[Cite as *State v. Howard*, 2011-Ohio-27.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23795
v.	:	T.C. NO. 2008CR04256
KENYON A. HOWARD	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 7th day of January, 2011.

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FROELICH, J.

{¶ 1} Kenyon A. Howard was found guilty after a jury trial in the Montgomery County Common Pleas Court of improperly discharging a firearm at or into a habitation, a second degree felony, and an accompanying firearm specification. The court sentenced Howard to four years in prison, to be served consecutively and subsequent to a three-year term for the firearm specification.

{¶ 2} Howard appeals from his conviction. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 3} Howard raises two assignments of error on appeal. They state:

{¶ 4} "THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF [THE] FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶ 5} "THE TRIAL COURT COMMITTED PLAIN ERROR AND VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL."

{¶ 6} In his assignments of error, Howard claims that his trial counsel rendered ineffective assistance in several respects and that the trial court committed plain error in allowing the State to use certain demonstrative evidence and in failing to give a written copy of a supplemental jury instruction to the jury. We will address Howard's arguments in a manner that facilitates our analysis.

{¶ 7} To reverse a conviction based on ineffective assistance of counsel, an appellant must demonstrate both that trial counsel's conduct fell below an objective standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. 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. Deficient performance

means that claimed errors were so serious that the defense attorney was not functioning as the "counsel" that the Sixth Amendment guarantees. *State v. Cook* (1992), 65 Ohio St.3d 516, 524.

{¶ 8} We begin with Howard's claim that his trial counsel was ineffective in failing to make a Crim.R. 29 motion for a judgment of acquittal. Such a motion is appropriate "if the evidence is insufficient to sustain a conviction." Crim.R. 29(A).

{¶ 9} A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259: "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."

{¶ 10} Howard was convicted of improperly discharging a firearm at or into a habitation, in violation of R.C. 2923.161(A)(1). That statute provides that "no person, without privilege to do so, shall knowingly do any of the following: (1) discharge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual."

{¶ 11} According to the State's evidence at trial, in the early morning of October 29, 2008, Pauline Williams was asleep in the first-floor living room of her home at 2112 Oakridge Drive in Dayton with her ten-year-old son, Daniel. Williams's eighteen-year-old son, Frederick Brooks; Brooks's girlfriend, Jennette McCluskey; and Brooks's and McCluskey's infant son were staying at her house and sleeping in an upstairs bedroom. At approximately 7:30 a.m., the family was awakened by the sound of numerous gunshots hitting the front of the house, wood cracking, glass and windows shattering, and smoke. They all retreated to the upstairs bathroom. Approximately 28 rounds were fired at the house. No one was injured.

{¶ 12} After the shooting stopped a minute or two later, Williams and Brooks went to the bedroom in the front of the house and looked outside. Williams saw "Tone," whom she knew from the neighborhood, "running back to his car," which was black with a "slanted low, short body." "Tone" was Kenyon Howard's street name. Williams stated that she saw Howard's face and recognized him "instantly." As Howard was running back to his car, Williams saw him carrying a "big black gun" that was "beyond a handgun" but not a rifle. Brooks testified that he saw an individual at the corner of Oakridge Drive and Shoop Avenue, which was diagonally across from Williams's home. Brooks testified that he "thought it was Tone but I'm not sure if it was Tone." Brooks also saw that a black compact car was parked on Shoop, facing away from Williams's house.

{¶ 13} McCluskey came out of the bathroom after Williams and Brooks and looked out the same front window. She observed a man open the driver's door of

a black vehicle with tinted windows and a fin on the back of the trunk; McCluskey identified the car as an Alero. The man put something black into his vehicle, got into the driver's seat, and drove away on Shoop. McCluskey recognized the car as belonging to "Tone Howard" and, although she only saw the man from the back and side, she testified that the man looked like Howard.

{¶ 14} After Williams, Brooks, and McCluskey looked outside, Brooks headed toward the front door in order to go after the shooter. Williams attempted to stop him. By the time they reached the front door, the police had arrived due to an anonymous report that a citizen had observed bullet holes in the front of the residence.

{¶ 15} During the police investigation, Brooks informed Dayton Police Officer John Beall that he knew who the shooter was. Brooks was taken to the police department, and he was interviewed by Detective C.W. Ritchey (in place of Detective Douglas Baker, the lead detective in the case). Detective Ritchey talked with Brooks about the October 29 incident as well as a prior incident on August 6, 2008. Brooks told Ritchey that he was present for both shootings, and he indicated that "Tone" was involved in the October 29 shooting. Detective Ritchey used the information provided by Brooks and looked up Howard in a police database. Ritchey placed a photo of Howard in a photo spread and showed the photo spread to Brooks. Brooks took approximately five seconds and then pointed to Howard's photograph and said, "That's him." Brooks signed the photo spread, dated it, and wrote the number he chose. Brook also told Detective Ritchey that he had seen a black Oldsmobile Intrigue at the scene.

{¶ 16} Former Dayton Police Officer (now with the Dayton Fire Department) Jason Hall was called to 2112 Oakridge on October 29, 2008, to perform his duties as an evidence technician. Hall documented "approximately 28 strikes" to the front of the house, and several exit holes in the back of the structure. He collected 19 spent bullet casings from the street. Two bullets were recovered – one from the living room floor and one from a dresser drawer in the upstairs bedroom. Hall testified that, based on the location of the spent casings, it appeared that someone had been standing in the street shooting.

{¶ 17} During the afternoon of December 25, 2008, Howard and his brother, Elijauan, were involved in a car accident between a black Intrigue with a spoiler on the trunk and a Cadillac at the intersection of Mia and Kammer Avenues in Dayton. Dayton Police Officer John Garrison arrived at the scene and apprehended Elijauan (believing Elijauan to be Howard), who was fleeing from the accident. Elijauan screamed that Howard was "burning up" inside one of the vehicles. The Intrigue and Cadillac were engulfed in flames, and Officer Garrison was unable to determine if anyone were inside. Garrison could hear "popping sounds and zinging sounds coming from the burning Intrigue" that he believed to be ammunition being burned. After the fire was extinguished, Officer Garrison was informed that no one else was in the car.

{¶ 18} Following the accident, several officers were ordered to look for Howard. Howard was later located at his brother's residence at 2353 Rugby Road in Dayton. (It is unclear from the record whether this was Elijauan's or whether there was another brother.) The police responded to that location and surrounded

the house; the occupants were ordered out of the residence. After the police had seen Howard inside the house and demanded for more than twenty minutes on a PA system that he exit, Howard eventually emerged from the house and was apprehended. Afterward, Officer Dustin Phillips and other officers "cleared" the house to make sure no one was hiding inside. While looking through the house, Phillips observed a large SKS semiautomatic assault rifle leaning against the main dresser in the master bedroom; a magazine for the weapon and several live .30 caliber rounds were there, as well. Officer Phillips took the assault weapon, the magazine, and the rounds for that weapon into evidence; at trial, these items were introduced by the State, without objection, as Exhibit 31. Phillips also collected a box of live rounds for a .40 caliber weapon, a box of live rounds for a 9 mm weapon, an extended magazine for the 9 mm rounds, and a small digital scale from Howard's brother's residence.

{¶ 19} After Howard was arrested, he was taken to the police department and interviewed by Detective Baker and Officer Jonathan Cider, a traffic investigator. Baker informed Howard of his *Miranda* rights. After Cider spoke with Howard about the traffic accident, Detective Baker informed Howard that he was identified in a shooting into a house. Detective Baker asked Howard if he had a problem with the people living at 2112 Oakridge, where Williams and Brooks lived. Howard responded that he had been "having words with them due to the fact that [Brooks's] been switching cell phone numbers." Howard explained that Brooks found out who had a "dope money phone" and would switch the phone calls. Howard did not indicate any knowledge about the October 29 shooting or a prior

shooting into Brooks's residence.

{¶ 20} In March 2009, McCluskey and Williams met with Detective Baker and the prosecutor. Detective Baker presented them with a photo array, which included a photo of Howard. McCluskey and Williams each identified Howard as the shooter from the photo array.

{¶ 21} Construing the State's evidence in the light most favorable to the State, we find ample evidence that Howard committed the offense of improperly discharging a firearm into a habitation, namely Williams's residence at 2112 Oakridge where Brooks was staying. Had Howard's counsel moved for a judgment of acquittal under Crim.R. 29 at the conclusion of the State's case, such motion would have been denied. Accordingly, Howard was not prejudiced by his counsel's failure to move for a judgment of acquittal.

{¶ 22} Second, Howard claims that his counsel rendered ineffective assistance by failing to file any pre-trial motions concerning the photo spread identifications. "The failure to file a suppression motion is not per se ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52, 2000-Ohio-448. Rather, trial counsel's failure to file a motion to suppress constitutes ineffective assistance of counsel only if the failure to file the motion caused Defendant prejudice; that is, when there is a reasonable probability that, had the motion to suppress been filed, it would have been granted." (Citations omitted.) *State v. Wilson,* Clark App. 08CA0445, 2009-Ohio-2744, ¶11. See, also, *State v. Nields*, 93 Ohio St.3d 6, 34, 2001-Ohio-1291.

{¶ 23} We summarized the guidelines for determining the admissibility of

identification testimony in *State v. Marshall*, Montgomery App. No. 19920, 2004-Ohio-778, as follows:

{¶ 24} "Due process requires suppression of pre-trial identification of a suspect only if the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. *Neil v. Biggers* (1972), 409 U.S. 188, 196-97, 93 S.Ct. 375, 34 L.Ed.2d 401. To establish a due process violation, a defendant must prove that the out of court confrontation was 'unnecessarily suggestive and conducive to irreparable mistaken identification.' *Stovall v. Denno* (1967), 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199. However, even where the identification procedure is suggestive, so long as the challenged identification itself is reliable, it is still admissible. *State v. Moody* (1978), 55 Ohio St.2d 64, 377 N.E.2d 1008. See *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140, ('reliability is the linchpin in determining the admissibility of identification testimony')." *Marshall* at ¶11.

{¶ 25} Howard has not argued that the photo spreads presented to Williams, Brooks, and McCluskey were unduly suggestive nor has he asserted that they were presented in an unduly suggestive manner. Howard merely argues that his counsel did not file motions that "could have challenged the validity of the photo layouts used by the police with the state's witnesses to identify the defendant." Howard has not established that there was a reasonable probability that a motion to suppress the out-of-court identifications would have been successful. Accordingly, we find no basis to conclude that his counsel was ineffective for failing to file a motion to suppress the pre-trial photo identifications.

{¶ 26} Third, Howard asserts that his trial counsel was ineffective in failing to file any motions concerning an alibi defense. He states: "If the defense strategy was that you can't identify me as the perpetrator of the crime because I didn't do it, then it stands to reason, the defendant had to be somewhere else at the time the crime was committed." There are innumerable reasons why a defendant does not put forth an alibi defense. Taken to its limits, Howard's argument would require a defendant to file a notice of alibi in almost every case in which factual guilt is contested. It is axiomatic that it is the burden of the prosecution to prove the accused guilty, not the burden of the accused to prove he was "somewhere else." In this case, there is nothing in the record to indicate that Howard had a viable alibi defense. Accordingly, Howard has not established that his counsel was ineffective in failing to file a notice of alibi.

{¶ 27} Fourth, Howard claims that his defense counsel should have filed pre-trial motions concerning the prosecution's use of an SKS assault rifle and a cartridge magazine. He asserts that the assault rife and the magazine were "irrelevant" and that their prejudicial effect outweighed the probative value of the evidence. Demonstrative evidence "is admissible if relevant, if substantially similar to the object or occurrence it is intended to represent, and if it does not confuse the issues or mislead the jury." *State v. Abner*, Montgomery App. No. 20661, 2006-Ohio-4510, ¶99, citing *State v. Jackson* (1993), 86 Ohio App.3d 568, 571.

{¶ 28} Initially, we note that, even if Howard had filed a motion in limine and that motion were overruled, his counsel would have needed to object during trial in order to preserve the issue for appeal. A ruling on a motion in limine reflects the

court's "anticipatory treatment of the evidentiary issue. In virtually all circumstances finality does not attach when the motion is granted. Therefore, should circumstances subsequently develop at trial, the trial court is certainly at liberty 'to consider the admissibility of the disputed evidence in its actual context.'" *State v. Grubb* (1986), 28 Ohio St.3d 199, 201-202, quoting *State v. White* (1982), 6 Ohio App.3d 1, 4. For those reasons, a motion in limine generally does not preserve for purposes of appeal any error in the disposition of the motion in limine. The failure to object at trial to the exclusion of evidence constitutes a waiver of the challenge. *State v. Davis*, Montgomery App. No. 20709, 2005-Ohio-5783, ¶27.

{¶ 29} Because Howard would have been required to renew his objections at trial, we cannot state that he was prejudiced by his counsel's failure to file a pre-trial motion regarding the State's use of an assault rifle and magazine as demonstrative evidence.

{¶ 30} Fifth, Howard claims that his counsel rendered ineffective assistance by failing to object to use of the assault rifle and cartridge magazine at trial. (Howard's counsel did not object to the State's use of the assault rifle/magazine during the State's opening statement, to the State's examination of its firearm expert regarding the weapon and the magazine, or to their admission as evidence.) In his second assignment of error, Howard also claims that the trial court committed plain error in allowing the use of the SKS assault weapon and cartridge magazine as demonstrative evidence.

{¶ 31} Plain error may be noticed if a manifest injustice is demonstrated. Crim.R. 52(B); *State v. Herrera*, Ottawa App. No. OT-05-039, 2006-Ohio-3053. In

order to find a manifest miscarriage of justice, it must appear from the record as a whole that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91.

{¶ 32} Chris Monturo, firearm and tool mark examiner for the Miami Valley Regional Crime Laboratory, testified that nineteen spent .30 caliber catridges and two .30 caliber bullets were found at the scene. He stated that the cartridges and bullets were rifle bullets, which generally are made for longer distance and travel at a higher velocity. SKS and AK47 semiautomatic rifles both fire and are designed for the .30 caliber (i.e., 762 by 39) cartridge, and Monturo testified that these are "by far" the most common weapons that he sees at the crime lab. Monturo indicated that the weapons and magazine are most commonly made of black plastic. Monturo further stated that the standard magazine for the SKS holds ten rounds, but there are magazines (such as the State's Exhibit 31-A) that hold twenty rounds. Monturo testified that the cartridges from the scene were not fired by the State's exhibit, but were fired from a weapon similar to the weapon offered at trial.

{¶ 33} Based on the testimony of Monturo and the witnesses at the scene, the trial court could have reasonably found that the SKS assault rifle and magazine were substantially similar to the weapon and clip used in the shooting, were relevant to the case, and that the use of the assault rifle and magazine would not confuse the issues or mislead the jury. Accordingly, Howard's counsel was not ineffective in failing to object to the State's use of the assault rifle and magazine as demonstrative evidence or to the admission of that evidence at trial. In addition, the court did not commit plain error in allowing the State to use that demonstrative

evidence and admitting it at trial.

{¶ 34} As for the State's use and introduction of the SKS assault rifle and magazine found at Howard's brother's residence as substantive evidence of Howard's guilt, Howard's counsel should have made an objection under Evid.R. 402 or 403. Relevant evidence is generally admissible whereas irrelevant evidence is not. Evid.R. 402. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 402; Evid.R. 403(A). The decision whether to admit evidence is left to the sound discretion of the trial court, and a reviewing court will not reverse that decision absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus.

{¶ 35} The State asserted in its rebuttal closing argument that the SKS assault rifle found in Howard's brother's residence tended to show that Howard had "clear access to those types of weapons." Other than exiting the same house, we are unable to find evidence in the record as to how long Howard was in the house, that Howard was ever in the room where the weapon was found, or whether he had ever been to the house previously. In our opinion, the relevance of the SKS assault weapon (as substantive evidence as opposed to solely demonstrative evidence) was marginal, at best. Whether Howard had access to firearms of any kind was only relevant if one of the guns found in Howard's brother's residence was

used in the offense. Howard's possible access to an assault rifle that was unconnected with the charged offense did not tend to prove that Howard had used the unrecovered assault rifle involved in the offense. Howard's counsel should have objected to Officer Phillips's testimony that State's Exhibit 31, as well as other boxes of ammunition and a digital scale, were recovered from Howard's brother's home.

{¶ 36} Nevertheless, we find counsel's failure to object to the State's evidence that an unrelated SKS assault rifle was retrieved from Howard's brother's house, in which Howard was found, to be harmless beyond a reasonable doubt and not to constitute ineffective assistance of counsel. As stated above, the State presented evidence that Williams and Brooks had identified Howard as the shooter at the time of the shooting, that Williams, McCluskey and Brooks had picked Howard from a photo spread, and that Howard was "having words" with Brooks regarding a dope money phone. McCluskey saw the shooter get into Howard's vehicle, which Brooks told Detective Ritchey was a black Oldsmobile Intrigue. (Although McCluskey identified the vehicle as an Oldsmobile Alero, there was testimony that the two vehicles "look very similar to each other.") The State further presented evidence that, two months later, Howard's black Intrigue, in which Howard was a front seat passenger (according to Howard's brother), was involved in an accident when ammunition was apparently in the vehicle.

{¶ 37} Moreover, the presence of an assault rifle in Howard's brother's house provided additional support to Howard's contention that he may have been misidentified. Williams, Brooks, and McCluskey observed the shooter as he was

returning to the driver's side of a black vehicle. McCluskey testified that she identified the shooter mainly by her recognition of Howard's car. Officer Garrison testified that he had chased Elijauan after the car accident, believing that Elijauan was Howard. Although Howard's vehicle was involved in that accident, Howard was reportedly only a passenger in the vehicle, not the driver. And, the assault weapon, .30 caliber rounds, and other ammunition were located in the master bedroom of Howard's brother's home.

{¶ 38} It is very conceivable that counsel's failure to object to the admission of the assault weapon was part of a strategy to shift blame; for example, in defense counsel's closing argument, counsel argued that the identifications by the State's witnesses should not be believed and there was "the officer who stated that he mistook Kenyon for his brother and chased him *** And it wasn't until he had the guy in cuffs that he realized it wasn't Kenyon; important point." Counsel later argued: "So, if you consider alternate possibilities, number one, could it have been somebody else? Yes, I mean, the police officers got Kenyon and his brother mixed up." Accordingly, not only did the assault rifle add little to the State's case, but it supported the defendant's argument that someone else, such as Howard's brother, may have done the shooting. Given the strong presumption that the challenged action might be considered sound trial strategy, this claim is not well taken. See, e.g., *State v. Reid*, Montgomery App. No. 23409, 2010-Ohio-1686, ¶24 ("Reviewing courts must indulge in a strong presumption that counsel's conduct was not improper, and reject post-trial scrutiny of an act or omission that was a matter of trial tactics merely because it failed to avoid a conviction."), citing

Strickland, supra.

{¶ 39} Sixth, Howard asserts that his counsel should have objected to "the Prosecutor's implication to the jury that the demonstrative weapon was the weapon used to commit the criminal offense charged against the defendant."

{¶ 40} Upon review of the trial transcript, we find nothing to support Howard's contention that the prosecutor implied that the assault weapon and magazine were used in the charged offense. The prosecutor began her opening statement at trial by presenting the assault rifle stating:

{¶ 41} "Ladies and gentlemen, you've seen this once already. You're going to see it throughout the trial. This is an SKS assault rifle. You're going to hear testimony from a firearms expert that indicates to you that a rifle such as this fires off .30 caliber rounds and it is designed for intermediate distance shooting.

{¶ 42} "This isn't a handgun like you see in the movies, close range type shooting, This type of weapon is designed to shoot up to three to 400 feet away. *** This is an assault rifle. The name in and of itself indicates to you it's for offensive purposes.

{¶ 43} "*This is the type of weapon* that was used to fire at a minimum 19 rounds into the address of 2112 Oakridge in Dayton, Montgomery County, Ohio. That occurred on October the 29th of 2008 at approximately 7:30 a.m. when sleeping in that house in various rooms were Fred Brooks, Jennette McClusky, his then girlfriend, their 18-month old baby, Pauline Williams, Fred Brooks' mother, and Fred Brooks' ten-year-old brother or Pauline's other son. These people were all sleeping in their house at approximately 7:30 a.m. when their house was turned into

Swiss cheese by a weapon such as this.

{¶ 44} "*Now this is not the weapon that was used*. ***" (Emphasis added.)

{¶ 45} Later, during the State's examination of Monturo, the prosecutor asked Monturo about the SKS assault rifle and magazine (State's exhibit 31A & B) and whether it was the weapon used to fire the bullets and spent cartridges retrieved from 2112 Oakridge. Monturo testified that he was unable to determine whether the weapon had fired the bullets located in the house due to the damage that had been done to the bullets. However, Monturo further testified that the spent cartridge cases "were found to have different marks than those left by this firearm." The prosecutor then asked:

{¶ 46} "Q: So the 19 casings that we have there while fired from a weapon that could be described as similar to the weapon we have in 31, it was not that weapon?

{¶ 47} "A: That's correct."

{¶ 48} During the State's closing arguments, the prosecutor argued that "[n]o one is denying the fact that that house was shot up with a rifle of some sort that shot .30 caliber rounds." In response, defense counsel argued that Exhibit 31 was "a prop" and "had nothing to do with the shooting into the habitation." The prosecutor in turn responded during rebuttal, saying:

{¶ 49} "The reason that assault rifle was brought in here is to show you that he clearly had access to the type of weapons that would fire off .30 caliber rounds.

{¶ 50} "The State's not hiding the fact that that's not the weapon that was involved. It's a demonstration that the weapon that fired those rounds was an

intermediate distance firing weapon, that is was an assault type rifle.

{¶ 51} "You heard the expert testify to you that you cannot fire .30 caliber rounds out of a handgun. That is purely a demonstrative piece of evidence to tell you two things. This is the type of weapon, not the exact weapon, but the type of weapon that was used to shoot up the house on Oakridge.

{¶ 52} "And that this man has clear access to those types of weapons as that particular weapon was found in the home where he was arrested. ***"

{¶ 53} In short, the prosecutor made clear during opening and closing statements and during the trial that the SKS assault rifle and magazine, which were offered as Exhibit 31, were not the actual weapon and cartridge magazine used to shoot at Williams's home. Howard's counsel had no reason to object to the prosecutor's characterization of the SKS assault rifle and magazine at trial, and defense counsel was not ineffective for failing to raise such an objection.

{¶ 54} Seventh, Howard claims that his counsel was ineffective due to his failure to object to Monturo's testimony that the demonstrative weapon was similar to the weapon used by the perpetrator. As stated above, Monturo explained that .30 caliber bullets are intermediate range bullets and that, in this area, they are most commonly fired from SKS or AK47 assault rifles, which are similar to the weapon offered as State's exhibit 31. Howard does not explain why he believes Monturo's testimony was objectionable, and we find no basis to exclude that testimony. Defense counsel did not render ineffective assistance by failing to object to Monturo's testimony that State's Exhibit 31 was similar to the weapon used during the offense.

{¶ 55} Eighth, Howard asserts that his counsel rendered ineffective assistance when he failed to cross-examine Brooks, who testified for the State.

{¶ 56} At trial, Brooks testified that he was asleep in the upstairs bedroom with McCluskey and their infant son when he was awakened by bullets coming through the wall of the house. Brooks got his girlfriend and the baby to the upstairs bathroom at the back of the house. After the shooting stopped, Brooks went to the front of the house to look out the window. He testified that he saw "somebody at the corner of Oakridge and Shoop" and a car on Shoop facing away from the house.

{¶ 57} When the prosecutor asked if he recognized the person he saw, Brooks replied that he "assumed it was somebody but I'm not sure if it was that person or not." Brooks acknowledged that he had identified Howard from prior photo spread, but he stated: "I remember telling the police that that's the person they asked me if that was Kenyon Howard. I told them that was Kenyon Howard." Brooks testified that his mother had told the police that the shooter was Howard, who went by the street name, "Tone." Brooks said that he only saw the back of the shooter's head. Brooks indicated that he had "words" with Howard in the past, but could not recall what the issue was about. Brooks made clear that he did not want to testify at the trial.

{¶ 58} In light of Brooks's testimony, it was reasonable trial strategy for Howard's counsel to forego cross-examination of Brooks. Brooks did not identify Howard as the shooter at trial, and he explained his prior photo spread identification by stating that he was asked to identify Howard, not the shooter. Howard's

counsel could have reasonably concluded that further questioning of Brooks might inculpate Howard rather than help his case.

{¶ 59} Ninth, Howard asserts that his defense counsel should have objected at trial to the State's use of the photo spread because the State failed to lay a proper foundation.

{¶ 60} Documents must be authenticated or identified prior to their admission into evidence. Evid.R. 901. This requirement is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. "The standard itself is not rigorous, and its low threshold reflects an orientation of the rules toward favoring the admission of evidence." *State v. Jones*, Lucas App. No. L-05-1232, 2007-Ohio-563, ¶54, citing Weissenberger's Ohio Evidence Treatise (1997), Section 901.2.

{¶ 61} In this case, Brooks, McCluskey, and Williams each identified the photo spread that they viewed. In discussing that photo array that he viewed (State's Exhibit 26), Brooks stated that he signed his name and marked where it said photo number. McCluskey stated that she recognized the photo spread (State's Exhibit 28) and that Detective Baker had shown her the document. McCluskey testified that she had circled photo number 3, put her initial beside it, and signed it. McCluskey further indicated that, other than Detective Baker's signature, nothing on the form had been changed since she had last seen it. Williams also recognized the photo spread she reviewed (State's Exhibit 29). Williams testified that she circled photo number 3, initialed it, and signed on the bottom of the page. Brooks's, McCluskey's, and Williams's testimony was

sufficient to establish a foundation for the admission of the three photo spreads. Accordingly, Howard's counsel was not ineffective in failing to object to the admission of the photo arrays.

{¶ 62} Finally, Howard claims that his counsel rendered ineffective assistance by failing to object to the trial court's "manipulation of the jury" due to the court's provision of a supplemental "dynamite charge" and the court's failure to provide a written copy of that supplemental instruction. In his second assignment of error, Howard asserts that the court's failure to provide the jurors with a written copy of the "dynamite charge" constituted plain error.

{¶ 63} At the outset, we find no error in the trial court's decision to provide the jury Ohio's version of the so-called "dynamite charge," in accordance with *State v. Howard* (1989), 42 Ohio St.3d 18, and 2 Ohio Jury Instructions (2008), Section 429.09. "Jury instructions are within the trial court's discretion. Accordingly, a trial court's decision whether to give a *Howard* instruction is within its discretion, and this court will not reverse that decision absent an abuse of discretion." (Citations omitted). *State v. Lightner*, Hardin App. No. 6-09-02, 2009-Ohio-4443, ¶11.

{¶ 64} The jury began its deliberations at approximately 11:50 a.m. on August 27, 2009. At approximately 4:00 p.m., the jury sent a note to the judge asking (1) "what if we cannot reach a unanimous verdict," and (2) if the jury could get a transcript of Detective Ritchey's testimony. The court responded to the first question, saying, "You must deliberate for a reasonable period of time, following the Court's instructions to determine whether you can reach a unanimous verdict." The court answered the second question by instructing the jury to rely on its

collective recollection of Detective Ritchey's testimony. (This was an appropriate answer, although, if technology allowed, the court could have supplied the jury with the complete testimony it requested.)

{¶ 65} At approximately 6:36 p.m., the court received a second note from the jury. It read: "Judge Wiseman, we the jury will not be able to reach a unanimous decision, either guilty or not guilty tonight, tomorrow or anytime." Without objection, the trial court provided a supplemental instruction to the jury, as follows:

{¶ 66} "*** So, please listen very carefully to this supplemental instruction: We understand that your jury deliberation is a new and difficult assignment for you.

{¶ 67} "The process of discussion and deliberation in the jury room is necessarily slow and requires consideration and patience. The secrecy which surrounds your efforts prevents others, including the Court, from knowing when your efforts will result in a verdict.

{¶ 68} "In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere acquiescence and the conclusion of other jurors, each question submitted to you should be examined with proper regard [and deference] to the opinions of others.

{¶ 69} "It is desirable that the case be decided.

{¶ 70} "You are selected in the same manner and from the same source as any future jury would be.

{¶ 71} "There is no reason to believe the case will ever be submitted to a jury more capable, impartial or intelligent than this one.

{¶ 72} “Likewise, there is no reason to believe that more or clearer evidence will be produced by either side. It is your duty to decide the case if you can conscientiously do so.

{¶ 73} “You should listen to one another’s opinions with a disposition to be persuaded.

{¶ 74} “Do not hesitate to reexamine your views and change your position if you are convinced it is erroneous.

{¶ 75} “If there is disagreement, all jurors should reexamine their positions, given that a unanimous verdict has not been reached.

{¶ 76} “Jurors for acquittal should consider whether their doubt is reasonable considering that it is not shared by others equally honest who have heard the same evidence with the same desire to arrive at the truth and under the same oath.

{¶ 77} “Likewise, jurors for conviction should ask themselves whether they might reasonably doubt the correctness of a judgment not concurred in by all other jurors.

{¶ 78} “It is conceivable that after a reasonable length of time, honest differences of opinion on the evidence may prevent an agreement upon a verdict. When that condition exists, you may consider whether further deliberations will serve a useful purpose.

{¶ 79} “If you decide that you cannot agree and that further deliberations will not serve a useful purpose, you may ask to be returned to the courtroom and report that fact to that Court. If there is a possibility of reaching a verdict, you should continue your deliberations.

{¶ 80} "At this time, we are going to return you to your jury deliberation room to consider this supplemental instruction. And then we will wait to hear from you in accordance with this supplemental instruction."

{¶ 81} The jury found Howard guilty of the charged offense and the firearm specification at approximately 7:45 p.m.

{¶ 82} Upon review of the record, the trial court did not abuse its discretion when it instructed the jury in accordance with *Howard* and Section 429.09 of the Ohio Jury Instructions upon receipt of the jury's second note. The trial court was entitled to encourage the jury to make continued efforts to reach a verdict, if the jury could conscientiously do so. *Howard*, 42 Ohio St.3d at 25. The trial court's supplemental instruction tracked the language approved by the Supreme Court of Ohio in *Howard* and Section 429.09. The court did not coerce the jury to reach a verdict or mislead the jury with its supplemental instruction. Since the court properly instructed the jury in accordance with *Howard* and Section 429.09, defense counsel was not ineffective in failing to object to that supplemental instruction.

{¶ 83} In addition, we find no basis to conclude that the trial court committed plain error in failing to provide a written supplemental instruction to the jury or that defense counsel was ineffective in not objecting to the trial court's failure to provide a written copy of the supplemental instruction to the jury. Crim.R. 30(A) requires the trial court to "reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve

those instructions for the record." Although the better practice would be for the trial court to provide written supplemental instructions, it is unclear whether the phrase "final instructions" in Crim.R. 30(A) encompasses a supplemental instruction provided to the jury in response to an inquiry from the jury during deliberations.

{¶ 84} Regardless, the supplemental "dynamite" instruction provided by the trial court was not lengthy, and it concisely asked all of the jurors to reexamine their individual positions and determine whether further deliberations would serve a useful purpose. Under these circumstances, we see no reasonable probability that the failure of Howard's counsel to object to the lack of a written supplemental instruction – or the court's failure to provide the jury with a written supplemental instruction – affected the outcome of Howard's trial. In short, we find no basis to conclude that Howard was prejudiced by the jury's failure to receive a written supplemental instruction.

{¶ 85} Howard's assignments of error are overruled.

II

{¶ 86} The trial court's judgment will be affirmed.

. . . . . .

DONOVAN, J. and OSOWIK, J., concur.

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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