

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

STATE OF WASHINGTON,

Respondent,

vs.

BARRY R. DRAGGOO

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF LEWIS COUNTY

Cause No. 08-1-00452-4

REPLY BRIEF OF APPELLANT

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Table of Contents

| | |
|--------------------------------|----|
| TABLE OF AUTHORITIES..... | ii |
| I. STATEMENT OF THE CASE | 1 |
| II. ARGUMENT | 1 |
| III. CONCLUSION | 3 |

TABLE OF AUTHORITIES

Cases

| | |
|---|---|
| <i>State v. Statler</i> , 160 Wn.App. 622, 248 P.3d 165 (2011)..... | 2 |
|---|---|

I. STATEMENT OF THE CASE

Mr. Draggoo relies upon the Statement of Facts set forth within his opening brief.

II. ARGUMENT

A. Newly Discovered Evidence was not Merely Impeaching, but Materially Affected Mr. Draggoo's Right to a Fair Trial.

The State's response suggests that the newly discovered evidence, which illustrated Ms. Nelson's perjury, was simply impeaching. The problem with such analysis is that the State is suggesting that this evidence, if known, would simply be used to impeach Ms. Nelson's testimony. Such analysis assumes the State would still have called her as an expert witness on delayed disclosure knowing her true credentials, which the State acknowledges it would not have done. *See* State's Brief at page 20.

The State asserts that this new evidence was not material to the trial's outcome because of the testimony of the two minor children and because of the Detective's general disclosure testimony on the same issue. If such claim was true, that begs the question as to why the State would have called Ms. Nelson unless the State believed her testimony was important for the jury to hear.

Respectfully, the reason the State called Ms. Nelson to testify was because she was an "expert" in delayed disclosures and the State believed such testimony was necessary to prove its case to explain the children's delayed and inconsistent testimony. For the State to suggest that the evidence obtained after the trial was

impeaching, although correct, does not detract from the fact that her testimony prejudicially affected Mr. Draggoo's rights to a fair trial.

The multi-part test set forth by *State v. Statler*, 160 Wn.App. 622, 632, 248 P.3d 165 (2011) is satisfied because the newly discovered evidence presented by Mr. Draggoo satisfies all five elements. Prosecutors routinely call medical witnesses or disclosure witnesses in child sex cases. The reason they do so is because of the State's concern that a jury will question a child's late disclosure and how such late disclosure might affect the child's credibility. By calling an "expert" witness, such as Ms. Nelson, the State seeks to eliminate such concerns by having an individual testify about late disclosure and why it might occur.

Whether the State argued, at length, Ms. Nelson's testimony in closing is really immaterial. The jury heard Ms. Nelson's testimony, which it would never have heard had Ms. Nelson's credentials been known. Further, it is highly likely that had Ms. Nelson's credentials, or lack thereof, been known, the State would have called some other person to testify regarding delayed disclosure. Therefore, the testimony is material and it likely changed the outcome of this case.

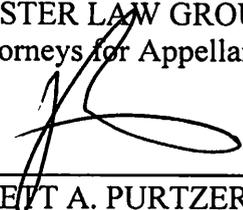
Respectfully, Mr. Draggoo urges that the trial court abused its discretion by denying his motion for new trial based on newly discovered evidence.

III. CONCLUSION

Based upon the aforementioned, Mr. Draggoo respectfully urges this Court to reverse the trial court and to grant him a new trial.

RESPECTFULLY submitted this 21st day of May, 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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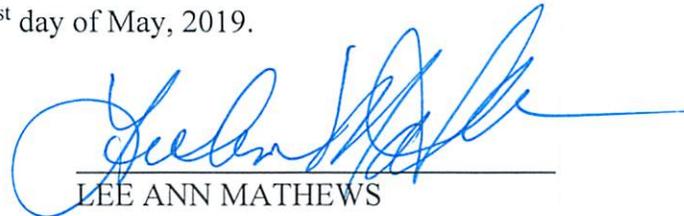
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Signed at Tacoma, Washington this 21st day of May, 2019.



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