STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2010
v	No. 286703 Wayne Circuit Court
RICARDO DESHAWN DUNSON, Defendant-Appellant.	LC No. 08-001919-FC

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

After a jury trial, defendant Ricardo Deshawn Dunson was convicted of one count of first-degree murder, MCL 750.316, one count of assault with intent to commit murder, MCL 750.83, one count of possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b, and one count of felon in possession of a firearm, MCL 750.224f. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of life imprisonment without parole for the first-degree murder conviction, 23 to 40 years' imprisonment for the assault with intent to commit murder conviction, and 12 to 20 years' imprisonment for the felon in possession conviction, and to a consecutive term of five years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial by the admission of evidence of his flight from police. Although this Court previously reversed the trial court on this issue in an order entered before trial, permitting the evidence to be admitted at trial, defendant argues that the law of the case doctrine should not apply because it is a discretionary doctrine that is inapplicable if it will create an injustice and the prior appellate decision was erroneous. We disagree.

Because application of the law of the case doctrine is an issue of law, we review it de novo. See *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007). The law of the case doctrine "bars reconsideration of an issue by an equal or subordinate court during subsequent proceedings in the same case." *People v Mitchell* (*On Remand*), 231 Mich App 335, 340; 586 NW2d 119 (1998). However, the law of the case doctrine need not apply if it will create an injustice. *People v Herrera* (*On Remand*), 204 Mich App 333, 340-341; 514 NW2d 543 (1994). Further, the law of the case doctrine need not be applied where the prior opinion was clearly erroneous, such as where there had been an intervening change in the law. *People v Phillips* (*After Second Remand*), 227 Mich App 28, 33-34; 575 NW2d 784 (1997). Regardless, "an

appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996).

This Court previously determined that the trial court abused its discretion by denying the prosecution's motion to admit evidence of flight. The order stated:

> In lieu of granting leave to appeal, pursuant to MCR 7.205(D)(2), the June 5, 2008, order of the Wayne County Circuit Court is REVERSED. Evidence of flight, including running from the police, is probative because it may indicate consciousness of guilt, and therefore is admissible. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The fact that defendant may, as a result of the evidence, choose to testify is not a basis for precluding the evidence. See *People v Wyngaard*, 462 Mich 659, 672; 614 NW2d 143 (2000). Accordingly, the trial court abused its discretion in denying the prosecution's motion to admit the flight evidence. *Coleman*, *supra*. [*People v Dunson*, unpublished order of the Court of Appeals, entered June 9, 2008 (Docket No. 285832).]

The facts of this case have not materially changed. Further, defendant does not point to any intervening change in the law that suggests that this Court's prior decision was clearly erroneous. Therefore, the law of the case doctrine bars our review of this issue.

Next, defendant argues that his counsel's failure to present an expert in identification testimony denied him the effective assistance of counsel because the entire case hinged on one of the victims, Deon Thomas, identifying defendant as the perpetrator. Defendant contends that had an expert testified regarding the unreliability of eyewitness testimony in stressful situations, there is a reasonable probability that the outcome would have been different. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the factual findings for clear error and the constitutional question de novo. *Id.* However, because there was no hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Riley* (*After Remand*), 468 Mich 135, 139; 659 NW2d 611 (2003).

"'To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.'" *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). This is the case even with respect to the presentation of expert testimony in the field of human memory and perception. See *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Further, an attorney's "failure to call witnesses only constitutes ineffective

assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the outcome of the trial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999).

The prosecution's case depended largely on Thomas's identification of defendant. If the jury believed that Thomas had misidentified defendant, the prosecution's case against defendant would almost certainly have failed. The issue here is whether counsel sufficiently raised the defense of misidentification at trial without expert testimony.

At trial, defense counsel did not focus on arguing the possibility of misidentification. Rather, the theory presented was that Thomas was lying. In fact, Thomas testified that he was familiar with defendant and had seen him on at least four prior occasions. During his cross-examination of Thomas and his closing argument, defense counsel emphasized that Thomas had lied on the witness stand and to the police, that his statements were inconsistent, and that the evidence did not corroborate Thomas's version of events. This was sound trial strategy on the part of defense counsel because he may have reasonably decided that an expert in eyewitness identification testimony would not have helped because there was no evidence to controvert that Thomas knew defendant before the incident. Further, defendant has failed to show how this type of expert could discredit the identification of someone known to the person making the identification. Therefore, defendant has failed to show that defense counsel was ineffective for failing to request the appointment of an identification expert, or that he was prejudiced by the absence of such an expert at trial. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

Last, defendant argues that the prosecutor committed misconduct in two instances during his closing argument, which resulted in defendant being denied a fair trial. First, defendant argues the prosecutor improperly placed his character at issue by stating, "[t]here is a saying that you can take a man out of the street, but you can't take the street out of a man." We disagree. Because this issue was not preserved, we review for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and this Court must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). In addition, the comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). However, it is improper for the prosecutor to comment on the defendant's character when his character is not at issue. *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005).

During his closing argument, the prosecutor stated:

> We'll also have to think about some of the things that Mr. Dunson did that helped us. You recall his behavior one day last week during a time when counsel and I were approaching and we were away from being able to see. Mr. Carroll was on the stand and they had a lady deputy in the courtroom, and I can still recall her saying, they're talking to each other, alerting the two attorneys and the Judge

'cause we were busy with what we were doing up at the Court's bench to [see] what was happening.

There is a saying that you can take a man out of the street, but you can't take the street out of man. The boldness with which he behaved in front of you is corroborated when he talks about, in the jail calls to his mother about how he was mugging two of the witnesses at 36th District Court. The behavior is consistent with, and I apologize 'cause the technical part of it, we have a transcript, which is 105, consistent with this top five line, this is the portion of the call that was played for you yesterday. It is the type of behavior that he acknowledged in the jail call at 36th District Court.

The type of behavior that you observed last week is consistent with attempting to arrange the nonappearance of Mr. Deon Thomas. That shows you consciousness of guilt. Anytime you engage yourself in that type of behavior, you're turning the guilty sign on. The 105 can now be changed to Dunson, to his mother, as we established who the voice was through the second to the last witness.

* * *

Thank you very much, Mr. Dunson, for your behaviors in the courtroom last week, for your jail calls, from your acknowledging in the jail calls that you were trying to egg people on across the street during his hearing, preliminary hearing, from his trying to speak with the unknown male about making sure that Mr. Deon Thomas isn't with us on June 9th.

The prosecutor's statement, when read in context, did not put defendant's character at issue. Rather, the prosecutor made an argument based on defendant's own behavior. Defendant made the prosecutor's point relevant because of his conduct at trial and his phone calls from jail, which allowed the prosecutor to argue that defendant concocted a scheme to intimidate witnesses. Further, reading the prosecutor's argument as a whole shows he was making a larger point regarding how defendant's conduct demonstrated consciousness of guilt. The prosecutor did not suggest that the jury convict defendant because of his "street" character. Rather, the prosecutor suggested that defendant had carried his bold street-type behavior into the courtroom and jail cell through his phone conversations and interaction with a witness, Johnnie Carroll, at trial.

Defendant also alleges prosecutorial misconduct occurred when the prosecutor argued that it was clear that defendant possessed a gun that shot Thomas. Defendant argues that there is no record to support that defendant possessed a gun. Defendant also contends that this statement misled the jury into believing there was some physical evidence connecting defendant to the crime and likely pushed the jury toward a guilty verdict. We disagree.

"A prosecutor may not make a factual statement to the jury that is not supported by the evidence, but he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case." The prosecutor "need not confine his argument to the blandest possible terms." *Id.*, *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

During his closing argument, the prosecutor stated:

> It's clear he possesses a weapon that shot Deon Thomas. It's clear from the circumstantial evidence that weapon was shot four times. You heard testimony five-foot six from the floor, not too much different from what Gardner said. He was five-seven. He remembers it being about his height, maybe a little higher. Latrelle McNairy measured it, said it was five-six from the floor. You saw the height of Mr. Thomas, and understand that when counsel measures Mr. Thomas, that assumes that he is not trying to duck from the gun.
>
> Human nature being what it is, and you have two shots that appear to be involved with Mr. Thomas and you have at least two shots that were involved with a sleeping man, 'cause remember the testimony is uncontroverted that Mr. Robinson was asleep on that couch and you heard testimony from Latrelle McNairy that this was fresh. You can see for yourself the strike mark is fresh in the wood. And you get an orientation from that strike mark to this area here.
>
> Let me show you where this area is in relation to, it's this joint right here which means that strike mark came into existence before the body was there 'cause his leg is covering it up right now. This strike mark and its orientation to this location where these joints are discolored is the same stretch of wood, which means that Mr. Robinson likely was awoken to gunshot, gunshot directed toward Mr. Thomas. And that the defendant, Mr. Dunson, shot more than once at him.

By reviewing the prosecutor's argument into context, it shows that the prosecutor merely argued that the evidence showed defendant's guilt. There is no evidence that the prosecutor attempted to persuade the jury with anything beyond the evidence presented. Rather, the prosecutor argued that the circumstantial evidence and the testimony from Thomas, in which he testified that he was shot and defendant was the shooter, made it clear that defendant possessed a gun. Because the prosecutor merely argued the evidence and all reasonable inferences arising from it as they related to his theory of the case, his statement was not improper.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot