No. 98322-4

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

BARRY ROYCE DRAGGOO

Petitioner

APPEAL FROM DIVISION II
OF THE COURT OF APPEALS
#52379-5-II

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

Cases

Rules

I. IDENTITY OF PETITIONER

Barry R. Draggoo, petitioner, respectfully requests that this Court accept review of the Court of Appeals' decision in case number 52379-5-II terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Mr. Draggoo respectfully requests that this Court review the Court of Appeals' decision, affirming the trial court's decision in this case

A copy of the decision from the Court of Appeals, Division II, terminating review which was filed on February 25, 2020 is attached as Exhibit "A".

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision denying petitioner's motion for a new trial when newly discovered evidence disclosed a purported expert's lack of qualifications to testify, yet still held that the inadmissible expert's testimony did not prejudicially deny petitioner's Constitutional right to a fair trial?

IV. STATEMENT OF THE CASE

Defendant Barry Draggoo was charged with three counts of child molestation in 2008. CP 58. Before trial, defense counsel was notified, via email, that the State intended to call an expert witness, Toni Nelson, to testify about the "dynamics and psychological effects of sexual assault on victims and how these effects produce seemingly inconsistent behavior in victims." *Id.* RP 2/4/09:9. Trial counsel requested more information from

the State, and, further requested a continuance to conduct more research on Ms. Nelson. *Id.* RP 2/4/09:9-11. The court denied the continuance request and, instead, evaluated Ms. Nelson in a pre-trial hearing. *Id.* RP 2/4/09:11-12. The court ruled that Ms. Nelson qualified as an expert witness under Rule 702, and she testified at trial. *Id.* RP 2/5/09:47-63; 76-91. Defendant was convicted on all counts. *Id.* RP 2/6/09:398-401.

On February 3, 2016, the Lewis County Prosecuting Attorney's Office mailed a letter to Mr. Draggoo's former appellate counsel informing him that Ms. Nelson had perjured herself in Mr. Draggoo's trial. CP 58, 63[1]. As referenced, Ms. Nelson testified that she graduated from a four-year university, that she possessed a nursing degree, and that she was working toward her master's degree in social work. *Id.* She later admitted to investigators that these statements regarding her training and education were false. *Id.* CP 41-44. Ms. Nelson also testified that she had been a certified teacher, a registered nurse, and a certified counselor with the State of Washington. *Id.* She later admitted to investigators that these statements regarding her skills and professional experience were also false. *Id.* Ms. Nelson further admitted she only possessed a two-year degree. *Id.*

On April 30, 2018, the trial court held a hearing on Mr. Draggoo's motion for a new trial based on this newly discovered evidence. RP 1-21. At the conclusion of the hearing, the trial court denied the request for a

[1] There was a scrivener's error on the letter, although the letter was dated January 26, 2015, it was actually penned on January 26, 2016.

new trial. The court held that even though Ms. Nelson's fabricated testimony was newly discovered evidence, the Court determined that, given the overall record in the case, this evidence would probably not change the result of the trial. RP 19-20. In making its ruling, the Court held that the new evidence, although material, was simply impeachment evidence because the evidence related to Ms. Nelson's qualifications as an expert. RP 20. On August 8, 2018, the trial court entered Findings of Fact and Conclusions of Law from that hearing. CP 45-48.

Respectfully, based upon the newly discovered evidence of the falsified testimony of the State's expert, and the trial court's erroneous ruling, this Court should grant Mr. Draggoo's petition for review as failure to do so denies Mr. Draggoo's Constitutional right to a fair trial.

V. ARGUMENT

A. Why Review Should be Accepted

Mr. Draggoo respectfully requests that this Court accept review of this case as this petition involves a significant question of law under out State and Federal Constitutions that entitle an accused the right to receive a fair trial and also involves an issue of substantial public interest that should be determined by the Supreme Court.

B. The Newly Discovered Evidence Materially Affected Mr. Draggoo's Constitutional Right to a Fair Trial.

As set forth above, the trial court allowed inadmissible expert testimony in Mr. Draggoo's trial, which denied his constitutional right to a fair trial.

Simply stated, over several years, Toni Nelson duped judges and attorneys alike about her background and qualifications to testify, yet courts allowed her to testify as an expert on issues related to child sexual abuse. She lied about her skills, experience, training and education. Here, the trial court allowed Toni Nelson to testify at Mr. Draggoo's trial as an expert witness under Rule 702 based upon her falsified qualifications to do so and based upon the State's argument that she was a material and necessary witness in its prosecution of Mr. Draggoo. Respectfully, she was neither qualified as an expert nor otherwise competent to testify in Mr. Draggoo's case.

All of Ms. Nelson's testimony regarding child sexual abuse against Barry Draggoo was improperly admitted and prejudiced his Constitutional right to a fair trial. The disclosure of her lack of qualifications was not simply impeaching, it was material, and it was material to Mr. Draggoo's Constitutional right to a fair trial. Had her lack of qualifications been known, the State would not have called her as a witness, and her testimony would not have been received by the jury. Allowing her to testify was harmful error.

1. Toni Nelson did not qualify to testify as an expert witness.

Our state courts have developed the following three-pronged test to determine the admissibility of expert testimony under ER 702; whether (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3)

the expert testimony would be helpful to the trier of fact. *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984), *citing State v. Canaday*, 90 Wn.2d 808, 585 P.2d 1185 (1978). A witness may be qualified as an expert by the trial court if he or she has the requisite "knowledge, skill, experience, training, or education." ER 702.

Here, Ms. Nelson had no qualifications to testify as an expert or otherwise. After being confronted, she admitted to falsifying her skills, experience, training, and education, yet during criminal trials she testified at length on sophisticated matters of power dynamics and the trauma of child sexual abuse. Without any credentials to substantiate the breadth or accuracy of her purported knowledge on the topics she testified about, trial courts were duped into allowing Ms. Nelson to testify as an expert about sexual abuse and how it relates to children. She did not qualify as an expert. This error was material as it prejudiced Mr. Draggoo's right to a fair trial.

The State acknowledged that had it known about Ms. Nelson's lack of qualifications, it would not have called her as a witness at trial. The appellate court's holding that "Nelson's dishonesty about her credentials would not have prevented her from testifying as an expert", is patently wrong. Court of Appeals decision at page 5. It's wrong because the State acknowledge that if it knew Ms. Nelson did not possess the claimed qualifications, the State would not have called her as a witness. Further, no evidence exists in the record that she was otherwise competent

to testify about sexual abuse issues. As such, the Court of Appeals conclusion that her testimony was still admissible is erroneous.

2. Toni Nelson's false testimony was unfairly prejudicial.

Practically all evidence is prejudicial in that it impacts the jurors' decision-making and may lead to a finding that a defendant is guilty beyond a reasonable doubt. *State v. Bernson*, 40 Wn.App. 729, 736, 700 P.2d 758 (1985). Trial courts may exclude evidence that is unfairly prejudicial. ER 403. Evidence is unfairly prejudicial if it is more likely to generate an emotional response rather than a rational decision among the jurors. *State v. Gould*, 58 Wn.App. 175, 183, 791 P.2d 569 (1990). Trial courts also exclude evidence if it is not relevant. ER 401.

Under the guise of expert testimony, Ms. Nelson testified about issues affecting alleged minor victims of sexual assault. Because Ms. Nelson intentionally misrepresented her qualifications and introduced expert testimony without any qualifications to do so, her opinion served no admissible purpose; yet it was offered as expert testimony on an extremely serious subject.

Had the trial court not previously qualified Ms. Nelson as an expert, she would not have been allowed to testify as no legal basis existed to allow her testimony. Because Ms. Nelson was not qualified to testify on any subject related to Mr. Draggoo's case, as an expert or otherwise, Mr. Draggoo was prejudiced as the jury received irrelevant and unfairly prejudicial evidence.

The Court of Appeals decision holds that Mr. Draggoo was not denied a fair trial because the newly discovered evidence was simply impeachment evidence, and such impeachment evidence would not have prevented her from testifying. This holding is clearly inaccurate.

As this Court is aware, ER 702 sets forth the basis for allowing expert testimony. But for Nelson's testimony regarding her qualifications, no evidence exists that she would have been allowed to testify as an expert or that she was competent to testify otherwise. The State acknowledges that it would not have called her as a witness had it known about her lack of credentials. Further, the trial court stated that the newly discovered evidence was material as it related to Ms. Nelson's testimony. CP 47. As such, her lying about her credentials is not merely impeachment evidence, it is the basis for a new trial because she was allowed to testify when, absent her credentials, she would not have been allowed to testify.

Additionally, the appellate court stated that because the state's investigating detective also testified about delayed disclosure by sexual assault victims, his testimony informed the jury of the same general concept. Respectfully, this part of the Court of Appeals decision is also wrong. The investigating detective testified as follows:

Q Based on your training and experience, Detective, is it normal for sexual assault victims to delay disclosure?

A Yes, sir.

Mr. Blair: Objection, foundation

The Court: Overruled.

Q (By Mr. Hayes) And based on your training and experience, do victims of sexual assault when they do disclosure all the details at once?

A Hardly ever.

Q How does it normally happen then?

A They disclose little by little. One of the instructors kind of described it as when you go into the lake you start with a toe, then a foot instead of just jumping right in and disclosing everything.

The Court of Appeals statement that "the detective's testimony included less detail than Nelson's testimony and informed the jury of the same general concepts, " is inaccurate. The detective offered no testimony regarding why delayed disclosure might occur, only that sexual assault victims might delay disclosure. The detective provided no information as to why such delayed disclosure might occur because he wasn't qualified to do so on the record presented. Accordingly, allowing Ms. Nelson to testify was significant and substantially prejudicial because her testimony about delayed reporting went well beyond that of what Detective Callas' testified about. *See* generally RP 77-90.

Toni Nelson's false testimony effectively denied Mr. Draggoo's right to a fair trial, and Detective Callas' limited testimony was not a substitute for the matters Ms. Nelson testified about.

3. *The Newly Discovered Falsified Evidence was Material Evidence that Denied Mr. Draggoo's Right to a Fair Trial.*

The trial court, it its conclusions of law, held that Mr. Draggoo failed to show that the newly discovered evidence would probably change the result of the trial due to Detective Callas' testimony and the testimony of the other witnesses at trial regarding the incident. CP 54 ¶ 2.3. Respectfully, this Conclusion of Law fails to recognize that Ms. Nelson was the glue the State relied upon for purposes of assessing the children's testimony and to testify about the reasons for delayed disclosure. She was introduced as an expert in child abuse and disclosure issues, which was something that the jury certainly relied upon in its decision. To suggest that Mr. Draggoo's convictions would have occurred absent her testimony is simply speculation and conjecture.

The trial court held that this newly discovered evidence was material as it related to the basis of Ms. Nelson's testimony, but then held that such evidence about her lack of qualifications was only impeaching. Respectfully, the evidence was much more than impeachment material because Ms. Nelson would not have testified has the State known the truth of her credentials. Given that she was a witness the State relied upon to prove its case, the failure to grant Mr. Draggoo's motion for a new trial based upon the perjured testimony, is harmful error.

Detective Callas' testimony did not provide any detail or reasons related to delayed disclosures, just that it occurs. His lack of expertise is why the State needed Ms. Nelson's testimony. Without it, the jury had

absolutely no evidence to explain why delayed disclosure might occur. Accordingly, Toni Nelson's testimony prejudiced Mr. Draggoo's right to a fair trial.

Respectfully, if such evidence was material, as the court held, her lack of qualifications cannot simply be viewed as impeachment evidence as Ms. Nelson could not have been called to testify by the State. Ms. Nelson's testimony was so significant to the State that the State filed a pre-trial motion to admit Ms. Nelson as an expert witness in this child abuse case. CP 30-34.

Significantly, when expert testimony is allowed, the concern is that the jury will give this evidence much greater weight than it would of lay testimony. Therefore, the fact of Ms. Nelson's false credentials is not simply impeaching evidence because Ms. Nelson simply would not have been allowed to testify had the State known the truth of her background.

In closing, the State argued as follows regarding the weight it gave to Ms. Nelson's testimony:

> Heard from Toni Nelson, an extremely learned individual on this subject, effects this kind of thing is going to have on kids and how kids are going to act. She said it's very, very common for kids to delay disclosure, just like what happened here, very common for them not to disclose all at once, over time, exactly what we have here.

RP 2/6/09:352

This "extremely learned individual's" expert testimony was evidence that the State relied upon to prove its case, and this expert testimony was material evidence offered by the State to explain dynamics

of child sexual abuse and delayed disclosure. Ms. Nelson's testimony was extremely significant, and not remotely cumulative to Det. Callas' testimony. Because Toni Nelson's testimony was not admissible, Mr. Draggoo was harmfully prejudiced such that her inadmissible testimony, wrongfully received by the jury, probably impacted the trial's outcome. As such, the only remedy is to grant Mr. Draggoo a new trial. Respectfully, Mr. Draggoo urges this Court to grant his petition.

VI. CONCLUSION

Based on the arguments, records and files contained herein, Mr. Draggoo respectfully requests that this Court accept review of this matter.

Respectfully submitted this 25th day of March, 2020.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

By: _____
BRETT A. PURTZER
WSB #17283

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the petition for review to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Senior Deputy Prosecuting Attorney
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Barry Draggoo
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Stafford Creek Corrections Center
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Signed at Tacoma, Washington, this 25th day of March, 2020.

LEE ANN MATHEWS

Filed
Washington State
Court of Appeals
Division Two

February 25, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BARRY ROYCE DRAGGOO, Appellant.	No. 52379-5-II UNPUBLISHED OPINION

MELNICK, J. — In 2009, a jury convicted Barry Draggoo of three counts of child molestation in the first degree. In 2016, the State informed Draggoo that an expert witness who testified at his trial had falsified her credentials. Draggoo filed a CrR 7.8(b) motion for a new trial. The court denied the motion, and Draggoo appeals.

Because the newly discovered evidence was merely impeachment evidence and Draggoo failed to prove that the evidence would probably impact the outcome of the trial, we affirm. We also reject Draggoo's assetions in his statement of additional grounds (SAG).

FACTS

In 2008, the State charged Draggoo with three counts of child molestation in the first degree, alleging that he molested two victims over a period of two years, between 2002 and 2005. The case proceeded to trial.

Draggoo's former cellmate testified that Draggoo admitted to raping his stepdaughter's friend on two separate occasions. Based on this admission, an investigation began and it led to two possible victims, NJD and RRS. NJD testified that she recalled three specific incidents of Draggoo touching her inappropriately, and although she did not remember well, she said Draggoo touched her approximately 20 other times. RRS testified that Draggoo had touched her inappropriately at least once.

Toni Nelson, a social worker, testified that child victims of sexual assault commonly delay disclosure of abuse, deny it happened, or disclose abuse little by little over time. The investigating detective also testified that based on his training and experience, it is normal for sexual assault victims to delay disclosure and to disclose the details little by little over time.

A jury convicted Draggoo on all counts. Draggoo appealed, and we affirmed the convictions.[1] A mandate issued on July 2, 2010. Draggoo also filed a personal restraint petition that was dismissed, and we issued a certificate of finality in February 2013.

In January 2016, the State became aware that Nelson falsified many of her qualifications. An investigation revealed that she did not possess the educational background, degrees, or certifications that she claimed she had when testifying. Nelson had worked as a community-based advocate for domestic violence and sexual assault victims for at least several years. By letter dated February 3, 2016, the State informed defendants whose cases Nelson worked on about her false testimony.

[1] *State v. Draggoo*, noted at 156 Wn. App. 1019 (2010).

Draggoo filed a motion for a new trial based on the newly discovered information. He also claimed that the State violated *Brady v. Maryland*.[2, 3] The court held a hearing on the motion and considered partial trial transcripts, briefing, and argument from counsel. At the hearing, the State acknowledged that it likely would not have called Nelson because of her dishonesty about her qualifications, not because of her lack of education and credentials.

The court denied the motion and made the following relevant conclusions of law.

> 2.3. Draggoo failed to show the newly evidence would probably change the result of the trial due to Detective Callas' testimony and the testimony of all the other witnesses at the trial regarding the incidents. The overall record in the case does not support that the newly discovered evidence, or Ms. Nelson's testimony, would probably change the result of the trial.
>
> 2.4. The evidence was discovered since the trial and could not have been discovered before the trial by the exercise of due diligence.
>
> 2.5. The evidence is material, as in regards to the basis of Ms. Nelson's testimony.
>
> 2.6. The evidence in not merely cumulative, but is impeaching.
>
> 2.7. There was no *Brady* . . . violation. Draggoo's case was litigated to its conclusion when the State found out a community based advocate lied about her credentials. There was no currently pending habeas actions which required continuing obligations under *Brady* to provide exculpatory evidence after a trial.

Clerk's Papers at 47.

Draggoo appeals.

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[2] 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[3] In the February 3, 2016 letter, the prosecutor said he had met with Nelson on January 26, 2015, but this date was a typo. The meeting actually occurred on January 27, 2016. Draggoo claimed that the State had violated *Brady* by waiting a year to inform him of Nelson's lies.

ANALYSIS

Draggoo argues that the court erred by denying his motion for a new trial based on newly discovered evidence. He contends that because Nelson was not qualified as an expert in the first place, the State would not have called her and therefore evidence of her false credentials could not be impeachment evidence. He also argues that the newly discovered evidence was material, highly prejudicial, and denied him a right to a fair trial. We disagree with Draggoo.

CrR 7.8(b)(2) allows a defendant to seek relief from judgement based on newly discovered evidence which by due diligence could not be discovered in time to move for a new trial under CrR 7.5. When a motion for a new trial is based on newly discovered evidence, we review a ruling denying it for an abuse of discretion. *State v. Gassman*, 160 Wn. App. 600, 608, 248 P.3d 155 (2011). A trial court abuses its discretion when its decision is based on untenable or unreasonable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). Because Draggoo did not assign error to any of the trial court's findings of fact, they are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

A defendant has a right to appeal the denial of a CrR 7.8 motion. *State v. Larranaga*, 126 Wn. App. 505, 508, 108 P.3d 833 (2005). Appellate review is limited to whether the trial court abused its discretion when it denied the CrR 7.8 motion. *Larranaga*, 126 Wn. App. at 509.

> A trial court will not grant a new trial on the basis of newly discovered evidence unless the moving party demonstrates that the evidence "(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." The absence of any one of these factors is grounds to deny a new trial.

State v. Statler, 160 Wn. App. 622, 632, 248 P.3d 165 (2011) (citation omitted) (quoting *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)).

Draggoo's argument fails on at least two grounds. First, impeachment evidence is evidence that tends to cast doubt on the credibility of the person being impeached. ER 607. In this case, Nelson possessed the qualifications to testify as an expert witness on delayed reporting, failing to report, and incomplete reporting, even though she did not possess the credentials she claimed to have. Nelson's dishonesty about her credentials would not have prevented her from testifying as an expert. Therefore, the fact that she lied about her credentials is merely impeachment evidence. It does not form the basis for a new trial.

Second, Draggoo needed to demonstrate that the evidence would "'probably change the result of the trial.'" *Statler*, 160 Wn. App. at 632 (quoting *Williams*, 96 Wn.2d at 223). The testimony about delayed reporting was important to show why RRS and NJD did not report the molestation at the time it happened. However, the investigating detective also testified about delayed disclosure by sexual assault victims. Although the detective's testimony included less detail than Nelson's testimony, it informed the jury of the same general concepts. Draggoo has not shown that the new evidence would probably change the trial's result.

SAG

Draggoo asserts that the court erred in determining that the newly discovered evidence would not change the outcome of the trial. As explained above, we disagree.[4]

Draggoo also asserts that the court erred in concluding that no *Brady* violation occurred because the prosecutor "failed to provide discovery in a timely manner." SAG at 6. Because this

[4] Where a SAG contains errors that "have been thoroughly addressed by counsel," they are "not proper matters for [the SAG] under RAP 10.10(a)." *State v. Thompson*, 169 Wn. App. 436, 493, 290 P.3d 996 (2012).

claim involves matters outside of the record, we do not consider it. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040

Melnick, J.

We concur:

Maxa, C.J.

Sutton, J.

HESTER LAW GROUP, INC., P.S.

March 25, 2020 - 1:34 PM

Filing Petition for Review

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