IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0639

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WILLIAM FREDERICK LAMOUREUX,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, the Honorable Amy Eddy, Presiding

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I. Section 45-8-213(1)(a) (2015, 2017) is facially unconstitutional.

A. Section 45-8-213(1)(a) is content based and presumptively invalid.

The First Amendment to the United States Constitution and Article II, § 7 of the Montana Constitution prohibit the government from enacting laws that restrict free speech. A statute that restricts speech based on communicative content is "presumptively invalid, and the government bears the burden to rebut that presumption." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citation omitted). The presumption applies in a facial challenge to a criminal law. *See Stevens*, 559 U.S. at 468; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 380–81 (1992). In this appeal, the State cannot overcome the presumptive and actual invalidity of Mont. Code Ann. § 45-8-213(1)(a) (2015, 2017)[1] ("§ 213(1)(a)").

The State seeks to avoid a presumption of § 213(1)(a)'s unconstitutionality by arguing (1) § 213(1)(a) regulates "conduct" and

[1] The challenge is to the 2015 and 2017 versions of § 45-8-213(1)(a), which the State used to prosecute this case. The 2019 Legislature revised § 45-8-213(1)(a) to address the constitutional problems that the State, in this appeal, denies exist. (*See* Appellant's Br. at 19–20.)

not speech, and (2) § 213(1)(a) does not restrict communications based on content. (Appellee's Br. at 10, 20–21.) One sign something is amiss with the State's argument is that it fails to cite any controlling authority. The State's sole primary citation is a Wyoming Supreme Court opinion. (Appellee's Br. at 20–21 (citing *Lewis Dugan v. Wyoming*, 451 P.3d. 731 (Wyo. 2019)).)[2] That opinion's binding effect stops somewhere along the Beartooth Highway. By contrast, the First Amendment as interpreted by the U.S. Supreme Court is the constitutional floor in Montana. *State v. Stewart*, 2012 MT 317, ¶ 34, 367 Mont. 503, 291 P.3d 1187. That floor does not support the State's position.

As to the State's "conduct" assertion, such "mere labels" do not fool the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Speech is not the opposite of "conduct"; speech includes both "the spoken or written word" and "expressive conduct." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). By its terms, § 213(1)(a) regulates "communicat[ions] with a person." By its terms, then, the "privacy in

[2] The Wyoming Supreme Court split three to two on the pertinent issue, and the dissenting opinion offers the better analysis. *See Lewis Dugan*, 451 P.3d. at 749–53 (Davis, C.J., & Fox, J., dissenting).

communications" statute is about communication, expressive conduct, and speech, and not non-expressive, non-speech conduct.[3]

Section 213(1)(a) additionally discriminates by communicative content. The State would have it that a statute is "content based" if it regulates a communication's "idea" whereas a statute is not "content based" if it regulates the communication's "purpose." (Appellee's Br. at 20.) But that is not what the law says. "The commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys," and a statute that regulates speech "by its function or purpose" draws a distinction "based on the message a speaker conveys." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (citation omitted). Such a law applies to a person "because of

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[3] If the State is intimating (without arguing) that § 213(1)(a) is confined to the First Amendment's "speech incident to criminal conduct" exception, that is incorrect. The exception classically applies to solicitation of another crime. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 492 (1949). The exception is not circular. It cannot justify a statute that criminalizes speech by rendering the criminalized speech incident to the criminal conduct of violating the selfsame statute. If that were permitted, the exception would swallow the point of the First Amendment—to protect speech from the government passing laws illegalizing speech. *United States v. Matusiewicz*, 84 F. Supp. 3d 363, 369 (D. Del. 2015).

what [his or her] speech communicate[s]," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010), and cannot be "justified without reference to the content of the regulated speech," *Reed*, 576 U.S. at 164 (citation omitted). Section 213(1)(a) fits the definition. Section 213(1)(a)'s restriction on certain profane or lewd language, for instance, is obviously about the communication's content. And § 213(1)(a)'s restriction on annoying or offending purposes, for instance, regulates speech "by its function or purpose," which qualifies as regulating "based on the message a speaker conveys." *Reed*, 576 U.S. at 163. Because it is impossible to find a person guilty of violating § 213(1)(a) without analyzing the communicative content, § 213(1)(a) cannot be "justified without reference to the content of the regulated speech." *Reed*, 576 U.S. at 164. Section 213(1)(a) is therefore a content-based regulation of speech.

Given its content discrimination, the only way to quickly counteract a presumption of § 213(1)(a)'s unconstitutionality would be if the statute's proscribed content is confined to free-speech exceptions. *See United States v. Alverez*, 567 U.S. 709, 715–19 (2012); *Cf. Mont. Cannabis Indus. Ass v. State*, 2016 MT 44, ¶¶ 63–64, 382 Mont. 256,

368 P.3d 1131 (applying lesser scrutiny to a statute falling within the "commercial speech" exception). But *State v. Dugan*, 2013 MT 38, 369 Mont. 69, 303 P.3d 705, rules out such a claim—the *Dugan* Court remanded for Dugan's trial under § 213(1)(a) for speech that the Court explicitly found did not fall within a free speech exception. *See Dugan*, ¶ 49 ("Dugan's words do not fall under one of the categorical exceptions to free speech protections guaranteed by the Montana and United States Constitutions."); *Dugan*, ¶ 73 (remanding for trial under § 213(1)(a)). As a content-based restriction not confined to First Amendment exceptions, § 213(1)(a) must be presumed invalid and unconstitutional. *Stevens*, 559 U.S. at 468.

B. Section 45-8-213(1)(a) is overbroad and fails strict scrutiny.

As a presumptively invalid statute restricting speech based on content, § 213(1)(a) is subject to "the most exacting scrutiny." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994). Strict scrutiny requires that the State prove § 213(1)(a) is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987). Such a content-based law failing strict scrutiny is facially

unconstitutional and "overbroad in the sense of restricting more speech than the Constitution permits." *R.A.V.*, 505 U.S. at 381 n. 3.

Rather than identify a compelling interest, the State broadly cites two cases for the proposition that § 213(1)(a) is constitutional. One of those cases is *State v. Lance*, 222 Mont. 92, 721 P.2d 1258 (1986), in which this Court upheld Mont. Code Ann. § 45-5-203, which defines the offense of intimidation. The State repeatedly equates § 213(1)(a) to § 45-5-203. (Appellee's Br. at 17, 20.) But the comparison is inapt. Section 45-5-203 covers only true threats, which are not protected speech. *Lance*, 222 Mont. at 104, 721 P.2d at 1266. By contrast, § 213(1)(a) is not limited to true threats. *Dugan*, ¶ 48 ("Dugan's speech did not constitute an unprotected true threat."). Accordingly, § 45-5-203's constitutionality does not impart the same to § 213(1)(a).

The State also cites *Dugan* for its holding that statements made "with the purpose to terrify, intimidate, threaten, harass, annoy or offend" can all be "proscribed without violating the Montana and United States Constitutions." *Dugan*, ¶¶ 50, 64. But as the opening brief explains (Appellant's Br. at 20–24), that holding is manifestly wrong and should be overruled. *Dugan* asserts its "purposes" holding *ipse*

dixit, without citation or justification. (Appellant's Br. at 17–18 (citing *Dugan*, ¶¶ 50, 64, 73).) While the State argues § 213(1)(a)'s purposes mean § 213(1)(a) does not regulate speech (Appellee's Br. at 10, 20–21) or make the statute like § 45-5-203 (Appellee's Br. at 17, 20), this brief has explained why both arguments are untenable. (Supra at 2–4, 6.)

At base, neither the State's brief nor *Dugan* comes to terms with there being no "purposes" exception to the First Amendment. (Appellant's Br. at 23.) Such an exception has never been announced by the U.S. Supreme Court, and the U.S. Supreme Court is not in the business of minting (or letting other courts mint) new free speech exceptions. *See Alvarez*, 567 U.S. at 717. Establishing a new "purposes" exception would contradict that, "[u]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (Roberts, C.J., controlling plurality opinion). What is more, there could be no compelling governmental interest to outlaw mere offensive or annoying speech when such disagreeable purposes are constitutionally-protected reasons to speak. *See Cohen v. California*, 403 U.S. 15 (1971) (addressing "offensive"

speech); *Coates v. City of Cincinnati*, 402 U.S. 611, 615–16 (1971) (addressing "annoying" speech). Because the State has not shown § 213(1)(a) is necessary to serve a compelling governmental interest or narrowly tailored to any First Amendment exception, § 213(1)(a) does not withstand strict scrutiny and is unconstitutional.

Overbreadth analysis leads to the same conclusion. The State invokes § 213(1)(a)'s "legitimate sweep." (Appellee's Br. at 12 (citing, *e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).) Section 213(1)(a)'s legitimate sweep is narrow because § 213(1)(a) regulates "communication[s]" alone and does not apply to any non-speech conduct. *Cf. State v. Lilburn*, 265 Mont. 258, 269, 875 P.2d 1036, 1043 (1994) (upholding a statute against an overbreadth challenge because the statute's legitimate sweep is broad in that it primarily regulates *non-speech* conduct). Only communications that otherwise happen to fall within First Amendment exceptions could be constitutionally prosecuted under § 213(1)(a). *Turner*, 512 U.S. at 641. But § 213(1)(a)'s terms do not require the prosecuted speech to fall within such an exception, *see Dugan*, ¶ 72, and the State rejects instructing a jury on

such exceptions. (Appellee's Br. at 35–37.) Section 213(1)(a)'s "legitimate sweep" is narrow indeed.

By contrast, § 213(1)(a)'s unconstitutional overbreadth is "real" and "substantial." *Broadrick*, 413 U.S. at 615. As explained in the opening brief (Appellant's Br. at 16–19, 24), the State in *Dugan* and *In re C.S*, DA 14-0230, used § 213(1)(a) to prosecute one-time, spontaneous epithets falling under no exception to the First Amendment. These real prosecutions cannot be dismissed as "hypothetical." (*Contra* Appellee's Br. at 19.) Nor does this Court's resolution of *C.S.* in an order cancel the fact of C.S.'s prosecution. (*Contra* Appellee's Br. at 19–20.) Orders like the one resolving *C.S.* are not marked "noncite" and are citable. *See, e.g.*, *State v. Sedler*, 2020 MT 248, ¶ 11, 401 Mont. 437, 473 P.3d 406 (citing such an order). Moreover, *C.S.* is not cited for law but for fact—the fact that the State has repeatedly used § 213(1)(a) to punish people (including children) for crude yet spontaneous and protected free speech. (*See* Appellant's Br. at 18–19, 24, 29.)

Finally, the State proves too much by dismissing all other applications of § 213(1)(a) to protected speech as "hypothetical." (*See* Appellee's Br. at 19.) A First Amendment overbreadth claim by nature

examines a statute's application and chilling effect upon speech not before the Court—in other words, "hypothetical" prosecutions. *See, e.g.*, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (demonstrating the statute's overbreadth by imagining the challenged law's application to a hypothetical autobiography). The question, nonetheless, is whether the statute, by its terms, constitutes a real and substantial threat to potential protected communications. *Broadrick*, 413 U.S. at 615. And here, the State notably does not dispute that § 213(1)(a) is usable to prosecute any and all of the communications exampled in the opening brief. (*See* Appellant's Br. 25; Appellee's Br. at 11–22.) Because § 213(1)(a) is unhinged from any First Amendment exceptions, § 213(1)(a) threatens and chills all such free speech.

In sum, § 213(1)(a) is not a carefully crafted speech law. As a result, it cannot withstand strict scrutiny or First Amendment overbreadth analysis. *Dugan*'s "purposes" holding, *see Dugan*, ¶¶ 50, 64, should be overruled because it cannot be constitutionally justified. This Court should strike down § 45-8-213(1)(a) (2015, 2017) as facially unconstitutional.

II. Count 2 and 3 are reversible regardless of § 45-8-213(1)(a)'s unconstitutionality.

A. Counts 2 and 3 are reversible because the jury received instructions that altered and substantively amended the elements of those counts.

Substantive amendments are prohibited at trial. Mont. Code Ann. § 46-11-205(1); *State v. Spotted Eagle*, 2010 MT 222, ¶¶ 13, 17, 358 Mont. 22, 243 P.3d 402. Here, Instructions 22 and 23 amended the substance of Counts 2 and 3. (Appellant's Br. at 41–44.) Seeking to avoid reversal, the State argues (1) that Instruction 22 did not substantively amend Count 2, (2) that the power to instruct the jury overrides the prohibition on substantive amendments, and (3) that prohibited substantive amendments may be affirmed as harmless. (Appellee's Br. at 38–41.) Each argument fails.

1. The alleged elements are the substance of a charge, and the jury instructions changed those elements as compared to the charging documents.

The State on appeal does not appear to contest that Instruction 23, which instructed the jury on Count 3, altered the elements that the Information had alleged in Count 3. (*See* Appellee's Br. at 38–41.) Specifically, Instruction 23 added new elements of using obscene, lewd,

or profane language with purposes to harass, annoy, or offend and dropped the charged elements of making a threat with purposes to threaten or intimidate. (Appellant's Br. at 42–43 (citing D.C. Doc. 36.1; D.C. Doc. 53, Instr. 23).) Because Instruction 23 indisputably changed the elements of the charged offense—and that is the definition of a substantive amendment, *State v. Hardground*, 2019 MT 14, ¶ 10, 394 Mont. 104, 433 P.3d 711—Instruction 23 substantively amended the charge.

As to Instruction 22 and Count 2, however, the State argues there was no alteration of the elements. (Appellee's Br. at 39.) Because the State's argument centers on the Information's supporting affidavit rather than the Information itself (*see* Appellee's Br. at 39), the State implicitly recognizes that, just looking at the Information and Instruction 22, the elements are different: Indeed, such a comparison establishes Instruction 22 added new elements of obscene, lewd or profane language with purposes to harass, annoy or offend and dropped the charged elements of purposes to intimidate or threaten. (Appellant's Br. at 42–43 (citing D.C. Doc. 36.1; D.C. Doc. 53, Instr. 22).) The State, however, contends Instruction 22 did not really change the

elements because the Information's supporting affidavit (but not the Information itself) alleged Bill used "threatening and offensive language" in the charged communication. (Appellee's Br. at 39.)

The State's argument that the affidavit's "threatening and offensive language" allegation encompassed the change of elements in Instruction 22 fails by requiring an implausible reading of the Information and affidavit. An information must provide a "plain, concise, and definite statement of the offense charged." Mont. Code Ann. § 46-11-401(1). While an information's supporting affidavit may supplement the notice provided in the information, the two together must still support a "common understanding" and "allow[] a person to understand the charges against him." *State v. Wilson*, 2007 MT 327, ¶ 25, 340 Mont. 191, 172 P.3d 1264 (citation omitted).

The State's argument fails the test of common understanding. The supporting affidavit alleging "threatening and offensive language" did not provide notice that Count 2 encompassed anything other than the elements that the State specifically charged under Count 2—that of a threat to Stacey, communicated over the phone to Sam, spoken with a purpose to intimidate, threaten, or harass. (D.C. Doc. 36.1.) Reading

the Information and affidavit together would not inform a defendant that the charge was instead about obscene, lewd, or profane language, as Instruction 22 told the jury. Such a reading disregards crucial context: Count 1 in the Information specifically alleged obscene, lewd, and profane language, whereas Count 2 did not. (D.C. Doc. 36.1.) Reading an allegation of obscene, lewd, and profane language into Count 2 would contradict the unmistakable meaning of those elements being specifically charged in Count 1 but not in Count 2.

The State's citations do not support the State's position. (*See* Appellee's Br. at 39 (citing *State v. Hanna*, 2014 MT 346, 377 Mont. 418, 341 P.3d 629; *State v. Lacey*, 2012 MT 52, 364 Mont. 291, 272 P.3d 1288).) The charge in *Hanna* was of a general violation of the robbery statute, such that the trial court was authorized to instruct the jury on all possible elements that could comprise robbery. *Hanna*, ¶ 20. Here, the charge in Count 2 in the Information was not general and instead selected and charged particular elements. (*See* D.C. Doc. 36.1.) Further, in *Lacey*, the supporting affidavit specified that the basis for the "without consent" element of the sexual assault charge included the complainant's intoxication, such that an instruction on incapacity due

to intoxication was within the charge. *Lacey*, ¶ 35. Here, the supporting affidavit did not indicate Count 2 was based on obscene, lewd, or profane language and a purpose to annoy—none of which the Information alleged but upon which the jury was instructed it could find guilt.

Because Instructions 22 and 23 altered the elements charged in Counts 2 and 3, Instructions 22 and 23 substantively amended Counts 2 and 3. *See Hardground*, ¶ 10.

2. Authority to instruct on the law applicable to the charged offense does not authorize substantively amending the information by instructing on inapplicable, uncharged law.

The Sixth Amendment of the United States Constitution and Article II, § 24 of the Montana Constitution require notifying the accused of "the nature and cause of the accusation." *See also In re Oliver*, 333 U.S. 257, 273 (1948) (applying the notice requirement to the states through U.S. Const. amend. XIV). Montana statutory law mandates such notice of the charge occur at least five days before trial; substantive amendments to the charge within five days of trial are prohibited. Section 46-11-205(1). A jury instruction that permits a jury to find the defendant guilty of something other than what he was

charged with constructively amends the substance of the State's charge past the § 46-11-205(1)'s five-day deadline. *Spotted Eagle*, ¶ 13. That is prohibited. *Spotted Eagle*, ¶ 13.

The State claims that, *Spotted Eagle* notwithstanding, a trial court is authorized to instruct the jury on any and all law that the trial evidence implicates. (*See* Appellee's Br. at 39–40.) The State's claim is meritless. The government's burden at trial is to prove the charge as stated in the notice to the defendant, *In re Winship*, 397 U.S. 358, 364 (1970), not any and all crimes the government may produce evidence of at trial. Permitting the government to enter trial evidence, receive instructions, and get a verdict upon an offense that it has not charged before trial would utterly undermine the right to notice. It is impermissible for trial evidence and jury instructions to "broaden[] the possible bases for conviction from that which appeared" in the charging documents. *United States v. Miller*, 471 U.S. 130, 138 (1985) (citing *Stirone v. United States*, 361 U.S. 212, 213 (1960)).

Said differently, a trial court's instructional authority does not include amending the State's charge. A court has authority to "fully and fairly instruct the jury regarding the *applicable* law." *State v.*

Archambault, 2007 MT 26, ¶ 25, 336 Mont. 6, 152 P.3d 698 (emphasis supplied). But it is the government that, by choosing the charge, defines the applicable law upon which a jury may convict. *See Winship*, 397 U.S. at 364 (stating the government's burden at trial is to prove what it has charged, not something else); *State v. Williams*, 2010 MT 58, ¶ 20, 355 Mont. 354, 228 P.3d 1127 (recognizing the judiciary "must take the case as it comes" given the government's choice of charges). *Spotted Eagle* makes this point when discussing why jury instructions adding an uncharged element are not acceptable even if they do not misstate the general law:

> [W]hile Instructions 3A and 4A are accurate statements of law generally, they are not accurate statements of the law as applicable in this case. Spotted Eagle was specifically charged with causing bodily injury to a partner. The jury should not have been instructed on the law regarding reasonable apprehension of bodily injury because that was never charged.

Spotted Eagle, ¶ 15. Whatever the trial evidence, the State's burden is to prove the offense as it is charged, *Winship*, 397 U.S. at 364, and a jury should not be instructed on elements that were never charged, *Spotted Eagle*, ¶ 15.

In this case, Instruction 22 and 23 instructed on elements that were never charged, constructively amending the substance of the charges. Such amendment through instruction is impermissible. *Spotted Eagle*, ¶¶ 13, 15, 17.

3. Prohibited substantive amendments are per se prejudicial and automatically reversible.

The State argues that even if Instructions 22 and 23 substantively amended Counts 2 and 3, this Court should hold the error harmless. (Appellee's Br. at 40–41.) The State's argument conflicts with the law.

Contrary to the State's argument, once a court determines a substantive amendment has occurred—and that the jury returned a verdict upon a substantively different offense than the one that the defendant was charged with and arraigned upon—reversal requires no additional showing of prejudice. Section 46-11-205 permits amendments as to form so long as there is no demonstrable prejudice, but the statute prohibits amendments as to substance within five days of trial without noting an additional showing of prejudice. *See* § 46-11-205(1)–(3). For decades, this Court has interpreted this dichotomy in § 46-11-205's language—requiring prejudice to prohibit amendments as to form but no additional showing of prejudice to prohibit amendments

as to substance—to mean a prohibited substantive amendment is per se prejudicial and automatically reversible. *State v. Brown*, 172 Mont. 41, 45–46, 560 P.2d 533, 535–36 (1976). Thus, this Court has never entertained "harmless error" arguments when reversing due to prohibited substantive amendments. *See Hardground*, ¶¶ 17–19; *Spotted Eagle*, ¶¶ 13–16; *City of Red Lodge v. Kennedy*, 2002 MT 89, ¶¶ 16–17, 309 Mont. 330, 46 P.3d 602; *Brown*, 172 Mont. at 45–46, 560 P.2d at 535–36; *State v. Knight*, 143 Mont. 27, 30–31, 387 P.2d 22, 23–24 (1963).[4]

Because prohibited substantive amendments are per se prejudicial and automatically reversible, the State's harmless error argument is misplaced. Instructions 22 and 23 permitted Bill's jury to find him guilty based on elements with which Bill was not charged before trial. Due to those errors, the verdicts as to Counts 2 and 3 should be reversed.

[4] Federal courts also consider such errors per se prejudicial and automatically reversible. *E.g.*, *United States v. Farr*, 536 F.3d 1174, 1184–85 (10th Cir. 2008) (citing *Stirone*, 361 U.S. at 217); *United States v. McCourty*, 562 F.3d 458, 470 (2d Cir. 2009).

B. Insufficient evidence supports jurisdiction over Count 3.

Count 3 is also subject to dismissal for the State's failure to prove the District Court's jurisdiction over that charge. (*See* Appellant's Br. at 37–40.)

In response, the State asserts Bill's jury determined Bill committed Count 3 in Montana. (Appellee's Br. at 30.) That is false. Bill's jury was not instructed to determine if Bill committed the offense in Montana. (*See* D.C. Doc. 53, Instr. 22 (instructing on elements of Count 3).) In any event, a court's jurisdiction cannot be conferred on a court by a jury; it is a question for the court itself. *See Stanely v. Lemire*, 2006 MT 304, ¶ 52, 334 Mont. 489, 148 P.3d 643.

The State also argues jurisdiction may be established by circumstantial evidence. (Appellee's Br. at 29, 31.) That is true, but it does not mean the particular circumstantial evidence in this case established jurisdiction. The State cites cases addressing extremely strong circumstantial evidence of location. In *State v. Jackson*, 180 Mont. 195, 200–01, 589 P.2d 1009, 1013–14 (1979), the defendant was charged with theft, at least four witnesses testified the defendant had possessed the stolen items in a parking lot located in Billings, and

venue was established by taking judicial notice that Billings is in Yellowstone County. *Jackson*, 180 Mont. at 200–01, 589 P.2d at 1013–14. Similarly, in *State v. Campbell*, 160 Mont. 111, 118, 500 P.2d 801, 805 (1972), evidence established the charged assault took place at a bar in Butte, and venue was established by taking judicial notice that Butte is in Silver Bow County. *Campbell*, 160 Mont. at 118, 500 P.2d at 805.

Here, by contrast, we know the alleged victim was not in Montana when the alleged offense occurred. (Tr. at 179–80.) We also know the defendant was not seen or otherwise traced (whether by phone records, financial transaction records, or any of the many methods the State may use to establish a person's location) to anywhere in Montana at or near the time of the alleged offense. (Tr. at 164, 188.) The only evidence for jurisdiction comes from Sam testifying Bill made a threat that he was "on the way" to the Whitefish store. No additional facts establish where Bill was allegedly calling from or where he would have been on his way to the store from. A jurisdictional fact in a criminal case must be proven beyond a reasonable doubt. *City of Helena v. Frankforter*, 2018 MT 193, ¶¶ 11–17, 392 Mont. 277, 423 P.3d 581. As a

matter of law, the evidence of jurisdiction over Count 3 is too thin to meet that standard. Count 3 should be dismissed.

C. Count 2's charge of a threat to a third party does not state an offense under § 45-8-213(1)(a).

Count 2 also requires dismissal because the Information, alleging a threat to a third party, does not state an offense under any of § 213(1)(a)'s *actus reus* clauses, including the clause prohibiting "threatening to inflict injury or physical harm to the person or property of the person." The issue is that § 213(1)(a)'s threat clause is limited to threats to the person or property of the person receiving the communication and does not contemplate a threat to a third party who is not the recipient of the communication. (Appellant's Br. at 32–37.)

The State's counterargument hinges on interpreting § 213(1)(a)'s word "injury," which is not specifically defined by the statute, to mean the same thing as "harm," which is expansively defined by the Montana Code. (Appellee's Br. at 25–26.) This Court, however, interprets "related statutes to harmonize and give effect to each," and "[d]ifferent language is to be given different construction." *Bullock v. Fox*, 2019 MT 50, ¶ 59, 395 Mont. 35, 435 P.3d 1187. If the Legislature intended § 213(1)(a) to proscribe threats of "harm" as statutorily defined, the

Legislature would have used that term. Further, when the Legislature has elsewhere proscribed threats to third parties—and even in statutes employing "harm"—that proscription has been communicated in clear terms. *See* Mont. Code Ann. §§ 45-5-203(1) (proscribing threats to "inflict physical harm on the person threatened or any other person"), 45-5-220 (proscribing stalking that causes a person to "fear for the person's own safety or the safety of a third person"), 45-7-102(1)(a) (proscribing threats to "harm to any person, the person's spouse, child, parent, or sibling"). Section 213(1)(a)'s proscription of a threat "to inflict injury or physical harm to the person or property of the person" does not so refer to third parties.

Section 213(1)(a)'s use of different language than statutes that do proscribe threats to third parties means § 213(1)(a) should be given a different, more limited construction. *See Bullock*, ¶ 59. Such a more limited construction is consistent with § 213(1)(a)'s language referring to the threat being to the communication recipient's "person or property." (*See* Appellant's Br. at 33–34.) Such a more limited construction is also consistent with the rule of lenity, which requires resolving ambiguities about the § 213(1)(a)'s coverage in favor of the

narrower reading. (Appellant's Br. at 34 (citing *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019)).) Because § 213(1)(a) does not contemplate threats to third parties—or at least does not unambiguously contemplate threats to third parties—Count 2's charge of a threat to a third party does not state an offense and should be dismissed.

Respectfully submitted this 15th day of December, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 4,777, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Alexander H. Pyle
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CERTIFICATE OF SERVICE

I, Alexander H. Pyle, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 12-15-2020:

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