[Cite as *State v. Driscoll*, 2009-Ohio-6134.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 2008 CA 93

: T.C. NO. 2008 CR 359

DALE DRISCOLL : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 20th day of November, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Dale Driscoll, filed October 6, 2008. Driscoll was indicted on May 5, 2008, for the rape of a child under thirteen, with a specification that the victim, N.E., was under ten years old, in violation of R.C. 2907.02(A)(1)(b). Following a jury trial, Driscoll was found guilty and sentenced to life in prison without the possibility of parole.

{¶ 2} The events giving rise to this matter began on February 5, 2008, a Tuesday, when S.B. went to the home of her friend, A.I., on W. Euclid Avenue in Springfield. Upon arrival, S.B. observed "prostitutes coming in and out buying drugs," and Driscoll was also present. S.B. testified that she bought "a twenty" of crack cocaine from Driscoll that day. Shortly after S.B. arrived, N.E., who is A.I.'s daughter, approached her and said that she wanted to go home with her. N.E. was four years old at the time. S.B. often babysat for A.I.'s children, and she testified that she "didn't really feel like taking them that day, and I told her, 'No, let's just wait.'

{¶ 3} "And she persisted that she go to my house, so by the look in her eye, I pretty much just said, Come on, let's go.'" S.B. took N.E. and N.E.'s little brother to her parents' home, where she resided. According to S.B., "When I got there and I had pulled up, I had the key in the door and we were trying to get in the door and she told me that she had to pee really bad. She was dancing around. I said, 'Hold on a minute, I'm going to open up the door.' I opened up the door and she went straight for the bathroom, and it was like a scream, like she had been shot.

{¶ 4} "And I was like, 'What is wrong with you?' Because I had no idea if there was a bug or what, but it wasn't a bug scream. It was more like sheer agony.

{¶ 5} "I said, 'What is wrong with you?' She said, 'My coonie hurts.' I asked her - - I said, 'Your coonie hurts?' And she said, 'Yes. I'm tired of Black and PJ sticking their fingers in me.'

{¶ 6} "* * *

{¶ 7} "She's bawling, crying, holding herself. She couldn't pee. I mean, she dropped down to her knees. I mean, she was just terrified, you know, sheer terrified." S.B. immediately took N.E. to the hospital.

{¶ 8} Dr. William Garringer, an emergency room physician, treated N.E. According to

Garringer, a patient brought to the E.R. is first evaluated by a triage nurse, and the physicians "depend on the nurse to do the initial screening and tell us who needs to be seen right away, who can wait." Garringer testified, "[t]he history was that I had been told that this little girl was brought to the emergency room by the babysitter, and that the child had told the babysitter that an adult male living in the mother's house had stuck his fingers inside her vagina." Based on the history he received, Garringer stated that he did "a focused exam on that priority."

{¶ 9} In the course of the examination of N.E.'s vaginal area, Garringer observed "on the left-hand side * * * a small area that had a slit almost like a little cut in it that was right next to the area where the major fold and minor one in that general area come together, * * *. And then surrounding that was redness and bruising. And that entire area was probably nearly a half inch in diameter from not only the tiny cut, which was extremely small, but then the surrounding area was red and somewhat bruised looking." Garringer stated the injury was consistent with external force being applied to N.E.'s vaginal area. There was no evidence that Garringer independently inquired of N.E. as to the source of her injury.

{¶ 10} Garringer stated that he does not know who S.B. is.

{¶ 11} Stacie Bowermeister, a social worker with the Clark County Department of Job and Family Services testified that she is assigned to the Clark County Child Advocacy Center to investigate referrals of sex abuse and severe physical abuse. According to Bowermeister, she conducts forensic interviews to make decisions about the welfare of the children she sees, including whether the child needs to be referred for medical treatment. Bowermeister stated that the forensic interview process involves non-leading and non-suggestive questions.

{¶ 12} Bowermeister met Detective Trent King on February 5th at the hospital to see N.E.

She stated that she spoke to King, Garringer, N.E., and S.B.. Based upon her "scaled-down" forensic interview of N.E., Bowermeister decided that a follow-up medical examination by Dr. Jim Duffee at the Rocking Horse Center was warranted, and one was schedule for the following day. From that initial interview, Bowermeister was able to gain information regarding the nature of N.E.'s disclosures. Bowermeister later conducted a full forensic interview of N.E on February 15th, which Bowermeister described as "very consistent" with both her interview on February 5th as well as N.E.'s interview with Duffee on the 6th. Bowermeister stated, developmentally, "[i]t's difficult for a preschool-age child to give details * * * to make up something and to provide details. And then to provide those details more than one time, it would be difficult." Bowermeister acknowledged that children are not always truthful, but she testified that, for children N.E.'s age, "their language really will be simple, so developmentally it would be difficult to tell a complex lie," and to maintain the lie over a period of time.

{¶ 13} Dr. Jim Duffee, the medical director of Rocking Horse Center in Springfield, a community health center, conducted a sexual assault examination of N.E. on February 6th. Duffee explained that such examinations begin with a medical interview, and he emphasized that when interviewing children alleged to have been sexually abused he "certainly take[s] a medical approach rather than a judicial approach." Duffee stated he attempts "to determine what happened in order to determine what particular tests need to be done or what particular examinations or treatment that needs to be done.

{¶ 14} "Our first concern is the safety of the child, and then the second concern is that there is no medical illness or medical condition that needs to be treated.

{¶ 15} "And third, of course, we are aware that what the children say to us is likely to be

presented in court, so the documentation is specific for that, again, our interview and our medical exam is related to medicine."

{¶ 16} Duffee stated that his examination of N.E. was consistent with the procedures he described. Due to N.E.'s age, Duffee only asked her a couple of questions, having received additional information from Bowermeister and the emergency room. Duffee stated that the questions he asked were for purposes of medical diagnosis and treatment, and that he was careful to ask non-leading and non-suggestive questions. The prosecutor then asked the following question: "You said you conducted a very short interview of [N.E.] If you could, tell the jury what you asked [N.E.] and what her responses to you were." Defense counsel objected to the admission of N.E.'s responses to Duffee's questions.

{¶ 17} After a lengthy discussion at sidebar, the trial court overruled the objection. Duffee continued to testify that his "questions were very open-ended. * * * she was very quick and spontaneous in her responses initially and then she stopped talking.

{¶ 18} "The first thing I said, as I recall, was, 'Do you know why you came here today?'

{¶ 19} "And her response was, 'PJ and Black hurt my bootie.' And I asked her to explain. I said, 'What do you mean by that?' And she said, 'Put their fingers in.'

{¶ 20} "* * * She was done with the interview after approximately two questions."

{¶ 21} Duffee then described his physical examination of N.E., stating it "was significant because of a slit or a tear beside her - - what's called the labia majora in the * * * genital region. There was also some redness on the opening, but no scaring or laceration or cut or trauma in that area." Dufee then identified photographs of N.E.'s injuries that he took during her examination. State's Exhibit #9, a medical record completed by Duffee after his examination, indicates under the

heading, "Findings and Interpretation," "Sexual abuse is highly suspected."

{¶ 22} On cross-examination, Duffee opined that N.E.'s injury was "acute in the previous twenty-four hours. * * * there was no healing process involved at all."

{¶ 23} Detective Trent King of the Springfield Police Department testified that he responded to the hospital on February 5, 2008. According to King, he showed N.E. a photograph of Driscoll, and she identified him by his street name, "Black," as the person who abused her. King stated that he interviewed Driscoll at the police station on February 8th, and the videotape of that interview was shown to the jury in redacted form pursuant to the parties' agreement. After the tape was played, King was asked, "How many times during that interview did the defendant admit that [N.E.], because of her age, would not have been able to make and hold together a lie?" King responded, "I counted ten." King also testified that in the interview, Driscoll stated that he was last at the W. Euclid Avenue address on February 4th or 5th.

{¶ 24} Driscoll testified on his own behalf. He acknowledged that he pled guilty to drug abuse and burglary in 2002, and that in 2005 he pled guilty to another drug offense, serving six-month sentences in each case. When asked what types of drugs he has taken in the past, he replied, "just weed and drinking liquor." When asked if he has an alcohol problem, Driscoll replied, "I ain't never caught no felony off of it; but yeah, I drink. I drink a lot." Driscoll stated that he is unemployed. He stated that he has been to A.I.'s home about 30 times, and that her children were familiar with him, but that he never interacted with them because, "I * * * don't deal with people's kids. That's disrespecting another man." According to Driscoll's trial testimony, the last day he was at the 640 W. Euclid Avenue address "was Sunday because I had a warrant. To me, I didn't want the police to come up and ask me about [A.I.'s] house for cases I'm guilty of." At trial, Driscoll denied

being at A.I.'s home on the 4th or 5th of February. According to Driscoll, he was confused when he stated to King that he had been there on those days, because "days are really flying. Then I have warrants for other cases I'm guilty for, but the days were flying * * *." Driscoll testified that he was never alone with N.E., and he denied raping her. Driscoll acknowledged that he is known by the street name, "Black." He testified that he agreed to a stipulated polygraph examination.

{¶ 25} Cindy Erwin, who is employed by the Ohio Attorney General's Office and the Bureau of Criminal Identification and Investigation in London, Ohio, testified that she administered the polygraph examination to Driscoll. Erwin asked Driscoll the following questions: "Did you ever put your fingers into [N.E.'s] bare vagina? Did you ever insert your fingers into [N.E.'s] bare vagina? Did you ever touch [N.E.'s] bare vagina and Did you ever commit a sex act on [N.E.]?" Erwin "found that Mr. Driscoll was deceptive when he answered the relevant questions." Erwin sent the test data to a second examiner for a "cold review," and the second examiner concurred with Erwin's conclusion. Erwin's results were admitted, and they provide as follows: "Specific reactions indicative of deception appeared on the subject's chart as a result of relevant questions asked during the examination. It is to be considered, therefore, that this person did not tell the truth during the tests."

{¶ 26} Driscoll asserts four assignments of error, which we will consider out of order for ease of analysis. His first assignment of error is as follows:

{¶ 27} "THE SENTENCE IMPOSED BY THE TRIAL COURT IS UNCONSTITUTIONAL AS IT REPRESENTS CRUEL AND UNUSUAL PUNISHMENT AND IS DISPROPORTIONAL TO THE OFFENSE COMMITTED."

{¶ 28} As the State correctly notes, Driscoll failed to raise these arguments below, thus they

are waived. Further, "'It is generally accepted that punishments which are prohibited by the Eighth Amendment are limited to torture or other barbarous punishments, degrading punishments unknown at common law, and punishments which are so disproportionate to the offense as to shock the moral sense of the community.' *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69 * * * . 'As a general rule, a sentence that falls within the terms of a valid statute cannot amount to cruel and unusual punishment.' Id." *State v. McConnell*, Montgomery App. No. 19993, 2004-Ohio-4263, ¶140.

{¶ 29} R.C. 2907.02(B) provides, "* * * if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, the court may impose upon the offender a term of life without parole." Driscoll's sentence of life without parole for raping four year old N.E., in violation to R.C. 2907.02(A)(1)(b), does not constitute cruel and unusual punishment, because it is "not disproportionate or shocking to the moral sense of the community, in view of the heinous nature of the crime." Id., ¶ 142.

{¶ 30} Driscoll's first assignment of error is overruled.

{¶ 31} Driscoll's third assignment of error is as follows:

{¶ 32} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY OVERRULING SUMMARILY DEFENSE OBJECTIONS TO HEARSAY TESTIMONY."

{¶ 33} According to Driscoll, the trial court erred in admitting N.E.'s responses to Duffee's two questions of her, namely that "PJ and Black" raped her. The State responds that N.E.'s statements are admissible under Evid.R.803(4) and are not testimonial in nature, pursuant to *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.

{¶ 34} "A reviewing court will not reverse the trial court's admission of evidence absent an

abuse of discretion." *State v. Bellomy*, Montgomery App. No.21452, 2006-Ohio-7087. "An abuse of discretion connotes more than a mere error of law or judgment. It implies an arbitrary, unreasonable, or unconscionable attitude on the part of the court." Id. (Internal citations omitted).

{¶ 35} "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Evid.R. 803(4) provides the following exception to the hearsay rule: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

{¶ 36} Following Driscoll's objections to Duffee's testimony, a sidebar conference was held. After listening to the parties' arguments, the trial court determined that N.E.'s statements, as related by Duffee, fell within the hearsay exception provided in Evid.R. 803(4). The trial court further decided that *Crawford* did not bar admission of the statements, in reliance upon *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267.

{¶ 37} In *Muttart,* the defendant was convicted of raping a child under 13 years of age, and the Supreme Court of Ohio determined that the trial court did not abuse its discretion in admitting the victim's out of court statements to medical personnel pursuant to Evid.R. 803(4). The statements contained the perpetrator's identity. The *Muttart* court further determined that the victim's statements were not testimonial in nature and did not implicate the defendant's Sixth Amendment right of confrontation. In the course of its analysis, the Court determined that the "salient inquiry is * * * whether [the victim's] statements were made for purposes of diagnosis and treatment rather than for some other purpose." Id., ¶ 47.

{¶ 38} The Court further went on to note that the trial court "retains the discretion to admit the testimony after considering the circumstances surrounding the child victim's statements." Id., ¶ 48. The Court determined, "[a]t a minimum * * * a nonexhaustive list of considerations includes (1) whether the child was questioned in a leading or suggestive manner, (citations omitted) (2) whether there is a motive to fabricate, such as a pending legal proceeding such as a 'bitter custody battle,' (citations omitted) and (3) whether the child understood the need to tell the physician the truth, (citations omitted). In addition, the court may be guided by the age of the child making the statements, which might suggest the absence or presence of an ability to fabricate, and the consistency of the declarations. (Citation omitted). In addition, the court should be aware of the manner in which a physician or other medical provider elicited or pursued a disclosure of abuse by a child victim, as shown by evidence of the proper protocol for interviewing children alleging sexual abuse." Id., ¶ 49.

{¶ 39} Having reviewed the record, we see no abuse of discretion; N.E.'s statements to Duffee were made for purposes of medical diagnosis and treatment. There is no suggestion herein that N.E. was not truthful. She repeatedly told a consistent story about what happened to her. There is no suggestion of a motive for fabrication, and Bowermeister explained that due to N.E.'s age, she lacked an ability to fabricate a version of events. N.E. had injuries consistent with her recitation of events. Bowermeister referred N.E. to Duffee for a medical examination, and N.E. told Duffee that she understood she was there to see the doctor because "PJ and Black" had injured her. Duffee made clear that it is his practice to ask non-leading and non-suggestive questions in the course of a sexual abuse examination, and he did so with N.E. We conclude that the trial court did not abuse its discretion in determining that N.E.'s statements were made for medical diagnosis and treatment

purposes.

{¶ 40} Regarding Driscoll's suggestion that his Sixth Amendment right to confrontation was violated, *Muttart* held, "Statements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under *Crawford*, because they are not even remotely related to the evils that the Confrontation Clause was designed to avoid." Id., ¶ 46. Accordingly, Driscoll's claim pursuant to *Crawford* fails, since "we have no concern that the statements at issue were testimonial in nature. The statements made by [N.E.] were not made in the context of in-court testimony or its equivalent. There is no suggestion that they were elicited as part of the police investigation or in a sworn statement with intention of preserving the statement for trial or that they were a pretext or facade for state action." Id., ¶ 61.

{¶ 41} Since the trial court did not err in admitting Duffee's testimony, Driscoll's third assignment of error is overruled.

{¶ 42} Driscoll's second assignment of error is as follows:

{¶ 43} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO RAISE TIMELY OBJECTIONS TO IMPROPER TESTIMONY, FAILED TO FILE A MOTION IN LIMINE ANTICIPATING SAID TESTIMONY AND, FINALLY, FAILED TO REQUEST A PRE-SENTENCE REPORT WHEN THE ULTIMATE MERCILESS SENTENCE WAS POSSIBLE."

{¶ 44} "We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, * * *. Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her

conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." (Internal citation omitted). *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 45} "Failure to object waives all but plain error. *McBride v. Quebe*, Montgomery App. No. 21310, 2006-Ohio-5128. Plain error exists 'if the trial outcome would clearly have been different, absent the alleged error in the trial court proceedings.' *State v. Rollins*, Clark App. No.2005-CS-10, 2006-Ohio-5399. '[T]o successfully prevail under plain error the substantial rights of the accused must be so adversely affected that the error undermines the "fairness of the guilt determining process." ' *State v. Ohl* (Nov. 27, 1991), Ashland App. No. CA-976." *State v.Bahns*, Montgomery App. No. 22922, 2009-Ohio-5525, ¶ 25.

{¶ 46} Driscoll initially argues that defense counsel was ineffective in failing to object to Garringer's testimony regarding the patient history he received because it "is a third-hand report from an unidentified source that said abuse had occurred." Driscoll further argues that his counsel was ineffective for failing to file a liminal motion requesting a hearing so that he could establish, "outside the presence of the jury, that the child's alleged statements had been filtered through two other persons, at least one of whom was not identified, and that he had not independently inquired of [N.E.] what had happened to her." The State responds that Garringer's testimony is admissible

hearsay pursuant to Evid.R.803(4). We disagree.

{¶ 47} There are multiple layers of hearsay in Garringer's testimony. First, there is the statement from N.E. to "the babysitter." Second, there is the statement from "the babysitter" to an unidentified triage nurse. Third, there is the statement from the nurse to Garringer. In other words, Garringer was allowed to testify without objection that an unidentified source told him that he or she had been told by "the babysitter" that N.E. had been raped by a member of her household. In contrast to Duffee's testimony involving N.E.'s direct statements to him regarding the source of her injuries, Garringer's testimony regarding the source of N.E.'s injuries was three times removed from the source, N.E., and there is no indication that Garringer ever spoke to N.E. regarding her injuries. In other words, the State provided no foundation to trigger the exception in Evid.R. 803(4) and, accordingly, the exception does not save that portion of Garringer's testimony.

{¶ 48} Having reviewed the entire record, however, we conclude that counsel's failure to object or file a liminal motion does not rise to the level of plain error; the substance of Garringer's testimony was properly adduced by the State through S.B. and Duffee, and subsequent, substantial, and properly admitted cumulative evidence corroborated N.E.'s assertions that Driscoll raped her. Since the testimony complained of is harmless, there is no prejudice to Driscoll.

{¶ 49} We further note that the authorities relied upon by the State in arguing that the testimony is admissible pursuant to Evid.R.803(4) are distinguishable from the matter herein. Each of those cases involved statements made by the victims themselves directly to medical personnel who testified regarding the content of the victim's statements.

{¶ 50} We also note that Driscoll's reliance upon the test set forth in *Ohio v. Roberts* (June 25, 1980), 448 U.S. 56, 100 S.Ct. 2531, is misplaced. That test has been abrogated by *Crawford v.*

Washington. "The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. Under *former* law, [*Roberts*], the right to confrontation did not bar admission of an unavailable witness's hearsay statements against a criminal defendant if the statement bore 'adequate indicia of reliability,' a test that was satisfied when the evidence either fell within a 'firmly rooted hearsay exception,' or bore 'particularized guarantees of trustworthiness.' Id.

{¶ 51} "In *Crawford v. Washington, supra,* the Supreme Court changed its view concerning application of the right of confrontation, and held that out-of-court statements by a witness that are testimonial in nature are barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether the statements are deemed reliable by the court." *State v. McNew*, Montgomery App. No. 22902, 2009-Ohio-5531,¶ 62-63 (emphasis added.)

{¶ 52} Driscoll next argues that his counsel was ineffective for failing to object to S.B.'s testimony that Driscoll was selling drugs to multiple people from A.I.'s home. After S.B.'s testimony regarding the sale of drugs, the following exchange occurred outside of the presence of the jury:

{¶ 53} "THE COURT: All right. The defendant is still present with counsel at table. The State is represented by counsel. * * * We do have an issue. The witness just testified that the defendant sold her crack cocaine. Is that something that the parties anticipated coming out, or how does that affect the nature of the case?

{¶ 54} "MR. WILSON: I don't think it's an issue because on the interview it's clear that they are slinging dope. I think it goes to Ron's theory of the case that there are all kinds of people in and out of there. If nothing else, it probably helps Ron.

{¶ 55} "MR. MORRIS: Yes. We can probably ask if there are rules on that, but I have nothing yet to present to the Court about instructions or anything.

{¶ 56} "* * *

{¶ 57} "MR. WILSON: If you want to give a full limiting instruction on other facts that the jury is not to regard them for anything other than the witness' bias or prejudice or something like that, I don't care at all on that. * * * It's not a show stopper.

{¶ 58} "MR. MORRIS: I would just ask the Court to reserve ruling for now.

{¶ 59} "* * *

{¶ 60} "THE COURT: * * * I just want the record to be clear that the Court is willing to consider any potential remedies that the defense may have. If you don't think it's a problem, or if you think it fits in with the strategy of your case, you don't want the Court to do anything, that's fine, but I will consider any request that you make."

{¶ 61} Again, we see no plain error. Given the substantial evidence against Driscoll, any objection to S.B.'s testimony that he was selling drugs at A.I.'s house would not have altered the outcome of Driscoll's trial. Further, the record makes clear that defense counsel considered the impact of S.B.'s testimony and made a strategic decision to allow it to remain unchallenged and refused the trial court's offer of a limiting instruction. Given that Driscoll asserted repeatedly that he was never alone with N.E., S.B.'s testimony that people were coming and going from the home to purchase drugs is consistent with the theory of defense counsel's closing argument, namely, "Anybody could have done it. Everybody's a drug addict, no one can be trusted."

{¶ 62} Next Driscoll argues, "Several instances of leading questions went unchallenged

{¶ 63} by defense allowing the prosecutor to basically testify to crucial issues." Driscoll

directs our attention to only one question posed to Erwin regarding her administration of the polygraph test, namely, "The defendant clearly reacted to the relevant questions showing deception, right?" Again, we see no plain error in defense counsel's failure to object; the results of the stipulated polygraph examination, which clearly stated that Driscoll was deceptive, were admitted into evidence.

{¶ 64} Finally, Driscoll asserts that defense counsel was "ineffective in failing to request a pre-sentence investigation or, at least, a separate and subsequent dispositional hearing when arguments could have been raised as to why the most draconian of punishments * * * could have been opposed by Driscoll, possibly through family or other witnesses."

{¶ 65} A trial court is not required to order a presentence report pursuant to Crim.R. 32.2(A) in a felony case when probation is not granted. *State v. Cyrus* (1992), 63 Ohio St.3d 164, syllabus. Further, as the State asserts, there is nothing in the record to suggest that a presentence investigation report would have provided any mitigation. Driscoll has a felony criminal history, he is unemployed, he consumes alcohol to excess, and he admitted guilt to other uncharged offenses. Accordingly, we cannot conclude that counsel's failure to request a presentence investigation fell below an objective standard of reasonableness.

{¶ 66} There being no merit to counsel's second assignment of error, it is overruled.

{¶ 67} Driscoll's fourth assignment of error is as follows:

{¶ 68} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT OVERRULED APPELLANT' MOTION TO DISMISS FOR FAILURE TO BRING HIM TO TRIAL WITHIN THE TIME LIMITS MANDATED BY O.R.C. 2945.71 ET SEQ."

{¶ 69} According to Driscoll, he was incarcerated for 118 days pending his trial, which is 28

days more than permitted by statute. The State responds, "Driscoll was brought to trial within 68 days for purposes of speedy trial time because multiple reasonable continuances tolled the speedy trial clock."

{¶ 70} "The right to a speedy trial is a constitutional right of every defendant who is charged with a criminal offense for which he may be deprived of his liberty or property. Sixth Amendment, Constitution of the United States; Article I, Section 10, Constitution of Ohio. The constitutional right is implemented by R.C. 2945.71, et seq., which imposes an affirmative duty on the State to bring a defendant to trial within the statutory times prescribed. (Citations omitted). The speedy trial statute * * * is mandatory and must be strictly construed against the State." *State v. Tillman*, Clark App. No. 06CA0118, 2008-Ohio-2060, ¶ 11.

{¶ 71} Pursuant to R.C. 2945.71(C)(2) and (E), in the case of a felony, a defendant who is held in jail in lieu of bond must be brought to trial within 90 days of his arrest. R.C. 2945.72(H), however, provides, "[t]he time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following: * * * (H) * * * the period of any reasonable continuance granted other than upon the accused's own motion."

{¶ 72} In *State v. Lee* (1976), 48 Ohio St.2d 208, 209-10, the Supreme Court of Ohio determined, in the case of a sua sponte continuance by the court, "the record of the trial court must in some manner affirmatively demonstrate [that the continuance] was reasonable in light of its necessity or purpose. * * * Although this burden is contrary to the presumption of regularity generally accorded to trial proceedings, it appears necessary to carry out the purposes of the speedy-trial statutes." "Whether a sua sponte continuance is 'reasonable' for purposes of R.C. 2945.72(H) requires two inquiries. First, the grounds for the continuance must be reasonable and must be stated

by the court in an entry journalized prior to the expiration of the defendant's speedy trial time. *State v. Mincy* (1982), 2 Ohio St.3d 6. Second, the resulting extension of the defendant's trial time, which is determined in relation to the new trial date the court sets, must not be unreasonable in duration, and in making that determination courts are limited to the delay that actually and directly results from the continuance ordered. 2 Baldwin's Ohio Practice, Criminal Law § 60:16." *Tillman*, ¶ 18.

{¶ 73} The trial court journalized one continuance, "on its own motion," on July 24, 2008, continuing the trial until September 8, 2008, due to the fact that the prosecutor "was in an aggravated vehicular homicide trial * * * to wit: *State v. Skaggs*, Clark County Common Pleas Court Case Number 07-CR-818. That jury trial commenced on July 23, 2008 and is anticipated to last for approximately three weeks." Proceedings were conducted on the record regarding the continuance of the July 24th trial date, and the prosecutor set forth his conflict in the presence of defense counsel. The trial court determined that the prosecutor's trial "will probably last several weeks. That it is physically impossible for the prosecutor to be in two places at one time. And that based on that, the court will on its own motion continue the jury trial. I will reassign the trial as soon as possible after the Scaggs trial is concluded. Obviously, I'll give the State's attorney some time once that case concludes to be able to prepare for this trial, but we can set a date that would be mutually agreeable to both sides. And we can do that as the Scaggs trial is starting to wind down and we'll have a better idea of when it will be over and when we can get this case back on."

{¶ 74} At the start of the trial herein, Driscoll moved the trial court for dismissal, arguing that his right to a speedy trial had been violated, and the State objected. In overruling Driscoll's motion, the trial court made the following determination orally on the record: "* * * the Court finds that between June 4th, when the prosecutor requested discovery, and July 21st, when discovery was

provided, the time was tolled.

{¶ 75} "Also, the time was tolled from July 24th, the date of the original trial, to September 8th because of the prosecutor being in the Scaggs trial and then the time was tolled again from September 8th until today because the Court was in *State v. Kyle Sims,* and based on that, the Court will overrule the motion to dismiss, * * * ."

{¶ 76} Having reviewed the record before us, we conclude that the continuance journalized by the trial court due to the prosecutor's unavailability tolled Driscoll's speedy trial time. The timely journal entry sets forth the grounds of the continuance, and it was not of unreasonable duration, given the length of the *Scaggs* trial.

{¶ 77} Regarding the trial court's determination that Driscoll's speedy trial time was tolled by the defense's dilatory response to the State's discovery demand, we note that the "failure of a criminal defendant to respond within a reasonable time to a prosecution request for reciprocal discovery constitutes neglect that tolls the running of speedy-trial time pursuant to R.C. 2945.72(D)." *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, syllabus ¶ 1. However, a "trial court shall determine the date by which a defendant should reasonably have responded to a reciprocal discovery request based on the totality of the facts and circumstances of the case, including the time established for response by local rule, if applicable." Id., syllabus ¶ 3. The trial court made no such determination, nor did it journalize this tolling, but instead it improperly counted all this time against Driscoll, doing so for an unreasonable duration, namely for the period of time between the discovery request and the response. Accordingly, we conclude that Driscoll's speedy trial time was not further tolled by this period of time.

{¶ 78} Regarding the trial court's continuance for three days while the court was in trial

(September 8th -11th), this continuance also was not journalized, and accordingly it did not toll Driscoll's speedy trial time.

{¶ 79} Driscoll was arrested May 17, 2008, and the State was required to bring him to trial within 90 days, on or before August 15, 2008. On July 24, 2008, the trial court filed its reasonable continuance, until September 8th, within the allowable 90 day limit, thereby tolling the speedy trial time by a total of 46 days. On the day of his trial, Driscoll had been incarcerated for 117 days. Tolling the time 46 days, Driscoll was brought to trial within 71 days, and thus, his speedy-trial rights were not violated. Accordingly, Driscoll's fourth assignment of error is overruled.

{¶ 80} Of final note, although not assigned as error, Driscoll, in the "Statement of Facts" section of his brief, directs our attention to a portion of the prosecutor's closing argument. For contextual purposes, we set forth the prosecutor's comments leading up to the comment at issue as follows: "And I think you would all agree with me that one of the decisions that's the most important in your life is who you leave your kids with, who you let baby-sit your kids.

{¶ 81} "And since he asked you about forming opinions on the most important things in the victim's life, I'm going to ask you this: *Would you let this defendant baby-sit your four-year-old daughter? Would you?"* (Emphasis added.)

{¶ 82} The test for prosecutorial misconduct is "'whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused.' (Citation omitted). 'The touchstone of analysis "is the fairness of the trial, not the culpability of the prosecutor."' (Citations omitted). Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced and his conviction will not be reversed. (Citation omitted). We review the alleged wrongful conduct in the context of

the entire trial. (Citations omitted).

{¶ 83} "In general, prosecutors enjoy a wide latitude during opening and closing arguments. (Citation omitted). They may freely address what the evidence has shown and what reasonable inferences may be drawn from that evidence. (Citation omitted). 'However, prosecutors must refrain from making misleading insinuations and assertions as well as expressing personal beliefs or opinions regarding the defendant's guilt. Prosecutors must also refrain from alluding to matters unsupported by admissible evidence. "It is a prosecutor's duty in closing argument to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury." ' (Citations omitted)." *State v. Green*, Greene App. No. 2007 CA 2, 2009-Ohio-5529, ¶ 101-02.

{¶ 84} We take notice that the above argument was improper. We address this to prevent such an argument from tainting a future case involving a child. There was no evidence in the record that Driscoll was N.E.'s babysitter, and to ask the jury if they would permit Driscoll to babysit their own children is irrelevant and inflammatory. By going beyond the evidence, this portion of closing remarks only served to incite passion and open the door to the consideration of improper facts in rendering judgment. However, in the context of the entire trial, given the overwhelming evidence against Driscoll, it is clear beyond a reasonable doubt that the jury would have found Driscoll guilty in the absence of such an inflammatory and improper remark.

{¶ 85} All assignments of error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, J. and FROELICH, J., concur.

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