IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1291

Filed: 21 August 2018

Dare County, No. 15 CRS 050302

STATE OF NORTH CAROLINA

v.

WILLIAM E. LONG

Appeal by defendant from judgment entered 10 March 2017 by Judge Walter H. Godwin, Jr. in Dare County Superior Court. Heard in the Court of Appeals 9 August 2018.

*Attorney General Joshua H. Stein, by Senior Deputy Attorney General Amar Majmundar, for the State.*

*Kimberly P. Hoppin for defendant-appellant.*

TYSON, Judge.

William E. Long ("Defendant") appeals from a jury verdict convicting him of first-degree murder. We find no error.

## I. Background

In February 2015, Duck United Methodist Church was among a group of churches participating in the "Room at the Inn Program." The Room at the Inn

Program involved several churches located in the Outer Banks area taking turns to house homeless people for one to two weeks at a time. One of the volunteers with the program was James Cotter, a member of Duck United Methodist Church.

On 26 February 2015, Duck United Methodist Church was nearing the end of its two-week schedule to provide meals and sleeping space for twelve to fourteen homeless participants. Mr. Cotter had arrived at the church every morning during the two-week period to help prepare breakfast. On the morning of 26 February, Mr. Cotter arrived at the church around 6:00 a.m. Defendant and George Provost, two homeless individuals, had been staying at the church.

At approximately 6:00 a.m., Mr. Provost was making coffee in the corner of the church kitchen. Mr. Cotter was the only other individual in the kitchen at the time. According to Mr. Cotter, Defendant entered the kitchen, walked to a drawer that contained knives, removed a long knife, took a squared stance toward Mr. Provost, and indicated that he intended to cut Mr. Provost. Defendant had been in the kitchen for only about "ten seconds" before he obtained the knife from the drawer. Mr. Cotter did not observe any instigating event that occurred between Defendant and Mr. Provost that morning.

Upon Defendant stating his intention to stab Mr. Provost, Mr. Cotter began yelling at Defendant. Mr. Cotter momentarily distracted Defendant, and Mr. Provost ran to the opposite side of a large kitchen island away from Defendant. Defendant

pursued Mr. Provost, during which Mr. Cotter repeatedly told Defendant to put the knife down. In response to Mr. Cotter, Defendant repeatedly said "I'm going to cut him, I'm going to slice him."

During this time, Mr. Provost yelled for someone to call 9-1-1. Another person, named David, who was inside the fellowship hall of the church, heard Mr. Provost and called 9-1-1.

Mr. Cotter fled the kitchen in fear for his own safety and to make sure other people were out of the building. Shortly after Mr. Cotter left, Defendant stabbed Mr. Provost three times. Upon going outside, Mr. Cotter observed emergency personnel arriving. Sergeant Jeffrey Ackerman of the Duck Police Department was the first law enforcement officer to arrive upon the scene.

While Mr. Cotter told Sergeant Ackerman what had just transpired, Defendant walked out of the church with his hands raised in the air. Sergeant Ackerman placed Defendant in handcuffs and asked him about the whereabouts of Mr. Provost. Defendant told Sergeant Ackerman and Mr. Cotter that Mr. Provost was in a restroom within the church.

Within the restroom, Sergeant Ackerman found Mr. Provost still alive, but suffering from several stab wounds. Paramedics arrived at the scene a short time later and transported Mr. Provost to the Outer Banks Hospital. Despite the efforts

of the paramedics and emergency room personnel, Mr. Provost died from his stab wounds later that morning.

Defendant had stabbed Mr. Provost three times. Two of the stab wounds were to Mr. Provost's left arm. The third stab wound extended from the side of Mr. Provost's torso into the heart, across his diaphragm, and into his stomach. Defendant was indicted for first-degree murder. At his non-capital trial, Defendant did not dispute he had stabbed and killed Mr. Provost with a knife, but asserted he was in a dissociative state stemming from post-traumatic stress disorder (PTSD) at the time of the stabbing.

In support of his PTSD defense, Defendant introduced the testimony of two expert witnesses: forensic psychiatrist Dr. George Corvin, and forensic psychologist Dr. Matthew Mendel. Dr. Corvin and Dr. Mendel offered their opinions that Defendant suffered from PTSD, and was experiencing a dissociative state when he stabbed Mr. Provost.

To rebut the expert witnesses' diagnosis of Defendant, the State presented the testimony of Dr. Mark Hazelrigg, the Director of Forensic Outpatient Evaluation Service at Central Regional Hospital in Butner, North Carolina. Dr. Corvin and Dr. Mendel recounted what Defendant had told them about his behaviors and demeanor at the time of the stabbing. Both doctors testified that Defendant had told them Mr. Provost had referred to Defendant as "big boy" on several occasions. Both doctors

testified Defendant had regarded the phrase "big boy" as a sexually-provocative prison slang term Defendant had become familiar with through prior periods of incarceration.

Dr. Corvin testified about Defendant's recollection to him of events that occurred on the morning of the stabbing. As recounted by Defendant to Dr. Corvin, during the morning of the incident, when Mr. Provost and Defendant were in the church kitchen, Mr. Provost said to Defendant, "today is the day, big boy." Defendant purportedly responded by saying something to the effect of "I'm not trying to hear that this early in the morning." Mr. Provost purportedly took a sip of coffee, put his cup down, stepped up in Defendant's face, and said something to the effect of, "[A]in't nobody going to tell me what to do, big boy," and reached out and stroked Defendant's crotch.

Defendant recounted to Dr. Corvin that he then "snapped" and only remembered "bits and pieces of what happened but mostly does not remember what immediately happened after that." Defendant knew "that he did then grab a knife from that drawer and did attack and stab Mr. Provost," but Defendant "described it in ways that are sort of consistent with prior trauma survivors and individuals with post-traumatic stress."

Dr. Mendel also testified about what Defendant had recollected to him regarding the events of the stabbing. Dr. Mendel testified Defendant described the

same interaction with Mr. Provost on the morning of the stabbing as he had related to Dr. Corvin. He testified Defendant had told him Mr. Provost referred to Defendant as "big boy," "took a big step towards his face," and grabbed Defendant's crotch. Defendant purportedly told Dr. Mendel these were the last events he recalled until after the stabbing. According to Dr. Mendel, the next thing Defendant recalled was:

> [Mr. Provost] standing at the other side of the counter holding his shirt up with blood there. [Defendant] is pointing at his side. I had the knife in my hand. He is saying, what are you doing, [Defendant], I just kept saying, you know what you did to me[.]

Dr. Mendel testified this rendition was consistent with a dissociative state. In his opinion, Defendant "was not in any sort of conscious control" at the time of the stabbing. Both Dr. Corvin and Dr. Mendel testified Defendant's actions immediately following the stabbing were consistent with remorse. At the close of the State's evidence, Defendant made a motion to dismiss based on insufficient evidence of premeditation and deliberation, and the absence of heat of passion on sudden provocation. The trial court denied Defendant's motion to dismiss.

In rebuttal to the defense's expert witnesses, the State called Dr. Hazelrigg. Dr. Hazelrigg testified, based upon his evaluation of Defendant, Defendant did not suffer from PTSD. Dr. Hazelrigg stated:

> That around that time [of the stabbing] he did not have a serious mental disorder . . . that would have prevented him from making plans or thinking through a rational sequence of events, that he was able to engage in activity with a goal

in mind, with a purpose, and complete that purpose.

The State also called Sergeant Melissa Clark as a rebuttal witness. Sergeant Clark had arrived at the church after Mr. Provost had been removed by paramedics and sat with Defendant. Sergeant Clark testified Defendant had told her, "I just did what I had to do, it was me or him." Sergeant Clark did not recollect Defendant being remorseful for the killing, but described him as "hardened" upon learning Mr. Provost had died from his wounds.

The State also introduced as rebuttal evidence an audio recording of conversations, which had taken place between police officers and Defendant, as he was being transported from the church to the police station, and a video recording of a conversation that officers had with Defendant in the interrogation room at the police station. Defendant objected to both recordings and the trial court overruled these objections. At the close of all evidence, Defendant renewed his motion to dismiss for insufficient evidence, which the trial court denied.

Following deliberation, the jury returned a verdict of guilty to first-degree murder. The trial court entered judgment on 10 March 2018 and sentenced Defendant to life imprisonment without parole. Defendant gave notice of appeal in open court.

## II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

## III. Issues

Defendant contends the trial court committed reversible error by: (1) admitting a video recording of police officers informing Defendant of his *Miranda* rights and Defendant's waiver of his *Miranda* rights; (2) denying his motion to dismiss for insufficient evidence; and, (3) not intervening *ex mero motu* to strike purportedly improper remarks made by the State during closing arguments.

## IV. Analysis

### A. *Video Recording*

At trial, the State offered State's Exhibit 40, consisting of an audio recording of conversations between police officers and Defendant within a patrol car as he was being transported from the church to the police station, and a video recording of a conversation police officers had with Defendant in the interrogation room at the police station. Defendant made objections to the State's offering of both the audio recording from the patrol car and the video recording from the police station interrogation room. The trial court overruled both objections.

On appeal, Defendant specifically, and solely, argues against the trial court's admission of the video recording over his objection. Defendant did not state the specific grounds for his objection to the video recording at trial, but referred back to

an earlier objection he had made to the State's offer of Sergeant Clark as a rebuttal witness, on the grounds of relevancy:

> THE COURT: Let the record reflect the jury has left the courtroom. I'll hear your objection.
>
> [Defense Counsel]: Thank you, Your Honor. We would object to this witness being called because the State has a right to put on rebuttal evidence but it's going to be rebuttal evidence to something we presented in our case in chief. And I don't feel that Officer Clark, Sergeant Clark's testimony is going to rebut what our doctors said on the stand. And at this point I would object [to] her being called in that capacity.

At the time the State offered the audio portion of its Exhibit 40, Defendant objected as follows:

> [Prosecutor]: Your Honor, move to introduce State's Number 40 into evidence.
>
> [Defense Counsel]: Again, just be [*sic*] based on my previous objection, Your Honor.
>
> [THE COURT] : Objection is overruled. The evidence is admitted.

When the State offered the video portion of its Exhibit 40, Defendant again renewed his objection, by stating:

> [Prosecutor]: Permission to publish the video portion.
>
> [Defense Counsel]: Same objection as before, Your Honor.
>
> THE COURT: Overruled.

On appeal, Defendant argues the trial court violated his Fifth Amendment

privilege against self-incrimination by admitting the video portion of State's Exhibit 40. On the video, a police officer reads Defendant his *Miranda* rights and Defendant invokes his right to remain silent. Defendant did not raise this constitutional issue at trial. Defendant's objection to the recordings reiterated his general objection to Sergeant Clark's rebuttal testimony on the grounds of relevancy, not for a violation of his Fifth Amendment privilege against self-incrimination.

"[C]onstitutional error will not be considered for the first time on appeal." *State v. Chapman,* 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005); *see also* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Because Defendant did not raise this constitutional issue at trial, he has failed to preserve it for appellate review and it is waived. *Chapman,* 359 N.C. at 366, 611 S.E.2d at 822. This assignment of error is dismissed.

B. *Motion to Dismiss*

Defendant also argues the trial court erred when it denied his motion to dismiss made at the close of the State's evidence and renewed at the close of all evidence. Defendant asserts the trial court should have granted his motion to dismiss for insufficient evidence.

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "The standard of review for a motion to dismiss in a criminal case is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Irons*, 189 N.C. App. 201, 204, 657 S.E.2d 733, 735 (2008) (citation and internal quotation marks omitted).

The trial court should consider the evidence in the light most favorable to the State, and "the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. Burke*, 185 N.C. App. 115, 118, 648 S.E.2d 256, 258-59 (2007) (citation and internal quotation marks omitted).

2. First-Degree Murder

Defendant was charged with first-degree murder for the death of Mr. Provost. First-degree murder "is the unlawful killing of another human being with malice and with premeditation and deliberation." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991); N.C. Gen. Stat. § 14-17(a) (2017). "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; it is sufficient if

the process of premeditation occurred at any point prior to the killing." *State v. Hunt*, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991) (citation omitted).

"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." *Id*. (citation omitted). "Evidence of the defendant's conduct and statements before and after the killing may be considered in determining whether a killing was done with premeditation and deliberation." *Id*. at 428, 410 S.E.2d at 481 (citation omitted).

"Premeditation and deliberation 'are not ordinarily subject to proof by direct evidence, but must generally be proved . . . by circumstantial evidence.'" *State v. Taylor*, 337 N.C. 597, 607, 447 S.E.2d 360, 367 (1994) (alteration in original) (quoting *State v. Williams*, 308 N.C. 47, 68-69, 301 S.E.2d 335, 349, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983)). The Supreme Court of North Carolina has ruled premeditation and deliberation may be inferred by circumstantial evidence including the following factors identified in *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991):

> (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 difficulty 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.

*Vause*, 328 N.C. at 238, 400 S.E.2d at 62. Defendant contends the State presented insufficient evidence of premeditation and deliberation or the absence of adequate provocation to negate any malice in Defendant's actions. Defendant contends the most serious offense the State's evidence supported, for which the jury could have convicted him, was voluntary manslaughter.

Viewing the evidence in the light most favorable to the State, sufficient evidence of premeditation and deliberation was presented to overcome Defendant's motion to dismiss and warrant instructing the jury on first-degree murder. *See Burke*, 185 N.C. App. at 118, 648 S.E.2d at 258-59.

At trial, the State presented the testimony of Mr. Cotter, the only witness to observe Defendant and Mr. Provost in the kitchen on the morning of the stabbing. According to Mr. Cotter, Mr. Provost was making a cup of coffee when Defendant entered the kitchen. Mr. Cotter testified he saw Defendant enter the kitchen. He saw Defendant near Mr. Provost, but "[n]othing was happening." Mr. Cotter then testified, while Mr. Provost was still getting his coffee, he saw Defendant walk over to the knife drawer, retrieve a long kitchen knife and began to pursue Mr. Provost.

According to Mr. Cotter, Defendant told Mr. Provost he was going to stab him: "He said, I'm going to cut him, I'm going to slice him, and he kept saying that. And he wouldn't back down from that." Mr. Cotter testified Mr. Provost was scared while

Defendant was threatening him with the knife and repeatedly said "call 911, call 911." *See Vause*, 328 N.C. at 238, 400 S.E.2d at 62 (holding premeditation and deliberation may be inferred from "threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased").

Despite being the only other person in the room, Mr. Cotter observed no interaction take place between Defendant and Mr. Provost prior to the attack and no instigating incident. Contrary to Defendant's version of events as recounted through Dr. Corvin and Dr. Mendel's testimonies, Mr. Cotter did not observe Mr. Provost refer to Defendant as "big boy" nor Mr. Provost grabbing Defendant's crotch. Mr. Cotter's testimony supports an inference Defendant was not provoked by Mr. Provost immediately prior to the attack. *See id.* (holding deliberation and premeditation may be inferred from "lack of provocation on the part of the deceased").

Sergeant Ackerman testified Defendant admitted that the incident arose out of "something personal." Sergeant Ackerman further testified the crime scene suggested Defendant continued to pursue Mr. Provost after he had already stabbed him, as blood was found throughout the kitchen area. Defendant stabbed Mr. Provost three separate times, which supports an inference Defendant had formed the intent to kill. *See id.* (stating premeditation and deliberation may be inferred from "the dealing of lethal blows after the deceased has been felled and rendered helpless, . . .

evidence that the killing was done in a brutal manner, and . . . the nature and number of the victim's wounds").

Defendant offered the testimony of Dr. Corvin and Dr. Mendel to contradict the State's evidence he had premeditated and deliberated the killing of Mr. Provost. Defendant's experts opined Defendant was in a dissociative state stemming from PTSD at the time he killed Mr. Provost. The State's expert, Dr. Hazelrigg, contradicted Defendant's expert witnesses, and testified Defendant did not suffer from PTSD and Defendant had expressed no remorse for killing Mr. Provost. Dr. Hazelrigg testified Defendant "did not have any symptoms of any disorder that would have prevented him from making plans or thinking through a rational sequence of events."

Viewed in the light most favorable to the State, the State presented sufficient evidence to submit the charge of first-degree murder to the jury. *See Burke*, 185 N.C. App. at 118, 648 S.E.2d at 258-59. The trial court did not err by denying Defendant's motion to dismiss. Defendant's arguments are overruled.

C. *Remarks During Closing Arguments*

Defendant also argues the trial court erred by failing to strike, *ex mero motu*, remarks made by the State during the State's closing arguments. Defendant did not object to the purportedly improper remarks, but argues it was error for the trial court not to intervene upon its own initiative.

1. Standard of Review

"'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*.'" *State v. Taylor*, 362 N.C. 514, 545, 669 S.E.2d 239, 265 (2008) (quoting *State v. McNeill*, 360 N.C. 231, 244, 624 S.E.2d 329, 338 (2006)). Our Supreme Court has held, "[u]nder this standard, '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.'" *Id.* (quoting *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001)).

"'A trial court is not required to intervene *ex mero motu* where a prosecutor makes comments during closing argument which are substantially correct shorthand summaries of the law, even if slightly slanted toward the State's perspective.'" *Id.* at 546, 669 S.E.2d at 265 (quoting *State v. Barden*, 356 N.C. 316, 366, 572 S.E.2d 108, 140 (2002)).

2. Comments at Issue

During closing arguments, the State made comments regarding the fees paid by Defendant to his expert witnesses. Defendant contends these comments

inappropriately impugned the veracity of Defendant's expert witnesses. The statements Defendant specifically takes issue with are:

> [Prosecutor]: So then the experts start coming. Mr. Routten talked about the fact that the lawyers are paid, they are professionals, and I get it . . . .
>
> I asked him about the pay because there are witnesses that testify in this case that are here and deserve being paid. And maybe it's a product of the system. If you're a doctor and your livelihood depends on other attorneys hiring you and to give a bunch of opinions like your guy is guilty as sin and I can't help you, you don't get many more clients. So it's something that-- how does it not sink into your mind at some point? And then if I give a good opinion and then I do a report and then I come testify. I hope you learn one thing that I learned a long time ago, I picked the wrong major. Because dang, $10,000? I got to go to Manteo for two days, talk to this guy, prepare a six-page report, testify for two hours and I got (sic) ten grand. I missed the boat. I'm not saying he is lying, not at all, no. Professional folks but how does it not-- it's something to consider when deciding what you believe and what you disbelieve . . . .
>
> Then you had Dr. Mendel, as I mentioned, which is shocking really that anyone would represent to you that is the most severe case they have ever seen. He spent nine hours with him over two days and never even talked of his childhood. Dr. Corvin talked to him for two and a half hours about his childhood and everything that happened to him in prison. $220 an hour, I would chat too. $110 an hour for driving, I would be driving Miss Daisy, I would do whatever I can. Money is good.

The Supreme Court of North Carolina addressed similar statements when a prosecutor referred to the defendant's expert witness as the "$15,000" man during closing arguments in *State v. Duke*, 360 N.C. 110, 127-28, 623 S.E.2d 11, 23 (2005).

The Supreme Court held the prosecutor's statements were not grossly improper, and stated:

> The prosecution's statement emphasized Dr. Hilkey's fee in the case was $15,000 and the jury should take that fact into account when determining the credibility of Dr. Hilkey and the weight it should place on his testimony. Considering the statements made by prosecutors in our prior cases that have found no gross impropriety requiring *ex mero motu* intervention by the trial court, we find the prosecution's closing argument in this case tame by those standards.

*Id*. at 130, 623 S.E.2d at 24. Similarly, the prosecutor's statements serve to highlight Defendant's expert witnesses' fees and emphasize the jury should take the expert witnesses' compensation into account when determining credibility. These comments were not improper and do not rise to the level of being so grossly improper as to warrant the trial court in intervening *ex mero motu*. *See id.*; *State v. Campbell*, 359 N.C. 644, 677, 617 S.E.2d 1, 22 (2005) ("[I]t is not improper for the prosecutor to impeach the credibility of an expert during his closing argument." (citation omitted)).

Defendant also assigns as error the failure of the trial court to intervene *ex mero motu* in the prosecution's closing argument at the following statement:

> And in spite of all the things the doctor told you about these different eyewitness accounts people that saw things, I think—it took me a while but I thought Dr. Corvin agreed, yes, there is no eyewitness account that saw what the defendant said happened as far as him touching him on the crotch. There is not one, not one. Of course they have the means and ability to have two doctors, one we know that made $10,000. So if there was a witness inside the church that saw that, they would be here. There is not one. So the

> only person that says this happened is the defendant. Period, end of sentence. *That was the point I'm trying to make with Dr. Corvin. You're basing your whole opinion on his word. The guy with the convictions for stealing. Eastern North Carolina, if you lie you will steal, if you steal, you will lie. So if you will break into somebody's house and steal property, if you're willing to rob something, do you think they're not willing to not tell the truth?* (Emphasis supplied).

Defendant contends this statement amounts to the State improperly insulting him and calling him a liar.

"A prosecutor is not permitted to insult a defendant or assert the defendant is a liar." *State v. Huey*, 370 N.C. 174, 182, 804 S.E.2d 464, 471 (2017). In *Huey*, the prosecutor "injected his own opinion that defendant was lying, stopping just short of directly calling defendant a liar, and his theme, 'innocent men don't lie,' insinuated that because defendant lied, he must be guilty." *Id.* at 182, 804 S.E.2d at 471. The Supreme Court held the prosecutor's statements were improper, but not "to be so grossly improper that they amount to prejudice[,]" because the evidence supported a permissible inference the defendant lacked credibility due to the defendant giving six inconsistent versions of events. *Id.* at 182-83, 806 S.E.2d at 471.

Here, the prosecutor's closing argument does not directly state Defendant is lying about what transpired the day he admittedly stabbed Mr. Provost. The State insinuates Defendant may not be credible because of his past criminal convictions for theft. "[A prosecutor] can argue to the jury that they should not believe a witness,

but he should not call him a liar." *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 345 (1967). While we do not condone the State's closing arguments, these comments do not rise to the level of being so grossly improper to warrant the trial court's intervention, *ex mero motu*. Our courts have rarely held that a prosecutor's statement is so grossly improper as to merit the trial court intervening to strike without an objection by the defendant. *See, e.g., State v. Gell,* 351 N.C. 192, 211, 524 S.E.2d 332, 345 *(*holding that prosecutor's reference to a witness as a "liar" was not so grossly improper to warrant trial court's intervention when witness's credibility was impeached by prior criminal convictions and jail records*), cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000); *State v. Brown*, 327 N.C. 1, 20, 394 S.E.2d 434, 445 (1990) (finding no reversible error where trial court did not intervene *ex mero motu* after prosecutor implied defendant's "alibi witnesses had motives to lie to protect him").

As our Supreme Court has stated, "the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979) (citation omitted).

The trial court did not err by failing to strike, *ex mero motu,* the comments at issue. *See State v. Frye*, 341 N.C. 470, 492, 461 S.E.2d 664, 674 (1995) (holding that trial court did not reversibly err by failing to intervene even presuming, *arguendo*,

that the prosecutor's statement during closing argument was improper), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). Defendant's arguments are overruled.

V. Conclusion

Defendant has failed to show the trial court erred by admitting the State's Exhibit 40, denying his motion to dismiss, or by failing to strike *ex mero motu* comments made in the State's closing arguments. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).