No. 98322-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 52379-5-II)

STATE OF WASHINGTON,

Respondent,

vs.

BARRY ROYCE DRAGGOO,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
And the Superior Court of Lewis County

JONATHAN MEYER
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By: _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Other Rules or Authorities

A. COURT OF APPEALS DECISION

The Petitioner, Barry Royce Draggoo, seeks review of the unpublished opinion in *State v. Draggoo,* Court of Appeals, Division II, cause number 52379-5-II, filed February 25, 2020, attached for the Court's convenience as Appendix A.

B. COUNTERSTATEMENT OF THE ISSUES:

1. Did the Court of Appeals error when it determined the trial court did not abuse its discretion when it denied Draggoo's CrR 7.8(b) motion, finding that the newly discovered evidence was merely impeachment evidence and Draggoo had not met his burden to prove the newly discovered evidence would probably change the outcome of the trial?

C. STATEMENT OF FACTS

In 2008, after Draggoo decided to share personal information with his cellmate, who later testified at Draggoo's trial, the Lewis County Sheriff's office began a child sexual assault investigation which culminated in the Lewis County Prosecutor's Office charging Draggoo with three counts of child molestation in the first degree. *Draggoo,* Slip Op. at 1; Ex. 2 at 286-90, 296-97. While the charges were brought in 2008, it was alleged Draggoo had sexually assaulted the two victims over a period between 2002 and 2005. *Draggoo*, Slip Op. at 1.

Draggoo's case proceeded to trial. *Id.* at 2. The State presented a number of witnesses, including the victims, their mothers, the victims' friend, D.R.E., Detective Callas of the Lewis County Sherif's Office, Draggoo's former wife, Kristi, and Toni Nelson, a community based victim's advocate. *Id.* at 2; Ex. 1, 2.

N.J.D., one of the victims, testified the first time Draggoo touched her in a sexual manner she was 10 years old. Ex. 1 at 182. Draggoo pinched N.J.D.'s nipple, and rubbed her vagina over her clothing. *Id.* at 182-83. Later, N.J.D. testified Draggoo touched her breast and pinched her nipple while she was over at their apartment in Centralia playing judge for the dress up the other girls were playing. *Id.* at 185-87. N.J.D. stated Draggoo was smiling when he pinched her nipple. *Id.* at 187. N.J.D. did admit that it was difficult for her to remember all the details about what she had spoken about in her numerous interviews. *Id.* at 224. N.J.D. stated Draggoo had touched her inappropriately about 20 times. *Id.* at 189-90.

R.R.S. said she was about 10 or 11 when she stayed the night at the Draggoos' apartment. *Id.* at 255. R.R.S. said that while she was getting a back rub by Draggoo he moved his hand under her shirt and rubbed her breast. *Id.* at 259-61.

Toni Nelson, who at the time was a social worker for White Pass Community Services Coalition, testified that it was very common for child victims of sexual abuse to delay disclosure of the abuse. Ex. 1 at 77, 85. Ms. Nelson also testified it was common for child victims of sexual abuse to deny the abuse happened. *Id.* at 88. Ms. Nelson further stated it was common for a child victim of sexual abuse to disclose the abuse little by little over a period of time. *Id*. Ms. Nelson explained child victims of sexual abuse are often afraid that they are going to get in trouble with their parents if they disclose the abuse. *Id.* at 89.

Draggoo was convicted as charged. *Draggoo*, Slip. Op. at 2. Draggoo appealed, his conviction and sentence was affirmed, and the Mandate was issued in 2010. *Id.* Draggoo subsequently filed an unsuccessful personal restraint petition. *Id.* The certificate of finality was issued in 2013. *Id.*

The Lewis County Prosecutor's Office became aware in January 2016, that Ms. Nelson has falsified her educational background and did not possess the degrees, or certifications that accompanied those degrees. CP 24-26. After receiving this information, Lewis County Prosecutor Jonathan Meyer had a letter

drafted to inform defendants, the courts, local defense counsel, and the local bar association of Ms. Nelson's dishonest conduct. *Id.*

Draggoo filed a CrR 7.8(b) motion for a new trial, arguing newly discovered evidence and a violation of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1965). *Draggoo,* Slip. Op. at 3. The trial court considered briefing from Draggoo and the State, argument from the parties, and partial trial transcripts (the testimony of the witnesses) before rendering its decision. *Id.*; Ex. 1, 2. The trial court determined the evidence did not meet the newly discovered evidence test because the evidence was impeaching and Draggoo did not show it would probably change the outcome of the trial. The trial court denied Draggoo's motion. The Court of Appeals found the trial court did not abuse its discretion and affirmed the trial court.

D. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The Court should not accept review in this case. The Court of Appeals denial of Draggoo's appeal does not invoke either of the considerations Draggoo cites in his petition for review to this Court, RAP 13.4(b)(3) or (4). The Court of Appeals decision does not raise a significant issue of law under the federal or state constitution. RAP 13.4(b)(3). Nor does this matter involve a substantial public interest that this Court should determine. RAP 13.4(b)(4).

E. ARGUMENT.

The Court of Appeals analysis of the trial court's rulings was correct. The Court of Appeals applied the proper standard of review of a CrR 7.8(b) motion, abuse of discretion and reviewing the trial court findings of fact for substantial evidence and whether those findings supported the conclusion of law. When applying this deferential standard, the Court of Appeals came to the same conclusion as the trial court, the denial of the CrR 7.8(b) motion was proper. Draggoo fails to recognize the deferential standard, and again attempts to relitigate his matter in this Court, making much of the same arguments he made in the trial court. The holdings by the Court of Appeals do meet the criteria set forth in RAP 13.4(b) for this Court to grant review.

1. The Court Of Appeals Decision, Finding The Trial Court Did Not Abuse Its Discretion When It Denied Draggoo's CrR 7.8(b) Motion Does Not Warrant Review, Does Not Meet The Considerations For Review Under RAP 13.4(b)(3) or (4).

Draggoo argues he was denied a fair trial because the newly discovered evidence, that Toni Nelson lied about the education she possessed, and the certifications that accompanied that education, showed Ms. Nelson was not qualified as an expert and was not simply merely impeaching evidence. Draggoo asserts the Court of

Appeals erred when it affirmed the trial court's denial of his motion for a new trial because Ms. Nelson was not qualified to testify in the matters for which she testified to in the trial court due to her lack of credentials, therefore the evidence was more than merely impeaching and he was prejudiced.

Draggoo is simply wrong, ER 702 does not require a person to have a degree or a certificate to be an expert. The trial court and the Court of Appeals knew this, Ms. Nelson's credentials are reflected in the uncontested findings of fact that support the trial court's conclusions of law. "Draggoo did not assign error to any of the trial court's findings of fact," therefore "they are verities on appeal." *Draggoo*, Slip Op. at 4, *citing State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011). While it is not contested Ms. Nelson's false testimony included that she was not a nurse, she did not have a teaching certificate, and was not getting further education for her master's degree, that is not her sole credentials. CP 45-46. The trial court found "Ms. Nelson also had considerable experience as a community based advocate for victims of domestic violence and sexual assault." CP 46 (Finding of Fact 1.4).

Draggoo states to this Court that Ms. Nelson testified "[w]ithout any credentials to substantiate the breadth or accuracy of

her purported topics she testified about…" Petition at 7. This is not true. A person with considerable experience as a community based advocate can be an expert. The State also never claimed, throughout these proceedings, that Ms. Nelson was not an expert in the area for which she testified. CP 15-18. The State's position was Ms. Nelson was dishonest about her education and training in areas having minimal to no impact on her expertise, and it was her dishonesty that made Ms. Nelson a less than ideal witness. CP 15-18. Ms. Nelson had been a community based advocate for six years, assisting approximately 150 sexual assault victims, providing weekly groups for sexual assault victims (including children), and having attended 1,051 hours of training for domestic violence and sexual assault matters. CP 16. One does not need to be a nurse, a child educator, or pursuing their master's degree to be an expert in sexual assault, a victim's advocate may suffice.

The trial court determined the evidence of Ms. Nelson's fictitious educational credentials, degrees, and certificates were merely impeaching, as it would go towards her credibility as a witness, not her qualification as an expert. *Draggoo*, Slip Op. 3. Draggoo continually ignores the deferential standard that must be afforded the trial court in an appeal for a CrR 7.8 motion. While

Draggoo passionately disagrees with the trial court's evaluation of the evidence presented, he does not explain how the trial court abused its discretion. Draggoo similarly does not adequately explain how the Court of Appeals erred when it applied an abuse of discretion standard and found the trial court's decision was not manifestly unreasonable or not based upon untenable grounds when it determined the evidence was merely impeaching.

Draggoo also argues the evidence violated his right to a fair trial because he was prejudiced due to Ms. Nelson's testimony probably affecting the outcome of his trial. Again, Draggoo reasserts his failed arguments from the trial court and the Court of Appeals. Draggoo does not adequately explain how the Court of Appeals erred when it affirmed, after applying the required deferential standard of an abuse of discretion, the trial court's determination that Draggoo did not show the evidence would probably change the result of the his trial. Petition 11.

Draggoo wrongly asserts Ms. Nelson was the witness the State relied upon to prove its case. Petition at 11. The State, as summarized briefly above in the Statement of the Facts, presented numerous witnesses who testified about Draggoo's actions. The trial court found due to the testimony of the other witnesses and Detective

Callas, Draggoo was unable to show the newly discovered evidence would probably change the result of the trial. CP 47. The Court of Appeals agreed with the trial court, again using the correct deferential standard of review.

Draggoo may disagree with the ultimate conclusion, but the Court of Appeals reasoning and decision does not deny his right to a fair trial. The Court of Appeals decision does not raise a significant issue of law under the federal or state constitution. RAP 13.4(b)(3). Nor is Draggoo's case a matter involving substantial public interest that this Court should determine. RAP 13.4(b)(4).

F. CONCLUSION

The State respectfully requests this Court not accept review on the issues Draggoo raises in his petition for review.

If this Court were to accept review, the State would respectfully request an opportunity to submit supplemental briefing.

RESPECTFULLY submitted this 6th day of May, 2020.

JONATHAN MEYER
Lewis County Prosecuting Attorney

by:_____
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Appendix A

State v. Draggoo, Court of Appeals,

Slip Op. 52379-5-II (2/25/20 Unpublished)

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.

[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.

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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