

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE ROY VAUGHN,

Defendant-Appellant.

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UNPUBLISHED

July 9, 1996

No. 163017

LC No. 93-34885-FH

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of aiding and abetting the placement of an explosive device with intent to destroy property, MCL 750.208; MSA 28.405. Defendant pleaded guilty to being a third habitual offender, MCL 769.11; MSA 28.1083, and was sentenced to serve a twenty to thirty year term of imprisonment. We affirm defendant's conviction and sentence but remand with directions to the trial court to correct the presentence investigation report.

Defendant first contends that insufficient evidence was presented to find him guilty of aiding and abetting in the placing of explosives with intent to destroy property. Specifically, he contends that the prosecution failed to prove that defendant used an explosive device because gasoline used in a Molotov cocktail is not an explosive substance within the meaning of MCL 750.208; MSA 28.405. Defendant acknowledges that, in *People v Stanton*, 190 Mich App 558, 561-562; 476 NW2d 477 (1991), this Court held that gasoline may constitute an explosive substance when used in a Molotov cocktail and, therefore, a Molotov cocktail was encompassed within the statutory phrase "explosive substance." Defendant nonetheless urges this Court to criticize the holding in *Stanton*. We agree with the reasoning in *Stanton*, thus we decline defendant's request. Furthermore, even if we disagreed with *Stanton* we would be obligated to follow it pursuant to Administrative Order 1996-4.

Defendant next argues that the prosecutor improperly suggested to the jury that the prosecution had special knowledge that the accomplices were testifying truthfully. A prosecutor may not comment on an accomplice's promise of truthfulness if such evidence is used by the prosecutor to suggest that the

government has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to his theory of the case. *Id.* at 282. The simple reference to a plea agreement containing a promise of truthfulness does not insinuate possession by the prosecution of information not heard by the jury. *Id.* at 276. A review of the record shows that the prosecutor did not insinuate to the jury that he had some special knowledge regarding the truthfulness of the witnesses. Defendant's theory of defense was that the witnesses against him were liars. In refuting this claim, the prosecutor vaguely referred to the plea agreement. This was permissible commentary because it was based on the evidence presented to the jury. Because the comments were proper, no error requiring reversal occurred.

Defendant next claims that he was denied a fair trial when the prosecutor argued facts not in evidence. Specifically, he contends that the prosecutor improperly argued to the jury that a witness had told him something prior to trial that was contradictory to her trial testimony. Defendant argues that this was improper because no evidence was elicited at trial showing that the witness made contradictory statements to the prosecutor. Defendant's contention of error is without merit. The record shows that the witness in question admitted that her trial testimony was contradictory to prior statements made to the prosecutor. Therefore, the prosecutor was merely commenting on evidence adduced at trial, and no error occurred. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995).

Defendant also argues that the prosecutor improperly elicited testimony from a witness which vouched for the credibility of another witness, in violation of *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, defense counsel did not raise an objection to preclude this improper questioning or seek a cautionary instruction. *Id.* at 18. Defendant has failed to articulate reasons why a cautionary instruction would not have cured any prejudice. Accordingly, this allegedly improper prosecutorial conduct is not a ground for reversal. *Lee, supra*, at 245. Any error by the prosecutor did not result in unfair prejudice to defendant. *Buckey, supra*, at 17.

Defendant next contends that his sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A given sentence can violate the principle of proportionality if the sentence imposed by the trial court is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 635-636. In imposing the sentence in this case, the trial court noted that defendant had an extensive criminal record, he pleaded guilty to being a third habitual offender, and he committed an act of extreme violence in attempting to burn down a house in which an adult and child were residing. Under these circumstances, we find that the sentence imposed is proportionate to the offense and the offender. *Id.*

Defendant's final contention of error is that his presentence investigation report contains inaccurate information that should be stricken from the report. At trial, defendant challenged a conclusion reached by the probation officer that a prior plea by defendant, in which he pleaded guilty to larceny from a person, was in reality a conviction for armed robbery. The trial court noted that the information was inaccurate and stated that it was not taking the information into consideration. When a

sentencing court states that it will disregard information as inaccurate, defendant is entitled to have the information stricken from the report. *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993). Therefore, we remand this case to the trial court to strike the inaccurate information from the report and to submit a corrected copy of the report to the Department of Corrections. *People v Martinez (After Remand)*, 210 Mich App 199, 202-203; 532 NW2d 863 (1995).

We affirm defendant's conviction and sentence but remand with directions to the trial court to correct the presentence investigation report. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald