

**IN THE
INDIANA COURT OF APPEALS**

CAUSE NO. 25A-CR-02601

MYKAL JAMES ALAN GEROU
Appellant,

v.

STATE OF INDIANA
Appellee.

Appeal from the:
Jefferson Superior Court

Trial Court No.: 39D01-2406-F5-000873

Before the Honorable:
Blaine Goode, Judge.

APPELLANT'S BRIEF

R. Patrick Magrath
26467-53
West Sixth Law, LLP
Attorneys for APPELLANT
One West Sixth Street
Madison, IN 47250
(812) 273-5230

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STATEMENT OF ISSUES

1. Whether evidence was sufficient to sustain Gerou's convictions for Intimidation where Gerou did not know his statements would be repeated to alleged victims, where Gerou did not use a deadly weapon, and where Gerou's statements were to and about individuals and were never aimed at an entire government.
2. Whether Gerou's sentence is appropriate where his conduct did not exceed the conduct proscribed by the legislature, where Gerou's character did not warrant an aggravated sentence, and where Gerou's conduct was all part of a single episode of criminal conduct.

STATEMENT OF CASE

On June 27, 2024, the State of Indiana charged Mykal Gerou as follows: count 1, attempted obstruction of justice as a level 6 felony; count 2, intimidation as a level 5 felony; count 3, intimidation as a level 6 felony; count 4, intimidation as a level 6 felony; and count 5, intimidation as a level 6 felony. (App. Vol.2 pp.35-39). The State alleged that between April 1, 2024, and June 26, 2024, Gerou attempted to intimidate Stacey Cornett into not testifying in a legal proceeding by stating he had a firearm and the right to shoot people who kept him from his child. The State further alleged that between April 1, 2024, and June 26, 2024, Gerou told Alexa Bischoff that if Department of Child Services employees hurt or took away his child he would kill them. The State further alleged that on June 20, 2024, Gerou threatened to have his dog attack Janet Daugherty. Finally, the State alleged that on June 20, 2024, Gerou told Mary Buxton he would kill her if she messed with his child.

On February 4, 2025, Gerou filed a motion for competency evaluation noting that counsel did not believe Gerou was able to assist or understand the proceedings. (App. Vol.2 pp.128). On February 7, 2025, the trial court held a competency hearing; the trial court ordered Gerou to be evaluated. (Tr. Vol.2 pp.22, 32; App. Vol.2 pp.133). On February 24, 2025, and March 27, 2025, competency reports were filed with the trial court. (App. Vol.2 pp.134, 143). On April 9, 2025, the trial court held a competency hearing; the trial court determined that Gerou was not competent to stand trial and ordered Gerou to restorative treatment. (Tr. Vol.2 pp.33, 38; App. Vol.2 pp.149). On April 16, 2025, the trial court transported Gerou to the Madison State Hospital for competency restoration. (App. Vol.2 pp.155). On June 25, 2025, the Madison State Hospital notified the trial court that Gerou had attained competency to stand trial. (App. Vol.2 pp.160).

On May 3, 2025, Gerou filed a Notice of Insanity Defense. (App. Vol.2 pp.156). On May 6, 2025, the trial court held a pretrial hearing on Gerou's Notice of Insanity Defense. (Tr. Vol.2 pp.40). Gerou argued that the trial court should accept his belated Notice of Insanity Defense on the basis of the fact that the trial court and the State were on constructive notice by way of Gerou's previously filed request for competency evaluation. (Tr. Vol.2 pp.42-43). The State opposed the Notice arguing Gerou had not demonstrated any good cause and how late the notice was filed. (Tr. Vol.2 pp.44). The trial court ruled that no good cause had been shown, specifically noting there were no particularized supporting circumstances for late filing, and rejected the filing of a Notice of Insanity Defense. (Tr. Vol.2 pp.46; App. Vol.2 pp.158). In part, the trial court ruled that because the defendant was aware of a mental health issue as early as August 14, 2024, the defendant had sufficient opportunity to consider and file the notice of insanity defense in a timely manner.

On July 24, 2025, the State filed a Motion to Amend the Information; the only justification offered was that the amendment did not prejudice Gerou's substantial rights. (App. Vol.2 pp.178). The State sought amended charges as follows: count 1, intimidation as a level 5 felony; count 2, intimidation as a level 5 felony; count 3, intimidation as a level 6 felony; count 4, intimidation as a level 5 felony; and count 5, intimidation as a level 5 felony. (App. Vol.2 pp.179-182). On July 30, 2025, the trial court held a pretrial hearing on the State's motion to amend the charging information. (Tr. Vol.2 pp.47). Gerou objected to the amendment of the charges on the basis that the amendment was filed less than thirty (30) days prior to trial and that the amendment affected his substantial rights by changing the potential penalty. (Tr. Vol.2 pp.50). The trial court offered Gerou the opportunity for a continuance and that the amendment

would be permitted. (Tr. Vol.2 pp.51). On July 30, 2025, the trial court issued an order granting the State's motion to amend. (App. Vol.2 pp.184). Gerou did not seek a continuance.

The trial court commenced a jury trial on August 19, 2025. (Tr. Vol.2 pp.61). At the conclusion of the State's case, Gerou moved for a directed verdict; the motion was denied. (Tr. Vol.2 pp.165). The jury returned a verdict of guilty on count 1, count 2, count 3, count 4, and count 5. (Tr. Vol.2 pp.203).

On September 16, 2025, the trial court held a sentencing hearing. (Tr. Vol.2 pp.207). The trial court determined that each count of the charging information, except for count 2 and count 5, were separate incidents and did not constitute a single episode of criminal conduct. (Tr. Vol.2 pp.248). The trial court sentenced Gerou to three (3) years on count 1, to four (4) years on count 2, to one (1) year fully suspended on count 3, four (4) years on count 4, and four (4) years on count 5, with counts 2 and 5 to be served concurrently and the remainder to be served consecutively for a total aggregate sentence of twelve (12) years with one (1) year suspended. (Tr. Vol.2 pp.249-250).

On September 16, 2025, the trial court clerk noted entry of a final written order on the chronological case summary. (App. Vol.3 pp.245-46). On October 16, 2025, Gerou filed the notice of appeal. (Docket). On October 17, 2025, the trial court clerk filed the notice of completion of the clerk's record. (Docket). On November 20, 2025, Gerou filed the amended notice of appeal. (Docket). On December 2, 2025, the trial court clerk filed the notice of completion of the transcript. (Docket). On December 11, 2025, the Court granted Gerou's motion for an extension of time. (Docket). Gerou now timely files his Appellant's Brief on or before February 2, 2026.

STATEMENT OF FACTS

Danielle Buxton is a family case manager with the Department of Child Services. (Tr. Vol.2 pp.103). On April 27, 2024, the Department received a report of child neglect with regard to the newborn child of Mykal Gerou and Constance Mueller. (Tr. Vol.2 pp.105). On April 28, Buxton made contact with Gerou at the hospital. (Tr. Vol.2 pp.106). Gerou declined to speak with Buxton regarding the report without the assistance of counsel and encouraged Mueller to do the same. (Tr. Vol.2 pp.106).

On April 29, 2024, Buxton returned to the hospital and notified Gerou of the Department's decision to detain the child. (Tr. Vol.2 pp.108). There was a greater security presence on the hospital floor than usual. (Tr. Vol.2 pp.108). Gerou stated it was not fair that security was allowed to carry firearms in the hospital when Gerou was not allowed to. (Tr. Vol.2 pp.108).

The child was detained. (Tr. Vol.2 pp.110). A child in need of services petition was filed. (Tr. Vol.2 pp.112). An initial hearing was held on the petition. (Tr. Vol.2 pp.112). Buxton had phone calls with Gerou regarding the next steps and goals for service. (Tr. Vol.2 pp.113). Buxton found these conversations difficult due to Gerou's anger. (Tr. Vol.2 pp.114). Gerou made no threats during phone calls with Buxton. (Tr. Vol.2 pp.124).

Stacey Cornett is a psychotherapist. (Tr. Vol.2 pp.88). She was employed with Encompass Healthcare and provided consultation and assessment services regarding parent-child bonds. (Tr. Vol.2 pp.88). Cornett performed assessments for the Department of Child Services. (Tr. Vol.2 pp.89-90).

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Cornett conducted such an assessment with Mykal Gerou. (Tr. Vol.2 pp.90-91). Cornett's initial contact with Gerou was by phone calls. (Tr. Vol.2 pp.91). Gerou was agitated and did not believe the assessment was necessary. (Tr. Vol.2 pp.91). Gerou scheduled an appointment to see Cornett for the assessment. (Tr. Vol.2 pp.91).

On June 3, 2024, Cornett met in person with Gerou. (Tr. Vol.2 pp.92). Gerou did not believe an assessment was necessary and felt he was being treated unfairly. (Tr. Vol.2 pp.92). Gerou stated he had rights under the Second Amendment and a right to carry a concealed firearm. (Tr. Vol.2 pp.93). Cornett asked Gerou to take his firearm to his vehicle; Gerou did not admit or deny that he had a firearm, but Cornett believed he did because he patted his hip. (Tr. Vol.2 pp.94). Gerou stated he had a right protect his children from kidnappers. (Tr. Vol.2 pp.94). Gerou stated Cornett should give him a fair report and complained that he had not had fair reports issued in the past. (Tr. Vol.2 pp.95). At the conclusion of the assessment Gerou stated he would not participate in services. (Tr. Vol.2 pp.96).

After meeting with Gerou, Cornett produced a report that was fair and favorable to Gerou. (Tr. Vol.2 pp.99). Cornett continued to conduct assessments at the Madison office following her meeting with Gerou. (Tr. Vol.2 pp.101). She did not contact law enforcement to report the incident. (Tr. Vol.2 pp.101). Two (2) to three (3) weeks after the assessment she received a phone call from attorney Alexa Bischoff. (Tr. Vol.2 pp.100).

Cornett was nervous and scared because Gerou was agitated and confused. (Tr. Vol.2 pp.93). Cornett felt threatened. (Tr. Vol.2 pp.95). She contacted her supervisor immediately after Gerou left to state she felt nervous and threatened. (Tr. Vol.2 pp.96). Cornett eventually declined to return to the Madison office to meet with clients. (Tr. Vol.2 pp.96). She relocated out of state.

(Tr. Vol.2 pp.97). Cornett had concerns about attending trial and testifying. (Tr. Vol.2 pp.98). She considered retiring to avoid testifying. (Tr. Vol.2 pp.98).

A family team meeting occurred on June 20, 2024. (Tr. Vol.2 pp.114). Gerou stated “mess with baby bear, you’re going to die.” (Tr. Vol.2 pp.115). The statement was made during a time when the parents had an open platform to speak about their feelings. (Tr. Vol.2 pp.125). Buxton advised Gerou to watch his words. (Tr. Vol.2 pp.125). Buxton interpreted this statement as a threat against the Department and herself. (Tr. Vol.2 pp.115). Buxton was not highly concerned because the meeting was in a well-populated public building and Gerou did not appear to be armed with any weapons. (Tr. Vol.2 pp.116). Buxton was not placed in fear as a result of Gerou’s statement. (Tr. Vol.2 pp.124). Buxton did not report the statement to law enforcement. (Tr. Vol.2 pp.124).

Gerou had to end the meeting to attend to his dogs in his vehicle. (Tr. Vol.2 pp.117). He returned stating an animal control officer threatened to beat him, so he threatened the animal control office with a firearm. (Tr. Vol.2 pp.117). Buxton did not witness Gerou’s interaction with the animal control officer. (Tr. Vol.2 pp.124). Buxton did not witness Gerou in possession of a firearm. (Tr. Vol.2 pp.124). Buxton’s concern increased with her belief that he was carrying a firearm. (Tr. Vol.2 pp.117). Buxton discussed her concerns with her supervisor. (Tr. Vol.2 pp.118). Buxton and her supervisor advised the local office director of the concerns. (Tr. Vol.2 pp.118). The local office attorney contacted law enforcement to report the concerns. (Tr. Vol.2 pp.119).

Janet Daugherty is an animal control officer for the City of Madison. (Tr. Vol.2 pp.126). On June 20, 2024, Daugherty conducted a welfare check at the Department of Child Services

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regarding a report of dogs left in a vehicle on a hot day. (Tr. Vol.2 pp.127). Daugherty located two dogs in the camper shell covered bed of a truck. (Tr. Vol.2 pp1128). Daugherty removed one of the dogs from the vehicle and placed it in her vehicle which had air conditioning. (Tr. Vol.2 pp.128). Gerou was identified as the owner and was located. (Tr. Vol.2 pp.128).

Daugherty and Gerou got into an argument; both individuals called each other names. (Tr. Vol.2 pp.128). Gerou stated he would sick his dog on Daugherty to bite her. (Tr. Vol.2 pp.129). Other officers arrived on the scene; Daugherty told them Gerou had threatened to sick his dog on her. (Tr. Vol.2 pp.130-131).

A fact-finding hearing was scheduled in the CHINS matter for June 28, 2024. (Tr. Vol.2 pp.118). Alexa Bischoff is an attorney who was appointed to represent Gerou in the CHINS case. (Tr. Vol.2 pp.150-152). On June 24, 2024, Bischoff spoke with Gerou on the telephone to discuss the upcoming hearing. (Tr. Vol.2 pp.152). Gerou later stated every phone call he made to Bischoff was made in Indiana. (Tr. Vol.2 pp.164). Ordinarily, such conversation are confidential and subject to attorney-client privilege. (Tr. Vol.2 pp.159). Gerou was angry at Cornett, the DCS attorney, and the Buxton. (Tr. Vol.2 pp.153). Gerou made statements such as if you take my child I will kill you. If you come between me and my family, you will die. People are going to die. I will kill people. I always have a gun. (Tr. Vol.2 pp.153). Gerou stated if Cornett testified the way he expected her to she would pay for it. (Tr. Vol.2 pp.154). Gerou did not ask Bischoff to relay any of his statements to other people. (Tr. Vol.2 pp.159). Gerou did not make any threats about Bischoff or her place of work. (Tr. Vol.2 pp.160).

Bischoff took the threats seriously. (Tr. Vol.2 pp.155). Bischoff was concerned about her own safety and the safety of everyone else involved. (Tr. Vol.2 pp.157). Bischoff contacted local law enforcement to report the statements. (Tr. Vol.2 pp.156). Bischoff also contacted court staff

to request additional security. (Tr. Vol.2 pp.156). Bischoff also contacted the local office attorney for the Department to make the Department aware of the statements. (Tr. Vol.2 pp.156).

The fact-finding hearing was continued because the Department alleged Gerou was threatening DCS workers and anyone involved in the CHINS action. (Tr. Vol.2 pp.120). Buxton understood these threats to be death threats. (Tr. Vol.2 pp.121, 123). Buxton feared that Gerou would attempt to harm herself or others prior to the hearing or after the hearing. (Tr. Vol.2 pp.121).

On June 26, 2024, Officer Logan Gray spoke with the local office attorney for the Department of Child Services. (Tr. Vol.2 pp.134, 144). As a result of that conversation, on the same day, he contacted Stacey Cornett, Danielle Buxton, Alexa Bischoff, and Janet Daugherty. (Tr. Vol.2 pp.134). Cornett appeared to be terrified. (Tr. Vol.2 pp.135). Buxton appeared to be concerned. (Tr. Vol.2 pp.141).

On June 28, 2024, after obtaining an arrest warrant, Gray made a plan to arrest Gerou. (Tr. Vol.2 pp.136-137, 143). When Gerou was taken into custody he had an empty holster on his hip. (Tr. Vol.2 pp.139). A firearm and two (2) loaded magazines matching the holster was located in the rear part of the vehicle Gerou arrived in. (Tr. Vol.2 pp.139). Gerou complied with officer commands and was taken into custody without incident. (Tr. Vol.2 pp.141).

Gerou was only twenty-four (24) years old at the time of sentencing. (App. Vol.3 pp.58). Gerou's brother described Gerou as a person with a big heart. (Tr. Vol.2 pp.212). He loves his children and is fiercely protective of them. (Tr. Vol.2 pp.212). Gerou had the support of his family including his brother, his grandmother and his aunt. (Tr. Vol.2 pp.212, 215). His family felt that Gerou needed mental health treatment and education assistance to become the

productive member of society they knew he could be. (Tr. Vol.2 pp.212). Gerou had a 2021 misdemeanor fine for driving offense, and a 2021 misdemeanor fine for disturbing the peace. (App. Vol.3 pp.61). Gerou had no prior felony convictions Both of his prior offenses were minor and were resolved by a fine.

Gerou grew up under neglectful parents. (Tr. Vol.2 pp.211). His parents did not prioritize education. (Tr. Vol.2 pp.211). Gerou struggled academically due to a low IQ and lack of necessary tools. (Tr. Vol.2 pp.211). Gerou had serious head trauma from having been hit by multiple cars while on his bike. (Tr. Vol.2 pp.211). He was diagnosed with CTE involving memory loss, confusion, and impulse control issues. (Tr. Vol.2 pp.211). It was unlikely that Gerou would have appreciated the threatening nature of any of his statements. (Tr. Vol.2 pp.215).

On February 24, 2025, Gerou was assessed for competency to stand trial. (App. Vol.2 pp.134). The consulting doctor found that Gerou was incompetent to stand trial due to a major neurocognitive disorder caused by traumatic brain injury. Gerou's condition was likely to result in angry outbursts, anxiety, agitation, trouble thinking, and trouble concentrating. Gerou required antipsychotic medication. Due to cognitive impairments, he was unlikely to understand the legal process.

On March 27, 2025, Gerou was assessed for competency to stand trial. (App. Vol.2 pp.143). The consulting doctor found that Gerou's competency to stand trial was borderline due to an unspecified schizophrenia or psychotic condition and borderline intellectual function. Gerou's condition made it likely that he would have trouble keeping up with legal process.

Following his conviction, Gerou placed a call to a friend (Tr. Vol.2 pp.220). Gerou complained that his rights had been violated during trial, that the prosecutors violated his rights,

and Ms. Mueller did not stand up for him. Gerou expressed disbelief that Cornett, Buxton, Bischoff, and Daugherty were actually placed in fear.

SUMMARY OF ARGUMENT

Gerou was convicted of five (5) counts of intimidation. There is insufficient evidence to support Gerou's conviction for intimidation based upon his communication with his lawyer. Gerou had no knowledge or reason to believe that his attorney would disclose statements Gerou made during a confidential communication. There is insufficient evidence to support Gerou's conviction for intimidation as a level 5 felony based on his communication with the psychotherapist service provider. Gerou may have been in possession of a deadly weapon, a firearm, but there was no evidence that he used the weapon during commission of the alleged offense. There is insufficient evidence to support Gerou's conviction for intimidation as a level 5 felony for statements he made to a DCS case manager. Although the DCS case manager was employed by DCS and acting in her official capacity, Gerou's alleged statements were made directly to her and there was no evidence the statements were intended to be against an entire government. There is insufficient evidence to sustain Gerou's conviction for intimidation based upon his statements to a psychotherapist he was being assessed by. Gerou did not know or reasonably believe she would repeat statements he made in a mental health assessment context.

Gerou is a very young man whose conduct did not exceed the elements of the offense. He has a history of traumatic brain injury and mental health issues. Gerou has limited criminal history. An aggravated sentence was not appropriate. Gerou's alleged offense all occurred in a relatively short period of time and most were directly related to his involvement in a CHINS action. Gerou's sentence should have been limited by the single episode of criminal conduct rule.

Gerou seeks reversal or reduction of his convictions and in the alternative seeks revision of his sentence to the advisory term with concurrent sentences.

ARGUMENT

Gerou was convicted of five (5) counts of intimidation. Four (4) of the counts were related to Gerou's involvement in a child in need of services case and his displeasure at the removal of his infant child and his perception that individuals were violating his rights. Gerou allegedly made several statements in a short period of time that were threatening. Some of these statements were made to third parties with no knowledge on Gerou's part that they would be reconveyed to the alleged victim. Gerou did not use a deadly weapon during any of these statements. And the evidence does not support that Gerou intended his statements to be threats against any entire government or department. Gerou's convictions cannot be sustained or should be reduced. Gerou's sentence should have been restricted by the single episode of criminal conduct rule or otherwise limited to the advisory sentence with concurrent terms.

I. The Evidence Was Insufficient to Sustain Gerou's Convictions for Intimidation

On review of the sufficiency of the evidence to support a conviction this Courts will consider the probative evidence and reasonable inferences supporting the verdict. *Hall v. State*, 271 N.E.3d 168, 172–73 (Ind. Ct. App. 2025). “It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction.” *Id.* This Court will reverse the conviction if no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* “The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” *Id.* citing *Drane v. State*, 867 N.E.2d 144, 146–47 (Ind. 2007).

Ind. Code Sec. 35-45-2-1 provides in relevant part:

(a) A person who communicates a threat with the intent:

...
(4) that another person be placed in fear that the threat will be carried out,
if the threat is a threat described in:

(A) subsection (c)(1) through (c)(5); or

- (B) subsection (c)(7) through (c)(8);
...
commits intimidation, a Class A misdemeanor.
- (b) However, the offense is a:
 - (1) Level 6 felony if:
 - (A) the threat is to commit a forcible felony;
...
 - (2) Level 5 felony if:
 - (A) while committing it, the person draws or uses a deadly weapon;
...
 - (C) the threat is:
 - (i) to commit terrorism; or
 - (ii) made in furtherance of an act of terrorism.

Ind. Code Sec. 35-31.5-2-329 provides:

“Terrorism” means the unlawful use of force or violence or the unlawful threat of force or violence to:

- (1) intimidate or coerce:
 - (A) a government; or
 - (B) all or part of the civilian population; or
- (2) affect the conduct of a government by use of a weapon of mass destruction, assassination, or kidnapping.

Count 1, alleged Gerou communicated a threat to Bischoff, his attorney, regarding the Department of Child Services. Ordinarily, such conversation are confidential and subject to attorney-client privilege. (Tr. Vol.2 pp.159). Gerou did not ask Bischoff to relay any of his statements to other people. (Tr. Vol.2 pp.159). The evidence was not sufficient to sustain a conviction where Gerou did not intend for his statements to be conveyed to the alleged victims.

For example, in *Bolen v. State*, 430 N.E.2d 398, 401 (Ind. Ct. App. 1982) the defendant talked in general terms about Yoder being the cause of all his problems. Bolen showed an officer the clip from an automatic weapon and stated, “I’m going to kill him,” referring to Yoder. This Court noted that the defendant’s statements did not constitute a crime “inasmuch as Yoder was not present at the time.”

Relying in part on *Bolen*, the Court in *Ajabu v. State*, 677 N.E.2d 1035, 1043 (Ind. Ct. App. 1997) distinguished the facts before it. There the defendant had made threats spoken before microphones and televisions cameras and communicated through the media to members of the public, including the intended victims. The Court ruled that the defendant “knew or had good reason to believe” his threats would reach the intended victims “with intent to influence” their conduct. The Court ruled this was sufficient to establish “intimidation under our statute.”

In *J.T. v. State*, 718 N.E.2d 1119, 1124 (Ind. Ct. App. 1999) the Court utilized the rule established in *Ajabu* in a situation where a juvenile printed a document that contained threatening statements. The juvenile dictated a threatening statement to another juvenile which they sent to a printer in the library. The librarian intercepted it and “gave it to a teacher, who gave it to the assistant principal, who gave it to the principal, who ultimately showed the document to...the alleged victim.” The Court ruled the juvenile did not “know or have good reason to believe that the document would be intercepted and transmitted through various intermediaries to” the alleged victim.” The Court held there was insufficient evidence of a communication, either direct or indirect, to support the finding of delinquency on the ground of intimidation.

Similarly, in *E.B. v. State*, 89 N.E.3d 1087 (Ind. Ct. App. 2017) a high school student, who was displeased with recent discipline he received at school, told two other students that he intended to shoot people at school. *E.B.*, 89 N.E.3d at 1089. The high schooler's sister overheard his plan to shoot the assistant principal. These students shared this information with the school. A delinquency case was filed against the high schooler, but this Court found that no evidence existed of the threat being communicated to the assistant principal and, thus, the evidence was insufficient to prove intimidation.

More recently in *Lester v. State*, 268 N.E.3d 1224, 1228 (Ind. Ct. App. 2025) the defendant sent a Snapchat direct message to a group he exchanged “dark humor” messages with. The message contained the caption: “Now that I've showered and washed my sins away I can go and shoot up a preschool”. Snapchat flagged the message and notified the Federal Bureau of Investigation's (FBI). The Court stated “[a]ssuming for the sake of argument the message included a threat and the target was the preschool on the Southern Wells campus, the evidence does not reflect that Lester knew or had good reason to believe that it would reach the targeted victims. Lester sent the message to a private Snapchat group of about twenty individuals who exchanged what he described as dark humor.”

There is no evidence that Gerou knew or had good reason to believe that his statements to his attorney, made during an attorney-client communication, would be conveyed to the Department of Child Services. To the contrary, the sole evidence is that Gerou was communicating with his attorney regarding the ongoing case and upcoming hearing and was expressing his dissatisfaction and frustration. Gerou not only reasonably anticipated his communications would be kept confidential, under the ordinary rules he was justified in that belief.

Assuming Gerou's statement's can be taken as threats against the Department of Child Services, there was no evidence that Gerou knew or had good reason to believe that his statements would be reconveyed by his lawyer. Thus, there is insufficient evidence upon which any fact finding could conclude that Gerou committed intimidation under Count 1.

Count 2, alleged Gerou communicated a threat to Cornett that she better be fair, or she would pay, while using a firearm. Gerou stated he had rights under the Second Amendment and a right to carry a concealed firearm. (Tr. Vol.2 pp.93). Gerou did not admit or deny that he had a

firearm, but Cornett believed he did. (Tr. Vol.2 pp.94). Because the evidence, at best, demonstrates Gerou possessed a firearm, the evidence is insufficient to demonstrate that Gerou committed intimidation while drawing or using a deadly weapon.

Our Supreme Court has explicitly ruled that “[m]ere possession of a firearm or being “armed” with a deadly weapon is not enough” to prove the “use” of the deadly weapon in the commission of the offense. *Nicoson v. State*, 938 N.E.2d 660, 665 (Ind. 2010), *Cross v. State*, 15 N.E.3d 569, 573 (Ind. 2014). “As the Court of Appeals pointed out, it is reasonable to infer that the General Assembly was recognizing the additional escalation of danger associated with the actual use of a firearm versus the mere possession of one during the commission of an offense.”

Cornett never witnessed Gerou in possession of a firearm during her conversation with Gerou. There was no evidence Gerou drew a firearm or pointed a firearm. There was no evidence that Gerou discharged a firearm or otherwise used the firearm in any manner during his conversation with Cornett. Indeed, the only evidence was that Cornett believed Gerou was carrying a firearm, there was no evidence he was actually in possession at that time.

Assuming Gerou was in possession of a firearm, a deadly weapon, at the time he spoke with Cornett, there is no evidence he brandished or used the weapon. Gerou's possession is not sufficient to demonstrate “use” of the firearm during the alleged intimidation. Thus, the evidence was insufficient to sustain a conviction of level 5 felony intimidation.

Count 4, alleged Gerou communicated a threat to Buxton that if she messed with his baby she would be killed which it further alleged was a terroristic threat against the Department of Child Services. Gerou made his statements in circumstances where he was encouraged to speak about his feelings regarding the case. He only made the statement to Buxton, it was communicated personally and did not include other individuals. Assuming the statement was

considered a threat, there was no evidence the statement was terroristic as there was no evidence Gerou intended or knew his statement would be construed as involving the whole Department.

A family team meeting occurred on June 20, 2024. (Tr. Vol.2 pp.114). Gerou stated “mess with baby bear, you’re going to die.” (Tr. Vol.2 pp.115). The statement was made during a time when the parents had an open platform to speak about their feelings. (Tr. Vol.2 pp.125). Buxton advised Gerou to watch his words. (Tr. Vol.2 pp.125). Buxton was not highly concerned because the meeting was in a well-populated public building and Gerou did not appear to be armed with any weapons. (Tr. Vol.2 pp.116). Buxton was not placed in fear as a result of Gerou’s statement. (Tr. Vol.2 pp.124). Buxton did not report the statement to law enforcement. (Tr. Vol.2 pp.124).

Assuming Gerou’s statement was a threat directed at Buxton, the offense was a class A misdemeanor unless it was “terroristic.” The application of “terrorism” in this context appears to be a novel issue. To satisfy the “terror” element, the State was required to prove the threat was made against “a government.” While the Department of Child Services is certainly an office of the State of Indiana, it is not in and of itself a “government.” More importantly, the only evidence was that Gerou made his statement to Buxton about Buxton’s involvement with Gerou’s child. There was no evidence that Gerou intended his statement to apply to the entire Department or that he knew or had reason to believe his statement would be construed as being with regard to the entire Department. Thus, the evidence does not support a finding that Gerou’s statement was terroristic intimidation. Count 4, should be reduced to a class A misdemeanor.

Count 5, alleged Gerou communicated a threat to Cornett regarding the Department of Child Services. Gerou was meeting with Cornett as a service provider specifically in the field of mental health. Cornett is a psychotherapist. (Tr. Vol.2 pp.88). Similar to the relationship between

an attorney and client, communications between psychotherapists and their patients is entitled to confidentiality and privilege. Because Gerou did not know or have reason to believe Cornett would reconvey his statements to alleged intended victims, there was insufficient evidence to support an intimidation conviction.

As argued more fully above, it is not sufficient for the State to produce evidence that the defendant made threatening statements which were eventually communicated to the intended victim. Rather, the defendant must know or have reason to believe the intended victim will receive the threat either directly or indirectly. When a threat is conveyed to or intercepted by a third party, the State must demonstrate that the defendant had good reason to anticipate the statement would be conveyed to the intended victim.

Here, Gerou was meeting with a psychotherapist to discuss what, if any, mental health services he may be in need of. Gerou would have reasonably assumed that he was permitted to speak his mind about his feelings and concerns in the context of receiving an assessment. There is no evidence that Gerou knew that Cornett would reconvey Gerou's statement's regarding his frustration with the system. There was no evidence that Cornett told Gerou that she would be repeating his statements or that what he said during his meeting with her was anything other than confidential. Thus, there is no evidence that Gerou knew or had reason to believe Cornett would repeat his statements. The evidence was insufficient to support a conviction for intimidation.

II. Gerou's Sentence was Inappropriate and in Excess of the Single Episode of Criminal Conduct Restriction on Consecutive Sentences

Indiana Appellate Rule 7(B) provides that this Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. When considering whether a sentence is inappropriate, the Court need not be "extremely" deferential to

a trial court's sentencing decision. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). However, the Court must give due consideration to that decision. *Id.* The Defendant carries the burden of persuading this Court that the sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

The Indiana Supreme Court has explained that the principal role of Indiana Appellate Rule 7(B) review is “to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes...” *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). This Court will “focus on the forest – the aggregate sentence – rather than the trees – consecutive or concurrent, number of counts, or length of the sentence on any individual count.” *Id.* A trial court may order consecutive sentences based on one valid aggravating factor. *Weaver v. State*, 189 N.E.3d 1128, 1135 (Ind. Ct. App. 2022)(citing *Kayser v. State*, 131 N.E.3d 717, 723 (Ind. Ct. App. 2019)). And that one valid aggravator may be used both to enhance a sentence and to justify consecutive sentences. *Id.*

Ind. Code Sec. 35-50-2-6(b) provides the advisory sentence for a level 5 felony is three (3) years, the minimum sentence is one (1) year, and the maximum sentence is six (6) years. Ind. Code Sec. 35-50-2-7(b) provides the advisory sentence for a level 6 felony is one (1) year, the minimum sentence is six (6) months, and the maximum sentence is two and one half (2 ½) years. Thus, Gerou received the advisory sentence for count 1, three (3) years, and count 3, one (1) year, and received an aggravated sentence on count two (2), four (4) years, count four (4), four (4) years, and count five (5), four (4) years. The trial court further aggravated Gerou's sentence by ordering him to serve count 1, count 2, count 3, and count 4¹ consecutively for an aggregate

¹ Count 5 was ordered to be served concurrently with Count 2, four (4) years.

sentence of twelve (12) years. Gerou's sentence was nine (9) years greater than the advisory sentence of the highest level offense he was convicted of.

In reviewing the nature of the offense, the deference generally afforded to the trial court may be overcome by evidence portraying the nature of the offense in a positive light such as accompanied by restraint, regard, and lack of brutality. *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017). Moreover, evidence that supports a material element of the crime is not an appropriate nature of the offense aggravator. *Gleason v. State*, 965 N.E.2d 702, 711 (Ind. Ct. App. 2012).

On April 29, 2024, Gerou's newborn child was detained by the Department of Child Services. (Tr. Vol.2 pp.108). Gerou was sent to a DCS service provider. Gerou stated he had a right protect his children from kidnappers. (Tr. Vol.2 pp.94). Gerou stated provider should give him a fair report and complained that he had not had fair reports issued in the past. (Tr. Vol.2 pp.95). At a family team on June 20, 2024, Gerou stated "mess with baby bear, you're going to die." (Tr. Vol.2 pp.114-15). The statement was made during a time when the parents had an open platform to speak about their feelings. (Tr. Vol.2 pp.125). Later the same day, Gerou got into an argument with an animal control officer; both individuals called each other names. (Tr. Vol.2 pp.128). Gerou stated he would sick his dog on Daugherty to bite her. (Tr. Vol.2 pp.129). Subsequently, Gerou was involved in what he believed to be a confidential communication with his attorney. Gerou made statements such as if you take my child I will kill you. If you come between me and my family, you will die. People are going to die. I will kill people. I always have a gun. (Tr. Vol.2 pp.153). Gerou stated if the service provider testified the way he expected her to she would pay for it. (Tr. Vol.2 pp.154).

All of Gerou's conduct was in the context of the fact that his newborn child had been detained under circumstances he did not believe were valid. Gerou was frustrated and upset by the loss of his child and his perception that the Department of Child Services was actively violating his rights and improperly keeping him separated from his child. Each of Gerou's statements were contingent on the desire to protect his child or to seek retribution for violations of his constitutional rights and rights as a parent. Regardless of whether Gerou's perception were accurate or whether Gerou responded appropriately, Gerou's conduct was limited and focused solely on response to the perceived threat to his child. Gerou's conduct did not significantly exceed the conduct proscribed by the legislature. Thus, the nature of Gerou's offense did not warrant an aggravated sentence. Gerou seeks revision of his sentence to the advisor term on each count sentenced concurrently.

In reviewing the character of the defendant, the Courts of Appeal frequently look to the Defendant's criminal history, drug and alcohol use, mental health, family / society life and age. *Brown v. State*, 10 N.E.3d 1, 6 (Ind. 2014). Gerou was only twenty-four (24) years old at the time of sentencing. (App. Vol.3 pp.58). Gerou's brother described Gerou as a person with a big heart. (Tr. Vol.2 pp.212). He loves his children and is fiercely protective of them. (Tr. Vol.2 pp.212). Gerou had the support of his family including his brother, his grandmother and his aunt. (Tr. Vol.2 pp.212, 215). His family felt that Gerou needed mental health treatment and education assistance to become the productive member of society they knew he could be. (Tr. Vol.2 pp.212). Gerou had a 2021 misdemeanor fine for driving offense, and a 2021 misdemeanor fine for disturbing the peace. (App. Vol.3 pp.61). Gerou had no prior felony convictions Both of his prior offenses were minor and were resolved by a fine.

Gerou grew up under neglectful parents. (Tr. Vol.2 pp.211). His parents did not prioritize education. (Tr. Vol.2 pp.211). Gerou struggled academically due to a low IQ and lack of necessary tools. (Tr. Vol.2 pp.211). Gerou had serious head trauma from having been hit by multiple cars while on his bike. (Tr. Vol.2 pp.211). He was diagnosed with CTE involving memory loss, confusion, and impulse control issues. (Tr. Vol.2 pp.211). It was unlikely that Gerou would have appreciated the threatening nature of any of his statements. (Tr. Vol.2 pp.215).

On February 24, 2025, Gerou was assessed for competency to stand trial. (App. Vol.2 pp.134). The consulting doctor found that Gerou was incompetent to stand trial due to a major neurocognitive disorder caused by traumatic brain injury. Gerou's condition was likely to result in angry outbursts, anxiety, agitation, trouble thinking, and trouble concentrating. Gerou required antipsychotic medication. Due to cognitive impairments, he was unlikely to understand the legal process.

On March 27, 2025, Gerou was assessed for competency to stand trial. (App. Vol.2 pp.143). The consulting doctor found that Gerou's competency to stand trial was borderline due to an unspecified schizophrenia or psychotic condition and borderline intellectual function. Gerou's condition made it likely that he would have trouble keeping up with legal process.

Gerou was a very young man with serious brain injury and substantial mental health issues. He was the child of neglectful parents who did not provide him with the training or tools to respond appropriately. He had a very minimal criminal history and the support of his family. Despite his mental deficits and his difficult history, Gerou was described as a good person with a big heart. The conduct described in the charges against him was not consistent with his character. Gerou was in need of mental health treatment and assistance rather than incarceration. Thus,

Gerou's character did not warrant an aggravated sentence. Gerou seeks reversal and revision of his sentence to the advisory term with all counts sentenced concurrently.

Furthermore, the trial court determined that counts 1, 2, 3 and 4 were not a single episode of criminal conduct subject to the statutory cap provided by Ind. Code Sec. 35-50-1-2(D)(5). Ind. Code Sec. 35-50-1-2(b)&(c) provides the trial court may not sentence a defendant to a total consecutive term in excess of the statutory limits imposed for offenses that are "a connected series of offense that are closely related in time, place, and circumstances." For criminal charges where the highest level offense is a level 5 felony the maximum consecutive sentence is seven (7) years, five (5) years less than Gerou received.

The trial court relied, in part, on *Ballard v. State*, 715 N.E.2d 1276, 1280 (Ind. Ct. App. 1999) for the proposition that "the singleness of a criminal episode should be based on whether the alleged conduct was so closely related in time, place, and circumstances that a complete account of one charge cannot be related without referring to details of the other charges." In *Ballard* the defendant was convicted of residential entry and battery. The crimes were of a different nature and occurred approximately one half (1/2) hour apart. Nonetheless, the Court found that the crimes were a single episode of criminal conduct because the residential entry explained why Ballard committed the battery.

Similarly, in *Jennings v. State*, 687 N.E.2d 621, 623 (Ind. Ct. App. 1997), the Court found that the defendant's burglary, theft, and arson charges were all part of a single episode of criminal conduct even though the defendant left and returned to the location of the offenses three (3) times. The Court determined the prior burglary with intent to commit theft explained the subsequent burglary with intent to commit arson. Thus, a complete account of one burglary could not be give without reference to the other.

The trial court also relied on *Magee v. State*, 111 N.E.3d 264 (Ind. Ct. App. 2018), *Terry v. State*, 102 N.E.3d 945 (Ind. Ct. App. 2018), *Scroggin v. State*, 31 N.E.3d 549 (Ind. Ct. App. 2015), and *Pickett v. State*, 132 N.E.3d 936 (Ind. Ct. App. 2019). Each of these cases are unpublished decisions not regarded as precedent by Appellate Rule 65(D). Thus, the trial court's decision is not properly supported by these cases.

However, *Hall v. State*, 231 N.E.3d 222 (Ind. Ct. App. 2024) is an unpublished decision issued on or after January 1, 2023, which the Court may consider for persuasive value. *Hall* is far more similar to the facts and circumstances involved here. In *Hall*, the defendant was charged with two counts of intimidation. One for intimidating a house guest with a firearm. The other for intimidating law enforcement with a firearm at a later time. The Court determined that although the two offenses were not committed simultaneously or contemporaneously, they were sufficiently connected to make them a single episode of criminal conduct.

Here, Counts 1, 4 and 5 were each an allegation that Gerou had made threats that were terroristic, because they were made against a government. Each of the allegations was that Gerou was threatening the Department of Child Services. Each of the allegations involved the underlying CHINS action related to Gerou's child and the Department's actions in that matter. All of the alleged actions took place in a relatively short period of time, and were focused on the same issue. Indeed, each of the individuals Gerou allegedly made threats to were connected by the CHINS case and communicated amongst each other. Both Cornett and Buxton expressly testified that they did not take Gerou's statements seriously until they heard that he had made statements to other individuals. It was not possible for a complete account of one offense to be related without reference to the others.

The trial court already determined that counts 2 and 5 were a single episode of criminal conduct because they occurred contemporaneously, in the same location, with the same victim/witness, and sentenced Gerou concurrently on those offenses. Counts 1 and 4 should have been included as a single episode of criminal conduct with count 5 as each of those counts related to Gerou's statement's about the Department of Child Services, were made to witnesses who were connected by the CHINS action, and the witnesses communicated or were informed about the accounts of other witnesses which allegedly increased or created their fear of Gerou. The trial court abused its discretion by determining each count, other than count 2 and 5, were separate episodes of criminal conduct. As a result, Gerou's sentence falls afoul of the limits imposed by Indiana Criminal Code. Gerou seeks reversal with remand to resentence him in accordance with the single episode of criminal conduct restriction.

CONCLUSION

For each of the foregoing reasons, the Appellant, Mykal Gerou, respectfully requests the Court reverse his conviction and in the alternative requests the Court revise the Appellant's sentence to a more appropriate sentence in light of the nature of the offense and the character of the offender.

Respectfully submitted,

West Sixth Law, LLP

s/ Patrick Magrath

R. Patrick Magrath 26467-53

Attorney for Appellant

One West Sixth Street

Madison, Indiana 47250

(812) 273-5230 Fax (812) 273-6844

CERTIFICATE OF SERVICE

I, R. Patrick Magrath, hereby certify that on the 26th day of January, 2025, I served a copy of the foregoing on the following by electronic filing:

Todd Rokita
Attorney General of Indiana
IGCS, 5th Floor
302 West Washington Street
Indianapolis, Indiana 46204-2794

s/ Patrick Magrath
R. Patrick Magrath