

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2012-1782

STATE OF OHIO	:	
Appellant	:	
-vs-	:	On Appeal from the
JEFFREY McGLOTHAN	:	Cuyahoga County Court
Appellee	:	of Appeals, Eighth
		Appellate District Court
		of Appeals
		CA: 97212

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**APPELLEE'S MERIT BRIEF**

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**TABLE OF CONTENTS**

	PAGES
TABLE OF AUTHORITIES .....	iii
SUMMARY OF APPELLEE’S ARGUMENT .....	3
STATEMENT OF THE CASE AND FACTS .....	5
LAW AND ARGUMENT .....	6
The State has asked this Court to pronounce as a Proposition of Law that –	
<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>	
<i>People v. Moore</i> , 44 Cal. App. 4th 1323, 52 Cal. Rptr. 2d 256 (1st Dist. 1996)-----	12
<i>Rickman v. Commonwealth</i> , 33 Va. App. 550, 535 S.E.2d 187 (2000) -----	13
<i>State v. Carswell</i> , 2007-Ohio-3723, 114 Ohio St. 3d 210, 216, 871 N.E.2d 547, 554 (2007) -----	8
<i>State v. Church</i> , Cuyahoga App. No. 85582, 2005 Ohio 5198 -----	10
<i>State v. Cobb</i> , 153 Ohio App. 3d 541, 544 (2003)-----	10
<i>State v. Kellogg</i> , 542 N.W.2d 514 (Iowa 1996)-----	13
<i>State v. Levin</i> , 2012 Ohio 2043-----	12
<i>State v. Rubes</i> , 2012 Ohio 4100 -----	12
<i>State v. Walburg</i> , 2011 Ohio 4762-----	12
<i>State v. Walker</i> , Mahoning App. No. 95 CA 180, 1999 Ohio App. LEXIS 711 -----	10
<i>State v. West</i> , 164 Vt. 192, 667 A.2d 540 (1995)-----	13
<i>State v. Williams</i> , 1997-Ohio-79, 79 Ohio St. 3d 459-----	8
R.C. 2919.25 -----	7, 9, 11
CRIM. R. 12-----	17
CONCLUSION.....	14
SERVICE.....	15

**TABLE OF AUTHORITIES**

CASES

<i>People v. Moore</i> , 44 Cal. App. 4th 1323, 52 Cal. Rptr. 2d 256 (1st Dist. 1996)-----	12
<i>Rickman v. Commonwealth</i> , 33 Va. App. 550, 535 S.E.2d 187 (2000) -----	13
<i>State v. Carswell</i> , 2007-Ohio-3723, 114 Ohio St. 3d 210, 216, 871 N.E.2d 547, 554 (2007) ----	8
<i>State v. Church</i> , Cuyahoga App. No. 85582, 2005 Ohio 5198 -----	10
<i>State v. Cobb</i> , 153 Ohio App. 3d 541, 544 (2003)-----	10
<i>State v. Kellogg</i> , 542 N.W.2d 514 (Iowa 1996)-----	13
<i>State v. Levin</i> , 2012 Ohio 2043-----	12
<i>State v. Rubes</i> , 2012 Ohio 4100 -----	12
<i>State v. Walburg</i> , 2011 Ohio 4762-----	12
<i>State v. Walker</i> , Mahoning App. No. 95 CA 180, 1999 Ohio App. LEXIS 711 -----	10
<i>State v. West</i> , 164 Vt. 192, 667 A.2d 540 (1995)-----	13
<i>State v. Williams</i> , 1997-Ohio-79, 79 Ohio St. 3d 459-----	8

STATUTES

R.C. 2919.25 -----	7, 9, 11
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RULES

Crim. R. 12 -----	17
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### SUMMARY OF APPELLEE'S ARGUMENT

In *State v. Williams*, 1997 Ohio 79, 79 Ohio St. 3d 459, 683 N.E.2d 1126, this Court held that (1) the offense of domestic violence arises out of the parties' relationship rather than their exact living circumstances; and (2) the essential elements of "cohabitation," for purposes of proving domestic violence, are sharing of familial or financial responsibilities and consortium. The State frames its appeal as an effort to rectify a gross deviation from that established precedent. The State is wrong. In fact, the Eighth District decision from which the State took this appeal applied *Williams* and found the evidence of cohabitation lacking. *State v. McGlothan*, 2012 Ohio 4049, ¶¶ 17-22.

The stated "proposition of law" before this Court is really a single observation the Eighth District made – when it reached the broader conclusion that the evidence was insufficient – but presented in isolation. A comprehensive review of the record and the Eighth District's opinion, however, highlights that the lapse in this case rests exclusively with the trial prosecutor who simply failed to elicit the information the State needed to prove its case for domestic violence. Under the circumstances, this appeal should be dismissed as improvidently allowed.

The appeal asks this Court to restate law on which the precedent is well-established. Specifically, the appeal seeks a decision holding "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' " as that term is understood in domestic violence prosecutions. (Appellant's Brief, p. 1) Given that the State is under no such obligation now, the requested holding will not clarify or alter domestic violence law in the slightest. In a highly fact-dependent decision, the court found that the prosecution had utterly failed to prove that the complainant was a "family or household member" as contemplated under R.C. 2919.25(A). The

problem in this case is not a distortion or misreading of the law as the State claims here. Rather it was the prosecutor's failure to adduce the necessary evidence.

Not only will the holding the State requests here not enhance the way domestic violence cases are prosecuted in this, or any other, Ohio county, the decision will have no impact whatsoever on Mr. McGlothan. He was convicted of attempted felonious assault for the same conduct, which makes the two charges allied. Under the circumstances, even if the Eighth District hadn't vacated the conviction, the domestic violence count would have merged into, and been subsumed by, the felonious assault conviction. Moreover, McGlothan has already served the prison sentence imposed. Consequently, he has neither a legal nor a practical stake in this appeal's outcome. Surely, this Court has better things to do with its resources than expending them by revisiting subject matter that remains unchallenged and uncontroversial. It should reject the State's invitation to so do now.

### STATEMENT OF THE CASE AND FACTS

In 2001, Appellee Jeffrey McGlothan was charged with felonious assault and domestic violence. The felonious assault count included notice of prior conviction and repeat violent offender specifications. McGlothan pleaded not guilty. McGlothan eventually waived his right to a jury trial. Following a bench trial, the court concluded that this evidence was sufficient to demonstrate that McGlothan either knowingly or recklessly caused Robinson's injury and found McGlothan guilty of attempted felonious assault and domestic violence. He was, however, acquitted on the notice of prior conviction and repeat violence offender specifications. The court imposed a sentence of two years on the attempted felonious assault with a six-month concurrent term on the domestic violence count.

McGlothan appealed to the Eighth District Court of Appeals, which affirmed in part but reversed and vacated his conviction for domestic violence. The Court did so after concluding that the State had failed to prove that McGlothan and the complainant, Cynthia Robinson, were family or household members as defined under R.C. 2919.25, the domestic violence provision.

At trial, the prosecution largely relied on the testimony of Cynthia Robinson, the complaining witness. Robinson characterized McGlothan as her "boyfriend." (Tr. 26) Robinson testified that she had met McGlothan about a year before the incident and he slept over her apartment every night. (Tr. 26-27) Robinson has worn a tracheostomy tube or trach tube for the last 12 years. Physicians installed it to treat a particularly acute form of sleep apnea. The trach tube is permanent and allows Robinson's brain to receive the oxygen she needs to survive. Without the tube, Robinson experiences shortness of breath and difficulty walking. (Tr. 40) If the tube is not replaced within approximately 6-8 hours, her condition will deteriorate and turn critical. (Tr. 28, 62) Robinson testified that on the evening the incident occurred, McGlothan

rang the buzzer to her apartment and she let him inside. (Tr. 29) She recalled being upset with him because she had seen him over in Ohio City, on the other side of town, and he kept denying having been there. (Tr. 29-31) The two spared verbally for a while, with McGlothan walking into then out of a bedroom. Robinson recalled that McGlothan returned to the living room where she was sitting on (or standing by) the couch and exclaimed, "I'm tired of this shit," at which point he grabbed Robinson by the front of her blouse and shoved her back on to the couch. The trach became dislodged during the struggle. (Tr. 31-33) Robinson was not sure how the device came out of her neck, speculating that McGlothan "bumped it or something." (Tr. 41)

According to Robinson, McGlothan was surprised when it happened and helped her call 911. (Tr. 42, 45) When the ambulance arrived, she went to the hospital alone. Medical records admitted at trial reflect that Robinson complained to hospital personnel that her boyfriend purposely pulled her trach tube out. (State's Ex. 11)

We set forth additional facts where they pertain to the argument leveled herein.

### **LAW AND ARGUMENT**

The State has asked this Court to pronounce as a Proposition of Law that –

*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.*

This appeal is not really looking for commentary on or a clarification of Ohio's Domestic Violence Statute, a subject upon which this Court has pretty clearly spoken. That law has been established, construed on more than one occasion, and it was followed in Mr. McGlothan's case. Obviously, the State takes issue with the Eighth District's application of that law to this case's facts – but the intermediate court's construction of the law itself was not unsound. The State is simply dissatisfied with the result. Under the circumstances, this appeal at best seeks what the

State perceives as error correction. Ultimately, however, if this Court gives the State what it seeks, the result will be to appreciably water-down the provisions that define the *domestic* element of domestic violence – and by extension future constructions of the familial relationships the law was enacted to foster and protect.

**The State did not prove the offense of Domestic Violence.**

Ohio’s domestic violence statute provides that “no person shall knowingly or recklessly cause or attempt to cause physical harm to a family or household member.” R.C. 2919.25 (A) and (B).<sup>1</sup> Under section R.C. 2919.25(F)(1), the phrase “Family or household member” is limited to the following relationships –

(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.

(emphasis added). R.C. 2919.25(F)(b)(2) further limits the phrase “Person living as a spouse” to someone “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.”

The term “person living as a spouse” as defined in R.C. 2919.25 identifies a particular class of persons for the purposes of the domestic-violence statutes. *State v. Carswell*, 2007-Ohio-

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<sup>1</sup> Under R.C. 2919.25(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

3723, 114 Ohio St. 3d 210, 216, 871 N.E.2d 547, 554 (2007). This Court has explained that the offense of domestic violence arises out of the relationship of the parties rather than their exact living circumstances. *Williams*, 1997-Ohio-79, 79 Ohio St. 3d 459. In *Williams*, the question was whether the victim was “cohabitating” or living as a spouse with the defendant even though the two did not actually live together on a fulltime basis. When it resolved that the two were “cohabitating” as that term is used under the domestic violence statute, this Court concluded that “cohabitating” was not necessarily defined by the act of living together. Rather, 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. *Id.* at 465.

When it resolved the *Williams* case as it did, this Court took pains to detail a list of factors, which might establish what the General Assembly intended by the phrase “shared familial or financial responsibilities.” That list included, “providing shelter, food, clothing, utilities, and/or commingled assets.” Factors possibly establishing the required element of consortium included “mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations.” *Id.* at 465. In so doing, this court underscored the idea that this was not checklist. Nor were these possible factors intended to be exhaustive. This is a fact intensive inquiry that needed to be undertaken on a case-by-case basis. *Id.*

In the instant case, the only evidence regarding the relationship the parties shared was introduced through Cynthia Robinson. She testified that McGlothan was her “boyfriend,” that they had met a year before the incident; and McGlothan lived with her. By living with her, Robinson clarified that McGlothan spent every night at her apartment. (Tr. 26) The record,

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or household member.” R.C. 2919.25(D) provides that a first offense is a misdemeanor of the

however, does not demonstrate that McGlothan had a key to Ms. Robinson's apartment. In fact according to Ms. Robinson's testimony, McGlothan depended on her to obtain access to her residence. (Tr. 29) That is the only evidence presented at trial, which describes the relationship between Robinson and McGlothan.

On appeal, McGlothan argued that the State had failed to present sufficient evidence that he and Ms. Robinson were members of, or shared, the same household – i.e. the relationship prong of R.C. 2919.25. To that end, the Eighth District undertook to determine whether Robinson and McGlothan were living as each other's spouse; in a common law marital relationship; or cohabiting as those phrases are understood under Ohio law. In addressing the sufficiency of the evidence supporting this element of the offense, the Eighth District acknowledged that its holding turned on this Court's decision in *Williams*.

The court took note of the fact that *Williams* defined the term "cohabitation" under R.C. 2919.25 as 1) sharing familial or financial responsibilities; and 2) consortium. *McGlothan* at ¶ 20; citing *Williams*, at paragraph two of the syllabus. The Eighth District then went on to note that this Court had broadly laid out various factors that could impact on or help to prove those elements. As noted above, that list is neither a checklist, nor is it exhaustive. Drawing on this Court's reasoning in *Carswell*, *supra*, the Eighth District then made the following observation:

[I]t 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.

*McGlothan*, at ¶ 22. Nor was there any evidence of "consortium" beyond Robinson's characterization of McGlothan as her "boyfriend."

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first degree.

*Williams* broadly defined the notion of cohabitation for purposes of R.C.2919.25, expanding it beyond traditional marriage and familial relationships. Given the evolving structures of modern families and the relationships they create, such a construction makes good sense. But in so defining such relationships for purposes of establishing the offense of domestic violence, neither the legislature in drafting the law, nor this Court in construing it, intended the statute to transform all relationships into “domestic” ones. Accordingly, Robinson’s characterization of McGlothan as her boyfriend is not, by itself, sufficient to prove cohabitation. *State v. Church*, Cuyahoga App. No. 85582, 2005 Ohio 5198, ¶ 36; see also *State v. Walker*, Mahoning App. No. 95 CA 180, 1999 Ohio App. LEXIS 711 (testimony that the victim was the “girlfriend” of the defendant for the last year and a half was insufficient to establish that she resided or cohabitated with the defendant); *State v. Cobb*, 153 Ohio App. 3d 541, 544 (2003) (concluding that the defendant and victim did not cohabit even though they had sexual relations, the defendant spent every night at her apartment, and the defendant had “given her money for rent one month when she needed it and, on occasion, had provided her money for the telephone bill, groceries, and the license plates for her car.”)

**The Eighth District’s holding is not in conflict with those of other Districts.**

The State also complains that what the Eighth District did is contrary to the decisions of other appellate districts. That assessment is false. As noted initially, the State begins this argument by initially misstating the holding and then by attacking it for being wrong. To be clear, when the Eighth District concluded that the prosecution had failed its burden of proof on the domestic violence count, it did not do so simply because the State failed to show “shared finances.” Rather, it did so because the trial prosecutor failed to establish the cohabitation factors this court laid out in *Williams* – beyond Robinson’s characterization of McGlothan as her

“boyfriend” and her testimony that he spent every night at her apartment. The Eighth District did not hold that prosecutors needed to prove shared financial responsibilities to establish domestic violence.

If the State’s position – that the evidence reflected in this record is sufficient to demonstrate “cohabitation” under R.C. 2919.25 – is adopted, then *Williams* will be effectively overruled. Certainly, such a position reads out most of the reasoning upon which that perfectly logical decision was based. Domestic violence cases are necessarily fact driven. Personal relationships that drive human behavior are often unusual, and determining whether those relationships are “domestic” under R.C. 2919.25 is going to depend each case’s unique facts.

The prosecutor who tried McGlothan’s case had ample opportunity to prove the elements of domestic violence. Cynthia Robinson, the person who understood that relationship better than anyone, was the prosecutor’s primary witness. Yet the prosecutor never asked Robinson what she meant when she called McGlothan her “boyfriend.” Moreover, when the lawyer asked Robinson to clarify her testimony that she and McGlothan lived together, Robinson’s answer was not – that they shared finances, expenses, assets, a roof, a bed, a child, or even a pet – it was that he “spent every night.” (Tr. 26) This was Robinson’s home, however. On this record, it appeared that McGlothan’s access to the apartment depended on whether Robinson wanted him in there. (Tr. 29) Again, no effort was made to establish that McGlothan had a key to Robinson’s apartment. Nor was there any evidence that McGlothan kept personal belongings in the apartment. All of this is evidence that the trial prosecutor may have been able to elicit but did not.

The various cases the State cites as contrary to the intermediate court's holding are actually entirely consistent with it. Moreover, in all of them except one<sup>2</sup>, the record includes evidence of "cohabitation" beyond what the prosecutor elicited in Mr. McGlothan's case. In *State v. Rubes*, 2012 Ohio 4100, for example, the Eleventh District concluded that the parties "cohabitated" because in addition to living together and being boyfriend and girlfriend, the two shared a bedroom, the complainant purchased the couple's food, the defendant did odd jobs around the house, and he kept personal items and received mail at the complainant's address. *Id.* at ¶ 1. Similarly, in *State v. Levin*, 2012 Ohio 2043, another case the State claims is contrary to the instant matter, the Ninth District found that the complainant and defendant were cohabitating because the evidence reflected that the two had sexual relations, the complainant cooked and cleaned for the defendant and the defendant's mother paid the couple's expenses. *State v. Walburg*, 2011 Ohio 4762, from the Tenth District is likewise unavailing to the State. There, in addition to the boyfriend/girlfriend relationship, the evidence demonstrated that the couple shared the defendant's residence and the complainant kept personal items there. *Id.* at ¶19. In all of those cases, the reviewing courts appear to recognize that the inquiry here must be undertaken on a case-by-case basis.

Courts in other jurisdictions require similarly fact intensive inquiries to determine whether individuals in domestic violence cases met the element of "cohabitation." See, e.g. *People v. Moore*, 44 Cal. App. 4th 1323, 52 Cal. Rptr. 2d 256 (1st Dist. 1996) (upholding the following jury instruction cohabitation definition: "Cohabiting means an unrelated man and

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<sup>2</sup> In *State v. West*, No. 06AP-114, 2006-Ohio-5095, a Tenth District panel concluded that the evidence at trial demonstrated that the victim was a family or household member for purposes of domestic violence statute where she testified the two were boyfriend and girlfriend and she lived at his house with him. Even this case, however, reflects just how fact specific the cohabitation

woman living together in a substantial relationship manifested principally by a permanence, or sexual, or amorous intimacy. Holding oneself out to be the husband and wife of the person with which one is cohabiting is not required.”); *State v. Kellogg*, 542 N.W.2d 514 (Iowa 1996) (adopting a nonexclusive list of six factors to be considered when determining whether a couple was cohabiting: (1) sexual relations between the parties while sharing the same living quarters; (2) the sharing of income or expenses; (3) the joint use or ownership of property; (4) whether the parties hold themselves out as husband and wife; (5) the continuity of the relationship; and (6) the length of the relationship.); *Rickman v. Commonwealth*, 33 Va. App. 550, 535 S.E.2d 187 (2000) (Defendant found to be a family or household member under domestic violence statute where he desired to contribute money to the victim’s household expenses, he gave victim grocery money, he asked the victim’s daughter not to consume drugs or alcohol in the victim’s house, he and the victim slept in the same bed and had a sexual relationship, and he lived with the victim continuously for three months and sporadically for a long time before that.); and *State v. West*, 164 Vt. 192, 667 A.2d 540 (1995) (Evidence was sufficient to demonstrate that defendant and complainant were “household members” for purposes of domestic violence prosecutions where the victim and defendant were boyfriend and girlfriend on the night of the assault, that they had two children together, and they had shared occupancy of the same residence that night.)

The State’s argument before this Court and the cases on which it grounds that argument merely serve to underscore how unique the element of “cohabitation” is to a domestic violence prosecution; and just how lacking it was in this case. In the absence of any evidence beyond Robinson’s testimony – that McGlothan was her “boyfriend” and that McGlothan spent every

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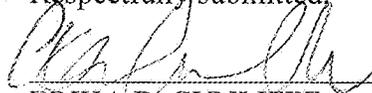
analysis is. In looking at the case’s briefs it is clear from the complainant’s testimony that her

night at her apartment, it was reasonable for the Eighth District to find the evidence of domestic violence insufficient.

**CONCLUSION**

Based on the foregoing, Appellee Jeffery McGlothan prays that this Honorable Court dismiss the State's Appeal as improvidently allowed or reject the State's proposition of law and affirm the decision of the Eighth District Court of Appeals.

Respectfully submitted,



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relationship with the defendant was intimate, and that the two shared a bedroom and a bed.

**CERTIFICATE OF SERVICE**

A copy of the foregoing Appellee's Merit Brief was served via hand delivery and email this 4<sup>th</sup> day of June, 2013 upon Timothy J. McGinty's Office, 1200 Ontario Street, 9<sup>th</sup> floor, Cleveland, Ohio 44112 and by ordinary U.S. Mail upon Mike Dewine, Attorney General of Ohio, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215.

  
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