IN THE

COURT OF APPEALS OF INDIANA

CAUSE NO. 15A01-1110-CR-550

DANIEL BREWINGTON, *Appellant* (*Defendant below*), *v.* STATE OF INDIANA, *Appellee* (*Plaintiff below*).	Appeal from the Dearborn Superior Court, II Cause No. 15D02-1103-FD-0084 Hon. Brian Hill, Special Judge

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE ISSUES

I. Whether Brewington's free speech rights were violated.

II. Whether the court properly instructed the jury.

III. Whether the State presented sufficient evidence of intimidation.

IV. Whether the State presented sufficient evidence of perjury.

V. Whether Brewington's convictions violate double jeopardy.

VI. Whether the court properly empanelled an anonymous jury.

VII. Whether the trial court properly admitted evidence.

VIII. Whether Brewington received effective assistance of counsel.

STATEMENT OF THE CASE

On March 7, 2011, a grand jury indicted Brewington with: (I) intimidation, a class A misdemeanor; (II) intimidation of a judge, a class D felony; (III) intimidation, a class A misdemeanor; (IV) attempt to commit obstruction of justice, a class D felony; (V) perjury, a

class D felony; and (VI) unlawful disclosure of grand jury proceedings, a class B misdemeanor (App. 1-2). Jury trial was held from October 3, 2011, through October 6, 2011 (App. 7-8).

The jury found Brewington guilty on counts I through V and not guilty of Count VI (App. 33-34). The court sentenced Brewington to six months executed for intimidation against Dr. Connor (Count I); two years executed (consecutive to Counts I, IV, and V), for intimidation against Judge Humphrey; six months executed for intimidation against Heidi Humphrey (Count III), to be served concurrently to Count II; two years executed for Count IV (attempted obstruction), *concurrent* with Count I; and one year executed for Count V (perjury), consecutive to counts I, II, II, and IV); the aggregate sentence was five years (App. 35).

Brewington filed his Notice of Appeal on October 24, 2011 (App. 8). The Notice of Completion of Clerk's Record was filed November 22, 2011 (App. 8). Notice of Filing of Transcript was filed February 6, 2012 (App. 8). Brewington's Appendix was filed April 18, 2012 (Docket). His amended brief was filed May 22, 2012, and served on the State by mail, making the State's brief due on or before June 25, 2012.

STATEMENT OF FACTS

Melissa Brewington (hereinafter "Melissa") and Daniel Brewington (hereinafter "Brewington") were married on August 10, 2002 (Exh. 209, p. 2). They had two children, M.B., born October 30, 2003, and A.B., born February 26, 2006 (Exh. 209, p. 2). When they were married, Brewington, who was unemployed, spent time working on internet projects, and the children attended day-care when Melissa worked as a registered nurse (Tr. 294-296). During disagreements, Brewington verbally abused Melissa, calling her a "crazy

psycho bitch," and saying "you don't have any friends" (Tr. 298-299). Brewington would yell or pound the car window as Melissa tried to leave with the children (Tr. 298-299). He was argumentative and confrontational (Tr. 298-299). Melissa would lock herself and the children in the bathroom and run water to keep them from hearing Brewington (Tr. 298). Melissa and Brewington tried a counselor (for two sessions) and Brewington said he did not want to return (Tr. 299). Melissa sought counseling for herself and Brewington interfered (Tr. 301).

The children had 74 pediatrician visits; Brewington attended 9; Melissa attended 71 (Tr. 321; Exh. 140). The children had 21 specialist medical appointments; Brewington attended 2; Melissa attended 20 (Tr. 322). Brewington did not attend any speech therapy sessions (Tr. 322-323). There were 135 extra-curricular events for the girls; Brewington attended 3; Melissa attended 133 (Tr. 323).

Melissa filed a petition for dissolution of the marriage in January, 2007 (Tr. 296; Exh. 209, p. 2). When Melissa told Brewington, he told her that they would become enemies (Tr. 302) and he purchased a .357 magnum handgun (Tr. 325). Brewington told Melissa he would make her life a living hell (Tr. 302). He did (Tr. 302).

During the divorce, Brewington sought physical custody of the children (Tr. 303). The provisional orders of the court gave physical custody to Melissa, until the final hearing, with Brewington given visitation at times when Melissa worked (Tr. 305). When the provisional orders did not grant him custody of the children, Brewington fired his first attorney (Tr. 304). Melissa found it difficult to work with Brewington to schedule visitation during the divorce process (Tr. 304). Between the time of the provisional orders and the final hearing, both Brewington by counsel Tom Blondell and Melissa, by her counsel

Angela Loechel, agreed that the custody evaluation would be prepared by Doctor Edward Connor (Tr. 37, 88, 305; Exh. 9; Exh. 104; Exh. 209).

Doctor Edward Connor (hereinafter "Dr. Connor") is a licensed clinical psychologist in Indiana and Kentucky (Tr. 84). He does custody evaluations when parents disagree about custody (Tr. 85). Dr. Connor began doing custody evaluations in the mid-1990's in Alabama and then later in Kentucky beginning around 1996 (Tr. 85). He was licensed in Indiana in July, 2008. Prior to that he was still consulted by Indiana counts to do custody evaluations and has done them as far out of state as North Dakota and Arizona (Tr. 87). In Brewington's case the court agreed with the parties and assigned Dr. Connor to the custody evaluation (Tr. 88; Exh. 209). Dr. Connor conducted the custody evaluation at his office in Kentucky with the assistance of his wife, Dr. Sarah Jones-Connor (hereinafter Dr. Jones-Connor) (Tr. 88-89, 196-205; Exh. 9). He interviewed both parties separately and administered a number of psychological tests for both Melissa and Brewington (Tr. 89; Exh. 9). The evaluation included parent-child observations and a home visit (Tr. 89; Exh. 9).

The custody evaluation is a neutral process, not meant to serve the interests of either party during dissolution proceedings (Tr. 90). Dr. Connor and Dr. Jones-Connor completed the evaluation August 29, 2007, and it was received by the court in September, 2007 (Tr. 42, 90; Exh. 9). It recommended that Melissa have sole legal custody of the children, and that Brewington have standard, even "liberal," visitation rights (Tr. 90, 306; Exh. 9).

The report did not say that Brewington should be denied visitation (Tr. 90; Exh. 9). But the custody evaluation report did state that joint custody was not viable: Brewington's psychological profile prevented effective communication and compromise (Tr. 91, 306; Exh. 9).

Until then, Dr. Connor had not experienced any difficulties with Brewington (Tr. 92). But Brewington disagreed with Dr. Connor's recommendations (Tr. 43). He was upset that Dr. Connnor did not recommend joint custody (Tr. 44). Both parties had argued for sole custody, but at some point Brewington asked for joint custody (Tr. 43). After Dr. Connor recommended against joint custody and submitted the evaluation to the court, Brewington's counsel moved to withdraw and Brewington represented himself (Tr. 306-307).

Not long after the evaluation was completed, Brewington sent Dr. Connor numerous faxes and letters (Tr. 95-137; Exhibits 26-29, 31-34, 36, 38-51). Dr. Connor received an anonymous letter (Exh. 33), that stated that if Connor fabricated any information in his report, it would be bad, and if it was intentional, it would be very bad, and if someone recorded his interview with Brewington, it would be very very bad, and if the recordings proved that Connor lied in his custody evaluation report, then that information would be sent to the Kentucky Board of Examiners of Psychology, Senators Mitch McConnell and Jim Bunning, Representatives Geoff Davis, Edward Whitfield, Ron Lewis, John Yarmuth, Harold Rogers, Ben Chandler, Governor Ernie Fletcher, Channel 5 News, Channel 9 News, Channel 12 News, FOX 19, The Cincinnati Enquirer, and a number of other professional organizations (Exh. 33). Especially disturbing to Dr. Connor was that it named the Athletic Director and President of Thomas Moore College and organizers of the "Coach Connor Classic," (Exh. 33). Connor's deceased father had been a coach and Athletic Director at Thomas Moore College; the Coach Connor Classic was begun in his memory (Tr. 95-97).

When Dr. Connor sent Brewington a letter asking if he had written the threatening and anonymous letter Brewington answered and did not deny it (Tr. 97). Dr. Connor was aware of Brewington's writing style, given the voluminous correspondence Connor had

observed on the internet in which Brewington referred to Connor as a pervert, a liar, a criminal and a dangerous man; having examined Brewington during the custodial evaluation process, Dr. Connor concluded Brewington had written the anonymous letter (Tr. 95-101).

In most of the letters and facsimiles that Dr. Connor received Brewington either disagreed with the evaluation or demanded that Dr. Connor provide his entire case file from the evaluation process (Tr. 95-137; Exhibits 26-29, 31-34, 36, 38-51). Dr. Connor could not release the entire case file, only the evaluation report; the entire file necessarily included Melissa's private medical and psychological data; without her consent the entire file could not legally be released, and the court so informed Dr. Connor (Tr. 101-102). Dr. Connor was concerned about the requests by Brewington and did not release the entire file because he believed Brewington might post and publicize Melissa's private medical and psychological information (Tr. 102). Brewington already had posted some of Melissa's medical data including her depression and obsessive compulsive disorder (Tr. 310; Exh. 164; Exh. 210). He did so despite Dr. Connor's admonishment, as contained in the evaluation, that the information contained was not to be made accessible to the children (Tr. 309-311; Exh. 164). He was concerned about Brewington's and Melissa's confidentiality rights (Tr. 119).

Brewington wrote numerous letters to Dr. Connor, beginning on or around March 28, 2008; many demanded the entire case file from Connor's custodial evaluation process (Exh. 26; Exh. 31; Exh. 36; Tr. 104, 110-114); some alleged that Dr. Connor's evaluation contained errors (Exh. 27; Tr. 106). Brewington alluded to the American Psychological Association's code of conduct (Exh. 26; Tr. 104). Brewington wrote that he would not be taking part in additional interviews (Tr. 107-108; Tr. 28). He alleged breach of contract (Tr.

110-111; Exh. 31). He accused Dr. Connor of unethical behavior, telling him to "pull your report now as you have crossed the line as a treating therapist" (Tr. 111-112; Exh. 34). He cited misrepresentations and inappropriate conduct (Tr. 113-114; Exh. 36). He demanded a copy of Connor's license from the Indiana State Board of Psychology (Exh. 38; Tr. 115). He accused Dr. Connor of "dishonest, malicious, and criminal behavior" and threatened to reveal his alleged "gross, retaliatory behavior against [Brewington] for trying to expose [Dr. Connor's] wrongdoing and delusions" (Tr. 116; Exh. 39). He told Dr. Connor to "please place your malpractice liability insurance carrier on notice" (Tr. 116; Exh. 39). He wrote "please don't assume that your nor any persons or employees affiliated with Connor and Associates have immunity from civil or criminal liability as the rules and statutes don't apply when gross negligence is a factor" (Tr. 117-118; Exh. 39).

Dr. Connor felt intimidated; that Brewington was trying to intimidate Dr. Connor into withdrawing his report (Tr. 117). Brewington wrote to Connor's wife, Dr. Jones-Connor, stating "please review the following as it may have serious legal implications for you" (Tr. 118; Exh. 40). He demanded all correspondence between Dr. Connor and Melissa's attorney, Angela Loechel and the names of Connor's staff (Tr. 119. He threatened a law suit, and telling Connor that Connor is going to pull the report, and that this is not up for debate (Tr. 120-121; Exh. 41). He demanded the contract, giving Connor until the end of the day to pull the report, and alleging illegal and unethical practices (Tr. 122; Exh. 42). He accused Connor of gross negligence, malpractice, slander and libel, and stated his intent to rope Connor's colleagues into the legal action as well (Tr. 123; Exh. 42). Now Dr. Connor's associates were concerned about becoming litigants (Tr. 123; Exh. 42).

More correspondence demanded all correspondence between Dr. Connor and Melissa's attorney Loechel and the entire case file (Tr. 124-8; Exh. 43; Exh. 44; Exh. 46, 47). He sent a petition for contempt (Tr. 125, 128; Exh. 45, 47). Dr. Connor was never found in contempt (Tr. 126). He demanded Dr. Connor's office policy statement, telling Dr. Connor that he – Brewington – was an attorney, and an attached letter to Loechel, telling her to have Melissa release the entire case file information, on threat of contempt, and on threat of Brewington contacting the Supreme Court Disciplinary Commission (Tr. 128; Exh. 47).

He wrote Dr. Connor asking for a good time to start depositions of Dr. Connor, and telling Dr. Connor to withdraw from the case entirely (Tr. 130; Exh. 48). He wrote Dr. Connor that "the game is over" (Tr. 130-131; Exh. 49).

Dr. Connor feared for the safety of his family given the psychological test results and the correspondence (Tr. 131-2). The correspondence included references to Connor's staff and wife (Tr. 131-132). Connor understood Brewington would not take "no" for an answer, even from an authority, such as the court, and that Brewington was aggressive (Tr. 131-132). But Doctor Connor could not share the entire case file, including Melissa's private data, without her consent (Tr. 133). He never shared either party's information (Tr. 133).

The letters continued, from October, 2008, through September, 2009 (Tr. 133-148; Exhibits 50, 51, 55, 59-61, 194). He told Connor that the court's protection did not extend to Connor (Exh. 51; Tr. 133-135), demanded Dr. Connor's notes (Tr. 140; Exh. 55), stated again that "the game is over," adding "don't bother running to another court looking for pity," and referencing other cases in which Dr. Connor testified; (Exh. 59). He wrote the Kentucky Attorney General (Exh. 60; Tr. 143) and continued requesting the entire file (Tr. 144; Exh. 61).

On September 1, 2009, Brewington sent Connor a letter referencing the final order and decree of the court, in which Judge Humphrey stated that "According to Dr. Connor's testimony, husband's [Brewington's] writings are similar to those of individuals who have committed horrendous crimes against their families" (Exh. 194). Brewington listed approximately thirty professionals that Brewington threatened to contact, and directed Dr. Connor to the name of Judge Humphrey's wife and their home address (Exh. 194). It accused Connor of being dangerous (Tr. 148). Connor feared for his professional reputation (Tr. 148).

Brewington also spent a large amount of time on the internet, setting up multiple web-sites and / or internet blogs, and making voluminous entries on the same, including www.danhelpskids.com, and Dans Adventures in Taking on the Family Courts (Tr. 137-167; Tr. 307-310; Exhibits 10, 53, 160-170, 172-186, 186a, 187, 188, 190, 191, 193, 195, 197-201, 210, 211). Brewington took full responsibility for the content in all of these postings (Tr. 58, 313).

Dr. Connor learned about these postings (Tr. 137). Brewington had posted Melissa's confidential medical data, so she routinely reviewed Brewington's postings (Tr. 57, 312). Brewington published a website dated July 2, 2010, informing other professionals that they would be in trouble if they used Dr. Connor, and that accused Connor of child abuse (Tr. 149-150); (Exh. 195). Brewington made postings about the Children's Home of Northern Kentucky (Tr. 153-155). Dr. Connor was a consultant who performed evaluations for the Children's Home, which treats children with psychological and behavioral problems (Tr. 153-155). On December 18, 2009, Brewington published an entry in which he stated that the courts will not protect Connor, that Brewington will tell people about Connor, that he

will send letters to the board and donors of the children's home to let the public know about Connor's affiliation with the home, even if the home ignores Brewington, and calling Dr. Connor a pervert who works with children who may have been sexually abused (Tr. 155-156). Dr. Connor had to visit with the Children's Home to explain what was happening with Brewington (Tr. 156).

On November 17, 2010, Brewington informed readers that he had attended another child custody case where Dr. Connor was a witness and he made Dr. Connor nervous by his presence there (Tr. 156-157; Exh. 200). Brewington also stated that he was a pyromaniac (Tr. 157). Dr. Connor was concerned for himself, his family, his children, his office, and his house (Tr. 158).

June 26, 2010, Brewington wrote about Connor and his wife, Dr. Jones-Connor, in a campaign to warn people about Dr. Connor's financial motives; Brewington indicated where the Connors lived, and referenced the bank that handled their mortgage (Tr. 160). Dr. Connor never told Brewington that his mortgage was with Fifth-Third Bank (Tr. 160-161). Brewington indicated he had family living near the Connors and that he contacted their neighbors (Tr. 161). Dr. Connor was "very" concerned (Tr. 161).

Brewington also published a picture of Connor's deceased father (Tr. 94; Exh. 193). That stated that Jim Connor had been a coach at Thomas Moore College (Exh. 193). The anonymous letter that Connor received and attributed to Brewington had included the Thomas Moore Athletic Department, and organizers of an event established in memory of Dr. Connor's father, among those that Brewington threatened to contact (Exh. 33).

Brewington also published a photograph of Dr. Connor dancing at a niece's wedding reception (Tr. 162-164; Exh. 201). Neither Dr. Connor, nor his wife, Dr. Jones-Connor,

knew how Brewington obtained the photograph (Tr. 161-164, 196-205). It was titled "the dangerous dancing Dr. Edward J. Connor" and told readers 'if you see this man, keep your distance' and, 'for more information on Dr. Connor's unethical and illegal activities, go to www.danhelpskids.com' (Tr. 164; Exh. 201).

Brewington also wrote that he wanted to beat Dr. Connor, and Dr. Jones-Connor senseless (Exh. 198; Tr. 158). Brewington wrote 'that lousy Son of a BI- - -, lied in his report and made [Brewington] so mad he wanted to beat him senseless; that dirty piece of S - - T would not honor his contract . . . even though he / she took my money . . . every time I think about the evaluation report that contained numerous errors and oversights it makes [Brewington] want to punch Dr. Custody Evaluation in the face' (Tr. 159). Dr. Connor took this as a direct threat against both Dr. Connor and his wife (Tr. 159).

Brewington published the following claims about Dr. Connor: that he was a criminal, a liar, a pervert, retaliatory, slanderous, and a dangerous man (Tr. 137-167; Tr. 307-310; Exhibits 10, 53, 160-170, 172-184, 186, 186a, 187, 188, 190-191, 193, 195, 197-201, 210-211). He made it possible for others to find where Dr. Connor lived (Tr. 137-167; Tr. 307-310; Exhibits 10, 53, 160-170, 172-186, 186a, 187-188, 190-191, 193, 195, 197-201, 210, 211).

Dr. Connor had never before experienced what he experienced from Brewington over the course of this dissolution proceeding (Tr. 167). Dr. Jones-Connor found all of Brewington's correspondence, given the volume, its threatening nature, the derogatory and factually inaccurate content, and its persistence, to be unsettling and disturbing, as it showed the extent to which Brewington would go (Tr. 196-202). When she discovered that Brewington had publicized their street, and remarked about some "nice looking houses on

[their] street", and proved he knew their bank, her heart 'just sank' (Tr. 205). She was extremely frightened when Brewington talked about beating the evaluator senseless (Tr. 205).

As a result of the above, the Connors notified the Children's Home, instructed them to notify the police immediately if Brewington ever appeared; contacted the police; informed their own children about Brewington, showing them a photograph of Brewington; and instructed their staff to call the police immediately if Brewington ever showed up (Tr. 164-167, 203-205). Dr. Connor did not seek a protective order, by choice, because he did not want to incite Brewington (Tr. 176, 190, 191). He refrained from filing a slander or libel suit for the same reason (Tr. 191).

Brewington not only sent Dr. Connor with the above letters and published the above internet postings; he also filed numerous motions with respect to the court's ruling that Dr. Connor not release Melissa's private medical and psychological information and motions in response to the court's final decree (Tr. 214-254, 314; Exhibits 99, 110-111, 116, 121, 123-126, 128-129, 132-134, 136-139, 141-142, 146, 148). Brewington, who was unemployed, was financially supported by his mother while he represented himself, but the pleadings cost Melissa financially because she had to pay an attorney to prepare a response (Tr. 315-316; Exh. 127; Exh. 135).

In December, 2008, Judge Taul recused himself and Judge James D. Humphrey was named Special Judge (Exh. 120). Judge Humphrey ruled on Brewington's numerous motions, including petitions for contempt, motions to exclude Dr. Connor's testimony, and motions for release of the entire case file from the custody evaluation (Exhibits 99; Exh. 120). Brewington's pleadings included motions for mistrial (before trial had occurred),

motions for change of judge, repetitive motions to exclude Dr. Connor's testimony and / or for release of his entire file from the evaluation, a motion to withdraw his appearance (when he was representing himself), and attempts to call Judge Taul as a witness (Tr. 214-254; Exhibits 99, 110-111, 116, 121, 123-126, 128-129, 132-134, 136-139, 141-142, 146, 148).

In his various pleadings, Brewington accused Judge Humphrey of unethical or illegal conduct and stated that he would not comply with a court order to remove or take down his web page(s) (Tr. 226-9; Exh. 129). Brewington wrote that if Judge Humphrey remained Judge, it would result in a nightmare of litigation for Judge Humphrey and all of his cases would be scrutinized (Tr. 230). He repeated motions after rulings were issued (Tr. 232). He stated that Judge Humphrey knew that Dr. Connor was a liar and that Humphrey would be subject to disciplinary action (Tr. 235-6).

The final hearing required three days and Judge Humphrey kept an officer in the court room because of Brewington's conduct (Tr. 237). Judge Humphrey issued his final order and decree of dissolution on August 17, 2009 (Exh. 140). In it, Judge Humphrey ruled joint custody was inappropriate, partly because of Brewington's actions in court, that Brewington's conduct displayed that he was paranoid, manipulative, unwilling to take responsibility for his behavior, un-cooperative and uncompromising (Tr. 240). The judge noted that Brewington's writings are similar to those of individuals who have committed horrendous crimes against their families (Tr. 241). In the final order, Judge Humphrey stated that Brewington attempted to intimidate the court, court staff, Judge Humphrey's wife, Dr. Connor, and anyone taking a contrary position; that the court is concerned about the attacks on Dr. Connor; that Brewington has attempted to intimidate opposing counsel with contact referencing weapons training, and that Brewington is irrational and dangerous

(Tr. 242-243). The reference to opposing counsel Amy Loechel referred to a time when Brewington contacted Loechel at home, made clear that he knew where she lived and who her spouse was, and in which Brewington mentioned firearms instruction (Tr. 68-71). The final order also divided the property (Exh. 140), and Brewington was ordered to give the .357 handgun to Melissa, but he never did so (Tr. 325). Loechel knew that Brewington kept the gun despite the order (Tr. 61-63).

The final order gave physical custody to Melissa and suspended Brewington's visitation, pending further evaluation; it did not terminate his parental rights, but made visitation contingent upon further evaluation (Tr. 244-245; Exh. 140). Brewington's internet activities escalated (Tr. 80). He posted that the court's findings were like playing with gasoline and fire and that anyone who has seen [Brewington] with gas and fire knows that [Brewington] is quite the accomplished pyromaniac (Tr. 241). He said the court would have to kill him to make him stop his internet posts (Tr. 242). He called Judge Humphrey a child abuser (Tr. 65). He named Judge Humphrey's wife Heidi by name (Tr. 65-66). He published the Humphrey's home address (Tr. 65-67).

Brewington, while under oath before a grand jury, claimed he did not know Heidi Humphrey was Judge James Humphrey's wife, and that he learned the address by visiting the Dearborn County Tax Assessor Web Site (Tr. 347-348).

Also after final judgment, in another of Brewington's motions he referred to Judge Humphrey's "child abducting tactics" and stated that anyone who takes actions against Brewington will be held personally responsible for their actions (Tr. 247-248; Exh. 142). Brewington stated that his job is to hold people accountable for doing mean things to his

kids, and to make sure that they do not have the opportunity to hurt others, and he forwarded this to Judge Humphrey's wife (Tr. 249-250).

Multiple internet postings referred to Judge Humphrey as a "child abuser" and called him dishonest, a liar, or unethical (Tr. 350-401); (Exhibits 160, 167-178, 180-183, 186-188, 190-191). Brewington also named the Court of Appeals after the *per curium* decision following his dissolution proceeding, mentioning Judge John Baker and Chief Judge Margaret Robb by name and accusing the Court of Appeals of lying, in part to help build the case against Brewington, and alleging that they "will abuse the rules just as they will have abused children." (Tr. 401; Exh. 172).

As a result of Brewington's internet postings the Humphrey's received mail at their home address from people they did not know (Tr. 251; Exh. 71, Exh. 87, Exh. 77, Exh. 78). Judge Humphrey was disturbed because of the mention of his wife and because his home address had been printed: he had served as a prosecutor, prosecuting dangerous criminals, before becoming a judge responsible for sentencing them (Tr. 250).

The Humphreys took the following precautions: (1) Judge Humphrey unlocked his firearm; it had been on safety lock for so long – since their children were born – that it needed repair; (2) they added a security system at home; (3) they had police escorts to and from work; (4) they had law enforcement at their residence; (4) they notified one son's high school and provided information about Brewington, and notified another son's campus police at college; (5) they kept a photograph of Brewington and a description of his vehicle in their home; (6) they received firearms training (Tr. 255, 263, 285). According to Judge Humphrey this was the first time he had been put in fear like this and the first time his home address had been published (Tr. 255-256). No one had ever caused him to take the actions

that Brewington caused him to take (Tr. 257). The Humphreys feared Brewington (Tr. 257, 286), and Mrs. Humphrey still fears for the safety of her sons ("I am a mother") (Tr. 286).

On March 7, 2011, a grand jury indicted Brewington with: (I) intimidation, a class A misdemeanor; (II) intimidation of a judge, a class D felony; (III) intimidation, a class A misdemeanor; (IV) attempt to commit obstruction of justice, a class D felony; (V) perjury, a class D felony; and (VI) unlawful disclosure of grand jury proceedings, a class B misdemeanor (App. 1-2). Jury trial was held October 3, 2011, through October 6, 2011 (App. 7-8). During opening statements the defense argued that Brewington was expressing his opinions about the judicial process and that his writings were protected speech (Tr. 26-28). The State moved on August 9, 2011, for the confidentiality of the juror's names and identities (App. 6). Brewington did not file any written motions challenging the constitutionality of the intimidation statute, intimidation charges, or prosecution for the same (App. 1-8). During trial the court admitted into evidence both the divorce trial court's final decree and Dr. Connor's custody evaluation (Exh. 9, Exh. 140).

At the conclusion of evidence Brewington moved under Trial Rule 50 for judgment on the evidence, arguing that the State did not sufficiently prove that Brewington conveyed threats (Tr. 426-427); Brewington argued that the State did not prove Brewington's intent was to place his victims in fear of retaliation, and that his intent was to express opinions protected by the Indiana and U.S. Constitutions (Tr. 428). The court denied the motion (Tr. 430). Brewington proposed a final instruction stating in relevant part that the jurors were to decide whether his statements fall under the protection of the Indiana Constitution; the State objected, and the trial court declined to read the proposed instruction (Tr. 439-443). The jury returned verdicts on counts I through V, and found him not guilty of Count VI (App.

33-34). The trial court sentenced Brewington to six months executed for intimidation against Dr. Connor (Count I); two years executed (consecutive to Counts I, IV, and V), for intimidation against Judge Humphrey; six months executed for intimidation against Heidi Humphrey (Count III), to be served concurrently to Count II; two years executed for Count IV (attempted obstruction), concurrent with Count I; and one year executed for Count V (perjury), consecutive to counts I, II, II, and IV); the aggregate sentence was five years imprisonment (App. 35).

SUMMARY OF ARGUMENT

I. Brewington's free speech rights were not violated. The intimidation statute is constitutional. The speech it criminalizes requires a threat, as contained in the language of the statute itself. Thus, it does not criminalize protected speech. Brewington never separately challenged the constitutionality of the statute at trial, but did argue his constitutional rights to free political expression. Waiver notwithstanding, the constitutional claim fails on the merits. Brewington's writings were not examples of protected speech.

II. Brewington waived all but one of his jury instruction challenges because he failed to object. The jury instruction argument loses on the merits as well. Because the State was not prosecuting Brewington for protected or political speech but for unprotected and threatening speech, the State did not face any higher burden of proof at trial. The trial court's instructions were thus proper. The court instructed the jury on Brewington's free speech rights and instructed the jury on the exact elements of the crimes charged.

III. The State proved that Brewington committed intimidation. The State presented evidence that writings about his victims showed a threat to burn property or commit arson, to commit battery by beating the doctor senseless, and made it possible for

others, including mentally ill patients familiar with the doctor, or dangerous criminals once prosecuted or sentenced by the judge, to locate each victim at their previously unlisted home addresses. Brewington also threatened to destroy the reputations of his victims and his writings endeavored to bring upon each of them either hatred or contempt.

IV. The State proved perjury. Brewington testified under oath that he learned Heidi Humphrey's address without knowing she was Judge Humphrey's wife. He testified he learned the address from a specific web site. The State proved that the site only provided information about Heidi Humphrey along with Judge Humphrey. It was impossible to learn Heidi Humphrey's address from that web site without learning that Heidi Humphrey was Judge Humphrey's wife and that she shared an address with him.

V. The jury was directed to use evidence from April 1, 2008, onwards when convicting Brewington of attempted obstruction of justice, and it is thus likely that the jury relied on different evidence when convicting Brewington of intimidation against Dr. Connor.

VI. The court correctly empanelled an anonymous jury. The record shows Brewington had no objection to the use of an anonymous jury. His failure to allege error at trial waives the issue for appellate review. The issue is not one of fundamental error; if there was any error, harmless error analysis applies. On the merits, the court had reason to believe that knowledge of the jurors' names could endanger them, and empanelling them confidentially was appropriate.

VII. The court properly admitted evidence of the custody evaluation report and the final decree from Brewington's divorce trial. Trial counsel only objected to the admission of the final order, so challenges to the custody evaluation are waived. But the final decree

was admissible to prove motive. To the extent that it includes language from the court stating that Brewington tried to intimidate the court, it is no different from victim testimony in any other intimidation trial in which the victim is an individual and not a court or judge.

VIII. Brewington received effective assistance. Objections to the jury instructions would have been overruled. The instructions accurately stated the elements of the crimes, did not require more, and the writings were un-protected speech. Objections to the custody evaluation would have been overruled because it proved motive. Had the court ruled otherwise, the verdict would remain, given the overwhelming evidence of guilt. Brewington fails to show that counsel's performance in these regards had any impact on the outcome of his proceedings.

ARGUMENT

I.

Brewington's free speech rights were not violated.

Brewington appears to make three separable arguments, which he has either collapsed into one or which at least overlap (App. Br. 13-26). They include a constitutional claim, a jury instruction claim, and a sufficiency claim. They are inter-related, and the State, to the best of counsel's ability, treats each separately in turn.

The claim that the trial court improperly instructed the jury, and that the State presented insufficient evidence, are inextricably bound up with the claim that the prosecution equaled punishment of one's First Amendment rights. It is a constitutional claim. The case summary indicates that Brewington did not file any written motions challenging the constitutionality of the intimidation statute, intimidation charges, or prosecution for the same (App. 1-8). But during openings, the defense argued that

Brewington was expressing his opinions about the judicial process and exercising his free speech rights (Tr. 26-28). At the conclusion of evidence, Brewington moved for judgment on the evidence, arguing that the State did not sufficiently prove that Brewington conveyed threats, the State did not prove Brewington's intent was to place his victims in fear of retaliation, and that Brewington's proven intent was simply to express opinions in speech protected by the Indiana and U.S. Constitutions (Tr. 428).

The State notes first that Brewington sets aside no special argument addressing the constitutional claim standing alone. Nonetheless, given his opening argument and argument for judgment on the evidence, if Brewington's argument is interpreted to mean that the intimidation statute runs afoul of the First Amendment, this is a challenge to the constitutionality of the statute, and a claim that the State's prosecution of Brewington for violating it is unconstitutional. But any challenge to the constitutionality of a criminal statute must be raised by a motion to dismiss prior to trial. *Wiggins v. State*, 727 N.E.2d 1, 5 (Ind. Ct. App. 2000) (citing I.C. §§ 35-34-1-6; IC § 35-34-1-4; *Rhinehardt v. State*, 477 N.E.2d 89 (Ind. 1985)). There are no such motions in the record (App. 1-55), nor any indication in the case summary that Brewington filed such a motion (App. 2-9). Because the statute now challenged on appeal is a criminal statute, the failure to timely raise the issue by a motion to dismiss results in a waiver of the alleged error. *Wiggins*, 727 N.E.2d at 5. Thus, if Brewington has embedded, amidst his jury instruction arguments and sufficiency argument, a claim respecting the constitutionality of the intimidation statute, that constitutional claim is waived. *Id.*

Waiver notwithstanding, the merits of a constitutional challenge to a law may still be assessed. *Vaughn v. State*, 782 N.E.2d 417, 419 (Ind. Ct. App. 2003) (citing *Rhinehardt v.*

State, 477 N.E.2d 89, 93 (Ind. 1985)). Even first assuming a free-standing constitutional claim, and even looking to the merits of the claim, the intimidation law and the State's prosecution of Brewington for breaking it did not violate Brewington's First Amendment rights.

Looking to the "construction of statutes" for guidance, one fundamental rule of statutory construction is to give words and phrases in the statute their plain, ordinary and usual meaning, unless the statute itself shows a contrary purpose. *Saurer v. Board of Zoning Appeals*, 629 N.E.2d 893, 897 (Ind. Ct. App. 1994). Here, given the plain language of the statute, there is no doubt that the statute does not run afoul of the First Amendment. The language it criminalizes necessitates the State prove a threat. I.C. § 35-45-2-1(b). Thus, the language of the statute begins where free speech rights end, and it does so by definition.

Under Indiana Code § 35-45-2-1(a), "[a] person who communicates a threat to another person, with the intent . . . that the other person be placed in fear of retaliation for a prior lawful act . . . commits intimidation, a Class A misdemeanor." The offense is a Class D felony if the threat is made to a judge. I.C. § 35-45-2-1(b). Whether a defendant committed intimidation is a question of fact. *Ajabu v. State*, 677 N.E.2d 1035, 1041 (Ind. Ct. App. 1997). I.C. § 35-42-2-1(c) defines "threat":

> 'Threat' means an expression, by words or action, of an intention to:
> (1) unlawfully injure the person threatened or another person, or damage property;
> (2) unlawfully subject a person to physical confinement or restraint;
> (3) commit a crime;
> (4) unlawfully withhold official action, or cause such withholding;
> (5) unlawfully withhold testimony or information with respect to another person's legal claim or defense, except for a reasonable claim for witness fees or expenses;
> (6) expose the person threatened to hatred, contempt, disgrace, or ridicule;

> (7) falsely harm the credit or business reputation of the person threatened; or
> (8) cause the evacuation of a dwelling, a building, another structure, or a vehicle.

The trier of fact must objectively determine whether a communication is a threat. *Ajabu*, 677 N.E.2d at1041.

In distinguishing between protected speech, and speech that subjects the speaker to criminal liability, Brewington notes that the "First Amendment requires that the State prove that Brewington's statements were "true threats." (App. Br. 20); citing *Watts v. U.S.*, 394 U.S. 705, 707 (1969); *Virginia v. Black*, 538 U.S. 343, 359 (2003). The United States Supreme Court defined "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" in *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)).

By definition, it is not enough for the State to prove the defendant in an intimidation proceeding communicated a threat; the State must also prove that it was done so with the intent to place the victim in fear of retaliation for a prior lawful act. Indiana Code § 35-45-2-1(a). But the commission of the threat is an essential element and by definition it is distinguishable from constitutionally protected speech. ("What is a threat must be distinguished from what is constitutionally protected speech." *Watts*, 394 U.S. at 707). Put another way: it is impossible to prove a person commits intimidation according to the requirements of Indiana's criminal code without simultaneously proving that the speech is, by definition, unprotected by the First Amendment. The State must prove a threat, including but not limited to those statements where the speaker means to communicate an intent to commit an act of unlawful violence. *Black*, 538 U.S. at 359.

Here, the State did just that. The State proved that Brewington communicated to the Judge and his wife Heidi Humphrey that his job is to hold people accountable for doing mean things to his kids, and to make sure that they do not have the opportunity to hurt others again (Tr. 249-250). The specific manner by which Brewington would make sure the judge could never again hurt others is not stated, but he did make clear to Amy Loechel that he was interested in firearms training, while simultaneously retaining his firearm despite the property division (Tr. 63, 69-71), facts of which the Judge was obviously aware. His writings about the judge were elsewhere more specific, with respect to the unlawful violence he threatened: he made clear enough that arson was an option (Tr. 241). With respect to Dr. Connor, it was battery Brewington threatened committing (Tr. 158-159, 205).

The speech for which Brewington was charged was not protected. Thus, had he brought a constitutional challenge to the trial court's attention it would have failed on the merits. The determination of what constitutes a true threat depends on the perspective of either the reasonable listener or the reasonable speaker. *Lovell v. Poway Unified School District*, 90 F.3d 367 (9th Cir. 1996); *U.S. v. Orozco-Santillian*, 903 F.2d 1262 (9th Cir. 1990); *U.S. v. Kelner*, 534 F.2d 1020 (2nd Cir. 1976). The question becomes what a reasonable speaker or listener would make of Brewington's volume of postings and correspondence, combined with its content. Brewington would argue that the quantity is beside the point. It is not. It defined the context and established the intent as well. The sheer quantity is beyond creepy. But the content of his contacts involved allusions to firearms training (when contacting Loechel), to arson (in a writing about Judge Humphrey), and to battery (in a posting about Dr. Connor). He has described his targets as criminals, unethical, retaliatory, "child abuser" and "pervert." Whether the perspective is that of a

listener or speaker, a reasonable person understands that Brewington tried to bring hatred or contempt upon his victims, to damage their reputations (for example, by contacting the Children's Home donors and Board), and to threaten them with either physical harm or criminal acts.

Fighting words are unprotected. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Brewington's language constitutes fighting words, and he as much admits it in some of his writings himself. In one of his postings, he admitted that he was not going to play by society's rules, that he was making up his own rules when "taking on" powerful entities (Tr. 360-363; Exh. 191). In other words, he was fighting. But in doing so he disobeyed the laws that usually govern such a war of words, and did so by his own admission (Tr. 361; Exh. 191). Case law contains similar examples: calling someone a fascist, indeed claiming that the entire local government consisted of fascists, was unprotected speech. *Id.* That attack resembles Brewington's relentless onslaught on the Dearborn court system and its witnesses. Telling a police officer to "get the fuck away" and calling his investigation "bullshit" is unprotected speech, as is calling the officer a "lying motherfucker." *Robinson v. State*, 588 N.E.2d 533, 534 (Ind. Ct. App. 1992). In comparable fashion, Brewington called Dr. Connor a "son of a b---h" and said he would like to beat him senseless. He deleted the letters of the obscenity, but the meaning remains, as does the physical threat. Speech before crowds that might incite action against government officials is unprotected. *Feiner v. New York*, 340 U.S. 315 (1951). Brewington did not stand on a soapbox on the sidewalk before a physical crowd. His crowd consists of anyone reading his postings. He did however post the address of a judge who has both prosecuted and sentenced dangerous criminals, and made clear the location of the home of a doctor who treats the mentally ill. It fits the

computer age example of the same kind of speech that is unprotected, for inciting violence against officials. Indeed, there is no other reason proven by the evidence for posting that information (the address), other than to facilitate violence against the judge.

The constitution protects criticisms of government action. But Brewington's attacks were personal, and Dr. Connor is not a government agent, either. The defense theory is that a good father was unjustly denied access to his daughters, and that he is criticizing the judicial system with political and protected speech. Both the premises and conclusion are false. He was not denied access to his daughters, but granted liberal visitation, contingent upon a follow-up evaluation (Tr. 90; Exh. 9). More importantly, he was not criticizing the system. His attacks were on the *persons* involved. Calling a man a "pervert" is not a philosophy of law; repeatedly calling a judge a "child abuser" is not a political claim; publishing the address of a judge and former prosecutor, for all the world, dangerous criminals included, says nothing about perceived flaws in the family courts. None of the postings resemble a typical editorial page. They are ad hominem attacks, and in some cases, too brutal for civil, political discourse. Brewington's attacks were *personal* and *threatening*.

In summary, the speech for which Brewington was being prosecuted was unprotected speech. Brewington never brought a constitutional challenge to the court's attention (App. 1-54). Had he done so, it would have failed on the merits.

II.

The court properly instructed the jury.

Brewington's constitutional argument is mostly enmeshed in his claim that the trial court improperly instructed the jury. He challenges the jury instructions for failing to inform the jury of the constitutional limitations of the intimidation and obstruction of justice

statutes. First, he argues that to convict him for threatening violence, the State must have proved that Defendant's statements were "true threats" and it was fundamental error for the trial court not to instruct the jury on the "true threats" standard. Second, he argues that the State had to satisfy the elements of defamation to satisfy Indiana Code § 35-45-2-1; the State was required to prove that his statements were intentionally false.

In jury instruction one, the court instructed the jury that in order to find Defendant guilty of intimidation, counts I, II, and III, the State had to prove beyond a reasonable doubt that Defendant communicated a threat to Dr. Edward Connor (count I), Judge James D. Humphrey (count II), or Heidi Humphrey (count III) "with the intent that [he or she] be placed in fear of retaliation for a prior lawful act." To find Brewington guilty of obstruction of justice, count IV, the State had to prove beyond a reasonable doubt that he "knowingly or intentionally . . . [i]nduced by threat, coercion, or false statement . . . [a] witness or informant in an official proceeding or investigation, to withhold or unreasonably delay in producing any information, document, or thing." The State had to prove that Brewington intimidated or harassed Dr. Edward Connor, a witness in the official proceeding.

In jury instruction two, the trial court read the text of the First Amendment to the jury. In jury instruction three, the court read the text of Article I, Section 9 of the Indiana Constitution to the jury. In jury instruction five, the court read the text of the portion of the intimidation statute that defines "threat" to the jury.

Jury instructions are left to the sound judgment of the trial court and are reviewed for an abuse of discretion. *Crose v. State*, 650 N.E.2d 1187, 1189 (Ind. Ct. App. 1995). A trial court abuses its discretion when the instructions taken as a whole are incomplete or inaccurate statements of the law which confuse or mislead the jury. *Id.* The instruction(s)

"must be a correct statement of the law, be applicable to the evidence adduced at trial and be relevant to the issues the jury must decide in reaching its verdict." *Id.*

Generally, "review of a claim of error in the giving of a jury instruction requires a timely trial objection clearly identifying both the claimed objectionable matter and the grounds for the objections." *Scisney v. State*, 701 N.E.2d 847, 849 (Ind. 1998). Brewington only objected to one jury instruction at trial. His other claims are therefore waived unless the instructional error was fundamental. *Harper v. State*, 963 N.E.2d 653, 660 (Ind. Ct. App. 2012). A fundamental error is one that is so prejudicial that the defendant could not have had a fair trial. *Id.* Unless an error affects the defendant's substantial rights, it will be considered harmless. *Lee v. State*, 964 N.E.2d 859, 863 (Ind. Ct. App. 2012).

The trial court correctly stated the law when it instructed the jury on intimidation and obstruction of justice. Brewington combines the convictions for intimidation and obstruction of justice as a single intimidation argument in his Brief. As noted above, under Indiana Code § 35-45-2-1(a), "[a] person who communicates a threat to another person, with the intent . . . that the other person be placed in fear of retaliation for a prior lawful act . . . commits intimidation, a Class A misdemeanor." The offense is a Class D felony if the threat is made to a judge. I.C. § 35-45-2-1(b). Whether a defendant committed intimidation is a question of fact. *Ajabu v. State*, 677 N.E.2d at 1041. As noted above, I.C. § 35-42-2-1(c) defines "threat" to mean any of the following (among others): an expression, by words or action, of an intention to: (1) unlawfully injure the person threatened or another person, or damage property (as in committing arson, or a battery); (2) unlawfully subject a person to physical confinement or restraint (as in requiring them to attend work or be at home with a police escort, arguably at least); (3) commit a crime (for example, arson, or battery); (6)

expose the person threatened to hatred, contempt, disgrace, or ridicule (by, for example, calling a child psychiatric evaluator a pervert, or calling a judge who presides over family law proceedings a "child abuser"); (7) falsely harm the credit or business reputation of the person threatened (for example, threatening to contact donors of a non-profit employing the person, or accusing them of criminal, unethical or dishonest behavior). The trier of fact must objectively determine whether a communication is a threat. *Ajabu*, 677 N.E.2d at1041.

To prove intimidation, the State had to show that Brewington "(1) communicated a threat; (2) to another person; (3) with the intent that the other person be placed in fear of retaliation for a prior lawful act." *VanMatre v. State*, 714 N.E.2d 655, 658 (Ind. Ct. App. 1999). To convict Brewington on counts I, II and III, the State had to prove that Defendant threatened Dr. Edward Connor, James D. Humphrey and Heidi Humphrey and that defendant intended to place them in fear of retaliation for a prior lawful act. The State was also required to prove that the legal act preceded the threat and Defendant intended to place the victims in fear of retaliation for that act. *Lainhart v. State*, 916 N.E.2d 924, 939 (Ind. Ct. App. 2009) ("Mere proof that the victim is engaged in an act which is not illegal at the time the threat is made is not sufficient."); *VanMatre*, 714 N.E.2d at 658.

Brewington claims the court was required to instruct the jury on the "true threats" standard. As noted, the United States Supreme Court defined "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" in *Black*, 538 U.S. at 359 (citing *Watts*, 394 U.S. at 708). The trial court defined "threat" according to I.C. § 35-45-2-1. A relevant portion of that definition is materially indistinguishable from the Court's definition in *Black*: "an intention to . . . unlawfully injure

the person threatened or another person." I.C. § 35-45-2-1(c). Because "we presume that the jury followed the instructions tendered by the trial court," *Williams v. State*, 782 N.E.2d 1039, 1047–48 (Ind. Ct. App. 2003), the jury must have found Defendant committed a "true threat."

Brewington claims that because part of the definition of "threat" in I.C. § 35-45-2-1(c) is "essentially criminal defamation," the State was required to prove that his statements were intentionally false. The relevant portion of the statute reads: "expose the person threatened to hatred, contempt, disgrace, or ridicule . . . [*or*] falsely harm the credit or business reputation of the person threatened." (emphasis added). To prove defamation in Indiana, a civil claim, the plaintiff must prove "a communication with defamatory imputation, malice, publication, and damages." *Trail v. Boys & Girls Club of Nw. Ind.*, 845 N.E.2d 130, 136 (Ind. 2006) (quoting *Davidson v. Perron*, 716 N.E.2d 29, 37 (Ind. Ct. App. 1999) (internal quotation marks omitted). The intimidation statute does not require that the threat be defamatory; the State must only prove that Brewington communicated a threat to another person with the intent that the person be placed in fear of retaliation for a prior lawful act. *VanMatre*, 714 N.E.2d at 658.

The court did not commit fundamental error because it properly instructed the jury of the necessary elements of I.C. § 35-45-2-1. *See Funk v. State*, 714 N.E.2d 746, 749–51 (Ind. Ct. App. 1999) (finding necessary elements conveyed to jury even though the trial court applied the wrong label to the charges). The instructions mirrored the language of the statute. The trial court only deviated from the statutory language by inserting the victims' names.

All but one of Brewington's allegations of trial court error respecting jury instruction are waived given a failure to object. But waiver notwithstanding, the trial court correctly instructed the jury of the elements, and the trial court provided the jury with instruction that no law shall prohibit the free exercise of speech according to the U.S. Constitution, and no law shall restrain the free interchange of thought and opinion, or restrict the right to speak or write on any subject, given Indiana's own constitutional protections (App. 14-15). The statute did not require more than the instructions indicated, and the State's proof satisfied the statutory requirements anyway, for reasons argued below. The instructions were not an abuse of discretion.

III.

The State proved Brewington committed intimidation.

Mixed in with the constitutional claim and jury instruction argument is a sufficiency argument. For reasons argued above, the State was not required to show more than what the statutory elements required, as the State never prosecuted Brewington for protected speech, but only for unprotected, threatening speech, and the court's instructions were consistent with this requirement.

When reviewing a claim of insufficient evidence, the court on appeal considers the evidence most favorable to the verdict, along with all reasonable inferences to be drawn therefrom. *Warren v. State,* 725 N.E.2d 828,834 (Ind. 2000). The court neither reweighs the evidence nor judges the credibility of the witnesses but, rather, will affirm the conviction if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.* Evidence is insufficient to convict when no rational fact finder could have found

the defendant guilty beyond a reasonable doubt. *Clark v. State,* 728 N.E.2d 880, 887 (Ind. Ct. App. 2000).

As noted, to prove intimidation, the State had to prove Brewington "(1) communicated a threat; (2) to another person; (3) with the intent that the other person be placed in fear of retaliation for a prior lawful act." *VanMatre*, 714 N.E.2d at 658. To convict Brewington on counts I, II and III, the State had to prove that Defendant threatened Dr. Edward Connor, James D. Humphrey and Heidi Humphrey and that defendant intended to place them in fear of retaliation for a prior lawful act. The State was also required to prove that the legal act preceded the threat and Defendant intended to place the victims in fear of retaliation for that act. *Lainhart v. State*, 916 N.E.2d 924, 939 (Ind. Ct. App. 2009) ("Mere proof that the victim is engaged in an act which is not illegal at the time the threat is made is not sufficient."); *VanMatre*, 714 N.E.2d at 658.

Brewington met the statute's requirements in more than one way. Judge Humphrey's order, and Dr. Connor's evaluation, both came in time before Brewington threatened Humphrey, Humphrey, and Connor.

With respect to the Humphreys, it was *after* the final order that Brewington's internet activities escalated (Tr. 80). He wrote the court's findings were like playing with gasoline and fire, adding that anyone who has seen [Brewington] with gas and fire knows that [Brewington] is quite the accomplished pyromaniac (Tr. 241). One entry called Judge Humphrey a child abuser (Tr. 65). Brewington named Judge Humphrey's wife Heidi by name (Tr. 65-66). He published Judge and Heidi Humphrey's home address (Tr. 65-67). After final judgment, he wrote that anyone who takes actions against Brewington will be held personally responsible for their actions (Tr. 247-248; Exh. 142) and that his job is to

hold people accountable for doing mean things to his kids, and to make sure that they do not have the opportunity to hurt others, and he forwarded this to Judge Humphrey's wife (Tr. 249-250). Because of Brewington's writings the Humphrey's received mail at their home from complete strangers (Tr. 251; Exh. 71, Exh. 87, Exhs. 77-78).

Brewington's threats showed an intent to do the following: (1) unlawfully injure the judge or damage his property (by setting a fire, that is, committing arson); (2) commit a crime (for example, arson); (6) expose the Humphreys to hatred, contempt, disgrace, or ridicule (he called Humphrey a "child abuser" and strangers even wrote them at home); (7) to falsely harm the credit or reputation of the Humphreys.

The same is true with respect to Dr. Connor. Brewington's threats revealed an intent to: unlawfully injure Dr. Connor (by committing battery); (2) commit a crime (assault and / or battery); (6) expose Dr. Connor to hatred, contempt, disgrace, or ridicule (he called Dr. Connor a "child abuser" and pervert); (7) to falsely harm the credit or business reputation of Dr. Connor (threatening to contact donors of a non-profit employing him).

Brewington committed so *many kinds* of threats in his unrelenting writings about his victims and made so *many* malicious comments that he covered the statute defining threat in multiple ways. The State presented sufficient evidence.

IV.

The State proved Brewington committed perjury.

The State sufficiently proved that Brewington committed perjury. The State incorporates the standard of review cited above (Argument III). To prove Brewington committed perjury, the State had to prove that he made a false, material statement, under

oath or affirmation, knowing the statement was false when he made it. In other words, the State had to prove Brewington lied under oath.

Under oath (Exh. 112) Brewington testified that he learned Heidi Humphrey's address through the Dearborn County Assessor's Web Site (Tr. 406), and that he did not know that Heidi Humphrey was Judge Humphrey's wife (App. 42). The State proved that when someone searching the internet goes to that web site, the Assessor's, entering Heidi Humphrey's name results in "no records found" (Tr. 406-407). Brewington could not have learned Heidi Humphrey's address from that web-site by searching her name (Tr. 406-407). If one visited the web site that Brewington claimed to use, and typed "Humphrey" without her first name, it showed three addresses, the third of which listed both Judge James and Heidi Humphrey (Tr. 407). To visit the site Brewington cited, and search for Heidi Humphrey, one had to learn that she lived with the judge; it was impossible not to. Searching the web site by "contains" and using Heidi Humphrey also linked her to the Judge in the results (Tr. 407-408). No listings existed for Heidi Humphrey alone (Tr. 406-409).

This brackets aside that Brewington is a self-proclaimed internet master (Exh. 174) who spent his unemployed hours on "internet projects" while his then-wife Melissa was working for a living (Tr. 294-296). It is counter-intuitive for a jury to believe that a computer expert such as Brewington is incapable of discovering that Heidi Humphrey was Judge Humphrey's wife, especially given his ability to discover the bank for Dr. Connor's mortgage, post a picture of Dr. Connor's deceased father, find addresses of unlisted persons, or locate a photograph from a wedding reception two states away. In other words, after searching the Humphreys, he knew they were married. The State proved that Brewington committed perjury, that he lied under oath (Tr. 405-409).

V.

Brewington's convictions do not violate double jeopardy.

The United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This constitutional provision includes protection from multiple punishments for the same offense. *Davis v. State*, 819 N.E.2d 863, 867-68 (Ind. Ct. App. 2004). Indiana's double jeopardy clause likewise provides the same protection, and our state's protection against double jeopardy is located in Article I, Section 14, of the state constitution. *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999).

There are two methods of analyzing a double jeopardy claim. To determine whether there are two offenses or only one offense under a federal double jeopardy claim, one must determine whether each statutory provision requires proof of an additional element which the other provision does not. *Purter v. State*, 515 N.E.2d 858, 860 (Ind. 1987) (citing *Blockburger v. United States*, (1932) 284 U.S. 299). The *Blockburger* test emphasizes the elements of the two crimes in question, and as a general rule, if each crime requires proof of a fact that the other crime does not require, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof used to establish each crime. *Id.* (citing *Brown v. Ohio* (1977), 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187).

Under the State constitution, Article 1, Section 14, the same elements test is applied, but also, two crimes are the same offense where a defendant can show that a reasonable possibility exists 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. *Richardson*, 717 N.E.2d at 53.

The record indicates that the jury in Brewington's case was directed to consider specific evidence in relation to the obstruction of justice attempt (Tr. 477). During the State's closing, specifically that part dealing with attempted obstruction of justice (Tr. 475-478), the prosecutor singled out specific evidence respecting the obstruction charge: those writings beginning on or around April 1, 2008 (Tr. 477). It is true that the quantity is vast, and the jury may have considered some of the threats in connection with the intimidation charge, and some in connection with the obstruction charge, since both required proof of Brewington's attempts to induce Dr. Connor to either withdraw the evaluation, or withdraw himself, from the proceedings. If this Court concludes that the same evidence was used to convict, the enquiry ends. *Richardson*, 717 N.E.2d at 53. That said, the record supports the conclusion that the jury considered only those postings after April 1, 2008, when determining guilt of the obstruction charge, and the convictions would not violate double jeopardy.

VI.

The trial court properly empanelled an anonymous jury.

The State moved on August 9, 2011, for the confidentiality of the juror's names and identities (App. 6, 45). The court apparently granted that motion (the order doing so is not contained in the Appendix prepared by Brewington).

The Appendix prepared by Brewington on appeal includes no response from the defense opposing the motion; the chronological case summary does not indicate a motion or responsive pleading of any kind filed by Brewington in opposition to the use of an anonymous jury (App. 2-9). The record is bereft of any proof that Brewington preserved this claim at the trial level by opposing the motion requesting the confidentiality of the jury

(App. 2-9). He has therefore waived the issue for appellate review. *Lewis v. State*, 755 N.E.2d 1116, 1122-23 (Ind. Ct. App. 2001); *Carmichael v. Siegel*, 754 N.E.2d 619, 634 (Ind. Ct. App. 2001) ("A party cannot . . . argue an issue that was not properly presented to the trial court"). The idea of waiver protects the trial courts. A court cannot or at least should not be held to have made an incorrect decision when the issue goes unchallenged by one of the parties and grants the request of the other. Here, the record indicates that the State requested a confidential jury, and that Brewington made no motion to oppose it (App. 2-9). He should not now be allowed to challenge the trial court's ruling, having acquiesced below.

The trial court properly impaneled an anonymous jury. "Control and management of the jury is an area generally committed to the trial court's discretion." *Norton v. State*, 273 Ind. 635, 661, 408 N.E.2d 514, 531 (1980). "A trial court has broad discretion in controlling the voir dire of prospective jurors." *Talley v. State*, 736 N.E.2d 766, 768 (Ind. Ct. App. 2000); *see also Kalady v. State*, 462 N.E.2d 1299, 1307 (Ind. 1984) (stating that trial courts have broad discretionary powers to regulate "the form and substance of *voir dire* examination"). A jury is "anonymous" when juror identification information is withheld from the public and the parties themselves. *Major v. State*, 873 N.E.2d 1120, 1125 (Ind. Ct. App. 2007); citing *U.S. v. Crockett*, 979 F.2d 1204, 1215, n.10 (7th Cir. 1992); *State v. Tucker*, 657 N.W.2d 374, 379 (Wis. 2003)). Appellate courts considering the permissibility of anonymous juries have largely upheld their use. *Major v. State*, 873 N.E.2d at 1126 (multiple citations omitted). The courts upholding their use have found it appropriate if the court concludes there is a strong reason to believe the jury needs protection, and the court takes precautions to minimize any prejudicial effects on the defendant. *Id.* The court may

consider several factors, one of which includes the defendant's past attempts to interfere with the judicial process. *Id.* (citations omitted). To consider the precautions, reviewing courts examine the explanation given the trial court to the jury for its anonymity. *Id.* Within these parameters, the decision is left to the lower court. *Id.* Review allows for harmless error analysis. *Id.*

Here, Brewington's charges were that he attempted to interfere with the judicial process. His victims as alleged in the indictment and as proven by the convictions were a witness, a judge, and the judge's wife, and all crimes were motivated by his efforts to "take on the family courts." Interference with the judicial system was and is Brewington's *modus operandi*; it's what he does: (see transcript at 361, for one example: "How do you . . . battle powerful entities that don't follow the rules . . . you make up your own"). The court properly concluded that the jury should be confidential. There is no telling what Brewington would have done about jurors whose names he acquired. Even if Brewington's postings about jurors would not rise to a criminal level by using threatening language, he accused a former prosecutor and judges of being child abusers and liars. A juror does not deal with this ever-present possibility five days a week and should be protected from such attacks. The trial court was correct to empanel an anonymous jury.

Brewington's record does not allow a review of any precautions taken by the court: jury instructions refer the reader of the transcript to the court file (Tr. 8), and Brewington has not included any instructions regarding the confidentiality of the jury, if the court made any. This is another kind of waiver. It is the appellant's duty to present an adequate record clearly showing the alleged error. *Thompson v. State*, 761 N.E.2d 467, 471 (Ind. Ct. App. 2002). Failure to do so constitutes a waiver of the issue. *Id.* Here, there is no telling how

the court responded in its instructions to the confidentiality of the jurors. The record is thus not sufficiently complete to allow the kind of review that the *Major* opinion contemplates.

That said, the court's reasoning was proper given the charges and the alleged victims. Interference with the judicial process defined Brewington's crimes. There is no showing he ever opposed the use of a confidential jury. He must therefore show fundamental error. He cannot. As *Major* shows, an anonymous jury can be harmless ("We are not inclined to deem the empanelment of an anonymous jury as one of the rare structural constitutional errors immune to harmless error analysis.") *Major*, 873 N.E.2d at 1128.

One factor showing the use of the anonymous jury is harmless is evidence of guilt. *Id.* at 1130. Multiple exhibits showed Brewington could commit battery or arson, revealed the judge's address for anyone he ever sentenced or prosecuted to read, and accused the victims of child abuse and perversion. The State overwhelmingly made its case. If this Court does conclude error, such error was harmless and not fundamental and Brewington fails to overcome waiver. That said, the decision was the right one anyway, to protect the jury. This Court, for *any* of the above stated reasons (waiver, merits, harmlessness), should deny Brewington any relief on this claim.

VII.

The trial court properly admitted evidence.

The trial court properly admitted evidence of the custody evaluation prepared by Dr. Connor, and the final decree issued by Judge Humphrey (App. Br. 44: B). Brewington acknowledges that the documents could have proven motive (App. Br. 44). The trial court has discretion to admit or exclude evidence. *Southward v. State*, 957 N.E.2d 975, 977 (Ind. Ct. App. 2011). On appeal, the court reviews the trial court decision to admit or exclude

evidence for abuse of discretion. *Id.* The trial court abuses its discretion if its decision is "clearly erroneous and against the logic and effect of the facts and circumstances." *Id.* Even if a trial court erroneously admits evidence, the court on appeal should not reverse "if the error is harmless, i.e., if the probable impact of the evidence upon the jury is sufficiently minor so as to not affect a party's substantial rights." *Cox v. State*, 854 N.E.2d 1187, 1197 (Ind. Ct. App. 2006); Ind. Evidence Rule 103(a).

A defendant's claim is waived on appeal when the defendant fails to object to the evidence at trial unless the defendant can prove fundamental error. Ind. Evid. R. 103(b); *Southward*, 957 N.E.2d at 977. A fundamental error is one that is "so prejudicial that a fair trial is impossible." *Southward*, 957 N.E.2d at 977 (quoting *Sasser v. State*, 945 N.E.2d 201, 203 (Ind. Ct. App. 2011) (internal quotation marks omitted)).

Here, Brewington argued at trial that Exhibit 140, the final decree, was irrelevant (Tr. 64). The trial court admitted the document into evidence over his objection (Tr. 64). On the other hand, Exhibit 9, which is the custody evaluation, was admitted *without* objection by Brewington (Tr. 92). With respect to the custody evaluation, Brewington has waived his claim that the evidence was improperly admitted. *Southward*, 957 N.E.2d at 977. To show error, he must show fundamental error. He cannot.

The evidence was relevant to show motive, and its probative value outweighed its prejudicial impact. Brewington argues that his custody evaluation and divorce decree were more prejudicial than probative and should have not have been admitted into evidence at his trial. Indiana Evidence Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence is

admissible if it is relevant, unless a constitutional provision, statute or other evidentiary rule provides otherwise. Ind. Evidence Rule 402. Evidence is not admissible if it is not relevant. *Id.* Indiana Evidence Rule 403 provides that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

The Indiana Court of Appeals found that evidence of divorce and child custody dispute was relevant to show the defendant's motive in *Cox*. *Cox*, 854 N.E.2d at 1196. The defendant in *Cox* was on trial for murder, and the State presented evidence that the defendant had previously lost custody of two children in divorce proceedings. *Id.* The Court held that the evidence was admissible as relevant evidence of the defendant's *motive* to kill her child's father. *Id.* ("Evidence of motive, though not required, is *always* relevant in the proof of a crime.") (citing *Wilson v. State*, 765 N.E.2d 1265, 1270 (Ind. 2002) (emphasis added)). The Court found that the relevancy of the evidence was not substantially outweighed by the danger of unfair prejudice to the defendant because the defendant's "fitness as a custodial parent was not at issue." *Id.* at 1197. Even if the trial court erroneously admitted the evidence, the *Cox* court concluded, the admission still did not require reversal because the impact of the evidence on the jury was probably minor and did not affect the party's substantial rights. *Id.* Here, the decree issued by Judge Humphrey is the very reason that Brewington targeted Judge Humphrey with intimidating correspondence and web site postings, and the custody evaluation – admitted without objection – is the very reason that Brewington threatened to beat Dr. Connor senseless, ruin his reputation, and subject him to hatred and contempt. Case law clearly supported the trial court's

determination that these documents were relevant and that their probative value outweighed the prejudice that could attach. *Id.*

Brewington additionally contends that the custody evaluation and divorce decree should not have been admitted because no foundation was laid for the expert testimony they contained. Indiana Evidence Rule 702 deals with expert testimony:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

Experts may "testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field." Evid. R. 703. Witnesses may not, however, "testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." Evid. R. 704(b).

Brewington argues that no foundation was laid for Dr. Connor's expert testimony in statements in the custody evaluation. And one of those statements was cited in the divorce decree. The claim fails for multiple reasons.

First, this argument *might* be barred by the doctrine of *res judicata*. *See Wright v. State*, 881 N.E.2d 1018, 1021–22 (Ind. Ct. App. 2008) ("*Res judicata* prevents the repetitious litigation of disputes that are essentially the same.") (citing *Collins v. State*, 873 N.E.2d 149, 157 (Ind. Ct. App. 2007). A claim is precluded as *res judicata* when:

> (1) the former judgment [was] rendered by a court of competent jurisdiction; (2) the former judgment [was] rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action [was] between the parties to the present suit or their privies.

Id. at 1022 (quoting *Afolabi v. Atlantic Mortg. & Investment Corp.*, 849 N.E.2d 1170, 1173 (Ind. Ct. App. 2006)). This Court decided in Brewington's direct appeal from the divorce decree that the trial court in *that* proceeding did not abuse its discretion when it admitted Dr. Connor's report and testimony into evidence in the divorce trial. (Ex. 209 at 11). The State was not a party to that appeal, although the divorce court itself, from that cause, is one of the victims in the instant case.

Second, even if the doctrine of *res judicata* does not apply, given the fourth prerequisite, Brewington still did not object to the admission of the evaluation (Tr. 92). He made no claims at trial that Dr. Connor's expertise was not established (Tr. 92). Thus, he waived this challenge. *Southward*, 957 N.E.2d at 977. Third, he cannot overcome waiver by relying upon a claim of fundamental error. Dr. Connor's expertise was in fact established at Brewington's trial, even if the State never used the magic words when it sought to admit the evaluation (Tr. 84-87). The State established the following: Dr. Connor's job title and description; that Connor has prepared custody evaluations in multiple states and jurisdictions; that he is licensed in two states as a clinical psychologist; that he prepared evaluations in Indiana for our courts even before Indiana licensed him; that he has been doing evaluations since the 1990's; that he consults for the Children's Home of Kentucky; that he was trained as a psychotherapist by the Malmo Institute of Psychotherapy in Sweden; that he holds both bachelors and doctorate degrees in psychology; and so on (Tr. 84-86). A foundation was laid, even if it was not pointed to, with the accompanying words: "foundation."

Brewington argues that Judge Humphrey gave an inadmissible opinion of Brewington's guilt in the divorce decree. Indiana Evidence Rule 704(b) states, "Witnesses

may not testify to opinions concerning intent, guilt, or innocence in a criminal case . . . ." A conviction should not be set aside for admission of evidence unless "such erroneous admission appears inconsistent with substantial justice or affects the substantial rights of the parties." *McManus v. State*, 814 N.E.2d 253, 259 (Ind. 2004) (citing Ind. Trial Rule 61). The decree admittedly mentioned Brewington's attempted intimidation of the court (Exh. 140), but remained relevant and admissible: the court – meaning, Judge Humphrey – was the victim. The list of citations from cases in which victim testimony was held relevant and / or admissible would fill a page. But Brewington picked his victims; it was a court itself, a judge, who felt threatened, and had Judge Humphrey been another person, his or her testimony that he or she felt threatened would have been admissible. The order is the exact same kind of evidence: a victim stating that he was threatened.

Brewington argues the evaluation contained hearsay. Again Brewington never objected to this evidence. Second, Evidence Rule 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The custody evaluation was *not used* to prove the truth of the matters asserted in the evaluation; rather, the custody evaluation was used to show Brewington's motive to threaten Dr. Connor. Therefore, the statements in the custody evaluation were not inadmissible hearsay testimony. Indeed, if one grants that the jury thought the statements were false, or that the jury thought them true, it has no bearing on the reason for their admission. The evaluation explains why Brewington chose to harass and intimidate Connor unrelentingly. The jury already learned through other admissible evidence that Brewington thought the evaluation was false; that would only prove motive all the more so. It did not matter to the State's case whether the evaluation was accurate or not.

Its issuance and Brewington's disagreement with its findings proved motive, not its truth, or its errors.

The trial court was absolutely correct to admit the court's or judge's statements that he felt intimidated for the same reason that any victim may testify to feeling threatened in a trial for intimidation. Dr. Connor's evaluation was admitted without any objection at all, and Brewington may not complain of it now. But it was certainly not admitted to show that the evaluation was accurate or true; even an inaccurate one proved motive and would be relevant. Both documents proved motive, and both were more relevant and probative than they were prejudicial. The court properly admitted them both.

VIII.

Brewington received effective assistance of counsel.

Brewington argues ineffectiveness of trial counsel, alleging two grounds: (1) ineffectiveness for failing to object to the court's jury instructions (App. Br. 27-29); and (2) failure to object to evidence of the final decree and custody evaluation (App. Br. 47-48).

First, it should be noted that Brewington's decision to raise ineffectiveness of counsel on direct appeal will bar any future attempts to claim the same in the post-conviction setting. *Woods v. State*, 701 N.E.2d 1208, 1219-20 (Ind. 1998).

Second, to show ineffective assistance of counsel, Brewington must overcome a heavy burden. The court strongly presumes that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Coleman v. State*, 694 N.E.2d 269, 272 (Ind. 1998) (citing *Barany v. State,* 658 N.E.2d 60, 65 (Ind. 1995)). On appeal, the presumption that counsel is competent must be rebutted by strong and convincing evidence. *Coleman*, 694 N.E.2d at 272. To prevail on a claim of

ineffectiveness of counsel, a defendant must show that (i) defense counsel's representation fell below an objective standard of reasonableness and (ii) there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's inadequate representation. *Troutman v. State*, 730 N.E.2d 149, 154 (Ind. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, (1984)).

A defense counsel's poor trial strategy or bad tactics do not necessarily amount to ineffective assistance. *Troutman*, 730 N.E.2d at 154; *Woods v. State*, 708 N.E.2d 1208, 1211 (Ind. 1998). The appellate court will not second-guess the propriety of counsel's tactics. *Lowery v. State*, 640 N.E.2d 1031, 1041 (Ind. 1994), *cert. denied*, 116 S.Ct. 525 (1995).

It is not necessary to determine whether performance is deficient before examining the prejudice allegedly suffered by alleged deficiencies. *Strickland*, 466 U.S. at 697. Brewington must show that – but for counsel's alleged errors – the result of the proceeding would have been different. *Blanchard v. State*, 802 N.E.2d 14, 34 (Ind. Ct. App. 2004) (citing *Strickland*, 466 U.S. at 690, 694). Here, Brewington cannot show that his trial counsel's performance prejudiced the outcome of his proceeding.

Brewington made the State's case with what he wrote. The State was entitled to prove motive as argued (Argument VII). Admission of the evidence was proper in the first place, and harmless if not, for all the reasons already argued (Argument VII). But Brewington cannot prove that the trial court would have sustained any objection to the admission of the custody evaluation, because it was relevant to show motive for targeting Dr. Connor. Had counsel objected, it should have been over-ruled (See again Argument VII). Had it been sustained, Brewington's convictions would still result, given all of the

overwhelming evidence of guilt. Brewington can show no prejudice from the admission of the custody evaluation (counsel actually did object to the final decree). The ineffectiveness claim is a loser for Brewington on the evidentiary issue. He fails the first prong for reasons argued in Argument VII and fails the prejudice prong. *Blanchard v. State*, 802 N.E.2d at 34.

The same reasoning disposes of the claim regarding jury instructions. The court's instructions already covered Brewington's First Amendment and Indiana constitutional speech protections; the court's instructions tracked the elements of the statute; the statute (Argument I) was not unconstitutional and the speech was not protected speech, so the State's burden was not elevated (Argument I; Argument II). For all these reasons, Brewington cannot prove that the court at trial would have agreed with counsel's arguments respecting the jury instructions, and therefore he cannot show prejudice. Had the court agreed with Brewington's arguments respecting instructions, there is no way he would be acquitted anyway, given the content of his writings about his victims. The evidence overwhelms Brewington's free speech argument, whether couched in a constitutional claim, jury instruction claim, sufficiency claim, or an ineffectiveness claim. He fails the first prong of his ineffectiveness claim (for reasons stated above in Arguments I, II, and III), and he fails the prejudice prong. *Blanchard v. State*, 802 N.E.2d at 34.

CONCLUSION

For the foregoing reasons, the State respectfully urges that the trial court's judgment be affirmed.

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes, contains no more than 14,000 words according to the word count function of the Microsoft Word word-processing program used to prepare this brief.

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Certificate of Service

I do solemnly affirm under the penalties for perjury that on June 20, 2012, I caused to be served upon the opposing counsel in the above-entitled cause two copies of the Brief of Appellee by depositing the same in the United States mail first-class postage prepaid, addressed as follows:

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