[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-13542

RANDALL GREER,
individually and as personal representative of the
Estate of Christopher Greer, deceased,

Plaintiff-Appellant,

CHRISTINE GREER,

Plaintiff,

versus

WAYNE IVEY,
in his official capacity as Sheriff of Brevard County,
TOWN OF INDIALANTIC,
Florida, a municipal corporation,
JAMES HAMAN,
Cpl., individually and as an employee of Wayne Ivey
in his official capacity as Sheriff of Brevard County,
DIOMEDIS CANELA,
Deputy, individually and as an employee of Wayne Ivey
in his official capacity as Sheriff of Brevard County,

Defendants-Appellees,

BREVARD COUNTY, FLORIDA, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:15-cv-00677-CEM-GJK

(Filed Jul. 25, 2022)

Before JORDAN, NEWSOM, and ED CARNES, Circuit Judges.

PER CURIAM:

Christopher Greer brandished a knife at his brother and grabbed his sister-in-law's throat, and Greer's brother called the police. Sheriff's deputies responded to the call, and after Greer failed to comply with their commands, two of those deputies shot and killed him inside his home. Greer's brother, sister-in-law, and estate filed a lawsuit containing a total of twenty-four claims against the sheriff, the town, and the two deputies who shot Greer.

The only remaining parties are the Greer Estate and the deputies. The only claims involved in this appeal are 42 U.S.C. § 1983 excessive force claims and state law wrongful death claims.

I.

This is the second time this case has been before us. The first appeal in the case was from the district court's grant of summary judgment in favor of the defendants on all counts. We reversed that judgment in part. *Greer v. Ivey*, 767 Fed. App'x 706, 714 (11th Cir.

2019) (*Greer I*). We held that a question of fact precluded summary judgment on the Estate's § 1983 excessive force claims and its state law wrongful death claims based on assault and battery. *Id.* at 712-13. Both the federal and state claims hinged on the question of whether "it was reasonable for [the deputies] to use deadly force on [Greer]." *Id.* at 710.

On remand, those claims went to trial, and a jury answered that question. It found that neither deputy violated Greer's "right not to be subjected to excessive or unreasonable force during an arrest." The Estate contends that the jury reached that verdict only because the district court made several errors that resulted in an unfair trial. We affirm because the trial may not have been perfect, but it was fair, and that is enough. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) ("This Court has long held that a litigant is entitled to a fair trial but not a perfect one, for there are no perfect trials.") (cleaned up).

II.

During voir dire, the Estate asked the district court to use a juror questionnaire that included several questions about implicit bias in favor of police officers. Implicit bias, according to the Estate, is unconscious bias that the potential juror may not be aware of. The Estate argues that its written questions were phrased to uncover that bias. For example, the questionnaire asked potential jurors whether they

agreed or disagreed with this statement: "Truth usually takes a backseat when police shoot and kill a citizen if it threatens an officer's personal and professional standing."

The court did not use the Estate's written questionnaire. Instead, it orally asked the potential jurors who stated that they had "friends or relatives that work in law enforcement" whether there was "anything about that relationship that you're concerned might interfere with your ability to remain fair and impartial in this case?" The court also explicitly warned the venire that it did not want jurors on the panel who would believe or disbelieve a witness simply because the witness worked in law enforcement. After the court gave both parties the opportunity to propose "any additional questions" for the court to ask, the Estate did not propose any questions about implicit bias in favor of police officers.

The Estate contends that the court failed to properly question venire members about their potential implicit or unconscious bias in favor of law enforcement. It argues that the oral questions the court asked were not designed to reveal that bias.

Trial courts have "wide discretion in determining which questions are asked during voir dire." *United States v. Nash*, 910 F.2d 749, 753 (11th Cir. 1990); *see also United States v. Hill*, 643 F.3d 807, 836 (11th Cir. 2011) ("The method of conducting the voir dire is left to the sound discretion of the trial court and will be upheld unless an abuse of discretion is found.")

(quotation marks omitted). "Even if the district court failed to ask particular voir dire questions that may be warranted in the case, we will find no abuse of discretion if the voir dire questioning as a whole complied with the essential demands of fairness, that is, if it gave reasonable assurance to the parties that any prejudice of the potential jurors would be discovered." *Nash*, 910 F.2d at 753 (quotation marks omitted).

Even if we assume that the questions on the Estate's questionnaire were "warranted in [this] case," the "questioning as a whole" fell well within the district court's wide discretion and "gave reasonable assurance to the parties that any prejudice of the potential jurors would be discovered." *Id.* District courts are not required to ask the specific questions proposed by the parties or ask them in a certain format, *see id.*, and the court's questions were designed to uncover biases in favor of law enforcement. The court did not abuse its discretion by asking the questions that it did in the format that it did, instead of the ones the Estate wanted in the format that the Estate wanted.

III.

The Estate contends that the district court made several erroneous evidentiary rulings. It argues that the court should have excluded evidence of Greer's intoxication, evidence that the deputies were not criminally prosecuted for killing Greer, and parts of the testimony of two expert witnesses.

A.

Before trial, the court denied the Estate's motion to exclude evidence that Greer was intoxicated when the deputies shot him. At trial, the defense presented without objection Greer's autopsy report, which included his blood alcohol level (of 0.222%) and toxicology. Starting with opening statements and continuing throughout trial, the defense referred to Greer's blood alcohol level. It also presented evidence that his blood alcohol level was well above the level (0.08%) that will result in a DUI charge under Florida law, evidence that there were prescription drugs in his system, and evidence that on a past occasion he had acted "extremely agitated" and had "required both physical restraints" and sedatives while intoxicated.

At the Estate's request, the court gave a cautionary instruction to the jury. The court told the jurors that it was not a crime for Greer to have a high blood alcohol level and that the purpose of comparing his blood alcohol level to the minimum level for DUI was to "give [the jury] some real life context" for his level of intoxication. The Estate now contends that allowing any evidence about Greer's intoxication was reversible error.

Generally, we review evidentiary rulings only for an abuse of discretion. *United States v. Brown*, 665 F.3d 1239, 1247 (11th Cir. 2011). But when a party "fail[s] to preserve [its] claim of evidentiary error, we

[ ] review only for plain error." *Id.* The Estate failed to object at trial to the autopsy report containing evidence of Greer's blood alcohol level and toxicology, but it argues that we should still review the issue for an abuse of discretion because the district court had definitively resolved the issue by denying the Estate's pre-trial motion to exclude that evidence. *See*, *e.g.*, Fed. R. Evid. 103(b); *United States v. Harris*, 886 F.3d 1120, 1127 n.2 (11th Cir. 2018). We don't need to decide whether the Estate's objection to the evidence of Greer's intoxication was forfeited because, even if it wasn't, the district court did not abuse its discretion or plainly err by admitting any of the evidence on that subject.

The Estate argues that the evidence of intoxication was not relevant. But it was because the deputies tried to communicate with Greer repeatedly, and his intoxication made it less likely that he could understand and respond to their instructions. The intoxication evidence also undermined testimony that Greer was a non-violent person because his intoxication made it more likely that he acted out of character, particularly given the evidence that on another occasion when he was intoxicated he had been extremely agitated and had required physical restraints and sedatives.

The Estate argues that the evidence was unfairly prejudicial. But it was not. In closing, counsel for one of the deputies told the jury that it was perfectly legal for Greer to be drinking in his own house. And the

court gave a limiting instruction in which it reminded the jurors that the "only purpose" for considering Greer's blood alcohol level was "to give [them] some real life context in terms of how does that compare to a .08, in terms of what would be a DUI type of offense." The court stressed that the jury should not hold Greer's blood alcohol level against him "in any way."

Even if the intoxication evidence could be considered unfairly prejudicial, a "limiting instruction can diminish [that] unfair prejudice." *Brown*, 665 F.3d at 1247. And we presume that the jury followed its instructions. *United States v. Stone*, 9 F.3d 934, 938 (11th Cir. 1993) ("Few tenets are more fundamental to our jury trial system than the presumption that juries obey the court's instructions."). The Estate has failed to show that the court abused its discretion in its handling of the intoxication evidence.

B.

The Estate called as one of its witnesses Ryan Bliss, the Florida Department of Law Enforcement officer who investigated Greer's shooting. On direct examination, Bliss testified that in investigations of officer-involved shootings like Greer's, an investigative report is written and submitted "to the state attorney's office." The court ruled that testimony opened the door to questions by the defense about what the state attorney did with the report that was submitted in the Greer investigation. Concerned that the jury would wonder whether the state attorney had pressed

criminal charges (which could unfairly prejudice the deputies), the court allowed the defense to ask a narrow question on cross-examination: whether it was true that the state attorney had declined to prosecute the deputies. Bliss answered that was true. The court immediately gave a limiting instruction. It explained to the jury that because the standard of proof in a criminal case is different from the standard in a civil case the non-prosecution "decision should have no impact on [the jury's] decision in this case."

The Estate challenges the admission of that testimony. Evidence of criminal non-prosecution is generally inadmissible in a related civil case because the difference in the standards of proof might mislead the jury. *See FIGA v. R.V.M.P. Corp.*, 874 F.2d 1528, 1531 (11th Cir. 1989). But otherwise inadmissible evidence can be properly admitted when opposing counsel "open[s] the door" to that evidence. *United States v. West*, 898 F.2d 1493, 1500 (11th Cir. 1990); *see also Bearint ex rel. Bearint v. Dorel Juv. Grp., Inc.*, 389 F.3d 1339, 1349 (11th Cir. 2004) ("This Circuit recognizes the concept of curative admissibility—also called opening the door or fighting fire with fire.") (quotation marks omitted). And a limiting instruction can offset any potential jury confusion that might arise from the evidence that a civil suit defendant was not criminally prosecuted. *See United States v. Wyatt*, 611 F.2d 565, 569 (5th Cir. 1980).[1]

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all

The district court did not abuse its discretion here. It was not a clear error of judgment to rule that the Estate elicited evidence from its own witness that opened the door to the defense's follow-up question. *See United States v. Cooper*, 926 F.3d 718, 730-31 (11th Cir. 2019) (holding that the district court did not abuse its discretion by admitting otherwise inadmissible testimony after the defense opened the door to that evidence).[2] In any event, the court's instruction "minimized the risk[]" that the testimony may have misled the jury. *Wyatt*, 611 F.2d at 569. And, once again, we presume the jury followed its instructions. *Stone*, 9 F.3d at 938.

C.

The Estate challenges the testimony of two defense experts: the medical examiner who performed Greer's autopsy, Dr. Krzysztof Podjaski, and the testimony of a forensic firearms and tool examiner, Richard Ernest. The Estate contends that the district court abused its discretion by allowing those two expert

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decisions of the former Fifth Circuit handed down before October 1, 1981.

[2] The Estate also argues that it could not have opened the door because the defense did not object to Bliss' direct testimony. *See Woods v. Burlington N. R.R. Co.*, 768 F.2d 1287, 1292 (11th Cir. 1985), *rev'd on other grounds*, 480 U.S. 1 (1987) (listing, as one of several "good reasons why skilled trial counsel may make a tactical decision not to object to an improper argument," the possibility that "the improper argument may open the door"). We have never held that a party must object to evidence before curative admissibility is available, and we won't do so here.

witnesses to testify that Greer's left arm was raised when the deputies shot him.

i.

The video of the deposition of medical examiner Podjaski was played for the jury at trial. Before trial, the Estate had asked the court to exclude testimony from that deposition about the position of Greer's arm at the time of the shooting. The argument behind the motion was that particular testimony went beyond the scope of the autopsy report and that it transformed Podjaski into a retained expert witness who had not submitted an expert's report as required by Fed. R. Civ. P. 26(a)(2)(B). The court ruled that Podjaski would be allowed to testify concerning the position of Greer's arm because his opinion about it was based on his examination and the autopsy he had performed. The court also reasoned that Podjaski was not a retained expert, but a non-retained one and they are not required to submit a report that satisfies Rule 26(a)(2)(B).[3]

During the video deposition, medical examiner Podjaski testified that the wounds in Greer's arm suggested it was "more likely than not" that his arm was "raised in some manner" when the deputies shot him.

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[3] Rule 26(a)(2)(C) provides that "if the witness is not required to provide a written report, [the party's] disclosure [of expert testimony] must state" both "the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705" and "a summary of the facts and opinions to which the witness is expected to testify." But the Estate does not rely on this provision on appeal.

He also testified that he first reached that opinion during his deposition while reviewing the autopsy report.

The Estate argues that the court's ruling about Podjaski's testimony was an abuse of discretion under Rule 26(a)(2)(B). But the disclosure requirements the rule imposes apply to witnesses "retained or specially employed to provide expert testimony in the case." Fed. R. Civ. P. 26(a)(2)(B). As the district court reasoned, Podjaski was neither a retained expert nor specially employed within the meaning of the rule. He prepared his autopsy report in the normal course of his medical examiner job duties, not specifically for this litigation.

The Estate argues it is enough for the rule to apply that Podjaski formed his opinion during his deposition (after reviewing his autopsy file, which contained a photograph of the wounds). But that isn't enough. The rule applies only if the expert was "retained or specially employed." That Podjaski formed his opinion when he was testifying during this litigation, based on material produced or gathered before this litigation, does not make him retained or specially hired.

The Estate also argues that the court should have barred the defense from using Podjaski's testimony at trial because he was unsure of his opinion, making it inadmissible under *Daubert*. But the Supreme Court has explained that "it would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science." *Daubert v. Merrell Dow Pharms., Inc.*,

509 U.S. 579, 590 (1993). In his deposition, Podjaski gave his opinion about arm position and admitted that he "c[ould] be wrong." It was not an abuse of discretion for the court to find that Podjaski's testimony satisfied *Daubert*. As the district court explained, any lack of certainty went to the weight the jury should give his testimony, not its admissibility. *See Quiet Tech. DC-8, Inc. v. Hurel Dubois UK Ltd.*, 326 F.3d 1333, 1341, 1345 (11th Cir. 2003) (stating that "it is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence" and concluding that the plaintiff's argument that an expert's testimony was "methodologically flawed" went "to the weight, not the admissibility, of the evidence he offered").

ii.

As for the forensic firearms and tool examiner, Ernest, the Estate argues that it was error to allow him to testify about Greer's arm position because he is not a forensic pathologist. We have never held that forensic firearms experts are categorically excluded from testifying about body position or wound path, or that forensic pathologists are the only experts who can give testimony about those things. The Estate offers no convincing argument or authority for why we should create a categorical exclusion, and Ernest has considerable experience in this area. He has worked as a firearms examiner or forensic consultant since 1977. Over the decades, his job duties have included tasks such as determining "angles" and "shooting distances" at

"shooting scenes" and "[a]ssisting [m]edical [e]xaminers in ballistics related areas," including "muzzle to target distances based on wound characteristics" and "intermediate target effects."

District courts enjoy "considerable leeway in making [] determinations" about the admissibility of expert testimony, and we will reverse those determinations only if they are "manifestly erroneous." *United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc) (quotation marks omitted). This one was not.

IV.

During trial, the district court expressed concern that submitting both the Estate's federal and state law claims to the jury could result in an inconsistent verdict or lead to double recovery for the Estate. The court told the Estate to choose between its state and federal claims; the Estate protested but chose the federal claims. The court instructed the jury on the Estate's federal claims and not its state law claims. The jury verdict found that neither deputy "intentionally committed acts that violated [Greer's] federal constitutional right not to be subjected to excessive or unreasonable force during an arrest, which caused [his] injury." The court entered judgment in favor of the defendants on all claims.

The Estate contends that the court erred and a new trial is required, but we disagree. Even if it was error to enter judgment for the defendants on the state law claims without submitting those claims to the jury,

it was harmless error because it did not affect the Estate's substantial rights. *See Vista Marketing, LLC v. Burkett*, 812 F.3d 954, 979 (11th Cir. 2016) (even when the district court errs "the challenging party must establish that the error affected substantial rights to obtain reversal and a new trial"). It did not affect the Estate's substantial rights because the jury's findings about reasonable force as to the federal claims would have definitively resolved the state law claims in favor of the defendants, just as it resolved the federal law claims.

Our decision in the first appeal in this case shows why.[4] We held that the Estate's federal excessive force claims and state law wrongful death claims all "turn[ed] on the reasonableness of the deputies' use of deadly force." *Greer I*, 767 Fed. App'x at 712. The Estate's wrongful death claims were based on the underlying torts of assault and battery. Under Florida law, "the sole basis and limit of an arresting officer's liability in making a lawful arrest is founded on a claim of battery." *City of Miami v. Sanders*, 672 So. 2d 46, 48 (Fla. 3d DCA 1996). It is only when "excessive force is used in an arrest" that "the ordinarily protected use of force by a police officer is transformed into a battery." *Id.*

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[4] Our *Greer I* decision was unpublished and not precedential, *see* 11th Cir. R. 36-2, but it is the law of the case, *see United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005) ("The law of the case doctrine bars relitigation of issues that were decided, either explicitly or by necessary implication, in an earlier appeal of the same case.").

Like a federal excessive force claim, a Florida "battery claim for excessive force is analyzed by focusing upon whether the amount of force used was reasonable under the circumstances." *Sanders*, 672 So. 2d at 47; *Davis v. Williams*, 451 F.3d 759, 767 (11th Cir. 2006) ("Whether the force used is reasonable [for purposes of a Fourth Amendment excessive force claim] turns on the facts and circumstances of each particular case. . . .") (quotation marks omitted). Under Florida law, "officers are entitled to a presumption of good faith in regard to the use of force applied during a lawful arrest, and officers are only liable for damage where the force used is clearly excessive." *Davis*, 451 F.3d at 768 (quotation marks omitted); *see also Sanders*, 672 So. 2d at 47. For the Estate to succeed on either its wrongful death claims or its § 1983 excessive force claims, it needed to prove that the deputies used excessive force on Greer.

After all, in our opinion in the first appeal we recognized that both the federal claims and the state law claims "turn[] on whether, in the moment before the shooting, the deputies reasonably believed that [Greer] posed an immediate threat to their safety." *Greer I*, 767 Fed. App'x at 710. And that is why we said the "principal question in this case is whether . . . it was reasonable for [the deputies] to use deadly force on [Greer]." *Id.* The jury answered that central question or questions (depending on how you count) in favor of the deputies, finding that neither of them caused Greer's death by "subject[ing] [him] to excessive or unreasonable force."

It would be impossible to reconcile that jury finding with a judgment in favor of the Estate on the state law claims. For that reason, any arguable error in leaving off the verdict form a place for the jury to reiterate that finding for the state law claims was harmless. *Cf. Prieto v. Malgor*, 361 F.3d 1313, 1320 (11th Cir. 2004) (holding that "even if the district court should have let the question [of whether the officers acted with bad faith or malicious purpose] go to the jury, any error was plainly harmless" because the jury had already determined that the officers did not commit a battery, so "they could not have found that either officer had battered [the plaintiff] with bad faith or malice").

For what it's worth, in other cases we have considered federal and Florida excessive force claims together, using the same standard to determine whether an officer's use of force was excessive. *See Johnson v. City of Miami Beach*, 18 F.4th 1267, 1275 (11th Cir. 2021) (considering the plaintiff's federal and Florida excessive force claims together); *Penley v. Eslinger*, 605 F.3d 843, 856 (11th Cir. 2010) (granting summary judgment to the defendant officer on federal and Florida excessive force claims because his use of deadly force was "objectively reasonable"); *Davis*, 451 F.3d at 768 (relying on the "facts and reasoning set forth" in the federal excessive force analysis to evaluate whether an officer's use of force was "transformed into a battery" under Florida law) (quotation marks omitted).

All of this means that the jury verdict which resolved the Estate's § 1983 claims in favor of the defendants also defeated its state law claims because the

deputies cannot be liable under state law, just as they can't be under federal law, for using reasonable, non-excessive force. *See Penley*, 605 F.3d at 856. If it was error to submit only the federal claims to the jury, it was harmless error.

V.

Finally, the Estate contends that the court erred by instructing the jury using the Eleventh Circuit pattern jury instructions for claims of excessive force in violation of the Fourth Amendment during an arrest. *See Pattern Civ. Jury Instr. 11th Cir. 5.4* (2019). Those instructions included the following language: "When making a lawful arrest, an officer has the right to use reasonably necessary force to complete the arrest." Greer was not formally arrested—or perhaps it is more accurate to say that his arrest was not completed—so the court instructed the jury that "[f]or the purposes of your deliberations, an attempt to effectuate an arrest can be considered an arrest."

The Estate argues that there was no factual basis for the court's instruction about attempted arrest because there was no evidence the deputies were attempting to arrest Greer when they shot him. During trial, the court found that "the record is replete with examples of testimony indicating that the purpose of [the deputies] going in there was to take [Greer] into custody." We agree that it is beyond dispute that the deputies were attempting to arrest Greer when they shot him. *See United States v. Wright*, 862 F.3d 1265,

1282 (11th Cir. 2017) ("The term 'arrest' ordinarily means that someone has been seized and taken into custody, however briefly.").

The Estate also argues that the court should have specifically instructed the jury about the use of deadly force, not the use of force more generally. "When evaluating a trial court's failure to give a requested instruction, the omission is error only if the requested instruction is correct, not adequately covered by the charge given, and involves a point so important that failure to give the instruction seriously impaired the party's ability to present an effective case." *Knight through Kerr v. Miami-Dade Cnty.*, 856 F.3d 795, 814 (11th Cir. 2017) (quotation marks omitted). The Estate asserts that we should require courts to give an instruction specific to deadly force in circumstances like the ones in this case. *Cf., e.g.*, *Rasanen v. Doe*, 723 F.3d 325, 334 (2d Cir. 2013) (holding that a "special instruction based on *Garner*" is necessary "in the original *Garner* context: the fatal shooting of an unarmed suspect") (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

But "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test." *Scott v. Harris*, 550 U.S. 372, 382 (2007); *see also Penley*, 605 F.3d at 849-50 (reaffirming that Fourth Amendment excessive force claims involving deadly force are analyzed under an objective reasonableness standard).

We have affirmed the use of the pattern instructions in deadly police shooting cases before, *see*, *e.g.*, *Knight*, 856 F.3d at 815, and we do so again here. "The principal question in this case is whether . . . it was reasonable for [the deputies] to use deadly force on [Greer]." *Greer I*, 767 Fed. App'x at 710. Because the jury instructions posed that question and accurately stated the law, they fell within the district court's "wide discretion as to the style and wording employed in the instructions." *Palmer v. Bd. of Regents of the Univ. Sys. Of Ga.*, 208 F.3d 969, 973 (11th Cir. 2000).[5]

AFFIRMED.

JORDAN, Circuit Judge, Concurring:

I join Parts I, II, and III of the court's opinion. As to Parts IV and V, I concur in the judgment.

As to Part IV, I conclude that the district court erred in forcing the Estate to choose between its state and federal claims at trial. So long as it is not "conceded or established" that a requested remedy is unavailable, a "district court err[s] in requiring the plaintiff to elect" which remedy he or she pursues. *See*

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[5] The Estate also, somewhat inexplicably, argues that the district court should have instructed the jury that the proper standard is "whether the suspect poses an immediate threat to the safety of *the officers or others*," instead of the instruction that was given: "whether a suspect poses an immediate violent threat to *others*." Because "others," used alone, encompasses everyone else, including the officers, that argument fails.

Pulliam v. Gulf Lumber Co., 312 F.2d 505, 507 (5th Cir. 1963). This is not surprising, for the Federal Rules of Civil Procedure allow plaintiffs to plead alternative—even inconsistent—theories of recovery. *See*, *e.g.*, *Banco Cont'l v. Curtiss Nat. Bank of Miami Springs*, 406 F.2d 510, 513 (5th Cir. 1969) (Rule 8 "makes it clear that the requirement of honesty in pleading does not force a party to select a single theory to the exclusion of all others if he is not sure of the basis for recovery or defense") (internal quotation mark and citation omitted). Absent other legal problems, the plaintiff is entitled to submit those alternative claims to a jury. *See*, *e.g.*, Fed. R. Civ. P. 18(a) ("A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party."); *Breeding v. Massey*, 378 F.2d 171, 178 (8th Cir. 1967) ("The right of a plaintiff to try his case on alternate theories has uniformly been upheld in the federal courts and [a] plaintiff cannot be required to elect upon which theory to proceed."); *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 990-91 (4th Cir. 1981) ("To the extent that each theory had legal validity as applied to the operative facts, the plaintiff was entitled to have both theories submitted to the jury, and should not have been required to make the election it did.").

Nevertheless, I agree that the error was harmless. Florida law provides that "[a]n officer . . . may not be held personally liable in tort . . . for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or

function, unless such officer . . . acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." Fla. Stat. § 768.28(9)(a). In the Estate's first appeal before us, we concluded that there was a genuine issue of fact as to whether the deputies exhibited "wanton and willful disregard of human rights, safety, and property," § 768.28(9)(a), and we recognized that evidence of an officers' excessive force could be probative of wanton and willful disregard. *See Greer v. Ivey*, 767 F. App'x 706, 712 (11th Cir. 2019). The jury here concluded that the Estate failed to show that the officers' use of force was unreasonable under the circumstances. As a result, the Estate could not show that the officers' conduct was wanton and willful to human life and safety—a higher standard than unreasonableness—under § 768.29(9)(a). The district court's error in failing to submit both the state and federal claims to the jury was therefore harmless.

With respect to Part V, I agree that the district court's decision to instruct the jury using our pattern excessive force instruction, rather than a more specific deadly force instruction, was not an abuse of discretion. *See Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir. 2007) (holding, in light of *Scott v. Harris*, 550 U.S. 372 (2007), that the district court did not err in "refusing to give a separate deadly force instruction"). Nevertheless, using an instruction specifically tailored to deadly force is the better practice. *See generally United States v. Focia*, 869 F.3d 1269, 1283 (11th Cir. 2017)

(recognizing that the pattern jury instructions "are not infallible" and "do not represent binding law").

A claim of "excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of [a] person . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 388 (1989). "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

Two of our sister circuits have concluded that failure to provide a deadly force instruction can amount to reversible error in some scenarios. *See Rahn v. Hawkins*, 464 F.3d 813, 818 (8th Cir. 2006) ("When a plaintiff presents evidence at trial tending to show that a defendant used deadly force, the district court must instruct the jury as to that more exacting standard.") (internal citation omitted); *Rasanen v. Doe*, 723 F.3d 325, 333 (2d Cir. 2013) ("In a case involving use of force highly likely to have deadly effects, an instruction regarding justifications for the use of deadly force is required."). The Second Circuit reasoned that the failure to give a deadly force instruction " 'deprive[s] the jury of adequate legal guidance to reach a rational decision' on a case's fundamental issue" and such an error may "fatally subvert[a] trial's integrity." *Rasanen*, 723 F.3d at 334-35. And the Eighth Circuit explained that "[j]ury instructions that discuss excessive force in only a general way do not adequately inform a jury about

when a police officer may use deadly force," and instructing the jury on Garner's "more exacting standard" is necessary. *See Rahn*, 464 F.3d at 818 (internal citations omitted).

I agree with the Second and Eighth Circuits that the *Garner* standard "is more detailed and demanding than the one that governs excessive-force claims not including deadly force" and "the more general . . . instruction" may not give the jury the clearest understanding possible "as to what is permissible under the law." *Rahn*, 464 F.3d at 818 (internal citations omitted). Using a more tailored deadly force instruction to guide juries—especially in what are often difficult cases—makes good sense.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

RANDALL GREER,

Plaintiff,

v.

WAYNE IVEY, TOWN OF INDIALANTIC, JAMES HAMAN and DIOMEDIS CANELA,

Defendants. /

Case No. 6:15-cv-677-Orl-41GJK

ORDER

(Filed Aug. 19, 2020)

THIS CAUSE is before the Court on Plaintiff's Motion for New Trial ("Motion," Doc. 437). Defendants James Haman and Diomedis Canela ("Defendants")[1] filed a Joint Response in Opposition ("Response," Doc. 440). For the reasons stated herein, the Motion will be denied.

I. BACKGROUND

Plaintiff, Randall Greer, brought this action as the personal representative of his brother, Christopher

[1] This matter does not apply to Defendants Wayne Ivey and Town of Indialantic as all substantive claims against them were dismissed prior to trial.

Greer,[2] (Third Amended Complaint, Doc. 117, at 4), who was shot and killed by Defendants Corporal Haman and Deputy Canela of the Brevard County Sheriff's Office on January 13, 2013. The incident occurred after Plaintiff called the police when Christopher threatened him with a knife and grabbed Plaintiff's wife[3] by the throat. (Randall Greer Dep. Pt. 1, Doc. 173-13, at 59:5–9, 60:2–6, 62:1–6; Christine Greer Dep., Doc. 173-11, at 131:25–132:7; 911 Phone Call Tr., Doc. 174-1, at 2).

A seven-day jury trial, (Min. Entries, Doc. Nos. 389, 390, 395, 397, 404, 405, 414), resulted in a verdict for Defendants. (Jury Verdict, Doc. 416, at 1). Plaintiff made an ore tenus request for an extension of time to file post-verdict motions (Doc. 409), which was granted. (Jan. 20, 2020 Order, Doc. 410). Plaintiff then timely moved for a new trial. (Doc. 437).

II. LEGAL STANDARDS

A. Rule 60

As a preliminary matter, the Motion states that it is being brought pursuant to "Federal Rules of Civil Procedure 59 and 60." (Doc. 437 at 1). There is nothing

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[2] To avoid confusion, Randall Greer will be referred to as "Plaintiff," and Christopher Greer will be referred to as "Christopher."

[3] Former Plaintiff Christine Greer indicated in her testimony that she was in the process of divorcing Plaintiff. Nevertheless, she will be referred to as Christine Greer or Plaintiff's wife throughout this Order as they were married at all times relevant to this matter.

else in Plaintiff's Motion regarding any legal standard, Rules 59 and 60, or what specific portion of either rule applies to the Motion or why. This alone is a basis to deny the Motion. However, in the interests of judicial economy the Court will construe this as a Motion brought pursuant to Rule 59(a). The Court arrives at this conclusion after an examination of Rule 60 and Plaintiff's Motion.

To receive a new trial pursuant to Rule 60, the Plaintiff must show one of the following reasons apply:

> (1) mistake, inadvertence, surprise, or excusable neglect;
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> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
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> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
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> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60. However, none of Plaintiff's substantive arguments appear to address any of the subsections of Rule 60. Therefore, to the extent Plaintiff

moves for relief pursuant to Rule 60, it will be denied, and the Court construes this Motion as being brought under Rule 59(a).

B. Rule 59(a)

After a jury trial, a district court may grant a request for a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). "When ruling on a motion for a new trial, a trial judge must determine if in his opinion, the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice." *Ins. Co. of N. Am. v. Valente*, 933 F.2d 921, 923 (11th Cir. 1991) (citations and quotations omitted). "[A] judgment should not be set aside merely because the losing party can probably present a better case on another trial." *George v. GTE Directories Corp.*, 195 F.R.D. 696, 701 (M.D. Fla. 2000) (quotation omitted). Additionally, "new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence." *Valente*, 933 F.2d 923.

III. Analysis

Plaintiff makes a variety of arguments as to why he believes a new trial is merited. They will each be addressed in turn.

A. Admission of Evidence that the State Attorney Declined to Prosecute Defendants

Plaintiff argues that the Court erred in admitting testimony that the State Attorney declined to prosecute Defendants for the incident underlying this case. Plaintiff cites only one case in support of this argument, *Watkins v. Broward Sheriff's Office*, 771 F. App'x 902, 910 (11th Cir. 2019), which Plaintiff claims stands for the proposition that "evidence of an acquittal is inadmissible in a civil case." (Doc. 437 at 1). It does not. Instead, *Watkins* held that the district court did not abuse its discretion in granting a motion in limine that excluded evidence of a judgment of acquittal when the plaintiff's counsel did not oppose the exclusion so long as the defendant "did not open the door." *Id.*

Opening the door is precisely what occurred here. Plaintiff was examining Special Agent Ryan Bliss, who was the agent at the Florida Department of Law Enforcement ("FDLE") who investigated the shooting of Christopher by the Defendants. (Bliss Testimony, Trans., vol. 4, Doc. 427, at 3:25–4:15). Agent Bliss was called by Plaintiff during his case in chief as his witness. Agent Bliss was asked by Plaintiff's counsel "[a]nd do you eventually complete a report of the information you collected for use by law enforcement, no matter which agency?" (*Id.* at 10:19–21). In response, Agent Bliss stated: "Yes. We write the reports. We get the crime scene completed, all of the dispatch calls, the dispatch reports, every report. Everything involving the shooting, we collect that, write the reports for that, and then we submit that to the State Attorney's office."

(*Id.* at 10:22–11:1). As a result, on cross examination, Defendants' counsel asked "[n]ow, you testified here today that once your investigation was completed—did you say that you sent that to the state attorney's office?" (*Id.* at 26:22–24). This question prompted an objection by Plaintiff on the basis of relevancy, to which Defendants counsel replied "[i]t was brought out on direct." (*Id.* at 26:25–27:1). The Court then heard argument on the matter outside of the presence of the jury. The Court stated "because [Plaintiff] opened the door implying that [the report] went to the state attorney's office . . . I know the jury's wondering, well were these guys prosecuted?" (*Id.* at 29:25–30:6). As such, to limit the prejudice of Agent Bliss's statement about the State Attorney, the Court allowed Defendant to ask Agent Bliss: "isn't it true, after this matter was sent by FDLE to the state attorney's office, they declined to prosecute?" (*Id.* at 33:5–6; 40:14–16). Agent Bliss answered "Yes." (*Id.* at 40:17). Immediately after Agent Bliss gave his answer, the Court gave the jury a curative instruction stating:

> Ladies and gentlemen of the jury, you have just heard testimony that the state attorney's office in and for the 18th Judicial Circuit of Florida declined to prosecute this case as a criminal matter. That decision should have no impact on your decision in this case. The standards and burden of proof applicable in that case are entirely different than the law I will instruct you on in this case.

(*Id.* at 40:21–41:2).

Now, Plaintiff argues that Agent Bliss's answer on direct was nonresponsive, and thus did not open the door to "prejudicially irrelevant evidence." (Doc. 437 at 3). Plaintiff also argues that Defendants should have objected to the answer, or moved to strike it as nonresponsive. Assuming *arguendo* that the evidence regarding the State Attorney's decision not to prosecute was originally inadmissible, "inadmissible extrinsic evidence becomes admissible on [cross] examination where defense counsel 'opens the door' to the evidence during [direct] examination." *United States v. Oliver*, 653 F. App'x 735, 739 (11th Cir. 2016) (internal citation omitted). "The [Defendant] may elicit testimony on redirect that clarifies issues to which the [Plaintiff] has opened the door on [direct] examination." *Id.* (citing *United States v. Elliott*, 849 F.2d 554, 559 (11th Cir. 1988)).

Whether or not the answer was nonresponsive is irrelevant—it was elicited by Plaintiff on direct. Thus, when Agent Bliss stated that he sent his report to the State Attorney's office, it clearly opened the door to consideration of whether or not the State Attorney criminally prosecuted Defendants. *Oliver*, 653 F. App'x at 739 (holding that a defendant asking an ambiguous question opened the door to testimony from the witness "regardless of whether [d]efendant intended to ask that question"). Defendants were "entitled to clarify [Agent Bliss's] answer on [cross examination] because [Plaintiff] had already opened that door." *Id.* Moreover, even if Defendants' narrow clarification question was prejudicial, the Court minimized the

prejudice by offering a limiting instruction. *See United States v. Brown*, 665 F.3d 1239, 1247 (11th Cir. 2011) (stating that "[a] limiting instruction can diminish any unfair prejudice"). Plaintiff will not be granted a new trial on this basis.

B. Requirement that Plaintiff Choose Between State and Federal Claims

At trial, Plaintiff attempted to submit to the jury two claims that were entirely duplicative of one another—a state law claim for wrongful death and a federal claim for excessive force pursuant to 42 U.S.C. § 1983. Now, Plaintiff argues that was an error meriting a new trial. However, Plaintiff has failed to meet his burden on this issue.

Plaintiff has presented no legal authority or legal analysis to support his argument that the Court erred. Instead, Plaintiff merely attached several verdict forms from other courts in which state law claims and federal claims were both allowed to go to the jury. Plaintiff provided no context or explanation about the circumstances in those cases for the Court to consider. The Court will simply "not address [such a] perfunctory and underdeveloped argument." *United States Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n.13 (11th Cir. 2007). In other words, "[u]nder the adversary system . . . the Court does not serve as [Plaintiff's] law clerk" and "will not fill in the gaps" for Plaintiff. *Watkins v. Goodyear Pension Plan*, No. 4:17-CV-461-VEH, 2018 U.S. Dist. LEXIS 70264, at *16–17 (N.D. Ala. Apr.

26, 2018). *Id.* (holding "that [Plaintiff] waives an argument if [he] fail[s] to elaborate or provide any citation of authority in support of the argument" (internal quotations omitted)). Accordingly, by putting forth no legal analysis and no explanation of the verdict forms in the other cases provided to the Court, Plaintiff has failed to meet his burden to show a new trial is warranted on this basis.

C. Renewed Motion for Directed Verdict

Next, Plaintiff renews his motion for directed verdict on Defendants' proposed affirmative defense regarding justifiable use of force and also argues that the motion was not ruled on at trial. The Court did not permit this affirmative defense to go to the jury, rendering any motion for directed verdict as to that defense moot. (*See* Doc. 433 at 27:25–28:1 (the Court stating in response to Plaintiff's oral motion "I'm not instructing them on an affirmative defense")).

To the extent Plaintiff asserts that failure to grant a directed verdict on this affirmative defense was an error warranting a new trial, he provides no support for that argument. The Motion will not be granted on this basis.

D. Excessive Force Jury Instruction

Plaintiff makes several arguments concerning perceived errors surrounding the excessive force jury

instruction given by the Court. Each will be addressed below.

1. Arrest

Plaintiff argues that the Court erred when it gave its instruction on excessive force to the jury, and he also appears to be arguing that the Court erred in not giving Plaintiff's proposed instruction. The part of the instruction given by the Court that Plaintiff takes issue with reads as follows:

> For the first element, Plaintiff claims that Defendants Haman and Canela used excessive force when arresting Christopher Greer. When making a lawful arrest, an officer has the right to use reasonably necessary force to complete the arrest. Whether a specific use of force is excessive or unreasonable depends on factors such as the crime's severity, whether a suspect poses an immediate violent threat to others, whether the suspect resists or flees, the need for application of force, the relationship between the need for force and the amount of force used, and the extent of the injury inflicted.

(Jury Instr., Doc. 415, at 10). This is the pattern instruction provided by the Eleventh Circuit. Plaintiff argues, as he did at trial, that the Defendants "were not involved in making an arrest," so whether an arrest occurred was not relevant to whether deadly force was permissibly used. (Doc. 437 at 8). Plaintiff's proposed instruction stated:

> "For the first element, [Plaintiff] claims that [Defendants] used excessive force during the police encounter with Christopher Greer. During a police-citizen encounter, an officer may use deadly force when there is an objectively reasonable fear that the person poses an imminent threat of bodily harm to the officer or others."

(Prop. Jury Instr., Doc. 367-10 at 31–32).

"When the instructions, taken together, properly express the law applicable to the case, there is no error even though an isolated clause may be inaccurate, ambiguous, incomplete or otherwise subject to criticism." *ADT Ltd. Liab. Co. v. Alarm Prot. Tech Fla., Ltd. Liab. Co.*, 646 F. App'x 781, 785 (11th Cir. 2016) (quoting *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1283 (11th Cir. 2008)). "The Court will reverse only if 'left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.'" *Id.* (quoting *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543 (11th Cir. 1996)). Further, "[s]o long as the instructions accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed in the instructions." *Bateman*, 79 F.3d at 1543 (internal quotations omitted). "If the jury charge as a whole correctly instructs the jury, even if it is technically imperfect, no reversible error has been committed" *Perry v. Ala. Bev. Control Bd.*, 786 F. App'x 204, 207 (11th Cir. 2019) (internal quotation omitted). And, when the Eleventh Circuit reviews "a district court's failure to give a requested instruction, even if the

requested instruction correctly states the law, [the Eleventh Circuit] will only reverse if (1) the contents of the requested instruction are not adequately covered by the jury charge and (2) the requesting party suffers prejudicial harm." *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1233 (11th Cir. 2004).

The Eleventh Circuit's § 1983 excessive force pattern instruction is a correct statement of law and the use of the pattern properly instructed the jury. Plaintiff claims that the use of the pattern instruction "confused the standard" but does not explain what "standard" he is referring to. While Plaintiff's proposed instruction may not have been incorrect, Plaintiff makes no showing that he was prejudiced by the use of the pattern instruction.

Moreover, Plaintiff's concern that the term "arrest" would be confusing under the circumstances of this particular case—where Christopher was not actually arrested—was addressed through a definitional instruction, which was agreed upon by the parties. That instruction stated: "For the purposes of your deliberations, an attempt to effectuate an arrest can be considered an arrest." (Doc. 415 at 11; Doc. 433 at 34:9–23).

Further, the pattern instruction covers the crux of Plaintiff's proposed instruction, which is that the use of force was reasonable if there was "an objectively reasonable fear that the person poses an imminent threat of bodily harm to the officer or others." The pattern states that among other factors, a use of force may be

reasonable if there was "an immediate violent threat to others." Accordingly, the use of the pattern instruction properly guided the jury in their deliberations, and the Court's decision not to use Plaintiff's proposed instruction did not prejudice Plaintiff because the pattern adequately covered the contents of the requested instruction.

2. Intent

Plaintiff argues in two sentences that intent was important to the jury since the word was underlined by the foreperson and that the Court erred in not defining the word "intent." Other than a citation to the transcript where Plaintiff requested an intent instruction from the Court, Plaintiff cites no legal authority and provides no legal analysis as to why the Court's decision not to offer an intent instruction was erroneous. Accordingly, Plaintiff has failed to meet his burden as to this issue. *Astrue*, 495 F.3d at 1287 n.13.

3. Indemnity

During opening statement, Defendant Canela's counsel stated:

> I want you to be reminded—the evidence is going to show this anyway—that he is suing on behalf of the estate and he's suing these two Brevard County Sheriff deputies individually. He is seeking an award against them individually. The significance of that will be more obvious later.

(Trans., vol. 1, Doc. 421, at 217:3–8). Plaintiff argues that this statement opened the door to evidence and a jury instruction informing the jury that the Sheriff would indemnify Defendants for any judgment entered against them. And, because the Court excluded evidence of indemnification and did not give said jury instruction, Plaintiff contends that the Court erred and a new trial is warranted based on this error.

First, when this issue was raised at trial, the Court asked Plaintiff: "[D]o you have any case law in support of your contention that you can elicit evidence showing that he's being indemnified . . . ?" (Trans., vol. 2, Doc. 423 at 199:16–18). In response, Plaintiff cited five cases: two decided in the 1990s from the Second Circuit and one from the Seventh Circuit, which the Court noted were "at best, persuasive authority," (*id.* at 206:18–21; 201:10–14 (noting that these cases were provided in a footnote to the proposed jury instructions); Doc. 367-10 at 41 n. 5 (citing *Mathie v. Fries*, 121 F.3d 808, 816 (2d Cir. 1997), *Vasbinder v. Scott*, 976 F.2d 118, 122 n.1 (2d Cir. 1992), and *Kemezy v. Peters*, 79 F.3d 33, 37 (7th Cir. 1996)); one from the Eleventh Circuit that Plaintiff himself said was inapplicable and provided to the Court in error (Doc. 423 at 207:2–3 (providing *Robinson v. Arrugueta*, 415 F.3d 1252, 1256 (11th Cir. 2005)); 207:10–11 (noting that the Court received word that *Robinson* was cited in error)); and another Eleventh Circuit case that did "not even mention the word 'indemnification' in the entire case," (*id.* at

207:12–16).[4] Moreover, even the persuasive authority from the Second Circuit was not analogous because those cases were discussing an award of punitive damages. The Court denied Plaintiff's request, stating that Plaintiff's interpretation of the cases he provided the Court was perhaps "the most aggressive and liberal interpretation of a case that I've heard in some time." (*Id.* at 208:22–24).

The Motion also fails to provide any such authority. Plaintiff offers only summary assertions without citation to legal authority, merely concluding that the door was opened and therefore the Court's ruling at trial was an error. Furthermore, even if the Court did err at trial, Plaintiff cites no authority showing that a new trial has ever been granted on this basis, *see* Fed. R. Civ. P. 59(a)(1)(A), or that due to this error the verdict was against the great, not just the greater, weight of the evidence, *Valente*, 933 F.2d 923. Plaintiff's Motion will be denied on this basis.

4. Hedonic Damages

At trial, the Court ruled that a claim for hedonic damages could not be considered by the jury. Plaintiff correctly points out that one of the cases cited by the Court in doing so, *Howard v. Wilkinson*, 379 F. Supp.

[4] Instead of citing this case on the record, Plaintiff sent the citation for this case back to chambers on a sticky note with the Courtroom Deputy Clerk after realizing that he had cited *Robinson* in error. As a result, the Court does not currently possess the full citation to this opinion.

3d 1251, 1255–56 (M.D. Fla. May 21, 2019), ultimately allowed hedonic damages to be considered by the jury. Admittedly, in the time-pressured atmosphere of trial, the Court mis-read *Howard*, believing that it agreed with the long line of other cases cited by the Court for the proposition that hedonic damages could not be considered in this type of case. The Court respectfully disagrees with the outcome in *Howard*. Instead, the Court continues to rely on the overwhelming majority of cases from this District and from sister courts in other districts of Florida that have reasoned that § 1983 cases involving death do not allow hedonic damages of a decedent to go to the jury. *See Sharbaugh v. Beaudry*, 267 F. Supp. 3d 1326, 1340 (N.D. Fla. July 14, 2017); *Estate of Breedlove v. Orange County Sheriff's Office*, No. 6:11-cv-2027-Orl-31KRS, 2012 U.S. Dist. LEXIS 87368, *10–14, (M.D. Fla. June 25, 2012); *Degraw v. Gualtieri*, No. 8:11-cv-720-EAK, MAP, 2013 U.S. Dist. LEXIS 95853 *17, 2013 WL 3462332 (M.D. Fla. July 9, 2013); *Herrera v. Hillsborough Cty. Sch. Bd.*, No. 8:12-cv-2484-T-30EAJ, 2013 U.S. Dist. LEXIS 202866, *15 (M.D. Fla. Mar. 22, 2013); *Moss v. Leesburg Reg'l Med. Ctr.*, No. 5:17-cv-535-Oc-32PRL, 2020 U.S. Dist. LEXIS 21361, *9, (M.D. Fla. Feb. 7, 2020). Accordingly, the Court will deny Plaintiff's Motion as to hedonic damages.

E. Expert Testimony

Plaintiff asserts five errors surrounding expert testimony. They will be discussed in turn below.

1. Testimony that Christopher was Being Arrested

Defense expert Richard M. Hough was asked if in his view, Christopher was "being arrested at the time that the officers entered the garage to take him into custody?" (Trans., vol. 5, Doc. 431 at 249:6–8). After objection from Plaintiff where Plaintiff argued that there was no evidence of an arrest, the Court overruled the objection stating: "I think the record is replete with examples of testimony indicating that the purpose of their going in there was to take him into custody." (*Id.* at 249:13–17). Hough then answered, "[i]n the training that I conduct on arrest situations of just this type, yes, it's my understanding that they were going in there to arrest Christopher Greer." (*Id.* at 249:18–21). Now, Plaintiff argues that there was no factual basis for that opinion because there was no evidence of arrest—there was only evidence that Plaintiff was going to be taken into custody. Plaintiff cites nothing in support and does not elaborate on his argument. Simply stating that there was no factual basis for testimony, without more, is insufficient to meet Plaintiff's burden to show that the Court erred and that a new trial is warranted based on this error.[5]

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[5] In *Kaisner v. Kolb*, the sole case cited by Plaintiff, the Supreme Court of Florida stated: "We thus conclude that 'custody' need not consist of the formal act of an arrest, but can include any detention." 543 So. 2d 732, 734 (Fla. 1989). Per the plain language of this case, taking a party into custody may not be an arrest, but an arrest is taking someone into custody because an arrest is a detention.

2. Blood Spatter

Defense expert Richard Ernest was asked about blood spatter by Plaintiff's attorney on cross examination. Now, Plaintiff says that allowing Ernest to testify about blood spatter was erroneous because it was not in Ernest's expert report. This argument ignores the fact that it was *Plaintiff* that elicited said testimony. (Doc. 431 at 150:18–151:16). Further, there was no objection to this testimony made at trial, which Plaintiff admits in his Motion. (Doc. 437 at 12). That Plaintiff would argue that he is entitled to a new trial due to his own counsel's questioning is absurd. The Court will not address this argument any further, other than to note that once again Plaintiff provides no legal analysis, or even any citations to any caselaw, relating to its argument.

3. Armpit Wound and Whether Christopher was Armed

Plaintiff argues that it was an error to overrule what Plaintiff refers to as a "defense objection"[6] to Ernest's testimony about Christopher's armpit wound and to allow "Hough to testify on the ultimate question of whether [Christopher] was armed." (Doc. 437 at 12). Each of the referenced sections of the Motion contains two sentences with no citation to legal authority in support of Plaintiff's assertion that the Court erred. Plaintiff failed to meet his burden as to these two

[6] The Court presumes that Plaintiff is referring to his own objection. (*See* Doc. 431 at 106:16).

arguments and Plaintiff's request for a new trial on these bases will be denied.

4. Blood Alcohol Level

Plaintiff argues that the Court erred in allowing evidence regarding Christopher's blood alcohol content ("BAC") from defense experts Josef Thundiyil and Krzysztif Podjaski. Thundiyil is an emergency physician and medical toxicologist, and Podjaski is the medical examiner who performed the autopsy on Christopher. The Court allowed the experts to testify about Christopher's BAC in relation to the legal limit for operating a vehicle for the jury as a point of reference. Then, to mitigate any potential prejudice, the Court provided the following agreed upon curative instruction:

> During the course of the video, as happened earlier in the trial, you heard this witness use the reference of blood alcohol level in the context of a DUI in describing the level of intoxication. I want to remind you that there is no allegation that the decedent Christopher Greer was committing a crime or was in the process of committing a crime by having that blood alcohol level. The only purpose of letting you hear that is to give you some real life context in terms of how does that compare to a .08, in terms of what would be a DUI type of offense. But there is no DUI offense here. So please don't hold that against the plaintiff in any way. It's just for an example. Thank you again.

(Doc. 433 at 19:15–20:1). Plaintiff now argues—without any legal authority or analysis—that allowing testimony regarding Christopher's BAC was an error that was extremely prejudicial. Because Plaintiff has provided no legal authority or analysis relating to his argument, let alone any authority or analysis that a new trial has been granted on this basis previously, Plaintiff has not met his burden on this issue. *Astrue*, 495 F.3d at 1287 n.13.

F. Questioning Venire Members Regarding their Bias in Favor of Law Enforcement

Prior to trial, Plaintiff submitted proposed voir dire questions regarding, among other things, potential biases in favor of law enforcement. (*See* Plaintiff's Proposed Voir Dire, Doc. 367-5, at 1–3). The Court conducted voir dire and did not permit the attorneys to ask questions of the venire panel. After concluding the initial voir dire, the Court asked the parties "do any of you want any additional questions asked?" (Doc. 421 at 120:24–25). Plaintiff did request a few additional questions from the Court, but he did not renew or make any requests for questions regarding police bias. (*Id.* at 121:1–9; 121:24–125:10). Plaintiff now argues that failing to "question the venire on bias in favor of law enforcement constituted reversible trial error." (Doc. 437 at 14).

Plaintiff is mistaken. The Court asked each prospective juror whether they had friends or family in law enforcement as well as whether they ever came

into contact with law enforcement because they were the victim of a crime. (*See generally* Doc. 421). If any prospective juror answered with an affirmative, the Court asked whether the juror would be able to be fair and impartial. The Court also asked the venire panel:

> Do any of the members have strong feelings pro or against law enforcement that you're concerned might interfere with your ability to remain fair and impartial in this case? If so, please raise your hand. All right. None of the hands have been raised. . . .

(Doc. 421 at 109:9–19). Accordingly, the Court did ask the venire panel whether there were any biases in favor of law enforcement.[7]

G. Cumulative Error

Plaintiff argues that the Court should grant a new trial based on the "above cited errors" due to the cumulative error doctrine. (Doc. 437 at 16). "The cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors)" can be grounds for a new trial. *Morris v. Sec'y Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012) (quoting *United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005)). The Court has

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[7] In support of his argument, Plaintiff relies on a nonbinding Third Circuit opinion. And then cites in comparison an Eleventh Circuit opinion that holds the opposite—namely that failing to ask questions at voir dire about law enforcement bias was not an abuse of discretion. *See United States v. Nash*, 910 F.2d 749, 753–56 (11th Cir. 1990). Eleventh Circuit precedent controls.

either found that there was no error or that Plaintiff did not meet his burden to show that the Court committed an error. Therefore, the cumulative error argument is inapplicable.

H. Renewal of Pretrial Motions and Motions in Limine

Plaintiff also purports to "renew[] all pretrial motions, motions in limine, and trial objections. Plaintiff further renews all objections to Defendants' pretrial motions and motions in limine." (Doc. 437 at 16). This is not an appropriate basis to grant a motion for new trial, but Plaintiff's objections and motions are preserved for the record.

IV. Conclusion

Plaintiff has not met his burden for this Court to grant a new trial. Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. Plaintiff's Motion for New Trial (Doc. 437) is **DENIED**.

2. The Clerk is directed to enter judgment in favor of Defendants Haman and Canela and against Plaintiff, providing that Plaintiff shall take nothing on his claims.

   Thereafter, the Clerk is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on August 19, 2020.

/s/ Carlos E. Mendoza
CARLOS E. MENDOZA
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

RANDALL GREER,

Plaintiff,

v.

JAMES HAMAN and DIOMEDIS CANELA,

Defendants. /

Case No. 6:15-cv-677-Orl-41GJK

COURT'S INSTRUCTIONS TO THE JURY

(Filed Jan. 29, 2020)

Members of the jury:

It is my duty to instruct you on the rules of law that you must use in deciding this case. When I have finished you will go to the jury room and begin your discussions, sometimes called deliberations.

INSTRUCTION 1

THE DUTY TO FOLLOW INSTRUCTIONS

Your decision must be based only on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against anyone.

You must follow the law as I explain it—even if you do not agree with the law—and you must follow all of my instructions as a whole. You must not single out or disregard any of the instructions on the law.

INSTRUCTION 2

CONSIDERATION OF DIRECT AND CIRCUMSTANTIAL EVIDENCE; ARGUMENT OF COUNSEL; COMMENTS BY THE COURT

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But, anything the lawyers say is not evidence and is not binding on you.

You should not assume from anything I have said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters.

In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You should not be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There is no legal difference in the weight you may give to either direct or circumstantial evidence.

INSTRUCTION 3

NOTE-TAKING

You have been permitted to take notes during the trial. Most of you—perhaps all of you—have taken advantage of that opportunity.

You must use your notes only as a memory aid during deliberations. You must not give your notes priority over your independent recollection of the evidence. And you must not allow yourself to be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than your memories or impressions about the testimony.

INSTRUCTION 4

CREDIBILITY OF WITNESSES

When I say you must consider all the evidence, I do not mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. The number of witnesses testifying concerning a particular point does not necessarily matter.

To decide whether you believe any witness I suggest that you ask yourself a few questions:

1. Did the witness impress you as one who was telling the truth?

2. Did the witness have any particular reason not to tell the truth?

3. Did the witness have a personal interest in the outcome of the case?

4. Did the witness seem to have a good memory?

5. Did the witness have the opportunity and ability to accurately observe the things he or she testified about?

6. Did the witness appear to understand the questions clearly and answer them directly?

7. Did the witness's testimony differ from other testimony or other evidence?

INSTRUCTION 5

IMPEACHMENT OF WITNESSES BECAUSE OF INCONSISTENT STATEMENTS

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or did not say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake does not mean a witness was not telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was

because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

INSTRUCTION 6

EXPERT WITNESSES—WHEN EXPERT FEES REPRESENT A SIGNIFICANT PORTION OF THE WITNESSES' INCOME

When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter.

But that does not mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

When a witness is being paid for reviewing and testifying concerning the evidence, you may consider the possibility of bias and should view with caution the testimony of such witness where the court testimony is given with regularity and represents a significant portion of the witness's income.

INSTRUCTION 7

RESPONSIBILITY FOR PROOF—PLAINTIFF'S CLAIMS, CROSS CLAIMS, COUNTERCLAIMS— PREPONDERANCE OF THE EVIDENCE

In this case, it is the responsibility of Plaintiff Randall Greer to prove every essential part of their claims by a "preponderance of the evidence." This is sometimes called the "burden of proof' or the "burden of persuasion."

A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that Randall Greer's claim is more likely true than not true.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence, you should find against Randall Greer.

In deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of Randall Greer's claim by a preponderance of the evidence, you should find for Defendants Haman and Canela as to that claim.

INSTRUCTION 8

CIVIL RIGHTS-42 U.S.C. § 1983 CLAIMS—
FOURTH OR FOURTEENTH AMENDMENT CLAIM—
PRIVATE PERSON OR PRETRIAL DETAINEE
ALLEGING EXCESSIVE FORCE

In this case, Plaintiff as personal representative of the Estate of Christopher Greer, deceased, claims that Defendants Haman and Canela, while acting under color of law, intentionally committed acts that violated Christopher Greer's constitutional right to be free from the use of excessive or unreasonable force during an arrest.

Under the Fourth Amendment to the United States Constitution, every person has the right not to be subjected to excessive or unreasonable force while being arrested by a law enforcement officer—even though the arrest is otherwise made in accordance with the law.

To succeed on this claim, Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That Defendants Haman and Canela intentionally committed acts that violated Christopher Greer's federal constitutional right not to be subjected to excessive or unreasonable force during an arrest;

Second: That Defendants Haman's and Canela's conduct caused Christopher Greer's injuries; and

Third: That Defendants Haman and Canela acted under color of law. The parties have agreed that Defendants Haman and Canela acted under color of law, so you should accept that as a proven fact.

For the first element, Plaintiff claims that Defendants Haman and Canela used excessive force when arresting Christopher Greer. When making a lawful arrest, an officer has the right to use reasonably necessary force to complete the arrest. Whether a specific use of force is excessive or unreasonable depends on factors such as the crime's severity, whether a suspect poses an immediate violent threat to others, whether the suspect resists or flees, the need for application of force, the relationship between the need for force and the amount of force used, and the extent of the injury inflicted.

You must decide whether the force Defendants Haman and Canela used in making the arrest was excessive or unreasonable based on the degree of force a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances. Defendants Haman's and Canela's underlying intent or motivation is irrelevant.

For the second element, Defendants Haman's and Canela's conduct caused Christopher Greer's injuries if Christopher Greer would not have been injured without Defendants Haman's and Canela's conduct, and the injuries were a reasonably foreseeable consequence of Defendants Haman's and Canela's conduct.

If you find Plaintiff has proved each fact that he must prove, you must decide the issue of his damages. If you find that Plaintiff has not proved each of these facts, then you must find for Defendants Haman and Canela.

For the purposes of your deliberations, an attempt to effectuate an arrest can be considered an arrest.

INSTRUCTION 9

DAMAGES—42 U.S.C. § 1983

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all Plaintiff's damages—no more, no less. You must not impose or increase these compensatory damages to punish or penalize Defendants Haman and Canela. And you must not base these compensatory damages on speculation or guesswork.

But compensatory damages are not restricted to actual loss of money—they also cover the intangible aspects of the injury. Plaintiff does not have to introduce evidence of a monetary value for intangible things. You must determine what amount will fairly compensate the estate of Christopher Greer for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

In this case, the only compensatory damages available are those incurred by Christopher Greer's surviving daughter, Alexis. In determining the damages to be

awarded to Plaintiff for the benefit of Christopher Greer's surviving daughter, Alexis, you shall consider, to the extent you find that Plaintiff has proved them by a preponderance of the evidence, and no others:

In determining any damages to be awarded to Plaintiff for the benefit of Christopher Greer's surviving daughter, Alexis, you shall consider Alexis' loss by reason of her father's death and of her father's support and services. In determining the duration of any future loss, you may consider the joint life expectancy of Alexis and Christopher Greer and the period of minority, ending at age 25 of Alexis.

In evaluating past and future loss of support and services, you shall consider Alexis' relationship to her father, Christopher Greer, and the replacement value of Christopher Greer's services to Alexis.

In determining any damages to be awarded for the benefit of Christopher Greer's surviving child, Alexis, you shall consider certain additional elements of damages for which there is no exact standard for fixing the amount of compensation to be awarded. Any such award should be fair and just in the light of the evidence regarding the loss by Alexis of parental companionship, instruction and guidance as a result of Christopher Greer's death from the date of his death and the period of minority, ending at age 25 of Alexis.

Punitive Damages:

If you find for Plaintiff and find that Defendants Haman and Canela acted with malice or reckless

indifference to Christopher Greer's federally protected rights, the law allows you, in your discretion, to award Plaintiff punitive damages as a punishment for Defendants Haman and Canela and as a deterrent to others.

Plaintiff, as personal representative of the estate of Christopher Greer, must prove by a preponderance of the evidence that he is entitled to punitive damages.

A defendant acts with malice if their conduct is motivated by evil intent or motive. A defendant acts with reckless indifference to the protected federal rights of Christopher Greer when a defendant engages in conduct with a callous disregard for whether the conduct violates Christopher Greer's protected federal rights.

If you find that punitive damages should be assessed, you may assess punitive damages against one or more of the individual Defendants, and not others, or against one or more of the individual Defendants in different amounts.

INSTRUCTION 10

CLOSING ARGUMENTS

All Parties have rested their case.

The attorneys now will present their final arguments. Please remember that what the attorneys say is not evidence or your instruction on the law. However, do listen closely to their arguments. They are intended

to aid you in understanding the case. Each side will have equal time to make their arguments, but the Plaintiff is entitled to divide this time between an opening argument and a rebuttal argument after the Defendants have spoken.

INSTRUCTION 11

DUTY TO DELIBERATE

I have given you instructions concerning the issue of the Plaintiff's damages, but that should not be interpreted in any way as an indication that I believe that the Plaintiff should, or should not, prevail in this case.

Your verdict must be unanimous—in other words, you must all agree. Your deliberations are secret, and you will never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you are discussing the case, do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs just because others think differently or because you simply want to get the case over with.

Remember that, in a very real way, you are judges—judges of the facts. Your only interest is to seek the truth from the evidence in the case.

INSTRUCTION 12

ELECTION OF FOREPERSON EXPLANATION OF VERDICT FORM

When you get to the jury room, choose one of your members to act as foreperson. The foreperson will direct your deliberations and speak for you in court.

A verdict form has been prepared for your convenience.

{ Explain verdict }

Take the verdict form with you to the jury room. When you have all agreed on the verdict, your foreperson must fill in the form, sign it and date it. Then you will return it to the courtroom.

If you wish to communicate with me at any time, please write down your message or question and give it to the court security officer. The court security officer will bring it to me and I will respond as promptly as possible—either in writing or by talking to you in the courtroom. Please understand that I may have to talk to the lawyers and the parties before I respond to your question or message, so you should be patient as you await my response. But I caution you not to tell me how many jurors have voted one way or the other at that time. That type of information should remain in the jury room and not be shared with anyone, including me, in your note or question.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13542-AA

RANDALL GREER,
individually and as personal representative of the
Estate of Christopher Greer, deceased,

Plaintiff - Appellant,

CHRISTINE GREER,

Plaintiff,

versus

WAYNE IVEY,
in his official capacity as Sheriff of Brevard County,
TOWN OF INDIALANTIC,
Florida, a municipal corporation,
JAMES HAMAN,
Cpl., individually and as an employee of Wayne Ivey
in his official capacity as Sheriff of Brevard County,
DIOMEDIS CANELA,
Deputy, individually and as an employee of Wayne Ivey
in his official capacity as Sheriff of Brevard County,

Defendants - Appellees,

BREVARD COUNTY, FLORIDA, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Sep. 16, 2022)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, NEWSOM, and ED CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)
