Circuit Court for Baltimore City
Case No. 24-C-15-007117

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 580

September Term, 2017

DAVID AUSTIN

v.

ESTATE OF JEFFREY BLAIR
BY PERSONAL REPRESENTATIVE
TIAUNA BLAIR

Fader, C.J.,
Berger,
Friedman,

JJ.

Opinion by Friedman, J.
Dissenting Opinion by Berger, J.

Filed: April 25, 2019

It is a bedrock principle of law that appellate judges will not, in the absence of abuse of discretion, overturn factfinding below. Yet the advent and prevalence of video cameras has created a crack in this bedrock. We do not know, nor will we attempt to predict, how big this crack may eventually become. For now, however, the governing law permits us to engage in a more searching review of video evidence only in cases involving allegations of excessive use of force by police officers in the line of duty. This is just such a case. We have reviewed the video here and cannot affirm a verdict that conflicts with what our eyes can clearly see. We therefore reverse.

FACTS

On the afternoon of February 22, 2015, Baltimore City Police Officer David Austin was on routine patrol duty. While stopped at a red light, one of the cars in line behind him pulled out and drove up the wrong side of the road past the other waiting vehicles. The car, driven by Jeffrey Blair, entered the intersection and made a right turn against the red light in front of Austin's marked patrol car. Austin turned on his lights and sirens, and followed. Blair continued driving at 20 to 25 miles per hour, making several more turns and going through another red light. The slow pursuit continued for about a mile.

At this point, the narrative is picked up by a video camera mounted high above street level. The video shows two vehicles driving toward the camera and coming to a stop along the right side of the road, with Officer Austin's patrol car 15 of 20 feet behind Blair's car. Almost immediately, Blair got out of his car and started walking toward Austin's patrol car. As Blair approached, Austin opened his door and, according to his testimony, ordered Blair to go back to his car. Instead, Blair quickened his pace toward Austin. Once Austin

emerged from his patrol car, Blair immediately broke into a run and charged at him. Austin briefly tried to shield himself with the car door, and then began backing away. Blair closed the distance between them within two seconds. Austin drew his gun and fired four shots. Blair fell to the ground. The entire incident, from the time that Blair exited his vehicle until Austin fired his gun, lasted approximately seven seconds.

Due to where Blair fell, he is not visible on the video immediately following the shooting. Austin testified, however, that after being shot Blair continued to behave aggressively and was only subdued after he was twice shot with a taser by other officers arriving on the scene. Blair was taken to the hospital and treated for gunshot wounds to his abdomen and right hand. He was eventually released from the hospital into police custody. Blair died of other causes in June of 2015.

Blair's wife filed suit on behalf of his Estate, alleging civil assault and that the police had used excessive force. At trial, the jury viewed the video of the shooting and heard testimony from Officer Austin about the events.[1] The Estate also presented the testimony of Dr. Tyrone Powers, who was accepted by the court as an expert witness. Dr. Powers described the continuum of force that police officers are taught to use when dealing with

[1] Because the reasonableness of Officer Austin's actions is judged based only on what he knew at the time of the shooting, evidence of details that would have been unknown to him are not relevant to the analysis. Despite this, the trial court allowed the Estate to present the testimony of Blair's mother, who spoke about his normally peaceful, non-violent nature. Blair's wife testified that he was a good husband but had recently developed mental health problems. She described that in recent months, he had been hospitalized three times for behaving incoherently and having homicidal thoughts about killing her with a sword. Blair had been released from the third hospitalization only the day before the shooting.

the public. During his testimony, the video was played and stopped numerous times to allow Dr. Powers to analyze, frame by frame, whether he believed Blair was posing a threat at that instant and what actions he believed a reasonable officer would have taken to reduce that threat. Dr. Powers testified that in his opinion, a reasonable officer being attacked by an unarmed individual would have limited his use of force to defensive tactics or impact techniques, such as use of a baton or a taser,[2] and that in his view, Austin's use of deadly force—firing his gun—breached this standard.

At the close of the Estate's case, Austin moved for judgment. The circuit court granted the motion on all counts except those alleging civil assault and excessive force. Austin renewed his motion on those counts at the close of evidence, but it was again denied. The jury ultimately returned verdicts against Austin on both remaining counts and awarded damages to Blair's Estate. For the reasons that follow, we conclude that, faced with the same emergent circumstances, any prudent officer in Austin's position could reasonably have made the same decision, and the circuit court therefore erred in denying Austin's motion for judgment.[3]

[2] In response to Powers' testimony, Austin testified that he was not armed with a taser, and although he had pepper spray, Blair was too close for him to use it without contaminating himself. He also testified that while he had a baton, he did not believe that it would have been effective due to Blair's size and proximity.

[3] Austin raises four issues, challenging that the trial court erred by (1) denying his motions for judgment; (2) denying his motion for judgment notwithstanding the verdict; (3) allowing the Estate's expert witness to give his opinion on legal conclusions; and (4) admitting irrelevant and prejudicial character evidence about Jeffrey Blair. Because of our resolution of Austin's first issue, we do not address his remaining issues.

DISCUSSION

Whether a police officer has used excessive force in violation of the Maryland Declaration of Rights is judged under the standard of objective reasonableness established by the United States Supreme Court to analyze analogous claims made under the Fourth Amendment to the federal Constitution. *Richardson v. McGriff*, 361 Md. 437, 452 (2000) (citing *Graham v. Connor*, 490 U.S. 386 (1989)); *Hines v. French*, 157 Md. App. 536, 574-75 (2004). Under this standard, a police officer's actions are measured against "how a reasonably prudent officer would respond faced with the same difficult emergency situation." *Richardson*, 361 Md. at 452 (citing *Boyer v. State*, 323 Md. 558, 589 (1991)). Because what constitutes "reasonable" conduct is not easily defined, application is not mechanical and courts must pay "careful attention to the facts and circumstances of each particular case." *Richardson*, 361 Md. at 452 (citing *Graham*, 490 U.S. at 396). Importantly, the standard is whether the officer's actions were *reasonable*, not whether they were the most prudent or whether there were better, possibly less intrusive, means available. *Richardson*, 361 Md. at 455 (citing *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995)).

It is appropriate for a police officer to use deadly force if the officer "has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others." *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996) (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). The calculation must "embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. Depending on the situation, even an unarmed

assailant can put an officer at risk of a violent physical altercation. *Mitchell v. Schlabach*, 864 F.3d 416, 422-23 (6th Cir. 2017). Courts have consistently held that an officer who perceives an imminent threat to his safety does not have to wait to see if a suspect is armed before defending himself. *Anderson v. Russell*, 247 F.3d 125, 131 (4th Cir. 2001).

A police officer's actions should not be evaluated with the benefit of 20/20 hindsight, nor should they be measured against what other actions the officer could have taken instead. *Richardson*, 361 Md. at 452 (citing *Graham*, 490 U.S. at 396-97); *Randall v. Peaco*, 175 Md. App. 320, 334 (2007). "Reasonableness" is judged against the circumstances and facts as they were known to the officer at the time. *Richardson*, 361 Md. at 454-55; *Randall*, 175 Md. App. at 334. Police officers are not required to be omniscient or perfect; their actions must only fall within the range of conduct that would be considered objectively reasonable from the perspective of a prudent officer on the scene. *Richardson*, 361 Md. at 454-55; *Randall*, 175 Md. App. at 333-34. To warrant submission to a jury, the officer's actions must be so flagrant that they raise the question of whether any reasonable officer under the same circumstances would have made the same choice. *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 696 (1st Cir. 1994) ("[W]e are concerned here not with proof of raw facts but whether, on known or assumed facts, police behavior can be deemed egregious enough to submit the matter to a jury.").

I. STANDARD OF REVIEW

A trial court's decision to grant or deny a motion for judgment is a legal question reviewed without deference. *DeMuth v. Strong*, 205 Md. App. 521, 547 (2012). An

appellate court applies the same standard as a trial court and looks at the evidence in the light most favorable to the non-moving party. *Id.*

II. ANALYSIS

The video recording of the encounter between Austin and Blair was the centerpiece of the case below and is part of the record here. The United States Supreme Court has instructed that in circumstances such as these, when faced with a claim of excessive use of force by a police officer where reliable video evidence is available, appellate courts should not blindly adopt the interpretation promoted by either of the parties. *Scott v. Harris*, 550 U.S. 372, 380-81 (2007). Rather, an appellate court should view the facts in the light portrayed by the video. *Id*.

In *Scott v. Harris*, a sheriff's deputy ended a high-speed chase by executing a maneuver that caused the suspect to lose control of his car. 550 U.S. at 375. The suspect sustained serious injuries and sued, alleging that the deputy had used excessive force in violation of federal constitutional protections. *Id*. at 375-76. On cross motions for summary judgment, the parties portrayed substantially different interpretations of the underlying facts, and the lower courts had consistently adopted the version of the story told by the suspect, as the non-moving party. *Id*. at 378. Writing for the Court, Justice Scalia reversed based on his review of video footage of the car chase that directly contradicted the suspect's story. *Id*. at 378-80. While the suspect had characterized his driving as sufficiently cautious and controlled such that he presented no danger to anyone else, the video showed a vastly different sequence of events that was more reminiscent of a "Hollywood-style car chase of the most frightening sort." *Id*. Justice Scalia held:

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; *it should have viewed the facts in the light depicted by the videotape*.

Id. at 380-81 (emphasis added). The Supreme Court therefore relied on its own viewing of the facts as depicted in the videotape to evaluate the objective reasonableness of the police officer's actions.

Although the objective reasonableness standard requires a fact-specific analysis, if the material facts are known, "the reasonableness of [the officer's] actions ... is a pure question of law." *Randall*, 175 Md. App. at 336-37 (quoting *Scott*, 550 U.S. at 381 n.8); *see also Roy*, 42 F.3d at 696 ("we are concerned here not with proof of raw facts but whether, on known or assumed facts, police behavior can be deemed egregious enough to submit the matter to a jury"). The role of a factfinder is to assess the credibility of the witnesses and make the necessary inferences to determine the material facts. *Benton v. State*, 224 Md. App. 612, 256 (2015). But here, as in *Scott*, establishing the material facts did not turn on judging the credibility of after-the-fact testimony because the material facts are on the video. *Scott*, 550 U.S. at 378; *see also Mitchell*, 864 F.3d at 418 ("There is no serious dispute about the facts of this case because a camera on the officer's dashboard captured most of the relevant event."). When the record contains video evidence that reliably establishes the material facts, appellate courts can and should review that evidence.

Scott, 550 U.S. at 380-81. Thus, while we will view the facts and draw all reasonable inferences in favor of the Estate, we will not give weight to an interpretation that is not supported, or is contradicted, by the video. *Id*.; *Mitchell*, 864 F.3d at 418.

To determine whether Austin's use of force was reasonable, we must view the encounter as he perceived it.[4] Austin intended only to make a traffic stop. He didn't know anything about the driver of the car. The lengthy slow-speed pursuit, though not dangerous to bystanders, was unusual. Blair got out of his car before the patrol car had even come to a complete stop. Blair didn't appear to be holding a weapon, but he was noticeably larger

[4] Although the Estate tried to position its expert testimony as evidence creating a fact question, an expert's interpretation of facts does not materially alter them. Powers' testimony relied on paused images from the video to review, frame by frame, the distance between Austin and Blair, the movements they both made, and the precise location of Blair's hands. But as the events were unfolding in real time, Austin did not have the option to pause Jeffrey Blair. The entire incident, from the time that Blair exited his car until Austin drew his weapon, took approximately seven seconds. From the time that Austin exited his patrol car until he drew his weapon only four seconds elapsed. Powers' testimony—relying on details that the officer wouldn't have had time to evaluate to determine that an officer could have proceeded differently and used lesser force—is precisely the kind of retrospective second-guessing that the case law warns against. *Richardson*, 361 Md. at 454-55 (citing *Schulz*, 44 F.3d at 649). Thus we decline to place the same degree of reliance on Powers' testimony as our dissenting colleague urges.

It would be equally misplaced to speculate that Austin might have been able to defend himself with fewer shots. The number of shots fired is not determinative of whether the use of force was excessive. *Elliott*, 99 F.3d at 643. "[I]f police officers are justified in firing at a suspect … to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014) (noting that police officers did not act unreasonably in firing 15 shots where the suspect had not abandoned his attempts to escape or been neutralized when the shots were fired). Austin's gun carried 15 rounds, but he only fired four times, suggesting that he did not simply fire indiscriminately until he emptied his gun. Given the quick succession of the shots fired, trying to distinguish each shot as a separate use of force is an endeavor more reflective of "the peace of a judge's chambers" rather than the "tense, uncertain, and rapidly evolving" circumstances faced by the officer on the scene. *Graham*, 490 U.S. at 396-97.

than Austin. Blair was moving fast, and his intentions and state of mind were unknown. The distance and angle of the video make it impossible to see the expression on Blair's face, but there is no mistaking that his body language is aggressive. The Estate's suggestion that Blair may not have looked threatening from the front is simply not an inference that is supported by the record.

Jeffrey Blair initiated the confrontation and was the aggressor. During what should have been a routine traffic stop, Blair intentionally placed himself in danger by attacking an armed officer. *See Scott*, 550 U.S. at 384 (noting that it is appropriate to consider the relative culpability of the parties involved). That Jeffrey Blair was himself unarmed was only conclusively known after the fact. Without warning, Austin faced an unprovoked assault by an unknown, fast-moving assailant who did not slow down after Austin pulled his service weapon. He had mere seconds to decide how to defend himself. There was no way for Austin to know then, or for us to know now,[5] how far Blair would have taken his assault or how violent the altercation might have become.

Under the objective reasonableness standard, the relevant question is not whether there was any evidence, no matter how slight, from which a jury might reasonably have concluded that this specific officer on this specific occasion could have or should have

[5] Blair's medical records from his treatment after the shooting, which were admitted into evidence at trial, showed that Blair had informed hospital staff that he had been attempting to commit suicide by forcing a police officer to shoot him. Were we to interpret the encounter in hindsight, as the Estate's expert did, knowing that Blair intended to provoke deadly force suggests that the situation may have been even more volatile than it had appeared to Austin at the time. Because this information was unknown to Austin, however, it is not part of our analysis.

done something different; the question is whether the actions taken were so deficient that no reasonable officer under the same circumstances would have done the same thing.[6] *Richardson*, 361 Md. at 455; *Roy*, 42 F.3d at 695-96. It is a question of law that recognizes the risks inherent in the role of police officers. Properly applied, the objective reasonableness standard also protects the public against the unnecessary use of force under the guise of law enforcement. The exercise of deadly force against an unarmed citizen who poses no threat of harm is an abuse of a police officer's authority and a tragedy. It is a tragedy that happens too often, and disproportionately impacts people of color. Appellate courts have a responsibility to ensure that officers are properly held accountable for actions that violate the rights of the citizens they are supposed to be protecting when, for example, they use deadly force in circumstances in which their own safety or that of others is not at imminent risk. Here, however, the video shows that a reasonable officer in Austin's position would have discerned that Jeffrey Blair posed a real and imminent threat of serious physical harm.

In the relative calm of a courtroom, a jury might review the evidence here and wish that the police officer would have handled the situation differently. But the objective reasonableness standard prohibits that kind of second-guessing when an officer has had to make a life and death decision under rapidly evolving, potentially dangerous, circumstances. *Roy*, 42 F.3d at 695. "[N]o court can expect any human being to remain passive in the face of an active threat on his or her life." *Elliott*, 99 F.3d at 644. We cannot,

[6] It is on this point that we must part ways with our dissenting colleague.

in good conscience, conclude that to avoid financial liability, a lone officer under attack by an unknown assailant should be limited to hand-to-hand combat, accepting the risk of serious—perhaps mortal—harm, and the possibility that the officer's own weapons could be seized and used against him or her. *Richardson*, 361 Md. at 459. The law "simply does not require police to gamble with their lives in the face of a serious threat of harm." *Elliott*, 99 F.3d at 641. Based on our review of the record, including the video, we conclude that any reasonable officer in Austin's position would have perceived Blair's actions as a threat creating a risk of serious bodily harm. We therefore hold that, as a matter of law, Austin's actions in using deadly force to defend himself were objectively reasonable.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. COSTS TO BE PAID BY APPELLEE.

Circuit Court for Baltimore City
Case No. 24-C-15-007717

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DAVID AUSTIN

v.

ESTATE OF JEFFREY BLAIR BY PERSONAL REPRESENTATIVE TIAUNA BLAIR

Fader, C.J.,
Berger,
Friedman,

JJ.

Dissenting Opinion by Berger, J.

Filed: April 25, 2019

I, respectfully, dissent. I am keenly aware of the video evidence and its effect on the opinion by the majority in this case. Nevertheless, our task is to determine "if there is any evidence, no matter how slight, that is legally sufficient to generate a jury question." *Bord v. Baltimore Cty.*, 220 Md. App. 529, 543 (2014). This is a case where a police officer fired four times on an unarmed civilian. At trial, an expert witness offered compelling testimony that Baltimore City Police Officer David Austin ("Austin") exceeded the maximum range of force that a reasonable officer would have used in the circumstances. Viewing this evidence in the light most favorable to the Estate, the evidence supports Judge Michael DiPietro's careful and considered determination to send this case to the jury.

A. The Circuit Court Did Not Abuse Its Discretion In Denying Austin's Motion for Judgment At the Close of Evidence and Denying Austin's Motion for Judgment Notwithstanding the Verdict.

It is undisputed that Austin discharged his firearm four times on Blair, and that Blair's hands were visibly empty when he exited his vehicle. Indeed, nothing that Blair does in the video would suggest to a reasonable officer that Blair was carrying a weapon. Although Austin testified that Blair "leaned over towards his passenger side" before exiting his vehicle, the video does not show Blair's movements inside his vehicle. The video does show, however, that Austin exited his police vehicle without a weapon in hand, suggesting that he did not believe Blair was armed and dangerous at that time.

Austin testified that Blair subsequently tried to "grab [Austin's] gun" and then "went right into his [own] pants as if he had a weapon." Because Blair was facing away from the camera just before the shooting, the video does not show what he was doing with

his hands. Critically, Austin testified that he drew his firearm *before* he thought that Blair was reaching for a weapon, and the video shows that very little time intervened between Austin drawing his firearm and Blair falling to the ground. Viewing the video in the light most favorable to the Estate, a reasonable jury could have certainly concluded that, in the moment Austin decided to use deadly force, he had no reason to believe that Blair was armed.

In assessing Austin's response to an apparently unarmed aggressor, the jury could have easily credited the expert testimony of Dr. Powers, who opined that Austin had exceeded the range of force that an objective reasonable officer would have used in the circumstances. Concerning the moment that Austin fired on Blair, Dr. Powers testified as follows:

> [THE ESTATE'S COUNSEL]: In your expert opinion what would the range a reasonable officer would have used [sic] at this time under these circumstances?
>
> [DR. POWERS]: Still impact techniques; mace, baton. Seeing no weapon based on not only the video presentation but the depositions. Seeing no weapon at this particular time, the techniques training of the academy of a baton or mace or defensive training.
>
> [THE ESTATE'S COUNSEL]: So Officer Austin breached that standard?
>
> [AUSTIN'S COUNSEL]: Objection.
>
> THE COURT: It has to be asked in the form of an opinion.
>
> [THE ESTATE'S COUNSEL]: Oh. In your opinion to a reasonable degree of certainty based on your knowledge,

> training and experience, did Officer Austin breach that standard?
> [DR. POWERS]: Yes.

Dr. Powers went on to provide the following testimony:

> [THE ESTATE'S COUNSEL]: How many shots had been discharged at this point, if you know?
>
> [DR. POWERS]: I can't tell from the video presentation.
>
> [THE ESTATE'S COUNSEL]: But you heard Officer Austin testify?
>
> [DR. POWERS]: That's correct.
>
> [THE ESTATE'S COUNSEL]: And what did he say, if you recollect?
>
> [DR. POWERS]: He, in his testimony, indicated he fired four shots from the evidence that I read in the file. The photographic and evidence presented were taken by the Baltimore City Police Department Crime Lab. They found four casings on the ground.
>
> [THE ESTATE'S COUNSEL]: In your expert opinion what would be the range a reasonably objective officer would have used at this time under these circumstances?
>
> [DR. POWERS]: Again, the range would have been, as I indicated before, impact techniques and defensive tactics.
>
> [THE ESTATE'S COUNSEL]: And to a reasonable degree of certainty based on your knowledge, training and experience, did Officer Austin breach that standard?
>
> [DR. POWERS]: Yes.

As a former Maryland State Trooper, FBI agent, and consultant for numerous police departments, Dr. Powers gave compelling testimony that Austin had **not** acted reasonably in shooting Blair.

I respectfully disagree with the majority's assertion that the video, standing on its own, unequivocally shows Austin's actions to be reasonable. A video can show what happened, but it cannot tell a jury how a reasonable officer would have responded in the circumstances. To be sure, the video establishes that Austin had reason to believe he was in danger. Nevertheless, the jury had to assess the level of danger, and Austin's response to that danger, from the perspective of an objectively reasonable officer. In so doing, an average juror, lacking the specialized training of a police officer, could reasonably look for some guidance as to how an objective reasonable officer, armed with both lethal and non-lethal weapons, would have approached the situation. Dr. Powers's testimony provided such guidance.

The majority concludes that Austin necessarily acted reasonably in using deadly force. I must, respectfully, disagree. In my view, the level of risk associated with the different choices that Austin faced on that day is a question of fact for the jury. In resolving this question, the jury could have reasonably drawn upon the testimony of Dr. Powers -- himself a former law enforcement officer -- who listed a range of defensive actions that Austin could have taken, including "a baton or mace or defensive training." Although the majority may have some doubts as to how effective these alternatives would have been, we must "assume[] the truth of all credible evidence on the issue and any inferences therefrom

in the light most favorable to . . . the non-moving parties." *Bord*, *supra*, 220 Md. App. at 543.

The majority emphasizes that we must view the encounter as Officer Austin perceived it. Viewed under that lens, the events leading up to the shooting unfolded rapidly, leaving Austin with little time to deliberate. Certainly, "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments." *Richardson v. McGriff*, 361 Md. 437, 452 (2000). It does not follow, however, that an officer who makes a split-second decision to use deadly force is not, as a matter of law, using excessive force. In the instant case, the quickness of the incident was one factor among many for the jury to consider. A reasonable jury could have also considered the testimony of Dr. Powers, the fact that Austin was not clearly armed, and the training and skills that Austin could draw upon in making that split-second decision. Weighing these various considerations is a difficult and fact-intensive undertaking, and I believe that reasonable minds could easily reach different results. Accordingly, I do not agree that the rapidity of the events leading to the shooting justifies taking the question from the jury.

The majority cites to *Mitchell v. Schlabach*, 864 F.3d 416, 418 (6th Cir. 2017), *reh'g denied*, (Aug. 3, 2017), in which the U.S. Court of Appeals for the Sixth Circuit held that "[t]here is no serious dispute about the facts of this case because a camera on the officer's dashboard captured most of the relevant event." The Court in *Mitchell* further held that the police officer acted reasonably in shooting an unarmed individual who was charging at

him. Notably, the Sixth Circuit stressed in *Mitchell* that its decision "does not stand for the proposition that deadly force is reasonable or proper whenever a suspect charges an officer or defies an order." *Id.* at 424. With this in mind, the present case is readily distinguishable from *Mitchell* on a number of points.

In *Mitchell*, the suspect led the police officer on an "extended, 100-mile-per-hour car chase" that culminated in a car crash. *Mitchell*, *supra*, 864 F.3d at 423. Indeed, in summarizing the factual context of its holding, the Sixth Circuit emphasized the suspect's "willingness to put lives at risk." *Id.* at 424. Blair, by contrast, maintained a low speed with Austin in pursuit and safely pulled his vehicle to the side of the road. Unlike the suspect in *Mitchell*, Blair did not verbally threaten Austin. Furthermore, the Estate's case was bolstered by expert testimony that Austin had exceeded the maximum force that an objectively reasonable officer would have used. No such testimony was presented in *Mitchell*. In my view, it is ultimately far more appropriate to commit the issue of reasonableness to a jury in these circumstances, rather than applying a highly fact-intensive opinion from another jurisdiction.

Assuming *arguendo* that Blair's actions prior to the first shot were sufficiently threatening to warrant deadly force, there would still be a jury question as to the reasonableness of Austin firing the second, third, and fourth shots. Austin testified that he fired four shots at Blair, and the video shows that Blair fell to the ground almost as soon as

Austin raised his gun.[7] The logical inference from this evidence is that Austin either fired four shots in rapid succession or shot Blair after he fell. Either scenario could lead a reasonable jury to question whether the second, third, or fourth shot was justified. Indeed, the trial judge made the same observation in denying Austin's motion for judgment notwithstanding the verdict:

> [The jury] may have found that it was an issue involving the firing of four shots as opposed to one shot. And that perhaps one shot or even two shots would have been the maximum level of reasonableness under those circumstances.

Because the timing of the shots cannot be clearly determined from the video, I would not rule out -- as a matter of law -- the conclusion that Austin acted unreasonably in firing four bullets at an unarmed citizen.

The majority cites *Elliott v. Leavitt* for the proposition that "the number of shots by itself cannot be determinative as to whether the force used was reasonable." 99 F.3d 640, 643 (4th Cir. 1996). In *Elliott*, the suspect was pointing a gun at the officers when they fired, leading the Fourth Circuit to conclude that the officers merely "sought to ensure the elimination of a deadly threat." *Id.* In the present case, as I have explained *infra*, a

[7] There is a factual dispute as to how many bullets connected with Blair. The Estate claims that Blair was shot four times. Austin asserts that only two of the four shots actually struck Blair. According to the trauma history and physical report completed by the University of Maryland Shock Trauma Center, Blair was diagnosed with "GSW - Gun shot wound" and had been "shot in the R hand and abdomen." The report further noted "GSW x2 to R hand," indicating that Blair had been shot twice in the right hand, in addition to the gunshot wound in his abdomen. Although the report does not specifically note that Blair was shot in the head, it does indicate that Blair had a "[s]calp gunshot wound without underlying fracture or associated intracranial injury."

reasonable jury could have concluded that Austin had no reason to believe Blair was armed. A proper application of the reasonableness standard "requires careful attention to the facts and circumstances of each particular case." *Richardson*, *supra*, 361 Md. at 452 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Accordingly, the number of shots fired may necessarily be more relevant when the suspect is -- or appears to be -- unarmed.

To be sure, there is also compelling evidence that Austin's actions were reasonable. The video shows that Blair, a relatively large man, was charging rapidly toward Austin at the time of the shooting. Indeed, Blair subsequently stated that his intention was to commit "suicide by cop." Nevertheless, a motion for judgment "is concerned only with whether the plaintiff has met the burden of *prima facie* production, as a matter of law, and not with the weight of the evidence, as a matter of fact." *Terumo Med. Corp. v. Greenway*, 171 Md. App. 617, 623 (2006). Further, "[w]eighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." *Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91, 136 (2000).

The excessive force inquiry is highly fact-intensive, and there are important details in the case *sub judice* that are either disputed or open to interpretation. It is undisputed that Austin discharged his firearm four times on an unarmed civilian. Further, a reasonable jury could conclude (1) that Austin had no reason to believe that Blair was armed; (2) that a reasonable officer in these circumstances would have confined himself to using non-deadly defensive tactics, as Dr. Powers had testified; and (3) that Austin continued to discharge his weapon after Blair was neutralized by the first shot. Consequently, I remain

steadfast in my view that the Estate presented "any evidence, no matter how slight, that is legally sufficient to generate a jury question" as to excessive force under a preponderance of the evidence standard. I simply do not believe that it is our role to weigh this evidence against the admittedly compelling evidence in Austin's favor. Accordingly, I would affirm the circuit court's denial of the motion for judgment and the motion notwithstanding a verdict.

B. The Circuit Court Did Not Abuse Its Discretion In Admitting Dr. Powers's Testimony.

Because I would hold that the verdict returned by the jury should not be set aside, it is necessary to consider the other two issues raised by Austin, which relate to the admissibility of evidence. The first of these issues concerns the testimony of Dr. Powers. Austin argues that the circuit court erred in allowing Dr. Powers "to draw a legal conclusion that was solely vested in the province of the jury, that being whether Officer Austin violated the range of reasonable force options." I would hold that Dr. Powers's testimony was admissible to help the jury evaluate Austin's actions from the perspective of an objective reasonable officer.

As a preliminary matter, I note that this issue was, in fact, preserved for our review. Under Maryland Rule 8-131, an appellate court ordinarily will not decide an issue unless it plainly appears by the record to have been raised in or decided by the trial court. Here, Austin first challenged the admissibility of Dr. Powers's testimony in a motion *in limine*, arguing that "[t]he balance of Dr. Powers's designation -- that the officers used excessive force -- is not a proper area of expert opinion testimony under Maryland law." At trial,

Austin's counsel objected -- and subsequently moved to strike -- when Dr. Powers was asked whether Austin had exceeded the range of force that a reasonable officer would have used:

> [THE ESTATE'S COUNSEL]: In your expert opinion what would the range a reasonable officer would have used [sic] at this time under these circumstances?
>
> [DR. POWERS]: Still impact techniques; mace, baton. Seeing no weapon based on not only the video presentation but the depositions. Seeing no weapon at this particular time, the techniques training of the academy of a baton or mace or defensive training.
>
> [THE ESTATE'S COUNSEL]: So Officer Austin breached that standard?
>
> [AUSTIN'S COUNSEL]: Objection.
>
> THE COURT: It has to be asked in the form of an opinion.
>
> [THE ESTATE'S COUNSEL]: Oh. [. . .] In your opinion to a reasonable degree of certainty based on your knowledge, training and experience, did Officer Austin breach that standard?
> [DR. POWERS]: Yes.
>
> [THE ESTATE'S COUNSEL]: Why?
>
> [DR. POWERS]: Again, he exceed -- he went to deadly force. And the training academies, if you have an unarmed individual, the tactic techniques that they train you in. So you do not have to use deadly force on an unarmed individual. They train you in defensive tactics. They give you a baton when you leave the academy. In some cases they give you a taser. They certainly give you mace. They give you other options to use less than lethal force when you're dealing with an individual who is unarmed.
>
> [AUSTIN'S COUNSEL]: Objection; moved to strike.

THE COURT: Overruled.

It is clear, therefore, that the admissibility of Dr. Powers's testimony -- and the proper scope of that testimony -- was raised by Austin and decided by the circuit court.

Turning to the question of admissibility, under Maryland Rule 5-702, expert testimony is admissible "if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." In making this determination, we consider "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702.

In the present case, Austin challenges the appropriateness of Dr. Powers's testimony on the subject of reasonableness. In particular, Austin argues that Dr. Powers testified as to an ultimate issue, infringing upon the role of the fact-finder. I disagree. The Estate's counsel did not ask Dr. Powers whether Austin used excessive force against Blair. The Estate's counsel confined his examination to questions about the range of force that an objective reasonable officer might employ in the same circumstances. Inasmuch as the average layperson does not have the training and experience of a police officer in areas such as defensive tactics, the use of weapons, and the continuum of force, expert testimony on this subject was appropriate to help the jury assess the reasonableness of Austin's actions.

Indeed, "[w]here the plaintiff alleges negligence by a professional, expert testimony is generally necessary to establish the requisite standard of care owed by the professional." *Schultz v. Bank of Am., N.A.*, 413 Md. 15, 28 (2010); *see also Catler v. Arent Fox, LLP*, 212 Md. App. 685, 720 (2013) (stating that "[o]ften, allegations of professional malpractice require expert testimony, because the intricacies of professional disciplines generally are beyond the ken of the average layman"); *see also Franch v. Ankney*, 341 Md. 350, 361 (1996) ("Expert testimony of attorneys is admissible in attorney malpractice cases, however, for the purpose of establishing the standard of care for a reasonable, prudent lawyer in a particular situation."). Similarly, expert testimony was helpful in the present case to explain the "objective reasonable officer" standard because an officer who uses deadly force is drawing upon training in weapons, defensive tactics, and use-of-force principles that are beyond the ken of the average layperson.

To be sure, Dr. Powers went one step further by testifying that Austin's use of a firearm exceeded the maximum force that a reasonable officer would have employed. This testimony is closer to the ultimate issue of whether Austin used excessive force, which "must be judged from the perspective of a reasonable officer on the scene[.]" *Richardson*, *supra*, 361 Md. at 485-86. Nevertheless, testimony that is otherwise admissible "is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact." Md. Rule 5-704. This Court has held that "[e]ven a lay witness may offer an opinion on an ultimate issue of fact, such as the reasonableness of [legal] fees, if the opinion is rationally based on the perception of the witness and helpful to the determination of the

trier of fact." *Zachair, Ltd. v. Driggs*, 135 Md. App. 403, 438 (2000); *see also Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571, 584 (1980) (stating that "the opinion of an expert, even on the ultimate issue of fact, is admissible if it is relevant and will aid the trier of fact").

Austin argues that the reasonableness of an officer's actions is an ultimate question *of law*, rather than a question of fact. "[I]t is the general rule that an expert witness may not opine on questions of law, except for those concerning the law of another jurisdiction." *Solomon v. State Bd. of Physician Quality Assur.*, 155 Md. App. 687, 706 (2003) (citing *Franch*, *supra*, 341 Md. at 361).[8] Critically, Austin does not provide any Maryland authority for the proposition that the reasonableness of an officer's actions is a pure question of law.[9] In the absence of such authority -- and in light of our case law allowing

[8] Austin also cites *Jones v. State* for the proposition that "[w]hen a standard . . . has been fixed by law, no witness whether expert or nonexpert . . . is permitted to express an opinion as to whether or not the person or conduct in question measures up to that standard." 425 Md. 1, 27-28 (2012) (ellipses in original). In *Jones*, the Court of Appeals held that expert testimony was not necessary to support the plaintiff's claim that the State had been negligent in training and supervising two sheriff's deputies who entered her home without a warrant. *Id.* at 26-28. The Court did *not* hold that expert testimony would have been inadmissible. The Court stressed that "[t]he jury . . . needed only its 'common knowledge or experience' to understand that an officer violates the Fourth Amendment if the officer crosses the threshold of a home . . . without proper authority to do so." *Id.* at 28 (internal citation omitted). In the present case, there is no such bright-line rule that the jury could have relied on to determine whether Austin used excessive force.

[9] Austin cites *Elliott v. Leavitt* for the proposition that "whether uncontroverted conduct represent[s] the use of excessive force" is "an issue of law." *Supra*, 99 F.3d at 644. I am not persuaded that *Elliott* should be construed to categorically prohibit experts from testifying as to reasonableness in excessive force cases. As I will endeavor to explain, the Fourth Circuit rejected such a categorical prohibition in *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993).

expert testimony as to professional standards of reasonableness -- I would reject Austin's overly rigid approach to expert testimony in excessive force cases. Dr. Powers's testimony was admissible under Maryland Rule 5-702 because it was rationally based and helpful to the finder of fact.

My conclusion that Dr. Powers's testimony was admissible is informed by the Fourth Circuit's case-by-case approach to expert testimony in excessive force cases. *See Kopf v. Skyrm*, 993 F.2d 374, 379 (4th Cir. 1993) (holding that the trial court erred in excluding expert testimony that an officer's use of a police dog was unreasonable), *cited in United States v. Mohr*, 318 F.3d 613, 624-25 (4th Cir. 2003) (holding that the trial court did not err in allowing an expert to testify that an officer's use of a police dog was "inappropriate" and that there was "no reason" for the officer's actions); *see also Waterman v. Batton*, 294 F. Supp. 2d 709, 721 n.30 (D. Md. 2003) ("The Fourth Circuit has held that expert witness testimony on police use of force may be admissible in cases alleging excessive force, including expert testimony on the ultimate issue of whether a particular use of force was objectively reasonable under the circumstances."), *rev'd on other grounds*, 393 F.3d 471 (4th Cir. 2005).[10]

[10] Prior to *Kopf*, the U.S. District Court for the District of Maryland noted that "[i]t would interfere inappropriately with [the jury's] judgment process, mandated by *Graham v. Connor*, to allow expert testimony as to what reasonableness is, either abstractly or as applied." *Wells v. Smith*, 778 F. Supp. 7, 8 (D. Md. 1991). The Court of Appeals implicitly rejected this reasoning in *Kopf* by holding that the trial court should have allowed expert testimony concerning the reasonableness of the officer's use of a police dog.

Indeed, it is worth taking a closer look at *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993). In that case, the U.S. Court of Appeals for the Fourth Circuit considered whether the trial judge had properly excluded expert testimony concerning the officers' use of a police dog and slapjacks. *Kopf v. Skyrm*, 993 F.2d 374, 378 (4th Cir. 1993). One of the proposed experts would have testified that the use of a police dog was unreasonable and violated accepted police practices. *Id.* The other proposed expert would have testified that "the use of blackjacks or slapjacks by all three officers [was] brutal and excessive." *Id.* The Fourth Circuit rejected the notion that experts in excessive force cases are categorically prohibited from opining on the "objective reasonableness" standard:

> As a general proposition, the "objective reasonableness" standard may be comprehensible to a lay juror. On the other hand, any "objective" test implies the existence of a standard of conduct, and, where the standard is not defined by the generic -- a reasonable person -- but rather by the specific -- a reasonable officer -- it is more likely that Rule 702's line between common and specialized knowledge has been crossed.[11]

Id. The Fourth Circuit continued:

> The facts of every case will determine whether expert testimony would assist the jury. Where force is reduced to its most primitive form -- the bare hands -- expert testimony might not be helpful. Add handcuffs, a gun, a slapjack, mace, or some other tool, and the jury may start to ask itself: what is mace? what is an officer's training on using a gun? how much damage can a slapjack do? Answering these questions may often be assisted by expert testimony.

[11] Under Rule 702 of the Federal Rules of Evidence, one of the requirements for expert testimony is that "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."

Id. at 379.

Applying this flexible standard, the Fourth Circuit concluded that a police dog "is a more specialized tool than a gun or slapjack" and that, consequently, the trial court erred in excluding the expert testimony concerning the officer's use of a police dog. *Id.* at 379. The Fourth Circuit acknowledged that the "proffered testimony about the use of slapjacks is a closer issue" because "[a] club and the damage it can cause when it strikes a person's head are easily understood by most laymen." *Id.* Nevertheless, the Fourth Circuit concluded that the expert "should clearly have been permitted to testify as to the prevailing standard of conduct for the use of slapjacks, even if he had been precluded from giving an opinion on the ultimate issue of whether the use in this case was reasonable." *Id.* The Fourth Circuit did not "foreclose the district court from admitting [the expert's] ultimate opinion on the use of slapjacks on retrial." *Id.* at 379 n.3.

Although *Kopf* and its progeny are not binding authority in the present case, I find the reasoning of the Fourth Circuit to be persuasive.[12] In the case *sub judice*, Austin used a firearm, which is a more specialized tool than a baton or bare hands. More broadly, Austin selected one option -- the use of a firearm -- from a range of defensive strategies

[12] I recognize that a few courts have adopted a more categorical approach to expert testimony in excessive force cases. *See Quagliarello v. Dewees*, 802 F. Supp. 2d 620, 625 (E.D. Pa. 2011) (ruling that the plaintiff's expert could not testify "as to ultimate legal conclusions, including whether [the officer] used 'unreasonable' force"); *see also Alvarado v. Oakland Cty.*, 809 F. Supp. 2d 680, 691 (E.D. Mich. 2011) (ruling that the plaintiff's expert "will not be permitted, either by his report or his testimony at trial, to opine as to whether [the officer's] conduct in arresting Plaintiff was unreasonable under [law enforcement] guidelines or practices"). Nevertheless, the Fourth Circuit's flexible approach is consistent with Maryland Rule 5-702, which focuses on whether the testimony "will assist the trier of fact to understand the evidence or determine a fact in issue."

available to him, each carrying a different level of risk to himself, and a different degree of deadliness. Police officers typically receive specialized training in defensive tactics, including the use of firearms, batons, and mace, as well as broader training in the "continuum of force" that may be used against civilians. Without expert guidance, it would be difficult for a layperson to evaluate the reasonableness of Austin's choice of a firearm rather than a non-lethal weapon, particularly in the unusual circumstances of this case.

The bulk of Dr. Powers's testimony was an explanation of the "objective reasonable officer" standard that did not encroach upon the jury's role. Insofar as Dr. Powers opined that Austin failed to act as an objective reasonable officer would have done in the circumstances, I am inclined to agree with the trial judge that this conclusion followed logically from Dr. Powers's other testimony:

> [I]f an expert says the limit of objectively reasonable force under certain situation would have been a voice command, and an officer used his firearm, then . . . it kind of goes without saying that they exceeded the objectively reasonable limit of force.

Indeed, a close review of the record in this case demonstrates that the trial judge did a superb job in limiting the extent of Dr. Powers's testimony in this case. Even if Dr. Powers opined on an ultimate issue, his testimony would not be objectionable solely on that basis. Furthermore, I am not persuaded that Dr. Powers opined on a question of law. Following the case-by-case approach of the Fourth Circuit, I would not reverse the trial court's decision to admit the testimony of Dr. Powers.

C. The Circuit Court Did Not Err In Admitting Testimony Regarding Blair's Character.

The final issue raised by Austin is whether the circuit court should have allowed Anne Blair to testify that she had never seen her son act in a violent manner. In Austin's view, Blair's supposedly peaceful character was irrelevant to the reasonableness inquiry. I disagree.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Austin argues that "[h]e had no way of knowing of Mr. Blair's supposed character prior to the events of February 22, 2015, and so none of that history could have informed the officer's decisions on that day[.]" Nevertheless, Anne Blair's testimony tended to show that Blair was not a violent person, which would make it less likely that Blair was acting in a threatening manner on February 22, 2015. Although the chain of inferences is somewhat attenuated, I cannot say that Anne Blair's testimony had *no tendency* to make a material fact more or less probable.

To be sure, Anne Blair's testimony is undermined to some extent by the video evidence, which shows Blair charging rapidly toward Austin. The video does not, however, unequivocally establish all of the relevant facts, as Austin acknowledges:

> As the video was taken from behind Mr. Blair, it cannot show his facial expressions or his full demeanor as they appeared to Officer Austin[.]

Indeed, the video does not show Blair "moving around and leaning toward the passenger side of the vehicle," "attempt[ing] to reach for [Austin's] service weapon," or reaching

"into his pants as if he had a weapon." In light of these lacunae in the video evidence, Anne Blair's testimony supported an inference that Blair's demeanor and off-camera actions were less threatening than Austin made them out to be. Anne Blair's testimony, therefore, was not a "visible fiction" that "no reasonably jury could have believed." *See Scott v. Harris*, 550 U.S. 372, 380-81 (2007).

Austin maintains that "Mr. Blair's statements to his treating doctors . . . establish his resolve to appear threatening to the officer." Austin's reasoning, however, actually supports the admission of Anne Blair's testimony into evidence. Austin argues that "[w]hile Officer Austin was unaware of Mr. Blair's state of mind at the time of the shooting, it is still relevant to the inquiry because it indicates that Mr. Blair intended to act in a menacing manner to elicit a deadly response from the officer." I agree that the evidence concerning Blair's motive was relevant. Likewise, Anne Blair's testimony was relevant because it tended to show that Blair was *not* acting in a threatening manner on February 22, 2015. Weighing and reconciling this evidence is an undertaking for the finder of fact. *See Hollingsworth & Vose Co., supra*, 136 Md. App. at 136.

Austin further argues that Anne Blair's testimony should have been excluded under Maryland Rule 5-403 because its probative value was substantially outweighed by the resulting unfair prejudice. Under Maryland Rule 8-131, an appellate court ordinarily will not decide an issue unless it plainly appears by the record to have been raised in or decided by the trial court. In *Mines v. State*, we held that a challenge to testimony on grounds of prejudice was not preserved because "appellant specifically objected to [the] testimony on

the ground that it was irrelevant, but at no time did he argue below that the testimony was prejudicial." 208 Md. App. 280, 291 (2012). Here, Austin specifically objected that Anne Blair's testimony was irrelevant and character-based:

> Objection on the basis of relevance initially, and also I think this is an improper attempt to develop character evidence for -- either to form the width or not with respect to ultimate events. Ultimately the day of the event, which is February the 22nd. This may be a means by which counsel is attempting to infer that Mr. Blair was being non-violent in his encounter with Officer Austin on the 22nd.[13]

At no time did Austin argue below that Anne Blair's testimony was prejudicial. As a result, the admissibility of the testimony under Maryland Rule 5-403 was not preserved for our consideration.

Insofar as the issue of prejudice was preserved, it is without merit. Austin argues that Anne Blair's testimony "suggest[ed] that Officer Austin should have made a different decision based on information that was not even known to him at the time, contrary to the established jurisprudence for an excessive force claim." This argument merely rehashes the relevancy issue, which has previously been addressed. Austin further contends that "defense counsel had no ability to question Mr. Blair directly about previous incidents in his history that may have belied his mother's assertion of his propensity for non-violence." This is pure speculation; the mere possibility of prejudice is not sufficient to compel reversal under an abuse of discretion standard. Furthermore, Anne Blair's testimony played a very limited role in the Estate's case. The crux of the case presented at trial

[13] Austin does not argue on appeal that Anne Blair's testimony was impermissible character evidence.

concerned the video, Austin's testimony, and the testimony of the experts. Accordingly, I would hold that Anne Blair's testimony was properly admitted into evidence.

In sum, this is, admittedly, a close case and one that a finder of fact could view differently. It is not our role to opine on the correctness of the jury's decision, but to determine whether the Estate established a *prima facie* case of excessive force. A reasonable jury could credit Dr. Powers's testimony that Officer Austin's action exceeded the range of force that an objective reasonable officer would have used in similar circumstances. A reasonable juror could also conclude that Officer Austin had no reason to believe that Jeffrey Blair was armed, and that Officer Austin continued to discharge his weapon after Jeffrey Blair was neutralized. Dr. Powers's testimony and the video evidence, viewed in the light most favorable to the Estate, were legally sufficient for the learned trial judge to submit this case to the finder of fact for the jury to decide this highly fact-intensive question of excessive force. I would, therefore, affirm the judgment of the circuit court.