IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

STERLING ASKEW and SYLVIA ASKEW,	)	
Plaintiffs,	)	
vs.	)	**No. 14-cv-02080-STA-tmp**
CITY OF MEMPHIS, TONEY ARMSTRONG, Individually and in his Official Capacity as the Police Director of the Memphis Police Department, OFFICER NED AUFDENKAMP, Individually and in his Official Capacity as a Police Officer with the Memphis Police Department, and OFFICER MATTHEW DYESS, Individually and in his Official Capacity as a Police Officer with the Memphis Police Department,	)	
Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART THE CITY OF MEMPHIS'S MOTION TO EXCLUDE TESTIMONY OF GARRY L. MCFADDEN

Before the court by order of reference is Defendant City of Memphis's ("City") Motion to Exclude Testimony of Plaintiff's Proposed Expert Garry L. McFadden, filed September 24, 2015. (ECF No. 142.) Plaintiffs Sterling and Sylvia Askew ("Plaintiffs") filed a response in opposition to this motion on

November 3, 2015. (ECF No. 186.) The City filed a reply on November 17, 2015. (ECF No. 219.)

The court has considered the briefs submitted in support of and in opposition to the motion and the attached exhibits, McFadden's report and curriculum vitae, and McFadden's testimony at his deposition. For the reasons below, the City's motion to exclude is granted in part and denied in part.

I. BACKGROUND

On the evening of January 17, 2013, the Memphis Police Department ("MPD") received a call concerning loud music coming from an apartment located at 3193 Tyrol Court in Memphis, Tennessee. MPD Officers Ned Aufdenkamp and Matthew Dyess ("Officers") were dispatched to respond to the call. For reasons unknown, the Officers left the Tyrol Court location after responding to the noise complaint and went to an adjacent apartment complex, the Windsor Place Apartments, located at 3197 Royal Knight Cove. From here, the parties' versions of events diverge drastically.

The City and the Officers (collectively "Defendants") allege that while checking the same general area around the Tyrol Court apartments on the night in question, the Officers saw Steven Askew passed out behind the wheel of a running vehicle in the parking lot of the Windsor Place Apartments.

When Officers approached the vehicle to assess the situation, Officer Aufdenkamp noticed a handgun in Askew's lap and notified Officer Dyess. The Officers then woke Askew up by tapping loudly on his car window and shouting loud verbal commands, at which time Askew made hand gestures towards the Officers and pointed the gun at Officer Aufdenkamp. Both Officers opened fire on Askew, which ultimately resulted in his death.

Plaintiffs allege that on the night in question, Askew was asleep in his car in the parking lot of the Windsor Place Apartments, waiting for his girlfriend who resides there to return from work. Upon spotting Askew in his vehicle, the Officers angled their patrol car towards Askew's car and turned on their overhead lights to illuminate his vehicle; however, the Officers never activated any blue lights, sirens, or other devices to get Askew's attention. Plaintiffs do not dispute that Askew had a gun in the car (which he was legally permitted to carry), but assert that he never pointed the gun at the Officers, and certainly did not fire the weapon. Plaintiffs also point out that although one officer reported that he saw Askew with a gun in his right hand, Askew actually had a cigar in his right hand at the time of the incident. The Officers fired a total of twenty-two shots that night, hitting Askew multiple times and killing him. Plaintiffs subsequently filed

an action pursuant to 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments of the United States Constitution alleging that Defendants wrongfully and unconstitutionally caused the death of their son.

Plaintiffs retained Garry L. McFadden to provide expert testimony concerning the adequacy of the MPD investigation of Askew's death, as well as the adequacy of the MPD's training of its officers generally. McFadden is the owner of McFadden Solutions, LLC, a company he founded in 2012 and which is located in Charlotte, North Carolina. According to McFadden, McFadden Solutions works with law enforcement agencies, attorneys, corporations, and companies, and provides consulting services regarding security, risk management, and investigative analysis. McFadden graduated with a degree in physical education from Johnson C. Smith University in 1982. From 1985 to the present, McFadden has been employed with the Charlotte-Mecklenburg Police Department. During his thirty-three year law enforcement career, McFadden has worked in various departments, including the violent crimes division and the robbery task force. Additionally, he worked as a homicide detective for twenty-one years and currently works in the homicide support division. While in the homicide support division, McFadden has established best practice procedures for homicide detectives,

trained detectives and crime scene technicians, and created homicide training curriculum for the region. (ECF No. 134.)

In its motion, the City argues that McFadden is not qualified as an expert and that his testimony should be excluded in its entirety for the following reasons: (1) he is not qualified as an expert, because he has never submitted an expert report, testified as an expert witness in a court proceeding, or authored any treatises, papers, or articles; (2) he has not conducted studies concerning the "48-hour rule" and therefore cannot express an opinion about it;[1] (3) he does not provide adequate support for his conclusions, some of which are speculative; (4) some of his opinions are not relevant and should be excluded because the "segmenting rule" applies; and (5) some of his opinions are legal conclusions and relate to an individual's state of mind and as such, are beyond the scope of acceptable expert testimony.

In their response in opposition, Plaintiffs argue that McFadden's education and experience, including investigating over 800 homicides during his twenty-one year career as a homicide detective, qualify him to be an expert in this case and qualify him to express an opinion about the 48-hour rule. They

[1]The MPD has a policy in which homicide detectives must wait 48 hours before obtaining information from officers involved in a shooting.

also argue that McFadden's conclusions are adequately supported by his review of thirty-nine other MPD cases and his review of over twenty depositions taken in the instant case, and that he adequately explained the basis for his conclusions in his expert report and at his deposition. Plaintiffs assert that the City's criticism of McFadden's analysis goes to the weight of his testimony, not its admissibility. Additionally, Plaintiffs argue that whether the segmenting rule applies is an issue that should be addressed in a summary judgment motion, and note that McFadden's opinions are about events that occurred at most a couple of minutes before Askew was killed and are therefore relevant. Plaintiffs dispute the City's assertion that McFadden expressed inappropriate legal conclusions in his report. Lastly, Plaintiffs assert that exclusion of expert testimony "is the exception, rather than the rule" and that courts generally permit expert testimony when there is some support for the testimony in the record.[2]

In addition to reiterating arguments made in its motion, the City argues in its reply that the fact that McFadden

[2]In their response in opposition to the City's motion, Plaintiffs request that the court receive testimony from McFadden, either in a hearing or at trial through *voir dire*, prior to ruling on the present motion. However, after reviewing the entire record, the court does not believe that a hearing is necessary for the resolution of this motion.

reviewed thirty-nine MPD cases is "of no consequence" because the cases did not involve a complaint of failure to properly investigate. The City also argues that irrespective of McFadden's qualifications, "his attack on the investigation is irrelevant since the record is silent on pattern or practice of inadequate investigations," which is required to establish liability under 42 U.S.C. § 1983.

II. ANALYSIS

A. Daubert and Rule 702

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the United States Supreme Court held that Federal Rule of Evidence 702 requires that trial courts perform a "gate-keeping role" when considering the admissibility of expert testimony. Daubert, 509 U.S. at 597. Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Rule 702 applies not only to scientific testimony, but also to other types of expert testimony based on technical or other specialized knowledge. See Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147, 149 (1999).

The court's gate-keeping role is two-fold. First, the court must determine whether the testimony is reliable. See Daubert, 509 U.S. at 590. The reliability analysis focuses on whether the reasoning or methodology underlying the opinion is scientifically valid. Id.; see also Decker v. GE Healthcare Inc., 770 F.3d 378, 391 (6th Cir. 2014). "To be reliable, the opinion must not have 'too great an analytical gap' between the expert's conclusion, on the one hand, and the data that allegedly supports it, on the other." Lozar v. Birds Eye Foods, Inc., 529 F. App'x 527, 530 (6th Cir. 2013) (quoting Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 675-76 (6th Cir. 2010)). The proponent of the testimony does not have the burden of establishing that it is correct, but that by a preponderance of the evidence, it is reliable. Rose v. Matrixx Initiatives, Inc., No. 07-2404-JPM/tmp, 2009 WL 902311, at *5 (W.D. Tenn. Mar. 31, 2009).

To aid the trial courts in their determination of whether an expert's testimony is reliable, the Supreme Court in Daubert

set forth four non-exclusive factors for the courts to consider: (1) whether the theory or technique has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the method used and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or method has been generally accepted by the scientific community. Daubert, 509 U.S. at 593-94; see also Siegel v. Dynamic Cooking Sys., Inc., 501 F. App'x 397, 403 (6th Cir. 2012). In addition, the court may consider "whether the proposed testimony grows [out] of independent research or if the opinions were developed 'expressly for the purposes of testifying.'" Siegel, 501 F. App'x at 403 (quoting Smelser v. Norfolk S. Ry. Co., 105 F.3d 299, 303 (6th Cir. 1997) (abrogated on other grounds by Morales v. Am. Honda Motor Co., 151 F.3d 500 (6th Cir. 1998))).

The Supreme Court has emphasized that in assessing the reliability of expert testimony, whether scientific or otherwise, the trial court may consider one or more of the Daubert factors when doing so will help determine that expert's reliability. Kumho Tire, 526 U.S. at 150. The test of reliability is a "flexible" one, however, and the Daubert factors do not constitute a "definitive checklist or test," but

must be tailored to the facts of the particular case. Id. (quoting Daubert, 509 U.S. at 593); see also Ellis v. Gallatin Steel Co., 390 F.3d 461, 470 (6th Cir. 2004). Moreover, the Sixth Circuit has explained that the Daubert factors "'are not dispositive in every case' and should be applied only 'where they are reasonable measures of the reliability of expert testimony.'" In re Scrap Metal Antitrust Litig., 527 F.3d 517, 529 (6th Cir. 2008) (quoting Gross v. Comm'r of Internal Revenue, 272 F.3d 333, 339 (6th Cir. 2001)). When non-scientific expert testimony is involved, the court's analysis may focus upon the expert's personal knowledge or experience, because "the factors enumerated in Daubert cannot readily be applied to measure the reliability of such testimony." Surles ex rel. Johnson v. Greyhound Lines, Inc., 474 F.3d 288, 295 (6th Cir. 2007) (citing Kumho Tire, 526 U.S. at 150 & First Tenn. Bank Nat'l Ass'n v. Barreto, 268 F.3d 319, 333 (6th Cir. 2001)); see also United States v. Jones, 107 F.3d 1147, 1155 (6th Cir. 1997) (reasoning that "a non-scientific expert's experience and training bear a strong correlation to the reliability of the expert's testimony").

The second prong of the gate-keeping role requires an analysis of whether the expert's reasoning or methodology can be properly applied to the facts at issue; in other words, the

court must determine whether the opinion is relevant. See Daubert, 509 U.S. at 591-93. This relevance requirement ensures that there is a "fit" between the proferred testimony and the issues to be resolved at trial. See United States v. Bonds, 12 F.3d 540, 555 (6th Cir. 1993); Brock v. Positive Changes Hypnosis, LLC, 589 F. Supp. 2d 974, 980 (W.D. Tenn. 2008). Thus, an expert's testimony is admissible under Rule 702 if it is predicated upon a reliable foundation and is relevant. The rejection of expert testimony, however, is the exception rather than the rule, and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." Burgett v. Troy-Bilt LLC, 579 F. App'x 372, 376 (6th Cir. 2014) (quoting Fed. R. Evid. 702 advisory committee's note (2000)) (quotation marks omitted). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 596.

B. McFadden's Qualifications

The City first challenges McFadden's qualifications as an expert witness. Specifically, the City asserts that McFadden is not qualified because he has never been employed as an expert witness prior to this case, nor has he ever authored any

treatises, papers, or articles. While the court may consider a witness's prior experience (or lack thereof) as an expert when deciding whether he or she is qualified, this factor alone is not dispositive. See Martinez v. City of Chicago, No. 07-CV-422, 2009 WL 3462052, at *3 (N.D. Ill. Oct. 23, 2009) (holding that "the fact that Malkin previously has not provided expert testimony does not render him unqualified"); Great N. Ins. Co. v. Power Cooling, Inc., No. 06-CV-874, 2007 WL 4688411, at *14 (E.D.N.Y. Dec. 18, 2007) (stating that "there is no such barrier preventing one without prior expert witness experience from testifying as an expert"); Dresser v. Cradle of Hope Adoption Ctr., Inc., 421 F. Supp. 2d 1024, 1033 (E.D. Mich. 2006) (stating that "lack of . . . previous expert witness experience does not render expert testimony inadmissible"); TNT Rd. Co. v. Sterling Truck Corp., No. CIV. 03-37-B-K, 2004 WL 1626248, at *2 (D. Me. July 19, 2004) ("Although prior experience as a testifying expert witness is some indication that one is actually an expert in something, the lack of such experience says little to nothing. Even the most trial-hardened expert witness had his or her first day in court."); Computer Associates Int'l v. Quest Software, Inc., 333 F. Supp. 2d 688, 693 (N.D. Ill. 2004) ("The simple fact that a witness has never testified as an expert before is not enough to disqualify

him."). Similarly, the fact that a witness has never published any articles does not, by itself, prevent the witness from qualifying as an expert. See Luttrell v. Novartis Pharm. Corp., 894 F. Supp. 2d 1324, 1336 (E.D. Wash. 2012) (stating that "Rule 702 does not require an expert to publish articles . . . in order to qualify to give expert testimony"); Benton v. Ford Motor Co., 492 F. Supp. 2d 874, 876 (S.D. Ohio 2007) (reasoning that "although things like extensive academic pedigree and prolific scholarly publication by a proffered expert are persuasive indicators of qualification, the presence or absence of such qualifications almost always bears on the weight that the jury should assign to the testimony and *not* on the admissibility of the testimony itself."). As discussed previously, McFadden worked as a homicide detective for twenty-one years and has been employed as a law enforcement officer for thirty-three years. McFadden currently works in the homicide support division, where he has established best practice procedures for homicide detectives, trained detectives and crime scene technicians, and created homicide training curriculum. During his long law enforcement career, McFadden has attended numerous training seminars and has given several presentations relating to homicide investigations. Based on the entire record, the court finds that McFadden is qualified by his

knowledge, skill, experience, training, and education to testify regarding police training and homicide investigations. As to this issue, the City's motion is denied.

C. Opinion Regarding 48-Hour Rule

Next, the City takes issue with McFadden's opinions regarding the 48-hour rule. In his expert report, McFadden opines that the MPD "did a woefully inadequate job of conducting a thorough investigation in this officer involved shooting which displays a lack of training." (ECF No. 134.) In his deposition, he elaborated that he believes that the MPD's policy that homicide detectives must wait 48 hours before getting information from officers involved in a shooting hinders the detectives from properly investigating the incident. (ECF No. 131, pp. 37-38, 46-51.) He testified that he has attended investigative schools and seminars all around the country as a member of the International Homicide Investigators Association, that he had never heard of the 48-hour rule before becoming involved with this case, and that he does not know of any other police department that utilizes the 48-hour rule in officer-involved shootings. (Id., pp. 38-39.) In its motion, the City cites four studies purportedly discussing "the efficacy of the 48-hour rule." (ECF No. 143.) The City argues that because McFadden is not familiar with these studies and because he has

not conducted any studies of his own regarding the 48-hour rule, he cannot offer an opinion on the rule. The court disagrees. Experts are allowed to base their opinions on their personal experience, as McFadden has done here. See Kumho Tire, 526 U.S. at 152; Rolen v. Hansen Beverage Co., 193 F. App'x 468, 473 (6th Cir. 2006). The fact that McFadden has not conducted any studies regarding the 48-hour rule and is unfamiliar with studies on the topic may affect the weight that the jury gives his testimony, but it does not affect its admissibility. See Barreto, 268 F.3d at 333; Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 919 (6th Cir. 1984) ("The fact that a proffered expert may be unfamiliar with pertinent statutory definitions or standards is not grounds for disqualification. Such lack of familiarity affects the witness' credibility, not his qualifications to testify."). Instead, the City's disagreement with McFadden's opinion about the 48-hour rule is an appropriate subject for cross-examination. See Melton v. Jewell, No. 1:02CV1242 T/P, 2006 WL 5175756, at *7 (W.D. Tenn. Feb. 17, 2006) ("A party's disagreement with an opposing expert's reasoning or conclusions is not a basis for exclusion, but rather such arguments are proper subjects of cross-examination

and go to the weight of the evidence.").[3] Therefore, the City's motion on this point is denied.

D. Bases for McFadden's Opinions

On numerous occasions throughout its motion, the City argues that McFadden does not adequately support his opinions or explain the bases for them, thus making his opinions unreliable. The Sixth Circuit has held that "[a]n expert may certainly rely on his experience in making conclusions, particularly in this context where an expert is asked to opine about police behavior." Thomas v. City of Chattanooga, 398 F.3d 426, 432 (6th Cir. 2005) (citing Fed. R. Evid. 702 advisory committee's note (2000)) ("In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert

[3]The court reaches the same conclusion regarding the arguments in the section of the City's motion titled "Inappropriate Use of Facts." One of the bases for McFadden's conclusion that the investigation of Askew's death was inadequate is that the report prepared by the internal investigation's lead detective did not contain information provided by a witness who said she saw Askew's hands on the steering wheel during the incident. However, the City alleges that another officer testified in his deposition that he "went up to the apartment where the witness was standing and it was clear that she could not see anything that was going on inside the car." The City asserts that "[t]his begs the question of the value of Mr. McFadden's opinion if he places the emphasis on a witness' statement where the evidence is virtually conclusive that she could not have seen Mr. Askew's hands on the wheel." The City's contention appears to be nothing more than a disagreement with McFadden about his reasoning and conclusions. This issue is a proper subject for cross-examination, but not grounds for exclusion of expert opinion.

testimony."). The City is correct that if an expert relies "solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached . . . and how that experience is reliably applied to the facts." Id. (internal quotation marks and citation omitted). However, the fact that McFadden "refers to no authorities, papers, treatises, other writing, or experts in the field of police practices to support his conclusions," as alleged by the City, does not necessarily indicate that his testimony is unreliable. After reviewing McFadden's report and his deposition testimony, the court finds that he has adequately explained the bases for most (but not all) of his conclusions.

In his report, McFadden explained that his conclusions regarding the adequacy of the investigation of Askew's death and the training of the officers involved were based on a number of observations gleaned from the materials he reviewed, which included a crime scene log, investigative reports, witness statements, officer interviews, audio recordings, deposition transcripts, officer training records, and more. McFadden provided several reasons he believed the investigation of Askew's death was inadequate, such as: officers did not interview potential witnesses and individuals who lived at the apartment complex where the incident occurred until several days

later; investigators did not properly follow-up on a tip provided by a witness who said there was another individual who saw the entire incident, as they did not attempt to locate the individual; and investigating officers never explored the inconsistency between various officers' statements. McFadden also expressed opinions about the adequacy of MPD investigations and training more generally based on his review of thirty-nine other homicide cases investigated by the MPD.[4] (ECF No. 131, pp. 51-55.) In his deposition, McFadden testified that his conclusions were based on his experience investigating over 800 homicides, examining cold cases, attending seminars all around the country, talking with other homicide detectives, and reviewing past MPD investigations. (Id., pp. 33-34, 38, 41, 44-45, 53.) Based on the entire record, the court finds that McFadden has adequately explained the bases for his opinions regarding MPD's investigation and officer training, and that these opinions are not inadmissible under Rule 702 or Daubert.[5] As to these opinions, the City's motion is denied.

[4]In its reply brief, the City argues that McFadden's review of thirty-nine MPD cases is "of no consequence" because the cases did not involve a complaint of failure to properly investigate. The court finds that this issue is a proper subject for cross-examination, but not grounds for exclusion of expert opinion.

[5]The City also argues in its reply brief that McFadden's opinion regarding the inadequacy of the investigation into Askew's death

The City also argues that McFadden improperly expressed an opinion about Officer Dyess' state of mind in his report. Specifically, McFadden opined as follows: "it is my professional opinion that Officer Matthew Dyess fired his weapon in the heat of the moment for no other reason than simply firing after realizing Officer Ned Aufdenkamp fired his weapon. The pattern of his gunshots indicate[s] that he was in a panicked state when he fired his weapon." (ECF No. 134.) McFadden offered this opinion in the context of explaining the "contagious fire" phenomenon that purportedly "occurs when one officer shoots, causing other officers to have the predisposition to also shoot, even if they are unaware of the justification for shooting." McFadden further explained that "[c]ontagious fire is intentionally reinforced during recruit and annual law enforcement training." The court finds that McFadden has provided a proper basis for his opinion that Officer Dyess was in a "panicked state when he fired his weapon," and that McFadden's opinion about the contagious fire theory could be helpful to the jury to explain why twenty-two shots were fired

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"is irrelevant since the record is silent on pattern or practice of inadequate investigations." The purported absence of pattern or practice evidence has no bearing on the *admissibility* of McFadden's expert testimony.

during the incident. Therefore, as to this opinion, the City's motion is denied.

However, the court agrees with the City that McFadden has not provided adequate bases for his opinions concerning (1) the motivation behind the thoroughness of the investigation of Askew's death, (2) the reason the officers' stories might have changed, and (3) the effects of the purported inadequate investigation and inadequate training. In his report, McFadden opined that the MPD's investigation "certainly creates the appearance that the MPD either does not want to discover any evidence to contradict the self-serving stories of the officers that killed Steven Askew or they did discover facts that would support prosecuting the officers and chose to sweep those acts under a rug to avoid the embarrassment of having to prosecute two white officers, one with lengthy history of misconduct, for the death of an innocent black man with no prior criminal record." (ECF No. 134.) When asked about this conclusion at his deposition, he said that there was a lot of racial tension in the United States at the time of Askew's death, and that "Memphis would have had a riot" if the officers involved were prosecuted. (ECF No. 131, p. 147.) Additionally, McFadden stated in his report that "the chain of command simply provided incomplete and inadequate summaries of the evidence that the

investigating officers wanted the chain of command to see as if the whole investigation was just an exercise to exonerate the officers without really trying to get to the truth." McFadden further expressed that the method in which witnesses were interviewed "shows a bias environment in favor of supporting the officer's actions." Lastly, McFadden also opined that the MPD's "lack of training and policy implementation was the moving force behind the death of Mr. Askew" and that the MPD "is sending the message to its other officers that they would be justified in using deadly force in a situation like the one at issue in this case." (ECF No. 134.) The court finds that these opinions are speculative and beyond the scope of McFadden's expertise. See Berry v. City of Detroit, 25 F.3d 1342, 1350-52 (6th Cir. 1994) (holding that former deputy sheriff was not qualified to testify as expert about what "effect claimed disciplinary shortcomings would have on future conduct of" police officers because his opinion assumed, "without any basis in fact or logic, that police officers will be extravagant in their use of deadly force if they know discipline will not be severe if a shooting occurs"). Therefore, as to these opinions, the City's motion is granted.

E. Application of the "Segmenting" Rule

The City argues that the "segmenting" rule applies to excessive force cases within the Sixth Circuit and prohibits McFadden from providing any expert testimony based upon the events leading up to the ultimate use of force by the Officers. With respect to Plaintiffs' excessive force claim, the court agrees. The Sixth Circuit has held in numerous cases that the court should examine excessive force claims in segments. See Scozzari v. McGraw, 500 F. App'x 421, 426 (6th Cir. 2012); Greathouse v. Couch, 433 F. App'x 370, 372-73 (6th Cir. 2011); Chappell v. City of Cleveland, 585 F.3d 901, 914 (6th Cir. 2009); Livermore ex rel. Rohm v. Lubelan, 476 F.3d 397, 406-07 (6th Cir. 2007); Gaddis ex rel. Gaddis v. Redford Twp., 364 F.3d 763, 772 (6th Cir. 2004); Dickerson v. McClellan, 101 F.3d 1151, 1160-62 (6th Cir. 1996). Specifically, the court must first identify the "seizure" at issue in the particular case and then examine "'whether the force used to effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances.'" Livermore, 585 F.3d at 406 (quoting Dickerson, 101 F.3d at 1161). In other words, the court must not consider decisions made by officers preceding the seizure, but must instead "focus on the 'split-second judgments' made immediately before the officer used allegedly excessive force." Id. at 407 (citing

Dickerson, 101 F.3d at 1162); see also Hickman v. Moore, No. 3:09-CV-102, 2011 WL 122039, at *7 (E.D. Tenn. Jan. 14, 2011). In light of this well-established precedent, the court must find that to the extent McFadden opines that the Officers used excessive force, that opinion is inadmissible because it relies upon evidence that is not to be considered for the determination of excessive force.[6] See Claybrook v. Birchwell, 274 F.3d 1098, 1105 (6th Cir. 2001) ("Although the officers' decision to approach Claybrook in the manner that they did was in clear contravention of Metro Nashville Police Department policy regarding procedures for undercover officers, under Dickerson, any unreasonableness of their actions at that point may not weigh in consideration of the use of excessive force.") (citing

[6]Plaintiffs argue that the Officers' actions before the shooting should be considered with respect to all of their claims because "at most a couple of minutes passed by from the time the officers approached Mr. Askew's vehicle and then shooting." (ECF No. 186.) In support of this argument, Plaintiffs cite Bletz v. Gribble, 641 F.3d 743 (6th Cir. 2011). In Bletz, the Sixth Circuit stated that "[w]here the events preceding the shooting occurred in close temporal proximity to the shooting, those events have been considered in analyzing whether excessive force was used." Id. at 752. However, the court went on to state that "[i]n the case before us, we need not decide precisely which preceding events (i.e., the breadth of the excessive-force segment) should properly be considered in analyzing the reasonableness of Gribble's use of deadly force." Id. Additionally, the court notes that the Sixth Circuit has held that the "segmented approach applies even to encounters lasting very short periods of time." Greathouse, 433 F. App'x at 372 (citing Claybrook, 274 F.3d at 1105) (segmenting a 1-2 minute encounter in order to analyze an excessive force claim).

Dickerson, 101 F.3d at 1161-62). Therefore, the City's motion is granted on this narrow issue.

However, the court finds that as to Plaintiffs' failure to train claim, the segmenting rule does not apply and does not prohibit McFadden from considering the Officers' conduct leading up to Askew's death. In order to establish liability under § 1983 for failure to train, Plaintiffs must prove that: (1) the MPD training program is inadequate for the tasks that its officers must perform; (2) the inadequacy is the result of the City's deliberate indifference; and (3) the inadequacy is closely related to or actually caused Plaintiffs' injury. Plinton v. Cnty. of Summit, 540 F.3d 459, 464 (6th Cir. 2008) (citing Hill v. McIntyre, 884 F.2d 271, 275 (6th Cir. 1989)). The Sixth Circuit has expressly permitted the use of expert testimony in establishing failure to train claims. See Russo v. City of Cincinnati, 953 F.2d 1036, 1047 (6th Cir. 1992) ("Especially in the context of a failure to train claim, expert testimony may prove the sole avenue available to plaintiffs to call into question the adequacy of a municipality's training procedures. . . . Reliance on expert testimony is particularly appropriate where, as here, the conclusions rest directly upon the expert's review of materials provided by the City itself."); see also Shadrick v. Hopkins Cnty., Ky., 805 F.3d 724, 741 (6th

Cir. 2015); Gregory v. City of Louisville, 444 F.3d 725, 753 (6th Cir. 2006). The City has not cited, and the court in conducting its own research has not found, any case within this circuit that has applied the segmenting rule to failure to train claims. Therefore, the court denies the City's motion to the extent that it seeks to exclude McFadden's opinions on failure to train under the segmenting rule.

F. Arguments Regarding State of Mind/Legal Conclusions

Lastly, the City argues that McFadden's expert report and deposition contain inappropriate legal conclusions. Specifically, the City takes issue with McFadden's use of the words "ratified," "deliberately," and "purposely." McFadden uses these words in the following context:

- "Moreover, as the officers testified that no supervising officer had been critical of their conduct on the night in question and as the MPD chose not to discipline them for any of their actions, the MPD has ratified their conduct . . .". (ECF No. 134.)

- "I think [the Officers] purposely changed their statement after getting the information from the scene and realizing that the scene evidence, forensic evidence or the ballistic evidence did not support what they had first told Officer Drew." (ECF No. 131, p. 137.)

- "Discovery Documents, including the statements and testimony of Officers Dyess and Aufdenkamp, demonstrated that their own unreliable and deliberate conduct created the high risk aspect of this encounter." (ECF No. 134.) When asked in his deposition what he meant by "deliberate," McFadden explained that he meant "it was done on purpose or purposely done." (ECF No. 131, p. 196.)

(emphasis added). The City is correct in stating that expert testimony expressing legal conclusions is improper and should be excluded. See DeMerrell v. City of Cheboygan, 206 F. App'x 418, 426 (6th Cir. 2006); Berry, 25 F.3d at 1353. Here, McFadden used common terms that can sometimes be construed as legal terms, depending on the context in which they are used. However, the court finds that McFadden did not use the challenged words in the context of improper legal conclusions. Therefore, the City's motion as to this point is denied. See Heflin v. Stewart Cnty., Tenn., 958 F.2d 709, 715 (6th Cir. 1992) (holding that expert testimony stating that conduct demonstrated "deliberate indifference" was admissible because it "merely emphasized the witness's view of the seriousness of the defendants' failures"); Hatton v. Spicer, No. CIV.A. 05-17-GFVT, 2006 WL 5249850, at *1 (E.D. Ky. July 7, 2006) ("While an expert may testify as to ultimate fact issues or use 'legal' words in a non-legal fashion, an expert may not define legal terms or advise the jury of the law in the context of a particular fact situation.").

Similarly, the City also seeks to exclude McFadden's opinion, as purportedly expressed in his deposition, that police officers in this case "lied." However, having reviewed

McFadden's statement in context, the court does not believe that McFadden intended to offer an expert opinion that officers lied. Rather, McFadden made this statement in response to questions from the City's counsel regarding who had reviewed his expert report. After McFadden replied that his wife had read his report, the City's counsel proceeded to ask whether his wife had "any comments" about it. McFadden responded that his wife said that the officers "lied." (ECF No. 131, pp. 258-61.) Because it does not appear that McFadden intended to offer this as an opinion, there is no "opinion" for the court to exclude. Therefore, the City's motion as to this issue is denied.

III. CONCLUSION

For the reasons above, the City's motion is GRANTED in part where noted. The remainder of the City's motion is DENIED.

IT IS SO ORDERED.

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

February 29, 2016
Date2/29/2016