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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LEONEL ALAMILLA BORJA,

Plaintiff and Appellant,

v.

INDIANA ALLEN SAXTON,

Defendant and Respondent.

G058142

(Super. Ct. No. 30-2017-00945257)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Theodore R. Howard, Judge. Affirmed.

Carpenter, Zuckerman & Rowley, Haytham Faraj, and Lance C.
Behringer for Plaintiff and Appellant.

Horvitz & Levy, Barry R. Levy, Steven S. Fleischman; Gates,
Gonter, Guy, Proudfoot & Muench and Peter J. Gates for Defendant and
Respondent.

Leonel Alamilla Borja was involved in an automobile accident and sustained physical injuries. He sued Indiana Allen Saxton, who admitted negligence, leaving the issues of causation and damages for a jury trial. Because Borja waived his claim for past medical costs, the jury focused on evidence related to his pain and suffering and future medical costs. After considering testimony from several experts, the jury filled out a special verdict form awarding Borja \$3,000 for past noneconomic damages and \$0 for future damages and costs. Borja filed a motion for new trial on the grounds that the trial court erroneously failed to exclude the following evidence: (1) satellite images of his home; and (2) expert testimony not offered at deposition. We conclude these contentions lack merit and the court correctly denied the motion for new trial. We affirm the judgment.

FACTUAL SUMMARY

For reasons discussed in more detail below, we have not considered Borja's statement of the case contained in his briefing because he failed to provide appropriate record references. Our factual summary is compiled from our own review of the record and Saxton's discussion of the facts supporting the judgment (which were supported by citations to the reporter's transcript). (*Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 252, fn. 1 ["we construe the facts, including all conflicting facts, in the light most favorable to the verdict"].)

On September 22, 2015, Borja was wearing his seatbelt when his vehicle was rear ended on the 57 freeway in Fullerton. One expert determined the closing speed of Saxton's vehicle upon impact with Borja's vehicle was approximately 13 miles per hour. After the collision, Borja drove his vehicle across five lanes of traffic to the right shoulder of the freeway. The total repairs to Borja's vehicle were less than \$3,000.

California Highway Patrol Officer Jamie Ocegüera investigated the accident. He observed minor damage to both vehicles and noted both were drivable. He obtained statements from each party and asked if there were any injuries. Borja did not raise any concerns and Ocegüera would have called for the paramedics if he had noticed signs of injury or brain trauma. The parties did not need a tow truck or an ambulance.

Following the car accident, Borja drove himself home and he did not go to urgent care or an emergency room. However, later Borja noticed he suffered some bruising to his chest, left elbow, and knee. He felt back pain, and he had a headache. He missed three days of work.

Borja contacted an attorney and then visited a chiropractor 16 times. He sought no other medical treatment until two years later, in March 2018, when he was referred by his attorney to a neurologist, Dr. Ronald Fisk.

Two years after the accident, on September 21, 2017, Borja filed a personal injury lawsuit against Saxton, who admitted negligence but disputed causation and damages. Borja waived any claim for past medical damages and lost wages. He sought \$313,070 for past noneconomic damages, \$3,074,760 for future noneconomic damages, and \$990,710 for future economic damages.

At trial, Borja sought to prove he suffered a traumatic brain injury, which negatively altered his personality and would adversely impact his life forever. Saxton contended that while Borja suffered some back and neck injuries immediately following the collision, there was no evidence of a traumatic brain injury or need for future damages.

Borja offered testimony from five medical experts, his treating neurologist, in addition to his mother, brothers, and friend. Although Borja did not include in his briefing any discussion of their testimony, we have compiled a

brief summary to provide a better understanding of the overall case. The jury in this car accident case was asked to consider testimony from 10 different highly qualified experts. As Saxton aptly noted in his briefing, “[t]he extended trial was a proverbial ‘battle of the experts.’”

Borja’s first expert was Brian King, a diagnostic radiologist with a subspecialty and board certification in neuroradiology. He examined Borja’s medical records and magnetic resonance imaging (MRIs) and observed small bulges in the upper cervical region of the spine and a herniated disc in the lower cervical region. He also saw signs of traumatic brain injury. Mariusz Ziejewski, an expert in engineering biomechanics, opined the forces present during the collision were sufficient to cause lumbar and cervical spine injuries as well as a traumatic brain injury.

Jeffrey Schaeffer, a clinical neuropsychologist, performed cognitive tests and determined Borja suffered from a mild neurocognitive disorder. He explained this diagnosis meant Borja had mild deficits in cognition secondary to a mild traumatic head and brain injury. Schaeffer also opined Borja suffered from an adjustment disorder, which meant he was anxious and depressed coping with the aftereffects of his injuries. Franklin David Rudnick, a neuropsychiatrist, treated patients who had psychiatric problems as a consequence of a neurologic illness or injury. He stated Borja exhibited symptoms normally seen in people who had suffered a traumatic brain injury.

Finally, David Eli Fish, a doctor specializing in physical medicine and rehabilitation, and pain medicine (also called physiatry), explained his job was to help injured people become as functional and independent as possible. Based on Borja’s injuries, Fish created a life care plan to predict how much it would cost

during Borja's lifetime for medical treatment, psychological services, pain management, diagnostic testing, and medication etc.¹

Saxton offered testimony from five different medical experts, and he summarized their testimony in the briefing (with appropriate record references). Thomas Szabo, an accident reconstructionist and biomechanical engineer, examined the linear and angular acceleration rates of the collision. He concluded there was less than a one percent chance Borja suffered a concussion as a result of the accident. He acknowledged Borja's expert (Ziejewski) opined there was a 50 percent chance of a concussion. Szabo noted Ziejewski was relying on data from an older, less comprehensive scientific study. Szabo also formulated an opinion regarding the probability of the collision causing injury to Borja's lumbar spine. He concluded, "[T]he forces in a rear-end impact like this would not cause to biomechanically put a lumbar herniated disk in a spine where there wasn't one already there."

Barry Ludwig, a neurologist, formulated his opinion based upon his consideration of medical records and his examination of Borja. He concluded Borja did not suffer a traumatic brain injury or concussion as a result of the collision. He stated Borja likely sustained soft tissue injuries to his neck and back, but there were no longer any signs of these injuries during his examination of Borja in June 2018.

When asked why his opinion on brain injury differed from Borja's expert's opinion, Ludwig stated the following: "What is most important in making a diagnosis of traumatic brain injury is what happened at the time of the accident or injury. It's not what a patient tells you two years later . . . because

¹ Borja's treating neurologist, Fisk, was hospitalized at the time of trial and his deposition was read into the record.

there's a big space there. You want to know what happened at the time of the injury. [¶] And what we know for certain is that he felt the impact, he applied his brake, he turned on his blinkers, he negotiated from where he was over to the side of the road, [and did not require] paramedics. You can't do that in the midst of a traumatic brain injury. A traumatic brain injury or concussion is loss of consciousness and/or . . . alteration in one's level of consciousness. You have to be dazed, confused, amnesic from the event. [¶] And in the midst of a concussion, you cannot function normally. You don't put on your blinkers, you don't realize what's going on, [and] you don't restart your car”

He explained Borja's experts relied on his statements about events two or three years later, when he claimed he was dazed/confused anywhere from a few seconds to minutes. “And then if you believe that, and then you look at the scans that have allegedly shown shearing, and this other functional MRI that allegedly showed abnormality, I can understand why they'd make the diagnosis. [¶] But you can't just look at MRIs and patient symptoms three years later . . . and I don't believe that any one of these doctors who have made a diagnosis of traumatic brain injury ever looked or ever realized what he was able to do right after the impact.”

Ludwig testified Borja did not need future neurological treatment and disagreed with the theory Borja would develop dementia in the future from this incident. He stated the following: “One can develop Alzheimer's disease or dementia if the traumatic brain injury is severe enough . . . or if one has repetitive mild traumatic brain injuries like boxers, hockey players, [and] football players. Those people are at risk. [¶] But if a patient has even one mild traumatic brain injury, there's absolutely no risk of developing Alzheimer's disease in the future.”

Steven Nagelberg, an orthopedic surgeon, examined Borja and did not observe any evidence of cervical or lumbar injuries. He explained pain was subjective, and anywhere between 15 to 40 percent of patients with whiplash injuries describe having ongoing pain treatable with over-the-counter medication. He opined Borja's future medical treatment may involve taking Tylenol® but not injections or invasive procedures. He disagreed with Borja's claim that in the future he would require medial branch blocks, which involve injecting a local anesthetic in the neck to stop nerve pain.

Dean Delis, a clinical psychologist specializing in neuropsychology, examined Borja. He offered several opinions. First, he stated Borja's report of having a brief memory gap after the accident would indicate a mild concussion, however, "given other factors, I felt there wasn't sufficient information to conclude with a reasonable probability, that he did have a mild concussion or mild, [a]cute [traumatic brain injury]." He explained typically when someone had a head injury or concussion their symptoms worsened immediately but Borja was able to drive and speak with the police officer and he did not seek immediate medical care. Second, Delis noted Borja "put forth a good effort" on the majority of the tests but there were extreme fluctuations with the results of a few tests suggesting "some cognitive exaggeration." Third, Delis stated the following: "In my opinion, when you look at the high scores from my exam and the high scores from . . . Schaeffer's exam, there's no evidence that [Borja] has permanent, acquired neurocognitive impairment secondary to this accident." Because Borja did not suffer from any psychotic disorders, other than perhaps mild depression, Delis recommended psychotherapy once a week for six weeks. Delis stated Borja had no limitations in his daily functioning or ability to work.

The final medical expert, Barry David Pressman, is chief of the neuroradiology and head and neck radiology departments as well as chairman of the imaging department at Cedars-Sinai Hospital. The portions of his testimony being challenged in this appeal will be discussed anon. Suffice it to say, Pressman reviewed Borja's MRIs taken in 2015 and 2019, and he saw no evidence of traumatic brain injury or trauma.

Saxton also presented evidence from an imagery expert, David Ruiz, about several satellite photographs that showed Borja's home. The photographs related to efforts to impeach Borja's testimony that before the accident he personally built a basketball court in his backyard and frequently liked to play. During his testimony Borja submitted a photograph (Exhibit No. 5-4) showing him playing basketball in the backyard. During cross-examination, Borja changed his story when questioned more closely about the construction timeline based on the dates of city permits. Borja admitted he purchased the property just a few months before the accident and hired workmen to renovate his backyard by adding a gate, wall, and concrete slab for the basketball court. Although somewhat confused about the timing of the construction, Borja believed the renovations all took place before the accident and his injuries.

Saxton hired Ruiz to look for satellite images of Borja's backyard on dates before and after the accident. To briefly summarize Ruiz showed the jury four aerial photographs demonstrating the basketball court was not visible in Borja's backyard in September or November 2015. Because the accident took place at the end of September 2015, it could be reasonably inferred the photograph showing Borja playing basketball in his backyard was taken after, not before, the accident.

After considering closing argument, the jury determined there was evidence of causation and awarded Borja \$3,000 for past damages. The jury awarded no future damages, necessarily reflecting it determined Borja recovered from his injuries and did not suffer from a traumatic brain injury requiring future care.

Borja filed a motion for new trial on the grounds the court improperly admitted Ruiz's satellite photographs without proper foundation and Pressman should not have been allowed to testify about opinions not previously discussed in his deposition. The court denied the motion. It concluded the arguments lacked merit and no claim of error was "so prejudicial as to have resulted in a miscarriage of justice warranting a new trial[.]"

DISCUSSION

Saxton argues we should affirm the judgment due to procedural defects in Borja's appeal. Specifically, Saxton contends Borja's opening brief and appendix are procedurally defective warranting waiver of the issues on appeal. Saxton notes Borja cannot establish the two purported evidentiary errors were prejudicial because he failed to cite to all the evidence supporting the jury's verdict. We agree on both points.

I. Opening Brief & Statement of the Case

In preparing his opening brief, Borja cited to and repeated the same self-serving factual summary written to advocate for a new trial. Indeed, Borja's statement of facts (comprised of a factual background and a procedural history section) does not cite to any of the evidence contained in the seven volumes of the reporter's transcript. His only citation from the appendix is to the new trial motion.

“California Rules of Court, rule 8.204(a)(1)(C) provides that each brief must ‘[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.’ The purpose of this rule is to enable appellate justices and staff attorneys to locate relevant portions of the record expeditiously. [Citation.]” (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 589-590, fn. omitted.) It should go without saying that “[c]iting points and authorities filed in the trial court is not appropriate support for factual assertions in a brief” because the documents “are not presented under penalty of perjury.” (*Id.* at p. 590.) “Matters set forth in points and authorities are not evidence. [Citation.] Evidence appears elsewhere—in deposition testimony, discovery responses, and declarations.” (*Ibid.*, fn. omitted.)

Borja also violated California Rules of Court, rule 8.124(b)(3)(B), by including portions of the trial testimony in his appendix. In his legal analysis of the issues on appeal, Borja only cited to the appendix.²

Saxton asserts we should conclude Borja’s procedurally defective brief and appendix result in a forfeiture of all contentions on appeal. Borja responded to this argument in his reply brief. He maintained he substantially complied with the rules, “such that this [c]ourt can disregard any purported procedural errors in the brief and fully consider the points and arguments raised by [Borja] in the opening brief.” (Citing Cal. Rules of Court, rule 8.204(e)(2) [court’s options regarding noncomplying briefs].) Alternatively, he asserts that if

² We note the appendix provided an incomplete record of the case. Borja included the trial court’s register of actions, the judgment, documents relating to Borja’s motion for new trial, several exhibits, and excerpts of approximately 350 pages of trial testimony.

this court cannot overlook the defects, he should be permitted to file a new brief to correct any procedural issues.

While it would be appropriate to strike the trial testimony from the appendix, or ask Borja to file a new brief with record references to the evidence, or disregard his contentions as forfeited, we conclude judicial economy is better served by considering the two evidentiary issues as presented. We had no trouble fashioning an adequate summary of the case from the record references provided in Saxton's briefing. We have, therefore, disregarded only Borja's unsupported statement of facts and the portions of the appendix containing trial transcripts. As Borja requested, we will consider the two arguments raised in his points and authorities as presented.

However, this ruling turns out to be a hollow victory for Borja. Assuming *arguendo* there was evidentiary error, Borja failed to adequately establish admission of the evidence was prejudicial. As will be discussed in greater length below, this deficiency was created, in part, by Borja's failure to provide a summary of all the significant facts supporting the judgment as required by California Rules of Court, rule 8.204(a)(2)(C). Borja's discussion of only favorable facts (as set forth in his new trial motion) was an incomplete account of the weight of the evidence supporting the judgment and, consequently, hindered his ability to establish these two evidentiary errors resulted in a miscarriage of justice. (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 ["an attack on the evidence without a fair statement of the evidence is entitled to no consideration when it is apparent that a substantial amount of evidence was received on behalf of the respondent"].) Borja's failure to follow the basic rules of appellate procedure may not have resulted in an automatic forfeiture of the legal issues, but ultimately contributed to his inability to prevail on the merits.

II. *Prejudice*

““A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.” [Citation.] [Citations.]” (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) Accordingly, it is not enough to establish how the trial court erred in admitting certain evidence. To warrant a reversal, the purported errors must be considered prejudicial after considering the entire body of evidence supporting the jury’s verdict. (*Soule v. General Motors Corp.* (1994), 8 Cal.4th 548, 574 [judgment not reversible unless “after an examination of the entire cause, including the evidence,” the error caused a “miscarriage of justice”]; Cal. Const., art. VI, § 13.) Prejudice requires review of the whole record, yet Borja only supplied us with his most favorable version of the case.

A. *First Evidentiary Issue*

In the briefing, Borja focuses on the rather complex legal issue of whether four satellite images of his home were admissible. He raises a very specific hearsay objection based on *People v. Sanchez* (2016) 63 Cal.4th 665, 676 [expert cannot discuss case specific facts relating to particular events that the expert has no independent knowledge of]. Before considering the merits of this issue, we would first have to consider if Borja adequately preserved the issue for appellate review because his objections during the trial related to authentication and foundation. Next, we would decide if the expert’s reliance on “metadata” (captured automatically when each photographic image was created) qualified as hearsay. If this hearsay contention failed, we would consider the issues of whether

Ruiz properly authenticated and laid a proper foundation for admitting the photographs. However, if we assume, for the sake of argument, Borja was correct on one or more of the above legal questions, we could not reverse the jury's verdict because Borja failed to establish the error resulted in a miscarriage of justice.

On the issue of prejudice, Borja repeatedly states the photographs "contradicted" the testimony of his family and himself regarding when the backyard renovations took place. He also notes a jury would likely give more weight to an expert's testimony over his own. In light of the above two observations, Borja offers the following conclusory analysis: "The photographs were clearly prejudicial as they influenced the jury in only awarding \$3,000 in a *well-supported head injury case*. It is also more probable that [Borja] would have obtained a better judgment had the improper hearsay been allowed to authenticate the date on which the images were taken."³ (Italics added.) This is the sum total of Borja's argument on the issue of prejudice.

As pointed out in Saxton's briefing, the prejudice argument is woefully inadequate. As mentioned, 10 different medical experts testified on the issue of whether Borja suffered a traumatic brain injury requiring future treatment. The "battle of the experts" involved interpreting scans, disputes about relevant medical studies and publications, calculating biomechanical data, contemplating psychological assessments, and weighing evidence regarding Borja's ability to cognitively function immediately following the collision. In rendering their expert opinions, these witnesses did not rely on whether Borja was mistaken about when he undertook backyard renovations or played basketball. Borja fails to explain

³ We assume Borja's brief has a typo and he meant to say the result would have been different if the hearsay had *not* been allowed

how the satellite images that served to contradict his testimony, as opposed to the wealth of scientific evidence presented in this case, influenced the jury in awarding \$3,000. A biomechanical engineer, neurologist, orthopedic surgeon, clinical psychologist and neuroradiology specialist all rendered professional opinions for the defense based on scientific data, medical tests, and scans.

Moreover, Borja fails to mention his credibility as a witness was contested before Ruiz testified. After presenting his case, Borja was called by the defense as an adverse witness under Evidence Code section 776. Borja's story changed from claiming to have built the basketball court with his "own two hands," to him simply overseeing/managing the project built by other laborers. He had trouble remembering if he applied for a permit to install a gate before or after it was built. When questioned by his own attorney, he suddenly expressed great uncertainty as to when the project was completed. He could no longer remember if the basketball court was installed before or after the accident. Thus, Borja's credibility was called into question when he contradicted his own prior testimony. The satellite photographs merely served to confirm the backyard construction project was completed after the accident, further highlighting what was already established, i.e., Borja had a foggy memory of events and/or fabricated his basketball court story.

In summary, Borja's claims of prejudice were diminished by evidence providing the jury with a reason to question his credibility before Ruiz showed the jury the satellite photographs. His prejudice argument was also weakened by Borja's failure to explain how the photographs added to or subtracted from what Saxton aptly called the "mountain of evidence supporting the verdict." The jury considered and weighed multiple expert opinions, accepted the proof offered by one or more experts presented by Saxton, and rejected those

presented by Borja’s experts. “It is within the exclusive province of the trier of fact to determine the credibility of experts and the weight to be given to their testimony. [Citations.] Where there is conflicting expert evidence, the determination of the trier of fact as to its weight and value and the resolution of such conflict are not subject to review on appeal. [Citations.]” (*Francis v. Saue* (1963) 222 Cal.App.2d 102, 119-120.) Given the number of experts testifying in this case, it was not enough for Borja to point to the error and conclude it was unfair without further analysis of the evidence supporting the verdict.

B. Second Evidentiary Issue

The second evidentiary issue concerns portions of Pressman’s testimony. However, once again Borja focused his briefing on analyzing the merits of the purported error and not whether it was sufficiently prejudicial to require a reversal.

At issue is the admissibility of two components of Pressman’s lengthy testimony and related to the trial court’s interpretation of Code of Civil Procedure section 2034, subdivision (j)(2). (*Jones v. Moore* (2000) 80 Cal.App.4th 557, 564-565 (*Jones*), and *Kennemur v. State of California* (1982) 133 Cal.App.3d 907.) This legal authority stands for the principle that “a party’s expert may not offer testimony at trial that exceeds the scope of his deposition testimony *if* the opposing party has no notice or expectation that the expert will offer the new testimony, or *if* notice of the new testimony comes at a time when deposing the expert is unreasonably difficult.” (*Easterby v. Clark* (2009) 171 Cal.App.4th 772, 780.) This ensures the opposing party has an opportunity to gather sufficient evidence for the cross-examination and rebuttal. (*Bonds v. Roy* (1999) 20 Cal.4th 140, 146-147.)

Borja maintains the court erroneously interpreted *Jones* as providing a new exception to the rule. He asserts the court permitted new opinion testimony after determining Borja's counsel failed to (1) affirmatively ask the expert during the deposition to provide notice of any newly formulated opinions and calculations before trial, and (2) counsel should have reasonably expected new opinions based on comments the expert made in his deposition.

i. *Testimony About MRI Data*

We need only briefly summarize the nature of the testimony challenged, to provide some necessary context for our review of Borja's prejudice argument. Borja asserts the trial court should have excluded Pressman's testimony a Default Mode Network MRI (DMN MRI) should *not be used* to diagnose a traumatic brain injury, calling into question Borja's experts' reliance on DMN MRI data. In his deposition, Pressman stated, "We have been asked by some doctors to do DMN, but I don't know anybody who uses it at Cedars-Sinai to make the diagnosis. We have done the [DMN MRI] at the request of neurologists, but we don't use it as a diagnostic tool." Saxton argues this deposition statement was consistent with Pressman's trial testimony. Borja asserts the statement proves Pressman changed his opinion about whether neurologists use DMN MRI data when diagnosing brain trauma.

If we assume for the sake of argument Borja is correct, we could not reverse the case because Borja's prejudice argument about this opinion testimony is woefully underdeveloped. Borja maintains Pressman's testimony about the DMN MRI data was prejudicial because he "undermined" the testimony of King and Fisk. Borja complains that Saxton knew the treating physician, Fisk, was unavailable to rebut/impeach Pressman's opinion at trial. Borja does not offer any other reason why the testimony was prejudicial. And while Fisk was unavailable,

Borja does not explain why King could not have been re-called to rebut Pressman's "new" opinion regarding the use of DMN MRIs. Borja also does not suggest Pressman was the only expert who disagreed with the medical opinions of his experts. He also does not suggest Fisk, King, or his other experts relied entirely on the DMN MRI data as opposed to other scientific studies, medical tests, and scans to diagnose a brain injury. Indeed, he fails to indicate whether the DMN MRI data was heavily relied upon by any of the experts. Without these kinds of showings, we must conclude Borja was merely speculating when he suggested Pressman's opinion about the usefulness of DMN data resulted in a miscarriage of justice warranting reversal of the case.

ii. *Fractional Anisotropy (FA) Measurements*

The second aspect of Pressman's testimony challenged in this appeal is his discussion about a scientific technique called Fractional Anisotropy (FA), a methodology used to detect brain trauma. In his deposition, Pressman stated he asked a physicist to take the FA measurements of the white matter fiber tracts in a portion of the brain called the corpus callosum visible in Borja's MRI. He agreed with Borja's expert (King) that a measurement below a .4 would be considered abnormal. During his deposition, Pressman indicated he planned to ask his physicist to redo the measurements. However, during the trial, Pressman projected Borja's MRI onto a screen and took measurements of Borja's corpus callosum in front of the jury. He calculated the white matter fiber tracts were "in the eights," which were considered normal and not indicative of brain trauma. When Borja objected to this new opinion testimony, the court reviewed the deposition transcript and determined it was admissible because Borja's counsel did not

request notification of additional opinions formulated post-deposition. The court stated, “everybody has a right to continue to investigate their case after the discovery cutoff” and present that evidence unless the “*Jones* . . . procedure” was followed or *Jones* “questions” were asked.

Assuming *arguendo* the testimony complained of should have been excluded, we conclude Borja utterly failed his burden of showing it was so prejudicial as to have resulted in a miscarriage of justice warranting a new trial. (*DePalma v. Rodriguez* (2007) 151 Cal.App.4th 159, 166.) His primary argument is the testimony should be deemed prejudicial because it was a surprise. Borja also maintains it would have been “fruitless” to attempt to impeach Pressman because he showed the jury that as an expert he could make the FA measurements himself. Borja maintains that Pressman’s measurements before the jury was “powerful evidence” and better than relying “on testimony regarding the performing of the measurements.”

These conclusory statements are insufficient. Borja needed to explain why the testimony was more powerful. Why would impeachment efforts have been fruitless? Indeed, Borja indirectly demonstrates impeachment was possible by later arguing “the entire thing [Pressman taking measurements in the courtroom] was a sham because the measurements are done by a computer using data . . . [and t]hat is why . . . Pressman testified he must reply on a physicist and obtain the data” from a compact disc (CD). Borja fails to explain why he did not expose this “sham” by recalling one of his own experts to the stand. Was this purported sham discussed when Borja’s counsel thoroughly cross-examined Pressman about his new and changed opinions? Borja’s counsel had the opportunity to discuss the discrepancies in closing argument.

More importantly, prejudice was not established because Borja made no effort to weigh Pressman's "new" opinion using FA measurements against the other evidence supporting the verdict to show there was a miscarriage of justice. For example, Pressman opined Borja did not suffer brain trauma based on other *admissible* scientific data. Borja does not say whether those opinions were more or less significant than Pressman's testimony about FA measurements. He also does not suggest the jury would have concluded Pressman's opinion using FA data outweighed Saxton's other experts, who all agreed there was no evidence of a traumatic brain injury. Ludwig, Nagelberg, and Szabo independently reached the same conclusion as Pressman. Borja also overlooks how the verdict was supported by facts surrounding the accident, such as the low speed of impact, the minor damage to both vehicles, Borja's clear cognitive function following the collision, his ability to drive, and his lack of apparent need for immediate medical attention. There was ample evidence to support the verdict.

We cannot reverse the case because Borja failed to establish Pressman's additional testimony was sufficiently prejudicial. As mentioned above, an appellant has the burden to show not only that the trial court erred but also that the error is prejudicial. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069; *Paterno, supra*, 74 Cal.App.4th at pp. 105-106.)

DISPOSITION

The judgment is affirmed. Respondent shall recover his costs on appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.