

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Miles Parish,
10 Plaintiff,
11 v.
12 Troy Lansdale, et al.,
13 Defendants.

No. CV-17-00186-TUC-JGZ

ORDER

14
15 Pending before the Court is Plaintiff's "Motion in Limine # 1: Preclude
16 Speculative and Irrelevant Opinion Re: Drug/Alcohol Use." (Doc. 121.) Defendants
17 oppose Plaintiff's Motion. (Docs. 137, 143.) The Court heard oral argument on the
18 motion on April 12, 2021. Upon consideration of the parties' briefing and oral argument,
19 the Court will grant Plaintiff's Motion.

20 **I. Background**

21 Plaintiff brings federal and state claims arising from a December 13, 2015
22 altercation with Tucson Police Department Officers Troy Lansdale and Bradley Kush.
23 Plaintiff alleges that while Defendants Lansdale and Kush were investigating a complaint
24 about a loud party, they illegally entered Plaintiff's home and pulled him outside, taking
25 him to the ground where Defendant Lansdale struck him. Plaintiff's claims include that
26 Defendants Lansdale and Kush illegally entered his home "due to racial animus against
27 African Americans" in violation of the Fourth Amendment. (Doc. 92, pp. 3-4.)

28 Plaintiff claims that several of his teeth were dislodged during the altercation with

1 the officers. (*See* Doc. 42, ¶ 60.) On March 2, 2016, Plaintiff saw John Day, DMD, to
2 determine the repair costs for his teeth. (Doc. 121, p. 3.) Dr. Day’s notes from the visit
3 include notations that Plaintiff presented with a “strong odor of alcohol and marijuana on
4 his clothes and breath” and “[r]e-evaluate this patient on a better day. Incoherent, poor
5 attention, listless—get neurological evaluation—head/brain injury may be in history.”
6 (Doc. 137-1, pp. 6, 7) Dr. Day’s notes also include his findings upon examination
7 concerning the mobility of Plaintiff’s teeth at the injury site, recommendations for
8 treatment, and estimated costs. (*Id.* at p. 6.)

9 At his deposition, Plaintiff denied that he had a strong odor of alcohol or
10 marijuana when he saw Dr. Day. (*Id.* at p. 19.) When Plaintiff was asked why Dr. Day
11 would include such a description in his notes, Plaintiff stated that Dr. Day told Plaintiff
12 that he had looked Plaintiff up on the internet and read about him. (Doc. 137, p. 4.)
13 Plaintiff further explained that Dr. Day “might have been biased.” (*Id.*) Plaintiff agreed
14 that by this statement, he meant that Dr. Day was out to get Plaintiff. (*Id.*)

15 **II. Discussion**

16 Defendants intend to introduce Dr. Day’s observations to establish that Plaintiff
17 failed to mitigate his damages, to corroborate officer and witness statements that Plaintiff
18 was intoxicated on the night of the incident,¹ and to show Plaintiff’s state of mind in that
19 he perceives that the officers and, now, Dr. Day, are biased against him based on race.
20 Plaintiff does not intend to introduce evidence from Dr. Day.

21 Pursuant to Rules 402 and 403, Fed. R. Evid., Plaintiff seeks to preclude Dr. Day’s
22 observations that Plaintiff was intoxicated and smelled of alcohol or marijuana. The
23 Court agrees with Plaintiff that this evidence should be precluded under Rules 402 and
24 403.²

25 ¹ The parties dispute whether Plaintiff was intoxicated on the night of the incident.

26 ² The Court rejects Plaintiff’s alternative argument that Dr. Day’s records are
27 inadmissible because of a discrepancy in Plaintiff’s birthdate on a handwritten form.
28 Plaintiff admits he saw Dr. Day and that Dr. Day’s forms include other information
pertinent to Plaintiff such as his address, his stepfather’s name, and his signature. (Doc.
137, p. 3.)

1 The evidence has little relevance to mitigation of damages. The duty to mitigate
2 focuses on the plaintiff's duty to prevent the aggravation of injuries already received and
3 to affect a recovery from those injuries. *Miller v. Lovett*, 879 F.2d 1066 (2nd Cir. 1989),
4 *abrogated on other grounds by Graham v. Connor*, 490 U.S. 386 (1989). Defendants
5 bear the burden of demonstrating that the plaintiff failed to take reasonable steps to
6 mitigate damages. See Martin A. Schwartz, *Section 1983 Litigation Claims and*
7 *Defenses*, § 16.08 (4th ed.) (collecting cases). Dr. Day examined Plaintiff, recommended
8 treatment, and provided estimated costs. Defendants fail to explain how any delay in
9 treatment by Dr. Day aggravated Plaintiff's injuries or affected his recovery.

10 Dr. Day's observations are also not relevant to Defendants' assertion that Plaintiff
11 was intoxicated on December 13, 2015. Alleged intoxication in March 2016 does not
12 tend to make it more or less likely that Plaintiff was intoxicated two months earlier on the
13 night of the incident. To admit this evidence would call for jury speculation based on an
14 unsupported inference that Plaintiff's conduct on the day of his visit with Dr. Day was the
15 same as on the incident night.

16 The evidence is also inadmissible under Rule 403. Dr. Day's observations not
17 only place Plaintiff in an unfavorable light, but a jury could unfairly infer that Plaintiff
18 was intoxicated on the night of the incident even though the doctor's notes do not pertain
19 to Plaintiff's state during the incident. Additionally, permitting the evidence would waste
20 time and confuse the issues by introducing a collateral issue: an event that is unrelated to
21 the incident.

22 Plaintiff's statement that Dr. Day described Plaintiff as he did because he might
23 have been biased against Plaintiff is also irrelevant. Whether Plaintiff perceived Dr. Day
24 to be biased against him in March 2016 does not tend to prove or disprove the Defendant
25 officers' motivation for their actions in December 2015. Even if Plaintiff's statement is
26 relevant to show he believes many are biased, it is inadmissible under Rule 403. Any
27 probative value is outweighed by waste of time and confusion of the issues caused by
28 focusing on a collateral issue that does not remotely involve Plaintiff's 2015 encounter

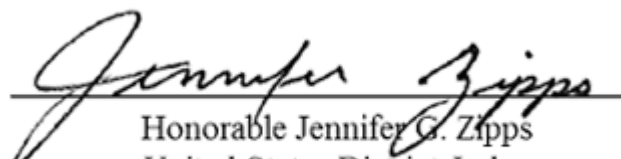
1 with police.

2 Accordingly,

3 IT IS ORDERED that Plaintiff's "Motion in Limine # 1: Preclude Speculative and
4 Irrelevant Opinion Re: Drug/Alcohol Use" (Doc. 121) is GRANTED. Defendants may
5 not question witnesses, refer to, or present argument relating to (1) Dr. Day's notes that
6 Plaintiff was intoxicated and smelled of alcohol and marijuana, or (2) Plaintiff's
7 statement that Dr. Day made the notes because he might have been biased against
8 Plaintiff.

9 Dated this 21st day of April, 2021.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


Honorable Jennifer G. Zipp
United States District Judge