No. 120958

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 1-13-4012.
Plaintiff-Appellant,	)	There on appeal from the Circuit Court of Cook County, Illinois , No. 11 CR 19547.
-vs-	)	
MATTHEW GRAY	)	Honorable Nicholas Ford, Judge Presiding.
Defendant-Appellee	)	

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE CROSS-RELIEF REQUESTED

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ISSUES PRESENTED FOR REVIEW

I. The State charged Matthew Gray with aggravated domestic battery based upon Matthew's former dating relationship with Tina Carthron, which both parties testified had ended 15 years before the alleged battery. Is the legislature's definition of "family or household members," 725 ILCS 5/112A-3(3), an unreasonable exercise of the State's police power when it allows Matthew to be charged with a domestic-related offense more than a decade after his and Tina's dating relationship ended?

CROSS APPEAL ISSUE

II. Tina Carthron drank a pint of whiskey and 40 ounces of beer until she was so intoxicated she described herself as "high." This intoxication led to memory loss, bizarre behavior, and repeated inconsistencies in her trial testimony. Does a reasonable doubt exist as to Matthew Gray's guilt?

STATUTES INVOLVED

720 ILCS 5/12-0.1[1] (eff. July 1, 2011 to July 26, 2015) provides in relevant part:

§ 12-0.1. Definitions. In this Article, unless the context clearly requires otherwise:

> "Family or household members" include spouses, former spouses, parents, children, stepchildren, and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, persons with disabilities and their personal assistants, and caregivers as defined in Section 12-4.4a of this Code. For purposes of this Article, neither a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or social contexts shall be deemed to constitute a dating relationship.

725 ILCS 5/112A-3 (eff. July 1, 2011 to January 24, 2013) provides, in relevant part:

> (3) "Family or household members" include spouses, former spouses, parents, children, stepchildren and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling,

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[1] The State correctly notes that the parties below and the appellate court looked to the wrong statutory provision for the definition of "family or household member" for the crime of aggravated domestic battery. (St. Br. 11, fn. 3) However, the definition used by the parties below, found in 725 ILCS 5/112A-3(3), is identical to the definition found in 720 ILCS 5/12-0.1, which applied as of July 1, 2011, to the offense of aggravated domestic battery. As the definitions are the same and the State referred to section 112A-3(3) in its brief, this brief refers to section 112A-3(3) rather than section 12-0.1.

persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, persons with disabilities and their personal assistants, and caregivers as defined in paragraph (3) of subsection (b) of Section 12-21 or in subsection (e) of Section 12-4.4a1 of the Criminal Code of 1961. For purposes of this paragraph, neither a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or social contexts shall be deemed to constitute a dating relationship.

STATEMENT OF FACTS

Tina Carthron and her friend, Matthew Gray, spent the night of November 1, 2011, and into the morning of November 2, drinking in Matthew's single-occupancy room in Chicago. (R. AA37-38, AA61-66) Tina drank a pint of Jack Daniel's whiskey and 40 ounces of Budweiser until she was "high." (R. AA37-39, AA62, AA67, AA203-05) They had dated 15 years before the events in question; however, Tina denied wishing to rekindle any dating relationship with Matthew and asserted that they were merely friends on November 1 and 2, 2011. (R. AA37, AA55-57, AA61, AA196-97)

While they drank, Tina became upset at Matthew for receiving a phone call from his long-time girlfriend, Laura Moore. (R. AA63-65, AA195) Matthew denied they had an argument over Laura. (R. AA239) Sometime that night, Tina claimed she and Matthew had sex (R. AA94); Matthew denied this occurred. (R. AA227) Matthew went to sleep, and Tina continued drinking. (R. AA65-66, AA207-08) Eventually Tina "dozed" off. (R. AA66)

Matthew testified he woke up around 7:00 a.m., on November 2, to Tina biting him on the chest. (R. AA207-08, AA236-37) He repeatedly yelled at her to get off him and tried to push her off. (R. AA208-09) In trying to push her off, Matthew scratched Tina's neck with his long fingernails. (R. AA209-10) With Tina still latched onto his chest, Matthew tried to reach for an ashtray to hit Tina but could not. (R. AA212) Matthew then grabbed the next closest item, a knife, and poked her on the back. (R. AA212-14) Matthew only intended to cause Tina to release her bite by poking her with the knife. (R. AA214-15) Tina released

her bite and fell off Matthew. (R. AA214-15) Photos taken later that night showed a bite wound to Matthew's chest. (PE #18; DE #1) He called 911 and escorted Tina out of his apartment. (R. AA223-24) He was arrested later that day. (R. AA235)

Tina testified Matthew and her woke up around 7:00 a.m. on November 2, 2011. (R. AA66-67) Tina was still drunk. (R. AA67) Tina said they had a second argument over the prior night's phone call from Laura. (R. AA39-40) Tina denied biting Matthew. (R. AA68, AA70-71) During the argument, Tina said Matthew choked her until she passed out on her back. (R. AA40-42) Tina woke up from having been choked and saw Matthew standing by the bathroom with a knife. (R. AA42) Tina then saw she had been stabbed on her left chest (R. AA43) and later learned she had a wound to her back. (R. AA46-47) Tina never saw or felt Matthew stab her. (R. AA73) Photos taken at a hospital showed one-inch cuts to Tina's left chest and back and a scratch to her neck. (PE #1-8) Prior to going to the hospital, Tina took two bus rides totaling 30 minutes to her daughter's house. (R. AA43-44, AA77-81)

Although both Matthew's and Tina's stories changed between November 2, 2011, and the day of trial (R. AA64, AA69, AA71-75, AA83-85, AA187-88, AA242-43, AA247-48, AA255, AA263, BB8-10, BB11-15); (*Infra* pp. 7-8), the above versions are the ones they told to the jury.

Based on the above incident, the State charged Matthew Gray with attempt murder, aggravated domestic battery, and aggravated battery. (C. 25-34) The State filed a pre-trial "Motion to Admit Proof of Other Crimes," asking to admit

through 725 ILCS 5/115-7.4, "Evidence in domestic violence cases," two alleged domestic altercations Matthew had with Laura Moore, Matthew's long-time girlfriend he referred to as his "common-law" wife. (C. 51-57; R. AA229) These altercations between Matthew and Laura occurred 10 and 14 months before the incident between Matthew and Tina. (C. 52) The defense objected to the motion because Matthew and Tina lacked a dating relationship on November 2, 2011, and because of the prejudicial nature of the evidence outweighing its probativeness. (C. 62-64) The trial court allowed the State to introduce these two Matthew-Laura incidents for propensity and other purposes via 725 ILCS 5/115-7.4. (C. 62-64; R. L10-11)

On the day before Matthew's jury trial, the State filed a motion *in limine* asking the court to allow them to call, instead of Laura, the officers who responded to the Matthew-Laura incidents and a doctor who treated Laura after one of them. (C. 95-96) The State sought to use the excited utterance exception to hearsay for Laura's statements to the responding officers on September 2, 2010, and February 6, 2011, and the medical treatment exception for her statements to the doctor. (C. 95-96) The defense objected on confrontation clause and hearsay grounds. (C. 98-101) The trial court granted the State's motion finding Laura's statements to the responding officers to be excited utterances and non-testimonial. (R. AA16-19) The court also allowed the State to question the doctor as to the medical treatment Laura received on September 2, 2010. (R. AA18) During the trial, the jurors heard from two officers and a doctor about the two alleged domestic altercations between Matthew and Laura. (R. AA118-55)

At trial, the jury heard the in-court versions of the events by Matthew and Tina (*supra* pp. 4-5) as well as the following initial versions they related soon after the events. Twelve days after the alleged incident, Tina testified at a preliminary hearing. During her preliminary hearing testimony, Tina could not remember having a verbal argument with Matthew about Laura Moore before her and Matthew's physical altercation. (R. AA64-66) At the same hearing, Tina admitted she could not remember due to her drunkenness whether she bit Matthew during the fight. (R. AA69-70) When Tina was treated at the hospital on November 2, 2011, she failed to tell a detective she was choked by Matthew. (R. AA83-85, AA187-88)

After Matthew testified, the jury heard from a 911 operator who received Matthew's 911 call on the morning of November 2, 2011. (R. BB8-10) Matthew told the 911 operator his girlfriend attacked him with a knife, he took the knife, stabbed her, and she might be hurt. (R. BB9-10) Officer Sanchez testified Matthew was arrested around 7:40 p.m. on November 2, 2011. (R. BB4) Detective Steven Scott testified to Matthew's November 2, 2011, custodial statements. (R. BB11-15) Matthew told Detective Scott he and Tina had a verbal fight over Laura, Tina bit him, a physical fight happened, and Matthew was defending Laura's honor during the fight. (R. BB11-15) During this interview, Detective Scott saw a red mark on Matthew's chest that he said he received from Tina biting him. (R. BB13)

A knife and a knife blade were recovered from Matthew's apartment. (R. AA109-12) Matthew's fingerprints were found on the blade of the knife, and Tina's

DNA was found on the blade and the handle. (R. AA111-12, AA155-59, AA169-74) Matthew's DNA could not be excluded on either portion of the knife. (R. AA169-77)

After both parties rested, trial counsel objected to the State's jury instruction defining "family or household member," I.P.I. 11.11A, and asked for a non-I.P.I. on the subject. The court denied this request. (R. BB19-20) After sending several notes during their deliberations, the jury returned a verdict of not guilty to two counts of attempt murder, guilty to two counts of aggravated domestic battery, and guilty to a single count of aggravated battery. (R. BB103-10) The court sentenced Matthew to five years in prison on his two aggravated domestic battery convictions and three years in prison on his aggravated battery conviction, all to be served concurrently. (C. 296; R. EE14-15)

On appeal, Matthew argued, *inter alia*, that: (1) the statute defining "family or household members" (725 ILCS 5/112A-3(3) (West 2011)), was an unconstitutional use of the State's police power as applied to his former dating relationship with Tina; and (2) the State failed to prove him guilty beyond a reasonable doubt where Tina's version of events was inconsistent and improbable. *People v. Gray*, 2016 IL App (1st) 134012, ¶1. The appellate court agreed as to the first argument and found the State's prosecution of Matthew for aggravated domestic battery premised on Matthew and Tina's prior dating relationship was not reasonably related to the public interest and thus section 112A-3(3) was unconstitutional as applied to Matthew. *Id*. at ¶47. Addressing Matthew's second argument, the appellate court found the evidence sufficient to sustain his conviction for aggravated battery thus allowing him to be retried on that count. *Id*. at ¶¶51-53.

ARGUMENT

I. As applied to Matthew Gray, it was an illegitimate exercise of the State's police power to define Matthew and Tina Carthron as "family or household members" allowing Matthew to be convicted of aggravated domestic battery 15 years after their dating relationship ended and where both admitted they were merely friends on the night of the incident.

This Court's analysis should begin with what the parties agree upon: "It is undisputed that [Matthew Gray] and [Tina Carthron] dated for over two years and that their dating relationship *ended approximately fifteen years* before" the events of this case. (St. Br. 11) (emphasis added); *see also People v. Gray*, 2016 IL App (1st) 134012, ¶¶37-40 (appellate court concluding Matthew and Tina had no dating relationship in 2011 when the incident occurred). Since Matthew and Tina's dating relationship ended in the mid 1990's, Matthew and Tina were merely friends. (R. AA37, AA55-57, AA196-97) Tina unequivocally testified, "No, we were just friends" in 2011 and had no desire to "rekindle" any dating relationship with Matthew, a fact corroborated by Matthew. (R. AA60-61, AA196)

In addressing the terms found in 725 ILCS 5/112A-3(3) that defines "family or household members," this Court has said "[e]ach case must be decided based on its specific facts." *People v. Almore*, 241 Ill.2d 387, 396 (2011). Limited to the specific facts of this case where Matthew and Tina had not dated since Bill Clinton was President, it was an improper use of the State's police power to define Matthew and Tina as "family or household members," thus subjecting Matthew to being prosecuted and convicted for aggravated domestic battery based upon this defunct, former dating relationship.

As the appellate court recognized, the State has presented no objective that would be furthered by treating the parties in this case as "family or household members." *Gray*, at ¶47; *see also People v. Wilson*, 214 Ill.2d 394, 402-03 (2005) (while finding it not unreasonable for legislature to have included former dating relationship that ended only a few months prior, this Court left open the question as to whether it would be reasonable "to include relationships that had ended 50 years ago"). Matthew's convictions for aggravated domestic battery violated due process and are unconstitutional. This Court should affirm the appellate court's decision finding as such.

Statutes are presumed constitutional. *City of Chicago v. Morales,* 177 Ill.2d 440, 448 (1997), *aff'd*, 527 U.S. 41 (1999). However, although courts are to construe enactments so as to sustain their constitutionality and validity if it can be reasonably done, it is equally the duty of the courts to declare an unconstitutional statute invalid. *People v. P.H.*, 145 Ill.2d 209, 221 (1991). The constitutionality of a statute is a question of law and is subject to *de novo* review. *People v. Fisher*, 184 Ill.2d 441, 448 (1998).

The legislature, pursuant to its police power, has latitude in determining what the public interest and welfare require and to determine the measures needed to secure such interest, but this discretion is limited by the constitutional guarantee that a person may not be deprived of liberty without due process of law. *In re K.C.*, 186 Ill.2d 542, 550 (1999); U.S. Const amend. XIV; Ill. Const. of 1970, art. I, §2. Where legislation does not affect a fundamental constitutional right, the

court is to apply the rational-basis test to determine the legislation's constitutionality. *People v. Wright*, 194 Ill.2d 1, 24 (2000).

Here, Matthew Gray is not claiming the aggravated domestic battery statute affects a fundamental constitutional right. Thus, a statute like the instant one attacked on such due-process grounds will be upheld only if it: (1) bears a reasonable relationship to the public interest sought to be protected, and (2) the means employed are a reasonable method of achieving the desired objective. *People v. Carpenter*, 228 Ill.2d 250, 267-68 (2008). The State charged Matthew with several counts of aggravated domestic battery. (C. 30, 32) An element of the offense is the alleged conduct involved a "family or household member." (C. 30, 32); 720 ILCS 5/12-3.2(a)(1) (West 2011); 720 ILCS 5/12-3.3(a)/(a-5) (West 2011). The statutory definition of "family or household member" includes "persons who have or have had a dating or engagement relationship." 725 ILCS 5/112A-3(3) (West 2011).

While the parties debate whether it is a rational use of the State's police powers to define Matthew and Tina as "family or household members," this Court should also consider the underlying purpose of the Criminal Code in determining whether the legislature's decision bears a reasonable relationship to the stated public interest in the Code. *See* 720 ILCS 5/1-2 (West 2011) ("The provisions of this Code shall be construed to in accordance with the general purposes hereof, to. . .[d]efine adequately the act and mental state which constitute each offense, and limit the condemnation of conduct as criminal when it is without fault. . .[p]revent arbitrary or oppressive treatment of persons accused or convicted of offenses.").

Turning to whether it was a proper exercise of the State's police power to define the parties as "family or household members" based on their former dating relationship, the State argues the appellate court "too narrowly" construed the purpose the legislature sought to address through the Illinois Domestic Violence Act ("IDVA"). (St. Br. 13-17) The State's initial argument is that the legislative purpose of the IDVA is served by considering individuals who formerly dated to be "family or household members" **in perpetuity** despite there being no romantic intimacy still affecting the parties at the time of any alleged criminal conduct. (St. Br. 13-17); *compare Gray*, 2016 IL App (1st) 134012 at ¶47 ("[A] couple's romantic intimacy may conceivably outlive the duration of the dating relationship. . .with that said, the record here does not suggest that [Matthew] and [Tina's] relationship at the time of the offense was still under the effect of the romantic intimacy from their relationship that ended 15 years earlier.").

Notably however, the State later admits there may be instances where it would be an irrational use of the State's police power to find individuals who formerly dated to be "family or household members." (St. Br. 19) An analysis of how the IDVA and how the term "family or household members" has been defined in the statute and case law demonstrates the legislative intent is not served by considering former dating partners, like Matthew and Tina, who are admittedly no longer affected by their prior romantic intimacy to be "family or household members."

"Family or household members," was originally defined in the 1982 IDVA for order of protection purposes. Ill.Rev.Stat. 1982, ch. 40 ¶2301-3(2) (West 1983). At that time, the legislature limited "family or household members" to spouses,

individuals who were formerly spouses, individuals sharing a common household, parents and children, or person related by blood or marriage." *Id.* In considering the 1982 IDVA, the Third District Appellate Court determined the type of harm sought to be remedied by the legislature through the Act was "the universe of physical and psychological abuses *which only someone as close as a relative can inflict*." *People v. Blackwood*, 131 Ill.App.3d 1018, 1023 (3d Dist. 1985) (emphasis added) (holding because the statute could not be expected to address every conceivable form of abuse, it was not facially vague or overbroad despite the fact that "[t]here is little doubt that the terms employed in the Domestic Violence Act are vague to a certain extent"). Similarly, the Fourth District Appellate Court addressed the 1982 IDVA stating, "the intent of the legislature in adopting the [IDVA] was to keep people from harassing, striking, and interfering with the personal liberty of people with whom they have had intimate relationships with. The express legislative purpose of a statute is to prevent and alleviate domestic violence." *People v. Whitfield*, 147 Ill.App.3d 675, 679 (4th Dist. 1986).[2]

When the IDVA was re-passed in 1986, the legislature recognized, *inter alia*, that "domestic violence as a serious crime against the individual and society which produces family disharmony in thousands of Illinois families, promotes a pattern of escalating violence which frequently culminates in intra-family homicide, and creates an emotional atmosphere that is not [conducive] to healthy childhood development." Ill.Rev.Stat. 1986, ch. 40 ¶2311-2(1) (West 1987).

[2] The State uses *Whitfield* as support for its argument as to the legislative intent of the current version of the IDVA. (St. Br. 15)

Interpreting this 1986 verison of the IDVA, the First District Appellate Court described the purpose of the Act as to prevent abuse *between persons sharing intimate relationships*. *Glater v. Fabianich*, 252 Ill.App.3d 372, 375-76 (1st Dist. 1993) (interpreting the definition of "shared or formerly shared a common dwelling" for the purposes of obtaining an order of protection). While the 1986 IDVA had these purposes of curtailing intra-family/intra-relationship violence when it was enacted, **the definition did not include those in or formerly in dating relationships**. Ill.Rev.Stat. 1986, ch. 38 ¶112A-3(3) (West 1987).

It was not until July 1, 1990, that the legislature even created the offense of domestic battery that incorporated the "family or household members" definition of section 112A-3; the offense of aggravated domestic battery did not come into existence for another decade. Ill.Rev.Stat. 1990, ch. 38 ¶12-3.2 (West 1990); 720 ILCS 5/12-3.3 (West 2000). In between the creation of the offenses of domestic battery and aggravated domestic battery, the legislature in 1992 altered the definition of "family or household members" to include "persons who have or have had a dating or engagement relationship." 725 ILCS 5/112A-3(3) (West 1992). When the legislature added the "dating relationship" portions to the Act and thus the offense of domestic battery, it also provided the important caveat that "neither a casual acquaintanceship nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute a dating relationship." 725 ILCS 5/112A-3(3) (West 1992).

"A review of the legislative history does not shed any light on the reason the protections of the Act were extended to persons in a 'dating relationship.'"

Alison C. v. Westcott, 343 Ill.App.3d 648, 652 (2d Dist. 2003). Nor did the legislature provide a specific definition for "dating relationship." Since dating relationship's inclusion in the definition of family or household member, the appellate court has grappled with what sort of romantically-intimate relationship satisfies the element of a "dating relationship." A review of this authority shows that the appellate court's approach taken below requiring romantic intimacy to be affecting the parties at the time of the offense to be a correct one.

In *Alison C. v. Westcott*, 343 Ill.App.3d 648, the court sought to determine whether the parties met the ambiguous "dating relationship" term. Due to the lack of guidance in either the statute or the legislative history, the Second District Appellate Court turned to our sister states' help in defining similar or identical terms. *Id*. at 652. In particular, the court found the California decision of *Oriola v. Thaler*, 84 Cal.App.4th 397 (Cal.Ct.App. 2000), most helpful. The *Oriola* Court "extensively examined what types of dating relationships are encompassed by other states' domestic violence protection statutes." *Alison C.*, 343 Ill.App.3d at 652. Ultimately, the *Oriola* Court defined a "dating relationship" as a "serious courtship" and further explained:

> "[A dating relationship] is a social relationship between two individuals who have or have had a reciprocally amorous and increasingly exclusive interest in one another, and shared expectation of the growth of that mutual interest, that has endured for such a length of time and stimulated such frequent interactions that the relationship cannot be deemed to have been casual." *Oriola*, 84 Cal.App.4th at 412.

Recognizing that the IDVA served a "penal purpose" and should be "strictly construed in favor of the accused," the *Alison C.* Court held that "the Illinois

legislature intended for a 'dating relationship' under section [750 ILCS 60/103(6)] to refer to a serious courtship, like that discussed in *Oriola*." *Alison C.*, 343 Ill.App.3d at 652.

The Second District Appellate Court next addressed "family or household member" for section 112A-3(3) purposes in *People v. Young*, 362 Ill.App.3d 843 (2d Dist. 2005). Analyzing the legislative intent to address violence in intimate relationships, the court noted "the section *has nothing in it* to suggest an intention *to bring all* intimate relationships within its scope." *Id*. at 849-50 (emphasis in original). Finding it was not enough for the State to establish the parties had an "*intimate* relationship" (emphasis in original), the *Young* Court concluded a "serious courtship" must be "at a minimum an established relationship with a *significant romantic focus*." *Id*. at 851 (emphasis added). In finding no dating relationship existed in that case, the *Young* Court importantly looked to the parties' subjective interpretation of their interactions as evidence that there was no dating relationship. *Id*. at 852 (complainant described the relationship as "social").

The First, Third, and Fifth Districts of the Appellate Court subsequently adopted the *Young* analysis[3] that for a dating relationship to qualify under the law there must be a serious courtship with a *significant romantic focus*. *See People v. Irvine*, 379 Ill.App.3d 116, 125 (1st Dist. 2008) (six weeks of dating coupled with sexual intercourse up to and including the date of the altercation sufficient

[3] This Court also adopted the reasoning of *Young* but for purposes of whether the individuals in that case were "family or household members" because they shared or formerly shared a common dwelling. *People v. Almore*, 241 Ill.2d 387, 395-97 (2011).

evidence of a dating relationship); *People v. Taylor*, 381 Ill.App.3d 251, 258 (5th Dist. 2008) (multiple-week romance that included parties having sex and sleeping in same bed found to be a dating relationship); *People v. Howard*, 2012 IL App (3d) 100925, ¶5 (parties' 15 sexual encounters during an 18-month period not sufficient evidence of dating relationship as encounters were simply physical and not romantic). These courts further adopted the *Young* Court's use of the parties' subjective understanding of their interactions. *Irvine*, 379 Ill.App.3d at 125 (complainant stated she and defendant had been involved in a "full relationship" for approximately 45 days); *Taylor*, 381 Ill.App.3d at 258 ("the complaining witness believed her relationship with the defendant was romantic"); *Howard*, 2012 IL App (3d) 100925 at ¶5 (complainant described relationship as purely sexual in nature and defendant considered relationship to be a series of "one-night stands").

Given this decade-plus body of appellate court precedent, the court below correctly held that the State's identified interest in the IDVA is not reasonably served by considering former dating partners like Matthew and Tina, who ended their relationship 15 years earlier and had no connection to their prior romantic intimacy, as "family or household members." *Gray*, 2016 IL App (1st) 134012 at ¶47.

While the State attempts to evade the import of "romantic intimacy" between dating partners by correctly noting none of the other qualifying relationships in section 112A-3(3) require romantic intimacy (St. Br. 14-15), this comparison falls flat. Those persons who are "family or household members" solely because of their current or former dating relationship are as such only *because of their relationship*

being romantically intimate. Thus, once that romantic intimacy has diminished as it did in this case, the reasonable relationship to the announced public interest also washes away.

The State and *amici* are correct that studies show partner violence does not end when a dating relationship ends. (St. Br. 18-19); (Am. Cur. Br. 14-15); *see also Wilson*, 214 Ill.2d at 403. However, the State and *amici* ignore that studies have demonstrated that reabuse markedly declines as post-separation time increases. *See, e.g.*, Edward W. Gondolf, *A 30-Month Follow-Up of Court Referred Batterers in Four Cities*, 44 International Journal of Offender Therapy and Comparative Criminology 120-21 (2000) ("The percentage of new reassaults progressively decreased over time, with a vast majority of the men no reassaulting their partners between 15 and 30 months after program intake"); Andrew Klein & Terri Tobin, *A Longitudinal Study of Arrested Batterers, 1995-2005*, 14 Violence Against Women 144-45 (2008) ("the number of abusers who reabused or were rearrested for a nonabuse crime each year after the study arraignment markedly declined after the first two years"); Ruth E. Fluery et al., *When Ending the Relationship Doesn't End the Violence*: Women's Experiences of Violence by Former Partners, 6 Violence Against Women 1363, 1371 (2000) (majority of initial assault by an ex-partner took place soon after the end of the relationship and risk of first assault decreased over time).

Dr. Gondolf's study made the following conclusion about how drastically the risk for reabuse lessens over time:

> The reassault rate for new reassults decreases even more dramatically over time, and especially in the latter half of the 30-month followup.

> . . The new reassaults during the 3-month followup intervals drops from 15% in the first 3-month interval to 3% to 4% in the 9-month to 15-month intervals. The rate of new reassaults by the 30-month interval falls to less than 1%. *A 30-Month Follow-Up of Court Referred Batterers in Four Cities* at 121.

This study also included in its definition of "reabuse" any violence to a new partner so the true rate for same-partner reabuse is even less. *Id*. at 117-20. Thus, the State's interest in protecting individuals in formerly intimate relationships drastically lessens over time and at some point past the end of the relationship it is no longer a rational use of the State's police power to define former dating partners as "family or household members." Applying this empirical data to this case, two things stands out: (1) there is no evidence Matthew ever abused Tina when they dated in the mid-1990's; and (2) their relationship having been defunct for 15 years is nearly four times as long as the 2 1/2 year period in the Dr. Gondolf study that found almost no risk of reabuse. *Id*. at 120-121.

By highlighting several hypothetical situations where former dating relationships played no part in the criminal conduct (and thus positing a defendant would have success in making an as-applied challenge similar to Matthew's), the State essentially concedes that whether former dating partners are still influenced by their romantic intimacy should be a concern in this, or any, as-applied challenge to section 112A-3(3). (St. Br. 19) And this implicit concession is grounded in this Court's authority. In the only prior case from this Court to analyze section 112A-3(3)'s inclusion of former dating relationships as "family or household members," this Court indicated it would not be a valid exercise of the State's police power to apply the statute to someone in Matthew Gray's and Tina Carthron's shoes.

In *People v. Wilson*, 214 Ill.2d 394, the defendant had ended his 10-month relationship with the complainant only four months prior to the alleged incident, and the State charged him with domestic battery. *Id.* at 396-97. The trial court was concerned that individuals who had dated decades in the past could be swept under the definition of "family or household member," and the court found the legislature's definition of a "dating relationship" unconstitutionally vague. *Id.* at 397-98. On appeal, this Court overturned that ruling partially because the trial court considered hypothetical facts that did not apply to the defendant. *Id.* at 402-03. This Court stated:

> It was not relevant whether it was a valid exercise of the police power to make the statute applicable to relationships that ended 50 years ago before the alleged battery. . .Clearly, it was not unreasonable for the legislature to include within the domestic battery statute relationships that had been over for only a few months. *Whether it was reasonable to include relationships that had ended 50 years ago is not before this court. Wilson*, 214 Ill.2d at 402-03 (emphasis added).

This reservation of judgment as to whether it would be a valid use of the State's police power to use a prior dating relationship from decades ago was a prescient realization that there are situations where the State's interest in preventing violence in current or former dating relationships evaporates with the passage of time.

And that is exactly what happened here. Matthew and Tina dated for two years in the mid-1990's, but they had not dated for 15 years before the night of the incident. (R. AA36-37, AA56, AA60-61, AA195-96) After Matthew and Tina's dating relationship ended, Matthew was in a long-term relationship with Laura Moore, a woman Matthew called his common-law wife. (R. AA229) Outside of their two-year dating relationship in the mid 1990's, Matthew and Tina were casual

acquaintanceships with merely friendly interactions between their families. (R. AA55-56, AA195-96) Specifically in the month before the November 2, 2011, incident, Matthew and Tina briefly saw each other a few times. (R. AA58-60, AA197-201)[4]

Not only does this objective passage of time since Matthew and Tina dated demonstrate a lack of State interest in defining Matthew and Tina as "family or household members," Matthew and Tina's subjective interpretation of their relationship since then also shows no reasonable State interest. Under cross-examination, Tina detailed the lack of any lingering romantic intimacy with Matthew:

> [Counsel]: You wanted to rekindle things with [Matthew], right?
>
> [Tina]: No.
>
> [Counsel]: So you weren't concerned about having a relationship with him at that time whatsoever?
>
> [Tina]: No, we were just friends. (R. AA61)

Matthew corroborated Tina's assessment of their interaction:

> [Counsel]: Do you know who Tina Carthron is?
>
> [Matthew]: Yes.
>
> [Counsel]: How do you know her?

---

[4] The State asserts in its brief that "Carthron testified that she saw defendant no fewer than three times in the month preceding defendant's attack upon her. AA58-60." (St. Br. 19) The record indicates only two dates that they saw each other: (1) Tina seeing Matthew outside of his apartment he had moved into; and (2) Tina giving Matthew clothes on her way to work and later retrieving them after she leaving work. (R. AA58-60) Matthew indicated these two interactions occurred on October 5 and 15, 2011. (R.AA197-201)

[Matthew]: She's my ex. (R. AA195)

[Counsel]: And so in November and October 2011 did you have any relationship with her? Was there a romantic relationship?

[Matthew]: No.

[Counsel]: Were you guys friends?

[Matthew]: Yeah, I thought. (R. AA196)

[Counsel]: When was the last time you dated [Tina]?

[Matthew]: We haven't for 15 years. We don't date. (R. AA197)

The lack of any lingering romantic intimacy between Matthew and Tina is further evinced by Matthew's ongoing, multi-decade relationship with Laura Moore:

[State]: Now, on November 2, 2011, you also – you were having a relationship with a person by the name of Laura Moore, correct?

[Matthew]: Yes.

[State]: [Laura] is still your girlfriend as we sit here today, correct?

[Matthew]: Yes.

[State]: In fact, you would refer to her as your common law wife?

[Matthew]: Yes.

[State]: You're not legally married, correct?

[Matthew]: No, we have been together for 15 years. So she considered it as being married twice. It's common law every seven years. She considers that two marriages. That's the way we see it.

The objective passage of time coupled with Matthew's and Tina's subjective consideration of their interaction demonstrates there is no reasonable State interest in defining them as "family or household members."

Recognizing the lack any current effect upon Matthew or Tina of their prior romantic intimacy, the State's brief (St. Br. 18-19) and *amici curiae* brief (Am. Cur. Br. 14-15, 18-20) rely upon several empirical studies referencing the prevalence of individuals abused by former partners. Simply put, these studies would be relevant if this were a facial challenge to the statute. However, this Court unambiguously has held that when addressing an as-applied challenge to section 112A-3(3) it is irrelevant whether the statute could or could not be applied properly to another defendant. *Wilson*, 214 Ill.2d at 402-03; *see also People v. Almore*, 241 Ill.2d 387, 396 (2011) (interpreting whether two individuals "shared a common dwelling," this Court stated, "There can be no bright-line test for determining household membership. Each case must be decided based on its specific facts."). Specifically, the *amici curiae*'s lengthy argument that affirming the appellate court's decision would have a "chilling effect on civil orders of protection" is entirely inappropriate for this as-applied challenge to Matthew's criminal convictions. (Am. Cur. Br. 23-31)

While there are cases where it could be debated as to whether a former dating relationship is sufficiently recent enough or one or both parties in the case were still under the effect of the romantic intimacy of their prior relationship to warrant the protections through the IDVA, this case is not one of them. *See Wilson*, 214 Ill.2d at 402-03 (not unreasonable use of legislature to include dating

relationship that ended only four months before criminal act as family or household member). While this Court in *Wilson* believed four months was not enough, more than a decade is certainly enough time for the State's interest in defining Matthew and Tina as "family or household members" to have disappeared. *See e.g.*, R.I. Gen. Laws §12-29-2(b) (West 2017) (domestic abuse limited to those who have been in a dating or engagement relationship within the past year); Mass. Gen. Laws ch. 265, §13M(c) (West 2017) ("length of time elapsed since the termination of the relationship" to be considered as to whether persons in substantive dating or engagement relationship are defined as family or household members); Minn. Stat. Ann. § 518B.01(a)(7) (West 2017) ("In determining whether persons are or have been involved in a significant romantic or sexual relationship. . ., the court shall consider. . . if the relationship has terminated, length of time since the termination.").

Allowing the State here to prosecute Matthew Gray with aggravated domestic battery more than a decade after his and Tina's dating relationship ended makes a mockery of the stated purposes of the IDVA to curb violence between romantically intimate partners. There is no reasonable relationship between the purposes of the IDVA and allowing the State to prosecute someone like Matthew Gray in 2011 for aggravated domestic battery based upon a dating relationship terminated in the mid-1990's. Nor is subjecting Matthew to increased punishment in perpetuity for this former dating relationship a reasonable method of accomplishing the desired objective of the IDVA.

There is no debate that Matthew and Tina were merely casual acquaintances on November 1 and 2, 2011, and Matthew should have been charged only as such (*ie*. simple aggravated battery). As applied to Matthew Gray, the definition of "family or household member," as an element of his offense of aggravated domestic battery violated his right to due process. His aggravated domestic battery convictions are unconstitutional and should be reversed.

Assuming this Court affirms the appellate court's decision reversing Matthew Gray's aggravated domestic battery convictions, the State alternatively requests that these convictions be reduced to the lesser-included offenses of aggravated battery. (St. Br. 20-22) The State entirely omits from its discussion that the appellate court also remanded Matthew's aggravated battery conviction for a new trial because "the trial court may or may not have determined that prejudice outweighed the probative value of such [other-crimes evidence] if it was not admissible as evidence as propensity, particularly considering that defendant has now been acquitted of attempted first-degree murder and that defendant's identity is not at issue." *Gray*, 2016 IL App (1st) 134012 at ¶49.

The same rationale applicable to the charged aggravated battery applies to any lesser-included offense of aggravated battery inherent in the charged aggravated domestic battery counts. (St. Br. 21-22) In fact, the charged aggravated battery, Count 8 of indictment (C. 33), involves the same conduct as one of the aggravated domestic battery counts, Count 3 of indictment (C. 30), to wit: stabbing Tina Carthron. This Court should reject the State's request for alternative relief

and, assuming it does not reverse Matthew's convictions outright (*infra* Issue II), affirm the appellate court's judgment.

However, as will be demonstrated in Issue II, the credibility of Tina Carthron is so suspect a reasonable doubt exists as to Matthew Gray's guilt as to any of the offenses he was found guilty of at trial.

II. Tina Carthron drank a pint of whiskey and 40 ounces of beer until she was so intoxicated she described herself as "high." Where Tina could not remember whether she bit Matthew Gray, did not know how she ended up with cuts to her chest and back, and could not remember many things said during the incident, a reasonable doubt exists as to Matthew's guilt.

"The intoxication of a witness at the time of an event about which [she] testifies may always be proved, because it affects the weight to be given to [her] testimony." *People v. McGuire*, 18 Ill.2d 257, 259 (1960). The parties below did not dispute Tina Carthron's intoxication: Tina drank a pint of Jack Daniel's whiskey and another 40 ounces of Budweiser during the approximately twelve hours she spent in Matthew Gray's apartment. (R. AA39); *People v. Gray*, 2016 IL App (1st) 134012, ¶¶9-10 (appellate court detailing Tina's alcohol consumption and subjective assessment of her sobriety). This level of intoxication alone eviscerates Tina's credibility as to the events that occurred in Matthew's apartment on November 1 and 2, 2011.

Tina's drunkenness caused her not to remember: (1) whether she bit Matthew (R. AA69-70); (2) whether they had an argument that morning (R. AA64); (3) whether Matthew had choked her (R. AA188-89); and (4) how she was cut (R. AA70, AA188-89). Finally, despite having just been allegedly choked and cut by Matthew, Tina walked past officers outside of Matthew's apartment, made no plea for help, and instead took two buses to her daughter's house miles away. (R. AA76-81) Tina's story of how she was choked and cut cannot be believed beyond a reasonable doubt. Because Tina's story is utterly implausible, Matthew Gray asks this Court to reverse his convictions.

The due process clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. U.S. Const. amends. V, XIV; Ill. Const. 1970, art. I, §2; *In re Winship*, 397 U.S. 358, 364 (1970). Here, the State charged Matthew Gray with, among other things, aggravated domestic battery predicated on great bodily harm (stabbing), aggravated domestic battery predicated on strangulation, and aggravated battery predicated on the use of a deadly weapon (knife). (C. 30, 32-33) Matthew denied choking Tina and asserted a self-defense claim to his having cut Tina with his knife. Thus, it was the State's burden to prove beyond a reasonable doubt that Matthew did not act in self-defense in cutting Tina. *See People v. Washington*, 2012 IL 110283, ¶34 (once an affirmative defense has been raised, the State has the burden of proving defendant guilty beyond a reasonable doubt as to that issue as well to the elements of the charged offense).

This Court must "carefully consider the evidence [and] reverse the judgment if the evidence is not sufficient to remove all reasonable doubt of the defendant's guilt and is not sufficient to create an abiding conviction that he is guilty of the crime charged." *People v. Ash*, 102 Ill.2d 485, 493 (1984); *People v. Smith*, 185 Ill.2d 532, 542 (1999). Tied into this Court's consideration of all the evidence, the fact-finder's determination of a witness's credibility, while given deference, is "not conclusive and does not bind the reviewing court." *People v. Cunningham*, 212 Ill.2d 274, 280 (2004); *Smith*, 185 Ill.2d at 542. While the jury found Matthew guilty of two counts of aggravated domestic battery and a count of aggravated battery and the appellate court found the evidence sufficient to warrant a retrial

on the aggravated battery conviction, this Court is not bound by that finding as the State's evidence, based essentially on Tina Carthron's threadbare credibility, was so improbable, unconvincing, and contrary to human experience to require a reversal of Matthew's convictions. *See People v. Stevenson*, 25 Ill.2d 361, 365 (1962) (in assault with intent to murder case where defendant claimed justified use of force, reversing conviction based upon complainant's testimony being "unconvincing, conflicting and unreasonable").

The State's case against Matthew Gray rises and falls with the credibility of Tina Carthron, a woman so admittedly drunk on 16 ounces of whiskey and 40 ounces of Budweiser she described herself as "high" from the intoxication. (R. AA39-40, AA62-63, AA67) A witness' intoxication during the time of the events of which she testifies is probative of the witness' "sensory capacity." *People v. Di Maso*, 100 Ill.App.3d 338, 343 (1st Dist. 1981). Tina's intoxication during the events was thoroughly shown.

Tina, standing 5'4", 125 lbs., arrived at Matthew's apartment after 7:00 p.m. on November 1, 2011. (R. AA203) She then began drinking Jack Daniel's whiskey and lime juice. (R. AA62, AA206) She also drank 40 ounces of Budweiser. (R. AA39) They drank together and listened to music until around 11:00 p.m., when Matthew turned off the music out of concern for his neighbors. (R. AA206) Tina drank so much whiskey she admitted, "Yes, I was high." (R. AA62)

After 11:00 p.m., Matthew received a phone call from Laura Moore, his "common-law" wife. (R. AA206-07) Matthew then went to sleep, but Tina continued drinking until she "dozed off." (R. AA65-66, AA207) In total, Tina consumed a

pint of Jack Daniel's whiskey and 40 ounces of Budweiser. (R. AA39-40) Tina woke up at 7:00 a.m. still drunk. (R. AA67) The incident between Tina and Matthew occurred shortly after 7:00 a.m., on November 2, 2011.

This unquestionably drunk person is the State's star witness and *whose story must be believed for Matthew's convictions to stand*. Tina conceded her drunkenness made her unable to remember much of what was said that morning. (R. AA73) Her level of intoxication alone renders her entire version of the events incredible, and this Court cannot trust anything she has said about the events.

Unsurprisingly, Tina's intoxication resulted in her trial testimony being repeatedly contradicted by her prior statements. At trial 22 months after the incident, Tina claimed Matthew choked her, she passed out, and she awoke to Matthew holding a knife and her having cuts to her body. (R. AA40-42) Yet hours after the events, Tina failed to tell Detective Rapunzel Williams she had been choked. (R. AA84, AA188)

At trial, Tina claimed the choking and stabbing occurred around 7:00 a.m. (R. AA39-40, AA71-72) In her initial interview with Detective Williams on November 2, 2011, Tina said she woke up at 1:30 a.m. bleeding from her side and saw Matthew with a knife. (R. AA189)

At trial, Tina said she woke up, and they had a second argument over Matthew having received a phone call from Laura Moore the night before. (R. AA39, AA63) Yet at the preliminary hearing only 12 days after the events, Tina testified she did not know whether they argued before the incident. (R. AA65)

At trial, Tina denied biting Matthew or leaving the bite mark found on Matthew's chest. (R. AA68); (PE #18) At the preliminary hearing 12 days after the events, Tina told the court, "I don't remember" as to whether she bit Matthew. (R. AA69-70) Tina then conceded at trial she was unable to remember because, "I was kind of drunk." (R. AA70)

Not only was Tina's level of intoxication so extreme her versions of the events were horribly inconsistent between November 2, 2011, and the day of trial, her actions immediately after the incident are indicative of a culpable mind. After the events, Matthew called 911, and officers responded to the residence. (R. AA42-43, AA75-76, AA223-24) Tina exited Matthew's apartment and encountered the officers. (R. AA76)

Having allegedly been choked and cut by Matthew, did Tina immediately cry out to these officers about the attack? No. Instead, Tina walked past the officers, said not a word, and walked to a nearby bus stop. (R. AA76-77) From Matthew's apartment at 6013 South State Street in Chicago, Tina got on a bus, took it to 71st Street, got off that bus, boarded another bus, and then took the second bus to 76th Street and South Shore Avenue to where her daughter lived. (R. AA77-81) With a cut to her chest (and a yet undiscovered cut to her back), Tina took this 30 minute ride on two buses to her daughter's apartment instead of immediately asking the police officers on the scene for help, a wound so severe that her daughter claimed she unzipped Tina's coat and "blood start [*sic*] shooting out" of her chest. (R. AA100)

Such "testimony taxes the gullibility of the credulous," and because it is "contrary to the laws of nature or universal human experience," this Court is not bound to believe Tina Carthron's implausible version of events. *People v. Coulson*, 13 Ill.2d 290, 296-97 (1958). Her extreme intoxication during the events, her repeated inconsistencies as to salient facts surrounding the events, and her utterly implausible actions after the events should have made it impossible for any reasonable fact-finder to accept any part of Tina's story. *See Smith*, 185 Ill.2d at 545 (no reasonable person could find the witness's testimony credible); *People v. Schott*, 145 Ill.2d 188, 208-09 (1991) (complaining witness, an admitted liar with a motive to falsely accuse the defendant, was so thoroughly impeached court held her testimony insufficient to convict); *Coulson*, 13 Ill.2d at 295 (conviction reversed where complainant's description of the crime was incredible); *People v. Herman*, 407 Ill.App.3d 688, 707 (1st Dist. 2011) (complaining witness's inconsistencies on material points render guilty verdict untenable). As the State's sole witness to the events is unworthy of any belief, the State failed to prove Matthew Gray guilty beyond a reasonable doubt that he strangled Tina or he did not act in self-defense when he cut her with his knife. This Court should reverse Matthew's convictions.

CONCLUSION

For the foregoing reasons, Matthew Gray, Defendant-Appellee, respectfully requests that this Court reverse all of his convictions under Issue II. Alternatively, pursuant to Issue I, Matthew asks this Court to reverse his aggravated domestic battery convictions and remand for a new trial on his aggravated battery conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Christofer R. Bendik, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 33 pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- MATTHEW GRAY Defendant-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-13-4012. There on appeal from the Circuit Court of Cook County, Illinois , No. 11 CR 19547. Honorable Nicholas Ford, Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601;

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Under the penalties provided in law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that an electronic copy of the Brief and Argument in the above-entitled cause was submitted to the Clerk of the above Court for filing on February 1, 2017. On that same date, we personally delivered three copies to the Attorney General of Illinois, personally delivered three copies to opposing counsel and mailed one copy to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. The original and twelve copies of the Brief and Argument will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped motion.

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