

The State did not meet its constitutional burden in proving that Brewington’s statements were intimidating. Brewington’s statements were neither “true threats” nor intentionally false. The Court should therefore reverse Brewington’s convictions on Counts I through IV. Furthermore, because this Court is exercising its independent review, there is no need to have the jury reconsider these issues under the proper standard. Rather, the Court should enter a verdict of acquittal.

II. Count V

In Count V, Brewington was convicted of perjury. Brewington’s allegedly perjured statements were made during his grand jury testimony. Brewington was asked a series of questions his requests for readers to write letters concerning Judge Humphrey’s handling of his divorce case to Heidi Humphrey—identified as an “Ethics and Professionalism advisor” to the Indiana Supreme Court “Ethics and Professionalism Committee”—and listed her home address (but did not identify it as her home address). The perjury charge specifically related to his statement that he was not sure whether Heidi Humphrey was Judge Humphrey’s wife when he first posted the request.

There was insufficient evidence for this conviction. This Court has stated the standard of review as follows:

When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. We do not reweigh the evidence or assess witness credibility. We consider conflicting evidence most favorably to the trial court’s ruling. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

Boggs, 928 N.E.2d at 864 (internal citations omitted).

At the grand jury, Brewington was asked whether he knew whether Heidi Humphrey was Judge Humphrey's wife. Brewington testified that he was not certain, but that it was a possibility. The following colloquy was held:

Mr. Negangard: It said James Humphrey who happens to be the name of your judge and you're under oath and you're actually expecting this Grand Jury to believe that you didn't know that that was his wife?

Dan: Oh, it very well could be a possibility. I'm not from Dearborn County. I don't know but the thing is ...

(Tr. 421-22). Brewington was then interrupted and not allowed to elaborate further. (App. 42).

At trial, Sheriff Kreinhop demonstrated a search of the Dearborn County tax assessor website, showing that a search for "Heidi Humphrey" yielded no results, and a search for "Humphrey" yielded three results, including an address for Heidi and James Humphrey (the only James among the results). (Tr. 405-08). No further evidence was presented concerning Brewington's knowledge of Judge Humphrey's marital status when he posted the address on the Internet.

This evidence was insufficient to prove beyond a reasonable doubt that Brewington intentionally lied. No evidence was introduced at trial showing what was listed on the website when Brewington visited it. Brewington testified that he was not certain that Heidi Humphrey was Judge Humphrey's wife. Sheriff Kreinhop's testimony did not refute that. Brewington never testified that he doubted that Heidi was Judge Humphrey's wife, or even that he suspected she was not. There was no evidence that the Dearborn County tax assessor website listed their marital status, or that it identified the James Humphrey listed as Judge James Humphrey.

Moreover, affirming this conviction would condone the prosecutor's improper conduct. As shown in the above-quoted testimony, Brewington attempted to explain his answer further,

but Negangard cut him off. Brewington was not allowed to further explain himself or qualify his response. Negangard controlled the testimony at the grand jury proceedings. He should not be permitted to extract a statement without context and then use it to prosecute the witness for perjury. The purpose of the grand jury is to seek the truth. It is not a “gotcha” game. Negangard’s tactics left Brewington’s testimony incomplete, and not necessarily what Brewington intended to say.¹² The State should not be able to prosecute Brewington on the basis of his incomplete response when the State caused it to be incomplete.

Brewington testified that he was not certain that Heidi Humphrey was married to Judge Humphrey. There is simply no evidence showing that this was a knowingly false statement. Thus, his conviction for perjury should be reversed.

III. Convictions Under Counts I and IV Violate Double Jeopardy

In Count I, Brewington was charged with intimidating Dr. Connor. In Count IV, Brewington was charged with attempt to commit obstruction of justice. The substantial step supporting Count IV was intimidating and/or harassing Dr. Connor. Brewington’s conviction for both counts violates the Double Jeopardy Clause of the Indiana Constitution.

This Court reviews claims that multiple convictions violate the Double Jeopardy Clause *de novo*. *Troutner v. State*, 951 N.E.2d 603, 608 (Ind. Ct. App. 2011). Brewington’s convictions fail the actual elements test identified in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999).

Under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the ‘same offense’ in a claim of

¹² That Brewington could have testified at trial is of no import. Brewington was not required to prove what he would have said if he had not been cut off.

double jeopardy, a defendant must demonstrate a reasonable probability that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Id. at 53. “The jury instructions and presentation of counsel to the jury can be helpful to the reviewing court in its analysis of the actual evidence to determine whether a jury used the same evidence to establish multiple offenses.” *Id.* at 54 n.48.

In this case, the substantial step to prove the attempt to commit obstruction of justice was the very crime charged in Count I: intimidation. The State did not differentiate the evidence it used to prove intimidation as charged in Count I, and the intimidation used to prove the substantial step as charged in Count IV. The State offered dozens of exhibits that it contended proved intimidation, primarily Brewington’s correspondence with Dr. Connor, his correspondence with Indiana and Kentucky officials complaining about Dr. Connor, and his Internet postings about Dr. Connor.

The State made clear in its closing argument that it was using the same evidence of intimidation for both counts. In discussing the attempted obstruction of justice, the State argued:

Ladies and gentlemen, he is guilty of obstruction of justice—of trying to keep Dr. Connor from sitting in that witness chair in the divorce proceeding. He acted with the culpability required for committing the crime of obstruction of justice. ... He did what he did because he knew what he was doing[,] and he ... intended to do what he was trying to do[,] and he engaged in conduct that constituted a substantial step toward that. Not just the conduct but the [ad] infinitum conduct. What are some of the conduct and we just went back to it—all these faxes and other means that he used to threaten and threaten and bully and bully.

(Tr. 478).

The jury instructions also show that the State relied on the same evidence. The instruction for attempt to commit obstruction of justice informed the jury that the State must prove that Brewington “did intimidate and/or harass Dr. Edward Connor” as the substantial step. (*See supra*

pp. 24-25). The indictment, which was read as part of the same instruction, said essentially the same thing. (*Id.*). The jury was instructed on the meaning of intimidation, but not harassment. (*Supra* pp. 25-26). Therefore, it is likely that the jury relied on intimidation, rather than harassment, as the substantial step.

The State's failure to distinguish between the intimidation that supported Count I and that which supported Count IV created the reasonable probability that the jury relied on the same evidence to convict Brewington of both counts. *See Troutner*, 951 N.E.2d at 609 (finding double jeopardy violation for convictions for robbery and battery: "at no point during the presentation or discussion of the evidence to the jury did the State identify part of the act as the robbery and another part as the battery.").

It does not matter that the State may have presented more evidence than necessary to prove one of the charges. The State cannot now argue that the surplus evidence could have been used on the second charge. The State must distinguish the evidence before the jury. In *Troutner*, the State argued that it had supported each charge with distinct evidence "because Troutner used force beyond that necessary for the robbery, which constituted the additional offense of battery." *Id.* at 610 (internal quotations omitted). This Court disagreed: "The degree to which Troutner beat Philo is irrelevant absent a clear delineation of the evidence in that respect to the jury. Absent such a clear delineation, there is a reasonable possibility that the jury did not consider the degree to which Troutner beat Philo and instead only considered the fact that Troutner did beat Philo." *Id.* at 611.

The Indiana Supreme Court has stressed the importance of properly delineating the evidence in a similar situation: where the evidence supporting one crime is the only evidence offered in support of the "overt act" to prove a separate conspiracy charge.

[W]e have found double jeopardy violations when the facts supporting a first crime are offered in the charges or jury instructions as the only “overt act” to prove a second conspiracy charge, even if other facts proving a conspiracy were presented at trial. *Lundberg v. State*, 728 N.E.2d 852, 855 (Ind. 2000) (finding violation when jury was instructed that murder was the only overt act supporting conspiracy to commit murder, despite evidence of other overt acts); *Guffey v. State*, 717 N.E.2d 103, 107 (Ind. 1999) (finding violation when facts of providing handgun and serving as lookout were offered for the aiding commission of armed robbery charge, and also charged as the only overt acts for conspiracy to commit armed robbery, despite evidence of other overt acts).

Lee v. State, 892 N.E.2d 1231, 1235 (Ind. 2008). In *Lee*, the court did not find a double jeopardy violation, but only because “there was ‘extended evidence of a protracted criminal episode,’ *and the prosecution emphasized the evidence that was distinct to each crime.*” *Id.* at 1237 (emphasis added). *See also Newgent v. State*, 897 N.E.2d 520, 527 (Ind. Ct. App. 2008) (finding double jeopardy violation in part because the State failed to emphasize the evidence distinct to each crime).

The State’s failure to distinguish the evidence was no mere technical lapse, but was likely a tactical decision. As the above-quoted passage from the State’s closing argument shows, the State focused on the volume of correspondence and posts to prove that Brewington was trying to intimidate Dr. Connor. This argument becomes weaker if that volume is cut in half. The State cannot have it both ways. It cannot use all of the correspondence and blog posts to prove intimidation for Count I, then argue that the same evidence proved intimidation as the substantial step for Count IV. That violates the Double Jeopardy Clause.

For these reasons, the Court should vacate Brewington’s conviction for Intimidation against Dr. Connor (Count I). *Richardson*, 717 N.E.2d at 55 (appropriate remedy for double jeopardy violation is to vacate conviction with less severe consequences).

IV. Other Trial Errors

The trial court committed other errors that require reversal of Brewington's convictions. First, the trial court granted the State's Motion for Confidentiality of Juror's Names and Identities, which was granted without a sufficient showing by the State that the jury needed protection. Second, the trial court admitted substantial irrelevant, prejudicial evidence. Finally, the jury instructions, which implied Brewington's guilt, were prejudicial.

A. The Use of an Anonymous Jury Was Improper.

Prior to trial, the State filed a Motion for Confidentiality of Juror's Names and Identities. (App. 45-46). The State cited five reasons why the jurors' identities should be kept anonymous, one of which was accepted by the trial court: that the jurors' safety would be jeopardized by revealing their names and identities based on Brewington's past behavior. (App. 45). The State's "memorandum" consisted only of a copy of the case *Major v. State*, 873 N.E.2d 1130 (Ind. Ct. App. 2007), but no evidence or argument in support of its motion. (App. 45-54).

In *Major*, this Court held that a trial court may use an anonymous jury if two conditions are met: (1) the trial court concludes that there is a strong reason to believe the jury needs protection; and (2) it takes reasonable precautions to minimize the potential prejudice to the defendant and ensure that his fundamental rights are protected. *Major*, 873 N.E.2d at 1127. These elements are listed conjunctively, meaning that both are required to use an anonymous jury.

Major identified several (non-exclusive) factors to determine whether the jury needs protection: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the

judicial process; (4) the severity of the punishment that the defendant would face if convicted; and (5) whether the publicity regarding the case presents the prospect that the jurors' names could become public and expose them to intimidation or harassment. *Id.* A trial court's decision to empanel an anonymous jury is reviewed for abuse of discretion. *Id.*

The State submitted only a motion with bare bones allegations, but no supporting evidence or argument. (App. 45-46). Brewington objected based on the lack of evidence that he posed a danger to the jurors. (Final Pretrial Tr. 67). Despite the State's complete lack of factual support for its motion, the trial court granted the motion. The trial court did not refer to *Major* or the factors cited in that case. (Final Pretrial Tr. 67). Instead, the court relied entirely on Jury Rule #10. (Final Pretrial Tr. 67). The court ruled as follows:

I'm going to disagree with you based on the evidence that was presented at the bond reduction hearing[.] I think that the State has made a prima [facie] case at least that there's been a history of disclosing private information. I don't know if there would be information to say that you were a physical risk to their safety but I think the privacy issue is definitely a concern based on the evidence that has been previously submitted[.]

(Final Pretrial Tr. 68).

The trial court abused its discretion in granting the motion. The State submitted considerable evidence at the bond reduction hearing (hundreds, if not thousands of pages), but the trial court did not identify any specific evidence it relied on. This makes review of the trial court's decision difficult.

There were two specific instances raised at the hearing, so they merit mention. First, the State introduced the final decree in the divorce case (Bond Reduction Tr. 19-20; Trial Ex. 140), which addressed some of Brewington's Internet postings. It noted that Brewington had posted information about the divorce proceedings on the Internet, including portions of the custody evaluation, and that Brewington had threatened to share information about the proceedings with

family and friends. (Ex. 140 at 6-7). Second, the State mentioned that Brewington posted Judge Humphrey's address on the Internet. (Bond Reduction Tr. 60).

This evidence does not support the trial court's conclusion that there was a risk that Brewington would disclose the jurors' identities. Neither instance involved Brewington disclosing information that he was prohibited from disclosing (as he would be with jurors' identities). Prior to the final decree, Brewington had not been prohibited by court order from posting information about the divorce proceedings (and even after the final decree, the court only enjoined postings about the proceedings as a condition for visitation). (Ex. 140 at 18-19).¹³ Additionally, Brewington did not post any private information about Judge Humphrey. Judge Humphrey's address was found on the publicly accessible Dearborn County Assessor website.

Moreover, the trial court ignored *Major* and used a less exacting standard to grant the motion (which it found in Jury Rule #10). (Final Pretrial Tr. 67). To empanel an anonymous jury, the trial court was required to find that there is a "strong reason to believe the jury needs protection." *Major*, 873 N.E.2d at 1127. In this case, the trial court merely found that "the privacy issue is definitely *a concern*." (Final Pretrial Tr. 68). Nor did the trial court refer to the factors identified in *Major*. Most of the factors, which are non-exhaustive but still relevant, weigh against using an anonymous jury. This was an abuse of discretion. "An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the evidence, or if the trial court has misinterpreted the law." *McCullough v. Airbold Ladder Co.*, 605 N.E.2d 175, 180 (Ind. 1993). The trial court failed to apply *Major*, and its decision was against the logic and

¹³ It is quite ironic that the State would rely on Brewington's posting information about the divorce proceedings (specifically, the child custody evaluation), when the State would go on to introduce a non-redacted version of the child custody evaluation at trial, making it a public record.

effect of the evidence. There was simply no evidence that Brewington was a risk to disclose the jurors' identities.

Using an anonymous jury signals to the jurors' that Brewington was dangerous. This denigrates the presumption of innocence guaranteed by the Fifth and Fourteenth Amendments. "[T]he empanelment of an anonymous jury implicates a defendant's Fifth Amendment right to a presumption of innocence because it 'raises the specter that the defendant is a dangerous person from whom the jurors must be protected.'" *Major*, 873 N.E.2d at 1126 (quoting *U.S. v. Mansoori*, 304 F.3d 635, 650 (7th Cir. 2002)). This was especially prejudicial for Brewington.

To convict Brewington of intimidation, the State was required to prove that Brewington intended his statements to be serious threats of violence. Keeping the jurors' identities secret signals to them that Brewington might do the same to them, and implies that there must be some reason for the court to think this is a risk, i.e., that he has already threatened others. It signals that he is dangerous. These signals were sent to the jury without the State having to meet its normal burdens of proof. It is also prejudicial because there was little other evidence that Brewington intended his statements to be threatening. None of Brewington's statements were direct threats of violence; at worst, they were ambiguous statements that could be interpreted as indirect threats. Implying that Brewington is dangerous might make the jury more willing to accept that Brewington's ambiguous statements were threatening. Conversely, the jury might have been more willing to accept an innocent explanation if they did not think he was dangerous.

It also prejudiced Brewington on the perjury charge. It signals to the jury that Brewington is dishonest and cannot be trusted. The evidence against Brewington on this charge was also weak. No evidence was offered that directly contradicted Brewington's statement that he was not certain Heidi Humphrey was Judge Humphrey's wife. The jury could only have convicted him if

it found him to be unreliable. Little evidence was offered about Brewington's credibility.

Improperly signaling to the jury that Brewington was unreliable may have tipped the scale when the jury would otherwise have accepted an innocent explanation.

The trial court's improper decision to use an anonymous jury denied Brewington the right to a fair trial. Therefore, this Court should reverse Brewington's convictions and remand for a new trial.

B. Other Evidentiary Errors.

The State offered, and the trial court admitted, the custody evaluation (Ex. 9) and the final decree from the divorce (Ex. 140). (Tr. 63-64, 89, 92). These exhibits were extremely unfairly prejudicial, and therefore should have been excluded under Rule 403, or at the very least should have been redacted to excise irrelevant, prejudicial content. These exhibits were so unfairly prejudicial that a new trial is necessary.

1. The custody evaluation and final decree should have been excluded.

The trial court's decision to admit evidence is reviewed for abuse of discretion. *Cox v. State*, 774 N.E.2d 1025, 1026 (Ind. Ct. App. 2002). Reversal is required when the trial court's abuse of its discretion results in the denial of a fair trial. *Id.*

The custody evaluation and final decree contained extremely prejudicial information. While these documents may have had some probative value, it was slight. The custody evaluation might have been a motive for Brewington to intimidate Dr. Connor. Similarly, the final decree might have been the motive for Brewington to intimidate Judge Humphrey. But that does not mean that those documents were admissible in their totality. These documents include

considerable prejudicial information that is not relevant to those issues, or is inadmissible for other reasons, which outweighs the probative value.

Both of these documents include irrelevant, highly prejudicial statements that attack Brewington's character. The custody evaluation contains the following statements:

- That Brewington kept a messy house;
- That Brewington "may even resort to indirect and manipulative means to get attention and affection";
- That Brewington has "a degree of psychological disturbance that is concerning and does not lend itself well to proper parenting."

(Ex. 9 at 17, 23, 28).

The custody evaluation included prejudicial statements that were inadmissible hearsay, including:

- Melissa's statement that "Dan could become physically abusive with her as he tried to put something behind her car so she could not leave and also blocked her car in with his";
- Melissa's claim that Brewington "would push and shove her and would 'go off' and hit walls";
- Melissa's claim that Brewington might be bi-polar;
- Melissa's parents' claim that Brewington was intimidating toward Melissa on the phone;
- Melissa's sister's speculation that Brewington is not capable of "unconditional love to the girls" and that Brewington only wanted custody "in order to hurt Melissa";

(Ex. 9 at 12, 18, 19, 20).

The final decree included the following statements, which are prejudicial, and are either irrelevant and/or inadmissible hearsay:

- That Dr. Connor found that Brewington’s “writings are similar to those of individuals who have committed horrendous crimes against their families”;
- That Brewington “has attempted to intimidate the Court, Court staff, Wife, Dr. Connor and anyone else taking a position contrary to his own. The Court is most concerned about Husband’s irrational behavior and attacks on Dr. Connor. Frankly it appears that these attacks have been an attempt at revenge for taking a position regarding custody contrary to Husband. The Court also finds that Husband has made a less than subtle attempt to intimidate Attorney Loechel ... In sum, the Court finds Husband to be irrational, dangerous, and in need of significant counseling before he can conduct himself as a parent. [H]is words and actions show that he is, at least presently, unable to conduct himself with the level of maturity necessary to be a parent.”

(Ex. 140 at 6, 8).

These documents also contain opinion testimony, but no foundation was set for such testimony as required by Rule 702. The above-cited passages clearly contain expert opinion (that Brewington “may even resort to indirect and manipulative means to get attention and affection”; that Brewington has “a degree of psychological disturbance that is concerning and does not lend itself well to proper parenting”; that Brewington’s “writings are similar to those of individuals who have committed horrendous crimes against their families”; and that Brewington was “irrational, dangerous, and in need of significant counseling before he can conduct himself as a parent” and that “his words and actions show that he is, at least presently, unable to conduct

himself with the level of maturity necessary to be a parent”). However, there was no offer, let alone finding by the trial court, that these opinions were admissible under Rule 702. *See Fleener v. State*, 656 N.E.2d 1140, 1141 (Ind. 1995) (“Because expert scientific testimony is permitted ‘only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable’ ... and because no foundational showing of reliability was made here, it was error to permit further testimony of this nature following the objection”) (internal citations omitted).

The conclusion that Brewington attempted to intimidate the court, court staff, and witnesses is also inadmissible. This is an opinion, rendered by a judge (and witness against Brewington) that Brewington is guilty as charged. Such an opinion is inadmissible: “Witnesses may not testify to opinions concerning intent, *guilt*, or innocence in a criminal case[.]” Rule 704(b) (emphasis added).

These improper exhibits were highly prejudicial. The primary thrust was that Brewington was dangerous. This was prejudicial for the reasons cited above, *supra* p. 56. The prejudice is heightened by the source of the opinions: a licensed psychologist and a circuit court judge, which are generally considered positions of authority and respect in the community.

The inadmissible hearsay in the evaluation, specifically, the statements that Brewington “may even resort to indirect and manipulative means to get attention and affection” and that Brewington only wanted custody “in order to hurt Melissa” attack Brewington’s reliability. This was prejudicial for the reasons cited above, *supra* pp. 56-57.

These highlighted statements were inadmissible for many reasons—they were irrelevant, improper character evidence, hearsay, or improper opinion—and were prejudicial. This prejudicial effect substantially outweighs the probative value. Again, the probative value of these documents relates to a potential motive for Brewington to intimidate the alleged victims.

However, this could have been proved by other means. Dr. Connor could have testified about the ultimate recommendations in his evaluation, without discussing the inadmissible portions. Judge Humphrey (or Melissa or her attorney) could have testified about how Judge Humphrey ruled in the final decree, without including the inadmissible opinion testimony contained therein. The availability of these other means of proof further tips the scales toward exclusion under Rule 403. Advisory Committee Notes to Federal Rule of Evidence 403 (“In reaching a decision whether to exclude on grounds of unfair prejudice ... [t]he availability of other means of proof may also be an appropriate factor.”). *See also Sams v. State*, 688 N.E.2d 1323, 1325 (Ind. Ct. App. 1997) (“courts in this state should normally construe Indiana evidence rules consistently with the prevailing body of decisions from other jurisdictions interpreting the same rule”). Even if Rule 403 did not require the complete exclusion of these documents, they should have been admitted in a redacted form, with the offending passages excised.

The Court should reverse Brewington’s convictions and remand for a new trial based on the improper admission of this prejudicial evidence.

2. Trial counsel’s failure to object to this evidence was ineffective assistance of counsel.

Brewington’s trial counsel did not object to the admission of the custody evaluation, and objected to the final decree on relevance only. (Tr. 63-64, 92). Counsel did not object based on Rule 403, hearsay, improper character evidence, or improper opinion, nor did he request that the exhibits be admitted in redacted form. This was ineffective assistance of counsel.

The failure to object on these grounds was constitutionally deficient performance. For the reasons shown above, an objection would have been sustained, or a request for redaction would have been granted. Trial counsel’s failure to object could not be attributed to trial strategy. There

are no legitimate strategic reasons for failing to object to this evidence that attacked Brewington's character and included impermissible expert opinions. *Cf. Pemberton v. State*, 560 N.E.2d 524, 526-27 (Ind. 1990) (reversing conviction on direct appeal because of ineffective assistance; trial counsel moved to suppress identification testimony, which was denied, but failed to object at trial: "This can in no way be characterized as a strategical or tactical decision gone awry"). Brewington's trial counsel refused to call a single witness or offer a single piece of evidence.

The evidence is sufficiently prejudicial that, had it not been admitted, there is a reasonable probability that the result would have been different. *Messer v. State*, 509 N.E.2d 249, 253 (Ind. Ct. App. 1987). "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* (citing *Strickland*, 466 U.S. at 696). The evidence against Brewington was weak.

For the reasons cited above, *supra* pp. 56-57, this improper evidence suggesting that Brewington is dangerous and unreliable is prejudicial. Due to the paucity of evidence proving that Brewington's statements were threats of violence and that Brewington's grand jury testimony was intentionally false, there was a reasonable probability that the result would have been different without this improper evidence.

Trial counsel's failure to object to these documents based on Rule 403, and failure to request redaction of the inadmissible portions, was constitutionally ineffective assistance. The Court should therefore reverse Brewington's convictions and remand for a new trial.

C. Other Instruction Errors.

Final Instruction 1, which listed the elements for each charge against Brewington, was prejudicial. This instruction repeated the grand jury indictments verbatim. The indictments each included superfluous language about the grand jury, such as “The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women and legally impaneled, charged and sworn to inquire into felonies ...” (*See supra* pp. 22-25 and App. 10-13 for a reproduction of the instructions). More importantly, the indictments are written in such a way as to suggest that the grand jury made a finding that Brewington had in fact committed the crimes with which he was charged. For example, Count I reads: “The Grand Jurors ... do present that on or about or between August 1, 2007 and February 27, 2011, Daniel Brewington *did communicate a threat to another person, to-wit: Dr. Edward Connor, with the intent that Dr. Edward Connor be placed in fear of retaliation for a prior lawful act, to-wit: issuing a custodial evaluation regarding Daniel Brewington’s children. All of which is contrary to the form of the statute made and provided by I.C. 35-45-2-1(a)(2) ...*” (emphasis added). Similar language was used for each count.

This language suggests that the grand jury already found that Brewington committed the charged offenses. The instruction did not inform the jury about the nature of a grand jury, that it was not an adversarial proceeding where the defendant has an opportunity to cross-examine witnesses or put on evidence, or that the burden of proof is significantly lower for an indictment (probable cause v. guilt beyond a reasonable doubt). It was not necessary to read the indictments to the jury in full. If the indictments were to be read, the prejudicial language should have been left out. The instruction that was actually given was misleading and prejudicial.

Brewington's trial counsel did not object to the reading of the indictments in full. This constituted ineffective assistance of counsel. If counsel had objected, the objection would have been sustained, as this language was extremely prejudicial. Failing to object to this language cannot be considered a matter of trial tactics. The failure to object was constitutionally insufficient performance.

The instruction was also constitutionally prejudicial. The instruction essentially told the jury that the grand jury already found that Brewington committed the charged crimes. Many rules prohibit any participants in the trial process from commenting on the guilt or innocence of a criminal defendant. *See, e.g.*, Ind. R. Ev. 704(b); Ind. R. Prof. Conduct 3.4 ("A lawyer shall not ... in trial, ... state a personal opinion as to ... the guilt or innocence of an accused"). An instruction that suggests the guilt of the defendant is at least as prejudicial.

The erroneous use of an anonymous jury, the admission of improper evidence, and the prejudicial language in Final Instruction 1, combined to deny Brewington a fair trial. Each alone would have been sufficient to require reversal; combined, the prejudice was even greater. Therefore, this Court should reverse Brewington's convictions.

CONCLUSION

Brewington's convictions for intimidation and attempt to commit obstruction of justice are constitutionally infirm. These convictions violate his rights under the First Amendment to the United States Constitution and Article I, § 9 of the Indiana Constitution, and are not supported by sufficient evidence. This Court should exercise its duty of independent review and reverse these convictions and enter a verdict of acquittal. At minimum, the Court should reverse these convictions and remand for a new trial at which the State will bear the burden of proof required by the Federal and Indiana Constitutions. The Court should also reverse Brewington's conviction for perjury, which was not supported by sufficient evidence. The Court should vacate Brewington's conviction on Count I, as convictions on both Count I and Count IV violate double jeopardy. Finally, if the Court does not reverse for these other reasons, it should reverse based on the improper empanelling of an anonymous jury, the improper admission of irrelevant and prejudicial evidence, and the use of prejudicial jury instructions, and remand to allow Brewington a fair trial.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Appellant has filed a motion for leave to file an oversized brief contemporaneously with this Brief, requesting leave to file a brief that does not exceed 20,000 words. I certify that this Brief contains no more than 20,000 words.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel
of record *via* first class U.S. Mail, postage pre-paid this 11th day of April, 2012:

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