Supreme Court No. 101830-4
Court of Appeals No. 84631-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY SHRONE PERSON,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Anthony Person, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Person seeks review of the unpublished opinion of the Court of Appeals in cause number 84631-1-I, 2023 WL 2131267 (slip op. February 21, 2023). A copy of the decision is attached as Appendix A at pages A-1 through A-18.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review where the trial court erred by denying a defense motion to depose State's witnesses who refused to answer relevant questions pertaining to a 2011 police investigation of the same allegations, and erred by finding that a series of deposition questions proffered by the petitioner where were not material and necessary?

2. Should this Court accept review where the State violated Mr. Person's right to be advised of favorable or

impeachment evidence as provided by ***Brady v. Maryland*** and conducted mismanagement by failing to preserve materials pertaining to prior investigations?

D. STATEMENT OF THE CASE

A jury convicted Anthony Shrone Person of 18 counts of sexual offenses against his minor daughters and step-daughter.

Mr. Person argued that the defense had "evidence of perjury" in a recording by M.E.P. and that his former wife Ramona Jones had fabricated the sexual abuse allegations against him, and that the recording was provided to the prosecution. 1RP at 66. Mr. Person argued that the recording "negates guilt" and "eliminates probable cause in the State's witnesses' testimonies that sexual abuse occurred." 1RP at 66. The state denied having received a recording by M.E.P. 1RP at 70. Mr. Person said that the recording contains a recantation by M.E.P. and was provided to his former attorney and that he assumed the information was provided to the State. 1RP at 71.

Through counsel, the defense filed a motion to conduct witness interviews by Zoom. CP at 99-109. The State noted that

the witnesses did not want to be interviewed and argued under ***State v. Mankin***, 158 Wn.App. 111 241 P.3d 421 (2010), the court did not have the ability to compel the witnesses to participate in a Zoom interview and that the defense could move for a deposition of the witnesses. 1RP at 14-15. The court ruled that it does not have the ability to compel the witnesses to agree to a Zoom interview. 1RP at 16.

At a later hearing, Mr. Person stated that questions for the witnesses were submitted to a defense investigator for an interview that took place on December 11, and O.D.P. said that she would not answer any questions "for the time period where she and the alleged victims declared that they have never been sexually abused." 1RP at 67. Mr. Person revisited the issue, arguing that Ms. Jones, O.D.P., A.M.A., and M.E.P. "declined to answer questions in regards to previous investigations by the Mason County Sheriff's Department and the Shelton Police Department in the scope and the relevancy of information that pertains to the alleged sexual abuse allegations that they claim occurred." 1RP at 80. Mr. Person had previously filed a motion

to compel a deposition. CP at 99-109. Mr. Person argued that there were interviews conducted with O.D.P. on December 11 and that she would not answer questions regarding a previous investigation of the alleged abuse. 1RP at 109-11. Mr. Person stated that there were also interviews on December 15 with Ramona Jones and M.E.P. and that they both said they would not answer questions about the prior investigation. 1RP at 111. The State argued that the request for deposition should be denied. 1RP at 125. The State argued against dismissal under CrR 8.3 and for any alleged discovery violations under CrR 4.7. 1RP at 122-24. The State argued that three of the four state's witnesses gave pretrial interviews conducted by standby counsel and two defense investigators and that had Mr. Person failed to show that the witnesses are refusing to discuss the case. 1RP at 125. The State argued that Mr. Person "seems to believe because a question may or may not have been answered in that interview setting, that now opens the door for him to get –to obtain a deposition." 1RP at 126.

Mr. Person said that approximately twenty questions were provided to the witnesses and "unanimously the state's witnesses

have declined to answer those questions." 1RP at 128. Mr. Person also argued that there were interviews that took place by Shelton Police Department and Pierce County Sheriff's Department of members of the Person family that were not provided to the defense and that the case should be dismissed pursuant to CrR 8.3 due to governmental misconduct. 1RP at 130-34.

The court found no governmental misconduct and that all discovery had been provided to standby counsel and that the State was pursuing any additional information that may exist regarding the prior investigation. 1RP at 135. The court also denied a motion to dismiss alleging that there are no disputed material facts. 1RP at 136. The court denied the motion to depose the witnesses. 1RP at 137. The court found what it called a "partial refusal" by witnesses to discuss the case and stated that the court did not have enough information to determine if the witnesses were refusing to discuss the case and would not grant the request but would consider additional information provided by Mr. Person. 1RP at 136-38.

Mr. Person argued again on January 4, 2021, that during the witness interviews on December 11 and December 15, 2020, the witnesses would not provide information to the defense. 1RP at 150. Mr. Person stated that O.E.P. said at an interview on December 11 that she would not answer the questions because "[']I know where they go,[']hinting at self-incrimination." 1RP at 152. Mr. Person stated that Ramona Jones and M.E,P. said on December 15 that they did not want to discuss any questions or provide any information to Mr. Person. 1RP at 152. The court stated that Mr. Person could provide information to the court about what "specially what it is that was refused to answer." 1RP at 154.

Mr. Person also argued that the Mason County Sheriff's Department and Shelton Police Department, which were the law enforcement agencies involved in a previous investigation of allegations of sexual abuse made in 2011 by A.M.A., O.D.P. and M.E.P. against Mr. Person would not provide the investigation details and the witnesses interviews, which he needs as part of his defense. 1RP at 179-182. Mr. Person stated that the document in

the case file in which there are notations that the Mason County and Shelton police investigated the allegations but had not provided detailed information to the defense. 1RP at 180, 182. The court denied Mr. Person's request to depose the witnesses, stating that Mr. Person's "frustration" is from not receiving material from other investigative bodies, and that he had not provided evidence of "what information is going to be gleaned [from depositions] that you don't already know." 1RP at 188, 189.

The court subsequently denied the defense motion to dismiss, stating that it had given Mr. Person the opportunity to "pinpoint specific questions that were both material and necessary, that were not being answered, and I have yet to receive that from Mr. Person." 1RP at 226. The court also denied Mr. Person's motion to exclude witness testimony on the basis that he was not present for an interview with O.D.P. on December 11, 2020, when Mr. Person was not able to attend due to illness. 1RP at 229, 230. The court denied Mr. Person's motion to dismiss due to failure to preserve evidence in a memorandum decision filed on March 9, 2021. CP at 575.

At trial, the following testimony was elicited:

Anthony Person married Romana Person in 1996 and they had ten children together. 3RP at 728, 729. Prior to their marriage Ms. Jones had a child—A.M.A. 3RP at 729, 764. The family lived in Lacey, Washington and then moved to a house on Summit Drive in Shelton. 3RP at 731. Ms. Jones testified that Mr. Person was "authoritarian" to the children and he was verbally and physically abusive to the children. 3RP at 734-35. Ms. Jones testified that there was a lot of fighting and arguing and that O.D.P. and A.M.A. moved out. 3RP at 738. The family moved from Summit Drive to a larger house in Shelton for about a year and then moved back to the residence on Summit Drive. 3RP at 742. Mr. Person, Ramona Jones and the children—except O.D.P. and A.M.A.—moved to Michigan in 2017. 3RP at 739. The parties separated in 2017 and Ms. Jones stated on cross-examination that the charges were filed in 2018, eight or nine months after they separated. 3RP at 756-57.

Ms. Jones stated that there was an investigation of alleged sexual abuse in June, 2011 by the Department of Social and

Health Services and that M.E.P. and O.D.P. were interviewed in October 2011. 3RP at 746. She stated that she was aware of an investigation at Joint Base Lewis McChord involving O.D.P. and M.E.P. 3RP at 758.

M.E.P. stated that Mr. Person touched her vagina with his hand while the family lived at the Summit Drive address. 3RP at 874. M.E.P. testified that the family was investigated by Child Protective Services and a military investigative unit called Criminal Investigation Division (CID) from JBLM. RP at 876-77. M.E.P. denied that Mr. Person forced her to not make disclosure of sexual abuse when the family was investigated in 2011. 3RP at 884.

Daniel Patton, a sergeant with the Shelton Police Department, testified that in February 2018 he received a referral from the Thurston County Sheriff's Office and also received an allegation from O.D.P. that she was sexually abused by her father. 3RP at 706-09. During an investigation, he stated that A.M.A. and M.E.P. also alleged that they had been sexually abused by Mr. Person. 3RP at 710. Sergeant Patton interviewed all three adults,

and also learned that there was a previous investigation of sexual abuse allegations by Mr. Person conducted by the Shelton Police Department. 3RP at 711. A narrative report of a Shelton Police investigation from 2011 was discussed by Sgt. Patton without defense objection but not admitted as an exhibit. 3RP at 712-13; CP at 766. Sgt. Patton testified that the investigation from 2011 was inactive and that a detective had spoken to M.E.P. and O.D.P. and they "refused to cooperate with the detective." 3RP at 713. Sgt. Patton testified that he was also contacted by a social services department and did not make any disclosure or allegation and the case was placed in inactive status. 3RP at 713.

A.M.A. testified that she lived at Summit Drive in Shelton with her siblings in a two-bedroom trailer. 3RP at 767-68. She said they moved from Lacey to Shelton when she was 13 or 14 years old. 3RP at 768. A.M.A. stated that the abuse started when she was eight and ended at 15. 3RP at 784, 785. A.M.A. left home in 2014 when she was 23 years old. 3RP at 799.

A.M.A. said that when she was 16, Mr. Person took her for a drive to teach how to drive and they got wine coolers and she was intoxicated and he then he pulled over and kissed and touched her. 3RP at 790. A.M.A. said that she had sexual intercourse with Mr. Person over two hundred times. 3RP at 791.

O.D.P. said that they lived in Lacey during her childhood and then moved Shelton. 3RP at 824-25. She said that she remembers her tenth birthday at an address in Shelton at 612 Laurel Street. 3RP at 825. O.D.P. said that she ran away from home at age 15 and that Mr. Person called Crime Stoppers and she was forced to return to the house. 3RP at 837, 838.

O.D.P. made a report to the Thurston County sheriff's office. 3RP at 839. The case was transferred to Mason County and she was interviewed by Sgt. Patton. 3RP at 839-40. She said that made the report in 2018 because she heard that her mother Ramona had left with the rest of the children. 3RP at 840.

David Hill testified that he lived on the property at Summit Drive for about seven and a half years and that he saw no signs of physical or sexual abuse by Mr. Person toward any of the

children. 3RP at 942. He testified that in June 2011 the children alleged sexual abuse by Mr. Person and that there was an investigation by CID and Person was detained and later released by law enforcement as part of the investigation. 3RP at 945. Mr. Hill said the that children later recanted their allegation of sexual abuse. 3RP at 946.

Officer Paul Campbell testified that he was a detective for the Shelton Police Department during an investigation in June 2011. 3RP at 927. Officer Campbell said that he did not recall the alleged victims recanting allegations made in 2011. 3RP at 926.

Mr. Hill said that he talked with M.E.P. in July 2020, and she said that their mother "was putting them up to making these allegations." 3RP at 948. Mr. Hill moved to Washington in 2010 and lived in a trailer on the Summit Drive property. 3RP at 949.

Mr. Person stated that during the investigation at JBLM he was transparent and answered all questions during a two-year investigation. 3RP at 962-64. He testified that ten agencies were involving in the investigation, including "CID, military police,

Pierce County Sheriff's Department, Tacoma Police Department, FBI, Mary Bridge Children's Hospital, Shelton Police Department." 3RP at 962-63. Mr. Person said that DSHS came to their house to talk to the children and he let them in and the following day drove the children to a community service office in Shelton for individual forensic interviews. 3RP at 964. Mr. Person said that the process continued until 2012 when there was another incident involving A.M.A. and O.D.P. and they told them that they had to leave because there were "out of control with immorality and lying, so we had to ask them to leave[.]" 3RP at 966. Mr. Person had not seen O.P. for ten years until the trial. RP at 966. He and Ramona moved to Michigan in 2017 and he worked in Detroit with Mr. Hill. 3RP at 967. Ms. Jones left him and took eight children to Oklahoma. 3RP at 969. Mr. Person said that January 2018 was the "magic date," and that he was served with divorce papers. 3RP at 970. At the same time he received a call from Officer Ohlen from the Shelton Police Department about child sex allegations. 3RP at 971. Mr. Person sent an email to the Shelton Police Department stating that this had already been

investigated by the military. 3RP at 971. He stated that in January 2019 he received a call from Sgt. Patton from the Shelton Police Department and said that he was tired to talking about it about it and that he was tired of being investigated. 3RP at 971.

Mr. Person denied having sexual intercourse with A.M.A. or O.D.P. or M.E.P. and denied having touched them for sexual gratification or having sexual contact with any of them or committing incest. 3RP at 986-88. Mr. Person stated that after learning of the allegation, he did what he had done in 2011 by contacting law enforcement, and said that he notified Sgt. Patton in July 2020 and in August 2020 about the allegations but received no follow up. 3RP at 988-89.

On appeal, Division 1 affirmed the trial court's rulings denying several pretrial motions, determined that the prosecutor did not commit misconduct by eliciting testimony about Person's right to prearrest silence and commenting on that right in closing argument, and that cumulative error did not merit reversal. ***Person***, 2023 WL 2131267, at *1, *18.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of this issue because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. RESPECTFULLY, THIS COURT SHOULD GRANT REVIEW OF THE QUESTION WHETHER THE TRIAL COURT ERRED BY DENYING MR. PERSON'S MOTION TO DEPOSE WITNESSES UNDER CRR 4.6(A).

A defendant's right to compulsory process includes the right to interview witnesses before trial. U.S. Const. Amend. XIV; ***State v. Wilson***, 149 Wn.2d 1, 65 P.3d 657 (2003). While a defendant's right to the compulsory attendance of witnesses includes the right to interview a witness in advance of trial, there is no right to have a successful interview. ***State v. Clark***, 53 Wn.App. 120, 124–25, 765 P.2d 916 (1988). The right to a right to interview witnesses co-exists equally with a witness's right to refuse such an interview. ***State v. Hofstetter***, 75 Wn.App. 390, 397, 878 P.2d 474 (1994) review

denied, 125 Wn.2d 1012 (1994) (quoting ***United States v. Black***, 767 F.2d 1334, 1338 (9th Cir.1985)).

The trial court has full authority to compel a deposition of a reluctant witness, and either party may move for such a deposition in order to prepare their case for trial. While the criminal rules place no affirmative burden on the State to produce uncooperative witnesses for pretrial interviews, the rules do allow the court to order a deposition of a reluctant witness upon application of any party. CrR 4.6(a) grants courts the authority to order a deposition in a criminal case solely under three circumstances. See ***State v. Mankin***, 158 Wn. App. 111, 122, 241 P.3d 421 (2010). These circumstances include when "a witness refuses to discuss the case with either counsel and the witness' testimony is material and necessary." CrR 4.6(a)(2). This Court's holding in ***Mankin*** aligns with Division One's holding that a witness may refuse to answer questions in an interview with either party. ***State v. Wilson***, 108 Wn.App. 774, 776, 31 P.3d 43 (2001); accord ***Hofstetter***, 75 Wn. App. at 398.

CrR 4.6 makes it clear that either party may move to depose a reluctant witness; CrR 4.6(a)(2) allows a trial court to order a

deposition if a witness refuses to speak to one of the parties, but "there is nothing in the rule that requires a successful or cooperative deposition." ***Mankin***, 158 Wn. App. at 124, n.10.

In this case, the court stated that Mr. Person could submit questions to the court to determine the materiality of the questions that he wanted to ask. 1RP at 137, 228. Mr. Person filed a series of eighteen proposed questions to Ms. Jones, nine questions to A.M.A., twenty questions to M.E.P., and thirty questions to O.D.P. in an Affidavit on January 8, 2021. CP at 315-336 (Declaration Affidavit of Defendant, Sub No. 84). By the court's own statement, the judge would consider whether a deposition under CrR 4.6 was appropriate upon review of specific questions to determine the materiality of the questions. 1RP at 228. The largely overlapping questions for the four witnesses include questions pertaining to the proposed deponent's recollection of the sexual abuse allegations from 2011 and the investigation following the allegations. CP at 316-336. The trial court abused its discretion by finding that the materiality of the questions contained in the affidavit was "questionable." 1RP at 228.

Division One found fault with the procedure by which Mr. Person failed to re-note his motion to depose witnesses or otherwise alert the trial court that he had filed documents including the copy of written questions that he provided to standby counsel and his investigator to use during interviews. ***Person***, slip op. at *9. Respectfully, the Court's opinion penalizes a pro se participant for a procedural error and overlooks that Mr. Person in fact complied with the trial court's directive to supplement his motion by "providing specifically what it is that's being refused." ***Person***, slip op. at *9. It is clear that Mr. Person did comply by filing the list of questions in documents that he filed with the trial court. Mr. Person had no way of knowing what the trial court had seen or not seen in the file and was presumably not failure with the option of re-noting a motion, providing a bench copy or other methods of making sure that a trial court judge sees the documents a litigant deems important. The Court's ruling puts form over substance; the proposed questions are specific and well-formed. The questions are material and necessary because Mr. Person's defense is primarily based on the previous 2011 investigation and the fact that the witnesses either

recanted prior allegations or denied that sexual abuse took place. Mr. Person should have been permitted to depose the witnesses regarding their recollection of the prior investigation and to determine if their testimony at trial was inconsistent to prior statements made to law enforcement, depriving the defense of the ability to effectively cross examine the State's witnesses and impeach their testimony if merited by their trial testimony. Mr. Person argues that Division One erred by affirming the trial court's denial of the multiple motions to depose witnesses and review should be granted.

2. MR. PERSON'S DUE PROCESS RIGHTS UNDER *BRADY V. MARYLAND* WERE VIOLATED

The Federal Due Process Clause provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV. The Washington State Constitution contains a similar due process provision. Wash. Const., Art. I, §3. "Because the language of our state due process clause is virtually identical with that of the federal due process clause, federal cases are entitled to great weight. They are not, however,

controlling," and Washington courts have sometimes interpreted the State Constitution as more protective of defendants' rights. ***State v. Davis***, 38 Wn. App. 600, 604, 686 P.2d 1143 (1984) (footnotes and citations omitted).

The prosecution has a duty to seek out exculpatory and impeaching evidence held by other government actors, and the failure to do so violates the defendant's right to due process. U.S. Const. amend. XIV; ***Kyles v. Whitley***, 514 U.S. 419, 438, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); ***Brady v. Maryland***, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

In this case, Mr. Person seeks reversal of the convictions on the basis that the State violated ***Brady*** by not disclosing favorable impeachment evidence about a prior police investigations by the Shelton Police Department and other law enforcement agencies of similar or identical accusations that resulted in no prosecution.

Under ***Brady***, a prosecutor has an affirmative duty to learn of and disclose any exculpatory or impeachment evidence known to the prosecution or police investigators that is material to guilt or punishment. See ***Strickler v. Greene***, 527 U.S. 263, 280-82, 119 S.

Ct. 1936, 144 L.Ed. 2d 286 (1999). A "*Brady* violation" occurs where (1) the evidence is favorable to the accused, either because it is exculpatory or because it is impeaching, (2) the evidence is suppressed by the State, either willfully or inadvertently, and (3) the evidence is material, i.e., prejudicial. ***In re Stenson***, 174 Wn. 2d 474, 276 P.3d 286 (2012); ***United States v. Price***, 566 F.3d 900, 907 & 911 n.12 (9th Cir. 2009). An appellate court reviews a ***Brady*** claim de novo. ***Price***, 566 F.3d at 907.

Mr. Person submits that the police withheld material evidence pertaining to a 2011 police investigation of the same allegations involving the same alleged victims.

"Favorable" evidence includes both exculpatory and impeachment evidence. ***Giglio v. United States***, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L. Ed. 2d 104 (1972); ***State v. Mullen***, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). Subsequent cases have held that a prosecutor's duty to disclose favorable evidence extends to "favorable evidence not specifically requested by defense." ***Mullen***, 171 Wn.2d at 893 (citing ***United States v. Agurs***, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L. Ed. 2d 342 (1976)). The prosecutor's duty also

extends to "evidence possessed by law enforcement." ***Mullen***, 171 Wn.2d at 893 (citing ***Kyles v. Whitley***, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L. Ed. 2d 490 (1995) (police investigators)); ***State v. Davila***, 184 Wn.2d 55, 71, 357 P.3d 636 (2015) (police crime lab).

In this case, it was uncontested that allegations of sexual abuse made by A.M.A. and O.D.P., and M.E.P. against Mr. Person were investigated in 2011 by Shelton Police Department and other agencies including an investigation by CID, associated with JBLM, and child protective services. Despite the fact that the sex allegations were investigated and that the complaining witnesses were interviewed, Mr. Person was not provided with material generated as a result of the investigations other than the notes referred to by Sgt. Patton in his testimony. 3RP at 711. The results of the previous investigation was material, and it is reasonable to presume that the investigations would have shown that the witnesses either recanted their prior allegations or denied that sexual abuse took place. The undisclosed evidence was material because there is a reasonable probability that the result of the proceeding would have been different if this information had been disclosed. There is a reasonable

probability the result would have been different if the witnesses were impeached with this evidence, because each was the only purported eyewitness to the alleged crimes. There was no physical or forensic evidence presented at trial; the State's evidence consisted solely of the accusations made by A.M.A., O.D.P., and M.E.P. The State suppressed potentially favorable impeachment evidence regarding the facts of the prior investigation against Mr. Person. This evidence was material to the charges and so requires reversal for retrial.

While a prosecutor has no duty to independently search for exculpatory evidence, the prosecutor has a duty to learn of evidence favorable to the defendant that is known to others acting on behalf of the government in a particular case, including the police. ***In re Pers. Restraint of Gentry***, 137 Wn.2d 378, 399, 972 P.2d 1250 (1999). The State has a duty to "seek out exculpatory and impeaching evidence held by other government actors." ***Davila***, 184 Wn.2d at 71 (citing ***Kyles v. Whitley***, 514 U.S. 419, 438, 115 S. Ct. 1555, 131 L.Ed. 2d 490 (1995)). "Thus, the prosecution 'suppresses' evidence, for purposes of ***Brady***, even if that evidence is held by others acting on the government's behalf, e.g., police investigators." ***Davila***, 184

Wn.2d at 71.

There is more than "'any reasonable likelihood"' that the State's suppression of potential impeachment evidence affected the outcome of the trial and review should be accepted.

In addition, the State violated Mr. Person's right to due process when police failed to preserve material from the 2011 investigations. CrR 8.3(b) authorizes a court to "dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's rights to a fair trial." Dismissal is justified when the following factors exist: (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. ***State v. Michielli***, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). Governmental misconduct can be something as basic as simple mismanagement. *Id.* at 239. To comport with due process, the prosecution must disclose and preserve material exculpatory evidence. ***State v. Wittenbarger***, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). The State's failure to preserve such evidence requires dismissal of criminal charges. ***State v. Groth***, 163 Wn. App. 548,

557, 261 P.3d 183(2011).

Due Process requires the State to preserve such evidence if it is "potentially exculpatory." ***Wittenbarger***, 124 Wn .2d at 477; Wash. Const. art. I, § 3.

Here, police reports were likely to be critical for Mr. Person's defense. If the defense can show the State failed to preserve evidence—for instance records showing that the complaining witnesses did not make disclosure of sexual abuse to investigators or had recanted allegations—would have permitted Mr. Person to challenge the testimony of the complaining witnesses that might be inconsistent with their trial testimony. the case must be dismissed. ***California v. Trombetta***, 467 U.S. 479, 485- 89, 104 S.Ct. 2528, 81 L Ed.2d 413 (1984); see also ***Brady***, supra; U.S. Const. amends. V, XIV.

Here, the record establishes the State mismanaged the case by not preserving the material generated from the prior investigations and by permitting records from the investigation to be destroyed. 3RP at 711. The State's mismanagement prejudiced Mr. Person's constitutional right to present a complete defense to the charges. U.S.

Const. Sixth Amendment; Washington Const. art. I, § 22. As discussed above, the results of the 2011 investigations were material to Mr. Person's defense and potentially useful for impeachment purposes. Accordingly, the State had a duty to preserve this evidence—particularly where the case was characterized as "inactive" —and which therefore could presumably be reactivated at any point in the future. The destruction of investigatory records described by Sgt. Patton constituted government misconduct that prejudiced Mr. Person's right to present a complete defense. As such, the trial court erred when it did not dismiss the charges under CrR 8.3(b) pursuant to Mr. Person's motion.

Based on the foregoing, the petitioner submits that the Court's unpublished opinion affirming the trial court's suppression ruling is contradictory to other decisions of this Court and the Court of Appeals and that Division Two has erred by affirming the conviction. this Court should accept review, find Mr. Person's due process rights were violated, reverse the convictions.

F. CONCLUSION

For the foregoing reasons, this Court should accept review and reverse the convictions.

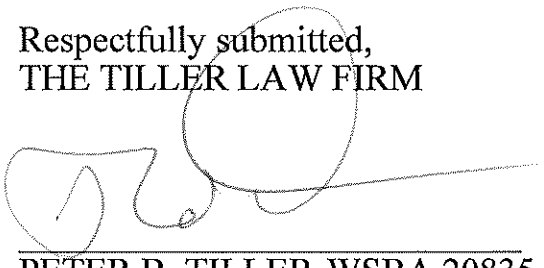
DATED: March 22, 2023.

Certification of Compliance with RAP 18.17:

This petition contains 4953 words, excluding the parts of the petition exempted from the word count by RAP 18.17.

DATED: March 22, 2023.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

CERTIFICATE OF MAILING

The undersigned certifies that on March 22, 2023, that this Petition for Review was sent by the JIS link to Ms. Lea Ennis, Clerk of the Court, Court of Appeals, Division I, 600 University St. Seattle, WA 98101 and to Timothy J. Higgs, Mason County Prosecuting Attorney, and a copy was mailed by U.S. mail, postage prepaid, to the appellant at the following address:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 22, 2023.

PETER B. TILLER

APPENDIX A

FILED
2/21/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. ANTHONY SHRONE PERSON, Appellant.	No. 84631-1-I UNPUBLISHED OPINION

BOWMAN, J. — A jury convicted Anthony Shrone Person of 18 counts of sexually assaulting his minor daughters. Person argues the trial court erred by denying several of his pretrial motions and the prosecutor committed misconduct by improperly commenting on his constitutional right to prearrest silence. Person also claims cumulative error deprived him of his right to a fair trial. We affirm.

FACTS

In 2011, Person and his wife Ramona Jones[1] lived in Shelton. Together they have 11 children, including Jones' daughter from a previous relationship, A.A. That June, two of their daughters, 15-year-old O.P. and 14-year-old M.P., began working at a Burger King on the Fort Lewis military base, Joint Base Lewis-McChord (JBLM).

[1] Jones divorced Person in 2018.

In August 2011, Person filed a missing person report after O.P. ran away from home. Soon after, the military found O.P in the barracks at JBLM and investigated two soldiers for sexually assaulting both O.P. and M.P. During their interviews, the soldiers claimed that O.P. and M.P. disclosed sexual abuse by Person. The military police did not ask O.P. and M.P. about the allegations, but they referred the case to the Department of Social and Health Services (DSHS).[2] Child Protective Services (CPS) contacted O.P. and M.P., but the girls did not disclose any sexual abuse by Person. CPS then referred the matter to the Shelton Police Department (SPD). SPD sent detectives to Person's home, but O.P. and M.P. "refused to cooperate."

Several years later in February 2018, A.A., O.P., and M.P. reported to police that Person sexually assaulted them as children. In April 2020, the State charged Person with 12 counts of sexual assault. As to A.A., the State charged Person with one count each of first and second degree child molestation and second degree incest. As for O.P., the State charged Person with one count each of first, second, and third degree rape of a child; first, second, and third degree child molestation; and first degree incest. And for M.P., the State charged Person with one count each of second degree child molestation and second degree incest.

[2] In her report, the special agent with the military police who investigated the matter and referred it to DSHS said that Person hired an attorney from Connolly Law Offices to represent the children, so she "can[ ]not talk with them." She also noted that "dad is a very slick talker."

In June 2020, the trial court issued a warrant for Person's arrest. In July, police found him living under a different name in Michigan. Police arrested and extradited Person to Mason County. The court arraigned Person and set bail at $250,000.

On September 18, 2020, the State amended the information to add six more counts. For the charges related to A.A., the State added one count each of first, second, and third degree rape of child, third degree child molestation, and first degree incest. And for O.P., the State added one count of second degree incest.

Pretrial Motions

In November 2020, Person moved to represent himself. The court granted his motion but also appointed standby counsel. Twice, Person asked the court to waive his bail and release him on his personal recognizance. The court denied both motions, finding each time that Person was a flight risk because he resides in Michigan and a community safety risk because of the seriousness and number of charges against him.

Person then sought to interview Jones, A.A., O.P., and M.P. Jones, A.A. and M.P. agreed to the interviews but would not agree to Person interviewing them. O.P. also agreed to an interview but refused to have Person present during her interview. So, Person drafted questions for his standby counsel and court-appointed investigator to ask during the interviews. Person did not attend O.P.'s interview. Person planned to attend Jones' and A.A.'s interviews, but he cancelled the morning of the interviews, telling jail staff he was sick. Person's

standby counsel and investigator conducted each interview and later provided summaries of the questions and answers to Person.[3]

After the interviews, Person moved to depose the witnesses, arguing that they refused to discuss the case and that "their testimony is material and necessary." Person also moved to dismiss the charges for "government misconduct," arguing that the prosecutor suppressed documents related to the 2011 sex abuse investigation. He argued the 2011 investigation showed that the witnesses previously denied any physical or sexual abuse, contradicting their later statements to police in 2018.

On December 30, 2020, the court heard both motions. It denied Person's motion to dismiss, concluding that the State provided Person with all known documents related to the 2011 investigation. As to Person's motion to depose, the trial court noted that it did not have enough information to address whether the witnesses refused to answer material questions during their interviews. The court denied Person's motion without prejudice so that he could "supplement his request by providing specifically what it is that's being refused."

In a hearing on January 5, 2021, Person renewed his motion to depose and reasserted the same arguments. The court noted that Person seemed to have a "very thorough understanding" of the details of the 2011 investigation, so

[3] The record suggests that Person never interviewed M.P. At a hearing on December 30, 2020, the State noted that "three of the four State witnesses . . . have given a pretrial interview voluntarily to standby counsel and a private investigator." In February 2021, the State told the court it was trying to arrange the "fourth and final interview." And at trial, Person asked for a continuance so that his private investigator could interview M.P. But at that time, M.P. declined the interview.

it was unclear what information he would gain by deposing the witnesses. The court determined that the information was not material and denied the motion.

On January 19, 2021, Person filed a "Motion for Dismissal on Grounds of Spoliation of Evidence" under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The court heard the motion in February. Person claimed that the Mason County Sheriff's Office (MCSO), SPD, DSHS, and CPS possessed additional documents related to the 2011 investigation. And he argued that the State violated its obligations under Brady by failing to preserve and disclose the information. The State again told the court it gave Person "all the evidence it has in its possession" and knew existed. The State explained that after submitting public disclosure requests, it gave Person 160 pages of investigative documents from the military, CPS, and SPD. In March 2021, the court denied Person's motion in a memorandum decision, explaining that he did not identify any material or exculpatory evidence withheld by the State.

Trial Testimony

At trial, Jones characterized Person as an "authoritarian," who physically and verbally abused her and the children. She stated that when SPD and CPS investigated the allegations of child abuse in 2011, Person "dictated" O.P. and M.P.'s cooperation with the investigation and "instructed" them how to answer questions. And she said that Person told her to "keep [her] mouth shut, not to talk about anything, let them do the work." On cross-examination, Jones said she did not see Person sexually assault their daughters and "was not aware of any sexual abuse in the home."

A.A., O.P., and M.P. all testified that Person sexually assaulted them. A.A. testified that Person began abusing her when she was 8 years old. The abuse ended when A.A. was 15, after he thought she was pregnant. A.A. then became concerned that Person started to abuse O.P. O.P. testified that Person began sexually assaulting her when she was 8 years old. She said the abuse continued until she was 16. And while M.P. did not remember when Person began abusing her, she said that Person repeatedly touched her before she turned 14 years old.

On cross-examination, O.P. and M.P both admitted that they denied Person sexually assaulted them during the 2011 investigation. O.P. testified that Person "ordered" her not to cooperate with the investigation. But M.P. said that Person did not "force[ ]" her to deny the abuse.

A jury convicted Person on all counts. Person appeals.

ANALYSIS

Person argues the trial court erred by denying several pretrial motions and the prosecutor committed misconduct by eliciting testimony about his right to prearrest silence and commenting on that right in closing argument. He also argues that cumulative error compels us to reverse his conviction.[4]

Pretrial Motions

Person contends that the trial court erred by denying several of his pretrial motions. We address each argument in turn.

[4] Person also argues that the trial court violated his right to a fair and impartial jury by seating a biased juror. But he conceded at oral argument that the allegedly biased juror was struck during peremptory challenges and did not sit on the jury.

a) Imposition of Bail

Person argues the trial court erred by imposing $250,000 in bail without first inquiring into his financial circumstances. Person concedes that the issue is moot but argues that we should consider his argument as a matter of continuing and substantial public interest. We disagree.

"An issue is moot if we can no longer provide effective relief." State v. Ingram, 9 Wn. App. 2d 482, 490, 447 P.3d 192 (2019). We cannot generally provide a convicted appellant with effective relief on a pretrial bail issue because "pretrial bail is no longer available to him." Id. Still, we may consider a moot issue if it involves a matter of continuing and substantial public interest. Id.

To determine whether a matter is of continuing and substantial public interest, we look to "(1) the public or private nature of the issue, (2) whether guidance for public officers on the issue is desirable, and (3) the likelihood that the issue will recur." Ingram, 9 Wn. App. 2d at 490. And we assess " 'the likelihood that the issue will escape review because the facts of the controversy are short-lived.' " State v. Huckins, 5 Wn. App. 2d 457, 463, 426 P.3d 797 (2018)[5] (quoting Westerman v. Cary, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994)).

Quoting Ingram, 9 Wn. App. 2d at 490,[6] Person says his argument amounts to a continuing and substantial interest because " 'the setting of bail is an issue of a public nature and there is currently a dearth of cases addressing

[5] Internal quotation marks omitted.

[6] Internal quotation marks omitted.

bail issues.' " But Ingram squarely addresses Person's argument. In that case, the defendant argued that the trial court violated CrR 3.2(d) by failing to consider less restrictive conditions of release when setting bail. Id. at 496. We agreed, noting that the trial court also failed to inquire into the defendant's financial circumstances. Id. We held that before imposing bail, the trial court

> must consider, "on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the safety of the community and prevent the defendant from intimidating witnesses or otherwise unlawfully interfering with the administration of justice."

Id. (quoting CrR 3.2(d)(6)).

Contrary to Person's argument, his alleged bail issue has not evaded review. And addressing his argument here would add no new guidance for public officers.[7] We decline to review Person's moot claim.

b) Deposition of Witnesses

Person argues the trial court erred by refusing to order that Jones, A.A., and O.P. submit to depositions. We disagree.

We review a trial court's ruling on discovery motions for abuse of discretion. State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993) ("The scope of criminal discovery is within the trial court's discretion."). The trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Lile, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017); see State v. Finch, 181 Wn. App. 387, 394-95, 326 P.3d 148 (2014)

[7] The State argues we should not address Person's argument because he "has not provided the record of the hearing at which bail was initially imposed." Because we reject Person's assignment of error as moot, we do not address the State's argument.

(court abused discretion in granting defendant's pretrial request to order alleged victim to submit to polygraph test).

In general, a criminal defendant has no right to depose prospective witnesses before trial. State v. Mankin, 158 Wn. App. 111, 121, 241 P.3d 421 (2010). But under CrR 4.6(a)(2), the trial court may order a deposition if "a witness refuses to discuss the case with either counsel and the witness' testimony is material and necessary."

Before trial, Person moved to depose Jones, A.A., and O.P. Person argued that during their interviews, the witnesses refused to answer questions related to the 2011 sex abuse investigation. And he claimed that their testimony about the investigation was material to his defense as impeachment evidence. The trial court denied Person's motion but allowed him to "supplement his request by providing specifically what it is that's being refused." Person did not supplement the record. Instead, at an unrelated hearing a week later, Person renewed his motion to compel witness depositions and reasserted the same arguments. The court again denied the motion and ruled that the information Person sought was not "material" because he still had not shown that the depositions would provide information that Person did not "already know."

Three days after the trial court denied his motion, Person filed several documents with the court, including a copy of the written questions he gave to his private investigator and standby counsel to use at the interviews. And he

provided his private investigator's notes from the interviews.[8] But Person did not renote his motion to depose witnesses or otherwise alert the trial court that he filed the documents. Even so, none of the documents filed by Person show that the witnesses refused to answer material questions at their interviews. The trial court did not abuse its discretion by denying Person's motion to depose the witnesses.

c) Brady Violation

Person argues that the State violated its obligations under Brady by either destroying or failing to disclose exculpatory information from the 2011 sex abuse investigations. We disagree.

Under Brady, the State has an obligation to disclose all evidence in its possession favorable to the accused, even if not requested by the defendant. Brady, 373 U.S. at 87; State v. Mullen, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). The obligation extends to evidence possessed by law enforcement. Mullen, 171 Wn.2d at 894.

To establish a Brady violation, a defendant must show that (1) the evidence at issue favors the accused because it is either exculpatory or impeaching, (2) the State willfully or inadvertently suppressed the evidence, and (3) the evidence was material. State v. Davila, 184 Wn.2d 55, 69, 357 P.3d 636 (2015); see In re Pers. Restraint of Mulamba, 199 Wn.2d 488, 503, 508 P.3d 645

[8] Person also filed his private investigator's proposed questions to M.P., summary transcripts of police interviews of M.P. and her younger brother J.P., summary transcripts of a call between J.P. and an unknown person called "Mookie," an e-mail from Person's friend David Hill alleging Jones is generating "false sex allegations to incarcerate" Person, and a summary transcript of A.A.'s interview with the private investigator.

(2022) (the terms "materiality" and "prejudice" are interchangeable under the third Brady prong).

But the State need not disclose information that it does not possess or of which it is unaware. Mullen, 171 Wn.2d at 895. And the State does not commit a Brady violation when " 'a defendant has enough information to be able to ascertain the supposed Brady material on his own.' " Id. at 896 (quoting United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991)). We review an alleged Brady violation de novo. Mulamba, 199 Wn.2d at 498.

Person argued below that law enforcement agencies possessed documents related to the 2011 investigation, that the State was aware of those documents, and that it failed to disclose or preserve them. The State told the court that it submitted public records requests to MCSO and SPD and provided everything it had to Person, including 160 pages of investigation done by the military police at JBLM and CPS. Still, Person claimed that other law enforcement agencies must have been involved in the investigation because

> when you look at [SPD's] policy [manual], there's steps A through G they're supposed to follow. They're supposed to coordinate with other investigating agencies. They're supposed to coordinate with DSHS, CPS, et cetera.[9] There's a lot of steps for them to follow. And so I asked for that material, and I have yet to receive that material.

But Person did not show that other law enforcement agencies participated in the

[9] Person's list of involved agencies continued to grow throughout the proceedings. At the time of trial, Person identified the Federal Bureau of Investigation, Pierce County Sheriff's Department, Tacoma Police Department, United States Army judge advocate general lawyers from JBLM, Mary Bridge Children's Hospital, Oakland Bay Pediatrics (now Mason Clinic Pediatrics), and Connolly Law Offices as agencies in possession of exculpatory information.

2011 investigation. Nor did he show that the investigation generated additional documents that would include exculpatory information.

In its memorandum decision, the trial court denied Person's motion, explaining:

> The Court is unable to begin the [Brady] analysis because the Defense has failed to identify any material exculpatory evidence. The Defendant is relying upon an assumption that a more thorough investigation was performed by [MCSO] and/or [SPD] and that documents memorializing the investigation were subsequently destroyed. However, outside of Defendant's assumptions and conclusions based upon those assumptions, there is no support for such proposition.

We agree with the trial court. Person fails to show that the State violated its obligations under Brady.[10]

Prosecutorial Misconduct

Person argues that the prosecutor committed misconduct by improperly eliciting testimony and commenting on Person's constitutional right to prearrest silence. We disagree.

To prevail on a claim of prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). To establish prejudice, the defendant must show a substantial likelihood that the misconduct affected the jury verdict. Id. When, as here, the defendant does not object to the misconduct

[10] Person also argues that the trial court erred by denying his motion to dismiss under CrR 8.3(b) for government misconduct. Person alleged the State committed misconduct by failing to provide documents related to the 2011 investigation. For the same reasons as discussed above, we conclude the trial court did not err by rejecting his CrR 8.3(b) claim.

at trial, he waives any error unless the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice. Id.

We construe the United States Constitution's Fifth Amendment privilege against self-incrimination liberally, prohibiting the State from using a defendant's prearrest silence as substantive evidence of guilt. State v. Easter, 130 Wn.2d 228, 236-37, 922 P.2d 1285 (1996). Nor may the State use a defendant's silence to "suggest to the jury that the silence was an admission of guilt." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). But the State does not violate the constitution when referring to prearrest silence to impeach a defendant's testimony. State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

Person first argues that the prosecutor committed misconduct by eliciting testimony from SPD Patrol Sergeant Daniel Patton[11] that Person "chose not to speak with police prior to being arrested." But the record shows that it was Person who first mentioned his prearrest silence and that the State elicited Sergeant Patton's testimony in rebuttal.

At trial, Person testified:

> 2019 January, I got a call from Officer Patton. Hi, this is Officer Patton with [SPD], child abuse allegations. This was about June, 2019. I was like no, I don't want to talk about it, because I was tired of being prodded and probed. Originally, I thought it was about Fort Lewis, that whole thing, following up on that. Didn't hear anything.

He went on to testify:

> [W]hen I received word that false statements were made, false allegations were made, I did what I did in 2011, June. I notified

[11] Sergeant Patton was a detective when SPD began investigating the sexual assault allegations against Person in 2018.

> Officer Patton on two separate occasions, July 20th, July 1st, around July 1st, 2020 and August, 2020. I notified the private investigator . . . in July, 2020, August, 2020. I even sent a recorded conversation to them on two separate occasions. No follow-up.

The State then called Sergeant Patton back to the stand to impeach Person's claim that he tried to reach out and provide the officer exculpatory information:

> Q. Detective Dan Patton, when you were investigating this case in 2018, as - your previous testimony was that you investigated the case, you interviewed the alleged victims and then you would attempt to reach out to the alleged suspect. Is that correct?
> A. Yes.
> Q. Did you attempt to reach out to the alleged suspect, Anthony Person, in 2018?
> A. Not in 2018. I think it was - one second - 2019.
> Q. Alright. So, I'll rehash. The investigation continued. The initial allegations came in 2018, but the investigation carried over to 2019?
> A. Correct. At some point I made contact - communication contact with Mr. Person.
> Q. Okay. And did Mr. Person cooperate with your investigation?
> A. Mr. Person declined to discuss the investigation with me.
> Q. Did Mr. Person reach out to you himself?
> A. In roughly July, about 2020.
> Q. So that would have been after charges were filed?
> A. That was after charges were filed.
> Q. Are you able to speak to a defendant after charges have been filed?
> A. Only on very, very rare occasions, and definitely not just me and the defendant. It would have to be with the defendant's attorney and ideally initiated by the defendant's attorney to secure those Sixth Amendment[12] rights, protecting his constitutional rights.
> Q. Did the defendant provide you any documentary evidence?
> A. He verbalized to me that he wanted me to get in contact with someone. Once again, I was very uncomfortable speaking to him because the charges had been filed and I didn't want to violate any constitutional rights, and I requested that he

[12] U.S. CONST. amend VI.

contact his legal representative to communicate with me, and that was the only discussion that we had.
Q. Thank you. I have no further questions.

Because the State offered Sergeant Patton's testimony only to impeach Person's claims, and the prosecutor did not argue or suggest that Person's noncooperation implied consciousness of guilt, we conclude that the prosecutor's questions do not amount to misconduct.

Person next argues that the prosecutor committed misconduct in his closing argument by saying that Person "slammed the door" on police during their investigation. But, taken in context, the prosecutor's comment did not relate to Person's prearrest silence in 2020. Rather, the prosecutor used the phrase to describe Person's efforts to interfere with the 2011 investigation into O.P. and M.P.'s disclosures.

When asked about the 2011 investigation at trial, Jones explained that Person dictated the family's answers to questions from police and DSHS:

Q. Ms. Jones, so you were aware of a[n] investigation that occurred on JBLM surrounding your daughters [O.P.] and [M.P.]?
A. Correct.
Q. And that investigation, is it - who dictated that - did that follow-up investigation?
A. Anthony Person did.
Q. Okay. In any of the interviews that you provided to DSHS, was that influenced or dictated by any individual?
A. Yes, it was.
Q. And who was that influenced and dictated by?
A. Anthony Person.
Q. And what was your biggest fear in complying with a DSHS investigation?
A. That they would take my children out of the home.
Q. Okay. And as a result of the investigation that occurred based upon preliminary allegations from JBLM, isn't it true that Anthony Person hired an attorney?

A. He did.
Q. Isn't it true that Anthony Person dictated [O.P.]'s and [M.P.]'s cooperation in the investigation?
A. He did.
Q. Were you ever instructed how to answer questions in regards to an investigation?
A. I was.
Q. And what were your instructions?
A. To keep my mouth shut, not to talk about anything, let them do the work.
Q. And were those instructions levied down by the defendant, Anthony Person?
A. They were.

Similarly, O.P. testified that Person instructed her not to answer questions in the 2011 CPS investigation:

A. We weren't allow[ed] to talk to the police at all because Anthony would be sent away if we did. He reinforced that. Anthony was the main person who dealt with law enforcement if they showed up to the door or not.
. . . .
Q. And when you were [working at JBLM] did you disclose - have any disclosures about the sexual abuse?
A. Yes, I did.
Q. And was that investigated?
A. It was disclosed through a man I was dating. I had told him I was being sexually abused. And detectives did come out. They knocked on the door, they had a piece of paper in their hand. I couldn't really read it. I said yes to it, there was sexual abuse in there. I thought it was - but yes, after they left we were basically - not basically, we didn't have no choice - Anthony was just telling people to keep our mouth shut or, you know, just be very intimidating. And so, CPS did come out.
Q. Okay. And did you make any disclosures of sexual abuse to CPS?
A. No, I didn't.
Q. And why could you not?
A. I was afraid if I did Anthony would fly off the handle, somebody would seriously be just - Anthony would just get into these moments where he would be on the verge of getting ready to kill you, seriously.
Q. Okay. And —

> A. And that just could vary. Like, it could be your brother. You know, if he was mad about something he would just snap. I jumped in a couple of times to help my brother or my mother. He would turn around and just beat you until you couldn't breathe.

During closing argument, Person repeatedly referred to O.P.'s and M.P.'s denials of sexual abuse in 2011. He asserted that "the accusations have not been completely and thoroughly investigated by law enforcement in this particular case. . . . It was alleged in the past, it was investigated, unfounded. We still don't have any findings." Responding to Person's comment, the prosecutor told the jury that Person "wants to rely on this [2011] investigation, but you don't have any of that investigation. Why? Because it was unable to be completed because of his control, his influence." The prosecutor explained that "it would have been . . . nice" if O.P. and M.P. did not endure Person's control, but "[n]ope, we didn't have that. Anthony Person slammed the door on law enforcement. But he wants you to believe this long investigation, two-plus years long, exonerates him."

In context, the prosecutor's comment referred to Person's efforts to control the 2011 investigation and aimed to rebut Person's argument that the sexual assault allegations were "unfounded." We conclude that the argument does not amount to a comment on Person's constitutional right to prearrest silence.

Cumulative Error

Person argues that the cumulative error doctrine entitles him to a new trial. Application of the cumulative error doctrine "is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify

reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because we find no error, the cumulative error doctrine does not apply.

The trial court did not err by denying Person's pretrial motions. Nor did the prosecutor commit misconduct by using Person's prearrest silence to impeach his testimony. And because Person cannot show any errors at his trial, the cumulative error doctrine does not apply. We affirm.

WE CONCUR:

THE TILLER LAW FIRM

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