

ORIGINAL

NO. 12-1782

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 97212

STATE OF OHIO

Plaintiff-Appellant

-vs-

JEFFREY MCGLOTHAN

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR AN ISSUE OF GREAT PUBLIC
INTEREST**

This case presents an important issue of great public or general interest. The Eighth District Court of Appeals now requires the State to prove that domestic violence victims share living expenses with a defendant in order to sustain a conviction for domestic violence. *State v. McGlothan*, 8th Dist. No. 97212, 2012-Ohio-4049, ¶22. This holding is problematic because it prohibits the successful prosecution of defendants who victimize people that they cohabitate with. A victim should not be additionally punished because a defendant fails to financially assist the victim.

This Court should revisit its holding in *State v. Williams*, 79 Ohio St.3d 459, 683 N.E.2d 1126 (1997). In *McGlothan*, the Eighth District primarily relied on this Court's opinion in *Williams*, in which this Court held that the essential elements of "cohabitation" are (1) sharing of familial or financial responsibilities and (2) consortium. This Court listed "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." *Williams* at 465. This Court also noted that the 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.* While *Williams* considers situations in which each partner shares responsibilities, it doesn't consider situations where either (1) one unmarried person relies on the financial support of another or (2) where neither party has financial responsibilities. This distinction is important, and one

that lower appellate courts are struggling with throughout Ohio. Victims in those circumstances deserve equal protection against abusive partners.

The *McGlothan* court vacated a domestic violence conviction because the Eighth District determined that there was no evidence that the victim and the defendant shared financial responsibilities. However, there was testimony that McGlothan was the victim's live-in boyfriend, that he lived with her for about a year, and that he slept over her apartment every night. And while the victim and McGlothan were both unemployed, the victim testified that they both received disability payments. *McGlothan* is in conflict with opinions from other districts throughout the State. In *State v. Rubes*, 11th Dist. No. 2012-P-0009, 2012-Ohio-4100, ¶1, the Eleventh District Court of Appeals was asked to decide "whether a defendant is cohabitating 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." The Eleventh District, applying *Williams*, answered that question in the affirmative and affirmed the conviction. In doing so, the Court noted two other districts that have upheld domestic violence convictions on similar occasions. *Rubes* at ¶29 citing *State v. Slevin*, 9th Dist. No. 25956, 2012-Ohio-2043; *State v. Walburg*, 10th Dist. No. 10AP-1087, 2011-Ohio-4762; see also *State v. Williams*, 2nd Dist. No. 99 CA 72, 2000 WL 1475585 (Oct. 6, 2000).

As this Court noted in *Williams*, domestic violence is a nationwide problem which has profound effects on its victims and society as a whole. Changing social norms require a re-examination of the *Williams* cohabitation factors. Victims who are already entirely financial dependent on their live-in partners should not be further punished because they do not, or cannot, share financial responsibilities. Those victims should be

equally protected against domestic violence. *McGlothan* discourages prosecutions for domestic violence by improperly limiting “cohabitation.”

After *McGlothan*, the State will be unable to prosecute domestic violence cases where physical harm occurs between a live-in boyfriend and girlfriend where the couple does not share living expenses. The General Assembly “enacted the domestic violence statutes specifically to criminalize those activities commonly known as domestic violence ***.” *Felton v. Felton*, 79 Ohio St.3d 34, 37, 679 N.E.2d 672, 674 (1997). There is a strong need to protect the victims of violence where the violence arises out of the *relationship* between the perpetrator and the victim. See *State v. Williams*, 79 Ohio St.3d 459, 462 683 N.E.2d 1126. (Emphasis in original). Therefore, the State respectfully requests this Court examine this important issue of great public interest in order to provide protection to those victims who suffer physical harm because of their relationship with the offender.

As such, the State of Ohio respectfully petitions this Honorable Court to accept jurisdiction over the Eighth District Court of Appeals opinion in *State v. McGlothan*, 8th Dist. No. 97212, 2012-Ohio-4049, and adopt the following propositions of law:

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.

STATEMENT OF THE CASE AND FACTS

On January 20, 2011, an argument occurred between Jeffrey McGlothan and the victim, Cynthia Robinson (“Robinson”). Robinson met McGlothan about a year before the altercation. Robinson and McGlothan developed a relationship, and McGlothan was

Robinson's boyfriend at the time of the altercation. McGlothan had been living with Robinson at her apartment for a year. McGlothan slept at Robinson's apartment every night. Both McGlothan and Robinson were not working and on disability payments while they were living together.

Robinson has a medical condition called sleep apnea. This condition requires her to use a trachea tube (hereinafter and referred to at trial as "trach") to help her breathe. Without the trach, Robinson does not get enough oxygen to her brain and cannot breathe. In order to have the trach placed in Robinson's neck, she had to undergo surgery. The trach is permanent and has been in Robinson's neck for approximately twelve years. If the trach comes out of Robinson's neck, she has to get to the hospital quickly. If Robinson does not go to the hospital to have the trach placed back in her throat, she will die. Robinson must seek medical attention to have the trach placed in her throat. Robinson cannot place the trach in her throat on her own. Robinson has had the trach in her throat the entire time she has known McGlothan, and he was aware that Robinson needed the trach in her neck to breathe.

On January 20, 2011, McGlothan came home to the apartment, and an argument began. Robinson was angry because she did not know where McGlothan was, and when she asked him, he told her to shut up. McGlothan and Robinson were arguing in the living room, and McGlothan went into the bedroom, stating "I'm tired of this shit...I'm tired of hearing this shit." After McGlothan came out of the bedroom, he pushed Robinson, and stated again, "I'm tired of this shit." Robinson testified in court that McGlothan grabbed her by the shirt, and that's how the trach came out. After the trach came out of Robinson's throat, she called 911. On the 911 call, the operator specifically asks Robinson how the trach came out, and Robinson stated, "I will tell you when you

get here.” McGlothan was present when Robinson made the 911 call, and Robinson was afraid to tell the operator what happened.

Robinson went to the hospital to have the trach placed back in her throat. Robinson told the nurse at the hospital that her boyfriend purposefully pulled the trach out of her throat. This was only the second time in twelve years that the trach came out of Robinson’s neck. Dr. Raphael testified that Robinson’s condition when she arrived at the hospital was “significant distress, mild to moderate category, which required my evaluation.” Robinson’s blood pressure was significantly elevated, she had some significant respirations, and her heart rate was above normal. Robinson had an unstable vital sign, and needed the Doctor’s intervention in order to replace the trach within a moderate amount of time so the patient would not be in further distress.

In order to place the trach in Robinson’s neck, the doctor must cut through cartilage. The tube must be surgically secured. The trach is secured by placing the device in the neck with an elastic band. As the tissue grows around the actual trachea, tissue attaches to the device, making it more ridged and difficult to pull out. According to Dr. Raphael, “it takes a lot of force to rip the skin off the device to pull it out of the hole or stoma.” Dr. Raphael testified that if the trach is in its proper place, it will not fall out. If the trach is pulled out, the patient can redevelop new tissue.”

When the Doctor was putting the trach back in Robinson’s throat, they first did it incorrectly. Robinson stated that when the Doctor was putting the trach back in, she was experiencing pain. Dr. Raphael testified that if Robinson had not come in to the hospital, the cells in her throat would start to fuse and form and not allow the tube to appropriately feed to the stoma. A surgeon would have to come in and conduct a procedure where the Doctors cuts open the cartilage. (Dr. Raphael stated that Robinson

had some overgrowth of tissue on the bottom portion, and this made it difficult to pass the tube in her neck.

On February 1, 2011, a Cuyahoga County Grand Jury indicted Jeffrey McGlothan with the following: count one: Felonious Assault (F-2) pursuant to O.R.C. 2903.11(A)(1) which contained both a Notice of Prior Conviction and Repeat Violent Offender Specification; and count two: Domestic Violence (M-1) pursuant to O.R.C. 2919.25(A).

On June 30, 2011, McGlothan waived his right to a trial by a jury, and a bench trial was held. The Court found McGlothan guilty of attempted felonious assault and domestic violence. On August 22, 2011, the court imposed a two year sentence on the attempted felonious assault, and a six month sentence on the domestic violence. The Court ordered that the sentences be served concurrently.

McGlothan appealed and the Eighth District, in a fractured opinion, affirmed the 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 share 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).

The State now asks this Honorable Court to accept jurisdiction in this case and to adopt the State’s proposition of law.

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.

I. Summary of Argument

McGlothan highlights a conflict among reviewing courts about this Court's requirement that cohabitation include evidence of a sharing of familial or financial responsibilities. The Eighth District has held that a domestic violence prosecution must fail if there is no evidence that the couple shared living expenses. In doing so, the Eighth District has elevated one of this Court's non-exhaustive *Williams*' factors to an essential element of "cohabitation." This requirement conflicts with *Williams* and decisions from other appellate courts throughout Ohio. Additionally, *McGlothan* highlights an important issue that this Court did not consider in *Williams*, which is that in some relationships one of the individuals may not share any financial responsibilities. This unwillingness or inability to financially share with a partner should not prohibit an otherwise successful domestic violence prosecution. A conviction for domestic violence should not be reversed on sufficiency grounds merely because a live-in boyfriend or girlfriend does not financially contribute. The fact finder is equipped to determine, in this case, whether *McGlothan* and the victim were cohabitating. In this case, the fact finder found that they were and the Eighth District reversed after improperly requiring that the parties share living expenses.

II. The Eighth District requires different levels of proof to prove cohabitation than that required in the Eleventh, Ninth, Tenth, and Second Districts.

A conflict currently exists over the amount and type of evidence required to prove cohabitation in a domestic violence prosecution. In *McGlothan*, a majority of the Eighth District held that the State is required to present evidence that the victim and the defendant shared living expenses in order to qualify as a “household member.” The majority reversed McGlothan’s domestic violence conviction on sufficiency grounds finding that “[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 share familial or financial responsibilities.” *State v. McGlothan*, 8th Dist. No. 97212, 2012-Ohio-4049, ¶22.

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, that neither Kim nor Rubes paid him rent, and that Rubes did not pay for groceries or utilities. 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 heard Rubes threaten Kim. O’Neal ran upstairs and saw Rubes “pushing Kim” against a wall. O’Neal yelled at Rubes to leave the home and Rubes punched O’Neal in the face. *Rubes* at ¶4-5.

Rubes was convicted of domestic violence against O’Neal. On review, the Eleventh District defined the issue before them as the following: “whether a defendant is

cohabitating 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 District found the facts sufficient to support cohabitation despite the fact that Rubes and Kim did not share living expenses. *Rubes* at ¶29. Like *Rubes*, there was no testimony that McGlothan shared living expenses with the victim. However, McGlothan and the victim were boyfriend and girlfriend, McGlothan lived in the victim’s apartment for a year, slept there every night, and helped the victim hang calendars in the apartment. Given those facts, it was reasonable for the trier of fact to find that McGlothan cohabitated with the victim. But unlike the Eleventh District, the Eighth District emphasized the failure to share living expenses and elevated it to a requirement. *Rubes* and *McGlothan* highlight this Court’s need to revisit *Williams* in order to clarify the requirement that the parties share financial resources.

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 another man. The victim became emotional and Slevin then attacked the victim, choking and punching her and threatening her with a knife. *Id.* at ¶2. Slevin was convicted of, among other things, domestic violence. On appeal, Slevin argued that his convictions were not supported by sufficient evidence. The Ninth District Court of Appeals affirmed the convictions finding that Slevin lived with the victim, that Slevin’s mother paid for all expenses, that the victim cooked and cleaned around the house, and that the victim and Slevin were intimate and that Slevin was told that the victim was pregnant with his child. *Id.* at ¶18. The *Slevin* court affirmed the domestic violence conviction despite the lack of evidence of shared living

expenses. The conflict between *Slevin* and *McGlothan* further highlights the need for this Court's review.

McGlothan is also in conflict with *State v. Walburg*, 10th Dist. No. 10AP-1087, 2011-Ohio-4762. Walburg was in a relationship with the victim and the couple had been staying at Walburg's mother's home. Walburg accused the victim of taking some of his Viagra pills and an altercation later ensued. The victim testified that Walburg "hit, kicked, and fell on her, hit her with a glass vase, dragged her through broken glass, tied her hands behind her back, and electrically shocked her." *Walburg* at ¶6. Walburg was convicted of domestic violence. On appeal, he argued that his conviction was not supported by sufficient evidence. The Tenth District disagreed and affirmed the conviction, finding that the victim lived with Walburg, kept clothes there, and stayed there overnight. *Id.* at ¶19. The Tenth District did not require that the victim and Walburg share living expenses. Rather, the court found it sufficient that the two were a couple and were living together. See also *State v. West*, 10th Dist. No. 06AP-114, 2006-Ohio-5095, ¶14. The conflict between *West* and *McGlothan* further highlights the need for this Court's review.

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 lived with Williams' mother, brother, and uncle. Williams assaulted the victim on multiple occasions. Williams was ultimately conviction of domestic violence. On appeal, Williams claimed his conviction was not supported by sufficient evidence because the State failed to prove that the couple shared financial responsibilities. The Second District noted 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. The couple had no financial responsibilities. The court still found cohabitation because 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. 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 were cohabitating. The conflict between *Williams* and *McGlothan* further highlights the need for this Court’s review.

As described above, *McGlothan* is in conflict with decisions from the Eleventh, Tenth, and Second District Courts of Appeals. Citizens in Cuyahoga County deserve the same protections against domestic violence that exists in other counties. The standard of proof should be uniform across the State of Ohio, and this Court should accept jurisdiction to consider question of the type of proof necessary for the State to establish cohabitation.

III. This Court should reexamine Williams to include victims who do not share financial responsibilities with the defendant.

In *State v. Williams*, 79 Ohio St.3d 459, 683 N.E.2d 1126 (1997), this Court held that the essential elements of “cohabitation” are (1) sharing of familial or financial responsibilities and (2) consortium. This Court listed “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.” *Williams* at 465. This Court also noted that the 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.*

However, *Williams* did not consider relationships where one of the parties does not share living expenses. Individuals may not share living expenses because one party may assume all of the responsibility or because there are no financial responsibilities. While *Williams* made it clear that the “sharing financial responsibilities” factors are non-exhaustive, the sharing is still a requirement. This is one that, as noted above, appellate and trial courts frequently struggle with. The Eighth District improperly elevated the requirement that the parties share actual living expenses, which the court listed as rent and utilities. However, living expenses should be merely one factor in a cohabitation analysis. This Court should clarify *Williams* in order to resolve the conflict among the districts. *Williams* should also be expanded to specifically include cases where the parties do not share living expenses.

As the dissent in *McGlothan* noted, reviewing courts “should be guided by common sense and ordinary human experience.” *State v. McGlothan*, 8th Dist. No. 97212, 2012-Ohio-4049, ¶45 citing *Young, supra*. Common sense and human experience make it clear that a reasonable trier of fact could find cohabitation where a boyfriend and girlfriend live together for a year. This Court should review *McGlothan* to resolve the conflict and to ensure a consistent standard among trial and reviewing courts.

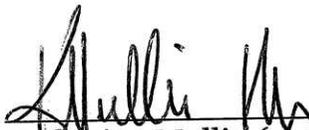
CONCLUSION

The State respectfully requests this Honorable Court grant jurisdiction over this matter of great public and general importance. This issue is worthy of Supreme Court

review. Resolution of this case will ensure protection against victims of domestic violence who may live in untraditional circumstances but are nonetheless victims because of their relationship with the offender.

Respectfully submitted,

TIMOTHY J. MCGINTY (0024626)
Cuyahoga County Prosecuting Attorney

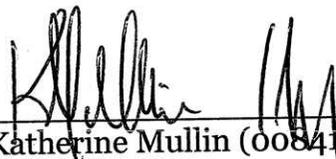


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[Cite as *State v. McGlothan*, 2012-Ohio-4049.]

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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{11} 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.

{12} 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.

{13} 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.”

{14} 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.

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

{16} 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.

{17} 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.”

{18} 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.

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

{110} 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.

{111} 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.

{112} 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 court¹ 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.

{122} A majority of this court² 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.

{123} 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

²Judge 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.

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

{137} 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).

{138} 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:

{¶145} 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).

{¶146} 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.