NO. COA12-84
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

STATE OF NORTH CAROLINA

v. Randolph County
No. 08 CRS 51730

CALEB NATHANIEL BROWN

Appeal by defendant from judgment entered 18 July 2011 by Judge Edgar B. Gregory in Randolph County Superior Court. Heard in the Court of Appeals 14 August 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for the State.

Russell J. Hollers III, for Defendant-appellant.

ERVIN, Judge.

Defendant Caleb Nathaniel Brown appeals from a judgment sentencing him to life imprisonment without the possibility of parole based upon his conviction for first degree murder. On appeal, Defendant contends that the trial court erred by denying his request for a voluntary intoxication instruction and by failing to intervene *ex mero motu* in response to allegedly improper prosecutorial arguments. After careful consideration

of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

I. Factual Background

A. Substantive Facts

On the afternoon of 18 March 2008, Jeremy Turner was at his mother's residence when Defendant came by with a bottle of "brown liquor" and started drinking it and a twelve-pack of beer that Mr. Turner had. While there, Defendant asked Mr. Turner where he could get a gun. Subsequently, Mr. Turner invited Tiffany Cooke and Kailey Lambeth to visit. At the time the two women arrived, Defendant was still drinking. A short while later, Ms. Cooke left to run an errand. When she returned, Defendant, Mr. Turner, Ms. Lambeth, and a woman named "Bubbles," who was extremely intoxicated, were there. Subsequently, Mr. Turner invited Gary Hutchins to come by.

After going by a pizza restaurant and bar, Mr. Hutchins and Sean Poly drove to Mr. Turner's house. On the way, Mr. Hutchins told Mr. Poly that he wanted to visit Mr. Turner for the purpose of buying cocaine. When Mr. Poly and Mr. Hutchins arrived at Mr. Turner's house, Defendant, Mr. Turner, Ms. Cooke, and Ms. Lambeth were present. After the two men arrived at Mr. Turner's

house, several members of the group went to the store and purchased beer.

At some point, Mr. Hutchins and Defendant had a private discussion and left to get cocaine. After obtaining what he thought was cocaine, Mr. Hutchins was ready to leave. At that point, Mr. Poly and Mr. Hutchins drove to a nearby McDonald's, where Mr. Poly stayed in the car while Mr. Hutchins went inside. When he came out of the restaurant, Mr. Hutchins was upset and said that he wanted to return to Mr. Turner's house because Defendant had sold him "fake cocaine."

After Mr. Poly and Mr. Hutchins returned to Mr. Turner's residence, Mr. Hutchins confronted Defendant about selling him "fake stuff" and demanded that Defendant either return his money or provide him with real cocaine. Defendant "started getting aggressive" and asked if Mr. Poly and Mr. Hutchins planned to "jump" him. However, Mr. Hutchins assured Defendant that he did not want to fight. After making a phone call, Defendant told Mr. Hutchins that, while he would accede to Mr. Hutchins' demand, the two of them needed to drive to a third person's house to complete the transaction.

At the time that he and Defendant returned a short time later, Mr. Hutchins seemed "scared" and "nervous," and told Mr. Turner, Ms. Cooke, and Ms. Lambeth that Defendant had tried to

rob him with a gun. Having become frightened as the result of hearing that Defendant had a gun, Ms. Cooke told Mr. Hutchins to leave and take Ms. Lambeth with him.

At about that point, Defendant got a phone call. As Defendant talked on the phone, Mr. Hutchins and Ms. Lambeth went outside "in a hurry" while Ms. Cooke blocked the front door. When Defendant noticed that Mr. Hutchins had departed, he became "very angry that they were going to leave and not take him with them." As a result, Defendant shoved Ms. Cooke out of the way and exited the house. When Mr. Poly stayed behind, Mr. Turner told him "you should go get your boy."

After Mr. Hutchins and Ms. Lambeth left the house, they entered Mr. Hutchins' car. Before the two of them could drive away, Defendant got in the back seat, asked for a ride, and then yanked Mr. Hutchins Defendant from the vehicle. At that point, Defendant threw Mr. Hutchins on the ground and began hitting him "as hard as he could." Although Mr. Hutchins made no effort to fight back or defend himself, he did undertake some self-protective measures and yelled for Defendant to stop. After Mr. Poly came outside and pulled Defendant off Mr. Hutchins, the latter got up and ran away. At that point, Defendant fired several shots and began chasing Mr. Hutchins while firing additional shots. After Defendant and Mr. Hutchins went around

the corner of the house, witnesses heard several additional gunshots and a cry from Mr. Hutchins that he had been hit. According to Mr. Turner, Defendant's gun was "pointed directly at" Mr. Hutchins' back, at which point Defendant "hit [Mr. Hutchins] straight in the back."

After being shot, Mr. Hutchins came back around the house, went inside, and collapsed. As Mr. Poly and the young women took Mr. Hutchins into a rear bathroom, Mr. Poly saw a bullet wound in Mr. Hutchins' back and called 911. At about the same time, Mr. Turner ran into the house, locked the front door, and leaned his weight into it while Defendant banged on the outside door. As Mr. Poly saw the blue lights of arriving law enforcement vehicles, the banging stopped and Defendant appeared to have gone. Mr. Hutchins died from a gunshot wound to the chest area, with the fatal projectile having entered his chest through his back.

Subsequently, Defendant called Latonia Alston, whom he was dating at the time, and said he had stolen $120.00 from "Gary," "that he had gotten into a fight," and that "he [had] shot somebody[.]" When Defendant came to her house, Ms. Alston called the police to inform them of Defendant's location. After Officer John Harris of the Asheboro Police Department located Defendant and ordered Defendant to stop, Defendant fled.

Defendant was eventually apprehended at a nearby apartment complex.

Mr. Poly testified that, although Defendant was drinking "brown liquor" during the evening, his speech, balance, and coordination were not visibly impaired. On cross-examination, Mr. Poly agreed that he had told investigating officers that Defendant was drunk when he and Mr. Hutchins arrived at Mr. Turner's house, but testified that Defendant "wasn't falling down drunk." In response to questions posed on redirect examination concerning his familiarity with varying degrees of inebriation, Mr. Poly testified that "[i]ntoxicated [is] like, really plastered, is falling down, not able to stand up, slurring words, saying things just stupid" and stated that, while Defendant was "drunk," his speech was not slurred, he had not fallen, and he ran "straight" and "had control" while chasing Mr. Hutchins.

Similarly, Ms. Cooke testified that, although Defendant had been drinking, he was not stumbling or slurring his words, which Ms. Cooke took to be symptoms exhibited by highly intoxicated people. Although Ms. Cooke acknowledged having told investigating officers that Defendant was "really drunk," she indicated that, while Defendant was intoxicated, "he was not falling down, slurring his words."

While Mr. Turner admitted on cross-examination that he had told investigating officers that Defendant had been "drinking too much" and had consumed a Xanax, he agreed on redirect examination that he had "been around people that were drunk" and stated that Defendant did not have any trouble with his balance, fall down, slur his words, or have trouble running after Mr. Hutchins on the night of the shooting. In other words, as Mr. Turner stated on recross-examination, Defendant "wasn't falling down, stumbling drunk."

Finally, Ms. Lambeth told investigating officers that Defendant was "very, very drunk." However, Ms. Lambeth testified that Defendant's speech and balance were not impaired and that, while Defendant was drunk, "he was still in control of [him]self." Although Ms. Lambeth had described Defendant in her statement to investigating officers as "really drunk," "really scary," and acting "crazy," she testified that his speech and coordination were not affected and that he "still ha[d] control" over his actions.

B. Procedural History

On 19 March 2008, a magistrate's order was issued charging Defendant with the first degree murder of Mr. Hutchins. On 23 June 2008, the Randolph County grand jury returned an indictment charging Defendant with the first degree murder of Mr. Hutchins.

The charge against Defendant came on for trial before the trial court and a jury at the 11 July 2011 criminal session of the Randolph County Superior Court. At the jury instruction conference, the trial court denied Defendant's request that the jury be instructed concerning the issue of whether Defendant's voluntary intoxication had rendered him unable to premeditate or deliberate. On 15 July 2011, the jury returned a verdict convicting Defendant of first degree murder. Based upon the jury's verdict, the trial court sentenced Defendant to life in prison without the possibility of parole. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Voluntary Intoxication

In his initial challenge to the trial court's judgment, Defendant contends that the trial court erred by failing to instruct the jury concerning the issue of whether voluntary intoxication precluded him from killing Mr. Hutchins with premeditation and deliberation. According to Defendant, the record contained "substantial evidence that [Defendant] was too drunk to form the specific intent to kill Mr. Hutchins after premeditation and deliberation" and that "there is a reasonable possibility that the jury would have returned a different verdict if given the instruction." We disagree.

"The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation."[1] *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citations omitted). "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. 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. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994) (citations omitted), *cert. denied*, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997). "Premeditation and deliberation, both processes of the mind, must generally be proven by circumstantial evidence. Circumstances which may be considered include: (1) lack of sufficient provocation by the victim; (2) defendant's conduct before and after the killing, including attempts to cover up involvement in the crime; and (3) evidence of the brutality of the crime, and the dealing of lethal blows after the victim has

[1]The only basis upon which the trial court allowed the jury to convict Defendant of first degree murder was malice, premeditation, and deliberation.

been rendered helpless." *State v. Smith*, 357 N.C. 604, 616, 588 S.E.2d 453, 461 (2003) (citation omitted), *cert. denied*, 542 U.S. 941, 124 S. Ct. 2915, 159 L. Ed. 2d 819 (2004).

"On the element of a deliberate and premeditated specific intent to kill in a first degree murder case . . . the burden of persuasion on the existence of this element remains throughout the trial on the state." *State v. Mash*, 323 N.C. 339, 345, 372 S.E.2d 532, 536 (1988).

> A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.

Id. at 346, 372 S.E.2d at 536. As a result, in order to be entitled to a voluntary intoxication instruction, "[t]he evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *State v. Medley*, 295 N.C. 75, 79, 243 S.E. 2d 374, 377 (1978) (citing *State v. Shelton*, 164 N.C. 513, 79 S.E. 888 (1913)) (other citation

omitted). For that reason, "'[e]vidence tending to show only that defendant drank some unknown quantity of alcohol over an indefinite period of time before the murder does not satisfy the defendant's burden of production.'" *State v. Long*, 354 N.C. 534, 538, 557 S.E.2d 89, 92 (2001) (quoting *State v. Geddie*, 345 N.C. 73, 95, 478 S.E.2d 146, 157 (1996), *cert. denied*, 522 U.S. 825, 118 S. Ct. 86, 139 L. Ed. 2d 43 (1997)). Thus, evidence tending to show that, on the day of the killing, the "defendant drank continuously," "shared three half-cases of beer and some liquor" and "a fifth of Jim Beam" with others, "smoked marijuana, and was 'pretty high'" did not suffice "to show that defendant was 'utterly incapable of forming a deliberate and premeditated purpose to kill.'" *State v. Hunt,* 345 N.C. 720, 727-28, 483 S.E.2d 417, 422 (1997) (quoting *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987)) (internal citation omitted).

"When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense . . ., courts must consider the evidence in the light most favorable to defendant." *Mash*, 323 N.C. at 348, 372 S.E.2d at 537). "Where the defendant's requested instruction is not supported by the evidence, the trial court may properly refuse to give it." *State v. Wright*, __ N.C. App __, __, 709 S.E.2d 471, 473 (citing

State v. Rose, 323 N.C. 455, 459, 373 S.E.2d 426, 429 (1988)), *disc. review denied*, 365 N.C. 332, 717 S.E.2d 394 (2011). On appeal, arguments "challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citing *State v. Ligon*, 332 N.C. 224, 241-42, 420 S.E.2d 136, 146-47 (1992) (other citation omitted). Thus, the ultimate issue raised by this aspect of Defendant's challenge to the trial court's judgment is the extent to which the record, when taken in the light most favorable to Defendant, contained sufficient evidence to allow a reasonable jury to find that Defendant was so intoxicated that he was incapable of forming a premeditated and deliberate intent to kill.

The evidence presented at trial, when considered in the light most favorable to Defendant, tended to show that: (1) Defendant drank beer and "brown liquor" during the day and into the evening on 18 March 2008; (2) Defendant took Xanax at some time on 18 March 2008; and (3) various witnesses described Defendant as "really drunk" or "very, very drunk." Although this evidence might support a determination that Defendant was intoxicated on the night in question, nothing contained in the record tends to show that, as a result of his intoxication, Defendant was "utterly incapable" of forming a premeditated and

deliberate attempt to kill Mr. Hutchins. As a result, the trial court had ample justification for refusing to deliver a voluntary intoxication instruction.

In seeking to persuade us to reach a different conclusion, Defendant focuses on certain inconsistencies between the statements that various witnesses gave to investigating officers and the trial testimony given by those same witnesses. Among other things, Defendant asserts that various witnesses told investigating officers that Defendant was "very drunk" or "really drunk" but described Defendant as merely "drunk" during their trial testimony. As a result, Defendant claims to have been entitled to a voluntary intoxication instruction based on these initial references to Defendant as "very drunk" coupled with other testimony to the effect that a highly intoxicated person typically exhibits impaired speech and coordination.

The fundamental problem with Defendant's argument is that each of the relevant eyewitnesses specifically testified that Defendant's consumption of alcohol did not affect his physical faculties or apparent degree of control on the night of the shooting. For example, Mr. Poly testified that, while Defendant was "drunk," he was not "falling down drunk;" that his speech was not slurred; and that he ran "straight" and "had control" while chasing Mr. Hutchins. Similarly, Ms. Cooke testified that

she was familiar with indicia of serious intoxication such as speech and coordination impairment; that, while Defendant had been drinking, he was not stumbling or slurring his words; and that Defendant "was drunk, but he was not falling down[.]" Moreover, Mr. Turner testified that Defendant did not fall down or have difficulty with his balance, did not slur his words, had no trouble running after Mr. Hutchins, and "wasn't falling down, stumbling drunk." Finally, although Ms. Lambeth described Defendant as "very, very drunk" in her statement to investigating officers, she testified that Defendant's speech and balance were not impaired and that Defendant "was still in control of [him]self." Simply put, none of the testimony contained in the present record tends to show that Defendant was so impaired that he lacked the ability to premeditate and deliberate upon the shooting of Mr. Hutchins. *Compare e.g. State v. Keitt*, 153 N.C. App. 671, 677, 571 S.E.2d 35, 39 (2002), *aff'd*, 357 N.C. 155, 579 S.E.2d 250 (2003) (holding that the trial court erred by failing to give a voluntary intoxication instruction given the presence of evidence tending to show that the defendant could not ride a bicycle or walk, could not remember leaving his companions, was barely able to stand on his own, and had trouble opening a door). As a result,

the trial court did not err by denying Defendant's request for a voluntary intoxication instruction.

B. Closing Argument

Secondly, Defendant argues that the trial court erred by failing to intervene despite the absence of an objection for the purpose of stopping the prosecutor's "grossly improper closing argument." According to Defendant, the prosecutor's comments describing Defendant and the prosecutor's decision to discuss the issue of Defendant's intoxication amounted to a "thumb[ing of] his nose at the judge," a "misstate[ment of] the law," and "a plea for general deterrence" and were sufficiently egregious to necessitate a new trial. Once again, we conclude that Defendant's argument lacks merit.

After the trial court denied Defendant's request for a voluntary intoxication instruction, Defendant asked the court for "guidance" concerning the permissible parameters of closing argument, in light of this ruling. In response, the trial court stated that:

> There was a question yesterday about . . . how . . . the arguments relate to the fact that the Court did not give the instruction on voluntary intoxication. . . . [Y]ou can argue the facts[.] . . . The defendant can argue that the defendant did not form the premeditation and deliberation necessary for first-degree murder, that the State has the burden of proof on . . . premeditation and deliberation, that

> considering all of the evidence the State's not met their burden. Anything like that is fair game, it seems to me. . . . [Y]ou can argue the facts and any conclusions flowing therefrom, but you cannot be allowed to argue the law on voluntary intoxication since I did not give that instruction. And that's all I have to say about that matter. I will rule on each objection as they come.

During his closing argument, the prosecutor reviewed the evidence in great detail, including the evidence that the prosecutor considered relevant to the issue of whether Defendant acted with premeditation and deliberation. For example, the prosecutor noted that Defendant had asked Mr. Turner where he could obtain a gun; that Defendant tried to rob Mr. Hutchins with a gun; that Mr. Hutchins was non-confrontational; that Mr. Hutchins did not either retaliate or attempt to defend himself when attacked; and that Defendant was calm after the shooting. In the course of urging the jury to find that Defendant acted with premeditation and deliberation, the prosecutor argued that Defendant was not too intoxicated to form a specific intent to kill:

> And, yeah, [Defendant was] drinking . . . [and] was intoxicated, but not enough to reach the level he needed to be . . . not guilty of this. . . . Not a single person said, "Well, hey, I saw him bumping into things." . . . Everybody said [Defendant] was in control, so you cannot in good faith use that to negate his specific intent because you know he wasn't that drunk. If we had - if intoxication was a defense, we

> would have to empty up - empty out every jail and every prison. It's not.

In addition, the prosecutor attempted to respond to arguments which he anticipated would be made on Defendant's behalf by stating that:

> And a lot of what [defense counsel] is gonna talk about is how drunk [Defendant] was. . . . [I]f somebody could plan a robbery, a specific intent crime, and they could plan a first-degree murder, a specific intent crime also. Could he plan it? Yeah, he could plan it. Did he have time to make decisions? Yeah, he had time to make decisions. That whole time with that gun in his hand when he was chasing him, he could have put it down. "What am I doing? I don't want to kill this guy." Every shot required a decision from [Defendant]. Every bullet that he put towards [Mr. Hutchins] shows premeditation. The fact that he was shot in the back while running away shows premeditation.

Moreover, the prosecutor, while comparing Defendant's level of intoxication with that of "Bubbles," argued that:

> . . . If Bubbles had been over there and . . . [shot Mr. Hutchins], that would not be a first-degree murder 'cause she would have been unable to form the intent, the premeditation. She would have been unable to do it. This man was able to premeditate. This man was able to plan. This man was able to think it through, at least to some extent, however short. . . .

In seeking relief from his conviction on the basis of this challenge to the trial court's judgment, Defendant argues that the prosecutor's argument that Defendant was capable of

premeditation despite having consumed alcohol violated the trial court's directions to counsel. In addition, Defendant contends that the prosecutor should not have referred to Defendant as "callous and cold-hearted" or argued that, "[i]f being drunk was a defense, no one would ever get convicted." We conclude that none of these un-objected to comments were sufficiently egregious to warrant a decision to grant Defendant a new trial.

"'The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.' Prosecutors generally are afforded wide latitude in closing argument. Remarks that do not draw a contemporaneous objection are viewed in context and constitute reversible error only when they have made the proceedings fundamentally unfair." *State v. Phillips*, 365 N.C. 103, 143, 711 S.E.2d 122, 150 (2011) (quoting *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (internal citation omitted) (other citations omitted)), *cert. denied*, __ U.S. __, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012). "When defendant does not object to comments made by the prosecutor during closing arguments, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his

discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (citing *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979)), *cert. denied*, 519 U.S. 890, 117 S. Ct. 229, 136 L. Ed. 2d 160 (1996). "'In deciding whether the trial court improperly failed to intervene *ex mero motu* to correct an allegedly improper argument of counsel at final argument, our review is limited to discerning whether the statements were so grossly improper that the trial judge abused his discretion in failing to intervene.'" *State v. Smith*, 347 N.C. 453, 465, 496 S.E.2d 357, 364 (quoting *State v. Holder*, 331 N.C. 462, 489, 418 S.E.2d 197, 212 (1992)), *cert. denied,* 525 U.S. 845, 119 S. Ct. 113, 142 L. Ed. 2d 91 (1998).

The undisputed evidence in the present record clearly reflects that Defendant was drinking on the night of the shooting and that the crucial issue for the jury's consideration revolved around Defendant's mental state at the time of the shooting. Understandably, the jury might treat Defendant's alcohol consumption as a factor which bore on the extent to which Defendant acted after premeditation and deliberation, regardless of the extent to which the trial court instructed the jury with respect to the defense of voluntary intoxication. In

other words, the fact that Defendant was not entitled to a jury instruction concerning voluntary intoxication on the night of the shooting did not make all comments on the relationship between his use of drugs and alcohol and his ability to premeditate impermissible. In apparent recognition of this fact, the trial court provided counsel with general guidance concerning the extent to which they were entitled to comment on any issues arising from Defendant's alcohol consumption and then stated that "that's all I have to say about that matter. I will rule on each objection as they come." In spite of this open invitation for counsel to seek assistance from the trial court in the event that they believed that an impropriety had occurred, Defendant not only failed to object to the prosecutor's argument, but also argued in his own argument that Defendant's intoxication precluded a finding that he premeditated and deliberated upon the shooting of Mr. Hutchins. For example, Defendant's trial counsel told the jury that "the appropriate choice you should make is guilty of second-degree murder" and addressed the issue of premeditation and deliberation by arguing that, although various witnesses initially told investigating officers that Defendant was highly intoxicated on the night of the shooting, they subsequently altered their opinions in a manner that tended to bolster the

State's showing on the issue of premeditation and deliberation. According to Defendant's trial counsel:

> [I]t got almost comical to see the efforts of the interested witnesses getting [Defendant] undrunk. . . . See, that doesn't fit in with first degree. We've got to show he's premeditating and deliberating, so we have to come to court and get him undrunk, and that's what they tried their best to do. . . . That was a gun in the hands of a drunk, of a man who was utterly incapable of premeditating anything, was utterly incapable of deliberating in a cool state of mind[.] . . . [Defendant], this entire night, was incapable of planning his way out of a paper bag, ladies and gentlemen. He couldn't do it. He was drunk. He was stoned. This was a terrible tragedy for which he will pay a severe price, but there was not premeditation, there was not deliberation, there was not a specific intent.

Having essentially urged the jury to refrain from convicting him based on the grounds of voluntary intoxication, Defendant has not provided us with a satisfactory explanation for why the prosecutor should not have been permitted to address the same subject or why the prosecutor's argument should be understood as involving a misstatement of applicable law. In addition, Defendant has not shown that the prosecutor's description of his actions as callous and cold-blooded rendered his trial fundamentally unfair. *State v. Harris*, 338 N.C. 211, 229-30, 449 S.E.2d 462, 472 (1994) (holding that the defendant was not entitled to relief based upon the prosecutor's description of

him as a "cold-blooded murderer" given that the defendant was on trial for a murder that the evidence showed to be calculated and unprovoked); *State v. Barfield*, 127 N.C. App. 399, 403-04, 489 S.E.2d 905, 909 (1997) (holding that the trial court did not abuse its discretion by failing to correct the prosecutor's description of the defendant as "callous"). As a result, we conclude that the challenged prosecutorial arguments, to which Defendant did not object at trial, were not so egregiously improper as to have required *ex mero motu* intervention and that Defendant is not entitled to relief from the trial court's judgment based on this claim.

III. Conclusion

Thus, for the reasons set forth above, we conclude that neither of Defendant's challenges to the trial court's judgment have merit. As a result, Defendant is not entitled to relief from the trial court's judgment on appeal.

NO ERROR.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).