[Cite as *State v. Langlois*, 2013-Ohio-5177.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals No. L-11-1313
Appellee	Trial Court No. CR0201101479
v.	
Mark Langlois	**DECISION AND JUDGMENT**
Appellant	Decided: November 22, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Jeffrey M. Gamso, for appellant.

* * * * *

YARBROUGH, J.

I. Background

{¶ 1} Defendant-appellant, Mark Langlois, appeals from his conviction and sentence by the Lucas County Court of Common Pleas following a jury trial in which he

was found guilty of one count of murder and one count of aggravated murder, both with attendant firearms specifications.

A. The Crime

{¶ 2} On the morning of January 27, 2011, a homicide occurred at Forklifts of Toledo (FOT) where Langlois was employed. Sometime between 7:50 a.m. and 8:30 a.m., the victim, Jim Schueler Jr., died of a gunshot wound to the head. Schueler, who was the manager at FOT, was in his office enjoying a cup of yogurt and a banana when he was killed. For about two years he had been on a "health kick," and each morning it was his habit to eat this same breakfast. Janice Albright, the fleet manager, last saw Schueler alive when she passed his office at 7:52 a.m. His back was to the doorway and he was seated at his desk eating. Albright then left the front office area to get coffee and was away until after 8:00 a.m. She testified that if someone entered the office who Schueler knew, he would continue to eat without stopping. But if he saw a customer or stranger, he "would stop eating, set his food on his desk, get up and introduce himself." At approximately 8:30 a.m., another FOT employee, Chris Fordham, discovered Schueler sprawled on the floor next to the desk. His chair was overturned and pieces of the banana and yogurt covered his face. Thinking Schueler had suffered a heart attack, Fordham and another employee attempted to revive him through CPR while Albright called 9-1-1. They stopped when they saw blood coming from the back of his head. Paramedics and Toledo police officers arrived soon afterward.

B. The Investigation

{¶ 3} It was quickly apparent to the crime scene investigators that Schueler was murdered with some type of 9mm semiautomatic pistol because a spent shell casing in that caliber was found next to his body. An autopsy later determined that he was shot once at point-blank range. The bullet entered just behind the right ear, traversed sharply downward and exited the left side of his neck. Investigators eventually recovered the bullet in the room near the desk. Since no gunshot was heard, police surmised that a sound suppressor must have been attached to the barrel of the pistol. The ambient noise from shop machines operating adjacent to Schueler's office would also have contributed to muffling a gunshot.

{¶ 4} Almost immediately police suspected that an FOT employee had killed Schueler even though no motive was apparent. There were no signs of a struggle, forced entry, or theft. Nor was there any indication that someone had entered FOT through the front door before the murder. Whenever that door was opened, it would trigger a chime to alert those working in the front offices that someone was entering. No one there had heard the chime sounding within the time frame of Schueler's murder. That left only the possibility of accessing the front office from the shop area. Consequently, all FOT employees were ordered to remain on the premises while police secured Schueler's office and gathered evidence.

C. A Suspect

{¶ 5} When Langlois arrived at FOT that morning it was extremely cold and snowing with a bitter wind driving the snow. A five-year employee and one of three shop mechanics, he had expected to work, as he usually did, inside the FOT facility that day. However, because a road technician called in sick and service was needed on a vehicle at a customer's business, Art Martin, FOT's service manager, assigned that task to Langlois. This prompted an angry response during which Langlois expressed frustration at being made to work outside in the cold. Despite the outburst, Martin ordered him to pack up and get started. At 7:20 a.m., Langlois, still visibly agitated about the assignment, began loading tools into an FOT truck to drive to the worksite. He did not leave the facility, however, until just before 8:00 a.m. This time was confirmed by both a GPS tracking device attached to the FOT truck that Langlois used and a videotape from a surveillance camera atop a car wash next to the FOT property. A fellow employee also saw Langlois leaving the front office before departing, "look[ing] like he was mad at the world." Another employee would later testify that the mechanics rarely visited this part of the building.

{¶ 6} Langlois returned to the FOT facility about 10:30 a.m., telling someone he came back for more tools and parts. He was already aware, from another employee's call earlier, that Schueler was dead; yet, despite that fact and the heavy police presence and the attendant commotion from fire department EMTs, Langlois appeared emotionless and disinterested. He asked no questions and seemed concerned only with getting back to his

offsite assignment. At first he refused to be interviewed by the investigating detectives who, by then, had gathered all the FOT employees into one room. Langlois told one detective that he "was not here" when Schueler was killed. Witnesses who saw Langlois at this point described him as looking "shaky" and "nervous."

{¶ 7} Later that day all the employees, including Langlois, went to the Toledo Police Safety Building to be interviewed and give statements. During questioning, Langlois was asked whether he stopped anywhere after leaving FOT for the assigned work site. Langlois said he drove directly to the location of the job assignment. However, the tracking data from the GPS device on the FOT truck revealed that he had stopped at his home for about five minutes before going on to the work site. Langlois acknowledged that he owned "a lot" of guns and had a concealed-carry permit. He agreed to give police two of his 9mm semiautomatic pistols for examination, one of them a Beretta and the other a Glock model 26. Subsequently, police executed a search warrant on his home and recovered more handguns, ammunition, sound suppressors, and numerous types of firearms paraphernalia.

D. Trial

{¶ 8} Langlois was eventually indicted on one count of aggravated murder in violation of R.C. 2903.01(A) and (F), and one count of murder in violation of R.C. 2903.02(B), along with firearms specifications as to each count. At trial, the state's evidence included the spent 9mm shell case recovered from the murder scene and the bullet that killed Schueler. One of the state's experts, David Cogan, testified about his

comparative ballistics testing using Langlois' 9mm Glock 26. Specifically, Cogan compared both the bullet and the shell case from the crime scene with a spent bullet and shell case produced through a test-fire procedure with the Glock 26. The comparison confirmed that the crime-scene shell case matched the one test-fired in the Glock, but the bullets did not match. The state theorized that the inconsistent results with the bullets were due to the fact that Langlois had used a different barrel in the Glock for the murder and then disposed of it afterward. Police were never able to find that barrel. A second ballistic expert testified that he reviewed Cogan's examination and testing of the shell cases, verified that his procedure was correct, and agreed that the crime-scene shell case came from Langlois' Glock 26.

{¶ 9} An assistant coroner testified that she found small abrasions and slight deposits of soot around the entrance wound on the back of Schueler's head. This indicated that the pistol had been placed close to the skin, resulting in an imprint or "contact wound." She noted, however, that in a "true contact wound," where the muzzle of the weapon is directly *on* the skin when fired, there is much more soot found in and around the entrance wound. The very slight amount of soot in Schueler's wound could indicate that a suppressor was used on the barrel. On cross-examination, however, she conceded there might be "other possible explanations too."

{¶ 10} In an effort to substantiate its theory that Langlois had killed Schueler with the Glock 26 using a different barrel and a suppressor, the state introduced, over objection, a large number of exhibits which tended to show his familiarity with firearms,

their component parts and method of assembly, and the use of sound suppressors on pistols. This evidence included other handguns, the suppressors and their adaptors, magazines, spare barrels, scopes, holsters, quantities of ammunition of different calibers, spent shell casings, tools for repairing firearms, reloading components and tools for making ammunition, as well as books, periodicals and DVDs all relating to firearms and shooting.

{¶ 11} Additionally, through the testimony of Detective James Dec, the state introduced Langlois' internet browsing history recovered from his home computer. Defense counsel did not object to this evidence. The browsing history showed that Langlois had visited websites pertaining to firearms, gun parts, and replacement barrels "hundreds of times," and had used on-line search engines for those subjects repeatedly. Dec could not identify the dates of these visits and searches, however, in relation to the date of Schueler's murder, because of the "particular way the internet history was logged." Dec's analysis also uncovered the browsing of websites devoted to the topic of pistol suppressors. This history indicated "hundreds if not thousands of searches for silencers or suppressors." Within that history, Dec found that Langlois had searched websites pertaining to suppressors that would fit the specific models of Glocks he owned. There were also searches for "drop-in" replacement barrels, some of them made for use with a suppressor. Again, Dec could not identify from the file paths when Langlois had visited those sites. Finally, an investigating detective testified that Langlois had legally acquired all of the firearms, ammunition, barrels, and other gun parts found in his home.

The detective also verified that the suppressors were legal for him to possess because they were properly registered with the Bureau of Alcohol, Tobacco, Firearms and Explosives.

{¶ 12} When the state concluded its case-in-chief, Langlois moved for a Crim.R. 29 judgment of acquittal. After the trial court denied this motion, Langlois rested his case without calling any defense witnesses or experts. The jury found Langlois guilty of both murder counts and the firearm specifications. The trial court merged the murder counts and sentenced him to life in prison without the possibility of parole, consecutive with the mandatory three-year sentence on the firearm specification. This appeal followed.

II. Analysis

{¶ 13} Langlois has assigned three errors for our review, the first of which states:

> Assignment of Error No. 1: Because ballistics evidence indicating that a particular shell casing was fired by a particular handgun cannot satisfy the reliability standard of Evid.R. 702, *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 687 N.E.2d 735 (1998), and *State v. Nemeth*, 82 Ohio St.3d 202, 694 N.E.2d 1332 (1998), its wrongful admission in this case denied appellant a fair trial, the right to present a defense, and due process of law as required by the Sixth and Fourteenth Amendments to the United States Constitution and the cognate provisions of the Ohio Constitution,

and counsel's representation was constitutionally ineffective for failing to move or pursue a motion to preclude the evidence on that basis.

A. Reliability of the Ballistics Evidence

{¶ 14} Under this assignment, Langlois argues that the trial court erred in admitting the expert ballistic testimony because the procedures used to determine that the crime-scene shell case matched the one that was test-fired in his Glock were unreliable. He also maintains that his defense counsel was ineffective for failing to seek exclusion of the ballistics testimony "or at least limit the strength of the claims that could be made about it" by means of a *Daubert* hearing.

1) Standard of Review

{¶ 15} Normally, the admissibility of expert testimony is a matter left to the discretion of the trial court, and we review for an abuse of that discretion. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 114. Here, however, Langlois failed to object to the ballistics testimony and evidence on the grounds he now asserts, thus forfeiting all but plain error. *See e.g.*, *State v. Swiergosz*, 197 Ohio App.3d 40, 2012-Ohio-830, 965 N.E.2d 1070, ¶ 10 (6th Dist.). "Plain error" means an "obvious" error of such magnitude that it "affected the outcome of the trial." *State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, 970 N.E.2d 891, ¶ 11.

2) Admissibility of Expert Testimony

{¶ 16} Generally, "[c]ourts should favor the admissibility of expert testimony whenever it is relevant and the criteria of Evid.R. 702 are met." *State v. Nemeth*, 82 Ohio St.3d 202, 207, 694 N.E.2d 1332 (1998).

{¶ 17} Evid.R. 702 provides:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical or other specialized information. *To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all the following apply:*
>
> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts or principles;
>
> (2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result. (Emphasis added).

{¶ 18} In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the United States Supreme Court held that the trial court must act as a "gatekeeper" to ensure both the relevance and reliability of expert scientific testimony before admitting it. In order to aid in determining the threshold reliability of such testimony, *Daubert* identified several factors for federal district courts to consider in addressing the issue. These factors, along with *Daubert's* approach to the reliability issue, were later adopted by the Ohio Supreme Court in *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 687 N.E.2d 735 (1998), and reaffirmed in *State v. Nemeth*, 82 Ohio St.3d 202, 694 N.E.2d 1332 (1998).

{¶ 19} Noting the general principle that "expert scientific testimony is admissible if it is reliable and relevant to the task at hand," the *Miller* court stated:

In evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance. *Miller* at 611, citing *Daubert* at 593-594.

{¶ 20} These factors are not a "definitive checklist or test," and no one factor is dispositive to the exclusion of the others.[1] *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72, ¶ 25. And while they are intended to aid in determining reliability, the inquiry remains a flexible one. *Daubert* at 594. "[W]hen gauging the reliability of a given expert's testimony, trial courts should focus 'solely on principles and methodology, not on the conclusions' generated." *Caputo* at ¶ 25, quoting *Daubert* at 595. The "ultimate touchstone is helpfulness to the trier of fact, and with regard to reliability, helpfulness turns on whether the expert's 'technique or principle [is] sufficiently reliable so that it will aid the jury in reaching accurate results.'" (Citations omitted.) *Miller* at 614. Under Evid.R. 702(C), the issue for the trial court is not whether the testimony is correct but whether the underlying data, methods, and processes are such that they can be trusted to generate reliable information. *Id.* The standard is reliability, not infallibility.

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[1] [E]ven if [the expert's] opinion has neither gained general acceptance by the scientific community nor has been the subject of peer review, these are not prerequisites to admissibility under *Daubert*[.] * * * Rather, they are just factors for a court to consider in determining reliability. Again, the *Daubert* court recognized that while peer review may be helpful, it is not absolutely necessary for an opinion to be admissible. In fact, the court stated: "Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability." [citing *Daubert*, 509 U.S. at 593]. (Other citations omitted). *Miller* at 613.

3) Judicial and Scientific Challenges

{¶ 21} Langlois does not dispute the relevance of the testimony of the state's ballistics experts, David Cogan and Todd Wharton, nor their qualifications. Rather, he argues that their testimony should have been excluded because the state could not demonstrate that it met the criteria for reliability under Evid.R. 702(C)(1)-(3). Counsel for Langlois observes, correctly, that the scientific basis for comparative ballistics analysis[2] `has received increased critical scrutiny in recent years. Some of this scrutiny has resulted in federal district court decisions that limit the scope of what a ballistics expert may claim in rendering his opinion. *See, e.g., United States v. Glynn*, 578 F.Supp.2d 567, 574 (S.D.N.Y.2008); *United States v. Diaz*, N.D.Cal. No. CR 05-00167 WHA, 2007 WL 485967 (Feb. 12, 2007); *United States v. Green*, 405 F.Supp.2d 104 (D.Mass.2005). Beyond the cases, he also cites two reports issued by the National Research Council (NRC) which purport to question the reliability of current firearms identification, tool mark and ballistics analysis: (1) NRC, *Strengthening Forensic*

[2] Although "ballistics" is used loosely to refer to firearm and tool mark analysis, the two are not, technically, the same. Ballistics, as a field of study, refers to the science of the travel or movement of a projectile in flight and the determination of the consequent velocity and energy produced. It sometimes extends to the projectile's impact or wounding characteristics on the target. The field of firearms and tool mark analysis, in contrast, involves the examination of markings on firearms and ammunition, including those left on spent projectiles and cases. *See United States v. Willock*, 696 F.Supp.2d 536, 560, fn. 10 (D.Md.2010), quoting *United States v. Green*, 405 F.Supp.2d 104, 118, fn. 26 (D.Mass.2005).

Science in the United States: A Path Forward (2009) https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf (accessed Oct. 1, 2013), and (2) NRC, *Ballistic Imaging* (2008) http://www.nap.edu/openbook.php?record_id=12162 (accessed Oct. 1, 2013). Pointing to the critiques by the courts and the academics, counsel maintains that "the reliability and accuracy of ballistics evidence * * * falls somewhere in the space between voodoo and soft science, and nobody really knows where."

{¶ 22} The 2008 NRC report addressed the issue of establishing a nationwide database for the computer imaging of bullets. The report's primary focus was not firearms identification, comparative ballistics, or tool mark analysis. Ultimately it recommended against creating such a computerized database. While the 2008 report did state in passing that "the validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related tool marks has not yet been fully demonstrated," the authors qualified that observation, noting: "[T]he creation of tool marks must not be so random and volatile that there is no reason to believe that any similar and matchable marks exist on two exhibits fired from the same gun. The existing research, and the field's general acceptance in legal proceedings for several decades, is more than adequate testimony to that baseline level." *Id*. at 81-82.

{¶ 23} The 2009 NRC report, authorized by Congress, was a wide-ranging white paper on the state of forensic science in the United States. It questioned the scientific validity of many long-recognized forensic science disciplines, including, among others, DNA analysis, serology, forensic pathology, toxicology, digital evidence, and fingerprint

analysis. Included also was a section addressing tool mark and firearms identification which incorporated many of the conclusions of the 2008 *Ballistic Imaging* report. *Id.* at 150-54. In part, the 2009 report stated:

> Because not enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result. Sufficient studies have not been done to understand the reliability and repeatability of the methods. The committee agrees that class characteristics are helpful in narrowing the pool of tools that may have left the distinctive mark. Individual patterns from manufacture or from wear might, in some cases, be distinctive enough to suggest one particular source, but additional studies should be performed to make the process of individualization more precise and repeatable. * * * Although some studies have been performed on the degree of similarity that can be found between marks made by different tools and the variability in marks made by an individual tool, the scientific knowledge base for tool mark and firearms analysis is fairly limited. *Id*. at 154-155.

{¶ 24} Even a sympathetic reading of the 2009 report, however, indicates its primary purpose was to serve as a catalyst for reassessing the scientific premises underlying the various fields of forensic science and to summarize the current state of the research in those fields relative to the challenges raised in the report. It was not its

purpose to opine on the long-established admissibility of tool mark and firearms testimony in criminal prosecutions, and indeed the NRC authors made no recommendations in that regard. Having identified certain limitations existing in this discipline, as they exist in other forensic sciences, they called for more research on "the variability in marks made by an individual tool," including "the rigorous quantification and analysis of sources of variability."

{¶ 25} That urging, however, hardly makes what firearms examiners do junk science, or "voodoo" as counsel termed it. Even those courts which have placed limits on a firearms examiner's opinion testimony, due to concerns with the physical or scientific theory on which it is based, have not gone that far. *See, e.g., Glynn*, *supra*, 578 F.Supp.2d at 574 (conceding that the field lacks "defining standards" and "the rigors of science," but finding that "the methodology [of firearms examination] has garnered sufficient empirical support as to warrant its admissibility.")

{¶ 26} Moreover, neither NRC report speaks to the *legal* standard for determining if what firearms examiners do is sufficiently reliable that their opinion testimony may be admitted in a criminal case. While certainly important for advancing the methodologies of the various forensic sciences, the NRC reports are simply not dispositive of the legal issue here. Instead, firearms and tool mark evidence is best viewed as developing from a forensic approach that is technical and specialized:[3]

[3] The *Daubert* factors, to the extent they are relevant, may be applied to test expert testimony that is based on "technical" and "other specialized" information. *See Kumho*

> Firearm identification evidence straddles the line between testimony based on science and experience. * * * [T]he methodology is "subjective in nature, founded on scientific principles and based on the examiner's training and experience." * * * Science is in the background, at the core of the theory, but its application is based on experience and training. (Internal citations omitted.) *United States v. Monteiro*, 407 F.Supp.2d 351, 365 (D.Mass.2006).

{¶ 27} As the *Monteiro* court observed, "the lack of a universal standard for declaring a match [between cartridge casings] is troubling but not fatal under *Daubert/Kumho* because a court may admit well-founded testimony based on specialized training and experience." *Id*. at 371. Both the "underlying physical theory" and "scientific principle that firearms leave unique marks on ammunition is reliable under Rule 702." *Id.* at 366. As to "whether the *methodology* of identifying a match between a particular cartridge case and gun is reliable," the *Monteiro* court found that "sufficient reliability" exists when "a qualified [firearms] examiner who has documented and had a second qualified examiner verify her results [testifies] based on those results that a

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Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

cartridge case matches a particular firearm to a reasonable degree of ballistic certainty." *Id.* at 372.[4]

{¶ 28} This appeal nevertheless presents a circumstantial murder case with some amount of unusual facts and much evidence relating to firearms and ammunition. In light of Langlois' vigorous challenge to the state's experts, and because the threshold admissibility issue is important to both parties, we will examine their testimony in detail.

4) The State's Experts

a) David Cogan

{¶ 29} Cogan has been employed in the Toledo Police Forensic Laboratory for 17 years and is currently its administrator. Additionally, he has trained in the examination of firearms, ammunition, ballistics analysis, and controlled substances at the FBI Academy

[4] Although Langlois cites *Monteiro* as authority for his argument that the testimony of Cogan and Wharton should have been excluded as unreliable, a careful reading of that opinion indicates the opposite conclusion. Firearms identification testimony may be admitted where one examiner's work has undergone a secondary review and there is supporting documentation of the examiner's findings "through the use of notes, sketches, or photographs." *Id.* at 374, fn. 3. If the expert opinion meets these standards, "the expert may testify that the cartridge cases were fired from a particular firearm *to a reasonable degree of ballistic certainty*." *Id*. at 375. (Emphasis added.) Further, confining the expert's testimony to this standard of certainty is critical because:

> [T]here is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a "match" to an absolute certainty, or to an arbitrary degree of statistical certainty [*e.g.*, "100%"]. Allowing the firearms examiner to testify to a reasonable degree of ballistic certainty permits the expert to offer her findings, but does not allow her to say more than is currently justified by the prevailing methodology. *Monteiro* at 372.

and the Michigan State Police Crime Laboratory. He is a member of the Association of Firearms and Tool Mark Examiners. His primary work for the police department involves the examination and testing of firearms and the testing and comparison of shell cases and projectiles (bullets) involved in crimes or recovered from crime scenes or suspects. During his tenure, Cogan has examined and tested approximately 3000 firearms, including shotguns, rifles and handguns. The handguns include Glock pistols of various models and calibers. He has conducted hundreds of comparison tests of projectiles and cases, using both macroscopic and microscopic methods of examinations.

{¶ 30} With respect to shell cases and projectiles, Cogan testified that a macroscopic examination is done to ascertain that the case and/or the projectile are related by caliber to the firearm in question, such as a 9mm pistol. The surface of the case is checked for visible marks and, at the bottom of the case, the headstamp is examined for caliber designation, name of manufacturer, and any other identifying or unusual characteristics. A microscopic examination is then undertaken on the case and the projectile to see whether individualized trace characteristics exist that might conclusively link them (or not) to a suspect firearm. The projectile itself is observed for consistency with the caliber of the suspect weapon and then for any "rifling marks," a type of tool mark. Such marks, or ridges, are transmitted to the projectile's surface during movement by the "lands and grooves" inside the barrel of a firearm.[5] The

[5] Lands and grooves refer to the spiraling cuts made to the inside of the barrel during manufacturing. The angle at which they are cut is called a "rate of twist." The purpose

machining process used to manufacture a barrel creates lands and grooves unique to that barrel, and thus the projectile, when fired, receives distinctive marks that will allow a trained eye to match it to that barrel. A "test-fired" shell case or projectile is obtained by firing ammunition of the same caliber and bullet type in the suspect weapon, and then comparing that case or projectile to the ones from the crime-scene.

{¶ 31} Cogan testified that after first examining Langlois' Glock 26 to determine that it was operable, he created a test-fired case and bullet using the Speer 9mm ammunition recovered from Langlois' home. He then conducted a comparative examination of the crime-scene bullet and case with those he test-fired. Since the Glock is a semi-automatic pistol, Cogan observed both cases under a microscope for the presence of markings made by the gun's breech face and, possibly, by the extractor or ejector. On both cases he detected parallel "striations," essentially "small scratches" of consistent length, and concluded that they matched. He also determined that there was a match between the location, depth, and shape of the "squared off" firing-pin indentation in the primer of each case. That shape, he noted, is unique to Glock pistols.

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of these cuts is to impart a stabilizing spin to the bullet as it moves down the barrel, giving each bullet fired a consistent accuracy in flight to the target. The number, degree or rate of twist, and whether made in a left or right direction, can vary among barrel-makers and with the type and caliber of firearm. *See, e.g., United States v. Mouzone,* 696 F.Supp.2d 536, 555-559 (D.Md.2009)*; United States v. Taylor,* 663 F.Supp.2d 1170, 1174-1175 (D.N.M.2009).

{¶ 32} While the bullet recovered in Schueler's office did not match the test-fired projectile, Cogan explained that this anomaly was due to the use of an "aftermarket" barrel in the murder weapon. These barrels use "cut" or "conventional" rifling, the lands and grooves of which impart "sharp," "crisp" marks to the surface of the bullet. He testified that several gun-parts companies lawfully sell barrels of this type for various makes of pistols, including Glocks, and in different calibers. The factory barrel in Langlois' Glock 26 contains "polygonal" rifling which imparts noticeably "rounder" marks to the bullet. The test-fired bullet exhibited marks from polygonal rifling, so it did not match the sharp marks on the crime-scene bullet. Aftermarket pistol barrels are also sold which have threads at the muzzle for attaching a sound suppressor, which is then simply screwed on.[6] The factory barrel in the Glock 26 was not so threaded, but Cogan noted that one of Langlois' suppressors was designed for a 9mm pistol and would have fit a pre-threaded aftermarket barrel made specifically for that model and caliber of Glock. Cogan indicated that the simplicity of disassembling a Glock is such that anyone familiar with the procedure can disassemble one and change barrels in "less than a minute."

[6] Suppressors are sometimes referred to as "silencers," "mufflers," "moderators," or in street vernacular, as "cans." These devices, operationally, are not firearms. They function internally to contain the decibel level and concussive blast of a gunshot, although not all sound is eliminated. The reductive effect can be significant however, and depending on the caliber of the weapon, any residual noise from the discharge would be difficult to recognize as gunfire.

Using Langlois' Glock 26 to demonstrate this procedure for the jury, he took less than *half* a minute.

{¶ 33} Finally, Cogan testified that the 9mm shell case recovered at the murder scene bore the name of the ammunition maker, Speer, on the headstamp, a standard identification practice in the industry. Fifteen boxes of Speer 9mm ammunition were found at Langlois' home, each containing 50 cartridges. When Langlois gave his Glock 26 to police early in the investigation, the magazine that came with it also held three live Speer 9mm cartridges. In the course of his testing, Cogan examined the crime-scene case for the presence of any defects that might have been left during the manufacturing process.[7] He detected an "unusual mark" on the headstamp, which he described as a "tail-shaped deformation." Cogan then inspected the 9mm cartridges in the boxes taken from Langlois' home as well as the three in the Glock magazine. The headstamps of the cartridges from the magazine all exhibited the same defect. On the boxed rounds, he found the defect on 539 (or 72 percent) of the headstamps. Cogan stated that the defect on the crime-scene Speer case "was consistent" in appearance with the defect on each of the rounds of Speer ammunition he examined.

{¶ 34} Based on his microscopic comparison of the markings on the crime-scene 9mm shell case and the 9mm test-case, Cogan concluded, to a reasonable degree of

[7] Defects or imperfections on the headstamp are not uncommon in the manufacture of the case as an ammunition component. Cogan testified that such defects are sometimes directly visible, while others can be detected only with a microscope. In boxes of ammunition manufactured at the same time the defect might be found on many cases.

scientific certainty, that the spent 9mm shell case found at the murder scene had been fired from Langlois' 9mm Glock 26.

{¶ 35} On cross-examination Cogan testified that his methods of testing and comparing the shell cases and projectiles were performed in accordance with the generally accepted practices that every firearm examiner uses. Defense counsel questioned whether "standardized" protocols existed among firearms examiners for "cartridge case analysis." Cogan responded that there are "common practices throughout the field" and that other examiners microscopically compare the striations found on shell cases. While acknowledging that the results of such tests do not have an established potential rate of error, he testified that numerous studies have confirmed the accuracy of the techniques that formed the basis for his conclusions. Cogan cited one study conducted over a ten year period that involved over 500 firearms examiners. Consecutively manufactured firearms barrels were examined for distinguishing tool marks left on projectiles and "7500 correct conclusions" were reached. "There were no false positives," he stated, "which means no one accidentally attributed a projectile to the wrong barrel." When defense counsel challenged that study's applicability to the methodology of comparing shell cases, Cogan responded that similar studies analyzing the markings on fired shell cases have been published as well. "The underlying theory of firearms examinations and tool marks in general covers projectiles going through a barrel, it covers the marks you get on shell casings, it even covers a screwdriver used to pry open a safe[.] * * * It's all under the same underlying theory."

b) Todd Wharton

{¶ 36} The state's second ballistics expert, Wharton, has been employed as a forensic scientist for the Bureau of Criminal Identification and Investigation for 15 years, and presently works in the bureau's firearms and tool marks section. He indicated that the underlying principle of identification with respect to ammunition is that each firearm will transfer a unique set of "machine or tool marks" to certain primary components of a cartridge fired in that gun. These components are the bullet and the shell case, which includes the primer. Wharton stated that marks left by the firearm are "a byproduct of how [the] gun is made and the machining process that manufactures them." Generally, a tool mark results when a harder object comes into contact with a relatively softer object. In the case of firearms, the marks result from the internal parts of the gun making violent contact with the components of the cartridge under high pressure.

{¶ 37} Wharton testified that he did a microscopic examination of the crime-scene 9mm Speer shell case and Cogan's test-fired case. He found that both Speer cases exhibited the same tool-markings imparted by the breech-face during the act of firing, and these marks indicated the same weapon fired both. On a semi-automatic pistol, the breech face is on the inside rear of the slide, and Wharton described how the base of the cartridge rests against it, held there by the extractor, before the gun is fired. He agreed that the "striations" on both cases matched, as did the firing-pin indentations on the primers. Their distinctive shape and depth signaled that a Glock pistol was used. They were made when the "elliptical" firing pin, which protrudes through a "rectangular

firing-pin hole" on the breech face, struck the primer to ignite the 9mm round. Wharton emphasized that because both of these shapes are unique to Glock as a firearms manufacturer, the shape of the indentation imparted to the primer is also unique. On the primers of both cases he also found "shear marks" that matched, made as the slide was driven rearward, extracting and then ejecting the spent case.

{¶ 38} Finally, Wharton indicated that in semi-automatic pistols unique marks are sometimes made on cases by the extractor, the ejector, and from imperfections existing in the chamber of the barrel. But even without the barrel, the most common identifying characteristic, and the strongest, comes from the breech-face markings. He testified that switching the barrels in a pistol, like a Glock, would create differences in the marks found on the sides of fired cases, due to differences in each barrel's chamber imperfections; however, the interaction of the cases against the breech-face and the firing pin, both at the rear of the slide, is unaffected by changing barrels, and thus the marks on the primer and headstamp would remain the same.

5) Admissibility

{¶ 39} Having reviewed the foregoing testimony, we conclude that it satisfies the threshold test for reliability under Evid.R. 702(C). It was not, therefore, plain error to admit it. Cogan and Wharton were properly qualified experts whose testimony helped the jury understand the basis for their tool mark examinations and the variables involved in comparing shell cases and projectiles. Such matters are well beyond the knowledge

and experience of most lay people, even among those who own firearms. Evid.R. 702(A).

{¶ 40} Both experts used widely-accepted and accurate microscopic methods for observing minute striations and primer cup indentations on the cases being examined. They explained in detail how such markings are made by semi-automatic pistols generally, and then how and why a particular pistol will impart individualized, distinguishing marks that make a spent case or bullet traceable to that pistol. Such microscopic comparison testing is a generally accepted method of forensic analysis. *See State v. Onunwor*, 8th Dist. No. 93937, 2010-Ohio-5587, ¶ 14-18. It was, moreover, within the jury's prerogative to assess the weight to be given their testimony. *State v. Johnson*, 10th Dist. No. 05AP-12, 2006-Ohio-209, ¶ 15.

{¶ 41} Our conclusion on this issue finds support in the decisions of other appellate districts in Ohio, notwithstanding the recent criticisms in scientific reports and the limitations some federal courts have imposed on the testimony of firearms experts. These decisions hold that the methodology of comparatively analyzing and testing bullets and shell cases recovered from crime scenes is reliable. *See Onunwor, supra*, at ¶ 14-18; *Johnson, supra*, at ¶ 13-15; *see also State v. Armstrong*, 11 Dist. No. 2001-T-0120, 2004-Ohio-5635, ¶ 63-66; *State v. Green*, 2d Dist. No. 2007 CA 2, 2009-Ohio-5529, ¶ 196-204.

{¶ 42} Notably, Langlois offered no contrary testimony to refute the state's ballistics experts. Apart from a thorough cross-examination, he presented no credible

challenge to the underlying physical or scientific theory of how marks are transferred from a firearm to the primary components of a cartridge, nor to the methodology of identifying a match between a particular gun and a shell case found at a crime scene. And despite his appellate counsel's characterization, neither witness opined in absolute terms or to a degree of "absolute certainty." Each expert stated his opinion to a "reasonable degree of scientific certainty." *See Monteiro, supra,* 407 F.Supp.2d at 372. Nor, finally, has Langlois attacked the jury's verdict on manifest-weight grounds or argued that the state's evidence is insufficient to sustain his conviction.

{¶ 43} Langlois' first assigned error does not end there, however. He further contends that ineffective assistance of counsel resulted from defense counsel's failure to oppose the state's expert ballistic testimony and related evidence through a *Daubert* hearing.

B) Ineffective Assistance

{¶ 44} A claim of ineffective assistance of counsel is evaluated under the deficiency standard set forth in *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 358

N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

{¶ 45} Ohio law presumes the competence of a properly licensed attorney. *State v. Robinson*, 6th Dist. No. L-10-1369, 2012-Ohio-6068, ¶ 72. There is thus "a strong presumption that counsel's performance falls within the wide range of reasonable professional performance." *Bradley* at 142. Even if counsel's performance fell below an objective standard of reasonable representation, the level of prejudice must be such that but for counsel's deficiencies and errors there is a reasonable probability that the trial's outcome would have been different. *Id.* at 142. Trial strategies and tactical choices do not constitute ineffective assistance merely because in hindsight they appear questionable or ineffective. *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980).

{¶ 46} In our view, Langlois cannot demonstrate that his counsel's trial performance was rendered ineffective by failing to seek a *Daubert* hearing as a means of challenging the testimony of the state's experts. We have already concluded that their testimony comported with the requirements of Evid.R. 702(C). Moreover, defense counsel thoroughly challenged the experts' methodology and the basis for their opinions during cross-examination. His performance in that regard was competent and part of a

reasonable trial strategy. Langlois has not shown how a more rigorous challenge through a *Daubert* hearing would have changed the outcome. Given a proffer of the same testimony after a *Daubert* hearing, the trial court could have reasonably determined that it met the requirements of Evid.R. 702(C). Thus, a motion to exclude the experts' testimony in that forum would not have succeeded. *Compare State v. Brown*, 11th Dist. No. 2012-L-007, 2013-Ohio-1099, ¶ 31-34 (failure to contest expert's blood-splatter testimony through a *Daubert* hearing not ineffective assistance). Because Langlois cannot demonstrate unreasonableness or prejudice under the *Bradley* standard, his ineffective-assistance claim is without merit.

{¶ 47} Accordingly, the first assigned error is not well-taken.

C. Admission of the Other Firearms Evidence

{¶ 48} Langlois' second assigned error states:

> Assignment of Error No. 2: The trial court's wrongful admission of firearms, books and periodicals, videotapes, tools, parts, ammunition, and computer search data, coupled with its failure to give a limiting instruction, was unduly prejudicial and violated appellant's right to a fair trial, to present a defense, and to due process of law all as guaranteed by the Sixth and Fourteenth Amendments and by the cognate provisions of the Ohio Constitution.

1) Arguments

{¶ 49} The gravamen of Langlois' argument under this assignment is evidentiary, notwithstanding his assertion of a conclusory due process violation that was never raised below. He maintains that he was prejudiced by the "improper admission of a wealth of exhibits suggesting that Mr. Langlois was a gun nut whose interest in firearms was really an interest in becoming a killer." He refers to the state's exhibits, approximately 47 of them, most of which he objected to, consisting of handguns other than the 9mm Glock 26, various gun parts and gun tools, the suppressors and adaptors, ammunition, holsters, reloading equipment and components, firearms books, DVDs, and the other items previously mentioned. (For ease of reference, these exhibits will be referred to collectively as the "other firearms evidence").

{¶ 50} The first part of Langlois' evidentiary argument is that none of the other firearms evidence was relevant under Evid.R. 401. The second part contends that even if it was relevant, the great prejudice this evidence carried warranted its exclusion under Evid.R. 403(A). Langlois also urges that the trial court erred in admitting his computer's internet browsing history. On that issue, however, because no objection was made, he has forfeited all but a plain-error review. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 15.

{¶ 51} The state argued at trial that although the other firearms evidence was not directly connected to Schueler's murder, the various items were being offered to show Langlois' extensive knowledge of firearms generally and, in particular, of semi-automatic

pistols, their internal components, and special-use devices like suppressors. This would inferentially support the state's theory that he used a replacement barrel in the Glock that fit one of his suppressors, disposed of that barrel after the murder, and then re-installed the factory barrel which was not threaded for a suppressor and whose polygonal rifling would impart marks of a type that would not match those on the bullet that killed Schueler. The state, in other words, was suggesting that Langlois knew how to alter the configuration of a pistol, kill someone with it, and then restore it afterward in an attempt to escape detection.

2) Standard of Review

{¶ 52} Because a trial court has discretion under the relevancy rules to admit or exclude evidence, *see State v. Richcreek*, 196 Ohio App.3d 505, 2011-Ohio-4686, 964 N.E.2d 442, ¶ 29 (6th Dist.), our review is limited to determining whether that discretion was abused. *Id.* Although generally given significant latitude, a trial court's discretion is not without limits. Abuse can be demonstrated in instances where the court's approach or process in deciding an evidentiary issue is shown to be "unreasonable, arbitrary, or unconscionable." *AAAA Enterprises, Inc. v. River Place Community Redevelopment*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). This formulation of the standard looks to the *process* involved rather than the *outcome* of a ruling or decision. It is deferential where the reasoning that led to the decision is supportable within the evidentiary or

factual context and was one that the trial court reasonably could have made given the alternatives before it. *Id.*[8]

3) Evid.R. 401

{¶ 53} That approach is particularly appropriate to the threshold issue under Evid.R. 401, because "whether a particular item of evidence is relevant is ordinarily not a question of law." Weissenberger, *Ohio Evidence Treatise*, Section 401.2 (2011 Ed.). Rather, determining relevancy is based on common experience, logic, and discerning analytical connections between the tendered evidence and some fact "of consequence" to

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[8] It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary. A decision is unreasonable if there is *no* sound reasoning process that would support that decision. *It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.* (Emphasis added). *AAAA Enterprises, Inc., supra*, 50 Ohio St.3d at 161, 553 N.E.2d 597.

The lower court receives no such deference for mistakes or misapplications of law, which are reviewed de novo: "When a pure issue of law is involved in appellate review, the mere fact that the reviewing court would decide the issue differently is enough to find error." *EnQuip Technologies Group, Inc. v. Tycon Technoglass, S.R.L.*, 2d Dist. Nos. 2009 CA 42, 2010-Ohio-28, ¶ 131 (Fain, J. concurring). Such errors, however, do not necessarily entail *reversal*, because many are determined to be harmless, are forfeited because they were never preserved for review, or else do not meet the stringent test for "plain error." *Id.*

deciding the case. *Id*. Evid.R. 401 states broadly that "relevant evidence" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Relevant evidence is then presumed admissible under Evid.R. 402, subject to the exceptions referenced therein.

4) *State v. Trimble*

{¶ 54} In arguing for and against the relevancy of the other firearms evidence at trial and in this appeal, both parties have cited *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242. In *Trimble* the defendant was convicted of three counts of aggravated murder, during the commission of which he used two firearms, and was sentenced to death. Among numerous issues on appeal, Trimble challenged the trial court's admission of 19 other firearms not used in the murders but which were kept in the basement of his home, some of them in a gun safe. Trimble maintained that since none of these guns were involved in the killings they had no relevance to the state's case. The state responded with four separate arguments for why the firearms were properly admitted. In the course of its Evid.R. 401 analysis, the Supreme Court rejected all but one.

{¶ 55} The court first dismissed the state's suggestion that the other weapons were relevant to prove Trimble killed one of the victims "with prior calculation and design." The specific murder weapon he used, an AR-15 rifle, "was unmistakably identified and admitted into evidence. The other firearms were not used in [that victim's] murder and

thus had no relevance to prove that Trimble murdered her with prior calculation and design." *Id*. at ¶ 106.

{¶ 56} The state next claimed that the other weapons in Trimble's basement were relevant to show he had "ready access to them," citing *State v. Drummond,* 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038. *Drummond* was an aggravated murder case in which the trial court had admitted a quantity of 7.62 x 39mm rifle ammunition, a 9mm semiautomatic pistol, and 9mm ammunition, all found at the defendant's home. *Id.* at ¶ 82. The *Drummond* court held that the rifle ammunition was relevant because the victim was killed with the same type of ammunition. The 9mm pistol and its ammunition were deemed relevant because, shortly before the murder, someone had fired a 9mm weapon at the victim's home. *Id*. at ¶ 84. Yet, the *Trimble* court found *Drummond* to be inapplicable "because the two murder weapons were seized when Trimble was arrested, and there was no link between the other weapons found in Trimble's basement and the murders." *Id.* at ¶ 107.

{¶ 57} On its third swing at admissibility, the state cited *State v. Hartman*, 93 Ohio St.3d 274, 754 N.E.2d 1150 (2001), for the proposition that other weapons found in a defendant's home are relevant to demonstrate his "familiarity with using the weapons." But the *Trimble* court distinguished *Hartman* based on two special facts: (1) the type of weapons involved and (2) how the perpetrator had actually employed them in the killing. The court stated:

> In *Hartman,* a set of knives belonging to the defendant was admitted into evidence because he owned the knives and, as a chef, *was familiar with using them,* a fact that made the knives relevant to *the surgically precise manner* with which he had cut off the victim's hands. * * * Unlike the facts in *Hartman,* the guns found in Trimble's basement had *no relevance in proving any unique type of wounds or manner of death.*" (Internal citations omitted; emphasis added). *Id.* at ¶ 108.

{¶ 58} Almost as an afterthought, the *Trimble* court then salvaged the state's case by noting that its admissibility argument at trial had been premised on an altogether different ground: "the firearms were admissible *to rebut claims of the defense* that Trimble had *accidentally* killed [the victim]." (Emphasis added). *Id.* at ¶ 109. Defense counsel in opening statement had claimed that "Trimble had been startled when he saw police officers entering the residence [and] accidentally shot [the victim] when he let go of the handgun in order to put both hands on his rifle, and the pistol discharged, killing her." *Id.* The other firearms became relevant to show Trimble's substantial familiarity with guns in order *to rebut* the defense theory that the shooting was "accidental."[9]

[9] To justify admitting these firearms on what was essentially an "opened-the-door" theory, the *Trimble* court cited *State v. Kamel,* 12 Ohio St.3d 306, 466 N.E.2d 860 (1984), for the reasoning that "*after the defense first raised* the subject of defendant's drug problem, 'the topic became *open to all relevant inquiry* in the discretion of the trial court.'" (Emphasis added). *Id.* at ¶ 110.

{¶ 59} It was only on this basis of relevancy that the Supreme Court upheld the admission of the 19 other firearms. *Id.* at ¶ 110.

5) Admissibility Here

{¶ 60} Langlois argues that, unlike Trimble, he opened no doors and put nothing in dispute that would have warranted admitting the other firearms, suppressors, and gun paraphernalia found in his home. The state replies that *Trimble* supports their admission because, open door or not, evidence relating to "[Langlois'] knowledge of how to replace barrels and use silencers became relevant due to the unique facts of this case."

a) *Hartman*, not *Trimble*

{¶ 61} We agree with Langlois that the narrow relevancy basis accepted in *Trimble* would not support the admission of the other firearms evidence here. The state never claimed that this evidence was needed *to rebut* anything Langlois had offered at trial. But that does not end the analysis, for the relevancy basis identified in *Hartman*, and to some extent in *Drummond*, does support the admission of most (though not all) of this evidence.[10]

[10] Normally the state's assertion on appeal of a ground for the admissibility of disputed evidence or testimony not argued below is prohibited. *See Richcreek, supra*, 196 Ohio App.3d 505, 2011-Ohio-4686, 964 N.E.2d 442, ¶ 33. But that rule is inapplicable here for two reasons. First, at trial the state *did* in substance argue *Hartman*'s "familiarity" basis for the relevance of this evidence, although in doing so it misread (and the trial court mistakenly accepted) *Trimble* as authority for that reasoning. Second, *Trimble*'s analysis can be read as incorporating by reference alternative rationales under Evid.R. 401 which might justify admitting additional firearms evidence otherwise unconnected to a homicide *if* predicate facts exist to warrant it. *Hartman*'s is one, *Drummond's* another. *Trimble's* facts simply made their rationales inapplicable in that case; it did not invalidate

{¶ 62} *In Hartman,* the admissibility issue turned on *unusual facts* involving a unique type of murder weapon, the manner in which it was used to kill the victim, and proof of Hartman's familiarity with using such a weapon. *Hartman at* 93 Ohio St.3d at 281-82, 754 N.E.2d 1150. Police had seized a set of knives belonging to Hartman from the Hilton hotel where he worked as a chef. At trial, the state introduced the cutlery set, which consisted of a knife sharpener, a high carbon knife, and a meat cleaver. Although these knives were never shown to be the ones actually used in the murder, the Supreme Court described how the knives were relevant:

> Such evidence was particularly relevant, since [the victim] was stabbed one hundred thirty-eight times, her throat was slit, and her hands were cut off. * * * Moreover, the medical examiner's testimony suggested that *the assailant probably knew what he was doing* when he cut off the victim's hands, [stating] that this "disarticulation is such that there is a cut right at the end of the bone, radius bone, [and] the cut is such that bone itself was not sawed or cut. There are ligaments in this area so that one can cut across the ligaments and the hand can be removed with just [a] few incisions." *Id.*at 281.

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them as precedent for other cases on different facts. Regardless, the relevancy argument before us was sufficiently broached in the trial court to preserve it for consideration on appeal.

{¶ 63} The Supreme Court concluded that Hartman's knives "showed [his] easy access to a possible murder weapon and *his familiarity with using knives*. * * * Thus, defendant's ownership of a set of knives and *his familiarity and use of knives at work* were relevant *considering the surgical precision of the removal of [the victim's] hands.*" (Emphasis added.) *Id.* at 282.

b) What was Relevant

{¶ 64} As we have previously noted, "[c]rime does not occur in a vacuum." *State v. Swiergosz*, 197 Ohio App.3d 40, 2012-Ohio-830, 965 N.E.2d 1070, ¶ 25 (6th Dist.). Most of the additional firearms evidence was plainly relevant to Schueler's murder, made so by the unusual circumstances of the killing and what it implied about the means used and the knowledge needed to accomplish it. This evidence was introduced against the backdrop of the time-line evidence and the ballistics testimony connecting the crime-scene shell case to the Glock 26 and to the 9mm Speer ammunition found in Langlois' home. The other *semiautomatic* pistols[11], the aftermarket pistol barrels, the gun tools,

[11] These pistols included another Glock in .40 caliber, two .380 caliber pistols, and the 9mm Beretta. Defense counsel did not object to the admission of the Beretta, but did object to the others. While the trial court was correct to reject the state's homogenous "all in" approach for the indiscriminate admission of all 47 exhibits, making the prosecutor parse and explain how each was relevant, the .40 and .380 caliber pistols did have limited relevance in this case. Though unrelated to the murder, these pistols would be relevant for the narrow purpose of showing Langlois' familiarity with semiautomatics, functionally the *type* of handgun that killed Schueler. They would, for that purpose, lend support to the state's contention that Langlois knew how to operate them, disassemble and reconfigure their internal components, etc. The trial court properly ruled that for other purposes or uses they were inadmissible, as when it prohibited testimony that Langlois had carried one of the .380 pistols concealed in an ankle holster the day of the

and the suppressors and adaptors, all served to contextualize the state's explanation for why the crime-scene bullet did not match the one test-fired from the Glock 26, even though the cases matched, and why no one in the front offices of FOT would have heard a shot fired. These items tended to show that Langlois had more than casual familiarity with the configuration and operation of handguns that were functionally the same as the murder weapon. They made the state's principal contention that he used a different barrel in the Glock 26 "more probable" than it would have been without this evidence. Evid.R. 401.

{¶ 65} Otherwise the jury would have been left to speculate on the plausibility of this theory because the knowledge of how to switch barrels in a semi-automatic pistol, or in a Glock in particular, much less use a barrel specifically made for a suppressor, can hardly be said to be commonplace. Since the state's circumstantial case relied so heavily on testimony about firearms and ammunition, how semi-automatic pistols operate, and how a suppressor can conceal the sound of gunfire, evidence tending to show that Langlois not only knew about these things but also possessed the means to have killed Schueler precisely this way, was "of consequence to the [jury's] determination of the

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murder (he had valid CCW permit) or that carrying it concealed had been part of some attenuated "explanation for why he quit work" at FOT. As the court correctly ruled, *why* Langlois quit was irrelevant to the state's murder case.

action." Evid.R. 401. Thus, by definition, the balance of the other firearms evidence was relevant under *Hartman's* application of the general relevancy rule.[12]

{¶ 66} The suppressor evidence, in particular, gained inferential support from two points in the trial testimony and, indirectly at least, its relevance was increased by a third consideration relating to the appearance of these devices in crimes. First, despite obvious evidence that a gun was fired at close quarters inside FOT, no shot was heard at a time when it was reasonable to expect that some employee should have heard it. Second, the assistant coroner's testimony, describing the unusual features of the "contact wound" on Schueler's head, suggested that the murder weapon could have had a suppressor attached. *Compare Hartman,* 93 Ohio St.3d at 281-82, 754 N.E.2d 1150. Apart from the medical testimony, the use of a suppressor can also have significance from a ballistics standpoint. *See People v. Ewell*, Cal.App. No. FO31391 (May 4, 2004), 2004 WL 944479 (Two firearms experts determined that "a lot of particulate matter on the [victim's] clothes" and "[u]nusual scratches on the bearing surfaces of the six bullets recovered from the crime scene and autopsies [meant] that all six bullets were fired by the same weapon, that the weapon had a ported barrel [and] *that a homemade sound suppressor (silencer) was used*." (Emphasis added.)

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[12] Further, under *Drummond's* Evid.R. 401 analysis, the defendant's possession of a *weapon or ammunition* shortly after the murder "*of the [same] type used to kill [the victim]*" would be relevant as tending to prove "*timely access to the means* to commit the murder." (Emphasis added.) *See Drummond* at ¶ 84. That reasoning by itself would apply to the 9mm pistols, the 9mm Speer factory ammunition, the 9mm suppressor and adaptors, and would have applied to aftermarket barrels in that caliber, if any.

{¶ 67} Third, since 1934 sound suppressors have been subject to special regulation and mandatory registration under the provisions of the National Firearms Act (NFA), as administered by the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE). *See* 26 U.S.C. 5801-5872 and 18 U.S.C. 921(a)(3) and (a)24 (defining one type of NFA "firearm" to include "firearm silencer.") While they are legal to own, the process of acquiring a suppressor is much more stringent than the process for purchasing the pistol or rifle on which it is typically used.[13] Of significance here, and despite public and media misimpressions, the use of suppressors in gun crimes generally and in homicides specifically is extremely infrequent, and the criminal use of a *registered* suppressor is virtually nil relative to their widespread ownership. *See* Clark, *Criminal Use of Firearm Silencers*, 8 Western Criminology Review (2), 44-57 (2007) ("The data indicates that use

[13] Suppressors are but one type of NFA "firearm." Others include short-barreled rifles and shotguns, and fully automatic weapons. Provided that an applicant meets all the NFA requirements, which include submitting fingerprints, passing federal and state background checks, paying a $200 tax and registering the suppressor by special serial number with BATFE, possession is lawful unless prohibited by the law of the applicant's state. *See* 26 U.S.C. 5811-5812, 5821-5822, 5841-5845, and 5861. 40 states, including Ohio, currently allow the ownership of registered suppressors for all lawful uses. Game laws in 31 of those states allow suppressors to be used while hunting. As of April 2013, BATFE reports that there are 494,452 registered suppressors documented within the NFA's firearms registry. *See* United States Department of Justice, BATFE, *Firearms Commerce in the United States, Annual Statistics* (2013) Ex. 8. https://www.atf.gov/ sites/default/files/assets/pdf-files/052013-firearms-commerce-in-the-us-annual-update.pdf (accessed Oct. 1, 2013). Nearly 27,000 suppressors are approved by BATFE for purchase every year in the United States, according to industry estimates. *See* American Silencer Association *Silencer Legality and Ownership*, http://americansilencerassociation.com/education/ (accessed Oct. 1, 2013).

of silenced firearms in crime is a rare occurrence, and is a minor problem.")[14] That same rarity of criminal use, therefore, only heightens the relevance of evidence indicating that a suppressor was employed on a firearm linked to a murder, because that *atypical* configuration goes to "proving *any unique* type of wounds or *manner of death*." (Emphasis added.) *Trimble*, *supra,* 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶ 108, characterizing the killing in *Hartman*, 93 Ohio St.3d at 281-282, 754 N.E.2d 1150. The comparatively unusual characteristics of Schueler's head wound, and what it implied about the probable (and equally unusual) configuration of the weapon that produced it, along with the other circumstances of the murder, made the suppressor evidence highly relevant.

{¶ 68} Finally, the firearms-related books, instruction manuals, magazines, catalogs, booklets, and DVDs, which the state tried to introduce *en mass*, turned for their relevancy on individual subject-matter. To the extent that the contents of a particular publication related to the type of handgun linked to Schueler's murder—a *semiautomatic*—or to the component parts or ammunition for such a gun, or to sound suppressors, the contents

[14] Merely possessing an unregistered suppressor is a federal felony, apart from other felonies resulting from its *use* on a firearm during a crime. *See* 26 U.S.C. Sec. 5861(d) and 5871; *United States v. Price*, 877 F.2d 334 (5th Cir.1989). Overwhelmingly the federal prosecutions do not involve commercially-made and serial-numbered suppressors, but rather "homemade" devices improvised from commonly available materials. *See, e.g., United States v. Rogers*, 270 F.3d 1076 (7th Cir. 2001); *United States v. Stump,* 106 F.3d 394 (4th Cir.1997); *United States v. Webb,* 49 F.3d 636 (10th Cir.1995) (two silencers made from "[o]ld toilet paper tubes and stuffing from some old stuffed animals")*;compare Ewell, supra,* Cal.App. No. FO31391, 2004 WL 944479 (silencer made with tennis balls.)

would be relevant as bearing on Langlois' knowledge and familiarity with such things. Those that did here were properly admitted. Other magazines, pamphlets and booklets whose contents had nothing whatsoever to do with these subjects, the trial court correctly excluded.

{¶ 69} Consequently, because it was reasonable on these facts for the trial court to have admitted most of the other firearms evidence, an abuse of discretion cannot be shown. Further, the internet browsing history from Langlois' computer was obviously relevant to the method of the murder given the particular subjects he pursued, and allowing it to be introduced was not plain error.

c) What was not Relevant

{¶ 70} We caution, however, that not *all* such evidence will be relevant in *every* murder case in which a defendant is found to possess a large number of firearms, ammunition or related paraphernalia. In each case the relevancy of each item must be determined within the context of the facts. In its nonlegal usage, "relevant" is a broad term that connotes anything "[b]earing upon, connected with, [or] pertinent to" a specified subject. 13 Oxford English Dictionary 561 (2d Ed.1989). But what is "relevant" in evidence law has always had a more particularized meaning. Evid.R. 401 designates provable facts in terms of *quality*, not quantity. Not everything and the kitchen sink comes in. "Relevant" is defined in terms of evidence that tends to identify a *consequential* fact as probable or that bears a "logical or analytical connection with" a consequential fact. Weissenberger, *supra*, at Section 401.6.

{¶ 71} Certain items the state introduced were not at all relevant to its theory or to the material facts of Schueler's murder and should not have been admitted. These items included the *non-semiautomatic* handguns (like the .357 and .44 magnum revolvers) and inoperable firearms or parts thereof; the reloading components, tools, equipment and reloading manuals; and any scopes, holsters (other than the one suspected to have carried the murder weapon), magazines, ammunition, and spent shell cases that were not shown to be *related by caliber or use* to the murder weapon or to its actual or probable *configuration*. *See Trimble*, 122 Ohio St.3d at 107, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 107 ("[T]here was no link between the other weapons * * * and the murders."); *compare Drummond, supra*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 84. ("Drummond's possession of a 9 mm handgun and 9 mm ammunition *was relevant because a 9 mm weapon was fired* at the Dent home on the evening of [the murder]." Emphasis added.)

{¶ 72} When the state, for example, attempted to introduce a knife along with the handguns, the trial court was prompted to ask (correctly): "What's a knife got to do with this case?" There was testimony, on the other hand, that Langlois' Glock 26 had a laser device attached. As with the suppressor evidence, the laser would be relevant since that goes to the weapon's actual or probable configuration. But unless the Glock 26 was shown to be configured for mounting a scope, or there was some evidence a scope was used in the crime (there was neither), his mere possession of a scope would not make it relevant.

{¶ 73} The same is true of the reloading materials. The crime-scene bullet was alleged to be from a cartridge of 9mm Speer *factory* ammunition, as was its companion crime-scene Speer shell case. Both were related directly to the 9mm Speer factory ammunition taken from Langlois' home. There was no evidence, and the state never claimed, that the crime-scene bullet came from 9mm ammunition *he made* using the reloading components and equipment also found there (i.e., bullets, cases, powder, dies or tools). Even accepting that these items showed Langlois knew how to reload, they had no relevance to the facts of the crime by virtue of mere possession, whether viewed under *Drummond*, *Hartman* or *Trimble*.[15] Since no *reloaded* 9mm ammunition was shown to be involved in Schueler's murder, the reloading evidence was logically unrelated to

[15] *Drummond*'s theory of admission involves a direct relation to the caliber and type of ammunition *actually used in the crime.* Indeed, it was *Drummond's* "sameness" theory that made the Speer 9mm ammunition relevant to the ballistics evidence and to the 9mm Glock 26 which that evidence connected to the crime. The reloading materials were not relevant on a "familiarity" theory under *Hartman* because that reasoning pertains to the nature of the weapon (which would include modifications, if any) and its specific manner of use in the crime. *Hartman's* theory made the other semi-automatic pistols, aftermarket barrels and suppressors relevant as tending to prove the probable configuration of the murder weapon, how its use as so configured was consistent with the circumstances of the killing, and because, along with the gun tools, books and magazines, these items unquestionably revealed Langlois' "nuts and bolts" knowledge of weaponry and firearms paraphernalia. But contrary to what the state asserted at trial, inferring "the knowledge of replacing barrels" in a pistol from the possession of unrelated reloading equipment is tenuous at best. Finally, the reloading materials would not be relevant under *Trimble's* "rebuttal" theory because the state was not introducing them for that purpose, there being nothing from Langlois to rebut.

proving Langlois was the killer. In the language of Evid.R. 401, this evidence made no fact of consequence to the state's case "more probable" than without it.

{¶ 74} But even conceding that error occurred in allowing the foregoing items to be introduced, the effect was cumulative when balanced against the properly admitted firearms evidence. Hence, admission of these exhibits is subject to the harmless-error rule. Crim.R. 52(A); *see Trimble*, *supra*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 111. That may not be true in a murder case involving firearms with different facts.

6) Evid.R. 403(A)

{¶ 75} Evid.R. 403(A) provides in pertinent part: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice[.]"

{¶ 76} Langlois secondarily argues that even if the other firearms evidence clears the initial hurdle of relevancy, Evid.R. 403(A) required its exclusion because any probative value was greatly outweighed by the prejudicial effect this body of evidence would confer on the jury's view of Langlois. The state's only purpose in introducing it, his appellate counsel asserts, was to paint him "as some mad recluse holed up with his guns, planning a string of essentially inexplicable homicides." The state replies that since it never claimed Langlois illegally acquired any of the items in question, the probative boost this evidence gave to its theory of the crime "far outweighed any arguable danger of unfair prejudice."

{¶ 77} Since Langlois never raised Evid.R. 403(A) below as a basis for excluding the additional firearms evidence, this argument is subject to plain-error review. *Payne*, *supra*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 15. Regarding the directive of Evid.R. 403(A) to balance probative value against prejudicial risk, the Ohio Supreme Court has explained the critical point this way:

> As a legal term, "prejudice" is simply "[d]amage or detriment to one's legal rights or claims." Black's Law Dictionary (8th Ed.1999) 1218. Thus, it is fair to say that all relevant evidence is prejudicial. That is, evidence that tends to disprove a party's rendition of the facts necessarily harms that party's case. Accordingly, the rules of evidence do not attempt to bar all prejudicial evidence - to do so would make reaching any result extremely difficult. Rather, only evidence that is *unfairly* prejudicial is excludable. (Emphasis sic.) *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 23; *compare Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 743 N.E.2d 890 (2001).

{¶ 78} Here, we are not persuaded that the probative value of the other firearms evidence was *substantially* outweighed by the risk of *unfair* prejudice to Langlois. Rather than appealing to the jurors' emotions, sympathies or biases, which the proponent of genuinely prejudicial evidence attempts to do, most of this evidence would instead appeal to their collective intellect, inviting them to make inferences from explicit facts and to "connect the dots" in what was otherwise a circumstantial case. Undoubtedly, this

evidence was very useful to the jury in deciding whether to accept the state's contention not only that Langlois killed Schueler but, inferentially, that certain facts about the mechanics of the murder *would have to be true* in order to reach that conclusion. Consequently, because Evid.R. 403(A) would not have barred the other firearms evidence, Langlois cannot show that plain error occurred.

7) Trial Court's Failure to Give a Limiting Instruction

{¶ 79} On this issue Langlois makes no argument beyond merely including it as an assertion in the text of his second assignment. Since no limiting instruction on the other firearms evidence was sought, we are again limited to a plain-error review. *State v. Davis*, 62 Ohio St.3d 326, 339, 581 N.E.2d 1362 (1991). Yet, the failure to give an unrequested instruction is typically not a basis for plain error. *State v. Schaim*, 65 Ohio St.3d 51, 600 N.E.2d 661 (1992). Defense counsel's decision not to ask for a limiting instruction is often a tactical one. *Id.* at 61, fn. 9. It is sometimes made from a concern that an instruction of this type, involving the court's imprimatur in addressing the jury on the use of particular testimony or evidence, will imbue it with a special significance to the detriment of his client. *Id.* Or, counsel may not request a limiting instruction as to certain evidence because he intends to attack its weight or credibility in closing argument. For those reasons, we cannot find plain error here.

{¶ 80} Accordingly, the second assigned error is not well-taken.

D. Ineffective Assistance and Closing Argument

{¶ 81} Langlois' third assigned error states:

> Assignment of Error No. 3: Appellant received constitutionally ineffective assistance of counsel when his trial counsel failed to object to the admission of a wealth of highly prejudicial and misleading evidence on the basis that its admission violated Evid.R. 403, failed to seek a limiting instruction when the court admitted the evidence for a single and limited purpose, and failed to object when the state made highly prejudicial and improper use of the evidence during closing argument.

{¶ 82} Under this assignment, Langlois makes three claims. The first two essentially repeat the evidentiary arguments from the second assignment but couch them in the language of ineffective assistance. The third claim premises ineffective assistance on defense counsel's failure to object to certain remarks by the prosecutor during closing argument and to request a mistrial. The same standards for establishing ineffective assistance discussed under Langlois' first assigned error apply to these claims. *See Bradley, supra,* 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraphs two and three of the syllabus.

{¶ 83} The first contention, that his counsel was ineffective for not citing Evid.R. 403(A) when objecting to the other-firearms evidence, is without merit. Even apart from the failure to raise that argument, we have already concluded that the probative value of this evidence was not substantially outweighed by the risk of unfair prejudice. Thus an

additional objection under Evid.R.403(A) would have been properly overruled. Langlois' second claim regarding the failure to seek a limiting instruction on this evidence must also fail. Tactical considerations, as previously discussed, are a legitimate reason not to ask for such an instruction. *See Robinson*, 6th Dist. No. L-10-1369, 2012-Ohio-6068 at ¶ 74 (rejecting an ineffective assistance claim where defense counsel could reasonably believe that a limiting instruction would do more harm than good).

{¶ 84} Lastly, as to Langlois' ineffectiveness claim regarding the prosecutor's comments on the other firearms evidence, we have thoroughly reviewed the closing arguments of both parties, including the specific remarks to which Langlois refers.

1) Record of Closing Argument

{¶ 85} In pertinent part, the transcript indicates that the prosecutor made several statements, initially, to which defense counsel did not object. After referring to Langlois' lifestyle as that of an unmarried "loner," the prosecutor turned to his "vast collection of weapons." He itemized each of the firearms, the suppressors, the replacement barrels, the reloading equipment, and all the gun-related books and magazines. The prosecutor then remarked:

> This is what Mr. Langlois does in his free time. * * * *Why do you have them? Who needs all these barrels unless you're planning on committing murder* and trying to throw off the police. * * * *Mr. Langlois has a vast array of firearms, barrels, suppressors, ammunition, loaded clips. What was he preparing for?* Is defense counsel going to get up here

and make an argument *that he was a casual sportsman*? Possibly. Clearly he likes guns. That's undisputed. Was he going to the firing range?

You know what we don't have any evidence of? Targets, clay pigeons, rifles for hunting, shotguns for hunting, camouflage uniforms for hunting, orange vests for hunting. "*Would a casual sportsman who's into guns or is into hunting not have those things?* You saw a picture of a gun safe. The detective testified that you can see inside the gun safe, and he told you look straight into the gun safe. These are the slots for long rifles, long shotguns. Was there any? No, there wasn't. *Only handguns designed for killing. What is the purpose of a handgun?*" (Emphasis added.)

{¶ 86} Following that statement, the trial judge interrupted the prosecutor and asked for a bench conference with both counsel. The court reprimanded the prosecutor for implying that Langlois was a killer simply because he owned multiple handguns, replacement barrels and suppressors. The court stated:

{¶ 87} "You're going somewhere you can't go. Because he had all of these guns, * * * he is more or less likely? The only purpose I allowed these guns to be put in is to raise the inference that he had the knowledge and wherewithal to work on guns and support your theory that he changed barrels."

{¶ 88} The prosecutor first responded that he was trying to get the jury to infer that because there were no shotguns or rifles found in Langlois' gun safe he was not "a casual sportsman."

{¶ 89} The court stated: "[Yet] because he had a bunch of handguns, he's someone that is planning on killing people? * * * It's not a proper argument. There are thousands of people with multiple handguns."

{¶ 90} The prosecutor replied: *"I should be able to say what I want*. [The jury] can make their own decision." At this point defense counsel interjected: "I didn't object because I think that's a pretty foolish argument *and we were ready to address it in our clos[ing]*." (Emphasis added).

{¶ 91} The bench conference ended with the court telling the prosecutor that equating the lawful ownership of firearms, suppressors, or gun parts with a propensity for homicide was "an improper argument" and directing him to "move on to something else." Back before the jury, the prosecutor then attempted the same line of argument, stating:

{¶ 92} "[He's got a] Glock 9mm with a laser sight, what purpose does this have? The testimony is, it's for hunting?"

{¶ 93} Defense counsel objected. The court sustained the objection and instructed the jury to disregard the remarks. The prosecutor then went on to summarize the experts' ballistics testimony.

{¶ 94} During defense counsel's summation, he responded to the prosecutor's earlier remarks, stating, in relevant part:

{¶ 95} "Now there's been a fair amount of testimony and evidence over the course of the week [about] stuff that really doesn't matter that much. But it came in [and] needs to be addressed. * * * And I don't know at what point disapproval of somebody's

lifestyle became evidence of guilt because that's what you heard. * * * Strong, strong disapproval of the way [Mark] Langlois lived his life.

{¶ 96} * * *

{¶ 97} "And the fact that Mark supposedly had no friends and supposedly had no wife and supposedly had no children and that's evidence that he is planning a homicide is the stupidest argument I've ever heard in 25 years."

{¶ 98} The prosecutor objected, but was overruled.

{¶ 99} "There was a great deal of gun evidence. The state put all the guns on the railing during their first closing argument. And there's just no other way for [the] defense to characterize that argument but as sad and ignorant."

{¶ 100} The prosecutor's objection to this comment was also overruled.

{¶ 101} Defense counsel then stated:

{¶ 102} "Possession of those firearms is legal, legitimate, and obviously very popular. And you don't need any justification for the possession of these handguns. It's legal, it's legitimate, and it's popular, and the idea that possession of handguns somehow indicates planning a murder is an incredible inferential stretch to the point of being insulting."

{¶ 103} Counsel then referred to Langlois' lawful purchase of the suppressors and to his possession of reloading equipment, citing the testimony of Detective Cousino that "lots and lots of people make their own ammunition. It doesn't prove anything. * * * The fact that the state can stand up here and tell you * * * that Mr. Langlois is a moody loner

with a penchant for handguns is proof of a homicide, is a sorry comment on the state's evidence."

{¶ 104} This time the prosecutor's objection drew a bench conference, at which point he lectured the court: "You know that is inappropriate and inexcusable and objectionable, and I don't want it to be done again. I want the court to instruct that [he cannot] make disparaging remarks in argument."

{¶ 105} The court replied: "He's not disparaging you. He's [making] disparaging comments on your argument which he's allowed to do."

{¶ 106} The prosecutor was not, apparently, finished:

{¶ 107} "It's despicable. I'm going to keep objecting. I can keep objecting. The court can keep ruling [that way] if it wants. * * * It's inappropriate, inexcusable and it should be stopped."

{¶ 108} The court responded:

{¶ 109} "Well, I'm finding that it's fair comment. And if you continue to make those objections, you'll be doing it from the hallway. Unless you find a different basis, he's not attacking you personally. [He's] characterizing the argument. I find it to be within the scope of a proper response. So have a seat."

{¶ 110} Defense counsel then continued, stating:

{¶ 111} "[M]urder cases in particular are not [to be] decided on [a] stereotype characterized by the state because they disapprove of somebody's lifestyle. That's not a basis for your verdict at all. * * * The guns are in front of you because the State wants

you to believe that people with guns are dangerous. That's what they said. People who buy guns are getting ready to kill people. * * * That's ridiculous. That argument reflects nothing about the evidence and only reveals an unenlightened value judgment, and that's it."

2) Closing Argument 101

{¶ 112} In light of the above exchanges, we have several observations.

{¶ 113} The circumstantial evidence against Langlois was certainly compelling but not overwhelming. Defense counsel thoroughly questioned the basis for the experts' ballistics conclusions, attacked discrepancies as well as possible biases in the testimony of the FOT witnesses, pointed out gaps in the state's time-frame for the murder, and cited the lack of eyewitnesses and any understandable motive. Conversely, that same ballistics evidence, the videotape and GPS data that contradicted Langlois' statements to police, and the logical coherence of the state's "means, motive and opportunity" theory all speak for themselves. Although it is a default truism to say that "closing arguments are not evidence," that merely begs the question of propriety in this case.

{¶ 114} The purpose of closing argument is to assist the jury in evaluating the testimony and the physical evidence in light of the instructions of law they will receive from the court. *United States v. Herberman*, 583 F.2d 222, 229 (5th Cir.1978). Generally, the prosecutor has "a certain degree of latitude" to comment on the evidence and to suggest the conclusions he believes the jury should draw from it. *State v. Treesh*, 90 Ohio St.3d 460, 466 739 N.E.2d 749 (2001); *State v. Maurer*, 15 Ohio St.3d 239, 473

N.E.2d 768 (1984); *State v. Liberatore*, 69 Ohio St.2d 583, 433 N.E.2d 561 (1982). But the prosecutor is not entitled, as he claimed here, to say "whatever" he wants. Both professionalism and the essential requirements of fairness impose strictures on that latitude. It does not encompass inviting the jury to reach a verdict based on considerations outside the admitted evidence, or by alluding to matters which the evidence does not support, or by making insinuations which are calculated to mislead the jury. *State v. Lott*, 51 Ohio St.3d 160, 166, 555 N.E.2d 293 (1990); *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984).

{¶ 115} The trial court was correct to intervene. The prosecutor's comments offered misleading insinuations which had nothing to do with the record before the jury. They were transparently an attempt to have the jury draw an adverse inference from the lawful possession of handguns of a certain type, apparently semi-automatics, as well as ammunition, reloading equipment, and devices lawfully acquired like suppressors. Worse, the comment which drew the trial court's attention explicitly suggested that someone who owns a semi-automatic pistol, which the prosecutor characterized as "only designed for killing," has a predisposition for murder. There was no logical difference between that statement and claiming that the defendant's ownership of a certain type of car indicates a predisposition to drive intoxicated. Any type of firearm may be used lawfully or unlawfully, and the action of the person using it determines when the line between is crossed. Although the remark about suppressors was less direct and more rhetorical, it too improperly insinuated that "casual sportsmen"—by whom, apparently,

the prosecutor meant "hunters"—would not have or use one.[16] It again suggested that an adverse inference toward guilt might be drawn from nothing more than the fact of lawful possession.

{¶ 116} Millions of law-abiding Americans own more than one firearm, including semi-automatic handguns and rifles. Such firearms have lawful purposes ranging from competitive or sporting uses to the defense of self or family. These same citizens also purchase, lawfully, ammunition and replacement parts for their guns. Among American firearms owners, there are a substantial number, according to BATFE's records, who own a registered pistol or rifle suppressor for various sporting purposes, including hunting. For the prosecutor to suggest that an inference of criminal intent or predisposition can be made from the lawful ownership of a firearm or other gun-related item was improper. Given the testimony of the state's investigating detective that all the handguns had been legally acquired and the suppressors were properly registered with BATFE, remarks of this sort were particularly inappropriate. More to the point, they were unnecessary to argue the strength of the evidence against Langlois.

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[16] And to that extent it was also erroneous. See fn. 13, *supra*. Ohio has long permitted the ownership and use of these devices on firearms as long as NFA requirements are met, and could permit their use when hunting. As of August 2013, pending House Bill 234 would amend R.C. 2923.17, and enact R.C.1533.04, to allow licensed hunters in Ohio, who are otherwise authorized to possess a suppressor under state and federal law, to use them for taking game. *See* 2013 H.B. No. 234, http://www.legislature.state.oh.us/bills.cfm?ID=130_HB_234 (accessed Oct. 1, 2013).

{¶ 117} Commendably, the state's appellate counsel acknowledged during oral argument that the prosecutor's comments were improper. He contended, however, that because the trial court intervened and sustained the later objection, prejudice cannot be shown. Counsel for Langlois replies that the prosecutor *intended* for the remarks to have prejudicial effect by implying that "anyone with as many handguns as Mr. Langlois * * * must have been preparing to commit murder." On this point, Langlois has not argued that the statements constituted prosecutorial misconduct. Rather, he postures the issue in terms of ineffective assistance due to counsel's *inaction*, at least initially, in failing to object and to immediately ask for a mistrial. We again view this claim under the *Bradley* standard for ineffective assistance. *Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373.

3) Ineffective Assistance

{¶ 118} Here, beyond the fact that the trial court intervened and then sustained a later objection, defense counsel's statement during the bench conference indicated that he had already made a *tactical decision* not to object but to wait until his closing to challenge the validity of the prosecutor's statements. That is exactly what he did. Counsel forcefully argued that the ownership and use of firearms for lawful purposes is not only a widely-embraced practice in this country, but is a right protected by both the Ohio and United States Constitutions.[17] Much of his closing also focused on highlighting certain weaknesses in the testimony of the state's witnesses. He made the point that the

[17] *See Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993) and *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

state was required to prove its case with evidence that connected Langlois to the murder, not based on a disapproving view of his lifestyle or of a constitutional right that millions of people lawfully exercise. Counsel's response to the prosecutor's earlier remarks was cogent and professional, and he provided the jury with a competent rebuttal to consider. His decision to handle the issue this way was a reasonable one. Hindsight criticism of such tactical choices is insufficient to demonstrate ineffectiveness. *Clayton, supra,* 62 Ohio St.2d at 49, 402 N.E.2d 1189.

4) Mistrial

{¶ 119} For mistrials, the standard is quite high. Generally, "[a] mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened[.] * * * The granting of a mistrial is necessary only when a fair trial is no longer possible." *State v. Treesh,* 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001); *State v Hunter,* 197 Ohio App.3d 689, 2012-Ohio-189, 968 N.E.2d 585, ¶ 18 (6th Dist.) Where the claim for a mistrial arises from alleged overreaching by the prosecutor during closing argument, the appellate court reviews the state's closing in its entirety to determine whether the improper remarks had prejudicial impact. *Treesh* at 466. This review includes a consideration of whether (or how) the court and/or defense counsel responded when the remarks were made. *Hunter, supra.* Isolated statements in themselves are generally insufficient to warrant the granting of a mistrial, especially where an objection (even a belated one) is sustained and the jury is given a related instruction. *Treesh, supra; State v. Waddy,* 63 Ohio St.3d 424, 436, 588 N.E.2d 819, 829 (1992).

{¶ 120} It is true that in other cases we have reversed convictions based on statements or conduct by the prosecutor in final argument that amounted to prosecutorial misconduct, where the issue of misconduct was explicitly assigned as error, briefed and argued on that basis. *See, e.g., State v. Purley*, 6th Dist. No.L-01-1005, 2002-Ohio-2689; *State v. Masing*, 6th Dist. No. OT-01-022, 2002-Ohio-1873. But in those cases too, either the trial court did not intervene, or no objection was made, or if one was made it was overruled. *Compare Hunter, supra*. That was not the case here. Had it been, we might have a different view of the issue. But given the relative paucity of the disputed remarks, the trial court's intervention, and defense counsel's aggressive response to the substance of the insinuations, we are unpersuaded that "a fair trial was no longer possible" once the remarks were made. Thus, Langlois' secondary claim that a mistrial should have been sought is also without merit. *Treesh* at 480.

{¶ 121} Accordingly, Langlois' third assignment of error is not well-taken.

III. Conclusion

{¶ 122} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is hereby affirmed. Pursuant to App.R.24, costs are assessed against Langlois.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE