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United States Court of Appeals
Tenth Circuit

July 18, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN JORDAN,

Plaintiff - Appellant,

v.

ADAMS COUNTY SHERIFF'S OFFICE,
DEPUTY CHAD JENKINS, and
DEPUTY MICHAEL DONNELLON

Defendants - Appellees.

No. 22-1154

**Appeal from the United States District Court
for the District of Colorado
(D.C. No. 20-CV-02297-STV)**

Robert M. Liechty (Terrell M. Gaines, Littleton, Colorado, with him on the briefs), Robert M Liechty PC, Denver, Colorado, for Plaintiff-Appellant.

Michael A. Sink (Kerri A. Booth with him on the brief), Assistant County Attorneys, Adams County Attorney's Office, Brighton, Colorado, for Defendants-Appellees.

Before **HARTZ**, **EBEL**, and **MATHESON**, Circuit Judges.

EBEL, Circuit Judge.

According to Plaintiff John Jordan's allegations, he was thrown to the ground and arrested for criticizing the police. Moments before the arrest, Mr. Jordan stood across the street from Deputies Michael Donnellon and Chad Jenkins (collectively,

the "Deputies"), listening as the Deputies questioned his nephew about a car accident involving a truck owned by Mr. Jordan's company. Mr. Jordan grew frustrated with what he was hearing and started criticizing the two Deputies. The Deputies retaliated with their own disparaging remarks about Mr. Jordan. Eventually, Deputy Jenkins became fed up with Mr. Jordan's criticisms and performed a takedown maneuver on Mr. Jordan, placing him under arrest for obstruction of justice. As relevant to this appeal, Mr. Jordan sued under 42 U.S.C. § 1983 for unlawful arrest, malicious prosecution, and excessive force. The magistrate judge granted the Deputies' motion for summary judgment on the basis of qualified immunity and dismissed each of these claims.

Exercising jurisdiction under 28 U.S.C § 1291 and 28 U.S.C. § 636(c)(3), we REVERSE the order granting summary judgment and REMAND for further proceedings.

I. BACKGROUND

In early September 2018, plaintiff John Jordan received word that his nephew, J.J., had been in a car accident while driving Mr. Jordan's company truck. Mr. Jordan traveled to the scene of the accident and, upon arrival, learned that J.J. was unable to locate the truck's insurance card. To help, Mr. Jordan called his office to see if someone could track down the insurance information.

The accident was being covered by defendant Deputy Michael Donnellon who, upon arriving at the scene, began questioning J.J. He was then joined by defendant Deputy Chad Jenkins. Mr. Jordan remained on the phone between twenty to forty

feet away as the officers questioned J.J. While on the call with his office, Mr. Jordan became annoyed at the questions that J.J. was being asked and began to engage in a verbal altercation with the Deputies. This interaction was recorded by his phone. The relevant part of this exchange goes as follows:

> **Mr. Jordan**: Well, are you taking a statement or are you giving a statement?
> **Deputy Donnellon**: What?
> **Mr. Jordan** [in raised voice]: Okay. Are you taking a statement from them or are you giving a statement? Okay. And they're saying that's not the point of impact. That's what you're saying. [Inaudible] witnesses with him.
> **Deputy Donnellon**: [Inaudible]
> **Mr. Jordan**: Those guys are independent.
> **Deputy Donnellon**: [Inaudible]
> **Mr. Jordan**: Okay. I'm just wondering if you're making a statement or are you gonna let them do it?
> **Deputy Donnellon**: [Inaudible]
> **Mr. Jordan**: You're way too high strung, man.
> **Deputy Donnellon**: No, I'm not.
> **Mr. Jordan**: You're way too high strung, man.
> **Deputy Donnellon**: I'm not going to give your [inaudible] because of your attitude and your behavior. You are being a complete . . . you are a complete disgrace to your son.
> **Mr. Jordan** [in a mocking tone]: Don't shoot me, man.
> **Deputy Donnellon**: That's a great way to show your son how to act.
> **Mr. Jordan**: Don't shoot me, man.
> **Deputy Donnellon**: You're a terrible father.
> **Mr. Jordan**: Don't shoot me.
> **Deputy Donnellon**: An embarrassment.
> **Mr. Jordan**: How can you tell those skidmarks are from that car? This whole road is full of skidmarks.
> **Deputy Jenkins**: Sir, you better go away.
> **Mr. Jordan** [in raised voice]: Quit making statements. If you guys want their statements.
> **Deputy Jenkins** [in raised voice]: [Inaudible]
> **Mr. Jordan**: If you guys want their statements, let them give their statements.
> **Deputy Jenkins**: Are you done?
> **Mr. Jordan**: Yeah.
> **Deputy Jenkins**: Good. Go. Go.
> **Mr. Jordan**: I'm not going anywhere. I'm going to stay right here.
> **Deputy Jenkins**: [Inaudible] Put your hands behind your back.

App'x at 115. At the moment that Deputy Jenkins commanded Mr. Jordan to put his hands behind his back, Mr. Jordan can be heard speaking on the phone with someone at his office. When Mr. Jordan did not immediately comply with the command, Deputy Jenkins grabbed his arm and used a takedown maneuver to bring Mr. Jordan to the ground.

The parties dispute exactly how these events played out. Deputy Jenkins claims that Mr. Jordan "pulled away" from his grip after his arm was grabbed, Aple. Br. 3 (citing App'x at 64), but Mr. Jordan denies this. Furthermore, although the parties agree that Deputy Jenkins told Mr. Jordan to put his hands behind his back three more times after the events recorded in the transcript above unfolded, they disagree about when these commands happened. Mr. Jordan contends that these commands came after the takedown maneuver was performed, as there were only a few seconds between the initial command and the takedown. The Deputies disagree with this on appeal.

After Deputy Jenkins knocked Mr. Jordan down, Mr. Jordan stuck out his right arm to catch the ground. The Deputies contend that this was done to resist arrest and that Mr. Jordan used this arm to push back against Deputy Jenkins, but Mr. Jordan claims that this was done to prevent his face from hitting the ground. Either way, once Mr. Jordan was on his knees, he had one extended arm holding himself off the ground. Deputy Jenkins then kicked out this arm, causing Mr. Jordan's face to hit the dirt. Deputy Jenkins placed his knee on Mr. Jordan's cheek and handcuffed him.

Mr. Jordan was arrested and charged with obstruction of justice and resisting arrest under Colo. Rev. Stat. §§ 18-8-103, 104. Per § 18-8-104, an individual commits obstruction of a peace officer when, "by using or threatening to use violence, force, physical interference, or an obstacle, such person knowingly obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his or her official authority." These charges were eventually dropped.

Mr. Jordan initiated this lawsuit in August 2020. He brought four claims under 42 U.S.C. § 1983: (1) unlawful arrest, (2) malicious prosecution, (3) excessive force, and (4) violation of religious freedom. The parties agreed to litigate the dispute before a magistrate judge and the Deputies moved for summary judgment on the basis of qualified immunity on all four claims. The magistrate judge granted summary judgment for defendants on the first three claims based on qualified immunity but denied summary judgment on the religious freedom claim.[1] On the unlawful seizure and malicious prosecution claims, the magistrate judge concluded that the Deputies had probable cause for arrest under Colo. Rev. Stat. § 18-8-104—which prohibits obstruction of a peace officer—and the Deputies were therefore entitled to qualified immunity on both claims. Both below and on appeal, Jordan makes no argument that Colo. Rev. Stat. § 18-8-104 does not by its terms make his

[1] There are additional facts and proceedings that pertain to Mr. Jordan's religious liberty claim, but since this claim is not at issue on appeal, we do not discuss them here.

protest illegal. Rather, he is arguing only that he had a First Amendment right under the U.S. Constitution to engage in the conduct for which he was arrested and prosecuted, and so § 18-8-104 could not constitutionally be applied to him.[2] On the excessive force claim, the magistrate judge declined to decide whether excessive force was applied because the judge concluded that there was not a clearly established right under the sole case cited by Mr. Jordan, and thus qualified immunity was appropriate.

Mr. Jordan now appeals the summary judgment ruling for each of those three claims, arguing that the magistrate judge erred in granting qualified immunity to the Deputies.

II. STANDARD OF REVIEW

Here, we review a "grant of summary judgment de novo, applying the same legal standard as the district court." Schaffer v. Salt Lake City Corp., 814 F.3d 1151, 1155 (10th Cir. 2016). In so doing, we view the evidence and any reasonable inferences from that evidence in the light most favorable to the non-moving party. Kaufman v. Higgs, 697 F.3d 1297, 1300 (10th Cir. 2012). In general, the movant bears the burden of establishing that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Schaffer, 814 F.3d at 1155 (quoting Fed. R. Civ. P. 56(a)).

[2] Since Mr. Jordan does not argue that his conduct didn't violate § 18-8-104, we assume for this appeal that his conduct fell within the ambit of the statute, and consider only whether his arrest violated his constitutional rights.

However, in the qualified immunity context, the plaintiff bears the burden of proving that (1) the defendants' actions violated plaintiff's federal rights, and (2) that the federal rights were clearly established at the time of the conduct. PJ ex rel. Jensen v. Wagner, 603 F.3d 1182, 1196 (10th Cir. 2010). To show that the law is clearly established, a plaintiff must normally point to a "Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts." Cortez v. McCauley, 478 F.3d 1108, 1114 (10th Cir. 2007) (en banc) (quoting Medina v. City of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992)). In the rare obvious case, though, "the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." McCoy v. Meyers, 887 F.3d 1034, 1053 (10th Cir. 2018) (quoting D.C. v. Wesby, 138 S. Ct. 577, 590 (2018)).

III. DISCUSSION

A. Did the magistrate judge err in granting summary judgment for the Deputies on Mr. Jordan's claim for unlawful arrest?

We first address the grant of qualified immunity on Mr. Jordan's unlawful arrest claim. "In the context of a false arrest claim, an arrestee's constitutional rights were violated if the arresting officer acted in the absence of probable cause that the person had committed a crime." Kaufman, 697 F.3d at 1300. To overcome qualified immunity in the unlawful arrest context, the first prong requires a plaintiff to show that the "arresting officer acted in the absence of probable cause that the person had committed a crime." Id. at 1300. For the second prong, the plaintiff must "show that

'it would have been clear to a reasonable officer that probable cause was lacking under the circumstances[.]'" Id. at 1300 (quoting Koch v. City of Del City, 660 F.3d 1228, 1238 (10th Cir. 2011)). Put another way, the plaintiff must show that there was not even "arguable probable cause" for the arrest. Id. (quoting Cortez, 478 F.3d at 1121).

We conclude that, when the facts are viewed in the light most favorable to Mr. Jordan at this stage in the proceedings, he meets both prongs of the qualified immunity analysis because his verbal criticism was clearly protected by the First Amendment, thereby meaning that there could be no arguable probable cause for his arrest based on that conduct. It was therefore erroneous to grant summary judgment in favor of the Deputies.

1. Prong One: Was there probable cause for the arrest?

Starting with the first prong, we conclude that Mr. Jordan's conduct was protected by the First Amendment, as established by City of Houston v. Hill, 482 U.S. 451, 453–54 (1987). There, Hill's friend was "intentionally stopping traffic on a busy street," prompting police officers to approach the friend and begin speaking to him. Id. at 453. To divert the officers' attention away from the friend stopping traffic, Hill "began shouting at the officers." Id. One of the officers asked Hill if he was interrupting the officer in his official capacity, to which Hill replied in the affirmative. Id. at 454. Hill was then arrested pursuant to a local ordinance that rendered it unlawful to "interrupt any policeman in the execution of his duty." Id. at 455 (quoting Houston, Texas, Code of Ordinances § 34–11(a) (1984)).

The Supreme Court in Hill held that this ordinance was unconstitutionally broad. Id. at 467. In so holding, the Court stated that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." Id. at 461. The Court made clear that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." Id. at 462–63; see also Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974) (declaring a statute unconstitutional after the appellant was arrested for screaming obscenities at an officer who was speaking to her husband). Like in Hill, Mr. Jordan here was arrested for merely criticizing an officer while the officer was questioning another party. "The Constitution does not allow such speech to be made a crime." Hill, 482 U.S. at 462.

Hill is relevant to an unlawful arrest claim under the Fourth Amendment, like the one here, even though it involved a First Amendment challenge to a local ordinance. We made this clear in Guffey v. Wyatt, where we relied on Hill (and other similar First Amendment cases) to deny qualified immunity against a Fourth Amendment challenge premised on conduct protected by the First Amendment. 18 F.3d 869, 870, 873 (10th Cir. 1994). For this reason, the Deputies miss the mark when they argue that Hill is distinguishable because it involved a First Amendment claim in the face of an anti-harassment statute, rather than an unlawful arrest claim

under the Fourth Amendment.[3] Together, Hill and Guffey both establish that criticism directed at police is protected by the First Amendment and cannot justify adverse police action.[4] Indeed, the First Amendment does not protect only quiet and respectful behavior towards police; it protects loud criticism that may annoy or distract the officer. See Hill, 482 U.S. at 453–54 (officer arrested the defendant because he admitted to "interrupting" the officer); see also Guffey, 18 F.3d at 870 (plaintiff engaged in a "heated exchange" with officer).

Moreover, since the First Amendment protects the right to criticize police, then a fortiori it protects the right to remain in the area to be able to criticize the

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[3] The Deputies also argue that Mr. Jordan forfeited reliance on Hill because he cited it for the first time on appeal. This is factually incorrect because Mr. Jordan did cite Hill below when opposing the Deputies' motion for summary judgment. App'x at 85. Even if he had not, though, we would not need to ignore Hill because "[a] court engaging in review of a qualified immunity judgment should [] use its 'full knowledge of its own [and other relevant] precedents.'" Elder v. Holloway, 510 U.S. 510, 516 (1994) (quoting Davis v. Scherer, 468 U.S. 183, 192 n.9 (1984)); see also Flyers Rights Educ. Fund, Inc. v. Fed. Aviation Admin., 864 F.3d 738, 748 n.6 (D.C. Cir. 2017) ("Indeed, a party cannot forfeit or waive recourse to a relevant case just by failing to cite it.").

[4] We also recently addressed the right to criticize and film police in Irizarry v. Yehia, 38 F.4th 1282 (10th Cir. 2022). There, we held that the plaintiffs "did not impede officers from performing their duties" when the plaintiffs stood "on a public street" and "loudly criticize[d]" one of the officers while filming him. Id. at 1292 n.10. In concluding that the plaintiffs had engaged in protected speech, we emphasized the importance of citizens acting "as 'a watchdog of government activity.'" Id. at 1289 (quoting Leathers v. Medlock, 499 U.S. 439, 447 (1991)). The right of citizens "verbally to oppose or challenge police activity" similarly serves this critical function "by which we distinguish a free nation from a police state." Hill, 482 U.S. at 462–63. Because the facts of Irizarry occurred after the facts before us, we discuss Irizarry merely to illustrate how the Tenth Circuit has recently addressed the right at issue here—not to show that the law was clearly established at the time of the arrest below.

observable police conduct. Otherwise, an officer could easily stop the protected criticism by simply asking the individual to leave, thereby forcing them to either depart (which would effectively silence them) or face arrest. This would render the right to criticize hollow and would implicate various other protected rights, like the right to film public police activity. See Irizarry, 38 F.4th at 1289. If police could stop criticism or filming by asking onlookers to leave, then this would allow the government to "'simply proceed[] upstream and dam[] the source' of speech"—i.e., it would allow the government to "bypass the Constitution." W. Watersheds Project v. Michael, 869 F.3d 1189, 1196 (10th Cir. 2017) (quoting Buehrle v. City of Key W., 813 F.3d 973, 977 (11th Cir. 2015)).

Of course, the right to criticize police has important limits. First, if criticism is accompanied by a physical act which interferes with an officer's official duties, then the officer may take measures to stop that physical act. See Hill, 482 U.S. at 462 n.11 (noting that the Court's decision "does not leave municipalities powerless to punish physical obstruction of police action"). For example, if an individual is physically blocking the officer from accessing a crime scene while criticizing the officer, then the officer may stop this physical obstruction. Or if the act of criticizing itself is so loud that an officer is prevented from executing his or her duties, then the officer may restrict the speech based on this physical act, which does not rely on the content of the speech. Second, if criticism of an officer has the function of coaching

a witness, then an officer may take measures to prevent this coaching.[5] In such a situation, the preventive measures are not based on the criticism itself, but on the active interference with the investigation.

Like in Guffey and Hill, Mr. Jordan's criticism was constitutionally protected by the First Amendment. Accordingly, there was no probable cause to arrest him. See Mink v. Knox, 613 F.3d 995, 1003–04 (10th Cir. 2010). Mr. Jordan has therefore successfully made out the first prong of the qualified immunity analysis at this stage of the proceeding.

2. Prong Two: Did the Deputies violate clearly established law?

"In the context of a qualified immunity defense on an unlawful arrest claim, we ascertain whether a defendant violated clearly established law by asking whether there was arguable probable cause for the challenged conduct." Stonecipher v. Valles, 759 F.3d 1134, 1141 (10th Cir. 2014) (quotation omitted). "Arguable probable cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists." Id. (citing Cortez, 478 F.3d at 1120); see also Figueroa v. Mazza, 825 F.3d 89, 100 (2d Cir. 2016) ("A police officer has arguable probable cause 'if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b)

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[5] In most cases, there will be a clear distinction between an act of criticism and an act of coaching a witness. In some cases, though, this line may become blurred. At a later stage of this case, a factfinder may determine that Mr. Jordan's speech crossed this line from criticism to coaching. As we discuss further below, however, we construe the facts most favorably to Mr. Jordan at this time because this case comes before us as an appeal from the Deputies' motion for summary judgment.

officers of reasonable competence could disagree on whether the probable cause test was met.'" (quoting Zalaski v. City of Hartford, 723 F.3d 382, 389, 390 (2d Cir. 2013))). "A defendant 'is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to arrest or detain the plaintiff.'" Stonecipher, 759 F.3d at 1141 (quoting Cortez, 478 F.3d at 1120). Thus "[i]n the § 1983 qualified-immunity context, an officer may be mistaken about whether he possesses actual probable cause to effect an arrest, so long as the officer's mistake is reasonable." A.M. v. Holmes, 830 F.3d 1123, 1140 (10th Cir. 2016) (emphasis in original). Applying these standards, we hold that Mr. Jordan's First Amendment rights were clearly established at the time of his arrest such that there was no arguable probable cause to arrest him for such conduct.

As we have discussed, the First Amendment right to criticize police is well-established, see Hill, 482 U.S. at 461 (" . . . the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."), and it is clearly established that "a government official may not base her probable cause determination on . . . speech protected by the First Amendment." Mink, 613 F.3d at 1003–04. Taking "all the facts in the light most favorable to" Mr. Jordan—as we must do at summary judgment, Emmett, 973 F.3d at 1135—it was clearly established that his conduct did not go beyond the bounds and protection of the First Amendment. On his version of the facts, he was standing twenty to forty feet away from the officers (on a public sidewalk or street), voicing his disagreement with the questions the Deputies were asking his youthful nephew. This was protected

conduct. See Hill, 482 U.S. at 461; see also Guffey, 18 F.3d at 870, 872. And, as explained above, his refusal to leave when asked to do so could not have provided arguable probable cause for his arrest because, if it did, officers could quickly silence any criticism simply by asking criticizers to leave.

Nor, under his account of the facts, did Mr. Jordan's criticism fall outside the bounds of the First Amendment's protections due to physical interference or coaching. Although Deputy Jenkins claims that he could not hear the nephew over Mr. Jordan's criticism, see App'x at 64, this is irreconcilable with a view of the record most favorable to Mr. Jordan, see App'x at 115 (phone recording of interaction), see also App'x at 97–98 (Deputy Donnellon's report reviewing his conversation with the nephew, including what they both said), App'x at 94–95 (declarations of Mr. Jordan and his nephew). And even though the Deputies claim that Mr. Jordan was "attempting to direct the interviews and suggest answers to his nephews," Aple. Br. 13, this is also unsupported by the transcript recording when viewed most favorably to Mr. Jordan. At this procedural juncture, there are too many outstanding factual questions to grant summary judgment for the Deputies.

Assuming these facts, we hold that no reasonable officer could have believed they had arguable probable cause for arrest, and it was therefore improper to grant summary judgment for the Deputies on Mr. Jordan's claim of unlawful arrest.

B. Did the magistrate judge err in granting summary judgment for the Deputies on Mr. Jordan's claim for malicious prosecution?

We next address Mr. Jordan's claim of malicious prosecution. Below, the magistrate judge's conclusion that the Deputies had probable cause was treated as dispositive for the malicious prosecution claim, since a plaintiff must show a lack of probable cause as an element of malicious prosecution. See Shrum v. Cooke, 60 F.4th 1304, 1310 (10th Cir. 2023); see also Thompson v. Clark, 142 S. Ct. 1332, 1337 (2022) (lack of probable cause is the "gravamen" of the Fourth Amendment claim for malicious prosecution and the tort of malicious prosecution). As we held above, though, this probable cause determination—on summary judgment review—was erroneous and unconstitutional. Since this determination was the only basis for the magistrate judge's summary judgment ruling dismissing the malicious prosecution claim, this judgment was erroneous.

C. Did the magistrate judge err in granting summary judgment for the Deputies on Mr. Jordan's claim of excessive force, again on the basis of qualified immunity?

Finally, we consider Mr. Jordan's excessive force claim. The qualified immunity analysis here follows the standard formula—we first determine whether there was a constitutional violation and then determine whether the constitutional right was clearly established. See Jensen, 603 F.3d at 1196. We conclude that Mr. Johnson successfully made out both prongs of this analysis, rendering summary judgment improper.

1. Prong One: Was the force applied to Mr. Jordan unconstitutionally excessive?

The first prong of the qualified immunity analysis asks whether the force applied to Mr. Jordan was "excessive" under the Fourth Amendment such that it was unconstitutional. Graham v. Connor, 490 U.S. 386, 394 (1989). Whether force is excessive is a question of "reasonableness," which "requires [a] balancing of the individual's Fourth Amendment interests against the relevant government interests." Cnty. Of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546 (2017). This is an "objective" inquiry that looks at "whether the totality of the circumstances justifie[s] a particular sort of search or seizure." Id. (first quoting Graham, 490 U.S. at 396; then quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)). There are three non-exclusive factors that are weighed in determining whether force was excessive: (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.[6]

Under the first Graham factor, "a minor offense supports only the use of minimal force." Wilkins v. City of Tulsa, 33 F.4th 1265, 1273 (10th Cir. 2022). "A misdemeanor committed in a 'particularly harmless manner . . . reduces the level of

[6] Mr. Jordan argues that "the use of non-trivial force of any kind was unreasonable" when the plaintiff made no threats nor attempted to resist the officer. Rice v. Morehouse, 989 F.3d 1112, 1126 (9th Cir. 2021) (emphasis in original) (quoting Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1094 (9th Cir. 2013)). Because we conclude that he has satisfied the Graham factors without this argument, we do not address it.

force that [is] reasonable for [the officer] to use.'" Id. (quoting Casey v. City of Fed. Heights, 509 F.3d 1278, 1281 (10th Cir. 2007)). This factor weighs in favor of Mr. Jordan. Section 18-8-104(1)(a) is punishable as a class two misdemeanor, meaning that this factor weighs against the use of "anything more than minimal force." Id. According to Mr. Jordan's presentation of the facts,[7] the Deputies tackled Mr. Jordan to the concrete, kicked out his supporting arm so that his head hit the concrete, and placed a knee on his cheek. In Surat v. Klamser, we recently held that the first Graham factor weighed against use of a takedown maneuver against a plaintiff charged with the same two misdemeanors as Mr. Jordan. 52 F.4th 1261, 1274–75 (10th Cir. 2022) (first factor favored plaintiff when officer used a takedown maneuver for violation of the misdemeanor at issue here); see also Koch, 660 F.3d at 1246–47 (first factor favored the plaintiff when the officer grabbed her arm and threw her to the ground after she resisted his grab). This force was therefore more than "minimal," and so the first Graham factor favors Mr. Jordan. See Wilkins, 33 F.4th at 1273.

The second Graham factor is the "most important," and requires us to look at "whether the officers or others were in danger at the precise moment that they used force." Id. at 1273 (first quoting Pauly v. White, 874 F.3d 1197, 1215–16 (10th Cir. 2017); then quoting Emmett v. Armstrong, 973 F.3d 1127, 1136 (10th Cir. 2020)).

[7] Because Mr. Jordan's account of the facts is not contradicted by the audio recording, we must "credit his version of the events on summary judgment." Wilkins, 33 F.4th at 1275.

This factor also favors Mr. Jordan, given that there is no evidence that he "had access to a weapon or that []he threatened harm to [him]self or others." Davis v. Clifford, 825 F.3d 1131, 1135 (10th Cir. 2016). At the time he was taken down, Mr. Jordan was simply talking on the phone to get insurance information to assist the deputies. Even in a case where a suspect had a small knife, we concluded that the suspect did not pose an immediate threat because he neither made threats nor advanced at anyone. See Walker v. City of Orem, 451 F.3d 1139, 1160 (10th Cir. 2006). This factor therefore also weighs against the takedown.

As for the third Graham factor, we consider whether there was "any resistance during the suspect's encounter with officers," or whether the suspect attempted to flee. Wilkins, 33 F.4th at 1273. This factor supports Mr. Jordan as well. In Davis, we held that this factor favored the plaintiff when the plaintiff responded to officers approaching her car by locking the doors, rolling up the windows, and refusing to exit. 825 F.3d 1131, 1136 (10th Cir. 2016). There, we determined that the plaintiff could not be considered "actively resisting arrest or attempting to flee" just because "she did not immediately obey the officers' orders." Id.

Like in Davis, this factor favors Mr. Jordan. Under his account of the facts, Deputy Jenkins asked Mr. Jordan to put his hands behind his back just one time—a command which Mr. Jordan says he did not hear—before Deputy Jenkins grabbed his arm and then tackled him to the ground around four to six seconds later.[8] There is no

[8] From the recording, it is unclear whether the second instruction comes before, during, or after the tackle. There is a scuffle in the audio before the second

evidence that Mr. Jordan was attempting to flee, since one of the bases for the arrest was the fact that Mr. Jordan refused to leave. As for potential resistance, the Deputies claim that after Mr. Jordan was taken to the ground, he used his right arm to push back in an attempt to resist arrest. Mr. Jordan disagrees with these facts, claiming that he used his right arm to prevent his face from hitting the ground. Since we must "tak[e] all the facts in the light most favorable to" Mr. Jordan at summary judgment, Emmett, 973 F.3d at 1135, this factor favors Mr. Jordan.[9]

In sum, we conclude that all three of the Graham factors favor Mr. Jordan and that he has established a constitutional violation of excessive force under the Fourth Amendment, thereby satisfying the first prong of the qualified immunity analysis.

2. Prong Two: Was the excessive force violation under the Fourth Amendment one of clearly established law?

The next issue is whether the law was clearly established. We conclude that, under Mr. Jordan's account of the facts, his constitutional right was clearly established. Thus, it was erroneous to grant summary judgment for the Deputies.

Our decision in Morris v. Noe, 672 F.3d 1185, 1190 (10th Cir. 2012), is particularly relevant here.[10] In Morris, following a verbal exchange between the

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instruction, and so this is consistent with the tackle beginning before the second instruction. So, like above, we must "credit [Mr. Jordan's] version of the events on summary judgment." Wilkins, 33 F.4th at 1275.

[9] Even if Mr. Jordan did throw out his arm, this happened after the takedown maneuver, so this potential resistance could not retroactively justify the takedown.

[10] We agree with the district court that Cortez, 478 F.3d at 1113, does not clearly establish the law here. There, we concluded that it was unconstitutional to grab one of the plaintiff's arms and lock her in a police car for nearly an hour because she was not the target of the arrest (rather, the police were in her home to

plaintiff's ex-boyfriend and the plaintiff's husband, the husband stepped backwards towards the police officers with his hands up. Id. This led the officers to grab the husband, twist him around, and throw him to the ground. Id. They then put their knees on his midsection and handcuffed him. Id. We concluded that this forceful takedown was unconstitutional under Graham because the husband posed no threat to others and neither resisted nor attempted to flee. Id. at 1195–98. Morris thus establishes that a takedown maneuver is unconstitutional when the arrestee poses no threat, puts up no resistance, and does not attempt to flee.[11]

As explained above, the parties dispute whether Mr. Jordan pulled away from Deputy Jenkins' grip and threw out his arm during the takedown to resist arrest. However, taking the facts in the light most favorable to Mr. Jordan, Emmett, 973 F.3d at 1135, Mr. Jordan did not pull away from Deputy Jenkins and did not use his

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arrest her husband). Id. at 1130. Cortez thus did not clearly establish the level of force that is permissible for the target of an arrest. Because Mr. Jordan was the target of the arrest, this case is more like Morris than Cortez. And, although Mr. Jordan did not cite Morris, we state again that "[a] court engaging in review of a qualified immunity judgment should [] use its 'full knowledge of its own [and other relevant] precedents.'" Elder, 510 U.S. at 516 (1994) (quoting Davis, 468 U.S. at 192 n.9).

[11] In Surat, we recently extended the holding of Morris and held that minor resistance similarly does not justify a takedown maneuver. 52 F.4th at 1277. Specifically, the takedown maneuver there was held to be unconstitutional when the plaintiff merely attempted to pry the officer's fingers off her and pawed at the officer's arm. Id. However, we held that that this takedown maneuver was not clearly unconstitutional under Morris because Morris had only established that a takedown maneuver is unconstitutional when there is no resistance. Id. Surat was decided in November 2022, and so at the time of Mr. Jordan's September 2018 arrest, it was only clearly established that a takedown maneuver is unconstitutional when there is no resistance whatsoever. Morris, 672 F.3d at 1198. Thus, whether Mr. Jordan did or did not resist arrest remains a key factual question for the application of qualified immunity.

arm to push back against Deputy Jenkins, and thus did not resist arrest. As such, under the Graham factors, it was clearly established that the takedown maneuver utilized by the Deputies here was excessive as applied to Mr. Jordan at the time of his arrest. It was therefore improper to grant summary judgment for the Deputies.

IV. CONCLUSION

For the foregoing reasons, we REVERSE the magistrate judge's grant of summary judgment on the unlawful arrest, malicious prosecution, and excessive force claims, and REMAND for further proceedings.