NO. COA09-1507

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 07 CRS 208926-27

MELVIN GENE FERGUSON, JR.

Appeal by defendant from judgment entered 10 November 2008 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 April 2010.

Attorney General, Roy Cooper, by Special Deputy Attorney General, Melissa L. Trippe, for the State.

Appellate Defender, Staples Hughes, by Assistant Appellate Defender, Daniel R. Pollitt, for defendant.

STEELMAN, Judge.

Defendant's taking of the victim's vehicle following the murder was part of one continuous transaction, and supported the submission of robbery with a dangerous weapon and felony murder to the jury. Defendant's abandonment of the victim's vehicle at a car wash was sufficient evidence to submit to the jury the issue of whether defendant intended to deprive the victim of the vehicle permanently. Under the seven factors set forth in *State v. Laws*, 345 N.C. 585, 481 S.E.2d 641 (1997) there was sufficient evidence to submit first-degree murder to the jury on the theory of premeditation and deliberation. Constitutional arguments made for the first time on appeal are not properly before an appellate court. The trial court did not abuse its discretion in sustaining

the State's objections to evidence of the victim's character. Under the rationale of *State v. Wallace*, the trial court did not err in allowing the State to cross-examine defendant's expert psychiatrist concerning a 2005 murder in Virginia. 351 N.C. 481, 528 S.E.2d 326 (2000), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). In the absence of an objection based upon attorney-client privilege or constitutional grounds, the trial court did not err in overruling a general objection to the State's questioning of defendant concerning whether he changed his story after learning the punishments for lesser offenses. The admission of testimony by the victim's sister concerning the character of the victim did not rise to the level of plain error. Where the prosecutor's cross-examination of defendant was based upon logical inferences from the evidence, it was not an improper examination. Where defendant admitted on direct examination that he lied to police, the prosecutor's cross-examination of defendant concerning the lie was proper. The prosecutor's cross-examination of defendant concerning his knowledge of possible ranges of sentences for lesser offenses did not rise to the level of plain error. The prosecutor's arguments that were not objected to at trial did not require the court to intervene *ex mero motu*. The trial court properly instructed the jury on how to consider defendant's confession. The State failed to introduce evidence supporting the amount of restitution ordered by the trial court, and this matter is remanded for a new sentencing hearing limited to the amount of restitution.

I. Factual and Procedural Background

On the afternoon of 23 February 2007, William Ray (Mr. Ray) heard arguing and fighting coming from Mark Bivens' (Bivens) apartment, which was above his apartment. After Mr. Ray heard one of the combatants say, "[y]ou are trying to kill me. You are trying to kill me. You are hurting me," he called 911. About thirty minutes after the argument began, Mr. Ray observed a light skinned, black male drive off in a jeep belonging to Bivens. Mr. Ray subsequently identified Melvin Eugene Ferguson, Jr. (defendant) as the person who drove off in the jeep. The jeep was later found abandoned at a car wash.

The Charlotte-Mecklenburg Police Department responded to the 911 call, arriving at 1:44 p.m. They found blood on the door knob to the apartment and bloody footprints leading from the bedroom. The bathroom was covered in blood. Police found Bivens dead in a half-filled bathtub with 79 stab wounds. Crime scene investigators recovered a knife handle without a blade but found no evidence of a wallet, money, or credit cards in the apartment.

Police officers, who heard the homicide dispatch to Bivens' apartment, later received a report of a man being treated at the Presbyterian Hospital Emergency Room for cuts on his hands. Officers found defendant in the Emergency Room waiting room with bandages on his hands. Police questioned defendant at the hospital. Defendant gave police five false names before telling Detective Osorio that he was Melvin Ferguson.

Initially, defendant said he cut his hands while moving glass for a friend. Defendant then stated that a person named "Ray-ray" stabbed Bivens, and that defendant was injured when he tried to intervene. After Ray-ray ran out of the apartment, defendant panicked and took Bivens' vehicle.

Defendant was taken into custody after officers learned of a warrant for defendant's arrest in Virginia and defendant's attempt to flee from the hospital on foot. At the Law Enforcement Center, defendant gave his first recorded statement, in which he reiterated his earlier statement involving Ray-ray. Subsequently, defendant changed his story to the police. In his second recorded statement, defendant admitted that he had quarreled with Bivens over money defendant owed Bivens for drugs. Defendant asserted that Bivens had attacked him with a knife. A struggle ensued, defendant gained control of the knife, and stabbed Bivens multiple times. Defendant's third recorded statement dealt with a warrant for his arrest arising out of an alleged murder in Dunwoody County, Virginia in 2005. In this statement, defendant admitted to shooting a man over drugs and money in self-defense. Defendant later told forensic psychiatrist, Dr. George Corbin (Dr. Corbin), that the Virginia victim had attacked and overpowered him, and defendant had shot the victim in self-defense. Defendant did not mention any sexual advance made by Bivens in any of his statements to police.

Defendant was indicted for first-degree murder and robbery with a dangerous weapon.

Defendant testified at trial that he regularly sold marijuana for Bivens and that he owed Bivens several hundred dollars after some of the drugs had been stolen. Defendant stated that after meeting at a store where Bivens cashed a check, they drove to Bivens' apartment.

At the apartment, the two argued while defendant prepared to smoke marijuana and Bivens paced between the bedroom and kitchen and prepared a bath. The argument became heated when Bivens accused defendant of being involved in the theft of the drugs, and both men began yelling and cursing.

At some point, Bivens approached defendant and slapped him on the face. Defendant became angry and followed Bivens into his bedroom. Defendant testified that at this time, Bivens, an open homosexual, told defendant that he would forgive defendant's debt in exchange for sex. When defendant refused, Bivens drew a kitchen knife, cutting defendant's hand. Defendant testified that he gained control of the knife and began stabbing Bivens; that he lost control and "didn't see nothing but red and black." Defendant testified that he took the knife blade, which had broken from the handle, and left in Bivens' vehicle, abandoning it at a car wash. Defendant then went to a friend's house, where he got a change of clothes, and threw the knife, car keys, his bloody clothes, and some money into a ditch. After defendant arrived at his girlfriend's house, she called 911 and they rode to the hospital.

Dr. Corbin testified that defendant told him about Bivens' alleged sexual proposition on 10 June 2008, one month before trial.

This was the first documented instance of defendant asserting that Bivens made sexual advances on 23 February 2007. Dr. Corbin testified that Bivens' sexual proposition triggered a traumatic reaction caused by defendant's having been sexually abused as a child.

On 10 November 2008, a jury found defendant guilty of first-degree murder based upon premeditation and deliberation and felony murder, and guilty of robbery with a dangerous weapon. Defendant was sentenced to life imprisonment without the possibility of parole upon the murder verdict and a consecutive active sentence of 64 to 86 months upon the robbery with a dangerous weapon verdict.

Defendant appeals. The motion of defendant to file an over-sized brief in this matter was granted.

II. Sufficiency of the Evidence - Robbery with a Dangerous Weapon and Felony Murder

In his first argument, defendant contends that his convictions for robbery with a dangerous weapon, and felony murder based upon the robbery conviction, must be vacated based upon insufficiency of the evidence. We disagree.

A. Standard of Review

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of

> innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Barnes, 334 N.C. 67, 75-76, 430 S.E.2d 914, 918-19 (1993) (internal citations and quotations omitted).

B. Evidence of Taking by Endangering or Threatening Life with Dangerous Weapon

The indictment for robbery with a dangerous weapon was based upon defendant's theft of Bivens' motor vehicle. This robbery was also the felony that supported defendant's felony murder conviction. Defendant first argues that under his own testimony, he stole the motor vehicle following the killing of Bivens as an afterthought, and that there was no evidence that he took the vehicle by endangering or threatening Bivens' life with a deadly weapon.

> To be found guilty of robbery with a dangerous weapon, the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, or be so joined by time and circumstances with the taking as to be part of one continuous transaction. Where a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial.

State v. Haselden, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (2003) (quoting *State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992)), *cert denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003).

Defendant's argument that he took Bivens' motor vehicle as an "afterthought" is the identical argument that our Supreme Court rejected in *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985).

> To accept defendant's argument would be to say that the use of force that leaves its victim alive to be dispossessed falls under N.C.G.S. 14-87, whereas the use of force that leaves him dead puts the robbery beyond the statute's reach. That the victim is already dead when his possessions are taken has not previously been an impediment in this jurisdiction to the defendant's conviction for armed robbery.

Id. at 201, 337 S.E.2d at 524 (citation omitted).

Taken in the light most favorable to the State, the State's evidence demonstrated that defendant's murder of Bivens, and the taking of Bivens' motor vehicle by defendant, were part of one continuous transaction.

This argument is without merit.

C. Evidence of Intent to Permanently Deprive Victim of his Property

Defendant next argues that there was not sufficient evidence that he intended to permanently deprive Bivens of his motor vehicle. Defendant again directs us to his own testimony that he took the vehicle so he could get medical attention - not to steal it - and that he abandoned the vehicle in a safe place - a car wash.

"Intent being a mental attitude, it must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred." *State v. Smith*, 211 N.C. 93, 95, 189 S.E. 175, 176 (1937).

> [T]he abandonment of a vehicle, regardless of how near the abandonment is to the scene of the crime, places it beyond a defendant's power to return the property and shows a total indifference as to whether the owner ever recovers it . . . . [T]he evidence that [defendant] took the vehicle and subsequently abandoned it near the crime scene was sufficient to show an intent to permanently deprive the victim of his property.

State v. Kemmerlin, 356 N.C. 446, 474, 573 S.E.2d 870, 889-90 (2002) (internal citations, quotations, and alterations omitted).

Absent an explicit confession by defendant, intent must ordinarily be proven by circumstantial evidence. The facts that defendant left Bivens dead or dying in his apartment, stole Bivens' motor vehicle, and abandoned it at a car wash were sufficient to support the submission of the question of defendant's intent to permanently deprive the victim of his property to the jury.

This argument is without merit.

III. Sufficiency of the Evidence - First Degree Murder Based upon Premeditation and Deliberation

In his second argument, defendant contends that his conviction for first-degree murder based upon premeditation and deliberation must be vacated because the State presented insufficient evidence of those two elements. We disagree.

Defendant contends that the evidence demonstrates that he acted in self-defense and lost control. He further contends that his testimony is supported by Dr. Corbin, his expert psychiatric witness.

> Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of

> premeditation. *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980). Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984).

State v. Bullock, 326 N.C. 253, 257, 388 S.E.2d 81, 83 (1990).

The State's evidence of premeditation and deliberation in the instant case must of necessity be circumstantial. Circumstances from which premeditation and deliberation may be inferred include:

> (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Laws, 345 N.C. 585, 593-94, 481 S.E.2d 641, 645 (1997), (citing *State v. Keel*, 337 N.C. 469, 489, 447 S.E.2d 748, 759 (1994) (quoting *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986)) *cert. denied,* 513 U.S. 1198, 131 L. Ed. 2d 147 (1995)).

It is not required that the State show the presence of all seven factors for the case to be submitted to the jury. *State v. Vause*, 328 N.C. 231, 239, 400 S.E.2d 57, 62 (1991). In the instant case, defendant made contradictory statements to the police following the killing. There was evidence of a dispute between defendant and Bivens over money owed from prior drug dealings.

Defendant inflicted 79 stab wounds upon Bivens, supporting factors 5, 6, and 7. In addition, defendant immediately attempted to conceal evidence by disposing of his bloody clothing, and stole Bivens' motor vehicle.

Taken in the light most favorable to the State, and not considering defendant's exculpatory evidence, *Id.* at 237, 400 S.E.2d at 61, we hold that the State presented substantial evidence of each element of the crime sufficient to submit the crime of first-degree murder based upon premeditation and deliberation to the jury. Once the trial court finds that a reasonable inference of defendant's guilt may be drawn from the State's evidence, it is for the jury to weigh the evidence and determine whether it shows the defendant is guilty beyond a reasonable doubt. *Laws*, 345 N.C. at 593, 481 S.E.2d 641, 644-45.

This argument is without merit.

IV. Exclusion of Evidence Concerning Character of Victim

In his third argument, defendant contends that the trial court erroneously excluded evidence concerning Bivens' prior sexual conduct and character, and that this error requires a new trial. We disagree.

A. Standard of Review

Since the trial court excluded evidence of Biven's prior conduct and character under Rule 404, and not under Rule 401, we review the trial court's evidentiary ruling for abuse of discretion. Only where it can be shown that the trial court's decision was "manifestly unsupported by reason or is so arbitrary

that it could not have been the result of a reasoned decision" will the trial court be found to have abused its discretion. *State v. Williams*, 363 N.C. 689, 701, 686 S.E.2d 493, 501 (2009)(quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

B. Constitutional Argument

Defendant failed to make a constitutional argument concerning the exclusion of this evidence at trial. Because defendant makes this constitutional argument for the first time on appeal, it is not properly before this court. *State v. Call*, 349 N.C. 382, 424, 508 S.E.2d 496, 522 (1998)(citing *State v. Billings*, 348 N.C 169, 500 S.E.2d 423 (1998), *cert. denied*, 525 U.S. 1005, 142 L. Ed. 2d 431 (1998), *disc. review denied*, 356 N.C. 680, 577 S.E.2d 894 (2003)). Defendant's constitutional argument is dismissed.

C. Exclusion of Evidence

At trial, the defendant moved to introduce evidence that "would tend to show not only that Mr. Bivens was an openly gay person, but that he also had a preference for straight-type individuals." Defendant argued that Bivens' attraction and proposition of straight men tended to show that Bivens was "more likely to sexually assault the defendant."

Under Rule 404(a), "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." N.C. Gen. Stat. § 8C-1, Rule 404(a)(2009). Further, Rule 404(b) states,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a

> person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b)(2009).

In *State v. Laws*, *supra*, defendant attempted to present evidence as to the victim's general reputation as a homosexual. The Supreme Court held that:

> [a] victim's homosexuality has no more tendency to prove that he would be likely to sexually assault a male than would a victim's heterosexuality show that he would be likely to sexually assault a female . . . . Because an individual's sexual orientation bears no relationship to the likelihood that one would threaten a sexual assault, it therefore can bear no relationship to defendant's claim that he killed in self-defense in response to a threatened sexual assault.

Laws, 345 N.C. at 597, 481 S.E.2d at 647 (citing *State v. Lovin*, 339 N.C. 695, 706, 454 S.E.2d 229, 236 (1995)).

Defendant attempts to distinguish *State v. Laws* arguing that in *Laws*, evidence of the victim's homosexuality was presented to prove that he was the first aggressor in a sexual assault. Defendant contends that in this case, unlike *Laws*, the evidence is offered to prove the likelihood that Bivens "made aggressive homosexual advances on heterosexual men for sex in exchange for favors . . . ."

We hold that *Laws* is controlling. It is clear that the basis of defendant's argument that Bivens made a sexual advance towards defendant rests on the nature and expression of Bivens' homosexuality. Thus, we hold that the trial court did not abuse

its discretion in sustaining the State's objection to this evidence under *State v. Laws*.

Even assuming, *arguendo*, that exclusion of this evidence was error, we hold that given the other evidence in this case, the introduction of this evidence would not have led to a different result at trial. N.C. Gen. Stat. § 15A-1443(a) (2009).

V. Admission of Evidence of Another Murder by Defendant in the State of Virginia

In his fourth argument, defendant contends that the trial court erred in allowing the State to cross-examine defendant's forensic psychiatrist, Dr. Corbin, concerning a 2005 murder in the State of Virginia. We disagree.

At a pretrial hearing, the State indicated that it had evidence that defendant had murdered a man in Virginia in 2005. Defendant had not been tried or convicted of this crime. The trial court ruled that this evidence was not admissible under either Rule 404(b) or Rule 608(b) of the Rules of Evidence. The State did not present evidence of this crime in its case in chief, nor did the State cross-examine defendant concerning this crime.

Defendant called Dr. George Corbin, a forensic psychiatrist, as an expert witness. On direct examination, Dr. Corbin opined that based upon defendant's version of the events, Bivens' sexual proposition triggered a traumatic reaction in defendant, and that it was improbable that defendant intentionally planned to murder Bivens.

On cross-examination, the State sought to cast doubt upon Dr. Corbin's opinions, and the bases of his opinions. In particular,

the State sought to examine Dr. Corbin concerning the 2005 homicide in Virginia, and why that murder was committed without the traumatic reaction that Dr. Corbin stated was caused by Bivens' conduct. Dr. Corbin created two reports; one in which Dr. Corbin referenced his review of discovery material and conversations with defendant regarding the Virginia homicide and another redacted report which was submitted to the jury and omitted all reference to the Virginia homicide. The State contended that under *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000), Dr. Corbin had reviewed and considered the Virginia homicide information in reaching his conclusions, and that this opened the door for the State to cross-examine Dr. Corbin concerning that crime. After a lengthy *voir dire*, and an examination of Dr. Corbin's original report, the trial court held that the State could examine Dr. Corbin concerning the 2005 homicide. In making that ruling, the trial court relied upon the holding of our Supreme Court in *State v. Wallace*. Prior to allowing this cross-examination, the trial court gave the jury the following limiting instruction:

> The instruction pertains to the evidence that you are about to hear from Dr. Corbin.
>
> The Court instructs you that this evidence is received for a limited purpose. You may consider this evidence only for this limited purpose.
>
> You may consider this evidence only as evidence of the basis of Dr. Corbin's opinions, as he has testified before you. You may not consider this evidence for any other purpose.
>
> It is not evidence of the defendant's guilt of the offenses that he is on trial for.

> If all of you are able to follow the instruction that I have just given you, please indicate by raising your hands.
>
> (Unanimous indication given.)
>
> The record will reflect that all 12 jurors have raised their hands in the affirmative.

The prosecutor then established that Dr. Corbin had discussed the 2005 murder with defendant and had reviewed the statement that defendant gave to police concerning those events. It was then established that defendant asserted that the murder in Virginia was also committed in self-defense. Dr. Corbin asserted that defendant had borderline intellectual functioning. The prosecutor questioned how a person of borderline intellectual functioning was able to move freely up and down the east coast of the United States and not be apprehended from 2005 until 2007, when he was arrested for the murder of Bivens. Dr. Corbin was also examined as to why defendant had a very clear recollection of the events of the 2005 murder and virtually no memory of the 2007 murder. Finally, Dr. Corbin was examined as to how the outstanding arrest warrants from Virginia impacted defendant's multiple stories to the police.

Defendant argues that under the rationale of the case *State v. Coffey*, 336 N.C. 412, 444 S.E.2d 431 (1994), the State should not have been allowed to inject the 2005 murder into the trial during the cross-examination of Dr. Corbin. He contends that this evidence was highly prejudicial. We hold that the rationale of *Coffey* is not applicable to this case, and that it was clarified and superseded by the Supreme Court in the case of *State v. Wallace*, *supra*.

Coffey dealt with a re-sentencing hearing in a capital murder case. Defendant presented expert testimony from a psychologist and a psychiatrist that as a result of sexual abuse by his father, defendant did not have the capacity to conform his conduct to the law. The State sought to examine the experts concerning defendant's child sex abuse conduct, which occurred after the murder but prior to the sentencing hearing. The Supreme Court held that while a party may examine an expert witness concerning the basis of the expert's opinion, that this is only the first stage of the inquiry. The trial court must then determine whether the testimony should be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403. Without expressly holding that the trial court abused its discretion, the Supreme Court held "the probative value of defendant's convictions in 1986 to be substantially outweighed by the danger of unfair prejudice . . . ." *Coffey*, 336 N.C. at 420, 444 S.E.2d at 436. It also appears that the Supreme Court felt that the convictions did not impeach the expert's diagnosis of defendant's mental condition but simply inflamed the jury to impose the death penalty.

In the later case of *State v. Wallace*, *supra*, the Supreme Court referred to *Coffey*, but adopted a slightly different analytical framework. The defendant in *Wallace* was tried for nine counts of capital murder. Wallace also confessed to two other murders that were not part of his trial. There was expert testimony that due to mental illness, defendant was unable to form

the specific intent to commit the crimes for which he was charged. The State sought to examine three experts concerning the other two murders and was allowed to do so by the trial court. On appeal, defendant argued that this was error under *Coffey*. The Supreme Court rejected these arguments, stating:

> Under the broad scope of Rule 705, cross-examination relating to the two murders was permissible to probe the basis for the experts' opinions. Furthermore, under Rule 403, the determination of whether relevant evidence should be excluded is a matter left to the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion. In the instant case, defendant has not demonstrated any abuse of discretion by the trial court. To the contrary, a review of the record reveals the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give a proper instruction limiting the jury's consideration of the evidence solely to the basis for the experts' opinions. The trial court gave the instruction during each disputed instance of cross-examination. For these reasons, we conclude defendant was not prejudiced by this cross-examination.

Wallace, 351 N.C. at 523-24, 528 S.E.2d at 352-53 (internal citations omitted).

We hold that the instant case is controlled by *Wallace* rather than *Coffey*. As in *Wallace*, the issue was presented during the guilt-innocence phase of the trial. The prosecutor's questions pertained to the bases of the expert's opinion and were not solely designed to place the 2005 Virginia murder before the jury. The trial court's initial exclusion of the murder charges demonstrate that he was keenly aware of the potential danger of undue prejudice to defendant. In accordance with *Wallace*, the trial court gave a

detailed limiting instruction to the jury. "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 674, 617 S.E.2d 1, 20 (2005) (citation omitted), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006). We discern no abuse of discretion by the trial court in this ruling.

This argument is overruled.

VI. Impeachment of Defendant on Cross-Examination

In his fifth argument, defendant contends that the trial court erred in allowing the prosecutor to impeach defendant with evidence touching upon his exercise of his right to counsel. Defendant argues that this violated Rules 608(b) and 611 of the Rules of Evidence, as well as his rights under the Sixth and Fourteenth Amendments to the United States Constitution. We disagree.

A. Constitutional Claims

By failing to make his constitutional argument at trial, defendant is barred from raising them for the first time on appeal. *Call*, 349 N.C. at 424, 508 S.E.2d at 515. Defendant's constitutional claim is dismissed and we review only his evidentiary contentions.

B. Standard of Review

We review a trial court's decision to admit evidence for an abuse of discretion. *State v. Williams*, 363 N.C. 689, 701, 686 S.E.2d 493, 501 (2009). We review an error at trial for whether "there is a reasonable possibility that, had the error in question

not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a).

C. Cross-Examination of Defendant

In the instant case, the prosecutor cross-examined defendant concerning whether he had talked to his attorneys, how many times he talked with his attorneys, whether they discussed his trial testimony, whether they discussed the strengths and weaknesses of his case, whether defendant changed his story after learning the difference in punishment for voluntary manslaughter and murder, and whether he understood the felony murder rule. The focus of the challenged testimony was to show that defendant changed his account of the events of 23 February 2007 in order to avoid the most serious consequences of his actions. Defendant's counsel objected to the first question in this line of questioning, and did not lodge further objections. The objection was a general objection, and was not based upon attorney-client privilege or constitutional grounds.

Rule 608(b) of the Rules of Evidence provides that a witness may be cross-examined concerning specific instances of conduct concerning his character for truthfulness or untruthfulness, in the discretion of the court. N.C. Gen. Stat. § 8C-1, Rule 608(b)(2009). Rule 611(b) of the Rules of Evidence provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b)(2009).

We hold that in the absence of a specific objection raising attorney-client privilege, or a constitutional objection, the trial court did not abuse its discretion in overruling defendant's objection. *State v. Hammett*, 361 N.C. 92, 97-98, 637 S.E.2d 518, 522 (2006)(refusing to consider defendant's argument on appeal when no specific objection was made at trial), *disc. review denied*, 361 N.C. 572, 651 S.E.2d 227 (2007).

Even assuming, *arguendo*, that the trial court erred in overruling defendant's objection, defendant can demonstrate no prejudice. The various versions of defendant's account of the events culminating in the death of Bivens were before the jury. *See* N.C. Gen. Stat. § 15A-1443(a) (2009).

This argument is without merit.

VII. Admission of Evidence of Bivens' Character

In his sixth argument, defendant contends that the trial court committed plain error and *ex mero motu* error by erroneously admitting evidence and closing arguments regarding Bivens' character and the impact of Bivens' death. We disagree.

A. Standard of Review

Errors which did not draw a timely objection at trial are reviewed for plain error only. Under plain error review, defendant must prove "'not only that there was error, but that absent the error, the jury probably would have reached a different result.'" *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (citations and quotations omitted), *cert. denied* __ U.S. __, 175 L. Ed. 2d 362 (2009). Plain error must be so fundamental, basic, and

prejudicial that "justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation omitted).

We review the State's closing argument, which was not objected to at trial, to determine

> 'whether the argument was so grossly improper as to warrant the trial court's intervention *ex mero motu*.' *State v. Nicholson*, 355 N.C. 1, 41, 558 S.E.2d 109, 137 (citation omitted), *remanded*, 355 N.C. 209, 560 S.E.2d 355, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002), *cert. denied*, 359 N.C. 855, 619 S.E.2d 859 (2005). Such action is required of the trial court only if the State's 'argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial.' *State v. Smith*, 351 N.C. 251, 269, 524 S.E.2d 28, 41 (1999) (citation omitted), *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000).

State v. Lawson, 194 N.C. App. 267, 273-74, 669 S.E.2d 768, 773-74 (2008), *disc. review denied*, 363 N.C. 378, 679 S.E.2d 837 (2009).

B. Character and Impact Evidence

During its case in chief, the State introduced the testimony of Bivens' sister, Mary Cureton (Cureton). Cureton's testimony was that "[w]hen [Bivens] entered the room, it was like sunshine. He brought sunshine to our family. He was that person that no matter what, he loved his family and we loved him. Now that he is gone, there is not going to be any peace in our family." Defendant argues that Cureton's testimony, along with the photograph of Bivens and his mother, prejudiced defendant and led the jury to find defendant guilty of murder.

While the admission of Cureton's testimony during the guilt-innocence phase of the trial was likely in error, it did not rise to the level of plain error. *Odom*, 307 N.C. at 660, 300 S.E.2d at

378. Defendant cannot demonstrate that but for this evidence, the jury would have reached a different result. *Department of Transp. v. Craine*, 89 N.C. App. 223, 226, 365 S.E.2d 694, 697 (1988) (*appeal dismissed, review denied* 322 N.C. 479, 370 S.E.2d 221-222 (1988).

This argument is overruled.

C. Character and Impact Arguments

Defendant further argues that it was *ex mero motu* error for the trial court to allow the prosecutor's closing arguments referencing Cureton's testimony.

"'[C]ounsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence.'" *State v. Jones*, 355 N.C. 117, 128–29, 558 S.E.2d 97, 105 (2002) (quotation omitted).

We have held that the admission of Cureton's testimony did not constitute plain error. We hold that the prosecutor's reference to this testimony in closing arguments was not so grossly improper so as to warrant the trial court's intervention *ex mero motu*.

This argument is overruled.

VIII. State's Cross-Examination of Defendant

In his seventh argument, defendant contends that the prosecutor's cross-examination of defendant was plain error. Defendant argues that the prosecutor posed questions regarding facts that were not in evidence, injected her opinion that defendant lied, and misleadingly referenced defendant's sentencing

range, which had not yet been determined. Defendant contends that this improper cross-examination caused the jury to find defendant guilty of first-degree murder rather than manslaughter. We disagree.

A. Standard of Review

We review errors which failed to draw a timely objection at trial for plain error only. *Williams*, 363 N.C. at 701, 686 S.E.2d at 501.

B. Cross-Examination

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2009). Defendant argues that it was plain error for the prosecution to pose questions to defendant that assumed facts not in evidence.

In defendant's first recorded statement to police, he stated that a man named Ray-ray killed Bivens and then stole Bivens' drugs. Defendant later recanted this statement, and stated that Ray-ray was never there. His description of Ray-ray's appearance and clothing was exactly what defendant was wearing on 23 February 2007. Defendant's testimony at trial was that he was to meet Bivens at a store where Bivens was cashing a check. After the two met, they drove to Bivens' apartment where defendant prepared to smoke marijuana. A detective on the scene of the crime testified that there was "no wallet, no credit cards, no money, [and] no driver's license, found in Mr. Bivens' apartment."

The prosecutor questioned defendant about his conflicting statements regarding the cash Bivens had from cashing the check and the drugs defendant testified to handling at Bivens' apartment. Defendant argues that because there was no evidence that defendant stole Bivens' wallet, money, and drugs, the prosecution improperly questioned defendant on these items.

> Q How about the quarter-pound of weed that you took from him.
>
> Was it your intent to give it back to him?
>
> A I wasn't thinking about other stuff. I was just thinking about my hands.
>
> Q You thought about it enough to pick it up and take it with you, didn't you?
>
> A I wasn't thinking about any of those things.
>
> . . . .
>
> Q You also stole Mr. Biven's money and wallet, didn't you?
>
> A No. I did not steal his money and wallet. The keys that I took had a strap to it. Like a little pouch you put your Social Security card inside. It was connected to his keys. I didn't intend to steal his license. It was connected to the car keys. I did take that. I wasn't thinking of taking it off or anything. I just grabbed it, and I took the car.

. . . .

Q It all got thrown away with everything else, didn't it?

A Car keys, knife, even the identification, including the money that I offered him.

Q And his wallet and his credit cards and the money you stole from him, they were all there together?

A I didn't steal his car.

. . . .

Q Now, you told the police that he gave you the marijuana and let you cut it. He was letting you cut it?

A Rolling it up.

Q You weren't cutting it and breaking it up?

A Yeah. Rolling up a little blunt. That's nothing. Just a little bit.

Q Just a little bit. How about is a quarter-pound or a quarter-ounce?

A I don't know. Maybe four ounces.

Q Can you show us in quantity how much marijuana that would be?

> A You know what an ounce is. Just four ounces. Real small. Nothing big. Nothing major.
>
> Q Do you sell four ounces at a time or cut it up and break it up into smaller portions?
>
> A At the time I wasn't breaking up anything. I was breaking up some weed to roll up. We never discussed the part of that.

> [I]t is an unquestioned truism that the cross-examination of a witness may be pursued by counsel as a matter of right so long as it relates to facts in issue or relevant facts which were the subject of his examination-in-chief. *Milling Co. v. Highway Com.*, 190 N. C., 692, 130 S. E., 724. When, however, it is sought to go beyond the scope of the examination-in-chief, for purposes of determining the interest or bias of the witness and to impeach his credibility, the method and duration of the cross-examination for these purposes rest largely in the discretion of the trial court . . . . [T]he tendency of modern decisions is to allow almost any question to be put to a witness, and to require him to answer it, unless it should subject him to a criminal prosecution.

State v. Beal, 199 N.C. 278, 298, 154 S.E. 604, 616 (1930) (internal citations omitted).

Defendant admitted in his statements that he met Bivens at a store where Bivens intended to cash a check and that he had been preparing to smoke marijuana during his argument with Bivens. The prosecutor's cross-examination properly questioned defendant on his actions on 23 February 2007 and his prior inconsistent statements.

Defendant next argues that the prosecution improperly asserted her opinion that defendant was a liar during the cross-examination

of defendant. During the direct examination of defendant, his counsel questioned him about his conversations with police at the hospital. Defendant admitted to lying to the police, and repeatedly stated that he told the officers a "sort of truth" or "almost the truth" because he was "just not good with a lie." On cross-examination, the State asked defendant:

> Q How many people on the 23rd alone did you lie to, Mr. Ferguson?
>
> A I lied to the police officers and to the ambulance people. Detective Osorio, I know I lied to him.
>
> I don't know many people it was, but I know it was officers.

Defendant relies on *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978), to support his argument that during this cross-examination, the prosecution improperly asserted that defendant was a liar. In *Locklear*, the prosecutor questioned defendant regarding a drug purchase.

> Q. Give me the names of a few that were in the pool room when you made this purchase.
>
> Sir?
>
> A. I don't know. I just know them by the nicknames.
>
> Q. Give me the nicknames, then.
>
> Sir? Give me the nicknames. Who are they?
>
> Clarence, you are lying through your teeth and you know you are playing with a perjury count; don't you?

State v. Locklear, 294 N.C. at 214-15, 241 S.E.2d at 68.

Locklear is distinguishable from this case. In *Locklear*, the court held that it was "improper for a lawyer to assert his opinion that a witness is lying." *Id.* at 217, 241 S.E.2d at 70. In the instant case, the prosecutor did not call defendant a liar or state that he was lying to the court or jury. Defendant had admitted to lying during direct examination. The prosecutor examined defendant concerning this prior testimony and questioned defendant regarding his various descriptions of the events of 23 February 2007. The prosecutor permissibly impeached defendant with his prior inconsistent statements to demonstrate to the jury defendant's tendency to be untruthful. *State v. Chapman*, 359 N.C. 328, 371, 611 S.E.2d 794, 825 (2005).

Defendant next argues that the prosecutor misleadingly indicated potential sentencing ranges during cross-examination. The prosecutor stated that:

> Q As a matter of fact, you could get as little as 38 months in jail for voluntary manslaughter.
>
> A I am not sure.
>
> Q About three years?
>
> A I'm not sure.
>
> Q Did they tell you what you could get if you were convicted of second-degree murder?
>
> A To my knowledge, it's not first degree. I am not sure of the time but, I know it's not a life sentence.
>
> Q Did they tell you it was 96 months, less than eight years?

A They didn't me [sic] the specific time. I know it's not a life sentence.

Q Isn't it true after getting a trial date and facing a charge of first-degree murder, that is when you came up with this story about Mark, isn't it?

A No.

Q Let's talk about some other thing that you never told any of the experts, other than Dr. Corbin, after you found out you were going to trial.

Defendant cites *State v. Lopez*, 363 N.C. 535, 681 S.E.2d 271 (2009) in support of his argument that the prosecutor improperly addressed possible ranges of sentences.

The issue in *Lopez* was whether a prosecutor could properly argue to the jury concerning the merger of two offenses and the effect of the jury finding an aggravating factor in the portion of the trial dealing with the aggravating factor. The trial court in *Lopez* overruled defendant's objection to this argument. 363 N.C. at 537-539, 681 S.E.2d at 272-274. The Supreme Court held that this ruling was error.

Under Structured Sentencing, before the appropriate sentence can be determined, the trial court must first determine the class of the offense, the defendant's prior record level and whether there exists any aggravating or mitigating factors. The overall sentence imposed can also be impacted by whether sentences for multiple convictions are imposed concurrently or consecutively. *See generally*, N.C. Gen. Stat. Chap. 15A, Art. 81B, Part 2 (2009). Because of these variables, "counsels' jury arguments forecasting the sentence are usually no better than educated estimates."

Lopez, 363 N.C. at 540, 681 S.E.2d at 274. The Supreme Court also held that "even a well-intentioned argument purporting to forecast a sentence under Structured Sentencing will almost invariably be misleading." *Id.* at 541, 681 S.E.2d at 275. However, the Supreme Court went on to state that:

> [C]onsistent with section 7A-97, parties may explain to a jury the reasons why it is being asked to consider aggravating factors and may discuss and illustrate the general effect that finding such factors may have, such as the fact that a finding of an aggravating factor may allow the court to impose a more severe sentence or that the court may find mitigating factors and impose a more lenient sentence.

Id. at 541-542,681 S.E.2d at 275 (citation omitted).

The Supreme Court held that although the trial court erred in overruling defendant's objection, the defendant failed to meet his "burden of establishing that, but for the error, there is a reasonable possibility that the jury would have reached a different result." *Id.* at 542, 681 S.E.2d at 276.

In the instant case, the alleged error occurred during cross-examination of the defendant, and not during a closing argument to the jury. In addition, in *Lopez*, there was an objection lodged by the defendant at trial to the argument contested on appeal; whereas in the instant case there was none. While *Lopez* is not directly applicable to the instant case, its rationale is instructive. The line of questioning employed by the prosecutor in her cross-examination of defendant is fraught with the same dangers of misleading the jury as was present with the closing argument in *Lopez*. However, as in *Lopez*, we hold that under plain error

review, defendant has not met his burden of showing that absent any error, the jury would have reached a different result.

This argument is overruled.

IX. Prosecutor's Closing Argument

In his eighth argument, defendant contends that the trial court erred in failing to intervene, *ex mero motu*, during the prosecutor's closing arguments. We disagree.

A. Standard of Review

We review the State's closing argument, which was not objected to at trial, for *ex mero motu* error under *State v. Lawson*. 194 N.C. App. at 273-74, 669 S.E.2d at 773-74.

B. Closing Arguments

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a)(2009).

Our courts recognize that "'counsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence.'" *Jones*, 355 N.C. at 128-29, 558 S.E.2d at 105 (citation omitted).

Defendant argues that the prosecutor misrepresented the evidence by stating that defendant was the aggressor who got the

knife, stabbed Bivens, and then took Bivens' keys, wallet, money, and car as he fled. Defendant assigns error to the prosecutor's remarks that:

> [h]is first story to the police about the Ray-ray killing Mark Bivens is what happened. The only difference is he was Ray-ray. In that story there was no provocation by Mark Bivens.
>
> He only told you on the stand on cross-examination he admitted that he had just flipped himself and Ray-ray.
>
> . . . .
>
> What else is very important about this Ray-ray story, mark [sic] Bivens never picked up Melvin Ferguson on February 23. He can't even tell you where he was picked up.
>
> Because he was waiting at Mr. Bivens' apartment, just like he claimed Ray-ray was.

In her closing argument, the prosecutor did not stray so far from the bounds of propriety to infringe on the defendant's right to a fair trial. The prosecutor argued a reasonable inference that defendant committed the crime in the same manner that he attributed to "Ray-ray" in his first statement. Defendant's first recorded statement narrated that a man named Ray-ray who took a knife from Bivens' kitchen, followed Bivens into his bathroom, and brutally murdered him. The prosecutor argued that Ray-ray was a fictional character created by defendant who murdered Bivens in the same manner that defendant actually did. The basis for this argument was that defendant's description of Ray-ray's clothing on 23 February 2007 was exactly what defendant had been wearing that day. The prosecutor drew a reasonable inference that defendant likely described the conduct of the fictional Ray-ray in killing

Bivens using his own conduct. *Lawson*, 194 N.C. App. at 275, 669 S.E.2d 773. The trial court did not err in failing to intervene *ex mero motu*.

Defendant next argues that it was improper for the prosecutor to call defendant a liar in the closing argument. *State v. Bunning*, 338 N.C. 483, 489, 450 S.E.2d 462, 464 (1994)(citing *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967)). In the instant case, the prosecutor did not call defendant a liar. The prosecutor merely asked the jury to conclude that defendant was lying because he had lied several times about his name and had given multiple accounts of the events surrounding Bivens' killing. *Bunning*, 338 N.C. at 489, 450 S.E.2d at 465. "This was evidence from which the prosecuting attorney could argue that the defendant had not told the truth on several occasions and the jury could find from this that he had not told the truth at his trial." *Id*.

Defendant next argues that the prosecutor's statement that "you have got [defendant] who from age six was assaulting people, bullying people. Sexually making passes at people, pulling down their pants" amounted to character assassination that prejudiced defendant.

During the direct and cross-examination of Dr. Jeanne Murrone, a psychologist called to testify by defendant, the elementary school records of defendant were discussed. They revealed that defendant had bullied other children, and had engaged in sexually inappropriate behavior towards other children, including pulling down his pants.

Counsel "are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *Jones*, 355 N.C. at 128-29, 558 S.E.2d at 105 (citation omitted). Evidence of the incidents referenced by the prosecutor in her closing argument was in fact presented at trial. We hold that this argument was not improper.

Defendant finally argues that the prosecutor's closing argument that "[i]f you are convicted of voluntary manslaughter, you can get as little as 38 months in the jail" is improper because it argues a sentencing range before one has been determined.

We agree that this argument was improper under the rationale of *State v. Lopez*, *supra*. However, defendant cannot meet his burden of proof that it was so grossly improper that it impeded the defendant's right to a fair trial.

This argument is overruled.

X. Jury Instruction on Confession

In his ninth argument, defendant contends that the trial court erred in instructing the jury how to consider defendant's confession in accordance with North Carolina Criminal Pattern Jury Instruction 104.70. We disagree.

The trial court instructed the jury that "[i]f you find from the evidence that defendant has confessed that the defendant committed the crime charged in this case, then you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight you will give to it." N.C.P.I.--Crim. 104.70 (2010).

"An instruction by the trial court stating the evidence tends to show the existence of a confession to the crime charged is not an impermissible comment invading the province of the jury and its fact-finding function." *State v. Duke,* 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005)(holding that the defendant's statement that he killed the victim was sufficient to charge the jury under N.C.P.I.--Crim. 104.70 on confession) (citation omitted), *cert. denied*, 549 U.S. 855, 166 L. Ed. 2d 96 (2006).

> The [confession] instruction should not be given in cases in which the defendant has made a statement which is only of a generally inculpatory nature. When evidence is introduced which would support a finding that the defendant in fact has made a statement admitting his guilt of the crime charged, however, the instruction is properly given.

Id. at 123-124, 623 S.E.2d at 20 (quoting *State v. Young*, 324 N.C. 489, 498, 380 S.E.2d 94, 99 (1989)).

As in *Duke*, where the defendant's admission to striking the victim multiple times with a fire extinguisher and detailing the events surrounding the killing was sufficient to warrant an instruction on confession, defendant in the instant case stated to police that he stabbed Bivens and described in detail how the altercation occurred. *Duke,* 360 N.C. at 123-124, 623 S.E.2d at 20-21. The trial court's instruction "made it clear that, although there was evidence tending to show that the defendant had confessed, the trial court left it entirely for the jury to determine whether the evidence showed that the defendant in fact had confessed." *State v. Cannon*, 341 N.C. 79, 91, 459 S.E.2d 238,

245 (1995) (quoting Young, 324 N.C. at 498, 380 S.E.2d at 99). This argument is without merit.

XI. Recommended Restitution

In his tenth argument, defendant contends that the trial court erroneously ordered him to pay $1,213.12 in restitution to Bivens' family because it was not supported by any evidence. The State does not contest this error, and we agree.

At the sentencing hearing, the State tendered to the court a Restitution Worksheet, Notice and Order on AOC form CR-611. No evidence was submitted in support of the State's request for restitution.

"'[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing.'" *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (citation and quotation omitted). The prosecutor's unsworn statements "[do] not constitute evidence and cannot support the amount of restitution recommended." *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992) (citations omitted). "[E]ven where a defendant does not 'specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18).'" *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007) (quotation omitted).

We reverse the order of restitution and the portion of the judgment pertaining thereto and remand for a new hearing on the amount of restitution.

XII. Conclusion

We hold that defendant received a fair trial, free from prejudicial error. However, this case is remanded to the trial court for a new sentencing hearing, limited to the amount of restitution.

NO PREJUDICIAL ERROR AS TO TRIAL, REMANDED FOR NEW SENTENCING HEARING ON RESTITUTION.

Judges CALABRIA and BEASLEY concur.