Filed 4/2/12 P. v. Khrayan CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARUTYUN KHRAYAN, Defendant and Appellant.	B213582 (Los Angeles County Super. Ct. Nos. BA255474, BA255302)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathleen Kennedy, Judge. Affirmed.

Geragos & Geragos and Mark J. Geragos for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson, Robert David Breton and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

_____

A jury convicted appellant Arutyun Khrayan of conspiracy to commit the crime of kidnapping for ransom in violation of Penal Code section 182, subdivision (a)(1);[1] attempted kidnapping for ransom in violation of sections 664 and 209, subdivision (a); and assault with a semiautomatic firearm in violation of section 245, subdivision (b). The jury found that in the commission of the conspiracy and attempted kidnapping counts, a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1). Appellant admitted a prior conviction of a serious or violent felony within the meaning of sections 667, subdivision (a); 667, subdivisions (b) through (i); and 1170.12, subdivisions (a) through (d).

The trial court sentenced appellant to life with the possibility of parole for the conspiracy to commit the crime of kidnapping and doubled this term pursuant to the Three Strikes law. The trial court imposed the high term of nine years, doubled to 18 years, for the assault with a semiautomatic firearm. The trial court stayed appellant's sentence in the attempted kidnapping pursuant to section 654. The trial court imposed a consecutive term of five years under section 667, subdivision (a) for the prior serious felony conviction. At the time of the instant offenses, appellant had been on probation in case No. GA047435, in which a four-year term had previously been imposed and suspended. The trial court imposed one-third the midterm doubled, i.e., one year four months in that case, to be served consecutively. Finally, the trial court imposed one-third the midterm doubled in case No. BA255302, in which appellant had admitted a violation of section 12021, subdivision (a)(1) with a strike prior.

Appellant appeals on the grounds that: (1) the trial court erred in denying his motion for a new trial based on newly discovered evidence; (2) the prosecution committed severe misconduct in failing to timely disclose and provide exculpatory evidence to the defense; and (3) the prosecution committed misconduct by destroying and/or failing to preserve material evidence.

---

1 All further references to statutes are to the Penal Code unless stated otherwise.

FACTS

I. Facts Pertaining to Appellant's Convictions in the Kidnapping Plot[2]

Prosecution Evidence

In accordance with the usual rule on appeal, we recite the evidence in the light most favorable to the judgment below.[3] (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) In January 2002, James Patlan met Karapet "Gary" Davytyan, Gina Geraci, and Angela Lewin at the Tarzana Treatment Center, where they were all being treated for addictions. Patlan was on parole for burglary at the time. Karapet talked Patlan into joining him in a kidnapping scheme.

Karapet and Patlan checked out of the treatment center on January 18, 2002. Karapet's brother picked them up and drove them to Glendale. There they met with Karapet's brother-in-law, Manvel, who was also known as Mike. Manvel, Karapet, and another Armenian named Jilbert spoke to each other in Armenian, which Patlan, who is not Armenian, did not understand. Patlan, Karapet, and Manvel later met with a man called Gordo at Manvel's apartment. Karapet said that Gordo had "done [prison] time before." Patlan later identified appellant as Gordo at the preliminary hearing and at trial. In 2002, appellant's hair was longer than at trial and worn in disarray, and he was "quite overweight." Patlan also said Gordo was balding. Appellant was much slimmer and looked very different at trial. Patlan also identified a photograph of appellant taken near the time of the offenses in this case. Appellant was much fatter in the photograph than he was at trial (Peo. exh. 9). Patlan never knew Gordo by any other name. Angela Lewin also positively identified appellant in a photographic lineup and at trial.

---

2 We note with disapproval that appellant failed in his opening brief to provide a summary of the facts and procedural history in this case comprised of 10 volumes of reporter's transcript—despite the importance of both in the analysis of the new trial motion and the trial court's ruling.

3 Appellant challenges neither the sufficiency of the evidence for his convictions nor his sentence.

The kidnapping target was a wealthy Armenian named Armen Mkrtumyan, the owner of the Bender Baking Company in Glendale. Karapet, Manvel, and Patlan spent several days surveilling the site of the kidnapping, which was the warehouse for the bakery. Karapet's family owned a grocery store named Partez Deli on Central Avenue in Glendale. On Sunday night, January 20, 2002, Patlan went with Manvel to Partez Deli to pick up the Smith and Wesson handgun he was to use. That night, Patlan participated in an aborted attempt to kidnap Mkrtumyan. Mkrtumyan drove out of his warehouse parking lot before the kidnapping could take place.

On Tuesday night, January 22, 2002, Gina, who was "interested" in Patlan, left the Tarzana center and met Karapet and Patlan in Glendale. Karapet introduced Gina to Manvel. Gina spent the next few nights with Patlan at motels in Glendale. During that week, Gina lent her cell phone to Patlan and sometimes to Karapet to use in her presence. Whenever she was not with Patlan and wanted to reach him, she would call Karapet and ask if he knew where Patlan was or to give Patlan a message. At one point, she was given another phone number to contact Karapet. Angela joined them on January 25, 2002. They all stayed in a motel until Sunday morning, January 27, 2002. Patlan, Gina, and Angela used a lot of drugs during that week.

Patlan saw appellant at Karapet's residence on Thursday, January 24, 2002. On the following evening, Patlan was at Karapet's residence in Glendale when Manvel arrived in a black Mercedes. Appellant was sitting in the front passenger seat. Karapet and Patlan got into the backseat, and the four men drove around. Appellant asked Patlan to call a businessman who owned a chain of gas stations, but Patlan refused, saying that setting up meetings was "not part of [his] job [description]." On Saturday, January 26, 2002, Karapet and Patlan went to the Partez Deli and met with appellant and Manvel. Appellant gave some instructions to Karapet, after which Karapet dropped Patlan off at his motel.

On Sunday afternoon, January 27, 2002, Patlan, Gina, and Angela drove around to various places in Gina's car and then went to the Partez Deli after dark. Karapet arrived with his wife and a small child. Patlan went inside the deli and spoke with Karapet and

Manvel. Karapet came out and left with his family. Appellant arrived at the Partez Deli in a silver Mercedes-Benz S500 to speak with Manvel and Patlan. Appellant told Patlan the kidnapping would take place that night. Appellant asked Patlan if he had the nine-millimeter handgun. Patlan had the gun in his waistband, but he did not say so. Manvel called Karapet and confirmed that Karapet had given Patlan the gun. Patlan then showed appellant the gun.

At approximately 9:18 p.m., appellant announced that they were going to do the kidnapping. Appellant and Manvel drove Patlan to Mkrtumyan's baking company in an Astro van that belonged to Karapet's and Manvel's family. Patlan got out of the van and appellant said, "Go and see if [you] can get this guy." The plan was for Patlan to accost Mkrtumyan at gunpoint. Patlan would then force Mkrtumyan to drive them both out of the parking lot in Mkrtumyan's own car. Patlan would order Mkrtumyan to follow appellant and Manvel's van. Appellant would negotiate for ransom while Karapet and Manvel held Mkrtumyan hostage.

Because of a prior unsuccessful kidnap attempt by Karapet and Manvel, Mkrtumyan was carrying a loaded .25-caliber Beretta handgun for protection. As Patlan began to climb the stairs of the bakery loading dock, he passed two men descending the stairs. These two men happened to be Mkrtumyan and his brother. Patlan suddenly realized that one of the men he had just passed on the stairs was Mkrtumyan. Patlan turned and was surprised to see that Mkrtumyan had drawn his gun at Patlan. Mkrtumyan fired at Patlan and hit him once on the leg and once in the arm. Patlan fired back and hit Mkrtumyan. Although both men were wounded, neither knew he had hit the other due to the darkness and the rain.

Patlan jumped off the loading dock and eventually made his way toward the street. He cut himself on some razor wire on a fence. Patlan stashed the gun under a trash can and went to the street to look for the Astro van. The van was gone, but appellant and Manvel eventually drove up in a Lexus SUV. Patlan told them what had occurred, although he did not know that he had hit Mkrtumyan.

Appellant and Manvel drove Patlan to the Partez Deli. Appellant begged Angela, who was still at the deli, to take Patlan to the hospital. Appellant and Manvel said they were "going to retaliate the individual that shot [him]." Appellant gave Angela some money and the directions to the hospital. Angela drove Patlan to Glendale Memorial Hospital. On the way, Patlan told her that "something went really bad." When she dropped off Patlan, Angela asked him not to give her name to anyone because there was a misdemeanor warrant out for her arrest.

Patlan entered the emergency room and told a security officer that he had been shot as he was walking down the street. He said he had then walked to a friend's store and asked a friend named Michelle to give him a ride to the hospital. Mkrtumyan had been taken to Glendale Memorial Hospital as well. Mkrtumyan had been shot in the right leg. Mkrtumyan and Patlan were thus in the emergency room at the same time. Glendale Police Officer Renae Kerner was speaking with Mkrtumyan when Mkrtumyan saw Patlan being wheeled past him on a gurney. Mkrtumyan pointed at Patlan and exclaimed, "That's the one who shot me." Patlan saw Mkrtumyan as he was wheeled past his room. Patlan then realized he must have hit Mkrtumyan.

Detective William Currie of the Glendale Police Department arrived and spoke with Mkrtumyan. Mkrtumyan gave Detective Currie the Beretta .25-caliber handgun he had shot that evening. Detective Currie returned the gun to Mkrtumyan after having it examined and photographed. There were still two rounds left in the gun's magazine.

At an interview at the police station, Angela told Officer Kerner about having been with Karapet, Manvel, Patlan, and another big-bellied Armenian male in his 40's whose name she did not know. Angela told Officer Kerner that Karapet's nickname was Gary, and she provided some phone numbers. She also assisted Detective Currie by placing pretext phone calls.

Patlan was arrested at the hospital just after midnight on January 28, 2002, and taken to the Glendale Police Station. Since Patlan was on parole, he was placed on a parole hold. In the early morning hours, Detective Currie interviewed Patlan. Detective Currie did not make any promises or threats to Patlan in exchange for his cooperation.

Patlan told the detective that his accomplices were Karapet, Manvel, and a male Armenian who was overweight and short and was named Gordo. Patlan described the vehicles that had been involved in the plot.

Patlan told Detective Currie where he had hidden the gun. At 3:00 a.m. on January 28, 2002, two officers found the loaded nine-millimeter Smith and Wesson under a Glendale city trash can at 425 Fernando Court. That same Monday morning, between 8:00 and 10:00 a.m., Detective Currie interviewed Gina. Gina agreed to make a recorded telephone call to Karapet in order to get him to make admissions and to verify Karapet's cell phone number.

During the afternoon of January 28, 2002, Detective Currie arranged for an Officer Jimenez to pretend to be Patlan during a pretext phone call to Karapet. The recording was played for the jury. A record of the call showed on the Davtyan's phone bill for the month of January. The bill was found during a search of the Partez Deli. During the conversation, Karapet made several incriminating statements to the officer who he thought was Patlan, although he was very wary. When the officer pretending to be Patlan insisted that he still wanted to be paid off. Karapet replied, "I'm gonna pay you off?" and "You know who said who gonna pay you off? Not me and [Manvel]. Look, you talked to the guy alone. The fat guy, him alone. And he's gonna buy you a car, any car you want, okay? Not me."

On February 20, 2002, after corroborating the preliminary details provided by Patlan, Detective Currie interviewed Patlan at the county jail. Detective Currie did not promise or offer Patlan anything. In February, Patlan told Detective Currie "everything." Detective Currie obtained a search warrant for the Partez Deli and for Karapet's and Manvel's residence on Lexington Avenue in Glendale.

Detective Robert Breckenridge searched Karapet's bedroom and found a black leather organizer containing photos, phone numbers, and addresses. Inside the organizer (Peo. exh. 28) was the name "Harut Gogor," with the phone number (213) 923-2442. Police did not realize that the phone number (213) 923-2442 was appellant's cell number.

On March 20, 2002, Patlan entered into a proffer and use-immunity letter of agreement. Patlan understood that for the use immunity to be operative, he was required to answer all questions truthfully, and he fully acknowledged that he was not being promised any specific disposition in exchange for his cooperation and testimony, although he was hoping that eventually he might be offered some kind of deal

Patlan again admitted that he confronted Mkrtumyan with the intention of kidnapping him at the request of the three Armenian males who had recruited him and who had met with him in person several times: Karapet Davtyan, Manvel Davtyan, and a bald, short, fat Armenian, known to Patlan only as Gordo, who drove a silver Mercedes Benz. Later that day, when shown photographs of a car, Patlan recognized the car and identified it as the silver Mercedes-Benz S500 that Gordo drove.

Patlan was offered a plea bargain pursuant to which he would receive a 14-year state prison sentence if he pleaded guilty and testified truthfully "one time" against Karapet and Manvel Davtyan at their preliminary hearing and trial.[4] The police still did not know the identity of Patlan's third accomplice, since Patlan could not provide Gordo's real name or any place where he might be found. Detective Currie had asked Mkrtumyan if he knew any balding, fat Armenian men. Mkrtumyan thought of one person who fit that description—a man named Ashot Harutyunyan. Mkrtumyan did not say he had any problems with Harutyunyan.

Detective Currie obtained a photograph of Harutyunyan from his driver's license. When he showed the photograph of Harutyunyan to Patlan on March 20, 2002, Patlan

---

4 Karapet Davtyan and Manvel Davtyan were arrested and charged with conspiracy to commit a crime (§ 182, subd. (a)), attempted kidnapping for ransom (§§ 664, 209, subd. (a)), and assault with a firearm (§ 245, subd. (b)). Following a jury trial in Los Angeles County Superior Court case No. BA230474, Karapet and Manvel Davtyan were convicted of solicitation to commit kidnapping for ransom, conspiracy to commit kidnapping for ransom, attempted kidnapping for ransom of Mkrtumyan, and assault with a semiautomatic firearm. Their convictions were affirmed on appeal by Division Three of this Court on October 5, 2004, in case No. B168441. At respondent's request we hereby take judicial notice of the record in case No. B168441.

said that he looked like the man that he knew as Gordo. Detective Currie obtained an arrest warrant for Mr. Harutyunyan and a search warrant for his residence on April 23, 2002. While executing the search warrant, Detective Currie realized that Harutyunyan could not be the man known to Patlan as Gordo. Harutyunyan did not appear to speak or know any English. The numbers corresponding to the telephones in Harutyunyan's apartment did not correspond to any of the phone numbers on the phone bills obtained from the Partez Deli or Gina, and there was nothing in Harutyunyan's apartment that linked him in any way to the attempted kidnapping. Harutyunyan drove a Lincoln Town car and a Cadillac and did not own a Mercedes-Benz that could be connected to the conspiracy to kidnap Mkrtumyan.

While searching Harutyunyan's apartment, Detectives Currie and Breckenridge found business cards for the Partez Deli, American Bakery Products, Continental Bakery (which belonged to Mkrtumyan's brother, Raphael Mkrtumyan), and Sassoon Sales (owned by Mkrtumyan's attorney and business partner). None of these cards cast any suspicion on Harutyunyan, since Harutyunyan owned a bakery in the same, close-knit community. It was not unusual for him to know other Armenians in the baking business.

In Harutyunyan's apartment, Detective Currie found a photograph of Mkrtumyan and Harutyunyan standing together. It was clear that they knew each other, and they appeared to be friends. Detective Currie also found a photograph of Mkrtumyan's brother with Harutyunyan. There were no photos of Karapet and Manvel in the apartment. When shown photographs of Karapet and Manvel, Harutyunyan did not recognize them. Ultimately Detective Currie found nothing in the search of Harutyunyan's apartment or in the detective's entire investigation that tied Harutyunyan to the kidnapping or suggested that he was the man known as Gordo. Moreover, Harutyunyan had no criminal record and was extremely cooperative with Detective Currie. And, although he had a "big belly," he was not short. He was big and "broad-boned" in stature, measuring five feet seven inches tall. No one called Harutyunyan by the nickname of Gordo. Therefore, Detective Currie did not arrest Harutyunyan, and he did not arrange for a live lineup.

In order to find new leads to the identity of Gordo, Detectives Currie and Breckenridge analyzed the telephone records of Gina, Angela, the Tarzana Treatment Center, Karapet, and Manvel. In April 2003, Detectives Currie and Breckenridge compiled and compared all the January 2002 toll calls listed on these telephone records. The detectives' examination of the phone calls made from Karapet's number (Peo. exh. 21), revealed a particular recurring number, i.e., (213) 923-2442. This number was salient because it was the first number Manvel called after Angela took Patlan to the hospital. It was also the first number that Karapet dialed after he hung up from Officer Jimenez's pretext call (in which the officer pretended to be Patlan.

The detectives found that, in January 2002, there were frequent phone calls among Karapet, Manvel and the person at the (213) 923-2442 phone number. The frequency of calls increased during the days immediately preceding and following the January 27, 2002 kidnapping attempt. The same number was in Karapet's address and phone book found in his bedroom and shown to be the number for someone called "Harut."

In April 2003, the detectives subpoenaed the records for the number (213) 923-2442 from Nextel Communications. The detectives discovered that the number belonged to a cell phone registered to an Andranik Musaulyan who owned a market at 10700 Long Beach Boulevard in Lynwood. A photograph of Musaulyan did not bear any resemblance to the man called Gordo, as described by Patlan and Angela. The detectives analyzed the frequency and consistency of calls made to a land line from the number and found that the land line frequently called belonged to a subscriber listed as Laura Khrayan. It was later discovered that she was appellant's mother. The residence for the land line was at 6701 Fulton Avenue, apartment No. 2, in Van Nuys. The utilities at that apartment were under the name "Ruben Khrayan," who was appellant's brother. A photograph of Ruben showed he did not fit the description of Gordo.

Using county records, the detectives found another male with the last name Khrayan. This man was appellant. Because the detectives did not know where this Khrayan resided, they could not obtain a search warrant or arrest warrant. The detectives obtained appellant's driver's license information from the Department of Motor Vehicles

(DMV) and saw that appellant's photograph was similar to that of Harutyunyan. Significantly, appellant was shorter and fatter, measuring five feet one inch tall and weighing 225 pounds.

The detectives ascertained that appellant had been the passenger in a silver Mercedes-Benz during a traffic stop on September 10, 2001, and they retrieved a photograph taken of the Mercedes-Benz during the traffic stop. Detectives Currie and Breckenridge obtained a booking photograph taken of appellant in September 2001 when he was still overweight. They placed appellant's photograph in a photographic lineup. On June 3, 2003, Patlan identified appellant's photograph. Patlan also identified the photograph of the silver Mercedes-Benz in which appellant was seated during the 2001 traffic stop (Peo. exh. 15) as the one Gordo drove. Angela also identified appellant's photo as being that of the fat man who had given her the money in the Partez Deli parking lot to drive Patlan to the hospital. She recognized appellant's face and weight.

In 2003, appellant's probation officer was Deputy Probation Officer Jimmy Stewart. During appellant's regular visit to probation on June 18, 2003, Stewart asked appellant to provide an alternate number to the area code 818 number he provided that day. Appellant gave Stewart his cell phone number. Stewart turned that cell phone number over to two detectives from the Glendale Police Department on the same day.

On the same evening as appellant's probation visit, June 18, 2003, a surveillance team including Detective Tim Feeley followed appellant as he drove a gold Dodge Stratus. The lead vehicles lost appellant on the freeway, and Detective Feeley exited the freeway and began searching surface streets. He found the gold Dodge parked on a street. He tried to radio the other police vehicles. He made a U-turn and saw appellant entering a Black Mercedes with other occupants. The black Mercedes pulled up next to Detective Feeley's car, which was unmarked, and appellant and another man got out of the Mercedes. The second individual was Levon Termendzhyan. Grigor Termendjian remained in the driver's seat. Appellant was holding a fanny pack with a gun inside, and Termendzhyan had a gun at his waist. Another officer who had arrived identified himself as a police officer. Detective Feeley then identified himself as a police officer also.

Appellant ran away. Detective Feeley managed to tackle appellant, who was arrested. Just after midnight on June 19, 2003, Detectives Currie and Breckenridge obtained a search warrant for the address at 6701 Fulton Avenue, Apartment 2.

After appellant was arrested, Patlan agreed to a lengthy continuance of his sentencing and agreed to continue to cooperate with the detectives in this case with no additional favors. After appellant was charged in June 2003, the preliminary hearing was continued numerous times at the request of Mr. Geragos, appellant's attorney. On April 24, 2004, Patlan went to court to testify against appellant, but the preliminary hearing was continued yet again, to May 7, 2004. Patlan became frustrated and believed it unfair that he was receiving no additional benefit for his continued cooperation beyond his original agreement. He had already spent two years four months in county jail. Patlan had someone contact the prosecutor in this case and he asked for a "better deal." He now wanted a reduction of his sentence from 14 to 10 years, or he would refuse to testify. The prosecutor agreed to modify the plea bargain to allow the four years for the gun-use enhancement to run concurrently with the 10 years for the attempted kidnapping.

Patlan said there was absolutely "no doubt in [his] mind" that appellant was the same person he knew as Gordo during the month of January 2002. Patlan had always described Gordo as being short and fat, and Patlan had no idea how tall Harutyunyan was from the photograph he had been shown and had identified.

Before the events of January 2002, Patlan had never met appellant and had no motive to falsely accuse appellant of his role in the kidnapping attempt. The modification of the plea bargain in no way influenced Patlan or caused him to alter his testimony or change his recollection of the events. Patlan had already identified appellant in the photo lineup a year before, and even if the prosecution had not agreed to reduce the negotiated sentence by four years, Patlan had decided that he "wasn't going to change [his] testimony," he "just wasn't going to say nothing." At trial, Angela positively identified appellant as Gordo.

Defense Evidence

Appellant did not testify and did not present any evidence.[5]

II. Facts Pertaining to the Procedural History of the Kidnapping Case

As noted, appellant was arrested on June 18, 2003. On May 21, 2004, the Los Angeles County District Attorney filed an information in case No. BA255474 charging appellant in count 3 with conspiracy to commit kidnapping for ransom, alleging 14 overt acts between January 13 and January 27, 2002 (§ 182, subd. (a)(1)). Appellant was charged in count 4 with attempted kidnapping for ransom, while a principal was armed with a firearm, on January 27, 2002, (§§ 209, subd. (a), 664, 12022, subd. (a)(1)), and in count 5 with assault with a semiautomatic firearm on January 27, 2002 (§ 245, subd. (b)). The same information charged appellant, Grigor Termendjian, and Levon Termendzhyan with assault with a firearm against Officer Feeley on June 18, 2003, the offense allegedly committed during the encounter between Detective Feeley and the three defendants when appellant was being followed by a surveillance team investigating the attempted kidnapping. Appellant was alleged to have personally used a firearm. The same information charged appellant in count 2 with possession of a firearm after having been convicted of three felonies (in 1992 of manslaughter, in 1994 unlawful taking of a vehicle, and in 2002 of ex-felon in possession of a firearm). On June 4, 2004, appellant and the two codefendants pleaded not guilty.

Appellant's case was bifurcated because Mr. Geragos was representing two of the three codefendants, i.e., appellant and Grigor Termendjian. The People agreed to sever appellant's case to avoid the conflict of interest created by Mr. Geragos's dual representation.

The trial of the two brothers, Grigor and Levon, for the assault on Officer Feeley was held between March 7 to March 28, 2005. The jury acquitted Grigor, but deadlocked as to Levon. The trial court declared a mistrial and dismissed the case against Levon

---

5 The defense theory was misidentification, urging the jury that the real Gordo was Harutyunyan. Patlan's identification of appellant was called into question by the defense because of the deals he received in exchange for his testimony in the case.

Termendzhyan on April 14, 2005. The prosecutor stated she would retry the case against Levon and seek to join appellant in that case. The prosecutor ultimately decided to re-prosecute the case by means of indictment rather than information.

On June 24, 2005, a grand jury returned a bill of indictment in Los Angeles County Superior Court case No. BA255302. The indictment charged two of the counts that had been charged in the May 21, 2004 information: count 1 charged appellant and Levon Termendzhyan with committing an assault with a firearm on June 18, 2003 (§ 245, subd. (a)(2)), and count 2 charged appellant with possessing a firearm on June 18, 2003, after having been convicted of three felonies. The indictment was later amended to add appellant's prior conviction of a serious or violent felony.

On September 22, 2005, appellant pleaded not guilty, still represented by Mr. Geragos. On January 4, 2006, the People moved for joinder of case Nos. BA255302 (the assault on Detective Feeley) and BA255474 (the kidnapping). The People's joinder motion was denied, and the trial court ordered the trial in case No. BA255474 (the kidnapping) to trail the trial in case No. BA255302 (the assault on Detective Feeley). Levon Termendzhyan retained Mr. Geragos to represent him in the trial of case No. BA255302. Appellant retained another attorney to represent him solely in case No. BA255302. On January 19, 2007, appellant addressed the court and declared that, for tactical purposes, he was seeking leave to plead guilty to count 2 in case No. BA255302 (ex-felon in possession of a firearm) and to admit the priors alleged as to count 2. Voir dire resumed, and a jury was impaneled to try count 1 only, the assault on Officer Feeley.

Appellant duly pleaded no contest to count 2, admitted a factual basis for the plea, and admitted the three alleged prior convictions on the next court day, January 24, 2007. Trial proceeded on count 1 in case No. BA255302, and the jury found appellant not guilty of the assault with a firearm on Officer Feeley on January 30, 2007.

Mr. Geragos told the trial court that he would represent appellant in case No. BA255474 (the kidnapping). Sentencing and a probation-violation hearing regarding count 2 in case No. BA255302, to which appellant had pleaded guilty, were trailed behind the trial in case No. BA255474. Counts 3, 4, and 5 were not re-numbered in the

court file, but the numbers were changed to counts 1, 2, and 3 in the jury instructions and on the verdict forms. In the amended information, appellant was charged in count 3 with conspiracy to commit kidnapping for ransom between January 13 and January 27, 2002 (§ 182, subd. (a)(1)), in count 4 with committing the attempted kidnapping for ransom on January 27, 2002, while a principal was armed with a handgun (§§ 209, subd. (a), 664, 12022, subd. (a)(1)), and in count 5 with committing an assault with a semiautomatic firearm on January 27, 2002 (§ 245, subd. (b)). The information further alleged that appellant had suffered a prior serious felony conviction for manslaughter within the meaning of section 667, subdivision (a)(1) and a prior strike conviction for the same manslaughter within the meaning of section 667, subdivisions (b) through (i) and section 1170.12, subdivision (a). Appellant was re-arraigned, and he again pleaded not guilty and denied the special allegations. Trial of the priors was bifurcated.

The trial in case No. BA255474 took place from January 14 to January 22, 2008. On January 23, 2008, the jury found appellant guilty as charged, found each of the 14 alleged overt acts of the conspiracy to have been committed, and found true the armed allegation. Appellant waived his right to a jury on the trial of the priors and on the probation violation, and sentencing was set for March 28, 2008, in both cases, i.e., in case No. BA255474 and case No. BA255302. On March 28, 2008, appellant filed his motion for new trial, the denial of which forms the basis of the instant appeal.

DISCUSSION

I. Denial of New Trial Motion Based on Newly Discovered Evidence

A. Relevant Authority

Section 1181, subdivision 8 provides that a trial court may grant a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given. . . ."

The trial court's decision to deny a new trial motion based on newly discovered evidence is reviewed for an abuse of discretion. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1251.) "'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."' [Citations.]" (*People v. Delgado*, *supra*, 5 Cal.4th at p. 328.)

"To warrant the granting of a new trial on the ground of newly-discovered evidence it must be such as to render a different verdict reasonably probable on a new trial. [Citations.]" (*People v. Long* (1940) 15 Cal.2d 590, 608; see also *People v. Clauson* (1969) 275 Cal.App.2d 699, 706 ["newly discovered evidence must not be merely cumulative or impeaching; it must be such as to render a different verdict reasonably probable"]; *People v. Huskins* (1966) 245 Cal.App.2d 859, 862 ["[o]rdinarily, evidence which merely impeaches a witness is not significant enough to make a different result probable"].)

B. The Motion

On the date set for appellant's sentencing, Mr. Geragos filed a motion to continue. The prosecutor complained that the motion contained spurious and scandalous accusations. This motion is not part of the record, and a request to augment the record with the motion was not successful. An attorney for Mr. Geragos's firm told the court that they had received an anonymous letter contained in an envelope from the Glendale Police Department. Presumably, the letter stated that certain items pertaining to appellant's case were destroyed. Substitute counsel told the court, "Miss Daniel, to our

surprise, said she was aware that there were items destroyed and that she had advised us of that." The trial court stated that the issue would clearly have to be litigated. A lengthy evidentiary hearing, filling over 140 pages of reporter's transcript was held on August 22, 2008, more than five years after appellant's arrest.

C. Evidentiary Hearing on New Trial Motion

Maria Perez is the budget and property supervisor for the Glendale Police Department. Perez had always worked in the property room in her career, which began in 1990. In 2002 an archiving system called "Quetel" was used to track property associated with a case. At some time in 2005, the department began using a different system called Tiburon. The two systems did not interface. When Perez took over the property room in January of 2007, one of her goals was to get rid of property that was no longer needed. She worked with investigators on catching up with dispositions from the court and assessing the status of cases.

The Quetel system is accessed by a case's DR number, and Perez identified a report generated by the Quetel system of all property in a case numbered DR 0201641. The location of some of the property for that DR number had as its location "DEST," which meant it was destroyed. "Owner" as a location meant it was returned to the owner. One could not print the screen that showed the date of the destruction or return to owner.

Perez or one of her employees would oversee the destruction of property only after receiving a message in the computer system saying that the property was to be destroyed. The orders for disposition of property were located in the case manager, which is part of the Tiburon system. Upon receiving a destruction order, the property room employees would find the location of all the items and begin with the easiest items first, saving any drugs, money, or firearms to the last. Appellant's attorney, Mr. Geragos, never contacted Perez to view any of the evidence in the case numbered DR 0201641.

Kristina Peterson, a community service officer with the Glendale Police Department, testified that, after Detective Currie retired, she closed his cases in the in-house case-management system (RMS) when appropriate. She obtained information

from a county data system regarding the defendants in the cases whose case number she was researching.

Heather Howison had been a community service officer with the Glendale Police Department since 2004 and had worked in the property room since November 2007. She had personally researched in Quetel each item on the four-page list of property for case No. DR 0201641 and noted its disposition.[6] (Peo. exh. 1, § 18.) Detective Breckenridge had requested this action. Her disposition notes were handwritten since, as Perez had testified, the screen could not be printed. Of the items listed as still being in the property room, she physically had located all the items but one, which consisted of "'two Partez Deli receipts.'"[7] If an entry said an item was destroyed on "9/28/07," that was the date that the item was physically destroyed by one of the property officers—in this instance, it had been a cadet.

Officer Esperanza Fernandez of the Glendale Police Department was asked to participate, along with other detectives, in updating the property department in August 2007. One of the cases assigned to her was DR 0201641. On August 23, 2007, she ordered, "Destroy All Property." Prior to making that order, she had looked at the status page for that case. (See Peo. exh. 1, § 17, first two pages.) Her review of the status page showed her that the defendant had entered a plea, was serving time, and "the case was done." The case was an "assault felony." She made no attempt to contact any investigator associated with the case because the officer assigned to it, Will Currie, had already retired, and the defendant was serving a prison sentence.

---

6 Section 16 of the binder listed the property seized from appellant during the execution of the search warrant at his apartment on the day after his arrest: June 19, 2003. After appellant was arrested, a different DR number was pulled, and the property from appellant's apartment was listed under this different booking number, DR 03-10880. None of this property was destroyed. (Peo. exh. 1, § 16, pp. 153-164.)

7 Photocopies of these two receipts were included in section 12 of People's Exhibit 1.

The trial court denied attorney Mr. Geragos's request to recess after Detective Fernandez's testimony so that he could examine the computer system at the Glendale Police Department. Mr. Geragos asserted that someone was "obviously mistaken," and he believed it was Officer Fernandez. The prosecutor argued that Detective Breckenridge could clarify what the exhibits showed.

Detective Breckenridge testified that he had accessed the Tiburon system, also known as RMS, and printed certain screens on March 11, 2008. That is why his police identification number showed up on the screen shown on People's exhibit 1, section 17.

Detective Breckenridge found out that some of the property had been destroyed and returned to owner because he went to the property room on January 16, 2008, to get certain color photographs belonging to Harutyunyan that the defense had requested. He had not known about the destruction and return of certain property before January 16, 2008. When he discovered that the color photographs had been released back to Harutyunyan, Breckenridge returned to court and told Mr. Geragos. Shortly thereafter, he asked the property room employees for Patlan's phone book and learned that it and other property had been destroyed. The defense had not asked for the phonebook—Breckenridge himself wanted it because he thought it might be useful. When he found out that the property had been destroyed he notified his lieutenant and the district attorney. Detective Breckenridge was officially assigned to the case against appellant at his own request. He told the property department to reassign the case to him so that no further property would be destroyed. Up until that point, the case had just "followed [him]," since he had worked aspects of the case prior to that date. Detective Breckenridge was not instructed to write a report on the destruction. Mr. Geragos had never contacted Breckenridge to view or test any of the property retained by the Glendale Police Department since time of appellant's arrest in June 2003.

Detective Breckenridge compiled the documents contained in the notebook labeled People's Hearing exhibit 1 after Mr. Geragos made a new trial motion. The pages of the notebook showed the property in appellant's case from the time it was collected and booked in 2002 and given a DR number to the time it was returned to its

owner or destroyed. A Bates-stamped copy of the property report was provided to the district attorney's office after the case was filed. Detective Breckenridge had included in the notebook the forms on which Detective Fernandez had relied before ordering the evidence to be destroyed.

Retired Investigator Will Currie also testified at the motion hearing. When he retired on January 18, 2005, the two Davtyans and Patlan had gone to prison. No one had ever consulted him regarding destruction of the property in that case. He had agreed to release some of Harutyunyan's property while he was still on the case because that property was not evidence, and there was no need to hold it. It was Currie who had investigated the phone records that led to appellant. He had not looked through Patlan's phone book to see if Harutyunyan's phone number was written there. While Currie was the investigating officer on the case, he was never contacted by Mr. Geragos to view or arrange for testing of any property booked in the case.

Mr. Geragos renewed his motion to look at the computers at the Glendale Police Department. He believed this was essential to his new trial motion. The prosecutor asked for an offer of proof as to how information so obtained would have any bearing on the issue before the court. Mr. Geragos stated he did not for a second believe that Officer Fernandez ordered the property destroyed. Investigator Currie "was in the mix then." The court noted that Currie's number appeared merely as the assigned officer. Mr. Geragos asserted he could show it was either Breckenridge or Currie who ordered destruction of the property. The trial court denied Mr. Geragos's request. He reiterated his request at the close of evidence, but it was denied.

When the parties were invited to argue, Mr. Geragos stated that the district attorney had a duty to notify the defense as soon as she learned that the items had been destroyed and before moving copies of the items into evidence. Mr. Geragos asserted that he would have changed his tactics during trial had he known of the destruction. He had assumed that all the copies or replicas of the items introduced at trial were of items that actually existed. He argued that the state of the law and the Evidence Code would have required the exclusion of a number of the items because the original no longer

existed. If Mr. Geragos had known, he would have asked for a mistrial at that point, and he believed the court would have granted it.

The prosecutor argued that not all of the property was destroyed. If Mr. Geragos had believed Patlan's phone book important, he had had over four years to look at it. The only phone book that Mr. Geragos had asked for belonged to one of the Davtyans, and that book had been in a box in court from the other trial. All of the relevant evidence had already been booked into the court during the previous trial.

D. Trial Court's Ruling

In denying appellant's new trial motion under section 1181, subdivision 8, the trial court stated, "You know, the suggestion that—that Mr. Geragos made during the course of this hearing that somehow this Detective Fernandez basically came in and perjured herself, there's just no support for that anywhere. There's no indication that Detective Fernandez had any connection with the defendant, with anything having to do with this case." The trial court stated that, unfortunately, Detective Fernandez was asked to take care of something about which she had little knowledge, and she did not realize there was a relationship between the case in which she ordered the destruction of property and appellant's pending case. However, the vast majority of the evidence that was introduced in appellant's case was evidence that came from the other trial. The court observed that, "but it really wasn't until it came to light that the items were destroyed that the defense showed any interest in those items at all. They hadn't shown an interest in those items during the course of the trial. It was like—it was almost like, you know, playing monopoly and getting that chance card of whatever, bank error in your favor, you know, collect $200. I mean, it was like manna from heaven. It really had nothing to do with anything, but gave the defense an issue that wasn't an issue. The court doesn't see it as ever having been an issue. The court doesn't see that there was any malice or intent of the police department to somehow ruin the defense in this case by destroying this evidence. It appeared to have been done in the ordinary course of business, and it just—I don't see it as relevant or I don't see that the defendant was denied a fair trial in this case

and due process, and I don't see that there are grounds to justifiably grant a new trial in this matter."

E. Appellant's Argument

Appellant argues that the trial court erred by denying his new trial motion based upon "newly discovered evidence." The evidence, which appellant argues was both newly discovered and material, consisted of "new information" that was not disclosed to the defense until after the trial had concluded. The new information was that "material evidence was destroyed by officers connected to this case."

According to appellant, the evidence was material because the items destroyed "directly supported the defense theory that someone other than appellant was responsible for the alleged crimes." The defense theory at trial was that Harutyunyan was Gordo, the coconspirator in the attempted kidnapping. Appellant alleges that a "search of Mr. Harutyunyan's residence in fact confirmed his participation in the crime." As an example, one of many items destroyed consisted of "Documents/papers," and this particular item of evidence "could have provided further proof that Mr. Harutyunyan was Gordo." Appellant asserts that, "[h]ad this evidence been available at trial it is probable that a different result would occur on a retrial." According to appellant, based on the materiality of this newly discovered evidence, this Court should reverse appellant's conviction.

F. No Abuse of Discretion

We disagree with appellant. The information that certain items of property had been destroyed was not evidence material to his defense. In addition, the evidence of the destruction did not constitute exculpatory evidence, since the jury clearly rejected appellant's theory that Harutyunyan was Gordo in any event. This despite intensive cross-examination of Detective Currie regarding his rejection of Harutyunyan as a suspect and of Patlan regarding his identifications of Harutyunyan and appellant, in addition to extensive argument on these subjects. Mr. Geragos went so far as to continually refer to Harutyunyan as Patlan's coconspirator during his cross-examination of Detective Currie. The destroyed property, such as business cards from Armenian

business people in Glendale, had no tendency to prove Harutyunyan's guilt and appellant's innocence, and it certainly did not confirm his participation in the crime, as appellant boldly asserts.

The fact that Mr. Geragos represented appellant almost continuously since his arrest on June 18, 2003, without demonstrating any need for the destroyed property serves to bolster this conclusion. Mr. Geragos represented appellant in this case from his arraignment, through his preliminary hearing in April and May 2004, and on to the date of final judgment in this case. Mr. Geragos himself introduced photocopies of the items seized from Harutyunyan's apartment into evidence as an exhibit at trial. Mr. Geragos utilized the photocopied items extensively in his cross-examination of Detective Currie. These included Harutyunyan's driver's license photograph, a photograph of Harutyunyan and Mkrtumyan standing together, and business cards for the Partez Deli, American Bakery Products, Sassoon Sales, and Continental Bakery. Mr. Geragos requested and was given a copy of the search warrant and search warrant affidavit, which contained Mkrtumyan's statement about Harutyunyan. He did not request that the original of any documents or other items be preserved for his inspection or produced in court, except for the original photograph of Mkrtumyan and Harutyunyan, which Mr. Geragos requested about halfway through the People's case. Detective Currie even testified during redirect examination that Harutyunyan's property was returned to him, and Mr. Geragos did not react in any way to this information.

Thus, the property whose destruction was the subject of appellant's new trial motion was merely cumulative to the evidence the defense used at trial. The fact that the original items of property were destroyed or returned to their owner constituted only impeachment evidence at best. Such impeachment evidence would not have destroyed the prosecution's case, since all of the police officers' motives were thoroughly brought into question at trial. (See *People v. Huskins*, *supra*, 245 Cal.App.2d at pp. 862-863.) The information thus does not rise to the level of material evidence. "[E]ach case must be judged from its own factual background" (*People v. Dyer* (1988) 45 Cal.3d 26, 52). Upon consideration of all the evidence, both old and new (*People v. Clauson*, *supra*, 275

Cal.App.2d at p. 706), we conclude that the destruction of the property did not damage the defense, and it was not reasonably probable that the information that the property was destroyed would have brought about a different result upon retrial.

II. Alleged *Brady* Violation[8]

A. Appellant's Argument

Appellant argues that the prosecutor was aware that evidence material to the case was destroyed prior to trial but deliberately chose to continue with the trial knowing that the defense did not have all the evidence pertinent to the case. Appellant again asserts that the evidence is material because it supports the defense theory that Harutyunyan and not appellant was the real perpetrator of the attempted kidnapping and conspiracy to kidnap. According to appellant, the failure to provide this substantial material evidence favorable to the defense violated the provisions of *Brady* and requires this Court to order a new trial to cure the prosecution's error.

B. Relevant Authority

The People have both a constitutional and statutory duty to disclose information to the defense. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378; *People v. Bohannon* (2000) 82 Cal.App.4th 798, 804 (*Bohannon*).) The constitutional duty arises under the due process clause of the United States Constitution and requires the prosecution to disclose any material evidence exculpatory of the defendant. (*Brady*, *supra*, 373 U.S. at pp. 86-87.) This duty is independent of the statutory duty. (*Izazaga v. Superior Court*, *supra*, at p. 378; *Bohannon*, at p. 804.)

Statutory provisions for reciprocal discovery in criminal cases are contained in sections 1054 through 1054.8. Section 1054.1 requires the prosecutor to disclose specified categories of information "if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies." Section 1054.1, subdivision (f) describes the category of "[r]elevant written or

---

8 *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

Section 1054.7 provides for the timing of the discovery obligation, in pertinent part as follows: "The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. . . ."

The United States Supreme Court has held that the suppression by the prosecution of evidence favorable to an accused, including impeachment testimony, violates the Fourteenth Amendment due process clause where it is material either to issues of guilt or punishment, irrespective of the good faith of the prosecutor. (*United States v. Bagley* (1985) 473 U.S. 667, 675-676; *Brady*, *supra*, 373 U.S. at p. 87; *People v. Ochoa* (1998) 19 Cal.4th 353, 473.) The high court has stated that evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "'reasonable probability'" is one sufficient to undermine confidence in the outcome of the trial. (*United States v. Bagley*, at pp. 681-682; see also *Strickler v. Greene* (1999) 527 U.S. 263, 280-281; *People v. Ochoa*, at p. 473; *In re Brown* (1998) 17 Cal.4th 873, 884.) Mere supposition based on weak premises that an undisclosed item might have helped the defense or affected the outcome is insufficient. (*Wood v. Bartholomew* (1995) 516 U.S. 1, 8.)

We independently review the issue of whether a *Brady* violation has occurred while giving great weight to the trial court's findings of fact supported by substantial evidence. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176.)

C. No Brady *Violation*

Brady is violated only when material exculpatory evidence is suppressed. The evidence here—the information that some property held in the Glendale police property room was destroyed—was not exculpatory. Although the suppression of impeachment evidence can also violate *Brady*, in this case, the information was not material. As we have concluded, there was no reasonable probability of a different result had the information been told to the defense. It is mere supposition that this information would have affected the outcome. The defense had copies of all the property that had been destroyed and never asked for the originals, except for the color photograph. "[N]ot every nondisclosure of favorable evidence denies due process. '[S]uch suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with "our overriding concern with the justice of the finding of guilt," [citation] a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.' [Citation.]" (*In re Brown*, *supra*, 17 Cal.4th at p. 884, quoting *United States v. Bagley*, *supra*, 473 U.S. at p. 678.) In this case, our confidence in the outcome of appellant's trial is not undermined by the prosecutor's failure to inform the defense that some property had been destroyed.

III. Alleged Violation of Due Process under *Trombetta*[9]

A. Appellant's Argument

Appellant asserts the destruction of the items was done in bad faith because the police knew that appellant would use the evidence to vindicate himself. He states that the police collected approximately 100 items of property that they believed had evidentiary value to this case, and more than half of these items were destroyed by officers prior to appellant's trial. Appellant claims the items were material, relevant and exculpatory.

---

9 *California v. Trombetta* (1984) 467 U.S. 479, 488 (*Trombetta*).

B. Relevant Authority

In *Trombetta*, the United States Supreme Court held the prosecution's duty to preserve evidence is limited to matters "that might be expected to play a significant role in the suspect's defense." (467 U.S. at p. 488, fn. omitted; *People v. Beeler* (1995) 9 Cal.4th 953, 976; *People v. Zapien* (1993) 4 Cal.4th 929, 964 (*Zapien*).) "'To fall within the scope of this duty, the evidence "must both possess 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."'" (*People v. Catlin* (2001) 26 Cal.4th 81, 159-160 (*Catlin*).) The evidence or testimony in question must affect the judgment. (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 873-874 (*Valenzuela-Bernal*) [examining the loss of testimonial evidence due to Government action]; *Trombetta*, at p. 488.)

Although the state's good or bad faith in failing to preserve evidence is ordinarily irrelevant to assessing whether its conduct amounted to a due process violation (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 (*Youngblood*)), it is of great significance when the challenge to the state's conduct is based on the failure to preserve *potentially* exculpatory evidence—that is, "evidentiary material of which no more can be said than that it could have been subjected to tests, the result of which might have exonerated the defendant." (*Ibid.*) In such a case, "'"unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."'" (*Catlin*, *supra*, 26 Cal.4th at p. 160, quoting *Youngblood*, at p. 58; see also *People v. Cooper* (1991) 53 Cal.3d 771, 810-811 [adopting the standard set forth in *Trombetta* and *Youngblood* to evaluate due process challenge under state law]; accord, *Zapien*, *supra*, 4 Cal.4th at p. 964.)

"The presence or absence of bad faith by the police for purposes of the Due Process Clause . . . necessarily turn[s] on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Youngblood*, *supra*, 488 U.S. at pp. 56-57, fn. *; *People v. Beeler*, *supra*, 9 Cal.4th at p. 1000.) A due process violation occurs when the state is aware that the evidence could form a basis for exonerating the

defendant and fails to preserve it as part of a conscious effort to circumvent its constitutional discovery obligation. (*Trombetta*, *supra*, 467 U.S. at p. 488; *Beeler*, at p. 1000; *Zapien*, *supra*, 4 Cal.4th at p. 964.) Negligent destruction of (or failure to preserve) potentially exculpatory evidence, without evidence of bad faith, will not give rise to a due process violation. (*Youngblood*, at p. 58.) We examine the ruling below in the light most favorable to the trial court's findings to determine whether substantial evidence supports the ruling. (*People v. Roybal* (1998) 19 Cal.4th 481, 510.)

C. No Bad Faith Destruction of Evidence

We conclude there is ample evidence to support the trial court's finding that the police did not act in bad faith in destroying the property in this case. Like the trial court, we find there was no evidence that the prosecutor or the Glendale Police Department lacked credibility. Officer Fernandez's testimony clearly showed that she acted on her own initiative in ordering some property destroyed or returned to its owner because she sincerely believed the case to which the property pertained was closed. The police department's automated records for the DR number attached to the property said that the case was closed. The investigating officer was retired, and the defendants named in the case were all serving their prison terms.

Furthermore, the record belies appellant's other arguments. Appellant claims that, "[t]o date, no explanation has been provided by the officers as to why these items with significant evidentiary value had been destroyed." On the contrary, Detective Fernandez and Detective Breckenridge explained exactly what occurred. Appellant also asserts that the items would have enabled the defense to conduct its own examination and investigate further, that they could have led to the impeachment of the credibility of prosecution witnesses, and that the items could also have completely exonerated appellant. As we have indicated, none of these assertions can be sustained. The defense showed no interest in examining the property or investigating further. Defense counsel could and undoubtedly would have conducted a protracted cross-examination of each police witness on the destruction of the property, but it is by no means reasonably probable that the credibility of any of these witnesses would have been impaired once Officer Fernandez

and Officer Breckenridge explained the chain of events. As for appellant's complete exoneration, it does not appear the destroyed property was of significant evidentiary value, since appellant did not seek to use any items at any time before or during trial—a period of over five years from arrest to verdict. In sum, there was no showing that the destroyed *property* was material, relevant, and exculpatory *evidence*. The evidence introduced at trial, such as the telephone records and the witness identifications of appellant, leads to the conclusion that appellant's assertion that the destroyed items could have completely exonerated him has no basis in fact. We reject appellant's *Trombetta* argument.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ