

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 30, 2012

v

OSCAR IVANN PEREZ-GARCIA,
Defendant-Appellant.

No. 305086
Wayne Circuit Court
LC No. 05-004892-FC

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of first-degree premeditated murder, MCL 750.316(1)(a), kidnapping, MCL 750.349, first-degree home invasion, MCL 750.110a(2), arson, MCL 750.74(1)(c)(i), and possessing a firearm during a felony, MCL 750.227b. He was sentenced to life in prison for the murder conviction, 18 to 30 years for kidnapping, 10 to 20 years for home invasion, three to five years for arson, and two years for felony firearm.

Defendant was originally sentenced in 2006, and his delayed application for leave to appeal was denied “for lack of merit in the grounds presented.” *People v Perez-Garcia*, unpublished order of the Court of Appeals, issued May 22, 2007 (Docket No. 275747), lv den 480 Mich 964 (2007). Defendant’s petition for writ of habeas corpus was also denied. *Perez-Garcia v Berghuis*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued September 30, 2010 (Docket No. 09-10839), 2010 US Dist LEXIS 103629. In 2011, the trial court granted defendant’s motion to reissue his judgment of sentence under MCR 6.428, because ineffective assistance of counsel prevented him from filing a timely appeal. Defendant now appeals by right the reissued judgment. We affirm.

Before trial, defendant moved the trial court to suppress his confession alleging that he was deprived of medical treatment, coerced by promises of leniency and threats toward his family, and physically struck by an officer. Defendant also alleged that the police ignored his repeated requests for counsel in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L

Ed 2d 694 (1966). The trial court conducted a *Walker*¹ hearing at which defendant and the officer who took his statement testified. Officer Derryck Thomas testified that he advised defendant of his *Miranda* rights, that defendant understood his rights, and signed a waiver form. Thomas also testified that defendant did not ask for an attorney or say he did not want to talk or make any complaints before making his statement. Thomas further testified that he did not threaten defendant or make any promises and that he complied with defendant's requests for a drink and a bathroom break. Thomas testified that defendant appeared to be in good health; Thomas said he was unaware that defendant had suffered a gunshot wound to his leg during the offense until defendant described the incident during his statement. Thomas took defendant to the hospital for treatment after his statement.

In support of his claims, defendant testified that he was taken into custody at 7:30 p.m. and interrogated at the house for about an hour by an unknown officer with a goatee. Defendant claimed that after he was taken to the police station, another unknown officer, whom defendant described as a black male with a goatee, questioned him for close to 40 minutes. Defendant asserted next that someone who claimed to be a federal investigator questioned him. Defendant further testified that before speaking to Thomas, yet another officer, named Willie Anderson, interrogated him. Defendant claimed that although he requested an attorney from each of these four officers, his requests were denied. Nonetheless, he did not make a statement to any of them.

Regarding the statement he did make, defendant testified that Thomas told him it would be best for him to confess to murder because otherwise his fiancée would go to jail, his baby would be given for adoption, and defendant would receive a maximum sentence. Defendant said that Thomas told him if he confessed, he would get one or two years in prison. Defendant also testified that Thomas did not read him his rights, and no one advised him he had a right to remain silent or a right to an attorney. Defendant also said that he asked Thomas for an attorney.

Defendant testified that he had not sought medical treatment for the gunshot wound to his left thigh that he had received two days earlier during the offense because he was afraid of being deported. He asserted that at the time of his arrest he was in a lot of pain and bleeding, and he asked all five officers for medical treatment. Defendant said he received medical treatment after making his statement and was probably released from the hospital within an hour.

The trial court observed that its ruling on the motion to suppress hinged on the credibility of witnesses and found that defendant's claims were not credible. The court determined that defendant was advised of his *Miranda* rights and knowingly, intelligently, and voluntarily waived them. Also, the trial court did not believe defendant's testimony that he had been coerced or promised anything. Regarding defendant's claims to have requested counsel, the trial court noted "there is nothing to indicate that." The trial court further found that defendant sufficiently understood English, he was not coerced, his fiancée was not going to jail, and defendant's injury was not a factor because it had been days since he was shot. The trial court therefore ruled that defendant's statement was voluntary and admissible at trial.

¹ *People v Walker*, 371 Mich 599; 124 NW2d 761 (1963).

Defendant first argues that by failing to present any evidence at the *Walker* hearing to rebut his testimony that the police ignored his repeated requests for an attorney before speaking to Thomas, the prosecution failed to establish a valid waiver of *Miranda* rights, and thus the trial court clearly erred by denying his motion to suppress his statement. Defendant also argues that the trial court erred by finding his statement was voluntary under the totality of the circumstances. Defendant presented this exact issue in his prior application for leave to appeal in Docket No. 275747. Defendant also presented this same issue in his application for a writ of habeas corpus in federal court. *Perez-Garcia v Berghuis, supra*.

We first note the pertinent law. To be admitted in evidence at trial, a confession made during custodial interrogation must be voluntary, *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000), and must follow a voluntary, knowing and intelligent waiver of *Miranda* rights, *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). When a defendant challenges the admissibility his statement, the prosecutor must establish by the preponderance of the evidence that it was voluntarily made, and that the defendant knowingly, intelligently and voluntarily waived his *Miranda* rights. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000); *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). An appellate court will review de novo the entire record regarding the trial court's resolution of these issues, but the court's factual findings will not be disturbed unless clearly erroneous. *Daoud*, 462 Mich at 629; *Gipson*, 287 Mich App at 264. Further, when the resolution of a disputed fact turns on the credibility of witnesses or the weight of the evidence, the reviewing court will defer to the trial court's superior opportunity to make such assessments. *Daoud*, 462 Mich at 629; *Sexton*, 461 Mich at 752. A finding will be affirmed unless the reviewing court is left with a definite and firm conviction that a mistake was made. *Gipson*, 287 Mich App at 264.

Where, as defendant claims here, an accused has requested counsel, a valid waiver of the right to counsel cannot be established by merely showing the accused was advised of his rights and responded to further police-initiated custodial interrogation. *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *People v Paintman*, 412 Mich 518, 526; 315 NW2d 418 (1982). Once an accused in custody expresses his or her desire to deal with the police only through counsel, the accused is not subject to further interrogation by the authorities until counsel has been made available to him or her, unless the accused himself initiates further communication, exchanges, or conversations with the police. *Edwards*, 451 US at 484-485; *Paintman*, 412 Mich at 525-526. A custodial statement taken in violation of the *Edwards* rule may not be admitted in evidence. *Edwards*, 451 US at 487. Statements resulting from further police-initiated interrogation without counsel are presumed involuntary. *Montejo v Louisiana*, 556 US 778, 787; 129 S Ct 2079; 173 L Ed 2d 955 (2009).

The prosecution argues that the trial court properly resolved credibility determinations on this issue against defendant and that this Court's prior denial of leave to appeal "for lack of merit in the grounds presented" in Docket No. 275747, is the law of the case. We agree.

"Whether the law of the case doctrine applies is a question of law that we review de novo." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals as to that issue where the facts have not materially changed. *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000); *People v Fisher*, 449

Mich 441, 444-445; 537 NW2d 577 (1995). Normally, the law of the case doctrine will apply regardless of the correctness of the prior determination. *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994). And the doctrine specifically applies in criminal cases when evidentiary issues have already been decided in a prior appeal. *People v Freedland*, 178 Mich App 761, 770; 444 NW2d 250 (1989). But the law of the case does not apply where an appellate court has not addressed the merits of an issue or where an issue has not been presented so that it could not have been implicitly or explicitly decided. *Lopatin*, 462 Mich at 260; *People v Willis*, 182 Mich App 706, 708; 452 NW2d 888 (1990). Here, the law of the case doctrine applies because defendant presented the same issue in his prior appeal, and this Court denied leave to appeal “for lack of merit in the grounds presented.” *People v Hayden*, 132 Mich App 273, 297; 348 NW2d 672 (1984); *People v Douglas*, 122 Mich App 526, 529-530; 332 NW2d 521 (1982). Additionally, there has been no change in the material facts, and there has been no intervening change in the pertinent law. See *Freeman v DEC International, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995); *Freedland*, 178 Mich App at 770.

Nevertheless, the law of the case doctrine merely expresses the practice of courts to maintain consistency and avoid reconsidering matters already decided during the course of a single continuing lawsuit; it is not a limit on their power. *Locricchio v Evening News Ass’n*, 438 Mich 84, 109, n 13; 476 NW2d 112 (1991); *Freeman*, 212 Mich App at 37. “Particularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice.” *People v Robinson (After Second Remand)*, 227 Mich App 28, 33; 575 NW2d 784 (1997). Thus, an appellate court may decline to apply the law of the case to avoid injustice, such as where the prior determination was clearly erroneous. *Herrera*, 204 Mich App at 340. Here, defendant unpersuasively argues that we should revisit the trial court’s credibility-based factual findings.

Defendant argues that the trial court’s disbelief of defendant’s testimony that he requested counsel cannot establish that he did not do so without presenting the testimony of the other purported police interrogators. Defendant cites *People v Morrin*, 31 Mich App 301, 332 n 54; 187 NW2d 434 (1971), and *People v Matthews*, 17 Mich App 48, 53 n 5; 169 NW2d 138 (1969), holding that disbelieving a witness’s testimony regarding a particular point does not establish the opposite point in the absence of other supporting evidence. In this case, there was evidence supporting the trial court’s conclusion that defendant did not request an attorney and that defendant’s statement was not coerced. As the federal district court explained:

The trial court’s *Walker* hearing findings that [defendant] had not requested an attorney prior to signing a *Miranda* waiver and offering a confession are factual determinations. These determinations are supported sufficiently—although not to the point of perfection—by the statement itself, the signed waiver, and the testimony of [defendant] and Thomas. [*Perez-Garcia v Berghuis*, slip op at 8.]

Defendant next argues that the trial court abused its discretion by failing to exclude DNA evidence used to positively identify the victim’s badly burned body as a sanction for the prosecution’s failure to timely disclose the DNA report. Additionally, defendant argues that the trial court abused its discretion by not granting a continuance for the purpose of obtaining an independent review of the report. Defendant also presented this combined issue in his application for leave to appeal in Docket No. 275747. Like defendant’s first issue, we conclude

the law of the case doctrine applies because this Court denied leave to appeal “for lack of merit in the grounds presented.” *Hayden*, 132 Mich App at 297; *Douglas*, 122 Mich App at 529-530.

Moreover, we are not persuaded that ignoring the law of the case doctrine is necessary to avoid injustice. *Robinson*, 227 Mich App at 33; *Herrera*, 204 Mich App at 340. The DNA identification was not essential to establish that the person who left his home with defendant and was never seen again was the same person who died not more than one hour later in the car that defendant borrowed. Consequently, any abuse of discretion by the trial court in admitting the DNA evidence or in denying defendant’s request for a continuance does not merit relief because based on review of the entire record, it was not outcome determinative. MCL 769.26; *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999).

We affirm.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ William C. Whitbeck