

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MELISSA WATSON,)	UNPUBLISHED OPINION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:




