

Delaney, J.

{¶1} Appellant Robert D. Blymiller appeals from the April 2, 2014 Judgment Entry of conviction and sentence entered in the Stark County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose on November 9, 2013, when appellant argued with his girlfriend, Brandy Lee. Appellant and Lee were engaged and living together “off and on.” Appellant and Lee spent some of their time at Lee’s house in Minerva and some of their time at appellant’s mother’s apartment in Canton.

{¶3} On this date, the couple was at appellant’s mother’s apartment on Fifth Street N.E. in Canton. Appellant had spent the night there and Lee had spent the night at a motel. Appellant was supposed to accompany Lee back to the motel for the evening. Instead, the two argued inside Lee’s car because she believed he was cheating on her. The car was running and appellant grabbed the keys. Then he punched Lee in the face with a closed fist. Lee started crying and told appellant she thought he broke her nose. Appellant fled from the car but first threw the keys underneath the car. He went back inside his mother’s apartment.

{¶4} Lee found the keys and sat inside her car for several minutes thinking about what to do. She drove to the Canton Police Department and spoke to Ptl. Danielle Taylor. Taylor observed Lee to be extremely upset and crying so hard it was difficult for her to speak. Lee told Taylor appellant struck her in the face with a closed fist, and Taylor observed redness and swelling of the right side of Lee’s face, lips, and nose. A detective took photos of Lee’s injuries.

{¶5} Lee filled out a written statement and Taylor sought a warrant for appellant's arrest for domestic violence.

{¶6} After she left the police department, Lee texted appellant, picked him up from his mother's apartment, and took him to the motel with her. They were at the hotel for five or six hours when they argued again and appellant left. The next day, Lee went to Mercy Medical Center and was found to have a nasal fracture. Subsequently, she developed two black eyes.

{¶7} Lee and appellant continued to have contact with each other and Lee was frequently in touch with appellant's mother. At one point, not wanting appellant to go to jail, Lee wrote a letter stating appellant struck her accidentally. At trial, Lee stated she lied in the letter in an attempt to get appellant out of the charges because she was still in love with him.

{¶8} Appellant was charged by indictment with one count of felonious assault [R.C. 2903.11(A)(1), a felony of the second degree]; one count of domestic violence [R.C. 2919.25(A), a felony of the fourth degree]; and one count of intimidation of a witness [R.C. 2921.04(A), a misdemeanor of the first degree]. Appellant entered pleas of not guilty and the case proceeded to trial by jury. Appellant stipulated to a prior conviction of domestic violence.

{¶9} Appellant was found not guilty of felonious assault and intimidation of a witness and guilty of domestic violence. The trial court immediately sentenced him to a prison term of 18 months.

{¶10} Appellant now appeals from the judgment entry of his conviction and sentence.

{¶11} Appellant raises one assignment of error:

ASSIGNMENTS OF ERROR

{¶12} “I. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT THE APPELLANT’S CRIM.R. 29 MOTION FOR ACQUITTAL.”

ANALYSIS

{¶13} Appellant argues his Crim.R. 29 motions for acquittal should have been granted because appellee submitted insufficient evidence Lee is his family or household member and Lee’s testimony was untrustworthy. We disagree.

{¶14} A Crim. R. 29(A) motion for acquittal tests the sufficiency of the evidence presented at trial. *State v. Blue*, 5th Dist. Stark No. 2001CA00250, 2002-Ohio-351, at ¶ 1, citing *State v. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996); *State v. Miley*, 114 Ohio App.3d 738, 742, 684 N.E.2d 102 (4th Dist.1996). Crim. R. 29(A) allows a trial court to enter a judgment of acquittal when the state's evidence is insufficient to sustain a conviction. A trial court should not sustain a Crim. R. 29 motion for acquittal unless, after viewing the evidence in a light most favorable to the state, the court finds no rational finder of fact could find the essential elements of the charge proven beyond a reasonable doubt. *State v. Franklin*, 5th Dist. Stark No. 2007-CA-00022, 2007-Ohio-4649 at ¶ 12, citing *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372, 683 N.E.2d 1096.

{¶15} The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to

examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶16} First, appellant argues appellee presented insufficient evidence Lee is his "family or household member" because she was still legally married to another man¹ and they "lived in several homes during their relationship" (Brief, 6). R.C. 2919.25(F)(1) and (2) define "family or household member" in pertinent part as a "person living as a spouse," meaning "a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question." The Ohio Supreme Court addressed the definition of "cohabitation" as follows:

[W]e conclude that the essential elements of "cohabitation" are (1) sharing of familial or financial responsibilities and (2) consortium. R.C. 2919.25(E)(2) and related statutes. Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. These

¹ Lee testified she was legally separated from her spouse and engaged to appellant.

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.

State v. Williams, 79 Ohio St.3d 459, 465, 1997-Ohio-79, 683 N.E.2d 1126.

{¶17} The Court further defined cohabitation in *State v. McGlothan*, finding where the state demonstrated the defendant was the victim's boyfriend and they had lived together for about a year, the state had no obligation to demonstrate the sharing of familial or financial responsibilities and consortium to prove cohabitation. 138 Ohio St.3d 146, 149, 2014-Ohio-85, 4 N.E.3d 1021, ¶ 15.

{¶18} We have found, pursuant to R.C. 2919.25(F), if testimony establishes the parties were presently living together at the time of the offense and had cohabitated within the past five years, such unrefuted testimony is sufficient to establish the complaining witness was appellant's family or household member. *State v. Avery*, 5th Dist. Stark No. 2004-CA-00010, 2004-Ohio-5226, ¶ 41. See also, *Uhrichsville v. Losey*, 5th Dist. Tuscarawas No. 2005 AP 030028, 2005-Ohio-6564.

{¶19} Applying the *Williams* analysis to the facts of the instant case, we find sufficient evidence exists Lee is appellant's family or household member. Her unrefuted testimony established she and appellant were involved in a romantic relationship since January 2013, became engaged, and lived together between her house and his mother's apartment. Appellant received mail at Lee's house and Lee received mail at his mother's apartment. Appellant played the role of stepfather to Lee's children and

grandchildren. We find sufficient evidence Lee is a “family or household member” of appellant for purposes of R.C. 2919.25.

{¶20} Next, appellant argues Lee was an unreliable witness because she recanted at one point, continued to have contact with him, and was angry about appellant’s attention to other women. We note, though, Ptl. Taylor observed Lee within 30 minutes of the domestic violence incident and corroborated Lee’s testimony in terms of her emotional state, visible injuries, and statement that appellant punched her in the face with a closed fist. Moreover, the weight of the evidence and the credibility of the witnesses are determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 231, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79.

{¶21} Upon our review of the record, we find any rational trier of fact could have found the essential elements of domestic violence proven beyond a reasonable doubt and appellant’s conviction is therefore supported by sufficient evidence.

CONCLUSION

{¶22} Appellant's sole assignment of error is overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J. and

Hoffman, P.J.

Baldwin, J., concur.