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Court of Appeals  
Division II  
State of Washington  
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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

BARRY R. DRAGGOO

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF LEWIS COUNTY  
Cause No. 08-1-00452-4

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BRIEF OF APPELLANT

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WSB #17283

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Draggoo's motion for a new trial based on newly discovered evidence.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it denied Mr. Draggoo's motion for a new trial based upon newly discovered and material evidence that the State's expert had falsified her credentials, which prejudiced Mr. Draggoo's right to a fair trial?

(Assignments of Error #1)

### III. STATEMENT OF THE CASE

#### A. Procedural History

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<sup>1</sup>. 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

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<sup>1</sup> 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.

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 newly discovered evidence. RP 1-21. At the conclusion of the hearing, the trial court denied the request for a new trial and found 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, this Court should reverse the trial court's decision and grant Mr. Draggoo's motion for a new trial.

#### IV. ARGUMENT

Simply stated, Toni Nelson duped many individuals about her background and qualifications and was allowed to testify as an expert on issues related to child sexual abuse. She lied about her skills, experience, training and education. The court allowed Toni Nelson to testify at Mr. Draggoo's trial as an expert witness under Rule 702 based upon her falsified qualifications and based upon the State's request that she was a material witness in its prosecution of Mr. Draggoo. She was not qualified. Respectfully, all of her testimony on the subject matter of 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.

*A. 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. 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 sexual abuse. Without any credentials to substantiate the breadth or accuracy of her purported knowledge on the topics she was allowed to testify about, the trial court was duped into allowing Ms. Nelson to testify as an expert about sexual abuse and how it relates to children. This error was material as it prejudiced Mr. Draggoo's right to a fair trial.

*B. 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 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).

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 presented 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 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.

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

The Court, in 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 consider that Ms. Nelson was the purported glue that the State relied upon for purposes of assessing the other testimony. 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 the same result of conviction would have occurred absent her testimony is simply speculation and conjecture. The trial court held that this new evidence was material as it related to the basis of Ms. Nelson's testimony, but then held that such evidence was only impeaching. Respectfully, the evidence was material because Ms. Nelson would not have been allowed to testify had the truth of her credentials been known. Given that she was a witness that the State relied upon for purposes of proving its case, the failure to grant Mr. Draggoo's motion for a new trial based upon the perjured testimony is error.

Respectfully, if such evidence was material, as the court held, it cannot simply be viewed as impeachment evidence as Ms. Nelson could not have been called to testify in this case had the parties known this information before trial. The evidence 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 Ms. Nelson:

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

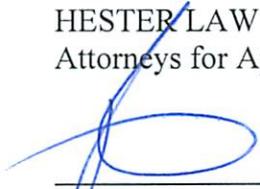
This expert testimony was evidence the State relied upon to prove its case, and it was material evidence that was offered to explain dynamics of child sexual abuse and goes to the heart of the idea behind this delayed disclosure. Ms. Nelson's testimony was significant, and because it should not have been allowed, the only remedy is to grant Mr. Draggoo a new trial.

V. CONCLUSION

The revelation that Toni Nelson falsified her education, training, and work experience disqualified her from testifying as an expert witness. Further, this revelation renders the substance of her testimony as unfairly prejudicial as it was inherently unreliable, and allowing such evidence to stand fundamentally denied Mr. Draggoo his right to a fair trial. Respectfully, considering this new and material evidence, this Court should grant Mr. Draggoo a new trial in the interest of justice.

RESPECTFULLY submitted this 20<sup>th</sup> day of February, 2019.

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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this brief to be served on the following in the manner indicated below:

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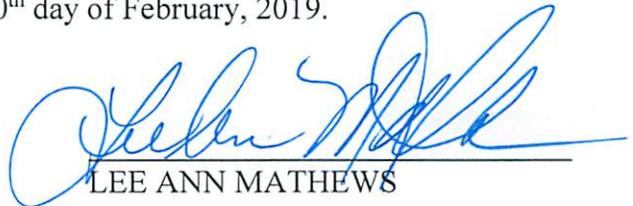
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Signed at Tacoma, Washington this 20<sup>th</sup> day of February, 2019.



LEE ANN MATHEWS

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