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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Puente, *et al.*,

10 Plaintiffs,

11 v.

12 City of Phoenix, *et al.*,

13 Defendants.
14

No. CV-18-02778-PHX-JJT

ORDER

15 At issue is the admissibility of expert testimony provided by Mr. Roger Clark on
16 behalf of Plaintiffs. The Court considers Defendants' Motion to Exclude Opinions of Roger
17 Clark Under Rule 702 and *Daubert* (Doc. 236, Mot.), Plaintiffs' Opposition (Doc. 287,
18 Opp'n), and Defendants' Reply (Doc. 303, Reply). The Court finds this matter appropriate
19 for decision without oral argument. *See* LRCiv 7.2(f). The Court will grant in part and deny
20 in part Defendants' Motion for the reasons set forth below.

21 **I. LEGAL STANDARD**

22 Rule 702 of the Federal Rules of Evidence tasks the trial court with ensuring that
23 any expert testimony provided is relevant and reliable. *Daubert v. Merrell Dow Pharm.,*
24 *Inc. (Daubert)*, 509 U.S. 579, 589 (1999). "Evidence is relevant if it has any tendency to
25 make a fact more or less probable than it would be without the evidence and the fact is of
26 consequence in determining the action." Fed. R. Evid. 401. The trial court must first assess
27 whether the testimony is valid and whether the reasoning or methodology can properly be
28 applied to the facts in issue. *Daubert*, 509 U.S. at 592–93. Factors to consider in this

1 assessment include: whether the methodology can be tested; whether the methodology has
2 been subjected to peer review; whether the methodology has a known or potential rate of
3 error; and whether the methodology has been generally accepted within the relevant
4 professional community. *Id.* at 593–94. “The inquiry envisioned by Rule 702” is “a flexible
5 one.” *Id.* at 594. “The focus . . . must be solely on principles and methodology, not on the
6 conclusions that they generate.” *Id.*

7 The *Daubert* analysis is applicable to testimony concerning scientific and non-
8 scientific areas of specialized knowledge. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S.
9 137, 141 (1999). However, the *Daubert* factors may not apply to testimony that depends
10 on knowledge and experience of the expert, rather than a particular methodology. *U.S. v.*
11 *Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000) (citation omitted) (finding that *Daubert*
12 factors do not apply to police officer’s testimony based on 21 years of experience working
13 undercover with gangs). An expert qualified by experience may testify in the form of
14 opinion if his or her experiential knowledge will help the trier of fact to understand
15 evidence or determine a fact in issue, as long as the testimony is based on sufficient data,
16 is the product of reliable principles, and the expert has reliably applied the principles to the
17 facts of the case. *See Fed. R. Evid. 702; Daubert*, 509 U.S. at 579.

18 The advisory committee notes on the 2000 amendments to Rule 702 explain that
19 Rule 702 (as amended in response to *Daubert*) “is not intended to provide an excuse for an
20 automatic challenge to the testimony of every expert.” *See Kumho Tire Co.*, 526 U.S.
21 at 152. “Vigorous cross-examination, presentation of contrary evidence, and careful
22 instruction on the burden of proof are the traditional and appropriate means of attacking
23 shaky but admissible evidence.” *Daubert*, 509 U.S. at 596 (citation omitted).

24 **II. ANALYSIS**

25 In their Motion to Exclude, Defendants offer two arguments in support of excluding
26 Mr. Clark’s testimony: (1) Mr. Clark does not have sufficient relevant expertise to render
27 his opinions, and (2) Mr. Clark’s testimony is unhelpful and unreliable because it
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1 improperly characterizes facts and includes legal and conclusory opinions. The Court will
2 examine each of these arguments in turn.

3 **A. Relevant Expertise**

4 Mr. Clark is Plaintiffs' police practices expert. Defendants argue that Mr. Clark is
5 unqualified to testify as an expert under Rule 702, which requires a witness to be qualified
6 "by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. The witness
7 must be an expert "in the relevant field." *Kumho Tire Co.*, 526 U.S. at 152.

8 Plaintiffs have satisfactorily demonstrated that Mr. Clark has experience in the
9 relevant field. One of the central issues in this matter is the appropriate use of police force
10 to control an assembly and the related police policies and procedures. Plaintiffs show that
11 Mr. Clark was a police officer in the Los Angeles Sheriff's Department for 27 years; holds
12 an advanced certificate from the California Peace Officer Standards and Training
13 ("POST") program and graduated from POST Command College; trained other officers in
14 police tactics; commanded the North Regional Surveillance and Apprehension Team for
15 six years; developed procedures within the Emergency Operations Bureau for appropriate
16 police response during natural disasters and civil disorders; and was a line officer during
17 the East LA riots, a platoon leader during the Rodney King riots, a commanding officer
18 during multiple Rose Parades, and the intelligence officer for the 1984 Olympic Games.

19 Mr. Clark's experience and training are certainly relevant to issues in this case. To
20 the extent Defendants argue that Mr. Clark's experience is outdated, they will have the
21 opportunity to cross-examine him. But in this instance, the age of Mr. Clark's experience
22 and training does not make them irrelevant.

23 Defendants also complain that Mr. Clark has not used the precise munitions the
24 Phoenix Police Department ("PPD") used at the August 22, 2017 rally at issue in this case.
25 To begin with, Plaintiffs do demonstrate that, during the Rodney King riots, Mr. Clark
26 commanded a platoon using tear gas and 40-millimeter canister launchers, which the PPD
27 used on the crowd at the rally. Moreover, it is not required that Mr. Clark used the same
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1 munitions in order for him to be qualified to testify on police policies and procedures in
2 controlling a mass gathering.

3 The Court also disagrees with Defendants' contention that Mr. Clark is nothing
4 more than a "hired gun" in this case. While a professional expert hired to testify on a wide
5 range of topics with great frequency may indeed not pass muster as an expert in a specific
6 field, *see Rascon v. Brookins*, No. CV-14-00749-PHX-JJT, 2018 WL 739696, at *3
7 (D. Ariz. Feb. 7, 2018), Mr. Clark's experience and training are relevant to the issues in
8 this particular matter. His frequent work as a consultant and expert witness is not
9 disqualifying in and of itself. Again, if anything, Defendants' concerns at this point amount
10 to subject matter for cross examination, but they are not sufficient for the Court to deem
11 Mr. Clark unqualified to testify in this matter in light of his substantial relevant experience
12 and training.

13 **B. Helpfulness and Reliability of Testimony**

14 Defendants also contend that certain testimony of Mr. Clark should be excluded
15 because it consists of legal conclusions, fact characterizations, and/or conclusory
16 statements.

17 **1. Legal Conclusions**

18 Defendants' first contention, that Mr. Clark offers impermissible legal conclusions,
19 raises the question of the extent to which an expert may offer opinions on matters that
20 should lie with the jury. Federal Rule of Evidence 704 allows an expert to express an
21 opinion on an ultimate issue to be decided by the jury, but the Ninth Circuit has made clear
22 that the propriety of an expert opinion on ultimate issues does not extend so far as to permit
23 an expert to offer legal conclusions. *Muhktar v. Cal. State Univ., Hayward*, 299 F.3d 1053,
24 1065 n.10 (9th Cir. 2002) ("However, an expert witness cannot give an opinion as to her
25 legal conclusion, *i.e.*, an opinion on an ultimate issue of law.").

26 As the Court has found in a previous case involving Mr. Clark's testimony, to the
27 extent that Defendants seek to preclude Mr. Clark from testifying as to what use of force
28 is justified, or offering an opinion that a particular amount of force was not justified under

1 the facts of this case, Defendants' request is denied. In addition, in light of Mr. Clark's
2 experience and training in police practices and standards and the use of force generally,
3 Mr. Clark may opine about whether the use of munitions were justified under the
4 circumstances. Defendants have not established that such testimony must be excluded or
5 that this testimony constitutes a legal conclusion. Indeed, many of the examples from Mr.
6 Clark's expert report that Defendants cite in their Motion as improper legal conclusions are
7 not. For example, when Mr. Clark testifies that the use of force on an assembly by police
8 officers should not be indiscriminate and should take into account the assembly's right to
9 protest, or that police officers are trained to use force pursuant to their legal authority, or
10 that tools such as unlawful assembly announcements are available to police officers to
11 control a protest, Mr. Clark is not offering improper legal conclusions.

12 However, to the extent that Mr. Clark actually does offer legal conclusions, his
13 testimony is not permitted. While Mr. Clark may freely opine that the officers should not
14 have acted in the manner that they did, or that they should have done something else, he
15 must not volunteer an opinion that the officers acted unconstitutionally or exercised
16 excessive force. For example, where Mr. Clark opines that use of force on the crowd was
17 "a violation of constitutional rights" (Doc. 237-2, Mot. Ex. 1 at 16, Opinion 6), the opinion
18 is an improper legal conclusion,¹ and the Court will exclude all legal conclusions from Mr.
19 Clark's testimony.

20 **2. Fact Characterizations**

21 Defendants next argue that Mr. Clark improperly characterizes facts that a jury can
22 interpret without the aid of an expert witness. As the Court stated above, Rule 702 provides
23 that an expert qualified by experience may testify in the form of opinion if his or her
24 experiential knowledge will help the trier of fact to understand evidence or determine a fact
25 in issue. *See Daubert*, 509 U.S. at 579.

26 The examples of Mr. Clark's fact characterization that Defendants provide are
27 simply disagreements between Plaintiffs and Defendants about what the facts show. For

28 ¹ Plaintiffs concede as much in their Response. (Opp'n at 12 n.4.)

1 example, in challenging Mr. Clark’s opinion that PPD used indiscriminate force on the
2 entire crowd, Defendants state that the record shows that “[o]fficers’ uses of force were
3 measured, largely targeted, and proportional to escalating criminal behavior.” (Mot. at 14.)
4 This fact is clearly and genuinely disputed between the parties. The Court will not exclude
5 an opinion of Plaintiffs’ expert simply because it does not align with Defendants’ opinion.
6 The issue here is whether the expert’s opinion, based on sufficient data, is helpful to the
7 jury in understanding the evidence. Defendants have not demonstrated that Mr. Clark’s
8 testimony is not based on sufficient data or is unhelpful in this regard; indeed, the Court
9 will allow Defendants’ experts to offer their opinions similarly. *See, e.g.*, Fed. R. Evid. 702
10 Advisory Comm. Notes (2000) (stating “experts sometimes reach different conclusions
11 based on competing versions of the facts,” which is not a basis for exclusion in and of
12 itself). Moreover, as the Court has already stated, Defendants will have the opportunity to
13 cross-examine Mr. Clark to challenge the weight of his opinions.

14 **3. Conclusory Statements**

15 Finally, Defendants contend that many of Mr. Clark’s statements are conclusory.
16 Under *Daubert* and its progeny, the Court must ensure that expert testimony is based on
17 sufficient data, is the product of reliable principles, and the expert has reliably applied the
18 principles to the facts of the case. *See* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 579.

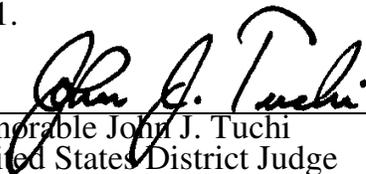
19 Defendants again point largely to disagreements they have with Mr. Clark’s
20 opinions rather than identifying missing sources or bases for his opinions. For example,
21 Defendants take issue with Mr. Clark’s opinions that it was improper for police officers to
22 use tear gas before they declared an unlawful assembly and that PPD’s policies regarding
23 the use of tear gas are insufficient. (Mot. at 18.) Defendants argue that no “accepted body
24 of knowledge require PPD to have more policies than it does.” (Mot. at 18.) Ironically,
25 Defendants’ argument is conclusory. Mr. Clark states that his opinions are based on his
26 training and experience, which are identified with specificity in his reports, as well as
27 publications including the Police Executive Research Forum (“PERF”) guidelines titled
28 “Handling Large, Preplanned Events, Recommendations and Preparations for the 2016

1 National Political Conventions.” (Doc. 237-2, Mot. Ex. 1 at 11–13.) Defendants have thus
2 not demonstrated that Mr. Clark’s opinions should be excluded as conclusory, and
3 Defendants can challenge the opinions through cross-examination.

4 Accordingly, the Court will grant Defendants’ Motion to the limited extent reflected
5 above, but the Motion is otherwise denied.

6 **IT IS THEREFORE ORDERED** granting in part and denying in part Defendants’
7 Motion to Exclude Opinions of Roger Clark Under Rule 702 and *Daubert* (Doc. 236), as
8 reflected in this Order.

9 Dated this 31st day of March, 2021.

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12 Honorable John J. Tuchi
13 United States District Judge
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