No. 120958

IN THE SUPREME COURT
OF ILLINOIS

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

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

The People appeal from the appellate court's judgment holding that 725 ILCS 5/112-A3(3), which defined the phrase "family or household members" for purposes of the aggravated domestic battery statute, is unconstitutional as applied to defendant.

ISSUE PRESENTED FOR REVIEW

A person commits the offense of domestic battery if he "knowingly without legal justification by any means: (1) Causes bodily harm to any family or household member; [or] (2) Makes physical contact of an insulting or provoking nature with any family or household member." 720 ILCS 5/12-3.2. As relevant here, the offense is aggravated domestic battery if the defendant, "in committing a domestic battery, knowingly causes great bodily harm." 720 ILCS 5/12-3.3. Section 112A-3 of the Code of Criminal Procedure defines "family or household members" to include "persons who have or have had a dating or engagement relationship." 725 ILCS 5/112A-3(3). By its terms, the statute applies to "anyone who has ever had a dating relationship with the victim or who has ever shared a common dwelling with the victim, no matter how long ago" — "the statute has no time limit." *People v. Wilson*, 214 Ill. 2d 394, 400 (2005).

At issue in this appeal is whether that definition is a reasonable exercise of the police power as applied to defendant.

STANDARD OF REVIEW

Where a statute is declared unconstitutional, this Court's review is de novo. *People v. Wilson*, 214 Ill. 2d 394, 399 (2005).

JURISDICTION

Jurisdiction lies under Supreme Court Rules 317 and 612(b), as a state statute was held invalid for the first time by the Appellate Court. The Appellate Court issued its opinion on May 18, 2016. On September 28, 2016, this Court allowed the People's appeal as of right.

STATUTES INVOLVED

720 ILCS 5/12-3.2 provides, in relevant part:

§ 12-3.2. Domestic battery.

> (a) A person commits domestic battery if he or she knowingly without legal justification by any means:
> (1) Causes bodily harm to any family or household member;
> (2) Makes physical contact of an insulting or provoking nature with any family or household member.

720 ILCS 5/12-3.3 provides, in relevant part:

> § 12-3.3. Aggravated domestic battery.
> (a) A person who, in committing a domestic battery, knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated domestic battery.

720 ILCS 5/12-0.1 (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 5/112-A3 (eff. July 1, 2011 to Jan. 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, 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 12-4.4a 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

Defendant was charged with two counts of attempted first degree murder, three counts of aggravated domestic battery, and two counts of aggravated battery for acts committed against his former girlfriend, Tina Carthron, in November 2011. C28-34.

State's case-in-chief

At trial, Carthron testified that she was fifty-one years old, RAA-35, and living with her daughter, Marie, AA59. She had known defendant for about twenty years, and they had dated for two years, AA36-37, about fifteen years earlier, AA55-56. She saw defendant several times in October 2011. AA58. In early October, she saw defendant outside of his new apartment. AA58-59. Later that month, when she saw defendant again, Carthron left some clothes at his apartment when she left his place to go to work. AA60. Carthron was not interested in rekindling their relationship; they remained "just friends." AA60-61.

On November 1, 2011, defendant called Carthron, and she went over to his residence, AA61, a single room apartment, *see* Peo. Exhs. 9 & 10 (depicting defendant's

room, furnished with bed and television and folding chair at foot of bed), where they spent the evening drinking together. Carthron brought a bottle of Jack Daniels, which she drank until she became "high." AA62. During the evening, defendant's current girlfriend, Laura Moore, called and Carthron became upset because defendant was talking to another woman while she was there; she told defendant that she thought it was disrespectful for him to do so. AA40; 57, 58, 63, 65. After the call, defendant and Carthron listened to music and watched TV, then defendant went to bed. AA65. Carthron continued drinking, then took off her clothes to get ready for bed. AA66. Although Carthron could not recall whether defendant explicitly told her she could sleep over that night, he "never had a problem with" Carthron sleeping over, and the reason she went over to defendant's apartment was "to spend the night." *Id*. Carthron spent the night at defendant's apartment and was still drunk when she awoke the next morning. AA66-67.

Around 7:00 a.m., they got into an argument about the phone call from Moore, and defendant choked her as she lay on the bed by placing his hands around the front of her neck. AA40-41. Carthron passed out, and when she regained consciousness, she saw defendant in the bathroom holding a knife in his hand. AA42. Defendant told Carthron to leave, so Carthron began to gather her clothes to get dressed. *Id*. As she grabbed her coat, she saw that her chest was bleeding and said, "oh, no, you didn't stab me." AA42-43. Defendant kept telling her to get out, and that he had "called the police on [her]," so Carthron donned her jeans and leather jacket and left, leaving her cell phone, underwear, and eyeglasses behind. AA43. Carthron took the bus to her daughter Suzette's home, where she told Suzette that defendant had stabbed her. AA44-46. When Suzette

unzipped Carthron's jacket, they noticed that she had been stabbed in the back as well as the chest. AA46. Suzette called 911 and Carthon was taken by ambulance to a hospital for treatment. AA47. Photographs of Carthron's injuries were introduced into evidence and published to the jury. AA49-53; Peo. Exhs. 1-8.

Carthron initially denied biting defendant, AA67-68, but later admitted that she did not remember whether she bit him because she was "kind of drunk," AA70. Carthron remembered defendant choking her, but did not remember him stabbing her. *Id*. Ultimately, Carthron agreed that she did not remember what was said that morning because she was intoxicated, and she never saw or felt defendant stab her. AA73. Only when she saw defendant with the knife and ordering her out of his home did she realize that she had been stabbed. *Id*.

On redirect, Carthron clarified that she and defendant had argued about Moore's phone call during the evening and again the following morning. AA87. She testified that she had spent the night at defendant's place before and that, when they saw each other, they often spent the night together. AA93. On the night of the offense, she shared the bed with defendant and they had sex. AA94.

Police officers testified to defendant's two prior domestic offenses against Laura Moore. In September 2010, when police responded to a domestic battery call, Moore reported that defendant had kicked her down the stairs and hit her in the eye. AA120-23. Both defendant and Moore were extremely intoxicated. AA126. Moore was admitted to the hospital for a left ankle fracture and a facial contusion. AA135. In February 2011, the police responded to another domestic call. AA141-42. Defendant and Moore had

been drinking while watching the Super Bowl; Moore told police that defendant became angry and began choking her. AA143-44.

Forensic evidence established that the major DNA profile from the handle and the blade of a knife recovered from defendant's apartment matched Carthron, while defendant could not be excluded from the minor profile. AA171-72.

Defense case

Officer Rapunzel Williams testified that, when she interviewed Carthron at the hospital on November 2, 2011, Carthron did not tell her that defendant had choked her until she passed out. AA187-88. Carthron told Williams that when she got up to leave defendant's apartment around 1:30 a.m., she saw that she was bleeding from her left side and that defendant was holding a knife. AA188-89. Williams also observed on defendant's chest an oval-shaped "red mark" that measured about two and one-half inches long. *Id*. On cross-examination, Officer Williams agreed that she had later spoken with Carthron at the police station and learned that Carthron "had been choked by the defendant." AA190. Williams also agreed that People's Exhibit 18 accurately depicted the mark she observed on defendant's torso. AA192.

Defendant testified that he was fifty-eight years old. AA194. In November 2011, he was in a relationship with Laura Moore, although they were separated at the time of this offense. AA195. Defendant described Carthron as his "ex." *Id*. He had met her twenty years earlier and, in November 2011, they were friends, AA196, and had not dated in fifteen years, AA197. In early October 2011, Carthron happened to walk by and defendant showed her his new apartment. AA198. In mid-October, Carthron dropped by and asked him to keep a bag of clothes at his apartment. AA199. Defendant took the bag

of clothes and walked Carthron to the bus stop. AA200. Carthron returned for the bag of clothes after work that evening. *Id*.

On November 1, Carthron called and asked defendant to buy her "a fifth of Jack Daniels, a pack of Newports, and a juice." AA202. Defendant purchased the items Carthron requested, as well as a bottle of Boone's Farm wine for himself. *Id*. Defendant invited Carthron to come over and, upon arriving that evening, Carthron asked whether she could have a cocktail before she left. AA204-05. Defendant went to the kitchen to retrieve a glass of ice and some lime juice and invited Carthron to sit and have a cocktail; he drank his wine and a glass of beer. AA205-06. The two talked and listened to music until around 11:00 p.m., when defendant turned off the music out of respect for his neighbors. AA206.

After turning off the music, defendant received a phone call from Moore. *Id*. He took the call in the bathroom and told Moore that he would be over after he took a short nap. *Id*. When defendant emerged from the bathroom, he gave Carthron the remote control and a stack of movies and told her that he would walk her home after he took a nap. AA207. Defendant testified that he awoke around 7:00 the following morning to discover Carthron laying on top of him and biting his "lower chest." AA208. Defendant repeatedly told her to "let [him] go," as he tried to push her off of him. AA209. In doing so, defendant allowed that he may have touched Carthron's neck. AA210. He also noted that he kept his fingernails "fairly long," in that he "let them grow until they break on their own." *Id*.[1] Carthron did not release her bite, and she lay on top of defendant's right arm and leg. AA211. Defendant looked around for something to hit her with, but he

[1] The court noted for the record that "defendant's fingernails are about roughly a quarter inch above his fingertip. Some are much longer than that." AA210.

found nothing. AA212. He then reached for the knife he kept next to his bed and "touched" her back with it so she would release her bite. AA214-16. Defendant then rolled her off the bed, "jumped up," and turned on the light. AA214-15. Defendant admitted it was possible that the knife also made contact with Carthron's body while he was pushing her off the bed. AA215. Defendant went to the bathroom and treated his bite mark with a wet towel and witch hazel. AA217. Defendant acknowledged that People's Exhibit 18 accurately depicted "the mark where [Carthron] bit [him]." AA218. Defense Exhibit 1 was a photograph of the same mark, taken three months later. AA219.

After treating the bite mark, defendant returned to the bedroom to find Carthron sitting on the edge of the bed in her underwear, drinking Jack Daniels from the bottle. AA220-22. He observed a cut on her back and said, "baby, I did cut you a little bit," as he used his towel to dab the cut. AA221. He then threw Carthron's clothes on the bed and told her to get out before he called the police. AA222-23. Defendant returned to the bathroom, and when he came out, Carthron was "dressed and standing by the door." AA223. Defendant then escorted her out of the building. *Id*. Defendant never sought medical treatment for the bite mark. AA224.

On cross-examination, defendant agreed that, at the time of the offense, he was about six feet tall and weighed around 165 pounds, while Carthron was about five feet, four inches and weighed about 125 pounds. AA224-25. Defendant admitted that he had known Carthron for over twenty years and that they previously had a dating relationship. AA225. Defendant agreed that he and Carthron "have drank together" and spent the night together before, but denied that he and Carthron had sex on November 1, 2011. AA226-27. Defendant agreed that Carthron's teeth never broke his flesh, AA237, and

that he "wasn't bleeding," AA258; *see also* Peo. Exh 18 & Def. Exh. 1 (depicting defendant's bite mark). Defendant denied having argued with Carthron about the phone call, AA239, and denied having told the police that he had argued with her, AA246. Defendant agreed that Carthron never attacked him with a knife, AA246, and denied telling the 911 operator that she had done so, AA247. Nor did he tell the 911 operator that she had bit him. AA247. And defendant denied telling the 911 operator that he had stabbed Carthron with a knife, AA247-48, or that he thought that he had hurt her badly, AA262.

State's case in rebuttal, closing argument, and guilty verdicts

On rebuttal, a call taker in Chicago's Office of Emergency Management Communications testified that defendant called 911 at 8:02 a.m. on November 2, 2011 and stated that his girlfriend had attacked him with a knife. BB9. He said that he "took the knife from her and stabbed her," and that he thought "she may be hurt bad." BB9-10.

Additionally, Officer Steven Scott testified that when he spoke with defendant on November 2, 2011, defendant told him that he had "a verbal altercation with Tina Carthron about his girlfriend," and that "after that altercation became physical, he went into the bathroom to get a patch and he patched her back." BB13. Defendant told the officers that he was "defending his girl's honor." *Id*.

In closing argument, defense counsel argued that defendant was acting in self-defense after Carthron bit him. BB41. The defense theorized that the scratch marks on Carthron's neck were consistent with "him having long fingernails that scratched her when he was trying to push her off," and urged the jury to find defendant's testimony more credible than Carthron's because he was not intoxicated and because he reported

the incident to police. BB43-44. Counsel described their relationship as "drinking buddies with benefits," BB56, and argued that Carthron was disappointed because defendant did not want her to live with him, BB40.

Defendant was convicted of two counts of aggravated domestic battery, C191, 194, and one count of aggravated battery, C195. At sentencing, the assistant state's attorney read Carthron's victim impact statement, in which she stated:

> To have been in a relationship thinking that this person cared for me and to have him dismiss me and try to cause me to leave this world is something I continue to try to understand. The only thing I ask myself is why. Why did I allow this to happen. Why did I stay. Why did I care for him. Why did you do this to me.

EE-8. On November 25, 2013, the court sentenced defendant to concurrent terms of five years on each of the Class 2 aggravated domestic battery counts and three years on the Class 3 aggravated battery count. C296.

The appellate court holds section 112A-3 unconstitutional as applied

On appeal, defendant argued for the first time that section 112A-3(3) constituted an abuse of the state's police power as applied to him because he and the victim had not dated for fifteen years. The appellate court agreed, finding first that defendant and the victim did not have a current dating relationship. *Gray*, 2016 IL App (1st) 134012, ¶ 40 ("In this Tinder[2] age of hook-ups and one-night stands, adults both young and old can readily recognize that sexual intercourse does not itself always relate to a dating relationship or any form of serious romantic attachment"; "no other facts in this case would support a determination that defendant and Carthron were presently involved in a

[2] Tinder is a dating app; the user is presented with photographs of potential partners and swipes right for potentially good matches and left "to move on to the next one." https://en.wikipedia.org/wiki/Tinder_(app) (last visited Jan. 10, 2017).

dating relationship"). And although defendant and Carthron had a past dating relationship, the appellate court concluded that treating Carthron as defendant's family or household member was not reasonably related to a public interest, and therefore section 112A-3 was unconstitutional as applied to him. *Id*. at ¶ 47.

ARGUMENT

I. Defendant Failed to Carry His Burden of Clearly Establishing that Section 112A-3(3) Is Unconstitutional as Applied to Him.

Section 112A-3 defines "family or household members" to include "persons who … have had a dating . . . relationship." 725 ILCS 5/112A-3(3).[3] By its terms, it applies to "anyone who has ever had a dating relationship with the victim . . . , no matter how long ago" — "the statute has no time limit." *People v. Wilson*, 214 Ill. 2d 394, 400 (2005). It is undisputed that defendant and Carthron dated for over two years and that their dating relationship ended approximately fifteen years before defendant's present offense. Thus, under the plain language of the statute, as someone who "had a dating relationship" with defendant, Carthron satisfied the statutory definition of a "family or household member," and defendant was properly convicted of aggravated domestic battery.

[3] The parties and the court below looked to the wrong statutory provision. Prior to July 1, 2011, 725 ILCS 5/112A-3(3) provided the definition of "family or household members" as that term appeared in the domestic battery statute. *See* 720 ILCS 5/12-3.2(a)(1) (eff. Aug. 11, 2009 to June 30, 2011) ("A person commits domestic battery if he intentionally or knowingly without legal justification by any means: (1) Causes bodily harm to any family or household member as defined in subsection (3) of Section 112A-3 of the Code of Criminal Procedure of 1963, as amended"). But effective July 1, 2011, Public Act 96-1551 amended the Criminal Code to add a new section 720 ILCS 5/12-0.1, which defines "family or household members" for purposes of Article 12. Because the definitions are the same, and for ease of reference, this brief refers to section 112A-3(3), rather than section 12-0.1.

There is no merit to defendant's contention, raised for the first time in the appellate court below, that section 112A-3's definition of "family or household members" constitutes an abuse of the state's police power merely because he and the victim had not dated in fifteen years. "All statutes are presumed constitutional, and the party challenging the constitutionality of a statute has the burden of clearly establishing that it violates the constitution." *People v. Madrigal*, 241 Ill. 2d 463, 466 (2011). Under its police power, "the legislature has wide discretion to fashion penalties for criminal offenses, but this discretion is limited by the constitutional guarantee of substantive due process, which provides that a person may not be deprived of liberty without due process of law." *Id*. When, as here, "the challenged statute does not affect a fundamental constitutional right, the appropriate test for determining its constitutionality is the highly deferential rational basis test," under which a statute will be upheld if it "bears a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective." *Id*. (quotations and citations omitted).

"The rational basis test is highly deferential; its focus is not on the wisdom of the statute." *People v. Johnson*, 225 Ill. 2d 573, 585 (2007) (citing *Vill. of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 125 (2004)). The question is not "whether the legislature has chosen the best or most effective means of resolving the problems addressed by the statute, but only . . . whether the statute is reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety, and general welfare." *Wilson*, 214 Ill. 2d at 421-22. "The statute will be upheld if a conceivable basis exists for finding it rationally related to the identified legitimate public interest."

People v. Boeckmann, 238 Ill. 2d 1, 8 (2010). To resolve this question, the Court must first ascertain the statute's purpose, then determine whether the challenged provision "reasonably implement[s] that purpose." *Madrigal*, 241 Ill. 2d at 466-67.

A. The appellate court construed the statute's purpose too narrowly.

The purpose inquiry is readily answered, for this Court has already found that "[t]he legislature's obvious concern in enacting the domestic battery statute was in curbing the serious problem of domestic violence." *Wilson*, 214 Ill. 2d at 402-03. In finding merely that "the State has an interest in preventing abuse between persons who share an intimate relationship," *Gray*, 2016 IL App (1st) 134012, ¶ 47, the appellate court overlooked the legislature's broad purpose and wrongly concluded that the legislature sought to prevent such violence only in presently romantically intimate relationships. That is, the appellate court incorrectly concluded that there must be some present romantic intimacy between persons who had a past dating relationship. *Id*. ("record here does not suggest that defendant and Carthron'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.").

The legislature's broad purpose is evident from the statutory text. By first adopting the definition of "family or household members" from the Domestic Violence Act, and later incorporating this same definition into the Criminal Code, the General Assembly intended that the domestic battery statute be liberally construed and applied broadly to persons who currently share or who have shared a familiar or intimate relationship. Section 112A-3(3) defines "family or household members" to 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 subsection (e) of Section 12-4.4a of the Criminal Code of 2012. 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.

725 ILCS 5/112A-3(3). Section 112A-1 provides that Article 112A "shall be interpreted in accordance with the purposes and rules of construction set forth in Section 102 of the Illinois Domestic Violence Act of 1986." 725 ILCS 5/112A-1. In turn, Section 102 of the Domestic Violence Act provides that the "Act shall be liberally construed and applied to promote its underlying purposes," which include "recogniz[ing] domestic violence as a serious crime"; "[r]ecogniz[ing] that the legal system has ineffectively dealt with family violence in the past, allowing abusers to escape effective prosecution or financial liability, and has not adequately acknowledged the criminal nature of domestic violence; that, although many laws have changed, in practice there is still widespread failure to appropriately protect and assist victims"; and "expand[ing] the civil and criminal remedies for victims of domestic violence." 750 ILCS 60/102. Thus, by first adopting this definition by reference and later incorporating it into the Criminal Code, the General Assembly displayed its intent that the definition of "family or household members" be liberally construed to promote its underlying purposes.

The appellate court's narrow view of the statute's purpose — requiring some present romantic intimacy between people who had a former dating relationship — cannot be squared with the statutory text, whose plain terms require no such present romantic intimacy. And had the legislature's purpose been limited to deterring violence

against persons with whom the offender shares a current romantic intimacy, it would not have included in its definition of "family or household members" the many broad categories of persons who (presumably) were never romantically intimate, much less currently so. "Parents, children, stepchildren, and other persons related by blood or by present or prior marriage" do not share a romantically intimate relationship. "Persons who share or formerly shared a common dwelling" includes mere roommates or housemates who need not share a romantically intimate relationship. Nor do "persons with disabilities and their personal assistants" or home "caregivers" for the elderly presumably share a romantically intimate relationship. And "former spouses" can hardly be expected to maintain romantic intimacy after a divorce. The broad scope of the definition of "family or household members" evinces the General Assembly's intent to cast a wide net to protect a large number of persons from domestic abuse, irrespective of any present romantic intimacy. *See People v. Whitfield*, 147 Ill. App. 3d 675, 679 (4th Dist. 1986) ("intent of the legislature in adopting the Domestic Violence Act was to keep people from harassing, striking, and interfering with the personal liberty of people with whom they have had intimate relationships"). Instead, the common thread among all of these categories of relationships is a resulting intimacy. In each of these categories, the persons share or have shared a relationship — and, as discussed, it need not have been a romantically intimate relationship — in which they have acquired a level of intimacy with the other person that may render them susceptible to abuse.

This construction sits comfortably with the only stated limitation on the statute's scope. Although the statute provides that "a casual acquaintanceship" and "ordinary fraternization between 2 individuals in business or social contexts" do not constitute a

present "dating relationship," 725 ILCS 5/112A-3(3), once an intimate relationship has been established, the statute applies to it regardless of the passage of time. *Wilson*, 214 Ill. 2d at 400. Defendant's argument before the appellate court — "that the statute's lack of a timeframe for prior dating relationships undermines the legislature's decision to exclude casual acquaintances and ordinary fraternization from the definition of dating relationships," *Gray*, 2016 IL App (1st) 134012, ¶ 44 — misses the mark. The appellate court correctly rejected defendant's contention that "there must be a certain point when a past dating relationship or prior cohabitation becomes a casual acquaintanceship or ordinary fraternization." *Id*. at ¶ 46. It is undisputed that defendant and Carthron dated for two years. *See* AA36-37; *see also* AA195 (defendant describing Carthron as his "ex"). At the time of their dating relationship, theirs was not a mere "casual acquaintanceship" or "ordinary fraternization between 2 individuals in business or social contexts." Thus, it qualified as a dating relationship under section 112A-3. In other words, the question of whether two individuals "have had" a dating relationship is gauged by the nature of their relationship at the time of the relationship, not at the time of the offense. *See People v. Irvine*, 379 Ill. App. 3d 116, 125 (1st Dist. 2008) (section 112A-3(3) satisfied where defendant and victim had dated for six weeks in past and continued to have sexual intercourse up to and including date of offense). If the past relationship was a dating relationship, and not merely an acquaintanceship or ordinary fraternization, that is enough. Stated another way, the legislature's concern that mere acquaintances and associates be excluded from the definition of "family or household members" is satisfied here because defendant's and Carthron's past relationship was romantically intimate, and the mere passage of time cannot change that fact.

In light of this precedent and the statutory definition of "family or household members," it is plain that the appellate court's definition of the state interest, protecting only those victims who currently share a romantically intimate relationship with the offender, was error.

B. The statutory definition of "family or household members" passes the rational basis test.

The appellate court's cramped definition of the state interest led it to incorrectly conclude, in turn, that treating Carthron as defendant's family or household member is not reasonably related to that interest. With the purpose of the domestic battery statute properly understood as "curbing the serious problem of domestic violence," *Wilson*, 214 Ill. 2d at 402-03, and "to keep people from. . . striking . . . people with whom they have had intimate relationships," *Whitfield*, 147 Ill. App. 3d at 679, it is plain that section 112A-3(3) satisfies the deferential rational basis test because it is "reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety, and general welfare," *Wilson*, 214 Ill. 2d at 422. "The legislature's judgments in drafting a statute are not subject to judicial fact finding and 'may be based on rational speculation unsupported by evidence or empirical data.'" *Boeckmann*, 238 Ill. 2d at 7 (quoting *Arangold v. Zehnder*, 204 Ill. 2d 142, 147 (2003)). Here, the General Assembly may have believed that persons who have had a past dating relationship are more likely to batter a former partner even after their dating relationship ends; the legislature's definition of "family or household members" recognizes that such prior relationships engender a degree of familiarity that may render a victim more vulnerable to abuse at the hands of a former romantic partner. It also reflects the fact, conceded by the defendant in

Wilson, that "the threat of domestic violence does not end when the relationship ends." *Id*. at 403.

Although such supporting evidence is not required, *Boeckmann*, 238 Ill. 2d at 7, there is a strong statistical basis for including formerly intimate relationships in the definition of "family or household members." According to a 2010 National Intimate Partner and Sexual Violence Survey, one in three women nationally has experienced physical violence by a current *or former* intimate partner. Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention (2011) at 37-38; 43-44 (available at www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf). A ten-year aggregate study published by the U.S. Department of Justice revealed that "[c]urrent or former boyfriends or girlfriends (7.8%) committed a greater percentage of all violent victimizations than spouses (4.7%) and ex-spouses (2.0%)." Truman & Morgan, Bureau of Justice Statistics, NCJ 244697, Nonfatal Domestic Violence, 2003-2012 (2014), at 3. Nationally, "[m]ost domestic violence was committed by the victim's current or former boyfriend or girlfriend." *Id*. at 7. And "[m]ore than half of American women who are murdered are killed by a partner or ex-partner." Kathryn E. Litchman, Comment, *Punishing the Protectors: The Illinois Domestic Violence Act Remedy for Victims of Domestic Violence Against Police Misconduct*, 38 Loy. U. Chi. L.J. 765, 777 (2007); *see also, e.g., People v. Leger*, 149 Ill. 2d 355 (1992) (affirming defendant's convictions for killing wife and ex-wife); *Huguely v. Commonwealth*, 754 S.E.2d 557 (Va. App. 2014) (affirming Huguely's

conviction for murdering his ex-girlfriend and fellow University of Virginia lacrosse player, Yeardley Love).

Domestic crime is equally prevalent in Illinois. In 2015, 62,547 domestic battery offenses and 3,727 aggravated domestic battery offenses were reported. Illinois State Police, Crime in Illinois 2015, p. 248 (available at http://www.isp.state.il.us/docs/cii/cii15/cii15_SectionII_Pg245_to_250.pdf). And of the domestic offenses committed in Illinois in 2015, 8.9% were committed by ex-dating partners. *Id*. at 249. These statistics amply support the General Assembly's conclusion that men and women continue to commit violent acts against their former dating partners even after the dating relationship ends.

Even if an as-applied challenge could succeed under some circumstances, those circumstances are not present here. Defendant's as-applied challenge might have some force if, for example, he had stabbed someone at night in a dark alley and only later came to learn that by coincidence the victim was his former girlfriend. In that circumstance, their former relationship would have played no role in the defendant's crime or the victim's vulnerability to it. And it might be a closer question if, after ending his dating relationship with Carthron, defendant stabbed Carthron upon seeing her again for the first time in fifteen years. But here, defendant and Carthron had known each other for twenty years and even though their two-year dating relationship had ended fifteen years earlier, they continued to see each other. In fact, Carthron testified that she saw defendant no fewer than three times in the month preceding defendant's attack upon her. AA58-60. Although they were not presently dating, their relationship remained intimate. AA93. On the day of the stabbing, Carthron called defendant and asked him to pick up some

items at the store; he purchased the requested items, then they spent the evening together drinking and talking; Carthron testified that she and defendant had sex that night and shared defendant's bed, AA94. The argument that led to the stabbing resulted after defendant accepted a phone call from his current girlfriend; Carthron found it "disrespectful," and she was upset because defendant was talking to another woman while she was there. AA65. And defendant testified that although he considered Moore his common law wife, the two were separated at the time of this offense; in his 911 call, he described Carthron as his girlfriend. This evidence establishes the reasonableness of treating defendant and Carthron as "family or household members" for purposes of the domestic battery statute.

Finally, it bears mentioning that unlike the identity theft statute at issue in *Madrigal* (and the cases cited therein), *see* 241 Ill. 2d at 467-68, the aggravated domestic battery statute captures no wholly innocent conduct, for every act of aggravated domestic battery is also an aggravated battery. Aggravated battery with a deadly weapon is punished as a Class 3 felony, 720 ILCS 5/12-3.05(h), while aggravated domestic battery is a Class 2 felony, 720 ILCS 5/12-3.3(b). This difference in punishment is consistent with the legislature's "wide discretion to fashion penalties for criminal offenses," *Madrigal*, 241 Ill. 2d at 466, and defendant failed to clearly demonstrate that the legislature's decision to treat him as Carthron's family or household member is an unreasonable exercise of its police power.

II. In the Alternative, This Court Should Reduce Defendant's Aggravated Domestic Battery Convictions to Aggravated Battery.

Alternatively, because aggravated battery is a lesser included offense of the charged crime of aggravated domestic battery, the appellate court erred in vacating

defendant's aggravated domestic battery convictions outright, rather than reducing them to aggravated battery. "[A] defendant may be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument, and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense." *People v. Clark*, 2016 IL 118845, ¶ 30. Under Supreme Court Rule 615(b)(3), this Court may reduce the degree of defendant's convictions, even if the lesser offenses were not charged. *People v. Kennebrew*, 2013 IL 113998, ¶ 25. Here, under the applicable charging instrument approach, *see id*. at 53, aggravated battery is a lesser included offense of aggravated domestic battery.

Defendant was charged with and convicted of aggravated domestic battery under sections 12-3.3(a) (for stabbing Carthron, causing great bodily harm) and 12-3.3 (a-5) (for strangling Carthron), which provide:

> § 12-3.3. Aggravated domestic battery.
>
> (a) A person who, in committing a domestic battery, knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated domestic battery.
> (a-5) A person who, in committing a domestic battery, strangles another individual commits aggravated domestic battery. For the purposes of this subsection (a-5), "strangle" means intentionally impeding the normal breathing or circulation of the blood of an individual by applying pressure on the throat or neck of that individual or by blocking the nose or mouth of that individual.

720 ILCS 5/12-3.05 defines aggravated battery, and provides in relevant part:

> § 12-3.05. Aggravated Battery.
>
> (a) Offense based on injury. A person commits aggravated battery when, in committing a battery, other than by the discharge of a firearm, he or she knowingly does any of the following:
>
> (1) Causes great bodily harm or permanent disability or disfigurement [or]
> . . . .

(5) Strangles another individual.

A comparison of the elements reveals that aggravated battery is a lesser included offense of the charged aggravated domestic battery offenses. Indeed, the only difference is that the crime is aggravated *domestic* battery if committed against a "family or household member." Thus, if this Court holds that the definition of "family or household member" is unconstitutional as applied to defendant, it should reduce his convictions to aggravated battery. *See Kennebrew*, 2013 IL 113998, ¶ 24 (defendant has no right to acquittal where evidence, though insufficient to establish greater crime, is sufficient to establish lesser offense).

III. This Court Should Remand This Case so the Appellate Court May Consider the Remaining Unaddressed Arguments.

If this Court holds that defendant's aggravated domestic battery convictions were proper, so too was the admission of evidence of defendant's prior domestic offenses against Moore. *See* 725 ILCS 5/115-7.4 (in "criminal prosecution in which the defendant is accused of an offense of domestic violence . . . evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant."). As the appellate court noted, the trial court admitted evidence of defendant's prior bad acts against Moore to prove defendant's motive, modus operandi, state of mind and intent, and "not just his propensity to commit domestic violence." *Gray*, 2016 IL App (1st) 134012, ¶ 49. The court was concerned, however, that the trial court "may or may not have determined that prejudice outweighed the probative value of such evidence if it was not admissible as evidence of propensity, particularly considering that defendant has now been acquitted of attempted first-degree murder and that defendant's identity is not at issue." *Id*. The court

also believed that "the jury may have found it difficult to consider defendant's other crimes as evidence of his propensity to commit only aggravated domestic battery, rather than aggravated battery," and reversed and remanded for a new trial on the aggravated battery count. *Id*. at ¶ 55. The appellate court reasoned that upon retrial, the trial court could determine "whether the probative value of the other crimes evidence still outweighs the potential prejudice now that the domestic charges are no longer at issue." *Id*. at ¶ 55. But if the appellate court erred in vacating defendant's aggravated domestic battery convictions, for which this evidence was plainly admissible under section 115-7.4, these concerns were unfounded. Stated another way, the appellate court did not hold that the trial court abused its discretion in admitting the other crimes evidence, but rather that it might have ruled differently in the absence of the domestic charges.

Finally, in light of its determination that a new trial was warranted on defendant's aggravated battery charge, the appellate court declined to address defendant's contentions that the trial court improperly admitted Moore's hearsay statements through the testimony of police officers, that the prosecutor made improper closing argument, or that defendant's aggravated battery conviction violates the one-act, one-crime doctrine. *Gray*, 2016 IL App (1st) 134012, ¶ 49. Accordingly, this Court should remand the case to the appellate court for consideration of respondent's remaining appellate issues.

CONCLUSION

This Court should reverse the judgment of the appellate court and remand to the appellate court for consideration of defendant's remaining issues.

January 11, 2017

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the 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 twenty-four pages.

s/Katherine M. Doersch
Assistant Attorney General

APPENDIX

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People's Exhibits 9 & 10 (photographs of defendant's apartment)

People's Exhibit 11 (stipulation)

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People's Exhibit 13 (stipulation)

People's Exhibit 14 (arrest report for defendant)

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2016 IL App (1st) 134012
Appellate Court of Illinois,
First District, Third Division.

The PEOPLE of the State of Illinois, Plaintiff–Appellee,
v.
Matthew GRAY, Defendant–Appellant.

No. 1–13–4012.
|
May 18, 2016.

Synopsis

Background: Defendant was convicted in the Circuit Court of Cook County, No. 11 CR 19547, Nicholas Ford, J., of aggravated battery and two counts of aggravated domestic battery. Defendant appealed.

Holdings: The Appellate Court, Lavin, J., held that:

[1] evidence supported finding that defendant was not involved in a dating relationship with the victim, and

[2] domestic battery statute, which defined family and household members as including persons who have or have had a dating or engagement relationship, was unconstitutional as applied to defendant.

Vacated in part; reversed and remanded in part.

Attorneys and Law Firms

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***1133** Anita M. Alvarez, States' Attorney, Chicago (Alan J. Spellberg, Michelle Katz, Janet C. Mahoney, and Timothy Richard, Assistant State's Attorneys, of counsel), for the People.

OPINION

Justice LAVIN delivered the judgment of the court, with opinion.

****496** ¶ 1 Following a jury trial, defendant Matthew Gray was found guilty of aggravated battery and two counts of aggravated domestic battery. On appeal, he asserts that we must vacate his aggravated domestic battery convictions because his romantic relationship with the victim ended 15 years before the offense. Specifically, he asserts that the statute defining "family or household members" (725 ILCS 5/112A–3(3) (West 2010)) is unconstitutional as applied to his relationship with the victim. Defendant also challenges (1) the sufficiency of the evidence; (2) the admission of the victim's out-of-court statements; (3) the State's closing argument; and (4) the imposition of multiple convictions in violation of the one-act, one-crime doctrine. We agree that defendant's aggravated domestic battery convictions are unconstitutional as applied to these facts, and reverse and remand for a new trial on aggravated battery.

¶ 2 I. BACKGROUND

¶ 3 A. Before Trial

¶ 4 On the night of November 1, 2011, defendant and a former paramour, Tina Carthron, had an alcohol-fueled encounter. By morning, Carthron had knife wounds to her chest and back, and defendant had a bite wound to his chest. Carthron claimed that defendant, without provocation, stabbed her and choked her. In contrast, defendant acknowledged cutting Carthron's back but claimed it was done in self-defense.

¶ 5 The State charged defendant not only with aggravated battery and attempted first-degree murder, but with aggravated domestic battery as well, notwithstanding that the dating relationship between defendant and Carthron had ended 15 years before. Specifically, each aggravated domestic battery count alleged that Carthron was a family or household member as defined in section 112A–3(3) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/112A–3(3) (West 2010)). Under section 112A–3(3), "family or household members" include

"persons who have *or have had* a dating or engagement relationship." (Emphasis added.) *Id.*

¶ 6 The State also moved to admit proof of other crimes against defendant's girlfriend Laura Moore, as evidence of his motive, state of mind and intent, as well as his propensity to commit domestic violence. Additionally, the State filed a motion *in limine* to present Moore's out-of-court statements to police officers in lieu of her live testimony regarding the prior incidents of domestic violence. Specifically, the State argued that the prior incidents were admissible under the excited utterance exception to the rule against hearsay. Defendant argued, however, that the prior incidents involving Moore were dissimilar and that the prejudice resulting from the admission of such evidence would outweigh its probative value. Furthermore, defendant argued that admitting Moore's out-of-court testimonial statements to police officers would violate his right to confront the witnesses against him. The trial court ultimately ruled that the State could, through the testimony of police officers, present evidence of Moore's out-of-court statements regarding past incidents of violence ****497 *1134** for the reasons proffered by the State. [1]

¶ 7 B. Trial

¶ 8 At trial, Carthron testified that approximately 15 years earlier, she and defendant dated seriously for 2 years. In addition, they had known each other for 20 years because their families were friends. In October 2011, she saw defendant a few times. Later that month, she left some clothes at his apartment at 6013 South State Street because she was going straight from there to work. Carthron testified that she and defendant were just friends and she did not want to rekindle a romantic relationship with him. She also denied asking if she could move in with him.

¶ 9 On the evening of November 1, 2011, Carthron and defendant purchased whiskey and went to his apartment, where they both drank the whiskey as well as beer. Carthron testified that she became drunk after consuming a pint of whiskey and 40 ounces of beer. At some point, defendant received a phone call from Moore, his girlfriend, and Carthron became upset. She and defendant argued but subsequently resumed listening to music and watching television. She also acknowledged testifying at a preliminary hearing, however, that she and defendant did not have an argument. Defendant went to bed but Carthron kept drinking. Eventually, Carthron removed her clothes to get ready for bed. This was not the first time she had spent the night there.

¶ 10 When Carthron awoke in the morning, apparently at about 7 a.m., she was still drunk. She and defendant argued about the phone call from Moore because Carthron thought it was disrespectful for defendant to talk to another woman while Carthron was there. Carthron testified that while she did not get physical with defendant, he choked her. Although Carthron first testified that she did not bite defendant, she later testified that she did not remember whether she bit him. In addition, Carthron testified that she passed out from being choked and regained consciousness to see defendant standing in the bathroom with a knife in his hand. Defendant then told Carthron to leave because he had called the police. As she grabbed her coat, she saw that the left side of her chest was bleeding and said, "oh, no, you didn't stab me." She also asked defendant why he called the police when he had stabbed her. With that said, Carthron did not see, feel or remember defendant stabbing her. She denied that he wiped blood from her back.

¶ 11 Carthron further testified that she left defendant's apartment with her pants, jacket, shoes and bottle, apparently referring to the bottle of whiskey, but left her cell phone, eyeglasses and underclothes behind. She saw that the police were outside defendant's apartment building but she did not approach them because she did not know what defendant had told them. Furthermore, she did not know the extent of her injuries at that time. As a result, she focused on seeking help from her daughter Suzette, who lived at 76th and South Shore. Carthron did not ask anyone on the two buses she took to get there to call 911.

¶ 12 Carthron experienced pain as she slowly climbed the stairs to Suzette's third-floor apartment. Once inside, Carthron sat down and told Suzette that defendant stabbed her. Suzette unzipped Carthron's coat and "blood start [*sic*] ****498 *1135** shooting out" of her chest. Carthron's back hurt too. Upon removing Carthron's jacket, Suzette saw that Carthron had also been stabbed in the back. Suzette then called 911. We note that Suzette's testimony corroborated Carthron's testimony regarding her arrival at Suzette's apartment.

¶ 13 At the hospital, Carthron spoke to Detective Rapunzel Williams. Carthron did not remember telling the detective that Carthron saw defendant with a knife at 1:30 a.m. or that defendant woke her by choking her. In addition, she did not say she passed out before being stabbed. After Carthron was discharged from the hospital, the police took her to retrieve her eyeglasses from defendant's home and then took her to the police station.

¶ 14 Before other crimes evidence was presented to the jury, defendant again argued that he and Carthron lacked the domestic relationship necessary to admit evidence regarding Moore. The trial court disagreed: "I think circumstantially that they had intercourse earlier that evening and somebody had spent the night at somebody else's house. All these things in my view establishes that there was a domestic relationship." The court then admonished the jury that evidence "received on the issues of the defendant's *modus operandi,* intent, motive, state of mind, and propensity to commit the offense of domestic battery" could only be considered for those limited purposes.

¶ 15 Officer Terry Murray testified that about 1 p.m. on September 2, 2010, he and his partner Officer Kim Williams responded to a domestic battery call at 5750 South Lafayette, where he saw defendant and his mother on the porch. When Moore eventually came outside and approached the two officers, she was agitated and holding her leg but was not bleeding. About 20 minutes had passed since the incident occurred. She said that defendant, her boyfriend, had kicked her down the stairs and hit her in the left eye. Officer Murray observed a minor bruise under her eye and a cut lip. In addition, both defendant and Moore were highly intoxicated. Officer Murray also learned that they had fought about money. No one asked Officer Murray for help but Moore did go to the hospital, for what seemed to be minor injuries. Based on information Moore gave Officer Murray in response to his questions, he arrested defendant. Moore did not, however, want to sign a complaint. The trial court then denied defendant's renewed motion to bar evidence of Moore's out-of-court testimonial statements.

¶ 16 Dr. Bhavana Vaidya testified that on September 3, 2010, she treated Moore for a left ankle fracture, a facial contusion and alcohol abuse. During their conversation, Moore said she was injured when she was hit and pushed down the stairs. [2]

¶ 17 Officer Ochoa testified that in February 2011, he and Officer Gonzalez responded to a domestic disturbance call at 7425 South Harvard Avenue, where they encountered Moore and defendant. Both appeared to be intoxicated and Moore's neck was red. In addition, Moore said that she and defendant were watching the Super Bowl when he became irate, called her names and grabbed her neck. This occurred 5 to 10 minutes before the officers arrived. Although Officer Ochoa first testified that Moore immediately made those statements upon his arrival, he also testified that she provided that information in response to his question regarding what had happened. Moore declined to have an ambulance called. Following Officer ****499 *1136** Ochoa's testimony, the trial court again overruled defendant's renewed objection to the admission of such testimony.

¶ 18 After the State rested, defendant called Detective Williams, who testified that she interviewed Carthron at the hospital. At that time, Carthron did not say defendant woke her up by choking her or that he choked her until she passed out. Carthron did say, however, that she was getting ready to leave defendant's apartment at about 1:30 a.m. when she saw that she was bleeding from her left side and that defendant was holding a knife. On the same day, Detective Williams observed that defendant had an oval-shaped red mark on his chest. Detective Williams spoke to Carthron again at the police station, following her discharge from the hospital. Carthron then said that defendant choked her.

¶ 19 Defendant testified on his own behalf that in early October 2011, he was standing in front of his building when Carthron passed by and learned that he had just moved in. Defendant had not dated her in 15 years and they were just friends. Later that month, Carthron had defendant keep a bag of clothing for her while she was at work. After work, she returned to collect her things and brought defendant wine. Carthron also told defendant that "she had been put out by her daughter" and asked to move into his apartment but he said no.

¶ 20 On the afternoon of November 1, 2011, defendant went to the store and purchased whiskey, cigarettes and juice for Carthron, at her request. Defendant bought wine for himself. At about 7 p.m., defendant called Carthron and told her to come over because she sounded depressed. He also told her how much she owed him for the items he

purchased for her. When Carthron eventually came over for her items, she asked if she could have a cocktail.

¶ 21 Defendant and Carthron began drinking, listening to music and talking. At about 11 p.m., Moore called and defendant told her he would come over after a short nap. Defendant had dated Moore for 15 years and considered her to be his common law wife. He then gave Carthron the remote control and said he would walk her home after a short nap. When he went to sleep, she was fully dressed, sitting in a chair and having a drink. Defendant denied that an argument or sexual conduct ensued.

¶ 22 At about 7 a.m., defendant awoke to Carthron biting his chest. Carthron, who was five feet, four inches tall, also had her arm was around his waist and her leg on top of him. When defendant touched her head, she bit him harder. He yelled and told her to let him go but she bit him harder still. Defendant, who was 6 feet tall, tried to push her off but she would not let go. Furthermore, defendant testified that he kept his fingernails long and may have pushed Carthron's neck but he never put his hands around it.

¶ 23 Defendant did not want to hurt Carthron, but after telling her 10 to 20 times to let go, he looked for something to hit her with. The only item near the bed was a knife, which he kept for security. Defendant added that he kept several knives in his home, including a knife with a protective sheath over it so he could carry it with him. After he touched Carthron's back with the knife, she continued biting him so he did it again, this time cutting her. Defendant testified that while he touched her, he did not stab her. Upon being touched a second time, Carthron released her hold on him. He then pushed her off the bed. Defendant testified it was possible that the knife made additional contact with her chest when he pushed her ****500 *1137** but he did not know at that time that her chest was bleeding.

¶ 24 Defendant went to the bathroom and saw the bite mark, which was not bleeding. After applying witch hazel to his wound, defendant returned to the bedroom where Carthron was sitting in her underwear and drinking whiskey. Defendant dabbed her back with a towel and told her he had cut her. She got up and refused to speak. After finding her clothes, defendant told her to leave before he called the police. He escorted her out of the building and called 911 after she left. Defendant also testified, however, that an ambulance was already outside his apartment when Carthron left. Furthermore, defendant denied telling a 911 operator that defendant's girlfriend had attacked him with a knife, that she bit him or that he stabbed her. He similarly did not remember telling the operator that Carthron may be badly hurt.

¶ 25 That day, defendant spoke to Detective Williams and Detective Steven Scott at the police station. Defendant denied telling the police that he patched Carthron's back but acknowledged saying that the ambulance came and took Carthron away. Defendant never obtained medical treatment for his bite wound because he had treated himself and was already on pain medication for a leg injury.

¶ 26 With respect to Moore, defendant acknowledged she had previously called the police on him. On September 2, 2010, they were drinking and she slipped on the stairs. He denied punching her in the face or kicking her down the stairs. In addition, the police happened to be passing by and asked what was going on. Moore, who was drunk, then said that defendant pushed her down the stairs. Furthermore, defendant testified regarding another incident when defendant pushed Moore during an argument. They were both intoxicated when the police arrived.

¶ 27 In rebuttal, Marc Coit, a 911 operator, testified that at 8:02 a.m. on November 2, 2011, a caller identified himself as defendant and said that his girlfriend attacked him with a knife. The caller also said that he took the knife, stabbed her and believed she may have been badly hurt. Coit acknowledged that he had no independent recollection of that conversation.

¶ 28 Detective Scott testified that he and Detective Williams spoke to defendant, who stated that he had a verbal altercation with Carthron about his girlfriend. Defendant also said that after the altercation became physical, he patched Carthron's back. Detective Scott did not ask defendant what he meant by that. Additionally, Detective Scott saw a red mark on defendant's chest, which defendant said he sustained from Carthron biting him.

¶ 29 The jury found defendant guilty of aggravated battery and two counts of aggravated domestic battery based on him strangling and stabbing Carthron, but acquitted him

of attempted murder. Defendant moved for a new trial, arguing, among other things, that the court erroneously admitted proof of other crimes into evidence. Defendant also argued that the court erred by allowing police officers to testify about Moore's hearsay statements. The trial court denied defendant's motion and sentenced him to concurrent five-year prison terms for the two counts of aggravated domestic battery and a concurrent three-year prison term for aggravated battery.

¶ 30 II. ANALYSIS

[1] ¶ 31 On appeal, defendant asserts for the first time that section 112A–3, which defines family or household members, constitutes an abuse of the State's ****501 *1138** police power as applied to this case because he and Carthron had not dated for 15 years. Defendant also observes that the legislature's irrational decision to treat Carthron as his family or household member allowed the State to charge him with Class 2 aggravated *domestic* battery (720 ILCS 5/12–3.3(a), (b) (West 2010)), rather than Class 3 aggravated battery (720 ILCS 5/12–3.05(a)(1), (h) (West 2010)), and allowed the State to present propensity evidence of other crimes involving violence against Moore (725 ILCS 5/115–7.4 (West 2010)). As a threshold matter, however, the parties dispute whether defendant's as-applied constitutional challenge is properly before us.

¶ 32 After the briefs were filed in this case, our supreme court, in *People v. Thompson,* 2015 IL 118151, 398 Ill.Dec. 74, 43 N.E.3d 984, addressed whether as-applied constitutional challenges can be raised for the first time on appeal. The parties have filed supplemental briefs addressing *Thompson's* impact on defendant's claim.

[2] **[3]** ¶ 33 In *Thompson,* the 19–year–old defendant raised an as-applied constitutional challenge to his sentence for the first time on appeal from the denial of his petition for relief under section 2–1401 of the Code of Civil Procedure (735 ILCS 5/2–1401 (West 2010)). *Thompson,* 2015 IL 118151, ¶¶ 6–7, 14–18, 398 Ill.Dec. 74, 43 N.E.3d 984. The defendant argued he could raise this claim at any time because it rendered the judgment void. *Id.* ¶ 30. Our supreme court disagreed, finding that judgments are void only where jurisdiction is lacking or where a judgment is based on a facially unconstitutional statute which is void *ab initio. Id.* ¶¶ 31–32, 34. Additionally, the supreme court rejected the defendant's assertion that it was illogical to permit a defendant to raise facial, but not as-applied, constitutional challenges to a sentence at any time. *Id.* ¶¶ 35–36. While a facial challenge requires demonstrating that a statute is unconstitutional under any set of facts, an as-applied challenge requires demonstrating that the statute is unconstitutional under the particular circumstances of the challenging party. *Id.* ¶ 36. Because as-applied challenges are dependent on the particular facts, "it is paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review." *Id.* ¶ 37.

¶ 34 Defendant suggests that *Thompson* applies only to appeals from section 2–1401 petitions due to the supreme court's following statement: "Because facial and as-applied constitutional challenges are distinct actions, it is not unreasonable to treat the two types of challenges differently for *purposes of section 2–1401*." (Emphasis added.) *Id.* ¶ 37. Thus, defendant asserts that prior supreme court cases allowing appellants to raise as-applied constitutional challenges for the first time on direct appeal remain valid. See e.g. *People v. Johnson,* 225 Ill.2d 573, 577–78, 592, 312 Ill.Dec. 350, 870 N.E.2d 415 (2007); *In re J.W.,* 204 Ill.2d 50, 61–62, 68–69, 73–74, 272 Ill.Dec. 561, 787 N.E.2d 747 (2003); see also *People v. Wright,* 194 Ill.2d 1, 23–24, 29, 251 Ill.Dec. 469, 740 N.E.2d 755 (2000) (where the defendant raised facial and as-applied constitutional challenges for the first time in a petition for rehearing, the court found the defendant's assertions were properly before it but ultimately, did not address the defendant's as-applied challenge). In light of *Thompson's* rationale, however, we find no distinction between as-applied challenges first raised on direct appeal and those first raised on appeal in collateral proceedings.

¶ 35 Instead, *Thompson's* rationale rests on the notion that reviewing courts require a sufficient evidentiary record in order to ****502 *1139** determine whether a statute is unconstitutional as applied to a particular defendant. See *Thompson,* 2015 IL 118151, ¶ 38, 398 Ill.Dec. 74, 43 N.E.3d 984 (finding the record before it contained " nothing about how that science applies to the circumstances of defendant's case" or "any factual development on the issue of whether the rationale of *Miller* should be extended beyond minors under the age of 18"); see also *People v. Mosley,* 2015 IL 115872, ¶ 47, 392 Ill.Dec. 588, 33 N.E.3d 137 (finding that courts cannot make as-applied determinations without an

evidentiary record and findings of fact). Accordingly, we find *Thompson's* rationale reflects a distinction between as-applied challenges that lack a sufficient record due to being raised for the first time on appeal and as-applied challenges supported by a sufficiently developed record for appellate review, despite the defendant's failure to raise the issue in the trial court.

¶ 36 Contrary to the State's contention, the evidentiary record is sufficient to review defendant's claim. Defendant's case proceeded to a trial, at which the parties explored the nature of defendant's relationship with Carthron. *Cf. Lebron v. Gottlieb Memorial Hospital,* 237 Ill.2d 217, 227–28, 341 Ill.Dec. 381, 930 N.E.2d 895 (2010) (where the circuit court granted judgment on the pleadings without an evidentiary hearing or factual findings, the trial court improperly found a statute was unconstitutional as applied); *Mosley,* 2015 IL 115872, ¶¶ 45–49, 392 Ill.Dec. 588, 33 N.E.3d 137 (rejecting the defendant's as-applied constitutional claim where the record lacked pertinent evidence regarding the defendant's as-applied constitutional claim even after a bench trial). While the State argues that we lack a necessary factual finding regarding whether defendant and Carthron engaged in sexual intercourse on the night in question, we find this argument to be both disingenuous and lacking in merit. The State's opening statement and closing arguments referred to defendant as Carthron's friend and ex-boyfriend. Additionally, the State argued before the jury that Carthron constituted a family or household member because they formerly dated. In stark contrast, the State never suggested Carthron's testimony that they had sex that night would support finding that she was defendant's household or family member. Furthermore, the State does not suggest that it actually had further evidence to present on this matter. More importantly, as we will discuss, an isolated sexual encounter does not constitute a dating relationship, notwithstanding the trial court's comments suggesting otherwise. Thus, even assuming the jury believed Carthron's testimony that she had sexual intercourse with defendant on the night of the offense, it would not have established a dating relationship within the meaning of section 112A–3(3).

¶ 37 A. Dating Relationship Defined

[4] ¶ 38 Defendant was charged with aggravated domestic battery, which requires, among other things, that he committed domestic battery. 720 ILCS 5/12–3.3(a), (a–5) (West 2010). In addition, a person commits domestic battery by causing bodily harm to, or making insulting or provoking contact with, "any family or household member." 720 ILCS 5/12–3.2 (West 2010). Furthermore, section 112A–3(3) of the Code states that family or household members "include * * * persons who have or have had a dating or engagement relationship * * *. 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 ****503 *1140** a dating relationship." [3] 725 ILCS 5/112A–3(3) (West 2010). We note that this definition is, in all pertinent respects, identical to the definition found in the Illinois Domestic Violence Act of 1986(DVA) (750 ILCS 60/103 (West 2010)), which was designed "to prevent abuse between persons sharing intimate relationships." *Glater v. Fabianich,* 252 Ill.App.3d 372, 376, 192 Ill.Dec. 136, 625 N.E.2d 96 (1993); see also 750 ILCS 60/102 (West 2010) (requiring that the DVA be liberally construed to support victims' efforts to avoid further abuse, to clarify law enforcement's responsibilities, to expand remedies, to recognize that domestic violence is a serious crime and to recognize the legal system's past ineffectiveness).

¶ 39 This court has held that section 112A–3(3) requires a dating relationship to have a romantic focus. *People v. Irvine,* 379 Ill.App.3d 116, 124–25, 318 Ill.Dec. 1, 882 N.E.2d 1124 (2008); see also *Alison C. v. Westcott,* 343 Ill.App.3d 648, 651–53, 278 Ill.Dec. 429, 798 N.E.2d 813 (2003) (finding that under the DVA, "dating relationship" referred to a serious courtship). One date and a brief, nonexclusive relationship do not constitute a dating relationship. *Irvine,* 379 Ill.App.3d at 124, 318 Ill.Dec. 1, 882 N.E.2d 1124; see also *Alison C.,* 343 Ill.App.3d at 650, 653, 278 Ill.Dec. 429, 798 N.E.2d 813 (finding that the defendant's conduct in touching the plaintiff's breasts and attempting to put his hand down her pants during a so-called "lunch date" did not constitute a dating relationship). Furthermore, this court has found that where both the defendant and the victim testified they were not in a dating relationship, the State failed to prove they had a dating relationship within the meaning of 112A–3(3), notwithstanding that they had shared approximately 15 sexual encounters. *People v. Howard,* 2012 IL App (3d) 100925, ¶¶ 5, 10, 361 Ill.Dec. 63, 970 N.E.2d 63. [4]

¶ 40 In this Tinder age of hook-ups and one-night stands, adults both young and old can readily recognize that sexual intercourse does not itself always relate to a dating relationship or any form of serious romantic attachment. In addition, no other facts in this case would support a determination that defendant and Carthron were presently involved in a dating relationship. Specifically, Carthron testified that she and defendant were just friends and that their dating relationship had ended more than 15 years prior. Defendant also testified that he and Carthron were just friends. Although the 911 operator testified that defendant reported that "his girlfriend attacked him," this does not change the result, since even the victim herself has testified that she was not his present girlfriend. We now determine whether the definition of family or household members can constitutionally be applied to their past relationship.

¶ 41 B. Past Dating Relationship

[5] **[6]** **[7]** ¶ 42 Statutes are presumed to be constitutional and the party challenging a statute's constitutionality has the burden of demonstrating otherwise. *Wright,* 194 Ill.2d at 24, 251 Ill.Dec. 469, 740 N.E.2d 755. Additionally, due process principles prohibit only the unreasonable or arbitrary use of police power. *People v. Wilson,* 214 Ill.2d 394, 402, 292 Ill.Dec. 887, 827 N.E.2d 416 (2005). Where no substantial right is at issue, we apply the rational basis test to ****504 *1141** determine whether due process is satisfied. *Wright,* 194 Ill.2d at 24, 251 Ill.Dec. 469, 740 N.E.2d 755. Defendant concedes that the rational basis test applies here.

[8] ¶ 43 Under this test, legislation will be upheld so long as it bears a reasonable relationship to a public interest and the means adopted are reasonable for accomplishing the objective desired. *Id.* While the means adopted by the legislature must constitute a reasonable method of accomplishing the result desired, courts are not concerned with whether the legislature has chosen the best or most effective means of addressing the problem at hand. *Wilson,* 214 Ill.2d at 402, 292 Ill.Dec. 887, 827 N.E.2d 416. The legislature's judgment may be based on rational speculation rather than evidence or empirical data. *People v. Boeckmann,* 238 Ill.2d 1, 7, 342 Ill.Dec. 537, 932 N.E.2d 998 (2010). With that said, this highly deferential review is not toothless. *Id.*

[9] ¶ 44 Defendant essentially asserts that the statute's lack of a timeframe for prior dating relationships undermines the legislature's decision to exclude casual acquaintances and ordinary fraternization from the definition of dating relationships, and in turn, family or household members. Defendant urges us to read into this statute a reasonable time limitation on prior dating relationships. We find our supreme court's decision in *Wilson* to be instructive.

¶ 45 In *Wilson,* our supreme court rejected the trial court's determination that section 112A–3(3) was unconstitutionally vague as applied to parties who had not dated for several months. *Wilson,* 214 Ill.2d at 397–99, 292 Ill.Dec. 887, 827 N.E.2d 416. Specifically, the trial court had determined that the statute was vague because it failed to place any time limits on former dating relationships. *Id.* The supreme court disagreed, finding the defendant's argument that the statute failed to set a time limit showed that the defendant understood exactly what the statute meant. *Id.* at 400–01, 292 Ill.Dec. 887, 827 N.E.2d 416. Furthermore, the supreme court found that while the trial court's true concern had been whether the statute constituted a valid exercise of the legislature's police power, the defendant had conceded that the threat of domestic violence does not end when a relationship does. *Id.* at 402–03, 292 Ill.Dec. 887, 827 N.E.2d 416. Finally, our supreme court found it was irrelevant "[w]hether it was reasonable to include relationships that had ended 50 years ago," because the defendant's as-applied challenge depended only on the specific facts of the case before the court. *Id.* at 403, 292 Ill.Dec. 887, 827 N.E.2d 416. Because the defendant's relationship with the victim ended only a few months before the incident, his as-applied challenge failed.

¶ 46 Thus, section 112A–3(3) is unequivocal to the extent that all individuals who have engaged in past dating relationships constitute family or household members of their respective former paramours, regardless of when the dating relationship occurred. Although defendant contends "there must be a certain point when a past dating relationship or prior cohabitation becomes a casual acquaintanceship or ordinary fraternization," the plain language of the statute provides otherwise. The question before us is whether the legislature's decision to treat defendant and Carthron as each other's family or household member under the particular circumstances

of this case bears a reasonable relationship to a public interest.

¶ 47 Based on the above case law, the State has an interest in preventing abuse between persons who share an intimate relationship. In addition, a couple's romantic intimacy may conceivably outlive ****505 *1142** the duration of a dating relationship and, thus, contribute to abuse occurring after the romantic relationship has officially ended. With that said, the record here does not suggest that defendant and Carthron'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. Even assuming they were physically intimate on the night of the offense, the record does not indicate that this occurred as a result of their prior relationship. We further recognize that police officers may in some instances find it difficult to identify when a relationship is domestic in order to discharge their duties. Yet, in this case, defendant could just as easily have been arrested for the nondomestic offenses. In fact, the State originally charged defendant with only aggravated battery and later amended the charges to include aggravated domestic battery. Additionally, the State has not identified any objective that would be furthered by treating Carthron as defendant's family or household member. We find defendant has met his burden of demonstrating that treating Carthron as his family or household member is not reasonably related to a public interest and that, as applied to them, section 112A–3(3) is unconstitutional.

[10] ¶ 48 In light of our determination, we vacate defendant's convictions for aggravated domestic battery. Defendant also contends, however, that we must reverse and remand for a new trial on defendant's aggravated battery conviction because the jury heard other crimes evidence involving Moore that it would not have heard absent the domestic charges. The State has not responded to this contention.

¶ 49 First, we remind defendant that other crimes evidence was admitted as evidence of defendant's motive, *modus operandi,* state of mind and intent, not just his propensity to commit domestic violence. With that said, the trial court may or may not have determined that prejudice outweighed the probative value of such evidence if it was not admissible as evidence of propensity, particularly considering that defendant has now been acquitted of attempted first-degree murder and that defendant's identity is not at issue. See *People v. Littleton,* 2014 IL App (1st) 121950, ¶ 44, 383 Ill.Dec. 272, 14 N.E.3d 555 (observing that "*[m]odus operandi* acts as circumstantial evidence of identity"). In addition, the jury may have found it difficult to consider defendant's other crimes as evidence of his propensity to commit only aggravated *domestic* battery, rather than aggravated battery. Accordingly, we agree that further trial court proceedings are warranted. In light of our determination, we need not consider defendant's contention that the trial court improperly admitted Moore's hearsay statements through the testimony of police officers (an issue that may be revisited on retrial), that the prosecutor committed misconduct during closing arguments or that defendant's aggravated battery conviction violates the one-act, one-crime doctrine.

¶ 50 C. Sufficiency of the Evidence

[11] [12] [13] [14] ¶ 51 We must, however, briefly address the sufficiency of the evidence. *People v. Ward,* 2011 IL 108690, ¶ 50, 351 Ill.Dec. 809, 952 N.E.2d 601 (stating that before trial is permitted, the double jeopardy clause requires courts to determine whether sufficient evidence was presented at the original trial). Specifically, reviewing courts must determine if, when viewing the evidence in the light most favorable to the prosecution, any reasonable jury could have found the essential elements of the crime to have been proven beyond a reasonable doubt. ****506 *1143** *People v. Belknap,* 2014 IL 117094, ¶ 67, 387 Ill.Dec. 633, 23 N.E.3d 325. In addition, a conviction will not be reversed unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt with respect to the defendant's guilt. *Id.* Furthermore, the jury is entitled to weigh the evidence, assess the witnesses' credibility, resolve conflicts in the evidence and draw reasonable inferences. *People v. Washington,* 2012 IL 110283, ¶ 60, 357 Ill.Dec. 1, 962 N.E.2d 902.

¶ 52 The jury was instructed that in order to sustain the aggravated battery charge, the State was required to prove that defendant knowingly caused Carthron bodily harm, that he used a deadly weapon in doing so and that defendant was not justified in using the force that he used. See 720 ILCS 5/12–3.05(a)(5), (f)(1) (West 2010). The State presented sufficient evidence to support each element of the offense. Carthron sustained knife wounds

to her back and chest. It is undisputed that she and defendant were the only two people in his apartment. In addition, defendant acknowledged touching Carthron's back with the knife. While defendant explained it was "possible" that the knife made contact with Carthron's chest as he pushed her off of him, the jury was not required to believe her chest wound resulted from an unintentional mishap. Based on the evidence presented, the jury was entitled to find that defendant deliberately inflicted both wounds to harm Carthron, not to get her to release her bite and not as a mere accident that occurred while pushing her off of the bed.

¶ 53 While defendant asserts that Carthron's level of intoxication "eviscerates" her credibility, the jury, rather than this court, is the best judge of how alcohol affected her. *People v. Ayers,* 331 Ill.App.3d 742, 755, 265 Ill.Dec. 82, 771 N.E.2d 1041 (2002). To be sure, Carthron's testimony suffered from inconsistencies and poor recollection, just as defendant's testimony suffered from inconsistencies and self-interest. Both witnesses' account of events could at times be considered illogical. Furthermore, we remind defendant that the record shows Carthron was not the only person drinking at the time of the offense: thus, the jury was not required to find that Carthron's account of defendant's irrational use of violence rendered her testimony improbable. See *People v. Andersen,* 134 Ill.App.3d 80, 86, 89 Ill.Dec. 158, 479 N.E.2d 1164 (1985) (observing that individuals under the influence of alcohol "may become totally irrational, unable to perceive reality, and may lose control over their behavior"). Based on the evidence presented, a jury could find that defendant was the only individual who could have inflicted Carthron's knife wounds and that stabbing her was unjustified, even if she did bite him. Accordingly, the evidence was sufficient to sustain defendant's conviction and he may be subjected to a new trial.

¶ 54 III. CONCLUSION

¶ 55 Under the specific facts before us, the legislature's decision to treat Carthron as defendant's household or family member is not rationally related to a public interest. Accordingly, we find the statute defining household or family members is unconstitutional as applied to this defendant and vacate his aggravated domestic battery convictions. We also remand for a new trial on aggravated battery. At that time, the trial court will have the opportunity to determine whether the probative value of other crimes evidence still outweighs the potential prejudice now that the domestic charges are no longer at issue.

***1144** ****507** ¶ 56 For the foregoing reasons, we vacate defendant's aggravated domestic battery convictions and reverse and remand for a new trial on defendant's aggravated battery conviction.

¶ 57 Vacated in part; reversed in part and remanded with directions.

Presiding Justice MASON and Justice PUCINSKI concurred in the judgment and opinion.

All Citations

2016 IL App (1st) 134012, 53 N.E.3d 1131, 403 Ill.Dec. 494

Footnotes

1 While the State moved to admit other crimes evidence to show motive, state of mind, intent and propensity, the jury was ultimately instructed that it could consider other crimes evidence with respect to *modus operandi* as well.

2 The State conceded at oral argument that Dr. Vaidya's testimony regarding defendant's responsibility for Moore's injuries should not have been admitted.

3 The jury instruction defining family or household members omitted the language specifying that ordinary fraternization does not constitute a dating relationship.

4 We note that notwithstanding this body of case law, the State suggested to the jury that not even the previous relationship between defendant and Carthron was required to have been serious in order to constitute a dating relationship.

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on January 11, 2017, the foregoing **Brief and Appendix of Petitioner-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and copies were served upon the following, by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, in envelopes bearing sufficient first-class postage:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail a copy of the pleading to the Clerk of the Supreme Court of Illinois, Michael A. Bilandic Building, 160 North LaSalle, Chicago, Illinois 60601.

/s/Katherine M. Doersch
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