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Supreme Court No. 99820-5
(COA No. 80347-6-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MELISSA WATSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

CORRECTED PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Melissa Watson asks this Court to review the opinion of the Court of Appeals in *State v. Watson*, 80347-6-I (issued on April 26, 2020). A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

The Sixth Amendment right to the effective assistance of counsel is denied where counsel's performance is deficient and prejudices the outcome of trial. Here, counsel failed to object to admission of a text message which the State did not authenticate as written by Ms. Watson. The message was the only direct evidence of Ms. Watson's identity as the driver. Did Ms. Watson receive ineffective assistance of counsel? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Chad Hanna was riding his bike in West Seattle when a woman struck him with her car while coming out of an obstructed alleyway. 7/11/19 Moll RP 215, 220; 7/15/19 Vitrano RP 76.¹ The impact caused Mr. Hanna to land in the street, and he suffered significant injury.

¹ The transcripts in this case were prepared by four different court reporters. As a result, the transcript pages are not sequential, with each reporter's transcripts numbered independently. At times, multiple court reporters transcribed recordings from the same date. For clarity, the citations to the record will include the date, last name of the court reporter, and page number.

7/15/19 Townsend RP 48. Multiple witnesses saw the accident and attempted to help. The driver also stopped, spoke to several witnesses, and later left the area. *Id.* at 14, 21-22.

When police arrived, witnesses provided the license plate number for the car involved. 7/15/19 Vitrano RP 127. Officer Phillip Ockler obtained an apartment address associated with the car, and tried to contact the resident there. *Id.* at 127-28. At the apartment, the officers found the car, but Officer Ockler did not testify about who he was looking for at the residence. *Id.* at 128. He knocked for several minutes without receiving any response. *Id.* at 129. He never made contact with anyone named Melissa Watson. *Id.* at 139.

The case was later assigned to Detective James Bulawa. 7/15/19 Vitrano RP 65. He called Ms. Watson. She denied having caused the accident. *Id.* at 72. He also spoke to several witnesses, but none of them could identify Ms. Watson as the driver. *Id.* at 73, 98-99. Detective Bulawa interviewed Mr. Hanna, who stated the driver had stopped and asked if he was “okay.” *Id.* at 93. He also completed a photo lineup with a witness, Mark Braseth, who identified someone other than Ms. Watson. *Id.* at 97. The detective did not investigate the woman Mr. Braseth actually identified. *Id.*

Mr. Braseth was overseeing a construction site nearby. 7/15/19 Vitrano RP 40. Approximately 20 subcontractors and employees were with him. *Id.* at 41. Mr. Braseth arrived moments after the accident and went to Mr. Hanna. *Id.* at 41, 45. At least two people were already offering assistance and waiting for an ambulance. *Id.* at 45. Deciding he could not help Mr. Hanna, Mr. Braseth went to speak to the driver. *Id.*

The driver of the car told Mr. Braseth the cyclist had hit her. *Id.* at 46. He assessed some minor damage to her car, then went back to work. *Id.* at 47. When he was later asked to identify the driver in a photo lineup, he selected someone other than Ms. Watson. *Id.* 49, 78. He described the driver as brunette, wearing dark clothing and a stocking cap. *Id.* at 49.

Larry Clark helped direct traffic immediately after the accident occurred. 7/11/19 Moll RP 237. He believed the driver involved was blond and middle-aged. *Id.* at 238. He could not identify the driver. *Id.* at 241.

Liz Markey also witnessed the accident. 7/15/19 Townsend RP 10. She stated the alley from which the car emerged was a “blind spot” and “tough to get out of.” *Id.* at 11. Dr. Markey called 911. *Id.* at 12. She also spoke to the driver, who had exited her car. *Id.* at 14. While on

the phone with 911, Dr. Markey relayed questions from the dispatcher to the driver, who responded and provided information. *Id.* at 21-22. The driver stayed for five to ten minutes before she told Dr. Markey she had to go to work and left. *Id.* at 17. Dr. Markey described the driver as blond, wearing a mint green shirt and blue jeans, with a tattoo on the back of her neck in black cursive. *Id.* at 15, 17, 23.

Erin Vogelpohl was doing landscaping at an apartment complex near the accident. *Id.* at 25-26, 27. She saw a woman driving a black car pull into the parking lot where she was working. *Id.* at 28. The woman left the car and walked to an apartment. *Id.* She remembered the driver as blond, wearing a dark dress, sunglasses, and a shawl. *Id.* at 35. Ms. Vogelpohl said the driver was not wearing a hat. *Id.*

Mary Stenroos saw the accident while driving towards Mr. Hanna. *Id.* at 58. She called 911 from her car, and then went over to him. *Id.* Ms. Stenroos recalled the driver wearing a tan sweater with a low back and having an ornate tattoo on her back. *Id.* at 60.

The State did not offer the car's registration to prove the identity of the owner. 7/9/19 Moll RP 98. The only direct evidence of the driver's identity was a text message allegedly sent from Ms. Watson's phone to a coworker, Lynnette Bear, stating that she had hit a cyclist.

7/15/19 Vitrano RP 32. Ms. Bear testified she had a saved contact on her phone under Ms. Watson's name with an associated phone number. *Id.* at 31. When asked how she knew the message came from Ms. Watson, Ms. Bear only responded that "It was her saved phone number in my phone." *Id.* Ms. Bear also claimed Ms. Watson went to work two days after the accident and spoke about it. *Id.* at 35. The State did not offer any other evidence to authenticate the message, and defense counsel did not object to admission of the message.

The State also moved to amend the information to add one count of making a false statement after the parties had delivered opening statements and examined two witnesses. 7/11/19 Moll RP 246. Although defense objected to the late amendment and had given an opening statement that did not address the charge of making a false statement, the trial court granted the motion. *Id.* at 247-48. The court agreed the amendment was late, but found no prejudice had attached from the State's failure. *Id.* at 248.

Ms. Watson was convicted of both offenses.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should accept review to determine whether Ms. Watson’s counsel was constitutionally ineffective for failing to object to the admission of a text message that was the only direct evidence identifying Ms. Watson as the driver in a hit and run accident.

1. *The Sixth Amendment guarantees an accused the right to effective assistance of counsel; counsel is ineffective where her performance is objectively unreasonable and the defendant is prejudiced by counsel’s deficient performance.*

An accused in a criminal case has a Sixth Amendment right to “effective assistance by the lawyer acting on the defendant’s behalf.” *State v. Adams*, 91 Wn.2d 86, 89-90, 586 P.2d 1168 (1978); U.S. Const. amend. VI. To establish an ineffective assistance of counsel claim, an accused must show that her attorney’s performance fell below an objective standard of reasonableness, and that she was prejudiced as a result. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 926 (2010); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is deficient if there is no legitimate, tactical reason for the incompetent act, and a defendant is prejudiced thereby. *State v. Doogan*, 82 Wn. App. 185, 189, 917P.2d 155 (1996). This Court reviews claims of ineffective assistance of counsel de novo. *State v. Rafay*, 168 Wn. App. 734, 775, 285 P.3d 83 (2012).

2. *Counsel was ineffective for failing to object to the admission of the text messages allegedly sent from Ms. Watson to Ms. Bear admitting to having caused the accident.*

Here, counsel failed to object to admission of the text messages allegedly sent from Ms. Watson to Ms. Bear admitting to having caused the accident. The State asserted these messages were sent from Ms. Watson, proving she had been driving.

The purpose of authentication is to establish that the evidence offered is what it purports to be. *State v. Monson*, 113 Wn.2d 833, 837, 784 P.2d 485 (1989). Pursuant to ER 901(a), “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” This requirement is met “if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification.” *State v. Bradford*, 175 Wn. App. 912, 928, 308 P.3d 736 (2013), *rev. denied*, 179 Wn.2d 1010, 316 P.3d 494 (2014) (citing *State v. Danielson*, 37 Wn. App. 469, 471, 681 P.2d 260 (1984)).

For example, in *Bradford*, this Court found the State introduced sufficient evidence to support a finding that text messages read to the jury and contained in an examination report had been authenticated and

were what the State claimed them to be, namely text messages written and sent to a stalking victim's friend by the defendant. *Bradford*, 175 Wn. App. at 928. The evidence included testimony that: for a substantial period of time, Bradford telephoned the victim and appeared at her home and place of employment on a frequent basis, indicating a desire to contact the victim, and the content of the messages themselves indicated that Bradford was the individual who sent them. *Id.* at 928-29. The messages included threats similar to one Bradford had made in the past, and two of the texts threatening to cause an explosion were followed by Bradford delivering a suspicious package to the victim. *Id.* at 929. Additionally, no messages were sent during a period of time when Bradford was incarcerated and could not access his phone. *Id.* 929-30. This quantum of evidence was sufficient to authenticate the messages as having been authored by Bradford.

Similarly, in *State v. Young*, the Court also found sufficient evidence to authenticate text messages as being sent from the defendant. 192 Wn. App. 850, 856-68, 369 P.3d 205 (2016). In that case, the evidence showed the victims had personal knowledge that the sender of the texts was Young. *Id.* at 857, 858. One complainant had watched Young enter his phone number into her phone, and another

had personally saved his phone number on her phone under a nickname. *Id.* As in *Bradford*, the content and context of the messages confirmed Young as the sender because they referred events Young and the victim had taken part in together. *Id.*

In contrast, the evidence here was entirely inadequate to authenticate the messages received by Ms. Bear as having originated from Ms. Watson. The State offered no evidence showing Ms. Bear had personal knowledge of Ms. Watson's phone number or how the phone number she had saved had been entered on her phone. Unlike in *Bradford*, Ms. Watson's actions after the messages were sent do not corroborate her identity as the sender. Indeed, due to the lack of identification, there is no direct evidence of Ms. Watson's behavior during or after the accident. And, unlike in *Young*, the content of the messages also fails to establish Ms. Watson sent them. At no point do the messages contain any information from which Ms. Bear could confirm Ms. Watson as the sender, such as a reference to the accident's location being near Ms. Watson's apartment, their employer, or some event in which they both participated. *See* 7/15/19 Vitrano RP 32-34.

At best, the State's evidence only established Ms. Bear received messages from someone she believed to be Ms. Watson. There is no

discernible reason why competent counsel would not have objected to the admission of these text messages.

The Court of Appeals found there was sufficient evidence authenticating the messages as authored by Ms. Watson, but the court mischaracterizes the evidence it cites to support its decision. The Court of Appeals reasoned the messages were authenticated because they bore Ms. Watson's name, and because Ms. Bear had received messages from Ms. Watson before. Slip Op. at 6. But this only establishes that *someone* texted Ms. Bear from the phone number Ms. Bear associated with Ms. Watson, not that Ms. Watson actually wrote the messages.

The Court of Appeals also found the timing of the messages and the description of the accident contained in them provided indicia of authenticity. Slip Op. at 6-7. The court claimed these "distinctive characteristics" established Ms. Watson sent the messages. Slip Op. at 7. This is only true if one first assumes Ms. Watson sent the messages. Indeed, the details contained in the messages to Ms. Bear establish only that the *sender* was present at the accident and saw what happened. Unlike in *Young*, there are no details in the text messages that would give Ms. Bear reason to believe these exact messages were sent from

Ms. Watson, other than the fact Ms. Bear had saved this particular phone number under Ms. Watson's name.

Contrary to the Court of Appeals's conclusion, there was adequate reason for Ms. Watson's attorney to object to the messages, and in failing to do so, counsel's performance was deficient.

Furthermore, Ms. Watson was prejudiced by her counsel's unreasonable performance. A defendant demonstrates prejudice where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's errors must be so serious as to deprive the defendant of a fair trial. *State v. Classen*, 4 Wn. App. 2d 520, 543, 422 P.3d 489 (2018).

No witnesses identified Ms. Watson as the driver. Indeed, at least one witness positively identified a different woman. Every witness gave a wildly different description of the driver. Some thought she was blond, while others thought she was brunette. Some described a large visible tattoo, while others saw nothing. No witnesses agreed about what the driver was wearing, variously describing a mint green shirt and jeans, a long dark dress and shawl with sunglasses, or dark clothing and a black stocking cap. While a coworker said Ms. Watson

mentioned having an accident at work, there were no other details it was the same accident. This text message was the key evidence the State relied on to claim Ms. Watson was the driver responsible for injuring Mr. Hanna.

Counsel's failure to object to this evidence prejudiced Ms. Watson, allowing the State to admit the messages as the missing link establishing Ms. Watson's identity as the driver, without which it is doubtful the State could have proved this essential element. This Court should accept review as a matter of substantial public interest and determine whether counsel was ineffective for failing to object to the authenticity of the text messages. RAP 13.4(b)(4).

E. CONCLUSION

Based on the foregoing, Ms. Watson respectfully requests that review be granted. RAP 13.4(b)(4).

DATED this 26th day of May 2021.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 80347-6-I
)	
Respondent,)	
)	
v.)	
)	
MELISSA WATSON,)	UNPUBLISHED OPINION
)	
Appellant.)	
_____)	

VERELLEN, J. — Melissa Watson was convicted of making a false statement to a public servant and of felony hit and run. She contends a late amendment to the information adding the false statement charge prejudiced her. Because Watson had ample warning that let her plan a defense against the amended charge, and the jury was not misled about the charges against her, she fails to show the trial court abused its discretion by granting the amendment.

Watson argues defense counsel was ineffective because she did not object on authentication grounds to the admission of a series of text messages establishing she struck a bicyclist with her car. The State claimed the text messages were sent by Watson to her coworker following the accident. Because the evidence is sufficient to conclude the text messages were sent by Watson following the accident, they were properly authenticated. Defense counsel did not provide deficient or ineffective assistance by not objecting.

Therefore, we affirm.

FACTS

Melissa Watson began her drive to work on the morning of April 11, 2018, and hit a bicyclist. Watson texted her coworker, Lynette Bear, “I’m going to be late. I hit a biker coming out of my alley.”¹ The bicyclist, Chad Hanna, suffered a broken collarbone and a collapsed lung. As emergency vehicles approached, Watson left the scene without providing her name, contact information, or insurance information.

Officer James Bulawa, a detective with the Seattle Police Department, investigated the accident. He interviewed Watson the next day, and she claimed to have been at work when the accident happened. She had not gone to work that day. Watson also told Officer Bulawa she had not driven her car to work or driven it for a while.

On November 30, 2018, the State charged Watson with felony hit and run. Before the pretrial omnibus hearing on June 14, 2019, the State notified the defense it would be amending the information to also charge Watson with making a false statement to a public servant. Jury selection began on July 10, 2019, and the court informed the pool of prospective jurors that Watson had been charged with felony hit and run and making a false statement to a public servant. On the first day of trial, the State moved to amend the information to add the charge of making a false statement. The court concluded no prejudice would result to Watson and granted the amendment. The court admitted the text messages into evidence without objection from defense counsel. The jury found Watson guilty of both charges.

Watson appeals.

¹ Ex. 8, at 2.

ANALYSIS

I. Amended Information

Watson argues she was prejudiced by the court granting the State's motion on the first day of trial to amend the information by adding the charge of making a false statement.

CrR 2.1(d) allows amendment of an information any time before the verdict if the substantial rights of the defendant will not be prejudiced. We review a decision to grant a motion to amend an information for abuse of discretion.² A court abuses its discretion when its decision rests on untenable grounds or was made for untenable reasons.³ The defendant bears the burden of proving prejudice from an amendment to the information unless the amendment occurs after the State rests its case.⁴ Because the information was amended during the State's case in chief, Watson must demonstrate prejudice from the amendment.

Watson asserts the amendment prejudiced her right to have notice of the charges against her, her right to effective counsel, and her ability to prepare a defense. Her assertions are not supported by the record. Weeks before trial, defense counsel knew the State planned to charge Watson with making a false statement. Watson's trial brief explains that she was charged with felony hit and run as count I, and "[t]he State has notified Defense that it intends to add two

² State v. Brooks, 195 Wn.2d 91, 96, 455 P.3d 1151 (2020) (citing State v. Brett, 126 Wn.2d 136, 155, 892 P.2d 29 (1995); State v. Lamb, 175 Wn.2d 121, 130, 285 P.3d 27 (2012)).

³ Id. at 97 (citing Lamb, 175 Wn.2d at 127).

⁴ Id. at 102 (citing State v. Schaffer, 120 Wn.2d 616, 623, 845 P.2d 281 (1993)).

misdemeanor charges on the day of trial: Violation of Ignition Interlock Device (Count II), and Making a False or Misleading Statement to a Public Servant (Count III).”⁵

The trial court informed the jury that Watson had been charged with felony hit and run and making a false statement. And when the State moved to amend the information on the first day of trial, defense counsel said she “agree[d] that we got notice of the State’s intent to do this.”⁶ Because Watson had ample notice of the amendment and does not establish prejudice from an inability to prepare a defense or from jury confusion, she fails to demonstrate the court abused its discretion by granting the State’s motion to amend.

II. Ineffective Assistance of Counsel

Watson contends defense counsel provided ineffective assistance because she did not object to the introduction of the inculpatory text messages she sent to her coworker, Lynette Bear.⁷

Watson has the burden of proving that defense counsel’s performance fell below an objective standard of reasonableness and prejudiced her.⁸ A claim of

⁵ Clerk’s Papers (CP) at 28. The alleged ignition interlock device violation was dismissed before trial began.

⁶ Report of Proceedings (RP) (July 11, 2019) at 247.

⁷ The State argues Watson cannot raise this error for the first time on appeal because she did not object to lack of authentication below. But a claim of ineffective assistance for failure to object to evidence is often raised for the first time on appeal. And here, defense counsel did object to the introduction of the text messages for “[l]ack of foundation.” RP (July 15, 2019 a.m.) at 27. Alternatively, we exercise our discretion under RAP 2.5(a) to consider the merits of Watson’s ineffective assistance claim. See State v. Grott, 195 Wn.2d 256, 270, 458 P.3d 750 (2020) (considering an alleged instructional error waived at trial when it was not a manifest error affecting a constitutional right).

⁸ State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

ineffective assistance of counsel presents a mixed question of law and fact, which we review de novo where, as here, the facts are undisputed.⁹

Watson argues defense counsel's performance was deficient because she did not object on authentication grounds to the introduction of the text messages Watson sent to Bear. We review a trial court's decision to admit evidence for abuse of discretion.¹⁰

Authentication is a "threshold requirement designed to assure that evidence is what it purports to be."¹¹ Proffered evidence is authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims."¹² To decide whether proffered evidence has been authenticated, the court considers only the proof offered by its proponent and disregards contrary evidence.¹³ Contrary evidence goes to the weight of the proffered evidence, not its authenticity.¹⁴

⁹ State v. Lopez, 190 Wn.2d 104, 117, 410 P.3d 1117 (2018) (citing State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009)).

¹⁰ State v. Young, 192 Wn. App. 850, 854, 369 P.3d 205 (2016) (citing State v. Bradford, 175 Wn. App. 912, 927, 308 P.3d 736 (2013)).

¹¹ In re Det. of H.N., 188 Wn. App. 744, 751, 355 P.3d 294 (2015) (quoting State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003)).

¹² Id. (quoting ER 901(a)).

¹³ Id. (quoting Rice v. Offshore Sys., Inc., 167 Wn. App. 77, 86, 272 P.3d 865 (2012)).

¹⁴ Young, 192 Wn. App. at 857 (citing State v. Tatum, 58 Wn.2d 73, 76, 360 P.2d 754 (1961)).

ER 901(b)(10) provides guidance for authenticating text messages.¹⁵ A text message can be authenticated by testimony from a witness establishing (1) that the text message “purports to be authored or created by the particular sender,” (2) that the text message was sent from a phone number associated with the particular sender, and (3) the contents or other “distinctive characteristics” of the text message, when considered under the circumstances, support a finding that the message is what the proponent asserts.¹⁶

Here, the text messages’s purported author and associated phone number support the trial court’s decision to admit the text messages. The name at the top of the text messages identifies the sender as “Melissa Watson,” Bear had Watson’s phone number saved in her cell phone, and Watson had texted Bear before.

The timing and content of the text messages support their authentication. For example, the first text message was sent on April 11, 2018, at 9:24 a.m., which corresponds with a police report stating that Hanna was struck at approximately 9:16 a.m. on April 11, 2018.¹⁷ That text message stated, “I’m going to be late. I hit a biker coming out of my alley.”¹⁸ Watson routinely texted Bear if she was running late. Another text message stated the cyclist was “laying in the street” after he was hit,¹⁹

¹⁵ See H.N., 188 Wn. App. at 752 (relying on ER 901(b)(10) as guidance for the authentication of text messages).

¹⁶ ER 901(b)(10).

¹⁷ CP at 4. Although this police report was not admitted, “[b]ecause under ER 104 authenticity is a preliminary determination, the court may consider evidence that might otherwise be objectionable under other rules.” H.N., 188 Wn. App. at 751 (quoting Rice, 167 Wn. App. at 86).

¹⁸ Ex. 8, at 2.

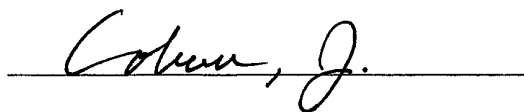
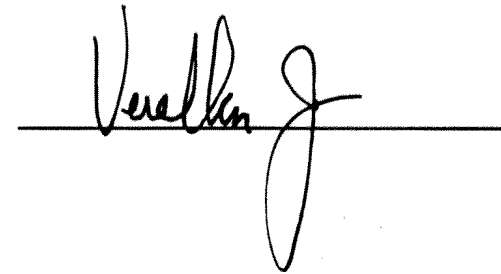
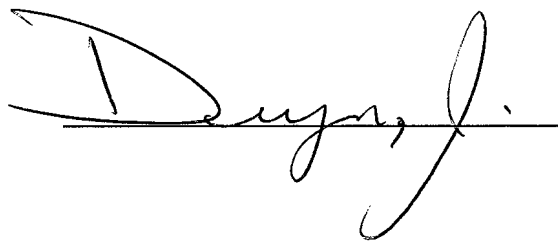
¹⁹ Id.

and Hanna testified he was lying in the middle of the road after being hit. A third text message stated a van parked in the street had obstructed the driver's view from the alley, and a witness testified he saw a van parked on the street near the alley.

Because the text messages purported to be from Watson were received by a person who had been receiving messages from Watson at that number and had distinctive characteristics consistent with the circumstances surrounding the accident, sufficient evidence existed to support a finding that they were, as the State claimed, text messages sent by Watson on the day of the accident. And because the text messages were adequately authenticated, Watson fails to show defense counsel was deficient for not objecting. Defense counsel did not provide ineffective assistance.

Therefore, we affirm.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Cohen, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Verellen, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Dwyer, J.", written over a horizontal line.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 99820-5**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 27, 2021
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

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