WORDS COUNT – EXCEPT MAYBE IN FORENSIC TESTIMONY ("IDENTIFIED" V. "CONSISTENT WITH")

You say "yes,"

Jurors say "no"

Whether "identification" and "consistent with" different things show

Oh no no no

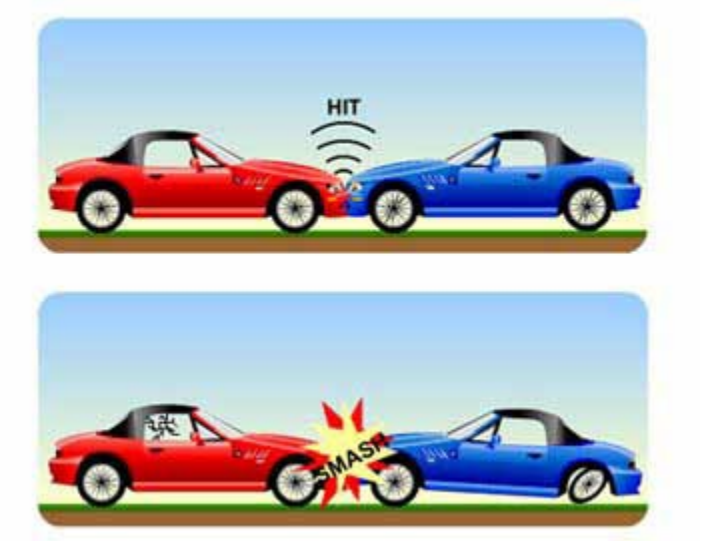
Jurors and lawyers hear different things

Where do we go?

[with apologies to the Beatles]

Is there a difference between an expert saying a bullet is "identified" as having come from a suspect's firearm and saying the bullet is "consistent with" having come from that weapon? Logic says "yes," but research says "hey, not so fast – lay jurors hear no difference."

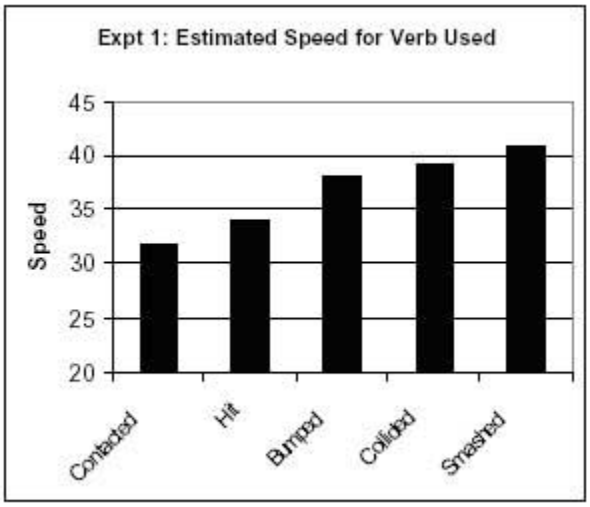
We know, and teach, that words count. Changing one word in a sentence or question can impact memory and recall and alter the message significantly. There is no more telling proof of this than in Elizabeth Loftus's now-famous experiment. Participants all watched the same video, one with no narration, where they saw this (minus "hit" and "smash"):



As summarized in McLeod, LOFTUS AND PALMER (1974) – CAR CRASH EXPERIMENT, SimplyPsychology June 16, 2023 https://www.simplypsychology.org/loftus-palmer.html (also the source of the above visual and the speed estimate chart, below),

> participants were asked to describe what had happened as if they were eyewitnesses. They were then asked specific questions, including the question "About how fast were the cars going when they (smashed / collided / bumped / hit / contacted) each other?"

The independent variable was the verb. And the results were stark in terms of speed estimates:



So shouldn't the same be true when a forensic analyst tells a jury that a bullet or fired cartridge case is "identified" as having come from the suspect's gun as opposed to being "consistent with" having been fired from that weapon?

From a forensic science/discipline viewpoint, this is critical. The last decade or more has seen a series of challenges to testimony by firearm examiners that 'this bullet [or cartridge case] came from this firearm to the exclusion of all other firearms in the world.' Why? An over-simplified answer is that there are no precise metrics for when the stria/impressions [markings left on the bullet or cartridge case on crime scene evidence] are sufficient in

number and detail to be a 100% match to the suspect's firearm, and similarly to conclude that no other firearm in the world would leave those same marks.

Here is a brief excursion into the legal landscape before we turn to the research. Based on numerous *Daubert* challenges, some courts have continued to allow 'matching' testimony, while others have put limitations on the conclusions. As explained by one federal court, limitations included

- firearms expert could "only describe and explain the ways in which the earlier [recovered] casings are similar to the shell-casings test-fired from the . . . pistol found a year later"; he would not be permitted "to conclude that the shell casings come from a specific . . . pistol 'to the exclusion of every other firearm in the world");
- "because an examiner's bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that [there] is a 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty"; accordingly, the expert would only be permitted to express her conclusions "to a **reasonable degree** of **ballistic certainty**"

United States v. Johnson, 2019 U.S. Dist. LEXIS 39590, *37-38 (S.D.N.Y. 2019) (citations omitted). A state high court ruled similarly, that "[p]hrases that could give the jury an impression of greater certainty, such as "practical impossibility" and "absolute certainty," should be avoided..." Commonwealth v. Pytou Heang, 458 Mass. 827, 849 (Mass. 2011).

Pytou Heang and *Johnson* felt that words do count. But that was an untested assumption. So here is what research shows. A study had mock jurors read a criminal case file. One third of the "jurors" read testimony that the firearms examiner "identified" the evidence as coming from the defendant's firearm; a second group had the same facts except that the examiner testified that they "could not exclude" the defendant's gun as the possible source for the bullet. Tellingly, "the third group of mock jurors were given the version in which the examiner testified that the markings on the bullet were 'consistent with' markings that would be left by the defendant's gun." State v. Kimberley, No. 22 CR-02932-01 (Cook County Illinois, July 1, 2025). The OPINION goes on to detail the results:

> After each group received their case, they were instructed on the standard of proof. Then, the researchers asked them if the State had proven beyond a reasonable doubt that the defendant was the one who had discharged a firearm in a public place. In answering this question, which was essentially the mock juror rendering their verdict, the participants did not treat the "consistent with" language any differently than hearing it was an AFTE identification. That is,

> the jurors in those groups were reaching guilty verdicts at the same rate as each other. The reduction in guilty verdicts occurred in the group that analyzed the case that used the "cannot exclude" language.
>
> In the second study, when the examiner used the identification language, 47.3% of participants voted guilty. When the examiner used the "cannot exclude" language, 32.7% of participants voted guilty. When the examiner used the "consistent with" language, 47.6% of participants voted guilty.

State v. Kimberley, 15-16. [The research relied upon by the Judge was by Nicholas Scurich, David Faigman and Brandon Garrett and will be published in an upcoming article.]

It was this finding, along with concerns that ballistics matching experts had no conclusive error rate and made subjective determinations, that led the Judge to rule that "the State will be barred from offering Panunzio's firearms identification opinion testimony at trial. However, the State will be allowed, so long as the requisite foundation is laid, to present evidence that the cartridge cases were all .40 caliber." *State v. Kimberley*, 59.

Why is this important to us as advocacy educators (and, for some, as practitioners)? I suggest several lessons:

- The Judge in *Kimberley* used Rule 403 as an add-on to a 702 analysis, an important approach to determining the admissibility and scope of expert testimony.
- If you teach Evidence or Forensic Science, this offers a healthy dose of skepticism as to what particular disciplines can conclude.
- The *Kimberley* case is a model of how to challenge purported expertise.
- Untested assumptions about whether changes in wording will affect juror comprehension and decision-making are dangerous and require testing. They also may require a more pointed cross-examination.
- At least in the area of forensic discipline testimony, the aura of accuracy and science is a powerful thumb on the scale when presenting 'matching' proof.
- Finally, for our students, sharing experiments such as this remind them that they really need to ask 'what are the jurors hearing,' and not just 'what am I dishing out to them.'

And those lessons should be "consistent with" what we know and teach about words. Watch your words, but also test your assumptions.