ORIGINAL

N IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Appellant,	:	Case No. 2012-1782
	:	
v.	:	On Appeal from the
	:	Cuyahoga County Court of Appeals,
JEFFREY McGLOTHAN,	:	Eighth Appellate District
	:	
Appellee.	:	

MERIT BRIEF OF APPELLANT STATE OF OHIO

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INTRODUCTION AND SUMMARY

The State respectfully requests that this Honorable Court hold the State is not required to prove that a victim and a defendant share living expenses in order to demonstrate shared familial or financial responsibilities to prove "cohabitation" within the meaning of family or household member in domestic violence prosecutions.

A majority of the Eighth District Court of Appeals reversed Jeffrey McGlothan's conviction for domestic violence, finding the State failed to demonstrate that the victim was a household or family member within the definition of R.C. 2919.25(A). Although the victim testified that McGlothan was her boyfriend and they lived together for about one year, the Eighth District found that due to the lack of testimony that the couple shared any living expenses such as rent and utilities - to demonstrate shared familial or financial responsibilities - the State failed to prove the victim was a family or household member.

The Eighth District primarily relied on *State v. Williams*, 79 Ohio St.3d 459, 683 N.E.2d 1126 (1997), in which this Court held that the essential elements of cohabitation are sharing of familial or financial responsibilities and consortium. This Court listed "possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets." *Williams*, at 465. The Eighth District's application of *Williams* to *require* evidence of shared living expenses elevated one of this Court's non-exhaustive *Williams'* factors to an essential element of cohabitation. This requirement conflicts with decisions from other Ohio appellate courts. The State respectfully seeks reversal of *McGlothan* and clarification that evidence of shared living expenses is not required to demonstrate shared familial or financial responsibilities in domestic violence prosecutions.

STATEMENT OF THE CASE AND RELEVANT FACTS

In 2011 McGlothan was indicted on one count of Felonious Assault in violation of R.C. 2903.11(A)(1), with Notice of Prior Conviction and Repeat Violent Offender specifications, and one count of Domestic Violence in violation of R. C. 2919.25(A). McGlothan was convicted at a bench trial of Attempted Felonious Assault and Domestic Violence and sentenced to an aggregate prison term of two years.

The charges stemmed from McGlothan's assault of his live-in girlfriend, Cynthia Robinson. The victim had a trachea tube surgically inserted 12 years ago due to sleep apnea; the trachea tube is permanent. (Tr. 27-28). During an argument, McGlothan pushed the victim down and grabbed her shirt, resulting in the victim's trachea tube coming out of her neck. (Tr. 30). The victim called 911 and the trachea tube was eventually reinserted in her neck. (Tr. 37).

With respect to "cohabiting" to establish living as a spouse within the meaning of family or household member, the victim testified that:

- McGlothan is her boyfriend. (Tr. 26);
- They have known each other for about two years. (Tr. 26);
- McGlothan lived with her at her apartment for about one year. (Tr. 26);
- McGlothan slept over every night. (Tr. 26-27);
- McGlothan helped her put things up on the walls when he moved there. (Tr. 44), and
- Both she and McGlothan are unemployed and on disability. (Tr. 44).

McGlothan appealed. The Eighth District affirmed the attempted felonious assault conviction but vacated the domestic violence conviction because "[a]lthough Robinson

testified that the defendant was her boyfriend and he had slept over at her apartment for roughly a year, there was no testimony that the couple shared any living expenses, such as rent and utilities, which would demonstrate shared familial or financial responsibilities." *State v. McGlothan*, 8th Dist. No. 97212, 2012-Ohio-4049, ¶22 (Boyle, J., and Gallagher, J., dissenting in part on different issues).

LAW AND ARGUMENT

PROPOSITION OF LAW I: THE STATE IS NOT REQUIRED TO PROVE THAT A VICTIM AND A DEFENDANT SHARE LIVING EXPENSES IN ORDER TO PROVE COHABITATION AS DEFINED IN R.C. 2919.25(F)(2). EVIDENCE THAT A VICTIM AND DEFENDANT ARE ENGAGED IN AN INTIMATE RELATIONSHIP AND LIVE TOGETHER IS SUFFICIENT TO PROVE COHABITATION.

A majority of the Eighth District, relying on *Williams*, found that due to the lack of testimony that the victim and McGlothan shared any living expenses such as rent and utilities - to demonstrate shared familial or financial responsibilities - the State failed to prove the victim was a family or household member. As a result, cohabitation for purposes of family or household member under R.C. 2919.25 is not proven in Cuyahoga County without evidence the couple shared living expenses.

By requiring evidence of shared living expenses to demonstrate shared familial or financial responsibilities, the Eighth District has elevated one of *Williams'* non-exhaustive factors to an essential element of cohabitation. Further, the Eighth District appears to require evidence of shared familial *and* financial responsibilities to demonstrate cohabitation, contrary to the language in *Williams*. As discussed herein, the Eighth District's decision is in conflict with decisions of other appellate districts and fails to consider that in some relationships, one of the individuals may not be willing, able, or needed to contribute financially to the household. Review of other districts' opinions

demonstrates that other appellate courts do not bar domestic violence prosecutions where couples, for a variety of reasons, do not share financial responsibilities. Rather, the appellate courts consider the absence of shared financial responsibilities as but one element in the cohabitation analysis. The State respectfully requests that this Court adopt this common sense approach, so that a uniform standard of proof is applied throughout Ohio.

R.C. 2919.25 provides, in relevant part:

> **2919.25 Domestic violence**
>
> (A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.
>
> * * *
>
> (F) As used in this section and sections 2919.251 and 2919.26 of the Revised Code:
>
> (1) "Family or household member" means any of the following:
>
> (a) Any of the following who is residing or has resided with the offender:
>
> (i) A spouse, a person living as a spouse, or a former spouse of the offender;
>
> * * *
>
> (2) "Person living as a spouse" means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.

R.C. 2919.15(A), (F)(a)(i), (F)(2).

In *Williams*, this Court addressed the issue of what constitutes a "family or household member," a required element in domestic violence prosecutions. This Court set forth the elements of "cohabitation" as follows:

> Having considered the above definitions of "cohabitant" and "family or household member," we conclude that the essential elements of "cohabitation" are (1) sharing of familial or financial responsibilities and (2) consortium. R.C. 2919.25(E)(2) and related statutes. Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. These factors are unique to each case and how much weight, if any, to give to each of these factors must be decided on a case-by-case basis by the trier of fact.

Williams, at 465.

The Eighth District's requirement of evidence of shared living expenses to establish cohabitation is contrary to decisions of the Eleventh, Ninth, Tenth, and Second Appellate Districts. Four days after the Eighth District decided *McGlothan*, the Eleventh District reached the opposite conclusion in *State v. Rubes*, 11th Dist. No. 2012-P-0009, 2012-Ohio-4100.

Rubes and his girlfriend Kim lived together at Kim's father's (Donald O'Neal) home. Mr. O'Neal testified that Rubes had lived there for about a year, neither Kim nor Rubes paid him rent, and Rubes did not pay for groceries or utilities. Mr. O'Neal allowed Rubes to live there because Rubes did not have a job and he was his daughter's boyfriend. While Rubes did some odd jobs around the home, he and Kim did not share in any expenses for living at O'Neal's home. Rubes and Kim slept in the same bedroom, Rubes slept there every night, had personal items at O'Neal's home, and received mail there. One day, O'Neal interceded in a physical altercation between Rubes and Kim. When O'Neal told Rubes to leave, Rubes punched O'Neal in the face. *Rubes* at ¶¶ 4-5.

Rubes was convicted of domestic violence against O'Neal. On appeal, Rubes argued that Kim was not living as his spouse, specifically, he did not cohabitate with her

because they did not share financial and familial responsibilities. The Eleventh District defined the issue before them as "whether a defendant is cohabiting with a victim for the purposes of Domestic Violence conviction when he lives with her, she is his girlfriend, he gets mail at her home, sleeps in the same bed with her, and spends every night with her." *Rubes* at ¶ 1.

Applying *Williams*, the Eleventh Appellate District found sufficient facts to support cohabitation even though Rubes and Kim did not share living expenses. *Rubes* at ¶29. The Eleventh District noted that Kim and Rubes were not paying rent or bills, but Kim provided Rubes with a place to live by allowing him to stay with her in her father's home. *Rubes*, at ¶ 30. "This creates at least some familial and financial relationship, especially when coupled with Kim purchasing food and Rubes doing odd jobs around the house. Since the two were in unique circumstances and were not required to pay living expenses, we cannot determine that their failure to jointly pay such expenses means that they were not cohabiting." *Rubes*, at ¶ 30.

Like *Rubes*, there was no testimony that McGlothan shared living expenses with the victim. But, unlike the Eleventh District, the Eighth District emphasized the failure to share living expenses and elevated it to a requirement to establish cohabitation.

McGlothan is also in conflict with *State v. Slevin*, 9th Dist. No. 25956, 2012-Ohio-2043. Slevin lived with the victim for several months. One day the victim found Slevin engaged in a sexual act with a man. The victim "went ballistic" and Slevin attacked her, choking and punching her and threatening her with a knife. *Slevin,* at ¶2. Slevin was convicted of, among other offenses, domestic violence. On appeal, Slevin argued that his convictions were not supported by sufficient evidence.

The Ninth Appellate District affirmed Slevin's convictions, including domestic violence. The victim testified that she and Slevin lived together, Slevin's mother paid all their expenses, and the victim performed household duties including cleaning and cooking. Also, the victim testified she and Slevin engaged in sexual relations and that she had told Slevin that she was pregnant with his child. *Slevin*, at ¶18. The *Slevin* court affirmed the domestic violence conviction despite the lack of evidence of shared living expenses.

McGlothan is also in conflict with *State v. Walburg*, 10th Dist. No. 10AP-1087, 2011-Ohio-4762, in which Walburg severely beat the victim, dragged her through broken glass, and electrically shocked her over the course of five hours. The victim testified that she and Walburg were in a relationship and started living together shortly after they began dating. *Walburg*, at ¶¶ 3, 19. The victim testified that she shared a residence with Walburg, kept clothes there, and stayed overnight. *Walburg*, at ¶19. Walburg was convicted of domestic violence. On appeal, he argued that his conviction was not supported by sufficient evidence.

The Tenth Appellate District disagreed, finding, "[i]f believed, the victim's testimony is sufficient to establish she and the defendant were cohabitating at the time of the offense, such that she was a family or household member for purposes of R.C. 2919.25(F). See *State v. West*, 10th Dist. No. 06AP-114, 2006-Ohio-5095, ¶ 14, discretionary appeal not allowed, 112 Ohio St.3d 1492, 2007-Ohio-924 (concluding sufficient evidence supported trier of fact's finding that the victim was a family or household member for purposes of domestic violence statute where the victim testified the two were boyfriend and girlfriend and she lived at his house with him)." *Walburg*, at ¶19.

Unlike *McGlothan*, the Tenth District did not require that the victim and Walburg share living expenses to establish cohabitation.

McGlothan is also in conflict with *State v. Williams*, 2nd Dist. No. 99 CA 72, 2000 WL 1475585 (Oct. 6, 2000). Williams and the victim were involved in an intimate relationship and moved in with Williams' mother, brother, and uncle. Williams assaulted the victim on multiple occasions and ultimately was convicted of domestic violence. On appeal, Williams claimed his conviction was not supported by sufficient evidence. Williams argued that the State failed to prove that the victim was a person living as his spouse because the State did not prove he had been cohabiting with the victim, as they did not financially support each other.

The Second Appellate District affirmed Williams' conviction, noting that "[i]n determining issues such as whether two persons had cohabitated for purposes of R.C. 2919.25(E)(2), 'courts should be guided by common sense and ordinary human experience.'" *Williams* at *4 citing *State v. Young*, 2nd Dist. No. 16985, 1998 WL 801498 (Nov. 20, 1998). The Second District found that neither the victim nor Williams were employed, had a house or apartment, or owned a car; they borrowed cars and moved from place to place according to their whims and who would take them in. *Williams,* at *4. Despite the couple's lack of financial responsibilities and, therefore, evidence of shared financial responsibilities such as paying rent or mortgage on each other's behalf, the Second District found sufficient evidence of cohabitation.

The Second District did not require a traditional sharing of living expenses, but instead applied common sense and ordinary human experience to conclude that a trier of fact could have reasonably concluded that the couple cohabited. The appellate court noted

that Williams had previously asked the victim to live with him, the victim borrowed a car to transport both of them, and the victim borrowed money to buy food for both of them. "Guided by common sense and ordinary human experience, the average person could have concluded from this evidence that Williams and Shortridge had shared their familial and financial responsibilities, insofar as they had any, and that Shortridge was a person living as Williams' spouse for purposes of a domestic violence conviction." *Williams*, at *4.

As this Court stated in *Williams*, the factors establishing shared familial or financial responsibilities are "unique to each case and how much weight, if any, to give to each of these factors must be decided on a case-by- case basis by the trier of fact." *Williams*, at 465. Whether a couple shares living expenses should be merely one factor in a cohabitation analysis. Individuals may not share living expenses because one party may assume all of the responsibility or because there are no financial responsibilities to share.

In enacting R.C. 2919.25, the General Assembly accorded heightened protection to victims of domestic violence. As this Court noted in *Williams*, "the wide-ranging definitions of "cohabitant" and "family or household member" . . . reflect this view that domestic violence arises out of the nature of the relationship itself, rather than the exact living circumstances of the victim and perpetrator." *Williams*, at 464. The unwillingness, inability, or lack of necessity to financially share expenses with a partner should not preclude this heightened protection to domestic violence victims. However, this is the situation in Cuyahoga County. The State respectfully requests that this be remedied by reversal of *McGlothan* and clarification of *Williams* that an essential element of cohabitation - the sharing of familial or financial responsibilities – may be satisfied without evidence of shared financial responsibility.

CONCLUSION

The State respectfully requests that this Honorable Court reverse the Eighth District's decision in *McGlothan* and hold that the State is not required to prove that a victim and a defendant share living expenses in order to demonstrate shared familial or financial responsibilities to prove cohabitation within the meaning of family or household member in domestic violence prosecutions.

Respectfully submitted,

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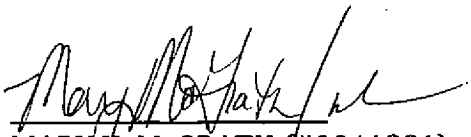
CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant State of Ohio was sent by regular U.S. mail this 18TH day of April, 2013, to Erika Cunliffe, Assistant Public Defender, Cuyahoga County Public Defender's Office, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113.



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ORIGINAL

CASE NO. 12-1782

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO
CA 97212

STATE OF OHIO
Plaintiff/Appellant

vs.

JEFFREY McGLOTHAN
Defendant/Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

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Now comes the State of Ohio and hereby give Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District entered September 6, 2012.

Said cause did not originate in the Court of Appeals, is a felony, involves a substantial constitutional question, and is of great general and public interest.

Respectfully submitted,

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A copy of the foregoing Notice of Appeal has been mailed this 19th day of September, 2012, to

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[Cite as *State v. McGlothan*, 2012-Ohio-4049.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97212

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEFFREY MCGLOTHAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-546566

BEFORE: Kilbane, J., Boyle, P.J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: September 6, 2012

[Cite as *State v. McGlothan*, 2012-Ohio-4049.]

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[Cite as *State v. McGlothan*, 2012-Ohio-4049.]
MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Jeffrey McGlothan, appeals from his convictions for attempted felonious assault and domestic violence. For the reasons set forth below, we affirm the conviction for attempted felonious assault, but we reverse the conviction for domestic violence.

{¶2} On February 1, 2011, defendant was indicted for felonious assault, in violation of R.C. 2903.11(A)(1), with a notice of prior conviction and a repeat violent offender specification, and for domestic violence, in violation of R.C. 2919.25(A). Defendant pled not guilty to the charges, and the matter proceeded to a bench trial on June 30, 2011.

{¶3} Cynthia Robinson ("Robinson"), the victim, testified that defendant was her boyfriend, and that they lived together for "about a year" in her apartment in Euclid. Robinson explained that she has a special medical condition that requires her to permanently use a tracheostomy ("trach") tube to help her breathe. The trach tube was surgically placed in her throat 12 years ago and has been there throughout her relationship with McGlothan. Robinson testified that if the trach tube becomes dislodged — something that has only occurred one other time — she must immediately seek hospital care or the opening on her throat could close and she could "die."

{¶4} Robinson testified as to the events of January 20, 2011, that gave rise to the charges. According to Robinson, defendant returned to the apartment in the evening, and she

immediately started questioning him as to his whereabouts earlier in the day, accusing him of going to the west side, which defendant denied. The two started arguing and then the following transpired:

> [Defendant] went into the bedroom and then he came out and he pushed me, pushed me, and he grabbed me like that. Then the trach came out. * * * He pushed me back, and he said, I'm tired of this shit, and took my shirt like this. He grabbed me by my shirt, and that's how the trach came out. Then when the trach came out, he helped me to call the ambulance. I called the ambulance. He was like surprised when it came out.

{¶5} Robinson was then escorted by ambulance to Euclid Hospital.

{¶6} Dr. Peter Raphael, the emergency room physician who attended to Robinson at Euclid Hospital, testified that Robinson was classified as "significant distress, mild to moderate category." He explained that Robinson's blood pressure was significantly elevated and her heart rate was above normal, which could have been "from the trach being replaced or the anxiety from the situation." Dr. Raphael testified that Robinson arrived at the hospital within enough time for him to replace the trach without requiring surgical intervention. Dr. Raphael further indicated that the trach would not "fall out"; it requires someone actually applying force to pull it out.

{¶7} The state then offered Robinson's medical records arising from her emergency room visit to Euclid Hospital. On the physician order sheet, there is a notation of the following: "trach pulled out." On the nursing assessment sheet, under the section titled "Alleged Assault," there is an area to note the patient's "chief complaint." In that section,

the following is noted: "injury to neck. Pt. states her boyfriend purposely pulled her trach out. Euclid PD on scene."

{¶8} The trial court ultimately found defendant not guilty of felonious assault, as well as the specifications attached, but guilty of the lesser included offense of attempted felonious assault. The trial court further found defendant guilty of the misdemeanor domestic violence count. Defendant was sentenced to a total of two years in prison and three years of postrelease control.

{¶9} Defendant now appeals, assigning five errors for our review.

{¶10} Defendant's first assignment of error states:

> The trial court erred when it denied appellant's motion for acquittal under Crim.R. 29 because the state failed to present sufficient evidence to establish beyond a reasonable doubt the elements necessary to support the convictions.

{¶11} In his first assignment of error, defendant argues that the state failed to present insufficient evidence to support his convictions for attempted felonious assault and domestic violence.

{¶12} When an appellate court reviews a record upon a sufficiency challenge, "'the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235,

818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

Attempted Felonious Assault

{¶13} In order to establish the offense of attempted felonious assault, the state was required to prove that the defendant attempted to cause serious physical harm to the victim. *See* R.C. 2903.11(A)(1) (felonious assault statute) and R.C. 2923.02(A) (attempt statute).

{¶14} Herein, defendant argues that his conviction "is contrary to law because the court found that [he] caused or attempted to cause physical harm" — but not *serious* physical harm as required under the statute. We find this argument to be unpersuasive.

{¶15} In this matter, a majority of this court[1] concludes that the record contains sufficient evidence to support an attempted felonious assault conviction. The state presented evidence that the victim had a trach that she needed to help her breathe. It further established that defendant forcibly pushed the victim onto the couch in the course of an altercation, resulting in the trach being dislodged. The record also revealed that the victim reported at the hospital that someone "purposely pulled" the trach from her neck. And although the victim ultimately received immediate medical care that prevented her from suffering serious physical harm, the testimony at trial revealed that, absent timely medical treatment, the

[1] Judge Mary J. Boyle concurs in this portion of the analysis of the assignment of error.

removal of the trach was life-threatening. Construing this evidence in a light most favorable to the state, we find that sufficient evidence exists to find that defendant attempted to cause serious physical harm to the victim.

{¶16} To the extent that defendant argues that his conviction cannot stand because the trial court's finding referenced that he attempted to inflict physical harm only — not serious physical harm, we find this argument misplaced. First, our review of the record reveals that the trial court's statements taken in their entirety evidence that the trial judge omitted a reference to "serious," but indeed found that the state established that defendant attempted to inflict "serious" physical harm. Second, the trial judge's spoken rationale in support of the trial judge's verdict is irrelevant for purposes of our sufficiency review. Accordingly, this portion of the first assignment of error is without merit.

Domestic Violence

{¶17} Next, defendant argues that the state presented insufficient evidence to support the domestic violence count under R.C. 2919.25(A), which provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." Defendant argues that the state failed to present sufficient evidence that he was a family or household member. He contends that the state never established that he had a key to the apartment; Robinson's testimony revealed that she had to "open up the door for him."

{¶18} In order to establish the offense of domestic violence pursuant to R.C. 2919.25(A), the state was required to prove that defendant knowingly caused or attempted to cause physical harm to "a family or household member."

{¶19} "Family or household member" is defined in R.C. 2919.25(F)(1)(a)(i) as "[a] spouse, a person living as a spouse, or a former spouse of the offender." Pursuant to R.C. 2919.25(F)(2), the phrase "'[p]erson living as a spouse' is defined as 'a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question."

{¶20} As noted in *State v. Williams*, 79 Ohio St.3d 459, 1997-Ohio-79, 683 N.E.2d 1126, at paragraph one of the syllabus, "[t]he offense of domestic violence * * * arises out of the relationship of the parties rather than their exact living circumstances." In *Williams*, the Ohio Supreme Court determined that the essential elements of "cohabitation" with respect to R.C. 2919.25 are: "(1) sharing of familial or financial responsibilities and (2) consortium." *Id.* at paragraph two of the syllabus.

{¶21} In discussing these elements, the *Williams* court has provided the following guidance:

> Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other,

> friendship, and conjugal relations. These factors are unique to each case and how much weight, if any, to give to each of these factors must be decided on a case-by-case basis by the trier of fact.

Id. at 465.

{¶22} A majority of this court[2] holds that the testimony at trial failed to demonstrate that Robinson was a family or household member within the meaning of R.C. 2919.25. As the Ohio Supreme Court recognized in *State v. Carswell,* 114 Ohio St.3d 210, 216, 2007-Ohio-3723, 871 N.E.2d 547, "* * * it is a person's determination to share some measure of life's responsibilities with another that creates cohabitation." Although Robinson testified that defendant was her boyfriend and he had slept over at her apartment for roughly a year, there was no testimony that the couple shared any living expenses, such as rent and utilities, which would demonstrate shared familial or financial responsibilities. *Accord State v. Church*, 8th Dist. No. 85582, 2005-Ohio-5198 (holding evidence to be insufficient to show that the victim was family or household member as required for conviction of domestic violence where defendant and victim, boyfriend and girlfriend, did not share any living expenses.) Accordingly, this portion of the first assignment of error is well-taken.

{¶23} In accordance with the foregoing, a majority of this court has determined that the state presented sufficient evidence to support the conviction for attempted felonious

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[2]Judge Eileen A. Gallagher concurs in this portion of the analysis of the assignment of error.

assault, and a separate majority of this court has further determined that the state did not present sufficient evidence to support the conviction for domestic violence.

{¶24} Defendant's second assignment of error states:

> The trial court erred in admitting inadmissible hearsay found in the medical records that were not shown to be business records and not made to further medical treatment.

{¶25} Defendant argues that the trial court erred in admitting inadmissible hearsay found in the medical records because the hearsay statements were not made to further medical treatment and were not shown to be part of a business record. Defendant, however, never objected to the admission of the medical records. Therefore, as to this issue, he has waived all but plain error on appeal. *See State v. Blevins*, 152 Ohio App.3d 39, 2003-Ohio-1264, 786 N.E.2d 515, ¶ 21 (12th Dist.).

{¶26} We do not find plain error in this case. First, contrary to defendant's assertion, we find that statements regarding Robinson's injury, i.e., that her trach was "purposely pulled out," were relevant for the sake of medical treatment. Second, while the identification of the perpetrator is unnecessary for medical treatment, we find that the failure to redact any reference to "boyfriend" was harmless error in this case. This case was tried to the bench, and therefore, we presume that a trial court considers nothing but relevant and competent evidence in reaching its verdict unless the record indicates otherwise. *Cleveland v. Welms*,

169 Ohio App.3d 600, 2006-Ohio-6441, 863 N.E.2d 1125, ¶ 27 (8th Dist.), citing *State v. Fautenberry*, 72 Ohio St.3d 435, 1995-Ohio-209, 650 N.E.2d 878. Further, based on the relevant and competent evidence that was admissible, i.e., Robinson's testimony, the trier of fact reasonably could have concluded that defendant was the perpetrator that "purposely pulled out" the trach tube. Indeed, the record revealed that Robinson called 911 immediately following her altercation with defendant and was taken to the hospital because her trach was dislodged.

{¶27} The second assignment of error is overruled.

{¶28} Defendant's third assignment of error states:

> The state of Ohio committed prosecutorial misconduct by making statements to the court about evidence not elicited during trial thereby depriving defendant of a fair trial.

{¶29} In his third assignment of error, defendant argues that he was denied a fair trial because of the prosecutor's misconduct. He contends that the prosecutor repeatedly made improper and prejudicial comments during opening and closing arguments and in response to his Crim.R. 29 motion; specifically, McGlothan argues that the prosecutor mischaracterized the evidence in a manner not supported by the record.

{¶30} The Ohio Supreme Court has held that "[t]he test for prosecutorial misconduct is whether remarks are improper and, if so, whether

they prejudicially affected substantial rights of the accused." *State v. Lott*, 51 Ohio St.3d 160, 165, 55 N.E.2d 293 (1990).

{¶31} The state concedes that the prosecutor did make some imprecise statements but that those statements were harmless. It contends that the prosecutor merely advanced reasonable inferences based on the admissible evidence.

{¶32} Initially, we note that defendant failed to object to any of these statements by the prosecutor. The failure to object to prosecutorial misconduct waives all but plain error. *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 77, 84. The alleged prosecutorial misconduct will constitute plain error only if it is clear that defendant would not have been convicted in the absence of the improper comments.

{¶33} Even if this court were to conclude that the statements were improper, they would not amount to plain error. Again, this was a bench trial, and therefore, it is presumed that the trial court relied on only relevant, material, and competent evidence in arriving at its judgment absent a showing to the contrary. *See State v. Sieng*, 2d Dist No. 2003-CA-35, 2003-Ohio-7246. We find no basis to conclude that the trial court was influenced by these comments and, therefore, we overrule this assignment of error. *State v. Hawthorne*, 7th Dist. No. 04 CO 56, 2005-Ohio-6779, ¶ 42.

{¶34} The third assignment of error is overruled.

{¶35} Defendant's fourth assignment of error states:

Appellant's convictions are against the manifest weight of the evidence.

{¶36} In his fourth assignment of error, McGlothan argues that his convictions are against the manifest weight of the evidence.

{¶37} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as a "thirteenth juror," and, after

> reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

State v. Thompkins, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶38} Where a judgment is supported by competent, credible evidence going to all essential elements to be proven, the judgment will not be reversed as being against the manifest weight of the evidence. *State v. Annable*, 8th Dist. No. 94775, 2011-Ohio-2029, at ¶ 60, citing *State v. Mattison*, 23 Ohio App.3d 10, 14, 490 N.E.2d 926 (8th Dist.1985). Moreover, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Martin*. In addition, this court must remain mindful that the weight to be given the evidence and the credibility of the witnesses are matters left primarily to the jury. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967).

{¶39} Defendant argues that his conviction for attempted felonious assault should not stand because Robinson specifically testified that he did not grab the trach and pull it out. To the extent that the medical records reflect otherwise, defendant argues that "Robinson made a conflicting report to the nurse when she was angry." The trier of fact noted, however, that Robinson had a change of heart at trial. Based on the circumstances, we find that the trial court reasonably found Robinson's earlier statement more credible than her trial testimony.

{¶40} Defendant also maintains that attempt to inflict serious physical harm is against the manifest weight of the evidence. There was competent, credible evidence, however, that the trach became dislodged after defendant forcibly pushed the victim onto the couch, and she reported at the hospital that someone "purposely pulled" the trach from her neck. Absent timely medical treatment, the removal of the trach was life-threatening. We therefore reject this challenge to the manifest weight of the evidence.

{¶41} The fourth assignment of error is overruled.

{¶42} Defendant's fifth assignment of error states:

> The trial court erred by sentencing appellant for convictions that are allied offenses of similar import.

{¶43} In his final assignment of error, defendant argues that the trial court erred by sentencing him on both offenses when they are allied offenses of similar import. Specifically, he contends that the domestic violence and attempted felonious assault counts stem from the same conduct, arising out of a single act and single animus. Although the state has conceded that the offenses are allied herein, our reversal of the domestic violence conviction renders this assignment of error moot. App.R. 12(A)(1)(c).

{¶44} Judgment affirmed in part, reversed in part, and remanded for resentencing.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

MARY J. BOYLE, P.J., CONCURS IN PART AND DISSENTS IN PART AS TO ASSIGNMENT OF ERROR ONE ON THE ISSUE OF DOMESTIC VIOLENCE (SEE SEPARATE DISSENTING OPINION).

EILEEN A. GALLAGHER, J., CONCURS IN PART AND DISSENTS IN PART AS TO ASSIGNMENT OF ERROR ONE ON THE ISSUE OF ATTEMPTED FELONIOUS ASSAULT.

MARY J. BOYLE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶45} I respectfully dissent from the majority's resolution of the first assignment of error as it relates to McGlothan's challenge of his conviction for domestic violence on sufficiency grounds. Unlike the majority, I find that the state met its burden and presented sufficient evidence that McGlothan was a "family or household member" to satisfy the elements of R.C. 2919.25(A). As recognized by other districts, the burden of production for establishing cohabitation is not substantial. *State v. Long*, 9th Dist. No. 25249, 2011-Ohio-1050, ¶ 6, citing *Dyke v. Price*, 2d Dist. No. 18060, 2000 Ohio App. LEXIS 4856 at *3 (Oct. 20, 2000). Reviewing courts "should be guided by common sense and ordinary human experience." *State v. Young*, 2d Dist. No. 16985, 1998 Ohio App. LEXIS 5446 at *3 (Nov. 20, 1998).

{¶46} As noted by the majority, the state presented evidence that McGlothan was the victim's boyfriend and that he had lived with the victim in her apartment for approximately a year. Specifically, the victim testified that McGlothan, her boyfriend, had slept over every night. Reviewing this evidence in a light most favorable to the state, I find that any rational trier of fact could have found that the state proved that McGlothan was a "household member" beyond a reasonable doubt. *State v. Gomez*, 9th Dist. Nos. 25496 and 25501,

2011-Ohio-5475 (evidence of an intimate relationship, i.e., boyfriend–girlfriend, coupled with evidence that defendant and victim live together is sufficient to satisfy the "household member" element).

{¶47} Unlike the majority, however, I do not believe that it was necessary for the state to prove that the couple shared any living expenses when it was established that McGlothan lived there. For this same reason, I find the majority's reliance on *State v. Church*, 8th Dist. No. 85582, 2005-Ohio-5198, misplaced. In *Church*, the only evidence connecting the victim with the defendant for purposes of the domestic violence charge was that they were boyfriend and girlfriend; there was no evidence that the defendant lived with the victim at her home. In fact, the defendant was married to another woman. *Id.* at ¶ 36. Under those circumstances, evidence that the defendant helped with the victim's living expenses would be necessary and relevant to support a domestic violence charge. I find this case to be distinguishable.

{¶48} Accordingly, I would overrule the first assignment of error in its entirety.

{¶49} I otherwise concur in all other aspects of the majority's decision.

2919.25 Domestic violence.

(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

(B) No person shall recklessly cause serious physical harm to a family or household member.

(C) No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member.

(D)

(1) Whoever violates this section is guilty of domestic violence, and the court shall sentence the offender as provided in divisions (D)(2) to (6) of this section.

(2) Except as otherwise provided in divisions (D)(3) to (5) of this section, a violation of division (C) of this section is a misdemeanor of the fourth degree, and a violation of division (A) or (B) of this section is a misdemeanor of the first degree.

(3) Except as otherwise provided in division (D)(4) of this section, if the offender previously has pleaded guilty to or been convicted of domestic violence, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially similar to domestic violence, a violation of section 2903.14, 2909.06, 2909.07, 2911.12, 2911.211, or 2919.22 of the Revised Code if the victim of the violation was a family or household member at the time of the violation, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially similar to any of those sections if the victim of the violation was a family or household member at the time of the commission of the violation, or any offense of violence if the victim of the offense was a family or household member at the time of the commission of the offense, a violation of division (A) or (B) of this section is a felony of the fourth degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the second degree.

(4) If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or two or more violations or offenses of the type described in division (D)(3) of this section involving a person who was a family or household member at the time of the violations or offenses, a violation of division (A) or (B) of this section is a felony of the third degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the first degree.

(5) Except as otherwise provided in division (D)(3) or (4) of this section, if the offender knew that the victim of the violation was pregnant at the time of the violation, a violation of division (A) or (B) of this section is a felony of the fifth degree, and the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the third degree.

(6) If division (D)(3), (4), or (5) of this section requires the court that sentences an offender for a violation of division (A) or (B) of this section to impose a mandatory prison term on the offender pursuant to this division, the court shall impose the mandatory prison term as follows:

(a) If the violation of division (A) or (B) of this section is a felony of the fourth or fifth degree, except as otherwise provided in division (D)(6)(b) or (c) of this section, the court shall impose a mandatory prison term on the offender of at least six months.

(b) If the violation of division (A) or (B) of this section is a felony of the fifth degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, the court shall impose a mandatory prison term on the offender of twelve months.

(c) If the violation of division (A) or (B) of this section is a felony of the fourth degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, the court shall impose a mandatory prison term on the offender of at least twelve months.

(d) If the violation of division (A) or (B) of this section is a felony of the third degree, except as otherwise provided in division (D)(6)(e) of this section and notwithstanding the range of prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of six months or one of the prison terms prescribed in section 2929.14 of the Revised Code for felonies of the third degree.

(e) If the violation of division (A) or (B) of this section is a felony of the third degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, notwithstanding the range of prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of one year or one of the prison terms prescribed in section 2929.14 of the Revised Code for felonies of the third degree.

(E) Notwithstanding any provision of law to the contrary, no court or unit of state or local government shall charge any fee, cost, deposit, or money in connection with the filing of charges against a person alleging that the person violated this section or a municipal ordinance substantially similar to this section or in connection with the prosecution of any charges so filed.

(F) As used in this section and sections 2919.251 and 2919.26 of the Revised Code:

(1) "Family or household member" means any of the following:

(a) Any of the following who is residing or has resided with the offender:

(i) A spouse, a person living as a spouse, or a former spouse of the offender;

(ii) A parent, a foster parent, or a child of the offender, or another person related by consanguinity or affinity to the offender;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.

(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.

(2) "Person living as a spouse" means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.

(3) "Pregnant woman's unborn" has the same meaning as "such other person's unborn," as set forth in section 2903.09 of the Revised Code, as it relates to the pregnant woman. Division (C) of that section applies regarding the use of the term in this section, except that the second and third sentences of division (C)(1) of that section shall be construed for purposes of this section as if they included a reference to this section in the listing of Revised Code sections they contain.

(4) "Termination of the pregnant woman's pregnancy" has the same meaning as "unlawful termination of another's pregnancy," as set forth in section 2903.09 of the Revised Code, as it relates to the pregnant woman. Division (C) of that section applies regarding the use of the term in this section, except that the second and third sentences of division (C)(1) of that section shall be construed for purposes of this section as if they included a reference to this section in the listing of Revised Code sections they contain.

Amended by 128th General AssemblyFile No.50,SB 58, §1, eff. 9/17/2010.

Amended by 128th General AssemblyFile No.21,HB 10, §1, eff. 6/17/2010.

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Related Legislative Provision: *See 128th General AssemblyFile No.21,HB 10, §3*