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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS  
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Appeal from Newberry County

Honorable D. Craig Brown, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

JOHN HENRY DAVENPORT, JR.

APPELLANT

APPELLATE CASE NO 2020-000198  
\_\_\_\_\_

FINAL BRIEF OF APPELLANT  
\_\_\_\_\_

VICTOR R SEEGER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

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## **STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred when it denied Appellant's directed verdict motion for his domestic violence charge where the state failed to prove Appellant and the complaining witness were "household members" through cohabitation because the complaining witness never stayed more than one night at a time at Appellant's sister's house, where Appellant stayed, and that the complaining witness used his sister's address to forward her mail was not evidence of cohabitation?

## **STATEMENT OF THE CASE**

During the February 2019 term, the Newberry County Grand Jury indicted Appellant for domestic violence in the first degree. R. 327.

On January 21 – 23, 2020 Appellant proceeded to trial before the Honorable D. Craig Brown, and a jury. R. 1. Charles Verner represented Appellant. Id. Daniel Scott and Taylor Daniel represented the state. Id.

Appellant was found guilty as indicted. R. 297, l. 24 – 298, l. 3; R. 311, ll. 2 – 7. Judge Brown sentenced Appellant to ten years' imprisonment. R. 323, l. 2 – 324, l. 11.

This appeal follows.

## STANDARD OF REVIEW

“A case should be submitted to the jury when the evidence is circumstantial ‘if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.’” State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). “Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt.” Id. “Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error.” Id. at 139, 708 S.E.2d at 776-777. “On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state.” Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court’s denial of the directed verdict motion. Hepburn, 406 S.C. at 429, 753 S.E.2d at 409.

## ARGUMENT

The trial court erred when it denied Appellant's directed verdict motion for his domestic violence charge where the state failed to prove Appellant and the complaining witness were "household members" through cohabitation because the complaining witness never stayed more than one night at a time at Appellant's sister's house, where Appellant stayed, and that the complaining witness used his sister's address to forward her mail was not evidence of cohabitation.

### **Relevant Facts**

Near midnight on October 18, 2018, Appellant allegedly entered his cousin's residence, Kenya Hunter, and struck the complaining witness, Latorya Morris. R. 84, l. 5 – 89, l. 10. Kenya Hunter then called the police and Appellant left the house. Id.; R. 91, l. 8 – 95, l. 10.

Shortly after the incident, and the arrival of police to the scene, Appellant's girlfriend, Panjora Sanders, drove by Kenya Hunter's home with Appellant in the passenger seat. R. 127, l. 25 – 130, l. 14. Officer Michael Wood, who responded to the 911 call, followed Sanders, stopped the car, and arrested Appellant. Id.

During Appellant's trial, Kenya Hunter testified Appellant and Morris dated, but were "on and off" and at the time of the incident Panjora Sanders was Appellant's girlfriend. R. 85, l. 5 – 89, l. 10. She categorized Morris and Appellant's relationship as, "one day they are together. One day they are not." Id. Kenya stated that Morris was staying the night at her home because Morris had "nowhere to go." Id. Kenya explained that Morris would stay at other people's homes throughout the area as well. R. 100, ll. 6 – 9.

Morris also testified at Appellant's trial. R. 141, l. 3. Morris stated she stayed overnight "on and off" at Tina Hunter's house, Appellant's sister. R. 145, ll. 8 – 12; R. 155, l. 24 – 156, l.

23. Morris testified that Appellant lived at Tina Hunter's house at 420 Floyd Street. R. 164, ll. 8 – 11. Morris described her past relationship with Appellant as “off and on” and stated Appellant moved on with another woman. R. 147, ll. 8 – 19. However, Morris also stated that she and Appellant had been intimate in the past. R. 164, l. 25 – 165, l. 5.

Morris admitted that Tina Hunter never let her stay two nights consecutively. R. 158, ll. 5 – 12. Morris would always have to leave Tina's home the next day. Id. While there were a few occasions where Appellant and Morris stayed at Tina Hunter's home on the same night, they never shared a room or a bed as Morris slept on a chair and Appellant slept on the floor. R. 159, l. 8 – 160, l. 10. Morris also admitted she never had a bedroom there and did not have a place to store any belongings. Id.

Morris explained that she listed the 420 Floyd Street address on her driver's license to use as a mailing address. R. 145, ll. 13 – 15; R. 155, l. 24 – 156, l. 23. Morris stated that in October 2018, she was living at Kenyata Hunter's house but had her address was still listed on her license at Tina Hunter's home at 420 Floyd Street<sup>1</sup>. R. 153, l. 23 – 155, l. 14. Morris admitted she never paid rent at Tina Hunter's house and testified she never had a stable place to stay. Id. Notably, Morris told law enforcement on the night of the incident that she lived at a different address on 934 Fair Street and had been living there for three to four months. Id.; R. 161, ll. 3 – 5.

At the conclusion of the state's case, trial counsel moved for a directed verdict because the state failed to prove Appellant and Morris were “household members” through cohabitation. R. 230, l. 23 – 235, l. 17; S.C. Code Ann. § 16-25-10. Trial counsel argued that Morris only

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<sup>1</sup> During Appellant's trial, defense counsel misstated the date in question during his cross-examination of Ms. Morris. R. 153, l. 23 – 154, l. 12. Trial counsel asked about Ms. Morris' residence in October 2016, when he actually meant October 2018 and corrected himself later in his cross-examination of Morris. Id.

stayed at Tina Hunter's home from "time to time" when she was homeless because Hunter specifically would *not* allow Morris to live there. R. 230, l. 23 – 235, l. 17. Therefore, any overlapping nights where Appellant and Morris both stayed at Tina Hunter's home were incidental and, as a result, the two never regularly or continuously cohabitated such that they were not "household members." Id.

Trial counsel stated cohabitation was "living with someone". Trial counsel requested the lower court use the Black's Law Dictionary definition of cohabitation<sup>2</sup> which he categorized as "having the same habitation not a sojourn," and that to be a cohabitant you must have "the right to remain in [the] house without prejudice to property." Id. Trial counsel explained "You do not [cohabitate] in a place until you have unfettered access to personal property," meaning you are not a cohabitant if you do not have a right of control over the location. Id. Trial counsel also argued that the legislature's intent was the definition of cohabitation be limited to "people living [together] for an extended period of time." Id.

Trial counsel then applied the proper definition of cohabitation to the facts of the present case to show that Appellant and Morris never cohabitated such that they were not "household members" under the statute. Id.; S.C. Code Ann. § 16-25-10. Trial counsel pointed out that there was no evidence of cohabitation other than Morris saying that she stayed at Tina Hunter's house "from time to time." Id. Trial counsel argued that Morris listing Tina Hunter's address on her license was of no consequence in the cohabitation analysis because Morris only used that address for mailing purposes. Trial counsel correctly analogized Morris using Tina Hunter's address to get her mail as no more evidence of residency than a college student using his parents' address to

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<sup>2</sup> Cohabitation as defined by Black's Law Dictionary is: The fact, state, condition, or practice of living together, especially as partners in life, usually with the suggestion of sexual relations. COHABITATION, Black's Law Dictionary (11th ed. 2019)

get his mail. Id. Moreover, Tina Hunter made Morris sleep on a “chair” and would not let her stay over more than one night consecutively which showed Morris was not a resident of the home but would only stay there “from time to time.” Id.

The state argued that since Appellant and Morris had an “on again, off again” sexual relationship and that they spent a few nonconsecutive nights together under the same roof they were household members as contemplated by the statute. R. 235, l. 22 – 237, l. 20; S.C. Code Ann. § 16-25-10. The state also argued that the domestic violence statute does not indicate how long you must stay under the same roof to be considered cohabitating. Id.; Id. Finally, the solicitor pointed to Morris using Hunter’s address to get her mail was “significant evidence that shows she was a cohabitant.” R. 235, l. 22 – 237, l. 20.

The lower court denied Appellant’s directed verdict motion and Appellant was convicted of domestic violence in the first degree. R. 237, l. 21 – 238, l. 19; R. 256, ll. 9 – 16; R. 304, l. 14 – 305, l. 12.

## **Discussion**

The trial court erred when it denied Appellant’s directed verdict motion for domestic violence in the first degree because the state did not prove Appellant and the complaining witness were “household members” through cohabitation as defined under the domestic violence statute. S.C. Code Ann. § 16-25-10. An accused is entitled to a directed verdict of acquittal when the state fails to present evidence on a material element of the offense charged. State v. Pittman, 373 S.C. 527, 546, 647 S.E.2d 144, 153 (2007) (citing State v. Brown, 360 S.C. 581, 586-587, 602 S.E.2d 392, 395 (2004)).

Appellant and the complaining witness never lived together, the state could only show that Appellant and Morris had a past intimate relationship and had some overlapping one-night

stays at Appellant's sister, Tina Hunter's home. R. 158, ll. 5 – 12; R. 160, ll. 14 – 16; R. 164, l. 25 – 165, l. 5. Furthermore, the fact that Morris had her mail delivered to Tina Hunter's house and Appellant and Morris had been intimate in the past did not constitute "cohabitation" as defined under S.C. Code Ann. § 16-25-10 such that Appellant and Morris were not "household members."

As best as undersigned counsel is aware, there is no South Carolina case directly on point defining the nature of a "cohabiting" relationship nor defining the duration two people must live together to be considered "cohabiting" such that they are household members under S.C. Code Ann. § 16-25-10.

In the federal context, the Fourth Circuit's decision in U.S. v. Barnette, 211 F.3d 803 (4th Cir. 2000), is instructive here. The Fourth Circuit held that the evidence supported the lower court's finding that Barnette and one of his victims had a relationship like that of husband and wife as required for conviction under the Violence Against Women Act. Id. at 814 – 15. At his trial, Barnette argued that the evidence did not support a guilty verdict on several of his charges because Barnette was not the victim's "intimate partner" as defined in and required by the Violence Against Women Act. Id.; 18 U.S.C.A. § 2266.

The act defines "intimate partner" under 18 U.S.C.A. § 2261(a) as a person who "has cohabited with the abuser *as a spouse*." Barnette, at 814 – 15. (emphasis added) The Fourth Circuit determined that the evidence adduced at trial showed Barnette and the victim had a dating relationship and moved in together. Id. Barnette and the victim lived in the same apartment that the victim only began renting when the two moved in together. Id. The evidence also showed that Barnette would beat the victim and force her to have sex with him. Id. Thus, the Fourth Circuit held that the words "as a spouse" in the statute applied to Barnette and the victim,

even though they were not married, because their relationship was “like that of husband and wife.” Id. The Fourth Circuit’s decision showed that a substantial relationship must exist for two people to be considered intimate cohabitating partners.

Outside jurisdictions have dealt with the issue of determining the definition of cohabitating in the domestic violence context directly. In State v. Williams, 79 Ohio St.3d 459, 683 N.E.2d 1126 (Oh. 1997), reconsideration denied, 685 N.E.2d 547 (1997), the Ohio Supreme Court held that due to the nature of their relationship Williams and the victim were “cohabitants” for purposes of Ohio’s domestic violence statute. Williams, 465 – 66, 683 N.E.2d at 1130 – 1131.

During Williams’ trial, the victim testified that she did not live with the defendant but that for several months she was staying more nights at his residence than at her own. Williams, at 465 – 66, 683 N.E.2d at 1130. Williams was convicted of domestic violence under the Ohio domestic violence statute, which stated, in pertinent part:

(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member. (B) No person shall recklessly cause serious physical harm to a family or household member. (C) No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member ... (E) (1) 'Family or household member' means any of the following: (a) A spouse, a person living as a spouse, or a former spouse of the offender ... (2) 'Person living as a spouse' means a person who is living or has lived with the offender in a common law marital relationship, *who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within one year prior to the date of the alleged commission of the act in question.*"

Ohio Rev. Code Ann. § 2919.25; Williams, at 461, 683 N.E.2d at 1127. (emphasis added)

On reviewing the legislature's intent and other court decisions, the Ohio Supreme Court agreed with the viewpoint that “*domestic violence arises out of the nature of the relationship itself rather than the exact living circumstances of the victim and the perpetrator.*” Id., at 463, 683 N.E.2d at 1129. (emphasis added) The court concluded that the essential elements of

"cohabitation" are the sharing of familial or financial responsibilities and consortium. Id. at 464 – 65, 683 N.E.2d at 1130.

The potential factors that established shared familial or financial responsibilities included provisions for shelter, food, clothing, utilities, and/or commingled assets. Id. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. Id. The Ohio Supreme Court also held that these factors are unique to each case and how much weight, if any, to give to each of these factors must be decided on a case-by-case basis by the trier of fact. Id.

With regard to Williams' case, the Ohio Supreme Court determined that, since the victim and Williams were fighting over money when the violence occurred, since they had spent most of their nights together at the William's residence, and since the victim believed she may have been pregnant with the his child, there was sufficient evidence to conclude that they were cohabitants. Williams, at 464 – 65; 683 N.E.2d at 1130 – 1131. Accordingly, Williams was denied relief. Id.

In Barnett v. Wiley, 103 S.W.3d 17 (Ky. 2003), the Kentucky Supreme Court used a non-exhaustive six prong test for determining whether the couple was cohabiting for purposes of issuing a domestic violence restraining order against Barnett. Barnett, at 20 – 21. The test included: sexual relations between parties while they shared the same living quarters; sharing of income or expenses; joint use or ownership of property, whether the parties hold themselves out as husband and wife, the continuity of the relationship, and the length of the relationship. Id. (citing State v. Kellogg, 542 N.W. 2d 514 (Iowa 1996)). In Barnett, the Kentucky Supreme Court denied issuing a domestic violence restraining order because there was no evidence “that Barnett

and Wiley ever shared living quarters, either permanently or on a part-time or temporary basis.”

Id.

In Rickman v. Commonwealth, 33, Va.App. 550, 535 S.E.2d 187 (2000), the Virginia Court of Appeals, determined as a matter of first impression that the factors considered in determining whether the defendant and victim were cohabitating, to establish that the victim was a “household member” included sharing of familial or financial responsibilities, consortium, and the length and continuity of the relationship. Rickman, at 558 – 59, 535 S.E.2d at 191 – 92. (citing State v. Williams, 79 Ohio St. 459, 683 N.E.2d 1126 (Oh. 1997)). The Virginia Court of Appeals held that Rickman and the victim were cohabitants because he provided financial support to the victim, he resided with the victim continuously for three months, and they “shared a bed.” Id.

The aforementioned cases are distinguishable from the present case. While it is true that Appellant and Morris had a past sexual relationship, that Morris listed the house where Appellant was staying as her mailing address, and that the two coincidentally spent the night at that house on a few occasions, the nature of Appellant and Morris’ relationship was not that of cohabitants. R.147, ll. 13 – 19; R. 144, l. 18 – 145, l. 12; R. 158, ll. 5 – 12.

The spirit of South Carolina’s statute prohibiting domestic violence is to prevent violence between intimate couples of the same household. It is not enough that two people slept under the same roof for a few nights or that two people shared the same mailing address. It is the nature of the relationship that must be examined to determine whether cohabitation was present such that the defendant and victim were “household members.”

Appellant and Morris were not “household members.” Appellant and Morris never shared any familial or financial responsibilities. Rickman, at 558 – 59, 535 S.E.2d at 191 – 92; Barnett,

at 20 – 21; Williams, at 464 – 65, 683 N.E.2d at 1130. Their relationship had almost no continuity as the undisputed testimony was that their relationship was “on and off,” such that they were not committed to one another. Rickman, at 558 – 59, 535 S.E.2d at 191 – 92. This was evinced by the fact that at the time of the incident Appellant had a new girlfriend, Panjora Sanders. R. 100, l. 13 – 101, l. 19.

Appellant and Morris had no joint property and never held themselves out as a cohabitants. Rickman, at 558 – 59, 535 S.E.2d at 191 – 92. While the evidence shows that Appellant and Morris stayed at Tina Hunter’s house at the same time, on a few incidental occasions, there is no evidence to suggest they ever shared a room or living quarters. Barnett, at 20 – 21. Morris testified that she slept on a “chair” and never had a bedroom at Tina Hunter’s home. R. 159, l. 4 – 160, l. 16.

Therefore, evidence in this case only showed that Appellant had a past sexual relationship with a transient woman who used his sister’s house as her mailing address and who happened to spend the night at his sister’s house on a few occasions while Appellant resided there. R. 160, l. 22 – 161, l. 2.

There was nothing about the nature of Appellant and Morris’ relationship that would suggest they were ever “cohabitants” such that the state failed to prove Appellant and Morris were “household members” under S.C. Code Ann. § 16-25-10. Accordingly, the lower court erred when it denied Appellant’s motion for directed verdict for his domestic violence charge.

**CONCLUSION**

By reason of the foregoing arguments, Appellant respectfully requests that this Court vacate his convictions and remand his case to the Newberry Court of General Sessions.

  
\_\_\_\_\_  
Victor R Seeger  
Appellate Defender

ATTORNEY FOR APPELLANT

This 1<sup>st</sup> day of June, 2021.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability with Rule 211 (b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



Victor R. Seeger  
Appellate Defender

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South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
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This 1<sup>st</sup> day of June, 2021.