IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MITCH ROONI,

OPINION AND ORDER

Plaintiff,

11-cv-827-bbc

v.

BRAD BISER,[1]

Defendant.

- -

It is no secret in Wisconsin that game hunters and wardens for the Department of Natural Resources do not always get along. This case represents one unfortunate example of a dispute between a deer hunter in Douglas County (plaintiff Mitch Rooni) and a DNR warden (defendant Brad Biser) that ended in the hunter's arrest for disorderly conduct. The charges were later dismissed, but plaintiff is now suing defendant under 42 U.S.C. § 1983 for false arrest and excessive force in violation of the Fourth Amendment.

Two motions are now before the court, defendant's motion to file corrected proposed findings of fact and defendant's motion for summary judgment. Dkt. ##11 and 24. I am granting the first as unopposed. I am denying defendant's motion for summary judgment with respect to plaintiff's claim that defendant used excessive force against him before

[1] Plaintiff identified defendant as "Bradley Biser" on his complaint. I have amended the caption to reflect defendant's correct name, as reflected in defendant's summary judgment filings.

placing him under arrest because there are genuine disputes of material fact that require resolution by a jury. Fed. R. Civ. P. 56. However, I am granting defendant's motion with respect to plaintiff's claims that defendant arrested him without probable cause and that defendant placed handcuffs on him too tightly. Even if all factual disputes are resolved in plaintiff's favor, plaintiff has not shown that defendant's alleged conduct would violate plaintiff's clearly established constitutional rights.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

On November 19, 2005, the first day of gun hunting deer season, plaintiff Mitch Rooni went deer hunting in northern Wisconsin near Iron River, where he lived. He was accompanied by his son, Peter Rooni, and a friend, Brad Weerts. The hunting party shot two bucks and a doe, which they carried home on a trailer attached to Weerts's truck.

The party stopped to register the deer at a post operated by the Wisconsin Department of Natural Resources at a gas station in Brule, Wisconsin. Cristopher Sand and Kevin Feind, two DNR employees, met plaintiff. Sand tagged and aged the deer. Both Sand and Feind congratulated plaintiff on his successful hunt. Plaintiff then went into the gas station to buy another tag, so the party could continue hunting.

While plaintiff was inside, defendant Brad Biser arrived at the station. Defendant is a conservation warden for the Wisconsin Department of Natural Resources whose duties

included making contact with individuals who were registering deer "to make sure there [were] no issues or concerns that needed to be addressed." Dft.'s PFOF ¶ 21, dkt. #24-1. He stopped at the station to put fuel in his vehicle and to address questions that Sand or hunters might have. He was on duty at the time.

As defendant drove into the station, he noticed some deer in a trailer, including a "nice antlered buck." Id. at ¶ 26. He also saw plaintiff and his hunting party. Defendant knew plaintiff because their sons went to the same high school and because plaintiff's son had been part of "a DNR investigation into an event dealing with a snowmobile going through the ice." Id. at 6. (The parties do not provide additional details about that incident.) Defendant went into the station and attempted to initiate a conversation with plaintiff. (Defendant says he "congratulat[ed]" plaintiff "on the nice bucks" and plaintiff responded that he "did not talk to game wardens." Plaintiff says that defendant began the conversation by asking him, "how many deers did you catch?" Plt.'s PFOF ¶ 1, dkt. #26. When plaintiff did not respond, defendant stated loudly, "Mitch Rooni doesn't like the DNR." Plaintiff says he did not respond because he believes defendant is "rude," "power happy" and "a little Hitler." Id. at ¶¶ 5-6; Dft.'s PFOF ¶ 59, dkt. #24-1.)

Defendant walked out of the gas station and saw Sand registering deer in Weerts's trailer. Defendant leaned up against the trailer and began speaking to Sand about the registration.

When plaintiff finished his transaction, he came out of the gas station. He approached defendant, stopping approximately five or six feet away from him and waiting

for him to speak, but defendant did not say anything or turn to look at plaintiff. (Defendant says he did not notice that plaintiff was there.) When plaintiff began to walk around him, defendant "leaned his leg out" in a way that obstructed plaintiff's path. Id. at ¶ 19. (Defendant denies that he did this intentionally to block plaintiff.) Plaintiff took two steps toward defendant and again waited for defendant to say something to him, but that did not happen. After this, plaintiff and defendant had an altercation that resulted in plaintiff being handcuffed and placed under arrest.

(The parties dispute many of the details about the altercation. According to defendant, plaintiff "grabbed and pushed" his shoulder and told him "in a loud voice" to get off of the trailer. Dft.'s PFOF ¶ 35, dkt. #24-1. Defendant lost his balance and had to take a few steps back to regain it. He turned around and saw plaintiff, who then "grabbed onto" defendant and "would not let go." Plt.'s PFOF ¶ 40, dkt. #26. Defendant "grabbed [plaintiff] back" and yelled at him to let go. Plaintiff and defendant began "grabbing, pushing and pulling" each other. Id. at 42. Defendant told plaintiff several times that he was under arrest. After the third time, plaintiff "calmed down" and allowed defendant to place handcuffs on him without resistance. Id. at 43.

According to plaintiff, he said to defendant, "Brad, get off the trailer and let me get through." Plaintiff "brushed" between defendant and the trailer. Plt.'s PFOF ¶ 24, dkt. #24-1. Defendant moved back, but spit a piece of a hot dog he was eating at plaintiff. When plaintiff asked defendant what he was doing, defendant said that plaintiff had pushed him. Plaintiff said that he had not pushed him; he was just trying to get through. After

defendant approached plaintiff and repeated twice that plaintiff had pushed him, defendant grabbed plaintiff's jacket. Plaintiff said, "get your hands off me." When defendant refused, plaintiff told defendant to remove his hands and pushed down on them. Defendant then "grabb[ed] [plaintiff's] belly through his shirt." Id. at ¶ 40. Plaintiff again told defendant to remove his hands and again pushed down on them. Defendant pushed plaintiff against the trailer and started hitting plaintiff's hand and arms. "At times, defendant . . . was grabbing [plaintiff's] skin, clenching his shirt and pushing him." Id. at ¶ 45. Plaintiff concluded that defendant was trying to provoke him and he instructed his son to call the police. When defendant told plaintiff he was under arrest, he turned around to allow defendant to place handcuffs on him.)

The amount of time between the beginning of alteration and the placement of handcuffs on plaintiff was approximately 45 seconds. Defendant handcuffed plaintiff behind his back using double-locked handcuffs, which means that they could not be tightened or loosened. Although defendant had no trouble placing and securing the handcuffs, they were so tight that they "really hurt" plaintiff. Plt.'s PFOF ¶ 57, dkt. #26. (Plaintiff says that, as defendant secured the handcuffs, he "grabbed" plaintiff "by the back of the neck and jerked him back, almost pulling him over." Id. at ¶ 58. He also says he complained to defendant that the handcuffs were too tight.)

Defendant moved plaintiff to the warden's truck. (Plaintiff says that he complained again at this time that the handcuffs were too tight, but defendant told him to "shut up.") When Alan Peterson, a deputy sheriff, arrived, plaintiff complained to him that the

handcuffs were too tight and "really hurt." (Plaintiff says he told Peterson that he believed defendant "twisted the handcuffs so that they were hurting him on purpose," id. at ¶ 76, but plaintiff does not cite any testimony that defendant actually *did* twist the handcuffs or otherwise manipulated them to make them tighter than usual.) Plaintiff "pleaded" with Peterson to do something about the handcuffs. Although Peterson checked the handcuffs and did not believe they were too tight, he offered to place plaintiff in shackles so that he could be handcuffed in the front rather than the back. Plaintiff agreed. When Peterson changed the handcuffs, plaintiff pointed to red marks on his wrists and asked, "aren't those terrible"? The marks "did not appear to be deep or have caused injury." Dft.'s PFOF ¶ 149, dkt. #24-1.

Peterson transported plaintiff to the Douglas County jail, where Peterson explained that he had been arrested for disorderly conduct and obstructing an officer. Plaintiff did not seek medical attention while he was in custody. However, he observed "blood and blister-type of discoloration under the skin." Plt.'s PFOF ¶ 80, dkt. #26. His hands were "numb and painful"; his fingers were swollen for a few days. Id. at ¶ 81. Although the swelling went down, his hands and fingers are still numb.

Plaintiff was charged with disorderly conduct, but the district attorney later moved to dismiss the charge.

In April 2006 plaintiff was diagnosed with carpal tunnel syndrome.

OPINION

A. False Arrest

To prevail on a claim for false arrest, the plaintiff must prove that the defendant did not have probable cause to arrest him for a crime. Mustafa v. City of Chicago, 442 F.3d 544, 547 (7th Cir. 2006); Kelley v. Myler, 149 F.3d 641, 646 (7th Cir.1998). The parties focus on the question whether defendant had probable cause to arrest plaintiff for disorderly conduct under Wis. Stat. § 947.01(1), so I will do the same. Under that provision, "[w]hoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor."

As defendant acknowledges, I must view the facts in the light most favorable to plaintiff for the purpose of the motion for summary judgment. Loudermilk v. Best Pallet Co., LLC, 636 F.3d 312, 314-15 (7th Cir. 2011). Thus, in arguing that he had probable cause to arrest plaintiff, defendant focuses on the facts that plaintiff admits or does not dispute: (1) "in a loud voice," plaintiff said to defendant, "Brad, get off the trailer and let me get through"; (2) plaintiff "brushed" defendant while walking by him and immediately after making that statement; and (3) plaintiff pushed down on defendant's hands in an attempt to remove them from plaintiff's shirt. (Although plaintiff says in his brief that he did not admit to "yelling" at defendant, dkt. #25 at 17, he does not cite any evidence in his brief or proposed findings of fact that is contrary to defendant's testimony. Procedure to Be Followed on Motions for Summary Judgment II.C. ("Unless the responding party puts into

dispute a fact proposed by the moving party, the court will conclude that the fact is undisputed.") Dkt. #5 at 3.)

I will assume for the purpose of the motion for summary judgment that plaintiff's actions did not give defendant probable cause to arrest him for disorderly conduct. However, because defendant has raised a qualified immunity defense, plaintiff must show not only that defendant lacked probable cause, but also that it was clearly established in the law that defendant lacked probable cause. Pearson v. Callahan, 555 U.S. 223, 231 (2009). Generally, a right is clearly established if the plaintiff can point to a case from the court of appeals or the Supreme Court (or a consensus of other courts) in which the court found the same or similar actions to violate the law. Alternatively, if there is no "clearly analogous" case, the defendant will not be not entitled to qualified immunity if more general legal principles made it obvious that the defendant's particular conduct was unconstitutional. Surita v. Hyde, 665 F.3d 860, 868 (7th Cir. 2011); Smith v. City of Chicago, 242 F.3d 737, 742 (7th Cir. 2001). In the context of a claim for false arrest, the question is whether "a reasonable officer could have mistakenly believed that probable cause existed." Thayer v. Chiczewski, 697 F.3d 514, 524 (7th Cir. 2012). This is often referred to as "arguable probable cause." Fleming v. Livingston County, Illinois, 674 F.3d 874, 880 (7th Cir. 2012); Carmichael v. Village of Palatine, Illinois, 605 F.3d 451, 459 (7th Cir. 2010); Williams v. Jaglowski, 269 F.3d 778 (7th Cir. 2001).

In arguing that defendant is not entitled to qualified immunity, plaintiff relies on Chelios v. Heavener, 520 F.3d 678 (7th Cir. 2008), Morfin v. City of E. Chicago, 349 F.3d

989 (7th Cir. 2003), and Payne v. Pauley, 337 F.3d 767 (7th Cir. 2003), but these cases are not on point. Although each involved arrests for disorderly conduct, the plaintiffs in each case testified that they had not engaged in *any* of the conduct alleged by the officer, including yelling or making physical contact. Chelios, 520 F.3d at 691 ("[U]nder his version of the facts, Mr. Chelios had not made physical contact with Sergeant Heavener, conducted himself in a disorderly manner or otherwise obstructed or impeded Sergeant Heavener in his duties."); Payne, 337 F.3d at 777 ("[W]e must credit Payne's version of the facts in which she claims that she did not argue with Pauley, she did not swear at him, did not yell, and she did not goad the crowd."); Morfin, 349 F.3d at 1005 ("According to both Mr. Morfin and Shaffer, Mr. Morfin did not pose a threat to the officers—he was docile and cooperative. Furthermore, Mr. Morfin did not resist arrest in any way prior to the officers' use of excessive force."). In this case, it is undisputed that plaintiff gave defendant a sudden verbal command "in a loud voice," "brushed" against him and later attempted to push him away. Although these may not be obvious examples of disorderly conduct, they are not similar to the facts in Chelios, Morfin and Payne.

If defendant's grounds for arresting plaintiff were limited to plaintiff's speech, defendant likely would not be entitled to summary judgment because it is clearly established that speech is protected by the First Amendment, even if it is rude or challenges an officer's authority. Payne, 337 F.3d at 776-77 ("[T]he First Amendment protects even profanity-laden speech directed at police officers. . . Police officers must be more thick skinned than the ordinary citizen and must exercise restraint in dealing with the public.

They must not conceive that every threatening or insulting word, gesture, or motion amounts to disorderly conduct.") (internal quotations omitted). See also State v. Becker, 51 Wis. 2d 659, 665, 188 N.W.2d 449, 452 (1971) (evidence that plaintiff was "yelling very loudly" not enough to prove disorderly conduct). Although courts have upheld arrests under § 947.01 for loud or abusive speech in some cases, this has been in situations more extreme than this one. E.g., Anderson v. City of West Bend Police Dept., 774 F. Supp. 2d 925 (E.D. Wis. 2011) (officers had probable cause to arrest plaintiff for disorderly conduct when argument was so loud that it prompted neighbors to call 911); Lane v. Collins, 29 Wis.2d 66, 72, 138 N.W.2d 264, 267 (1965) ("Calling another person a 'son-of-a-bitch' under charged circumstances might well constitute abusive language" in violation of disorderly conduct statute).

Plaintiff's "brushing" against defendant complicates the matter. Defendant cites Currier v. Baldridge, 914 F.2d 993, 996 (7th Cir. 1990), in which the court held that an officer had probable cause to arrest the plaintiff for disorderly contact when he served the defendant with legal papers in a courtroom: "The evidence is undisputed that Currier made physical contact with Baldridge as he attempted to serve the officer with legal papers. Currier quibbles with the defendants' characterization of this contact as a 'striking' but any physical contact within a courtroom between a police officer and a private citizen would tend 'to cause or provoke a disturbance,' as the state of Wisconsin has defined disorderly conduct." In addition, defendant cites Becker, 51 Wis. 2d at 665, 188 N.W.2d at 452-53, in which the court upheld a conviction for disorderly conduct when the defendant "pushed and jostled

[an] officer."

Both of these cases are distinguishable because Currier involved the special setting of a courtroom and Becker involved more obviously violent conduct. Thus, they do not show that simply "brushing" against an officer in any setting constitutes disorderly conduct. However, plaintiff does not cite any contrary authority that is more similar to his situation. In fact, in one of the cases he cites, the court considered it to be "critical" to its decision that the plaintiff denied any "physical contact" with the officer. Chelios, 520 F.3d at 686. This gives defendant stronger grounds to say that he had "arguable probable cause" to arrest plaintiff, particularly when plaintiff's action is viewed in conjunction with his statement. Although it might be obvious that disorderly conduct requires more than accidental physical contact with an officer, it would be more reasonable to interpret plaintiff's conduct as threatening and disruptive when it is paired with the confrontational and loud statement, "Brad, get off the trailer and let me get through."

Even if these two actions together would not justify an arrest, plaintiff's claim is further undermined by his attempt to push defendant's hands away. Although plaintiff says he simply was acting defensively in response to defendant's allegedly unlawful conduct, he does not cite any authority that would have permitted him to do that. In the absence of such authority, I cannot say that it is obvious that plaintiff's resistance was not "disorderly conduct," particularly in light of the inherently ambiguous language in the statute. Thayer v. Chiczewski, 697 F.3d 514, 524 (7th Cir. 2012)("Qualified immunity protects police officers who reasonably interpret an unclear statute.") (alterations and internal quotations

omitted). Accordingly, I conclude that defendant is entitled to qualified immunity on this claim.

B. Excessive Force

Plaintiff contends that defendant used excessive force against him in two instances, first in the context of arresting him and later when placing him in handcuffs. Force is excessive under the Fourth Amendment "if, judging from the totality of circumstances at the time of the arrest, the officer used greater force than was reasonably necessary to make the arrest." Payne, 337 F.3d at 778. The parties agree that the relevant factors in assessing reasonableness include the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. Graham v. Connor, 490 U.S. 386, 396-97 (1989).

1. Forced used before the arrest

Construing the facts in the light most favorable to plaintiff, I conclude that defendant is not entitled to qualified immunity with respect to the force he used leading up to the arrest. It is clearly established that "[f]orce is reasonable only when exercised in proportion to the threat posed." Cyrus v. Town of Mukwonago, 624 F.3d 856, 863 (7th Cir. 2010). Defendant does not identify any justification for grabbing plaintiff by his shirt in response to "brushing" defendant. Under plaintiff's version of the facts, he presented no threat to

defendant at this time. Although courts must take into account that "law-enforcement officers must make critical, split-second decisions in difficult and potentially explosive situations," id. at 862, plaintiff says that defendant's use of force was not a knee-jerk response to an uncertain situation, but occurred after the parties exchanged words and that he did not try to push defendant.

Plaintiff's attempt to push defendant away after defendant grabbed him may have justified some use of force, but defendant does not explain why it would have been necessary to grab plaintiff's abdomen or hit him to gain control. He also does not provide any justification for grabbing plaintiff by the back of the neck and jerking him back while handcuffing him. Although plaintiff's injuries from this encounter may have been slight, it is well established that serious injury is not an element of an excessive force claim. Sow v. Fortville Police Dept., 636 F.3d 293, 303-04 (7th Cir. 2011); Chelios, 520 F.3d at 690.

In arguing that he used reasonable force, defendant relies on the opinion of Robert C. Willis, "an instructor of law enforcement and criminal justice at Northeast Wisconsin Technical College." Dkt. #29-1, ¶ 1. However, this opinion is not helpful because Willis does not use any expertise he has in law enforcement to assess the reasonableness of particular tactics defendant used. Rather, his opinion consists primarily of an application of the Graham factors at a high level of generality. United States v. Lupton, 620 F.3d 790, 799 -800 (7th Cir. 2010) (expert may not give legal opinions); Mid-State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333, 1339 (7th Cir.1989) (conclusory expert opinions not admissible). In fact, Willis's opinion is so vague that it is impossible to tell which

version of the facts he is relying on in his report, though it is reasonable to infer that he is relying on defendant's testimony because the summary of facts in his report tracks defendant's. Because I must accept plaintiff's version of events as true at this stage of the proceedings, any expert opinion not bound by the same limitation cannot be used to support a motion for summary judgment.

Plaintiff does not cite any cases with the same facts as this case, but I conclude that Graham provided sufficient notice to defendant to overcome a qualified immunity defense for the purpose of summary judgment. Under plaintiff's version of the facts, plaintiff had not committed a serious crime, did not pose a threat and did not resist when defendant told him he was under arrest. Accordingly, I am denying defendant's motion for summary judgment with respect to this claim.

2. Handcuffs

An officer may use excessive force in violation of the Fourth Amendment by placing handcuffs on a suspect too tightly. In particular, "an officer may not knowingly use handcuffs in a way that will inflict unnecessary pain or injury on an individual who presents little or no risk of flight or threat of injury." Stainback v. Dixon, 569 F.3d 767, 772 (7th Cir. 2009). A key element is "knowingly." "[A] reasonable officer cannot be expected to accommodate an injury that is not apparent or that otherwise has not been made known to him." Id. at 773. An officer's knowledge may be inferred "from the nature of the act itself" or from information he receives about the plaintiff's condition. Id.

In this case, plaintiff contends that defendant used excessive force against him by placing handcuffs on him too tightly and then refusing to remove them when he complained. (It is undisputed that another officer adjusted plaintiff's handcuffs while he was still at the gas station, but neither side proposed any findings of fact regarding the amount of time plaintiff was handcuffed before the adjustment was made.) Defendant denies that plaintiff complained to him about the handcuffs, but even if I assume that plaintiff did complain to defendant, plaintiff cannot overcome a qualified immunity defense.

It is undisputed that defendant had no difficulty placing and securing the handcuffs and plaintiff does not point to anything about the way defendant secured the handcuffs that would have given him notice that they were too tight. With respect to plaintiff's complaints, he testified that he told defendant twice that the handcuffs were "too tight," but he did not propose as fact any complaints that he made about pain or numbness, any requests for medical attention or any other specific acts or statements he made to defendant that would have given him notice that he needed to take action.

These facts are difficult to distinguish from Tibbs v. City of Chicago, 469 F.3d 661 (7th Cir. 2006), and Sow v. Fortville Police Dept., 636 F.3d 293 (7th Cir. 2011), in which the court affirmed dismissals of excessive force claims. In Tibbs, 496 F.3d at 666, the plaintiff had complained to officers about his handcuffs being too tight, but he gave them "no indication of the degree of his pain." In Sow, 636 F.3d at 304, the plaintiff testified that he "complained once to [the defendant] that the handcuffs were too tight," but he "presented no evidence that he provided any elaboration to" the defendant. The only

difference in this case is that plaintiff complained twice instead of once. Even if I were to assume that the Fourth Amendment required defendant to take plaintiff's second complaint more seriously despite the absence of specific information, plaintiff has not shown that such a requirement is clearly established.

Plaintiff again relies on Payne, 337 F.3d at 779-80, in which the court concluded that the plaintiff could proceed to trial on an excessive force claim involving handcuffs that were too tight. However, Payne is distinguishable for two reasons. First, the court found that, under the plaintiff's version of the facts, the officer was not authorized to place handcuffs on the plaintiff under the Fourth Amendment because she had not violated the law. Id. at 779. Second, the allegations in Payne were more serious because the plaintiff alleged that the defendant "grabbed her left arm, jerked it into handcuffing position, forced her arm behind her back, slammed the handcuff down on her wrist, jerked her wrist, and tightened the handcuffs until Payne could not feel her hands." Id. at 774. Although the plaintiff told the defendant "that she could not feel her hands, and that she was in pain," the defendant refused to loosen the handcuffs. Id. at 774-75. Thus, in Payne, the defendant was on notice that he was using excessive force both because of the nature of his actions and because of the specific complaints of the plaintiff. In this case, plaintiff points only to his vague complaints that the handcuffs were "too tight" as evidence that defendant was on notice of a problem.

In his proposed findings of fact, plaintiff cites evidence that he continues to suffer from pain and numbness in his wrists and hands. However, he admits he did not seek medical care while in custody or for several months after the incident. In any event, plaintiff

has not adduced any evidence that any health problems he has now are related to defendant's conduct. In fact, he has not submitted any evidence to rebut the opinion of defendant's medical expert that plaintiff's carpal tunnel was caused by his work as a welder and metal fabricator rather than anything defendant did. Accordingly, defendant is entitled to summary judgment on this claim.

ORDER

IT IS ORDERED that

1. Defendant Brad Biser's motion to file corrected proposed findings of fact, dkt. #24, is GRANTED as unopposed.

2. Defendant's motion for summary judgment, dkt. #11, is DENIED with respect to plaintiff Mitch Rooni's claim that defendant used excessive force against him before placing him in handcuffs on November 19, 2005. The motion is GRANTED in all other respects.

Entered this 17th day of December, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge