IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2025 Term

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No. 22-706

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**FILED**

**June 6, 2025**

**released at 3:00 p.m.**
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

v.

RICHARD DANE SMALL,
Defendant Below, Petitioner.

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Appeal from the Circuit Court of Berkeley County
The Honorable Michael Lorensen, Judge
Criminal Action No. 20-F-212

AFFIRMED

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Submitted: February 19, 2025
Filed: June 6, 2025

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JUSTICE BUNN delivered the Opinion of the Court.

JUSTICE TRUMP, deeming himself disqualified, did not participate in the decision of this case.

JUDGE PATRICK WILSON sitting by temporary assignment.

## SYLLABUS BY THE COURT

1. "[West Virginia Code § 62-3-2] requires that one accused of a felony shall be present at every stage of the trial during which his interest[s] may be affected; and if anything is done at trial in the accused's absence which may have affected him by possibly prejudicing him, reversible error occurs." Syllabus point 3, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975).

2. "A defendant has a due process right to be present at all critical stages of a criminal proceeding pursuant to Article III, Section 10 of the West Virginia Constitution and the Fifth Amendment of the United States Constitution." Syllabus point 3, *State v. Byers*, 247 W. Va. 168, 875 S.E.2d 306 (2022).

3. "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." Syllabus point 1, *State v. Timothy C.*, 237 W. Va. 435, 787 S.E.2d 888 (2016) (quoting Syllabus point 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998)).

4. “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.” Syllabus point 3, *State v. Boyd*, 238 W. Va. 420, 796 S.E.2d 207 (2017).

5. “On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo.* Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.” Syllabus point 3, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994),

6. “To assert the *Miranda* right to terminate police interrogation, the words or conduct must be explicitly clear that the suspect wishes to terminate all questioning and not merely a desire not to comment on or answer a particular question.” Syllabus point 5, *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994).

7. “Remarks made by the State’s attorney in closing argument which make specific reference to the defendant’s failure to testify, constitute reversible error and defendant is entitled to a new trial.” Syllabus point 5, *State v. Green*, 163 W. Va. 681, 260 S.E.2d 257 (1979).

8. “Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court.” Syllabus point 6, *Yuncke v. Welker*, 128 W. Va. 299, 36 S.E.2d 410 (1945).

9. “An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.” Syllabus point 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

10. “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syllabus point 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

11. “An instruction outlining factors which a jury should consider in determining whether to grant mercy in a first[-]degree murder case should not be given.” Syllabus point 1, *State v. Miller*, 178 W. Va. 618, 363 S.E.2d 504 (1987).

**BUNN, Justice:**

Following the shooting death of Ms. Taylor Hawkridge in June 2014, a jury convicted Petitioner Richard Small of conspiracy to commit murder and first-degree murder. Following these convictions, the Circuit Court of Berkeley County sentenced Mr. Small, by order dated August 19, 2022, to not less than one nor more than five years for the conspiracy to commit murder conviction and life in imprisonment without the possibility of parole for the first-degree murder conviction. On appeal, Mr. Small asserts five assignments of error,[1] asserting that the circuit court erred by: (1) violating his constitutional rights when both he and his counsel were absent from two critical-stage hearings and by admitting prior bad act evidence of his codefendant, Joseph Mason, when the State failed to provide him notice pursuant to Rule 404(b) of the West Virginia Rules of Evidence; (2) admitting evidence offered about Mr. Mason's gang affiliation which unfairly prejudiced Mr. Small's right to a fair trial; (3) failing to sever his trial from Mr. Mason's to avoid unfair prejudice; (4) failing to suppress his statement to law enforcement officers where he unequivocally invoked his right to counsel immediately following his *Miranda*[2] warnings; and (5) allowing the State, during closing argument for the mercy

[1] While Mr. Small lists eight assignments of error in the "Assignments of Error" section of his appellate brief, in his argument section he categorizes them as five assignments of error with subcategories. Accordingly, we address these assignments of error as five assignments of error.

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

phase of the bifurcated jury trial, to improperly comment on his right to remain silent and to improperly direct the jury regarding the law concerning the mercy phase. We find that the circuit court did not err, and thus, we affirm Mr. Small's convictions and sentence.

## I.

## FACTUAL AND PROCEDURAL HISTORY

In the early morning hours of June 28, 2014, Ms. Taylor Hawkridge was shot to death in the parking lot of her apartment complex after returning home from work at Vixens Gentlemen's Club ("Vixens"). During the subsequent investigation, eyewitnesses told law enforcement they saw a man wearing a hooded sweatshirt fleeing the scene and entering a dark colored Dodge Charger. Law enforcement also received reports that Ms. Hawkridge had a verbal altercation at Vixens with Nasstashia Van Camp Powell. Ms. Powell accused Ms. Hawkridge of having an inappropriate relationship with Ms. Powell's boyfriend, Mr. Mason. Law enforcement interviewed Ms. Powell regarding her activities between the evening of June 27 and the morning of June 28. Throughout the investigation, law enforcement spoke with Ms. Powell on several occasions; she provided continually evolving statements. Ms. Powell initially denied any involvement in or knowledge of Ms. Hawkridge's murder. However, after being convicted by a jury for the second-degree murder of Ms. Hawkridge, Ms. Powell agreed to provide a statement to the State, fully describing what she knew about Ms. Hawkridge's murder, in exchange for the State recommending that her sentence be reduced by fifteen years.

Ms. Powell then implicated Mr. Mason and Mr. Small in Ms. Hawkridge's murder. She explained that Mr. Mason and Mr. Small were paid by another individual to commit the murder, and they were further motivated by Ms. Hawkridge's actions as a confidential drug informant.[3] Ms. Powell also led law enforcement to the location of the murder weapon, a .45 caliber pistol.

After learning of Mr. Small's alleged involvement, law enforcement spoke with him several times throughout the investigation. Relevant to this appeal, West Virginia State Police Sergeant Jonathan Bowman conducted an interview on June 26, 2018 ("June 2018 statement"), while Mr. Small was incarcerated at a facility in Maryland on an unrelated conviction. The interview was not recorded.[4] Sergeant Bowman read Mr. Small his *Miranda* rights, and then Mr. Small generally commented that he thought he needed a lawyer. The interview continued. Later in the interview, Mr. Small asked Sergeant Bowman if he needed a lawyer and Sergeant Bowman advised it was up to Mr. Small to decide if he needed to hire a lawyer. Throughout the interview, Mr. Small generally denied

[3] Ms. Powell identified this individual as Armistead Craig. The State did not charge Mr. Craig in connection with Ms. Hawkridge's murder.

[4] Because of certain procedural issues at the federal facility, law enforcement could not record this interview; however, the appendix included a summary of the interview as a part of a detailed report of the entire investigation. However, the record is unclear if the circuit court considered this report during the hearing on Mr. Small's subsequently filed motion to suppress this statement.

his involvement in the murder, but did acknowledge that he knew Mr. Mason and that a murder for hire was not his "M.O."

A Berkeley County grand jury indicted Mr. Small in a joint indictment with Mr. Mason in October 2020, alleging, in separate counts, that they each committed first-degree murder[5] and conspiracy to commit murder.[6] Despite the joint indictment, each defendant had a separate case number. Therefore, unless documents were filed in both cases, the codefendant's attorneys did not automatically receive documents filed solely in the other defendant's case.

Mr. Mason subsequently filed a motion to sever, arguing that he had a right to be tried separately from Mr. Small. Apparently, neither Mr. Small nor his counsel received official notice of this motion at the time it was filed.[7] The circuit court conducted a hearing on Mr. Mason's motion to sever without the presence of Mr. Small or his counsel,

[5] *See* W. Va. Code § 61-2-1 (defining first-degree murder).

[6] *See* W. Va. Code § 61-10-31 (setting out the crime of conspiracy).

[7] The docket sheet does not indicate that Mr. Mason filed his motion in Mr. Small's case. In addition, Mr. Small's counsel is not listed on the certificate of service for the motion.

and ultimately denied the motion.[8] Mr. Small never filed his own motion to sever his trial from Mr. Mason's.

In September 2021, Mr. Small filed a motion to continue the trial and pretrial proceedings and, in one sentence, also requested "that the two [d]efendants' cases be joined within the [c]ourt's e-filing system" because each defendant was "not receiving the filings made by the other[.]" At a hearing on the motion to continue, the circuit court did not address or rule on Mr. Small's request for consolidated e-filing, and neither defense counsel raised the issue when the circuit court asked the parties if there were any outstanding issues.

That same month, the State filed a notice of intent to introduce evidence against Mr. Mason that it claimed was intrinsic to the charged crimes or otherwise permissible under Rule 404(b) of the West Virginia Rules of Evidence. Specifically, the State sought to admit evidence of Mr. Mason's drug dealing, affiliation with the Crips gang, and hatred of police informants, including posts from a social media account allegedly belonging to Mr. Mason. The State e-filed its notice only in Mr. Mason's case and did not serve notice of the filing on Mr. Small. Despite not receiving formal notice of the filing from the State regarding its intent to introduce this evidence relating to Mr. Mason, Mr.

[8] In his brief to this Court, Mr. Small states that he and his attorney were absent from this hearing "because of a pending motion to disqualify Mr. Small's attorney due to a potential conflict of interest."

Small responded with a motion to exclude the evidence, arguing it amounted to inadmissible prior bad act evidence and, alternatively, the evidence should be excluded because the State did not provide Mr. Small with proper notice. During a pretrial hearing, with Mr. Small's counsel in attendance, the court requested the State amend its notice to identify the exhibits and testimony it planned to introduce.[9] At the hearing, the court scheduled a pretrial hearing for January 21, 2022, to consider the State's notice after Mr. Small and his codefendant had an opportunity to review the amended filing. Mr. Small's counsel acknowledged the hearing date.

On January 14, 2022, Mr. Small filed consolidated pretrial motions, including motions to suppress his June 2018 statement to law enforcement, to exclude all social media posts of himself and Mr. Mason, and to exclude all gang references involving either defendant. Eleven days prior to the January 21, 2022 pretrial hearing, Mr. Small's counsel filed an unopposed notice to continue his portion of the hearing due to a scheduling conflict.[10] The court granted Mr. Small's motion. On January 21, 2022, the court held a pretrial hearing on the State's amended Rule 404(b) notice as to Mr. Mason; neither Mr.

[9] Prior to the hearing, the State filed an amended notice supplementing its original notice by identifying the specific testimony and exhibits it sought to introduce at trial.

[10] The record does not indicate whether Mr. Small's counsel was aware that the court would consider pending trial issues related to Mr. Mason during this hearing, despite Mr. Small's absence. Nor does it reflect that Mr. Small requested that the court continue the hearing as it related to Mr. Mason.

Small nor his counsel attended. The court found that evidence of Mr. Mason's drug dealing, membership in the Crips gang, and animus toward police informants was admissible as intrinsic evidence, and to the extent it was not intrinsic, the evidence was permitted pursuant to Rule 404(b)(2) to prove motive and identity.

The circuit court held another pretrial hearing in March 2022, only days prior to the start of the trial, where Mr. Small argued in favor of his motion to exclude any reference to himself, Mr. Mason, or any other witness being associated with a gang as well as the related social media posts. The court ruled that the State would not be permitted to introduce gang affiliation evidence against Mr. Small, but for the reasons explained during the January 2022 hearing, the State would be permitted to introduce evidence of Mr. Mason's gang affiliation and related social media posts.

At the same hearing, Mr. Small also argued that the court should suppress his June 2018 statement to law enforcement, raising, as the only grounds for suppression, that he invoked his right to counsel twice during the interview yet law enforcement continued to interview him. Mr. Small asserted that he invoked his right to counsel by stating "I think I need to talk to a lawyer," but Sergeant Bowman did not stop the interview or provide Mr. Small with an attorney. The State did not present any evidence of the circumstances surrounding Mr. Small's June 2018 statement. The court found that the parties agreed that during the interview, Mr. Small stated, "I think I need a lawyer;" "[t]his

factual issue was not in contest"; and that the parties agreed that testimony as to that factual issue was not necessary. The court denied Mr. Small's motion to suppress at the pretrial hearing, finding that Mr. Small's reference to a lawyer was ambiguous and not an unequivocal invocation of his right to counsel. However, the court informed counsel that it might consider an amended motion that included authority explicitly supporting Mr. Small's position that he had invoked his right to counsel. Mr. Small did not file an amended motion or offer additional authority to support his position prior to trial.

At trial, the State theorized that Mr. Mason and Mr. Small murdered Ms. Hawkridge for being a confidential informant who reported illegal drug sales to law enforcement officers. The State called numerous witnesses,[11] including former West Virginia Trooper Brian Bean, who testified that Ms. Hawkridge worked as a confidential informant for him after he caught her selling drugs. As a confidential informant, Ms. Hawkridge completed a controlled buy[12] from Mr. Craig, the uncharged additional individual, [13] who called her afterward and "told her to be careful because the police may have observed their transaction." Mr. Bean testified Ms. Hawkridge attempted more buys

[11] We only recount the necessary and relevant portions of the trial testimony.

[12] "A controlled buy is when a confidential informant or undercover agent uses money from the government to buy drugs as part of an investigation." *United States v. Chisholm*, 940 F.3d 119, 121 n.1 (1st Cir. 2019).

[13] See *supra* note 3.

from Mr. Craig, but Mr. Craig would not answer her calls. She was killed shortly after her last phone call to Mr. Craig went unanswered. While Ms. Hawkridge was Mr. Bean's only informant who had been murdered, he "investigated other murders where the motive was belief that the victim was an informant."

The State called Sergeant Bowman to testify regarding text messages concerning illegal drug sales between Ms. Hawkridge and Mr. Mason. Sergeant Bowman further described Mr. Mason's gang affiliation and dislike of police informants, including his known alias "craccloc" or "Cracc." Sergeant Bowman stated that "loc" meant "love of Crips." Discussing the contents of several social media posts from both Instagram and Facebook that law enforcement discovered during the investigation, most of which were specific to Mr. Mason, Sergeant Bowman informed the jury of one such post that included a photograph of a firearm with an extended magazine capacity[14]—the same type of firearm used in the murder of Ms. Hawkridge. Other posts depicted drug-related activity and comments denigrating police informants.[15] Sergeant Bowman also told the jury about how he received numerous calls from the public reporting a Facebook post on Ms. Powell's

[14] The photograph included the caption, "Extendo if a p[****] wanna try me!!! Crip Life."

[15] These comments included words such as "snitches" or "rats." There was also a photograph of Mr. Mason's body tattoo, which read "A man's ruin lies in his tongue."

Facebook account that revealed Ms. Hawkridge's status as an informant and Mr. Mason's involvement in Ms. Hawkridge's murder.[16] In addition, Sergeant Bowman discussed his June 2018 interview where Mr. Small stated that he knew Mr. Mason. Mr. Small generally denied any involvement in the murder by claiming that a murder for hire was not his "M.O." and that he would like to help with the investigation but could not.

Ms. Powell also testified and recounted the events surrounding the murder. She recalled being nearby during a meeting at a sporting goods store between Mr. Mason and Mr. Small. Ms. Powell stated that she could not hear the entire conversation but heard Ms. Hawkridge's name; the phrase, "how to do it"; and the word "informant." Prior to the murder, Mr. Mason asked Ms. Powell to get Ms. Hawkridge's address, which she did. On the night of the murder, Mr. Mason went to Ms. Powell's home and asked her to go to

[16] Ms. Powell denies that she authored this post. It referred to Mr. Mason as "Joey" and stated as follows:

> Joey's my baby daddy. No, I didn't kill Taylor. Yes, Tiara Brown showed me where she lived at on that Tuesday. Taylor was a snitch. No one wants to talk about that, how she got caught up and decided to roll on people. Guess people want to keep that a secret to weight out the fact she's a good person. She's everyone's sister, everyone's friend. Well, I guess y'all snitching too. Yes, I found out where she lived for Joey. No, I didn't go there. . . . [N]o, I didn't know he was going to kill her. So, yes, Joey had something to do with it. Yes, it was my car. No, I wasn't there. And yes, I was at the club. New Nassy. I'm living for me and my babies.

Vixens. She went to Vixens, and shortly after arriving, Mr. Mason texted Ms. Powell and instructed her to drive to Hagerstown, Maryland, to retrieve Mr. Small from the Clarion Inn. After she retrieved Mr. Small, the two went to Ms. Hawkridge's home and waited for her to arrive. Once Ms. Hawkridge got home, Mr. Small got out of the car and shot her twice. Mr. Small returned to the car, and Ms. Powell drove away while Mr. Small disassembled the gun and discarded it out of the car window. Afterward, Ms. Powell witnessed Mr. Craig pay Mr. Mason $10,000 in a brown bag. Mr. Mason kept $3,000 for himself and gave the bag with the remaining $7,000 to Mr. Small.

The jury found Mr. Small and Mr. Mason guilty of each count charged in the indictment and the bifurcated trial proceeded to the mercy phase, where the jury was tasked with determining whether to afford Mr. Small or Mr. Mason the opportunity to be considered for parole after serving no less than fifteen years of their life sentence. Mr. Small chose not to testify on his own behalf, but Mr. Mason testified, informing the jury that he was a father and was missing key parts of his child's life. The State made the following remarks during its closing argument in the mercy phase of trial:

> There's a comment made by Mr. Mason that he missed his son's first baseball game today. What I want you to think about is that [Ms. Hawkridge] will never know what sports her daughter . . . even gets to play. She will never know. She will never get to see her daughter as you saw her in the photos that were passed around.
>
> You heard that from the defendant. But you know what you haven't heard today? Remorse. You haven't heard any

> remorse. This was a cold-blooded gang hit where [Ms. Hawkridge] had no chance. They are asking for a chance, but [Ms. Hawkridge] had no chance. The defendants showed [Ms. Hawkridge] no mercy when she was gunned down in front of her house.
>
> And so I ask that you show these defendants no mercy and return a verdict that does not attach mercy to their first degree murder convictions.

In closing arguments, the State argued as follows: "When we consider whether or not mercy should attach to a sentence, when we make this argument to the jury, we generally look to two factors. We look to the defendant's criminal history. We look to the heinous nature of the crime." The jury unanimously decided not to recommend mercy. By order entered on August 19, 2022, the court sentenced Mr. Small and Mr. Mason to life imprisonment without mercy for first-degree murder and to a consecutive term of imprisonment for not less than one year nor more than five years for conspiracy. Mr. Small appeals that order.

## II.

## STANDARD OF REVIEW

Each of Mr. Small's assignments of error is reviewed by this Court under a different standard. Accordingly, the proper standard of review is discussed below in connection with the issue to which it relates.

## III.

## DISCUSSION

Mr. Small assigns five errors on appeal. We address each in turn.

### *A. Absence from Critical-Stage Hearings*

Mr. Small argues that his federal and state constitutional due process rights were violated by his absence from two hearings—a hearing on his codefendant's motion to sever and a hearing on the admissibility of certain evidence the State intended to introduce against his codefendant. Because these hearings were not critical for Mr. Small, we disagree.

Whether Mr. Small's due process rights were violated by his absence from two hearings where the circuit court addressed issues raised by or focused on his codefendant is a question of law. As such, our review is plenary. *See* Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

This Court has recognized the statutory right of a felony defendant to be present at critical stages of trial:

> [West Virginia Code § 62-3-2] requires that one accused of a felony shall be present at every stage of the trial during which his interest[s] may be affected; and if anything is

> done at trial in the accused's absence which may have affected him by possibly prejudicing him, reversible error occurs.

Syl. pt. 3, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975). Additionally, "A defendant has a due process right to be present at all critical stages of a criminal proceeding pursuant to Article III, Section 10 of the West Virginia Constitution and the Fifth Amendment of the United States Constitution." Syl. pt. 3, *State v. Byers*, 247 W. Va. 168, 875 S.E.2d 306 (2022).[17]

"[A] critical stage in a criminal proceeding is one where the defendant's right to a fair trial will be affected." *State v. Boyd*, 160 W. Va. 234, 246, 233 S.E.2d 710, 719 (1977). Examples of pretrial critical stages provided by the *Boyd* Court include "hearings involving substantial matters of law or the testimony of witnesses[.]" *Id.* On the other hand, the "[e]ntry of routine orders filing motions or court orders involving clerical or administrative matters" as well as "consultation between defense counsel, the prosecutor and the court prior to the actual trial," are not critical stages. *Id.*

Mr. Small contends that the hearings regarding Mr. Mason's motion to sever and regarding the State's notice of its intent to introduce certain evidence against Mr.

[17] *See also* Syl. pt. 6, *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977) ("The defendant has a right under Article III, Section 14 of the *West Virginia Constitution* to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless.").

Mason were critical stages for Mr. Small, and his absence from these hearings denied him a fair trial. Mr. Small relies on several cases to support his argument; however, those cases are all distinguishable from the present matter because they involve the defendant's *own* motion hearing or an issue specifically relating to the defendant while the hearings and issues Mr. Small characterizes as critical relate to his codefendant, Mr. Mason.[18]

[18] For example, Mr. Small cites *Hanson v. Passer*, 13 F.3d 275 (8th Cir. 1994). However, in *Hanson*, the court found that the defendant's *own* pretrial omnibus hearing was a critical stage. *Id.* at 278. The other cases Mr. Small identifies as supporting his position similarly concern a defendant's own motion hearing or an issue specifically relating to that defendant. *See State v. Curry*, 147 P.3d 483, 485-86 (Utah Ct. App. 2006) ("The suppression hearing constituted a critical stage of the proceeding because it was *Defendant's* opportunity to contest the admissibility of the evidence upon which the City's entire case against him was based." (emphasis added)); *State v. Ralph B.*, 131 A.3d 1253, 1263-64 (Conn. App. Ct. 2016) (observing that a hearing on multiple substantive motions, including a motion to suppress *filed by the defendant* was a critical stage); *Robinson v. Commonwealth*, 837 N.E.2d 241, 247 (Mass. 2005) (concluding that *a defendant* was entitled to be present at a hearing on *his own motion* to suppress); *State v. Grace*, 165 A.3d 122, 125 (Vt. 2016) (finding that the trial court committed prejudicial error by holding hearing on *the defendant's motion* to suppress in *the defendant's absence*); *State v. Allenbaugh*, 151 N.E.3d 50, 60 (Ohio Ct. App. 2020) (finding that *the defendant's* absence at a *Daubert* hearing he requested "deprived him of a fair and just hearing"); *State v. Ogburne*, 561 A.2d 667, 669 (N.J. Super. Ct. App. Div. 1989) (concluding that *the defendant* was entitled to be present during evidentiary rape shield hearing to confront his accuser); *People v. Hoey*, 145 A.D.3d 118, 119 (N.Y. App. Div. 2016) (determining that, because *the defendant was absent* from a hearing "relating to the admissibility of evidence of uncharged crimes and bad acts allegedly committed *by defendant* against his girlfriend[] and others," *the defendant* "was not present before the trial court for all of the core proceedings" (emphasis added)).

Courts considering whether a codefendant's motion hearing is a critical stage for another defendant have found that the right to be present applies only to proceedings critical to that specific defendant:

> While petitioner and his co-defendant were tried together, petitioner only has a constitutional right to be present at any stage of the proceeding that is critical *as to him.* There is no clearly established federal law regarding the right to be present at a co-defendant's hearing [or] whether such a hearing constitutes a "critical stage." In fact, the Supreme Court has recognized that there are moments in defendant's *own* trial that may not constitute "critical stages."

*Bogan v. Bradt*, No. 11 CV 1550 (MKB)(LB), 2014 WL 12714530, at *7 (E.D.N.Y. Nov. 12, 2014), *report and recommendation adopted*, No. 11CV1550MKBLB, 2017 WL 2913465 (E.D.N.Y. July 6, 2017).[19] Considering these standards, we next determine

[19] *See also People v. Fox*, 123 A.D.3d 844, 844-45 (N.Y. App. Div. 2014) ("The defendant and codefendant . . . were tried together, with separate juries. [The codefendant], unlike the defendant, testified in his own defense. The defendant contends that he was deprived of his constitutional right to be present at a material stage of the trial since he and his jury were not present when [the codefendant] testified. This contention is without merit since the portion of [the codefendant's] trial at which the defendant was not present 'was not a critical stage of [the defendant's] trial, as it was unrelated to his prosecution.'" (last alteration in original) (citations omitted)); *People v. Morris*, 187 A.D.2d 460, 461 (N.Y. App. Div. 1992) ("'In every criminal proceeding, a defendant has an absolute right to be present, with counsel, "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge[s]"' brought against him. . . . Here, the . . . hearing held to evaluate an eyewitness' pretrial identification of the codefendants . . . did not constitute a 'material stage' of the defendant's trial at which he had an absolute right to be present with counsel. By parity of reasoning, the defendant did not have a constitutional right to counsel at his codefendants' . . . hearing because that proceeding was not a critical stage of his trial, as it was unrelated to his prosecution[.]" (first alteration in original) (citations omitted)); *People v. Ramos*, 262 A.D.2d 587, 587 (N.Y. App. Div. 1999) ("It is well settled that a criminal defendant has a right to be present, *inter alia*, at all material stages of trial at which evidence

whether each challenged hearing was a critical stage as to Mr. Small, "where [*his*] right to a fair trial [was] affected." *Boyd*, 160 W. Va. at 246, 233 S.E.2d at 719.

**1. Hearing on Mr. Mason's Motion to Sever.** Mr. Small first contends that the hearing on Mr. Mason's motion to sever was a critical stage as to Mr. Small's own trial. We disagree. The entire focus of the hearing was Mr. Mason's motion to sever and the alleged prejudice that *Mr. Mason* argued he would suffer if the State tried the matter jointly. Nothing from the transcript of this hearing indicates Mr. Small's right to a fair trial was affected. Furthermore, Mr. Small did not request to join Mr. Mason's motion and did not file his own specific motion,[20] nor did he formally make an oral motion to sever his trial. Accordingly, we find that the hearing on Mr. Mason's motion to sever was not a critical stage as to Mr. Small. This hearing simply did not affect Mr. Small's right to a fair trial because the focus of the hearing was on whether a consolidated trial would be prejudicial to Mr. Mason, not Mr. Small.[21]

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is introduced . . . . Thus, to the extent that the appellant, as opposed to any of his six codefendants, was the focus of the pretrial proceedings to determine the admissibility of evidence at trial, he had a right to be present[.]" (citations omitted)).

[20] Prior to trial, Mr. Small filed consolidated pre-trial motions in limine. One of those motions involved a motion to exclude the testimony of a witness, J.M. or in the alternative to sever the trial. The motion did not set forth any of the applicable rules or law regarding a motion to sever. Ultimately, the State informed the court that it did not intend to call J.M. as a witness and the court found the motion was moot.

[21] Mr. Small also asserts that his constitutional right to counsel was violated by his counsel's absence from this hearing. Because we find that the hearing on Mr.

**2. Hearing on the State's Notice of Intent to Admit Evidence.** Mr. Small next asserts that the hearing on the State's notice of its intent to admit intrinsic or Rule 404(b) evidence against Mr. Mason was a critical stage for Mr. Small because he had arguments to raise regarding spillover prejudice from this evidence. However, for the same reasons stated above, this hearing was not a critical stage for Mr. Small. *See Boyd*, 160 W. Va. at 246, 233 S.E.2d at 719 (recognizing that a critical stage exists in a criminal proceeding "where *the defendant's* right to a fair trial will be affected" (emphasis added)). The evidence at issue related to *Mr. Mason's* gang affiliation, drug dealing, and hatred of police informants. Furthermore, Mr. Small was aware of the evidence; filed his own motion to exclude any reference to his or Mr. Mason's gang affiliation, drug dealing, and hatred of police informants; and was present with counsel at the hearing on his own motion to exclude the same evidence. As we discuss below, the evidence against Mr. Mason had no unfair prejudicial effect on Mr. Small because the circuit court instructed the jury to limit

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Mason's motion to sever was not a critical stage for Mr. Small under the circumstances of this case, we likewise find that no violation of his Sixth Amendment right resulting from his counsel's absence from the hearing. *See* Syl. pt. 6, in part, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995) ("Section 14 of Article III of the West Virginia Constitution and the Sixth Amendment to the United States Constitution guarantee the right to counsel only at critical stages."). *Cf. State v. Vance*, 162 W. Va. 467, 474, 250 S.E.2d 146, 151 (1978) ("[A] pretrial orientation meeting is not a critical stage of the trial proceedings requiring the presence of an accused and counsel.").

its consideration of the evidence.[22] Thus, under these circumstances, we find that the circuit court did not err in holding these two hearings without Mr. Small or his counsel present.[23]

[22] Moreover, the circuit court found, and this Court agreed that the complained of evidence was intrinsic to the crimes charged and properly admitted. *See State v. Mason*, No. 22-674, __ W. Va. __, __, __ S.E.2d __, __ (June 6, 2025). This Court has explained that "'[o]ther 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." *State v. LaRock*, 196 W. Va. 294, 312 n.29, 470 S.E.2d 613, 631 n.29 (1996) (quoting *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990)). The Court has further concluded that "evidence which is 'intrinsic' to the indicted charge is not governed by Rule 404(b)." *State v. Harris*, 230 W. Va. 717, 722, 742 S.E.2d 133, 138 (2013) (per curiam). *See also United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995) ("Rule 404(b) is not implicated when the other crimes or wrongs evidence is part of a continuing pattern of illegal activity. When that circumstance applies, the government has no duty to disclose the other crimes or wrongs evidence."); *United States v. Bell*, No. 17-CR-20183, 2020 WL 4726935, at *2 (E.D. Mich. Aug. 14, 2020) ("[The defendant] is not entitled under Rule 404(b) to pretrial disclosure of the intrinsic evidence the Government intends to introduce.").

[23] Again, Mr. Small contends that his right to counsel was violated by his counsel's absence from this hearing. Because we find this hearing was not a critical stage as to Mr. Small under the circumstances of this case, we likewise find no violation of his Sixth Amendment rights. *See* Syl. pt. 6, in part, *Daniel*, 195 W. Va. 314, 465 S.E.2d 416. Mr. Small also argues that his due process rights were violated by the State's failure to provide him with notice of its intent to introduce this "critical" evidence. As Mr. Small was not entitled to attend the hearing, we find the circuit court did not err in admitting evidence when the State failed to provide him with notice of evidence it intended to introduce against Mr. Mason. *See State v. Hutchinson*, 215 W. Va. 313, 321, 599 S.E.2d 736, 744 (2004) (per curiam) ("We find that the evidence which the appellant challenges on this appeal was merely presented as context evidence illustrating why the appellant committed this murder. It portrayed to the jurors the complete story of the inextricably linked events of the day and amounted to intrinsic evidence. Given the facts of this case, the State had no obligation to provide notice of Rule 404(b) evidence, the appellant's counsel had no reason to object, and the circuit court had no reason to *sua sponte* exclude this evidence."). Moreover, while the State did not serve notice of its intent to introduce this evidence on Mr. Small, he nevertheless had actual notice as demonstrated by his pretrial motion to exclude this same evidence.

### *B. Relevance and Prejudicial Effect of Intrinsic Evidence*[24]

Next, Mr. Small contends that the evidence demonstrating Mr. Mason's gang affiliation was not relevant, and its admission was unfairly prejudicial to Mr. Small.[25] "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. 1, *State v. Timothy C.*, 237 W. Va. 435, 787 S.E.2d 888 (2016) (quoting Syl. pt. 4, *State v. Rodoussakis*, 204

[24] Mr. Small also asserts that the gang affiliation evidence was cumulative. However, Mr. Small's argument consists of three sentences and fails to cite to any portion of the record or any citation of law to support his position, so we will not consider this issue. Additionally, Mr. Small briefly states that evidence of Mr. Mason's drug dealing was not relevant, its admission unfairly prejudiced him and was cumulative. However, he fails to offer any argument to support this assertion. Accordingly, we decline to address this inadequately briefed issue. *See LaRock*, 196 W. Va. at 302, 470 S.E.2d at 621 ("Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but [which] are not supported with pertinent authority, are not considered on appeal."). *See also* W. Va. R. App. P. 10(c)(7) (requiring that petitioner's brief include argument supported by citations to authority relied on and facts in the record on appeal and cautioning that Court may disregard errors that are not properly supported).

[25] Mr. Small fails to cite any rules of evidence to support his arguments on appeal that this evidence was not relevant and unfairly prejudicial. However, in the proceedings below, he argued that the gang affiliation evidence was not relevant pursuant to Rule 401 of the West Virginia Rules of Evidence. Rule 401 provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Furthermore, in the proceedings below, he asserted that the evidence was unfairly prejudicial under Rule 403 of the West Virginia Rules of Evidence. Rule 403 provides, in relevant part, that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice[.]" We, therefore, evaluate these claims pursuant to Rules 401 and 403.

W. Va. 58, 511 S.E.2d 469 (1998)).

First, the evidence of Mr. Mason's gang affiliation was relevant to the crimes charged to give context to Mr. Mason's participation in Ms. Hawkridge's murder. In *State v. Vincent*, this Court found that gang affiliation evidence was intrinsic, as the evidence "was necessary to a 'full presentation of the case, [and was] appropriate in order to complete the story of the crime on trial by proving its immediate context or the res gestae.'" No. 21-0656, 2022 WL 17444782, at *2 (W. Va. Dec. 6, 2022) (memorandum decision) (quoting *State v. LaRock*, 196 W. Va. 294, 312 n.29 470 S.E.2d 613, 631 n.29 (1996) (quotations omitted)). Therefore, the *Vincent* Court found the evidence was relevant and the circuit court did not err by allowing its admission. *Id.* at *2 n.3. *Cf. Commonwealth v. Correa*, 770 N.E.2d 435, 439 (Mass. 2002) ("Gang evidence was relevant in this case as to the defendant's motive for the killing, as well as going to the motive and bias of witnesses at trial."); *State v. Scott*, 213 P.3d 71, 75 (Wash. Ct. App. 2009) ("Courts have regularly admitted gang affiliation evidence to establish the motive for a crime or to show that defendants were acting in concert. In each instance, there was a connection between the gang's purposes or values and the offense committed. In contrast, when there was no connection between a defendant's gang affiliation and the charged offense, admission of the gang evidence was found to be prejudicial error." (citations omitted) (footnote omitted)).

Here, the State's consistent theory of the case at trial was that Mr. Mason participated in Ms. Hawkridge's murder because, as a Crips gang member and a drug dealer, he despises police informants. The State presented evidence demonstrating that Ms. Hawkridge was a police informant and had drug dealings with Mr. Mason. The State also presented evidence from which the jury could reasonably conclude that Mr. Mason had learned that Ms. Hawkridge was an informant. Furthermore, the State presented a social media post depicting a hatred of informants. Both Mr. Mason and Mr. Small commented on the post, which was relevant to establish a connection between the coconspirators. Therefore, the evidence regarding Mr. Mason's gang affiliation which includes his hatred of police informants, was "inextricably intertwined" with the murder and conspiracy and his connection to Ms. Hawkridge, as these characteristics were "the catalyst for all of the events underlying the charged crime," and were necessary for a full presentation of the case. *United States v. Peete*, 781 F. App'x 427, 439-40 (6th Cir. 2019). We, thus, find that the evidence regarding Mr. Mason's gang affiliation was relevant to the crimes charged and the State's theory of the case.

Likewise, Mr. Small has failed to demonstrate that he was unfairly prejudiced by the circuit court's admission of Mr. Mason's gang affiliation pursuant to Rule 403 or otherwise. As explained above, the gang affiliation evidence he complains of was intrinsic to the crimes charged, probative of the relationship between the charged coconspirators,

and highly relevant to the alleged motive for the charged murder.[26] Any potential unfair prejudice to Mr. Small was outweighed by the probative value of the evidence and was cured by the circuit court's limiting instruction. *See* W. Va. R. Evid. 403; *United States v. Murillo*, No. ED CR 05- 69 (B) VAP, 2008 WL 11411629, at *10 (C.D. Cal. May 23, 2008) ("[T]he risk of prejudice posed by joint trials can be cured by proper jury instructions." (citing *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 938, 122 L. Ed. 2d 317 (1993)), *aff'd sub nom. United States v. Rodriguez*, 766 F.3d 970 (9th Cir. 2014)). During the final jury charge, the circuit court instructed the jury to view the evidence separately as to each defendant:

> A separate crime is alleged against each of the defendants in each count of the indictment. You should consider each alleged offense and any evidence pertaining to it separately in respect to each defendant.
>
> The fact that you find one defendant guilty or not guilty of one of the offenses should not control your verdict as to the other offense charged against the defendant, or the other defendant. You must give separate and individual consideration to each charge against each defendant.

Juries are presumed to follow the instructions of the court. *See State v. Miller*, 197 W. Va. 588, 606, 476 S.E.2d 535, 553 (1996) ("[J]uries are presumed to follow their instructions." (quotations and citation omitted)). The circuit court did not abuse its discretion in admitting

[26] The *Vincent* Court also found that the gang affiliation evidence was "more probative than prejudicial" pursuant to Rule 403 for the same reasons it found the evidence to be intrinsic and relevant. *Vincent*, No. 21-0656, 2022 WL 17444782, at *2 n.3.

this evidence because the probative value outweighed the potential for unfair prejudice to Mr. Small and the circuit court gave a limiting instruction to reduce the risk of unfair prejudice. As such, we find no error.

### *C. Severance of Trial*

Mr. Small next argues that the circuit court erred by failing to sever his trial from Mr. Mason's trial.[27] As we have consistently held, "[t]his 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. 3, *State v. Boyd*, 238 W. Va. 420, 796 S.E.2d 207 (2017).

In the circuit court, Mr. Small never filed a written motion[28] or made a formal oral motion to sever his trial from Mr. Mason's trial.[29] Because Mr. Small did not request

[27] Mr. Small also contends that he was not afforded notice of the hearing on Mr. Mason's motion to sever. As a result, neither Mr. Small nor his counsel were present during that hearing and were unable to argue the motion. While this is true, as we found above in Section III.A.1. of this opinion, this hearing was not a critical stage of Mr. Small's proceeding that he had an absolute right to attend. Moreover, Mr. Small could have filed his own motion to sever at any time, but he failed to do so. Accordingly, Mr. Small is entitled to no relief for his absence from this hearing.

[28] See *supra* note 20 explaining the deficiencies of Mr. Small's pre-trial motion to exclude the testimony of a witness, J.M.

[29] Mr. Mason filed his motion to sever on July 2, 2021, and the circuit court entered an order denying the motion on July 19, 2021. The trial began almost a year later, in March 2022. Therefore, Mr. Small had almost entire year to file a motion to sever on his

that his trial be severed from Mr. Mason's below, the circuit court never had an opportunity to consider the request. Mr. Small essentially argues that the circuit court should have, sua sponte, severed his trial from his codefendant's. This Court has consistently stated that "nonjurisdictional questions not raised at the circuit court level will not be considered [for] the first time on appeal." *State v. Jessie*, 225 W. Va. 21, 27, 689 S.E.2d 21, 27 (2009) (citing *Whitlow v. Bd. of Educ. of Kanawha Cnty.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993))[30]. Accordingly, we decline to consider Mr. Small's argument on appeal.

### *D. Motion to Suppress*

Next, Mr. Small argues that the circuit court erred by denying his motion to suppress his June 2018 statement, because he twice invoked his right to counsel during the interview, law enforcement did not terminate the interview, and he thereafter made the statement he sought to suppress. The only issue before us is whether Mr. Small unequivocally invoked his right to counsel, requiring law enforcement to terminate the

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own grounds. Mr. Small briefly mentioned severance in passing during a March 16, 2022 pre-trial motions hearing, days before the trial. Specifically, during the pre-trial motions hearing, Mr. Small's counsel argued that the Mr. Mason's social media posts should be excluded because they were more prejudicial than probative. Mr. Small's counsel stated that he was concerned about these posts, "unless this [case] is severed, which obviously there is no desire by the State to do." Mr. Small never made a formal motion to sever.

[30] *See also* W. Va. R. Crim. Proc. 12 **(**stating, in part, that a motion to sever a trial must be raised prior to trial and that a party's failure to make a request prior to trial "may constitute waiver thereof, but the court for cause shown should grant relief from the waiver.").

interview.[31] In Syllabus point 3 of *State v. Stuart*, this Court explained the proper standard of review of a circuit court's decision on a motion to suppress:

> On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo.* Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.

192 W. Va. 428, 452 S.E.2d 886 (1994). *See also* Syl. pt 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996) ("When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.").

[31] Mr. Small also asserts that at the suppression hearing, the State failed to present evidence that he knowingly and intelligently waived his *Miranda* rights. Specifically, he argues that without witness testimony at the suppression hearing, the circuit court had insufficient information to determine whether his statement was voluntary, or if he waived his *Miranda* rights. However, the only issue raised below was whether he unequivocally invoked his right to counsel; Mr. Small never raised an issue regarding the circumstances of the interview nor argued below that his June 2018 statement was otherwise not voluntary. Accordingly, we decline to address arguments otherwise relating to the voluntariness of his June 16, 2018 Statement and his waiver of his *Miranda* rights. *See, e.g.*, *State v. Jessie*, 225 W. Va. 21, 27, 689 S.E.2d 21, 27 (2009) (reiterating the general rule that this court will not address a non-jurisdictional issue not raised before the circuit court).

As we have previously explained, "[i]n *Miranda*, the Supreme Court held that, in order to protect a defendant's right against compelled self-incrimination under the Fifth Amendment, before police initiate custodial interrogation, they must advise a defendant that, in addition to other rights, he has the right to remain silent and the right to counsel." *State v. Bradshaw*, 193 W. Va. 519, 528, 457 S.E.2d 456, 465 (1995). It is well established that "[w]hen a criminal defendant requests counsel, it is the duty of those in whose custody he is, to secure counsel for the accused within a reasonable time. In the interim, no interrogation shall be conducted, under any guise or by any artifice." Syl. pt. 1, in part, *State v. Bradley*, 163 W. Va. 148, 255 S.E.2d 356 (1979). Furthermore, we have held that "To assert the *Miranda* right to terminate police interrogation, the words or conduct must be explicitly clear that the suspect wishes to terminate all questioning and not merely a desire not to comment on or answer a particular question." Syl. pt. 5, *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994). The Supreme Court of the United States has similarly explained that a request for counsel must be unequivocal:

> Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil v. Wisconsin*, [501 U.S. 171, 178, 111 S. Ct. 2204, 2209, 115 L. Ed. 2d 158 (1991)]. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . . Rather, the suspect must unambiguously request counsel.

*Davis*, 512 U.S. at 459, 114 S. Ct. at 2355, 129 L. Ed. 2d 362.

Here, it is undisputed that Sergeant Bowman conducted a custodial interview of Mr. Small and that law enforcement recited *Miranda* rights to Mr. Small prior to initiating questioning. Therefore, we consider Mr. Small's statement during the interview to determine if it was an unequivocal invocation of his right to counsel. At least once, if not twice, Mr. Small indicated during his custodial interview that he thought he "needed a lawyer."[32]

On appeal, Mr. Small relies on *State v. Green*, 172 W. Va. 727, 310 S.E.2d 488 (1983) (per curiam), to support his position.[33] In *Green*, the defendant argued that his right to counsel was violated because law enforcement officers did not stop his

[32] There is no recording of the interview, and it does not appear that the police report summarizing this interview was before the circuit court. At the suppression hearing, there was some discussion among the parties that Mr. Small stated either "I think I need to talk to a lawyer" or "You think I might need a lawyer?" Mr. Small did not raise any factual question regarding the nuance of the comment. During the suppression hearing, the State stressed that it did not believe evidence was needed because the parties agreed to the comment made; the order from the suppression hearing states that "[t]he parties agreed that during questioning by Sgt. Bowman, the Defendant stated, 'I think I need a lawyer.' This factual issue was not in contest and the parties agreed that testimony on that [comment] was unnecessary." Ultimately, the circuit court concluded that Mr. Small stated, "I think I need a lawyer." The comment—"I think I need a lawyer"—is the stronger expression of a request for counsel. Because we find that, under the circumstances presented in this case, even saying the stronger expression—"I think I need a lawyer"—was not an unequivocal request for counsel, we, like the circuit court, analyze "I think I need a lawyer."

[33] Mr. Small failed to cite any West Virginia cases in his motion to suppress submitted to the circuit court. During the suppression hearing, the circuit court informed Mr. Small that he could supplement his argument with any cases that directly support his position that "I think I need a lawyer" is an unequivocal request for counsel. Mr. Small did not file a supplement with the circuit court.

interrogation after he effectively stated "I think I should contact my attorney," and the circuit court denied his motion to suppress his subsequent confession. *Id.* at 728-30, 310 S.E.2d at 489-91. This Court reversed and remanded for a new trial, finding that the defendant's confession should have been suppressed because there was "nothing ambiguous" about the defendant's statement, particularly when the defendant made the confession directly after being read his *Miranda* rights. *Id.* at 729-30, 310 S.E.2d at 491.

While *Green*, on its face, appears to be directly on point to the facts here, we find it distinguishable for several reasons. In *Green*, the defendant testified at the suppression hearing that he informed one of the interrogating officers that he "'thought [he] should get ahold of an attorney.'" Then, the interrogating officer testified that the defendant "attempted to contact his attorney by telephone 'numerous times.'" *Id.* at 728, 310 S.E.2d at 490. The defendant "went so far as to telephone his attorney's mother in order to reach his attorney[;]" however, the officer did not discontinue his interrogation. *Id.* at 728-29, 310 S.E.2d at 490. Accordingly, the officer "was aware of the [defendant's] desire and numerous attempts to contact counsel[.]" *Id.* at 729, 310 S.E.2d at 490. The record before us does not support such an unambiguous expression of the desire to, or actual attempts to, contact an attorney.[34]

[34] *See also State v. Wisotakey*, No. 13-1240, 2014 WL 6607462, at *8 (W. Va. Nov. 21, 2014) (memorandum decision) (finding the comment "'I should have a lawyer, shouldn't I?'" to be ambiguous).

Not only is *Green* distinguishable on the facts, but its precedential value as to this comment is questionable because it was decided before the Supreme Court issued its decision in *Davis*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362. The *Davis* Court declined to disturb a lower court's determination that the remark "'Maybe I should talk to a lawyer'—was not a request for counsel[.]" *Id*. at 462, 114 S. Ct. at 2357, 129 L. Ed. 2d 362. The law enforcement agents "were not required to stop questioning petitioner[.]" *Id.*[35] Since the *Davis* decision, this Court has adopted certain principles from that decision, noting: "We believe that under *Davis* insubstantial and trivial doubt, reasonably caused by the defendant's ambiguous statements as to whether he wants the interrogation to end, should be resolved in favor of the police and that under these circumstances further interrogation by the police does not offend the West Virginia Constitution." *Farley*, 192 W. Va. at 256, 452 S.E.2d at 59. *See also* Syl. pt. 5, in part, *id*. (holding that in order to

[35] Following the *Davis* decision, courts are generally split as to whether comments like "I think I need a lawyer" are unequivocal requests that require law enforcement to end an interrogation. *Compare Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000) (finding comment "I think I need a lawyer" was not an unequivocal request for counsel), and *State v. Purcell*, 203 A.3d 542, 552 (Conn. 2019) ("When statements regarding the assistance or presence of counsel include one or more conditional or hedging terms, such as if, should, probably, or maybe, courts generally have deemed them ambiguous or equivocal.") and *People v. Shamblin*, 186 Cal. Rptr. 3d 257, 273 (Cal. Ct. App. 2015) ("Under our *Miranda* cases, words like 'probably' and 'I think' indicate to an objective listener that defendant did not have a clear intention to invoke his right to counsel, but was only considering the possibility of doing so."), with *People v. Bethea*, 159 A.D.3d 710, 711, (N.Y. App. Div. 2018) (finding that defendant's statement "I think I need a lawyer" "constituted an unequivocal invocation of the right to counsel") and *Wood* v. *Ercole*, 644 F.3d 83, 91 (2d Cir. 2011) (concluding that "'I think I should get a lawyer'" is sufficiently unequivocal.).

terminate a police interrogation pursuant to *Miranda*, "the words or conduct be must explicitly clear").[36] Under the circumstances presented in this matter, we conclude that the circuit court did not err in finding that Mr. Small made an equivocal comment when he indicated, "I think I need a lawyer," and, thus, admission of the statements Mr. Small made thereafter was not error because it did not encroach upon his *Miranda* rights.

### *E. Remarks by the State During the Mercy Phase*

Finally, Mr. Small argues that he is entitled to a new trial on the issue of mercy, asserting that during the mercy phase of his bifurcated trial[37] the State improperly: (1) commented on his right to remain silent and (2) suggested that there were factors that the jury should consider in the mercy phase.

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[36] *See also McNemar v. Ballard*, No. 11-0606, 2012 WL 5990127, at *2 (W. Va. Nov. 30, 2012) (memorandum decision) (finding that the circuit court did not err in concluding that the petitioner failed to establish that he unequivocally requested counsel when he asked if he should have an attorney and citing *Davis* with approval).

[37] In a bifurcated first-degree murder trial, there are two phases, the guilt phase and the mercy phase. As we have explained, "[d]uring the guilt phase of the trial, the jury is to consider only whether the defendant is guilty of the crimes charged in the indictment." *State v. Reeder*, 248 W. Va. 346, 348 n.3, 888 S.E.2d 846, 848 n.3 (2023). However, during the mercy phase, the issue is "whether or not the defendant, who already has been found guilty of murder in the first degree, should be afforded mercy, *i.e.*, afforded the opportunity to be considered for parole after serving no less than fifteen years of his or her life sentence." *State v. Trail*, 236 W. Va. 167, 181, 778 S.E.2d 616, 630 (2015).

**1. Right to remain silent.** Mr. Small first argues that during closing arguments in the mercy phase of the trial, the State invited the jury to infer a lack of remorse from Mr. Small's invocation of his right to remain silent at trial.

Generally, the State is prohibited from commenting on the silence of an accused person. [38] For example, this Court has held that "Remarks made by the State's attorney in closing argument which make specific reference to the defendant's failure to testify, constitute reversible error and defendant is entitled to a new trial." Syl. pt. 5, *State v. Green*, 163 W. Va. 681, 260 S.E.2d 257 (1979).[39]

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[38] The State argues that the prosecutor's closing remarks do not afford Mr. Small any relief because they occurred during the mercy phase of a bifurcated trial, after the jury had already convicted him. The State relies on *State v. Boyd*, which provides that

> [t]he basis for the rule prohibiting the use of the defendant's silence against him is that it runs counter to the presumption of innocence that follows the defendant throughout the trial. It is this presumption of innocence which blocks any attempt of the State to infer from the silence of the defendant that such silence is motivated by guilt rather than the innocence which the law presumes.

160 W. Va. at 240, 233 S.E.2d at 716. Furthermore, "[i]n the trial of a criminal offense, the presumption of innocence existing in favor of a defendant continues through every stage of the trial until a finding of guilty by the jury." Syl. pt. 11, *State v. Pietranton*, 140 W. Va. 444, 84 S.E.2d 774 (1954). The State, therefore, contends that because the jury had already found Mr. Small guilty, his presumption of innocence was lost, and he was no longer afforded this right. Because we find no error in the State's comments, we need not decide this question.

[39] *See also* Syl. pt. 4, *State v. Murray*, 220 W. Va. 735, 649 S.E.2d 509 (2007) (per curiam) ("It is prejudicial error in a criminal case for the prosecutor to make statements

Mr. Small did not contemporaneously object to the prosecutor's statements during the closing arguments.[40] Mr. Small's failure to object operates as a waiver of this claim of error, as this Court has stated that, in criminal cases, if counsel believes that opposing counsel "has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks." Syl. pt. 5, in part, *State v. Grubbs*, 178 W. Va. 811, 364 S.E.2d 824 (1987). This Court has also long held that "Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." Syl. pt. 6, *Yuncke v. Welker*, 128 W. Va. 299, 36 S.E.2d 410 (1945). *See also State v. Young*, 185 W. Va. 327, 349 n.25, 406 S.E.2d 758, 780 n.25 (1991) (finding defendant waived issue of improper remarks by the prosecutor during closing argument because of failure to object). Thus,

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in final argument amounting to a comment on the failure of the defendant to testify." (quoting Syl. pt. 3, *State v. Noe*, 160 W. Va. 10, 230 S.E.2d 826 (1976), *overruled on other grounds by State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995))); W. Va. Code § 57-3-6 ("In any trial or examination in or before any court or officer for a felony or misdemeanor, the [accused's] . . . failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by anyone.").

[40] In its brief on appeal, the State argues that Mr. Small both failed to object during closing arguments and failed to raise the mercy phase issues in a post-trial motion. The record reflects that the State's representation is incorrect. While Mr. Small failed to contemporaneously object, he clearly raised the issue in his amended post-trial motions. However, as discussed herein, because Mr. Small failed to object contemporaneously, he waived the issue.

because Mr. Small failed to raise his objection contemporaneously to the prosecutor's comments, he waived this issue.

However, this Court has, on occasion, reviewed alleged improper remarks for plain error. *See State v. Murray*, 220 W. Va. 735, 742, 649 S.E.2d 509, 516 (2007) (per curiam) ("Although counsel for the appellant failed to raise contemporaneous objections to the statements of the prosecuting attorney, we find the statements on their face to be of such magnitude as to justify a review upon a plain error analysis."). As this Court has held,

> An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Syl. pt. 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). Furthermore, "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Here, Mr. Small fails to meet the threshold of plain error review because we find no error in the State's remarks. The State argued, in relevant part, as follows:

> There's a comment made by Mr. Mason that he missed his son's first baseball game today. What I want you to think about is that [Ms. Hawkridge] will never know what sports her daughter . . . even gets to play. She will never know. She will never get to see her daughter as you saw her in the photos that were passed around.
>
> *You heard that from the defendant. But you know what you haven't heard today? Remorse. You haven't heard any remorse. This was a cold-blooded gang hit where [Ms. Hawkridge] had no chance. They are asking for a chance, but [Ms. Hawkridge] had no chance. The defendants showed [Ms. Hawkridge] no mercy when she was gunned down in front of her house.*

(Emphasis added). Mr. Small complains about the last seven sentences italicized above. When viewing the entirety of the State's remarks, it is clear that the State's comments regarding what the jury had not heard during the mercy portion of the trial were in response to Mr. Mason's testimony about missing his son's baseball game. Those comments were not addressed to Mr. Small or his lack of testimony. Although the State's closing could have been worded more precisely to identify which defendant was being referenced, when viewed as a whole, the State's comments were not improper remarks on Mr. Small's right to remain silent. Accordingly, we find no error, plain or otherwise.

**2. Elements to consider when deciding the mercy issue.** Mr. Small next asserts that during closing arguments in the mercy phase of the trial, the State improperly

outlined certain elements the jury should consider when deciding the mercy issue. The State made the following remarks to the jury:

> When we consider whether or not mercy should attach to a sentence, when we make this argument to a jury, we generally look to two factors. We look to the defendant's criminal history. We look to the heinous nature of the crime. In this case the facts are clear.

Once again, Mr. Small did not object to this remark during trial; rather, he raised it in his post-trial motions. Accordingly, for the same reasons that he waived his objection to any purported commentary on his silence, Mr. Small also waived this assignment of error. *See* Syl. pt. 6, *Yuncke*, 128 W. Va. 299, 36 S.E.2d 410.

To the extent that we may review for plain error, this Court has held that "An instruction outlining factors which a jury should consider in determining whether to grant mercy in a first[-]degree murder case should not be given." Syl. pt. 1, *State v. Miller*, 178 W. Va. 618, 363 S.E.2d 504 (1987). Reviewing the State's closing as a whole, it is clear that the State did not inform the jury that it was to consider only those two factors, but rather that the State considers those two factors when deciding how to argue during the mercy phase. Furthermore, the circuit court properly instructed the jury regarding the considerations for mercy:

> . . . . You may want to know what the legal definition of mercy is. However, I'm unable to give you one. The issue of mercy is committed to your discretion. And I am not permitted to guide you further as to what reasons justify mercy.

> I'm allowed only to tell you the effect of your finding, and that your finding must be unanimous.
>
> A recommendation of mercy would mean that the Defendants Richard Dane Small and Joseph Wayne Mason could be eligible for parole consideration after having served the minimum of 15 years.
>
> The mere eligibility for parole in no way guarantees immediate parole after 15 years, and that parole is given to inmates only after thorough consideration of their records by the Parole Board. The Parole Board decides whether either of the defendants would be granted parole.

Therefore, we decline to find that the State's remarks during closing arguments during the mercy phase of the bifurcated trial were error. Furthermore, even if the remarks constituted error, Mr. Small failed to demonstrate how they affected his substantial rights. This Court has consistently declared that a defendant who fails to object to a perceived error has the burden to demonstrate that the error prejudiced the defendant:

> Assuming that an error is "plain," the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and *the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.*

Syl pt. 9, *Miller*, 194 W. Va. 3, 459 S.E.2d 114 (emphasis added). *See also State v. Todd C.*, 250 W. Va. 642, 660, 906 S.E.2d 295, 313 (2023) ("Importantly, plain error review places on the *defendant* the burden of proving prejudice[.]"). Thus, having found no prejudicial error, we conclude that Mr. Small is entitled to no relief on this ground.

## IV.

## CONCLUSION

For the reasons explained above, we affirm the August 19, 2022 order of the Circuit Court of Berkeley County sentencing Mr. Small for his convictions of conspiracy to commit first-degree murder and first-degree murder.

Affirmed.