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 DEFENDANTS' MOTIONS TO EXCLUDE TESTIMONY OF MICHAEL A. KNOX

Before the court by order of reference are the following motions:

1. Defendant City of Memphis's ("City") Motion to Exclude Testimony of Plaintiff's Proposed Expert Michael A. Knox, filed October 20, 2015. (ECF No. 153.) Plaintiffs Sterling and Sylvia Askew ("Plaintiffs") filed a response in opposition on

November 13, 2015. (ECF No. 212.) The City filed a reply on November 25, 2015. (ECF No. 234.)

2. Motion to Exclude Testimony of Plaintiff's Proposed Expert Michael A. Knox, filed on October 22, 2015, by defendants Officer Ned Aufdenkamp and Officer Matthew Dyess (collectively "Officers"). (ECF No. 165.) Plaintiffs filed a response in opposition on November 18, 2015. (ECF No. 223.)

The court has considered the briefs submitted in support of and in opposition to the motions and the attached exhibits, Knox's report and curriculum vitae, and Knox's testimony at his deposition. For the reasons below, the motions are 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 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 the 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 emergency equipment 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 Michael A. Knox to reconstruct the scene of Askew's death and to analyze the procedures used by MPD officers before, during, and after the shooting incident. Knox has been a forensic consultant with Knox & Associates, LLC, a company which he owns, since 2008. Additionally, Knox is currently a forensic technology instructor with the Institute of Police Technology and Management, Sirchie Fingerprint Laboratories, Inc., Professional Business Solutions, Inc., and Eagle Crime Scenes, Inc. Knox served as a police officer and detective at the Jacksonville, Florida Sheriff's Office from 1994 until 2010. Knox has an associate's degree in criminal justice technology from Florida Community College at Jacksonville, a bachelor's degree in mechanical engineering from

the University of North Florida, a master's degree in forensic science from the University of Florida, and is presently pursuing a doctoral degree in criminal justice at Nova Southeastern University. Knox has been certified as a Crime Scene Reconstructionist by the International Association for Identification since 2011. He has reconstructed crime scenes and traffic accidents in eighteen states, and has provided law enforcement training in four states and three foreign countries. Knox is the author of a book titled Intermediate Range: The Forensic Evidence in the Killing of Trayvon Martin, and a co-author of another book titled Crime Scene Processing 2.0. Knox has given many presentations and lectures, and has made multiple media appearances regarding various criminal justice topics. (ECF No. 209-1.) Lastly, Knox has testified as an expert witness in numerous state and federal court cases, including over forty times in the area of crime scene reconstruction, approximately twenty times for traffic accident reconstruction, once for crime scene processing procedures, and once for blood stain pattern analysis. (ECF No. 209-2.)

In its motion, the City argues that Knox's testimony should be excluded because: (1) he did not consider all possible scenarios in reaching his conclusions, and thus, his opinion is "based upon conjecture and speculation"; (2) he does not

properly explain the bases for some of his opinions; (3) some of his opinions are not relevant and should be excluded because the "segmenting rule" applies; (4) the City does not agree with some of Knox's conclusions; (5) Knox has not sufficiently established the necessary elements for municipal liability under 42 U.S.C. § 1983; and (6) some of his opinions are legal conclusions that are beyond the scope of acceptable expert testimony.

In their response in opposition, Plaintiffs assert that none of the City's objections to Knox's opinions relate to the admissibility of Knox's testimony, but rather are challenges that can be raised at trial through argument or cross-examination. Plaintiffs argue that Knox has sufficiently explained the bases for each of his opinions, which are based on his experience combined with the ballistics analysis he conducted and his evaluation of other evidence. Plaintiffs also argue that whether or not Knox can establish the necessary elements of a municipal liability claim under § 1983 is wholly irrelevant to the admissibility of his testimony. Regarding the segmenting rule, Plaintiffs allege that segmentation is not appropriate because the events preceding the shooting at issue occurred in close temporal proximity to the shooting, and because the Officers' conduct during their interaction with Askew is a central issue in the lawsuit. Lastly, Plaintiffs

argue that Knox's report does not contain improper legal conclusions.

In its reply, in addition to reiterating its previous arguments, the City argues that because Knox's opinion does not consider the various other possible scenarios raised by the City, his opinion is inadmissible. Additionally, the City argues that "[w]hile it may not be [Knox's] job to reference prior inadequate investigations without such proof Plaintiffs do not have a cause of action." Lastly, the City argues that Knox's testimony regarding MPD training is irrelevant because Plaintiffs have not presented proof that the City was previously put on notice that its training was deficient.

The Officers also filed a motion to exclude Knox's testimony. In their motion, the Officers incorporate the arguments raised by the City and further argue that Knox's testimony should be excluded because: (1) Knox's investigation was deficient, and as such, will not assist the trier of fact; (2) some of Knox's conclusions are "inaccurate"; (3) Knox's opinion is based upon mere conjecture and speculation; (4) Knox did not consider distorted perception studies in reaching his opinion, even though he authored one such study himself; (5) Knox's opinion relating to the tactics utilized by the Officers is "completely irrelevant based upon the existing law under 42

U.S.C. Section 1983 and the defense of qualified immunity"; and (6) Knox's opinions that the actions of the Officers were "not objectively reasonable under the circumstances" and that the amount of force they utilized was "excessive" are improper legal conclusions.

In their response in opposition, Plaintiffs incorporate their opposition brief in response to the City's motion to exclude Knox, and also contend that Knox conducted "an extraordinarily thorough investigation." Additionally, Plaintiffs assert that Federal Rule of Evidence 702 "does not require anything approaching absolute certainty," and the Officers' disagreement with Knox's opinions does not render them inadmissible. Plaintiffs also argue that Knox adequately explained why distorted perception studies are not applicable to this case, and that "exclusion of an expert is the exception and not the typical approach." Lastly, Plaintiffs contend that the tactics utilized by the Officers are highly relevant to the ultimate issue in this case, and that Knox does not state improper legal conclusions.[1]

[1]In both of the briefs filed in opposition to the present motions, Plaintiffs request that the court receive testimony from Knox, either in a hearing or at trial through *voir dire*, prior to ruling on the motions. After reviewing the entire record, the court does not believe that a hearing is necessary for the resolution of these motions.

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. Knox's Qualifications

Although Defendants do not challenge Knox's qualifications, the court will begin its Rule 702 analysis with a determination of whether Knox is qualified by "knowledge, skill, experience, training, or education" to offer his opinions. This requirement has been treated liberally by the courts. See Bradley v. Ameristep, Inc., 800 F.3d 205, 209 (6th Cir. 2015); Huffman v. Electrolux Home Products, Inc., No. 3:12CV2681, 2015 WL 5451461, at *6 (N.D. Ohio Sept. 17, 2015). As discussed previously, Knox served as a police officer and detective in Florida for sixteen years. He has a master's degree in forensic science and has been certified as a Crime Scene Reconstructionist by the International Association for Identification since 2011. Knox

has authored books and given numerous presentations and lectures on various criminal justice topics. Knox has reconstructed crime scenes and traffic accidents in eighteen states, provided law enforcement training in four states and three foreign countries, and is currently employed as a forensic technology instructor. Knox has previously qualified as an expert witness in several federal and state court cases. Based on the entire record, the court finds that Knox is qualified by his knowledge, experience, training, and education to testify regarding crime scene reconstruction and analysis, police training, and police investigations.

C. Knox's Investigation

The Officers first argue that Knox's own investigation in this case was deficient and that the conclusions reached based on his investigation will not assist the trier of fact. The Officers point out that Knox did not examine Askew's vehicle until almost two years after Askew's death, and even then, he spent only two to three hours inspecting the vehicle in an airport hangar where it was being stored. The Officers also assert that Knox never visited the crime scene and did not position a mannequin in the driver's seat of Askew's vehicle during his investigation. Lastly, the Officers take issue with the fact that Knox was only able to account for eleven of the

twenty-two shots fired during the shooting incident. In response, Plaintiffs contend that Knox conducted an "extraordinarily thorough investigation" by physically inspecting Askew's vehicle and reviewing extensive records, including officer statements, police records, the medical examiner's report, crime scene photographs and diagrams, the MPD internal investigation case file, MPD case notes, depositions, and more. After reviewing the record, the court finds that Knox's investigation was not deficient so as to warrant the exclusion of his testimony. The Officers have not identified any source or applicable standard to support their argument that Knox's investigation was defective in any material manner. The court believes that Knox's conclusions based on his investigation could be helpful to the jury, and that the Officers' challenges to Knox's investigation can be addressed through cross-examination. See Billstein v. Goodman, No. 08-13415, 2012 WL 1048468, at *3 (E.D. Mich. Mar. 28, 2012) (stating that defendant's concern about expert's methodology was "better addressed through cross-examination and rebuttal experts").

D. Bases for Knox's Opinions

On several occasions throughout their motions, Defendants argue that Knox has not adequately supported his opinions and

that his opinions are based on speculation and conjecture. After reviewing Knox's report and his entire deposition testimony, the court finds that he has adequately explained the bases for all but one of his conclusions. The court will address the Defendants' specific objections in turn below.

First, regarding Knox's opinion that Askew could not have pointed his gun at either officer during the incident, the City asserts that Knox "does not support his opinion based upon any authorities with regard to movement of the body after a shooting and particularly after multiple shootings" and that he "does not explain the basis for his opinion." As an initial matter, the fact that Knox's report does not refer to any outside authorities in support of this opinion does not necessarily render the opinion inadmissible. The Sixth Circuit has held that "[a]n expert may certainly rely on his experience in making conclusions," as long as the expert explains "how that experience leads to the conclusion reached." Thomas v. City of Chattanooga, 398 F.3d 426, 432 (6th Cir. 2005) (internal citation and quotation marks omitted). In his report, Knox explained that the "physical evidence indicates that Askew could not have pointed his pistol at either officer." He provided a detailed description of the physical evidence that formed the basis of this opinion, including the position of Askew's body,

the location of his gun, and the condition of his vehicle after the shooting. The court finds that Knox has adequately explained the bases for his opinion that Askew did not point a gun at the officers on the night in question. Therefore, the City's motion on this point is denied.[2]

Next, the City challenges Knox's statement that "[w]hen approaching a person who is sleeping in a vehicle, it is reasonable and prudent to assume that, if startled or awakened quickly, the individual's immediate perception of his surroundings might not be clear. The individual may not immediately recognize that he has been awakened by police officers but may instead assume that he has been approach[ed] by someone wishing to do him harm." (ECF No. 145.) The City

[2]With regard to this opinion, the City also argues that "the failure of Mr. Knox to explain factually in his report how he reached his conclusion is basis for rejecting his testimony pursuant to Rule 26." Specifically, the City argues that Knox relied on the wounds to Askew's arms to support his opinion at his deposition, but that he did not explain this basis in his report. However, roughly five pages of Knox's report describe in detail the location, "wound track," and "wound path" of the gunshot wounds Askew sustained. Federal Rule of Civil Procedure 26(a)(2)(B) exists "to avoid trial-by-surprise and to avoid wasting unnecessary resources." R.C. Olmstead, Inc. v. CU Interface, LLC, 657 F. Supp. 2d 905, 913 (N.D. Ohio 2008); see also Nan Ya Plastics Corp. v. Glob. Polymers, LLC, No. 3:04CV-529-S, 2005 WL 5988669, at *2 (W.D. Ky. Oct. 5, 2005) ("The purpose of Rule 26(a)(2)(B) essentially is twofold - to eliminate unfair surprise to an opposing party and to conserve resources."). The court finds that Knox's report fully meets the standards of Rule 26(a)(2)(B).

argues that this statement is inadmissible because "a party's state of mind is not within the knowledge of any expert." The court agrees that it would be generally impermissible for an expert to testify about a party's state of mind; however, in the statement cited above, Knox has not done so. Rather, Knox commented generally about the likely reaction of a person who is awakened or startled while asleep, not about Askew's reaction specifically. Therefore, the City's motion regarding this statement is denied.

The City also asserts that the following opinion by Knox is inappropriate: "By failing to adequately investigate an officer-involved shooting, the Memphis Police Department is rubber-stamping the officers' conduct and setting precedent for use of deadly force investigations. The underlying message to rank-and-file officers is that any use of deadly force is likely to be deemed justified as long as the officers assert that they were in fear." (ECF No. 145.) The court agrees that this opinion regarding the effects of the purported inadequate investigation on rank-and-file officers is speculative and beyond the scope of Knox'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 this opinion, the City's motion is granted.

Lastly, the City argues that Knox has no basis for opining that: "Officers Aufdenkamp and Dyess testified that they handled this incident in accordance with their training and that they were told they did a good job with regard to this shooting . . . Assuming the officers' testimony to be true and accurate, the Memphis Police Department failed to train the officers properly with respect to handling incidents of this nature." (ECF No. 145.) The City contends that "[t]o follow this line of reasoning, is a reach and an unrealistic conclusion based upon speculation and conjecture." The court disagrees. Knox adequately explained in his report and in his deposition the reasons he believed the training of the Officers in this case was inadequate, including: the Officers did not run the vehicle's license plate to obtain the name of the registered owner to determine if that individual held a valid concealed carry permit; the Officers did not turn on their blue flashing lights or sirens, and did not use their vehicle's public address system to give loud verbal commands; and the Officers did not

follow standard protocol for handling an armed subject in a vehicle, including remaining at or near their vehicles, seeking cover and/or concealment, and giving verbal commands for the subject to step out of the vehicle with his hands visible. Because Knox has provided adequate bases for his opinion that the Officers did not handle the incident properly, and because the Officers testified that they handled the incident in accordance with their training, the court finds that Knox has provided sufficient bases to support his opinion that the MPD does not properly train its officers to handle these types of encounters. Therefore, the City's motion on this issue is denied.

Both the City and the Officers argue that some of Knox's opinions are speculative because he did not consider various alternative possibilities that contradict his conclusions. Defendants assert that the existence of these other possible scenarios necessarily means that Knox's opinions are based upon "mere conjecture and speculation." For example, the City's motion includes the following alternative scenario:

> Since Mr. Knox is focusing on the wounds to the arms saying that the gun could not have been pointed at Officer Aufdenkamp, this raises a question of which shots struck the arms. Was it the first, second, third or twenty-second? Assuming it was one of the later rounds, consideration must be given to the possibility that earlier rounds which struck him may

> have caused the body to twist and turn, therefore causing the arms to rotate or flail around moving them in various positions when they were struck. This also suggests that the gun which had been pointed at Officer Aufdenkamp could have dropped to the floor after the initial shootings. *Suffice it to say this is all speculation but not out of the realm of possibility* and would tend to refute the conclusions of Mr. Knox.

(emphasis added) (ECF No. 154.) Setting aside the fact that the City's alternative scenario is (1) not based on any rebuttal expert testimony and (2) is itself "all speculation," Knox's failure to consider every remote possible scenario goes to the weight of his testimony rather than its admissibility. See Jahn v. Equine Servs., PSC, 233 F.3d 382, 390 (6th Cir. 2000) ("The fact that several possible causes might remain 'uneliminated' . . . only goes to the accuracy of the conclusion, not to the soundness of the methodology.") (alteration in original) (internal citation and quotation marks omitted); United States v. Freeman, No. 06-20185, 2015 WL 2062754, at *5 (E.D. Mich. May 4, 2015) ("Defendants can address their concerns about Agent Hess' alleged failure to consider these factors through cross-examination; or, they can address the issue by presenting their own expert witness.").

Additionally, both the City and the Officers disagree with some of Knox's opinions. For example, in reference to Knox's opinion that the MPD conducted an inadequate investigation into

Askew's death, the City states that "[i]t is not as if there was no investigation at all. It is apparent that considerable time and effort was put forth." Similarly, the Officers assert that Knox's "statement regarding the injury to Mr. Askew's right arm is simply inaccurate." The Defendants' disagreements with Knox's conclusions do not affect the admissibility of Knox's testimony. Rather, these disagreements are appropriate subjects 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."). Therefore, the Defendants' motions on these points are denied.

Lastly, the Officers contend that Knox's "opinion ignores scientific studies relevant to this case." The Officers argue that Knox failed to cite studies regarding officers' distorted perceptions during shooting incidents, including an article which he authored, and that this makes his opinion inadmissible. However, when asked at his deposition why he did not cite such studies, Knox thoroughly explained why he did not believe they were relevant to this case. (ECF No. 146, pp. 98-102.) The following is an excerpt from Knox's deposition:

Q: All right. Are you familiar with any studies on officer perception, what they may perceive, say, in the heat of the moment in a situation where there's a shooting?

A: Yes. I'm familiar with a number of studies in that area.

. . .

A: I have not used any studies in relation to this case.

Q: Well, don't you think it would be appropriate to do that, to determine what maybe the officers' perception was at the time of this shooting?

A: Well, what would it be that I would be evaluating? I mean, the issue with perception is when you have things like an officer says, the guy reached out and pulled a gun on me, and it turns out to be a wallet or it turns out to be a cell phone. Then you get into issues of identifying why is it that the officer perceived that to be a firearm when, in fact, it turned out not to be a firearm. The thing is is here you don't have that case. You don't have the officers saying, Hey, he pointed this at me, and then it turns out, well, it wasn't a gun; it was something else. You have officers who are insisting that what happened is that this man took his hands and turned towards the officer and pointed a gun at them. And they don't just describe he had some object in his hand. Dyess said he saw the silver muzzle of the gun pointed towards Aufdenkamp. Well, that's just not possible. And there's nothing in any studies that are going to rectify how he misperceived that when the gun couldn't have been in that location. He's not misperceiving seeing an object and thinking it was something else. He's describing seeing movements that could not have occurred with the gun in the hand the way it's described.

Q: So suffice it to say, you have considered that in your opinion; correct? I'm talking about officer perception.

> A: I've certainly considered officer perception. I just don't see any issue here where you've got what is potentially a misperception. Those types of things occur all the time in officer-involved shootings. The cell phone misrecognition or the unarmed person that they thought were pulling for a gun and they don't even have anything in their hand, those sorts of things can occur. But what you're looking at in every case that I've seen of those types of misperceptions is things like shape identification, contrast issues, you know, lighting issues, all sorts of things that can affect that perception. We're not talking about that here. We're not talking about officers who misperceived an object to be something other than what it was. You're talking about officers who are insistent that they saw the gun in his hand pointed at Officer Aufdenkamp with the arms extended out towards Officer Aufdenkamp. And the physical evidence in this case is just simply not consistent at all with that account.

(ECF No. 146, pp. 100-102.) The above testimony reflects that Knox considered officer perception studies and found them to be inapplicable. Therefore, the Officers' motion on this issue is denied.

E. Application of the "Segmenting" Rule

The City argues that "whether the officers' approach to the vehicle was reasonable [] is immaterial as the sequence of events is governed by the Segmenting Rule." 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 Knox may not rely upon the events that occurred before the Officers' use of force when expressing opinions about Plaintiffs' excessive force claim at trial.[3] See Claybrook v. Birchwell, 274 F.3d 1098, 1105 (6th

[3]Plaintiffs argue that the Officers' actions before the shooting should be considered with respect to all of their claims because

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 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 Knox 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

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"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).

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 Knox's opinions on failure to train under the segmenting rule.

F. Relevancy of Knox's Testimony under § 1983

Both the City and the Officers argue that Knox's testimony is irrelevant based upon the existing law under 42 U.S.C. § 1983. The City contends that in order to establish municipal liability, Plaintiffs must prove deliberate indifference on the part of the City. The City argues that "[i]n the face of an extensive investigation, labeling it as poor and shoddy is insufficient and does not amount to deliberate indifference." Additionally the City asserts that "Knox makes no reference to prior investigations, and "[w]ithout evidence of a pattern of inadequate investigations, there can be no Section 1983 liability based upon one instance of potential misconduct." Similarly, the Officers allege generally that "Mr. Knox's opinion relative to the tactics utilized by Officers Aufdenkamp and Dyess is completely irrelevant based upon the existing law under 42 U.S.C. Section 1983 and the defense of qualified immunity." The court finds that these arguments go to the underlying merits of Plaintiffs' § 1983 claims, and have no bearing whatsoever on the admissibility of Knox's testimony. Therefore, the Defendants' motions on this point are denied.

G. Legal Conclusions

Defendants argue that Knox's expert report contains inappropriate legal conclusions. First, the City takes issue

with Knox's use of the word "ratified" in the following context: "The Memphis Police Department failed to conduct a thorough investigation of this shooting and, by doing so, ratified the officers' conduct without regard to the factual circumstances surrounding the shooting." The City is correct 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. However, the court finds that Knox's use of the word "ratified" in the context above does not constitute an improper legal conclusion. 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 the admission of expert testimony generally stating that conduct demonstrated "deliberate indifference" was not erroneous 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.").

Next, the City asserts that Knox's opinion that the Officers' tactical decisions likely "caused or contributed to

this shooting" is "an issue for the jury and not an appropriate comment by the expert." However, Knox is opining simply that the Officers' conduct contributed to Askew's death, which does not constitute an improper legal conclusion. Therefore, the City's motion as to this point is also denied.

Finally, both the City and the Officers contend that Knox's opinion that "[t]he use of deadly force by Officers Aufdenkamp and Dyess was excessive and was not objectively reasonable under the circumstances" is inadmissible. The court agrees. Courts have permitted experts to testify in excessive force cases "so long as the expert refrains from expressing legal conclusions." King v. Taylor, 944 F. Supp. 2d 548, 555 (E.D. Ky. 2013) (citations omitted). The Sixth Circuit has held that an expert opinion stating that an officer's conduct in utilizing deadly force was "objectively unreasonable" was inadmissible because it impermissibly expressed a legal conclusion. DeMerrell, 206 F. App'x at 426; see also United States v. Williams, 343 F.3d 423, 435 (5th Cir. 2003) (stating that the district court "erred under rule 704(a) by allowing the officers' testimony about the reasonableness of the shooting"); Alvarado v. Oakland Cnty., 809 F. Supp. 2d 680, 691-92 (E.D. Mich. 2011); Norman v. City of Lorain, Ohio, No. 1:04CV913, 2006 WL 5249725, at *3 (N.D. Ohio Nov. 27, 2006) (holding that expert "may testify concerning the

proper procedures to be followed in the situation faced by Officer Lachner, but he may not testify that the force used by Officer Lachner was 'unreasonable' or 'unnecessary'"). Following this same line of reasoning, courts have also precluded experts from testifying that an officer's conduct amounted to "excessive force." See Thompson v. City of Chicago, 472 F.3d 444, 458 (7th Cir. 2006); Valtierra v. City of Los Angeles, 99 F. Supp. 3d 1190, 1198 (C.D. Cal. 2015); Alvarado, 809 F. Supp. 2d at 691-92; McBroom v. Payne, No. 1:06CV1222-LG-JMR, 2011 WL 1356925, at *3 (S.D. Miss. Apr. 11, 2011); United States v. Eberle, No. 08-20139, 2008 WL 4858438, at *2 (E.D. Mich. Nov. 10, 2008); White v. Gerardot, No. 1:05CV-382, 2008 WL 4372019, at *7 (N.D. Ind. Sept. 23, 2008). Based on this case law, the court finds that Knox's opinion that the Officers' use of force was "excessive" and "not objectively reasonable" is inadmissible. Therefore, the Defendants' motions on this issue are granted.

III. CONCLUSION

For the reasons above, the Defendants' motions are GRANTED in part where noted. The remainder of the Defendants' motions is DENIED.

IT IS SO ORDERED.

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

March 7, 2016
Date