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Division II
State of Washington
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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BARRY R. DRAGGOO,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITES ii

I. ISSUE 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 10

 A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
 WHEN IT DENIED DRAGGOO’S CrR 7.8(b) MOTION. 10

 1. Standard Of Review 11

 2. Draggoo Fails To Assign Error To Findings Of Fact
 And Conclusions Of Law 12

 3. A CrR 7.8(b) Motion Is A Collateral Attack And The
 Defendant Must Establish Actual And Substantial
 Prejudice To Be Entitled To Relief From Their
 Judgment And Sentence 13

 4. Review Is Limited To The Trial Court’s Denial Of
 The CrR 7.8(b) Motion..... 15

 5. The Trial Court Did Not Abuse Its Discretion When
 It Determined Draggoo Had Not Met The Requisite
 Showing Under The Newly Discovered Evidence
 Test To Entitle Draggoo To Relief 16

IV. CONCLUSION.....24

TABLE OF AUTHORITIES

Washington Cases

In re Stockwell, 179 Wn.2d 588, 316 P.3d 1007 (2014)..... 13, 14

State ex. rel. Lige v. County of Pierce, 65 Wn. App. 614, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992)..... 11

State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006)..... 11

State v. Gomez-Florencio, 88 Wn. App. 254, 945 P.2d 228 (1997) 11

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996)..... 11

State v. Larranaga, 126 Wn. App. 505, 108 P.3d 833 (2005) 15

State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287 (2011) 11, 12

State v. Riofta, 166 Wn.2d 358, 209 P.3d 467 (2009) 18

State v. Statler, 160 Wn. App. 622, 248 P.3d 165 (2011) 18, 23

State v. Williams, 96 Wn.2d 215, 233, P.3d 868 (1981) 18

Federal Cases

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1965) 8, 10, 17

Washington Statutes

RCW 10.73.090 13

RCW 10.73.100 13

RCW 10.73.130 13

RCW 10.73.140 13

Other Rules or Authorities

CrR 4.2 14

CrR 7.8 1, 8-11, 13-17, 23, 24

ER 702..... 17

RAP 10.3(g) 12

I. ISSUE

- A. Did the trial court abuse its discretion when it denied Draggoo's CrR 7.8(b) motion based upon newly discovered evidence, finding Draggoo had not met the newly discovered evidence test and failed to show actual and substantial prejudice?

II. STATEMENT OF THE CASE

The State charged Draggoo with three counts of Child Molestation in the First Degree by an Amended Information alleging Draggoo had molested two separate victims over a period of time from 2002 to 2005. 2nd Supp. CP Amend Info.¹ The victim in counts I and II was N.J.D. (DOB: 4/24/93). *Id.* The victim in count III was R.R.S. (DOB: 9/16/93). *Id.* Counts I and II were alleged to have occurred on or about or between April 24, 2002 and April 23, 2005. *Id.* Count III was alleged to have occurred on or about or between September 16, 2002 and September 15, 2005. *Id.*

At trial the State called Toni Nelson, James Pea, Kristi, D.R.E.², Minerva, N.J.D., Jennifer, R.R.S., Detective Tom Callas,

¹ The State has submitted a supplemental and a 2nd supplemental designation of Clerk's Papers to include a number of items: Information, Amended Information, Judgement and Sentence, Mandate, Certificate of Finality, Exhibit List from 4/30/18 hearing, and Exhibits 1, 2, and 3. The Exhibits designated are the verbatim report of proceedings from Draggoo's trial. The State will cite the exhibits as the exhibit number and then reference the page number of the verbatim report of proceedings the State is citing.

² D.R.E. is the victim in Draggoo's Lewis County Superior Court case number 07-1-00498-4, therefore the State will refer to her throughout its brief by her initials to protect her privacy.

and John Huggins to testify on behalf of the State.³ See Ex. 1 at 44; Ex. 2 at 281. 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.

Kristi stated she was previously married to Draggoo and has one child from a previous relationship, D.R.E., and two children with Draggoo. *Id.* at 94. Kristi testified that the Draggoo family lived at 132 Elma Drive, apartment four, in Centralia, Washington from June 2000 until July 5, 2006. *Id.* at 95. The Draggos then moved to Richland. *Id.* at 95. Kristi ended her relationship with Draggoo and moved back to Centralia in December 2006. *Id.* at 95.

³ The State will refer to the minor victim's other family members by the first names only to protect the minor victims' identities.

While the Draggos were living at 132 Elma Drive, Minerva, Fabion, and their three children, including N.J.D., moved next door to the Draggos.⁴ *Id.* at 96. The two families became friendly and the children began to play together. *Id.* at 97. Minerva and Fabion's children would frequently spend the night at the Draggos' apartment, sleeping on the hide-a-bed in the living room or the floor in the children's room. *Id.* at 98-99.

Kristi also explained she was friends with Allen and Jennifer's family, who she had met at church. *Id.* at 99. Allen and Jennifer have three children, including R.R.S. *Id.* at 99-100. Allen and Jennifer's children came over and slept at the Draggoo apartment at least once in December of 2003. *Id.* at 100-01. Photographs were taken during the December 2003 sleepover which included Minerva and Fabion's children. *Id.* at 100-07, 179-81.

N.J.D. testified she spent a lot of time with the Draggos. Ex. 1 at 178-79. N.J.D. also stated she had slept over at the Draggos' apartment when R.R.S. slept over in December 2003. *Id.* at 179-80. N.J.D. testified that Draggoo first touched her inappropriately when she was nine or 10 years old. *Id.* at 182. N.J.D. explained she had been outside playing with one of the Draggoo children, she went into

⁴ The State is again using the initials to help protect the child victim's identity.

the house to get something in the kitchen when Draggoo locked the door, keeping his kid outside, and touched N.J.D.'s breasts, pinching her nipple, and rubbed her vagina over her clothing. *Id.* at 182-83. N.J.D. stated Draggoo was smiling while he was touching her breast and rubbing her vagina. *Id.* at 184.

N.J.D. also told about a time, while on a vacation with the Draggos in Forks, Washington, Draggoo picked her up in the pool and put his thumb in her vagina. *Id.* at 185. 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. N.J.D. testified she had slept over at the Draggos' apartment with R.R.S. once and identified the picture taken as the night R.R.S. stayed over. *Id.* at 193-95.

Jennifer testified she had known Kristi for around 10 years. Ex. 1 at 237-38. Jennifer's younger daughter, R.R.S., was friends with D.R.E. *Id.* at 239. According to Jennifer, R.R.S. spent the night

over at the Draggos' apartment when she was around 10 or 11 years old. *Id.* at 239-40. Jennifer viewed the photograph that Kristi and N.J.D. had identified as being taken the night of the sleepover and Jennifer verified that R.R.S. was in one of the photographs and it looked like R.R.S. was 10 to 11 years old. *Id.* at 241-42. Jennifer stated she had received a call from Kristi and after receiving the phone call she spoke to R.R.S. and learned some surprising information. *Id.* at 243-44. Jennifer said she was contacted by Detective Callas and she brought R.R.S. into the sheriff's office to speak to Detective Callas. *Id.* at 244.

R.R.S. testified she knew the Draggoo family through church. *Id.* at 253. R.R.S. stated she stayed the night at the Draggos' at least once, maybe twice. *Id.* at 253. R.R.S. explained she stayed at the Draggos' once because her parents went out of town and the sleepover included the two Hispanic girls, N.J.D. and N.J.D.'s sister, that were neighbors of the Draggos. *Id.* at 254. R.R.S. also identified the photographs from the sleepover. *Id.* at 255-56. R.R.S. said she was about 10 or 11 when she stayed the night at the Draggos' 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. R.R.S. testified she turned

around and gave Draggoo a look and Draggoo simply said, "What." *Id.* at 262. R.R.S. said Draggoo moved his hands back to her lower back and then again touched her breast. *Id.* R.R.S. said she did not recall if Draggoo touched her nipple. *Id.*

James Pea, a lieutenant with the Lewis County Sheriff's Office, testified Draggoo and John Huggins shared a cell together from January 5, 2008 until March 3, 2008. *Id.* at 92-3. Lieutenant Pea stated Draggoo and Mr. Huggins were in the maximum security area of the jail and the practice in that area is to have the people confined to their cells 23 hours a day. *Id.* at 93.

Mr. Huggins testified during the jury trial. Ex. 2 at 286-92. Mr. Huggins stated he was currently serving a long prison sentence for rape of a child in the first degree and child molestation in the first degree. *Id.* at 286. Mr. Huggins testified he and Draggoo shared a cell at the Lewis County jail from January 3, 2008 to March 3, 2008. *Id.* Mr. Huggins said Draggoo had told him about Draggoo's family. *Id.* at 287. Mr. Huggins could tell the jury that Draggoo's wife was named Kristi, the name of D.R.E. and Draggoo's other two children, and the ages of the children. *Id.* at 287-88. Mr. Huggins testified Draggoo had told him that Draggoo had held down a friend of D.R.E.'s and raped her on two separate occasions. *Id.* at 288.

Draggoo had told Mr. Huggins that Draggoo was neighbors with the girl he raped. *Id.* at 289. The rape had occurred sometime around 2004. *Id.* Mr. Huggins stated Draggoo seemed to be bragging when he told Mr. Huggins about the rape. *Id.* at 290. Mr. Huggins also testified he was not receiving any benefit for testifying. *Id.*

It was Huggins' information that led Detective Callas to investigate the claim, contact Kristi and ultimately, track down and interview N.J.D. and R.R.S. about their contact with Draggoo. *Id.* 296-97.

Draggoo was convicted of all three counts of Child Molestation in the First Degree, with a special allegation that Draggoo used his position of trust or confidence to facilitate the commission of the crime. Supp. CP Judgment and Sent (JS); Ex. 3 at 399-401. Draggoo was sentenced to a minimum term of 198 months on each count, to run consecutively to each other, therefore a minimum term of 1594 months to a maximum term of life in prison. Supp. CP JS. The sentence was to run consecutive to Draggoo's conviction in Lewis County Superior Court case number 07-1-00498-4. *Id.*

Draggoo appealed his convictions, which were affirmed in an unpublished decision on June 1, 2010 (COA No. 64945-1-I). Supp.

CP Mandate. The Court of Appeals issued the Mandate on July 2, 2010. *Id.* Draggoo also previously filed a personal restraint petition. Supp. CP Cert. of Finality. This Court issued the Certificate of Finality on February 28, 2013. *Id.*

On October 25, 2017 Draggoo filed a motion and memorandum for a new trial pursuant to CrR 7.8. CP 56-64. Draggoo alleged the State had presented testimony from an expert witness during his trial who: (1) did not qualify as an expert witness, (2) the witness' false testimony regarding her credentials was unfairly prejudicial, and (3) the State did not comply with *Brady*⁵ due to its delay in providing discovery regarding the witness. *Id.* The allegations are in regards to Toni Nelson. Ex. 2 at 77, 85, 88. Nearly seven years after the conclusion of Draggoo's trial the State became aware Ms. Nelson has falsified her academic credentials, certificates, and experience surrounding those credentials. CP 24-28.

The State had become aware of Ms. Nelson's dishonesty, and on January 27, 2016 Lewis County Prosecuting Attorney, Jonathan Meyer, had a meeting with Ms. Nelson where he confronted her regarding the alleged dishonest conduct. CP 24-26. Ms. Nelson

⁵ *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1965).

admitted that she did not possess the educational background, degrees, or certifications that went with those degrees at that meeting. *Id.* After receiving this information Mr. 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.* Mr. Meyer had his staff determine Ms. Nelson's involvement in any case handled by the Lewis County Prosecutor's Office and sent a letter to each defendant whose case was identified, regardless of Ms. Nelson's level of participation. *Id.* This letter was signed on February 3, 2016, six days after the meeting with Ms. Nelson. *Id.*

The State responded to Draggoo's CrR 7.8(b) motion. CP 2-44. A hearing was held by the trial court on April 30, 2018. See RP. After considering parts of the trial transcripts which were admitted as exhibits, reading the briefing, and hearing argument from counsel, the trial court denied Draggoo's motion. RP 2, 19-21. The trial ruled the evidence was material regarding Ms. Nelson's testimony, not merely cumulative, but it was impeaching. RP 19-20; CP 47. The trial court held the evidence, which was discovered after the trial, could not have been discovered before the trial with the exercise of due diligence. *Id.* The trial court found Draggoo did not show the newly discovered evidence would probably change the result of the trial. *Id.*

The trial court also found there was no *Brady* violation. *Id.* The trial court entered Findings of Fact and Conclusions of Law, finding Draggoo had not met his burden and denying the motion. CP 45-48. Draggoo timely appeals the trial court's denial of his motion. CP 49-55.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DRAGGOO'S CrR 7.8(b) MOTION.

The trial court did not abuse its discretion when it denied Draggoo's CrR 7.8(b) motion to vacate his conviction. Draggoo's motion, as appealed here, was based upon newly discovered evidence.⁶ Draggoo fails to argue the correct standard on appeal and attempts to improperly relitigate the issues below. The only issue before this Court is the trial court's determination of the CrR 7.8(b) motion. This Court should affirm the trial court's denial of the CrR 7.8(b) motion to vacate the conviction.

⁶ Draggoo has abandoned his *Brady* violation claim, as it appears nowhere in his briefing or assignments of error.

1. Standard Of Review.

A trial court's determination of a CrR 7.8(b) motion is reviewed for abuse of discretion, and the findings of fact that support this decision are reviewable for substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006); *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996); *State v. Gomez-Florencio*, 88 Wn. App. 254, 258, 945 P.2d 228 (1997).

Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted). The appellate court defers to the fact finder regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992).

Assignments of error unsupported by argument or reference to the record will not be considered on appeal. *Lohr*, 164 Wn. App. at 419. Findings not assigned error become verities on appeal. *Id.* at 418.

2. Draggoo Fails To Assign Error To Findings Of Fact And Conclusions Of Law.

Draggoo failed to assign error to any Finding of Fact or Conclusion of Law. See, Brief of Appellant.

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in assignment of error or is clearly disclosed in the associated issue pertaining thereto.

RAP 10.3(g). The Findings of Fact not assigned error are now verities in this appeal. *Lohr*, 164 Wn. App. at 418; CP 45-47 (FF 1.1-1.16).

Draggoo's failure to assign error to any Conclusion of Law is also problematic. Through a careful reading of Draggoo's "Issues Pertaining to Assignments of Error" and his brief, it appears to the State Draggoo takes issue with Conclusions of Law 2.2, 2.3, 2.6, and 2.8 for purposes of this appeal. See, Brief of Appellant; CP 47-48. Draggoo specifically mentions Conclusion of Law 2.3, and takes issue with the trial court's decision regarding that conclusion. Brief of Appellant at 6. The State will address the Conclusions of Law in its briefing below.

3. A CrR 7.8(b) Motion Is A Collateral Attack And The Defendant Must Establish Actual And Substantial Prejudice To Be Entitled To Relief From Their Judgment And Sentence.

CrR 7.8 allows for relief from final judgment when a defendant provides sufficient proof of:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b). Motions brought under CrR 7.8(b) are also subject to RCW 10.73.090, RCW 10.73.100, RCW 10.73.130, and RCW 10.73.140, all which govern collateral attacks. A motion for a collateral attack pursuant to CrR 7.8(b) must be filed within one year of the judgment being final with the exception of collateral attacks brought under subsections (1) and (2), which must be brought within a reasonable time.

Reviews of alleged errors on collateral attacks are distinct from review on direct appeal. *In re Stockwell*, 179 Wn.2d 588, 597,

316 P.3d 1007 (2014). “[C]ollateral relief undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes costs society the right to punish admitted offenders.” *Id.* (internal quotations and citations omitted).

In *Stockwell* the Court analogized the burden a petitioner must meet in a personal restraint petition showing prejudice resulting from misinformation regarding sentencing consequences with the burden required of a defendant in a CrR 7.8 motion. *Id.* at 601-02. *Stockwell* argued to the Court the prejudice standard found under CrR 4.2, the manifest error requirement, mirrored prejudice standard required in a personal restraint petition. *Id.* at 601. The Court rejected *Stockwell*’s argument, noting post-sentence motions to withdraw a guilty plea are not governed by CrR 4.2, but by CrR 7.8(b). *Id.* The Court stated:

CrR 7.8 represents a potentially higher standard than CrR 4.2(f) for withdrawing a plea. Just as a petitioner may need to meet a higher burden when withdrawing a plea postjudgment versus prejudgment, so should a petitioner in the context of a PRP.

Id. at 602. The Court concluded a petitioner, who was seeking to withdraw his guilty plea after being misinformed about the statutory maximum sentence, was required to show the complained error caused actual and substantial prejudice. *Id.* at 602-03.

Therefore, prejudice is not presumed in a collateral attack in the trial court pursuant to CrR 7.8. A defendant seeking to have his conviction set aside in a post-sentencing CrR 7.8(b) collateral attack motion, such as the one Draggoo filed, must establish the error caused actual and substantial prejudice.

4. Review Is Limited To The Trial Court's Denial Of The CrR 7.8(b) Motion.

Draggoo fails to acknowledge this is an appeal of a CrR 7.8(b) motion. Brief of Appellant 4-8. Draggoo does not get to relitigate each issue to this Court as if this were a direct appeal of the issues presented in his CrR 7.8 motion. Draggoo's only course of action in this appeal is to argue the trial court abused its discretion when it reached its decision to deny his motion.

A defendant has a right to appeal the denial of their CrR 7.8 motion. *State v. Larranaga*, 126 Wn. App. 505, 508, 108 P.3d 833 (2005). Yet, on appeal, the only order before the appellate court is the denial of the CrR 7.8 motion. *Larranaga*, 126 Wn. App. at 509. "The original sentence would not be under consideration." *Id.* Appellate review is limited to whether the trial court abused its discretion when it denied the CrR 7.8 motion. *Id.*

Under the limited review in this matter, Draggoo does not prevail. Draggoo fails to argue the standards of review, lest address

whether the trial court abused its discretion in ruling in the State's favor. This Court must limit this appellate review to a review of the trial court's decision in the CrR 7.8 hearing, and not allow Draggoo to relitigate the matter through this appeal.

5. The Trial Court Did Not Abuse Its Discretion When It Determined Draggoo Had Not Met The Requisite Showing Under The Newly Discovered Evidence Test To Entitle Draggoo To Relief.

The trial court did not abuse its discretion when it denied Draggoo's CrR 7.8(b) motion. The trial court read all the briefing, considered the exhibits, and heard the arguments of the parties. The trial court weighed the evidence, applied the correct legal standard, and determined Draggoo had not met his burden, as required as the person bringing the post-conviction collateral attack. CP 47-48. The trial court did not abuse its discretion when it determined Draggoo did not meet his burden to show he suffered actual and substantial prejudice by his claimed errors. CP 48. The trial court's denial of the motion was not manifestly unreasonable or untenable. Therefore, the trial court's denial should be affirmed.

The only way Draggoo's motion was timely pursuant to CrR 7.8(b) was the motion was based upon newly discovered evidence, CrR 7.8(b)(2). Draggoo did not fully brief the issue regarding newly discovered evidence in his motion to the trial court below, but

acknowledged in his argument to the trial court he could only overcome the one-year time bar through that provision. RP 3-4; CP 56-64. Draggoo's briefing to the trial court simply argued Ms. Nelson was not qualified as an expert, pursuant to ER 702, her testimony was unfairly prejudicial, and asserted a *Brady violation*. CP 56-62.

Draggoo's first and second argument in his briefing to this Court parrot his briefing to the trial court regarding Ms. Nelson's failure to qualify as an expert witness and her false testimony being unfairly prejudicial. Brief of Appellant 5-6; CP 59-61. Draggoo does not cite to the trial court record during this argument or mention its rulings. Brief of Appellant 5-6. Draggoo's matter was decided on whether, pursuant to CrR 7.8(b)(2), there was newly discovered evidence and whether that evidence met the criteria for the trial court to grant Draggoo a new trial. See, RP; CP 45-48. At best, Draggoo's second argument, that Ms. Nelson's testimony was unfairly prejudicial could be tied into the newly discovered evidence argument regarding whether the evidence would probably change the result of the trial, as will be argued below. This Court should not consider Draggoo's arguments under headings A and B, as they do not apply to this appeal, except as argued below.

The trial court evaluated the five-part test for newly discovered evidence Draggoo was required to meet to be entitled to a new trial. RP 19-21; CP 47.

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 the 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), *citing*, *State v. Williams*, 96 Wn.2d 215, 233, P.3d 868 (1981). The Court considers significance, credibility, and cogency of the proffered evidence when evaluating a claim of whether newly discovered evidence will probably change the trial’s outcome. *Statler*, 160 Wn. App. at 632 (citation omitted). A defendant must show something more than a mere possibility of change of the outcome of the trial. *Id.* “Defendants seeking postconviction relief face a heavy burden and are in a significantly different situation than a person facing trial.” *Id.*, *citing State v. Riofta*, 166 Wn.2d 358, 369, 209 P.3d 467 (2009).

No one denied Ms. Nelson was dishonest regarding her credentials, and therefore, perjured her testimony when testifying during Draggoo’s trial. RP; CP 47. The trial court found “[t]he

evidence [,that Ms. Nelson falsified her credentials and perjured herself,] was discovered since the trial and could not have been discovered before the trial by the exercise of due diligence.” CP 47 (CL 2.4); see also, RP 19-20. The trial court also held the evidence was material in regards to the basis of Ms. Nelson’s testimony. RP 20; CP 47 (CL 2.5).

The question before this Court is did the trial court abuse its discretion when it determined the evidence was impeaching, that Draggoo failed to show the newly discovered evidence would probably change the result of the trial, and therefore, that Draggoo failed to meet his burden under the newly discovered evidence test? Simply put, there was no abuse of discretion. First, the evidence that could be presented at trial was Ms. Nelson falsified her academic credentials and certificates which corresponds to such training. CP 40-43. Ms. Nelson lied about being a registered nurse, graduating from Endicott College with a degree in K-8th grade education, being Montessori trained for primary grades, having a nursing degree from Boise State, and that she was currently attending University of Washington in pursuit of her master’s degree. *Id.* Ms. Nelson absolutely perjured herself on the witness stand in regards to these credentials. Ex. 2 at 77-81.

The information Ms. Nelson did not possess the academic credentials and experience related to them she claimed to have, and lied about it, is impeachment evidence, as ruled by the trial court. RP 20 CP 47 (CL 2.6). Draggoo argues the evidence is material because Ms. Nelson would not have been allowed to testify had the truth of her credentials been known. Brief of Appellant at 7. This statement relates back to Draggoo asserting Ms. Nelson was not an expert because she lacked the formal education required. Brief of Appellant at 5-7. The State acknowledged it likely would not have called Ms. Nelson to the stand, not based upon her lack of education and credentials, but based upon her lack of honesty about her education and credentials. RP 10. That given the revelation Ms. Nelson was less than truthful and therefore, the State would likely not place her on the witness stand does not make the evidence material. If it did there would never be evidence that was merely impeaching. Draggoo has not shown the trial court's conclusion of law, 2.6, finding the evidence was impeaching, was an abuse of discretion.

The trial court also found Draggoo failed to show the newly discovered evidence regarding Ms. Nelson's falsified credentials would probably change the result of the trial. RP 19-20; CP 47 (CL 2.3). The trial court considered Ms. Nelson's testimony, which

consisted of discussing delayed reporting, how children report a little bit at a time, power and control dynamic, and the reasons why some children delay or never report child abuse. Ex. 2 at 85-90. The trial court also considered Detective Callas' testimony regarding disclosure by sexual assault victims:

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 disclose 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.

Q Is it common for you in sexual assault investigations to learn more information as you go from victims?

A Yes, sir.

Ex. 3 at 318-19; see, RP 19. The deputy prosecutor referenced Ms. Nelson's testimony briefly in his closing argument in regards to

delayed reporting and do not tell the entire series of events up front. See Ex. 3 at 352.

The trial court highlighted that all the other testimony in the case, while not identical, were consistent with the guilty verdicts. RP 19-20; CP 47 (FF 1.16). The trial court commented there are inconsistencies in the testimony at every trial, stating, “if everybody’s testimony lines up, you know, point by point by point, then that generally gets attacks as, well, somebody was - - there was some collusion to try to get all of the witnesses together.” RP 19. The testimony of the State’s witnesses, including Draggoo’s wife, the family members of the victims, and the victims pieced together the timeline and the story of the crimes perpetrated by Draggoo.

In Draggoo’s case, the testimony from the victims was powerful. Ex. 2 at 184-87, 262. N.J.D. described two distinct incidents, one where Draggoo locked the door while they were in the kitchen, locking one of his children outside, and touched her breasts, pinching her nipples, and rubbing her vagina over her clothes. *Id.* at 184. N.J.D. also testified about Draggoo touching her breast and pinching her nipple while she was at the apartment for a sleepover. *Id.* at 185-87. R.R.S. similarly testified about Draggoo rubbing and

touching her breast under her shirt when he was giving her a backrub during a sleepover at the Draggoo's apartment. *Id.* at 262.

Draggoo cannot show the trial court's decision is manifestly unreasonable or untenable and that no other trial court would come to the same conclusion. The trial court determined Draggoo had not met the newly discovered evidence test because he failed to show the evidence was not impeaching and could not show the evidence would probably change the result of the trial. CP 47 (CL 2.2, 2.3, 2.6). Pursuant to the newly discovered evidence test, absence of one of the factors is grounds to deny a motion for a new trial, the trial court here found two. *See, Statler*, 160 Wn. App. at 632 (citations omitted). The trial court did not abuse its discretion when it denied the motion for a new trial when Draggoo failed to meet two of the five factors.

Draggoo's matter was a post-conviction request for relief pursuant to CrR 7.8(b)(2). The trial court, using the appropriate standard for a post-conviction relief, required Draggoo to meet the newly discovered evidence test and show actual and substantial prejudice before granting Draggoo the relief he requested. After finding Draggoo failed to meet the newly discovered evidence test, the trial court determined Draggoo failed to show he sustained actual and substantial prejudice from Ms. Nelson's later discovered

perjured testimony and falsified credentials. CP 48 (CL 2.8). The trial court did not abuse its discretion when it entered this conclusion of law, as Draggoo did not, on the record presented to the trial court, show the requisite prejudice to be granted relief. This Court should affirm the trial court's denial of Draggoo's CrR 7.8(b) motion to vacate his conviction.

IV. CONCLUSION

The trial court did not abuse its discretion when it determined Draggoo did not meet his burden to show Ms. Nelson's later discovered perjured testimony and falsified credentials met the requirements to be considered newly discovered evidence per CrR 7.8(b)(2). Draggoo also did not show he sustained actual and substantial prejudice as a result of his alleged error. This Court should affirm the trial court's denial of Draggoo's CrR 7.8(b) motion.

RESPECTFULLY submitted this 22nd day of April, 2019.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

Appendix A

Findings of Fact and Conclusions of Law



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FILED
Lewis County Superior Court
Clerk's Office
AUG 08 2018
Scott Tinney, Clerk
By _____, Deputy

**SUPERIOR COURT OF WASHINGTON
IN AND FOR LEWIS COUNTY**

STATE OF WASHINGTON,

Plaintiff,

v.

BARRY R. DRAGGOO,

Defendant.

NO. 08-1-00452-4

FINDINGS OF FACT, CONCLUSIONS
OF LAW FROM CrR 7.8(b) HEARING

After the Defendant, though his attorney, Brett Purtzer, filed a Motion and Memorandum for a New Trial, this matter was set for hearing. The State was represented by Senior Deputy Prosecuting Attorney Sara Beigh. The Defendant was present and represented by his attorney. The Court considered the briefing submitted, exhibits admitted, and arguments from counsel. Having considered the parties' briefing, exhibits, and argument, and being otherwise fully advised, the Court adopts the following findings, conclusions, and order:

FINDINGS OF FACT

- 1.1. Draggoo is the defendant in this matter and had a jury trial where Toni Nelson testified as an expert witness on behalf of the State.
- 1.2. Ms. Nelson's testimony was in regards to delayed reporting of child victims of sexual abuse, the disclosure of bits of information over a period of time, and denial of abuse by victims.
- 1.3. Ms. Nelson testified at trial that she had extensive educational background, including a bachelor's degree, a nursing certificate, and was working on her

FINDINGS OF FACT, CONCLUSIONS OF
LAW FOR CrR 7.8 HEARING
Page 1 of 4

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AMY.

- 1 master's degree.
- 2 1.4. Ms. Nelson also had considerable experience as a community based advocate for
- 3 victims of domestic violence and sexual assault.
- 4 1.5. Detective Tom Callas testified about delayed reporting and how sexual abuse
- 5 victims relay information at Draggoo's trial.
- 6 1.6. Draggoo was convicted by the jury as charged, appealed his conviction, which was
- 7 affirmed, and Mandate was issued July 2, 2010.
- 8 1.7. Draggoo previously filed a personal restraint petition, that was dismissed, and the
- 9 Certificate of Finality was issued February 28, 2013.
- 10 1.8. On January 27, 2016, Lewis County Prosecuting Attorney, Jonathan Meyer, had a
- 11 meeting with Toni Nelson where Ms. Nelson was confronted about dishonest
- 12 conduct that had been discovered.
- 13 1.9. Ms. Nelson admitted at the January 27, 2016 meeting with Mr. Meyer that she did
- 14 not possess the education background, degrees, or certificates that go with those
- 15 degrees she had claimed to possess and had previously testified in court that she
- 16 did possess.
- 17 1.10. Mr. Meyer had a letter drafted to inform defendant, the courts, local defense
- 18 counsel, and the local bar association of Ms. Nelson's dishonest conduct.
- 19 1.11. Mr. Meyer and his staff determined Ms. Nelson's involvement in any case handled
- 20 by the Lewis County Prosecutor's Office, one of which included Draggoo's.
- 21 1.12. Mr. Meyer signed the drafted letter on February 3, 2016, six days after meeting
- 22 with Ms. Nelson.
- 23 1.13. There was no currently pending habeas action by Draggoo when the letter was
- 24 sent.
- 25 1.14. Discovery was provided when requested by Draggoo in the current post-conviction
- 26 action.
- 1.15. Ms. Nelson did give false testimony in Draggoo's trial regarding her educational
- background and certificates that accompany that background.

1 1.16. There was testimony from numerous witnesses at Draggoo's trial, that while there
2 may have been some inconsistencies with their testimony, the overall record from
3 the trial, absent Ms. Nelson's testimony, was consistent with the guilty verdicts.

4 CONCLUSIONS OF LAW

5 Based on these findings the Court draws the following conclusions:

- 6 2.1. Toni Nelson's dishonesty regarding her credentials, and therefore, perjured
7 testimony, is newly discovered evidence.
- 8 2.2. Under the newly discovered evidence test Draggoo must show: "(1) will probably
9 change the result of the trial; (2) was discovered since the trial; (3) could not have
10 been discovered before the trial by the exercise of due diligence; (4) is material;
11 and (5) is not merely cumulative or impeaching. The absence of any one of the
12 factors is grounds to deny a new trial" *State v. Statler*, 160 Wn. App. 622, 632, 248
13 P.3d 165 (2011). Draggoo has failed make the request showing under this test for
14 the Court to find he is entitled to relief.
- 15 2.3. Draggoo failed to show the newly evidence would probably change the result of
16 the trial due to Detective Callas' testimony and the testimony of all the other
17 witnesses at the trial regarding the incidents. The overall record in the case does
18 not support that the newly discovered evidence, or Ms. Nelson's testimony, would
19 probably change the result of the trial.
- 20 2.4. The evidence was discovered since the trial and could not have been discovered
21 before the trial by the exercise of due diligence.
- 22 2.5. The evidence is material, as in regards to the basis of Ms. Nelson's testimony.
- 23 2.6. The evidence in not merely cumulative, but is impeaching.
- 24 2.7. There was no *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215
25 (1965) violation. Draggoo's case was litigated to its conclusion when the State
26 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 pursuant to *State v. Riofta*, 166
Wn.2d 358, 689 (2009), *citing Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir.
1992).

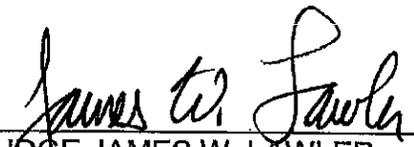
1 2.8. Draggoo has not met his burden to show he has sustained actual and substantial
2 prejudice from Ms. Nelson's later discovered perjured testimony. Draggoo is
3 therefore not entitled to relief he seeks, vacation of the judgment and a new trial,
4 pursuant to his CrR 7.8(b)(1),(2).

5 **ORDER**

6 ACCORDINGLY, it is ordered that:

7 3.1. Draggoo's CrR 7.8(b) motion is denied.
8

9 DATED this 8 day of Aug, 20 18.

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13 JUDGE JAMES W. LAWLER

14 Presented by:

15 Copy received; Approved as to form:

16 
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18 Sara I. Beigh, WSBA # 35564
19 Senior Deputy Prosecuting Attorney

20 
21
22 Brett A. Purtzer, WSBA # 17283
23 Attorney for Defendant
24
25
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LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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Superior Court Case Number: 08-1-00452-4

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