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.

BRIEF OF APPELLEE

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Did the district court correctly deny Lamoureux's motion to dismiss the charges in their entirety based on the alleged facial overbreadth of Mont. Code Ann. § 45-213(1)(a) (privacy in communications)?

2. Did the district court correctly deny Lamoureux's motion to dismiss Count II for failure to state an offense under the statute?

3. Did the district court correctly deny Lamoureux's motion to dismiss Count III for lack of jurisdiction?

4. Did the district court fully and fairly instruct the jury on the applicable law in accordance with the evidence presented at trial?

STATEMENT OF THE CASE

Appellant William Frederick Lamoureux (Lamoureux) appeals from his judgment of conviction for three counts of felony privacy in communications. (D.C. Docs. 36.1, 54, 56, 64, 67; Tr. at 259-60.) Specifically, Lamoureux was foundguilty under Mont. Code Ann. § 45-8-213(1)(a) (2017), for communicating on three occasions by electronic communication (one phone call to Ashley Dunigan (Ashley) and two phone calls to Sam McGough (Sam)), with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, and, in so communicating, used obscene, lewd, or profane language; suggested lewd or lascivious acts; and/or

threatened to inflict injury or physical harm to the person or property of the person. (D.C. Docs. 36.1, 53 (Jury Instrs. 21-23), 56.)

The district court sentenced Lamoureux to three concurrent 5-year terms in Montana State Prison, with no time suspended; recommended conditions of parole; imposed certain financial obligations (but waived others); and granted 253 days credit for time served. (D.C. Docs. 62, 64; Sent. Tr. at 46-48.) The district court took into account Lamoureux's approximately 19 prior misdemeanor convictionswhich included DUI, assaults, and other privacy in communication convictions. (9/6/18 Tr. at 47.) The court also considered Lamoureux's "escalating behavior"—horrific threats and anger directed to the family which only got worse and worse over the course of years. (*Id*.; *see id*. at 15-16, 18-19, 25-28; D.C. Doc. 61 (victim impact statements attached to presentence investigation report (PSI)).) Lamoureux does not challenge his sentence on appeal.

STATEMENT OF THE FACTS

Stacey McGough (Stacey) is from Whitefish and, at the time of trial, had lived there for 30 years. (Tr. at 161.) Stacey is the owner of a jewelry store in Whitefish (McGough & Company) originally owned by her parents, where Stacey had worked since 1990. (Tr. at 161-62, 164, 176.) Stacey's father, Sam, still owned the building where the jewelry store was located. (Tr. at 165, 177.) Stacey had

five employees at the store, including a sales associate named Ashley. (Tr. at 162, 166-67.)

For 16 of her 30 years in Whitefish, Stacey was married to Lamoureux—from 1993 until their divorce in 2009. (Tr. at 161.) They had two children together, A. and H., who were 23 and 20 years old at the time of trial. (*Id*.) In the 8 or 9 years since their divorce, Stacey acknowledged that she and Lamoureux "have had [their] disagreements." (*Id*.) Sam had lived in Whitefish about 32 years, had known Lamoureux roughly 25 years, and considered himself very familiar with Lamoureux. (Tr. at 177.)

On September 20, 2017, Ashley was working at the jewelry store when a call came in from Lamoureux identifying himself as "Sam's son-in-law," and he talked to another employee, Sue, for about 20 minutes. (Tr. at 167-69.) After Sue hung up, Lamoureux called again and Ashley answered. (Tr. at 169.)

Ashley knew it was Lamoureux because she recognized his voice and she had previously spoken to him on the phone, probably ten other times—calls in which "he said his name . . . said I'm Sam's son-in-law." (Tr. at 169-70, 173.) Ashley testified that he recognized Lamoureux's voice because he had previously identified himself to her in phone calls, and because of the context of the conversations related to the store or to Stacey and her family. (Tr. at 174.) Also, Stacey had previously identified Lamoureux for Ashley (using a newspaper photo)

so that the jewelry store staff would know who he was "if he were ever to call or come in." (Tr. at 167.)

Lamoureux's calls to the store came late in the afternoon and Lamoureux wanted phone numbers for Sam and for H. (Tr. at 170.) Lamoureux was "[a]ggressive, angry, drunk." (*Id*.) Ashley told him she was not able to give him those numbers, and Lamoureux said, "Fuck you, I'm going to get you fired." (*Id*.) He dropped the phone and hung up, but then called again. (*Id*.) Ashley recounted the conversation: "So he said I want those phone numbers, and I said no, I can't give you those phone numbers. He shouted bullshit at me, and then told me he was going to kiss me and come down to the store and slap my ass." (Tr. at 171.)

Ashley was very concerned that Lamoureux was going to come down to the store, and she was afraid. (Tr. at 171-72.) So she and Sue closed and locked the store early, called the police, and let the folks at the quilt shop next door know what was going on. (*Id*.) Ashley did not want to walk out of the store alone, and she called her husband to come down and be with them while they closed up. (*Id*.)

On October 12, 2017, Sam received a call from Lamoureux who had been drinking and sounded angry. (Tr. at 178.) Sam knew Lamoureux's voice very well and he knew it was Lamoureux calling. (*Id*.) Sam testified that Lamoureux said, in reference to Stacey, "I want to kill that fucking cunt. . . . I'm going to stuff her in a culvert for the skunks to eat her. . . . I'm going to kill her now." (*Id*.) Sam

considered Lamoureux's language to be profane, offensive, threatening, and harassing. (Tr. at 179.) Because Lamoureux had called and was threatening to kill his daughter Stacey, Sam contacted the Whitefish police and asked them to go down to the jewelry store, check on Stacey, walk her to her car, and make sure that she was safe. (*Id*.)

On November 7, 2017, Sam received another phone call from Lamoureux, at a time when Sam was in New York traveling. (Tr. at 179.) This time Lamoureux said, "I'm going to go kill her now. I want to go shoot her in the face with my .45 and watch her eyes bulge out. I'm going to kill that fucking cunt and then I'm going to put her in the garbage bin in back and set it on fire." (Tr. at 179-80.) Once again, Sam knew it was Lamoureux—he knew his voice very well and the subject matter was the same as before, all about Stacey. (Tr. at 180.) Lamoureux said he was on his way there: "I'm on my way, I'm going to kill her." (*Id*.)

In addition, Lamoureux told Sam he was going to destroy the jewelry store building: "I'm going to burn your building down so that she won't have a job." (*Id*.) Sam said that would only hurt him, more so than Stacey. (*Id*.)

Again, Sam considered Lamoureux's language to be profane, threatening to him, offensive, and harassing. (Tr. at 180.) Sam told Lamoureux to stop calling, to stop talking about "my daughter" like that, and made it clear that it was offensive and threatening to him. (Tr. at 184-85.)

Sam knew that Lamoureux was a resident of Flathead County and lived on the way to nearby Columbia Falls—evidence that was undisputed. (Tr. at 181; *see* Tr. at 30 (district court took judicial notice that venue was proper, ruling that the "[criminal conduct] occurred here in Flathead County and I have jurisdiction"), 135-36 (Lamoureux conceded he lived in Flathead County and therefore consented to venue).) Sam assumed that Lamoureux was on his way to Stacey's from where he lived. (Tr. at 183.) Sam also knew that Lamoureux owned a ".45," which was what he threatened to shoot Stacey with. (Tr. at 181.) Sam perceived Lamoureux's threats to be very real—"he was very threatening." (*Id*.) Accordingly, Sam called Stacey and law enforcement, and "they went down and . . . circled her neighborhood for awhile to make sure she was safe." (Tr. at 182.)

Although Stacey was not the recipient of Lamoureux's phone calls, she did hear about them, understood that she was the subject of the calls, and had conversations with law enforcement about them. (Tr. at 162.) Stacey was scared—"terrified"—that the threats Lamoureux made on the phone calls were very real. (Tr. at 163.) In response to the calls and the threats expressed in them, Stacey requested extra law enforcement patrols around her home; installed an alarm and camera system in her home; installed a camera system in the jewelry store; upgraded the alarm system in the store; and had a new telephone system

installed. (Tr. at 163.) The Whitefish police perceived Lamoureux's phone calls as "real threats" and took them seriously. (Tr. at 190.)

The charges against Lamoureux

The Amended Information charged three (of the original four) counts of privacy in communications as felonies based on Lamoureux's two prior privacy in communications convictions in Whitefish City Court in 2016. (D.C. Docs. 35-36.1 (attached hereto as Apps. A and B); *see* D.C. Docs. 1-3, 61 at 2-3 (PSI, criminal history); 7/5/18 Tr. at 5-6.)

The three charges each alleged that Lamoureux violated the privacy in communications statute and cited the pertinent provisions of the crime and the punishment; that such violations occurred in Flathead County, Montana; that he acted purposely or knowingly; that he communicated with another person by telephone; and that he did so with one or more of the purposes listed in the statute—to intimidate, threaten, harass, annoy, and/or offend. The charges were different in the alleged date, the recipient of the call, and what Lamoureux communicated in each instance. (*See* App. B; Tr. at 17.) Count I was the September 20, 2017, communication with Ashley in which Lamoureux used obscene, lewd and profane language, and suggested lewd and lascivious acts. Count II was the October 12, 2017, communication with Sam in which Lamoureux

threatened to kill his daughter and, according to the affidavit, used "threatening and offensive language." (App. A (Aff. at 3).) And Count III was the November 7, 2017, communication with Sam in which Lamoureux threatened to shoot his daughter in the head and burn down his store, and her home.

Lamoureux's motions to dismiss

Lamoureux filed two motions to dismiss before trial which the district court denied: a motion to dismiss Count II (original Count III) for failure to state an offense (D.C. Docs. 14, 19, 25, 46; Tr. at 17-18); and a motion to dismiss the Information on the grounds that Mont. Code Ann. § 45-8-213(1)(a) was constitutionally overbroad under the "freedom of speech" clauses of the United States and Montana Constitutions. (D.C. Docs. 15, 18, 24, 34.) At the close of evidence, Lamoureux moved to dismiss Count III on the ground that there was insufficient evidence that the offense occurred in Montana and the district court lacked jurisdiction; the court denied this motion also. (Tr. at 200-03.)

The record regarding these motions will be further referenced in the Argument, *infra*.

Jury instructions

The district court instructed the jury that Lamoureux had been charged by Information with three counts of privacy in communications alleged to have been committed in Flathead County, State of Montana, on September 20, October 12, and November 7, 2017. (D.C. Doc. 53 (Instr. 5); Tr. at 151, 230.) The district court gave four instructions to the jury regarding the law of privacy in communications: the language of the offense of privacy in communications in its entirety and the elements of Counts I, II, and III. (D.C. Doc. 53 (Instrs. 19, 21-23) (attached hereto as Apps. C-F).)

SUMMARY OF THE ARGUMENT

The district court correctly denied Lamoureux's motion to dismiss the prosecution on the grounds that Mont. Code Ann. § 45-8-213(1)(1) was facially overbroad in violation of constitutionally guaranteed free speech. The court based its decision on this Court's definitive holdings in *Dugan*—a decision which Lamoureux has not shown to be "manifestly wrong" and, therefore should not be overruled.

This Court has already settled the issue raised anew by Lamoureux in this appeal: that the privacy in communications statute is not constitutionally overbroad. The statute does not criminalize protected speech, but only

communications made with the purpose to terrify, intimidate, threaten, harass, annoy, or offend—like Lamoureux's telephone calls in this case. As *Dugan* held, the requirement that the State prove that statements were made with a specific intent—through which merely offensive or disagreeable words become conduct that causes harm to other individuals and society at large—removes the danger of criminalizing protected speech.

The privacy in communications statute does not suppress or infringe upon Lamoureux's, or anyone else's, freedom to engage in the uninhibited, robust, and wide-open expression of ideas or a suitable level of discourse within the body politic. But Lamoureux did not engage in such lofty and solemn speech when he called Ashley and Sam spewing obscenity and lewdness and threatening to commit sexual harassment or assault, homicide, and arson—all with the intent to terrify, intimidate, threaten, harass, annoy, or offend them. While the Montana Constitution guarantees that Lamoureux be "free to speak or publish whatever he [would] on any subject," the privacy in communications statute ensures that he be "responsible for all abuse of that liberty."

The district court also correctly denied Lamoureux's motions to dismiss Count II for failure to state and offense—under the plain meaning of the statute—and for lack of "territorial" jurisdiction over Count III which was established by circumstantial evidence to have occurred in Flathead County,

Montana. In addition, the district court fully and fairly instructed the jury on the applicable law, consistent with the charging documents and the evidence presented at trial.

ARGUMENT

I. The district court correctly denied Lamoureux's motion to dismiss the charges based on the facial overbreadth of Mont. Code Ann. § 45-8-213(1)(a) (privacy in communications) based on this Court's definitive precedent in *Dugan.*

A. Standard of review and applicable law

This Court reviews the denial of a motion to dismiss in a criminal case de novo. *State v. Dugan*, 2013 MT 38, ¶ 13, 369 Mont. 39, 303 P.3d 755, Rehr'g. denied at 2013 Mont. LEXIS 105 (Mar. 29, 2013), cert. denied at 571 U.S. 881 (2013).

With respect to questions of constitutional law, this Court's review is plenary, and it will examine the district court's interpretation of the law for correctness. *State v. Sedler*, 2020 MT 248, ¶ 5, 401 Mont. 437, ___ P.3d ___. "In reviewing constitutional challenges to legislative enactments, the constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt." *State v. Egdorf*, 2003 MT 264, ¶ 12, 317 Mont. 436, 77 P.3d 517 (internal quotations omitted). Thus, the party challenging a statute bears the burden of

proving it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute. *Sedler*, ¶ 5 (citing *Egdorf*, ¶ 12; *State v. Price*, 2002 MT 229, ¶¶ 27-28, 311 Mont. 439, 57 P.3d 42).

"An over-broad statute is one that is designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment." *State v. Nye*, 283 Mont. 505, 515, 943 P.2d 96, 102 (1997). The crucial question is whether the statute sweeps within its prohibitions what may not be punished constitutionally. *Dugan*, ¶ 52 (citing *City of Whitefish v. O'Shaughnessy*, 216 Mont. 433, 440, 704 P.2d 1021, 1026 (1985), *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972)).

Since *Dugan*, the Court has reaffirmed the longstanding principle that a statute is unconstitutionally overbroad only if its overbreadth is not only "'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *State v. Spottedbear*, 2016 MT 243, ¶ 15, 385 Mont. 68, 72, 380 P.3d 810 (quoting *State v. Lilburn*, 265 Mont. 258, 264-65, 875 P.2d 1036, 1040 (1994); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). The test for overbreadth, therefore, "is not whether hypothetical remote situations exist, but whether there is a significant possibility that the law will be unconstitutionally applied." *Spottedbear*, ¶ 15 (quoting *Lilburn*, 265 Mont. at 269, 875 P.2d at 1043 (citing *Broadrick*, 413 U.S. at 615)). "In short, there must be a realistic danger that the statute itself will

significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Lilburn*, 265 Mont. at 269, 875 P.2d at 1041 (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984)).

When there is no realistic danger or significant possibility that First Amendment protections will be meaningfully compromised, this Court has held consistently that any unconstitutionality should be addressed under an as-applied challenge on a case-by-case basis. *Spottedbear*, ¶ 16 (citing *Mont. Supreme Court Comm'n on the Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, ¶ 78, 334 Mont. 311, 147 P.3d 200 (unauthorized practice of law); *State v. Nye*, 283 Mont. 505, 515-16, 943 P.2d 96, 102-03 (1997) (malicious intimidation and harassment); *State v. Ross*, 269 Mont. 347, 356, 889 P.2d 161, 166 (1995) (intimidation); *Lilburn*, 265 Mont. at 269-70, 875 P.2d at 1043-44 (hunter harassment); *see New York v. Ferber*, 458 U.S. 747, 772 (1982). "To the extent that the statute may reach constitutionally protected expression, we conclude, as did the Supreme Court in *Broadrick*, 413 U.S. at 615-16, that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations where the statute is assertedly being applied unconstitutionally." *Lilburn*, 265 Mont. at 270, 875 P.2d at 1044.

B. This Court has determined that the privacy in communications act is not unconstitutionally overbroad, Lamoureux has not shown that *Dugan* is manifestly wrong, and the district court correctly relied upon it in dismissing Lamoureux's motion to dismiss.

Lamoureux argues that Mont. Code Ann. § 45-213(1)(a) is unconstitutionally overbroad and asks this Court to reconsider and overrule the Court's precedent which held that the statute was not overbroad; reopen that issue and reconsider whether the statute is facially overbroad; and dismiss all three counts of Lamoureux's judgment of conviction. (Appellant's Br. at 1, 6, 9-32.) Lamoureux makes only a facially overbreadth challenge, and does not challenge the statute as applied to his own conduct.

In *Dugan*, this Court has already settled the question raised on appeal, having determined that the privacy in communications statute under which Lamoureux was prosecuted and convicted, as it stands after the Court struck one invalid provision, is not facially overbroad in violation of the free speech protections of the Montana and United States Constitutions. That decision addressed in detail and rejected Dugan's arguments after briefing, oral argument, and denial of Dugan's petition for rehearing. (*See* Public View Docket, DA 11-0496.)

In *Dugan*, this Court:

> affirmed the district court's order denying Dugan's motion to dismiss the charge of violation of the privacy in communications statute,

> Mont. Code Ann. § 45-8-213, on the grounds that the statute was vague on its face and as applied to Dugan's prosecution for calling a victim services advocate a "fucking cunt" over the telephone, *Dugan*, ¶¶ 69-72;
>
> "reversed" the district court's conclusion that Dugan could be prosecuted under the "fighting words doctrine" because the words were not spoken "face-to-face" and the advocate "was not able to react with imminent violence," *Dugan*, ¶¶ 42-43;
>
> struck the prima facie evidence provision in the statute as unconstitutionally overbroad because it effectively proscribed the use of certain words with no regard to the defendant's intent in using them, *Dugan*, ¶ 61-63;
>
> held that neither the Montana nor the United States Constitutions prohibits the State from prosecuting a person for using certain types of language with the purpose to terrify, intimidate, threaten, harass, annoy, or offend the listener, *Dugan*, ¶¶ 50, 64;
>
> determined that the remainder of the statute encompassed only those communications which can be constitutionally prohibited, *Dugan*, ¶¶ 50, 64; and
>
> remanded the case to the district court with instructions to allow Dugan to withdraw his plea of nolo contendere and proceed to trial, at which the State must prove that Dugan knowingly or purposely used obscene, lewd, or profane language on the telephone with the purpose to offend the advocate.

Dugan, ¶ 73.

In doing so, this Court specifically addressed the United States Supreme Court's decisions in *Cohen v. Cal.*, 403 U.S. 15 (1971) and *Gooding v. Wilson*, 405 U.S. 518 (1972), as well as many other Supreme Court cases involving First Amendment challenges. This Court interpreted the Supreme Court's

First Amendment jurisprudence as establishing that "the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Dugan*, ¶ 45 (quoting *Cohen*, 403 U.S. at 25). This Court further explained that "[e]xpletives and insults, no matter how distasteful, can be constitutionally proscribed only if they fall within one of the narrow and limited categories of unprotected speech." *Dugan*, ¶ 45.

This Court concluded that the privacy in communications statute does not run afoul of these principles because "the requirement that the State prove [the defendant's] statement was made with a specific intent removes the danger of criminalizing protected speech." *Dugan*, ¶ 50. This Court concluded that while First Amendment jurisprudence dictates that the State may not generally proscribe the use of language simply because it is objectively offensive or because the language chosen actually offended a particular person, it may proscribe the knowing or purposeful use of speech that is communicated electronically for the purpose of terrifying, intimidating, threatening, harassing, annoying, or offending the recipient of the communication. *Dugan*, ¶ 61 (explaining that the prima facie evidence provision rendered the statute facially overbroad because it criminalized protected speech and drawing a distinction between the inadvertent exclamation of profanity over the telephone, such as when a person stubs his toe, and the purposeful use of profanity directed at the listener). This Court further concluded

that with the prima facie evidence provision excised from the statute, it no longer criminalizes protected speech, *Dugan*, ¶ 50, but rather criminalizes intentionally harmful activities that are not constitutionally protected. *Dugan*, ¶ 64.

Hence, in *Dugan*, this Court rejected the argument that Lamoureux makes on appeal: that the privacy in communications statute is overbroad because it prohibits constitutionally protected speech. This Court rejected Dugan's overbreadth claim when it held that "communications made with the purpose to terrify, intimidate, threaten, harass, annoy, or offend . . . can be proscribed without violating the Montana and United States Constitutions," and "the requirement that the State prove [that a] statement was made with a specific intent removes the danger of criminalizing protected speech." *Dugan*, ¶¶ 50, 64. In effect, this Court concluded that the privacy in communications statute, as excised by the Court, does not criminalize *any* protected speech. The privacy in communications statute is, as this Court and the Supreme Court have said long before *Dugan*, "narrowly tailored to accomplish the State's asserted purpose—caustic, abusive, and robust speech is fully protected until it rises to the level of threats which cause harm to society" and "'curtails no more speech than is necessary to accomplish its purpose.'" *State v. Lance*, 222 Mont. 92, 105, 721 P.2d 1258, 1267 (1986) (quoting *Vincent*, 466 U.S. at 810).

Principles of law should be positively and definitively settled so that courts, lawyers, and, above all, citizens may have some assurance that important legal principles involving their highest interests shall not be changed from day to day. *State v. Wolf*, 2020 MT 24, ¶ 21, 398 Mont. 403, 457 P.3d 218 (citing *State ex rel. Sparling v. Hitsman*, 99 Mont. 521, 525, 44 P.2d 747, 749 (1935)). *Stare decisis* is a fundamental doctrine that reflects this Court's concerns for stability, predictability, and equal treatment. *Id.* (citation omitted). "Principles of law should be definitively settled if that is possible." *State v. Long*, 216 Mont. 65, 84, 700 P.2d 153, 166 (1985) (Weber, J., concurring).

These principles, of course, do not require the perpetuation of incorrectly-decided precedent and the Court is not bound to follow a manifestly wrong decision, but very weighty considerations demand that courts should not lightly overrule past decisions. *See Wolf*, ¶¶ 21-22; *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 45, 396 Mont. 57, 443 P.3d 504; *State v. Gatts*, 279 Mont. 42, 51, 928 P.2d 114, 119 (1996); *Hitsman*, 99 Mont. at 525, 44 P.2d at 749.

Rather than demonstrate that *Dugan* was "manifestly wrong," Lamoureux rehashes the same arguments and many of the same authorities (i.e., *Cohen*) which this Court addressed in *Dugan*. He cites no authority since *Dugan* expressly criticizing or questioning the ruling, its constitutional underpinnings, or its holding that neither the Montana nor the United States Constitutions prohibits the State

from prosecuting a person for using certain types of language with the purpose to terrify, intimidate, threaten, harass, annoy, or offend the listener, and that the statute (once the offending *prima facie* presumption was eliminated) encompassed only those communications which can be constitutionally prohibited. *Dugan*, ¶¶ 50, 64.

Lamoureux lists hypothetical after hypothetical, despite the fact that the established test for overbreadth "is not whether hypothetical remote situations exist, but whether there is a significant possibility that the law will be unconstitutionally applied." *See, e.g.*, *Spottedbear*, ¶ 15; *Lilburn*, 265 Mont. at 269, 875 P.2d at 1043; *Broadrick*, 413 U.S. at 615. One of Lamoureux's "hypotheticals" is based on citation to an appeal that was dismissed on concession by the State—a case in which this Court did not issue even a "noncite" opinion; in other words, an unpublished order without determination of the merits of the underlying facts or issues, or any reasoned analysis or authority. (*See* Appellant's Br. at vii, 18-19, 24, 29 (citing *In re C.S.*, DA 14-0230).) As such, Lamoureux's repeated references to *C.S.* as "authority" are inappropriate, irrelevant to the issues in this appeal (the constitutionality of the statute and the validity of *Dugan*), and should be disregarded by this Court, if not stricken from Lamoureux's brief altogether.

> Once again we take this opportunity to stress that unpublished orders and opinions from this Court are not to be cited as precedent. Indeed, unpublished opinions begin with an unambiguous and specific directive to counsel: "the following decision shall not be cited as

> precedent." These sorts of orders and opinions are unpublished for a reason. And, we admonish counsel not to cite to or rely on such orders and opinions in the future. Moreover, when included in briefs, we give no regard to such citations.

State v. Oie, 2007 MT 328, ¶ 16, 340 Mont. 205, 174 P.3d 937.

Lamoureux asserts that the statute is content-based and effectively criminalizes disagreeable communication alone, rather than distinguish that the statute only criminalizes intentionally harmful activities—communication with the purpose to terrify, intimidate, threaten, harass, or injure, like what he was convicted for—that are not constitutionally protected. *Dugan*, ¶ 64. He fails to grasp that the statute is narrowly tailored to protect even "caustic, abusive, and robust speech . . . until it rises to the level of threats which cause harm to society" and curtails no more speech than is necessary to accomplish its purpose. *Lance*, 222 Mont. at 105, 721 P.2d at 1267; *Vincent*, 466 U.S. at 810.

Lamoureux cites cases from other States with little to no precedential authority, yet he ignores an ironically-titled case from our sister State of Wyoming which cited *Dugan* and other states' cases favorably for the proposition that obscene communications made with criminal intent are restricted not because their content communicates any particular idea but because of the purpose for which it is communicated. *Dugan v. State*, 2019 WY 112, ¶ 22, 451 P.3d 731, 739, cert. denied 140 S. Ct. 1298 (quotations omitted) (citing *People v. Kucharski*, 2013 IL App (2d) 120270, 987 N.E.2d 906, 370 Ill. Dec. 140 (Ill. Ct. App. 2013);

State v. Richards, 127 Idaho 31, 896 P.2d 357, 361-63 (Idaho Ct. App. 1995); *Perkins v. Commonwealth*, 12 Va. App. 7, 402 S.E.2d 229, 232-33, 7 Va. Law Rep. 1846 (Va. Ct. App. 1991); *Dugan*, 303 P.3d at 769-72). Like the privacy in communications statute here, such laws are not content based and they are constitutional because they are narrowly tailored to control conduct, not a substantial amount of protected speech. *Id*., ¶¶ 21-22.

The district court correctly denied Lamoureux's motion to dismiss based on *Dugan*. (D.C. Doc. 34.) The court quoted this Court's holding: "With the prima facie provision invalidated, Montana's Privacy in Communications statute legitimately encompasses only those electronic communications made with the purpose to terrify, intimidate, threaten, harass, annoy, or offend. Such communications can be proscribed without violating the Montana and United States Constitutions." (*Id*. at 2 (citing *Dugan*, ¶64).) The court recognized that this Court upheld the statute and found, as a matter of law, that "[s]uch communications can be proscribed without violating the Montana and United States Constitutions." (*Id*.) The court explained why it was bound to follow this holding from *Dugan*, despite Lamoureux's claim that it consisted of dicta :

> Nothing could drive this point home with any greater magnitude [than] Defendant's own logic. Defendant argues that because the briefs submitted in *Dugan* did not analyze the constitutionality of the statute as a whole, "nobody involved in the case gave significant attention to the gravity of the court's declaration" regarding the constitutionality of the remaining statute. . . . However, clearly, from

> their own words, one entity gave the issue significant consideration: The Montana Supreme Court. The Court found it imperative to review the prima facie issue in the context of the statute as a whole. After doing so, the Court invalidated part of the statute, and kept the rest. When doing so, the Court explicitly found the remainder of the statute to be constitutional. Thus, the [district court] does not view the Court's holding as mere dicta.

(*Id*. at 2-3.)

Therefore, the district court concluded that it could not find "Section 45-8-213, MCA, to be unconstitutionally overbroad when the Montana Supreme Court has explicitly held the opposite. *Dugan* is controlling. The Court does not dismiss Defendant's challenge as lacking in merit or support. Instead, the Court finds it is bound by *Dugan*, and therefore Defendant's efforts must be rejected." (D.C. Doc. 34 at 3.)

On appeal, therefore, this Court must conclude that the district court was correct based on the established, definitive, and correct decision in *Dugan*. Lamoureux has not carried his burden to show that the privacy in communications statute is unconstitutionally overbroad or that *Dugan* was manifestly wrong. This Court should reaffirm without reconsideration both its decision in *Dugan* and the validity and constitutionality of the statute, and it should affirm the district court's denial of Lamoureux's motion to dismiss.

II. The district court correctly denied Lamoureux's motion to dismiss Count II for failure to state an offense.

A. Standard of review and applicable law

This Court reviews the denial of a motion to dismiss in a criminal case de novo. *Dugan*, ¶ 13. When the dismissal is based upon the interpretation or construction of a statute, the Court reviews whether the district court's interpretation or construction is correct. *State v. Nelson*, 2014 MT 135, ¶ 16, 375 Mont. 164, 334 P.3d 345.

B. Under Count II and the terms of Mont. Code Ann. § 45-8-213(1)(a), Lamoureux's threat to kill Sam McGough's daughter—made to Sam by telephone with the purpose to intimidate, threaten and harass—communicated a "threat[] to inflict injury" to Sam by killing his daughter.

As pertinent to this issue, the statute provides that a person commits the offense of privacy in communication when, "with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, communicates with a person by electronic communication and . . . threatens to inflict injury or physical harm to the person or property of the person." Mont. Code Ann. § 45-8-213(1)(a). Count II alleged that Lamoureux, contrary to the provisions of Mont. Code Ann. § 45-8-213(1)(a), "knowingly or purposely, and with the purpose to intimidate, threaten and harass, communicated with another, Sam McGough, by telephone and threatened to kill his daughter[.]" (App. B at 1-2.) The affidavit in support thereof further alleged

that Lamoureux "used threatening and offensive language [and] told Sam he was planning to find Sam's daughter, Lamoureux's ex-wife, Stacey McGough, and kill her." (App. A (Aff. at 3).)

In his motion to dismiss Count II and on appeal, Lamoureux argues that Count II failed to state an offense because the threat made to Sam on the phone to kill his daughter Stacey did not amount to a threat to "inflict injury or physical harm" to Sam's "person or property," as Sam was the person to whom he communicated the threat; instead, he was only threatening to "inflict injury or physical harm" on Stacey alone, "a person other than the communication's recipient." (D.C. Docs. 14 at 2, 25 at 5; Appellant's Br. at 1, 7, 33-35.)

The district court correctly denied the motion based on the language of the crime charged and the statute, finding that Lamoureux—with his sole focus on whether the threat "to inflict injury or physical harm" language included a third party—read the statute too narrowly. (D.C. Doc. 46 at 1-2.) The court pointed out that the statute also encompassed other acts of prohibited communication, including the use of "obscene, lewd, or profane language," or suggesting "a lewd or lascivious act." (*Id*. at 2.) In addition, the statutory language as a wholereasonably encompassed "threats such as those allegedly made by [Lamoureux]"—to wit, with the purpose to intimidate, threaten and harass, Lamoureux threatened to kill Sam's daughter. (*Id*.)

Before the trial started, Lamoureux again questioned the district court whether "a threat to injure someone's daughter . . . [was] sufficient allegation to say that there was a threat to injure or physically harm Sam McGough himself." (Tr. at 17-18.) The court answered yes, and reiterated that "part of the way this is charged is broader than the threats to Mr. McGough," and that "the threat to kill his daughter is sufficient . . . to demonstrate the purpose to . . . not just threaten, but intimidate, harass Mr. McGough through the threats to his daughter." (*Id*.)

The district court's interpretation was correct based on the plain meaning of the statute and by reference to defined terms applicable to criminal offenses in general. *See State v. Booth*, 2012 MT 40, ¶ 11, 364 Mont. 190, 272 P.3d 89 (the Court construes a statute only to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted); Mont. Code Ann. §§ 45-2-101(27) ("harm"), -101(76) ("threat"). The plain meaning of "inflict injury . . . to the person," by the statute's terms and substance, must include "killing" that person's daughter—a person undoubtedly suffers a most personal injury, trauma, and loss when someone kills someone they love, be it a child or other family member.

Aside from certain legally cognizable injuries and damages that a parent undoubtedly suffers from the wrongful death of a child, countless victims in

homicide cases in courts across the State and nation express their own personal injury, loss anguish, and suffering inflicted upon them when a loved one is killed.

The district court's broader reading of the statutory language—"threatens to inflict injury or physical harm to the person"—is consistent with the statutory definitions of "harm" and "threat." In fact, Lamoureux relied on the definition of "harm" in his motion to dismiss Count II, although he apparently decided it did not support his position on appeal, because he did not cite it again. The term "harm" includes "**injury** or **anything so regarded by the person affected**, including **loss**, disadvantage, or **injury to a person or entity in whose welfare the affected person is interested**." Mont. Code Ann. § 45-2-101(27) (emphasis added). And the term "threat" means "a menace, however communicated, to: **inflict physical harm on the person threatened or any other person** or on property; . . . commit a criminal offense; . . . [or] expose a person to hatred, contempt, or ridicule." Mont. Code Ann. §§ 45-2-101(76)(a), (c), (e) (emphasis added).

The district court correctly interpreted the statute and denied Lamoureux's motion to dismiss Count II where the alleged conduct of threatening to kill Sam's daughter Stacey fell within the plain meaning and substance of the statute proscribing "threat[s] to inflict injury or physical harm to the person" which are communicated electronically with the purpose to terrify, intimidate, threaten, harass, annoy, or offend.

III. The district court correctly denied Lamoureux's motion to dismiss Count III on the ground that the court lacked "territorial" jurisdiction.

A. Standard of review and applicable law

Jurisdiction is conferred on the courts only by the Constitution or statutes adopted pursuant to the Constitution. *Stanley v. Lemire*, 2006 MT 304, ¶ 52, 334 Mont. 489, 148 P.3d 643. A challenge to the district court's jurisdiction is an issue of law, which this Court determines de novo for correctness. *Id*.; *State v. Martz*, 2008 MT 382, ¶ 16, 347 Mont. 47, 196 P.3d 1239; *In re Adoption of C.J.L.*, 2017 MT 19, ¶ 4, 386 Mont. 218, 388 P.3d 951 (citing *In re Support Obligation of McGurran*, 2002 MT 144, ¶ 7, 310 Mont. 268, 49 P.3d 626).

The Court views the sufficiency of the evidence to prove where a crime was committed in the light most favorable to the prosecution. *See State v. Dahlin*, 2004 MT 19, ¶¶ 8, 12, 319 Mont. 303, 84 P.3d 35 (a reasonable person, "after viewing the evidence in the light most favorable to the prosecution," could conclude that felony theft was committed in Golden Valley County).

B. There was sufficient evidence to establish that Lamoureux committed the offense in Count III in the State of Montana.

The Montana Constitution confers on district courts "original jurisdiction in all criminal cases amounting to felony." Mont. Const. art. VII, § 4(1); *Martz*, ¶ 21. Jurisdiction is the power and authority of a court to hear and decide the case or

matter before it. *Martz*, ¶ 21 (citations omitted). District courts in Montana have original jurisdiction over all felonies and "all public offenses not otherwise provided for." Mont. Const. art. VII, § 4(1); Mont. Code Ann. §§ 3-5-302(1)(a), 46-2-201; *Martz*, ¶ 21. A person is "subject to prosecution" in Montana for an offense that "is committed either wholly or partly within the state[.]" Mont. Code Ann. § 46-2-101(1); *see City of Helena v. Frankforter*, 2018 MT 193, ¶¶ 18-19, 22, 392 Mont. 277, 423 P.3d 581 (holding the City failed to prove whether a charged offense occurred within the municipal court's geographical jurisdiction and, accordingly, did not meet its burden of proving the court's jurisdiction over that charge).

In *Frankforter*, this Court held that the prosecution must prove proper jurisdiction at trial and, where the City "failed to present any evidence regarding where the second PFMA charge occurred," the City did not meet its burden of proving jurisdiction. *Frankforter*, ¶ 22. Although venue is not an element of the crime, it is "a jurisdictional fact that must be proved at the trial the same as any other material fact in a criminal prosecution." *Frankforter*, ¶ 13 (citations and internal quotations omitted). In so ruling, the Court overruled numerous cases "to the extent they confuse venue with jurisdiction." *Frankforter*, ¶¶ 13 n.1, 14.

However, *Frankforter* did not overrule prior cases in regard to the manner in which the prosecution may prove the jurisdiction of the trial court. In that regard,

the Court has also held that: "No positive testimony that the violation occurred at a specific place is required, it is sufficient if it can be concluded from the evidence as a whole that the act was committed in the county where the indictment is found." *State v. Jackson*, 180 Mont. 195, 200, 589 P.2d 1009, 1013 (1979), *overruled on other grounds by Frankforter*, ¶¶ 13 n.1, 14 (quoting *State v. Campbell*, 160 Mont. 111, 118, 500 P.2d 801, 805 (1972), *overruled on other grounds by Frankforter*, ¶¶ 13 n.1, 14). Thus, "[c]ircumstantial evidence may be and often is stronger and more convincing than direct evidence. . . . If, from the facts and evidence, the only rational conclusion which can be drawn is that the crime was committed in the state and county alleged, the proof is sufficient." *Jackson*, 180 Mont. at 200, 589 P.2d at 1013 (quoting *Campbell*, 160 Mont. at 118, 500 P.2d at 805). In upholding defendant's conviction for theft in Yellowstone County, the Court held that: "While the prosecution . . . did not produce any testimony specifically directed to the venue [i.e., jurisdictional] issue, a reading of the transcript shows the only rational conclusion [was] that defendant exercised control over [the stolen] property in Yellowstone County," based on testimony that he possessed the stolen property at a particular place within the City of Billings. *Jackson*, 180 Mont. at 200, 589 P.2d at 1013.

Lamoureux challenges the district court's jurisdiction over Count III on the ground that Sam was not located in the State of Montana (he was on a trip in

New York) when he received Lamoureux's threatening communication and, he says, there was no evidence presented at trial to prove that Lamoureux made the offending phone call from within the State of Montana.

Lamoureux first ignores the fact that the jury was instructed that Lamoureux was charged with the offense "alleged to have been committed in Flathead County, State of Montana." (D.C. Doc. 53 (Instr. 5); Tr. at 151, 230.) That issue was, thereby, expressly and squarely put to the jury as a part of performing its "task . . . to decide whether the Defendant is guilty or not guilty based upon the evidence and the law." (*Id*.) "American jurisprudence depends on a jury's ability to follow instructions and juries are presumed to follow the law that courts provide." *State v. Sanchez*, 2008 MT 27, ¶ 57, 341 Mont. 240, 177 P.3d 444. Thus, the jury was charged with determining whether Lamoureux was guilty of committing Count III in Flathead County, Montana—a task which this Court must presume the jury did not shirk. This Court may certainly take judicial notice that Whitefish, Columbia Falls, and Flathead County are all located within the territorial boundaries of the State of Montana.

Second, Lamoureux argues, essentially, that the district court's jurisdiction failed because there was no direct, or "positive evidence," that Lamoureux was located within the State of Montana when he communicated his threats to Sam in New York. Lamoureux's argument ignores the circumstantial evidence of

commission of this crime in Flathead County—evidence which this Court acknowledged in *Jackson* and *Campbell*, *supra*, is often "stronger and more convincing than direct evidence," and which, as the district court instructed, is an "acceptable . . . means of proof." (D.C. Doc. 53 (Instrs. 8, 11); Tr. at 155, 233.) Circumstantial evidence consists of proof of facts "from which other facts might be inferred" and from which "the jury may infer other and connective facts which follow according to common experience." (*Id*.)

The circumstantial evidence presented at trial established that Lamoureux committed Count III (and the other counts) in Flathead County. Stacey had lived in Whitefish for 30 years, worked in the downtown store almost that long, had been married to Lamoureux for 16 of those years, and had raised their children there. Stacey testified that she and Lamoureux continued to have their disagreements.

Sam had lived in Whitefish 32 years, had known Lamoureux for 25 years, and was very familiar with him. Ashley was also familiar with Lamoureux and his relationship with Stacey and her family from her experience working at the store, having spoken with him, and having been warned about him if he were to call or come in. The Whitefish police knew where Lamoureux lived and had made attempts to find him, both at his house and by calling him on the phone.

The evidence was undisputed that Lamoureux was a resident of Flathead County and lived outside of Whitefish on the way to nearby Columbia Falls. Sam

assumed that Lamoureux was on his way from where he lived to find Stacey in Whitefish. Lamoureux's very own words on the three phone calls amounted to circumstantial evidence that he committed Count III and the other offenses in Flathead County: he was going to "come down to the store and slap [Ashley's] ass;" "I'm going to kill [Stacey] now;" "I'm going to kill her now. . . . I'm on my way, I'm going to kill her. . . . I'm going to burn your building down[.]" (Tr. at 171, 178-80.) The reactions to these threatening phone calls show that Sam and Ashley feared that Lamoureux was in or around Whitefish (and therefore in Montana), was on his way there, and was presently able to act on his threats—Ashley called for protection and help closing the store, and Sam called the Whitefish police to protect Stacey at the store and at home.

The only rational conclusion from the entirety of the circumstantial evidence at trial was that Count II was committed in Flathead County, State of Montana: Lamoureux lived and resided in Flathead County; he had significant and long-term ties to the area and Stacey's family in particular; everybody knew he lived there, and that he was somewhere near Whitefish when he said he was going to the store to slap Ashley's ass, was going to burn down the store, and was on his way to kill Stacey. There was no suggestion at trial that Lamoureux was anywhere other than the place where he lived, where he had significant ties, and where he said he was going in order to commit his threatened acts.

The Amended Information charged Lamoureux with three counts of felony privacy in communication in Flathead County, State of Montana, as the jury was instructed, and the evidence as a whole was sufficient to conclude that Count III, like the other counts, occurred within the State of Montana. The district court's rulings on the issue of jurisdiction were correct: "It occurred here in Flathead County and I have jurisdiction," and "there is sufficient testimony and evidence at this point in time to exercise jurisdiction over this matter." (Tr. at 30, 203.)

IV. The district court properly and within its discretion instructed the jury.

A. Standard of review and applicable law

This Court reviews issues arising from a district court's decisions on jury instructions for abuse of the court's broad discretion. *State v. Birthmark*, 2013 MT 86, ¶ 10, 369 Mont. 413, 300 P.3d 1140. The inquiry, viewing the instructions as a whole, is whether the district court fully and fairly instructed the jury on the applicable law. *State v. Dethman*, 2010 MT 268, ¶ 12, 358 Mont. 384, 245 P.3d 30. To constitute reversible error, any mistake in instructing the jury must prejudicially affect the defendant's substantial rights. *State v. Spotted Eagle*, 2010 MT 222, ¶ 6, 358 Mont. 22, 243 P.3d 402.

As a basic rule, trial courts are required to instruct a jury on the issues or theories that are supported by the evidence. *State v. Robbins*, 1998 MT 297, ¶ 28,

292 Mont. 23, 971 P.2d 359. While the defendant is entitled to have instructions on his or her theory of the case, he or she is not entitled to an instruction concerning every nuance of his or her argument. *Ross*, 269 Mont. at 358, 889 P.2d at 167. A jury instruction "may be given when it is relevant to evidence or issues in a case, and when it is supported either by some evidence or some logical inference from other evidence presented at trial." *State v. Johnson*, 1998 MT 289, ¶ 35, 291 Mont. 501, 969 P.2d 925.

In addition, the Court will read the Information, and the affidavit in support thereof, as a whole to determine the sufficiency of the charging documents. *State v. Lacey*, 2012 MT 52, ¶ 34, 364 Mont. 291, 272 P.3d 1288.

B. The district court fully and fairly instructed the jury on the law of privacy in communications as charged in Counts I through III and supported by the evidence presented at trial and logical inferences therefrom.

On appeal, Lamoureux claims that the district failed to instruct the jury on true threats or obscenity (Appellant's Br. at 1, 8, 30-32) and wrongly instructed the jury on "uncharged alternative elements," in effect amending the charging documents in regard to Counts II and III. (*Id*. at 1, 8, 41-44.)

As a preliminary matter, each count against Lamoureux alleged a different electronic communication that was in violation of the provisions of Mont. Code Ann. § 45-8-213(1)(a) and the district court correctly instructed the jury on the law defining the offense of privacy in communications, including the three proscribed

types of communication: "us[ing] obscene, lewd, or profane language, suggest[ing] a lewd or lascivious act, or threaten[ing] to inflict injury or physical harm to the person or property of the person." (App. C.) Thus, the jury was informed that Lamoureux could be found guilty if the evidence presented at trial supported any of the three proscribed acts of electronic communication. The jury was able, entitled, and presumed to follow this correct statement of the law in reaching its verdict. *See Sanchez*, ¶ 57.

1. Instructing on "true threat" and "obscenity."

On the issue of jury instructions for "true threats" and "obscenity," Lamoureux relies solely on dicta buried in a 1986 case to the effect that "whether a statement constitutes a true threat is to be determined by the trier of fact." *State v. Lance*, 222 Mont. at 104, 721 P.2d at 1267 (citations omitted). But *Lance* did not require or hold—as Lamoureux claims on appeal—that an instruction was required to be given for the jury to determine whether the communication at issue constituted a "true threat." Moreover, *Lance* had nothing whatsoever to do with "obscenity," and Lamoureux provides no citation to any other authority that has required or held that either a "true threats" or an "obscenity" jury instruction must be given in these types of cases.

It is universally understood that Lamoureux is not entitled to an instruction concerning every nuance of his argument. *Ross*, 269 Mont. at 358, 889 P.2d at 167.

Yet Lamoureux would have this Court reverse and remand in order to impose his "nuances"—which require an explanation of over 23 pages of complex and evolving constitutional principles (Appellant's Br. at 9-32)—as instructions for the jury "to determine whether the statute's application to the alleged words in this case fell under the implicated constitutionally-proscribable categories." (Appellant's Br. at 30-31.)

Aside from Lamoureux's proposed instruction being "misleading and confusing to the jury," *see*, *e.g.*, *Tarlton v. Kaufman*, 2008 MT 462, ¶ 43, 348 Mont. 178, 199 P.3d 263, the applicability and interpretation of the law and constitution are "appropriately within the province of the judge not the jury," while issues of fact are decided by the jury. *See*, *e.g.*, *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165, 1170-71 (1996) (citations omitted). Lamoureux is saying that the jury should decide whether the statute applies to his words and conduct as an exception to his constitutional freedom of speech. That is not a nuance, that is a total conflation of the roles of judge and jury.

In any event, *Lance* does not require a jury instruction and that decision has never been applied to require a jury instruction of any kind. Rather, it has been limited to determining whether, as a matter of fact, sufficient evidence of a "true threat" was presented to the jury. *See Ross*, 269 Mont. at 361, 889 P.2d at 169 (finding sufficient evidence that Ross communicated "true threats" under

circumstances which reasonably tended to produce fear that the threats would be carried out, and threats were communicated for the purpose to cause the victim to refrain from performance of an act); *State v. Felando*, 248 Mont. 144, 152, 810 P.2d 289, 294 (1991) (threats made after several days of harassment forced neighbor to hide in her house and produced a fear that the threats would be carried out); *State v. Cleland*, 246 Mont. 165, 170-71, 803 P.2d 1093, 1096 (1990) (circumstances of threats reasonably tended to produce a fear that they would be carried out; conviction did not violate constitutional principles of free speech).

Furthermore, the jury need not be instructed on words or phrases of common understanding or meaning. *See, e.g.*, S*tate v. Crisp*, 249 Mont. 199, 205, 814 P.2d 981, 984 (1991) (jury was perfectly capable of determining whether defendant's conduct posed a substantial risk of death without an instruction defining the term). Likewise, the terms used in the privacy in communications statute and the jury instructions given—obscene, lewd, profane, lascivious, threatening, threat, inflict, injury, and physical harm—are words or phrases of common understanding or meaning, regardless whether Lamoureux disagrees about them in a legal or constitutional context. That the jury instructions given here use words that invite debate in the rarefied atmosphere of constitutional litigation does not mean that citizen jurors are incapable of understanding what those same words mean in common everyday usage.

2. The instructions for Counts II and III were consistent with the charges and the evidence presented.

Lamoureux challenges the instructions given regarding Counts II and III, relying solely on *Spotted Eagle* for the proposition that an instruction on a new and uncharged legal theory for conviction of PFMA amounted to an improper substantive amendment of the Information requiring reversal. *Spotted Eagle*, ¶¶ 11, 13-15. However, the decision in *Spotted Eagle* did not take into account whether the alternative instruction at issue was or was not supported evidence presented at trial and inferences therefrom, which has long been a proper basis for instructing the jury. *See Robbins*, *Johnson*, *supra*. Therefore, *Spotted Eagle*—a case that is silent on whether the evidence supported the instruction—should not control here, where the evidence and inferences at trial manifestly did support the giving of the instructions for Counts II and III.

Here, Lamoureux's own words were evidence that "in threatening to kill Stacey, [Lamoureux] used obscene, lewd, or profane language with the purpose to harass, annoy or offend," as instructed in Counts II and III. (Apps. E. and F.) As to Count II, Sam testified, without objection, that Lamoureux said, "I want to kill that fucking cunt. . . . I'm going to stuff her in a culvert for the skunks to eat her. . . . I'm going to kill her now." (Tr. at 178.) Sam testified that Lamoureux's language was profane, offensive, threatening, and harassing. (Tr. at 179.) As to Count III, Sam testified, without objection, that Lamoureux said, "I'm going to go

kill her now. I want to go shoot her in the face with my .45 and watch her eyes bulge out. I'm going to kill that fucking cunt and then I'm going to put her in the garbage bin in back and set it on fire." (Tr. at 179-80.) Again, Sam testified that Lamoureux's language was profane, threatening to him, offensive, and harassing. (Tr. at 180.) Thus, the court's instructions took this evidence into account—a factor that was not at issue in *Spotted Eagle*.

Moreover, at least in regard to Count II, Lamoureux ignores the affidavits in support of the charges which further alleged that Lamoureux "used threatening and offensive language" when he told Sam he was going to kill Stacey. (D.C. Doc. 1 at 3; App. A (Aff. at 3).) This Court has held that appellants' reliance on *Spotted Eagle* is misplaced where they "neglect[] entirely the material available in the affidavit in support of the information." *Lacey*, ¶ 34; *accord State v. Hanna*, 2014 MT 346, ¶ 20, 377 Mont. 418, 341 P.3d 629 (unlike Spotted Eagle, the Information in this case did not so limit the charges).

Even if the district court mistakenly instructed the jury as asserted by Lamoureux, any error was harmless. *Spotted Eagle*, ¶ 6 (erroneous instructions must prejudicially affect the defendant's substantial rights). An instruction does not affect a defendant's substantial rights or constitute reversible error where it is "[b]ased upon the evidence presented at trial" and the instructions as a whole.

State v. Ellerbee, 2019 MT 37, ¶¶ 32-33, 394 Mont. 289, 434 P.3d 910 (citing *Spotted Eagle*, ¶ 6).

As this Court has said: "Jury instructions are crucial to a jury's understanding of the case." *State v. Rinkenbach*, 2003 MT 348, ¶ 36, 318 Mont. 499, 82 P.3d 8. "A criminal trial is, above all, a search for truth[.]" *State v. Carter*, 2014 MT 65, ¶ 12, 374 Mont. 206, 320 P.3d 451. Instructing the jury based on the evidence presented is crucial to that search because, as this Court has said: "It is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and **factual issues involved in their search for truth**." *Rinkenbach*, ¶ 36 (emphasis added) (quoting *Billings Leasing Co. v. Payne*, 176 Mont. 217, 224-25, 577 P.2d 386, 390-91 (1978)).

Finally, there could be no prejudicial lack of notice here—Lamoureux knew what he had been charged with, knew what the law said, knew what he said to Ashley and Sam, and knew what the evidence against him was, as it was presented at trial. All of the counts alleged that Lamoureux's conduct was contrary to Mont. Code Ann. § 45-8-213(1)(a), the entirety of which was given to the jury as an instruction without objection. Lamoureux was represented by counsel; was arraigned twice on essentially the same facts and charges under the same statute; the State provided all required disclosures and discovery; and the only specific

defense he asserted was simply "mistaken identity." (*See* D.C. Docs. 7, 10, 16 at 1-2, 39; 7/5/18 Tr.) In addition, in ruling on the motion to dismiss Count II to the effect that the statute was broader than Lamoureux contended, the court pointed out that the statute also encompassed other acts of prohibited communication, including the use of "obscene, lewd, or profane language," or suggesting "a lewd or lascivious act," in addition to threatening to inflict injury. (D.C. Doc. 46 at 2.)

There can be no question that Lamoureux was notified of and understood each of the ways he could be convicted under the statute. Lamoureux knew or should have known what he himself said and how those communications incriminated him under the statute and Counts II and III, as he was charged and arraigned. And, in case he had forgotten what he said, the testimony at trial—upon which the district court based the instructions for Counts II and III—described without objection the "obscene, lewd, or profane language" Lamoureux used "with the purpose to harass, annoy or offend," as the district court instructed the jury, in addition to his threats to "inflict injury or physical harm" to Sam's person or property.

CONCLUSION

This Court should affirm Lamoureux's judgment of conviction for three counts of felony privacy in communications.

Respectfully submitted this 2nd day of November, 2020.

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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 9,950 words, excluding certificate of service and certificate of compliance.

/s/ *Jonathan M. Krauss*
JONATHAN M. KRAUSS

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.

APPENDIX

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 11-02-2020:

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