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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,
Plaintiff and Respondent,
v.
JESUS ARAGON,
Defendant and Appellant.

F066820
(Super. Ct. No. BF137806A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Hilda Scheib, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Marcia A. Fay, Deputy Attorneys General for Plaintiff and Respondent.

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Jesus Aragon was convicted of the first degree murder of Francisco Flores, a shopping center security supervisor who had confronted a group of customers, including Aragon, over their unruly behavior. Aragon was also convicted of being a felon in

possession of a firearm. He now argues: (1) sufficient evidence supported neither the verdict of murder nor the finding that the murder was of the first degree; (2) his trial counsel rendered ineffective assistance because he did not present expert testimony about the reliability of eyewitness identifications; and (3) the trial court abused its discretion by denying both Aragon's new trial motion and his request for a continuance to obtain additional evidence to support the new trial motion. We reject these arguments.

The People point out a clerical error in the abstract of judgment. We will order the error corrected and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On July 18, 2010, Francisco Flores was shot to death while working as a security supervisor at Mercado Latino, a shopping center in Bakersfield. The district attorney charged Aragon with the crime. The information contained two counts: (1) premeditated murder (Pen. Code, §§ 187, 189)¹ and (2) being a felon in possession of a firearm (former § 12021, subd. (a)(1)). In connection with count 1, the information alleged for sentence-enhancement purposes that Aragon personally and intentionally discharged a firearm, proximately causing great bodily injury or death. (§ 12022.53, subd. (d).) In connection with count 2, the information alleged for sentence-enhancement purposes that Aragon personally used a firearm. (§ 12022.5, subd. (a).)

At trial, Emanuel Salinas, a security guard under Francisco Flores's supervision, testified that he and Francisco Flores confronted a group of unruly customers in the patio dining area of Tacos Los Amigos, a restaurant in the shopping center. Francisco Flores asked the group to quiet down and stop causing a scene, but they continued. He asked them to pay their bill and leave. They did so, peacefully.

After about an hour, however, the group returned. This time, the group was belligerent, saying to the guards, "F you guys, you guys are nothing, you guys are

¹Subsequent statutory references are to the Penal Code unless otherwise noted.

nobodys,” and “flipping us off.” According to Salinas, Aragon was not one of the misbehaving members of the group. “It wasn’t so much him doing the problem. It was his friends that were causing the scenes. He was being normal.” Francisco Flores approached Aragon and told him again that he and his friends would have to leave. They left the restaurant, but Salinas was told they were lingering in the parking lot.

Salinas picked Aragon out of a photo lineup as one member of the group of people who were ejected from the shopping center. Before being shown the lineup, Salinas told a deputy sheriff that he did not think he would be able to identify any suspects.

Tomas Flores, another security guard on duty that day, gave a similar account at trial. Unlike Salinas, Tomas Flores could only say that Aragon “[p]ossibly” was one of the men in the ejected group. During a redirect examination, Tomas Flores said he remembered that Aragon was one of those who made an obscene gesture at the guards and that he might have told this to a detective. On re-cross, however, Tomas Flores again said he was not 100 percent sure.

After hearing that the group had not left, Francisco Flores began walking toward the parking lot. Salinas and Tomas Flores both testified that they heard shots and saw Francisco Flores fall to the ground before he reached the exit. The shots came from beyond the exit and neither Salinas nor Tomas Flores could see who did the shooting. Salinas said he saw the muzzle of the gun, however.

An evidence technician testified and said 25 shell casings were found at the scene. At least two guns were used. Most of the shell casings were nine millimeter and the rest were .40 caliber. The nine-millimeter casings were of two different brands.

Monique Loza testified that she, her husband, her brother, and two friends were sitting in the patio at Tacos Los Amigos at the time of the shooting. She arrived around 4:00 or 5:00 p.m. to have drinks. She had four or five beers. About an hour after she arrived, a man who was with Aragon started arguing with some other men. Aragon stood out for Loza because he was dressed casually, in a white tank top and jean shorts, while

others in the restaurant were “dressed up nice” to dance to the band that was there. She saw Aragon’s group leave at the request of security guards.

About an hour after Aragon’s group was ejected, Loza heard gunfire. At first, she did not know what was happening. She thought the sound was coming from a tambora drum in the band and did not move when her husband tried to pull her away. Then she turned and saw Aragon firing a gun. She recognized him and his clothing, including gray tennis shoes. He was holding his right arm straight out in front of him and firing as he moved backward. She saw fire flashing from the gun. She saw Aragon’s face clearly. The day after the shooting, Loza identified Aragon in a photo lineup without hesitation.

Aragon ran off and Loza went to the man who had been shot. He was wearing a security guard uniform. Loza and her husband and brother then ran to their car and left.

It was later stipulated that Francisco Flores was actually wearing a white shirt and blue jeans when he was shot. There was uncontradicted testimony that he also was wearing a holster with a gun in it and that a badge and walkie-talkie were found on the ground where he fell.

Loza testified that, about a month before the night of the shooting, she had seen Aragon at a nightclub called La Movida. She denied that she had seen Aragon at a nightclub called Aldo’s and said she had no recollection of an incident there in which, after a disturbance, her group was ejected from the club at Aragon’s request. She denied that she had any animosity toward Aragon on account of any such occurrence.

Loza testified that, an hour after the shooting, she contacted the police and a deputy met with her at her home. She did not remember telling the deputy, however, that although she had seen the shooter was a man, she could not tell his nationality. She also did not remember telling a detective that she was unable to see the shooter’s face on the night of the shooting. She believed police reports saying she had made these statements were inaccurate, or perhaps she misspoke because she was in shock. Confronted with a statement in a police report that she had said there were about “six other guys” with

Aragon on the night of the shooting, Loza conceded that she might have said this and that it was inconsistent with her trial testimony that there were three or four men and three or four women. Finally, Loza conceded that she must have been mistaken when she told a deputy the shooter was six feet tall. In court, she estimated that Aragon was five feet seven inches tall.

During cross-examination, defense counsel attempted through the use of photographs to show that Loza could not have seen the shooter from where she was sitting in the Tacos Los Amigos patio. Loza said the shooter was just outside a gate that led to the parking lot. Counsel concluded by asking: “Ma’am, isn’t it true that it is absolutely impossible for you to be inside here and see whoever was behind this gate?” Loza said, “No, it’s not.”

The defense called Loza back to the stand as part of its case-in-chief. Counsel asked about a statement in a deputy’s report that Loza had said she had seen Aragon before at many dances at Mercado Latino. Loza said she meant she had seen him before at dances at Movida. Loza admitted she told an officer that, before the shooting, she thought Aragon looked evil. She also admitted she told an officer that the staff at Tacos Los Amigos treated Aragon “like royalty” and that he and his friends were served beer in glasses while the other customers were given plastic cups.

The defense called two alibi witnesses, Jaime Alvarez Zarco and Albairis Cortez. Alvarez (as he specified he should be called) testified that he was with Aragon’s group at Tacos Los Amigos on the evening of July 18, 2010. Unlike the others, Alvarez was not drinking because he had agreed to drive. Some in the group created a disturbance, and Aragon tried to settle them down. They continued to misbehave, however, and the group was ejected from the shopping center. Alvarez and Aragon then separated from the group and went to pick up Aragon’s wife. From there, they drove to Los Angeles in Aragon’s car. Alvarez drove back to Bakersfield the same night in a car Aragon sold him. During cross-examination, the prosecutor obtained judicial notice of a document

showing that Alvarez's wife had visited Aragon in jail 13 times before trial. Alvarez admitted he had cooperated with the defense investigator and had refused to speak with the prosecution's investigator.

Alvarez also testified that all the members of Aragon's group at Tacos Los Amigos were wearing white t-shirts, and that all of them except for the tallest man—who was not Aragon—were wearing pants. The tallest man was wearing shorts.

Cortez testified that she was an old friend of Aragon. On July 18, 2010, she arrived at Mercado Latino around 8:00 p.m. As she was arriving, she saw Aragon and Alvarez in the parking lot preparing to depart. Aragon said they were about to go to Los Angeles. He was wearing a white t-shirt and black jeans. Cortez saw them leave. Then she went into the shopping center and had some drinks. About an hour later, she heard gunshots. Like Alvarez, Cortez had refused to speak with the prosecution's investigator, but did cooperate with the defense investigator.

Junior Perez is Aragon's brother. He testified that he saw Monique Loza at Aldo's nightclub in Bakersfield in March or April 2010. Aragon and several others were with Perez. Their group invited a group of women, including Loza, to come to their table. The men bought beer for the women and they sat together for a few minutes. Then one of the women said one of the men "had spanked her, like, in the butt." The woman was angry. Perez thought someone at another table had hit her, but the woman insisted it was someone at their table. She broke one or two beer bottles. The men could not calm her down, so Aragon asked the club owner to remove the group of women. He did so. Loza was one of the people ejected.

The defense called Detective James Newell of the Kern County Sheriff's Department. Newell was present when Loza was interviewed the day after the shooting. Newell recalled that Loza said she had a partial view of the shooter's face, but Newell was not 100 percent sure of his recollection. He conceded that the report of the interview, prepared by another officer, said Loza stated she never saw the shooter's face.

Another portion of the report stated that Loza said she only saw “half of the body of one of the shooters” Loza also told the officers she thought Aragon looked evil.

Newell testified on cross-examination that he was present when Loza identified Aragon’s picture in a photo lineup. Loza was crying and shaking when she circled Aragon’s picture.

Kern County Sheriff’s Deputy Alan Fullerton testified for the defense that he interviewed Loza. He said Loza told him she did not see the shooter’s face and could not tell his nationality. She said he was wearing a white tank top, blue jean shorts and white tennis shoes, and was six feet tall. She also said she had seen Aragon at Mercado Latino many times at dances.

The jury found Aragon guilty of first degree murder and being a felon in possession of a firearm. It found the enhancement allegations true.

Before sentencing, the court granted Aragon’s request to relieve the public defender and retain new counsel. New counsel filed a motion for a new trial, described in greater detail below, in which he stated that he had located an eyewitness, who had not been discovered at the time of trial, and who could give exculpatory testimony. The trial court denied the motion for a new trial and denied Aragon’s request for a continuance of the sentencing hearing to allow him to obtain a signed affidavit from the eyewitness or to subpoena her.

The court imposed an indeterminate sentence of 50 years to life. This term consisted of 25 years to life on count 1 plus an enhancement of 25 years to life pursuant to section 12022.53, subdivision (d). The court stayed the sentence on count 2 pursuant to section 654.

DISCUSSION

I. Sufficiency of evidence

Aragon argues that the evidence was not sufficient to support the convictions. The standard of review for a challenge to the sufficiency of the evidence supporting a conviction is well established:

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] ... We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility. [Citation.]’ [Citation.]” (*People v. D’Arcy* (2010) 48 Cal.4th 257, 293.)

Aragon argues more specifically that the convictions rest on the eyewitness identification testimony by Loza and that, although a single witness’s testimony ordinarily suffices to support a conviction, Loza’s testimony did not suffice because it was inherently improbable and claimed things that were physically impossible. “[A]n appellate court can reject the positive testimony of a witness only when that testimony is ‘inherently improbable.’ It is not sufficient that the testimony may disclose circumstances which are unusual. Where the testimony is such that within the knowledge of reasonable men it cannot be true the appellate court might assume that knowledge and hold the testimony legally insufficient” (*People v. Collier* (1931) 111 Cal.App. 215, 226.) “To come within the rule of inherent improbability, testimony must be such that it is physically impossible for it to be true, or its falsity must be apparent without resort to inference or deduction.” (*People v. Norman* (1959) 175 Cal.App.2d 348, 352; see *People*

v. Watts (1999) 76 Cal.App.4th 1250, 1258-1259; *People v. Breault* (1990) 223 Cal.App.3d 125, 140-141; *People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

Aragon argues that Loza's testimony was inherently improbable because (1) it contradicted her earlier statements, as reported by two police officers, that she did not see the shooter's face; (2) her description to the police of the shooter as six feet tall did not match Aragon's actual height; (3) Loza's description of Aragon's clothes did not match the description given by other witnesses; (4) Loza told an officer that the shooter was wearing white tennis shoes, but testified that he was wearing gray tennis shoes; (5) it is unlikely that anyone could be unaware that a shooting was taking place nearby until after the first three or four shots had been fired, as Loza testified she was; (6) Loza said Francisco Flores was wearing a security guard's uniform, when really he was only wearing a white shirt and jeans with his walkie-talkie, badge, and gun; (7) Loza told an officer she saw Francisco Flores fall to the ground, but testified that she at first thought the fallen man might have been her brother; and (8) Loza was biased against Aragon, thinking he looked evil and was receiving special treatment from the restaurant staff.

None of these considerations come close to showing inherent implausibility as that term is used in the case law. All concern ordinary conflicts in the evidence, problems regarding the weight of the evidence, or challenges to the credibility of the witness. All these issues are within the province of the jury. They do not, separately or together, show that Loza's identification of Aragon as the shooter was such that, within the knowledge of reasonable people, it could not be true.

Aragon also maintains that it was physically impossible for Loza to see the shooter from where she was sitting. He relies on photographs (People's exhibit Nos. 7 & 31) of the patio of Tacos Los Amigos and the adjacent exit walkway and gate leading to the parking lot. He claims these photographs establish that a person sitting on the patio could not see a person standing outside the gate.

The photographs establish no such thing. We have reviewed them, and it appears that a person looking toward the gate from the right-hand edge of the patio would be able to see through at least a portion of the opening to the parking lot.

We conclude that Loza's testimony was not inherently improbable, and Aragon has presented nothing to show that it was physically impossible for Loza to see the shooter. Aragon therefore has failed to show that the verdict was not supported by sufficient evidence.

Aragon also argues that, even if the evidence was sufficient to prove murder, it was not sufficient to prove first degree murder under the theory presented by the prosecution, namely that the murder was willful, deliberate, and premeditated within the meaning of section 189.

“To prove the killing was ‘deliberate and premeditated,’ it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.” (§ 189.) Deliberation, as the jury was correctly instructed in accordance with CALJIC No. 8.20, requires that the defendant make a decision “as a result of careful thought and weighing of considerations for and against the proposed course of action.” Premeditation means “deliberating before taking action.” The jury was further correctly instructed as follows:

“The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

“The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.”

Our Supreme Court has held:

“Generally, there are three categories of evidence sufficient to sustain a premeditated and deliberate murder: evidence of planning,

motive, and method. [Citations.] When evidence of all three categories is not present, ‘we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.’ [Citation.] But these categories of evidence, borrowed from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 ..., ‘are descriptive, not normative.’ [Citation.] They are simply an ‘aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.’ [Citation.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.)

The evidence can be sufficient if there is “‘some evidence of motive in conjunction with ... a deliberate manner of killing.’” (*People v. Cole, supra*, 33 Cal.4th at p. 1224.)

In this case, there was adequate evidence in all three categories: motive, planning, and manner. The ejection of Aragon and his group was evidence of a payback or revenge motive. The testimony that the shooter or shooters left the restaurant, lingered in the parking lot, and then fired at the guards who had ejected him or them when the guards followed was evidence of planning. Finally, the manner of the killing—at least two guns fired a total of more than two dozen times—was evidence of its deliberateness. No more was required.

II. Failure to present expert testimony on eyewitness identifications

Aragon contends that his trial counsel failed to render the effective assistance required by the Sixth Amendment when he failed to present expert testimony that eyewitness identifications lack reliability and are often mistaken, and that there were particular reasons to be cautious about the identification in this case. He points out that, although other witnesses placed Aragon at the scene, only Loza identified him as the shooter, and there was no physical evidence tying him to the crime.

To establish ineffective assistance of counsel, defendant must show that counsel’s performance “fell below an objective standard of reasonableness,” and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the

proceeding would have been different.” (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; see also *People v. Hester* (2000) 22 Cal.4th 290, 296.)

Aragon discusses several points an expert on eyewitness identifications could have made. First, scientific studies have shown that eyewitness identifications are often incorrect and jurors often overestimate their reliability. Second, Loza expressed a high degree of confidence in her identification of Aragon, but research has shown that, contrary to common beliefs, an eyewitness’s confidence in an identification is not highly correlated with the accuracy of the identification. Third, Loza testified that she had seen Aragon before the night of the shooting. An expert could have testified that, once again, a popular perception is mistaken: A witness’s prior contact with an individual is not highly correlated with accuracy of identification.

We do not doubt the validity of empirical research revealing the weaknesses of eyewitness identifications. Reliability problems with eyewitness identifications were already sufficiently well known almost 50 years ago for the United States Supreme Court to describe them as “proverbially untrustworthy.” (*United States v. Wade* (1967) 388 U.S. 218, 228.) Recently in *Perry v. New Hampshire* (2012) ___ U.S. ___ (132 S.Ct. 716), that court endorsed the use of expert testimony on this subject (while rejecting the contention that due process required a prior judicial determination of reliability before an eyewitness identification could be admitted where the identification was not obtained under unnecessarily suggestive circumstances). (*Id.* at p. ___ [132 S.Ct. at pp. 729-730].) The California Supreme Court has ruled that this kind of expert testimony is usually admissible when “an eyewitness identification of the defendant is a key element of the prosecution’s case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury” (*People v. McDonald* (1984) 37 Cal.3d 351, 377 (*McDonald*), overruled on other grounds by *People v.*

Mendoza (2000) 23 Cal.4th 896; see also *People v. Wright* (1988) 45 Cal.3d 1126, 1153-1154 [expert testimony, not specialized cautionary jury instructions, is proper method for placing before jury issue of unreliability of eyewitness identifications under particular circumstances].)

Nevertheless, there is no rule that other methods of safeguarding against the pitfalls of eyewitness identification, such as cross-examination, are insufficient whenever the prosecution's case depends on an uncorroborated eyewitness identification. The Court of Appeal has stated that, "*McDonald* provides no support for the claim that expert testimony must be presented by a defense attorney in *every case* where an eyewitness identification is uncorroborated." (*People v. Datt* (2010) 185 Cal.App.4th 942, 952.) Beyond this, neither *McDonald* nor any other binding authority stands for the proposition that expert testimony attacking an eyewitness identification is *ever* required to satisfy the demands of the Sixth Amendment.

We are also confronted in this case with indications that defense counsel deliberately used an alternative approach. In his closing argument, Aragon's trial counsel chose to maintain not that Loza could have mistaken another person for Aragon because (for instance) she had seen Aragon before and his image was unconsciously called to mind by the sight of a similar-looking man. Instead, counsel said it was "obvious" that it was "[i]mpossible" for a person sitting where Loza was sitting to see the shooter at all. Consequently, she must have been "lying" when she identified Aragon; and she was lying because "she despises this guy." Having chosen to state this theory in such unequivocal terms, trial counsel might reasonably have decided that he would be weakening or watering down his case if he had added an alternative argument (supported by expert testimony) that Loza simply was mistaken. We cannot say the record "affirmatively disclose[s] the lack of a rational tactical purpose for" these choices. (*People v. Ray* (1996) 13 Cal.4th 313, 349.)

In light of the foregoing, we cannot conclude that Aragon's trial counsel fell below an objective standard of professional reasonableness in deciding not to use an expert on eyewitness identifications. Aragon therefore has not established ineffective assistance of counsel.

III. New trial motion and continuance request

The jury reached its verdict on September 20, 2012. The request for substitution of counsel was granted on October 19, 2012. At that time, the court granted Aragon a continuance of his sentencing to November 6, 2012, which he requested for the purpose of preparing a new trial motion, among other purposes. On November 5, 2012, counsel filed a status report stating that trial transcripts were not yet available and that counsel had retained Joseph Serrano, an investigator. Counsel requested an additional continuance. The court continued the sentencing hearing to February 5, 2013, and ordered Aragon to file any motions by January 14, 2013. Counsel filed another motion for a continuance on January 11, 2013, stating that trial transcripts had been received on December 18, 2012, and that Serrano was still interviewing witnesses. The court granted a continuance of the hearing to February 28, 2013, and directed Aragon to file motions by February 8, 2013.

Aragon filed a new trial motion on February 8, 2013, and a supplement to the motion on February 13, 2013. The motion advanced several grounds for granting a new trial, but the only ground at issue in this appeal is new evidence. The supplement to the new trial motion reported that Serrano had located a witness, Lisbeth Sarabia, who was present at the shooting and said she saw two men firing, neither of whom she identified as Aragon.

The motion was supported by Serrano's report, but not by a signed affidavit or declaration by the witness. The report stated that Serrano first made contact with Sarabia on February 6, 2013, when she agreed to be interviewed. Sarabia was at Mercado Latino with her boyfriend in June or July 2010. They arrived and parked in the south parking lot

between 8:15 and 9:00 p.m. While they were still in the car, Sarabia saw two men run toward the shopping center entrance and stop. They waved as if calling someone over. Sarabia and her boyfriend walked toward the entrance. She saw the two men take guns from their waistbands. They were the type of guns that have clips or magazines (i.e., semiautomatics). Sarabia and her boyfriend stopped walking. She saw flashes from the guns and heard 10 to 12 gunshots. There were only two shooters. They were firing toward the shopping center entrance, but she could not see what they were shooting at. Sarabia and her boyfriend ran back to the line of parked cars and took cover.

Sarabia saw the shooters and their faces but could not remember what they were wearing. Both were Hispanic. One was about 5 feet 10 inches tall, of average build, about 240 to 260 pounds, with a medium complexion. He had a moustache and a light beard. He appeared to be in his mid-20's. The other was thin and 5 feet 6 or 7 inches tall. His complexion was darker. His hair was very short, shorter than that of the other man, and appeared to have been freshly cut. He looked about 20 years old.

Sarabia and her boyfriend left the shopping center after the shooting without going inside. She had not discussed the shooting with anyone, and she and her boyfriend agreed to keep to themselves the fact that they had seen it. She had since broken up with the boyfriend and lost contact with him.

Serrano had copies of the photo lineups that had been used by the police in the case. Out of a total of 12 photos, Sarabia selected one and said it looked "kind of like" the taller shooter she had seen. The photo was not the photo of Aragon, and, according to the written motion prepared by counsel, it was of another person who had been identified by several other witnesses as one of Aragon's companions the night of the shooting. A picture of Aragon was in one of the lineups, and Sarabia did not select it.

The court heard the new trial motion on February 28, 2013. It pointed out that the only material provided in support of the new evidence claim was the Serrano report, which was unsigned, not under penalty of perjury, and not in the form of an affidavit.

The court pointed out that, by statute, when a new trial motion is based on alleged new 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.” (§ 1181, subd. (8).) The court asked whether defense counsel had asked Sarabia to sign an affidavit. Counsel said he had not done so, as Sarabia had said she was afraid and did not want to get involved. Counsel then conceded that an affidavit was required and said he could subpoena Sarabia and have her brought to court within 10 days, if the court were to grant a continuance for that purpose. Asked why he had not done that already, for that day’s hearing, counsel said he had mistakenly believed the investigator’s report would be sufficient for purposes of the new trial motion.

The court denied the request for a continuance, observing that it had been “more than reasonable in granting continuances” for investigation up to that time. The court then went on to deny the motion for a new trial. On the issue of new evidence, the court stated that the Serrano report was “nothing more than an offer of proof. It is not a properly signed and executed affidavit. It is not a declaration under penalty of perjury. I can’t consider that under Penal Code Section 1181 as sufficient to establish new evidence which would justify granting a new trial.”

The court further stated that it would not grant a new trial based on Sarabia’s evidence even if that evidence had been properly placed before it:

“But even assuming for the sake of argument that ... an affidavit was procured which basically contained all of the information that’s set forth in the Serrano Investigative Services report, the Court agrees with the People’s analysis that the only value of this newly discovered evidence would be as impeaching evidence or to contradict a witness of the opposing party.... [¶] So even assuming arguendo that this affidavit was produced, the Court would not find that this is newly discovered evidence that would justify granting a new trial.”

The court also rejected the other grounds in Aragon’s motion.

Aragon argues that the court abused its discretion when it denied his motion for a new trial and his request for a continuance to obtain the evidence necessary to support the motion.

The failure of the defense to discover and present Sarabia's evidence at trial is troubling. Further, although the trial court was correct that the new trial motion failed to satisfy the requirements of section 1181, subdivision (8), and the motion therefore could not be granted at the February 28, 2013 hearing, it is unclear whether the trial court acted within its discretion in denying the defense a 10-day continuance to cure the defect by securing Sarabia's affidavit or live testimony, just because it had granted a series of continuances already. It also is not at all clear that Sarabia's testimony would have served merely to impeach or contradict Loza, as opposed to constituting independent evidence that Aragon was not one of the shooters.

We could not reverse the judgment even if we were persuaded that the trial court erred, however. An appellant has the burden of showing the appellate court not only error, but also prejudice. (*People v. Coley* (1997) 52 Cal.App.4th 964, 972.) We cannot find prejudice to Aragon from the trial court's denial of a continuance because the evidence that would possibly show prejudice—Sarabia's affidavit or testimony—is not in the record. The court was correct in describing Serrano's report as a mere offer of proof. Without the evidence, Aragon cannot establish a reasonable probability of a better outcome absent the asserted error (*People v. Watson* (1956) 46 Cal.2d 818, 836), regardless of whether that better outcome is conceived of as a more favorable verdict in a new trial or merely as the granting of the new trial motion.

In sum, the absence of Sarabia's evidence from the record means that the reversible error Aragon attempts to show is fundamentally of a kind that cannot be shown in an appeal. The procedural device available for challenging a conviction on the basis of matter not in the record is a petition for a writ of habeas corpus. (*In re Clark* (1993) 5 Cal.4th 750, 804 ["When matters that do not appear in the trial record ... have affected

the outcome of the trial, habeas corpus offers the sole method by which an unjustly imprisoned inmate may obtain relief.”].)

IV. Clerical error

At the sentencing hearing, on count 2, the court stayed a three-year term for being a felon in possession of a firearm plus a 10-year enhancement under section 12022.5, subdivision (a). The abstract of judgment, however, incorrectly shows the stayed term for the enhancement as three years. We will order the trial court to correct the abstract to conform to its oral pronouncement of sentence. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

DISPOSITION

The trial court is directed to amend the abstract of judgment to show that the stayed enhancement on count 2 is 10 years, not three years. The trial court shall forward the amended abstract to the appropriate correctional authorities. The judgment is otherwise affirmed.

Oliver, J.

WE CONCUR:

Cornell, Acting P.J.

Gomes, J.