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21 JOHN M. WALKER, JR., Circuit Judge:

22
23 Defendants-appellants Elijah Bobby Williams ("Bobby"),
24 Michael Williams, ("Michael"), and Xavier Williams ("Xavier")
25 appeal from judgments entered in the United States District Court
26 for the Southern District of New York (Naomi Reice Buchwald,
27 Judge), convicting them of and sentencing them for various
28 offenses, including narcotics trafficking, racketeering, and
29 murder. In a concurrently filed summary order, we address most
30 of appellants' arguments and find them without merit. In this
31 opinion, we consider: (1) Michael's contention that the district
32 court erred in admitting Bobby's self-inculpatory out-of-court
33 statements that also implicated Michael, and (2) Bobby's claim
34 that the district court abused its discretion in concluding that
35 the methodology employed by the government's firearms

1 identification expert met the reliability standard set forth in
2 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579
3 (1993). We hold that the district court did not err on either
4 score. Accordingly, we affirm the convictions and sentences.

5 **BACKGROUND**

6 On a gelid night in February 1996, residents along the 1100
7 block of Sperling Drive, a residential street in Wilkinsburg,
8 Pennsylvania, were startled by the ringing sound of gun shots.
9 One resident who rushed to see what had happened saw two people
10 shooting into a Ford Bronco parked alongside the street. Another
11 observed a mid-sized car darting away from the scene immediately
12 after the shooting ceased. But neither was able to describe the
13 shooters in detail.

14 Once the commotion passed, one of the residents approached
15 the Ford Bronco. Inside she found the bullet-riddled bodies of
16 Joel Moore, Timothy Moore, and Robert James. Law enforcement was
17 called, a crime scene was established, and an investigation
18 immediately ensued.

19 The indictments that followed charged appellants with
20 operating a violent criminal organization that existed for the
21 purpose of, among other things, enriching its members by
22 trafficking in cocaine and cocaine base in New York and
23 Pennsylvania. Because the government sought the death penalty
24 against Bobby and Michael for their roles in the triple homicide,

1 they were tried separately from Xavier on a superceding
2 indictment that charged fifteen counts: racketeering, in
3 violation of 18 U.S.C. § 1962(c) (Count One); racketeering
4 conspiracy, in violation of 18 U.S.C. § 1962(d) (Count Two);
5 conspiracy to murder in aid of racketeering activity, in
6 violation of 18 U.S.C. § 1959(a) (5) (Counts Three and Four);
7 murder in aid of racketeering activity, in violation of 18 U.S.C.
8 §§ 2, 1959 (a) (1) (Counts Five through Seven); conspiracy to
9 distribute narcotics, in violation of 21 U.S.C. § 846 (Count
10 Eight); murder while engaged in a narcotics conspiracy, in
11 violation of 18 U.S.C. § 2 and 21 U.S.C. § 848(e) (Counts Nine
12 through Eleven); use of a firearm during and in relation to a
13 drug trafficking crime or crime of violence, in violation of 18
14 U.S.C. §§ 2, 924(j) (Counts Twelve through Fourteen); and
15 conspiracy to launder money derived from narcotics trafficking,
16 in violation of 18 U.S.C. § 1956(h) (Count Fifteen). The jury
17 found Bobby and Michael guilty on all counts except Counts Three
18 and Four but determined that they should not receive the death
19 penalty. Bobby and Michael were sentenced principally to life
20 imprisonment.

21 Xavier was tried on a superceding indictment charging
22 fourteen counts that matched Bobby's and Michael's indictment
23 through Count Thirteen, omitted one of the firearm counts, and
24 charged the money laundering count as Count Fourteen instead of

1 Fifteen. Upon the government's motion, the district court
2 dismissed Counts Five, Six, Seven, Nine, Ten, Eleven, and Twelve.
3 The jury found Xavier guilty on all remaining counts except Count
4 Four. He was sentenced principally to life imprisonment.

5 The remaining facts and procedural history are provided as
6 necessary for our analysis of the specific issues addressed in
7 this opinion.

8 DISCUSSION

9 I. Admission of Bobby's Out-of-Court Statements

10 Prior to the trial of Bobby and Michael, the government
11 requested permission to introduce, against both defendants,
12 statements Bobby made to Carol Johnson, Earl Baldwin, and Julian
13 Brown about his involvement in the triple homicide. Michael
14 objected and moved for exclusion and, in the alternative,
15 requested a severance pursuant to Fed. R. Crim. P. 14. After
16 hearing from both sides, the district court denied the severance
17 and allowed Johnson and Baldwin, but not Brown, to testify about
18 Bobby's statements, finding their testimony admissible under the
19 exception to the hearsay rule for statements against penal
20 interest. See Fed. R. Evid. 804(b)(3). The district court also
21 found no Confrontation Clause impediment to the admission of
22 Johnson's and Baldwin's testimony.

23 At trial, Baldwin testified that Bobby admitted to him on
24 two separate occasions that he participated in the triple

1 homicide. Bobby first told Baldwin that Timothy Moore was killed
2 because the "Dude owed" money. The second time, Bobby, speaking
3 about himself and Michael, stated: "[W]e gave it to them niggers.
4 . . . [W]e walked up to the truck, each of us on a side of the
5 truck and gave it to them niggers." Johnson, echoing much of
6 Baldwin's account, testified that Bobby told her that the victims
7 were shot because of their debts. She then explained that Bobby
8 told her that Michael shot the man in the driver's seat while
9 Bobby shot at least one of the other passengers. Johnson's
10 testimony did not account for the shooting of the third victim.

11 In this challenge to the district court's pretrial ruling,
12 Michael argues again that the admission of Bobby's out-of-court
13 statements violated both Rule 804(b) (3) and the Confrontation
14 Clause. We review the district court's admissibility
15 determination under Rule 804(b) (3) for abuse of discretion and
16 its Confrontation Clause analysis de novo. United States v.
17 Tropeano, 252 F.3d 653, 657 (2d Cir. 2001).

18 **A. Admissibility under Rule 804(b) (3)**

19 Admission of a statement under Rule 804(b) (3) hinges on
20 "whether the statement was sufficiently against the declarant's
21 penal interest 'that a reasonable person in the declarant's
22 position would not have made the statement unless believing it to
23 be true.'" Williamson v. United States, 512 U.S. 594, 603-04
24 (1994) (quoting Rule 804(b) (3)). Whether a challenged statement

1 is sufficiently self-inculpatory can only be answered by viewing
2 it in context. Id. at 604. Thus, this determination must be
3 made on a case-by-case basis. See Tropeano, 252 F.3d at 658.

4 We find no abuse of discretion in the district court's
5 decision to admit the challenged statements under Rule 804(b)(3).
6 The first of Bobby's statements to Baldwin was plainly self-
7 inculpatory, and it did not on its face implicate Michael. The
8 second of Bobby's statements to Baldwin and his statement to
9 Johnson were also sufficiently self-inculpatory as they described
10 acts that he and Michael committed jointly. See United States v.
11 Saget, 377 F.3d 223, 231 (2d Cir. 2004) (finding that the bulk of
12 confessor's statements were self-inculpatory because they
13 described acts that the defendant and the confessor committed
14 jointly). Moreover, the context of these statements shows that
15 Bobby was not attempting to minimize his own culpability, shift
16 blame onto Michael, or curry favor with authorities. Cf.
17 Williamson, 512 U.S. at 601, 603. To the contrary, in his second
18 statement to Baldwin, Bobby was boastful regarding his
19 participation in the murders, and in his remark to Johnson he
20 claimed an equal role, asserting that he and Michael each killed
21 one of the three victims.

22 **B. Confrontation Clause Analysis**

23 The Confrontation Clause states that "[i]n all criminal
24 prosecutions, the accused shall enjoy the right . . . to be

1 confronted with the witnesses against him.” U.S. Const. amend.
2 VI. In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme
3 Court held that the Confrontation Clause prohibits the admission
4 of out-of-court “testimonial” statements against a criminal
5 defendant, unless the declarant is unavailable and the defendant
6 had a prior opportunity to cross-examine the declarant.

7 Crawford’s per se bar on such testimonial statements displaced
8 that much of the “indicia of reliability” standard of Ohio v.
9 Roberts, 448 U.S. 56 (1980), that had allowed into evidence, as
10 not violative of the Confrontation Clause, hearsay statements
11 that fell within a firmly rooted hearsay exception or contained
12 particularized guarantees of trustworthiness. Id. at 66;
13 Crawford, 541 U.S. at 60; Saget, 377 F.3d at 226 (explaining that
14 under Roberts, “[a]ny out-of-court statement was constitutionally
15 admissible so long as it fell within an exception to the hearsay
16 rule or, if that exception was not firmly rooted, the court found
17 that the statement was likely to be reliable”).

18 While Crawford’s per se bar did away with Roberts’
19 reliability analysis for testimonial statements, it left unclear
20 whether the admission of “nontestimonial” statements would still
21 implicate Confrontation Clause concerns because Crawford did not
22 explicitly overrule Roberts on that score. See Saget, 377 F.3d
23 at 227 (“Crawford leaves the Roberts approach untouched with
24 respect to nontestimonial statements. . . . Accordingly, while

1 the continued viability of Roberts with respect to nontestimonial
2 statements is in doubt, we will assume for purposes of this
3 opinion that its reliability analysis continues to apply to
4 control nontestimonial hearsay”). However, in Davis v.
5 Washington, 126 S. Ct. 2266 (2006), the Court was required to
6 “decide . . . whether the Confrontation Clause applies only to
7 testimonial hearsay.” Id. at 2274 (emphasis added). Answering
8 that question in the affirmative, the Court explained that
9 Crawford, even if it did not expressly so hold, pointed the way:

10 The text of the Confrontation Clause reflects this
11 focus on testimonial hearsay. It applies to witnesses
12 against the accused – in other words, those who bear
13 testimony. Testimony, in turn, is typically a solemn
14 declaration or affirmation made for the purpose of
15 establishing or proving some fact. An accuser who
16 makes a formal statement to government officers bears
17 testimony in a sense that a person who makes a casual
18 remark to an acquaintance does not.

19
20 Id. “A limitation so clearly reflected in the text of the
21 constitutional provision,” the Court continued, “must fairly be
22 said to mark out not merely its ‘core,’ but its perimeter.” Id.

23 Following Davis, we stated in United States v. Feliz, 467
24 F.3d 227 (2d Cir. 2006), that Roberts’ reliability analysis plays
25 no role in a Confrontation Clause inquiry. See id. at 230-32.
26 It is plain from Davis “that the right to confrontation only
27 extends to testimonial statements, or, put differently, the
28 Confrontation Clause simply has no application to nontestimonial
29 statements.” Feliz, 467 F.3d at 231; see Tom Lininger,

1 Reconceptualizing Confrontation After Davis, 85 Tex. L. Rev. 271,
2 280 (2006) ("Whereas Crawford called into question the reasoning
3 of Roberts, Davis sounded the death knell. The Davis Court
4 indicated plainly that the protections of the Confrontation
5 Clause are limited to testimonial hearsay.").

6 Now, after Crawford and Davis, indicia of reliability
7 play no role in the Confrontation Clause analysis.
8 Rather, the inquiry under the Confrontation Clause is
9 whether the statement at issue is testimonial. If so,
10 the Confrontation Clause requirements of unavailability
11 and prior cross-examination apply. If not, the
12 Confrontation Clause poses no bar to the statement's
13 admission.

14
15 Feliz, 467 F.3d at 232.

16 Michael does not, nor could he, contend that Bobby's
17 statements were testimonial; they bear none of the hallmarks of
18 testimonial statements identified in Crawford. See 541 U.S. at
19 51-52 (identifying as testimonial "ex parte in-court testimony,"
20 "extrajudicial statements . . . contained in formalized
21 testimonial materials, such as affidavits, depositions, prior
22 testimony, or confessions," and "statements that were made under
23 circumstances which would lead an objective witness reasonably to
24 believe that the statement would be available for use at a later
25 trial" (internal quotation marks and citations omitted)); see
26 also Saget, 377 F.3d at 228 (identifying as testimonial under
27 Crawford "a declarant's knowing responses to structured
28 questioning in an investigative environment or in a courtroom
29 setting where the declarant would reasonably expect that his or

1 her responses might be used in future judicial proceedings").
2 Instead, relying on Roberts and its progeny, Michael asserts that
3 the statements lack particularized guarantees of trustworthiness.
4 Because the Confrontation Clause does not bar such nontestimonial
5 statements, whatever their guarantees of trustworthiness,
6 Michael's argument fails and our Confrontation Clause inquiry is
7 at an end.

8 * * *

9 Accordingly, we conclude that the district court neither
10 abused its discretion in admitting Bobby's out-of-court
11 statements under Rule 804(b)(3) nor violated the Confrontation
12 Clause in doing so.

13 **II. The Government's Firearms Identification Expert**

14 Spent bullets, cartridge casings, and bullet fragments were
15 recovered from the scene of the triple homicide and the victims'
16 bodies. A subsequent search of Michael's apartment in
17 Pittsburgh, Pennsylvania turned up two handguns, one of which was
18 a 9mm Bryco semiautomatic pistol. Shortly thereafter, this and
19 other ballistics evidence was turned over to Michelle Kuehner, a
20 firearms examiner in the Forensic Laboratory Division of the
21 Allegheny County Coroner's Office (the "Forensic Lab"). Upon
22 comparing the ballistics evidence recovered from the crime scene
23 and the victims' bodies with bullets and cartridge casings
24 produced from a test firing of the 9mm Bryco, Kuehner concluded

1 there was a "match."¹

2 Before trial, the government placed Bobby and Michael on
3 notice that it intended to call Kuehner as an expert witness.
4 Michael moved for a pretrial Daubert hearing to challenge
5 Kuehner's testimony,² contending that the government had yet to
6 establish its admissibility under Fed. R. Evid. 702.

7 In an order dated December 22, 2004, the district court
8 denied the motion without a hearing. It reasoned:

9 Judge Marrero of this Court has recently upheld the use
10 of ballistics as reliable under Rule 702. See United
11 States v. Santiago, 199 F. Supp. 2d 101, 111-12
12 (S.D.N.Y. 2002). The Supreme Court has likewise cited
13 ballistics as a proper subject of expert testimony
14 because it aids the jury in understanding the evidence.
15 See United States v. Scheffer, 523 U.S. 303, 312-313
16 (1998) ("unlike expert witnesses who testify about
17 factual matters outside the juror's knowledge, such as
18 the analysis of fingerprints, ballistics, or DNA found
19 at a crime scene, a polygraph expert can supply the
20 jury only with another opinion, in addition to its own,
21 about whether the witness was telling the truth"); see
22 also United States v. Foster, 300 F. Supp. 2d 375, 376
23 n.1 (D. Md. 2004) (stating that, "[i]n the years since
24 Daubert, numerous cases have confirmed the reliability
25 of ballistics identification," and collecting cases);
26 [United States v. O'Driscoll, No. 4:CR-10-277, 2003 WL
27 1402040, at *2 (M.D. Pa. Feb. 10, 2003)] ("the field of
28 ballistics is a proper subject for expert testimony and

1 ¹ Apparently Bobby's and Michael's own firearms examiner came
2 to the same conclusion as Kuehner.

1 ² Though Bobby raises the issue on appeal and the parties
2 indicate that he was the one who requested a Daubert hearing, the
3 district court's order states that it was, in fact, Michael who
4 made the request. United States v. Williams, No.
5 S100CR.1008(NRB), 2004 WL 2980027, at *24 (S.D.N.Y. Dec. 22,
6 2004). This is of no moment, however, because appellants have
7 joined one another's arguments pursuant to Fed. R. App. P. 28(i).
8

1 meets the requirements of Rule 702."
2 Defendants have not offered any reason for us to depart
3 from the reasoning of these cases. Accordingly, the
4 request for a Daubert hearing to challenge the
5 government's proposed ballistics . . . evidence is
6 denied.

7
8 Williams, 2004 WL 2980027, at *24.

9 At trial, the government called Kuehner as an expert. She
10 testified first about her background. Kuehner stated that she
11 had served as a firearms examiner within the firearms section of
12 the Forensic Lab for approximately twelve years. She testified
13 that, in addition to the "hands-on training" she received from
14 her section supervisor, Dr. Robert Levine, she attended seminars
15 on firearms identification, including annual workshops put on by
16 the Association of Firearm and Toolmark Examiners (the "AFTE")
17 where firearms examiners from the United States and the
18 international community gather to present papers on current
19 topics within the field. Kuehner also explained that she and Dr.
20 Levine published a paper in the AFTE Journal matching a bullet to
21 the cartridge case from which it was discharged. Kuehner further
22 stated that she has given presentations on the subject of
23 firearms analysis at several AFTE meetings and for Duquesne
24 University's forensic science and law programs. In addition,
25 Kuehner testified that she had examined approximately 2,800
26 different types of firearms and provided expert testimony on
27 between 20 and 30 occasions.

28 After establishing her background, training, and experience,

1 Kuehner went on to testify that she uses a firearms
2 identification methodology that is a subset of a broader forensic
3 discipline referred to as toolmark identification. Toolmark
4 examiners are trained to examine the marks left by tools on a
5 variety of surfaces in an attempt to "match" a toolmark to the
6 particular tool that made it. Firearms, she explained, are
7 simply the tools that impart marks on bullets and cartridge
8 cases.³

9 Kuehner then testified as to how the methodology enables her
10 to determine whether a given sample of ballistics components⁴ was
11 fired from the same gun. She starts by examining the components'
12 "class characteristics." A spent bullet's class characteristics
13 include its caliber, the number of its land and groove

1 ³ For a thorough discussion of the firearms identification
2 methodology employed by Kuehner see Theory of Identification, 30
3 Am. Firearms and Toolmark Examiners J. 86 (1998).

1 ⁴ The ballistics components relevant here include the spent
2 bullets and cartridge casings recovered from the crime scene and
3 the victims' bodies. It suffices for our analysis to recount
4 Kuehner's testimony regarding the process by which she examines
5 spent bullets, but we note that the process she employs in
6 examining spent cartridge cases involves many of the same
7 concepts.

1 impressions,⁵ the twist of its land and groove impressions, and
2 the width of its land and groove impressions. Class
3 characteristics, Kuehner explained, allow her to narrow the
4 universe of firearm possibilities to certain types of guns made
5 by certain manufacturers. For example, a spent 9mm bullet
6 exhibiting six land and groove impressions could only have been
7 expelled from a firearm with a 9mm gun barrel that has six lands
8 and grooves.

9 Once Kuehner narrows the firearms possibilities by class,
10 she looks for specific random, microscopic imperfections in the
11 barrel caused by changes in the manufacturing tool as it makes
12 each barrel on the production line. These imperfections in turn
13 leave unique "striations" on each bullet as it moves through the
14 barrel. It is her examination of these unique marks, Kuehner
15 testified, that allows her to determine whether two bullets were
16 fired from the same gun.

17 Using a comparison microscope to view the two bullets side-
18 by-side, she compares the height, depth, width, length and
19 spatial relations of their striations. Significant similarity

1 ⁵ When a handgun is fired, its barrel imparts "rifling" on the
2 bullet. Rifling places a twist on a bullet as it travels, thus
3 promoting flight accuracy. Rifling, which runs the length of the
4 barrel, consists of cuts called "grooves" and raised surfaces
5 called "lands." As a bullet travels down the barrel, the raised
6 lands press into the surface of the bullet and it likewise
7 conforms to fill the recessed grooves. The corresponding marks
8 left on the bullet are referred to as land and groove
9 impressions.

1 between striations signals an "identification" or a "match" –
2 that is, the bullets were fired from the same firearm. The
3 striations need not be identical; they need only be in
4 "sufficient agreement" based on Kuehner's training and
5 experience. She explained:

6 So I am looking at the number of striations, . . .
7 their physical characteristics, their height, [and]
8 their depth. And when the pattern of agreement exceeds
9 the amount of agreement that I know exists in two
10 bullets that have not been fired from the same firearm,
11 then that is sufficient agreement.
12

13 * * *

14
15 You can't really put numbers to it. It's more, more
16 coming from experience, so, which is why . . . you test
17 bullets. So sufficient agreement meaning that you have
18 enough agreement [between the striations on the
19 bullets] than those that you know do not match.
20

21 Kuehner testified that, based on comparison of striations,
22 there are two conclusions she may reach other than a match. She
23 can make an "eliminat[ion]," concluding that the two bullets were
24 not fired from the same gun. Or, she can make an "inconclusive"
25 determination, meaning that, although the bullets exhibit similar
26 class characteristics, there is not enough agreement or
27 disagreement between their striations to conclude whether they
28 were or were not fired from the same gun. Kuehner further
29 explained that after she performs her examination, she documents
30 her conclusions in a report, which Dr. Levine reviews. Based on
31 her analysis in this case, Kuehner concluded that certain bullets
32 and cartridge casings recovered from the crime scene and the

1 victims' bodies matched those she produced by test firing the 9mm
2 Bryco.

3 Bobby now challenges the district court's decision to
4 permit Kuehner to testify as an expert. We understand his
5 argument to be that the district court abused its discretion by
6 (1) denying him a Daubert hearing and (2) failing to undertake an
7 adequate inquiry into the reliability of Kuehner's firearms
8 identification methodology. The government counters that the
9 district court acted within its discretion under the
10 circumstances and that any error was harmless.⁶ We review the
11 district court's decision to admit expert testimony under Rule
12 702 for abuse of discretion. Kumho Tire Co. v. Carmichael, 526
13 U.S. 137, 152 (1999). "A decision to admit scientific evidence
14 is not an abuse of discretion unless it is manifestly erroneous."
15 United States v. Salameh, 152 F.3d 88, 129 (2d Cir. 1998)
16 (internal quotation marks omitted).

17 **A. Gatekeeping under Daubert**

18 While the proponent of expert testimony has the burden of

1 ⁶ The government also contends that Bobby failed to preserve
2 his claim of error as to the reliability of Kuehner's testimony
3 because his pretrial challenge lacked the necessary specificity,
4 which was never remedied by a further objection after Kuehner's
5 trial testimony provided more persuasive grounds for objection.
6 Therefore, the government argues that the district court's
7 decision should be reviewed for plain error only. But we need
8 not reach this point because we conclude that Bobby cannot
9 satisfy the lower burden of abuse of discretion according to the
10 record here.
11

1 establishing by a preponderance of the evidence that the
2 admissibility requirements of Rule 702 are satisfied, see
3 Daubert, 509 U.S. at 593 n.10, the district court is the ultimate
4 “gatekeeper.” See Fed. R. Evid. 104(a); United States v. Cruz,
5 363 F.3d 187, 192 (2d Cir. 2004); see also Brooks v. Outboard
6 Marine Corp., 234 F.3d 89, 91 (2d Cir. 2000) (rejecting argument
7 that opposing expert testimony is necessary to trigger the
8 district court’s obligation to analyze admissibility of expert
9 testimony). The Federal Rules of Evidence assign to it “the task
10 of ensuring that an expert’s testimony both rests on a reliable
11 foundation and is relevant to the task at hand.” Daubert, 509
12 U.S. at 597.

13 In assessing reliability, “the district court should
14 consider the indicia of reliability identified in Rule 702,
15 namely, (1) that the testimony is grounded on sufficient facts or
16 data; (2) that the testimony is the product of reliable
17 principles and methods; and (3) that the witness has applied the
18 principles and methods reliably to the facts of the case.”
19 Amorgianos v. Nat’l R.R. Passenger Corp., 303 F.3d 256, 265 (2d
20 Cir. 2002) (internal quotation marks omitted). But these
21 criteria are not exhaustive. See Wills v. Amerada Hess Corp.,
22 379 F.3d 32, 48 (2d Cir. 2004). Daubert enumerated a list of
23 additional factors bearing on reliability that district courts
24 may consider: (1) whether a theory or technique has been or can

1 be tested; (2) "whether the theory or technique has been
2 subjected to peer review and publication;" (3) the technique's
3 "known or potential rate of error" and "the existence and
4 maintenance of standards controlling the technique's operation;"
5 and (4) whether a particular technique or theory has gained
6 general acceptance in the relevant scientific community. See
7 Daubert, 509 U.S. at 593-94. _____

8 _____ "Daubert's list of specific factors," however, "neither
9 necessarily nor exclusively applies to all experts or in every
10 case." Kumho Tire, 526 U.S. at 141. Rather, the district
11 court's inquiry into the reliability of expert testimony under
12 Rule 702 is a "flexible one." Daubert, 509 U.S. at 594.
13 Accordingly, "the law grants a district court the same broad
14 latitude when it decides how to determine reliability as it
15 enjoys in respect to its ultimate reliability determination."
16 Kumho Tire, 526 U.S. at 142. Yet while the district court's
17 discretion is considerable, it is not unfettered: It does not
18 permit the district court "to perform the [gatekeeping] function
19 inadequately." Id. at 158-59 (Scalia, J., concurring) (noting
20 that the majority opinion "makes clear that the discretion it
21 endorses – trial-court discretion in choosing the manner of
22 testing expert reliability – is not discretion to abandon the
23 gatekeeping function").

24 As an initial matter, we reject Bobby's contention that the

1 district court abused its discretion by denying his request for a
2 hearing. While the gatekeeping function requires the district
3 court to ascertain the reliability of Kuehner's methodology, it
4 does not necessarily require that a separate hearing be held in
5 order to do so. See id. at 152 (district courts possess
6 "latitude in deciding how to test an expert's reliability, and to
7 decide whether or when special briefing or other proceedings are
8 needed to investigate reliability"); see also United States v.
9 Alatorre, 222 F.3d 1098, 1102 (9th Cir. 2000) ("Nowhere . . .
10 does the Supreme Court mandate the form that the inquiry into . .
11 . reliability must take. . . ."). This is particularly true if,
12 at the time the expert testimony is presented to the jury, a
13 sufficient basis for allowing the testimony is on the record.
14 See 4 Weinstein's Federal Evidence § 702.02[2] (Joseph M.
15 McLaughlin ed., 2d ed. 2006).

16 The remaining question, then, is whether there was a
17 sufficient foundational basis in the record to support the trial
18 court's decision to admit Kuehner as an expert?

19 First, the district court noted with approval the decision
20 in Santiago rejecting a challenge to the reliability of the
21 government expert's firearms identification methodology as
22 "pseudo-science." 199 F. Supp. 2d at 111. The Santiago court
23 stated that the government had submitted a letter describing,
24 among other things, the method that the expert used to "match

1 particular guns to the bullets in question.” Id. Moreover, the
2 preliminary ruling below in Santiago had accepted that much of
3 the reliability inquiry would occur when the government laid the
4 foundation preliminary to the district court’s admitting the
5 expert’s testimony. See 199 F. Supp. 2d at 112 (noting that in
6 addition to expecting the government to ask about the expert’s
7 “training, experience, qualifications, and the methods he used to
8 match the bullets with the guns in question,” the court was
9 “interested to learn how often [the expert’s] identifications
10 have been wrong in the past and the degree to which his
11 methodology has been accepted in the community of forensics
12 experts”).

13 We think that Daubert was satisfied here. When the district
14 court denied a separate hearing it went through the exercise of
15 considering the use of ballistic expert testimony in other cases.
16 Then, before the expert’s testimony was presented to the jury,
17 the government provided an exhaustive foundation for Kuehner’s
18 expertise including: her service as a firearms examiner for
19 approximately twelve years; her receipt of “hands-on training”
20 from her section supervisor; attendance at seminars on firearms
21 identification, where firearms examiners from the United States
22 and the international community gather to present papers on
23 current topics within the field; publication of her writings in a
24 peer review journal; her obvious expertise with toolmark

1 identification; her experience examining approximately 2,800
2 different types of firearms; and her prior expert testimony on
3 between 20 and 30 occasions. Under the circumstances, we are
4 satisfied that the district court effectively fulfilled its
5 gatekeeping function under Daubert. The trial court's admission
6 of Kuehner's testimony constituted an implicit determination that
7 there was a sufficient basis for doing so. The formality of a
8 separate hearing was not required and we find no abuse of
9 discretion.

10 We do not wish this opinion to be taken as saying that any
11 proffered ballistic expert should be routinely admitted. Daubert
12 did make plain that Rule 702 embodies a more liberal standard of
13 admissibility for expert opinions than did Frye v. United States,
14 293 F. 1013, 1014 (D.C. Cir. 1923). See Daubert, 509 U.S. at 588
15 (holding that the Frye test of general acceptance in the
16 scientific community was superceded by the Federal Rules); see
17 also Amorgianos, 303 F.3d at 265 (observing departure, under
18 Federal Rule, from the Frye standard). But this shift to a more
19 permissive approach to expert testimony did not abrogate the
20 district court's gatekeeping function. Nimely v. City of New
21 York, 414 F.3d 381, 396 (2d Cir. 2005). Nor did it "grandfather"
22 or protect from Daubert scrutiny evidence that had previously
23 been admitted under Frye. See United States v. Crisp, 324 F.3d
24 261, 272 (4th Cir. 2003) (Michael, J., dissenting); see also

1 United States v. Saelee, 162 F. Supp. 2d 1097, 1105 (D. Alaska
2 2001) (“[T]he fact that [expert] evidence has been generally
3 accepted in the past by courts does not mean that it should be
4 generally accepted now, after Daubert and Kumho [Tire].”). Thus,
5 expert testimony long assumed reliable before Rule 702 must
6 nonetheless be subject to the careful examination that Daubert
7 and Kumho Tire require. See Daubert, 509 U.S. at 589 (explaining
8 that Rule 702 requires district courts to ensure that “any and
9 all scientific testimony or evidence admitted is not only
10 relevant, but reliable”); id. at 592 n.11 (“Although the Frye
11 decision itself focused exclusively on ‘novel’ scientific
12 techniques, we do not read the requirements of Rule 702 to apply
13 specially or exclusively to unconventional evidence. Of course,
14 well-established propositions are less likely to be challenged
15 than those that are novel, and they are more handily defended.”);
16 see also Kumho Tire, 526 U.S. at 152 (explaining that whether a
17 witness’s area of expertise is technical, scientific, or more
18 generally “experience-based,” Rule 702 requires the district
19 court to fulfill the gatekeeping function of ensuring that his or
20 her testimony is reliable). Because the district court’s inquiry
21 here did not stop when the separate hearing was denied, but went
22 on with an extensive consideration of the expert’s credentials
23 and methods, the jury could, if it chose to do so, rely on her
24 testimony which was relevant to the issues in the case. We find

1 that the gatekeeping function of Daubert was satisfied and that
2 there was no abuse of discretion.

3

4

CONCLUSION

5

For the foregoing reasons and those provided in the
6 concurrently filed summary order, appellants' convictions and
7 sentences are AFFIRMED.

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