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.	)	

BRIEF OF APPELLANT

Michael K. Sutherlin
Samuel M. Adams
MICHAEL K. SUTHERLIN & ASSOCIATES
P.O. Box 441095
Indianapolis, IN 46244-1095
Phone: (317) 634-6313
Fax: (317) 631-8818
Attorneys for Appellant-Defendant

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INTRODUCTION

This is a case of first impression that requires the Court to reconcile the protections of the First Amendment and Article I, § 9 of the Indiana Constitution with Indiana's intimidation statute, Ind. Code § 35-45-2-1.

This case arose from a difficult divorce. Daniel Brewington, who represented himself throughout most of the proceedings, became disillusioned with the legal process and the many barriers he faced pursuing joint custody of his two young children. No abuse, inappropriate lifestyle, or drug issues were raised in this case. Yet his efforts to maintain an important and vital role in his children's lives were hindered by Dr. Edward Conner, the appointed evaluator, and Judge James Humphrey, who ultimately denied him any contact with his children.

Brewington used the Internet to criticize the legal system and the individual decision-makers who denied him access to his children. Brewington also raised his concerns directly in correspondence with Dr. Connor and in filings with the court.

Aaron Negangard, the Dearborn County Prosecutor, took personal umbrage with Brewington exercising his First Amendment rights and silenced him by indicting Brewington with three misdemeanors and three felonies. Brewington should not be punished for expressing his opinions. Brewington asks this Court to affirm his rights and enter judgment in his favor, or at minimum, to reverse and remand for a fair trial.

STATEMENT OF ISSUES FOR REVIEW

1. Did the trial court commit reversible error by failing to instruct the jury on the federal and state constitutional limitations on prosecutions for intimidation, and, if so,

   a. Was this fundamental error, or

   b. Was trial counsel's failure to contemporaneously object to these improper instructions ineffective assistance?

2. Should the Court reverse Brewington's convictions for intimidation and attempted obstruction of justice because the State failed to produce sufficient evidence to sustain the burdens imposed by the First Amendment and Article I, § 9 of the Indiana Constitution?

3. Should the Court reverse Brewington's conviction for perjury because the State failed to produce sufficient evidence that Brewington's grand jury testimony was intentionally false?

4. Should the Court vacate Brewington's conviction for intimidation of Dr. Connor because State offered the same evidence to prove that charge and the substantial step for the commission of attempted obstruction of justice, thereby exposing him to double jeopardy?

5. Should the Court reverse all of Brewington's convictions because the trial court improperly used an anonymous jury, admitted improper evidence, and used prejudicial jury instructions?

STATEMENT OF THE CASE

On March 2, 2011, Appellant-Defendant Daniel Brewington was indicted on six counts: (I) Intimidation, Class A Misdemeanor, I.C. § 35-45-2-1(a)(1); (II) Intimidation of a Judge, Class D Felony, I.C. § 35-45-2-1(a)(2)(b)(1); (III) Intimidation, Class A Misdemeanor, I.C. § 35-45-2-1(a)(1); (IV) Attempt to Commit Obstruction of Justice, I.C. § 35-44-3-4; (V) Perjury, Class D Felony, I.C. § 35-44-2-1(a)(1); and (VI) Unlawful Disclosure of Grand Jury Proceedings I.C. § 35-34-2-10. (App.21-26). The indictments were filed in Dearborn Superior Court II on March 7, 2011 (App.3). Brewington was tried before a jury from October 3 through 6, 2011. (App.7-8). The jury convicted Brewington on Counts I-V, and acquitted Brewington on Count VI. (App.33-34).

The Court sentenced Brewington on October 24, 2011. (App.35-36). Brewington is currently serving his sentence at the Putnamville Correctional Facility.

Brewington timely filed his notice of appeal on October 24, 2011. (App.8).

STATEMENT OF FACTS

A. Initial Divorce Proceedings.

Daniel and Melissa Brewington were married in August 2002. (Ex.140 at 1). They had two children. (Ex.140 at 1). The marriage failed, and Melissa filed for divorce in Ripley County on January 8, 2007. (Ex.140 at 1). Ripley Circuit Judge Carl Taul was initially assigned to the divorce. (Tr.33-34). Judge Taul was replaced by Special Judge James Humphrey (Dearborn Circuit Court) on December 17, 2008. (Ex.120).

Melissa was represented by Angela Loechel. (Tr.31-32). Brewington was initially represented by counsel, but began representing himself in February 2008. (Tr.36; Ex.99 at 5).

Custody was contested. (Tr.37). Brewington and Melissa, through their attorneys (Thomas Blondell for Mr. Brewington), agreed to appoint Dr. Edward J. Connor to perform a custody evaluation. (Tr.37; Ex.104). Both parents sought temporary sole custody during proceedings. (Tr.303). At the provisional hearing, Melissa was awarded temporary sole custody, and Brewington was given three days visitation per week. (Tr.303-05).

Dr. Connor was a clinical psychologist, located in Erlanger, Kentucky. (Ex.104). At the time, Dr. Connor was licensed to practice in Kentucky, but not Indiana. (Tr.87; Ex.104). Dr. Connor testified that the Indiana psychology board had informed him that he could perform custody evaluations in Indiana if he did not work in the state continuously and if clients came to Kentucky for the evaluations. (Tr.87).

B. Dr. Connor's Custody Evaluation.

At the criminal trial, Dr. Connor testified about how he performs evaluations. He interviews both parents separately, gives them a number of psychological tests, observes them

interacting with the children (separately), and conducts home visitations. (Tr.87). Dr. Connor—with his wife, a psychologist in his practice—completed the evaluation for the Brewingtons on August 29, 2007. (Tr.90; Ex.9). The evaluation was filed in court on September 27, 2007. (Ex.99 at 4).

Dr. Connor recommended that Melissa have sole legal custody of the children, and Brewington have standard/liberal visitation. (Tr.90). Dr. Connor wrote in his report that Brewington and Melissa did not meet the criteria for joint custody because Melissa and Dan had serious problems communicating (due in part to her Obsessive-Compulsive-Disorder and Dan's Attention-Deficit-Disorder); and effective communication is critical to joint custody. (Ex.9 at 29-31)

C. Brewington's Correspondence with Dr. Connor.

On February 19, 2008, Brewington gave Dr. Connor a packet of information highlighting numerous errors and oversights he identified in the evaluation. (Ex.107). In response, Dr. Connor offered the Brewingtons additional appointments (at "significantly" reduced rates) to review any perceived errors, and to prepare an evaluation addendum. (Ex.107).

Some time before March 28, 2008, Brewington (now representing himself) began correspondence with Dr. Connor requesting the release of Dr. Connor's entire case file (i.e., tests, notes, etc.—the basis of the evaluation). (Ex.26).[1] Brewington wanted the entire case file to help him address the numerous errors and oversights he identified. (Ex.28 at 10).

In these various letters, Brewington claimed that he was entitled to the entire case file under his contract with Dr. Connor, as well as under Kentucky law and applicable professional

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[1] Exhibit 26, a March 28 fax from Brewington, refers to earlier correspondence, but the earlier correspondence is not in the record.

standards for psychologists. (Ex.26, Ex.55, Ex.61). At some point, Dr. Connor stated that he would release the case file if Brewington provided proof of his pro se status, which Judge Taul provided. (Ex.26, 27). Dr. Connor still declined the request, citing Judge Taul's statement that "This Court has only ordered that Mr. Brewington have a copy of your evaluation, at this point." (Ex.27). Brewington contended that this only meant that Judge Taul had not yet been asked to rule on Brewington's request. (Ex.27).

Over the next several months, there followed a lengthy series of correspondence, mostly from Brewington to Dr. Connor, regarding the case file.[2] Brewington's letters became increasingly demanding and agitated, accusing Dr. Connor of varied misconduct.

First, that Dr. Connor's refusal was a breach of contract. (*E.g.*, Ex.28, Ex.31). Second, that Dr. Connor committed ethical violations, including: providing an opinion about Brewington's ADHD without an adequate understanding of that condition; falsely advertising his fees; misrepresenting Brewington's statements in correspondence with Judge Taul; refusing to correct mistakes in the evaluation; misrepresenting himself in his deposition; and making false public statements. (*E.g.*, Ex.28, Ex.36, Ex.39, Ex.42). Third, that Dr. Connor committed malpractice, gross negligence, slander, and/or libel. (*E.g.*, Ex.39, Ex.42). Fourth, that Dr. Connor practiced psychology in Indiana without a license and committed other unspecified criminal behavior. (*E.g.*, Ex.34, Ex.43, Ex.48, Ex.49, Ex.51, Ex.55). Fifth, that Dr. Connor intentionally refused to cooperate and attacked Brewington in retaliation for "trying to expose [Dr. Connor's] wrongdoing." (*E.g.*, Ex.39, Ex.51). Finally, that Dr. Connor intentionally delayed resolution of the divorce, causing harm to Brewington's children. (*E.g.*, Ex.59, Ex.61).

[2] The record contains the following correspondence: (1) letters from Brewington to Dr. Connor, Exhibits 26-28, 31, 34, 36, 38-39, 41-51, 55-56, 59, and 61; (2) letter from Brewington to Dr. Connor's wife, Exhibit 40; (3) letters from Dr. Connor to Brewington, Exhibits 29 and 33; and (4) letter from Dr. Connor to Judge Taul, Exhibit 32.

Brewington told Dr. Connor that he would be held accountable for his misconduct. Brewington warned that he would file a breach of contract lawsuit, and drafted a proposed complaint. (Ex.31, Ex.39, Ex.41). Brewington mentioned filing other lawsuits for malpractice and other unspecified claims. (Ex.34, Ex.39, Ex.40, Ex.42). Brewington stated that he would hold Dr. Connor accountable for criminal wrongdoing (Ex.39, Ex.48, Ex.49, Ex.55, Ex.59); report him to the Kentucky Board of Psychology (Ex.39, Ex.48, Ex.49); file a petition for contempt, (Ex.45); and/or inform the public about Dr. Connor's wrongdoing, (Ex.59, Ex.194). Brewington did not threaten violence, directly or indirectly, and expressly disclaimed any threat of violence. (Ex.59).

Brewington made good on some of his stated intentions. Brewington did not file any lawsuits, but did file several motions to exclude Dr. Connor from the divorce proceedings (*See* Ex.99, Ex.111, Ex.133); a complaint with the Kentucky Board of Psychology and the Kentucky Attorney General (Ex.55, Ex.60); a Petition for Contempt Citation (Ex.116); wrote letters to law enforcement officers in Ripley and Dearborn Counties requesting criminal investigations of Dr. Connor (Ex.67. Ex.87); and, publicized Dr. Connor's perceived misdeeds (*see infra* pp.9-11).

D. Continuation and Disposition of the Divorce Proceedings

Brewington raised his concerns about Dr. Connor with Judge Humphrey, who was assigned special judge after Judge Taul recused himself for having ex parte communication with Dr. Connor. (*See* Ex.132).

Brewington made several unsuccessful attempts to compel the release of Dr. Connor's case file. (Ex.99 at 10-11; Ex.110; Ex.116). Subsequently, Brewington filed motions in limine to prevent Dr. Connor from participating in the divorce proceedings, which were also denied.

(Ex.99 at 8, 12; Ex.111; Ex.206A; Ex.209). When Judge Humphrey refused to take any action on his complaints against Dr. Connor, Brewington began lodging complaints about Judge Humphrey's conduct. (*E.g.*, Ex.129, Ex.139). Brewington filed two motions for mistrial, citing Dr. Connor's and Judge Humphrey's misconduct. (Ex.129, Ex.139). Both motions were denied, as was Brewington's motion to reconsider. (Ex.99 at 16-18; Ex.135). Brewington also filed an unsuccessful motion for change of judge, citing alleged ex parte communication with Dr. Connor, and Judge Humphrey's knowledge of Dr. Connor's misconduct and unlicensed practice of psychology. (Ex.132, Ex. 138).

The final hearing was held on May 27, June 2, and June 3, 2009. (Ex.140 at 1). Brewington continued to see his children three days a week until August 17, 2009, when Judge Humphrey issued the Final Order dissolving the marriage. (Ex.140). Judge Humphrey awarded Melissa sole legal custody, relying on Dr. Connor's recommendation. (Ex.140 at 2, 5). Judge Humphrey also denied Brewington any visitation. (Ex.140 at 17). Specifically, Judge Humphrey ordered that Brewington was not allowed visitation until he met a number of onerous conditions: (1) first, being cleared by a court-approved psychologist; (2) followed by a period of limited supervised visitation; and (3) then petitioning the court for unsupervised visitation and proving that he was not a threat to himself or his family—all at his own cost. (Ex.140 at 17-18).

Brewington appealed various aspects of the final decree, including the property distribution and the custody and visitation decisions. (Ex.99 at 20). On July 20, 2010, the Court of Appeals affirmed. (Ex.209). Brewington filed a petition for transfer, which was denied. (Tr.57); *See Brewington v. Brewington*, 940 N.E.2d 832 (Ind. 2010).

E. Brewington's Internet Sites.

During the divorce proceedings, Brewington created two Internet sites. The first was "www.DanHelpsKids.com" (hereinafter "website"), where Brewington posted information on his divorce. Portions of the website were introduced at trial. (Ex.161, Ex.162, Ex.163, and Ex.164). The second Internet site was "Dan's Adventures in Taking on the Family Courts" (hereinafter "blog"). (*E.g.,* Ex.191). Brewington's blog was updated more frequently and discussed developments as they occurred. Brewington created the blog on or before February 25, 2009. (Ex.191).

The main theme of both sites is the dysfunction of the family court system and its unfair treatment of some people, as evidenced by his experiences: the errors and omissions in his custody evaluation, the inability to challenge it without the case file, and Judge Humphrey's retaliation against Brewington when he challenged Dr. Connor. (*See, e.g.,* Ex.161, Ex.179, Ex.190, Ex.191, Ex.188).

As a self-represented father, Brewington explained that he created the blog to challenge these inequities. (Ex. 191) Some time after the final decree, Brewington updated the blog with a mission statement:

> I was involved in a divorce and child custody proceedings that lasted over two and a half years. My main objective was to ensure that my children have the ability to grow up spending equal time with both parents. I stood up to a crooked custody evaluator and was punished for it. I lost all parenting time with my 3 and 5 year old girls. No accusations of abuse, no adultery, no drug or alcohol abuse, no social services, no police reports. … I have designed this blog to help inform people about the dangers of the family court system and the "professionals" who are involved.

(Ex.198).

The State introduced dozens of Brewington's blog posts, dating from February 25, 2009, through February 17, 2011.[3] Brewington continued his criticisms of Dr. Connor and Judge Humphrey on both sites, at times using caustic and hyperbolic language.

For example, regarding the custody and visitation decisions: "Reducing the amount of time children have with a parent is emotionally trying. Eliminating the children's right to see a perfectly capable parent is child abuse." (Ex.160). Brewington repeated similar accusations in other posts. (*E.g.,* Ex.168, Ex.170, Ex.171).

In discussing why he believed the family court system was broken, Brewington continued his accusations that Dr. Connor and Judge Humphrey engaged in unethical or illegal conduct. (*E.g.,* Ex.171) Brewington also wrote, "Judge Humphrey punished my children because I challenged Judge Humphrey's unethical evaluator." (Ex.176). Brewington wrote that Judge Humphrey could be subject to disciplinary action because he was aware of Dr. Connor's misconduct and did nothing about it. (Ex.169, Ex.188)

Brewington's posts sometimes devolved to what was essentially name-calling. He called Judge Humphrey "a vindictive spineless coward" (Ex.176), and a "[vile] and despicable man" (Ex.171). He wrote a post on his blog titled, "Dr. Edward J. Connor may be a pervert," because, Brewington was told, Dr. Connor asks sexually explicit questions of women, but not men. (Ex.197).

Brewington wrote some posts mentioning where Dr. Connor and Judge Humphrey lived. Brewington wrote a post in which he identified Dr. Connor's neighborhood and the bank where he had a mortgage. (Ex.199). In one of the posts criticizing Judge Humphrey's conduct, Brewington posted a request that people who shared his concerns send a letter to "Heidi

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[3] The blog posts were introduced as Exhibits 160, 165-84, 186-88, 190-93, 195, 197-201. Some posts were included in multiple exhibits.

Humphrey," the "Dearborn County Advisor" to the "Ethics and Professionalism Committee" for the Indiana Supreme Court. (Ex.160). Brewington did not identify Heidi Humphrey as Judge Humphrey's wife, nor did he identify the address as their home address (though it was). (Ex.160). Three individuals wrote letters to Heidi Humphrey. (Ex.71, Ex.77, Ex.87).

Brewington did not make threats of violence on his Internet sites. He disclaimed any intention to do so. "I have never written about any thoughts of causing physical harm to anyone." (Ex.198) "Judge Humphrey ruled that [my Internet] writings were not harmful to the children. If I made any threats, I would have been arrested immediately." (Ex.167). "Fortunately for Dr. Connor, I do not fit into the demographic that would want to cause physical harm to someone who lied to hurt their children." (Ex.200).

F. Brewington's Prosecution.

At some point, Melissa's attorney learned about Brewington's Internet sites and contacted the Dearborn County Prosecutor. (Tr.57, Tr.64). In August 2009, Michael Kreinhop, then a detective with the Dearborn County Sheriff Department, began investigating Brewington's Internet postings. (Tr.340-41).[4] Kreinhop viewed the sites, and interviewed Judge Humphrey, Ms. Loechel, Mrs. Brewington, Dr. Connor, and Mr. Brewington. (Tr.342). Kreinhop testified that during the three-month investigation, there were no reports of any acts of violence by Brewington, nor were there reports of seeing Brewington near the Humphreys' home, Dr. Connor's home, or Heidi Humphrey's workplace. (Tr.410, Tr.417-18).

At the insistence of Dearborn County Prosecutor Aaron Negangard, the grand jury investigated. Brewington testified before the grand jury. (Tr.345). Brewington stated that when

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[4] Kreinhop became Sheriff of Dearborn County in 2011.

he posted the request for people to contact Heidi Humphrey, he did not know whether she was Judge Humphrey's wife. (Tr.346-47, Tr.421-22). The grand jury returned six indictments: three counts of intimidation (one each for intimidation against Dr. Connor, Judge Humphrey, and Heidi Humphrey), one count of attempted obstruction of justice, one count of perjury, and one count of unlawful disclosure of grand jury proceedings. Brewington was tried in October 2011 before Special Judge Brian Hill. At trial, Brewington's counsel did not call a single witness or offer a single exhibit. The jury acquitted Brewington of unlawful disclosure of grand jury proceedings, but convicted him on the remaining counts. (App.33-34).

SUMMARY OF ARGUMENT

Brewington's convictions on Counts I-IV (three counts of intimidation and one count of attempted obstruction of justice) must be overturned for two reasons. First, the jury instructions failed to define the protections under the First Amendment and Article I, § 9 of the Indiana Constitution. Brewington's failure to contemporaneously object to these instructions should be excused. These instructions constituted fundamental error, and the failure to object constituted ineffective assistance of counsel.

Second, these convictions were not supported by sufficient evidence. The United States Supreme Court requires this Court to review the First Amendment issues independently. The State did not prove beyond a reasonable doubt that Brewington committed intimidation or attempted obstruction of justice.

The Court should reverse Brewington's conviction on Count V (perjury). The State's evidence was insufficient to prove beyond a reasonable doubt that Brewington intentionally lied to the grand jury.

The Court should vacate Brewington's conviction for intimidation of Dr. Connor (Count I) because convictions for this and attempted obstruction of justice (Count IV) violate the Double Jeopardy Clause of the Indiana Constitution. Specifically, the State presented the same evidence to prove Count I as it used to prove the substantial step for Count IV.

Finally, the Court should reverse Brewington's convictions based on other trial errors. First, the trial court improperly granted the State's motion for an anonymous jury, without making a finding that there was a strong and sufficient reason to believe the jury needed protection. Second, the trial court improperly admitted two improper exhibits. Third, the final instructions, which included verbatim repetitions of the grand jury indictments, contained language that suggested Brewington's guilt. These errors implied that Brewington was dangerous and/or unreliable. This was prejudicial because it signaled that Brewington was more likely to have committed the crimes with which he was charged. This denied Brewington a fair trial, and requires reversal.

ARGUMENT

I. Counts I-IV

Brewington's convictions on Counts I-IV, three counts of intimidation and one of attempted obstruction of justice, must be overturned for two reasons. First, the jury instructions did not inform the jury of the specific First Amendment limitations on these charges, or the

limitations under the Indiana Constitution. Second, there was insufficient evidence to support these convictions. Brewington's convictions must be overturned, and this Court should enter a verdict of acquittal.[5]

A. Constitutional Limitations on Intimidation Prosecutions.

The crime of "Intimidation" is found in I.C. § 35-45-2-1. This section provides (in relevant part) that it is a Class A misdemeanor to "communicate[] a threat to another person, with the intent ... that the person be placed in fear of retaliation for a prior lawful act[.]" I.C. § 35-45-2-1(a). The crime is a Class D felony if the person threatened is a judge. *Id.* § 35-45-2-1(b)(1)(ii).

The State advanced two theories for why Brewington's statements, correspondence, and Internet postings were threatening. First, his statements "express[ed] ... an intention to ... unlawfully injure the person threatened or another person[.]" *Id.* § 35-45-2-1(c)(1). Second, his statements "express[ed] ... an intention to ... expose the person threatened to hatred, contempt, disgrace, or ridicule; [or] ... falsely harm the business reputation of the person threatened." *Id.* § 35-45-2-1(c)(6)-(7). The second theory is essentially criminal defamation.

In relevant part, the jury was instructed as follows:

<u>Final Instruction No. 1</u>:

[5] The attempted obstruction of justice charge (Count IV) relied on the exact same conduct as the charge for intimidating Dr. Connor (Count I). See *infra* pp.15-19 for a reproduction of the indictments and jury instructions. The constitutional requirements for both are the same, so they are treated as a single charge of intimidation in this Brief.

This is a criminal case brought by the State against Daniel Brewington. The State of Indiana, by grand jury, has indicted the defendant with Count I, Intimidation, a Class "A" Misdemeanor, Count II, Intimidation of a Judge, a Class "D" Felony, Count III, Intimidation, a Class "A" Misdemeanor, Count IV, Attempt to Commit Obstruction of Justice, a Class "D" Felony. ...[6]

<u>COUNT I</u>
<u>INTIMIDATION A CLASS "A MISDEMEANOR</u>

The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women, legally impaneled, charged and sworn to inquire into felonies and misdemeanors in the name of and by the authority of the State of Indiana, on their oaths or affirmations, do present that on or about or between August 1, 2007 and February 27, 2011, Daniel Brewington did communicate a threat to another person, to wit: Dr. Edward Connor, with the intent that Dr. Edward Connor be placed in fear of retaliation for a prior lawful act, to-wit: issuing a custodial evaluation regarding Daniel Brewington's children. All of which is contrary to the form of the statute made and provided by I.C. 35-45-2-1(a)(2) and constitutes a Class "A" Misdemeanor.

To convict Defendant of Count I, Intimidation, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. communicated a threat to Dr. Edward Connor;
3. with the intent that Dr. Edward Connor be placed in fear of retaliation for a prior lawful act.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of Intimidation, a Class "A" Misdemeanor, charged in Count I.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of Intimidation, a Class "A" Misdemeanor, charged in Count I.

<u>COUNT II</u>
<u>INTIMIDATION OF A JUDGE, A CLASS "D" FELONY</u>

The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women, legally impaneled, charged and sworn to inquire into felonies and misdemeanors in the name of and by the authority of the State of Indiana, on their oaths or affirmations, do present that on or about or between August 1, 2009

[6] Brewington is not challenging the instructions on Counts V (Perjury) or VI (Unlawful Disclosure of Grand Jury Proceedings), so they are not reproduced.

and February 27, 2011, Daniel Brewington did communicate a threat to another person, to wit: Dearborn-Ohio County Circuit Court Judge, James D. Humphrey, with the intent that James D. Humphrey be placed in fear of retaliation for a prior lawful act, to-wit: issuing an Order regarding the dissolution of marriage between Daniel Brewington and Melissa Brewington, and James D. Humphrey is the Judge of Dearborn and Ohio County Circuit Court. All of which is contrary to the form of the statute made and provided by I.C. 35-45-2-1(a)(2)(b)(1)(B)(ii) and constitutes a Class "D" Felony.

To convict the Defendant of County II, Intimidation of a Judge, a Class "D" Felony, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. communicated a threat to James D. Humphrey
3. with the intent that James D. Humphrey be placed in fear of retaliation for a prior lawful act; and
4. James D. Humphrey was a judge of any court.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of Intimidation of a Judge, a Class "D" Felony, charged in Count II.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of Intimidation of a Judge, a Class "D" Felony, charged in Count II.

COUNT III
INTIMIDATION, A CLASS "A" MISDEMEANOR

The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women, legally impaneled, charged and sworn to inquire into felonies and misdemeanors in the name of and by the authority of the State of Indiana, on their oaths or affirmations, do present that on or about or between August 1, 2009 and February 27, 2011, Daniel Brewington did communicate a threat to another person, to wit: Heidi Humphrey, with the intent that Heidi Humphrey be placed in fear of retaliation for a prior lawful act, to-wit: that her spouse, Judge James D. Humphrey, issued an Order regarding the dissolution of marriage between Daniel Brewington and Melissa Brewington. All of which is contrary to the form of the statute made and provided by I.C. 35-45-2-1(a)(2) and constitutes a Class "A" Misdemeanor.

To convict Defendant of Count III, Intimidation, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;

2. communicated a threat to Heidi Humphrey;
3. with the intent that Heidi Humphrey Connor be placed in fear of retaliation for a prior lawful act.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of Intimidation, a Class "A" Misdemeanor, charged in Count III.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of Intimidation, a Class "A" Misdemeanor, charged in Count III.

COUNT IV
ATTEMPT TO COMMIT OBSTRUCTION OF JUSTICE
A CLASS "D" FELONY

The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women, legally impaneled, charged and sworn to inquire into felonies and misdemeanors in the name of and by the authority of the State of Indiana, on their oaths or affirmations, do present that on or about or between August 1, 2007 and February 27, 2011, Daniel Brewington, acting with the culpability for the crime of Obstruction of Justice, did engage in conduct that constituted a substantial step toward the commission of the crime of Obstruction of Justice, to-wit: did intimidate and/or harass Dr. Edward Connor, who was a witness in an official proceeding. All of which is contrary to the form of the statute made and provided by I.C. 35-44-3-7 and constitutes a Class "D" Felony.

To convict the Defendant of Attempted Obstruction of Justice, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant;
2. acting with the culpability required to commit the crime of Obstruction of Justice, which is defined as:

   a. The Defendant;
   b. Knowingly or intentionally;
   c. Induced by threat, coercion or false statement;
   d. A witness or an informant in an official proceeding or investigation, to withhold or unreasonably delay in producing any information, document or thing.

3. did intimidate and/or harass Dr. Edward Connor, who was a witness in an official proceeding;

4. which was conduct constituting a substantial step toward the commission of the crime of Obstruction of Justice.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of the crime of Attempted Obstruction of Justice, a Class "D" Felony, charged in Count IV.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of Attempted Obstruction of Justice, a Class "D" Felony, charged in Count IV.

[...]

<u>Final Instruction No. 2</u>:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the government for a redress of grievance.

<u>Final Instruction No. 3</u>:

No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, or any subject whatever: but for the abuse of that right, every person shall be responsible.

[...]

<u>Final Instruction No. 5</u>:

The term 'threat' is defined by law as meaning 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;
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.

There are specific requirements under the First Amendment that the State must fulfill to convict on the State's theories (threatening violence and defamation) to ensure that the defendant is not convicted for protected speech. The Indiana Supreme Court has similarly developed tests under Article I, § 9 applicable to any attempt to restrict expressive activity. The only instructions the jury received on the constitutional protections were verbatim repetitions of the First Amendment and Article I, § 9. The trial court's instructions failed to inform the jury of the specific constitutional limitations. "[I]t is bedrock law that a defendant in a criminal case is entitled to have the jury instructed on all of the elements of the charged offense[.]" *Thomas v. State*, 827 N.E.2d 1131, 1134 (Ind. 2005) (citing *In re Winship*, 397 U.S. 358, 373-74 (1979)). It is reversible error to punish speech without adequate findings that the speech was unprotected by the First Amendment. *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, 931 (1982) (reversing substantial damages award when there were insufficient findings that the defendants' conduct was not protected speech: "To impose liability without a finding [that the speech is unprotected] ... would impermissibly burden the rights ... that are protected by the First Amendment.").

1. The First Amendment limitations on prosecution for threats of violence.

The State must meet a high burden to convict someone for making statements threatening violence. "[Statutes] such as [these], which make[] criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Watts v. U.S.*, 394 U.S. 705, 707 (1969). The First Amendment requires that the State prove that Brewington's statements were "true threats." *Id.* at 708; *Virginia v. Black*, 538 U.S. 343, 359 (2003). "'True threats' encompass 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[.]" *Black*, 538 U.S. at 359. A true threat must be distinguished from hyperbole or other heightened rhetoric. The First Amendment recognizes a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). "The language of the public arena, like the language used in labor disputes, ... is often vituperative, abusive, and inexact." *Id.* (internal citations omitted).

The jury was not instructed on the "true threats" standard. This allowed the jury to convict Brewington for protected speech (e.g., "unpleasantly sharp attacks on government and public officials", etc.), *Watts*, 394 U.S. at 708. There is no way to know whether a properly instructed jury would have found that Brewington's statements were "true threats," so his convictions must be overturned.

<u>2. The First Amendment limitations on prosecution for criminal defamation.</u>

The State cannot punish an individual simply because the individual's speech causes someone to suffer hatred, contempt, disgrace, ridicule, or harm to his business reputation. *Claiborne Hardware*, 458 U.S. at 921 ("To the extent that the court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment."). Rather, the State must further satisfy the constitutional elements of defamation: proof that the statement is false, and proof of a minimum level of culpability with respect to the falsity of the statement. *Sullivan*, 376 U.S. 271; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). If the alleged victim is a public person or public official, the minimum culpability is actual malice: that the statement was made "with knowledge of its falsity or with reckless disregard for the truth." *Gertz*, 418 U.S. at 342. For a private person, the State may select a lesser standard. *Id.* at 347. Of course, a state can choose a higher standard.

I.C. § 35-45-2-1(c) does not on its face require proof that the defamatory statement is false, and consequently does not define the level of culpability. Therefore, courts must interpret the statute to require such proof to avoid finding it unconstitutional. *Price v. State*, 622 N.E.2d 954, 963 (Ind. 1993) ("If an act admits of two reasonable interpretations, one of which is constitutional and the other not, we will choose the path which permits upholding the act."). Under I.C. § 35-45-2-1(c), the level of culpability is intentional falsehood, regardless of the alleged victim's status. Unless a statute provides otherwise, if a kind of culpability is required for commission of an offense, it is required for every material element. I.C. § 35-41-2-2(d). I.C. 35-45-2-1(c) requires intentional conduct. Therefore, the State is required to prove that the statements were intentionally false.

The jury was instructed that it could convict Brewington simply by finding that he threatened to expose the alleged victims to "hatred, contempt, disgrace, or ridicule," with "the intent that [they] be placed in fear of retaliation for a prior lawful act." *See* Final Instruction Nos. 1, 5. There is no way to know whether a properly instructed jury would have found that Brewington's statements were intentionally false, so his convictions must be overturned.

3. Limitations in the Indiana Constitution.

Article I, § 9 of the Indiana Constitution protects the right to free expression. A person claiming that state action infringes upon this right must prove (1) that the state action restricted his expressive activity, and (2) that the State could not reasonably conclude that the expression was an abuse of the right to speak. *Whittington v. State,* 669 N.E.2d 1363, 1367-69 (Ind. 1996). An abuse of the right to speak is "any expressive activity that 'injures the retained rights of individuals or undermines the State's efforts to facilitate their enjoyment.'" *Id.* at 1368 (quoting *Price*, 622 N.E.2d at 959). If the speech is "political"—that is, "if its point is to comment on government action, whether applauding an old policy or proposing a new one, or opposing a candidate for office or criticizing the conduct of an official acting under color of law"—the expression cannot constitute an abuse "unless it 'inflicts upon determinable parties harm of a gravity analogous to that required under tort law.'" *Id.* at 1369-70 (quoting *Price*, 622 N.E.2d at 964). When political speech is at issue, the State must prove that the prosecution does not materially burden the speaker's opportunity to engage in political expression. *Id.* at 1369.

This standard applies to both of the State's theories. Brewington's speech was directed at government action—his treatment by the family court system. Brewington's speech directed toward Dr. Connor was a comment on government action. Dr. Connor's custody evaluation was

a public function, as its primary purpose was to assist Judge Humphrey (an elected government official) on custody. Therefore, the State was required to meet the higher "political speech" standard. The jury was not instructed on this or the general standards under Article I, § 9. This allowed the jury to convict Brewington for protected speech, so his convictions must be reversed.

The trial court declined to give more specific (but still inadequate) instructions requested by Brewington (reproduced below), concluding that counsel could outline the specific constitutional principles in closing arguments. (Tr.443-44). This approach was insufficient. Brewington was entitled to have the court explain the law. *Thomas*, 827 N.E.2d at 1134 (Ind. 2005). It was the trial judge's responsibility to instruct the jury. The Court should therefore reverse Brewington's convictions, and, for reasons elaborated in § I.D *infra*, enter a verdict of acquittal. If not, the Court should at least remand for a new trial that ensures adequate protection for Brewington's constitutional rights.

B. The Court Should Reverse Brewington's Convictions Due to Erroneous Instructions Despite Trial Counsel's Insufficient Contemporaneous Objections.

With one exception, Brewington's trial counsel failed to object to the final instructions or offer instructions that explained the constitutional limitations. Brewington's trial counsel offered one instruction on Article I, § 9. Defendant's Proposed Final Instruction No. 5, based on *Whittington*, 699 N.E.2d at 1367, read:

> You, as the trier of fact, are to decide whether the statements the accused is accused of saying fall under the protections of Art. I, Sec. 9 of the Indiana Constitution, which states:
>
> [Omitted]

This requires a two step process. You must first decide whether a state action has, in the concrete circumstances of the case, restricted the accused's opportunity to engage in expressive activity. Second, if it has, you must decide whether the restricted activity constitutes an "abuse" of the right to speak under the Indiana Constitution. You must first determine whether the State's action in the case restricted the accused's opportunity to engage in expressive activity. Under the Indiana Constitution, expressive conduct is to be given a broad interpretation. It extends to any subject whatever, and reaches every conceivable mode of expression. Expressive activity is restricted when the State imposes a direct and significant burden on the person's opportunity to speak their mind, in whatever manner the speaker deems appropriate.

(App.38).

The State objected to this instruction:

Your honor again, [Whittington] versus state is a case dealing with the first amendment process. We don't believe that 5 is really an accurate statement of that case. Um, there's a lot more to that process than indicated in an instruction and as such we don't think it will be helpful to the jury but more confusion. We have no objection to the Defense making arguments along the lines of what's stated in [Whittington] but we believe this instruction would be inappropriate under those circumstances.

(Tr.442-43).

Brewington's counsel responded:

Judge, with regard to Defendant's proposed 5, I believe it is correct statement of the law in the State of Indiana and it is obviously cited from the [Whittington] case before the Indiana Supreme Court in 1996 and … I guess I would argue that the current status and the most recent (indiscernible) interpretation that our Court or Supreme Court has given. Um, I believe it would be helpful for the jury.

(Tr.443).

The trial court declined to give this instruction, even though it conceded that it accurately stated the law, and instead relied on counsel to explain this constitutional principle in closing argument. (Tr.443-44). This was insufficient. Trial counsel made a contemporaneous objection and offered an appropriate instruction explaining the constitutional requirements. This decision

requires reversal, even without the other instructional errors which were not objected to. *Thomas*, 827 N.E.2d at 1134.

While Defendant's Proposed Final Instruction No. 5 was an accurate statement of the law, it was incomplete as to the requirements of Article I, § 9, and was completely silent on the First Amendment. Trial counsel did not otherwise object to the court's other final instructions. The Court should nevertheless reverse Brewington's convictions. First, giving these instructions was fundamental error. Second, the failure to contemporaneously object constituted ineffective assistance of counsel.

1. The instructions were fundamental error.

If a party does not contemporaneously object to an instruction, the error is waived on appeal unless it is "fundamental error." *Lacy v. State*, 438 N.E.2d 968, 970-71 (Ind. 1982). "The 'fundamental error' rule ... applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002). The failure to include the constitutional elements for intimidation prosecutions met these requirements.

These omissions violated basic constitutional principles. It is well settled that, in addition to the statutory elements of the crime, the State is required to prove that the conduct was not protected speech, as defined in the caselaw cited in the preceding section

The potential for harm was great. The erroneous instructions permitted the jury to convict Brewington for constitutionally protected speech. Both the U.S. and Indiana Constitutions cherish free expression and give it robust support. *Bose Corporation v. Consumers Union of*

United States, Inc., 466 U.S. 485, 503-04 (1984) (noting that free expression protects individual liberty and is "essential to the common quest for truth and the vitality of society as a whole"); *Price*, 622 N.E.2d 961-63 (holding that political speech is a core constitutional value entitled to heightened protection).

The failure to properly instruct the jury denied Brewington fundamental due process. "[I]t is bedrock law that a defendant in a criminal case is entitled to have the jury instructed on all of the elements of the charged offense[.]" *Thomas*, 827 N.E.2d at 1134.

In *Lacy*, the Indiana Supreme Court addressed a claim of fundamental error for failure to instruct the jury on the elements of armed robbery. 438 N.E.2d at 970. The trial court gave a preliminary instruction listing the elements, but omitted them in the final instructions, and the defendant did not object. *Id.* The court held that there was no fundamental error because the essential elements were included in the preliminary instructions. *Id.* at 971. However, the error would have been fundamental if no instruction on the elements had been given. *Id.*

Lacy discussed *Screws v. U.S.*, 325 U.S. 91 (1945), a case in which the defendants failed to object to instructions that omitted an essential element of the charged offense. 325 U.S. at 104-07. The Supreme Court excused the failure to object because the failure to instruct the jury on an essential element of the charge is fundamental error. *Id.* at 106-07. *Lacy* distinguished *Screws*—because Lacy's jury was instructed on the essential elements, albeit not in the final instructions—but recognized that it is fundamental error to completely fail to instruct the jury on the essential elements of the offense. *Lacy*, 438 N.E.2d at 971.

In this case, the trial court's failure to instruct the jury on the constitutional elements of the intimidation charges was fundamental error. Unlike in *Lacy*, the instructions were not given elsewhere. As in *Screws*, this requires reversal.

2. Trial counsel's failure to object to the court's instructions and offer appropriate instructions constituted ineffective assistance of counsel.

Even if the erroneous instructions were not fundamental error, Brewington's convictions should be reversed because he received ineffective assistance of counsel.

There is a two-part test to determine if a defendant received ineffective assistance of counsel: "First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness[.] ... Second, the defendant must show prejudice: a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Taylor v. State*, 922 N.E.2d 710, 716 (Ind. Ct. App. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)). Claims of ineffective assistance are generally raised on a collateral attack, but when the issues can be evaluated on the face of the trial record—such as failure to tender or object to an instruction or to inadmissible evidence—they may be raised on direct appeal. *Woods v. State*, 701 N.E.2d 1208, 1211 (Ind. 1998). In order to establish ineffective assistance for failure to offer or object to an instruction, the defendant must show that he would have been entitled to the proposed instruction or that an objection to the improper instruction would have been sustained. *Potter v. State*, 684 N.E.2d 1127, 1132-35 (Ind. 1997).

Both this Court and the Indiana Supreme Court have held that failure to object to an improper instruction on the elements of criminal charges is ineffective assistance. In *Palmer v. State*, 573 N.E.2d 880 (Ind. 1991), the supreme court found ineffective assistance because counsel failed to object to an erroneous voluntary manslaughter instruction. "We agree ... that Palmer's counsel's failure to object to and appeal from this incorrect instruction rendered their assistance ineffective. Palmer was entitled to have the jury instructed on such an essential rule of law." *Palmer*, 573 N.E.2d at 880.

In *Taylor*, this Court found ineffective assistance due to trial counsel's failure to object to a felony murder instruction that did not list the elements of the underlying felony (robbery). *Taylor*, 922 N.E.2d at 711-12. This Court found counsel's performance constitutionally defective even though counsel decided not to challenge the State's allegation of robbery for strategic reasons. *Id.* at 718. This Court also found that the error was prejudicial: "It was Taylor's right to have the jury instructed on the elements of [underlying felony]. ... [This] failure 'left [the jurors] to fend for themselves and cobble together whatever robbery elements they could. As a result, Taylor was denied fundamental due process.'" *Id.* at 718 (internal citations omitted). "[H]aving never been instructed on any of the elements of robbery, it is impossible to say whether the jury would have found Taylor guilty of robbery." *Id.* at 719. Such an error is never harmless. *Id. See also Walker v. State*, 779 N.E.2d 1158, 1159-62 (Ind. Ct. App. 2002) (finding ineffective assistance where counsel failed to object to improper instruction on *mens rea* for accomplice liability: performance was deficient because the Fourteenth Amendment requires the State to prove each element beyond a reasonable doubt; error was prejudicial because there was a reasonable probability that a properly instructed jury would not have convicted the defendant).

In this case, Brewington's trial counsel's failure to object fell below reasonable standards. Had counsel objected to the instructions and offered proper instructions, the trial court would have been required to sustain the objection and give the proffered instructions. *Thomas*, 827 N.E.2d at1134. Failure to object to incorrect instructions cannot be attributed to trial tactics. *Walker*, 779 N.E.2d at 1161 (quoting *Perez v. State*, 748 N.E.2d 853 (Ind. 2001)). This is especially so in this case, where counsel repeatedly argued that Brewington's statements were protected speech. In his opening statement and closing argument, counsel stressed that Brewington's statements were protected speech, and that it is critical to protect free speech and

dangerous to punish people for expressing their opinions—including unpopular opinions and speech critical of the government. (Tr.28, Tr.484, Tr.486, Tr.488-89). It is inconceivable that trial counsel would strategically fail to object to instructions that ignore the State's heightened burdens when prosecuting speech.

This deficient performance was prejudicial. Similar to *Taylor*, where the jury was not instructed on the elements of the underlying felony, Brewington's jury was not instructed on the constitutional limitations underlying the intimidation charges. Just as the jury in *Taylor* was left to guess the elements of robbery, the jury here was left to guess the constitutional elements. There is no way to know whether a properly instructed jury would have found that Brewington's statements were constitutionally protected, or whether the speech was criminal. *See Taylor*, 922 N.E.2d at 719-20.

Brewington's convictions on Counts I-IV should be reversed because the jury was not properly instructed on the constitutional limitations on intimidation charges. Moreover, for the reasons discussed in the following section, this Court should enter a judgment of acquittal.

C. There Was Insufficient Evidence to Support the Convictions on Counts I-IV.

Brewington's convictions on Counts I-IV should also be reversed because there was insufficient evidence to prove that his speech was unprotected by the First Amendment. Appellate courts must review these issues independently, with no deference to the jury verdict. The State failed to prove beyond a reasonable doubt that Brewington's statements were unprotected.

1. Standard of review.

This Court generally reviews claims of insufficient evidence under a deferential standard. *Boggs v. State*, 928 N.E.2d 855, 864 (Ind. Ct. App. 2010). However, when the case raises a First Amendment issue, "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990) (quoting *Bose Corp.*, 466 U.S. at 499). *See Journal-Gazette Co. Inc. v. Bandido's, Inc.*, 712 N.E.2d 446, 454-56 (Ind. 1999) (holding that this requirement is binding on Indiana appellate courts).

The requirement of independent review is necessary because

> the jury's application of [First Amendment standards] is unlikely to be neutral with respect to the content of the speech and holds a real danger of becoming an instrument for the suppression of those vehement, caustic, and sometimes unpleasantly sharp attacks ... which must be protected if the guarantees of the First And Fourteenth Amendments are to prevail.

Bose Corp., 466 U.S. at 510 (internal citations omitted).

"The question whether the evidence in the record in a [First Amendment] case [meets the constitutional standards] required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." *Id.* at 511. This is true independent review; no deference is given to the jury's findings. *Id.* at 506-07.

2. The State did not prove that Brewington intended to threaten violence.

The State was required to prove beyond a reasonable doubt that Brewington's statements were "true threats": that Brewington intended his statements and conduct to "place[] the

victim[s] in fear of bodily harm or death." *Black*, 538 U.S. at 360. The State failed to meet this burden.

It does not matter whether the alleged victims felt threatened. *Claiborne Hardware*, 458 U.S. at 925 (holding that expressive conduct does not lose protection simply because it causes apprehension). Both the First Amendment and I.C. § 35-45-2-1 require that the State prove that Brewington intended his statements to threaten violence. *Black*, 538 U.S at 360; I.C. § 34-45-2-1. There is no evidence that Brewington intended his statements to be threatening rather than strident complaints about public officials and the functioning of the family court system.

Most of Brewington's statements were essentially name-calling, such as calling Dr. Connor and Judge Humphrey "child abusers," "evil," "crooked," etc. Name-calling is not threatening violence. The State also introduced evidence that Brewington explicitly threatened to file lawsuits, criminal complaints, and complaints with professional boards—but again, no threats of violence.

The State introduced evidence of statements and conduct that it contended were threatening, but viewed in context, these statements and conduct were not "true threats."

The State introduced a comment from Brewington's Facebook page, in which he stated, regarding the divorce proceedings, "This is like playing with gas and fire, and anyone who has seen me with gas and fire know that I am quite the pyromaniac." (Ex.140 p. 7). This is not a threat to commit arson. Rather, it was a metaphor—Brewington intended to zealously pursue his position in the divorce proceedings. *Watts* involved a similar expression. Watts was convicted for stating, at an anti-Vietnam demonstration, "now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Watts*,

394 U.S. at 706. The Supreme Court reversed: "We agree with the petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." *Id.* Similarly, Brewington's statement, taken in context—especially considering the forum—was nothing but an inartful metaphor.

The State also discussed a blog post which it characterized as an expression from Brewington that Dr. Connor "made me so mad I wanted to beat [him] senseless" and that Dr. Connor's custody evaluation "[made] me want to punch Dr. Custody Evaluation in the face." (Ex.198). This is not a fair or accurate characterization of Brewington's post, which must be read in its entirety.

The language quoted by the State was purely hypothetical: Brewington stated that *if* he wrote that a custody evaluator made him so mad he wanted to punch him in the face, he should be able to do that without risking the loss of his children, just as if he wrote a similar rant about a plumber. But, Brewington stated that he had never gone that far: "I have never written about any thoughts about causing physical harm to anyone. (Ex.198). Even had he stated that Dr. Connor made him so angry that he wanted to punch him in the face, this would not be a true threat, because it does not articulate an actual intent to assault Dr. Connor. *Black*, 538 U.S. at 359-60.

The State also introduced a letter that Brewington sent to Dr. Connor in which he wrote: "The game is over Dr. Connor." (Ex.49). This was not a threat of violence. Brewington wrote that he would file a petition for contempt if Dr. Connor refused to release his case file. "The game is over" only meant that there would be *legal* consequences for not releasing the file.

The State introduced a blog post in which Brewington discussed watching Dr. Connor testify in a different case in Kentucky. (Ex.200). Brewington described Dr. Connor as "surprised" to see Brewington, and "a little nervous." However, Brewington explicitly stated that he was not there to threaten, intimidate, or harm Dr. Connor. Rather, he stated that he was there to see "how Dr. Connor operates in other situations." (Ex.200). At the time, Brewington's case was still on appeal, which if successful, would have given Brewington another opportunity to challenge Dr. Connor's evaluation. The hearing he attended involved issues similar to Brewington's divorce. (Ex.200). There is nothing wrong with studying an expert's testimony in another case to prepare your own, something lawyers do frequently. Brewington stated his explicit intention, and it was not to threaten or intimidate Dr. Connor.

The State also presented evidence that Brewington posted information on the Internet concerning where the alleged victims lived. *See supra* pp.10-11. However, the State presented no evidence showing that these posts were intended as threats of violence.

The State did not present any evidence that any of Brewington's Internet postings were intended as threats of violence. It was not sufficient for the State to show that the individuals may have felt threatened. The State's burden was to prove that Brewington intended to threaten violence.

3. The State did not prove that Brewington's statements were defamatory.

In order to convict Brewington under its criminal defamation theory, the State was required to prove that Brewington's statements were intentionally false. The State did not meet that burden.

Many of Brewington's statements could not be defamatory because they did not make falsifiable claims. "Under the First Amendment, there is no such thing as a false idea." *Gertz*, 418 U.S. at 339. This means that "statements ... must be provable as false before there can be liability[.]" *Milkovich*, 497 U.S. at 19. If a statement implies a fact, it is falsifiable, and can be subject to liability. *Id.* at 18-19.

The Court must discard Brewington's statements that do not make falsifiable claims. Brewington's statements that Dr. Connor and Judge Humphrey are "evil" and that Dr. Connor was a "pervert" must be disregarded. How could the State prove that these statements were false? There are no objective standards against which to judge them, so there is no way to prove that Brewington was lying.[7] *Cf. Id.* at 20 (providing examples).

Calling Dr. Connor and Judge Humphrey "child abusers" was hyperbole, not an intentional falsehood. Brewington equated losing contact with his children, which caused the children harm, as "abuse." Although uncivil, this is protected speech. No one could reasonably understand this as an accusation that Dr. Connor and Judge Humphrey physically, sexually, or otherwise abused children. This is akin to anti-war protesters calling President Nixon a "baby killer," which no one took as an accusation that the President murdered children. Similarly, in *Letter Carriers v. Austin*, the Supreme Court held that a union newsletter calling a scab a "traitor" was not defamatory; the term was "mere rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members." 418 U.S. 264, 285-86 (1974). For the same reason, Brewington calling them "crooked," "corrupt," and "dangerous" is also protected speech.

Finally, Brewington's statements that Dr. Connor and Judge Humphrey were "criminals" were not intentionally false. Brewington called Dr. Connor a criminal because (1) Dr. Connor

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[7] The State did not challenge the falsifiable claims underlying the "pervert" allegation: that Dr. Connor asked women, but not men, detailed and explicit sexual questions. (Ex.197).

refused to release the case file, which Brewington believed he was entitled to under their contract and Kentucky and Indiana law (*E.g.*, Ex.61, Ex.67, Ex.179); (2) Dr. Connor made misrepresentations to the court (*E.g.*, Ex.192); and (3) Dr. Connor was not licensed to practice in Indiana at the time he performed the evaluation. (*E.g.*, Ex.67). Brewington called Judge Humphrey a criminal because Judge Humphrey was aware of Dr. Connor's misdeeds and refused to do anything about them. (*E.g.*, Ex.188).

Brewington may have been wrong that this was criminal behavior, but his belief was honest and in good faith. This is why Brewington went to such lengths to challenge their participation in his divorce. (*See supra* pp.6-8 and evidence cited therein). Brewington's perseverance demonstrates his good faith belief that their behavior was criminal, even if he was mistaken.

The State did not meet its constitutional burden in proving that Brewington's statements were intimidating. Brewington's statements were neither "true threats" nor intentionally false. The Court should therefore reverse Brewington's convictions on Counts I through IV. Because this Court is exercising its independent review, it should enter a verdict of acquittal.

<u>II. Count V</u>

In Count V, Brewington was convicted of perjury for making a false statement during his grand jury testimony—for testifying that he was unaware that Heidi Humphrey was Judge Humphrey's wife. There was insufficient evidence for this conviction. This Court has stated the standard of review as follows:

> When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. We do not reweigh the

> evidence or assess witness credibility. We consider conflicting evidence most favorably to the trial court's ruling. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

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

At the grand jury, Brewington was asked about his request that people write letters to Heidi Humphrey (identified as an "Ethics and Professionalism advisor" to the Indiana Supreme Court) and how he obtained her address from the assessor's website. Brewington stated that when he first posted the request, he was not sure whether Heidi Humphrey was Judge Humphrey's wife. The following colloquy was held:

> Mr. Negangard: It said James Humphrey who happens to be the name of your judge and you're under oath and you're actually expecting this Grand Jury to believe that you didn't know that that was his wife?
>
> Dan: Oh, it very well could be a possibility. I'm not from Dearborn County. I don't know but the thing is ...

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

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

This evidence was insufficient to prove beyond a reasonable doubt that Brewington intentionally lied. No evidence was introduced at trial showing what was listed on the website when Brewington visited it. There was no evidence that the Dearborn County tax assessor website listed their marital status, or that it identified the James Humphrey listed as Judge James

Humphrey. Brewington testified that he was not certain that Heidi Humphrey was Judge Humphrey's wife, nothing more, nothing less. Sheriff Kreinhop's testimony did not refute that. Brewington never testified that he doubted that Heidi was Judge Humphrey's wife, or even that he suspected she was not.

Moreover, affirming this conviction would condone the prosecutor's misconduct. Brewington attempted to explain his answer further, but Negangard cut him off. Brewington was not allowed to explain or qualify his response. Negangard controlled the testimony. He should not be permitted to extract a statement without context and then use it to prosecute the witness for perjury. The purpose of the grand jury is to seek the truth, not to play "gotcha." Negangard's tactics left Brewington's testimony incomplete and misleading. The State should not be able to prosecute Brewington for an incomplete response when the State caused it to be incomplete.

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

III. Convictions Under Counts I and IV Violate Double Jeopardy

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

This Court reviews claims that multiple convictions violate double jeopardy *de novo*. *Troutner v. State*, 951 N.E.2 603, 608 (Ind. Ct. App. 2011). Brewington's convictions fail the

actual evidence test identified in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). Under this test, convictions for multiple offenses violate double jeopardy if there is a reasonable probability that the evidentiary facts used by the jury to establish the essential elements of one offense may also have been used to establish the essential elements of a second offense. *Id.* at 53. In conducting this review, the court may look to "[t]he jury instructions and presentation of counsel to the jury[.]" *Id.* at 54 n.48.

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

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

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

(Tr.478).

The jury instructions also show that the State relied on the same evidence. The instruction for Count IV read that the State must prove that Brewington "did intimidate and/or harass Dr. Edward Connor" as the substantial step. (*See supra* pp.14-19). The jury was instructed on the

meaning of intimidation, but not harassment. Therefore, it is likely that the jury relied on intimidation as the substantial step.

The State's failure to distinguish between the intimidation on the two counts created the reasonable probability that the jury relied on the same evidence to convict Brewington of both. *See Troutner*, 951 N.E.2d at 609-11 (finding double jeopardy violation for convictions for robbery and battery where State failed to differentiate between the conduct supporting each crime).

The Indiana Supreme Court has stressed the importance of properly delineating the evidence in a similar situation: where the same evidence is used to prove one crime and the "overt act" in a separate conspiracy charge. *See Lee v. State*, 892 N.E.2d 1231, 1235 (Ind. 2008) (citing *Lundberg v. State*, 728 N.E.2d 852, 855 (Ind. 2000) (finding double jeopardy violation) and *Guffey v. State*, 717 N.E.2d 103, 107 (Ind. 1999) (same)). There was no violation in *Lee*, but only because the State "emphasized the evidence that was distinct to each crime." *Id.* at 1237. *See also Newgent v. State*, 897 N.E.2d 520, 527 (Ind. Ct. App. 2008) (finding double jeopardy violation in part because the State failed to emphasize the evidence distinct to each crime).

This was likely a strategic decision by the State. The State stressed the volume of Brewington's correspondence and posts to prove Brewington's intent to intimidate. (Tr.478) This argument becomes weaker if that volume is cut in half. The State cannot have it both ways. It cannot use all of the correspondence and blog posts to prove intimidation for Count I, then argue that the same evidence proved intimidation as the substantial step for Count IV. That is the very conduct the Double Jeopardy Clause forbids.

Therefore, the Court should vacate Brewington's conviction for Intimidation against Dr. Connor (Count I). *Richardson*, 717 N.E.2d at 55 (remedy is to vacate conviction with less severe consequences).

IV. Other Trial Errors

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

A. The Use of an Anonymous Jury Was Improper.

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

In *Major*, this Court held that a trial court may use an anonymous jury if two conditions are met: (1) the trial court finds strong reason to believe the jury needs protection; and (2) it takes reasonable precautions to minimize the potential prejudice to the defendant and ensure that his

fundamental rights are protected. *Major*, 873 N.E.2d at 1127. A trial court's decision to empanel an anonymous jury is reviewed for abuse of discretion. *Id.*

Major identified several (non-exclusive) factors to determine whether the jury needs protection: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process; (4) the severity of the punishment if convicted; and (5) whether the publicity regarding the case could potentially publicize the jurors' names and expose them to intimidation or harassment. *Id.*

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

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

(Final Pretrial Tr.68).

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

There were two specific instances raised at the hearing, so they merit mention. First, the State introduced the final decree in the divorce case (Bond Reduction Tr.19-20; Trial Ex.140),

which noted that Brewington had posted information about the divorce proceedings on the Internet, including portions of the custody evaluation. (Ex.140 at 6-7). Second, that Brewington posted Judge Humphrey's address on the Internet. (Bond Reduction Tr.60).

This evidence does not support the trial court's conclusion. Neither instance involved Brewington disclosing information that he was prohibited from disclosing (as he would be with jurors' identities). It was not unlawful for Brewington to post information about the divorce proceedings. In fact, the State introduced the custody evaluation and divorce decree at Brewington's trial, making them public records. Additionally, Judge Humphrey's address was found on the publicly accessible Dearborn County Assessor website.

Moreover, the trial court ignored *Major* and used a less exacting standard to grant the motion (which it found in J.R. 10). (Final Pretrial Tr.67). To empanel an anonymous jury, the trial court was required to find that there is a "strong reason to believe the jury needs protection." *Major*, 873 N.E.2d at 1127. In this case, the trial court merely found that "the privacy issue is *a concern*." (Final Pretrial Tr.68). Nor did the trial court refer to the factors identified in *Major*. Most of the factors, which are non-exhaustive but still relevant, weigh against using an anonymous jury. This was an abuse of discretion. "An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the evidence, or if the trial court has misinterpreted the law." *McCullough v. Airbold Ladder Co.*, 605 N.E.2d 175, 180 (Ind. 1993). The trial court failed to apply *Major* and used a lower standard, and its decision was against the logic and effect of the evidence. There was simply no evidence that Brewington was a risk to disclose the jurors' identities.

"[T]he empanelment of an anonymous jury implicates a defendant's Fifth Amendment right to a presumption of innocence because it 'raises the specter that the defendant is a

dangerous person from whom the jurors must be protected.'" *Major*, 873 N.E.2d at 1126 (quoting *U.S. v. Mansoori*, 304 F.3d 635, 650 (7th Cir. 2002)). This was especially prejudicial for Brewington.

To convict Brewington of intimidation, the State had to prove that Brewington intended his statements to be serious threats of violence. Keeping the jurors' identities secret signals to the jury that Brewington is dangerous, and that he might do something to harm the jurors. It also tells the jurors that there is a reason to believe he is a threat to them, namely, that he has harmed or threatened someone in the past. Such evidence is generally inadmissible. Ind. Evidence Rule 404(b). It was especially prejudicial in this case because the other evidence supporting the intimidation charges was so weak. The State presented no evidence that Brewington made direct threats of violence. Implying that Brewington is dangerous and has threatened or harmed others may have tipped the scale when the jury would otherwise have accepted an innocent explanation for his statements.

It also prejudiced Brewington on the perjury charge. It signals to the jury that Brewington is dishonest and cannot be trusted because of something he did in the past. The evidence against Brewington on this charge was also weak. No evidence was offered that directly contradicted Brewington's statement that he was not certain Heidi Humphrey was Judge Humphrey's wife. The jury could only have convicted him if it found him unreliable. The State offered no other evidence about Brewington's credibility. Improperly signaling to the jury that Brewington was unreliable may have tipped the scale when the jury would otherwise have accepted an innocent explanation.

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

B. Other Evidentiary Errors.

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

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

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

The custody evaluation and final decree were admitted at trial, but should have been excluded or redacted. While these documents may have had some probative value, it was slight. These documents might have been Brewington's motive to intimidate Dr. Connor and Judge Humphrey, respectively. But that does not mean the documents were admissible in their totality. These documents include considerable prejudicial information that is not relevant to those issues, or is inadmissible for other reasons, which outweighs the probative value.

These documents included expert opinion testimony for which no foundation was laid. The custody evaluation contained the following opinions:

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

(Ex.9 at 17, 23, 28). The final decree cited Dr. Connor's opinion that Brewington's "writings are similar to those of individuals who have committed horrendous crimes against their families" (Ex.140 at 6, 8).

No foundation was laid for these opinions as required by Evid. R. 702. There was no offer, let alone finding by the trial court, that these opinions were admissible under Evid. R. 702. *See Fleener v. State*, 656 N.E.2d 1140, 1141 (Ind. 1995) ("Because expert scientific testimony is permitted 'only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable' … and because no foundational showing of reliability was made here, it was error to permit further testimony of this nature following the objection") (internal citations omitted).

The final decree also contained an improper opinion that Brewington was guilty. In the decree, Judge Humphrey wrote that Brewington

> has attempted to intimidate the Court, Court staff, Wife, Dr. Connor and anyone else taking a position contrary to his own. The Court is most concerned about Husband's irrational behavior and attacks on Dr. Connor. Frankly, it appears that these attacks have been an attempt at revenge for taking a position regarding custody contrary to Husband. … In sum, the Court finds Husband to be irrational, dangerous, and in need of significant counseling before he can conduct himself as a parent.

(Ex.140 at 6, 8). This opinion, rendered by a judge, is inadmissible: "Witnesses may not testify to opinions concerning ... guilt ... in a criminal case[.]" Evid. R. 704(b).

The custody evaluation also contained highly prejudicial hearsay testimony, including:

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

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

These improper exhibits were highly prejudicial. The primary thrust was that Brewington was dangerous. This was prejudicial for the reasons cited above, *supra* p.43. The prejudice is heightened by the source of the opinions: a licensed psychologist and a circuit court judge, two positions of authority and respect in the community. The inadmissible hearsay in the evaluation includes statements that attack Brewington's credibility, which is prejudicial for the reasons cited above, *supra* p.43.

In addition to being inadmissible as improper opinions or hearsay, these documents' probative value is substantially outweighed by their unfair prejudice. Evid. R.

403. The probative value of these documents relates to a potential motive for Brewington to intimidate the alleged victims. However, this could have been proved by other means. Dr. Connor could have testified about his recommendations in the evaluation without discussing the inadmissible portions. Judge Humphrey (or other witnesses) could have testified about how he ruled in the final decree, without including the inadmissible portions. The availability of these other means of proof further tips the scales toward exclusion under Evid. R. 403. Advisory Committee Notes to Federal Rule of Evidence 403 (availability of other means of proof weighs in favor of exclusion under Rule 403). *See also Sams v. State*, 688 N.E.2d 1323, 1325 (Ind. Ct. App. 1997) ("courts in this state should normally construe Indiana evidence rules consistently with the prevailing body of decisions from other jurisdictions interpreting the same rule"). Even if Evid. R. 403 did not require complete exclusion of these documents, they should have been redacted to excise the offending passages.

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

Brewington's trial counsel did not object to the admission of the custody evaluation, and objected to the final decree on relevance only, but did not object based on Evid. Rule 403, hearsay, improper character evidence, or improper opinion, and did not request redaction. (Tr.63-64, Tr.92). This was ineffective assistance of counsel.

The failure to object was constitutionally defective performance. An objection or request for redaction would have been sustained. Failure to object could not be attributed to trial strategy, as there are no legitimate reasons for failing to object to this inadmissible evidence. *Cf. Pemberton v. State*, 560 N.E.2d 524, 526-27 (Ind. 1990) (reversing conviction on direct appeal

because of ineffective assistance; trial counsel moved to suppress identification testimony, which was denied, but failed to object at trial: "This can in no way be characterized as a strategical or tactical decision gone awry").

The evidence is sufficiently prejudicial that, had it not been admitted, there is a reasonable probability that the result would have been different. For the reasons cited above, *supra* p.43, this improper evidence suggesting that Brewington is dangerous and unreliable is prejudicial. Due to the paucity of evidence proving that Brewington's statements were threats of violence and that Brewington's grand jury testimony was intentionally false, there is a reasonable probability that the improper evidence tipped the scale in favor of conviction. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Messer v. State*, 509 N.E.2d 249, 253 (Ind. Ct. App. 1987) (citing *Strickland*, 466 U.S. at 696).

Trial counsel's failure to object on these grounds was constitutionally ineffective assistance. The Court should therefore reverse Brewington's convictions and remand for a new trial.

C. Other Instruction Errors.

Final Instruction 1, which listed the elements for the charges, was prejudicial. This instruction repeated the grand jury indictments verbatim. The indictments each included superfluous language about the grand jury, such as "The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women and legally impaneled, charged and sworn to

inquire into felonies ..." (*See supra* pp.22-25 and App.10-13 for a reproduction of the instructions).

More importantly, the indictments imply that the grand jury already found that Brewington committed the charged offenses. The instruction do not inform the jury about the nature of a grand jury, that it was not an adversarial proceeding, or that the burden of proof is only probable cause. It was not necessary to read the indictments to the jury in full. If the indictments were to be read, the prejudicial language should have been left out. The instruction that was read was misleading and prejudicial.

Brewington's trial counsel did not object to these instructions. This constituted ineffective assistance of counsel. If counsel had objected, the objection would have been sustained, as this language was extremely prejudicial. Failing to object to this language cannot be considered a matter of trial tactics.

The instruction was also constitutionally prejudicial. The instruction stated that the grand jury already found that Brewington committed the charged crimes. Many rules prohibit participants in the trial process from commenting on the guilt or innocence of a criminal defendant. *See, e.g.,* Evid. R. 704(b); Ind. Professional Conduct Rule 3.4 ("A lawyer shall not ... in trial, ... state a personal opinion as to ... the guilt or innocence of an accused"). There is a reasonable probability that the jury would not have convicted Brewington without these prejudicial statements.

The erroneous use of an anonymous jury, admission of improper evidence, and the prejudicial language in the final instructions, combined to deny Brewington a fair trial. Each

error alone would have been sufficient to require reversal; combined, the prejudice was even greater. Therefore, this Court should reverse Brewington's convictions.

CONCLUSION

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

Respectfully submitted,

____
Michael K. Sutherlin
Attorney No. 508-49

____
Samuel M. Adams
Attorney No. 28437-49
Attorneys for Appellant-Defendant

WORD COUNT CERTIFICATE

I verify that this Brief contains 13,979 words.

____

Samuel M. Adams
Atty. No. 28437-49
Attorney for Appellant-Defendant

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 22nd day of May, 2012:

J.T. Whitehead
OFFICE OF THE ATTORNEY GENERAL
Indiana Government Center South, 5th Floor
302 W. Washington Street
Indianapolis, IN 46204

Samuel M. Adams
Atty. No. 28437-49
Attorney for Appellant-Defendant

MICHAEL K. SUTHERLIN & ASSOCIATES
P.O. Box 441095
Indianapolis, IN 46244-1095
Phone: (317) 634-6313
Fax: (317) 631-8818
Email: msutherlin@gmail.com