived his speedy trial rights. Therefore, unlike in *Naich*, where the defendant had asserted his right to a speedy trial, Martinez's failure to request an additional continuance undermines his argument with respect to this third *Sarcinelli* factor. *Cf. Naich*, 2013 Guam 7 ¶ 42. In other words, the failure to "move for a continuance in order to be afforded an opportunity to better assess the new evidence hurts any argument that" an additional continuance would rectify any potential prejudice. *Id.* ¶ 41 (citing *People v. Kitano*, 2011 Guam 11 ¶ 10); *see also Quinata*, 2010 Guam 17 ¶ 48 ("[Defendant] failed to move for a continuance, thereby undercutting his claim of prejudice based on an inability to hire his own expert. If he felt he was entitled to more time to prepare to rebut the DNA evidence, he should have asked for the alternative remedy of a continuance rather than simply ask for the flat-out exclusion of all DNA evidence."); *People v. Flores*, 2009 Guam 22 ¶ 66 (rejecting claim of prejudice over delayed disclosure of witness in part because "even with the information obtained[,] [defendant] did not request . . . a continuance or additional time to further prepare the defense").

[21] Finally, in reviewing the appropriateness of a discovery sanction, the court may consider any other relevant circumstances. *See Naich*, 2013 Guam 7 ¶ 43. We consider the following in

this case: (1) as discussed further below, not all of the fingerprint reports mentioned during the trial were turned over; (2) the jury was already empaneled when the alleged report was disclosed; and (3) the jury may give an expert's testimony greater weight. While these additional considerations favor Martinez's position, we do not believe they are sufficient to overcome the other factors discussed above. Here, the essence of the late discovery materials was not a surprise. *Cf. Quinata*, 2010 Guam 17 ¶ 49 (finding that defendant "was aware of the results" of the relevant test significantly before the actual report was disclosed, and as a result, "[h]ad [defendant] truly had qualms over the reliability of the laboratory or of the test results themselves, he could have hired his own expert in [the window of time] to rebut the results, regardless of the Government's intent to call its own expert."). In addition, although an expert opinion may impact the jury's decision more than a lay opinion, Martinez's defense counsel had the opportunity to attack credibility through the cross-examination of Officer Mondia, which he took full advantage of. *See United States v. Pitts*, 428 F.2d 534, 536 (5th Cir. 1970) (a factfinder "need not be bound by expert testimony, even if all of the witnesses are presented by only one side," especially where cross-examination of expert is such as to justify the trier of fact to question his or her reliability).

[22] Taking the above four *Tuncap* factors together, we find that the trial court did not abuse its discretion in denying Martinez's request to suppress the fingerprint evidence due to its late disclosure.

B. The Trial Court Did Not Err in Admitting the Fingerprint Evidence Over a Guam Rule of Evidence 702 Objection

[23] Martinez next claims on appeal that the trial court abused its discretion in allowing the People to introduce the fingerprint reports and the expert testimony of Officer Mondia because each purportedly lacked any indicators of reliability as required by Guam Rule of Evidence (GRE) 702. Appellant's Br. at 16, 18. Rule 702 governs opinion and expert testimony. *See* Guam R. Evid. 702. Martinez offers no form of support for his assertion other than a citation to this Rule and to Rule 26(a) of the Guam Rules of Civil Procedure, which is not applicable here. Nor does he articulate what, exactly, he believes makes the admitted evidence unreliable. This alone is sufficient to deny this portion of Martinez's appeal. *See Lamb v. Hoffman*, 2008 Guam 2 ¶ 35 ("It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." (quoting *Wilson v. Taylor*, 577 N.W.2d 100, 105 (Mich. 1998))); *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

[24] In any event, "[e]videntiary rulings of the trial court . . . will not be reversed absent prejudice affecting the verdict." *See People v. Roten*, 2012 Guam 3 ¶ 13 (citing *People v. Muritok*, 2003 Guam 21 ¶ 32); *see also B.M. Co. v. Avery*, 2001 Guam 27 ¶ 29 (in reviewing admissibility of expert testimony, stating that "in the absence of an incurable prejudice to the opposing party, trial judges should err on the side of affording the parties the opportunity to fully present the case on the merits"). We see no prejudice here. As noted above, the additional evidence against Martinez, such as his confession and his video reenactment, is substantial. Therefore, even if we were to strike the report under Rule 702, the outcome would almost

certainly be the same. There is thus no justification to reverse Martinez's conviction on this basis, as Martinez was not prejudiced by the introduction of Officer Mondia's testimony.

C. The Court Properly Denied Martinez's Motion for a Mistrial Based Upon an Alleged *Brady* Violation

[25] Next, Martinez argues that the trial court erred in denying his motion for a mistrial because the People committed a *Brady* violation by failing to produce the complete fingerprint analysis reports created by the GPD's crime lab. *See* Appellant's Br. at 18-21. The People argue in opposition that the evidence was not *Brady* material because it was not exculpatory and that under our decision in *People v. Kitano*, 2011 Guam 11, and the United States Supreme Court's decision in *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), there is no evidence of bad faith that would otherwise justify reversal on appeal. *See* Appellee's Br. at 15-16. Whether a *Brady* violation occurred is an issue we review *de novo*. *See People v. Campos*, 2015 Guam 11 ¶ 16 (citation omitted).

[26] "Under the federal [C]onstitution, the government's failure to provide evidence within its control to a criminal defendant may violate the defendant's right to due process of law in two situations." *Kitano*, 2011 Guam 11 ¶ 29. The first situation refers to a violation of a defendant's rights granted under *Brady v. Maryland*. *Id.* ¶ 30 (citing *Brady*, 373 U.S. 83, 87 (1963)). *Brady* held that "[t]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment . . . ." 373 U.S. at 87; *see also Kitano*, 2011 Guam 11 ¶ 19. Among other requirements, for non-disclosed material to be considered *Brady* material, it "must be favorable to the accused"—*i.e.*, exculpatory. *Kitano*, 2011 Guam 11 ¶ 21 (quoting *Flores*, 2009 Guam 22 ¶ 61) (internal

quotation marks omitted). Thus, "strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *see also Kitano*, 2011 Guam 11 ¶ 21 (same).

[27] Here, Martinez has pointed to no indication that the report or reports that were referred to during the testimony of various witnesses at trial would have been beneficial to his defense. Martinez's counsel failed to ask Officer Tenorio what was in his purported written report, *see* Tr. at 40-41 (Jury Trial, Dec. 31, 2014), Officer Tainatongo could not remember the contents of the report, *see id.* at 66, Officer Mondia testified that he never saw the report prepared by Officer Tenorio, *see id.* at 127, and he was not asked about the contents of the report he prepared, *see id.* at 139-40. Indeed, Martinez admitted below that he could not "say that they were inculpatory or exculpatory because I just don't know." Tr. at 18 (Jury Trial, Jan. 2, 2015). The other facts indicating Martinez's guilt that are tangentially related to the fingerprint reports—including Martinez's confession, his reenactment of the crime, and the expert testimony of Officer Mondia—indicate that the missing reports likely were inculpatory. We, therefore, cannot find a pure *Brady* violation on the facts of this case, as Martinez has not established that the reports at issue were exculpatory.

[28] The second situation in which the failure to disclose material may violate due process refers to "the failure of the police to preserve evidence that *might* be useful to the accused." *Kitano*, 2011 Guam 11 ¶ 31. Unlike a pure *Brady* violation, "the Due Process Clause 'requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it . . . *might* have exonerated the defendant.'" *Id.* (quoting

Youngblood, 488 U.S. at 58). "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve useful evidence does not constitute a denial of due process of law." *Id.* (quoting *Youngblood*, 488 U.S. at 58) (internal quotation marks omitted). We have previously found, in accordance with United States Supreme Court precedent, that the "presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* (quoting *Youngblood*, 488 U.S. at 56 n.*). Courts have relied upon this language to hold that a finding of bad faith must be predicated upon proof of "official animus" or a "conscious effort to suppress exculpatory evidence." *Jones v. McCaughtry*, 965 F.2d 473, 477 (7th Cir. 1992) (citations omitted); *see also United States v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996) (citations omitted).

[29] In this case, the full report is the type of evidence more properly analyzed under *Youngblood—i.e.*, evidence that *might* be useful to Martinez—not the exculpatory and material evidence analyzed under *Brady*. *See Kitano*, 2011 Guam 11 ¶ 32. Martinez claims bad faith was demonstrated on the part of the GPD's crime lab personnel who he alleges to have "willfully, intentionally, and quite casually . . . ignored the [People's] subpoena in responding that no such reports exist. . . ." *Id.* at 19-20; *see also* Tr. at 34, 139 (Jury Trial, Dec. 31, 2014). But, mere failure to preserve evidence cannot serve as a basis for finding bad faith. *See, e.g.*, *United States v. Richard*, 969 F.2d 849, 853-54 (10th Cir. 1992) ("The mere fact that the government controlled the evidence and failed to preserve it is by itself insufficient to establish bad faith." (citation omitted)); *see also Holdren v. Legursky*, 16 F.3d 57, 60 (4th Cir. 1994) (finding argument that police failed to properly preserve evidence "asserts nothing more than negligence .

. . and does not indicate any bad faith"). Were we to find that simple failure to produce potentially helpful evidence standing alone (whether in the face of a subpoena or otherwise) was a basis for finding bad faith, the bad-faith standard articulated in *Youngblood* and *Kitano* would be swallowed whole and rendered meaningless. *Cf. Illinois v. Fisher*, 540 U.S. 544, 548 (2004) ("We have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of police" for an alleged violation of the *Youngblood* standard.).[5] This sort of "proof" falls far short of the type required by cases such as *Jones* and *Jobson* necessary for us to find a due process violation. For example, there is no evidence that anyone in the GPD suspected that the reports were exculpatory. *See Jobson*, 102 F.3d at 218; *In re Sealed Cases*, 99 F.3d 1175, 1178 (D.C. Cir. 1996) (rejecting claim of due process violation under *Youngblood* because "Appellant has forwarded no evidence that the police knew of the exculpatory nature of this evidence at the time they packaged it together"); *United States v. Femia*, 9 F.3d 990, 995-96 (1st Cir. 1993) (finding that a materiality requirement is required under *United States v. Trombetta*, 467 U.S. 479 (1984)).

[30] Throughout the discovery process, Martinez was put on notice of the existence of fingerprint evidence linking him to the crime. Also, three separate officers testified about how they went about obtaining the fingerprint evidence and the process used to match that evidence against Martinez's prints. The existence of this comparable evidence also strongly weighs against a finding of a due process violation. *See People v. Muna*, DCA No. 91-48A, 1992 WL

[5] Martinez's argument also fails to consider the possibility that the GPD's response to the OAG's subpoena may have been a true and accurate response at the time it was made. There is nothing in the record indicating whether the purportedly withheld reports are still in existence, and if not, when the reports were destroyed, lost, or otherwise became unavailable.

245624, at *3 (D. Guam App. Div. Sept. 11, 1992) (finding the existence of, and access to, comparable evidence weighs against a finding of due process violation under *Youngblood* and *Trombetta*); *see also Trombetta*, 467 U.S. at 489 (failure to preserve evidence not a due process violation unless "evidence . . . both possess[es] an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means"). Indeed, the existence of comparable evidence is fatal to any assertion of a due process violation under *Trombetta* and *Youngblood*. *See, e.g.*, *Jobson*, 102 F.3d at 218 (to prove due process violation under *Youngblood*, "the defendant must show: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; and (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other reasonably available means" (citing *Youngblood*, 488 U.S. at 57-58; *Trombetta*, 467 U.S. at 488-89)); *Femia*, 9 F.3d at 995 (materiality requirement of *Trombetta* requires that defendant be unable to obtain comparable evidence (quoting *Trombetta*, 467 U.S. at 488-89)).

[31] For all of these reasons, under *de novo* review, we find Martinez was not denied due process and the trial court's denial of Martinez's motion for a mistrial was not in error.[6]

[6] Martinez alternatively moved to strike all fingerprint evidence, but the trial court denied that motion. *See* Tr. at 14-20 (Jury Trial, Jan. 2, 2015). Martinez argues on appeal that this too was error. Appellant's Br. at 22. As noted above, however, evidentiary errors are not subject to reversal except upon a finding of prejudice, *see Roten*, 2012 Guam 3 ¶ 13 (citing *Muritok*, 2003 Guam 21 ¶ 32); *see also Avery*, 2001 Guam 27 ¶ 29, and we find no prejudice here even assuming the trial court abused its discretion by refusing to strike the fingerprint evidence, *see supra* Part III.B. The trial court's denial of Martinez's motion to strike was therefore not reversible error.

D. Submitting the Felon on Felony Release Issue to Jury Was Not Reversible Error

[32] In his final argument raised on appeal, Martinez asserts the trial court erred by allowing evidence of his prior criminal conduct to reach the jury based upon an alleged misreading by the trial court of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Appellant's Br. at 12. He asserts reversible error in the cumulative effect of exposing the jury to (1) the indictment indicating that he was on release in another felony matter; (2) an instruction as to felony release; and (3) the submission of the matter for a fact-finding in verdict forms. Appellee Br. at 23. According to Martinez, this case is controlled by our decision in *People v. Quitugua*, 2015 Guam 27, where we upheld a valid waiver of a defendant's *Apprendi* rights. In response, the People contend, among other things, that this case is not analogous to *Quitugua* because Martinez never knowingly waived his *Apprendi* rights. Appellee's Br. at 17. "[T]he issue of whether the lower court violated the constitutional rule established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) . . . [i]s a question of law that is reviewed *de novo*." *Quitugua*, 2015 Guam 27 ¶ 32; *see also State v. Dettman*, 719 N.W.2d 644, 651-52 (Minn. 2006) (applying *de novo* review to purported *Blakely* waiver).

[33] Under *Apprendi*, a criminal defendant has a constitutional right to have every fact that increases the penalty for a crime submitted to the jury and proved beyond a reasonable doubt. *See* 530 U.S. at 490; *see also Blakely v. Washington*, 542 U.S. 296 (2004). In *Blakely v. Washington*, the United States Supreme Court stated that this right could be waived. 542 U.S. at 310 ("Even a defendant who stands trial may consent to judicial fact-finding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial."). And in *Quitugua*, we agreed. *See* 2015 Guam 27 ¶ 43. We explained in *Quitugua* that

the United States Supreme Court's comments in *Blakely* "flow from the longstanding proposition that an accused in a criminal trial may waive his Sixth Amendment right to trial by jury if the waiver is made with express, intelligent, consent and agreed to by the People and the lower court." *Quitugua*, 2015 Guam 27 ¶ 42 (citing *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942)). We later held in *People v. Guerrero*, however, that a "valid waiver must be procured in order for a defendant to enjoy the benefits of waiving his or her *Apprendi* rights." 2017 Guam 4 ¶ 24.

[34] In determining whether a criminal defendant has waived one of his fundamental constitutional rights, the court must "indulge every reasonable presumption *against* waiver," and we may not "presume acquiescence in the loss of fundamental rights." *Guerrero*, 2017 Guam 4 ¶ 25 (emphasis added). The *Quitugua* court accepted that the defendant adequately waived his *Apprendi* rights based on his initiative "to keep the fact of felony release from the jury, as shown by his stipulation, remarks made during the pre-trial conference, and his initial objection to any reference to the stipulation." *Id.* ¶ 43. On these facts, the court had "little doubt that [Quitugua] expressly and intelligently waived his *Apprendi* right as to the sentence enhancement," and "[n]o challenge was made at trial or on appeal as to the validity of Quitugua's waiver." *Id.* Specifically, the *Quitugua* court found the record reflected that the defendant "stipulated in order to avoid the harmful effects of admitting evidence that would portray him as a repeat felon." *Id.* ¶ 51.

[35] We more recently held in *Guerrero* that simply stipulating to the fact that defendant was on felony release was insufficient evidence of a knowing, intelligent waiver of a defendant's *Apprendi* rights without any further indication that it was also his conscious objective that all

such facts of his criminal past not be brought to the jury's attention. *See* 2017 Guam 4 ¶¶ 31-33, 38. The court distinguished the facts in *Guerrero* from those in *Quitugua* on the basis that: (i) "[t]he record is silent on whether Guerrero made an objection to the admission of facts relating to the felony release in the pre-trial phase, unlike the pre-trial conference objection made in *Quitugua*"; (ii) "Guerrero did not comment or object to the notion that the jury would consider the stipulated facts"; (iii) "[a]t the end of the prosecution's case-in-chief, trial counsel moved to admit into evidence" facts regarding Guerrero's felony release, and "Guerrero did not object"; (iv) "the prosecution discussed the special allegation and reminded the jury" of the fact that Guerrero was on felony release, and "[a]gain, defense counsel did not object"; and (v) the verdict form "required the jury to deliberate over the stipulated fact of the felony release and provide a verdict regarding the special allegation" and "[t]here is no indication that defense counsel objected to the content of the verdict forms." *Id.* ¶¶ 32-33. On this record, the court found that Guerrero "had knowledge of the fact that the jury would deliberate on the stipulated fact of the felony release and that he did not consent to judicial fact-finding." *Id.* ¶ 33. Moreover, the record "d[id] not indicate that the court and the parties contemplated the effects of *Apprendi*, nor mentioned anything *Apprendi*-related other than at the sentencing hearing." *Id.*

[36] Like the defendant in *Guerrero*, we find that Martinez did not act with the conscious objective to assert a *Blakely* waiver on the facts presented here. The parties, in this case, stipulated to a statement regarding the fact of felony release, which the prosecution read to the jury. *See* Tr. at 3, 11-12 (Jury Trial, Jan. 2, 2015). The purpose of this stipulation does not appear intended to prevent the fact of Martinez's pretrial release from going to the jury, as evidenced by the fact that Martinez did not object when the People read the stipulation to the

jury. *See id.* at 12-13. Instead, the stipulation appears to have been aimed at preventing the People from producing evidence of the same fact differently, *i.e.*, through live witness testimony. *See* Tr. at 3 (Jury Trial, Jan. 2, 2015); *cf. Guerrero*, 2017 Guam 4 ¶¶ 33, 38. Moreover, Martinez did not object when the People, during closing argument, referred to the fact that "Mr. Martinez had been released on another felony case." Tr. at 79 (Jury Trial, Jan. 2, 2015). Nor did Martinez object to the jury instructions regarding the presentation of the indictment or that a stipulation is a type of evidence. *See id.* at 33, 35. His first and only objection was made during the charging conference, where he suggested that under his reading (or more accurately, misreading) of *Apprendi*, jury findings of fact were not required for sentencing enhancements—only for elements of crimes. *See* Appellee's Br. at 19-20. This objection during the charging conference is the only apparent distinguishing characteristic between the facts of this case and that in *Guerrero*.

[37] In *Guerrero*, the defendant argued that he waived his *Apprendi* rights through his objections to testimony implicating his criminal past. *Id.* ¶¶ 35-36. We rejected the defendant's argument, finding that he did not make his objections with the conscious objective to waive his *Apprendi* rights and, therefore, he did not assert a valid waiver. *Id.* ¶¶ 37-38. Here, the parties initially agreed to the inclusion of a jury instruction as to the special allegations, *see* Tr. at 43-52 (Jury Trial, Jan. 2, 2015), as well as its inclusion on the verdict form, *see id.* at 53-56. When defense counsel finally objected, he argued:

> The more I think about the special allegation . . . the more I view it as sentence enhancement, which should go to the Court upon sentencing and not to the jury, and I *would object to reference to . . . the conditions of release*, as well any reference to that special allegation for the jury, *both in verdict forms and jury instructions*. I believe them to be for the court and not for the [jury].

Id. at 58-59 (emphases added). Based upon this proffered reason for his objection, it is not clear that Martinez even contemplated a *Blakely* waiver, let alone validly sought one.

[38] During his objection, defense counsel seems to have interpreted *Apprendi* to not require jury findings of fact on sentencing enhancements but only on elements of crimes.[7] *See id.* Regardless, this colloquy indicates that counsel was not contemplating a knowing, intelligent *Blakely* waiver, but rather, his misinterpretation of *Apprendi* showed that he believed the special allegation was purely a sentencing issue that was not appropriate for jury resolution. *See* Tr. at 58-59 (Jury Trial, Jan. 2, 2015). When the People explained on the record that *Apprendi* required a jury finding as to facts underlying a sentencing enhancement, as we found in *Muritok*, Martinez gave no reply and did not seek to waive that right. At no point did counsel mention waiver or *Blakely*, and there is even less indication in the record that Martinez (as opposed to his counsel) knowingly and intelligently dispatched with these important constitutional rights. *Cf. People v. Mallo*, 2008 Guam 23 ¶ 22 (finding colloquy surrounding signing of plea agreement was insufficient to establish defendant knowingly and intelligently waived his right to appeal his sentence); *People v. Camacho*, 2009 Guam 6 ¶¶ 21-23 (same).

[39] For these reasons, we cannot find on this record that Martinez knowingly waived his *Apprendi* rights. The trial court's decision to charge the jury on the issue of felon on felony release was not in error.

IV. CONCLUSION

[40] First, we find that the trial court did not commit reversible error in rejecting Martinez's request to exclude the fingerprint evidence based upon the People's discovery violation or based

[7] This is an incorrect interpretation of *Apprendi* and its progeny. *See Muritok*, 2003 Guam 21 ¶ 44.

upon his GRE 702 objection. Second, we find that the People's failure to provide the portion of the fingerprint reports detailing the methodology behind fingerprint collection and analysis did not violate Martinez's right to due process, as Martinez has failed to show that GPD acted in bad faith in collecting and handling the fingerprint evidence. Third, we find that Martinez did not knowingly and intelligently waive his *Apprendi* rights, and therefore the trial court did not err in submitting the felon on felony release issue to the jury. For these reasons, we **AFFIRM** the trial court's judgment.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice