STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 27, 2001
v	No. 172558 Kent Circuit Court
DIAPOLIS SMITH, Defendant-Appellant.	LC No. 92-060735-FC ON REMAND

Before: Hoekstra, P.J., and Markey and Owens, JJ.

PER CURIAM.

This criminal case is on remand from our Supreme Court. On original submission, we reversed defendant's convictions and remanded for a new trial "with a jury that satisfies the Sixth Amendment guarantee of a representative cross-section of the community." We also affirmed in part, concluding that certain evidence was properly admitted at trial because "neither the detective's discovery of defendant's identity from the Chippewa Correctional Facility nor the one person grand jury's subpoena compelling defendant to appear in a lineup violated the Fourth Amendment." *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued May 7, 1999 (Docket No. 172558), slip op pp 12-13. Our Supreme Court reversed with respect to the jury selection process issue and remanded for consideration of defendant's remaining arguments.[1] *People v Smith*, 463 Mich 199; 615 NW2d 1 (2000) (*Smith II*). We have considered defendant's eighteen remaining arguments, and now affirm the judgment of the lower court.

I

Defendant contends that the trial court erred in refusing to suppress the identification

[1]The Supreme Court did not address defendant's issues involving the admission of evidence gathered as a result of the detective's discovery of defendant's identity from the Chippewa Correctional Facility and the one person grand jury's subpoena compelling defendant's appearance in a lineup. Because this Court's prior decision considering these two issues constitutes the law of the case, further consideration is precluded. *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996).

evidence because the lineup was unduly suggestive. We disagree. This Court reviews a trial court's ruling on a motion to suppress evidence on legal grounds for clear error. *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996). The suggestiveness of a corporeal lineup is to be examined in light of the totality of the circumstances. *People v Kurylczyk*, 443 Mich 289, 311-312 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). Generally, physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness. *Id*. at 312 (Griffin, J.), 318 (Boyle, J.). Physical differences among lineup participants are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other participants in the lineup. *Id*. It is then that there exists a substantial likelihood that the differences among lineup participants, rather than recognition of the defendant, were the basis of the witness' identification. *Id*.

We reject defendant's claim that the lineup was impermissibly suggestive because of the physical differences between defendant and the other four participants. The photograph of the lineup participants shows that the participants were roughly the same height, with only a few inches difference between the tallest and the shortest. A few of the participants had a darker complexion than defendant, and one appears to have had the same complexion as defendant. The other four participants had closely-cropped hair while defendant was the only participant who was bald and who had facial hair (i.e., a mustache). Finally, defendant had a physique similar to that of one other participant, while the other three were slimmer. Our Supreme Court has stated that a lineup is not impermissibly suggestive where the defendant was the second tallest participant and heavier than the other participants, where age and height differences existed between defendant and the other participants, where defendant was the only participant with a scarred face, and where the defendant was the only participant with a mustache and goatee. *Id.* Based on the photograph and the fact that only three of the twelve witnesses identified defendant, we conclude that the physical differences that existed between defendant and the other four participants were of insufficient magnitude to substantially distinguish defendant from the other participants.

We also reject defendant's claim that the assistant prosecutor present at the lineup made a comment that suggested that the shooter was in the lineup. The testimony on which defendant relies established that the assistant prosecutor neither imparted to the witnesses that the police had arrested the actual shooter nor that person number 4 in the lineup (i.e., defendant) was the actual shooter. Instead, the testimony established only that the assistant prosecutor posed a general question meant to ascertain whether any of the witnesses recognized anyone in the lineup. Given the totality of the circumstances as set forth above, we conclude that the trial court did not clearly err in determining that the corporeal lineup was not impermissibly suggestive.

II

In addition, defendant asserts that the trial court improperly refused to allow defense counsel to question Katherine Brown about a threat Detective Lyzenga made to her sister Dorothy Brown. We conclude that this issue is unpreserved because defendant failed to make an

offer of proof to provide this Court with the information it needs to evaluate this claim of error. MRE 103(a)(2); *Orlich v Buxton*, 22 Mich App 96, 100; 177 NW2d 184 (1970). Here, from the question posed, we are unable to ascertain the nature of the alleged threat, why Katherine Brown's sister Dorothy had been told that she would be in some unspecified "trouble," or the nature of this "trouble." In addition, defense counsel offered no legal rationale for the admission of the evidence.

Because this issue is unpreserved, defendant must show that (1) an error occurred, (2) the error was plain, i.e., clear and obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. at 763. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the integrity, fairness, or public reputation of the judicial proceedings. *Id*. at 763, 774.

Even assuming that the trial court improperly excluded the testimony, defendant has failed to show that the error affected his substantial rights, i.e., that the outcome of the proceedings would have been different. *Id*. First, the reason defendant sought to question Katherine Brown about the "threats" Lyzenga made was to use the information to question the credibility of Katherine's trial identification of defendant as the shooter. The exclusion of Katherine's testimony on this point did not preclude defendant from challenging Katherine's credibility during argument to the jury. In fact, the argument defendant sought to advance was supported by reasonable inferences drawn from various evidence introduced at trial. Second, defense counsel was allowed to question Katherine about whether her identification of defendant was based on her knowledge of Dorothy's lineup identification of defendant and on a desire to prevent Dorothy from getting into "trouble." Third, Katherine testified that her identification of defendant had nothing to do with her sister's identification of defendant at the lineup or with any desire to prevent trouble for Dorothy.

III

We also reject defendant's claim that the trial court improperly excluded the testimony of witness John Dent that Robert Glass admitted to Dent that Glass had been the shooter at So-So's Lounge. This issue was not preserved below, and defendant has failed to show a plain error that affected substantial rights. *Id*.

At trial, Dent testified that both defendant and Glass told him that Glass had been the shooter. The trial court properly excluded Dent's testimony concerning Glass' admission of guilt because Glass' statement did not bear the persuasive indicia of trustworthiness. *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973); *People v Conte*, 152 Mich App 8, 13; 391 NW2d 763 (1986). Glass' confession lacked indicia of trustworthiness because (1) the admission established that the shooting occurred outside of So-So's, which contradicts all other evidence introduced at trial that established that the shooting occurred within So-So's, including defendant's own testimony, and (2) defendant denied knowing Dent or making any statement to Dent. Moreover, Glass testified at trial and was subject to cross-examination by defendant.

IV

Defendant asserts that the prosecutor engaged in misconduct when he improperly acted as a witness by challenging witnesses on the basis of what they allegedly had told the prosecutor. Additionally, defendant claims that because he could not cross-examine the prosecutor, the testimony given by the prosecutor violated his confrontation rights. We conclude that defendant has failed to demonstrate error requiring reversal. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989). A prosecutor engages in misconduct when the prosecutor injects personal knowledge into the proceedings through testimonial questioning. *People v Christensen*, 64 Mich App 23, 28-29; 235 NW2d 50 (1975).

With respect to defendant's preserved challenge to the prosecutor's question posed to witness Watson, we conclude that defendant has failed to establish a miscarriage of justice under a "more probable than not" standard, i.e., that it is more probable than not that a different outcome would have resulted without the error. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); see, also, *Carines, supra* at 774. Even assuming that the prosecutor's questions were improper, we conclude that no miscarriage of justice resulted. After reviewing the record, we believe that the prosecutor's questioning was meant to rehabilitate Watson's identification of defendant as the man that Watson saw leaving the bar with the gun by establishing that Watson's original misidentification was intentional, and by impeaching Watson's claim at trial that he could not identify the man with the gun and that his earlier identification of defendant had been erroneous. Even if the prosecutor's questions had the effect of giving credence to Watson's identification of defendant, the level of credence afforded cannot be said to have caused defendant's conviction where Detective Kooistra testified that Watson told him that Watson recognized the suspect in the lineup by the back of his head and that the person he recognized was number four (i.e., defendant), and where other witnesses testified that they observed defendant with a gun either immediately before, during, or after the shooting.

With respect to defendant's unpreserved[2] claim that the prosecutor engaged in improper testimonial questioning during the examination of Latonia Thrash, we conclude that defendant has not shown a plain error that affected substantial rights, i.e., that the outcome of the proceeding would have been different. *Carines, supra* at 763, 774; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000) (this Court reviews unpreserved claims of prosecutorial misconduct for plain error). Our review of the record indicates that the prosecutor's question did not constitute improper testimonial questioning because the question did not impart personal knowledge of the prosecutor to the jury. The challenged question was merely a reference to the testimony that preceded it.

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[2] Defendant objected below on a different ground than that raised on appeal; thus, this issue is unpreserved. *Harvey v Security Services, Inc*, 148 Mich App 260, 265; 384 NW2d 414 (1986).

Finally, for the reasons set forth above, we reject defendant's claim that his confrontation rights were violated because defendant has not shown prejudice, i.e., that the error affected the outcome of the proceedings. *Carines, supra* at 763-764, 774.

V

Defendant also claims that the prosecutor improperly introduced grand jury testimony against defendant that was never subjected to cross-examination. Even assuming that the prosecutor's use of the grand jury testimony for impeachment purposes constituted plain error, defendant has failed to show that the error affected his substantial rights. *Carines, supra* at 763, 774. Any error did not effect the outcome of the proceeding where other witnesses testified that they observed defendant with a gun either immediately before, during, or after the shooting. To the extent that defendant claims that his right to confrontation was violated, we reject this assertion because defendant had the opportunity to cross-examine Glass concerning his grand jury testimony, and there is no indication in the record that the scope of defendant's cross-examination was limited by the trial court.

VI

Defendant asserts that the prosecutor introduced irrelevant and prejudicial evidence when he elicited testimony from witness Rod Fee that Fee met defendant in jail. A prosecutor's intentional injection into trial of a defendant's prior conviction or prior incarceration constitutes error. *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983); *People v McGee*, 90 Mich App 115, 116-117; 282 NW2d 250 (1979). Even assuming that the conduct of the prosecutor constituted plain error, defendant has failed to establish that this unpreserved error affected his substantial rights. *Carines, supra.* Any error did not prejudice defendant because defendant himself testified regarding his incarceration. For example, defendant testified on direct examination that he had been jailed on the charges being tried in the instant matter, and he also testified as to the dates of his first and second incarcerations resulting from those charges.

VII

Defendant asserts that the trial court improperly failed to take any action when witness Rod Fee indicated his willingness to take a polygraph. We disagree. The record in this case indicates that during cross-examination, witness Fee spontaneously offered to take a lie detector test in an unresponsive answer to a question posed by defense counsel. Generally, an unresponsive answer from a lay witness is not grounds for reversal of a conviction. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Further, the unresponsive statement involved only an offer to take a polygraph and not the results of a polygraph test. The trial court did not abuse its discretion in refusing to grant a mistrial, *People v Taylor*, 190 Mich App 652, 659-660; 476 NW2d 767 (1991), nor did the court improperly fail to give a curative jury instruction. In fact, defense counsel specifically requested that the trial court not give a curative instruction. Defendant cannot now complain of the trial judge's failure to do so. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

VIII

Defendant claims that the prosecutor engaged in misconduct when he improperly presented the decedent's mother for the sole purpose of invoking sympathy. We disagree. Defendant has failed to preserve this claim because his objection below is not based on the same ground as that raised on appeal. *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989); *Harvey v Security Services, Inc*, 148 Mich App 260, 265; 384 NW2d 414 (1986).

Defendant has failed to show a plain error that affected his substantial rights. *Carines, supra; Schutte, supra*. After a review of the testimony in question, we cannot say that the decedent's mother's testimony was of such a heart-rendering nature so as to enflame the jury and ensure a verdict based on the jurors' passions as opposed to the evidence before them. Although the testimony may have had no relevance to any issue concerning defendant's guilt or innocence of the offenses for which he was being tried, any error did not affect the outcome of the proceedings.

IX

Defendant asserts that the trial court improperly admitted Dorothy Brown's testimony that she felt scared after talking with defendant on the telephone on the day after the shooting. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Generally, all relevant evidence is admissible. MRE 402; *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more or less probable than it would be without the evidence. MRE 401; *VanderVliet, supra* at 60. Under this broad definition, evidence is admissible if it is helpful in shedding light on any material point. *People v Kozlow*, 38 Mich App 517, 524-525; 196 NW2d 792 (1972). The credibility of a witness is a material issue. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995), modified 450 Mich 1212; 539 NW2d 504 (1995). Further, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Mills, supra* at 74-75.

Here, Brown's fear of defendant had some probative value on the material issue of Brown's credibility because her fear of defendant provided some insight into her motivation for testifying against defendant. See, e.g., *People v Clements*, 91 Mich App 103, 107-108; 284 NW2d 132 (1979) (evidence helpful in assessing a witness' motivation and credibility is admissible under MRE 401, 402, and 403). Moreover, Brown's admission that she was frightened by defendant is not testimony of such an inflammatory nature that the jury would give it undue or preemptive weight. The trial court did not abuse its discretion in allowing Brown's testimony.

X

Defendant claims that the trial court improperly precluded defendant from eliciting from witness Leonora Jones whether her brother Anthony Hardin was in a position to have seen defendant re-enter the bar after the shooting and fire into the air. We disagree. A trial court's decision limiting cross-examination is reviewed for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995).

A review of the record shows that Jones had no knowledge of where her brother was located at the time she saw defendant re-enter the bar and fire additional shots. Accordingly, any testimony on her part regarding whether her brother was in a position to see defendant re-enter the bar and fire additional shots would be purely speculative. Moreover, there is no indication in the record that defendant was precluded from asking that Jones' brother be recalled so that defendant could question him about whether he saw defendant re-enter the bar. The trial court did not abuse its discretion when it limited defendant's cross-examination and excluded Jones' testimony about what her brother might have seen.

XI

Defendant next claims that the trial court improperly admitted numerous instances of hearsay testimony from police officers regarding what others had told them or what they "ascertained " from what others had told them. While defendant preserved many of his hearsay challenges by objecting below, some of the hearsay challenges and defendant's constitutional challenge were not raised below. We will review defendant's preserved, nonconstitutional hearsay challenges under the "more probable than not" standard, i.e., defendant must show that it is more probable than not that a different outcome would have resulted without the error. *Lukity*, *supra*; see, also, *Carines, supra* at 774. Defendant's unpreserved challenges, both constitutional and nonconstitutional, will be reviewed under the plain error that affected substantial rights standard, i.e., that the error affected the outcome of the proceeding. *Carines*, *supra* at 763-764, 774.

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c). For the purposes of MRE 801, a statement is defined as an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion. MRE 801(a).

After reviewing the record and defendant's many instances of alleged hearsay challenges, we conclude that many of the statements admitted by the trial court were properly admitted because the statements did not constitute hearsay or were properly admitted as third-party identification testimony under MRE 801(d)(1)(C) and *People v Malone*, 445 Mich 369, 377-378, 384-385, 389-390; 518 NW2d 418 (1994). Further, one of the complained-of challenges was sustained by the trial court after defendant's hearsay objection. Accordingly, if error did occur in this instance, it was cured by the trial judge's action. Even assuming that the trial court did improperly admit several of the hearsay statements, our review of the record establishes that the

outcome of the proceedings was not affected by the errors. Defendant has failed to establish evidentiary error warranting reversal.

XII

Defendant claims that the prosecutor attempted to shift the burden of proof when he argued facts not in evidence by asserting that various witnesses were afraid to testify against defendant and when the prosecutor advanced a civic duty argument. We conclude that defendant was not deprived of a fair and impartial trial by prosecutorial misconduct. *Foster, supra* at 317.

While a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), the prosecutor may argue the evidence and all reasonable inference arising from it to the jury, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Our review of the record indicates that the prosecutor's argument was supported by the evidence and reasonable inferences drawn therefrom. The testimony of Brown and Bowman provided factual support for the prosecutor's argument that witnesses were afraid to identify defendant as the shooter. Moreover, from the fact that Watson identified defendant outside of defendant's presence, but refused to do so in defendant's presence, the prosecutor could reasonably infer that Watson was afraid to identify defendant.

We also reject defendant's claim that he was denied a fair trial because the prosecutor appealed to fear and the jury's sense of civic duty. Assuming arguendo that the prosecutor's argument was improper because it appealed to the jury's sense of civic duty, i.e., the need to reward the witnesses for their courage and the need to protect the witnesses from defendant by convicting defendant, we conclude that any error was harmless because the prosecutor's argument was not of such an inflammatory nature so as to have resulted in the jury rendering a verdict based on fear rather than the evidence.

XIII

Defendant claims that the trial court improperly refused the jury's reasonable request for a transcript of the testimony of Katherine Brown, Dorothy Brown, and Eva Price. We disagree. When a jury requests that testimony be read back to it, both the reading and the extent of the reading is a matter confided to the sound discretion of the trial court. *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974), quoting *People v Turner*, 37 Mich App 162, 165; 194 NW2d 496 (1971). "A trial court must exercise its discretion to assure fairness and to refuse unreasonable requests; but, it cannot simply refuse to grant the jury's request for fear of placing too much emphasis on the testimony of one or two witnesses." *Howe, supra* at 676; see, also, MCR 6.414(H).

After reviewing the record, we conclude that the trial court did not abuse its discretion in denying the jury's request for the transcripts. First, the trial court did not refuse the jury's request because it feared that too much emphasis would be placed on the testimony of the three witnesses. *Howe, supra*. The record indicates that the trial court denied the jury's request because the time needed to prepare the transcripts was substantial. However, the court also invited the jury to submit a more specific request for portions of the witnesses' testimony. The record contains no subsequent request from the jury. The court also instructed the jury to rely on

its collective memory. This Court's decision in *People v Crowell*, 186 Mich App 505; 465 NW2d 10 (1990), remanded on other grds 437 Mich 1004; 469 NW2d 305 (1991), supports our conclusion that no abuse of discretion occurred in the instant matter. In *Crowell, supra* at 508, this Court found no abuse of discretion where the trial court denied the jury's request for a transcript of certain testimony after it told the jurors that they should rely on their memories and that, if the jurors were still unable to recall the information, then they could request the testimony again.

XIV

Defendant asserts that defense counsel was ineffective because, when given the opportunity to allocute on behalf of defendant, counsel limited his remarks to informing the judge that defendant continued to assert his innocence. We disagree. Because defendant failed to create a testimonial record below, our review is limited to the facts contained in the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

The decision to address the sentencing court and what information to be given the court are tactical decisions. *People v Newton (After Remand)*, 179 Mich App 484, 493-494; 446 NW2d 487 (1989). Defendant does not explain what mitigating information defense counsel should have presented during allocution. Accordingly, defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant also asserts that he did not have an opportunity to review the presentence report (PSIR). Defendant failed to raise this claim below. Moreover, the record contains a statement by defense counsel that both he and defendant had reviewed the PSIR. The record does not support defendant's claim.

Defendant also claims that his life sentence violates the principle of proportionality. We disagree. This Court reviews a challenge to the proportionality of a sentence under the abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The guidelines range in this case was 180 to 360 months, or life. Defendant received a life sentence. Because this sentence falls within the guidelines range, the sentence is presumed proportionate, absent a showing of unusual circumstances. *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). Defendant has failed to supply any unusual circumstances sufficient to rebut the presumption of proportionality. Further, the trial court's indication that the sentence fell within the guidelines range, exclusive of the other reasons given for the sentence, was sufficient to satisfy the articulation requirement. *People v Poppa*, 193 Mich App 184, 190; 483 NW2d 667 (1992).

XV

Defendant next claims that defense counsel was ineffective because counsel failed to follow the proper procedure for raising a claim that blacks are systematically underrepresented in the jury venire, counsel failed to hire a private investigator as defendant requested, counsel failed to move to suppress the identifications where the identifications lacked an independent basis, and

counsel failed to ask detective Lyzenga whether he had threatened to arrest Dorothy Brown. We disagree. Because no testimonial record was created below, this Court's review is limited to the facts contained in the record. *Barclay, supra*.

We conclude that defendant has failed to support his claim of ineffective assistance of counsel and has failed to provide any justification for a remand to permit him to attempt to develop a record that would support his claims. With regard to defendant's jury selection system challenge, our Supreme Court determined that this claim was meritless. *Smith II, supra* at 203. With respect to the private investigator claim, defendant supports his claim solely with speculation that a private investigator might have discovered that "lineup witnesses had been shown photos of defendant before the lineup." In addition, the record does not support defendant's claim that the identifications of defendant were tainted or unduly suggestive. *Barclay, supra* at 675. Further, with regard to counsel's failure to question detective Lyzenga about whether he threatened to arrest Brown, the record reveals that, on cross-examination, defense counsel elicited testimony from Lyzenga that Brown did not initially implicate defendant, that Lyzenga then accused Brown of lying, and that Lyzenga told Brown that her lying would land her in trouble.

XVI

Defendant claims that the identifications of him should have been suppressed because no independent basis existed for those identifications. We reject defendant's claim. Because this issue was not raised below, defendant must show a plain error that affected substantial rights. *Carines, supra* at 763-764, 774.

After reviewing the record, we conclude that defendant has failed to establish a plain error that affected substantial rights. "The need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive." *Barclay, supra*. Here, defendant does not argue that pretrial identification procedures were tainted. Absent tainted pretrial identification procedures, there is no need to determine whether the identifications were supported by an independent basis.

XVII

Defendant claims that the trial court improperly allowed defendant to be impeached with a prior UDAA conviction. A trial court's decision to allow impeachment by evidence of a prior conviction is within its sound discretion and will not be reversed on appeal absent an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995).

"Crimes of dishonesty or false statement are directly probative of truthfulness, and are therefore admissible under MRE 609(a)(1) without consideration of the balancing test of MRE 609(a)(2)(B)." *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992). "Crimes of theft are minimally probative and are therefore admissible only if the probative value outweighs the prejudicial effect as determined under the balancing test of MRE 609(a)(2)(B)." *Id*. Prior convictions for non-theft crimes that do not contain elements of dishonesty or false statement should not be admitted into evidence. *People v Allen*, 429 Mich 558, 596; 420 NW2d 499 (1988).

Even assuming that the trial court abused its discretion in admitting evidence of defendant's prior UDAA conviction, we conclude that reversal of defendant's conviction is not warranted. *People v Nelson*, 234 Mich App 454, 463; 594 NW2d 114 (1999). Defendant has failed to show that it is more probable than not that a different outcome would have resulted without the error. *Lukity, supra*. First, UDAA is not in any way similar to the charged murder and assault offense, and introduction of the prior conviction did not create the risk that the jury would take the position that if defendant committed the prior offense, then he also was likely to have committed the instant offenses. Second, defendant's testimony implicated another individual in the instant shooting, and this testimony was supported by similar testimony given by several other witnesses.

XVIII

Finally, we reject defendant's claim that the trial court improperly admitted a statement made by defendant during booking procedures because the statement was secured before defendant was advised of his *Miranda*[3] rights. The question posed to defendant during the booking process was whether defendant had previously been arrested in Grand Rapids.[4] Although defendant testified that he responded to the question by stating that he had never been arrested before in Grand Rapids, a detective and the jail turnkey testified that defendant actually responded that he had never been in Grand Rapids before the date of the booking.

We conclude that there is nothing inherent in the question at issue that suggests that the police either knew or should have known that the question would invoke an incriminating response. There is no indication in the record that defendant was arrested in Grand Rapids immediately after the shooting and, therefore, that a positive response would place defendant in Grand Rapids at the time of the shooting. *People v Cuellar*, 107 Mich App 491, 493; 310 NW2d 12 (1981). Defendant's statement as testified to by the detective and turnkey is only incriminating because the answer given was non-responsive and volunteered more information than necessary to answer the question. *Miranda* warnings were not required before the question at issue was posed to defendant because the question posed did not constitute interrogation or an investigative question. *People v Armendarez*, 188 Mich App 61, 73; 468 NW2d 893 (1991). Thus, the trial court properly denied defendant's request to suppress the statement.

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Donald S. Owens

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[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] We note that the record establishes that a person being booked in the Kent County Jail is asked a series of general questions, including whether the arrestee has previously been arrested in Grand Rapids. This question is asked for the valid purpose of cross-indexing.