IN THE

INDIANA COURT OF APPEALS

Cause No. 15A01-1110-CR-00550

DANIEL BREWINGTON,	)	
	)	Appeal from Dearborn County Superior Court II
Appellant,	)	
	)	Cause No. 15D02-1103-FD-0084
v.	)	
	)	The Honorable Brian Hill,
	)	Special Judge
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPELLANT'S REPLY

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INTRODUCTION

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, ... is nevertheless protected against censorship and punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. ... There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Terminello v. City of Chicago, 337 U.S. 1, 4-5 (1949) (internal citations omitted).

The Supreme Court could have added prosecutors to that list; their nearly unfettered discretion could allow them to censor speech that they disagree with or find bothersome. For this reason, the First Amendment constrains prosecutorial discretion.

From the very beginning of Brewington's prosecution, the State has shown no concern for these principles. Brewington may not have had the rhetorical skill of Thomas Paine, but like 18th Century pamphleteers, he used a popular forum of expression in his time (here, the Internet) to complain about unfair treatment by an oppressive system. This case is not just an appeal of a wrongful conviction. It is a challenge to this Court to re-affirm the fundamental right of free expression.

RESPONSE TO STATE'S STATEMENT OF FACTS

With indifference to accuracy, the State's facts contain irrelevant information and gross errors. The State discusses the merits of the divorce court's custody decision (State's Response 2-3) and Brewington's posts criticizing the Court of Appeals's decision affirming the divorce

court (State's Response 15). These matters are irrelevant to Brewington's criminal charges, and serve no purpose but to prejudice Brewington before this Court.

Brewington did not compare Judge Humphrey's custody decision to "playing with gasoline and fire." (State's Response 14). This statement did not refer to Judge Humphrey's decision; it was posted before his ruling. (Ex.140 p. 7). Brewington did not identify Heidi Humphrey as Judge Humphrey's wife. (State's Response 14). Brewington did post about Heidi Humphrey, but identified her only as an advisor to the Supreme Court's "Ethics and Professionalism Committee." (Ex.160). Brewington did not identify the address he posted as the Humphreys' home address. (*Id.*).

Contrary to the State's assertion, Brewington did file a pre-trial motion to dismiss based on the First Amendment. (App.7; Supp.App.2-6).

ARGUMENT

I. Brewington's Conviction on Counts I Through IV Must Be Reversed.

The principal issue in this appeal is whether Brewington's speech was protected by the First Amendment. The State's main arguments rely on Brewington's speech being unprotected. The State argues: First, the intimidation statute tracks the boundaries of protected speech, so if Brewington's speech violates the statute, it is unprotected, and vice versa. (State's Response 21-25). Second, because the statute only criminalizes unprotected speech, the trial court properly instructed the jury on the elements of the crime and the First Amendment, and consequently, there was no fundamental error. (State's Response 25-30). Third, because the State proved the

statutory elements, there was sufficient evidence for Brewington's convictions. (State's Response 30-32). Finally, because there was sufficient evidence, Brewington received effective assistance of counsel. (State's Response 44-46).

The State offers no other arguments on the propriety of the instructions, fundamental error, sufficiency of the evidence, or effectiveness of counsel. Because Brewington's speech was in fact protected, the State's arguments must fail and his convictions on Counts I through IV must be reversed.

A. The Importance of Protecting Brewington's Speech.

A case decided by the U.S. Supreme Court during briefing on this appeal reiterated that there are only a handful of long-established, well-defined categories of speech that receive *no* First Amendment protection. *U.S. v. Alvarez*, 567 U.S. -- (June 28, 2012). The Court held that knowingly false statements of facts do not fit into any of these categories. *Id.* at --, (slip op. 4-5, 18) (striking down the Stolen Valor Act, which made it a crime to falsely claim to be the recipient of military honors). This was the fourth case in the last three years in which the Court refused to recognize new categories of unprotected speech. *See also Snyder v. Phelps*, 131 S.Ct. 1207, 1219 (2011) ("outrageous" statements on matters of public concern that cause emotional distress not unprotected); *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2734 (2011) (First Amendment covers violent video games); *U.S. v. Stevens*, 130 S.Ct. 1577, 1585 (2010) (depictions of animal cruelty not unprotected).

Alvarez catalogued the categories of unprotected speech: incitement to imminent lawless action, obscenity, defamation, speech integral to criminal conduct, fighting words, child

pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has power to prevent. *Alvarez*, 567 U.S. --, (slip op. 5) (internal citations omitted). The State in this case relies on three categories: true threats, fighting words, and incitement to imminent lawless action. As a fallback, the State argues that Brewington's speech is insufficiently civil to warrant protection. Brewington will address each of these theories, as well as defamation. Brewington will also address First Amendment principles common to all of the State's theories.

1. The well-developed law of First Amendment protection.

Brewington respectfully invites this Court to carefully consider some general, yet important First Amendment principles.

First Amendment protections are the same in both civil and criminal proceedings. *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964).

Second, all courts reviewing First Amendment issues must undertake an independent review of the record to ensure that protected speech is not punished. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990) (internal citation omitted). Brewington's opening brief described this standard. (Appellant's Brief 30). The State chooses to ignore this command. (States Response 30).

Third, when performing this review, courts have an obligation to critically examine the basis for liability when it is clear that some of the speech is protected. *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, 915 (1982). The State does not argue that *all* of Brewington's speech was unprotected. Consequently, this Court must make sure that Brewington is not punished for protected speech.

Claiborne Hardware illustrates this requirement and many principles relevant to this appeal. *Claiborne Hardware* arose from a multi-year boycott of white-owned businesses in Claiborne County, Mississippi, during the Civil Rights era. *Id.* at 889. The boycott was organized by the local NAACP. *Id.* at 889, 898-99. The boycott was encouraged and enforced in several ways: speeches; peaceful marches and pickets near boycotted business; and recording and publicizing the names of black residents who patronized white-owned stores. *Id.* at 902-04. Charles Evers, the NAACP Mississippi Field Secretary, gave several speeches, including one in which he "stated that boycott violators would be 'disciplined' by their own people and warned that the Sheriff could not sleep with boycott violators at night[,]" and another in which he stated that "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902.

Some unidentified supporters illegally retaliated against boycott violators by damaging violators' property and assaulting, robbing, and/or threatening violence against violators. *Id.* at 904-06. In all, the Supreme Court discussed ten incidents. *Id.* at 905-06. There was no evidence that boycott leadership was responsible for the violent acts. *Id.* at 906, 926-29.

A group of white merchants sued 148 persons involved in the boycott, including Evers and the NAACP. *Id.* at 889-90. The merchants obtained a substantial verdict, and the Mississippi Supreme Court affirmed the finding of liability, finding that the presence of "force, violence, or threats" rendered the entire boycott unlawful. *Id.* at 893.

The Supreme Court reversed. The primary means for advocating the boycott—speeches, nonviolent picketing, and encouraging others to join—were protected activities. *Id.* at 907. Similarly, publicizing the names of violators was protected: "Speech does not lose its protected character [] simply because it may embarrass others or coerce them into action." *Id.* at 909-10.

Threatening to embarrass or harm the reputation of boycott violators was also protected, unless accompanied by violence or threats of violence. *Id.* at 921-22. The activity of "store-watchers"—who recorded names of violators but did not commit or threaten violence—was also protected, even though their conduct "may [have] cause[d] apprehension in others." *Id.* at 925.

Because these activities were protected, the Court noted that it had to "critically examine the basis on which liability was imposed" to ensure that it was based on illegal, rather than protected activity. *Id.* at 915. "When such [illegal] conduct occurs in the presence of constitutionally protected activity, [] precision of regulation is demanded." *Id.* at 916-17 (internal quotations and citations omitted).

Evers's speeches were protected under the *Brandenburg* test—which holds that the state may only proscribe the advocacy of violence or law-breaking if the advocacy incites imminent lawless action and is likely to produce such action. *Id.* at 927-29 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). Despite Evers's violent rhetoric, he did not incite, authorize, ratify, or directly threaten violence. *Id.*

The Court concluded by stating that the plaintiffs bore the heavy burden of proving, by specific evidence, that their losses were caused by the violent conduct, not the protected speech/conduct, and courts must "recognize the importance of avoiding the imposition of punishment for constitutionally protected activity." *Id.* at 933-34.

The State's case against Brewington ignores this standard and fails to differentiate between protected and unprotected speech. The State characterizes all of Brewington's speech as "threats" without identifying how each statement is unprotected. Not all threats are punishable. The boycott supporters' conduct was protected even though they threatened non-violent retaliation for the violators' lawful patronage of white-owned businesses. *Id.* at 927. Similarly,

the First Amendment protects Brewington's threats to file lawsuits and professional complaints, and to publicize Dr. Connor's and Judge Humphrey's perceived misdeeds. This may be contemptible to some, but it is not criminal.

2. Brewington challenges his convictions as violations of his First Amendment rights.

Brewington does not raise a facial challenge to the intimidation statute. The statute does raise constitutional concerns, but Brewington first asks the Court to reconcile the First Amendment's requirements with the statute to avoid finding it unconstitutional.

Ind. Code § 35-45-2-1(a) requires that the State prove that the defendant communicated a threat to another person. I.C. § 35-45-2-1(c) defines eight discrete actions that constitute punishable "threats."[1] Two of these categories—threat to expose to hatred, contempt, disgrace, or ridicule, subsection (c)(6); and threat to falsely harm credit or business reputation, subsection (c)(7)—are criminal defamation. The statute must incorporate the First Amendment restrictions on defamation actions. (*See* Appellant's Brief 21-22).

The State argues that it need not prove the falsity/culpability elements because the statute does not require proof that the statements are defamatory. (State's Response 29). This is wrong. The intimidation statute uses the common law definition of defamation: "A defamatory communication [is] one which tends to hold the plaintiff up to hatred, contempt, or ridicule, or to cause him to be shunned or avoided." William L. Prosser, *The Law of Torts* § 111 (4th Ed. 1971). Because the same constitutional limitations apply to civil and criminal defamation, *see*

[1] The State never argued that Brewington threatened to: unlawfully confine anyone, unlawfully withhold official action, unlawfully withhold testimony, or cause evacuation of a building. I.C. §§ 35-45-2-1(c)(2), (c)(4), (c)(5) & (c)(8). Nor did the State argue that Brewington threatened crimes other than his alleged threats of unlawful violence (subsection (c)(1)). Subsection (c)(3) does not need separate consideration.

Garrison, 379 U.S. at 67, the Court must read those requirements into the statute to avoid finding it facially unconstitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). However, if the State is correct that it need not prove those elements, the Court must strike down the intimidation statute.[2]

3. Brewington's speech was not defamatory.

In his opening brief, Brewington argued that the State's defamation theory failed because the State did not prove that his statements were intentionally false. (Appellant's Brief 33-35). The State did not address these requirements in its response, because it believed the statute is not premised on defamation. (State's Response 29). The State has waived any argument to the contrary by failing to make a cogent argument that Brewington's statements were intentionally false in its response. Ind. Appellate R. 46.

4. Brewington's statements were not true threats

To convict Brewington for threatening violence, the State must prove that Brewington's statements were "true threats": that Brewington communicated "a serious expression of an intent to commit an act of unlawful violence." *Virginia v. Black*, 538 U.S. 343, 359 (2003). In its response, the State identified four alleged "true threats": (1) threatening to commit arson; (2) threatening to assault Dr. Connor; (3) posting the Humphreys' home address; and (4) identifying

[2] Contrary to the State's contention, Brewington did file a pre-trial motion to dismiss based on the First Amendment, so he did not waive a facial challenge. (Supp.App.2-6). Additionally, as the State points out, this Court can consider a statute's constitutionality in the first instance in appropriate cases. *Vaughn v. State*, 782 N.E.2d 417, 419-20 (Ind. Ct. App. 2003). Because the statute on its face criminalizes protected speech (e.g., true statements that harm an individual's reputation), this would be an appropriate case.

Dr. Connor's neighborhood. (State's Response 25, 31-32). The State misreads the record and the law.

The State contends that Brewington threatened arson against Judge Humphrey in retaliation for his custody decision, by writing on Facebook that "This is like playing with gas and fire, and anyone who has seen me with gas and fire know [*sic*] that I am quite the pyromaniac." (State's Response 31-32); (Ex.140 p. 7). There is no evidence that this post was about Judge Humphrey. Additionally, the State gets the timing wrong. The post was written before Judge Humphrey ruled on custody (it was mentioned in the final decree). Therefore, it could not have been a threat of violent retaliation for the ruling. The State's theory fails as a matter of law. As the State concedes, it must "prove that the legal act *preceded* the threat and Defendant intended to place the victims in fear of retaliation for that act." (State's Response 31).

This was not an actual threat to commit arson. At worst, it was overheated rhetoric. There are many common figures of speech that use similar language, such as "fight fire with fire." Brewington previously compared the Facebook post to the conduct in *Watts v. U.S.*, 394 U.S. 705 (1969). (Appellant's Brief 31-32). The State does not attempt to distinguish *Watts*.

A recent case from the District of Columbia Court of Appeals, *In re S.W.*, 2012 WL 2044356 (D.C. March 6, 2012), raised a similar issue. S.W. was adjudicated a juvenile delinquent for allegedly threatening arson. *S.W.*, 2012 WL 2044356 at *1. S.W.'s neighbor's house had been damaged in a fire. *Id.* On the day after the fire, S.W. and some friends walked past her house, while S.W. sang a modified version of a rap song. *Id.* According to the neighbor (named Cherie), S.W. sang, "Fuck the police, Cherie ... we're not scared of the police, Cherie. ... [W]e will set this whole block on fire ... we will set your house on fire. *Id.* at *2. The D.C. Court of Appeals held that there was insufficient evidence this was a true threat. *Id.* at 6.

Although the statements were facially threatening, no reasonable observer would believe S.W. threatened arson. "An objective observer might perceive a teenager engaging in jesting, teasing, mocking, even insult and humiliation—but would not reasonably perceive that S.W. posed an actual threat of arson." *Id.*

To be sure, there are differences between S.W.'s statements and Brewington's post, but they show that there was less reason to believe that Brewington threatened violence. Brewington's post was not facially threatening. Unlike S.W., who intended his neighbor to hear his taunts, there is no evidence that Brewington intended Judge Humphrey to read his post (or even that it was directed toward him).

S.W. again confirms that courts must consider the context of the statement. Context shows that Brewington was not threatening violence. He used a metaphor to illustrate to his family and friends his resolve in his battle to maintain a relationship with his children. A father in this situation must be able to draw on the support of family and friends, even when his frustration leads to overheated rhetoric. The Supreme Court has stated, "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." *Claiborne Hardware*, 458 U.S. at 928.

The State insists that Brewington threatened to assault Dr. Connor. He did not. Brewington's statement in Exhibit 198 was purely hypothetical: that if he wanted to complain about a custody evaluator, he should be able to. Brewington did not even refer to Dr. Connor by name. Even if he had, his statement could not reasonably be read as a threat to assault Dr. Connor. Brewington did not write, "I *am* going to punch Dr. Connor in the face," or "I *will* beat

Dr. Connor senseless if he does not retract his evaluation." Instead, he wrote "Dr. Custody Evaluator ... made me so mad I wanted to beat him/her senseless." That type of statement is a common expression. It is usually uttered after the heat of passion subsides. It is a common phenomenon to use speech to diffuse one's anger. It is venting frustration, not a threat of violence.

The State also relies on Brewington's blog posts discussing where Dr. Connor and the Humphreys lived. The State concedes that posting this information is not a direct or indirect threat of violence. Instead, the State argues that it was threatening because it could "facilitate violence against" the alleged victims. (State's Response 25). This conflates different categories of unprotected speech: incitement to imminent lawless action—*see Claiborne Hardware*, 458 U.S. at 927-28—and true threats. Each category has distinct elements that must be proven to punish speech. The State cannot borrow some elements from one and combine them with elements of another to create a new hybrid form of unprotected speech. *Alvarez*, 567 U.S. --, (slip op. 6-10). This would allow the State to punish unquestionably protected speech, such as a baseball fan directing colorful language toward a bad umpire.

The State also urges the Court to find that two other items in the record show that Brewington's non-threatening statements were intended as threats: (1) his statement that it was his job to hold people accountable for doing mean things to his kids (State's Response 23, 31-32); and (2) that he owned firearms and inquired about firearms training from Angela Loechel (State's Response 23).[3]

Brewington's statement about holding people accountable is not vague and cannot be interpreted as threatening violence. Brewington demonstrated over a long period of time that he

[3] Brewington actually made the inquiry with Loechel's husband, with whom she owns a business offering firearms instruction. (Tr.69-71),

intended this to mean taking several actions, none of which were violent. With respect to Judge Humphrey, Brewington discussed: reporting him to public officials and appropriate agencies (Ex.132, Ex.167, Ex.183, Ex.194); filing disciplinary complaints (Ex.135, Ex.168); publicizing Judge Humphrey's perceived misdeeds (Ex.165, Ex.169, Ex.171, Ex.174, Ex.180, Ex.194); and encouraging people to ask Judge Humphrey to retire (Ex.176). Brewington discussed similar actions with respect to Dr. Connor. (Appellant's Brief 6-7 and evidence cited therein). Brewington specifically disclaimed any violent intention. (Appellant's Brief 11). Brewington's course of conduct during this time made it clear that he meant actions other than violence. *Cf. Claiborne Hardware*, 458 U.S. at 902 (discussing Evers's speeches).

Brewington's inquiry about firearms training is even more dubious as a basis for criminal convictions. The State tries to paint this as the equivalent of Brewington telling Judge Humphrey and Dr. Connor that "It's my job to hold people accountable" while pointing to a gun in his holster. This characterization rests on false two premises. First, that Brewington told Judge Humphrey and Dr. Connor that he inquired about firearms training and possessed a handgun. Second, that Brewington's statement about holding people accountable is vague. Without those premises, the State's characterization of this evidence is not plausible. Brewington's vow to hold people accountable is not vague. And Brewington did not tell them about his inquiry; Loechel did. Neither of these items shows that Brewington's non-threatening statements were intended as threats of violence.

The State cited only these four instances as "true threats" in its response. It has waived any argument that other statements were true threats. Brewington's convictions cannot be affirmed based on "true threats."

5. Brewington's statements did not incite imminent lawless action.

Brewington did not advocate violence or unlawful action. To prove that speech is incitement, the State needs to show that (1) Brewington advocated violence or unlawful action; (2) such violence or lawless action was *imminent*; and (3) his speech was "likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447 (emphasis added). The State did not prove any of these elements.

The State argues that there was no reason for Brewington to post Judge Humphrey's address other than to "facilitate violence against the judge." (State's Response 25).[4] This is wrong. Brewington posted the address so his readers could send letters to an advisor to the Supreme Court's "Ethics and Professionalism Committee," and provided a sample letter. (Ex.160). People did write letters, which did not threaten or imply violence. (Ex.71, Ex.77, Ex.87). A letter writing campaign is a hallmark of lawful and protected protest. *Cf Claiborne Hardware*, 458 U.S. at 928-29.

Nor was this likely to lead to imminent violence or lawless action. Brewington did not identify the address as Judge Humphrey's home. (Ex.160). He listed it as the address for the advisor to the "Ethics and Professionalism Committee," so a reasonable reader would assume this was her office. He did not identify Heidi Humphrey as Judge Humphrey's wife. Only someone who already knew that this was Judge Humphrey's address would read it that way.

The State also failed to prove that the information posted about Dr. Connor's residence incited imminent lawless action. Nothing in his blog posts suggested advocacy of violence or lawless action. Brewington only listed Dr. Connor's neighborhood, not his actual address.

[4] The State did not make this argument with respect to Dr. Connor.

(Ex.199). The State offers nothing but bald assertion that this was *likely* to lead to *imminent* violence or lawless action.

The State failed to prove that Brewington's postings incited imminent lawless action. His convictions cannot be sustained on those grounds.

6. Brewington's statements were not "fighting words."

"Fighting words" are words "that provoke immediate violence." *Claiborne Hardware*, 458 U.S. at 927 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Brewington's statements were not fighting words.

"Fighting words" only includes speech likely to provoke an *immediate* response. *See Purtell v. Mason*, 527 F.3d 615, 623-625 (7th Cir. 2008); *State v. Drahota*, 788 N.W.2d 796, 801-03 (Neb. 2010). The Supreme Court has overruled its earlier dicta, *see Chaplinsky*, 315 U.S. at 572, that "fighting words" might also include words that "by their very utterance inflict injury." *Purtell*, 527 F.3d at 623-25 (reviewing authority and determining that the Court has overruled this dicta); *Drahota*, 788 N.W.2d at 802 (same).

Brewington's statements could not provoke an immediate violent response from Judge Humphrey or Dr. Connor because they were not spoken in their immediate presence. Thus, the cases cited by the State are easily distinguished. *See Chaplinsky*, 315 U.S. at 573 (noting that the statute under review only applied to "face-to-face words"); *Robinson v. State*, 588 N.E.2d 533, 534 (Ind. Ct. App. 1992) (affirming conviction based on face-to-face communication).

Rather, this case is much more like *Drahota*. Drahota initiated an email correspondence with a university professor who was running for office (Avery), with whom Drahota disagreed

vehemently on a number of political issues. *Drahota*, 788 N.W.2d at 799. Overall, they exchanged 20 emails, during which Drahota's rhetoric grew more heated, culminating in two emails for which he was arrested and convicted for disturbing the peace. *Id.* at 798-99. Drahota's emails included personal attacks, such as calling Avery a traitor and supporter of America's enemies; accusing him of undermining the United States' efforts in Iraq; and stating that he was "the lowest form of life on the planet." *Id.* at 800. The Nebraska Supreme Court reversed. *Id.* at 804. Because the statements were conveyed by email, they could not have provoked an immediate violent response. *Id.* at 804. "[E]ven if a fact finder could conclude that in a face-to-face confrontation, Drahota's speech would have provoked an immediate retaliation, Avery could not have immediately retaliated." *Id.*[5]

Brewington's Internet postings are not the equivalent of standing on a soapbox. (*See* State's Response 24). "Fighting words" and incitement to imminent lawless action—which the State conflates with fighting words—require that the speech provoke *immediate* reaction. Brewington's Internet postings could not provoke an immediate reaction from Dr. Connor, Judge Humphrey, or his readers. Thus, the State's reliance on *Feiner v. New York*, 340 U.S. 315 (1951) is misplaced.

"Fighting words," as used in First Amendment jurisprudence, is a term of art. Everything that can be described as verbal "fighting" does not fit. A criminal defendant's promise to "fight the charges," or an underdog political candidate's vow to "fight to the end" would not. The State cites Exhibit 191 as Brewington's "admission" that he "disobeyed the laws that usually govern such a war of words." (State's Response 24). Brewington's post describes what he meant by "re-

[5] The court also suggested, without deciding, that the speech would be protected even if spoken face-to-face. *Id.* Additionally, the court's holding did not rest on the fact that Avery did not initially know who sent the emails. *Id.* Even if he had known, he could not immediately retaliate.

writing" the rules and "making up" his own. (Ex.191). None of these actions were illegal or likely to provoke immediate reaction by Dr. Connor, Judge Humphrey, or his readers.

Brewington's convictions for intimidation and attempted obstruction of justice cannot be affirmed based on "fighting words."

7. Civility is not required for First Amendment protection.

There is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The State's final First Amendment argument is that Brewington's speech was insufficiently civil. (State's Response 25).[6] The State argues that his speech was unprotected because: (1) he attacked individuals, rather than the judicial system; (2) name-calling is not political argument; and (3) publishing peoples' addresses is not political argument. According to the State, "[n]one of these postings resemble a typical editorial page ... too brutal for civil, political discourse." (State's Response 25).

Needless to say, the State's notion of "civility" does not define the scope of the First Amendment. "[I]t is a prized American privilege to speak one's mind, although not with perfect good taste, on all public institutions." *Bridges v. California*, 314 U.S. 252, 270 (1941). Nor does it matter that Brewington criticized participants in the family court system, not the system itself. "The sort of robust political debate encouraged by the First Amendment is bound

[6] Contrary to the State's assertion, Judge Humphrey denied Brewington access to his daughters. Judge Humphrey ruled that "[Brewington] shall not be entitled to visitation until he undergoes a mental health evaluation[.] (Ex.140). This cut off Brewington's visitation until further court order.

to produce speech that is critical of those who hold public office or those public figures who are intimately involved in the resolution of important public questions[.]" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (internal quotation omitted) (reversing judgment against magazine based on lewd parody about Rev. Jerry Falwell). This is especially true with Judge Humphrey, an elected official. "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." *Id.* (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971)). This protection is not limited to criticism of elected/government officials. *Claiborne Hardware*, 458 U.S. at 921.

The First Amendment protects much more than political discourse. *See e.g., Entertainment Merchants Association*, 131 S.Ct. at 2733 (holding that video games enjoy First Amendment protection). The default rule is that speech is protected; for the State to punish speech, it must prove that the particular speech is unprotected. *Claiborne Hardware*, 458 U.S. a 933-34. The State did not prove that Brewington's name-calling or posting information about where Dr. Connor and Judge Humphrey lived fell within one of the narrow categories of unprotected speech, *supra* 8-15. It is irrelevant whether this speech was directly political.

The State failed to prove that Brewington's speech was unprotected. His convictions on Counts I through IV must be reversed.

B. The Jury Instructions on Intimidation and Attempted Obstruction of Justice Were Constitutionally Infirm.

The State argues that the jury instructions were proper because (1) the statutes only criminalize unprotected speech/conduct; (2) the court instructed the jury on the statutory

elements of the crimes; and (3) the court read the First Amendment verbatim. This is incorrect for several reasons.[7]

The trial court's instruction on criminal defamation permitted conviction for protected speech because it did not require proof that the defamatory statements were intentionally false. (*See supra* 7-8; Appellant's Brief 21-22). The jury returned general verdicts, so there is no way to know which of the State's theories the jury relied on. Since it is possible that the jury convicted Brewington only for defamation, but without finding his statements intentionally false, the convictions must be reversed. *Cf. Claiborne Hardware*, 458 U.S. at 931.

The instruction on "true threats" was also constitutionally deficient. While the instruction generally tracked the language from *Watts*, it omits important information. It did require proof that the statements communicate a "serious" threat of violence. *Black.* 538 U.S. at 360. More importantly, the jury was not instructed that it needed to differentiate between true threats and other heated rhetoric. *Watts*, 394 U.S. at 708.

This is no minor oversight. Average jurors are not as steeped in First Amendment doctrine as judges and lawyers. Courts must be cautious when allowing juries to sanction speech, so that they do not punish speech just because the message is unpopular. *Snyder*, 131 S.Ct. at 1219. Jurors must be reminded of the strict limitations on punishing speech. This is not salvaged by closing argument.

Reading the First Amendment verbatim is insufficient. Jurors cannot possibly distill the very specific requirements developed by the Supreme Court from the bare text of the First Amendment. Specific instructions were required.

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[7] Brewington does not separately discuss attempted obstruction of justice. The State charged intimidation of Dr. Connor as the substantial step toward committing obstruction. (Appellant's Brief 17). Therefore, the obstruction instruction incorporated the intimidation instructions, constitutional flaws and all.

Finally, the State's response does not even address Brewington's argument that the court's instructions on Article I, § 9 of the Indiana Constitution were insufficient. The State has therefore waived the argument, and the Court should reverse Brewington's convictions because the jury was not properly instructed on the Indiana Constitution.

C. The Instructional Errors Were Fundamental, and Brewington Received Ineffective Assistance of Counsel.

In his opening brief, Brewington argued that the trial court's failure to instruct the jury on the First Amendment and Article I, § 9 protections was fundamental error. The State's only response was that there was no error, so it could not be fundamental. (State's Response 29). The State does not argue that if there was an error, it was harmless. Therefore, the State waived any such argument. The instructions were erroneous, and the error was fundamental. (Appellant's Brief 25-26).

Brewington also argued that his trial counsel's failure to object to the trial court's instructions constituted ineffective assistance of counsel. The State's only response was that Brewington could not prove the second prong for ineffective assistance (prejudice). The State made no argument on the first prong (constitutionally deficient representation). Therefore, the State has waived any such argument. Brewington's trial counsel's performance was constitutionally deficient. (Appellant's Brief 27-29).[8]

[8] The State's response to Brewington's other claims of ineffective assistance—failing to object to the final divorce decree and the custody evaluation, and failing to object to prejudicial portions of the jury instructions—was the same. The State did not address those claims separately. (State's Response 44-46).

II. Brewington's Conviction for Perjury Was Not Supported by Sufficient Evidence.

Brewington testified at the grand jury that that he did not know whether Heidi Humphrey was Judge Humphrey's wife, but that it was a "possibility." (Tr.421-22). Brewington never denied that they were married, or that he even doubted it. The State did not prove that this was a lie.

The State's only evidence at trial showed that on October 5, 2011, the assessor's website listed a Heidi Humphrey and a James Humphrey at the same address. (Tr.405-08). This does not contradict Brewington's statement; it does not list their marital status.

In its response, the State speculates that Brewington may have done further Internet searches that confirmed their marital status. The State cannot rest on conjecture about what Brewington may have found on the Internet. *Shutt v. State*, 367 N.E.2d 1376, 1378 (Ind. 1977) (holding that inferences based on speculation/conjecture are not sufficient evidence to sustain convictions).

The State failed to prove beyond a reasonable doubt that Brewington committed perjury. His conviction on Count V should therefore be reversed.

III. Brewington's Convictions on Both Counts I and IV Violate Double Jeopardy.

Brewington's conviction on both Count I (intimidation of Dr. Connor) and Count IV (attempted obstruction of justice) violates the Double Jeopardy Clause of the Indiana Constitution under the actual evidence test. *See Richardson v. State*, 717 N.E.2d 32, 53 (Ind. 1999). In its response, the State contends that the prosecutor's closing argument highlighted particular evidence for the obstruction charge, specifically, evidence of actions after April 1,

2008. (State's Response 35). This is not sufficient. The jury must use distinct evidence for each charge. The State relied on evidence from after April 1, 2008, to prove intimidation as well. This included: (1) Exhibit 198, dated May 2010 (*see* Tr.457-58); (2) Exhibit 191, dated June 2010 (*see* Tr.459); and (3) Exhibit 200, dated November 2010 (*see* Tr.464). Therefore, the jury may have relied on evidence it used for Count IV to decide Count I.

Additionally, the Court should look at the jury instructions. *Richardson*, 717 N.E.2d at 54 n.8. The instructions refer to the same timeframe: August 1, 2007, through February 27, 2011. (Appellant's Brief 22-25)

There is a reasonable probability the jury relied on the same evidence to establish the essential elements of Counts I and IV. Therefore, the Court should vacate Brewington's conviction on Count I.

IV. The Trial Court Improperly Impaneled an Anonymous Jury.

The State incorrectly contends that Brewington never objected to the State's motion for an anonymous jury. Brewington objected orally at the final pre-trial hearing, arguing that there was insufficient evidence that he posed a danger to the jurors. (Final Pre-Trial Tr.67). The transcript of the final pretrial hearing is in the appellate record, preserving the issue.[9]

The State argues that using an anonymous jury was appropriate because Brewington's alleged crimes involved interference with the judicial process. (State's Response 37). This puts the cart before the horse. Brewington had not been convicted when the court granted the State's motion. Furthermore, the State now relies on evidence (from the trial) in its response that it did

[9] Brewington did not omit the court's order from the appendix. The court ruled orally without written order. (Final Pretrial Tr.67-68).

not present to the trial court in support of its motion. (State's Response 37). The State did not present any supporting evidence to Judge Hill. (Appellant's Brief 41; App.45-54). The State cannot belatedly rely on evidence that it failed to present to the trial court.

Brewington was not required to prove that the trial court failed to lessen the prejudice from the use of the anonymous jury. Under *Major v. State*, 873 N.E.2d 1120 (Ind. Ct. App. 2007), a finding that there is a strong reason to believe the jury needs protection is a prerequisite for empanelling an anonymous jury. 873 N.E.2d at 1127 (listing requirements conjunctively). It does not matter how the jury is instructed if the decision is incorrect in the first place.

The trial court improperly empanelled an anonymous jury. For the reasons set forth in Brewington's opening brief, this requires reversal of his convictions.

V. Admitting the Child Custody Evaluation and Final Divorce Decree Was Reversible Error.

The State argues that the custody evaluation and final decree were admissible to prove Brewington's retaliatory motive. This misses the core of Brewington's argument: that they were inadmissible because their probative value was outweighed by the danger of unfair prejudice. The State's motive argument does not establish that the documents were admissible *in toto*. There is considerable extraneous, prejudicial information in those documents that was inadmissible for other reasons. Moreover, the relevant portions of those documents could have been (and were) presented by other means, i.e., witness testimony. Therefore, the documents should have been excluded or redacted. (Appellant's Brief 44-47)

The State argues that the documents are not excludable even though they contained improper opinion testimony. The State's *res judicata* argument must fail. One of the elements for

res judicata is that the "matter now in issue was, or could have been, determined in the prior action." *Wright v. State*, 881 N.E.2d 1018, 1022 (Ind. Ct. App. 2008). Dr. Connor's opinion may have been relevant in the divorce, but it was not in the criminal case. Dr. Connor's admission as an expert witness in that case had no preclusive effect.

The State also argues that Dr. Connor could have been admitted as an expert if the State requested. Not so. The State only argues that Dr. Connor had relevant expertise; that is but one requirement for the admission of expert testimony. Expert testimony must also help the jury determine a fact in issue and be based on reliable scientific principles. Ind. Evidence R. 702. The State's response does not establish this foundation. Moreover, the State's failure to lay the foundation at trial is crucial. Brewington had no notice that the State was using Dr. Connor as an expert witness. Therefore, Brewington had no opportunity to challenge the State's foundation and the admission of such testimony.

The State further argues that Judge Humphrey's opinion regarding Brewington's alleged intimidation was admissible because alleged victims are permitted to testify that they felt threatened. The State cited no authority for this proposition, even though it contends it could have. How is Brewington supposed to respond to this assertion? The Court should not consider this unsupported argument. App. R. 46. Moreover even if an alleged victim can testify that he felt intimidated, he cannot testify that he thinks others were also intimidated. Evid. R. 704(b). Finally, the State ignores that Judge Humphrey testified that he felt intimidated. The existence of other means of proof supports excluding unfairly prejudicial evidence under Evid. R. 403. *See* Advisory Committee Notes to Fed. Evid. R. 403. Judge Humphrey's opinion about Brewington's alleged intimidation in the final decree should have been excluded.

The State responds to Brewington's hearsay objections by arguing that the statements were not offered for the truth of the matter asserted. Regardless of whether the statements were hearsay, they are irrelevant and prejudicial. The State's theory is that the custody evaluation was admissible because it proved motive: Brewington's anger with Dr. Connor's recommendation against joint custody.[10] The cited statements have nothing to do with Brewington's alleged motive. Therefore, their inclusion renders the unredacted custody evaluation inadmissible.

Brewington's convictions should be reversed due to the improper admission of the divorce decree and custody evaluation.

VI. Supplemental Matters.

One issue that Brewington intended to raise in this appeal was his inability to effectively assist in his defense. Brewington suffers from extreme Attention Deficit Disorder, for which he was prescribed a high dose of Ritalin. (Ex.9 at 28). After Brewington was arrested, the Dearborn County Jail refused to provide him his medication. (Supp.Tr.10). This diminished his ability to concentrate, review the evidence in the case, and assist with his defense. (*Id.*) Brewington raised this issue with the trial court, but the court expressed indifference to his medical issues. (*Id.*).

Brewington was not able to develop and present this claim in his opening brief. Brewington and his family requested transcripts for the pretrial hearings held on June 17, 2011, and July 18, 2011, but were told by the trial court that no transcripts were available because no hearings were held. (Supp.App.7). Brewington did not obtain these transcripts until he presented affidavits from friends and family who attended the hearings. (Supp.App.9-15). Only then did

[10] Brewington disagrees with this characterization, but the State can offer its theory.

the court locate the recordings and prepare the transcripts. (Supp.App.8). Brewington did not receive the transcripts until July 13, 2012. (Supp.App.16). This was too late to fully develop this issue for the Court's review.

CONCLUSION

For these reasons, and the reasons set forth in Brewington's opening brief, his convictions should be vacated and a verdict of acquittal should be entered. Alternatively, Brewington should be given a new, fair trial.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Brief contains 6,995 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 23rd day of July, 2012:

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