IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-674

STATE OF WEST VIRGINIA,

Respondent,

v.

JOSEPH WAYNE MASON,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the August 19, 2022, Order
Circuit Court of Berkeley County
Case No. 20-F-213

PATRICK MORRISEY
ATTORNEY GENERAL

MARY BETH NIDAY
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar No. 9092
Office of the Attorney General
1900 Kanawha Blvd. E.
State Capitol, Bldg. 6, Ste. 406
Charleston, WV 25305
Tel: (304) 558-5830
Fax: (304) 558-5833
Email: Mary.B.Niday@wvago.gov

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1. INTRODUCTION

Petitioner Joseph Wayne Mason has failed to demonstrate that he is entitled to relief as to his challenges to his convictions of First Degree Murder and Conspiracy to Commit Murder. Each of Petitioner's assignments of error fail for lack of merit. Petitioner's challenges to several of the trial court's evidentiary rulings are without merit. Moreover, Petitioner had no mandatory right to severance and the trial court properly denied Petitioner's motion as the evidence for Petitioner and Mr. Small was inextricably intertwined. For these reasons, Petitioner cannot demonstrate that he is entitled to the relief he seeks and, accordingly, his convictions should be affirmed.

II. ASSIGNMENTS OF ERROR

Petitioner, by counsel, raises five assignments of error in his Brief:

> 1. The lower court erred by allowing into evidence a social media post without sufficient authentication.
>
> 2. The lower court erred by permitting the discussion of res gestae and/or 404(b) evidence related to the Petitioner's gang and drug affiliations and his dislike of police informants.
>
> 3. The lower court erred by permitting improper hearsay testimony under the guise of a "prior consistent statement."
>
> 4. The lower court erred by failing to sever the Petitioner's trial from that of his co-defendant.
>
> 5. The effects of these errors are cumulative, and they combined to deny the Petitioner a fundamentally fair trial.

(Pet'r Br. 2.)

III. STATEMENT OF THE CASE

A. Indictment and Pretrial Proceedings.

In October 2020, a Berkeley County grand jury returned an indictment charging Petitioner and his co-defendant, Richard Dane Small, with one count of First Degree Murder for the killing of Taylor Hawkridge on June 28, 2014, and one count of Conspiracy to Commit Murder. (App. 22.)

1. Motion for Separate Trial.

Petitioner moved for a separate trial, arguing that West Virginia Code § 62-3-8 created a statutory right for a separate trial for persons charged with a felony offense. (App. 24–25.) Petitioner further argued that pursuant to Rule 14(b) of the West Virginia Rules of Criminal Procedure, the trial court was required to grant a separate trial upon his request. (App 24.) Petitioner did not state any reasons for his request for a separate trial. In response, the State noted that Petitioner referenced the pre-2006 version of Rule 14(b) and that the modified rule requires "an actual showing of prejudice on the part of the Defendant." (App. 26.) The State argued the motion should be denied because Petitioner moved to sever as a matter of right and not based on a showing of actual prejudice. (App. 28.)

At a hearing on Petitioner's motion, counsel for Petitioner argued that Petitioner was concerned his association at the same table at trial with Mr. Small, who committed "fairly heinous" acts, would lead the jury to conclude Petitioner committed the same acts. (App. 586.) Moreover, Mr. Small had requested another continuance due to attorney issues and Petitioner wanted to proceed "to trial now." (App. 587.) The State argued that Petitioner's concerns could be cured by a jury instruction that the jury consider their level of culpability separately. (App. 587.) Furthermore, the State asserted that Petitioner's arguments failed to rise to the level of actual prejudice. (App. 587–88.) The State was unaware of any evidence that it planned to introduce

against Mr. Small that would not also be admitted against Petitioner. (App. 585–86.) The trial court denied Petitioner's motion, finding Petitioner failed to "demonstrate[ ] sufficient prejudice to warrant a severance of his case from Mr. Small's at this time." (App. 30.) If Petitioner "were able to show some particular piece of evidence that would be inadmissible against him, but admissible against Mr. Small," the trial court advised it "may reconsider this decision." (App. 30.)

2. Motion in Limine.

The State filed its notice of intent to admit "other acts" evidence that was intrinsic to the crimes charged or, alternatively, that was admissible under Rule 404(b) of the West Virginia Rules of Evidence. (App. 35–38.) First, the State sought to introduce intrinsic evidence that Petitioner was a drug dealer in the area during the relevant period in 2014. (App. 35–36.) Alternatively, the evidence was admissible under Rule 404(b) to explain Petitioner's motive for the murder. (App. 36.) Second, the State sought to introduce intrinsic evidence that Petitioner was affiliated with the Crips gang as an active and vocal member. (App. 36.) This evidence was intrinsic to the State's case because "[t]he culture of the Crips gang creates an environment that deplores any cooperation with law enforcement for any reason." (App. 36.) Alternatively, the evidence was probative of Petitioner's motive for the murder and was admissible under Rule 404(b). (App. 37.) Finally, the State sought to introduce intrinsic evidence of Petitioner's hatred of informants and other individuals who cooperate with law enforcement officers. (App. 37.) Coinciding with Petitioner's gang affiliation, this evidence showed that Petitioner "exhibits both rage and disgust toward informants and believes that they should die." (App. 37.) Alternatively, the evidence was admissible under Rule 404(b) as probative of motive. (App. 37.)

In response to the State's notice, Petitioner filed a motion in limine seeking to prohibit the State's introduction of "a screenshot from an internet site, Instagram, posted on the profile listed

as 'craccloc141,' depicting a photo of a firearm on an individual's lap." (App. 32–34.) Petitioner argued that the screenshot was inadmissible because there was no foundation or proof established that Petitioner was the individual who actually took the photo, possessed the original photo, posted the photo, or drafted the caption for the photo. (App. 33.)

In response, the State described how the photo was of a .45 caliber Para Ordnance LDA pistol posted on the public profile belonging to user "Craccloc141." (App. 39.) The State explained that this firearm was the same make and model of the murder weapon retrieved by the West Virginia State Police. (App. 39.) The State asserted that it would demonstrate Petitioner's Instagram account was under the user name Craccloc141, which combines "his street name 'Cracs' with 'loc' which stands for 'love of Crips.'" (App. 40.) The account contained multiple images of Petitioner alone or with friends. (App. 40.) All together, a number of characteristics on the post that made it clear the post was attributable to Petitioner, including his user name, pictures, and the fact he is widely known as Cracs. (App. 42.)

Following a hearing at which the State presented the testimony of Sergeant Jonathan Bowman of the West Virginia State Police, the investigating officer in this mater, the trial court found that "evidence of [Petitioner's] drug sales, Crip gang affiliation, and hatred of informants are intrinsic to the presentation of the State's case." (App. 82–83.) The court further found that "to the extent that evidence is not intrinsic, it is admissible for purposes of motive and identity under Rule 404(b) of the West Virginia Rules of Evidence." (App. 83.)

B. Trial and Sentencing.

Following a jury trial, Petitioner was convicted of First Degree Murder and Conspiracy to Commit Murder, together with his co-defendant, Mr. Small.[1] (App. 517.) The trial court sentenced Petitioner to life without mercy for First Degree Murder and to a consecutive indeterminate term of imprisonment of not less than one year nor more than five years for Conspiracy to Commit Murder. (App. 527–28.)

It is from this judgment Petitioner appeals.

IV. SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's order as Petitioner has failed to demonstrate the existence of reversible error.

First, the trial court correctly admitted evidence of Petitioner's social media post on his public Instagram account. The State used several pieces of circumstantial evidence to establish that Petitioner posted the picture to his Instagram account. That evidence, which was then combined with contextual clues from the posts and Ms. Powell's knowledge of the content they depicted, provide enough authentication that this post came from Petitioner. The trial court's judgment should be affirmed.

The trial court also correctly admitted evidence of Petitioner's gang and drug affiliations and his dislike of informants as intrinsic or res gestae evidence. This evidence was probative of Petitioner's motive to have Ms. Hawkridge killed and, thus, was inextricably intertwined and provided context to the crimes charged. This information was necessary for the State to provide a full presentation of the events to the jury. Alternatively, the evidence was properly admitted as

[1] Mr. Small's direct appeal has been fully briefed and remains pending in this Court in Case Number 22-706.

Rule 404(b) evidence to demonstrate Petitioner's identity of his Instagram account and to establish his motive in killing Ms. Hawkridge.

Third, the trial court properly admitted Ms. Linton's testimony because it was not hearsay testimony. Ms. Linton's testimony was offered, in part, to confirm Ms. Powell's statements that she drove the vehicle and Mr. Small shot and killed Ms. Hawkridge. To the extent Ms. Linton's testimony was inconsistent with Ms. Powell's testimony, her testimony was properly admitted under Rule 613 of the West Virginia Rules of Evidence to impeach the State's own witness who had given multiple differing stories of the events the night Ms. Hawkridge was murdered.

Next, the trial court properly denied Petitioner's motion to sever because Petitioner had no mandatory right to sever. Moreover, because the evidence related to both defendants was inextricably intertwined, it was in the best interest of justice to try Petitioner and Mr. Small together to ensure the jury was fully informed of the facts.

Finally, Petitioner has failed to demonstrate any error, let alone cumulative error requiring reversal.

Respondent, therefore, requests that this Court affirm the August 19, 2022 Order of the Circuit Court of Berkeley County.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary and this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W.Va. R. App. P. 18(a)(3) and (4).

VI. ARGUMENT

A. The trial court did not err by allowing into evidence a social media post when the State provided sufficient authentication.

1. Standard of Review

"A trial court's ruling on authenticity of evidence under Rule 901(a) of the West Virginia Rules of Evidence will not be disturbed on appeal unless there has been an abuse of discretion." Syl. Pt. 1, *State v. Benny W.*, 242 W. Va. 618, 837 S.E.2d 679 (2019) (quoting Syl. Pt. 12, *State v. Boyd*, 238 W. Va. 420, 796 S.E.2d 207 (2017).

2. The trial court did not err in finding Petitioner's social media post was authenticated.

Petitioner first argues that the trial court erred in allowing into evidence a social media post without sufficient authentication. (Pet'r Br. 8.)

West Virginia Rule of Evidence 901(a) provides that, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." "[T]he standard of admissibility under Rule 901(a) is rather slight, i.e., is the evidence sufficient 'to support a finding' that the object is authentic." *State v. Boyd*, 238 W.Va. 420, 443, 796 S.E.2d 207, 230 (2017) (citation omitted). "[T]he trial judge is required only to find that a reasonable juror could find in favor of authenticity or identification before the evidence is admitted." Syl Pt. 1, *State v. Jenkins*, 195 W.Va. 620, 466 S.E.2d 471 (1995).

Social media messages and posts in particular may be authenticated under Rule 901(a) in numerous ways, "for example, . . . through circumstantial evidence showing distinctive characteristics that link the sender to the text messages." *Benny W.*, 242 W.Va. at __, 837 S.E.2d at 681. In *Benny W.*, for example, the defendant engaged in Facebook Messenger text messaging

with his daughter, who authenticated the messages at trial based upon (1) her recognition of the messages she sent, (2) her memory of the messages he sent, and (3) a note at the top of the messages indicating that she was talking with her dad. *Id.* at 625–26, 837 S.E.2d at 686–87. Likewise, in *State v. Palmer*, No. 14-0862, 2016 WL 3176472 (W.Va. Supreme Court, June 3, 2016) (memorandum decision) (cited in *Benny W.*), the defendant challenged the admission of an email containing a reference to a Facebook post and comments to the post. *Id.*, 2016 WL 3176472, at *4. A witness authenticated the post based upon a conversation with the defendant on Facebook, "the manner of speech used in the post, the Facebook profile of [the] defendant, and the fact that the content of the post was something only the witness and defendant had knowledge of." *Benny W.*, 242 W.Va. at 625–26, 837 S.E.2d at 686–87 (summarizing *Palmer*, 2016 WL 3176472, at *5).

The social media post on Petitioner's Instagram was properly authenticated pursuant to Rule 901. Just as *Benny W.* and *Palmer* anticipate, the State used several pieces of circumstantial evidence to establish that Petitioner posted the picture. Ms. Powell testified that she was familiar with Petitioner having an Instagram account with the username of "Craccloc141." (App. 1327.) She also testified that Petitioner's nickname was known as "Craccs." (App. 1327.) Moreover, the State possessed evidence that Ms. Powell listed Petitioner in her phone by the names of "Cracc," "Craccloc141," "Craccloc 141," and "Cracks," all with various emojis following his name. (App. 42.) Ms. Powell further testified about her knowledge of the gun that appeared in the photo—confirming the specific post's tie to Petitioner himself. In response, Petitioner can only muster inappropriate attacks on Ms. Powell's credibility. (Pet'r Br. 13.) Meanwhile, Sgt. Bowman also testified to Petitioner having a public Instagram account containing many pictures of himself in clothing related to the Crips gang. (App. 1141.) He took photos of screenshots of photos of Petitioner holding a firearm that was the same make and model as the one used to kill Ms.

Hawkridge. (App. 1142–43.) The photos depicted Petitioner's username, and Sgt. Bowman personally observed the picture on his page. (App. 1141–43.) *See, e.g., State v. Groves*, 323 So. 3d 957, 976 (La. Ct. App. 2021) (finding that information provided by investigating officer sufficiently authenticated Instagram post). Given the slight standard for authentication and the particular characteristics associated with the Instagram photo, the State properly authenticated the post.

Petitioner mistakenly believes that the State was required to introduce direct evidence that Petitioner took the picture of himself holding the pistol used to kill Ms. Hawkridge; he insists it "is not important at all" that the photo was obtained from Petitioner's particular social media account. (Pet'r Br. 13.) He cites no authority for that proposition because he believes the trial court's position is an "absurd submission." (Pet'r Br. 14.) Yet the Court has never required that the State provide direct evidence of authorship—circumstantial evidence will do. And the evidence that a particular party controls the account from which a post or message is sent *is* relevant information for authentication. *Cf. Hasan v. W.Va. Bd. of Med.*, 242 W.Va. 283, 295 835 S.E.2d 147, 159 (2019) (finding that fact that text messages were sent from numbers matching phone numbers belonging to the relevant parties was additional evidence relevant to authentication); *see also, e.g., People v. Lee*, 296 Cal. Rptr. 3d 499, 503 (Cal. Ct. App. 2022) (finding that Instagram post was sufficiently authenticated where, among other things, the password-protected account was associated with the defendant's name and email); *Commonwealth v. Castro*, 169 N.E.3d 524, 532 (Mass. App. Ct. 2021) (finding that unique features of Instagram account, including name, helped authenticate that the defendant had sent Instagram messages). That evidence, which was then combined with contextual clues from the posts and Ms. Powell's knowledge of the content they depicted, provide enough authentication that this post came from Petitioner.

The trial court did not err in finding that the Instagram photo was sufficiently authenticated, and its use provides no reason to reverse.

B. The trial court properly admitted evidence of Petitioner's gang and drug affiliation and hatred for informants in the first instance as intrinsic evidence as it was inextricably intertwined to and provided context of the charges against Petitioner. Alternatively, the evidence was properly admitted as Rule 404(b) evidence to show Petitioner's identity and motive in killing Ms. Hawkridge.

1. Standard of Review

"'A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.' Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998)." Syl. Pt. 5, *State v. Gibbs*, 238 W. Va. 646, 797 S.E.2d 623, 625 (2017) (quoting Syl. Pt. 1, *State v. Timothy C.*, 237 W.Va. 435, 787 S.E.2d 888 (2016)).

2. Analysis

In his second assignment of error, Petitioner alleges that the trial court erred in permitting evidence of Petitioner's gang and drug affiliations and his dislike of police informants as intrinsic or res gestae evidence. (Pet'r Br. 14–20.)

a. Intrinsic or Res Gestae Evidence.

Rule 404(b) provides that "[e]vidence 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." Such evidence, however, may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." W.Va. R. Evid. 404(b). Before the trial court may address whether Rule 404(b) applies, it must first determine "if the 'other bad acts' were intrinsic evidence or extrinsic evidence." *State v. Harris*, 230 W.Va. 717, 721, 742 S.E.2d 133, 137 (2013). If the evidence is admissible as intrinsic evidence it is not governed by Rule 404(b). *Id.* at 722, 742 S.E.2d at 138.

"'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." *Id.* at 721, 742 S.E.2d at 137 (citation omitted). In other words the other acts "are part of a 'single criminal episode' or the other acts were necessary preliminaries to the crime charged." *State v. McKinley*, 234 W.Va. 143, 155, 764 S.E.2d 303, 315 (2014) (citation omitted). "Events, declarations and circumstances which are near in time, causally connected with, and illustrative of transactions being investigated are generally considered *res gestae* and admissible at trial." *State v. Tewalt*, 243 W. Va. 660, 670, 849 S.E.2d 907, 917 (2020).

The other-acts evidence here was intrinsic to the charged crimes. In this case, Petitioner was charged with murder and conspiracy to commit murder. (App. 22–23.) The State's theory of the case was that Petitioner was a drug dealer in the community during the relevant time surrounding the murder of Ms. Hawkridge. (App. 1700–02.) *See State v. Vincent*, No. 21-0656, 2022 WL 17444782, at *2 (W.Va. Supreme Court, Dec. 6, 2022) (memorandum decision) (finding that evidence of the defendant's gang affiliation was intrinsic to murder charge). Shortly before she was killed, Ms. Hawkridge had become a confidential informant and it was believed she had snitched on Petitioner or was about to snitch on him. (App. 1141, 1197–98.) Given his dislike of police informants and the possibility that Ms. Hawkridge would dampen his career as a drug dealer, Petitioner wanted her killed. (App. 1197–98.) Moreover, the culture of the Crips gang creates an environment that abhors cooperation with law enforcement. (App. 1141.) Thus, the facts in time were contemporaneous with the charged crime, and they formed essential parts of the criminal episode that eventually led to Ms. Hawkridge's death. In other words, the evidence of Petitioner's gang and drug affiliations and dislike of informants was probative of Petitioner's motive to have

Ms. Hawkridge killed and is inextricably intertwined and provide context to the crimes charged. Without that information, the State would not have been able to offer a "full presentation" of the events the jury was asked to judge. *State v. Cyrus*, 222 W.Va. 214, 218, 664 S.E.2d 99, 103 (2008). The other act evidence, thus, is admissible as intrinsic or res gestae evidence

b. Rule 404(b).

Should this Court find that the evidence was not intrinsic, it remains admissible under Rule 404(b) as extrinsic evidence. Extrinsic evidence is governed by Rule 404(b) "because it 'is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense.'" *McKinley*, 234 W.Va. at 156, 764 S.E.2d at 316. The State argued below that the evidence was admissible in the alternative under Rule 404(b) to show motive and intent.

This Court has stated that the purpose of Rule 404(b) of the West Virginia Rules of Evidence is to

> prevent the conviction of an accused for one crime by the use of evidence that he has committed other crimes, and to preclude the inference that because he had committed other crimes previously, he was more liable to commit the crime for which he is presently indicted and being tried.

State v. McDaniel, 211 W.Va. 9, 12, 560 S.E.2d 484, 487 (2001) (quoting *State v. Thomas*, 157 W.Va. 640, 654, 203 S.E.2d 445, 455 (1974)). In other words, Rule 404(b) exists to prevent the State from improperly arguing to a jury that because a particular defendant engaged in some criminal conduct or other similar act in the past, that he or she is more likely to commit the crime for which he or she is charged. The admission of crimes, wrongs, or other bad acts, however, is admissible if offered to prove something other than a defendant's propensity to commit a particular crime, such as the defendant's motive, intent, opportunity, identity, or any other number of factors. W.Va. R. Evid. 404(b)(2).

"In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence, in this case the prosecution, maximizing its probative value and minimizing its prejudicial effect." *State v. McGinnis*, 193 W.Va. 147, 159, 455 S.E.2d 516, 528 (1994). Under Rule 404(b), "it is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a particular purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record Rule 404(b) determination that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction." Syl. Pt. 3, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

Petitioner challenges the admission of the evidence under Rule 404(b) for relevancy and to the extent that it was offered for a particular purpose, namely that of motive and identity. This Court has defined motive as "supply[ing] the reason that nudges the will and prods the mind to indulge the criminal intent." *Miller*, 184 W.Va. at 499, 401 S.E.2d at 244. "Evidence of other crimes is admitted to show that defendant has a reason for having the requisite state of mind to do the act charged, and from this mental state it is inferred that he did commit the act." *Id.*

i. Gang Affiliation.

Addressing first Petitioner's gang affiliation, such evidence was necessary and relevant for two reasons. First, Petitioner's gang affiliation was instrumental in proving his identity with respect to his Instagram posts and username. Petitioner's Instagram username was "Çraccloc141." (App. 640–41.) Sgt. Bowman testified that Petitioner's nickname is "Cracc" and that "loc" stands for "love of Crips." (App. 641.) Drawing inferences from references in social-media usernames this way is a common and acceptable approach. *See, e.g., In re D.D.C.*, No. 13-22-00239-CV, 2022 WL 11429990, at *11 (Tex. Ct. App. Oct. 20, 2022) (citing social media username "CMP

[D.D.C.]" as evidence that juvenile was associated with Closed Mouth Playas gang); *State v. Tomlinson*, 340 Conn. 533, 562 (2021) (reference in "Snapchat username" linked the defendant to a gang). Although Petitioner insists that references in internet usernames can mean many things, a jury was entitled to consider that evidence and make the call on its own. Second, the gang affiliation further evidences Petitioner's motive to harm confidential informants, as the culture of the Crips gang fosters an environment that deplores any cooperation with law enforcement for any reason. (App. 36.) *See, e.g., People v. Jones*, No. A126023, 2012 WL 1028438, at *6 (Cal. Ct. App. Mar. 27, 2012) ("[T]he evidence that appellant was a member of [a gang] and the [gang's] attitude toward snitches tended to establish appellant's motive for attacking and stabbing [the victim], whom he perceived to be a [gang] snitch."); *United States v. Frank*, 336 F. App'x 581, 584 (8th Cir. 2009) (finding that gang evidence was relevant to establishing the defendant's view of "snitches" and motive to kill). The State sought to introduce testimony and documentary evidence such as Petitioner's Instagram posts depicting him as a Crip member. (App. 664.)

ii. Drug Dealer.

Next, the State sought to introduce evidence that Petitioner was a known drug dealer in the area surrounding the time of the murder to prove motive. The jury needed to understand that Petitioner, as a drug dealer, was angered and bothered about Ms. Hawkridge working with the Violent Crimes Task Force because that threatened his livelihood and liberty. (App. 663.) The State sought to introduce evidence in the form of text messages where Ms. Hawkridge attempted to purchase narcotics from Petitioner during the relevant period. (App. 46.) *See, e.g., State v. Nelson*, 791 N.W.2d 414, 425–26 (Iowa 2010) ("[T]he evidence of drug dealing is relevant to motive because a drug dealer would be more inclined to shoot an individual seeking to purchase crack if they believed the person was an undercover narcotics officer."). The State also possessed

a picture from Petitioner's Instagram account depicting cash spread across his lap, parallel to a Gucci belt, captioned "This ain't tax money." (App. 46.)

iii. Hatred of Confidential Informants.

Finally, the State sought to introduce evidence that Petitioner had a strong hatred of informants based on his status as a Crip gang member and a drug dealer. (App. 665.) The State sought to introduce testimonial and documentary evidence, including posts to Petitioner's Instagram account of news articles identifying someone as a "rat." (App. 665.) Throughout the comment section of his post, arguments continued where Petitioner told others commenting that he would punish people who talked to police and for being a snitch. (App. 665.) Here again, this evidence established Petitioner's motive to kill Ms. Hawkridge, who he believed to be working with police.

All together the facts of this case are similar to those set forth in *Miller*, wherein the State sought to introduce evidence that the murder victim had reported her boyfriend, the defendant, to law enforcement for dealing drugs. 184 W.Va. at 499, 401 S.E.2d at 244. The *Miller* Court concluded that "the probative value of the evidence was significant in that the victim reporting the appellant to law enforcement officials for his drug dealing clearly demonstrated a motive for her murder." *Id.* The same holds true in the instant case. The evidence is probative of Petitioner knowing Ms. Hawkridge was speaking to the authorities, which jeopardized his livelihood and liberty. His affiliation with the Crips bred a culture of hate for such informants. The evidence relating to Petitioner's motive and identity was properly admitted in the first instance as intrinsic but in the alternative as extrinsic evidence properly admitted under Rule 404(b) for a specific purpose. Petitioner's conviction should be affirmed.

C. The trial court did not abuse its discretion in allowing Ms. Linton's testimony as her testimony was not entirely inconsistent and was offered to confirm some of Ms. Powell's statements. To the extent Ms. Linton's testimony was inconsistent with Ms. Powell's testimony, it was properly admitted under Rule 613 as impeachment evidence.

1. Standard of Review

"'A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.' Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998)." Syl. Pt. 5, *State v. Gibbs*, 238 W. Va. 646, 797 S.E.2d 623, 625 (2017) (quoting Syl. Pt. 1, *State v. Timothy C.*, 237 W.Va. 435, 787 S.E.2d 888 (2016)).

2. Analysis

Petitioner argues that the trial court erred by allowing "improper hearsay testimony under the guise of a 'prior inconsistent statement.'" (Pet'r Br. 20–22.) Petitioner contends that the hearsay occurred when the State questioned Ms. Linton about her conversations with Ms. Powell related to the night of the murder and her role in the murder. (Pet'r Br. 20–21.) The lower court allowed Ms. Linton's testimony, finding that it was an issue for the jury. (Pet'r Br. 21.)

At trial, Ms. Powell testified that she discussed Ms. Hawkridge's murder with a friend of hers, Tiffany Linton. (App. 1396.) Ms. Powell recalled telling Ms. Linton that Mr. Small shot Ms. Hawkridge and that she drove the vehicle. (App. 1396–97.) During her testimony at trial, Ms. Powell said she never told Ms. Linton that she was supposed to pull the trigger but backed out at the last second, that Ms. Hawkridge was killed because she stole money from Petitioner to go to Las Vegas, that she was with Petitioner and Mr. Small at Vixen's on the night of the murder, or that she followed Ms. Hawkridge home that night. (App. 1397.)

Prior to the State calling Ms. Linton to the stand, Petitioner objected to Ms. Linton being offered "to corroborate a statement that Ms. Powell had prior given to her [Ms. Linton]." (App.

1435.) The trial court noted that Petitioner's cross-examination of Ms. Linton would be the place for him to address any inconsistency between Ms. Linton's testimony and Ms. Powell. (App. 1435.) The court concluded that it knew of no other simpler way to determine whether the statement is consistent or not "than simply lay it out in front of the jury and count on their good judgment to determine when they have been told something that's materially different over two different occasions." (App. 1436.)

The State subsequently called Ms. Linton to the stand who testified that she talked to Ms. Powell about the murder. (App. 1440.) Ms. Powell told her that law enforcement had impounded her car to be searched and she was worried about them "finding stuff out about her and [Ms. Hawkridge]." (App. 1440.) The State then asked Ms. Linton what Ms. Powell had told her, and Petitioner again objected as the question sought hearsay. (App. 1440–41.) The State responded that Ms. Linton's statement "is either consistent or inconsistent prior statement of [Ms. Powell]" and that certain aspects of Ms. Linton's testimony will confirm Ms. Powell's testimony. (App. 1441.) For that purpose, the trial court admitted the statement with a limiting instruction to the jury. (App. 1441.)

Ms. Linton then testified that during the summer of 2014, Ms. Powell told her that she, Petitioner, and Mr. Small were at the club where Ms. Hawkridge worked as a dancer, and that Petitioner told her and Mr. Small "to leave the club . . . to go kill [Ms. Hawkridge], because he thought that she was setting him up. Or that she had stole from him." (App. 1442.) When Ms. Powell and Mr. Small arrived at Ms. Hawkridge's house, Ms. Powell "couldn't pull the trigger, so she had rich do it." (App. 1442.)

Ms, Linton subsequently met Mr. Small through Ms. Powell when they exchanged vehicles—trading his rental Charger for her black Charge. (App. 1442–43.) Eventually, Mr. Small

and Ms. Linton formed a romantic relationship. (App. 1443.) Relating to the night of the murder, Mr. Small told Ms. Linton "he did what had to be done that night" and that "he did what [Ms. Powell] couldn't do." (App. 1443.) Ms. Linton testified that "[i]t was no secret that" Ms. Powell "was supposed to do it [shoot Ms. Hawkridge] because she got her Crip tattoo on her right arm." (App. 1443.)

On cross-examination, Ms. Linton was asked if it would surprise her that her testimony is inconsistent with Ms. Powell's testimony to which she responded, "That's what she told me." (App. 1457.)

Rule 801(c) defines hearsay as a statement that the declarant did not make while testifying that is offered by a party "to prove the truth of the matter asserted in the statement." W.Va. R. Evid. 801(c)(1), (2). This Court has long held:

> Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules.

State v. Richardson, No. 18-0342, 2019 WL 4257084, at *4 (W.Va. Supreme Court, Sept. 9, 2019) (memorandum decision) (quoting Syl. Pt. 1, *State v. Maynard*, 183 W. Va. 1, 393 S.E.2d 221 (1990).

Petitioner argues that Ms. Linton's statements were "completely inconsistent with what Ms. Powell testified to at trial and should not have been admitted." (Pet'r Br. 22.) Ms. Linton's statements, however, are not excluded as hearsay because the statements were offered in part to confirm Ms. Powell's testimony—that Mr. Small shot Ms Hawkridge and Ms. Powell drove the vehicle—which they did.

To the extent Ms. Linton's testimony was inconsistent with Ms. Powell's testimony, "[a] witness can be impeached by statements made by [her] out of court only when such statements are contradictory to [her] testimony. If there is no substantial variance between such statements and [her] testimony, statements cannot be introduced for purposes of impeachment." *State v. Adkins*, 2021 WL 4935746, at *5 (W.Va. Supreme Court Oct. 13, 2021) (memorandum decision). Rule 613 of the West Virginia Rules of Evidence provides that "[e]xtrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it."

To the extent that Ms. Linton's testimony differed from that of Ms. Powell's her testimony constituted extrinsic evidence offered by the State to impeach their own witness who had given multiple differing stories of the events the night Ms. Hawkridge was killed. As such evidence is properly admissible under the West Virginia Rules of Evidence, the trial court did not commit reversible error and Petitioner's conviction must be affirmed.

D. The trial court did not abuse its discretion in denying Petitioner's motion to sever because he had no mandatory right to sever and it was in the best interest of justice to try Petitioner and Mr. Small together given the evidence was the same for both defendants.

1. Standard of Review

"This Court will not reverse a denial of a motion to sever properly joined defendants unless the [petitioner] demonstrates an abuse of discretion resulting in clear prejudice." Syl. Pt. 2, *State v. Gibbs*, 238 W.Va. 646, 797 S.E.2d 623 (2017) (quoting Syl. Pt. 3, *State v. Boyd*, 238 W.Va. 420, 796 S.E.2d 207 (2017)).

2. Analysis

Petitioner asserts that the trial court abused its discretion in denying his motion to sever because he was prejudiced by the statements of his co-defendant, Mr. Small, that were made during

police interrogations. (Pet'r Br. 23–24.) Petitioner further asserts that the judicially created discretionary standard of separate trials provided by Rule 14(b) of the West Virginia Rules of Criminal Procedure violates the mandate for such provided in West Virginia Code § 62-3-8 in violation of the due process clause of the State and Federal Constitutions. (Pet'r Br. 22–23.) Petitioner's claims do not possess any merit and Petitioner has failed to demonstrate that he is entitled to relief.

Prior to the adoption of Rule 14 of the West Virginia Rules of Criminal Procedure, this Court held "that a court does not have jurisdiction in a criminal case to try jointly those defendants who choose to be tried separately." *State ex rel. Whitman v. Fox*, 160 W.Va. 633, 646, 236 S.E.2d 565, 573 (1977). The Court's holding was premised upon West Virginia Code § 62-3-8, enacted in 1923, that provides: "If persons jointly indicted elect to be, or are, tried separately, the [jury] panel in the case of each shall be made up as provided in the third section of this article." Syl. Pt. 2, *Whitman*, 160 W.Va. 633, 236 S.E.2d 565. But in 2006, the current version of Rule 14(b) of the West Virginia Rules of Criminal Procedure was adopted providing, "[i]f the joinder of defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the State, the Court ***may*** sever the defendants' trials, or provide whatever other relief that justice requires." (emphasis added). Generally, this Court "should grant a severance under Rule 14(b) of the West Virginia Rules of Criminal Procedure *only* if there is a serious risk that a joint trial would compromise a specific right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence." Syl. Pt. 5, *Boyd*, 238 W.Va. 420, 796 S.E.2d 207 (emphasis added).

The narrow exceptions to the severance requirement were implemented "to prevent inconsistent verdicts and to conserve judicial and prosecutorial resources." *Boyd*, 238 W.Va. at

432, 796 S.E.2d at 219 (quoting *United States v. DeCologero*, 530 F.3d 36, 52 (1st Cir. 2008)). More importantly, "[w]hen defendants are properly joined, there is a strong presumption for their joint trial, as it gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome." *Id.* (quoting *United States v. Lewis*, 557 F.3d 601, 609 (8th Cir. 2009)). "This presumption can only be overcome if the prejudice is severe or compelling." *Id.*; *see also Zafiro v. United States*, 506 U.S. 534 (1993) (finding that "[w]hen the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but as we indicated . . ., less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice."). "A defendant bears a heavy burden in gaining severance, and must pinpoint clear and substantial prejudice resulting in an[ ] unfair trial." *Boyd*, 238 W.Va. at 431, 796 S.E.2d at 218.

Petitioner does not dispute that he and his co-defendant were properly joined in a single indictment. Consequently, the "general rule" applies, which requires that defendants "indicted together are tried together," unless there exists some "severe or compelling" prejudice that results therefrom. *Boyd*, 238 W.Va. at 432, 769 S.E.2d at 219. Petitioner argues that he was prejudiced by the statements Mr. Small made to Sgt. Bowman, as testified to by Sgt. Bowman. (Pet'r Br. 24.) For instance, although Mr. Small never confessed, he told Sgt. Bowman he would like to help his investigation but he could not. (Pet'r Br. 24.)

The evidence against both Petitioner and Mr. Small was inextricably intertwined and arose from the same act or transaction. The evidence established that Petitioner conspired with Mr. Small and Ms, Powell to kill Ms. Hawkridge. For example, Ms. Powell provided Petitioner with Ms. Hawkridge's address and at Petitioner's request, drove the vehicle from which Mr. Small shot Ms. Hawkridge. (App. 1331–33, 1338–39.) After Mr. Small killed Ms. Hawkridge, Petitioner obtained

$10,000 from Manny and Petitioner gave Mr. Small $7,000 and Petitioner kept $3,000. (App. 1341–45.) Moreover, the co-defendants did not present conflicting defenses. Despite Petitioner's statements to the contrary, Mr. Small's statements would have been admissible at a separate trial to establish the conspiracy, if nothing else as Mr. Small never confessed to the crimes. Alternatively, Mr. Small's statements would have been admissible as an exception to the hearsay rule.

Petitioner takes issue with the fact that prior to the amendment to Rule 14(b) in 2006, and pursuant to West Virginia Code § 62-3-8, "this Court held 'that a court does not have jurisdiction in a criminal case to try jointly those defendants who choose to be tried separately.'" *Boyd*, 238 W.Va. at 432, 796 S.E.2d at 219 (quoting *State ex rel. Whitman v. Fox*, 160 W.Va. 633, 646, 236 S.E.2d 565, 573 (1977)). This Court, however, has recognized the long-established precedent that rules promulgated under constitutional and statutory authority prevail whenever there is a conflict, real or perceived, between such rule and legislative provisions involving court procedures." *Games-Neely ex rel. W.Va. State Police v. Real Prop.*, 211 W.Va. 236, 244, 565 S.E.2d 358, 366 (2002); *see also* Syl. Pt. 5, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999) ("The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect."). Other than arguing in a conclusory manner that the Court should reverse itself because the right to a separate trial is "powerful," Petitioner provides any reason why the Court should reverse itself.

Based on the foregoing, the trial court properly denied Petitioner's motion to sever. "A defendant is not entitled to relief from prejudicial joinder pursuant to Rule 14 of the West Virginia Rules of Criminal Procedure[ ] when evidence of each of the crimes charged would be admissible

in a separate trial for the other." Syl. Pt. 4, *State v. Gibbs*, 238 W. Va. 646, 797 S.E.2d 623 (2017). Petitioner's conviction should be affirmed.

E. Cumulative Error

1. Standard of Review

"Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." *State v. Jeremy S.*, 243 W.Va. 523, 847 S.E.2d 125 (2020) (quoting Syl. Pt. 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972)).

2. Analysis.

Petitioner argues that "each of his assignments of error merit reversal and a new trial." (Pet'r Br. 25.) To the extent, however, the Court disagrees, Petitioner asserts that "taken in totality, . . . he presents a broad picture about the unfairness of his trial," when combined make "his conviction and his stay in prison until the day he dies most terribly unjust and in contravention of controlling law." (Pet'r Br. 25.)

The cumulative error doctrine "'should be used sparingly' and only where the errors are apparent from the record." *Rollins v. Ames*, No. 20-0149, 2022 WL 2093415, at *8 (W.Va. Supreme Court,. June 10, 2022) (memorandum decision) (quoting *Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 118, 459 S.E.2d 374, 395 (1995)). The "[c]umulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." *Johnson v. Mutter*, No. 19-0788, 2020 WL 6624970, at *7 (W.Va. Supreme Court, Nov. 4, 2020) (memorandum decision) (quoting *State v. Knuckles*, 196 W.Va. 416, 426, 473 S.E.2d 131,

141 (1996)). Petitioner has failed to demonstrate the existence of any error, let alone cumulative error. His claim should be refused.

VII. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the August 19, 2022 Sentencing and Commitment Order of the Circuit Court of Berkeley County.

Respectfully Submitted,

State of West Virginia,
Respondent,
By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

for MARY BETH NIDAY (W.Va. State Bar # 9092)
ASSISTANT ATTORNEY GENERAL
Office of the Attorney General – Appellate Division
1900 Kanawha Blvd. East, State Capitol
Building 6, Suite 406
Charleston, WV 25305
Telephone: (304) 558-5830
Fax: (304) 558-5833
Email: Mary.B.Niday@wvago.gov

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-674

STATE OF WEST VIRGINIA,

Respondent,

v.

JOSEPH WAYNE MASON,

Petitioner.

CERTIFICATE OF SERVICE

I, Mary Beth Niday, do hereby certify that on the 13th day of March, 2023, I served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure:

Jason T. Gain, Esquire
Losh Mountain Legal Services
P.O. Box 578
Anmoore, WV 26323

Bar No. 12290

for Mary Beth Niday (State Bar No. 9092)
Assistant Attorney General