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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

MOHAMAD MESDAGHI,

Defendant and Appellant.

B239038

(Los Angeles County
Super. Ct. No. YA073765)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed as modified.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

Mohamed Mesdaghi appeals from the judgment entered after a jury convicted him of leaving the scene of an accident resulting in injury and insurance fraud. Mesdaghi contends he received ineffective assistance of counsel at trial and was improperly excluded from critical proceedings in violation of his federal constitutional rights. He also contends the trial court abused its discretion in denying his motion for a mistrial and improperly sentenced him. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Accident

At approximately 8:40 p.m. on June 13, 2008, Jocelyn McCormick was driving in the southbound fast lane of the 405 freeway in Los Angeles when her car was struck in the right rear by another vehicle. McCormick lost control of her car, which hit the center divider and then rebounded across the freeway, striking another car and finally coming to rest facing northbound along the shoulder. The driver of the third car, Tracy Greathouse, whose car had been struck by McCormick's vehicle, pulled over to the shoulder near McCormick. As he parked, he saw a black sports utility vehicle (SUV) resting against the median, also facing northbound. Greathouse saw the driver of the SUV climb out of his vehicle, run across the freeway and disappear up the embankment. Greathouse described the driver as a young man of medium height and build with shoulder-length dark hair.

Todd Williams, who was driving in the carpool lane a short distance behind the accident, saw the black SUV collide with McCormick's car. Williams drove slowly past the black SUV and spoke with the driver to find out whether he was injured. The driver indicated he was fine.

Alerted by several callers, the California Highway Patrol (CHP) dispatched Officer Ronald McMillan to investigate the accident. McMillan was unable to locate the driver of the SUV and observed no blood in the car or other indicia of injury. After McMillan completed his investigation, the SUV was towed to a nearby lot in Inglewood.

2. Mesdaghi's Report of His Vehicle as Stolen

At 9:43 p.m. the Santa Monica Police Department received a report of a residential burglary and vehicle theft from Mesdaghi. Mesdaghi explained to the responding officers he had been sleeping in his apartment when his mother arrived at 7:30 p.m. and alerted him to the fact his black Land Rover SUV was missing. Mesdaghi told the officers his front door had not been locked and his keys, cellular telephone and wallet, which he had placed just inside the door, were also missing. According to Mesdaghi, he believed his property had been stolen while he slept. The officers were not able to find any evidence of forced entry, and Mesdaghi was unable to explain why he had waited two hours to report the theft.

Later that evening Officer Scott McGee attempted to report the Land Rover as stolen and learned it had been involved in a hit-and-run collision. McGee returned to Mesdaghi's home to check him for injuries, but no one responded to his knock at the door or telephone calls.

The next day Mesdaghi submitted a stolen vehicle claim to his insurer.

3. The CHP Investigation

The day after the accident CHP Officer McMillan contacted the tow yard and learned Mesdaghi had visited the yard early that morning and removed items from the SUV. He had also provided identification to the tow company and authorized release of the vehicle to his insurer. Because the tow yard had a security camera, McMillan was able to view a surveillance videotape showing Mesdaghi. McMillan notified Mesdaghi by mail the SUV had been involved in an accident. In a recorded interview Mesdaghi told McMillan the SUV had been stolen from his home and he had not been driving the vehicle at the time of the accident.

Officer McMillan was able to locate Williams and arrange for him to view a photographic lineup (a "six-pack") three weeks after the accident. Williams identified Mesdaghi as the driver of the SUV. McMillan was unable to locate Bao Tran, who had reported an incident on the 405 freeway that same night. According to the dispatcher's log, Tran called at 9:15 p.m. to report she had hit a man running across the freeway. The

impact had not been hard; the man was already bleeding and had continued to run toward the embankment.

4. The Insurance Investigation

On June 16, 2008 Mesdaghi spoke with a claims examiner for his insurer. Based on his statements, the examiner referred the claim to a security investigator. The investigator interviewed Mesdaghi twice and spoke with Officer McMillan about Mesdaghi's statements to her. Mesdaghi's claim was denied on the investigator's recommendation in October 2008.

5. The Charges

Mesdaghi was charged with leaving the scene of an accident resulting in injury (Veh. Code, § 20001, subd. (a)(1) (count 1)) and insurance fraud (Pen. Code, § 550, subd. (a)(1) (count 2)).¹ As to both counts it was alleged Mesdaghi has suffered a prior serious felony conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had served a prior prison term for a felony within the meaning of section 667.5, subdivision (b).

6. Mesdaghi's Defense

At trial Mesdaghi presented a defense of misidentification. In addition to his contention the SUV had been stolen, he blamed the CHP for a faulty investigation. Other than Williams, no one else identified him at the scene; yet Officer McMillan failed to follow up with potential witnesses, including members of Mesdaghi's family who would support his assertion the SUV had been stolen. Moreover, McMillan failed to preserve critical evidence in the form of the actual CHP emergency hotline recordings or the videotape from the tow yard.² Based on the People's failure to preserve the tape of

¹ Statutory references are to the Penal Code unless otherwise indicated.

² The parties stipulated the 911 audiotapes were deleted as of December 13, 2008 pursuant to CHP policy and that charges were filed against Mesdaghi on December 15, 2008.

The parties also stipulated that, as of June 13, 2008, Mesdaghi's driving privileges were suspended; he was on summary probation for a misdemeanor; and he was on parole.

Tran's call or even interview her, Mesdaghi's counsel obtained a pretrial ruling allowing Mesdaghi to introduce a stipulation relating the substance of her call and informing the jury the tape had been destroyed shortly before the case had been filed. According to Mesdaghi, Tran's description of the bleeding man was inconsistent with his condition at the time he was interviewed by Santa Monica police officers about the theft of his SUV.

Shortly before trial, Officer McMillan found Tran and interviewed her. She told him she had not seen blood on the man, but her father had told her, once they arrived at their destination, there was blood on their van. Based on the late discovery of this evidence, the court ruled Mesdaghi was still entitled to introduce the original stipulation but could not ask Tran what her father saw. The prosecutor stated he did not intend to call Tran as a witness but would cross-examine her on any inconsistencies in her statements.

The week before the trial began, defense counsel was contacted by Mesdaghi's estranged father, Amir, who informed her he had been driving the SUV on the night of the accident. To avoid becoming a witness at trial, defense counsel urged the People to interview Amir, who stated he wanted to testify at trial. At the beginning of trial Amir was provided counsel, who advised him against testifying. Amir affirmed his intention to testify before the trial court. Based on his promise to testify, Mesdaghi's counsel told the jury in her opening statement Amir would testify he, and not his son, was the one who had been driving the SUV at the time of the accident. But when the time came for Amir to testify, his counsel had convinced him to assert his Fifth Amendment right not to testify. The court upheld Amir's assertion of his Fifth Amendment privilege, thus removing him from the case.

Mesdaghi proceeded with his defense of misidentification. Although neither he nor Amir testified, his mother and wife both testified Mesdaghi had been asleep at home when the SUV was stolen. In addition, his counsel called Tran to testify, notwithstanding the proposed stipulation related to her original call. Tran stated her recollection was shaky but disputed the way her call had been presented in the CHP log. She had been driving with her family at a speed of 50 miles per hour on the southbound 405 freeway

near the Century Boulevard exit when she saw a man attempt to cross the freeway from the onramp side of the freeway. She was able to slow significantly but was unable to avoid him; and her van knocked him down. He immediately got up and ran back to the shoulder. She did not recall seeing emergency vehicles on the freeway. She never saw blood on the man but admitted she had told the dispatcher “he bled a little.” The man was between 20 and 45 years old and had short hair. She reported the incident to the CHP, but McMillan told her many people had reported the accident and she should not “worry about it.”

7. Verdict and Sentencing

The jury convicted Mesdaghi on both counts. In a bifurcated proceeding Mesdaghi admitted the truth of the prior conviction allegation for purposes of both the strike and the enhancement under section 667.5. Sentencing was continued to March 29, 2011.

On February 8, 2011 Mesdaghi’s counsel appeared and asked to be relieved, offering to explain her reasons in camera, because she believed she could no longer represent Mesdaghi without compromising the Rules of Professional Conduct. The motion was assigned to a different judge who approved the request. Mesdaghi’s new counsel filed a motion for a new trial based in part on his former counsel’s representation to him that conviction on the current charges would constitute a second strike under the Three Strikes law. According to Mesdaghi, had he understood the charges were not strikes, he would have accepted a two-year plea offer. The motion was denied.

At a January 5, 2012 sentencing hearing the court imposed an aggregate state prison term of seven years four months, composed of the middle term of three years (doubled under the Three Strikes law) plus a one-year prior prison term enhancement (which the court stayed) on count 2; and a consecutive term of one-third the middle term of two years (doubled) on count 1. The hearing was continued for two weeks for the purpose of setting victim restitution.

On January 20, 2012 the parties appeared for the restitution hearing. Although no victim sought restitution, Mesdaghi’s mother was allowed to speak and begged the court

to reduce the sentence. The court declined to modify the sentence and commented, “This isn’t a life sentence, by any means” Mesdaghi, who had appeared contrite at the previous sentencing hearing, then asked, “Am I getting punished for going to trial because it if—?” The court interrupted him, stating, “No, you are not being punished for going to trial and, you know what, it’s not your turn.” Mesdaghi responded, “When was my turn? I’ve been here for two years.” In answer the court said, “Do you want me to reconsider your sentence? Is that what you are asking for because I don’t think you want that.” Mesdaghi stated, “You asked if it’s my turn.” The court reaffirmed the terms of the sentence, instructed Mesdaghi of his right to appeal and remanded him to the custody of the sheriff.

Three days later the court reconvened the hearing. Based on Mesdaghi’s attitude at the previous hearing, the court announced it was reopening sentencing and imposing the one-year enhancement it had previously stayed for a total aggregate term of eight years four months. The court explained, “His attitude and outbursts . . . are in stark contrast to the statement that he read. It’s pretty clear to the court that he doesn’t get it. He is not taking responsibility for what’s going on, what happened in this case.”

CONTENTIONS

Mesdaghi contends portions of his trial counsel’s opening statement and her decision to introduce certain evidence were so deficient as to have deprived him of the effective assistance of counsel and his exclusion from certain proceedings violated his constitutional rights. Mesdaghi also challenges the court’s denial of his motion for mistrial after his father asserted his privilege against self-incrimination and the court’s imposition of the one-year prior prison term enhancement.

DISCUSSION

1. Mesdaghi’s Claims of Ineffective Assistance of Counsel Are Premature

“To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel’s deficient performance was prejudicial, i.e., that a reasonable probability exists that, but

for counsel's failings, the result would have been more favorable to the defendant.'" (*In re Roberts* (2003) 29 Cal.4th 726, 744-745; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.)

""Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" [Citations.] '[W]e accord great deference to counsel's tactical decisions' [citation] and we have explained that "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.'" [Citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.] [¶] In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions.'" (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) Decisions whether to call particular witnesses are peculiarly matters of trial tactics unless the decision results from the unreasonable failure to investigate. (See *People v. Bolin* (1998) 18 Cal.4th 297, 334.)

On direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442; see *People v. Carter* (2003) 30 Cal.4th 1166, 1211 ["If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus."].)

Mesdaghi contends his counsel was ineffective in three respects: (1) her decision to call Tran as a witness when she had already obtained a stipulation that Tran had reported the man she saw running across the freeway had been bleeding; (2) her failure to preserve for trial Amir's confession he had been driving Mesdaghi's SUV on the night of the accident; and (3) her acquiescence to, and participation in, ex parte hearings that excluded Mesdaghi from discussions about his father's invocation of his privilege against self-incrimination.

As to defense counsel's decision to call Tran as a witness, her actual reasoning is not set forth in the record. Nonetheless, we have no difficulty positing a strategic rationale for the decision: A stipulation read into the record has far less impact than live testimony. Counsel had no other witness to support her argument the driver who caused the accident had been injured in a manner inconsistent with Mesdaghi's apparent lack of injury when he was interviewed about the theft of his vehicle by Santa Monica police. While it may be easy to second-guess the decision to call Tran in hindsight, it was plainly tactical in nature and, at least from the record now before us, reasonable. (See *People v. Jones*, *supra* 29 Cal.4th at p. 1254; see also *Strickland v. Washington*, *supra*, 466 U.S. at p. 689 [courts must presume challenged action "'might be considered sound trial strategy'" absent evidence to contrary]; *People v. Dennis* (1998) 17 Cal.4th 468, 541 [same].)

To the extent Mesdaghi complains his counsel should have located Tran and interviewed her before the trial, that claim must be presented in a habeas corpus petition. The record does not disclose whether the People provided Mesdaghi's counsel with adequate information to locate Tran or whether any such efforts were made. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [a claim of ineffective assistance of counsel relating to "'why counsel acted or failed to act in the manner challenged'" is more appropriately decided in a habeas corpus proceeding].)

Mesdaghi also challenges his counsel's failure to preserve his father's confession in view of the strong likelihood he would invoke his Fifth Amendment right not to testify. Amir had come forward on the eve of trial and informed defense counsel he had been the

driver of Mesdaghi's SUV on the night of the accident. He insisted he wanted to testify and reaffirmed his intent even after having been advised by independent counsel not to testify. The record fully discloses the lengthy and vigorous efforts of defense counsel to preserve the right to call Amir as a witness while both ensuring he received independent advice and avoiding the need to herself become a witness at trial, thus jeopardizing Mesdaghi's overall defense. Under the circumstances evident on the record, the decision to disclose Amir's proposed testimony in opening statement was a substantial risk; but it did not violate Mesdaghi's constitutional right to effective counsel. (See *In re Cudjo* (1999) 20 Cal.4th 673, 692 [“[s]trategic choices made [by counsel] after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable”].)

Nonetheless, Mesdaghi contends on appeal his counsel could have recorded Amir's confession or otherwise preserved his statements for trial as a declaration against interest. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 606-607 [witness's declaration against interest admissible under Evid. Code, § 1230 when witness made unavailable through invocation of privilege against self-incrimination].) Again, the facts necessary to conclude Mesdaghi's counsel failed to fulfill her professional obligation are absent from this record and are more appropriately explored in connection with a petition for writ of habeas corpus. Our record necessarily does not disclose whether there has been any investigation of the actions Mesdaghi's counsel took pending Amir's decision to invoke his Fifth Amendment right or whether Mesdaghi or his family instructed her not to preserve or use Amir's statements. Consequently, this too is an issue more appropriate for resolution in a habeas corpus proceeding.³

³ Any petition should also examine the possibility of prejudice in light of the witnesses' descriptions of the driver (including Williams's specific identification of Mesdaghi as the driver) and the jury's disregard of the testimony of Mesdaghi's wife and mother, who testified Mesdaghi was at home in Santa Monica at the time of the accident. (See *In re Fields* (1990) 51 Cal.3d 1063, 1079 [In considering a claim of ineffective assistance of counsel, it is not necessary to determine “whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the

Finally, Mesdaghi asserts his Sixth Amendment right to effective counsel and his corollary due process right to attend hearings were violated by his exclusion from two ex parte hearings—one in which Amir’s counsel discussed his belated assertion of the Fifth Amendment with the trial court and one in which defense counsel made a motion for mistrial following Amir’s change of mind and presented it to the court outside of Mesdaghi’s presence.

To be sure, Mesdaghi, like all criminal defendants, has the right to be personally present at virtually all adversarial proceedings concerning his prosecution. (See, e.g., *People v. Ayala* (2000) 24 Cal.4th 243, 263 [with limited exceptions, “[t]he right of a criminal defendant to an adversary proceeding is fundamental to our system of justice. [Citations.] This includes the right to be personally present and to be represented by counsel at critical stages during the course of the prosecution. [Citation.] This is not mere idle formalism. Our system is grounded on the notion that truth will most likely be served if the decisionmaker—judge or jury—has the benefit of forceful argument by both sides. . . .”]; *People v. Lucero* (2000) 23 Cal.4th 692, 716-717 [defendant’s presence required if proceeding “bears a reasonable and substantial relation to his full opportunity to defend against the charges”].) However, a court retains discretion to conduct an in camera ex parte hearing to protect an overriding interest in confidentiality such as the lawyer-client privilege. (*People v. Gurule* (2002) 28 Cal.4th 557, 593-594.) In such cases, “a criminal defendant’s right to due process does not entitle him to invade the attorney-client privilege of another.” (*Id.* at p. 594.) The fact Amir was Mesdaghi’s father does not alter the applicability of this exception to the ex parte hearing conducted by the court with Amir’s counsel on the question of his invocation of the Fifth Amendment.

The justification for Mesdaghi’s exclusion from the second ex parte hearing is less clear. Although the transcript of that hearing has been unsealed and does not reveal any

alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”].)

statements by Mesdaghi's counsel that varied from statements she had previously made in his presence, the record does not disclose the reason he was excluded from the hearing. As discussed in reference to Mesdaghi's current contention his counsel should have preserved and introduced his father's statement, there is no indication in the record Mesdaghi and his counsel disagreed on this strategy at the time. Consequently, this issue too is one more appropriate for a habeas corpus proceeding. Again, Mesdaghi will be required to establish not only error but also that his absence from the hearing had any prejudicial impact on his case.⁴

2. *The Court Did Not Abuse Its Discretion in Denying the Motion for Mistrial*

A trial court should grant a mistrial "only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Bolden* (2002) 29 Cal.4th 515, 555; accord, *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 291 ["we have stated that a trial court should grant a mistrial only if the defendant will suffer prejudice that is incurable by admonition or instruction"].) We review the trial court's ruling denying a mistrial for abuse of discretion. (*Bolden*, at p. 555; *People v. Ayala* (2000) 23 Cal.4th 225, 282.)

Mesdaghi contends the trial court abused its discretion when it declined to grant his motion for mistrial following his father's decision to invoke his right against self-incrimination. In denying the motion the court advised the parties it would instruct the jury to minimize any prejudice to Mesdaghi. It subsequently instructed the jury with CALCRIM No. 200 (informing the jury of its duty to apply the law as instructed by the court), CALCRIM No. 222 (informing the jury to "use only the evidence that was presented in this courtroom" and that the statements of counsel, including their remarks during opening statements and closing arguments, are not evidence) and CALCRIM

⁴ Based on our conclusion Mesdaghi's claims of ineffective assistance of counsel are premature and his remedy lies in a petition for writ of habeas corpus, we do not reach his contention his counsel's ineffectiveness undermined the functioning of the adversarial process so as to yield an unjust result. (See *United States v. Cronin* (1984) 466 U.S. 648, 656-657 [104 S.Ct. 2039, 80 L.Ed.2d 657].)

No. 300 (informing the jury that “[n]either side is required to call all witnesses who may have information about the case”).

We presume the jury followed those admonitions and find no error. (See *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 292 [“Here the trial court struck Berber’s testimony and properly admonished the jury. Although Soliz asserts the admonitions were inadequate, we see no basis for the assertion and presume, as always, that the jury followed the court’s instructions. [Citation.] We therefore conclude the trial court did not err in denying Soliz’s motion for mistrial.”]; see generally *People v. Waidla* (2000) 22 Cal.4th 690, 725 [jury presumed to follow court’s instructions and admonitions].)

3. *The Prior Prison Term Enhancement Was Properly Imposed*

Section 667.5, subdivision (b), “provides for an enhancement of the prison term for a new offense of one year for each ‘prior separate prison term served for any felony,’ with an exception not applicable here. . . . Once the prior prison term is found true within the meaning of section 667.5[, subdivision] (b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken.” (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) The failure to impose an enhancement under section 667.5, subdivision (b), or to strike it pursuant to section 1385, subdivision (a), is a jurisdictional error and results in a legally unauthorized sentence subject to correction on appeal. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1562; *People v. Bradley* (1998) 64 Cal.App.4th 386, 390.)

Mesdaghi contends the trial court improperly reopened sentencing to impose the one-year prior prison term enhancement authorized by section 667.5, subdivision (b), which the court had initially ordered stayed.⁵

⁵ Mesdaghi also contends the court was biased against him, in part because of his trial counsel’s improper remarks at the time she moved to withdraw as his counsel and her later testimony disputing the contention he had been misled as to whether either charge would constitute a second strike. As Mesdaghi argues, his counsel, who was privately retained, had no obligation to explain the basis of her motion to withdraw. (See *People v. Ortiz* (1990) 51 Cal.3d 975, 987 [defendant seeking to relieve his retained attorney need not meet more stringent requirements for discharging appointed counsel set

Ordinarily, a trial court loses jurisdiction over a defendant when it relinquishes custody as to that defendant (*People v. Karaman* (1992) 4 Cal.4th 335, 344), including the power to increase a valid sentence after its formal entry in the court minutes (*id.* at p. 350 & fn. 16 [“double jeopardy concerns would be implicated were the trial court to attempt to increase the sentence after its formal entry in the minutes”]). When a particular term is unauthorized, however, the sentence is subject to judicial correction whenever the error comes to the attention of the trial court or a reviewing court. (*People v. Serrato* (1973) 9 Cal.3d 753, 763, disapproved on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; accord, *People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1040.)

While the trial court did not appear to be aware of its error in staying the enhancement under section 667.5, subdivision (b), its subsequent imposition of the one-year enhancement was within its power to correct the unauthorized sentence. Under these circumstances, we see no basis to remand for further reconsideration by the court whether the enhancement should have been stricken.⁶

forth in *People v. Marsden* (1970) 2 Cal.3d 118]; accord, *People v. Munoz* (2006) 138 Cal.App.4th 860, 866.) The record, however, does not reveal whether Mesdaghi, at the time the motion was made, had informed the court of his desire for new counsel. As discussed, the issue of defense counsel’s performance is more appropriate for review in a habeas corpus proceeding. On this record Mesdaghi’s imputation of bias is speculative; the trial court’s comments, while harsh, do not reveal improper prejudice. (See *Liteky v. United States* (1994) 510 U.S. 540, 555 [114 S. Ct. 1147, 127 L.Ed.2d 474] [opinions formed by judge on basis of facts introduced or events occurring in proceeding do not constitute bias unless they display “‘deep-seated favoritism or antagonism’ as to make fair judgment impossible”; in absence of any evidence of some extrajudicial source of bias or partiality, neither adverse rulings nor impatient remarks will overcome presumption of judicial integrity].)

⁶ Likewise, as the People note, the court failed to impose the \$40 fee for each conviction mandated by section 1465.8, subdivision (a)(1). (See *People v. Roa* (2009) 171 Cal.App.4th 1175, 1181.) We will modify the judgment and direct correction of the abstract accordingly.

DISPOSITION

The judgment is modified to impose an additional \$40 fee under section 1465.8, subdivision (a)(1). As modified, the judgment is affirmed. The superior court is to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.