IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0423

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLES CLIFFORD HAMLIN,

Defendant and Appellant.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUE

Was Hamlin subject to a valid temporary order of protection, as established by evidence at trial, supporting both sufficient evidence for Hamlin's conviction and rejection of any collateral challenge to the order of protection, to the extent Hamlin properly raised one at trial?

STATEMENT OF THE CASE

Appellant Charles Clifford "Chuck" Hamlin (Hamlin) appeals from his judgment of conviction and sentence for two felony violations of order of protection obtained by S.R., Hamlin's ex-girlfriend and mother of their child (Counts I and II), and felony stalking of S.R. (Count III) committed during a period which the jury unanimously and beyond a reasonable doubt found S.R. was "under the protection of a restraining order directed at the defendant." (D.C. Docs. 87-88, 116, 124; Tr. at 700-02; *see* D.C. Docs. 3 (affidavit), 5 (Information).)

Based on these convictions, the district court revoked Hamlin's suspended sentence in ADC 2015-75 (felony criminal distribution of dangerous drugs) and reimposed the remaining 15 years of that Department of Corrections (DOC) commitment, all suspended. (4/17/19 Tr. at 115-16, 118-19.) In this case, for Counts I and II (violation of order of protection), the court imposed two concurrent 2-year DOC commitments to run concurrently with the sentence in ADC 2015-75;

for Count III (stalking), the court imposed a 5-year DOC commitment, all suspended with conditions, to run consecutively to the sentence imposed in ADC 2015-75. (D.C. Doc. 116 at 3-7; 4/17/19 Tr. at 116-20.)

STATEMENT OF THE FACTS

S.R. first met Hamlin in 2007, started dating him in 2013, and had a child with him, J.D., in 2014. (Tr. at 168-70.) A couple of months after J.D. was born, S.R. moved out of Hamlin's house and moved in with her parents. (*Id*. at 171.) Their relationship had become very tense—it was "kind of touch and go." (*Id*.)

Despite their relationship problems, S.R. still wanted J.D. to have contact with Hamlin and get to know his father. (Tr. at 171.) They had an interim parenting plan and they would have visits together with J.D. "like at the park or like at Burger King or something, you know, with the playground." (*Id*. at 172.) That arrangement changed over time because S.R. "wanted something that was more like a home-like setting for bad weather or just [for Hamlin and J.D.] to spend more quality time communicating and getting to know each other instead of just watching [J.D.] play." (*Id*.)

At some point, Hamlin moved into a trailer outside of Helena with a man named Dave Benson and started having visits with J.D. there. (Tr. at 172-73.) S.R. testified that, "As long as J.D. was safe, I would be perfectly fine with visits."

(*Id*. at 173.) However, toward the end of 2017, S.R. stopped those visits because of safety issues at that location and with Hamlin, including constant arguing and behavior outside of the trailer, dangerous driving, and following S.R. and trying to run her off the road—"those kind of things with JD around. I wasn't going to allow him to go visit there, because I didn't feel safe there, and I knew my son wasn't going to be safe there." (*Id*. at 173-74.) When JD started school, Hamlin would want to see S.R. and she just wanted to not hang out with him; then pretty soon she would be driving, and Hamlin would appear be right behind her, or beside her, and block her into parking spots. (Id. at 175.) S.R. explained:

> And every day . . . he'd be right around J.D.'s school or close by—somewhere where I'd end up—and he just wouldn't let me have that time. If I wasn't going to spend time with him, then he was going to make sure I didn't spend time with anybody else or something. . . . It was just the entire time he was calling and driving and following.

(*Id*.) S.R. would not tell Hamlin where she was going to be, but "[s]omehow he still showed up wherever I was." (*Id*.)

S.R. became concerned for her safety due to this behavior and other incidents, and she got an order of protection. (Tr. at 176-85.) At first she did not report it to the police or get a restraining order, because she felt that calling and reporting it would make everything worse—"There's going to be the retribution for reporting it." (*Id*. at 183.)

Eventually S.R. did obtain an order of protection in the district court (BDR 2014-330, Judge McMahon) which was signed and issued on December 1, 2017, filed on December 4, and eventually ordered to "remain in effect" and extended without date on February 13, 2018. (Tr. at 185-87, 190-91; State's Exs. 8-9.) S.R. testified that Exhibit 8 was the temporary order of protection that was "in effect for everything" S.R. was going to testify about; Exhibit 9 was the February 13, 2018 court order on Hamlin's "stipulated motion for the hearing for the order of protection to be extended without date," which "extended the original order . . . indefinitely." (Tr. at 190; *see* Tr. at 220.) Other witnesses also testified they knew an order of protection was in place. (Tr. at 380-81, 407, 418, 427, 608.) No objection or contradictory evidence was presented at trial to suggest that the order of protection, Exhibit 8, had lapsed or expired, was dismissed or terminated, or was not in effect during the relevant time period of Hamlin's conduct—the phone calls, the texts, the drive-bys, the threats—alleged and proved as violations of the order or constituting the offense of stalking, as evidenced by the jury's verdict. (*See* Tr. at 192-243 (S.R. direct testimony), 262-91 (S.R. cross-examination), 291-310 (S.R. redirect), 311-12, 322-23 (S.R. recross).)

Undisputed evidence was presented that Hamlin knew about the order of protection in the middle of December 2017, and that he was served on December 26, 2017, with the temporary order of protection, the order setting new

hearing date on January 3, 2018, the petition, and the minute entry for December 19, 2017. (Tr. at 377-83, 386-87, 392-93, 407, 608; State's Ex. 20.) Hamlin admitted in closing that he knew about the order of protection, even before he was served on December 26, "because [S.R.] told him—because he was with her when she got the phone call the order of protection had been signed," and because the police called Hamlin and told him "there really is one." (Tr. at 679, 684.)

The State introduced, without objection from Hamlin, additional court filings in the order of protection proceeding (BDR 2014-330) so "the jury could see how those proceedings went along the way," specifically:

> State's Ex. 35A: minute entry for December 19, 2017, reciting that: "Due to Respondent, Mr. Hamlin, not being served, the hearing currently set for December 21, 2017 at 11:30 a.m. is hereby rescheduled to Wednesday, January 3, 2018 at 11:00 a.m.;"
>
> State's Ex. 36: minute entry for the January 3, 2018 hearing, reflecting that S.R. was "unable to enter the courtroom," that the order of protection shall "remain in full force and effect until the next hearing date," and resetting the matter for January 16, 2018;
>
> State's Ex. 37: January 9, 2018 notice of appearance of counsel for S.R. and unopposed motion to continue hearing, with proposed order;
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> State's Ex. 38: January 10, 2018 order continuing hearing to January 30, 2018, reflecting that the order of protection "shall continue in full force and effect pending final order of this Court;"
>
> State's Ex. 39: Hamlin's January 29, 2018 stipulated motion to vacate and reschedule hearing, with proposed order;

> State's Ex. 40: January 29, 2018 order vacating hearing and ordering Hamlin to submit a status report no later than February 9;
>
> State's Ex. 41: Hamlin's February 12, 2018 stipulated motion to "extend hearing without date" (*see* State's Ex. 9, *supra*, February 13 order stating that the order of protection remained in effect); and
>
> State's Ex. 42: Case Register for BDR 2014-330 (did not go to jury).

(Tr. at 524-28 ("I'm not objecting to [the State] putting this in."), 534-35 (admitted without objection).)

Hamlin moved for a directed verdict[1] on the violation of order of protection charges (specifically Counts I and II), but not stalking (Count III), arguing as follows:

> [T]he state has failed to prove that there was an order of protection in effect at that time, and I would suggest that there was not. Because it expired on the 3rd [of January, 2018] until it was resurrected on the 13th [of February, 2018]. . . . [T]he assumption cannot be made that it just continued on without any notice to Mr. Hamlin or any opportunity for him to be heard.
>
> And for that reason, those counts [I and II] of violation of an order of protection that date from the 8th of January [and] the 23rd of January . . . fail. They have not met their burden of proof. They put forth no evidence on the order of protection being in effect.

(Tr. at 507-08.) The State responded that S.R. testified that the order was in effect the entire time and that the February 13 order (State's Ex. 9) reflected that the

[1]Motions for a directed verdict or for acquittal "are more appropriately entitled motions to dismiss for insufficient evidence." *State v. Farmer*, 2008 MT 354, ¶ 6, 346 Mont. 335, 195 P.3d 800.

"temporary order of protection shall remain in effect. That is circumstantial evidence that it had been in effect the whole time, otherwise [the judge] wouldn't have used the word 'remain' in effect." (Tr. at 508-09.)

The district court first noted that, "This might have been something that should have been in the form of a motion to dismiss or something of that nature." (Tr. at 509.) Although the court was concerned "that perhaps the order wasn't in effect" after January 3, as Hamlin argued, there was no evidence that the order of protection was dismissed as a result of failing to have the hearing. (Tr. at 512.) Hamlin persisted that the order lapsed—it was not dismissed—because "nothing in the record before this jury that [Hamlin] got to be heard on the 3rd of January, or that the Court continued." (Tr. at 513.)

The district court determined that whether or not the restraining order should have been dismissed because the court failed to have a hearing on it was not an issue for the jury. (Tr. at 513.) In addition, it appeared to the court, based on the evidence, "as if the order of protection remained in effect by superseding acts of the Court." (*Id.*) The court, therefore, denied the motion for "a directed verdict." (*Id.*)

At that point, Hamlin advised the district court that there was "a Supreme Court case that says in a proceeding like this I can challenge the order of protection

. . . if he's never been heard—*State v. Huffine*." (Tr. at 513-14 (italics added).) Hamlin asserted, ambiguously, "So I just want . . . I'm doing that." (Tr. at 514.) The court acknowledged that Hamlin "preserved it as an issue." (*Id.*) However, the court stated that it did not have all the facts about what happened at the January 3rd hearing, but based on typical district court practice, "It sounds to me like the Judge left that order in effect. There's no order from Judge McMahon saying that this order of protection was dismissed." (*Id.)* "And that is basically the most important fact upon which I'm denying the motion for a directed verdict." (Tr. at 515.)

The State clarified that Hamlin was now changing his motion from "directed verdict" to more of a legal argument based on a Supreme Court case "which is in the nature of [a] motion to dismiss charges. That, I think, the defense has waived. It would be untimely, at this point, to make that motion. That's why I was limiting my arguments to the context of a directed verdict type of motion[.]" (Tr. at 515.) The State continued:

> But if they're trying to make a motion to dismiss claiming that the order of protection was dismissed, that there's some problem with the charging documents, that time has passed. That should have been done pretrial where we could have gotten the transcript from whatever hearing, gotten you all the orders from that hearing, gotten you whatever you needed to make that decision. They didn't file that motion. So I think that they waived that argument at this time.

(Tr. at 515-16.)

Hamlin did not clarify that he was raising a motion to dismiss, asking for the court to dismiss the charges, or asking for any other relief based on his "I'm-doing-that" challenge to the order of protection. Rather, Hamlin seemed only to fall back on his sufficiency of the evidence argument:

> I think I can certainly argue to a jury that . . . there is not sufficient evidence to support any element of a crime. . . . I'm going to tell them here's what you have before you as to the order of protection. And that . . . I don't believe that they can determine whether or not the order continued.

(Tr. at 516.) The State responded: "As long as [Hamlin is] not asking the jury to invade your province to make legal conclusions, I don't disagree[.] But I suspect [he's] going to go over the line there." (*Id.*) The district court did not appear to consider Hamlin's argument as a proper or sincere motion to dismiss the charges, and did not rule on anything other than the motion for "directed verdict":

> So we're not quite at that point. At this point, I believe that, in closing arguments, Ms. Hood is not precluded from making an argument based upon the evidence that's been presented. And I think that the two of you will just have to . . . argue as to what the facts were in the particular case, and what they prove. I don't think I can preclude Ms. Hood from arguing those elements in closing.

(Tr. at 516-17.)

Along these lines, Hamlin presented no evidence in the defense case, and made no argument to the jury in closing, that the order of protection had lapsed or was not in effect during the relevant time period of the charged offenses. The lack of any evidence or argument that the order of protection had lapsed was consistent

with Hamlin's theory of the case previewed in his opening statement. At that time, Hamlin conceded that the order of protection existed—S.R. "goes and gets the restraining order"—and that Hamlin had knowledge of its existence through communications on December 4 and 14, 2017, and by service of the order on December 26. (Tr. at 158-59.)

As a matter of record, Hamlin did not file any pretrial motion in the course of these proceedings in the form of a motion to dismiss or collateral attack based on allegations that the order of protection had lapsed, expired, was invalid, or was not in effect during the relevant time. There was no such motion at arraignment. (*See* D.C. Doc. 8 (no transcript in record on appeal).) There was no such motion at the omnibus hearing. (*See* D.C. Doc. 12 (no transcript in record on appeal).) In fact, there was no omnibus order filed, apparently because, as the minute entry reflects: "State advised that there are no issues at this time, defense agreed." (*Id.*) Hence, there were no pretrial motions contemplated at the time when notice of such motions is required to be made.

About six months after the omnibus hearing, at a pretrial conference, Hamlin did raise the possibility of an issue regarding the order of protection:

> There is a fairly new case out of the Supreme Court that deals with to what extent you can attack, in these kind of cases, the underlying order of protection. And because I have a trial starting on the first, I have not gotten to actually look at that. But I will try to do that within the next day or two and **may want to bring that to the Court's**

> **attention**. . . . [A]s soon as I have a chance to locate it, I'll provide it to you."

(9/19/18 Tr. at 4-5 (emphasis added).) The State responded that it was "not aware of what that case is at all. So this is news to me." (*Id*. at 5.) Despite Hamlin's notice of the unnamed case as something he "may want to bring to the Court's attention," he never raised the issue again and made no motion based on the underlying validity of the order of protection—not at that pretrial conference or the next one three months later. (*See* 12/19/18 Tr.) Nor did Hamlin file any post-trial motion that effect.

Finally, at sentencing, the district court discussed and affirmed the validity and effect of the order of protection as established on the evidence at trial and found by the jury:

> . . . . [T]he order of protection remained in effect. And so Mr. Hamlin's subsequent criminal conduct arises from violations of that order.
>
> You know, I also take seriously the fact that the public has to follow Court orders. And restraining orders are an order issued by the Court. And I think that Judge McMahon's Court made it clear that that order of protection would remain in effect until the matter came before the Judge for a hearing.
>
> . . . . The jury, I think, followed the law and found Mr. Hamlin guilty. I think, based upon that, and other evidence in the case, they believed beyond a reasonable doubt that he was aware the order of protection was valid, and he violated it several times.

(4/17/19 Tr. at 111-12.)

SUMMARY OF THE ARGUMENT

There was sufficient evidence presented in the record at trial for the jury to find that a valid order of protection existed at the time of Hamlin's alleged violations. As a matter of law and of the facts, the order of protection remained in full force and effect after hearings were continued by the court, the victim, and Hamlin.

Based on essentially the same facts and law, Hamlin's "collateral attack" argument is without merit—to the extent it is properly before this Court on appeal. Hamlin should have raised this type of claim by pretrial motion, not after the State had presented evidence at trial for two days. Moreover, Hamlin's claim on appeal represents a new legal theory not raised or argued at trial.

ARGUMENT

Hamlin has not met his burden on appeal to show either that there was insufficient evidence to convict him or that the underlying order of protection was invalid.

A. Standard of review

Whether evidence is sufficient to sustain a conviction presents a question of law that this Court reviews de novo. *State v. Dineen*, 2020 MT 193, ¶ 8, 400 Mont. 461, 469 P.3d 122. The standard of review calls for determining whether, in the light most favorable to the prosecution, any rational trier of fact

could have found all the essential elements of the offense beyond a reasonable doubt. *Dineen*, ¶ 14.

The grant or denial of a motion to dismiss in a criminal case is a question of law. This Court reviews question of law to determine whether the trial court's interpretation of the law is correct. *State v. Baker*, 2004 MT 393, ¶ 12, 325 Mont. 229, 104 P.3d 491; *City of Missoula v. Gillispie*, 1999 MT 268, ¶ 18, 296 Mont. 444, 989 P.2d 401.

B. Sufficient evidence was presented at trial that a valid order of protection existed and he has not established any factual or legal basis for a "collateral attack" of the order.

Pursuant to statute, a person commits the offense of violation of an order of protection "if the person, with knowledge of the order, purposely or knowingly violates a provision of . . . an order of protection under Title 40, chapter 15." Mont. Code Ann. § 45-5-626(1). The district court properly instructed the jury on that statute: "A person commits the offense of violation of order of protection if the person, with knowledge of the order, purposely or knowingly violates a provision of the order of protection." (D.C. Doc. 85 (Instr. 7).) The court also properly instructed on the elements of the offense which the State had to prove at trial: that an order of protection existed; that Hamlin had knowledge of the order of protection; that Hamlin violated a provision of the order of protection; and that Hamlin acted purposely or knowingly. (D.C. Doc. 85 (Instr. 8).)

The law also provides that:

> It may be inferred that the defendant had knowledge of an order at the time of an offense if the defendant had been served with the order before the time of the offense. Service of the order is not required upon a showing that the defendant had knowledge of the order and its content.

Mont. Code Ann. § 45-5-626(1). And the district court instructed the jury accordingly: "It may be inferred that the Defendant had knowledge of an order of protection at the time of an offense if the Defendant had been served with the order of protection before the time of the offense." (D.C. Doc. 85 (Instr. 9).) Regarding the existence of the order of protection, the district court instructed the jury that:

> The order of protection is issued by the court, and the respondent is forbidden to do any act listed in the order of protection, even if invited by the petitioner or another person. The order of protection may be amended only by further order of the court or another court that assumes jurisdiction over the matter.

(D.C. Doc. 85 (Instr. 10).) The jury instructions cited above (among the first 17 jury instructions), were given by the court without objection at the beginning of the trial, due to the relative complexity of the charges and the evidence—in particular the alternative charges (Counts IV-X, not at issue on appeal) and to clarify for the jury that the offense requires knowledge of the order, not service. (Tr. at 16, 19, 138-39, 616, 644.)

The law also provides parameters for the existence and continuation of a temporary order of protection:

> A hearing must be conducted within 20 days from the date that the court issues a temporary order of protection. The hearing date may be continued at the request of either party for good cause or by the court. **If the hearing date is continued, the temporary order of protection must remain in effect until the court conducts a hearing.** At the hearing, the court shall determine whether good cause exists for the temporary order of protection to be continued, amended, or made permanent.

Mont. Code Ann. § 40-15-202(1) (emphasis added).

On appeal, Hamlin argues, as a factual matter, that there was insufficient evidence that a valid order of protection existed at the time of the alleged violations of the order and, as a legal matter, that the district court denied Hamlin's "ability to collaterally challenge the validity of the order of protection and therefore violated his due process rights." (Br. of Appellant at 7, 11.) Both claims are without merit.

1. Sufficient evidence was presented at trial that a valid order of protection existed.

First, as he did at trial, Hamlin challenges the sufficiency of the evidence on a single element of the offense only—existence of a (valid) order of protection—and therefore must concede that there was sufficient evidence to prove the remaining elements: that Hamlin had knowledge of the order of protection, violated provisions of the order of protection, and acted purposely or knowingly. The appellant bears

the burden of establishing error on appeal and this Court will decline to address an issue absent authority or developed argument. *State v. Longfellow*, 2008 MT 343, ¶ 18, 346 Mont. 286, 94 P.3d 694.

Second, Hamlin claims that the "threshold and dispositive question" is not the actual evidence presented, but whether that evidence was "affirmative and competent" to prove that the order "was in place during the time of the allegations." (Br. of Appellant at 9.) Of course, Hamlin made no objections at trial to any of the evidence that was admitted establishing the existence or effectiveness of the order of protection. In order to preserve an objection to the admission of evidence for appeal, the objecting party must make a timely and specific objection on the record. *See, e.g., State v. Funkhouser*, 2020 MT 175, ¶ 12, 400 Mont. 373, 467 P.3d 574 (citing Mont. R. Evid. 103(a)(1)*; State v. Clausell*, 2001 MT 62, ¶ 25, 305 Mont. 1, 22 P.3d 1111). The failure to make a timely during trial constitutes a waiver of the objection. *Id*. (citing Mont. Code Ann. § 46-20-104(2); *State v. Neiss*, 2019 MT 125, ¶ 48, 396 Mont. 1, 443 P.3d 435). Thus, while the sufficiency of the evidence is properly before this Court on appeal, the admissibility or "competence" of that evidence admitted without objection is not.

Third, Hamlin's argument on appeal that there was insufficient evidence to establish that a valid order was in place appears to be based solely on the fact that the defense "argued that the Order of Protection expired." (Br. of Appellant at 8.)

Hamlin does not specify on appeal when or how the order of protection "expired" by reference to facts in the record, developed argument, or authority. By way of judicial admission on the record, Hamlin's position at trial was that the order expired on January 3, 2018 (or 24 hours thereafter), because the terms of the order stated it expired 24 hours after the original hearing, and apparently, but without explication, the continuation of the January 3 hearing was constrained by that 24-hour provision. (Tr. at 506-07; *see* State's Ex. 8 at 3.) In any event, the order set the hearing for December 21 "or as soon thereafter as the matter may be heard," thus allowing for continuances as contemplated in the statute. (State's Ex. 8 at 3.)

Finally, the evidence presented at trial—through testimony of S.R., police officers, and other witnesses, and the exhibits of the order of protection proceedings admitted without objection—established that the order of protection was obtained, signed, and issued; Hamlin, as well as other witnesses, knew about the existence of the order and did not question the effectiveness of it; Hamlin was served with the order and other associated documents; Hamlin purposely and knowingly violated the terms of the order through his actions contacting and harassing S.R.; Hamlin and S.R. both retained attorneys who entered appearances in the order of protection case; Hamlin and S.R. each obtained stipulated continuances of the order of protection; Judge McMahon continued the hearings on his own motion and at the request of Hamlin and S.R.; none of the Exhibits from

the order of protection case, or any other evidence, indicate that the order of protection was dismissed, expired, lapsed, or was no longer in effect for any reason; and multiple Exhibits from the order of protection case indicate that the order of protection remained in full force and effect during the time of the alleged offenses and beyond. *See Supra* at 3-10. Moreover, as a matter of law regarding orders of protection: "**If the hearing date is continued, the temporary order of protection must remain in effect until the court conducts a hearing."** Mont. Code Ann. § 40-15-202(1) (emphasis added). Thus, based on the facts and the law, there was sufficient evidence that a valid order of protection was in existence at the time of Hamlin's violations.

2. The district court did not, as a matter of law or fact, err by not dismissing the charges against Hamlin based his so-called "collateral attack" of the underlying order of protection.

As both the district court and the State noted at trial, Hamlin's objection to the validity of the underlying order of protection was not an issue for the jury to decide and was more like a question of law that properly should have been raised as a motion to dismiss well before trial. (Tr. at 509, 513, 515-16.) As such, the State was correct below and now submits again on appeal, that Hamlin waived any such motion—however he styles it—attacking the validity of the order of protection because he failed to timely raise it. Hamlin did not present a proper

motion to dismiss before trial or any legitimate "collateral attack" at trial or on appeal.

The timely filing of pretrial motions is a well-established requirement. *State v. VonBergen*, 2003 MT 265, ¶ 13, 317 Mont. 445, 77 P.3d 537. The parties in criminal cases are statutorily mandated to bring any defense, objection, or request capable of determination without trial of the general issue at or before the omnibus hearing, or at the latest, by the subsequent date ordered by the district court. *State v. Heavygun*, 2011 MT 111, ¶ 15, 360 Mont. 413, 253 P.3d 897; Mont. Code Ann. § 46-13-101(1). A party's failure to do so constitutes a waiver. *VonBergen*, ¶ 11; *State v. Griffing*, 1998 MT 75, ¶ 10, 288 Mont. 213, 955 P.2d 1388; Mont. Code Ann § 46-13-101(2). The purpose behind requiring pretrial motions to be brought at or before the omnibus hearing is the "orderly and fair administration of the criminal justice system itself." *VonBergen*, ¶ 16 (internal quotes and citation omitted). The purpose of the omnibus hearing "is to expedite the procedures leading up to the trial of the defendant." *State v. Cotterell*, 2008 MT 409, ¶ 79, 347 Mont. 231, 198 P.3d 254; Mont. Code Ann. § 46-13-110(2); *see also* Mont. Code Ann. § 46-13-101(4) (all pretrial motions must be in writing, supported by a statement of the relevant facts, and state with particularity the grounds for the motion and the order or relief sought).

Hamlin objected at trial, in concert with his motion for "directed verdict," that "a Supreme Court case . . . says in a proceeding like this I can challenge the order of protection . . . if he's never been heard—*State v. Huffine*. . . . So I just want . . . I'm doing that." (Tr. at 513-14) Whatever "that" was that he was "doing," Hamlin never said it on the record, never put it in a written motion, never supported it by facts or authority, and never stated with particularity the grounds for any motion or any relief sought. If what "that" was constituted a motion to dismiss—which seems to be the relief Hamlin now wants on appeal—then Hamlin should have raised the issue well before trial with reasoning and authority so that the district court, in the first instance, could make a legal determination and potentially avoid a lengthy trial about conduct for which Hamlin might not be criminally responsible.

That is not what happened here. There were no issues at the omnibus hearing. Hamlin filed no motions to dismiss at any time—not at arraignment, omnibus, or any of the pretrial conferences. Yet this very issue was actually noted by Hamlin on the record six months after omnibus and three months before trial. But such issue spotting by the defense never materialized into a motion for relief that might obviate a trial of the matter. Whatever Hamlin now calls his objection at trial, it could have been and should have been raised well before trial by written,

authoritative motion—not after the State had spent two days at trial presenting evidence.

Hamlin's "collateral attack" on appeal should be dismissed not only because it was not properly raised in a pretrial motion and was therefore waived, but because it is based on new legal theories and authority not previously raised in the district court. It is a well-established rule that this Court will not address an issue raised for the first time on appeal, nor may a party raise new arguments or change its legal theory on appeal. *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P. 3d 207. The critical reason for the rule is that it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider. *Id*. A party complaining of error must stand or fall upon the ground relied on in the trial court. *State v. Garrymore*, 2006 MT 245, ¶ 62, 334 Mont. 1, 145 P.3d 946 (quotation and citation omitted).

Hamlin has seized upon his off-hand mention of a single case name, without proper citation and without developed argument, and argued for some kind of collateral relief based on authority that does not address his situation. What he wants is to attack the validity of the order of protection because it expired and thereby reverse his convictions based on violation of that order. But the authority he cites for the first time on appeal—his new legal theory—is exclusively related to collateral attacks to underlying convictions which, if nullified, simply convert

felony offenses (based on prior convictions) to misdemeanors because they were "constitutionally infirm."

The end result is a claim on appeal that is novel and was not presented at or before trial and really has nothing to do with the facts or procedural posture of this case. Hamlin was charged and convicted of felonies due to other prior violation of order of protection convictions in his history. And his claim is not that the underlying order of protection in this case was "constitutionally infirm"—because he was without counsel or some other violation of his rights—his claim is that the perfectly constitutional order in this case had expired.

Of course, as found and concluded by the district court and the jury, the order of protection which Hamlin violated remained in effect during the time charged. That conclusion is supported by the law providing that temporary orders of protection "must remain in effect until the court conducts a hearing," Mont. Code Ann. § 40-15-202(1), which never happened in this case due to continuances at the instance of both parties and the court. Thus, while Hamlin's "collateral attack" claim on appeal has been waived and is not properly before this Court for any number of reasons, it is also simply false and unsupported by any facts.

CONCLUSION

This Court should affirm Hamlin's judgment of conviction for violation of order of protection and stalking.

Respectfully submitted this 26th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 5,758 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Jonathan Mark Krauss, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-26-2021:

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