

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERCY BARNES RUFFIN,

Defendant-Appellant.

UNPUBLISHED

April 8, 1997

No. 183698

Recorder's Court

LC No. 93-008751

Before: White, P.J., and Cavanagh and J.B. Bruff,* JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), for the shooting death of Michael Gipson. Defendant was sentenced to two years in prison for the felony firearm conviction and to a consecutive life sentence for the first-degree murder conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial by the introduction into evidence of Almiron Overman's identification of defendant from a photograph shown to him by Sergeant Gale after Overman failed to identify defendant in a lineup. Defendant argues that the identification was suppressed at defendant's first trial due to the suggestiveness of the identification procedure, and that the trial judge in the instant case was required to follow the previous judge's evidentiary ruling pursuant to the law of the case doctrine. We disagree.

Defendant argues that the suppression ruling at the first trial falls within the law of the case doctrine. Defendant is in error. The law of the case doctrine provides that, once an appellate court decides a legal question, that decision is controlling at all subsequent stages of the litigation. *People v Bradshaw*, 165 Mich App 562, 568; 419 NW2d 33 (1988). The law of the case doctrine does not apply to the present situation. On retrial, a case stands procedurally as if there had been no prior trial. Therefore, a trial court is not required to follow another trial court's previous evidentiary rulings.

* Circuit judge, sitting on the Court of Appeals by assignment.

People v Daniels, 192 Mich App 658, 670; 482 NW2d 176 (1992). In the instant case, defense counsel did not move to suppress the identification evidence at the second trial, and therefore introduction of the evidence by the prosecutor was not improper.

Defendant next argues that the trial court's denial of his motion to recall Darryl Matthews for the purpose of impeaching his testimony regarding the nature of his relationship with Audrey Mathis violated defendant's right to confrontation. We disagree.

The Sixth Amendment guarantees a criminal defendant the right to confront witnesses against him. US Const, amend VI. However, a defendant does not have an unlimited right to cross-examine on any subject. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). The right to confrontation is subject to a balancing test involving other legitimate state interests in the criminal trial process, which include avoiding harassment, prejudice, confusion of the issues, safety of the witness, and repetitive or marginally relevant interrogation. *People v Byrne*, 199 Mich App 674, 679; 502 NW2d 386 (1993). Nevertheless, a limitation on cross-examination which prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation. Violations of the right to adequate cross-examination are subject to harmless error analysis. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996).

In the instant case, defendant argues that the trial court violated his right to confrontation by denying his motion to recall Darryl Matthews for the purpose of impeaching his testimony regarding the nature of his relationship with Audrey Mathis with Matthews' testimony from defendant's second trial. At the second trial, Matthews testified that he was "still seeing" Mathis between May 20, 1993, the date they broke off their relationship, and July 20, 1993, the date of the shooting, but that defendant did not know that he and Mathis were still seeing each other. Matthews further testified at the second trial that his relationship with Mathis after May 20, 1993, was not a "lover relationship," and only consisted of talking to each other. At the third trial, Darryl Matthews testified that he did not have an "intimate love relationship" with Mathis after May 20, 1993, but that they "were still intimate" after that date.

Although the trial court's ruling prevented defense counsel from using Matthews' previous testimony to impeach his testimony in the instant case, Matthews' testimony was impeached in the instant case by Audrey Mathis' testimony denying any relationship with Matthews after May 20, 1993. Therefore, we do not believe that the trial court's ruling violated defendant's right to confrontation.

Defendant next argues that he was denied a fair and impartial trial because of the prosecutor's improper questioning of defense witness Audrey Mathis. Specifically, defendant argues that the prosecutor erred by questioning Audrey Mathis regarding defendant's history of violence before defendant placed his character in issue, and that the prosecutor improperly alluded to defendant's prior conviction for a violent crime, which was previously suppressed by the court.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). On appeal, this Court

examines the pertinent portions of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

The prosecution may not introduce evidence of a defendant's bad character until the defendant has placed his character in issue. MRE 404(a)(1); *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995). Once a defendant's character has been placed in issue, the prosecutor, on cross-examination of the defendant's character witnesses, may inquire into specific instances of the defendant's conduct to test the credibility of the character witness. MRE 405(a); *People v Roupe*, 150 Mich App 469, 478; 389 NW2d 449 (1986).

In the instant case, the prosecutor asked Audrey Mathis on cross-examination whether she, Darryl Matthews, or anyone else had any reason to fear defendant. The prosecutor also asked Mathis whether defendant had a violent history. When Mathis denied that defendant had a violent history, the prosecutor asked Mathis if she would consider a person who committed a crime of violence to be a violent person. Even if defendant did not place his character in issue, the prosecutor's questioning did not deny him a fair trial. Mathis continually denied that anyone had any reason to be afraid of defendant and testified that defendant did not have a violent history. Furthermore, defense counsel objected to the prosecutor's question regarding whether Mathis would consider someone a violent person if that person had committed a violent crime before Mathis answered the question. The objection was sustained and no prejudicial testimony was elicited by the prosecutor's questioning. Furthermore, the trial court instructed the jury that the lawyers' questions to the witnesses were not evidence, and that the jurors must base their decision solely on the evidence. Therefore, the prosecutor's conduct did not deny defendant a fair trial.

Finally, defendant asserts that comments made by the prosecutor during her rebuttal argument were improper. Defendant did not object to the prosecutor's comments at trial, and therefore this Court's review is precluded unless a cautionary instruction could not have cured the prejudicial effect of the prosecutor's remarks or unless the remarks resulted in a miscarriage of justice. *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1995). Prosecutors are generally accorded great latitude in their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Furthermore, an otherwise improper argument by a prosecutor may not require reversal if made in response to an equally or more improper argument by defense counsel. *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984). In the instant case, the prosecutor's arguments were made in response to arguments made by defense counsel during his closing argument and were not improper. Accordingly, defendant is not entitled to a new trial because of prosecutorial misconduct.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ John B. Bruff