IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 19-0423

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLES CLIFFORD HAMLIN,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis & Clark County, the Honorable Mike Menahan, Presiding

APPEARANCES:

DAVID M. MALDONADO
MALDONADO LAW, PLLC
210 N. Higgins, Suite 226
Missoula, MT 59802

ATTORNEY FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
C. MARK FOWLER
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

LEO GALLAGHER
Lewis & Clark County Attorney
JEFF SEALEY
Deputy County Attorney
Courthouse - 228 Broadway
Helena, MT 59601

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution:

Montana Constitution:

STATEMENT OF ISSUES

Appellant presents the following issue for this Court:

1. Did the district court err by denying Appellant's motion for directed verdict when the State relied upon minute entries as competent evidence to show an Order of Protection was in place; and
2. Did the district court err when it summarily denied defendant's ability to collaterally challenge the validity of the order of protection at trial.

STATEMENT OF THE CASE

Charles Clifford Hamlin (hereafter "Appellant") appeals the district court's judgment convicting him of two counts of violations of an order of protection, 3rd or subsequent offense, and one count of stalking (App. H, D.C. Doc 116) On January 22 through January 25, 2019, a jury trial was held in this matter. *Id.* The jury convicted Appellant of counts I-III. *Id.* Appellant was sentenced on April 17, 2019 to two years to the Montana Department of Corrections on counts I and II for those counts to run concurrently, followed by an additional five years on count

III with all that time to run concurrent. *Id.*

FACTS

The material facts primarily rest in the procedural posture of proceedings related to a temporary order of protection issued in December 2017 and legal arguments at a jury trial in January 2019, after the State rested its case-in-chief.

Appellant was charged by Information on or about February 7th, 2018 (App. A.) The State charged Appellant as follows: (1) Count I, Violation of Order of Protection (3rd or subsequent offense), in violation section 45-5-626(1), MCA, a felony, alleged to have occurred on January 8th, 2018; (2) Count II, Violation of Order of Protection (3rd or subsequent offense), in violation section 45-5-626(1), MCA, a felony, alleged to have occurred on January 23rd, 2018; (3) Count III Stalking, a felony, in violation of section 45-5-220(1)(b) and (3), MCA, alleged to have occurred between on or about December 22, 2017, and on or about January 23, 2018. *Id.*

Additionally, and in the alternative to Count III, the State alleged in Counts 5 through 10, Violation of Order of Protection (3rd or subsequent offense), in violation of section 45-5-626(1), MCA, felonies,

alleged to have occurred on December 22 and 29th, 2017, amounting to two occasions on January 8, 2018, and separate and distinct violations on January 13th and January 23, 2018. *Id.* Appellant entered not guilty pleas and the case proceeded to a jury trial on January 22, 2019 (Trial Trans., p. 1).

A. The Temporary Order of Protection

In BDR 2014-330, the district court ordered a temporary order of protection (hereafter "TOP or TOP hearing") on Monday, December 1, 2017. (App. B, State's Exhibit 8.) This temporary order of protection would be the basis for all the charges against Appellant. The temporary order of protection was filed with the clerk on Monday, December 4, 2017, *id.*, and set a hearing for December 21st, 2017 at 11:30 a.m. *Id.* A hearing that would never occur.

Two days prior to the scheduled hearing, on December 19, 2017, *sua sponte*, the court continued the hearing recognizing that Respondent had not been served with the TOP. (App. C, State's Exhibit 35A.) No where in the minute entry did it indicate the temporary order of protection was to remain in place. *See id.*

Five days after the original hearing date was set on December 26, 2017, Respondent was served with the TOP and the minute entry from December 19, 2017. (App. D, State's Exhibit 20). On January 3, 2018, the date of the TOP hearing, Respondent was present with counsel and Petitioner was present in the building but was "unable" to enter the courtroom, so the court again, *sua sponte*, continued the hearing (App. E, State's Exhibit 36). According to a minute entry, this time the court indicated the temporary order of protection would remain in full force and effect until the next hearing which was set for January 16, 2018. *Id.*

On January 9th, Petitioner's counsel filed an unopposed motion and order continuing the TOP hearing, which indicated the TOP to remain in effect. (App. F, State's Exhibit 37-38). On January 29th, 2018, Respondent's counsel filed a stipulated motion and order with the court which vacated the January 30, 2018, TOP hearing and required a status report. (App. G, State's Exhibit 39)

B. Directed Verdict and reopening the State's case-in-chief

In the subsequent criminal proceedings, the State presented its case-in-chief calling numerous witnesses and offering several exhibits. After

the State rested its case-in-chief, the defense made two motions. One for directed verdict arguing insufficient evidence, Tr. Trans, 1/22/19, p. 506 at ln. 7, and the other one collaterally challenging the Order of Protection, *id.* at p. 513, lns 24-25; p. 514, lns. 1-8. The defense's motion for directed verdict was on all Counts except Count III. *Id.* at p. 507, lns. 21-25, p. 508, lns. 1-5. The trial court denied both motions. *Id.* at p. 513, ln 20 (denying motion for directed verdict); id. at p. 514 at lns. 19-23 (denying defense's ability to attack the validity of the order of protection).

Despite denying the defense's motions and the State resting its case-in-chief, the State moved, pursuant to Mont. R. Evid. 611(a), to reopen its case. Tr. Trans, 1/22/19, p. 524 at lns. 2-6. The court granted the motion on the basis that the State did not rest its case in front of the jury. *Id.* at p. 528 at lns. 17-20.

Once the State's case-in-chief was reopened, it offered exhibits 35A through 41, which were court documents related to the order of protection proceedings. *Id.* at p. 534, ln. 25; p. 535, lns. 10-19. Once admitted, the State rested and did so on the premise that the jury could

read the documents related to the proceedings. *See id.* Facts are added as needed.

STANDARDS OF REVIEW

In regards to the first issue, this Court reviews the question of whether sufficient evidence supports a conviction *de novo*. *State v. Swann*, 2007 MT 126, ¶ 19, 337 Mont. 326, 160 P.3d 511. The evidence is considered in the light most favorable to the prosecution to determine whether "'any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt.'" *State v. Torres*, 2013 MT 101, ¶ 16, 369 Mont. 516, 299 P.3d 804 (quoting *State v. Trujillo*, 2008 MT 101, ¶ 8, 342 Mont. 319, 180 P.3d 1153).

To the second issue, this Court reviews a district court's decision on issues of law to determine whether the decision was correct. *State v. Frickey*, 2006 MT 122, P 9, 332 Mont. 255, 136 P.3d 558; *see also State v. Krebs*, 2016 MT 288, ¶ 7, 385 Mont. 328, 330, 384 P.3d 98, 100 (reviewing predicate offense used for enhancement on correctness grounds).

ARGUMENT

1. **There was insufficient, competent evidence to prove that a valid temporary order of protection was in place which was an essential element of the crime.**

"When, at the close of the prosecution's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant. However, prior to dismissal, the court may allow the case to be reopened for good cause shown." 46-16-403, MCA.

Here, the defense properly argued that there was insufficient evidence offered that a valid order of protection was in place from December 22, 2017 through January 23, 2018. Tr. Trans, 1/22/19, p. 506 at lns. 7-25. The district court ordered a temporary order of protection on Monday, December 1, 2017 and set a hearing for December 21st, 2017 at 11:30 a.m. A hearing that would never occur but was set at exactly twenty days. (App. B, State's Exhibit 8).

The basis for the twenty (20) days is clear. Specifically, section 40-15-201(4), MCA, provides that [t]he court may, without requiring prior notice to the respondent, issue an immediate temporary order of

protection *for up to 20 days* if the court finds, on the basis of the petitioner's sworn petition or other evidence, that harm may result to the petitioner if an order is not issued before the 20-day period for responding has elapsed. *Id.* at (4)(emphasis added).

At this point, the defense argued the Order of Protection expired, yet the lower court denied the motion for directed verdict. The State offered in its original case-in-chief only the TOP, Return of Service, an Order from February 13, 2018, and subjective and irrelevant testimony about the protected person's belief that the TOP was in place. January 23, 2018. Tr. Trans, 1/22/19, p. 508 at lns. 7-22; *see also* State's Exhibit 9.

At this point in the proceedings, no rationale trier of fact could have concluded a TOP was in place. Violations could not have occurred on December 22, 2017 because Appellant was not served until four days later on December 26, 2017. Although service is not required to sustain a conviction, section 45-5-626(1), any violations required the Appellant knew the order was in place, i*d.* And all that he was served with was the original TOP and a minute entry continuing the hearing. Nothing in the December 19, 2017 Minute Entry indicated the TOP was to

remain in place. (App. C, State's Exhibit 35A), State's Exhibits 35A through 41 were not even offered into evidence until the State was allowed to reopen its case and after the defense had argued both that there was insufficient evidence and that it wanted to collaterally attack the Order of Protection based on *State v. Huffine* 2018 MT 175, ¶ 23, 392 Mont. 103, ¶ 23, 422 P.3d 102, ¶ 23. *See* January 23, 2018. Tr. Trans, 1/22/19, p. 514 at lns. 3-4.

Here, the threshold and dispositive question is what constituted affirmative and competent evidence that the TOP was in place during the time of the allegations. By way of analogy, when attacking prior convictions related to misdemeanor traffic offenses, in *State v. Chaussee*, this Court clearly stated:

> Affirmative evidence may include direct evidence and circumstantial evidence. But whatever evidence is offered, it must be more than a silent or ambiguous record, and conclusory or self-serving inferences drawn therefrom, or testimony speculating about what might have happened in the underlying case. Affirmative evidence is evidence which demonstrates that certain facts actually exist or, in the context of a collateral challenge, that certain facts *actually existed* at some point in the past—for example, that the trial court actually did not advise the accused of her right to counsel, or that an indigent defendant actually requested the appointment of counsel but counsel was actually refused. An affidavit from the defendant, a witness, or court personnel attesting this sort of affirmative evidence

> will figure more persuasively in the calculus of whether the rebuttable presumption of regularity has been overcome than will, for example, references to *unclear court minutes*, judge's notes, or preprinted forms.

Id. at 2011 MT 203, ¶ 18, 361 Mont. 433, ¶ 18, 259 P.3d 783, ¶ 18 (emphasis in original and added).

Here, this Court is faced with too many questions. First, the TOP was ordered on December 1, 2017 with a hearing set on December 21, 2017, yet miraculously the district court two days prior, with nothing scheduled or docketed just continues the hearing. (App. D, State's Exhibit 20). Then the hearing is reset but Appellant was not even afforded the 20 day response period by statute or the ability to request an emergency hearing within the initial 20 days set by statute. 40-15-201(4), MCA; 40-15-202(2), MCA.

There is no record that supports the lower court found good cause for the December 19, 2017 continuance as required. Specifically, section 40-15-202(1) provides a hearing must be conducted within 20 days unless good cause exists. By statute on December 19, 2017, when the court, *sua sponte*, continued the TOP hearing, it was required that good cause be established for

the delay and the good cause why the TOP would be continued, amended, or made permanent. *Id.* Therefore, the lower court's determination that the court did not say the TOP was dismissed, supported by unclear court minutes, was both illogical and inconsistent with this Court precedent regarding affirmative evidence. Accordingly, the lower the court erred in allowing this matter to be submitted to a jury to decide: Minute Entries and Motions were insufficient competent evidence to establish a TOP was in place.

2. The district court erred when it summarily denied defendant's ability to collaterally challenge the validity of the order of protection and therefore violated his due process rights.

The Due Process Clause of Article II, Section 17, of the Montana Constitution "protects a defendant from being sentenced based upon misinformation." *State v. Chaussee*, 2011MT 203, ¶ 9, 361 Mont. 433, 259 P.3d 783. "A constitutionally infirm prior conviction used for enhancement purposes constitutes 'misinformation of constitutional magnitude.'" *Id.* Thus, the state "may not use a constitutionally infirm conviction to support enhanced punishment." *State v. Chaussee*, 2011

MT 203, ¶ 9, 361 Mont. 433, 259 P.3d 783. (quoting *State v. Okland*, 283 Mont. 10, 15, 941 P.2d 431, 434 (1997)). Naturally, these unwavering principles extend to proof in a case where the predicate is an Order of Protection. *See generally State v. Huffine.* Id. 2018 MT 175, ¶23, 422 P.3d 102, 114-15

The district court's decision to allow the State to reopen its case-in-chief offering exhibits related to whether a valid order of protection was in place and denying defense's ability to legally challenge the order of protection was both legally incorrect and resulted in a substantial injustice by allowing an element of the allegations to be presumed and the jury to read biased hearsay on a proceeding. *See* JURY INS. 17 (stating "Prima face evidence is evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports"); App. E, State's Exhibit 36 ("Minute Entry")(stating Petitioner unable to entre the courtroom)

This case presents the issue that remained outstanding following *dicta* in *State v. Huffine.* In *Huffine*, this Court stated the following:

> [u]pon our independent review of the record on appeal, we similarly find no basis upon which to suspect that the 2006 protective order at issue was constitutionally invalid. Thus, we need not consider whether, by extension of or analogy to

> our holding in *Maine*, a criminal defendant charged with violating a protective order may similarly collaterally challenge the validity of the order in a subsequent criminal proceeding."). Here, the district erred in two ways. First, it did not allow the defense to challenge the validity of the TOP. Second, the evidence was insufficient relying on minute entries: Documentation this Court has clearly rejected in the context prior convictions. Taken as whole with the jury instructions the evidence presented was insufficient to support a conviction.

Id. 2018 MT 175, ¶23, 422 P.3d 102, 114-15.

This Court turned to the Wyoming Supreme Court in regards to collaterally attacking Order of Protection. *See id.* Specifically, in *Joyner v. State*, Defendant argued, *inter alia*, that the trial court erred by denying his motion to dismiss because he had not been given an opportunity to challenge the underlying order of protection. The Wyoming Supreme Court agreed. *Joyner* at. 2002 WY 174, ¶23. The court developed a test akin to the analysis in the *Main* Framework when examining the validity of prior convictions for driving under the influence. *State v. Maine*, 2011 MT 90, 360 Mont. 182, 187, 255 P.3d 64. Collateral Challenges have been deeply rooted in Montana jurisprudence for nearly half a century. *See e.g., Lewis v. State*, 153 Mont. 460, 463, 457 P.2d 765, 766 (1969); however, the *Maine* framework has never been entirely extended when it relates to Orders

of Protection. The *Joyner* Court did create a procedure similar to *Maine* Specifically, the Court found the following procedure to attacking the validity of the protection order:

> The defendant has the burden of production for making a prima facie showing that the order of protection was entered in violation of his constitutional rights. Should the defendant meet this burden of production, then the burden shifts and the prosecution must establish, beyond a reasonable doubt, that the order was constitutionally obtained. The trial court should determine *such questions of law at a pretrial hearing.*

Joyner v. State, 2002 WY 174, ¶19. This procedure and inferences are entirely consistent with Montana Law and this Court should adopt it for future guidance except for forcing it as a pretrial matter. Here, TOP hearings were set and continuances made without a finding of good cause. Respondent did not enjoy the statutory benefit to request an emergency hearing within 3 days as offered by statute because he was not even served within the original 20 days.

Additionally, for all the purported conduct and allegations in this case, perhaps the criminal allegations would have not even come to fruition had the order been served, findings been made,

and clearly communicated as to the requirements to remain law abiding. Whether Order was valid is a question of law that the lower court should have considered. It didn't and it violated Appellant's due process rights. The Wyoming Supreme Court tailored a three part remedy of withdrawal of plea, dismissal, and remand for further proceedings. *Joyner v. State*, 2002 WY 174, ¶23. This Court can equally fashion a remedy that sets aside the convictions, dismisses the charges, and set matters for hearing on the validity of the Order of Protection and it should do so.

Here, whether the State proved a TOP existed was primarily based on minute entries. By analogy, this Court has almost uniformily rejected collateral challenges to prior driving under the influence convictions by the use of minute entries. *See State v. Anderson*, 2001 MT 188, ¶ 21, 306 Mont. 243, ¶ 21, 32 P.3d 750, ¶ 21. Here, the prosecution offered an exhibit, didn't explain it, authenticate it, and didn't offer it until it was allowed to reopen its case-in-chief. That exhibit was beyond prejudicial with little probative value when it expressly states the petitioner in the order of protection was in the courthouse but couldn't come into the courtroom. App. E, State's

Exhibit 36. The issue was raised and the lower court erred in denying defense counsel's ability to challenge the validity of the minute entry TOP.

CONCLUSION

Respectfully submitted this 19th day of February, 2021.

By: */s/ David M. Maldonado*
David M. Maldonado

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,075, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ David M. Maldonado
David M. Maldonado

APPENDIX

CERTIFICATE OF SERVICE

I, David Michael Maldonado, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-22-2021:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Charles Clifford Hamlin
Service Method: eService

Leo John Gallagher (Govt Attorney)
Lewis & Clark County Attorney Office
Courthouse - 228 E. Broadway
Helena MT 59601
Representing: State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

David Michael Maldonado (Attorney)
210 N. Higgins
Missoula MT 589802
Service Method: eService
E-mail Address: maldonadolaw@406justice.com

Electronically Signed By: David Michael Maldonado
Dated: 02-22-2021