

[Cite as *State v. Carter*, 2010-Ohio-1061.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-090490
		C-090491
Plaintiff-Appellee,	:	C-090492
		TRIAL NOS. 09CRB-14495A
vs.	:	09CRB-14495B
		09CRB-14495C
DOMINGO CARTER,	:	
		<i>DECISION.</i>
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 19, 2010

John Curp, Cincinnati Solicitor, and *Lura Clark Teass*, Assistant City Prosecutor, for Plaintiff-Appellee,

Jon R. Sinclair, for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

SYLVIA SIEVE HENDON, Judge.

{¶1} Following a bench trial, defendant-appellant, Domingo Carter, was convicted of assault, aggravated menacing, and unlawful restraint. Carter now appeals, raising two assignments of error. For the following reasons, we affirm the convictions.

I. Allied Offenses

{¶2} In his first assignment of error, Carter argues that the trial court erred by entering convictions for aggravated menacing and unlawful restraint because the crimes are allied offenses of similar import.

{¶3} Our analysis begins with a comparison of the elements of the offenses in the abstract, without considering the evidence in the case.¹ If the comparison reveals that the offenses are so similar that the commission of one offense would necessarily result in the commission of the other, then the offenses are allied offenses of similar import, even if the elements are not exactly aligned.²

{¶4} To commit the offense of aggravated menacing as defined in R.C. 2903.21(A), one must knowingly cause another to believe that he will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family. To commit the offense of unlawful restraint under R.C. 2905.03(A), one must, without privilege to do so, knowingly restrain another of the other person's liberty.

{¶5} A comparison of the elements of the offenses reveals that the commission of aggravated menacing would not necessarily result in the commission of unlawful restraint, and that the commission of unlawful restraint would not

¹ *State v. Williams*, ___ Ohio St.3d ___, 2010-Ohio-147, ___ N.E.2d ___, ¶22, citing *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

² *Cabrales*, supra.

automatically result in the commission of aggravated menacing. An offender could cause another to believe that he would cause serious harm to her without restraining her liberty. And an offender could restrain another's liberty without causing that person to believe that he would cause serious harm to her or her family. Accordingly, we hold that the two crimes are not allied offenses of similar import. We overrule the first assignment of error.

II. Effective Assistance of Trial Counsel

{¶6} In his second assignment of error, Carter argues that he was denied the effective assistance of counsel at trial. Carter contends that counsel's failure to object to certain trial testimony constituted ineffective assistance.

{¶7} At trial, the victim testified that she had believed Carter when he had told her that if she left the house, he was going to beat her or kill her. The prosecutor asked the victim why she believed Carter, and the victim responded, "Because, I mean, he has hurt other people." The prosecutor asked if Carter had hurt *her* prior to the day of the offense. The victim responded that, a month before the incident, Carter had punched and kicked her in the chest and stomach.

{¶8} Carter now contends that trial counsel was ineffective in failing to object to this testimony. We note, however, that the failure to make objections is not, by itself, enough to sustain a claim of ineffective assistance of counsel.³ Reversal of a conviction for ineffective assistance requires that the defendant show that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.⁴

³ See *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶168; *State v. Holloway* (1988), 38 Ohio St.3d 239, 244, 527 N.E.2d 831.

⁴ See *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.

{¶9} Under Evid.R. 404(B), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

{¶10} In this case, the victim’s testimony, while inadmissible to show Carter’s propensity to commit violent acts, was nonetheless admissible for another purpose. To prove that Carter had committed the aggravated-menacing offense, the state was required to prove that the victim had believed that Carter would cause her serious physical harm. The victim’s testimony about Carter’s prior actions was relevant to prove the reasonableness of her fear of serious physical harm at Carter’s hands.⁵ Consequently, the testimony was properly admitted, and there was no basis for counsel to object. Because Carter has failed to demonstrate that defense counsel’s performance was deficient, he cannot show that he was denied the effective assistance of counsel. We overrule the second assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

CUNNINGHAM, P.J., and SUNDERMANN, J., concur.

Please Note:

The court has recorded its own entry this date.

⁵ See *State v. Sperk*, 8th Dist. No. 91799, 2009-Ohio-1615, ¶28; *State v. Manley*, 2nd Dist. No. 20229, 2004-Ohio-4930; *State v. Skeens* (Dec. 3, 1999), 2nd Dist. No. 17528.