Supreme Court No. ____
(COA No. 74925-1-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK SHEWMAKER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mark Shewmaker, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mark Shewmaker seeks review of the Court of Appeals decision dated December 18, 2017, a copy of which is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Is a new trial required where Mr. Shewmaker's right to meaningful self-representation was denied under the Sixth Amendment and Article I, § 22, where the court-appointed investigator, who the court found was necessary satisfy Mr. Shewmaker's right to self-representation, refused to comply with investigation requests and then instructed a witness to lie to the court and her domestic violence advocate?

2. Were the prosecutor's questions during voir dire that were designed to denigrate Mr. Shewmaker by suggesting the only reason he was representing himself was so that he could cross-examine

his accusers flagrant and ill-intentioned misconduct that requires a new trial?

3. Is a new trial required because of the prosecutor's flagrant and ill-intentioned misconduct in deciding to call a witness at trial for the purpose of invoking sympathy for the complainant and asserting that she was also a sex crime victim?

D. STATEMENT OF THE CASE[1]

Mark Shewmaker[2] was charged with three counts of molesting his daughter, N.S., in 2011 when Mark watched his children while their mother, Jacki Shewmaker, and her boyfriend, Mark's brother, Michael Shewmaker, were away on overnight trips. CP 257, 276. Mark was alleged to have molested N.S. while she was sleeping in her bed, while she had been sleeping in her mother's bed, and in the hot tub. CP 276. When N.S. told a friend what had happened, her mother, Tami Beck, reported the incident to a school counselor. 12/14/15 RP 1557. N.S.

[1] The pagination of the transcripts is extremely complicated, as there were many separate transcriptionists, none of whom used the same method to identify their work or worked together to create consecutive pagination. This brief refers to the transcript by the date of the first hearing in each volume, including those which are titled by volume rather than date. An appendix is added to the end of this brief to reduce confusion.

[2] Most of the witnesses in this case share the common last name of Shewmaker. In order to avoid confusion, these witnesses will be referred to by their first names or by their initials, if underage. No disrespect is intended.

disclosed the incident to a detective and Mark was charged some months later. 12/7/15 RP 968, CP 274.

1. Mark Shewmaker was assigned an investigator who did not complete the tasks asked of him and advised a witness to lie to the court.

Mark was initially represented by the public defender's office, which withdrew when Mark told the court he intended to hire counsel. 4/25/13 RP 3, 11-12. After admitting he was "out of his realm" and lacked the skills to represent himself, the public defender's office was re-appointed. 4/25/13 RP 40, 49.

During pre-trial motions in his first trial, however, Mark told the court he wished to represent himself, which the court permitted. 4/20/15 RP 164, 4/21/15 RP 13. His attorney remained on the case as standby counsel. 4/21/15 RP 13. The jury could not reach a verdict at this trial, and the court declared a mistrial. 4/20/15 RP 201.

Before his second trial commenced, the court determined Mark would not be entitled to standby counsel. 5/22/15 RP 1000; 8/7/15 RP 228. Mark did not ask for an attorney and continued to represent himself. 5/22/15 RP 988. Mark remained in custody before the second trial commenced and asked the court to appoint him an investigator.

7/13/15 RP 24. The court determined it was necessary to appoint an investigator to aid Mark in his trial preparation. 7/13/15 RP 49.

Mark quickly complained to the court that his investigator was not performing the requested tasks. 11/30/15 RP 398. After visiting him in jail, Mark told the court that the investigator told him that he did not have time to interview witnesses and left. 11/30/15 RP 398. Mark told the court he had not seen the investigator since. 11/30/15 RP 398.

Mark told the court the investigator was "ineffective, that he has not provided me with any contact information for witnesses and he basically just wants the $1,500 for doing nothing." 11/30/15 RP 399. Three weeks later and on the eve of trial, the investigator still had not returned to meet with Mark. 11/20/15 RP 398. When he complained to the court, the court told Mark he had to solve this problem on his own because the court could not. 11/30/15 RP 403.

Once trial commenced, it became clear that the investigator was actively working against Mark's interests. Mark determined his first wife, Robin Shewmaker, should be called on his behalf. 12/10/15 RP 1505. Robin did not have a way to get to court and the court the investigator should bring her to court. 12/15/15 RP 1762. The investigator spoke to Robin but told her he would not come to her

house because it was too far away. 12/16/15 RP 1827. According to the domestic violence advocate assigned to the case, the investigator told Robin she should lie to the court and her domestic violence advocate and tell the court she would not come in. 12/16/15 RP 1827.

Mark told the court the investigator did not contact him again. 12/16/15 RP 1830. No remedy was offered for this malfeasance, although Robin was able to testify via Skype. 12/16/15 RP 1829.

2. During voir dire, the prosecutor intentionally elicited from the panel that the reason Mr. Shewmaker was representing himself was so he could cross-examine the complainant.

In voir dire, the prosecutor asked the panel whether they could think of a "strategic reason" why someone would choose to represent themselves when charged with child molestation. 12/3/15 RP 766. When the prosecutor did not get an affirmative response, she followed up by asking the jurors who they thought would "be asking questions of the alleged victim?" 12/3/15 RP 766. The prosecutor asked the question again, getting the answer that the "one who is accused of doing the act is the one who is questioning them." 12/3/15 RP 767.

3. During testimony, the prosecutor intentionally elicited testimony from a witness to vouch for the credibility of other witnesses and to testify that she had been a victim of rape.

Ms. Beck was recalled as one of two witnesses in the prosecution's rebuttal case. In rebuttal, the prosecutor asked Ms. Beck whether she was aware Mark had been charged with sexually assaulting his older daughter. 12/21/15 RP 11. Ms. Beck said she had been aware of the charges, that the daughter had been called in to testify, and that the charges had been dropped. 12/21/15 RP 11.

On redirect, the prosecution also asked Ms. Beck why she had reported N.S.'s allegations to the school. In response, Ms. Beck told the jury she was also a sex crime victim. 12/14/15 RP 1585.

After deliberations, Mark was found guilty of two counts of child molestation. 12/7/15 RP 928. The jury was unable to reach a verdict on the third charge and a mistrial was declared. 12/7/15 RP 932.

E. ARGUMENT

1. Review should be granted to address whether depriving Mr. Shewmaker of his right to meaningful self-representation requires a new trial.

The Court of Appeals held that there was no basis for Mark's assertion that the investigator's misconduct deprived him of his right to meaningful self-representation. Slip Op. at 7. This is contrary to

constitutional principles and established decisions of the Court of Appeals. RAP 13.4(b)(2) and (3). This Court should find that this question also involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

a. The trial court determined an investigator was necessary for Mr. Shewmaker to effectively represent himself.

State v. Silva establishes that pre-trial detainees acting as their own attorneys have the right to state-provided resources to enable them to prepare a meaningful defense. *State v. Silva*, 107 Wn. App. 605, 622, 27 P.3d 663, 674 (2001); U.S. Const. amend. 6; Const. art. I, § 22. When Mark was provided an investigator who not only ignored his investigation requests but actively worked against his interests, Mark was denied the right to meaningful self-representation.

An investigation can be an essential part of preparing a case for trial. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing *State v. Bao Sheng Zhao*, 157 Wn.2d 188, 205, 137 P.3d 835 (2006) (Sanders, J., concurring)). The failure to investigate can be considered evidence of ineffective assistance of counsel. *See A.N.J.*, 168 Wn.2d at 112; *see also In re Brett*, 142 Wn.2d 868, 882-83, 16 P.3d 601, 603 (2001).

Whether an investigator must be appointed to ensure adequate preparation of a meaningful pro se defense must be determined by the trial court after considering the needs of the case. *Silva*, 107 Wn. App. at 624. Here, the court found Mark needed an investigator to prepare his defense. 7/13/ 2015 RP 49. Whether Mark was entitled to an investigator is a decision left to the sound discretion of the trial court. *Silva*, 107 Wn. App. at 622. This question need not be readdressed by this Court.

b. The investigator appointed by the court to work on Mr. Shewmaker's behalf actively worked against his interests.

Once a trial court has determined an investigator should be appointed, the services may not be in name only. *Silva*, 107 Wn. App at 624. Here, the trial court determined Mark needed an investigator to work on his case while held on bail. 7/13/ 2015 RP 49. An investigator was appointed, who was authorized to provide Mark with fifty hours of service. 11/30/15 RP 398.

But Mark quickly complained to the court of the lack of communication between him and the investigator. 11/30/15 RP 400. He told the court the investigator had only visited him once. 11/30/15 RP 398. When Mark asked the investigator to perform some basic

investigative functions, the investigator said he did not have time to perform those tasks and left. 11/30/15 RP 398. The investigator appears to have had limited contact with Mark after he was assigned to assist Mark. 11/30/15 RP 398.

During the trial, the court discovered the investigator had been actively working against Mark's interests. The most disturbing evidence of the investigator's malfeasance was told to the court by the government's domestic violence advocate. 12/16/15 RP 1827. As part of Mark's case, he intended to call his first wife, Robin. Robin lived on her own and did not have transportation to court. 12/15/15 RP 1762. The investigator was instructed to go to Robin's house and provide transportation to court for her. 12/15/15 RP 1762. The domestic violence advocate said:

> She [Robin] stated that the Defense investigator contacted her and started out by saying: This is between you, me and the wall. He said: You're going to tell me that you will not get in the car with someone you do not know. Say you told me to tell the Court that you won't come in when you speak with the advocate.

12/16/15 RP 1827.

Mark never spoke again to his investigator, who did not tell Mark he would not comply with Mark's request. 12/16/15 RP 1829.

Robin did not come to court but was able to testify via Skype. 12/16/15 RP 1829. The investigator's act of betrayal by Mark's investigator, however, demonstrates a far greater problem. Not only can this Court lack confidence Mark received effective assistance from his investigator, but must also conclude the investigator actively acted against Mark's interests. When the trial court discovered Mark and the court had been deceived by this investigator, the court should have found Mark's right to meaningful representation had been denied. *Silva*, 107 Wn. App at 624.

c. The active wrongdoing of the investigator prejudiced Mr. Shewmaker and warrants review.

Had Mark been assigned an attorney who actively worked against him, there would be no question that he had received ineffective assistance of counsel and that a new trial was required. *A.N.J.*, 168 Wn.2d at 119. He was unable to investigate his case or discover evidence that would have been favorable to him. Without the investigator's basic help, his witness was unable to appear in court. Moreover, this witness was instructed by the investigator to lie, to both the court and the government's domestic violence advocate. This behavior should not be tolerated in anyone assigned to work for a person accused of a crime.

That the malfeasance involves an investigator makes no difference. Once a court makes the determination an in-custody pro se litigant is entitled to an investigator, that assistance must be meaningful. *Silva*, 107 Wn. App at 624. It is not enough to appoint an investigator in name only. *Id*. When the investigator, as here, not only fails to complete the tasks requested but actively works to thwart the defense, there should be no question that the right to meaningful self-representation has been compromised.

RAP 13.4(b) has been satisfied. The decision of the Court of Appeals stands in conflict with the long-standing rules established by State v. Silva. In addition, this issue involves an important constitutional question under both the state and federal constitution and an issue of substantial public interest that should be determined by this Court. RAP 13.4(b). Mr. Shewmaker asks this Court to accept review.

2. Review should be granted to address whether the prosecutor's misconduct deprived Mr. Shewmaker of his right to a fair trial.

The Court of Appeals held the prosecutor's misconduct did not deprive Mark of his right to a fair trial. Slip Op. at 12. Review of this issue is warranted because it involves a significant question of

constitutional law and an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(3) and (4).

a. Prosecutors have a duty to act impartially in the interest only of justice.

While a pro se litigant is to be treated by the court as if they were an attorney, there is no rule that says a prosecutor may take advantage of the pro se litigant's skill. "As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice." *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008); *State v Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). It is the prosecutor's duty to "seek a verdict free of prejudice and based on reason." *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. den'd*, 393 U.S. 1096.

Misconduct occurs where the prosecutor's actions are both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Prejudice is established by demonstrating there was a substantial likelihood the misconduct affected the jury verdict. *Id*.; *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). Even where there is no objection, misconduct that is flagrant and ill-intentioned can require a reversal. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

b. The prosecutor questions in voir dire were improper in that they denigrated Mr. Shewmaker's right to self-representation.

A prosecutor commits misconduct when they denigrate the role of defense counsel. *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125, 130 (2014). Statements that malign the role of defense counsel can severely damage the right of an accused to present a case and are therefore impermissible. *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983). Although this Court and the 9th Circuit have generally addressed this issue in the context of the denigration of counsel, the same obligations not to impugn the role of defense counsel should apply when a person chooses to proceed pro se.

In voir dire, the prosecutor asked the panel whether they could think of a reason why someone might choose to represent themselves in a case of child molestation. 12/3/15 RP 766. When a juror replied that they could not think of a good reason, the prosecutor followed up by asking who the jurors thought would be asking questions of the alleged victim. 12/3/15 RP 766. When the juror replied that she did not know, the prosecutor asked another juror the same question. 12/3/15 RP 766. This time the prosecutor found the answer she was looking for, with the

juror replying that the "one who is accused of doing the act is the one who is questioning them." 12/3/15 RP 767.

This highly improper questioning was extremely prejudicial. Mark had the constitutional right to represent himself and stated many times that he believed that it was the only way he could be found not guilty. 4/20/15 RP 164. The prosecutor's clear intent by asking these questions was to impugn Mark's decision to proceed pro se and to suggest that it was for nefarious reasons having nothing to do with the right to self-representation. These questions undermined Mark's ability to represent himself. *E.g., Lindsay*, 180 Wn.2d at 431.

c. The prosecutor improperly elicited testimony a witness had been raped by a person unrelated to Mark Shewmaker's case.

The prosecution is not excused from complying with the evidence rules based on its belief that a door has been opened by the defense. *State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008). This is because a prosecutor may not "seize[ ] the opportunity to admit otherwise clearly inadmissible and inflammatory" evidence by virtue of a defense question to a witness, because "[a] defendant has no power to 'open the door' to prosecutorial misconduct." *Id*.

To bolster a witness and the credibility of N.S., the prosecutor committed again flagrant and ill-intentioned misconduct. On re-examination, the prosecutor asked Ms. Beck why she believed the allegations against Mark were true. 12/14/15 RP 1585. She responded that it was because she had also been raped at some point in her life. 12/14/15 RP 1585. The prosecutor asked Ms. Beck:

Q. Why do you believe it [the molestation] happened?

A. Because it happened to me.

12/14/15 RP 1585.

This highly inappropriate question prejudiced Mark in a number of ways. First, it bolstered N.S.'s credibility by asking an unrelated adult witness to vouch for her credibility. *See State v. Ramos,* 164 Wn. App. 327, 334, 263 P.3d 1268, 1272 (2011) ("It is prosecutorial misconduct to ask a witness whether another witness is lying.") (citing *State v. Wright*, 76 Wn. App. 811, 821, 888 P.2d 1214 (1995); *State v. Casteneda–Perez,* 61 Wn. App. 354, 362–63, 810 P.2d 74 (1991)).

Second, it was designed to bolster Ms. Beck's credibility and invoke an emotional response in the jurors to otherwise clearly inadmissible testimony. *Jones*, 144 Wn. App. at 313. After hearing this, the jurors could not have but felt sorry for Ms. Beck and found her

more believable. By implication, Ms. Beck's vouching for N.S., through her own experiences, made this misconduct insurmountable.

d. The prosecutor recalled Ms. Beck to vouch for the credibility of other witnesses.

Ms. Beck was recalled as one of two witnesses in the prosecution's rebuttal case. In rebuttal, the prosecutor asked Ms. Beck whether she was aware Mark had been charged with sexually assaulting his first daughter. 12/21/15 RP 11. Ms. Beck said she had been aware of the charges, that the daughter had been called in to testify, and that the charges had been dropped. 12/21/15 RP 11.

Instead of focusing the jury on the question of whether Mark had molested N.S., this question distracted the jurors from the facts. It was a flagrantly improper question and constitutes misconduct. *Jones*, 144 Wn. App. at 295.

e. The flagrant and ill-intentioned misconduct of the prosecutor warrants review.

Because the prosecutor violated Mark's constitutional rights, the constitutional harmless error standard applies. *State v. Easter*, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996). The State must prove beyond a reasonable doubt the misconduct did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d

705 (1967). Alternatively, when reviewing evidentiary errors, a new trial is necessary "where there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence.'" *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010) (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)).

Deciding whether to reverse a case because of misconduct is not deciding whether there is sufficient evidence to justify upholding the verdicts, but is instead a question of whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. *In re Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012) (citing *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). Trained and experienced prosecutors "do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996).

Denigrating Mark's decision to proceed pro se is presumptively prejudicial. *Easter*, 130 Wn.2d at 241. Suggesting Mark intended to

represent himself so that he could personally cross-examine and perhaps scare the witnesses into not testifying was highly improper.

Using Ms. Beck to vouch for the credibility of other witnesses also deprived Mr. Shewmaker of his right to a fair trial. The primary purpose of the questions to Ms. Beck was to invoke an emotional response in the jury and to vouch for the credibility of N.S. There was no physical evidence to connect Mark to a crime. The only charge where there was a second witness resulted in a hung jury, as Matthew, the witness who was present when the prosecution alleged this incident occurred, could not corroborate the allegations.

Ms. Beck was not a Shewmaker. 12/14/15 RP 1547. As such, she presented as an unbiased witness. Using her to vouch for the credibility of other witnesses made those witnesses appear more credible. This improper bolstering by the prosecutor resulted in an unjust verdict. *Jones*, 144 Wn. App. at 295.

These instances of misconduct satisfy the requirements of RAP 13.4(b). Review of this is warranted because it involves a significant question of constitutional law and an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(3) and (4).This Court should accept review.

F. CONCLUSION

Based on the foregoing, petitioner Mark Shewmaker respectfully requests this that review be granted pursuant to RAP 13.4 (b).

DATED this 17th day of January 2018.

Respectfully submitted,

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARK DALE SHEWMAKER, Appellant.	)	No. 74925-1-I DIVISION ONE UNPUBLISHED OPINION FILED: December 18, 2017

BECKER, J. — The appellant, Mark Shewmaker, represented himself in a trial on charges of molesting his minor daughter, NS. We affirm his conviction.

FACTS

The victim, NS, was born in 1999. She and her brother, MS, are the minor children of Shewmaker and Jacki Shewmaker. Shewmaker and Jacki divorced in 2000. The children lived with Jacki. Occasionally, Shewmaker came to Jacki's house to supervise them when Jacki was away.

The charges were supported by the testimony of NS that on specific occasions in 2011, Shewmaker forced her to share a bed with him; rubbed her breasts, buttocks, vaginal area, and thighs; forced her to touch his penis; and pulled aside her swimsuit, exposing her crotch. Shewmaker has an adult daughter, AK, from a previous marriage to Robin Shewmaker. AK was allowed to testify that she was also molested by Shewmaker when she was a child. She

testified that Shewmaker forced her to share a bed with him; prohibited her from wearing a bra or underwear to bed; rubbed her breasts, buttocks, and vaginal area; and subjected her to oral sex and other forms of abuse. AK testified that these allegations were investigated in 2002, but charges were dismissed because of her reluctance to appear in court.

Shewmaker's first trial, in which he was pro se with standby counsel, resulted in a mistrial due to a hung jury. In his second trial, he again represented himself, this time without standby counsel. The jury in the second trial convicted him of two counts of child molestation in the first degree. He was sentenced to 80 months' imprisonment.

PERFORMANCE OF APPOINTED INVESTIGATOR

Shewmaker first contends that the ineffective performance of his appointed investigator prevented him from preparing a meaningful defense. At Shewmaker's request, he was assigned an investigator who was authorized to perform approximately 50 hours of services to aid Shewmaker in his trial preparation. Shewmaker claims that the investigator failed to interview witnesses and instructed Robin to lie about her availability to testify in person.

As a preliminary matter, we note that appellant treats the investigator's alleged misconduct as if it were an undisputed fact. He assigns error in the following way: "Mr. Shewmaker was deprived of the right to meaningful self-representation under the Sixth Amendment and Article I, § 22 where the investigator appointed to assist him refused to conduct an investigation and told a witness to lie to the court and her domestic violence advocate."

This assignment of error fails to comply with the requirement in RAP 10.3(a)(4) for a "separate concise statement of each error a party contends was made *by the trial court*, together with the issues pertaining to the assignments of error." (Emphasis added.) By avoiding the requirement to identify action or inaction by the trial court, appellant presents the issue as if it can be decided in the abstract. We take this opportunity to emphasize the importance of making proper assignments of error in an appellant's brief. The role of the appellate court is to review trial court decisions, not to review abstract issues. The rules of appellate procedure are designed to facilitate deciding the law in the context of how the particular issue was brought to the attention of the trial court and how the trial court handled it. Assignments of error must be included in the appellant's brief so that the reviewing court can pinpoint the time and place in the record at which the trial court allegedly committed error, either by ruling or failing to rule. Shewmaker's assignment of error does not allege error by the trial court. And the portions of the record he cites do not support a claim that the court deprived him of his right to meaningful self-representation.

1. Alleged failure to interview witnesses

Shewmaker first contends the investigator refused to conduct an investigation. Specifically, he claims that the investigator failed to carry out interviews with prospective defense witnesses.

Before an investigator was assigned, the prosecutor agreed to facilitate two interviews by Shewmaker of witnesses who were available by telephone on August 10, 2015. On that morning, the parties were in court. Shewmaker

waived his right to interview the two witnesses "at this time" as he was waiting to see if the public defender office would assign an investigator who could help him with the interviews.[1] The trial court warned Shewmaker there was no guarantee an investigator would be able to conduct the interviews at a later date and if he declined to go forward with the interviews arranged for that morning, he risked losing his opportunity to conduct the interviews. Shewmaker confirmed that he was waiving his right to interview the witnesses and if an investigator was not assigned or could not do the interviews, he would "proceed at the court's discretion."[2]

After an investigator was assigned to assist him, Shewmaker raised concerns about the investigator's performance in a hearing on November 30, 2015. Shewmaker said he had completed all his discovery and witness interviews, but he complained that the investigator spent very little time with him and he needed the investigator to help him locate defense witnesses and serve subpoenas on them.[3] The trial court pointed out that Shewmaker had phone privileges that would allow him to contact the witnesses himself. Shewmaker said he was too embarrassed to call them. The trial court suggested that Shewmaker should get over his embarrassment. As the discussion went on, the problem of contacting witnesses worked itself out as it became clear that the State was going to subpoena some of the witnesses and Shewmaker lacked any

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[1] Report of Proceedings (Aug. 10, 2015) at 252-53.
[2] Report of Proceedings (Aug. 10, 2015) at 254-55.
[3] Report of Proceedings (Nov. 30, 2015) at 398-402.

basis for expecting others to give relevant and admissible testimony or else had no idea how to find them.[4]

So far as the record reveals, there was no further discussion of the investigator's alleged refusal to assist with investigation. Shewmaker does not explain what he thinks the trial court should have done differently on August 10, 2015, or on November 30, 2015.

2. Alleged instruction to lie

Shewmaker's second contention, that the investigator instructed a witness to lie, is based on events that occurred during trial, on December 15 and 16, 2015. Shewmaker had subpoenaed his ex-wife Robin, the mother of AK. The State had learned from victim advocate Wendy Ross that Robin, who was in Oak Harbor, did not drive and did not want to take a cab or ride with a detective. On December 15, Ross was sworn in and asked to describe her recent telephone conversations with Robin. According to Ross, Robin said she had a long standing agoraphobic disorder that made her fearful and hysterical to the point of being almost suicidal at the prospect of leaving her home. Robin hoped that rather than coming to court in person, she could testify by Skype, a telecommunications application that facilitates video and audio conference calls using the internet.[5]

Shewmaker asked the court to issue a material witness warrant for Robin. The court declined, finding nothing material in Shewmaker's lengthy description

[4] Report of Proceedings (Nov. 30, 2015) at 410-14.
[5] Report of Proceedings (Dec. 15, 2015) at 1757-59.

of Robin's expected testimony. The court told Shewmaker it was up to him to figure out how to get his witness to court the next day. That evening, Shewmaker asked the investigator to drive to Oak Harbor to pick up Robin and bring her to court.

The next morning, Ross informed the court that the previous evening, she had received a call from Robin, reporting that she had just received a call from the investigator. Ross said Robin told her the investigator said Oak Harbor was too far away for him to travel and she should just say she told him she refused to come.[6] At this point, the trial judge said that she had already reconsidered her previous ruling that Shewmaker had to get Robin to court to give her testimony. The judge said she had informed Robin by e-mail at 8:45 a.m. that she could fulfill her obligation under the subpoena by testifying via Skype.[7] Shewmaker does not assign error to this decision.

The judge said her decision to let Robin testify by Skype was not affected by Ross' account of what Robin said about the investigator telling her what to say. The prosecutor asked if the court was "inclined to require any information from the defense investigator about the conversation." The judge responded "No. Again, that does not impact this trial because I made my decision and informed Ms. Shewmaker of that before I heard what he said to her. It doesn't change my position. It doesn't change her availability because she's always said she's been available for Skype."[8]

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[6] Report of Proceedings (Dec. 16, 2015) at 1827-32.
[7] Report of Proceedings (Dec. 16, 2015) at 1828.
[8] Report of Proceedings (Dec. 16, 2015) at 1832.

This record shows there is no basis for Shewmaker's assertion that his investigator's misconduct deprived him of a meaningful right to self-defense. The trial court was provided with hearsay information that the investigator instructed Robin to say she refused an offer of transportation to the courthouse. The trial court found it was unnecessary to look into that issue further because it was moot. Regardless of what Robin and the investigator said to each other, the most Shewmaker was entitled to was to present Robin's testimony by Skype, and that opportunity was afforded to him.

Shewmaker argues that the investigator's alleged misconduct entitles him to a new trial. His argument is based on State v. Silva, 107 Wn. App. 605, 613, 27 P.3d 663 (2001). The pro se defendant in Silva was in custody pretrial and during trial. The defendant appealed his conviction to this court, arguing that the trial court erred by failing to ensure that he had access to an investigator. We recognized that under article I, section 22 of the Washington State Constitution, a pretrial detainee who has exercised his constitutional right to represent himself must be afforded a right of reasonable access to State provided resources that will enable him to prepare a meaningful pro se defense. Silva, 107 Wn. App. at 622. We recognized that access to an investigator might be required in some cases, but it was not an absolute right. The defendant in Silva did not show he was prejudiced by the lack of an investigator:

> There is no authority holding that the right of self-representation embodies a right to have an investigator assigned to the defendant. This is not to say that the services of an investigator may never be constitutionally required. Whether an investigator must be appointed to ensure adequate preparation of a meaningful pro se defense must be determined by the trial court after considering the

> needs of the case. The record in this case does not establish that Silva needed an investigator to prepare his defense, nor has Silva demonstrated that he was prejudiced by the lack of one. We therefore decline to hold that Silva was deprived of adequate resources on this basis.

Silva, 107 Wn. App. at 624.

Shewmaker similarly fails to establish that he was prejudiced by the allegedly deficient performance of his investigator. He does not demonstrate that his defense was prejudicially impacted by the investigator's alleged refusal to locate witnesses or by the investigator's alleged effort to get Robin to lie and say she refused to let the investigator give her a ride to court.

At oral argument, Shewmaker asserted that Robin's statement to Ross that the investigator instructed her to lie was such serious evidence of misconduct that it should be considered structural error. A structural error necessarily renders a trial unfair and is thus subject to automatic reversal without considering whether the error was harmless. Neder v. United States, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Structural error has been found in a very limited class of cases involving constitutional error. Neder, 527 U.S. at 8. This case does not belong in that class. A showing of prejudice is required in any ineffective assistance of counsel claim. Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. It would be anomalous to have a different rule for investigators. This court requires a showing of prejudice as a predicate for a claim of

deprivation of the right to State provided resources necessary to prepare a meaningful pro se defense. Silva, 107 Wn. App. at 624. Because Shewmaker has failed to show prejudice, his assignment of error pertaining to the investigator's performance is denied.

PRIOR ACTS

Shewmaker next claims that the trial court erred by admitting three separate categories of prior bad act evidence: (1) AK's testimony that she was molested by Shewmaker 15 years earlier, introduced to establish a common scheme; (2) testimony that Shewmaker physically abused AK, subjected her to oral sex, and made her watch as he raped Jacki; and (3) MS's testimony that he and the family dog were physically abused by Shewmaker.

Shewmaker opened the door to the evidence of prior acts. "'A party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.'" State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008), quoting 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.14, at 66-67 (5th ed. 2007). Before opening statements, Shewmaker requested that all of AK's allegations, including forced oral sex, be admitted. In his opening remarks, Shewmaker acknowledged that he had abused his son and the dog. And he admitted that he had been accused of molesting AK. After Shewmaker informed the court that he planned to refer to the alleged rape of Jacki, the trial court ruled the door had been opened for the State to raise the issue as well. Because

Shewmaker opened the door to the challenged evidence, he cannot now be heard to argue the court erred by admitting it.

Even if Shewmaker had not opened the door to evidence of his prior bad acts, he does not demonstrate that the court erred by admitting it.

Shewmaker contends the trial court misinterpreted the standard for weighing probative value against prejudice. The interpretation of an evidentiary rule is reviewed de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Admission of evidence is reviewed for abuse of discretion. DeVincentis, 150 Wn.2d at 17.

Testimony that Shewmaker molested AK was properly admitted under the ER 404(b) exception for evidence establishing a common scheme or plan. The facts are similar to the facts in DeVincentis. Consistent with DeVincentis, the trial court found that AK's allegations were established by a preponderance of the evidence, they established a common scheme or plan, the acts of molestation she alleged were substantially similar to the acts alleged by NS, and the evidence was substantially more probative than prejudicial. The record provides no reason to doubt that the trial court knew that evidence of prior sexual misconduct can be highly prejudicial. In this case, it was also highly probative. We find no error in the court's interpretation and application of the evidentiary rules.

PROSECUTORIAL MISCONDUCT

Shewmaker next alleges prosecutorial misconduct. In each instance of alleged misconduct, Shewmaker failed to object. Failure to object to misconduct in the trial court constitutes waiver on appeal unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

First, during voir dire, the prosecutor asked prospective members of the jury whether they could think of a strategic reason why someone might choose to be self-represented in a case of child molestation. Receiving no response, the prosecutor prompted by asking who would be questioning the alleged victim. On the third try, this question elicited the answer, "the one who is accused of doing the act is the one who is questioning them."[9] The prosecutor moved on to a new line of questioning.

Voir dire that tends to suggest a defendant has questionable motives for acting pro se may impinge on the right of self-representation. But the State has the right to ask questions designed to assure that jurors are not prejudiced against either party. We cannot say on this record that the prosecutor's questions crossed the line from eliciting bias to evoking it. If Shewmaker had objected, any prejudice could have been cured by an instruction.

The second instance of alleged misconduct occurred during the testimony of Tami Beck. NS had disclosed Shewmaker's abusive conduct to Beck, who was the mother of a friend of NS. On redirect examination, Beck admitted that

[9] Report of Proceedings (Dec. 3, 2015) at 766-67.

she was a rape victim herself. Shewmaker argues that the State intentionally elicited this statement from Beck in an impermissible effort to bolster her credibility. Even assuming this to be so, the jury could have been instructed to disregard her remark had Shewmaker objected.

The third instance occurred when the State called Beck as a rebuttal witness. Shewmaker's defense rested on the theory that his ex-wives, children, and Beck were conspiring against him. Anticipating that Shewmaker would argue in closing that Beck learned of AK's allegations from NS, the prosecutor notified the court that Beck would be called on rebuttal to testify that she had learned of AK's allegations from Jacki. The trial court ruled Beck's testimony was admissible, and Shewmaker declined a limiting instruction. Shewmaker argues that the prosecutor's questions to Beck distracted the jurors. This is unlikely. Shewmaker fails to demonstrate any prejudice that an instruction could not have cured.

In summary, we reject the claim of prosecutorial misconduct. We also reject Shewmaker's claim of cumulative error. The doctrine of cumulative error does not apply where the errors are few and have little or no effect on the outcome of the trial. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137 (2007).

Shewmaker raises seven additional grounds for review under RAP 10.10. Having examined the portions of the record pertaining to each ground, we conclude none of them warrant appellate review. There is no reason to suppose the trial court erred in its rulings.

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74925-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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