CASE NO. 18-10791

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OMAR T. ALSTON,

Plaintiff/Appellant,

vs.

MARK SWARBRICK,
DANIEL TRAMMEL, and
SHERIFF OF MARION COUNTY, FLORIDA

Defendants/Appellees.

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

APPELLEES' ANSWER BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellees, Mark Swarbrick, Daniel Trammel, and the Sheriff of Marion County, Florida, in his official capacity, hereby certifies that the following is a complete list of persons and entities known to have an interest in the outcome of this case:

Alston & Bird LLP, Appellant Attorneys for Plaintiff/Appellant

Alston, Omar T., Plaintiff/Appellant

Florida Sheriffs' Risk Management Fund

Green, Jr., John M., Trial/Appellate Attorney for Defendants/Appellees

Harmon, Benjamin, Appellate Attorney for Plaintiff/Appellant

Hodges, The Honorable Wm. Terrell, United States District Court Judge

John M. Green, Jr., P.A., Trial/Appellate Attorneys for Defendants/Appellees

Lammens, The Honorable Philip R., United States Magistrate Judge

Sheriff of Marion County, Florida, Defendant/Appellee

Swarbrick, Mark, Defendant/Appellee

Trammel, Daniel, Defendant/Appellee

Tuck, Andrew, Appellate Attorney for Plaintiff/Appellant

Winchenbach, Linda L., Trial/Appellate Attorney for Defendants/Appellees

There are no publicly traded companies or corporations that have an interest in the outcome of this case.

STATEMENT OF ORAL ARGUMENT

The Appellees respectfully request oral argument in this matter.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES AND RULES

STATEMENT OF JURISDICTION

The Middle District of Florida's jurisdiction was based on 28 U.S.C. § 1331. The Eleventh Circuit's jurisdiction is pursuant to 28 U.S.C. § 1291.

On January 25, 2018, the district court entered an order granting the Defendants' Motion for Summary Judgment and a Judgment was entered the same day. (Doc. 162; Doc. 163.) On February 23, 2018, the incarcerated pro se Plaintiff filed (pursuant to the Mailbox Rule) a Notice of Appeal. (Doc. 164.) The notice stated he was appealing "from the final judgment – from an order granting Defendants' Motion for Summary Judgment entered in this action on 25th Day of January, 2018."

STATEMENT OF THE ISSUES

I. WHETHER SWARBRICK HAD PROBABLE CAUSE OR ARGUABLE PROBABLE CAUSE TO ARREST ALSTON.

II. WHETHER SWARBRICK USED ONLY NECESSARY AND REASONABLE FORCE DURING ALSTON'S ARRESTS.

III. WHETHER TRAMMELL IS ENTITLED TO SUMMARY JUDGMENT ON THE FAILURE TO INTERVENE CLAIM.

IV. WHETHER THE SHERIFF OF MARION COUNTY IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIMS AGAINST HIM.

PREFACE

A. References to the Parties

1. Plaintiff/Appellant Omar T. Alston will be referenced as "the Plaintiff" or "Alston."

2. The Defendants/Appellees Mark Swarbrick and Daniel Trammell will be referenced as "the Defendant(s)," "Swarbrick," or "Trammell."

3. The Defendant/Appellee Sheriff of Marion County, Florida will be referenced as "the Sheriff."

B. References to the record and the Brief of Appellant*

1. Documents in the record on appeal: "Doc. #, p. #."

2. Brief of Appellant (Initial Brief): "IB, p. #."

* PACER page numbers are used unless otherwise noted.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The Plaintiff's original pro se complaint was filed on September 2, 2014, pursuant to 42 U.S.C. § 1983. (Doc. 1.) He filed three amended complaints with the Third Amended Complaint being filed on August 21, 2015. (Doc. 14; Doc. 33; Doc. 41.) That document is referred to herein as "the Complaint." On August 2, 2016, the Plaintiff was allowed to add a medical records exhibit to the Complaint. (Doc. 82-1: Records.)

The Complaint before the district court, after dismissals of other defendants by the court and by the Plaintiff, sued Swarbrick and Trammell in their individual capacity, and the Sheriff in his official capacity, for alleged violations of the Plaintiff's Fourth and Fourteenth Amendment rights and the Equal Protection Clause during his arrest on June 27, 2011. (Doc. 41.) The Plaintiff's lawsuit included claims against Swarbrick for alleged false arrest and excessive force, and a claim against Trammell for failure to intervene. His claim against the Sheriff was for an alleged custom or policy of excessive force and failure to train/supervise/discipline.

The Complaint's allegation that Swarbrick violated the Plaintiff's Equal Protection rights was addressed in the Defendants' Motion for Summary Judgment. (Doc. 41, p. 9; Doc. 145, p. 13-14.) However, in his brief in opposition, the

Plaintiff stated, "This is specifically a Fourth Amendment claim and if Plaintiff's Complaint is read correctly the only mentioning as to Equal Protection is the fact that [Swarbrick] did not treat Plaintiff equally as other arrestees (as Q.D.B.) and arrest without force." (Doc. 152, p. 52.) In the order on appeal, the court recognized that the Plaintiff had either abandoned the claim or never intended to bring it, and was just referencing equal protection to compare the force of his arrest with the nonviolent minor's arrest. (Doc. 162, p. 11.) However, if he was making an equal protection claim, the court found that it failed. (Doc. 162, p. 12.) The Initial Brief does not mention an equal protection claim or list it among the "remaining claims," and if the Plaintiff intended to make it, it has been abandoned on appeal. (IB, p. 13.)

B. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

Pleadings regarding the institution of the lawsuit are set out above. In response to the Complaint, the Defendants named therein filed a Partial Motion to Dismiss on October 5, 2015, requesting the dismissal of several Defendants, which was granted in part. (Doc. 55; Doc. 106; Doc. 107.) Filed the same date was an Answer and Affirmative Defenses, including the defense of qualified immunity on behalf of the deputies. (Doc. 56.) After discovery, the Defendants filed their Motion for Summary Judgment on October 23, 2017, to which the Plaintiff filed

numerous opposition responses. (Doc. 145; Doc. 151; Doc. 152; Doc. 153; Doc. 154.)

On January 25, 2018, the district court granted the Defendants' Motion for Summary Judgment and entered a Judgment. (Doc. 162; Doc. 163.) The Plaintiff filed a Notice of Appeal on February 23, 2018 (Mailbox Rule). (Doc. 164.) He also moved for appellate in forma pauperis status, which the court denied on April 27, 2018, finding the appeal was not taken in good faith pursuant to 28 U.S.C. § 1915(a)(3) and Fed. R. Civ. P. 24(a)(3)(A). (Doc. 170.)

On April 6, 2018, the Plaintiff filed with the Eleventh Circuit a Motion for Appointment of Counsel, which the Court granted on June 13, 2018. On July 16, 2018, Andrew Tuck was appointed as the Plaintiff's appellate counsel.

C. STATEMENT OF THE FACTS

The Third Amended Complaint ("Complaint") alleges that on June 27, 2011, Swarbrick and Trammell investigated a matter involving a minor in the Plaintiff's custody, Q.D.B. (Doc. 41, p. 6.) It states that after the minor was taken into custody and placed in Trammell's vehicle, Swarbrick approached the Plaintiff and asked what happened. The Plaintiff admits that he refused to answer Swarbrick, but instead, as he turned to walk away, said, "Fuck you, I don't have to answer anything." (Doc. 41, p. 16.) He alleges that Swarbrick then slammed him in the middle of the street, where he was arrested. He says the deputy handcuffed him,

dragged him 20-30 feet through a grassy area, and threw him inside the deputy's vehicle without searching him. (Doc. 41, p. 17.)

The Plaintiff alleges that, while in the vehicle, he was in possession of two cellphones and his house keys. He says he "made a call to [his] aunt in Virginia to alert her of what was occurring." "At a distance, Deputy Trammell stood and notice [the Plaintiff's] movements as he and Deputy Swarbrick was conversating. Deputy Trammell came to Deputy Swarbrick's vehicle (to the back driver's side door) and took [his] cell phone from [him]." [1] (Doc. 41, p. 17.) He alleges Swarbrick pulled him from the vehicle, threw him up against the back of the vehicle and searched him, taking his keys and the other cell phone, which belonged to Temekia Morris ("Morris"). (Doc. 41, p. 17-18.) During the search, he claims that Swarbrick pulled down his pants, exposing his "private areas," as he had no underwear on. He states the deputy threw him back inside the vehicle. (Doc. 41, p. 18.) Morris requested the taken items from Swarbrick and the deputy responded to her disrespectfully. The Plaintiff and Swarbrick then argued for 2-3 minutes inside the car. (Doc. 41, p. 18.)

[1] The Defendant filed four verified complaints in this action, with the first being filed about 38 months after the incident. (Doc. 1; Doc. 14; Doc. 33; Doc. 41.)The allegations about making the cell phone call and Morris asking Swarbrick for her phone were not mentioned until the third one, filed almost a year after the lawsuit was instituted. (Doc. 33, p. 17-18.)

After giving the items to Morris, Swarbrick opened the vehicle's passenger side back door and "while in handcuffs" tried to pull the Plaintiff out by his "right arm pit." (Doc. 41, p. 18.) The Complaint says he was screaming in pain that his foot was stuck, and Swarbrick pulled harder, placing his foot on the Plaintiff's left shoulder side area. He claims that "being unable to remove [him] from the vehicle and being stuck" the deputy then sprayed him in the face repeatedly with chemical agent. (Doc. 41, p. 18; Doc. 153, p. 5.) The Complaint states that Trammell stood by and watched this action. Then Trammell opened the other back car door and released his foot, whereupon Swarbrick pulled him out onto the ground and continued to spray him. (Doc. 41, p. 19.) The Plaintiff alleges Swarbrick used chemical agent spray "for about 3 to 5 minutes or so."[2] Paramedics arrived and decontaminated him. (Doc. 41, p. 20.)

The Complaint states that as the Plaintiff was on the ground being sprayed, L.D.B., a twelve-year-old child,[3] was "going off" behind Deputy Swarbrick saying the deputy was "a racist and to get a black officer on the scene," and the deputy kicked backwards at him. Morris was "grabbing L.D.B. (getting him under control)" and the Plaintiff alleges that Swarbrick pepper sprayed the boy and

[2] Once again, the alleged continuing pepper spraying when the Plaintiff is on the ground after being pulled from the car, including the "3-5 minutes" statement, is not mentioned until the third complaint filed. (Doc. 33, p. 19-20.)

[3] The Second Amended Complaint states the child is twelve. (Doc. 33, p. 19.)

Morris. Trammell then "assisted" Morris by placing L.D.B. in handcuffs. (Doc. 33, p. 19-20; Doc. 41, p. 19.) The child's actions are asserted for the first time in the third complaint, as well as the allegation that Swarbrick pepper sprayed the boy and his mother.

The affidavits of Swarbrick and Trammell, Docs. 145-1 and 145-2, respectively, provide their contemporaneous reports for incident #11020809 regarding the Plaintiff's arrest. Trammell's affidavit also includes his June 27, 2011, Arrest Affidavit for incident #11020808 related to the arrest of Q.D.B., which was the reason the deputies had responded to the scene.[4] Q.D.B., a minor, was arrested by Trammell on a misdemeanor charge of Simple Battery—Domestic, for admittedly striking Alston, his stepfather. In the investigation, Trammell had interviewed witnesses L.D.B. and Morris, and Swarbrick was attempting to interview Alston, who was the victim and a witness. (Doc. 145-2: Trammell affidavit; Arrest Affidavit for Q.D.B.) In addition, the Complaint states that Alston had custody of and power of attorney for Q.D.B. (Doc. 41, p. 6.)

However, when Swarbrick approached Alston and tried to speak with him, Alston told him he had nothing to say. When Swarbrick asked him to move away

[4] Documents from the Sheriff's Office are prepared in the regular course of business and would be admissible at trial. See Pt Indonesia Epson Ind. v. Orient Overseas Container Line, Inc., 219 F. Supp. 2d 1265,1274 n.8 (S.D. Fla. 2002).

from the area then, Alston began screaming obscenities at the deputy, such as calling him a mother fucker, a piece of shit, and a racist cracker, and telling the deputy to "suck his dick." (Doc. 145-1: Swarbrick affidavit.) The Plaintiff has confirmed that when Swarbrick asked him what happened, he did not cooperate with the investigation, but instead turned to walk away, yelling, "Fuck you, I don't have to answer anything." (Doc. 41, p. 16.) He does not deny yelling the other statements. Trammell, from twenty yards away, could hear Alston screaming obscenities at Swarbrick. Trammell's report notes that a crowd of onlookers had formed at the entrance to the subdivision, and the Complaint also mentions the onlookers. (Doc. 41, p. 16; Doc. 145-2.)

Trammell stated that Alston's yells were inciting Morris and L.D.B. to apparent retaliatory action and they began running towards Swarbrick. Trammell ran over to provide security to the other deputy. (Doc. 145-2.) Swarbrick began attempting to handcuff Alston to arrest him for Disorderly Conduct, but Alston kept struggling and pulling away from the deputy. He continued to scream at Swarbrick, telling him "Go fuck yourself." Swarbrick wrestled him to the ground, while giving him commands to stop resisting arrest and to place his hands behind his back. Trammell assisted, and they were able to handcuff Alston in the back of his body. Swarbrick placed him in the back seat of his patrol vehicle on the driver's side. During the handcuffing, L.D.B. and Morris became so hysterical that

Trammell had to physically push them away from Swarbrick. (Doc. 145-1; Doc. 145-2.)

Trammell continued interviewing Morris about a possible battery on her by Q.D.B. (she had a split lip), when he observed Swarbrick get into the driver's seat of his patrol car. (Doc. 145-2.) Swarbrick's affidavit states he got into the patrol car and began to get Alston's identification information. Trammell could hear Alston kicking the inside of the car, and Swarbrick states that Alston had managed to get the handcuffs in front of his body. The Plaintiff lifted up his midsection and was trying to unbuckle the belt of his shorts, telling Swarbrick he was "going to piss all over [him]." Swarbrick opened the car's passenger side back door to remove Alston so he could be re-cuffed behind his back, which was necessary for safety reasons. Trammell saw Swarbrick take the Plaintiff's arm to remove him from the car. Alston was still yelling obscenities, such as "Fuck you crackers" and "suck my dick." (Doc. 145-1; Doc. 145-2.)

The Plaintiff actively resisted being removed from the car, and Trammell assisted by grabbing his legs so Swarbrick could pull him out. After Alston was removed, Trammell saw that his penis was out of his shorts. Alston physically resisted being handcuffed in the back, yelling obscenities and that he wanted the handcuffs removed so he could "beat [Swarbrick's] ass." Swarbrick gave him several verbal commands to stop resisting or he would be pepper sprayed. Alston

refused to comply and Swarbrick sprayed him once in the eyes while he was up against the patrol car. (Doc. 145-1; Doc. 145-2.)

The Plaintiff continued to fight Swarbrick, but Swarbrick and Trammell pushed him to the ground and were able to handcuff him behind his back. Trammell maneuvered the Plaintiff's shorts so his penis was back inside and refastened his belt which was undone. He then was ordered to kneel down and wait for the paramedics to arrive. Upon arrival, the medics washed out his eyes. Swarbrick transported him to the jail. (Doc. 145-1; Doc. 145-2.)

When Swarbrick had taken Alston from the car and had removed the handcuffs so he could attempt to re-cuff him behind his back, L.D.B. and Morris again became irate and hysterical, screaming and crowding Swarbrick. Trammell assisted Swarbrick by shielding him from L.D.B. and Morris. L.D.B. began calling the deputies names such as "racist crackers" and "motherfuckers," and came up behind Swarbrick, causing the deputy to have to put his right foot out behind him to stop the boy. Morris was unable to restrain him and when she asked Trammell for help, he handcuffed L.D.B. and made him sit on the sidewalk. When the paramedics arrived, Morris had hyperventilated and they treated her as well as Alston. (Doc. 145-1; Doc. 145-2.)

Neither deputy's report includes the alleged cell phone incident or indicates the Plaintiff was removed from the patrol vehicle twice. Both affidavits

affirmatively state that Swarbrick, after giving the Plaintiff a warning, only deployed his pepper spray once in order to handcuff the Plaintiff after removing him from the vehicle, and both deny that he pepper sprayed L.D.B. and Morris. Both affidavits deny that either deputy pulled down Alston's pants. (Doc. 145-1; Doc. 145-2.)

D. STANDARD OF REVIEW

The appellate standard of review for the order granting the Motion for Summary Judgment is de novo. O'Ferrell v. U.S., 253 F.3d 1257, 1265 (11th Cir. 2001). The appellate court may affirm if there exists any adequate ground for doing so, regardless of whether it is the one on which the district court relied. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1117 (11th Cir. 1993) (citations omitted).

SUMMARY OF THE ARGUMENTS

Swarbrick had probable cause or arguable probable cause for both charges made against the Plaintiff. The arrest for disorderly conduct was not just based upon the facts that the Plaintiff refused to answer his investigatory questions and was yelling profanities at him. The deputy's objectively reasonable belief that he had probable cause was based on the extreme loudness of the yelling in a public place where onlookers were gathered and its interference with his ability to continue to investigate the domestic violence incident in which Alston and his

family were involved. In addition, the yelling incited Alston's twelve-year-old stepson and the boy's mother to run up behind Swarbrick, and Trammel had to step in to protect him.

Swarbrick had probable cause or arguable probable cause for the charge of resisting an officer without violence in the performance of a legal duty when it was necessary to remove Alston from the patrol car and re-handcuff him because he had maneuvered his handcuffs to the front of his body. Swarbrick encountered resistance to pulling the Plaintiff from the car, which he reasonably perceived to be willful. Also, after removal from the car, Alston resisted being re-handcuffed.

Any uses of force by Swarbrick were objectively necessary and reasonable under the circumstances. The takedown when arresting the Plaintiff for disorderly conduct, the action of pulling him from the car, the pepper spraying, and any other forceful actions of Swarbrick were de minimis. As confirmed by the Plaintiff's filed medical records, his only injuries were a strained neck and a sprained shoulder for which a sling was adequate treatment. There are no allegations of additional treatment.

Both because Swarbrick did not use excessive force and because any forceful actions happened so quickly, there was no need or obligation for Trammell to intervene. He has no liability for the failure to intervene claim.

The claims against the Sheriff are not addressed in the Initial Brief and are abandoned. Furthermore, he has no liability based on policies and customs which caused the Plaintiff's alleged constitutional violations, and the evidence is clear that deputies, including Swarbrick and Trammell, were adequately trained, supervised, and disciplined.

Swarbrick and Trammell are entitled to qualified immunity and summary judgment on the claims against them, and the Sheriff is entitled to summary judgment on the claim against him. The order on appeal should be affirmed.

ARGUMENTS

I. SWARBRICK HAD PROBABLE CAUSE OR ARGUABLE PROBABLE CAUSE TO ARREST ALSTON.

A. DISORDERLY CONDUCT CHARGE

Swarbrick arrested the Plaintiff on charges of Disorderly Conduct (Florida Statute 877.03) and Resisting a Law Enforcement Officer Without Violence (Florida Statute 843.02). A deputy has probable cause for an arrest when the facts and circumstances within his knowledge are sufficient to warrant a reasonable belief that the suspect has committed or is committing a crime. U.S. v. Floyd, 281 F.3d 1346, 1348 (11th Cir. 2002) (per curiam). Probable cause is a defense to a false arrest claim and arguable probable cause, meaning that a reasonable officer in the same circumstances could have believed there was probable cause, will also

shield an officer from liability. Case v. Eslinger, 555 F.3d 1317, 1327 (11th Cir. 2009). An officer acting within his discretionary authority, such as when making an arrest, has qualified immunity if he does not violate clearly established constitutional rights of which a reasonable person would have known. See Brown v. City of Huntsville, 608 F.3d 724, 734 (11th Cir. 2010); Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002) (warrantless arrest is within officer's discretionary authority).

Florida Statute 877.03 (2011) states:

> Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them…or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree…

An analysis of whether disorderly conduct has occurred is subject to the subjective interpretation of specific facts, such as the words, tone, and decibels used, and the reactions of onlookers. See Gold v. City of Miami, 121 F.3d 1442, 1446 (11th Cir. 1997) (finding probable cause for disorderly conduct arrest and awarding qualified immunity to officers arresting bank patron for twice using profanities in a public place and in the presence of others), cert. denied, 525 U.S. 870 (1998); see also Morris v. City of Orlando, 2010 WL 4646704, *11 (M.D. Fla. Nov. 9, 2010) (finding probable cause for arrest of disruptive man who was yelling at officer in bus station and invading others' right to pursue their lawful activities)

(citing State v. Saunders, 339 So. 2d 641, 644 (Fla. 1976)). Under such an analysis, the facts and circumstances of the encounter with Alston and his public behavior met the requirements of Florida Statute 877.03 and could lead a reasonable officer to conclude that he had probable cause for an arrest. At the least, Deputy Swarbrick would have arguable probable cause. See Gold, 121 F.3d at 1446; Morris v. City of Orlando, 2010 WL 4646704 at *4, 5.

The Florida Supreme Court found the statute applied where the person's speech, by its very utterance, "inflict[s] injury or tend[s] to incite an immediate breach of the peace…" Gold, 121 F.3d at 1445 (citing Saunders, 339 So. 2d at 644). A person does not violate the statute merely by employing profane language, but whether the law is violated largely depends on the facts and circumstances of each case and "[i]t is the degree of loudness, and the circumstances [under] which [the speech is] uttered, [that] take [it] out of the constitutionally protected area." Id. at 1445-46 (citing Morris v. State, 335 So. 2d 1, 2 (Fla. 1976) (per curiam) (not the words' offensiveness, but the degree of loudness, the circumstances under which they are uttered, their invasion of others' right to pursue their lawful activities, and whether they tend to incite an immediate breach of the peace may make them not constitutionally protected).

In his affidavit (Doc. 145-1), Swarbrick states why he believed he had probable cause to arrest the Plaintiff for this offense:

> Mr. Alston then began screaming at me in an extremely loud voice, calling me names such as "mother fucker," "cracker," "piece of shit," and "racist cracker," and telling me to suck his dick. I determined that Mr. Alston's actions were in violation of Florida Statute 877.03 as he was screaming these epithets and obscenities in a public place so as to outrage the sense of public decency and to affect the peace and quiet of residents of the apartment complex and other members of the public who might be nearby. I also became aware of Tamekia Morris and her minor son running towards me in an excited response to Mr. Alston's screaming, with Deputy Trammell coming behind them. In addition, his screaming was obstructing my ability to interact with other potential witnesses to the domestic violence allegations we were investigating and was creating a danger to the deputies.

In his affidavit, Trammell testifies he could hear the Plaintiff screaming obscenities from twenty yards away. (Doc. 145-2.) He recounts how the yelling incited Morris and twelve-year-old L.D.B. to run towards Swarbrick such that Trammell had to push them away from the other deputy.

Cases involving a disorderly conduct arrest require a subjective and fact-intensive inquiry, and in close cases finding arguable probable cause and awarding qualified immunity is justified. See Morris v. City of Orlando, 2010 WL 4646704 at *11 (citing Gold, 121 F.3d at 1446). Statements and actions invading others' rights to pursue lawful activities can constitute arguable probable cause for a disorderly conduct arrest. See White v. State, 330 So. 2d 3, 7 (Fla. 1976) (regardless of the words uttered, shouting in police station loudly enough to disrupt

its functioning may constitute disorderly conduct). Comparison of the 1976 cases of White and Saunders, which found that "hassling" people on the street to sell them newspapers was not disorderly conduct, illustrates the disparity in rulings on the issue due to the subjective, fact-intensive analysis. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (citing Plumhoff v. Rickard, 572 U.S. 765, 778-79 (2014)).

The deputies' affidavits set out facts meeting the statute's criteria for a disorderly conduct arrest, and Swarbrick's belief he had probable cause was objectively reasonable. See Durruthy v. Pastor, 351 F.3d 1080, 1088 n.5 (11th Cir. 2003), cert. denied, 543 U.S. 917 (2004). He had at least arguable probable cause and should be granted qualified immunity. Alston was a witness in the domestic violence incident involving Q.D.B., who admitted getting into a physical altercation with Alston, and over whom Alston had custody and power of attorney. (Doc. 41, p. 6; Doc. 145-2, p. 8.)

The Plaintiff admits that rather than answering Swarbrick's investigative question regarding what happened, he just repeated "good morning" over and

over.[5] He also admits yelling profanity at Swarbrick and that a crowd of onlookers had formed. (Doc. 41, p. 16, 19; Doc. 152, p. 11.) The Initial Brief says it is "undisputed" that Alston did not yell obscenities until Swarbrick asked him to leave the scene and he was walking away, but this is an incorrect restatement of Swarbrick's affidavit. (IB, p. 17; Doc. 145-1, p. 2.)

The Plaintiff does not deny yelling the other profanity recorded in the deputies' affidavits and incident reports. Rather, he says the other profanity "has yet to be confirmed by any court." (Doc. 152, p. 18.) Swarbrick stated that Morris and L.D.B. ran towards him in response to the screaming. (Doc. 145-1, p. 2.) Trammell's testimony is that they were incited by Alston's screaming to run towards Swarbrick in apparently retaliatory action and he had to push them away from Swarbrick. (Doc. 145-2, p. 2.) The Plaintiff claims that Morris and L.D.B. remained on the "sidelines" with Trammell. (IB: 27-28; Doc. 41, p. 17; Doc. 152, p. 11.) However, this is the same twelve-year-old youth that a short time later, the Plaintiff admits, ran up behind Swarbrick yelling that he was a racist, and had to be handcuffed, at his mother's request, to assist her in grabbing him to gain control of him. (Doc. 33, p. 19-20; Doc. 41, p. 19.) The deputies' affidavits give a more complete account of the boy's actions at that time: he was yelling at Swarbrick and

[5] The brief characterizes the "Good Mornings" as "polite"—an unlikely contrast to his admittedly yelling "Fuck you" a few minutes later.

Trammell, calling them "racist crackers," "motherfuckers," and other profane names and demanding that a black deputy show up. (Doc. 145-1, p. 4; Doc. 145-2, p. 4.)

The Plaintiff's allegation lacks credibility when compared to the deputies' affidavits and the later threatening activities of L.D.B. against Swarbrick. Notably, the Plaintiff has chosen not to provide any affidavits in this case besides his own numerous ones although Morris, to whom he was apparently married, was a witness to much of what occurred. Finally, the profane yelling of Alston was disruptive to Swarbrick's activities in pursuing the investigation of the domestic violence incident, as stated in his affidavit.

The Initial Brief cites two cases from the Florida Second District Court of Appeal regarding disorderly conduct arrests. (IB, p. 25-26.) However, neither case is from or even cited by the U.S. Supreme Court, the Eleventh Circuit or the Florida Supreme Court prior to the date of this incident. See Terrell v. Smith, 668 F.3d 1244, 1244 (11th Cir. 2012) (clearly established law sources). The analysis of whether a right is clearly established is undertaken in the "specific crucible" of the case. Id. If the officer was not put on fair notice that his conduct was unlawful, summary judgment based on qualified immunity is appropriate. Id. In Saunders, the court recognized the need for analysis on a "case by case basis." Saunders, 339 So. 2d at 644. The district court performed the correct fact-intensive review in

finding that Swarbrick had at least arguable probable cause for the arrest and its grant of qualified immunity on this claim should be affirmed. (Doc. 162, p. 12-16.)

In addition, an arrest may be lawful even without probable cause for the stated charge if there is probable cause for another charge. See Devenpeck v. Alford, 543 U.S. 146, 148, 153-55 (2004). The officer's subjective reason for making the arrest does not have to be the offense for which the known facts provide probable cause. Id. at 153. The Complaint states that Swarbrick kept trying to pursue his investigation by repeatedly asking the Plaintiff what happened, but he refused to answer. When Swarbrick told him to leave the area, the Plaintiff turned to walk away, cursing at Swarbrick. He states that Swarbrick took him to the ground ("slammed" him). He does not deny shouting further obscenities at the deputy. (Doc. 41, p. 16-17.)

Swarbrick stated in his Incident Report and in his affidavit that when he attempted to arrest and handcuff the Plaintiff for disorderly conduct, Alston pulled away, screaming obscenities, and he had to "wrestle" him to the ground. Swarbrick gave him repeated orders to place his hands behind his back, but required Trammell's assistance to handcuff him. (Doc. 145-1, p. 3, 8; Doc. 145-2, p. 5.)

Accordingly, viewing the circumstances objectively, Swarbrick had probable cause to arrest the Plaintiff for resisting an officer without violence in the lawful

execution of a legal duty. (Florida Statute 843.02.)[6] His behavior impeded Swarbrick's lawful investigation of the domestic violence incident in which Alston had been involved, and then he resisted the handcuffing. "[W]hen an officer makes an arrest, which is properly supported by probable cause to arrest for a certain offense, neither his subjective reliance on an offense for which no probable cause exists nor his verbal announcement of the wrong offense vitiates the arrest." Lee, 284 F.3d at 1196; see also Brown v. City of Huntsville, 608 F.3d at 735 (if arresting officer had probable cause to arrest for any offense, qualified immunity will apply).

Swarbrick had probable cause or arguable probable cause to arrest the Plaintiff for resisting or obstructing without violence. The related false arrest claim also fails on that basis and Swarbrick should be granted qualified immunity and summary judgment.

B. RESISTING WITHOUT VIOLENCE

As noted, neither deputy, in his contemporaneous report, recorded the event alleged by Alston in which he used a cell phone while in the back of Swarbrick's patrol car and then was taken from the car, searched, and replaced in the car. The

[6] The elements of resisting an officer without violence are (1) the officer was engaged in the lawful execution of a legal duty; and (2) the suspect's action, by his words, conduct or a combination thereof, constituted obstruction or resistance of a lawful duty. See C.E.L. v. State, 24 So. 3d 1181, 1185-86 (Fla. 2009), cert. denied, 560 U.S. 911 (2010).

Plaintiff did not allege that a cell phone was present in these events in his original September 2, 2014, complaint. (Doc. 1.)[7] Likewise, his next complaint, filed January 26, 2015, tracks the first complaint. (Doc. 14, p. 14-15.) In the August 3, 2015, complaint, he adds the embellishment of the alleged phone call to being pulled from the car by Swarbrick and searched by pulling his pants down. (Doc. 33, p. 17-18.) He also adds the story of Morris asking Swarbrick for the confiscated phone's return. (Doc. 33, p. 18.) The pending Complaint, filed a few days later, on August 21, 2015, tracks the previous complaint. (Doc. 41, p. 17-18.) The deputies' accounts reference the Plaintiff being removed from the vehicle by Swarbrick one time, for safety reasons when he had managed to move his handcuffs to the front. Their reports do not mention searching the Plaintiff before he is placed in the car after being arrested for disorderly conduct; that would just be a standard procedure.

As "evidence" of making the phone call, the Plaintiff has provided a letter and some partial cell phone records from Sprint. He has obviously removed or deleted most of the records provided, and the exhibit would likely be inadmissible. Fed. R. Evid. 801(b); 901(a). He has handwritten a note next to a six minute call to

[7] The original complaint merely says the Plaintiff was "thrown [in Swarbrick's vehicle] without being searched." Then, Swarbrick "eventually pulled [him] from his vehicle and searched [him] by pulling [his] pants down and exposing [his] private areas and throwing [him] back inside of [Swarbrick's] vehicle." (Doc. 14, p. 14-15.)

Norfolk, Virginia, made at 12:14 p.m. on June 27, stating that he made the call while he was in the patrol car. (Doc. 153, p. 25-26.) However, the next call, for eleven minutes, was made only an hour later, at 1:16 p.m. The Complaint states he was released from the jail "later that night of June 27, 2011 or maybe it was early June 28, 2011." (Doc. 41, p. 20; Doc. 153, p. 13: says released on June 28 a few minutes after 12:00 a.m.) The deputies responded to the area at about 11:50 a.m. on June 27, Swarbrick arrested the Plaintiff at 12:38 p.m. and he was booked at 3:20 p.m. (Doc. 145-1, p. 2, 10; Doc. 145-2, p. 9.) The evidence does not support that he was the person using the cell phone at 12:14 p.m. on June 27.

The Defendants recognize the Court must consider favorably the Plaintiff's evolving account of what occurred. However, even assuming arguendo that the cell phone allegation did occur, it does not negate summary judgment for the deputies. The Plaintiff's claims of false arrest and excessive force are not based on this alleged removal from the car to conduct a search. He has not claimed any injuries or a constitutional violation based on his allegation of being "pulled" from the vehicle or the alleged action of "pulling down [his] pants."[8] His claims relate to what he alleges to be the second time he was removed from the car, which both he

[8] The deputies deny Swarbrick pulled down the Plaintiff's pants and exposed his "private parts." (Doc. 145-1, p. 5; Doc. 145-2, p. 5.) However, if such a search had occurred, the deputies would not have known he was not wearing any underwear.

and the deputies agree occurred, and which the deputies aver was necessary because he had maneuvered his handcuffs to the front of his body.

The district court properly addressed the cell phone allegation in its order. (Doc. 162, p. 17-19.) It viewed the Plaintiff's use of the phone as being consistent with his moving the handcuffs to the front, and stated the Plaintiff's claim that he remained handcuffed behind his back was incredible. See U.S. v. Calderon, 127 F.3d 1314, 1325 (11th Cir. 1997) (when witness testimony is of events that could not possibly have occurred, it may be incredible as a matter of law) (citation omitted). The Initial Brief points to an imaginary "modern" (2011 or earlier) cell phone and says that voice dialing takes no special effort. (IB, p. 16 n.4.) It comes close to ridiculing the court's order and says the judge "just as easily" could have said that the deputies stating that Alston repositioned his hands in the front while he was handcuffed is discredited by the record as the "evidence shows that Mr. Alston reached into his pocket with his hands cuffed behind his back and used voice-activated dialing and speakerphone to call his aunt." (IB, p. 16 n.4.)

However, the record does not say that nor does the evidence provide such an inference. The Plaintiff did not say he voice-dialed his aunt and used a speakerphone. His first mention of the phone, in the third complaint, was that he was in possession of the phone in the car, and "made a call to [his] aunt." (Doc. 33, p. 17.) In other pleadings, while averring he was handcuffed in the back, he said

he "retrieved his cell phone and [called his aunt]" (Doc. 152, p. 12), and he "retrieved" his cell phone and [called her] (Doc. 153, p. 3).

Furthermore, he states that Trammell "at a distance…notice[d] [his] movements" and came and took the phone, after he had spoken with his aunt for six minutes. (Doc. 33, p. 18; Doc. 41, p. 17; Doc. 152, p. 12; Doc. 153, p. 4.) Such movement, that could be seen from a distance, would be unnecessary if he voice-dialed and was using a speakerphone. Just as the order says, the evidence does not support that he was handcuffed behind his back when he allegedly used the phone. The Plaintiff would like for the court to "imagine several ways in which he could have made a phone call while restrained from behind…" (IB, p. 33.) However, the court does not imagine allegations for a plaintiff. The brief recognizes this when it states the district court may not "invent new factual circumstances that neither party alleges." (IB, p. 33.)

If the Plaintiff has attempted to make an excessive force or unreasonable search claim for the alleged pulling down of his shorts when he was searched, Swarbrick is entitled to qualified immunity. (Doc. 152, p. 51.) The district court correctly ruled that any contact was not excessive. (Doc. 162, p. 23.) No allegations assert that Swarbrick touched the Plaintiff's body or his genitals, and no established law would have put the deputy on notice that pulling down his pants during a search, assuming, arguendo that it occurred, would be excessive force.

See, e.g., Jones v. Edmond, 2014 WL 5801536, *1, 7 (M.D. Ga. Nov. 7, 2014) (in 2012: not clearly established that public strip search without any physical contact may be excessive force). The Initial Brief did not argue this issue.

As noted, the deputies' incident reports do not reference the cell phone incident/removal from the car that the Plaintiff alleges, and it is not the basis for his claims. Swarbrick states that after he arrested the Plaintiff for disorderly conduct, he placed him in the patrol vehicle's back seat and got in the front seat to get the Plaintiff's information. Alston got the handcuffs around to his front and was unbuckling his belt, raising his midsection and threatening to urinate on Swarbrick.[9] [10] (Doc. 145-1.) The Initial Brief characterizes Swarbrick's account as stating the Plaintiff "somehow" moved the handcuffs to the front, suggesting that such a maneuver is implausible.[11] (IB, p. 22.) This naïve viewpoint belies the well-known ease with which handcuffs may be slipped to the front, particularly by an

[9] The Initial Brief mentions several times that the divider between the front and back seats is made of metal. (IB, p. 17, 23, 39.) Presumably, the implication is that Alston is "secure." This is immaterial to the situation in which he and Swarbrick are arguing in the car, as he admits, then he has the handcuffs in the front and is threatening to urinate on the deputy.

[10] Again, the Plaintiff stated he had on no underwear. (Doc. 41, p. 17.)

[11] Https://en.wikipedia.org/wiki/Handcuffs#Hand_positioning. "[A] common method of escaping (or attempting to escape) from being handcuffed behind the back, is that one would, from a sitting or lying position, bring one's legs up as high upon one's torso as possible, then push one's arms down to bring the handcuffs below one's feet, finally pulling the handcuffs up using one's arms to the front of

experienced arrestee. The brief also states in one place that the Plaintiff said he was handcuffed behind his back from the time of his arrest until he was taken to the jail, and in another that he was handcuffed behind his back the entire time, but those are conclusions of his counsel; Alston does not say that. (IB, p. 31, 32.)

The Plaintiff says that he and Swarbrick had a 2-3 minutes exchange of verbal insults that turned into verbal tirades. (Doc. 152, p. 13.) He does not deny Swarbrick's averment of his getting the cuffs in front and threatening to urinate on the deputy. Swarbrick told Trammell he needed to re-cuff the Plaintiff in the back because he had moved the cuffs to the front, and Trammell observed Swarbrick trying to replace the handcuffs in the back after the Plaintiff had been removed from the car. (Doc. 145-2, p. 3.) Furthermore, when the Plaintiff had been taken from the car, Trammell observed that his belt was undone and his penis was out of his shorts. (Doc. 145-2, p. 3.) These circumstances provide support that Swarbrick's account of the events is correct, and that his reason for taking the Plaintiff from the car was to reapply the handcuffs in the front for safety reasons. There is no genuine issue of this material fact.

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one's body." Cuffs may also be moved to the front over the head in a matter of seconds. YouTube demonstrations are available. See, e.g., Rivera v. McNeil, 2009 WL 4277235, *3 (S.D. Fla. Nov. 30, 2009), where the arrestee in the patrol car had to be re-secured; he had gotten his handcuffs to the front of him and squeezed partially through the car's partition.

Swarbrick encountered resistance when removing the Plaintiff from the car, which he attributed to the Plaintiff's willful actions. (Doc. 145-1.) The Plaintiff claims his foot was stuck in a part of the car seat, but Trammell, who took hold of his legs from the other side of the car so Swarbrick could pull him from the car, testified he did not observe a stuck foot. Trammell also believed he was willfully resisting Swarbrick's efforts. (Doc. 145-2.) If Alston's foot was actually caught on part of the car and Swarbrick mistakenly thought Alston was resisting, which he is not conceding, that belief would be reasonable based on the Plaintiff's prior behavior and on the physical resistance the officer was experiencing from the Plaintiff. Such a reasonably mistaken belief would contribute to a probable cause finding just as much as a correct belief. See U.S. v. Gonzalez, 969 F.2d 999, 1005-06 (11th Cir. 1992); Hunter v. Bryant, 502 U.S. 224, 229 (1991). Additionally, after his removal from the car, Alston, shouting obscenities, continued to pull away from Swarbrick's efforts to handcuff him in the back, and Trammell had to assist with restraining him. (Doc. 145-1; Doc. 145-2.)

Swarbrick had probable cause or arguable probable cause to arrest the Plaintiff for resisting him without violence in the lawful execution of his legal duty. (Florida Statute 843.02.) The disorderly conduct arrest was lawful and after the Plaintiff was placed in the patrol car, securing him properly in handcuffs was a lawful duty. See Guitterrez v. State, 837 So. 2d 1095, 1096 (Fla. 4th DCA 2003).

Swarbrick did not violate the Plaintiff's constitutional rights. No established law would have put him on notice that the arrest would be unlawful where he encountered physical resistance when trying to re-handcuff the Plaintiff for officer safety. He is entitled to qualified immunity and to summary judgment on Count I. The order on appeal should be affirmed.

II. SWARBRICK USED ONLY NECESSARY AND REASONABLE FORCE DURING ALSTON'S ARRESTS.

The Plaintiff alleges excessive force was used by Swarbrick during two incidents: the original takedown when he refused to answer the deputy's questions and was loudly shouting profanities at him, and when he was pulled from the patrol car for what he alleges was the second time. (Doc. 41.) The first use of force would be a normal incident of the lawful arrest. The Plaintiff did not allege any injuries from it, and its de minimis nature would not violate his constitutional rights. See Nolin v. Isbell, 207 F.3d 1253, 1257-58 (11th Cir. 2000); Durruthy, 351 F.3d at 1094 (force was de minimis where officer forced plaintiff to ground and placed him in handcuffs); see also Horn v. Barron, 720 Fed. Appx. 557, 562, 564 (11th Cir. Jan. 4, 2018). The court was correct to grant Swarbrick summary judgment on the excessive force claims and the order should be affirmed.

In regard to the second incident, the Plaintiff alleges that Swarbrick pulled him from the back passenger door of the patrol car by jerking him under his right

arm pit, "while in hand restraints." The Complaint says when Swarbrick encountered resistance, the deputy "took his foot on [the Plaintiff's] shoulder and pulled harder." (Doc. 41, p. 18-19.) The alleged shoulder placement is further clarified as the deputy's foot being "planted on my left shoulder side area." (Doc. 153, p. 5.) The logistics of being on the righthand side of a person seated in a car and pulling on the person's right armpit while pushing on his left shoulder with your foot would be difficult, and there would be no purpose to pushing on the Plaintiff's body to aid in pulling him from the car. Further, based on the Plaintiff's description, as Swarbrick is standing there on one foot with one hand occupied with pulling, he "grab[s] his chemical agent spraying [the Plaintiff] …in his face." (Doc. 153, p. 5.) The Plaintiff's account of Swarbrick's actions is not credible.

The Plaintiff alleges Swarbrick began pepper spraying him repeatedly in his face, then when Trammell released his foot, Swarbrick pulled him from the car and continued to spray him as he lay on the ground. (Doc. 41, p. 18-19.) He alleges Swarbrick "used chemical agent spray for about 3 to 5 minutes or so." (Doc. 41, p. 20.)

As with his account of the alleged cell phone episode, the Plaintiff's story about the pepper spray gained new embellishments with each pleading. In the original complaint, he states only that, as Swarbrick had difficulty pulling him from the car, the deputy "remov[ed] his chemical agent and began to spray me

directly in my face." (Doc. 1, p. 12.) In the next complaint, four months later, he says Swarbrick, while pulling him from the car, "began to spray [him] repeatedly directly in [his] face." After being removed to the ground he "laid in a pasture of grass screaming from the pain." (Doc. 14, p. 15.)

In his third complaint, six months later, in addition to alleging the deputy pepper sprayed him repeatedly in his face when there was apparent resistance to removing him from the car, he alleged that when removed from the car onto the ground, Swarbrick "continued to spray me with chemical agent," "for about 3 to 5 minutes or so." (Doc. 33, p. 18-19, 20.) The allegations evolved from being sprayed in his face when there was difficulty removing him from the vehicle, to spraying him in the face repeatedly, to continuing to spray him once he was on the ground for 3 to 5 minutes. The pending Third Amended Complaint tracks the previous one. (Doc. 41, p. 18-19, 20.)[12]

Swarbrick has testified that the reason for removing the Plaintiff from the car was because he had moved his handcuffs to the front, which was a danger to the deputies. As discussed, Swarbrick's belief that the Plaintiff was resisting being pulled from the vehicle by his arm was objectively reasonable, as the deputy did

[12] The Second Amended Complaint is when the allegation that Swarbrick pepper sprayed Morris and L.B.D. is added. No claim is made regarding this nor is there evidence to support it. (Doc. 33, p. 19; Doc. 145-1; Doc. 145-2.) It is only mentioned in passing in the Initial Brief. (IB, p. 19.)

not know the Plaintiff's foot was caught on part of the car, which the Plaintiff claims. Trammell, who, from the opposite side of the car, moved the Plaintiff's legs so Swarbrick could pull him from the vehicle, did not see a caught foot either. Swarbrick's perception of resistance as he pulled would be heightened by the Plaintiff's continued screaming of phrases such as "Fuck you crackers" and "suck my dick," although the Plaintiff's allegation is that he was screaming about his foot. (Doc. 41, p. 18; Doc. 145-1, p. 3-4; Doc. 145-2, p. 3.)

Once removed from the car, Alston physically resisted being uncuffed and re-cuffed in the back, and, as Trammell and Swarbrick testified, Swarbrick warned him he would be pepper sprayed if he did not cooperate. The Plaintiff continued to curse and pull away, and Swarbrick deployed his pepper spray for one burst, spraying it in the Plaintiff's eyes as he was up against the patrol car. The deputies then took him to the ground and were able to handcuff him. (Doc. 145-1, p. 4, 8; Doc. 145-2, p. 4.) Swarbrick arrested him for Resisting Without Violence, as he resisted being removed from the car and the handcuffing. (Doc. 145-1, p. 4.)

A Use of Force Report was prepared by the Sheriff's Office regarding this incident, and a copy is attached to the affidavit of Capt. Dennis Joiner. (Doc. 145-5.) Some degree of physical coercion is permissible to effect an arrest, and objective reasonableness, the applicable standard of review, requires attention to the particular facts and circumstances. See Graham v. Connor, 490 U.S. 386, 395-

96 (1989). Factors to be considered for the necessity for the use of force include (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. Graham, 490 U.S. at 396. In determining if the amount of force used was reasonable, factors include (1) the need for the application of the force, (2) the relationship between the need and the amount of force used, and (3) the extent of the injury inflicted. Lee, 284 F.3d at 1197-98 (citing Leslie v. Ingram, 786 F.2d 1533, 1536 (11th Cir. 1986)).

The Plaintiff has not denied the threat to urinate on Swarbrick or that he had gotten the handcuffs to his front. Having the handcuffs in the front presented a danger to officer safety and it was necessary to move them. The need for force arose when he did not cooperate with being removed from the car or having the handcuffs moved and actively resisted Swarbrick's efforts. See Graham, 490 U.S. at 396. The use of pepper spray is a very reasonable alternative to escalating a physical struggle with an arrestee. Vinyard v. Wilson, 311 F.3d 1340, 1348 (11th Cir. 2002); see also McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1245 (11th Cir. 2003). For example, it is reasonable where the plaintiff is resisting arrest or refusing police requests, such as a request to enter (or exit) a patrol car. See Vinyard, 311 F.3d at 1348; Fernandez v. Cooper City, 207 F. Supp. 2d 1371, 1380 (S.D. Fla. 2002); Jessup v. Miami-Dade Cty., 2010 WL 883684, *4, 9 (S.D. Fla.

Mar. 10, 2010), rev'd on other grounds, Jessup v. Miami-Dade Cty., 440 Fed. Appx. 689 (11th Cir. Sept. 1, 2011); Benton v. Hopkins, 190 Fed. Appx. 856, 859 (11th Cir. July 25, 2006) (use of pepper spray on arrestee refusing to be handcuffed was reasonable).

Even if the Plaintiff's allegation that he was pepper sprayed for three to five minutes is given credence, the use of force is still objectively reasonable. He tacitly admitted the spray's use was necessitated by his behavior, stating that Swarbrick sprayed him with chemical agent "repeatedly in a quantity greater than necessary." (Doc. 41, p. 8, 18, 20.) Swarbrick's reasonable observation would be that Alston was physically resisting being pulled from the patrol car, and the use of pepper spray to force compliance would be a minimal response, as it was for his refusal to cooperate with being re-handcuffed.[13] See, e.g., Buckley v. Haddock, 292 Fed. Appx. 791, 798 (11th Cir. Sept. 9, 2008) (use of taser multiple times on non-violent, handcuffed arrestee not excessive where arrestee refused to comply with reasonable orders), cert. denied, 556 U.S. 1235 (2009).

Use of the spray was preferable to a physical altercation in which Alston or one of the deputies might be injured. As the Complaint says, his eyes were washed

[13] Swarbrick's testimony, corroborated by Trammell, is that he pepper sprayed the Plaintiff only once, to gain his compliance with the re-cuffing. (Doc. 145-1; Doc. 145-2.)

out by the paramedics. (Doc. 41, p. 20.) The burning sensation typically associated with that type of restraint was the only "injury" alleged from the spray's use.[14] The right to make an arrest carries with it the right to use some degree of force to effect it, and de minimis force will not support a claim for excessive force. See Durruthy, 351 F.3d at 1094. Swarbrick did not violate the Plaintiff's rights and he is entitled to qualified immunity and a summary judgment on the excessive force claims.

The Complaint alleges injuries from Swarbrick pulling on the Plaintiff's arm when he resisted being removed from the patrol car, and it may also be alleging injuries from his allegation that Swarbrick placed his foot on the Plaintiff's shoulder, although there is no evidence of that. He says that after bonding out of jail that night, he went to the emergency room and was treated. He alleges injuries of "knees; chest; and wrist…contusions, and having [his] right arm put in a sling." (Doc. 41, p. 20.)

The hospital medical records filed by the Plaintiff show that his alleged injuries were minor. (Doc. 82-1.) Although it is not conclusive about whether a constitutional violation occurred, "a lack of serious injury can illustrate how much force was actually used." Walker v. City of Orlando, 368 Fed. Appx. 955, 956 n.1 (11th Cir. Mar. 16, 2010) (citing Wilkins v. Gaddy, 559 U.S. 34, 37 (2010)). He

[14] The Plaintiff also alleged the pepper spray caused "asthma flaring." (Doc. 41, p. 8.) This would be a temporary, de minimus injury.

has not produced evidence that would enable a reasonable jury to find that he suffered more than a de minimis physical injury as a result of any of Swarbrick's alleged actions.

The Plaintiff was at the hospital about 1½ hours on June 28, 2011 (approximately 12:51 a.m. to 2:30 a.m.). (Doc. 82-1, p. 10.)[15] He, of course, gave a history alleging injuries by the officer, and complained of right arm/shoulder, and neck pain, and migraine.[16] (p. 11.) The records reflect his pain was moderate. (p. 13.) After a negative right shoulder x-ray and a negative cervical spine x-ray, he was diagnosed with shoulder strain and neck strain. (p. 12.) He received no treatment for his neck. For his shoulder, he was given a sling for his arm, a tetanus shot, and a Toradol shot.[17] It was noted that the side effects of Toradol can be nausea/diarrhea, headache, and increased blood pressure. (p. 16, 19.) At discharge, the Plaintiff's pain level was 0 and his blood pressure was 130/46. (p. 15.)

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[15] Unless stated otherwise, page numbers in these two paragraphs regarding the records refer to Document 82-1.

[16] No complaint was made about a left shoulder injury (p. 11: Reason for Visit) and no treatment was rendered for such an injury. The Plaintiff initially mentioned "bilateral wrist pain" (p. 14), but the exam recorded no tenderness or swelling (p. 13), and he received no treatment. He advised the hospital that he was previously subject to migraines. (p. 15.)

[17] Toradol is a NSAID for short term relief of pain. http://www.medicinenet.com/ketorolac-injection/article.htm The Plaintiff reported he was taking citalopram hydrobromide (Celexa), an antidepressant. (p. 17.) http://www.webmd.com/drugs/2/drug-1701/citalopram-oral/details

The x-ray reports are at pages 21 and 22. The cervical report found some mild disc space narrowing and questionably mild neural foraminal stenosis, with no fractures. The right shoulder x-ray showed no dislocation or definitive fracture. The clinical impression was cervical strain and shoulder strain. (p. 12.) The printed Discharge Instructions for "Neck Injuries" advised that the muscles and ligaments in the Plaintiff's neck were strained, an injury that could result from various causes, including sleeping in an awkward position. The instructions said a person's neck could be sore for a few days and recommended pain medications, rest, and an ice pack. (p. 27.) The Discharge Instructions for a "Sprained Shoulder" said it is treated with a sling, and recommended various over-the-counter pain medications and an ice pack. (p. 28.) At discharge, it was noted that the Plaintiff moved all extremities, had no edema, and no complaints of bruises or abrasions. (p. 16-17.)

The alleged uses of force by Swarbrick would be objectively reasonable under the circumstances. They were de minimis and the normal incidents of an arrest. See Durruthy, 351 F.3d at 1094; Rodriguez v. Farrell, 280 F.3d 1341, 1351 (11th Cir. 2002) (the typical arrest involves some force and injury), cert. denied, 538 U.S. 906 (2003), (citing Nolin, 207 F.3d at 1257-58).

In addition, the medical records, which report no permanent injury, but only a cervical and right shoulder strain or sprain, demonstrate that any alleged injuries were minor. See Brown v. Town of Weymouth, 76 F.3d 370, 1996 WL 55703 (1st

Cir. 1996) (shoulder strain is a mild injury consistent with a reasonable use of force); Foster v. Metro. Airports Comm'n, 914 F.2d 1076, 1082, 1082 n.5 (8th Cir. 1990) (force used in pulling plaintiff from car, resulting in mild shoulder strain, was reasonable under the circumstances). No evidence has been presented that the Plaintiff sought or required any further medical attention.

Swarbrick did not violate the Plaintiff's constitutional rights and no clearly established law would have given him notice that his actions would do so. For example, in Nolin, the court applied the de minimis force principle where the arresting officer grabbed the arrestee from behind by the shoulder and wrist, threw him three or four feet against a van, kneed him in the back and pushed his head into the side of the van. Nolin, 207 F.3d at 1255. The de minimis harm was insufficient to support an excessive force claim, and the officer was granted qualified immunity. Id. at 1255-58.

Although not competent as clearly established law, in a case with similar allegations, Woodruff v. City of Trussville, 434 Fed. Appx. 852, 855 (11th Cir. July 18, 2011), the Court found that punching the plaintiff in the face, forcefully removing him from the car and slamming him to the ground was only de minimis force. In Ainsworth v. City of Tampa, 2010 WL 996514, *3 (M.D. Fla. Mar. 17, 2010), the forcible removal of the plaintiff from a vehicle, including slamming his

body to the ground and allegedly causing serious injuries, including a herniated disk and a shoulder injury requiring surgery, was de minimis force.

In Vinyard, this Court held that an officer stopping his patrol car and pepper spraying a detainee in the back seat was excessive force. 311 F.3d at 1355. However, contrary to this case, the Court noted she was not actively resisting the officer, she was handcuffed behind her back, and she posed no threat to him. Id. at 1343-44, 1347-48. The circumstances of the Plaintiff's behavior of moving his handcuffs and then resisting Swarbrick's re-cuffing are quite different. As discussed, the Court recognized that the use of pepper spray was reasonable where the plaintiff was resisting arrest or refusing police requests. Id. at 1348. The nonlethal weapon, a reasonable alternative to an escalating physical struggle, is of limited intrusiveness and is designed to disable the person without causing permanent physical injury. Id.

III. TRAMMELL IS ENTITLED TO SUMMARY JUDGMENT ON THE FAILURE TO INTERVENE CLAIM.

The district court correctly found that Trammell should be granted summary judgment on the failure to intervene claim and the order should be affirmed. (Doc. 162, p. 26.) The obligation to intervene only arises when excessive force is being applied and the officer is in a position to intervene. See Ensley v. Soper, 142 F.3d 1402, 1407-08 (11th Cir. 1998); Crenshaw v. Lister, 556 F.3d 1283, 1293-94 (11th

Cir. 2009). As discussed, Swarbrick did not use excessive force in this incident, and Trammell testifies in his affidavit that he did not observe Swarbrick using any excessive force or any need to intervene. This was a reasonable observation, and in that circumstance, he had no obligation to intervene. See Crenshaw, 556 F.3d at 1294.

Furthermore, even if Swarbrick had used excessive force in the original takedown of the Plaintiff or in removing him from the car and using pepper spray, the circumstances do not support that Trammell would have had an opportunity to anticipate and realistically intervene in these quickly-occurring actions. See Johnson v. White, 725 Fed. Appx. 868, 878 (11th Cir. Feb. 27, 2018) (instances of force occurring within seconds do not give officers realistic chance to intervene) (citing Hadley v. Gutierrez, 526 F.3d 1324, 131 (11th Cir. 2008)).

IV. THE SHERIFF OF MARION COUNTY IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIMS AGAINST HIM.

The Plaintiff's claims against the Sheriff under § 1983 are for a custom or policy of excessive force and failure to train/supervise/discipline deputies in violation of the Fourth and Fourteenth Amendments. (Doc. 41, p. 13-15.) None of the claims against the Sheriff are addressed or discussed in the Initial Brief except to say in passing that summary judgment should not be granted to the Sheriff

because the brief's arguments on the claims against the deputies "have established several violations of Mr. Alston's rights…" (IB, p. 41.)

The order on appeal correctly ruled that because the court had found no liability for the deputies, there was no liability for the Sheriff. (Doc. 162, p. 26.) See Case, 555 F.3d at 1328; Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (per curiam). However, the reverse is not automatically true. A liability finding for officers does not necessarily result in a liability finding for their employer, and in its de novo review, the Court may grant summary judgment on any adequate ground. See Fitzpatrick, 2 F.3d at 1117. Any argument that there is a genuine issue of material fact regarding the claims against the Sheriff has been abandoned on appeal. See Old W. Annuity & Life Ins. Co. v. Apollo Grp., 605 F.3d 856, 860 n.1 (11th Cir. 2010) (issue presented in passing without "substantive argument" in appellate brief is waived); Wetherbee v. S. Co., 423 Fed. Appx. 933, 934 (11th Cir. Apr. 19, 2011) (court does not consider arguments raised for the first time in a reply brief) (citing Lovett v. Ray, 327 F.3d 1181, 1183 (11th Cir. 2003)).

Furthermore, the evidence in this case supports that the Sheriff is entitled to summary judgment. No allegation or evidence asserts that the Sheriff personally participated in the Plaintiff's arrest. The Sheriff has no § 1983 liability under a theory of vicarious liability; there must be evidence of a policy or custom that provided the moving force behind the alleged constitutional violation. Monell v.

New York City Dep't of Social Servs., 436 U.S. 658, 694-95 (1978); Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); Belcher v. City of Foley, 30 F.3d 1390, 1396 (11th Cir. 1994).

The Plaintiff discussed the claim against the Sheriff in his verified Brief in Opposition to the Motion for Summary Judgment (Doc. 152, p. 59-61.) Regarding policies, the Complaint has no allegations nor is there any evidence on the incident date of a persistent and widespread practice of false arrests or the use of excessive force by arresting officers that would put the Sheriff on notice of the need for a policy to prevent constitutional violations, to which he was deliberately indifferent.[18] See McDowell v. Brown, 392 F.3d 1283, 1290 (11th Cir. 2004); Hartley v. Parnell, 193 F.3d 1263, 1269 (11th Cir. 1999) (widespread abuse sufficient to give notice must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences).

The Sheriff's Office has a written policy regarding the use of force. Operations Directive ("O.D.") 4030.00, in effect on the incident date, which is provided with the affidavit of Capt. James Pogue. (Doc. 145-3, Pogue affidavit.).[19]

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[18] The Plaintiff's brief focuses only on excessive force arguments, not false arrest.

[19] This affidavit also provides other operations directives: O.D. 3350.00—Discipline Policy; O.D. 3352.00—Complaints Against Employees/Internal Investigations; and O.D. 3500.00—Training Programs. (Doc. 145-3.)The Sheriff's Office had policies in place relevant to all areas of the Complaint, and no agency policy or custom caused a violation of the Plaintiff's rights.

The policy states that "officers shall use only that degree of force necessary to perform their official duties, and shall not strike or use physical force against any person except when necessary in the performance of official duties." (O.D. 4030.00(A).) A framework for making decisions about the use of force is provided in the policy by the Florida Department of Law Enforcement Force Guidelines. (O.D. 4030.00(B).) Non-lethal force, such as the use of a chemical agent, may be used when necessary to overcome resistance, effect a lawful arrest, or protect the officer or another person from bodily harm. (O.D. 4030.15(A).)

Restraint devices such as handcuffs are to maintain control of the person in custody; provide safety for the officer, the arrestee, and the general public; and to minimize the possibility of the situation escalating. (O.D. 4030.25(B).) Most persons placed in custody should be handcuffed behind their back. (O.D. 4030.24(A).) Pepper spray is an authorized "less than lethal" or "non-lethal" chemical agent weapon and personnel using it must complete a training course and then complete a refresher course and demonstrate efficiency biennially. (O.D. 4030.30 (A).)

The Plaintiff provides his personal opinion that O.D. 4030 is deficient because it does not provide "how or when to deploy" the chemical agent. (Doc. 152, p. 60.) However, the policy states that the use of pepper spray may be considered when it would assist, inter alia, in overcoming resistance, enabling an

arrest, and reducing the risk of more serious injury. (O.D. 4030.35(A).) A person who has been exposed to pepper spray will be decontaminated, and its deployment by a deputy will be documented in a Use of Force Report. (O.D. 4030.40; Doc. 145-5, p. 12: Use of Force Report.) None of the operations directives caused any constitutional violations in this case.

Attempting to establish a widespread, persistent use of excessive force that would have put the Sheriff on notice of a policy that was causing constitutional violations, to which he was deliberately indifferent, the Plaintiff lists five undated cases filed against the Sheriff's Office in the Middle District of Florida. (Doc. 152, p. 59.) That a party filed a case against the Sheriff is meaningless. No further information about the cases is given, including the factual circumstances or what the results were if the Sheriff was sued in the case. Again, a sheriff's potential liability is not based on respondeat superior.

The Plaintiff also refers to it having been "recently…stated on the record that there was a 'Culture of Violence' under the guidance of the Defendant." (Doc. 152, p. 59.) No such alleged testimony exists in this case and the reference to it is irrelevant. No evidence is provided supporting the claim that the Sheriff's Office had a policy or custom of the use of excessive force or of making false arrests. The Plaintiff has produced no evidence that would enable a jury to enter a verdict in his

favor on his claims against the Sheriff and the Sheriff should be granted summary judgment as a matter of law.

Provided with Capt. Pogue's affidavit are several policies addressing the Plaintiff's claims that the Sheriff failed to train, supervise, and discipline deputies. (Doc. 145-3.) "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." Connick v. Thompson, 563 U.S. 51, 60 (2011). A failure to train must reflect a "deliberate' or 'conscious' choice by the policymaker not to take any action although it knew of a need to train and/or supervise in a particular area. See Gold v. City of Miami, 151 F.3d 1346, 1350-51 (11th Cir. 1998). To be found deliberately indifferent to the rights of persons coming into contact with the untrained employees, the policymaker must be on notice that a particular omission in the training program causes employees to violate citizens' rights, but the policymaker chooses to retain the program. Connick. 563 U.S. at 61.

In this case, there is no evidence of constitutional violations by untrained employees similar to those the Plaintiff alleges, and he has not presented a factual issue of deliberate indifference by the Sheriff. See Bd. of Comm'rs v. Brown, 520 U.S. 397, 409 (1997). The generation of the Use of Force Report for this incident shows that the Sheriff's Office supervises officers and reviews any use of force. (Doc. 145-5, p. 12-17.) The Plaintiff has failed to produce evidence that the

training program itself is deficient. See Owens v. City of Fort Lauderdale, 174 F. Supp. 2d 1282, 1294 (S.D. Fla. 2001). There is no evidence supporting the claim that the Sheriff's Office failed to train, supervise, or discipline deputies.

The Plaintiff's stated focus in his district court brief responding to the deputies' motion is on a claimed training deficiency in regard to Swarbrick only. (Doc. 152, p. 60-61.)[20] He says he is not addressing "the level of training or the preferability," but the "failure to train as a single incident." He cites Canton v. Harris, 489 U.S. 378 (1989), to underpin his attempt to base his argument on a single incident "where the need for more or different training is so obvious and the inadequacy is so likely to result in the violation of constitutional rights" that deliberate indifference may be found. (Doc. 152, p. 61.)

Canton provided a narrow hypothesis regarding inadequate training of a police force in the constitutional limitations on the use of firearms. Id. at 390. The case went on to say that deficiencies in the training of particular officers do not put the sheriff on notice of a need for better training. Id. at 390-91. The attention is not on the training of a particular officer, but on the adequacy of the training programs in relation to the tasks the officers must perform. See Lewis v. City of W. Palm

[20] The Plaintiff also makes allegations regarding Swarbrick's training in his Affidavit in Opposition to Defendants' Motion for Summary Judgment. (Doc. 153, p. 5-6.)

Beach, 561 F.3d 1288, 1293 (11th Cir. 2009), cert. denied, 559 U.S. 936 (2010); see also Johnson v. Dixon, 666 Fed. Appx. 828, 830-31 (11th Cir. Nov. 29, 2016).

Canton's dictum regarding a single incident providing an obvious need for training has not been expanded by the Supreme Court or the Eleventh Circuit. See Connick, 563 U.S. at 63-64; Bd. of County Comm'rs v. Brown, 520 U.S. at 398, 409 (Canton opinion was "simply hypothesiz[ing]" in a "narrow range of circumstances"); Keith v. DeKalb County, GA, 749 F.3d 1034, 1056 n.56 (11th Cir. 2014) (declining to use that case "as the vehicle for flushing out the Supreme Court's hypothetical basis for § 1983 relief"); Denham v. Corizon Health, Inc., 675 Fed. Appx. 935, 942 (11th Cir. Jan. 13, 2017) (Supreme Court has never determined that need for more or different training was obvious; it has only given a hypothetical example of a need to train being obvious without prior constitutional violations).

Furthermore, there is no genuine issue of material fact that Swarbrick's training was adequate. The Plaintiff has provided as "evidence" of Swarbrick's inadequate training in the use of pepper spray copies of his training records produced by the Sheriff's Office. (Doc. 152, p. 95-101.) Again, the Plaintiff gives his personal interpretation of the Sheriff's Office records. (Doc. 152, p. 55.) The Plaintiff's opinion of the records' content is irrelevant in the face of the affidavit of Lt. David Redmond, the agency's Training Unit Director. (Doc. 145-4.) The

lieutenant is knowledgeable in the content of the training courses listed in the records and the Plaintiff is not.

In the affidavit, Lt. Redmond quotes O.D. 3500 which requires "non-lethal weapons" training every other calendar year, which includes pepper spray. He reviewed the training records of Swarbrick and Trammell and said each was current in his use of force training, and Swarbrick was current in his non-lethal weapons training. He stated the Sheriff's Office also provides regular training in issues such as probable cause. The affidavit referenced three agency reports regarding Swarbrick prior to the incident date, none of which involved the use of excessive force.[21] (Doc. 145-4.)

There is no genuine issue of material fact that the Sheriff provided adequate training, supervision, and discipline to the agency's deputies, and to Swarbrick and Trammell in particular. The Court is requested to affirm the order on appeal and to grant summary judgment to the Sheriff on all the claims against him.

[21] The reports were a disciplinary report for unprofessional behavior during a traffic stop, and two observation reports for turning a criminal citation in late, and using excessive cell phone minutes. (Doc. 145-4.)

CONCLUSION

Based on the arguments and citations of authority herein, the Court is requested to affirm the order on appeal and to grant summary judgment to all the Defendants on the claims made against them.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This Answer Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,999 words, excluding the parts of the brief exempted by 11th Cir. R. 32-4. It complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word for Mac in 14 point Times New Roman type.

/s/ Linda L. Winchenbach
LINDA L. WINCHENBACH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of November, 2018, the original and 6 copies of the foregoing Appellees' Answer Brief were provided by U.S. Mail to the Office of the Clerk, Eleventh Circuit Court of Appeals, 56 Forsyth Street NW, Atlanta, Georgia 30303 and also electronically filed using the CM/ECF system, which will send notice of electronic filing to the following:

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