

Filed 12/13/12 P. v. Reed CA4/1
Opinion following order vacating prior opinion

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS DESHAWN REED,

Defendant and Appellant.

D059519

(Super. Ct. No. FBA900039)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Steven A. Mapes, Judge. Reversed and remanded with directions.

A jury convicted Thomas Deshawn Reed of murdering Evelyn Scott and found true the robbery and burglary special circumstances. The jury also convicted Reed of first degree residential robbery, first degree burglary, arson of an inhabited structure, unlawful driving or taking of a vehicle, and two counts of receiving stolen property. The trial court sentenced him to a total term of life in prison without the possibility of parole plus 12 years. Reed appeals, contending (1) he received ineffective assistance

when defense counsel failed to request a mistrial, (2) the trial court improperly admitted evidence of prior uncharged crimes, (3) the trial court improperly instructed the jury regarding malice, and (4) the court failed to hold a posttrial hearing under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

We reject Reed's first three contentions, but find the trial court erred in not holding a *Marsden* hearing. Accordingly, we reverse the judgment with directions.

FACTUAL AND PROCEDURAL BACKGROUND

Consistent with the standard of review, we summarize the facts in the light most favorable to the judgment. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Evelyn Scott lived in Barstow with her husband, Kennedy Scott, and son, Adam Scott. (Throughout this opinion, we refer to some individuals by their first names as a matter of simplicity and clarity.) Evelyn's parents lived one block away.

On December 11, 2008, Reed showed up at the Scott residence. Adam knew Reed, but had not seen or heard from him in a couple of years. Reed told Adam that he had moved back to Barstow and came by to say hello to people in the neighborhood. Reed left, but returned 30 to 60 minutes later and had Adam drive him to the Scenic View Apartments on East Virginia Way where Reed lived with his girlfriend Desiree Gomez. Later that evening, Reed called Adam claiming he was going to loan Adam some video games in the morning for Adam's Xbox 360. Adam told Reed that he would not be home, but that Reed could leave the video games outside the house or with his mother.

The following morning, Adam and Kennedy left for work. Sometime between 8:00 a.m. and 9:00 a.m., Evelyn called her parents, asked for some bananas and said she was going to come by and pick them up. After 40 minutes or so had passed and Evelyn had not arrived, her father, Capers Hamilton, got into his car and headed towards her house. Hamilton saw Evelyn's Toyota Camry pull out of the driveway and drive away. He followed the car for a few blocks, but then decided to turn around, thinking that Evelyn had decided to go to the store. As Hamilton drove home, he saw that Evelyn's house was on fire.

A sheriff's department arson expert concluded that the fire had been intentionally started. Evelyn's body was found on the floor near the kitchen table. A forensic pathologist concluded that Evelyn died of "homicidal violence" by strangulation and blunt force trauma. Police detectives found an open bedroom window with pry marks on it. Adam's bedroom drawers were open and his Xbox console had been moved to the garage. Someone had taken Adam's 37-inch Vizio flat screen television, two or three hats, and about \$100 in cash from a coffee can. A jewelry box had also been taken from the master bedroom and a drawer from the box and jewelry were found on the living room floor.

Late that evening, the police located Evelyn's car parked in the driveway of a vacant house on a street near East Virginia Way. Inside the trunk of the car were Adam's hats and the missing jewelry box. Fresh shoeprints were found leading from the driveway of the house through the vacant lot to the apartment complex gate. The police later discovered that the shoeprints matched the size and brand of Reed's shoes. A

search of Reed's apartment uncovered a military pin and a Barstow pin that were later identified as belonging to Evelyn.

Gomez testified that she and Reed moved into an apartment on East Virginia Way in November 2008. On the morning of the crime, at about 9:00 a.m., Gomez woke up as Reed returned to the apartment. Reed seemed "real upset" and later told Gomez that he had "messed up." Lacrisha Scott, Reed's foster sister, picked up Reed and Gomez for a planned trip to Victorville. Gomez saw Reed go behind the apartment complex and return with a flat screen television that he placed inside Lacrisha's car trunk.

Reed later told Gomez that he entered Adam's house through a window because he wanted money. Reed did not expect Evelyn to be home. When she appeared, he got scared and hit her on the head. Reed started the fire to cover up what he had done. Reed was worried about being caught because it would be his third strike conviction.

Gomez initially lied about what happened to the television. During a break in Gomez's testimony, she decided to tell the truth about the television because she felt it was the right thing to do. Gomez explained that she gave the television to her child's godfather, James Francis. Authorities recovered a television in Francis's possession that Adam identified as the one that had been stolen.

DISCUSSION

I. *Alleged Ineffective Assistance of Counsel*

A. Background

During opening statements, defense counsel asserted that Gomez was not a credible witness. He also claimed the television would never be found. During a trial recess, Gomez made statements to Detective Libby regarding where the television could be found, resulting in counsel being appointed for Gomez and the prosecution granting her immunity. Based on this revelation, the police recovered a television matching the description of the stolen television. Stating that the television was strong physical evidence linking Reed to the crime, the court granted the defense a two-day continuance to rethink its approach and tactics.

When trial resumed, defense counsel indicated he would question Gomez about her perjuring herself at the preliminary hearing and "attack" Gomez as a possible accomplice with the trial court commenting that would be "fair game." Thereafter, Gomez identified a photograph as the television she saw Reed carrying and that she gave to her child's godfather. Adam later looked at the television, the same photograph and concluded the television was the one stolen from his home. During closing argument, defense counsel conceded the existence of the television, but argued that Gomez was a "liar" and that she had a strong motive to lie to avoid a murder charge.

B. Analysis

Reed asserts that after the television was recovered during trial, defense counsel should have moved for a mistrial because the existence of the television completely

undermined his defense. He claims that defense counsel provided ineffective assistance by failing to bring such a motion, that the motion would have been granted because the prejudice caused by the discovery of the television could not be cured by an admonition or an instruction, and there was no tactical reason for failing to seek a mistrial. We disagree.

An ineffective assistance of counsel claim has two prongs. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) First, the defendant "must show that counsel's representation fell below an objective standard of reasonableness." (*Id.* at p. 688.) "Second, the defendant must show that the deficient performance prejudiced the defense [and] deprive[d] the defendant of a fair trial" (*Id.* at p. 687.) To establish the first prong of deficient performance on direct appeal, the record must affirmatively disclose that counsel lacked a rational tactical basis for the challenged omission. (*People v. Majors* (1998) 18 Cal.4th 385, 403.) "If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 367.)

A mistrial should be granted "only when "'a party's chances of receiving a fair trial have been irreparably damaged'" (*People v. Ayala* (2000) 23 Cal.4th 225, 282), that is, if it is "apprised of prejudice that it judges incurable by admonition or instruction" (*People v. Haskett* (1982) 30 Cal.3d 841, 854). "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court

is vested with considerable discretion in ruling on mistrial motions." (*Ibid.*)

Accordingly, "it would be a rare case in which the merits of a mistrial motion were so clear that counsel's failure to make the motion would amount to ineffective assistance. Nonetheless, defendant could conceivably prove incompetence if his counsel's omission was shown to be grounded in ignorance or misapplication of the law rather than tactical considerations [citations] and if the motion for mistrial bore strong potential for success." (*Id.* at pp. 854-855.)

As a preliminary matter, we note that Reed does not contend defense counsel provided ineffective assistance by making the comment regarding the television during opening statement. Rather, the record is clear that Gomez's disclosure of the location of the television during trial was an unforeseen event that took the parties and the court by surprise. Accordingly, we turn to whether counsel should be faulted for failing to move for a mistrial after Gomez made the disclosure midtrial.

First, "[m]aking promises about the defense evidence in opening statement and then failing to deliver does not constitute ineffective assistance per se." (*People v. Burnett* (2003) 110 Cal.App.4th 868, 885.) Additionally, the probability is slight that the trial court would have granted a mistrial motion as the prejudice caused by discovery of the television was curable with an admonition or an instruction. During opening statement when the prosecutor objected to defense counsel's characterization of Gomez as a liar, the trial court admonished the jury that the statements of counsel were not evidence, but "just what they expect the facts to be." The trial court later instructed the jury that during opening statements, the attorneys discuss the case, but that their

remarks are not evidence and "[n]othing that the attorneys say is evidence."

(CALCRIM No. 222.) "We presume the jury followed the court's instructions."

(*People v. Avila* (2006) 38 Cal.4th 491, 574.)

Moreover, Reed offered no proof that defense counsel misunderstood or misapplied the law, and "the appellate record does not eliminate the possibility that counsel's omission was tactical." (*People v. Montiel* (1993) 5 Cal.4th 877, 914.) Defense counsel may have similarly determined that any prejudice caused by his comment during opening statements was curable by admonition. Alternatively, counsel may have had other tactical reasons for choosing not to move for mistrial. "[E]ven if [defense counsel] concluded that his chances were positive, he may have refrained for fear that a second trial under less favorable circumstances would follow." (*People v. Haskett, supra*, 30 Cal.3d at p. 855.) Accordingly, we conclude that Reed's claim of ineffective assistance of counsel based on defense counsel's failure to move for a mistrial has no merit.

II. *Uncharged Acts Evidence*

A. Background

Over defense objection, the trial court granted the prosecution's motion to admit evidence that Reed committed two prior burglaries, concluding that the prior uncharged acts showed a common plan or scheme to steal from acquaintances and negated the possibility Reed did not have the requisite intent.

At trial, the prosecution introduced evidence of the two burglaries. In 2007, Reed knew Curtis Smith's son, and lived with the Smith family for several months at

their home in San Bernardino. After Reed moved out, a window in the Smith home was broken and the house had been ransacked. The burglars stole money, hair clippers, and two cars. Reed was arrested after he was seen driving one of the stolen cars. Reed later admitted to police that he committed the crime.

In 2008, Oscar Osuna lived next door to Gomez's foster mother, where Gomez lived for a period of time and Reed visited. Osuna knew Reed and had given him rides. One day, Osuna returned home and noticed items had been moved around and disconnected in his home, and a jewelry box had been cleaned out. Osuna concluded that the burglar had entered his home through a bathroom window. Reed later apologized to Osuna for breaking in Osuna's home and told Osuna a friend was going to stop by and return his property, but no one ever did. Eventually, Reed gave Osuna a location where Osuna was able to recover some of his property, but none of the higher valued items.

Before the jury heard the uncharged acts evidence, the trial court instructed it with a generic version of CALCRIM No. 375, telling the jury it could only consider the evidence to determine if Reed acted with the necessary intent. The trial court later read a modified version of CALCRIM No. 375, instructing the jury that it could consider the evidence for the limited purpose of deciding whether Reed acted with the necessary intent to be guilty of burglary and taking a vehicle, had a motive to commit the offenses, and had a plan or scheme to commit the offenses.

B. Analysis

Reed asserts the trial court prejudicially erred in admitting evidence of his prior burglaries under Evidence Code section 1101, subdivision (b), to prove common plan or scheme, motive, and intent because the prior crimes were not sufficiently similar to the instant crimes. (Undesignated statutory references are to the Evidence Code.) We disagree.

Evidence of other crimes or misconduct is inadmissible when it is offered to show that a defendant had the criminal propensity to commit the charged crime (§ 1101, subd. (a)); however, such evidence is admissible when offered to prove some fact (such as motive, intent, plan) "other than [the defendant's] disposition to commit such [crime or bad act]." (§ 1101, subd. (b).) However, even if the other crimes evidence is relevant to prove one of the facts specified in section 1101, subdivision (b), it must also satisfy the admissibility requirements of section 352. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 (*Ewoldt*), superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505–506.)

Our Supreme Court has held that the least degree of similarity between the prior crimes and the charged offense is required to prove intent. (*Ewoldt, supra*, 7 Cal.4th at p. 402.) A greater degree of similarity is required to prove the existence of a common design or plan. (*Ibid.*) Where a defendant challenges the relevance and admission of evidence under sections 352 and 1101, we review the trial court's rulings under the abuse of discretion standard (*People v. Cole* (2004) 33 Cal.4th 1158, 1195) and its decision will not be disturbed on appeal absent a showing that it exercised its discretion

in an arbitrary manner resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

"To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Ewoldt, supra*, 7 Cal.4th at p. 403.) "[E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Ibid.*) "[A] common scheme or plan focuses on the manner in which the prior misconduct and the current crimes were committed, i.e., whether the defendant committed similar distinctive acts of misconduct against similar victims under similar circumstances.'" (*People v. Walker* (2006) 139 Cal.App.4th 782, 803.)

We conclude the uncharged acts evidence was sufficiently similar to show a common plan. For all three crimes, Reed knew the victims and entered the homes through a window. Additionally, while the uncharged acts occurred in unoccupied homes, Gomez testified that Reed did not anticipate encountering Evelyn that morning.

We also conclude the uncharged acts evidence was sufficiently similar to be probative on the disputed issue of intent for the instant crimes. Reed was charged with burglary and unlawfully taking a vehicle. His not guilty plea put all elements of these

crimes at issue. (Pen. Code, § 1019; *People v. Balcom* (1994) 7 Cal.4th 414, 422 (*Balcom*)).) The trial court properly instructed the jury that these crimes required that Reed act with the necessary intent to enter a building to commit theft (burglary) and deprive the owner of a vehicle for any period of time (unlawfully taking of a vehicle). (Pen. Code, § 459; Veh. Code, § 10851, subd. (a).) Although the primary element at issue for these crimes was Reed's identity as the person that entered the house and took items and the car, Reed took no action to narrow the prosecution's burden of proof. (*Ewoldt, supra*, 7 Cal.4th at p. 400, fn. 4.) Stated differently, even after the jury concluded that Reed was the individual that entered the home and took the car, it still needed to determine whether he did these acts with the requisite intent before it could find him guilty of the charged crimes. (*People v. Steele* (2002) 27 Cal.4th 1230, 1243–1244 [Even where a defendant concedes an element of the crime, "the prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent."].) Here, the prior uncharged acts were probative as to Reed's intent for these crimes because the evidence showed he previously stole items after entering two homes and took a vehicle without returning it.

Relying on *Balcom*, Reed appears to contend that when a defendant argues his sole defense will be that he did not commit the charged offense, evidence of another crime should not be admitted to prove intent. Reed is mistaken.

Balcom was a rape case, in which the defense was consent. The victim testified that the defendant had put a gun to her head and forced her to have intercourse with him; the defendant testified that their sexual contact had been consensual. (*Balcom*,

supra, 7 Cal.4th at pp. 419–420.) In that situation, the Supreme Court held that evidence of the defendant's having committed another rape two months later was not admissible on the issue of the defendant's intent, although it was admissible on the issue of common design or plan. (*Id.* at p. 421.) The Court reasoned: "Defendant's plea of not guilty put in issue all of the elements of the offenses, including his intent [citation], and evidence that defendant committed uncharged similar offenses would have some relevance regarding defendant's intent in the present case. But, because the victim's testimony that defendant placed a gun to her head, if believed, constitutes compelling evidence of defendant's intent, evidence of defendant's uncharged similar offenses would be merely cumulative on this issue. [Citation.] Accordingly, we conclude that the limited probative value of the evidence of uncharged offenses, to prove *intent*, is outweighed by the substantial prejudicial effect of such evidence." (*Id.* at pp. 422–423.)

Contrary to Reed's assertion, this is not a case in which the evidence relating directly to the charged crimes was so compelling on the question of Reed's intent when he entered the home and took the car as to render the uncharged crimes evidence merely cumulative on the issue.

Reed asserts that the uncharged acts evidence, even if relevant to prove a common plan or intent, should have been excluded because the probative value of the evidence was substantially outweighed by the probability of undue prejudice. (§ 352.) The fact that evidence is harmful to a particular party does not establish prejudice. (See *People v. Zapien* (1993) 4 Cal.4th 929, 958.) Rather, evidence is unduly prejudicial only if it ""uniquely tends to evoke an emotional bias against . . . [one party]""

(*People v. Minifie* (1996) 13 Cal.4th 1055, 1070–1071) or causes the jury to prejudge the issues based on extraneous factors (*People v. Zapien, supra*, at p. 958). The evidence of the uncharged burglaries was brief and much less inflammatory than the instant offenses. Additionally, the trial court instructed the jury before the evidence was admitted and at the end of the trial regarding the limited purpose of this evidence. The court also instructed the jury, using CALCRIM No. 220, on the presumption of innocence and the People's burden of proof beyond a reasonable doubt. Juries are presumed to follow the instructions given and there is no reason to believe that the jury was unable to follow these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Accordingly, we conclude the trial court did not abuse its discretion in admitting evidence of the prior burglaries to show common plan and intent.

Even assuming the trial court had abused its discretion in admitting the uncharged acts, the assumed error "does not compel reversal unless a result more favorable to the defendant would have been reasonably probable if such evidence were excluded. [Citations.]" (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018–1019.) A more favorable result is not reasonably probable in this case.

Gomez testified that Reed burglarized the Scott home, hit Evelyn and committed arson which ultimately resulted in Evelyn's death. Although Reed claims Gomez's testimony was not credible because she had been coerced and threatened by the police, the jury heard testimony from Gomez and Detective Libby and viewed the videotape of Gomez's police interview. The trial court later instructed the jury regarding evaluating witness credibility. Coincidentally, Reed visited Adam's home the day before the

crimes and told Adam he would return the following day to bring him some video games. Reed obtained a television consistent with the one stolen from the Scott home and police found a military pin and a Barstow pin inside Reed's apartment that were identified as belonging to Evelyn. Finally, the police found Evelyn's car near Reed's apartment complex with footprints leading from the car to the complex gate that matched Reed's shoes.

In our view, it is not reasonably probable the jury would have reached a result more favorable to Reed in this case if the evidence of the uncharged acts had not been admitted into evidence at trial.

III. *Jury Instructions*

A. Background

The trial court told the jury that a necessary element of murder is malice aforethought and instructed on the distinction between express and implied malice. (CALCRIM No. 520.) It also instructed the jury that it must conclude Reed acted "willfully and maliciously" in order to find him guilty of arson and that a person "acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else." (CALCRIM No. 1502.)

B. Analysis

Reed asserts the trial court erred by instructing the jury on both the homicide and nonhomicide definitions of malice without telling the jury which definition it should use for what counts. We reject this contention.

As a preliminary matter, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate modifying language. (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1711.) Here, the trial court correctly instructed the jury with CALCRIM Nos. 520 (murder) and 1502 (arson). (*People v. Flannel* (1979) 25 Cal.3d 668, 685 [A trial court "should instruct the jury on every theory of the case, but only to the extent each is supported by substantial evidence."], overruled on other grounds in *In re Christian S.* (1994) 7 Cal.4th 768, 777.) Reed has not cited and we have been unable to find any request in the record to modify or clarify these instructions. Reed waived any alleged defect with the instructions by failing to request any modification. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.)

In any event, Reed's claim lacks merit. When reviewing a claim of instructional error, we must consider the instructions as a whole, and view them in the context presented to the jury. (*People v. Tatman* (1993) 20 Cal.App.4th 1, 10.) Here, each of the two definitions of malice was applicable to a crime charged, each definition was legally correct in its context, contained specifically within the different instructions for the two separate crimes, and were on different pages with different titles, separated by about 11 other instructions. There is no reasonable possibility the jurors were misled by the two definitions. The case cited by Reed in support of his contention, *People v. Shade* (1986) 185 Cal.App.3d 711, is distinguishable. In *People v. Shade*, the jury was given two definitions of malice, one legally incorrect, and one legally correct. (*Id.* at p. 715.)

IV. *Alleged Marsden Error*

A. Background

Following the guilty verdict, defense counsel informed the court that Reed sought to relieve him and have other counsel appointed for the purpose of filing a new trial motion. The trial court appointed attorney Clifton Peters for the "sole purpose" of evaluating whether there was a basis for a new trial motion, and if feasible, preparing the motion.

Peters informed the court that he met with Reed, reviewed the trial transcripts and found no grounds for a new trial motion. Peters explained that he did not acquire any of the discovery from trial, a stack about one foot tall, because he understood that his role was limited to evaluating a new trial motion. Although Reed believed grounds existed for an ineffective assistance of counsel claim, Peters could find no support for this contention after reviewing the trial transcripts and discussing the matter with trial counsel. Peters indicated that he would conduct an additional evaluation if directed to do so by the court and that Reed sought pro per status to develop an ineffective assistance of counsel claim.

The trial court denied Reed's request for pro per status to investigate a claim of ineffective assistance of counsel, stating that Peters did not find anything suspicious after reviewing the trial and that Peters would have asked for leave of court had he found something. The court allowed Reed to address his request for pro per status, telling him that he could not discuss "the facts of the case or anything like that." After conferring with Peters, Reed indicated he did not want to address the court on his

request for pro per status. Finding there was no motion before it, the trial court relieved Peters and sentenced Reed.

B. Analysis

When a defendant complains about the adequacy of appointed counsel, the trial court must permit the defendant to articulate the basis for his or her concerns to determine if they have merit and, if necessary, appoint new counsel. (*Marsden, supra*, 2 Cal.3d at pp. 123–124.) The denial of a *Marsden* motion without careful inquiry into the defendant's reasons for requesting the substitution of counsel does not qualify as an informed judicial determination. (*People v. Ivans* (1992) 2 Cal.App.4th 1654, 1666.) *Marsden* principles apply to posttrial proceedings. (*People v. Smith* (1993) 6 Cal.4th 684, 695.)

Reed asserts the matter needs to be remanded for a *Marsden* hearing because the trial court failed to adequately inquire into the basis of his ineffective assistance of counsel claim. We agree.

Here, after the trial court learned that Reed sought to relieve defense counsel and have new counsel appointed for the purpose of filing a new trial motion, the trial court never inquired of Reed why he wanted new counsel; rather, it simply appointed new counsel. Essentially, the trial court granted Reed's *Marsden* motion without conducting the required hearing. (*People v. Sanchez* (2011) 53 Cal.4th 80, 92 ["In the present case, the trial court appointed substitute counsel to represent defendant on a motion to withdraw his plea in lieu of conducting a *Marsden* hearing—in effect, granting the defendant's *Marsden* motion without conducting the required hearing."].)

The Attorney General contends a remand is not required under these circumstances because Reed discussed the details of his claim with Peters, and Peters determined Reed did not have a colorable claim for ineffective assistance of counsel. The record, however, does not support the Attorney General's assertion.

When asking that Reed be allowed pro per status, Peters told the court that Reed had his "own grounds" to assert an ineffective assistance of counsel claim. Thereafter, the trial court queried Peters as to his experience and asked him whether anything in the "transcript" made Peters believe Reed had a valid ineffective assistance of counsel claim. The trial court later stated, "I think that Mr. Peters looked into the trial and had he found things that would raise that suspicion, he would definitely have looked further and he would have asked for further leave of the Court to go into that." Although the record shows that Peters scrutinized the trial transcripts for purposes of determining whether grounds existed to file a new trial motion, Peters admitted that he never looked at the discovery or defense counsel's file. Additionally, the trial court never asked Peters whether he had heard, considered and rejected all of Reed's claimed grounds of ineffective assistance of counsel. Thus, on this record, we cannot conclude that the trial court made an informed judicial determination.

When, as here, a request for new counsel comes after trial, and the court fails to conduct a proper *Marsden* hearing, "[t]he appropriate course of action is to remand to the trial court to allow it to fully inquire into appellant's allegations concerning counsel's performance. Following the inquiry, if the trial court determines that defendant has presented a colorable claim of ineffective assistance, then the court must appoint new

counsel to fully investigate and present the motion for new trial. If, on the other hand, the inquiry does not disclose a colorable claim, the motion for new trial may be denied and the judgment reinstated. [Citation.]" (*People v. Winbush* (1988) 205 Cal.App.3d 987, 992.) We conclude such a procedure is appropriate in this case.

DISPOSITION

The judgment is reversed and the matter is remanded with the following directions: (1) the court shall hold a *Marsden* hearing concerning Reed's representation by the public defender's office; (2) if the court finds that Reed has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make; and (3) if newly appointed counsel makes no motions, any motions made are denied, or Reed's *Marsden* motion is denied, the court shall reinstate the judgment.

MCINTYRE, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.