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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID ARAGONEZ;)	Case No. EDCV 07-00992-VAP
SALVADOR LOZANO,	)	(OPx)
)	
Plaintiffs,	)	[Motions filed on October
	)	13, 2008 and October 14,
v.	)	2008]
)	
COUNTY OF SAN	)	ORDER GRANTING DEFENDANT
BERNARDINO; GARY PENROD;	)	HUFF'S MOTION FOR PARTIAL
ALVIN HUFF; P. RECATTO;	)	SUMMARY JUDGMENT
AND DOES 1-10,)	
INDIVIDUALLY ,	)	ORDER GRANTING IN PART AND
	)	DENYING IN PART DEFENDANT
Defendants.)	)	RECATTO'S MOTION FOR SUMMARY
	)	JUDGMENT
AND RELATED CROSS-CLAIMS))	
_____))	

Defendant Huff's Motion for Partial Summary Judgment and Defendant Recatto's Motion for Summary Judgment came before this Court for hearing on November 17, 2008. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS Defendant Huff's Motion and GRANTS in part and DENIES in part Defendant Recatto's Motion.

///

1
2 **I. BACKGROUND**

3 Plaintiffs David Aragonex ("Aragonex") and Salvador
4 Lozano ("Lozano") bring this action against Defendants
5 San Bernardino County Sheriff's Deputy Alvin Huff
6 ("Huff") and California Highway Patrol Sergeant Pete
7 Recatto ("Recatto"), who encountered, detained and
8 eventually arrested Plaintiffs in San Bernardino on
9 August 10, 2005.

10 Plaintiffs assert the following claims against Huff
11 and Recatto, all based on 42 U.S.C. § 1983:¹
12

13 (1) violation of their rights under the Fourth and
14 Fourteenth Amendments to the U.S. Constitution
15 by subjecting them to an unjustified and
16 excessive detention;
17

18 (2) violation of their rights under the Fourth and
19 Fourteenth Amendments to the U.S. Constitution
20 by subjecting them to a false arrest;
21

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25
26

¹ Plaintiffs originally brought a Monell claim
27 against the County of San Bernardino and Gary Penrod in
28 his capacity as Sheriff of San Bernardino County. The
parties filed a stipulation to dismiss the claims against
those Defendants on October 30, 2008.

1 (3) violation of their rights under the Fourth and
2 Fourteenth Amendments to the U.S. Constitution
3 by subjecting them to excessive force;² and
4

5 (4) violation of their rights to substantive due
6 process under the Fourteenth Amendment by
7 misrepresenting facts or concealing exculpatory
8 information in the ensuing criminal
9 investigation (the "substantive due process
10 claim").
11

12 (Compl. ¶¶ 23-41).
13

14 Before the Court are two related motions for summary
15 judgment. On October 13, 2008, Huff filed a Motion for
16 [Partial] Summary Judgment or Summary Adjudication ("Huff
17 Mot."), seeking judgment in his favor on the substantive
18 due process claim, and lodged a Statement of
19 Uncontroverted Material Facts and Conclusions of Law
20 ("HSUF"). Huff argues that Plaintiffs have failed to
21 produce evidence of any injury under the Fourteenth
22 Amendment. Huff Mot. at 5.
23

24 On October 14, 2008, Recatto filed a Motion for
25 Summary Judgment and Summary Adjudication of Claims
26

27 ² Claims 1-3 are referred to collectively as "the
28 Fourth Amendment claims."

1 ("Recatto Mot.") and Memorandum of Points and Authorities
2 ("Recatto Mem."), and lodged a Statement of
3 Uncontroverted Facts and Conclusions of Law ("RSUF"). As
4 to the Fourth Amendment claims, he argues: (1) the
5 undisputed facts created reasonable suspicion and
6 probable cause to detain and arrest Plaintiffs; (2) the
7 undisputed facts show that Recatto himself did not detain
8 or arrest Plaintiffs; and (3) he should be afforded
9 qualified immunity for any acts he did commit. (Recatto
10 Mot. at 2.) He argues Plaintiffs cannot establish a
11 Fourteenth Amendment violation in support of their
12 Substantive Due Process Claim. (Id.)

13
14 Plaintiffs filed Oppositions and Memoranda of Points
15 and Authorities³ on November 3, 2008, and also lodged two
16 Statements of Genuine Issues of Material Fact.⁴

17
18 **II. LEGAL STANDARD**

19 A motion for summary judgment shall be granted when
20 there is no genuine issue as to any material fact and the
21

22 ³ The Opposition to Huff's motion is referred to here
23 as "Opp'n-Huff"; the Opposition to Recatto's motion is
24 referred to as "Opp'n-Recatto".

25 ⁴ Although Plaintiffs filed statements of genuine
26 issues of material fact for both motions for summary
27 judgment, they assert identical facts as to the incident.
28 All references to the PSGI are to Plaintiffs' Statement
of Genuine Issues of Material Fact in Opposition to
Recatto's Summary Judgment Motion. Where necessary to
cite to the SGI in opposition to Huff's Motion, the Court
refers to it as PSGI-Huff.

1 moving party is entitled to judgment as a matter of law.
2 Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc.,
3 477 U.S. 242, 247-48 (1986). The moving party must show
4 that "under the governing law, there can be but one
5 reasonable conclusion as to the verdict." Anderson, 477
6 U.S. at 250.

7
8 Generally, the burden is on the moving party to
9 demonstrate that it is entitled to summary judgment.
10 Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998);
11 Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707
12 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears
13 the initial burden of identifying the elements of the
14 claim or defense and evidence that it believes
15 demonstrates the absence of an issue of material fact.
16 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

17
18 Where the non-moving party has the burden at trial,
19 however, the moving party need not produce evidence
20 negating or disproving every essential element of the
21 non-moving party's case. Celotex, 477 U.S. at 325.
22 Instead, the moving party's burden is met by pointing out
23 that there is an absence of evidence supporting the non-
24 moving party's case. Id.

25
26 The burden then shifts to the non-moving party to
27 show that there is a genuine issue of material fact that
28

1 must be resolved at trial. Fed. R. Civ. P. 56(e);
2 Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256. The
3 non-moving party must make an affirmative showing on all
4 matters placed in issue by the motion as to which it has
5 the burden of proof at trial. Celotex, 477 U.S. at 322;
6 Anderson, 477 U.S. at 252. See also William W.
7 Schwarzer, A. Wallace Tashima & James M. Wagstaffe,
8 Federal Civil Procedure Before Trial § 14:144.

9
10 A genuine issue of material fact will exist "if the
11 evidence is such that a reasonable jury could return a
12 verdict for the non-moving party." Anderson, 477 U.S. at
13 248. In ruling on a motion for summary judgment, the
14 Court construes the evidence in the light most favorable
15 to the non-moving party. Barlow v. Ground, 943 F.2d
16 1132, 1135 (9th Cir. 1991); T.W. Electrical Serv. Inc. v.
17 Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31
18 (9th Cir. 1987).

20 **III. UNCONTROVERTED FACTS**

21 Defendants submitted Statements of Uncontroverted
22 Facts, and Plaintiffs submitted Statements of Genuine
23 Issues of Material Fact. The Court finds the following
24 facts uncontroverted; the remaining facts set forth in
25 the parties' respective submissions are deemed
26 controverted and discussed below.

27 ///

28

1 **A. The Incident**

2 Recatto and Huff ("the officers") were patrolling the
3 City of Highland on August 10, 2005 to gather
4 intelligence about gang activities in the area. (RSUF ¶
5 4.) At approximately 5:30 p.m., Recatto and Huff pulled
6 their unmarked white patrol car into the driveway of the
7 residence of Aragonez's mother, where Aragonez was
8 standing behind a pickup truck. (PSGI ¶¶ 6, 13, 17, 38.)
9 When the officers got out of their car, Aragonez said
10 "What the fuck do you want?" He was uncooperative and
11 argumentative in response to Huff's questions. (PSGI ¶
12 6; RSUF ¶ 8-1.⁵) Huff ordered Aragonez to put his hands
13 behind his back, and Aragonez remained uncooperative,
14 cursing and directing racially derogatory language at
15 Huff. (PSGI ¶¶ 43-44.)

16
17 Huff repeatedly told Aragonez to calm down, and told
18 Aragonez, "You are coming at this all wrong." (PSGI ¶
19 45.) The two argued for several minutes, and Aragonez
20 continued to curse at Huff, who pulled his taser from his
21 utility belt, but did not deploy it. (PSGI ¶ 47; Recatto
22 Dep. at 104.)⁶ Aragonez then complied with Huff's

23

24 ⁵ Recatto's Statement of Uncontroverted Facts
25 contains two paragraphs numbered "8." The first such
26 paragraph is referred to as "8-1" and the second as "8-
27 2."

27 ⁶ Huff has invoked his right under the Fifth
28 Amendment and refused to testify about any of the events
alleged in Plaintiffs' complaint. (PSGI-Huff ¶¶ 92-98.)

1 instructions to calm down, and Huff handcuffed him, and
2 put him in the back seat of the patrol car. (PSGI ¶ 49.)
3 Huff subsequently placed Aragonez under arrest for
4 violating California Penal Code section 647(f),
5 disorderly conduct - being found under the influence of
6 liquor or drugs in a public place. (RSUF ¶ 11.)

7
8 While Huff was engaged with Aragonez,⁷ Lozano came
9 out from behind the house and into the driveway, carrying
10 a compressor on his shoulder. (PSGI ¶ 8, RSUF ¶ 8-2.)
11 Recatto suspected Plaintiffs may have been involved in a
12 residential burglary and were under the influence of
13 alcohol; thus, he believed the circumstances warranted
14 further investigation. (RSUF ¶¶ 9-10; Recatto Dep. 78:
15 218-21.)⁸

16
17 Recatto instructed Lozano to put down the compressor
18 and put his hands behind his back. (PSGI ¶ 51.) At this
19 point, Huff took over, eventually handcuffing Lozano,
20 placing him under arrest, and putting him into the patrol
21 car. (PSGI ¶¶ 52-53; RSUF ¶ 12.⁹)

22 _____
23 ⁷ The parties dispute the precise timing of this, but
the discrepancy is immaterial.

24 ⁸ Plaintiffs dispute this fact, but do not succeed in
25 controverting it, since their objection is merely a legal
conclusion that there was insufficient bases for
26 Recatto's suspicions - not that he did not have those
suspicions. See PSGI ¶ 9.

27 ⁹ Although Plaintiffs attempt to dispute this fact,
28 (continued...)

1 Once Huff began driving to the West Valley Detention
2 Center, Aragonéz and Lozano asked several questions about
3 their arrests and their destination. (PSGI ¶ 60; RSUF ¶
4 14.) En route, Aragonéz and Lozano "kicked [out] the
5 windows of the car," (PSGI ¶ 63), after which Huff pulled
6 the car into a restaurant parking lot. (PSGI ¶ 63.)

7
8 There, Huff sprayed both Plaintiffs with chemical
9 spray. (PSGI ¶ 66; Recatto Dep. at 128-29.) At least
10 one backup officer arrived, and he, Huff, and Recatto
11 removed Aragonéz from the patrol car and placed him into
12 a restraint. (PSGI ¶¶ 72-73; Recatto Dep. at 134-135.)
13 The officers placed Aragonéz in another patrol car, and
14 took both Plaintiffs to the West Valley Detention Center.
15 (PSGI ¶ 74; Recatto Dep. 135:14-16, 137:24-138:3.)

16
17 **B. The Belt Recording and Police Report**

18 A device on Huff's utility belt recorded the events
19 at Aragonéz's mother's house. The transcript of this
20 recording, referred to as the "belt recording," is

21
22
23
24
25 ⁹(...continued)
26 their response to Defendants' SUF merely states that
27 Recatto "participated" in taking Lozano into custody.
28 This fails to create a dispute as to who placed Lozano
under arrest, as Plaintiffs cite no evidence showing that
Recatto took Lozano into custody. See PSGI ¶ 12.

1 attached as Exhibit 2 to Sheriff's Department employee
2 Dan Garcia's Declaration.¹⁰

3

4 Huff prepared a police report about the incident,
5 (Garcia Decl. 2, Ex. 1 ("Report")), which Plaintiffs
6 claim contained several falsehoods.¹¹

7

8 **C. The Criminal Prosecution**

9 Aragonez and Lozano, represented by counsel, were
10 arraigned on August 12, 2005, on felony charges of
11 violating California Penal Code § 594(b)(1), vandalism of
12 public property (\$400 or more).¹² Both entered "not
13 guilty" pleas. (Christensen Decl. ¶ 3, Ex. 1 (Criminal
14 Court Docket).)

15

16 Plaintiffs moved to suppress their arrests under
17 California Penal Code § 1538.5; the Superior Court
18 granted their motions. (No details of the basis for the
19

20

20 ¹⁰ Plaintiffs claim this recording establishes that
21 Aragonez and Lozano "were not completely uncooperative."
22 (PSGI-Huff ¶ 5.) Plaintiffs do not specify any portion
23 of the recording that illustrates such a "cooperative"
24 attitude or demeanor, however, and the certified
transcript reveals Aragonez's repeated use of racial
epithets, insults, curses, and vulgarities directed at
Huff. (Garcia Decl., Ex. 2, throughout.)

24

25 ¹¹ It is undisputed that Recatto had no involvement
with the preparation of the Report. (RSUF ¶ 18.)

26

27 ¹² Although neither party provides any information
regarding the basis for the charges, the Court assumes
the property at issue was the windows in the patrol car
in which Plaintiffs were first placed, and in the patrol
28 car in which Aragonez was later placed.

1 Superior Court's ruling has been provided to the Court.)
2 See Christensen Decl. 6, Ex. 4 (transcript excerpts);
3 Santa Romana Decl. 7, Ex. 6 (same). On October 10, 2006,
4 the Superior Court granted the prosecution's motion to
5 dismiss all charges against Aragonéz and Lozano.
6 (Christensen Decl., Ex. 4 at 3; HSUF ¶ 2.)

8 IV. DISPUTED FACTS

9 Defendants claim to have encountered Aragonéz first
10 when he was walking along the sidewalk, approximately 100
11 feet from his mother's house. (Recatto Dep. 48:7-25;
12 Report at 3.) As the officers drove by, Aragonéz was
13 looking over his shoulder at their car. (Recatto Dep.
14 49:5-8). The officers sought to initiate a consensual
15 pedestrian contact, but lost sight of Aragonéz. (Recatto
16 Dep. 50:5-8). Plaintiffs claim Aragonéz was not walking
17 along the street that evening, and did not become aware
18 of the officers until they pulled into the driveway.
19 (PSGI ¶¶ 31-34.)

20
21 Recatto claims both Aragonéz and Lozano appeared
22 intoxicated throughout the encounter. He observed Lozano
23 was belligerent, was slurring his speech, had the odor of
24 alcohol on his breath, and his eyes were bloodshot and
25 watery. (Recatto Dep. 106:13-17.) Recatto also noted
26 Aragonéz's eyes were bloodshot, red, and watery, and he

1 was acting belligerently, though Recatto never had a full
2 chance to evaluate him. (Recatto Dep. 108:7-11.)

3
4 Plaintiffs maintain they were not drunk, although
5 Lozano admits having consumed one 24-ounce beer. (PSGI ¶¶
6 21-23.) Plaintiffs offer the testimony of a neighbor,
7 Darlene Brown, who was present and "less than one car-
8 length" away from Plaintiffs and Defendants during the
9 initial encounter in the driveway. According to Ms.
10 Brown, neither Aragonnez nor Lozano appeared intoxicated.
11 (PSGI ¶¶ 25-26.)

12
13 Lozano claims that, when Recatto approached him and
14 told him to put the compressor down and put his hands
15 behind his back, Recatto held Lozano's hands behind his
16 back. (Lozano Dep. 46:19-24.) Recatto claims he never
17 touched Lozano. (RSUF ¶ 13.)

18
19 Once in the patrol car, Plaintiffs contend they were
20 confused about where the officers were taking them
21 because they did not recognize the route, and the
22 officers would not answer their questions about their
23 destination. (PSGI ¶¶ 60-62.) Only then, Plaintiffs
24 maintain, did they kick out the windows in the patrol
25 car, because they doubted the authenticity of the
26 officers' identity. (PSGI ¶ 63.)

27
28

1 Recatto maintains he responded to Plaintiffs'
2 questions and told them they were not going to the
3 Victorville prison, but to the West Valley Detention
4 Center. (Recatto Dep. at 117-118.) At that point,
5 according to Recatto, Plaintiffs launched racial
6 invective toward him, and began spitting at the officers.
7 (Recatto Dep. at 118-119.) A few minutes later, Recatto
8 heard a noise and saw that Aragonez had kicked out the
9 window in the backseat and was trying to hang out the
10 window. (Recatto Dep. at 120.) Aragonez then told
11 Lozano to do the same, and Lozano kicked out the window
12 on his side of the car. (Recatto Dep. at 121.)

13
14 Recatto claims Plaintiffs were still cursing and
15 yelling when the officers stopped the patrol car at the
16 restaurant parking lot, and Huff then sprayed each with a
17 chemical spray through the broken window for 2 or 3
18 seconds. (Recatto Dep. at 128-129). According to
19 Plaintiffs, on the other hand, they were sitting "quietly
20 and still" after kicking the windows out of the car, when
21 without any warning Huff, laughing, sprayed each of them
22 twice at close range with chemical spray, pausing for
23 over a minute between each spray. (PSGI ¶¶ 64-71.)

24
25 Once he was placed in the second patrol car, Aragonez
26 claims, Huff turned the heat up and rolled up the
27 windows, making it difficult for him to breathe.

28

1 Aragonez contends he screamed for help, and eventually
2 "managed to kick another window out, but just slightly."
3 (PSGI ¶ 74.) According to Recatto, however, he never
4 heard Aragonez yelling in the car, and no one on the
5 scene reported hearing Aragonez complain about the heat
6 in the car. (Recatto Dep. 137:6-23.)

8 V. DISCUSSION

9 A. The Fourth Amendment Claims Against Recatto

10 1. Recatto's responsibility for the events

11
12 Recatto moves for summary judgment on all three of
13 Plaintiffs' Fourth Amendment claims on the basis that he
14 did not detain, arrest, or use force against either
15 Aragonez and Lozano.

16
17 Recatto's mere presence at the scene of the incident
18 is not enough to establish liability. "In order for a
19 person acting under color of state law to be liable under
20 section 1983 there must be a showing of personal
21 participation in the alleged rights deprivation." Jones
22 v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). To
23 prevail against Recatto on their claims, Plaintiffs must
24 demonstrate either that his actions constituted "integral
25 participation" in the alleged violation, see Torres v.
26 City of Los Angeles, --- F.3d ---, No. 06-55817, 2008 WL
27 4878904 at *5 (9th Cir. Nov. 14, 2008), citing Chuman v.

1 Wright, 76 F.3d 292, 294-95 (9th Cir. 1996), or that
2 Recatto's failure to intervene was itself a violation of
3 his constitutional duties, see Ting v. U.S., 927 F.2d
4 1504, 1511 (9th Cir. 1991).

5

6 Thus, the Court first analyzes the extent, if any, of
7 Recatto's involvement in the allegedly wrongful acts to
8 determine the extent to which he can be held liable under
9 either theory.

10

11 **a. Recatto's participation in the early**
12 **stages of the encounter**

13 Plaintiffs do not dispute that Recatto was not
14 directly involved in the initial detention of Aragonéz.
15 (PSGI ¶¶ 45-49.) Rather, he merely acted as the
16 "covering" officer. (Recatto Dep. 87:10-15.) Recatto
17 did participate in the arrest and detention of Lozano to
18 a greater degree, however. The parties agree Recatto
19 told Lozano to put down the compressor and put his hands
20 behind his back. (PSGI ¶ 51; Recatto Dep. 100:16-17.)
21 Whether or not anything else happened is disputed, as
22 Lozano alleges that Recatto briefly "held" his hands
23 behind him. (Lozano Dep. 46:19-24.)

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28

1 The only evidence Plaintiffs cite in support of this
2 is the following deposition testimony of Lozano:

3 Recatto tells me, "Keep your hands out
4 of your pockets." And I think he said,
5 "Turn around." And he just held my
hand until - and then right away, Huff
comes to me.

6 (Lozano Dep. 46:19-22.) Asked to describe how
7 Recatto held his hands, Lozano responded "Just held
8 them behind me. You know." (Id. at 46:23-24.)

9
10 There are no other allegations of physical
11 interaction between Recatto and either Plaintiff.
12 Plaintiffs do not dispute that Recatto was not
13 involved in the chemical spraying in the restaurant
14 parking lot. They do allege, however, he did nothing
15 to stop the spraying from occurring, though he could
16 have done so. (PSGI ¶¶ 77-78; Aragonéz Dep. 180:22-
17 25.)

18 19 **b. Integral Participation**

20 To hold an officer liable for his participation
21 as part of a team or group of officers, a plaintiff
22 must show the officer "integrally participated" via
23 "some fundamental involvement in the conduct that
24 allegedly caused the violation." Blankenhorn v.
25 City of Orange, 485 F.3d 463, 481 n. 12 (9th Cir.
26 2007). While there is no bright-line test for
27 determining what constitutes "fundamental
28

1 involvement," courts have interpreted the integral
2 participation standard to require either physical
3 interaction with a suspect, or some knowledge or
4 control over the challenged conduct. See Torres,
5 2008 WL 4878904 at *5, (finding no integral
6 participation where there was no evidence that
7 defendant had "instructed the other detectives to
8 arrest [plaintiff] or that any of those detectives
9 consulted with [plaintiff] before making the
10 arrest"); Blankenhorn, 485 F.3d at 481 n. 12 (finding
11 assistance in handcuffing a suspect was integral
12 participation, but providing crowd control was not);
13 Boyd v. Benton County, 374 F.3d 773, 780 (9th Cir.
14 2004) (finding officers could be liable for excessive
15 force they did not personally deploy where they were
16 "aware of the decision to use the flash-bang, did not
17 object to it, and participated in the search
18 operation knowing the flash-bang was to be
19 deployed"); Myser v. Spokane County, No. CV-06-24-
20 FVS, 2008 WL 4833294, at *9 (E.D. Wash. Nov. 3, 2008)
21 (granting summary judgment and finding no integral
22 participation even though evidence showed officer
23 "was nearby and should have paid closer attention to
24 what the deputies were doing").

25 ///

26 ///

27 ///

28

1 **c. Failure to Intervene/ Bystander**
2 **Liability**

3 The Ninth Circuit has noted that "police
4 officers have a duty to intercede when their fellow
5 officers violate the constitutional rights of a
6 suspect or other citizen." U.S. v. Koon, 34 F.3d
7 1416, 1446-47 n. 25 (9th Cir. 1994), rev'd on other
8 grounds by 518 U.S. 81 (1996); Estate of Brutsche v.
9 City of Federal Way, No. C05-1538Z, 2006 WL 3734153,
10 at *5- *6 (W.D. Wash. Dec. 14, 2006). If a bystander
11 officer fails to fulfill this duty, he can face the
12 same liability as colleagues who directly violated
13 the suspect's rights. Id. Bystander officers only
14 have a duty to stop a violation, though, where they
15 know or have reason to know of the constitutional
16 violation. Ting v. U.S., 927 F.2d 1504, 1511 (9th
17 Cir. 1991), see also Ramirez v. Butte-Silver Bow
18 County, 298 F.3d 1022, 1029-30 (9th Cir. 2002)
19 (holding that bystander officers could not be held
20 liable for failing to stop an unlawful search where
21 they had no reason to believe the warrant at issue
22 was defective).

23
24 **2. The Excessive Force Claim**

25 Although neither Plaintiff alleges Recatto
26 personally used excessive force on them, it is well-
27 settled that, once a suspect is taken into custody,
28

1 law enforcement officers have a duty to protect the
2 suspect's safety. See United States v. Reese, 2
3 F.3d 870, 887-88 (9th Cir. 1993). Therefore, Recatto
4 can be held liable if (1) excessive force was used
5 against Plaintiffs; and (2) he was an "integral
6 participant" or had reason to believe excessive force
7 was being used and could have, but failed to, stop
8 it.

9

10 To determine if a use of force was excessive,
11 the finder of fact must consider "whether the use of
12 force was objectively reasonable in light of the
13 facts and circumstances confronting" the arresting
14 officers. Blankenhorn v. City of Orange, 485 F.3d
15 463, 477 (9th Cir. 2007), quoting Graham v. Connor,
16 490 U.S. 386, 397 (1989) (internal quotation marks
17 omitted). Plaintiffs allege the use of chemical
18 spray against them was excessive force. (Opp'n-
19 Recatto at 11.)

20

21 The parties dispute at least some of the events
22 leading up to Huff's use of the chemical spray.
23 While Recatto claims Plaintiffs were spitting and
24 kicking at the officers, (Recatto Dep. at 113-114.)
25 Plaintiffs contend they were sitting "quietly and
26 still," when, without notice each was sprayed twice
27 in the eyes with chemical spray. (PSGI ¶¶ 64-65.)

28

1 They further claim there was pause of over a minute
2 between sprays. (PSGI ¶¶ 64-71.) Viewing this
3 factual dispute in the light most favorable to
4 Plaintiffs, the Court cannot conclude that no
5 reasonable jury would find this spraying to be
6 objectively unreasonable and that Recatto did not
7 have an opportunity to intervene.

8
9 In light of this triable issue of fact, the
10 Court cannot determine whether or not Recatto
11 breached his duty to protect a suspect's safety once
12 in custody, or reach the issue whether Recatto is
13 entitled to qualified immunity on the basis that his
14 conduct did "not violate clearly established
15 statutory or constitutional rights of which a
16 reasonable person would have known." Harlow v.
17 Fitzgerald, 457 U.S. 800, 818 (1982).

18 19 **3. The False Arrest and Detention Claims**

20 **a) Aragonez's Claims**

21 Plaintiffs have pointed to no authority holding
22 an officer is responsible when another officer
23 unlawfully detains or arrests a suspect under either
24 an integral participation or failure to intervene
25 theory. Nonetheless, a claim is feasible under
26 either theory.

27
28

1 Plaintiffs argue that by "covering" Sergeant
2 Huff during the incident, Recatto's participated
3 sufficiently to be held liable for Aragonez's
4 detention and arrest. They have produced no evidence
5 to show that Huff consulted with Recatto before
6 making the decision to detain and arrest Aragonez,
7 however. It is undisputed that Huff and Recatto had
8 no communications with one another from the time the
9 officers got out of the car until after Aragonez was
10 arrested.¹³ Providing cover is "an essentially
11 defensive posture." Neuburger v. Thompson, 305 F.
12 Supp.2d 521, 530 (W.D. Pa. 2004). As an act designed
13 to secure an area and minimize the risks of
14 unexpected danger, it is analogous to crowd control,
15 which the Blankenhorn court determined was not a
16 sufficient basis for liability.

17
18 As such, the Court finds Plaintiffs have failed
19 to produce evidence that Recatto integrally
20 participated in the arrest or detention of Aragonez,
21 and thus cannot prevail on such a theory. See Travis
22 v. Village of Dobbs Ferry, 355 F.Supp.2d 740, 753
23 (S.D.N.Y. 2005) (granting summary judgment in favor
24 of backup officers where plaintiff failed "to provide
25 evidence to support her claim that they were

26 ¹³ At hearing on this motion, Plaintiffs' counsel
27 suggested Huff only decided to arrest Aragonez once
28 Aragonez started belligerently yelling and cursing at
Huff. This would preclude any determination that Recatto
knew Huff was going to arrest Aragonez.

1 personally involved in her arrest or evidence that
2 they were in a position to stop the illegal arrest
3 and failed to do so").

4
5 As for a bystander liability theory, it may be
6 difficult or impossible for a bystander officer to
7 know whether another officer, in the moment, is
8 acting based on the reasonable suspicion or probable
9 cause required. See also U.S. v. Ramirez, 473 F.3d
10 1026 (9th Cir. 2007) (discussing "collective
11 knowledge" or "fellow officer" doctrine). Still,
12 under the cases discussed above, a claim based on an
13 officer's failure to intervene is plausible if an
14 officer knew or had reason to know his colleague was
15 engaging in an unlawful arrest or detention.¹⁴

16
17 Here, there is no evidence to suggest that
18 Recatto knew or had reason to know that Huff was
19 acting without either probable cause¹⁵ or reasonable
20 suspicion¹⁶ in arresting or detaining Aragonz.¹⁷ The

21 _____
22 ¹⁴ Contrary to Plaintiffs' assertions, an officer
23 need not establish that he personally observed evidence
24 to support his colleague's decision to arrest or detain.

25 ¹⁵ See U.S. v. Hernandez, 322 F.3d 592, 596 (9th Cir.
26 2002) (explaining probable cause standard). On this
27 motion, there is no need to address whether Huff had
28 probable cause to arrest Aragonz. Even assuming
probable cause was lacking, Recatto could only be liable
if he knew or had reason to know it was lacking.

¹⁶ See Terry v. Ohio, 392 U.S. 1 (1968) (establishing
reasonable suspicion standard). As with the probable

(continued...)

1 undisputed evidence shows Recatto was not involved in
2 any interaction between Aragonez and Huff at all.

3
4 As such, Recatto is entitled to summary judgment
5 on the claims by Aragonez for false arrest and
6 excessive detention claims against him.

7
8 **b) Lozano's Claim**

9 There is no dispute that Recatto had any
10 involvement in the decision to arrest Lozano, and
11 there is no evidence to suggest that Recatto had any
12 reason to believe Huff was acting unlawfully in
13 arresting Lozano. Accordingly, Recatto is entitled
14 to summary judgment as to Lozano's false arrest
15 claim.

16 It is undisputed, though, that Recatto did
17 detain Lozano. A detention is deemed a Fourth
18 Amendment seizure when, "taking into account all of
19 the circumstances surrounding the encounter, the
20 police conduct would have communicated to a
21 reasonable person that he was not at liberty to

22
23 ¹⁶(...continued)
24 cause determination, there is no need to conclude whether
25 there was reasonable suspicion for detaining Aragonez.

26 ¹⁷ While, on a summary judgment motion, the Court is
27 to "draw[] all reasonable inferences supported by the
28 evidence," Noyes v. Kelly Services, 488 F.3d 1163, 1167
(9th Cir. 2007) the Court is not required to indulge the
mere speculation advanced by Plaintiffs' counsel at the
hearing that Recatto "must have" known that Huff planned
to unlawfully detain and arrest Aragonez.

1 ignore the police presence and go about his
2 business." U.S. v. Washington, 490 F.3d 765, 769
3 (9th Cir. 2007), quoting Florida v. Bostick, 501 U.S.
4 429, 437 (1991) (internal marks omitted). By
5 ordering Lozano to put down the generator and
6 allegedly holding Lozano's hands behind his back,
7 Recatto thus "seized" Lozano for Fourth Amendment
8 purposes, and thus can be held responsible on a
9 theory of direct liability if this seizure was
10 unconstitutional.

11 Recatto violated Lozano's constitutional rights
12 if he detained him without reasonable suspicion of
13 criminal activity supported by "specific and
14 articulable facts" and "rational inferences from
15 those facts." Terry v. Ohio, 392 U.S. 1, 21 (1968).
16 In determining whether reasonable suspicion is
17 present, a reviewing court is to consider the
18 totality of the circumstances known to the officer.
19 United States v. Arvizu, 534 U.S. 266, 273-275
20 (2002). The Court cannot fully analyze the totality
21 of circumstances here, however, since key facts are
22 unclear or disputed.

23
24 Recatto has explained that he suspected a
25 residential burglary might be underway when he saw
26 Lozano emerge from behind the house carrying a
27 compressor towards the truck. (Recatto Dep. at 79-
28

1 80.) At the same time, Huff, his partner on the
2 scene, was engaged with Aragonez, who was cursing and
3 shouting racist invective. (Id., PSGI ¶ 8.) Huff
4 was either in the process of arresting Aragonez, or
5 had just done so. While these facts are undisputed,
6 the combination is insufficient to establish a
7 reasonable suspicion of burglary as a matter of law.
8

9 A police officer may detain an individual to
10 prevent ongoing or imminent crime, provided he
11 "observes unusual conduct which leads him reasonably
12 to conclude in light of his experience that criminal
13 activity may be afoot." U.S. v. Grigg, 498 F.3d
14 1070, 1075 (9th Cir. 2007), quoting Terry, 392 U.S.
15 at 30. Recatto has not shown that it is sufficiently
16 unusual to carry a compressor out of a house in the
17 early evening as to establish reasonable suspicion of
18 criminal activity. Nor has Recatto explained how
19 Aragonez's behavior, though perhaps giving rise to
20 suspicion that Aragonez had committed some crime,
21 created a "reasonable inference" that Lozano was
22 engaged in criminal activity.
23

24 While the Court cannot, at this stage, conclude
25 that Recatto definitively did have reasonable
26 suspicion, such a finding is not barred by the
27 evidence before the Court. Since "[c]onduct that
28

1 alone may appear innocent can be suspicious when
2 viewed in context of other information or surrounding
3 circumstances that police are aware of, "People of
4 Territory of Guam v. Ichiyasu, 838 F.2d 353, 355-56
5 (9th Cir. 1988), a jury, upon a fuller examination of
6 the totality of circumstances, may conclude that
7 Recatto's suspicion was reasonable. See also U.S. v.
8 Arvizu, 534 U.S. 266 (2002) (explaining that seemingly
9 innocent actions may justify detention when placed in
10 larger context). In addition, Recatto's observation
11 that Lozano appeared intoxicated, (Recatto Dep. 79:9-
12 13), could be sufficient to establish reasonable
13 suspicion of criminal activity, i.e., public
14 drunkenness. However, Plaintiffs dispute whether
15 Recatto had any reason to suspect intoxication, and
16 it is unclear whether Recatto had any chance to
17 observe Lozano's behavior before detaining him.

18
19 While Recatto independently moves for summary
20 judgment on this claim on the basis of qualified
21 immunity, the parties' factual disputes must be
22 resolved to determine whether Recatto violated
23 clearly established law when he detained Lozano. See
24 Harlow, 457 U.S. 800, supra. Recatto therefore has
25 not carried his burden of showing he is entitled to
26 qualified immunity as a matter of law.

27
28

1 In light of the undisputed facts, the Court
2 grants summary judgment in favor of Recatto on the
3 unlawful arrest claim against him brought by both
4 Plaintiffs, and the unlawful detention claim as to
5 Aragonnez. Due to the remaining factual uncertainty,
6 the Court denies Recatto's motion for summary
7 judgment as to Lozano's unlawful detention claim.

8
9 **B. The Fourteenth Amendment Claim**

10 Plaintiffs bring a claim against both Lozano and
11 Recatto under the substantive due process component
12 of the Fourteenth Amendment for "providing false or
13 misleading information" in the Report.¹⁸ While this
14 claim originally named Huff and Recatto, Compl. ¶¶
15 33-41, Plaintiffs now concede that there is no
16 evidence Recatto was involved in drafting the report.
17 Thus, Plaintiffs concede the claim as to Recatto has
18 no merit. Accordingly, the Court grants summary
19 judgment in favor of Recatto on the Fourteenth
20 Amendment claim.

21
22 Plaintiffs now characterize their claim against
23 Huff as one of deliberate falsification of evidence,
24 based on the Ninth Circuit's decision in Devereaux v.

25 _____
26 ¹⁸ While Plaintiffs initially claimed that the
27 withholding of the belt recording was a substantive due
28 process violation, (Compl. ¶ 39), they now only argue
that the presentation of "false evidence" via the police
report is the basis of their claim. See Opp'n-Huff at
11-12.

1 Abbey, 263 F.3d 1070 (9th Cir. 2001) (en banc).
2 Devereaux concerned the investigation and prosecution
3 of a foster parent for alleged sexual abuse of foster
4 children living in his home. 263 F.3d at 1073.
5 Based on interviews of questionable validity,
6 Devereaux was charged with several felonies. Id.
7 After a yearlong investigation, the felony charges
8 were dropped in exchange for Devereaux's guilty plea
9 to two misdemeanor counts (rendering criminal
10 assistance and fourth-degree assault for spanking one
11 foster child). Id. Devereaux sued various
12 investigators and state employees for violating his
13 civil rights in the course of the investigation,
14 saying they used improper interview techniques with a
15 known tendency to produce false testimony. Id. at
16 1075.

17
18 Even though Devereaux was convicted as a result
19 of the investigation, an en banc Ninth Circuit panel
20 held that, even absent a conviction, "there is a
21 clearly established constitutional due process right
22 not to be subjected to criminal charges on the basis
23 of false evidence that was deliberately fabricated by
24 the government." 263 F.3d at 1074-75; see also
25 Cunningham v. City of Wenatchee, 345 F.3d 802, 811
26 (9th Cir. 2003). To survive summary judgment on that
27 claim, though, the court held a plaintiff must point
28

1 to evidence that, at a minimum, shows that "(1)
2 Defendants continued their investigation of
3 [Plaintiff] despite the fact that they knew or should
4 have known that he was innocent; or (2) Defendants
5 used investigative techniques that were so coercive
6 and abusive that they knew or should have known that
7 those techniques would yield false information." 263
8 F.3d at 1076; see also Ramirez v. County of Los
9 Angeles, 397 F. Supp.2d 1208, 1226 (C.D. Cal. 2005).
10 Here, Plaintiffs do not claim Defendant Huff's method
11 of taking a police report was improper, so only the
12 first prong is relevant.

13
14 Plaintiffs argue the Court should construe
15 Devereaux broadly. However, some courts have
16 questioned the continued viability of a Devereaux
17 claim at all. See, e.g., Bastidas v. City of Los
18 Angeles, No. CV 04-8902-GAF, 2006 WL 4749706 at *6
19 (C.D. Cal. 2006). Moreover, not only are Plaintiffs
20 unable to establish any evidence to suggest Huff, or
21 any other officer, knew Plaintiffs were innocent of
22 the charges against them, i.e., vandalism of public
23 property, but they fail to show any specific
24 falsehoods or omissions that have given rise to a
25 constitutional injury.¹⁹ None of the facts in the

26 _____
27 ¹⁹ Plaintiffs argue that Huff's failure to testify
28 about the accuracy of the Report creates a presumption of
falsehood. (Opp'n-Huff at 14.) However, several of the
(continued...)

1 police report that they dispute have any relevance to
2 the question of whether or not they committed that
3 crime. Plaintiffs were charged with vandalism after
4 they undisputedly kicked out the windows of a police
5 car.²⁰

6
7 Plaintiffs' allegations boil down to two
8 complaints. First, they contend the Report was
9 faulty, as it reveals the investigation was not
10 particularly thorough. Second, Plaintiffs disagree
11 with the arresting officer's description of the
12 events of the evening. But as one court applying
13 Devereaux has noted, "a careless or inaccurate
14 investigation that does not ensure an error-free
15 result does not rise to the level of a constitutional
16 violation." Costanich v. Washington, No. C05-
17 0090MJP, 2008 WL 1968775 at *11 (W.D. Wash. May 2,

18 _____
19 ¹⁹(...continued)
20 challenged aspects of the report are demonstrably true
21 based on other evidence on the record. For example,
22 Plaintiffs challenge the Report's characterization of
23 them as "completely uncooperative and combative" and
24 "completely belligerent and uncooperative." (PSGI-Huff ¶¶
25 76, 80, 83.) Rather, they claim there was only "some"
26 non-cooperation. (PSGI-Huff ¶ 76.) As a matter of law, a
27 dispute over such a subjective inquiry is not evidence of
28 deliberate falsification. Other challenged aspects of
the report, including the earlier encounter with
Aragonez, are substantiated by Recatto's testimony.

25 ²⁰ At hearing, Plaintiffs' counsel argued that
26 Plaintiffs may have had an affirmative defense of
27 "necessity." However, their claimed necessity - that
28 they believed the officers were not real officers or they
were not truly being taken to the West Valley Detention
Center- has no relationship to the alleged falsehoods or
omissions in the Report.

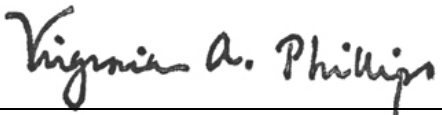
1 2008). Devereaux makes clear that a deliberate
2 falsification claim requires evidence that an officer
3 knew of the plaintiff's innocence, and proceeded
4 anyway. No such evidence has been presented here.
5

6 Accordingly, the Court grants summary judgment
7 as to the Fourteenth Amendment claim against Huff.
8

9 **V. CONCLUSION**

10 For the foregoing reasons, the Court GRANTS
11 Defendant Recatto's Motion for Summary Judgment in
12 part and DENIES it in part. The Court GRANTS summary
13 judgment in favor of Recatto on Plaintiff's claims as
14 follows: (1) unlawful detention claim as to Aragonz,
15 (2) false arrest claim as to both Defendants, and (3)
16 Fourteenth Amendment substantive due process claim.
17 The Court DENIES the motion for summary judgment as
18 to the excessive force claim and the unlawful
19 detention claim as to Lozano. As discussed above,
20 the Court GRANTS Defendant Huff's Motion for Partial
21 Summary Judgment as to the Fourteenth Amendment
22 substantive due process claim against him.
23

24 Dated: November 18, 2008



VIRGINIA A. PHILLIPS
United States District Judge