

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DUANE SPIVEY,

Defendant-Appellant.

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UNPUBLISHED

March 16, 2006

No. 258013

Saginaw Circuit Court

LC No. 04-024325-FH

Before: Smolenski, P.J., Whitbeck, C.J., and O’Connell, J.

PER CURIAM.

Defendant Michael Spivey appeals as of right from his jury trial conviction of unlawful driving away of a motor vehicle.<sup>1</sup> The trial court sentenced Spivey as a fourth habitual offender,<sup>2</sup> to a prison term of 3 to 20 years, to be served consecutive to an existing sentence for which he was on parole at the time of the instant offense. We affirm.

I. Basic Facts And Procedural History

When Angie Baker awoke on November 8, 2003, she discovered that her automobile, a 1994 Dodge Intrepid, and a set of keys for the vehicle were missing. Baker and her boyfriend at the time, Spivey, had just had a falling out, which was preceded by an incident a week before when Spivey had borrowed Baker’s car and had returned it in suspicious condition. The night before her car went missing, the couple argued, and Baker packed Spivey’s belongings, put them in the shed, and told him, that when he wanted to come and pick them up, to call her and she would unlock the shed. Baker testified that Spivey called her later on November 8, and told her that he had taken the keys and the vehicle. Baker told him that if he did not return the car, she was going to report it stolen. Baker testified that she filed a report with the police after she came home from work on November 8, 2003. According to Baker, Spivey called a few days later and threatened to take the “car to a chop shop.”

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<sup>1</sup> MCL 750.413.

<sup>2</sup> MCL 769.12.

Baker stated that, based on a tip from an acquaintance, five days after it had disappeared, she found her car parked in front of an apartment house where Spivey's nephew lived. Baker said there did not appear to be any indication that anyone used force to steal the vehicle. Spivey was not inside the home where the car was found. Baker said that, after the police came and took the car for fingerprinting, Spivey called her again and made more threats to her. Defendant's nephew testified that Spivey had been at his apartment on November 9, and was driving a 1994 Dodge Intrepid. At trial, Spivey attempted to portray Baker as an angry ex-lover who was bringing these allegations against Spivey out of spite.

On redirect examination during trial, as Baker began to explain what was wrong with the car after Spivey had used it the week before the theft, defense counsel objected. The trial court held a conference at the bench and then overruled the objection. Baker then testified that a week before the theft, Spivey had borrowed her car and returned it with two bullet holes on the passenger door, the back windshield blown out, and bloody handprints in the back seat.

Also during redirect examination, the prosecutor handed Baker a police report dated November 8. Spivey objected and moved for a mistrial, arguing that the prosecutor failed to comply with "the *mandatory* obligations of MCR § 6.201(A)(2), (A)(5), and (B)(2)" and should not have been allowed to admit the November 8, 2003 police report into evidence. Spivey alleged he was prejudiced by the prosecution's action.

Out of the presence of the jury, Spivey argued that there was a violation of the discovery rule because he was never given a copy of the November 8, 2003 police report. Spivey argued that his defense, beginning with his opening statement, rested on the fact that Baker did not file a report until two days after the alleged theft, which demonstrated that she fabricated the theft allegation after allowing Spivey to use the vehicle, but now he was suddenly being given notice that there was a report that was dated November 8. The prosecution argued that the complaint and warrant all indicated that the date of the incident was November 8.

Still out of the presence of the jury, James Foley, a detective assigned to the Saginaw County Auto Theft Team, testified that he provided the prosecutor with a copy of the police report for the first time at trial. Detective Foley said his report indicated that he was assigned to the case on November 10, but that Baker had made a prior report when she returned home from work on November 8. Detective Foley acknowledged that his November 10 report contained all of the information that the November 8 report contained. The trial court found that Detective Foley's report references to an earlier report, were "presumably the report in question." The trial court also noted that Baker had testified at the preliminary examination that she called the police when she got home from work. The trial court concluded that although the prosecutor failed to provide Spivey with the November 8 police report in violation of the discovery requirement set forth in MCR 6.201(B)(2),<sup>3</sup> the violation was harmless given that the November 10 report

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<sup>3</sup> MCR 6.201(B)(2) provided in part at the time of trial, "Upon request, the prosecuting attorney must provide each defendant . . . any police report concerning the case, except so much of a report as concerns a continuing investigation . . . ."

disclosed the existence of the November 8 report and the complainant's preliminary examination testimony that she had called the police on November 8.

The jury found Spivey guilty of unlawful driving away of a motor vehicle, and the trial court sentenced Spivey, as a fourth habitual offender, to a prison term of 3 to 20 years.

## II. Motion For Mistrial

### A. Standard Of Review

Spivey asserts that the prosecutor committed misconduct by not timely providing him with the November 8 report, in violation of *Brady v Maryland*.<sup>4</sup> Spivey argues that this violation prejudiced his ability to receive a fair trial and, thus, denied him due process.

We review a trial court's decision on a motion for a mistrial for an abuse of discretion.<sup>5</sup> A trial court should grant a mistrial "only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial."<sup>6</sup> We review preserved issues of prosecutorial misconduct de novo to determine if the defendant was denied a fair and impartial trial.<sup>7</sup> "When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for non-compliance."<sup>8</sup>

### B. Disclosure Of Police Report

The prosecutor's suppression "of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."<sup>9</sup> We cannot conclude that a *Brady* violation occurred because the November 8 police report was not favorable to Spivey. The report corroborated Baker's testimony that she reported the vehicle missing the same day that she noticed it was gone. This evidence directly contradicts Spivey's argument that Baker waited two days to report the vehicle stolen. "[E]ven the most generous reading of the 'favorable evidence' standard [does not] require the prosecution to disclose evidence whose utility lay only in helping a defendant contour a portion of his cross-examination of a key state witness."<sup>10</sup> Further, Spivey has not shown that there is a reasonable probability that, had the evidence been disclosed earlier, the

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<sup>4</sup> *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

<sup>5</sup> *People v Bauder*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2005).

<sup>6</sup> *Id.* at \_\_\_, quoting *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999).

<sup>7</sup> *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

<sup>8</sup> *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002).

<sup>9</sup> *Id.* at 87.

<sup>10</sup> *Banks, supra* at 255.

result of the proceeding would have been different.<sup>11</sup> Spivey's argument that the untimely disclosure undermined what would have been an effective defense (i.e., challenging Baker's credibility) is entirely speculative.

### C. Admission of Evidence

#### (1) Standard Of Review

Spivey argues that the trial court erred when it allowed Baker to testify about the incident when Spivey returned her car with two bullet holes on the passenger back door, her back windshield blown out, and bloody handprints in her back seat. We review a trial court's evidentiary ruling for an abuse of discretion.<sup>12</sup> An abuse of discretion should only be found "if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made."<sup>13</sup>

#### (2) Relevance

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible. MRE 402; *Aldrich, supra* at 113. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *Aldrich, supra* at 113.<sup>[14]</sup>

The credibility of witnesses is a material issue, and evidence that shows bias or prejudice of a witness is always relevant.<sup>15</sup>

In order to counter Spivey's assertion at trial that Baker lied about the vehicle being stolen because she was mad about her break-up with Spivey, the prosecutor wanted to establish why Baker and Spivey broke up. According to Baker, the reason for the break-up was because she began to feel that something was not right with the relationship after Spivey returned her car with bullet holes and blood. Given Spivey's theory of defense, we conclude that this testimony

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<sup>11</sup> *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985); *Banks, supra* at 255.

<sup>12</sup> *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

<sup>13</sup> *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

<sup>14</sup> *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004).

<sup>15</sup> *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000).

was highly relevant,<sup>16</sup> and its probative value was not substantially outweighed by the danger of unfair prejudice.<sup>17</sup>

### III. Ineffective Assistance on Counsel

Spivey argues that he was denied the effective assistance of counsel because his defense counsel did not specify on the record the reason for his objection to the admission of the above evidence. However, in light of the fact that the evidence was properly admitted, any possible error on counsel's part is irrelevant. "A trial attorney need not register a meritless objection to act effectively."<sup>18</sup>

We affirm.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

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<sup>16</sup> MRE 401.

<sup>17</sup> MRE 403.

<sup>18</sup> *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).