

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2012-P-0009
DAVID R. RUBES,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R 2010 CRB 1111.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Dennis Day Lager, Portage County Public Defender, 209 South Chestnut Street, #400, Ravenna, OH 44266 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, David R. Rubes, appeals his conviction for Domestic Violence, following a trial in the Portage County Municipal Court, Ravenna Division. The issue to be decided in this case is whether a defendant is cohabiting with a victim for the purposes of a Domestic Violence conviction when he lives with her, she is his girlfriend, he gets mail at her home, sleeps in the same bed with her, and spends every night with her. For the following reasons, we affirm the decision of the court below.

{¶2} On May 12, 2010, Rubes was charged with Domestic Violence, a misdemeanor of the first degree, pursuant to R.C. 2919.25(A), in case number R 2010 CRB 1111. He was charged with a second count of Domestic Violence in case number R 2010 CRB 1110.

{¶3} The matter proceeded to a bench trial on September 19, 2011. The State presented the following testimony.

{¶4} Donald O'Neal testified that his daughter, Kim, who is 21 years old, lives in his home. On May 11, 2010, Kim was living there, as well as Kim's boyfriend, Rubes. O'Neal explained that on that date, Rubes had been living there for about a year. O'Neal testified that he allowed Rubes to live there because he did not have a job or a place to stay and was his daughter's boyfriend. On May 11, O'Neal heard Rubes and Kim both screaming, with Rubes yelling threats at Kim. O'Neal ran upstairs and saw Rubes "pushing Kim" against a wall. O'Neal yelled at Rubes to leave the home and Rubes punched O'Neal in the face.

{¶5} Regarding the living situation, O'Neal testified that neither Kim nor Rubes paid him rent to live in the home. Rubes also did not pay for groceries or utilities. O'Neal explained that Rubes "was asked to do some odd jobs around the house." He also stated that Kim brought some groceries or food into the home at times. He explained that he was not aware of Rubes and Kim sharing in any expenses related to living at his home. O'Neal testified that in July of 2010, a few months after the incident, Rubes was allowed to move back into the home and lived there until around February of 2011. O'Neal testified that Rubes and Kim slept in the same bedroom, Rubes slept there every night, and he had personal items and clothing in the home. Rubes also received mail at that address.

{¶6} Lieutenant Jeffrey Wallis of the Ravenna Police Department testified that he responded to O'Neal's home on a domestic dispute call. While there, he observed an injury to O'Neal's face. Lieutenant Wallis also testified that Kim indicated to him that she was in a relationship with Rubes.

{¶7} At the close of the State's case, Rubes moved for acquittal on both Domestic Violence charges, one with O'Neal as the victim and the other with Kim as the victim. Rubes asserted there was no evidence that he was a family or household member of either O'Neal or Kim. Rubes also argued that the physical harm element had not been proven in the case involving Kim. The trial court granted the motion as to the Domestic Violence charge arising from case number R 2010 CRB 1110, in which Kim was the alleged victim, and that charge was dismissed.

{¶8} Subsequently, the trial court found Rubes guilty of one count of Domestic Violence, a first degree misdemeanor, stemming from case number R 2010 CRB 1111, in which O'Neal was the victim. The court memorialized this in a September 22, 2011 Judgment Entry.

{¶9} On December 19, 2011, the trial court issued a Judgment Entry of Sentence. A subsequent sentencing entry nunc pro tunc was filed on January 5, 2012. The trial court sentenced Rubes to 180 days in jail, with 150 days suspended. Rubes was ordered to serve one year of probation and pay a \$100 fine and court costs. He was also ordered to complete a substance abuse assessment and have no contact with O'Neal.

{¶10} On January 13, 2012, Rubes filed a Motion for Stay of Execution Pending Appeal. The trial court granted the stay on the same date.

{¶11} Rubes timely appeals and raises the following assignment of error:

{¶12} “The trial court erred to the prejudice of defendant-appellant by denying defendant-appellant’s Criminal Rule 29 Motion for directed verdict of acquittal when there was insufficient evidence to prove the elements of the crime of Domestic Violence in violation of R.C. § 2919.25(A), by proof beyond a reasonable doubt.”

{¶13} The Ohio Rules of Criminal Procedure provide that a defendant may move the trial court for a judgment of acquittal “if the evidence is insufficient to sustain a conviction.” Crim.R. 29(A). “[S]ufficiency’ is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury,” i.e. “whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), quoting Black’s Law Dictionary (6 Ed.1990), 1433. Essentially, “sufficiency is a test of adequacy,” that challenges whether the state’s evidence has created an issue for the trier of fact to decide regarding each element of the offense. *Id.*

{¶14} “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.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In reviewing the sufficiency of the evidence to support a criminal conviction, “[t]he 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.” *Id.*

{¶15} In order to convict Rubes of Domestic Violence, the State had to prove, beyond a reasonable doubt, that he “knowingly cause[d] or attempt[ed] to cause

physical harm to a family or household member.” R.C. 2919.25(A). Rubes does not argue that the State failed to prove that Rubes knowingly caused or attempted to cause physical harm to O’Neal. Instead, he argues only that the State failed to prove the “family or household member” element and, therefore, the trial court should have granted the Crim.R. 29 motion as to the Domestic Violence charge involving O’Neal as the victim.

{¶16} R.C. 2919.25(F) defines “family or household member” as follows:

{¶17} “(1) ‘Family or household member’ means any of the following:

{¶18} “(a) Any of the following who is residing or has resided with the offender:

{¶19} “(i) A spouse, a person living as a spouse, or a former spouse of the offender;

{¶20} “(ii) A parent, a foster parent, or a child of the offender, or another person related by consanguinity or affinity to the offender;

{¶21} “(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.

{¶22} “(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.”

{¶23} Rubes argues that although he lived in O’Neal’s home, this alone was not sufficient to classify him as a family or household member of O’Neal under R.C. 2919.25(F)(1). He argues that none of the relationships in R.C. 2919.25(F)(1) applied to the circumstances of this case, as he was not related to O’Neal in any way, by blood or marriage.

{¶24} We agree that R.C. 2919.25(F)(1) requires more than just residing with the offender, but also requires the existence of one of the relationships described in the statute. As stated in the statute, however, a *parent* of a person living as a spouse of the offender falls under the definition of a family or household member, provided that parent resides with or has resided with the offender. R.C. 2919.25(F)(1)(iii). It was undisputed in this case that O'Neal was Kim's father and that Rubes was living not only with Kim but also with O'Neal, in O'Neal's home. The only question that remains is whether Kim was a "person living as a spouse" with Rubes, such that the statutory definition applies to include O'Neal as a family or household member of Rubes.

{¶25} A "person living as a spouse" is defined as "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." R.C. 2919.25(F)(2).

{¶26} The Ohio Supreme Court has held that "the essential elements of 'cohabitation' are (1) sharing of familial or financial responsibilities and (2) consortium. * * * 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 factors are unique to each case * * *." *State v. Williams*, 79 Ohio St.3d 459, 465, 683 N.E.2d 1126 (1997). The Ohio Supreme Court has emphasized that "it is a person's determination to share some measure of life's responsibilities with another that creates cohabitation." *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶ 35.

{¶27} How much weight, if any, to give to each of the *Williams* factors “must be decided on a case-by-case basis by the trier of fact.” *Williams* at 465; *State v. Pash*, 3rd Dist. No. 10-09-13, 2010-Ohio-1267, ¶ 10, citing *State v. Miller*, 105 Ohio App.3d 679, 686, 664 N.E.2d 1309 (4th Dist.1995) (“[a] trial court’s determination of whether two people cohabitated under R.C. 2919.25 is a question of fact”). Courts have held that, under *Williams*, “[t]he burden of [production for] establishing cohabitation is not substantial.” (Citation omitted.) *State v. Long*, 9th Dist. No. 25249, 2011-Ohio-1050, ¶ 6; *State v. Young*, 2nd Dist. No. 16985, 1998 Ohio App. LEXIS 5446, *6 (Nov. 20, 1998).

{¶28} Rubes argues that he did not cohabit with Kim because he did not share financial and familial responsibilities with her.

{¶29} We initially note that there is limited case law from this court in Domestic Violence cases related to the *Williams* test for cohabitation. In the only criminal case to address the *Williams* cohabitation elements, *State v. Boldin*, 11th Dist. No. 2007-G-2808, 2008-Ohio-6408, this court found that parties were “living as spouses,” or cohabiting, when the defendant and victim were living together, the victim paid for groceries and utilities, did all of the household chores, handled the finances, and the parties had been intimate. *Id.* at ¶ 52. In the present case, not all of these circumstances were present. Neither Kim nor Rubes were paying rent or utilities while living in O’Neal’s home. However, according to O’Neal’s testimony, Kim did purchase food to bring into the household and Rubes did odd jobs around the home. The evidence also shows that Rubes and Kim were in a relationship and that Rubes had been living with her for approximately a year. According to O’Neal, Rubes was sleeping in the same bed as Kim, and living in her bedroom. Rubes had clothing and personal

effects in the room. Several other districts have upheld Domestic Violence convictions in similar circumstances as the present matter. *State v. Slevin*, 9th Dist. No. 25956, 2012-Ohio-2043, ¶ 18-19 (where the victim testified that she was living with the defendant, the defendant's mother paid all of the expenses, the victim did certain chores around the home, and she and the defendant had sexual relations, the two were cohabiting); *State v. Walburg*, 10th Dist. No. 10AP-1087, 2011-Ohio-4762, ¶ 19 and 40 (where the victim and the defendant were dating, were living together, the victim kept clothes in the apartment, stayed there overnight, and purchased groceries, there was sufficient evidence of cohabitation to sustain a Domestic Violence conviction).

{¶30} Regarding the first prong of the *Williams* factors, the familial or financial responsibility element, we recognize that there was not a great deal of financial connection between the parties. However, although Kim and Rubes were not paying the rent or bills, Kim essentially provided Rubes with a place to live, by allowing him to stay in her room in her father's home. This creates at least some familial and financial relationship, especially when coupled with Kim purchasing food and Rubes doing odd jobs around the house. Since the two were in unique circumstances and were not required to pay living expenses, we cannot determine that their failure to jointly pay such expenses means that they were not cohabiting. See *State v. Williams*, 2nd Dist. No. 99 CA 72, 2000 Ohio App. LEXIS 4642, *11 (Oct. 6, 2000) (while neither the victim or the defendant were employed or owned a house or apartment and they had no financial responsibilities, there was evidence of cohabitation where the defendant invited the victim to live in a place where he was staying for free, and the victim purchased food for the two parties, since the parties shared familial and financial responsibilities to the extent that they had any such responsibilities).

{¶31} In addition, regarding the consortium element, although there was no specific testimony of conjugal or sexual relations, the fact that the two were in a relationship and that Rubes lived in the same room and slept in the same bed as Kim establishes some level of consortium between Kim and Rubes. See *State v. Messenger*, 3rd Dist. No 9-09-19, 2010-Ohio-479, ¶ 36 (where the victim testified that the defendant was her live-in boyfriend and was sleeping with her in the same bedroom, the jury could have reasonably concluded the consortium element of *Williams* was met).

{¶32} Rubes also argues that since the trial court dismissed the charges related to Kim because she was not a family or household member of Rubes, it would be improper to argue that Donald O'Neal is a household member of Rubes by virtue of being Kim's parent. However, the record does not indicate that the court dismissed the Domestic Violence charge relating to Kim because she was not a household member of Rubes. Regarding the dismissal of that charge, the trial court stated on the record only that the Crim.R. 29 Motion was granted and "the case is dismissed." Similarly, in the September 22, 2011 Judgment Entry, the court stated only that "the State was not able to meet its burden of proof in that case and that case is dismissed." The court never stated that the dismissal was due to the State's failure to prove the family or household member element of Domestic Violence. Rubes presented several different arguments supporting his Rule 29 Motion, including that Kim did not testify and that there was no testimony that Rubes caused her physical harm. In light of this, there is no basis for finding that the trial court dismissed the case related to Kim due to the State's failure to prove the family or household member element of Domestic Violence.

{¶33} Finally, Rubes argues that, regardless of the foregoing, the trial court improperly applied R.C. 2919.25(F), since it determined that Rubes was O'Neal's

household member because Rubes was living in O'Neal's household, not because O'Neal was Kim's father. However, during the trial, the court did read, on the record, the portion of the statute discussing individuals living as spouses and Rubes' counsel argued that Rubes and Kim were not living as spouses because their relationship was not like a marital relationship. Based on the record, it appears that the court did consider the law as discussed above and whether, by virtue of Kim and Rubes cohabiting, O'Neal was also a family or household member of Rubes. Even if the trial court did improperly apply the statute, however, we note that "the affirmance of a judgment by a reviewing court is not an affirmance of the reasons given by the lower court for its rulings," and "[r]eviewing courts affirm and reverse judgments, not reasons." *State v. Eschenauer*, 11th Dist. No. 12-237, 1988 Ohio App. LEXIS 4479, *8 (Nov. 10, 1988). Therefore, as discussed above, since the judgment convicting Rubes was supported by sufficient evidence, it cannot be reversed.

{¶34} The sole assignment of error is without merit.

{¶35} Based on the foregoing, the Judgment Entry of the Portage County Municipal Court, Ravenna Division, finding Rubes guilty of Domestic Violence, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, J.,

THOMAS R. WRIGHT, J.,

concur.