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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 Kyle Johnson, an individual,

18 Plaintiff,

19 vs.

20 City of San Jose, a California charter city; San
21 Jose Police Department Officer James Adgar,
22 Badge No. 4552, an individual; Does 2 through
23 50,

24 Defendants.

Case No. 5:21-cv-01849-BLF

**PLAINTIFF KYLE JOHNSON'S
OPPOSITION TO DEFENDANTS'
MOTION TO EXCLUDE EXPERT
TESTIMONY OF ROGER A. CLARK**

Date: December 14, 2023

Time: 9:00 a.m.

Dept: Courtroom 3 - 5th Floor

Judge: Hon. Beth L. Freeman

Trial Date: February 26, 2024

INTRODUCTION

1
2 On May 30, 2020, Plaintiff Kyle Johnson was shot in the back of the leg by a foam baton
3 round while attending a protest against police brutality in the wake of George Floyd’s murder.
4 He has, through examination of City Hall security footage, police body camera footage, and 3D
5 reconstruction via video analysis, identified Officer James Adgar as the individual who fired the
6 40mm launcher that injured his leg. Roger A. Clark was brought on as a police procedures expert
7 to testify whether, in his opinion, it was proper police procedure to fire a 40mm launcher into a
8 crowd of fleeing protestors. Defendants now wish to strike Mr. Clark’s testimony as improper,
9 as “he has no special expertise beyond that of a juror, he improperly opines as to legal
10 conclusions, and he has no factual basis upon which to render his opinion.” Defendants’ Motion
11 to Exclude Testimony of Plaintiff’s Expert Roger Clark, (“ECF 110”) at p.1:20-22. This is a
12 gross mischaracterization of Mr. Clark’s work and testimony. Mr. Clark’s decades of experience
13 as a police officer, combined with his decades of experience studying, researching, instructing,
14 and lecturing on the California Peace Officer Standards and Training (“POST”) qualifies him as
15 an expert in POST training and standards. Declaration of Tianqi Sun (“Sun Decl.”), Ex. 1 (Clark
16 Report) at Exhibit A (CV). He has served as a consultant in over 2,300 civil rights cases, and has
17 testified on the use of force, police procedures, and police tactics in state and federal courts
18 across the country. *Id.*, Ex. 1 (Clark Report) at p. 23, Exhibit C (List of Testimony). Courts
19 around the country, and the Ninth Circuit in particular, have relied on his expert testimony and
20 reports to render their decisions. *See e.g. Shirar v. Guerrero*, No. EDCV13906JGBDTBX, 2017
21 WL 6001270 at *12 (C.D. Cal. Aug. 2, 2017) (admitting Clark’s testimony as to “whether the
22 conduct by the officers complied with POOST standards in the use of force.”); *Vaughn v. City of*
23 *Los Angeles*, No. CV1603086ABAJWX, 2017 WL 8786868 at *4 (C.D. Cal. Oct. 30, 2017)
24 (admitting Clark’s testimony “including but not limited to: (1) the deployment and/or use of a
25 Taser and the LAPD’s policies regarding the Taser; (2) bullet trajectories; (3) hobble restraint
26 device (‘HRD’); and (4) compelled blood draw.”); *Smith v. City of Oakland*, 538 F. Supp. 2d
27 1217 (N.D. Cal. 2008) (admitting Clark’s testimony “on the failure of the officers to follow
28 standard procedures”); *Solis v. City of Los Angeles*, No. LACV1702352ABPJWX, 2018 WL

1 4998261 at *2 (C.D. Cal. June 6, 2018) (admitting Clark’s testimony regarding his “opinions as
2 to the chain of events caused by [Officer Defendant’s] physical location.”); *Abuka v. City of El*
3 *Cajon*, No. 17-CV-347-BAS-NLS, 2019 WL 1077495 (S.D. Cal. Mar. 7, 2019); *Huntzinger v.*
4 *Coyle*, No. CV 5:17-184-KKC, 2022 WL 95280 at *4 (E.D. Ky. Jan. 10, 2022) (admitting
5 Clark’s testimony based on his review of “the Complaint; various photographs; various [police
6 department] manuals; [Plaintiff’s] medical records; a post-shooting audio recording of
7 [Plaintiff’s] interview; a transcript of [Plaintiff’s] post-shooting interview; various 3-D
8 recreations of the incident; relevant deposition transcripts; [Plaintiff’s] Motion for Summary
9 Judgment; a relevant article in Police Magazine; and satellite imagery of the scene of the
10 incident.”). His report in this case clearly and concisely lays out the factual basis for his
11 opinions, which he takes care to relate directly to his expertise in the realm of POST training, the
12 very same training that Defendants’ experts rely on when updating their policies and duty
13 manuals. Sun Decl., Ex. 2 (Tassio Depo) at 27:15-18, 28:12-16. Defendants may disagree with
14 Mr. Clark’s conclusions, but ultimately his credibility is a matter for the jury to decide.

15 ARGUMENT

16 While trial courts may look to the factors outlined in *Daubert v. Merrell Dow Pharm.,*
17 *Inc.*, (509 U.S. 593-94 (1993)), they are not forced “to mechanically apply the *Daubert* factors—
18 or something like them—to both scientific and non-scientific testimony, *Kumho Tire* heavily
19 emphasizes that judges are entitled to broad discretion when discharging their gatekeeping
20 function.” *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir.2000). “Where non-scientific
21 expert testimony is at issue, the reliability of the expert’s opinion focuses on his or her
22 knowledge and experience.” *Cotton v. City of Eureka, Cal.*, No. C 08-04386 SBA, 2010 WL
23 5154945, at *14 (N.D. Cal. Dec. 14, 2010). The Court has previously found that Mr. Clark
24 possess the requisite experience to testify as an expert witness as to police use of force:

25 Mr. Clark was employed with the Los Angeles County Sheriff’s Department for
26 twenty-seven years from 1965 through 1993. Since his retirement, Mr. Clark has
27 served as an expert witness on matters pertaining to ‘police administration, police
28 procedures, police tactics, police investigative procedures, police investigative
procedures and jail administration.’ He has testified as an expert in state and

1 federal courts about the duties and responsibilities of police officers. His opinions
2 are based on his years of experience, which has included investigating and reporting
on the use of force by law enforcement officers.

3 *Id.*, at *14 (internal citations omitted). In this case Mr. Clark is again testifying regarding his
4 knowledge of POST training, and his experience investigating and reporting on the use of force
5 by law enforcement. Defendants' objections to Mr. Clark's testimony hinge mostly on
6 mischaracterizations of his report and deposition testimony, along with several challenges to his
7 credibility which are better left for a jury to decide.

8 **I. MR CLARK IS ALLOWED TO USE HIS OBSERVATIONS OF THE BODY**
9 **CAM FOOTAGE OF THE INCIDENT IN QUESTION AS THE BASIS UPON**
10 **WHICH HE OFFERS HIS OPINION AS TO OFFICER ADGAR'S USE OF**
FORCE.

11 Defendants mischaracterize Mr. Clark's description of what he saw in the videos he
12 reviewed as expert testimony of what the videos purport to show. To the extent such videos
13 were relied upon by Mr. Clark, they were used as a basis for his opinion, and not related to his
14 opinion as his expert. "[T]he disclosure of [such] basis evidence can help the factfinder
15 understand the expert's thought process and determine what weight to give to
16 the expert's opinion." *Williams v. Illinois*, 567 U.S. 50, 78, (2012).

17 Plaintiff agrees with Defendants in suggesting that a lay person could determine what the
18 videos show themselves, and then determine whether or not Mr. Clark's characterization of the
19 events depicted in the videos is credible or not. However, to exclude any observations or
20 conclusions Mr. Clark made based on his viewing of the video would be an error, as it forms the
21 basis of his other opinions for which he is qualified to testify as an expert. Just as Mr. Clark is
22 allowed to view the Duty Manuals and training materials to form the basis of his opinions
23 regarding SJPD's training and policies, he must also be allowed to use footage of SJPD officers
24 in the field to determine whether or not there was an actual violation of said policies, or whether
25 the officer's behavior at the scene indicates a failure or policy or training. *See A.B. v. Cnty. Of*
26 *San Diego*, No. 18CV1541-MMA-LL, 2020 WL 4431982, at *2 (S.D. Cal. July 31, 2020) (ruling
27 that "it would be odd for [a police-practices expert] to present his ultimate conclusions in a
28 vacuum without explaining how he reached those conclusions.").

1 **II. MR. CLARK PROPERLY BASIS HIS CONCLUSIONS AS TO THE**
2 **INTENTIONALITY OF OFFICER ADGAR’S DECISIONS TO FIRE INTO**
3 **THE CROWD OF PROTESTORS ON HIS REVIEW OF THE EVIDENCE**
4 **AND HIS EXPERIENCE WITH POLICE PROCEDURES.**

5 Defendants offer a series of statements made by Mr. Clark at his deposition that purport
6 to disagree with Officer Adgar’s own, subjective version of the events that occurred on May 30,
7 2020. ECF 110 at p. 3. Defendants offer this testimony as an admission by Mr. Clark that he has
8 no basis for his opinion that Officer Adgar intentionally struck Plaintiff. However, the testimony
9 clearly shows that Mr. Clark’s opinion was based on his viewing of the body camera footage of
10 the shooting itself, and not solely on Officer Adgar’s own after-action report. Sun Decl., Ex. 3
11 (Clark Depo) at 108:18-109:12. Even so, Mr. Clark provides several instances in which Officer
12 Adgar reports firing at a suspect at the same time and location as when Plaintiff was struck,
13 along with his review of video evidence showing the exact moment Plaintiff was shot. *Id.*, Ex. 1
14 (Clark Report) at pp. 10-11. Mr. Clark also points to evidence showing that Officer Adgar
15 himself had trouble identifying the supposed target but shot anyways, showing that Officer
16 Adgar did not accidentally discharge his weapon but instead “lifted, aimed, and fired” at
17 Plaintiff. *Id.*, Ex. 1 (Clark Report) at p. 17. Mr. Clark then connects this action with his overall
18 opinion that aiming and firing at Plaintiff despite the fact he was fleeing was a clear violation of
19 POST procedures regarding the use of projectile impact weapons. *Id.*, Ex. 1 (Clark Report) at p.
20 15. Such opinions are well within the scope of Mr. Clark’s knowledge and experience, and not
21 within the realm of psychology or human behavioral analysis.

22 **III. MR. CLARK HAD SUFFICIENT BASIS TO TESTIFY THAT THE**
23 **FAILURES OF SJPD’S TRAINING, POLICIES, COMMAND, AND**
24 **SUPERVISION RESULTED IN CONDUCT BY THE POLICE AT THE**
25 **PROTEST THAT FELL BELOW POST STANDARDS.**

26 Defendants attempt to prove that Mr. Clark has no basis for rendering opinions on
27 training by presenting a series of excerpts in which he appears to agree with the training provided
28 by San Jose Police Department (“SJPD”). This completely ignores the raft of criticisms Mr.
29 Clark levied at the training and policies employed by SJPD contained in his actual report. This
30 includes his opinion that “SJPD’s policy regarding the use of impact weapons provided

1 inadequate guidance to officers on use of the weapons in protest situations, particularly as to the
2 target-specific weapons deployed en masse during the protests.” *Id.*, Ex. 1 (Clark Report) at p.
3 18. So, while Mr. Clark at his deposition may have agreed in theory that the SJPD’s projectile
4 impact weapon policy requires an officer only to use the weapon when objectively reasonable to
5 prevent serious injury, he makes clear that this policy alone is inadequate to address situations in
6 which the weapons are deployed in response to a mass protest, and that lack of training with
7 regard to the unlawfulness of the use of such weapons against crowds of protestors, along with a
8 lack of rules of engagement with regard to protestors, led to the indiscriminate and improper use
9 of those munitions against protestors. *Id.*, Ex. 1 (Clark Report) at p.18-19. The basis for Mr.
10 Clark’s opinion that SJPD officers did not receive such training was evident to him based on his
11 review of the materials he was provided, namely the bodycam footage, duty manuals, POST
12 guidelines, and after-action reports of the officers at the scene. *Id.*, Ex. 1 (Clark Report) at p. 3-
13 4.

14 Defendants’ most egregious misrepresentation of Mr. Clark’s opinion comes in at page 5
15 of their motion, wherein they state, without citation to the record, that “Mr. Clark clarified he
16 agreed with SJPD’s policies.” ECF 110, at p. 5. Mr. Clark explicitly does not agree with SJPD’s
17 policies. *Id.*, Ex. 3 (Clark Depo) at 91:4-92:1. To ignore this emphatic rejection of the efficacy
18 of SJPD’s policies, and then go on to state that Mr. Clark “does not criticize the SJPD for having
19 officers equipped with the 40mm launcher at the protests” is an unconscionable distortion of Mr.
20 Clark’s sworn testimony. ECF 110 at p. 5. Defendants characterize Mr. Clark’s testimony that
21 he “agrees with the requirements of the two bullet points” of one part of the duty manual as an
22 agreement with SJPD’s policies in general, despite the fact that Defendants immediately state
23 that those two points are “not the entirety of the policy.” *Id.*, Ex. 3 (Clark Depo) at 96:17-19.
24 Defendants state that Mr. Clark agrees that “no dispersal order is necessary before using the
25 weapon against someone who is assaulting an officer” when his answer was not any opinion of
26 his, but rather a response to a hypothetical presented by Defendants. ECF 110 at p. 5; Sun Decl.,
27 Ex. 3 (Clark Depo) at 170:15-171:11 (“with those boundaries of the question, I would agree.”).
28 The portion the deposition Defendants cite as Mr. Clark not criticizing SJPD’s deployment of the

1 40mm launchers at the protests is also false: Mr. Clark explicitly states the 40 millimeter
2 launchers should not have been deployed at the protests, “[t]here’s nothing in this incident that it
3 should have been deployed.” *Id.*, Ex. 3 (Clark Depo) at 156:10-19. Defendants even misstate
4 Mr. Clark’s testimony that POST training is “a requirement of California law, that all police
5 agencies do that” as somehow certifying that SJPD trains their officers by the standards required
6 by POST. *Id.*, Ex. 3 (Clark Depo) at 76:25-77:28.

7 Defendants also claim that Mr. Clark was not provided with training materials produced
8 in this case. ECF 110 p.6. However, Mr. Clark reviewed the POST Learning Domains which
9 are required training for all California Peace Officers and which Officer Adgar was certified as
10 having been trained in. Sun Decl., Ex. 1 (Clark Report) at pp. 3-4. He also received SJPD’s
11 policies and their Duty Manual. *Id.*, Ex. 1 (Clark Report) at p. 2. Defendant’s claim rests on a
12 definition of “training materials” which somehow excludes the relevant policies regarding
13 SJPD’s use of force, their Duty Manual, and the required state-level training necessary to be
14 certified as a peace officer in California. In any case, Mr. Clark’s opinions fall squarely in the
15 realm of his stated expertise.

16 Ultimately, Defendants cannot attempt to exclude Mr. Clark’s report on the premise that
17 some of his suggestions as to what SJPD should have done were actually carried out by SJPD.
18 The crux of his criticism remains as to what SJPD *did* do, which was in clear violation of
19 established police procedures, and is evident in the record.

20 **IV. MR. CLARK’S OPINION SJPD’S RESPONSE TO THE ANTI-POLICE**
21 **BRUTALITY PROTESTS WAS A FAILURE OF BOTH POLICY AND**
22 **PROCEDURE IS WELL SUPPORTED BY THE RECORD, AND HIS**
EXPERTISE, EXPERIENCE, EDUCATION, AND KNOWLEDGE.

23 Mr. Clark’s “experience and education, and after reviewing the record and all
24 documents” alone has been found by the Court to be sufficient to sustain his expert testimony.
25 *Abuka v. City of El Cajon*, No. 17-CV-347-BAS-NLS, 2019 WL 1077495, at *4 (S.D. Cal. Mar.
26 7, 2019). Mr. Clark’s experience, education, and familiarity with the record in this case also
27 precludes any motion to exclude his testimony. Defendants point to Mr. Clark’s lack of training
28 with regard to projectile impact weapons as evidence as evidence his opinion should be

1 excluded, ignoring the fact that Mr. Clark’s criticism of SJPD is directed at the failures in the
2 command and control structure of SJPD to promulgate and enforce appropriate crowd control
3 tactics, including but not limited to further guidance as to the use of 40mm launchers in a protest
4 setting. Sun Decl., Ex. 1 (Clark Report) at pp. 18-20. The basis of his opinion is the record,
5 including the deposition testimony of the command staff in charge of the response to the protests
6 on May 30. *Id.*, Ex. 1 (Clark Report) at p. 5. His opinion is also based on his own experiences as
7 an officer on the ground responding to a similarly chaotic protest following the murder of
8 Rodney King in 1992.

9 The fact that Mr. Clark has neither received nor given any training on the use of the
10 40mm launcher is irrelevant to the helpfulness or reliability of his testimony. Mr. Clark’s
11 testimony does not depend on his specific knowledge regarding the technical specifications and
12 proper maintenance of the 40mm projectile launcher. Mr. Clark is a police practices expert, and
13 as such his testimony relates to the whether or not the use of such devices comports with the
14 standards and practices all police officers are expects to uphold. The Southern District of
15 California, in another case in which Mr. Clark was retained as an expert, ruled that while Mr.
16 Clark was not necessarily expert on Tasers, “to the extent Mr. Clark’s testimony regarding
17 Tasers is premised on his experience concerning police training standards and policies, he may
18 opine on those issues.” *Godinez v. Huerta*, No. 16-CV-0236-BAS-NLS, 2018 WL 2018048, at
19 *4 (S.D. Cal. May 1, 2018). In this case, Mr. Clark’s opinions were clearly couched in his
20 evaluation of SJPD’s use of force policies, and their lack of an adequate policy and training for
21 use of those weapons at a protest. Sun Decl., Ex. 1 (Clark Report) at p. 18.

22 Defendants claim “Mr. Clark cannot point to any written policy or deficiency in training
23 to support” his opinion that SJPD allowed the use of arbitrary force on peaceful protestors.
24 However, Mr. Clark does point to several deficiencies in training, namely that officers equipped
25 with 40mm launchers were not given adequate guidance as to the use of these launchers in
26 protest settings. *Id.* He further identified several crowd control tactics which officers could have
27 employed instead of firing target-specific weapons into a crowd. *Id.*, Ex. 1 (Clark Report) at p.
28 19.

1 Defendants also claim that Mr. Clark “only” reviewed body camera footage from two
2 officers who fired projectile impact weapons, and that “one City Hall security camera video does
3 not show what any of the officers who shot less than lethal projectile impact weapons struck or
4 were aiming at when they shot.” ECF 110 at p.7. While it is true that Mr. Clark provides no
5 opinion as to who those officers were targeting and why, that is beside the point: Mr. Clark’s
6 opinion is that SJPD used *indiscriminate* force against the protestors on May 30. The fact that
7 the officers shot into a crowd (with Adgar later admitting he did not have a clear view of the
8 person he was supposedly aiming at) with their target-specific projectile impact weapons gave
9 rise to Mr. Clark’s opinion that SJPD as a whole did not adequately train those officers in the
10 proper use of those weapons or in proper crowd control tactics. Sun Decl., Ex. 1 (Clark Report)
11 at p. 9. To the extent that Defendants disagree with Mr. Clark’s characterization of who the
12 officers were shooting at, and what training they were or were not acting in accordance with, that
13 is a matter appropriate for cross-examination, and not appropriate grounds for a motion to
14 exclude.

15 Finally, Defendants claim that Mr. Clark’s opinion that the city failed to use well-known
16 law enforcement methods is contradicted by later testimony from Officer Dwyer. ECF 110 at p.
17 8. It is unclear how this is relevant to Mr. Clark’s qualifications as a police procedures expert.
18 The testimony Defendants cite to purporting to show that undercover officers were deployed
19 during the May 30 protest was taken the day after Mr. Clark’s deposition, and well after Mr.
20 Clark had prepared his report.¹ Mr. Clark’s opinions were, at the time, well supported by the
21 materials he relied on. If Defendants challenge the accuracy of his opinions, that is a fact dispute
22 more appropriate for a jury to decide.

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27 _____
28 ¹ It should be noted that while Defendants refer to “other police reports” they cite not to a report,
but to deposition testimony by Officer Dwyer. ECF 110 p. 8

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CONCLUSION

Plaintiff respectfully requests the court deny Defendants’ motion to exclude Roger Clark’s expert testimony.

Dated: September 20, 2023

McMANIS FAULKNER

/s/ Tianqi Sun
TIANQI SUN

Attorneys for Plaintiff
KYLE JOHNSON