

[Cite as *State v. Barnes*, 2008-Ohio-5997.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 90842**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**FRANKLIN BARNES**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-498406

**BEFORE:** McMonagle, J., Sweeney, A.J., and Rocco, J.

**RELEASED:** November 20, 2008

**JOURNALIZED:**

[Cite as *State v. Barnes*, 2008-Ohio-5997.]

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

[Cite as *State v. Barnes*, 2008-Ohio-5997.]

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Franklin Barnes, appeals his domestic violence convictions and misdemeanor assault sentence. We affirm.

{¶ 2} Barnes was indicted on three counts of domestic violence in violation of R.C. 2919.25(A). Each count contained two furthermore clauses relating to two prior domestic violence convictions, rendering them felonies of the third degree. Barnes waived his right to a jury trial, and the matter proceeded to trial before the court. At the start of the trial, Barnes stipulated to two prior convictions for domestic violence.

{¶ 3} At the conclusion of the State's case, Barnes made a Crim.R. 29 motion for acquittal, which the court denied. Barnes then testified. The court returned a guilty verdict on two counts of domestic violence (counts one and three) and a lesser included charge of count two, assault, a first-degree misdemeanor. Barnes was sentenced to a concurrent three-year term for the domestic violence convictions, and a suspended six-month term for the assault conviction.

{¶ 4} The record demonstrates that at the time of the incident, one of the victims, Sandra, and her ten-year old son resided at Barnes' home. Sandra and Barnes had been dating for 18 months prior to the incident, and Sandra's son had resided with them for three weeks prior to the incident.

{¶ 5} In the early morning hours on the day of the incident, Barnes arrived home from his job as a bouncer and approached Sandra, who was in the couple's bedroom; Sandra's son was also in the bedroom, sleeping on the floor.<sup>1</sup> Barnes woke Sandra and yelled at her about her son still being in the house. During the course of his yelling, Barnes grabbed Sandra, hit her in the face, and ordered her and her son to immediately vacate the house. The son was awakened during the argument, and went to his room to pack his belongings.

{¶ 6} Barnes followed the son to his room and assaulted him. Sandra and her son left the house, and Sandra called her daughter, Tiffany, to come pick them up. After arriving at the house, Tiffany called the police to report the incident. Tiffany testified that before the police arrived, Barnes came out his house and yelled that he had hit her brother and that he was going to harm her. Barnes then assaulted Tiffany, stopping and fleeing when police sirens became audible. Barnes returned to the scene while the police were still there and was arrested. The police noted that Barnes smelled of alcohol.

{¶ 7} In his statement to the police, Barnes said that he pushed the son out the way because he was trying to help him pack. Barnes further said that he "mugged" Tiffany because she had called the police. Barnes described to the police that "mugging" meant he "pushed her face." Barnes also told the police

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<sup>1</sup>The son testified that he had his own bedroom in the house, but slept in the couple's bedroom that night.

that he suffered from post-traumatic stress disorder (“PTSD”) and that because of his illness he gets angry, “flip[s] out,” “black[s] out,” and “a lot of times [doesn’t] know what [he’s] doing.” Barnes told the police that he had blacked out on the evening of the incident.

{¶ 8} Barnes admitted to the police that he, Sandra, and her son cohabited. In particular, Barnes acknowledged that Sandra had lived with him for at least four months prior to the incident and her son had lived with him for three weeks prior to the incident. Barnes told the police that he and Sandra were “trying to get married and get a bigger house.” Barnes also admitted to coming home on the day of the incident, waking Sandra and her son, and ordering them out of the house.

{¶ 9} During his direct testimony at trial, however, Barnes downplayed his relationship with Sandra, and his cohabitation with her and her son. He first testified that the evening of the incident was the first time Sandra’s son had slept at his house, but upon his attorney’s further questioning, he admitted that it would be a fair statement that the son had been there before on a number of occasions. In regard to Sandra, Barnes testified that she never continuously resided with him but, rather, she mainly resided with Tiffany or her mother, and on some occasions, her whereabouts were unknown to him.

{¶ 10} Barnes further testified that he only hit the phone out of Tiffany's hand as she spoke to the police, telling her to go down the street and talk to the police instead of in front of his house. He denied hitting Tiffany in the face, and denied any violence toward Sandra and her son.

{¶ 11} Barnes testified that he and Sandra did not share any financial obligations, but admitted that, on at least one occasion, he watched Sandra's son for the day, taking him with him on errands and to a doctor's appointment.

{¶ 12} On cross-examination, Barnes testified about his PTSD, described that he was "upset" when he came home and found Sandra and her son in the house, but remained "composed." Barnes admitted that he "mugged" Tiffany in the face, but denied any violence toward Sandra or her son. In regard to his previous statement that he pushed the son, Barnes testified that he "just moved him to the side."

{¶ 13} Barnes also testified that when Sandra slept at his house, she slept in his bed with him, and that they had a sexual relationship. Barnes admitted that he has a lengthy history of felony convictions.

{¶ 14} Barnes challenges the sufficiency and weight of the evidence relative to the domestic violence convictions in his first and second assignments of error.

{¶ 15} Crim.R. 29(A) provides that a trial court “shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, \*\*\* if the evidence is insufficient to sustain a conviction of such offense or offenses.” To determine whether the evidence before a trial court was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the State. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, 683 N.E.2d 1096.

{¶ 16} 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 State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 17} While the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenge questions whether the State has met its burden of persuasion. *Thompkins* at 390. When a defendant asserts that his conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh

the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.* at 387.

{¶ 18} R.C. 2919.25(A), governing domestic violence, provides that “[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member.” The statute defines “family or household member” as:

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

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

{¶ 21} “\*\*\*

{¶ 22} “(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.” R.C. 2919.25(F)(1).

{¶ 23} The statute further defines “person living as a spouse” 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).

{¶ 24} Barnes contends that the State failed to prove that Sandra cohabited with him as a “person living as a spouse.” We disagree.

{¶ 25} The State presented evidence that Barnes and Sandra had dated for 18 months and for four months prior to the incident, she lived with him in his house. Evidence was also presented that Sandra’s son lived in the house for three weeks prior to the incident. Barnes himself, at one point, admitted to such. Evidence was also presented that Barnes and Sandra’s relationship was sexual and there was some shared familial responsibility,<sup>2</sup> again, points that were established by Barnes’ own testimony.

{¶ 26} On this record, both the weight and sufficiency of the evidence support Barnes’ convictions. Accordingly, the first and second assignments of error are overruled.

{¶ 27} Barnes argues in his third assignment of error that the State failed to prove the two furthermore specifications of the domestic violence charges. In particular, Barnes maintains that one conviction was uncounseled and the State failed to prove that the other conviction was counseled.

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<sup>2</sup>Sharing of familial responsibility and consortium are necessary to establish cohabitation. See *State v. Williams*, 79 Ohio St.3d 459, 465, 1997-Ohio-79, 683 N.E.2d 1126.

{¶ 28} Barnes' premise that an uncounseled prior conviction may not be used to enhance a later conviction and sentence is correct. See *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶9. However, a defendant must first raise this issue in the trial court. Here, Barnes did not raise the issue; he stipulated to the prior convictions without raising any challenge to them.

{¶ 29} In *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, reversed on other grounds, the Ohio Supreme Court ruled on this issue:

{¶ 30} "Thus, we hold that a stipulation to the fact of a prior conviction constitutes a stipulation as to the conviction's constitutionality, unless the defendant raises the constitutional challenge at the trial where the conviction is used to enhance a penalty. When a defendant raises a constitutional question concerning a prior conviction, he must lodge an objection to the use of this conviction and he must present sufficient evidence to establish a prima facie showing of a constitutional infirmity. This view is consistent with the obligation of a defendant to bring evidentiary objections to the attention of the trial court so that it can timely deal with them. Since the defendant did not object to the constitutionality of the prior convictions at any time before or during trial, he may not do so on appeal. Any other view would endorse 'ambush tactics' that undermine the truth-seeking process." *Id.* at 297.

{¶ 31} Because Barnes did not set forth any challenge to the constitutionality of the prior convictions at the trial court level, he may not do so now. Accordingly, the third assignment of error is overruled.

{¶ 32} For his final assignment of error, Barnes contends that the trial court erred in sentencing him to “an unspecified term of probation with respect to his misdemeanor conviction.” Barnes was sentenced to a suspended six-month term for the misdemeanor conviction; he was not placed on probation for “an unspecified term.” His fourth assignment of error is therefore meritless and overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

JAMES J. SWEENEY, A.J., and  
KENNETH A. ROCCO, J., CONCUR