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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Richard William Heathershaw,

10 Plaintiff,

11 v.

12 Phoenix Police Department, et al.,

13 Defendants.
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No. CV-14-01615-PHX-DLR

ORDER

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16 Before the Court is Defendants' Motion for Summary Judgment.¹ (Doc. 55.) The
17 motion is fully briefed. For the following reasons, Defendants' motion is granted.

18 **BACKGROUND**²

19 On January 23, 2014, Defendants Phoenix Police Officers Daniel Rogers and
20 George Fulton were dispatched to assist with two detained shoplifting suspects at a JC
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22 ¹ Plaintiff filed a motion to strike Defendants' reply memorandum as untimely.
23 (Doc. 60.) The motion is denied because, contrary to Plaintiff's assertion, Defendants'
24 reply memorandum was timely filed. Fed. R. Civ. P. 6(a)(1)(C), (d); LRCiv 56.1(d).

25 ² Local Rule of Civil Procedure 56.1(b) requires a party opposing a motion for
26 summary judgment to file a separate controverting statement of facts with
27 correspondingly numbered paragraphs either agreeing with or disputing each of the
28 moving party's statements of fact. Additionally, if the non-movant disputes a statement
of fact, he must reference admissible evidence in the record showing that a genuine
dispute exists. LRCiv 56.1(b). If the non-movant fails to properly address the movant's
statements of fact, the Court may consider those facts undisputed for purposes of the
motion. Fed. R. Civ. P. 56(e). Plaintiff did not file a separate controverting statement of
facts, nor did he otherwise respond to each of Defendants' factual assertions or cite to
admissible evidence in the record supporting his claim. Accordingly, for purposes of this
order Defendants' factual assertions are deemed undisputed.

1 Penney store in Phoenix, Arizona. (Doc. 56, ¶¶ 1-2.) The suspects, Plaintiff Richard
2 Heathershaw and a female accomplice, were detained in the JC Penney loss prevention
3 office. (*Id.*, ¶¶ 3-4.) Officer Fulton reviewed security footage and spoke with various JC
4 Penney employees, including loss prevention staff. (*Id.*, ¶¶ 6, 19, 21, 27, 30, 31.) His
5 investigation revealed that Plaintiff and his accomplice first attempted to purchase several
6 items with a check and identification card that JC Penney employees suspected were
7 fraudulent. (*Id.*, ¶¶ 10-11, 19-21.) After the purchase was denied, Plaintiff concealed
8 two shirts in a bag that his accomplice was carrying. (*Id.*, ¶¶ 11, 22.) JC Penney loss
9 prevention staff stopped Plaintiff and his accomplice as they attempted to leave the store.
10 (*Id.*, ¶¶ 12, 13, 23, 29.) During the encounter, Plaintiff became violent. He punched one
11 loss prevention employee and attempted to pull a knife on another. (*Id.*, ¶¶ 15-16, 24-25,
12 29.) Eventually, loss prevention employees were able to handcuff Plaintiff and detain
13 him in the loss prevention office. (*Id.*, ¶¶ 17-18, 26, 35.)

14 Incident to the arrest, Officers Rogers and Fulton searched a backpack that
15 Plaintiff was carrying. (*Id.*, ¶ 36.) Inside, they found two debit cards that did not appear
16 to belong to Plaintiff, along with numerous receipts for merchandise returned to various
17 stores. (*Id.*) The backpack also contained a pawnshop receipt marked with the name
18 “Daniel Bergin,” and a glass pipe with what appeared to be white methamphetamine
19 residue on it. (*Id.*, ¶ 37.) When asked for his name, Plaintiff gave the name and date of
20 birth for Daniel Bergin. (*Id.*, ¶ 40.) However, MVD records revealed that Plaintiff did
21 not resemble him. (*Id.*)

22 During the detention, Plaintiff complained that he was severely hurt and had
23 breathing problems. (*Id.*, ¶ 38.) Officers Rogers and Fulton called the Phoenix Fire
24 Department to administer medical care, but the fire department determined there was
25 nothing medically wrong with Plaintiff. (*Id.*, ¶ 39.) Accordingly, the officers transported
26 Plaintiff to the Mountain View Precinct for booking. (*Id.*, ¶ 41.)

27 At the precinct, Officer Fulton removed Plaintiff’s handcuffs and attempted to
28 obtain Plaintiff’s fingerprints on a fingerprint card. (*Id.*) Plaintiff refused to cooperate,

1 clenched his hands into fists, placed his fists under his chest, and curled his body into a
2 ball. (*Id.*, ¶¶ 41-44.) Officers booked Plaintiff as a “John Doe” after determining that he
3 was not going to cooperate. (*Id.*, ¶ 46.) When officers attempted to place Plaintiff back
4 in handcuffs, Plaintiff fell to the floor, began struggling, and kept his hands under his
5 body. (*Id.*, ¶ 47.) After Plaintiff refused officers’ commands to remove his hands from
6 under his body, Officer Fulton used his knee to apply pressure to Plaintiff’s thigh in order
7 to force compliance. (*Id.*, ¶ 49.) Eventually, officers were able to handcuff him. (*Id.*)

8 Plaintiff against complained of injuries. He claimed that he had been assaulted at
9 JC Penney and needed medical attention because he could not breathe. (*Id.*, ¶ 52.)
10 Officer Fulton once again contained the fire department to provide medical assistance,
11 and the fire department once again found nothing medically wrong with Plaintiff. (*Id.*, ¶
12 53.) Officers Fulton and Rogers transported Plaintiff to Baptist Hospital for a medical
13 examination. (*Id.*, ¶ 54.) The hospital examined Plaintiff and took x-rays, but could find
14 nothing medically wrong with him. (*Id.*, ¶¶ 55-56.)

15 As he was escorted back to the patrol car, Plaintiff’s identification card fell out of
16 his underwear. Officers conducted a records check and learned that there was a felony
17 warrant for Plaintiff’s arrest and that he was considered a flight risk. (*Id.*, ¶ 60.)
18 Ultimately, Plaintiff was jailed on various charges related to his felony warrants and the
19 shoplifting incident. (*Id.*, ¶ 61.)

20 **LEGAL STANDARD**

21 Summary judgment is appropriate if the evidence, viewed in the light most
22 favorable to the nonmoving party, demonstrates “that there is no genuine dispute as to
23 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
24 P. 56(a). “[A] party seeking summary judgment always bears the initial responsibility of
25 informing the district court of the basis for its motion, and identifying those portions of
26 [the record] which it believes demonstrate the absence of a genuine issue of material
27 fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

28 Substantive law determines which facts are material and “[o]nly disputes over

1 facts that might affect the outcome of the suit under the governing law will properly
2 preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
3 242, 248 (1986). “A fact issue is genuine ‘if the evidence is such that a reasonable jury
4 could return a verdict for the nonmoving party.’” *Villiarimo v. Aloha Island Air, Inc.*,
5 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson*, 477 U.S. at 248). Thus, the
6 nonmoving party must show that the genuine factual issues ““can be resolved only by a
7 finder of fact because they may reasonably be resolved in favor of either party.”” *Cal.*
8 *Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th
9 Cir. 1987) (quoting *Anderson*, 477 U.S. at 250). Furthermore, the party opposing
10 summary judgment “may not rest upon mere allegations of denials of pleadings, but . . .
11 must set forth specific facts showing that there is a genuine issue for trial.” *Brinson v.*
12 *Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995); *see also* Fed. R. Civ. P.
13 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).
14 If the nonmoving party’s opposition fails to specifically cite to materials either in the
15 court’s record or not in the record, the court is not required to either search the entire
16 record for evidence establishing a genuine issue of material fact or obtain the missing
17 materials. *See Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028-29 (9th Cir.
18 2001); *Forsberg v. Pac. N.W. Bell Tel. Co.*, 840 F.2d 1409, 1417-18 (9th Cir. 1988).

19 DISCUSSION

20 Plaintiff brings this lawsuit under 42 U.S.C. § 1983 against Officers Fulton,
21 Rogers, and Michael Sales alleging that they violated his Fourth and Fourteenth
22 Amendment rights by using excessive force during the booking process. (Doc. 1.) To
23 succeed on a claim under § 1983, a plaintiff must show “(1) that a right secured by the
24 Constitution or the laws of the United States was violated, and (2) that the alleged
25 violation was committed by a person acting under color of State law.” *Long v. Cty. of*
26 *L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006). “Liability under section 1983 arises only
27 upon a showing of personal participation by the defendant.” *Taylor v. List*, 880 F.2d
28 1040, 1045 (9th Cir. 1989).

1 “Excessive force claims, like most other Fourth Amendment issues, are evaluated
2 for objective reasonableness based upon the information the officers had when the
3 conduct occurred.” *Saucier v. Katz*, 533 U.S. 194, 207 (2001). The operative question is
4 “whether the officers’ actions were ‘objectively reasonable’ in light of the facts and
5 circumstances confronting them, without regard to their underlying intent or motivation.”
6 *Graham v. Connor*, 490 U.S. 386, 397 (1989). Analyzing a Fourth Amendment
7 excessive force claim requires “careful balancing of the nature and quality of the
8 intrusion on the individual’s Fourth Amendment interests against the countervailing
9 governmental interests at stake.” *Id.* at 396 (internal quotations omitted). Traditionally,
10 this balancing is conducted in three steps. First, a court evaluates “the type and amount
11 of force inflicted.” *Espinosa v. City and Cty. of San Francisco*, 598 F.3d 528, 537 (9th
12 Cir. 2010) (internal quotations omitted). Second, the court considers the government’s
13 interest in using force, relying on factors such as, “(1) the severity of the crime; (2)
14 whether the suspect posed an immediate threat to the officers’ or public’s safety; and (3)
15 whether the suspect was resisting arrest or attempting escape.” *Id.* The court then
16 “balance[s] the gravity of the intrusion on the individual against the government’s need
17 for that intrusion” *Miller v. Clark Cty.*, 340 F.3d 959, 964 (9th Cir. 2003).

18 Here, Plaintiff has offered no evidence to support his claim or to refute
19 Defendants’ factual assertions. The undisputed evidence shows that Plaintiff was
20 arrested for, among other things, attempting to shoplift from JC Penney and for assaulting
21 JC Penney employees. He was uncooperative throughout the encounter. Officer Fulton
22 used force to compel compliance with officer demands only after Plaintiff refused to
23 remove his hands from under his body during the fingerprinting and handcuffing process.
24 Further, there is no evidence that the force Officer Fulton used caused any injuries. *Cf.*
25 *Larez v. City of L.A.*, 946 F.2d 630, 634 (9th Cir. 1991) (officer used excessive force
26 when he kicked plaintiff and smashed his face into the floor); *Martinez-Rodriguez v.*
27 *United States*, 375 F. App’x 743, 744 (9th Cir. 2010) (whether officer used excessive
28 force was triable issue of fact because he broke three of the plaintiff’s fingers). Based on

1 the undisputed facts, a reasonable jury could only conclude that the force used by Officer
2 Fulton was reasonable under the circumstances.

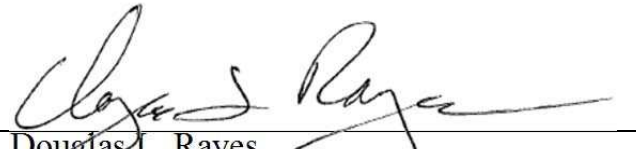
3 Additionally, Officer Rogers was not present when the alleged excessive force
4 occurred, and there is no evidence that Officer Sales was involved in the incident at all.
5 (Doc. 56, ¶¶ 66-67.) Accordingly, liability cannot attach to these Defendants because
6 they did not personally participate in the alleged excessive force.

7 **CONCLUSION**

8 For the foregoing reasons, no reasonable jury could conclude that Defendants used
9 excessive force during the booking process.

10 **IT IS ORDERED** that Plaintiff's motion to strike, (Doc. 60), is **DENIED** and
11 Defendants' motion for summary judgment, (Doc. 55), is **GRANTED**. The Clerk is
12 directed to enter judgment accordingly and terminate this case.

13 Dated this 11th day of April, 2016.

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18 Douglas L. Rayes
19 United States District Judge
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