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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTONIO DELCASTILLO,

Plaintiff,

No. C 08-3020 PJH

v.

**ORDER GRANTING SUMMARY
JUDGMENT IN PART AND DENYING
SUMMARY JUDGMENT IN PART**

CITY AND COUNTY OF SAN
FRANCISCO, et al.,

Defendants.

_____ /

Defendants’ motion for summary judgment came on for hearing on April 14, 2010 before this court. Plaintiff, Antonio DelCastillo (“plaintiff” or “DelCastillo”), appeared through his counsel, Kenneth Frucht. Defendants City and County of San Francisco, and certain individual defendant San Francisco police officers (collectively “defendants”), appeared through their counsel, Daniel Zaheer. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS in part and DENIES in part defendants’ motion for summary judgment, for the reasons stated at the hearing, and as follows.

BACKGROUND

This is a section 1983 case.

A. Background Facts

On July 16, 2007, plaintiff Antonio DelCastillo (“plaintiff” or “DelCastillo”) was living part time with his girlfriend Jennifer Botai (“Botai”) at 88 Cambridge St. in San Francisco, Ca. At around 7 p.m. that evening, plaintiff and Botai got into a heated argument over plaintiff’s misplaced ipod. The argument continued to escalate, however, with the couple trading profane insults, and some property destruction occurring. At some point during the

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1 argument, plaintiff grabbed Botai, although he testified that he did not hit her. See
2 Declaration of Daniel Zaheer ISO Defs. MSJ (“Zaheer Decl.”), Ex. B at 148:24-155:6
3 (DelCastillo Depo.).

4 Plaintiff phoned 911. See Zaheer Decl., Ex. B at 152:1-3. He told the operator to
5 “send the police here fast.” See Zaheer Decl., Ex. G (CD containing 911 recordings). The
6 operator noted (as can be heard on the recording) a woman screaming in the background.
7 Id., Ex. C at 28:14-15. Shortly thereafter, seven police officers responded, and arrived at
8 plaintiff’s residence in order to investigate the 911 call. Prior to arriving, the officers had
9 been notified via dispatch that there was a prior history of domestic violence related fights
10 at the house. See id., Ex. C at 40:20-41:8. When the officers arrived, plaintiff invited them
11 inside the house, where they interviewed plaintiff and Botai separately. See Zaheer Decl.,
12 Ex. B at 159:10-23, 336:18-337:21; id., Ex. C at 27:6-8; id., Ex. D at 16:16-17:20. The
13 officers informed plaintiff of his right to file for a restraining order, but plaintiff indicated he
14 did not want to go obtain one. Ultimately, the officers asked Botai to leave, and she
15 departed. See id., Ex. B at 163:20-22, 164:1-19.

16 Approximately a half hour later, plaintiff testified that he was watching television in
17 his living room when he heard Botai return, knocking and kicking the door to his house.
18 See Zaheer Decl., Ex. B at 167:17-169:4, 195:21-196:5. She had returned because she
19 had forgotten her money inside plaintiff’s house – which she needed for bus fare. See id.,
20 Ex. C at 39:4-40:5, 43:14-25, 46:3-9, 53:1-3. In response to Botai’s knocking and kicking,
21 plaintiff called 911 a second time. See id., Ex. B at 169:14-170:6. As part of his
22 conversation with the dispatcher, plaintiff stated “send the police here because I’m going to
23 fuck [Botai] up.” Zaheer Decl., Ex. G; id., Ex. B at 175:9-12, 183:7-10. Plaintiff also stated,
24 prior to hanging up, “right now, right away. Fast. I’m tired of this shit.” See id., Ex. B at
25 175:18-19.

26 Two minutes after making this second 911 call, plaintiff called 911 a third time. See
27 Zaheer Decl., Ex. G. Plaintiff testified that he called again because he was impatient and
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1 wanted the police to arrive more quickly. See id., Ex. B at 186:3-4, 187:6-7. In response to
2 plaintiff’s latter two calls, six of the seven officers who had responded to plaintiff’s home
3 after his first 911 call earlier in the evening, responded again. See Zaheer Decl., Ex. C at
4 90:17-91:18. The 911 dispatch officer had indicated to the officers that plaintiff was irate.
5 See id., Ex. D at 84:22-85:5.

6 When the officers arrived at plaintiff’s home, officers Robert Kobold (“Kobold”) and
7 Robin Odum (“Odum”) met Botai in front of plaintiff’s house, where she told the officers that
8 she had forgotten her money inside the house, and needed it for bus fare. See Zaheer
9 Decl., Ex. C at 38:4-40:5, 43:14-25, 46:3-14; id., Ex. D at 28:9-11, 29:4-9. The officers
10 agreed to conduct a stand-by, and to remain on the scene and assist Botai in obtaining her
11 property. See id. The officers went to plaintiff’s door, knocked and announced their
12 presence. Plaintiff yelled from inside, and then opened the door and invited the officers in.
13 Id., Ex. B at 196:19-20, 202:15-21, 337:18-21; Ex. C at 46:19-47:15; Ex. D at 30:9-10.

14 At this point, the parties’ version of events diverges. Plaintiff has one version, and
15 defendants have another:

16 **Plaintiff’s version.** Plaintiff testified that after he opened the door and invited the
17 officers in, the officers immediately rushed in and tackled him onto the sofa. See Zaheer
18 Decl., Ex. B at 202:6-14, 205:17-18, 218:21-23, 222:6-11, 223:1-9, 226:9-15, 337:18-21.
19 Plaintiff does not recall who grabbed him or how the officers got him to the ground – only
20 that he ended up on the sofa with arms and legs restrained. See id. at 215:24-216:7,
21 219:6-11, 222:6-11, 223:5-9. Plaintiff admits that he “tr[ie]d to get out of” the officers’ grasp
22 when on the sofa and tried “not to let them grab” him. Id. at 218:23, 222:8, 226:19-227:21,
23 228:6-8, 234:13-16. During the struggle, plaintiff testified that one officer punched him
24 once in the face, and that an officer Jason Gallagher (“Gallagher”) choked him until he fell
25 unconscious. Zaheer Decl., Ex. B at 225:18-25, 228:9-18, 231:21-24.

26 **Defendants’ version.** Two of the defendant officers here – Kobold and Odum –
27 testified that plaintiff initially opened the door only a foot, and when he did, he was in a
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1 hysterical state. See Zaheer Decl., Ex. D at 29:11-25, 30:22-32:1. He appeared red-faced,
2 sweating, agitated, and belligerent. See id., Ex. C at 48:5-50:25, 54:15-20, 64:13-17; id.,
3 Ex. D at 32:10-33:8, 46:2. Plaintiff was screaming profanity and incoherent statements at
4 the officers. Id. The officers believed plaintiff was suffering from a psychotic break, or was
5 under the influence of narcotics. Zaheer Decl., Ex. C at 48:7-10, 50:22-25; id., Ex. D at
6 85:18-24. Kobold told plaintiff that Kobold needed to interview plaintiff about his 911 call,
7 and to check on plaintiff's welfare. Id., Ex. D at 33:10-18; Ex. C at 58:13-24. Plaintiff then
8 opened the door all the way, stepped back into the house, and said, "go ahead and look at
9 me, I'm fine." Id., Ex. D at 43:14-23, 45:13-17. Kobold then stepped into the doorway in
10 order to examine plaintiff, but as he stepped into the doorway, plaintiff slammed the door on
11 Kobold's right leg and right side, pinning the officer between the door and door frame. See
12 Zaheer Decl., Ex. C at 59:2-25, 73:8-21; id., Ex. D at 60:5-15, 62:23-63:2, 71:10-17.
13 Plaintiff pressed his weight into the door, but the officers on the other side pushed back and
14 freed Kobold. Id. Inside, the officers then told plaintiff he was under arrest for battery on a
15 police officer and instructed plaintiff to put his hands behind his back. Zaheer Decl., Ex. C
16 at 73:23-25, 74:1-8, 78:20-22, 79:1-80:20, 82:15-85:21; id., Ex. D at 71:18-22, 71:22,
17 73:13-79:18, 80:11-81:4. Plaintiff failed to comply. The officers then attempted to take
18 control of plaintiff's arms and handcuff him, but plaintiff resisted, and screamed at the
19 officers. See id. The officers – including officer Gallagher – then attempted to control
20 plaintiff. Id. A scuffle ensued, plaintiff fell backwards onto Officer Gallagher such that
21 plaintiff was laying on top of Gallagher on the sofa in plaintiff's house. Id. The officers
22 ultimately subdued plaintiff and handcuffed him. Id.

23 The officers testified that there was never a punch to plaintiff's face, and that
24 although Gallagher's arm did inadvertently contact plaintiff's neck during the struggle, no
25 chokehold was applied and plaintiff never lost consciousness. Zaheer Decl., Ex. C at 85:1-
26 9; Ex. D at 79:22-25.

27 These are the competing versions regarding the actual arrest. After the takedown
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1 and arrest, the parties' stories are once again aligned. The parties agree that plaintiff
2 stated that he was having trouble breathing, and the officers therefore called an ambulance
3 to plaintiff's residence. Zaheer Decl., Ex. B at 248:5-6; Ex. C at 85:15-86:4. The
4 paramedic found no evidence of trauma or injury, and plaintiff reported that he had not lost
5 consciousness. See id., Ex. E at 24:2-11, 25:16-29:6. Plaintiff was taken to San Francisco
6 General Hospital, where the admitting physician found no indicators of injury. Id., Ex. F at
7 33:9-13, 34:7-18. Plaintiff then left the hospital against medical advice. Id. at 43:22-24.

8 When plaintiff finally returned to 88 Cambridge St., he claims his medications were
9 missing. See Zaheer Decl., Ex. B at 243:15-244:18. Plaintiff does not know what
10 happened to them. Id.

11 B. The Instant Action

12 On June 19, 2008, plaintiff filed the instant action against defendants City and
13 County of San Francisco ("the City"); and individual San Francisco police officers Kevin
14 Chin ("Chin"), Jason Gallagher ("Gallagher"), Kevin Horan ("Horan"), Robert Kobold
15 ("Kobold"), Steven Needham ("Needham"), Robin Odum ("Odum"), Tyler Repelato
16 ("Repelato"), and Wayman Young ("Young").

17 The complaint alleges two incidents: one taking place, as described above, on July
18 16, 2007. Complaint, ¶¶ 16-21. The second allegedly took place on December 16, 2007.
19 See Complaint, ¶¶ 22-24. In connection with the former incident, plaintiff makes allegations
20 regarding the conduct of Officers Odum and Kobold. In connection with the December 16,
21 2007 incident, plaintiff makes specific allegations in connection with Officers Needham and
22 Chin. However, on Tuesday, April 7, 2010, the parties stipulated to plaintiff's dismissal
23 with prejudice of those claims stemming from the December 16, 2007 incident. Thus, all
24 claims against officers Needham and Chin are also dismissed with prejudice.

25 Plaintiff alleges five causes of action against defendants: (1) excessive force,
26 pursuant to 42 U.S.C. § 1983; (2) unreasonable search and seizure, pursuant to 42 U.S.C.
27 § 1983; (3) battery; (4) intentional infliction of emotional distress; and (5) a Monell claim
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1 against the City, pursuant to 42 U.S.C. § 1983. See generally Complaint.

2 Defendants the City and the individual officer defendants now seek partial summary
3 judgment, and ask the court to grant summary judgment on all claims except for plaintiff's
4 excessive force claim.

5 DISCUSSION

6 A. Legal Standard

7 Summary judgment shall be granted if “the pleadings, depositions, answers to
8 interrogatories, and admissions on file, together with the affidavits, if any, show that there is
9 no genuine issue as to any material fact and that the moving party is entitled to judgment
10 as a matter of law.” FRCP 56(c). Material facts are those which may affect the outcome of
11 the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to
12 a material fact is genuine if there is sufficient evidence for a reasonable jury to return a
13 verdict for the nonmoving party. Id. The court must view the facts in the light most
14 favorable to the non-moving party and give it the benefit of all reasonable inferences to be
15 drawn from those facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
16 587 (1986).

17 In section 1983 cases such as the one here, the qualified immunity issue is
18 particularly well-suited for disposition on summary judgment. See, e.g., Martin v. City of
19 Oceanside, 360 F.3d 1078, 1081 (9th Cir. 2004).

20 B. Legal Analysis

21 Defendants' motion requests the court to enter summary judgment with respect to all
22 asserted claims, with the general exception of the excessive force claims under federal and
23 state law. Specifically, defendants seek summary judgment as to: (1) plaintiff's claim that
24 defendants entered his home unlawfully in violation of the Fourth Amendment (second
25 cause of action); (2) plaintiff's claim that defendants stole his medications (second cause of
26 action); (3) plaintiff's claim for unlawful search and seizure (second cause of action); (4)
27 plaintiff's first and third causes of action for excessive force and battery against Officer
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1 Odum; (5) all federal claims against the City (fifth cause of action); and (6) plaintiff's fourth
2 cause of action for intentional infliction of emotional distress.

3 As a preliminary matter, and prior to analyzing the substance of the parties'
4 arguments, the court takes a moment to comment on the overall sufficiency of plaintiff's
5 evidence in opposition to defendants' motion. Generally, while plaintiff argues the
6 existence of disputed issues of fact in relation to the arguments before the court, plaintiff's
7 brief fails to include affirmative citations to the discovery record in the case – e.g.,
8 deposition testimony or other discovery responses – that would allow plaintiff to
9 demonstrate that disputed facts exist. Indeed, plaintiff has submitted a mere two items in
10 connection with his opposition brief: a declaration submitted by plaintiff himself, and an
11 attorney declaration containing an attached excerpt to the deposition testimony of Officer
12 Kobold (introduced in support of an isolated fact). See generally Declaration of Antonio
13 DelCastillo ISO MSJ Opp. ("DelCastillo Decl."); Declaration of Kenneth Frucht ISO MSJ
14 Opp. ("Frucht Decl."). It bears noting, however, as defendants point out, that "a party
15 cannot create an issue of fact by an affidavit contradicting his prior deposition testimony."
16 Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir.1991). Thus, to the extent that
17 plaintiff exclusively cites to his own declaration in support of the existence of material
18 disputes of fact, and in contravention of his existing deposition testimony, the later-filed
19 declaration is of limited effect.

20 With this in mind, the court now turns to the substantive issues before the court.

21 1. Unlawful Entry in Violation of Fourth Amendment (Second Cause of Action)

22 Defendants target plaintiff's second cause of action alleging unreasonable search
23 and seizure pursuant to 42 U.S.C. § 1983 on numerous grounds, the first of which is that,
24 to the extent plaintiff suggests that defendants are liable for unlawful entry based on
25 defendants' arrest of plaintiff at his doorway entry, such a claim fails. See, e.g., U.S. v.
26 Santana, 427 U.S. 38, 42 (1976) and U.S. v. Vaneaton, 49 F.3d 1423, 1426 (9th Cir. 1995).
27 Both Santana and Vaneaton set forth the general proposition that where a defendant
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1 standing within the frame of his or her doorway as officers approach retreats into the
2 vestibule of his or her home where the officers follow and effect an arrest, there is no
3 constitutional violation, provided “an otherwise proper arrest by officers who pursued [the
4 defendant] inside.” See id.

5 As clarified by plaintiff’s counsel at the hearing on the instant motion, however,
6 plaintiff has not pled any claim premised on defendants’ unlawful entry into plaintiff’s home,
7 separate and apart from the claim of false arrest, in violation of plaintiff’s Fourth
8 Amendment rights. This being the case, defendants’ motion on this ground – which
9 defendants’ counsel conceded has been made in an abundance of caution due to
10 uncertainty over the nature of the Fourth Amendment claims being asserted by plaintiff – is
11 both premature and unnecessary. As such, it is hereby DENIED.

12 2. Plaintiff’s “Seized” Medications (Second Cause of Action)

13 Defendants also target plaintiff’s second cause of action alleging unreasonable
14 search and seizure pursuant to 42 U.S.C. § 1983, to the extent plaintiff’s claim is premised
15 on defendants’ unlawful seizure of plaintiff’s medication. Plaintiff’s opposition brief confirms
16 that plaintiff is, in fact, alleging that defendants committed an unlawful search and seizure
17 in connection with plaintiff’s medications, and further argues that triable issues of fact exist
18 regarding plaintiff’s claim. See Opp. Br. at 4:22-23.

19 The undisputed facts here not only fail to demonstrate that defendant officers took
20 plaintiff’s medication pursuant to any unlawful search, they in fact demonstrate the
21 opposite: i.e., that defendants officers did *not* take plaintiff’s medication. Officer Odum
22 testified: that it was the paramedics, and not any police officer, who retrieved plaintiff’s
23 medications from plaintiff’s bedroom; that plaintiff’s medications were not taken to the
24 police station; and that officers never take medications from individuals. See Zaheer Decl.,
25 Ex. C at 87:16-23, 88:6-11. Plaintiff himself testified: that it was *not* a police officer who
26 was physically holding his medications at the time the arrest occurred, and during plaintiff’s
27 subsequent physical examination; and that he had no idea who actually took his
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1 medications. See id., Ex. B at 250:23-251:6, 244:4-18. Even plaintiff's concurrently filed
2 declaration, moreover, does not say that any police officer took his medication: it states
3 only that when plaintiff returned home from the hospital post-arrest, "a box of [his]
4 medications was missing." See DelCastillo Decl., ¶ 10.

5 All of which establishes without any dispute of fact that, whatever happened to
6 plaintiff's medications, they were not in the possession of any police officer, and were not
7 taken by any police officer. As such, and to the extent plaintiff's second cause of action is
8 premised on grounds that defendants' unreasonably seized plaintiff's medications during
9 the incident in question, summary judgment is hereby GRANTED in defendants' favor.

10 3. Unlawful Detention/Arrest (Second Cause of Action)

11 Defendants' final challenge to plaintiff's second cause of action alleging
12 unreasonable search and seizure pursuant to 42 U.S.C. § 1983 is to the heart of plaintiff's
13 claim: i.e., that defendants unlawfully detained and arrested plaintiff in violation of his
14 Fourth Amendment rights. See Dubner v. City and County of San Francisco, 266 F.3d 959,
15 965 (9th Cir. 2001)(a claim for unlawful arrest is cognizable under § 1983 as a violation of
16 the Fourth Amendment, provided the arrest was without probable cause or other
17 justification). Generally, defendants argue that summary judgment in their favor on
18 plaintiff's false arrest claim is appropriate, since the undisputed material facts show that the
19 officers had probable cause to detain and/or arrest plaintiff for any number of violations,
20 including violations of: the Cal. Welf. & Inst. Code § 5150; Cal. Penal Code § 422 (statute
21 prohibiting criminal threats); Cal. Penal Code § 273.5 (statute prohibiting domestic
22 violence); Cal. Penal Code §§ 148.3 and 148.5 (statute prohibiting false report to police);
23 and Cal. Penal Code § 148 (statute prohibiting resisting arrest). See Pierson v. Ray, 386
24 U.S. 547, 555-57 (1967)(an officer not liable for damages based on a claim of false arrest if
25 there was probable cause to make the arrest).

26 Probable cause to arrest exists when, under the totality of the circumstances known
27 to the arresting officer, a prudent person would conclude there is a fair probability that the
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1 arrestee had committed, or was committing, or was about to commit, a crime. See Beier v.
2 City of Lewiston, 354 F.3d 1058, 1065 (9th Cir. 2004); see also Michigan v. DeFillippo, 443
3 U.S. 31, 37 (1979). Where probable cause exists at the time of an arrest, the arrest does
4 not violate the Constitution even if the charges are later dropped or the person arrested is
5 subsequently acquitted. DeFillippo, 443 U.S. at 36; Freeman v. City of Santa Ana, 68 F.3d
6 1180, 1189 (9th Cir. 1995). Although the plaintiff bears the burden of proof on the issue of
7 unlawful arrest, he can make a prima facie case simply by showing – as is the case here –
8 that the arrest was conducted without a valid warrant. At that point, the burden shifts to the
9 defendant to provide some evidence that the arresting officers had probable cause for a
10 warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of
11 production falls on the defendant. See Dubner, 266 F.3d at 965. "This minimal burden
12 shifting forces the police department, which is in the better position to gather information
13 about the arrest, to come forward with some evidence of probable cause." Id.

14 As an initial matter, the court is unpersuaded that the evidence in the record
15 supports a finding of probable cause to arrest pursuant to Cal. Penal Code §§ 148.3 and
16 148.5, or Cal. Penal Code § 148. As proof of the former, defendants suggest that plaintiff's
17 call to the 911 dispatcher indicating that his "ex-girlfriend [was] trying to break into [his]
18 house," when contrasted with Botai's statement to Officer Odum at the scene that she had
19 only been "knocking" on plaintiff's door in order to retrieve her property from inside the
20 house, is sufficient to justify a finding a probable cause to believe that plaintiff had falsely
21 reported an attempted break in to police, violating Penal Code §§ 148.3 and 148.5.
22 Defendant submits no evidence, however, that establishes, let alone suggests, that
23 plaintiff's phone call to the police was based on a knowingly false belief that plaintiff was
24 attempting to break in to plaintiff's house. Both Cal. Penal Code §§ 148.3 and 148.5
25 require proof that an individual submitted knowingly false reports before liability may attach.

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27 As for Penal Code § 148, this statute imposes criminal liability on "person[s] who
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1 willfully resist[], delay[], or obstruct[] any public officer, peace officer, or an emergency
2 medical technician... in the discharge or attempt to discharge any duty...”. Defendants
3 argue that plaintiff’s admissions regarding the active struggle that took place with police
4 officers prior to his arrest support a finding that defendants had probable cause to arrest
5 plaintiff for willfully resisting, delaying, or obstructing defendant officers in the performance
6 of their duties. As defendants acknowledge, however, the testimony by both parties
7 surrounding the actual circumstances and nature of plaintiff’s arrest by the officers is
8 disputed. See, e.g., Def. MSJ Br. at 4:21-6:10. As such, defendants cannot meet their
9 burden in coming forward with sufficient evidence to demonstrate that probable cause to
10 arrest for violation of Penal Code § 148 existed.

11 This leaves the court with the remaining – and most likely – asserted sources to
12 support a finding that probable cause to arrest existed: Welf. & Inst. Code § 5150
13 (permitting officers to detain/arrest a person who, as a result of mental disorder, is a danger
14 to himself or others); Cal. Penal Code § 422 (statute prohibiting a person from threatening
15 serious bodily injury if the threat is communicated in such a manner that it will be carried
16 out and causes the victim to fear for his or her safety); and Cal. Penal Code § 273.5
17 (statute prohibiting an individual from committing a battery on a cohabitant or a former
18 cohabitant).

19 As to the first statute, “probable cause exists under section 5150 if facts are known
20 to the officer ‘that would lead a person of ordinary care and prudence to believe, or to
21 entertain a strong suspicion, that the person detained is mentally disordered and is a
22 danger to himself or herself.” See Bias v. Moynihan, 508 F.3d 1212, 1220 (9th Cir. 2007);
23 see also People v. Triplett, 144 Cal. App.3d 283 (1983). Here, defendants’ contend that,
24 when they arrived at plaintiff’s house for the second time, and plaintiff first opened the door
25 to his house, they observed that plaintiff appeared red-faced, sweating, agitated, and
26 belligerent. See id., Ex. C at 48:5-50:25, 54:15-20, 64:13-17; id., Ex. D at 32:10-33:8, 46:2.
27 Plaintiff was screaming profanity and incoherent statements at the officers. Id. The officers
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1 believed plaintiff was suffering from a psychotic break, or was under the influence of
2 narcotics. Zaheer Decl., Ex. C at 48:7-10, 50:22-25; Id., Ex. D at 85:18-24. Plaintiff,
3 however, tells a different story, as he states that he was never given a chance to do
4 anything other than answer the door, as the defendant officers immediately rushed him and
5 began to wrestle with him immediately. See Zaheer Decl., Ex. B at 202:6-14, 205:17-18,
6 218:21-23, 222:6-11, 223:1-9, 226:9-15, 337:18-21. Thus, there is ultimately a material
7 dispute of fact as to whether defendants were able to learn any facts that would lead them
8 to believe plaintiff was a danger to himself or others, as a result of a mental disorder. In
9 this vein, plaintiff is correct that, regardless whether plaintiff was on psychotic medication at
10 the time, or was suffering from psychological conditions, there is no evidence that
11 defendants were aware of these facts regarding plaintiff's mental disorders, at the time they
12 appeared and arrested plaintiff.

13 As to the second statute, Cal. Penal Code § 422 imposes liability on any person who
14 "willfully threatens to commit a crime which will result in death or great bodily injury to
15 another person, with the specific intent that the statement" be conveyed to the other person
16 in such a manner that "causes that person reasonably to be in sustained fear for his or her
17 own safety or for his or her immediate family's safety...". In order to find that a defendant
18 has committed the crime of criminal threat under the statute, five constituent elements must
19 be established: (1) that defendant willfully threatened to commit a crime resulting in death
20 or great bodily injury to another person; (2) that defendant made the threat with specific
21 intent that it be taken as a threat; (3) that the threat was so unequivocal, unconditional,
22 immediate, and specific as to convey to the person threatened a gravity of purpose and
23 immediate prospect of execution of the threat; (4) that the threat actually caused the person
24 threatened to be in sustained fear for his or her own safety or that of his or her immediate
25 family; and (5) that the threatened person's fear was reasonable under the circumstances.
26 See People v. Maciel, 113 Cal. App. 4th 679 (2003).

27 Here, defendants do not come forward with evidence satisfying all five elements. It
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1 is undisputed that: plaintiff made a first call requesting that police come to his house
2 quickly; prior to arriving, the officers had been notified via dispatch that there was a prior
3 history of domestic violence related fights at the house; that, when plaintiff called 911 a
4 second time, he told the dispatcher, “send the police here because I’m going to fuck [Botai]
5 up,” and prior to hanging up said, “right now, right away. Fast. I’m tired of this shit;” that
6 plaintiff then called 911 a third time, because he wanted the police to arrive more quickly;
7 and that the 911 dispatch officer also indicated to the officers that plaintiff was irate. See
8 Zaheer Decl., Ex. G; id., Ex. B at 175:9-19, 183:7-10. These facts may be sufficient to
9 establish that plaintiff was in the process of threatening Botai. However, these facts are not
10 sufficient to establish that plaintiff ever communicated the threat *to Botai herself*, such that
11 the communication caused Botai to be in “sustained fear” for her own safety or that of her
12 immediate family. As such, defendants have not satisfied their burden to come forward
13 with evidence satisfying the statute’s requirement that any alleged criminal threat be
14 communicated to “another person” in the manner proscribed by the statute, such that an
15 affirmative finding of probable cause may be made at this juncture.

16 Finally, as to the third statute urged upon the court by defendants, Cal. Penal Code
17 § 273.5, it prevents any person from “willfully inflict[ing] upon a person who is his or her
18 spouse, former spouse, cohabitant, former cohabitant... corporal injury resulting in a
19 traumatic condition,” where “traumatic condition” is defined as “a condition of the body,
20 such as a wound or external or internal injury, whether of a minor or serious nature, caused
21 by a physical force.” Defendants here argue that, in view of the history of domestic
22 violence at the address and between the parties (a fact which was known to the responding
23 officers), and plaintiff’s 911 calls containing clear statements by plaintiff regarding his desire
24 to possibly harm Botai, probable cause to arrest existed based on the officers’ belief that
25 plaintiff was *about to commit* a violation of the statute. The court, however, is unpersuaded
26 that defendants have demonstrated sufficient facts to warrant the entry of summary
27 judgment as to this issue. While technically correct that probable cause to arrest may be
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1 established based on the existence of facts suggesting that a suspect is about to commit
2 an offense, here there are simply not enough facts in evidence to suggest that any violation
3 of Penal Code § 273.5 was imminent. There is no evidence submitted by defendants, for
4 example, demonstrating that Botai suffered any wound or external or internal injury. More
5 importantly, at the time that the defendant officers arrested plaintiff, there is no evidence
6 that even suggests that plaintiff was within sufficient physical proximity to Botai such that a
7 violation of the statute could be imminent. Indeed, the undisputed testimony states that
8 when the officers arrived at plaintiff's home prior to the arrest, plaintiff was inside the
9 house, while Botai was outside the house. See Zaheer Decl., Ex. C at 39:4-40:5, 43:14-25,
10 46:3-14; id., Ex. D at 28:9-11, 29:4-9. This makes sense, moreover, considering that
11 plaintiff's reason for calling the police a second and third time that evening was due to
12 Botai's efforts to gain access to plaintiff's residence once again, and plaintiff's
13 determination that she should not regain such access. All of which suggests, if anything,
14 that plaintiff was not in the process of committing or even imminently about to commit, any
15 violation of section 273.5.

16 In sum, and based on the foregoing discussion, the court concludes that triable
17 issues of fact exist with respect to the existence of probable cause to arrest plaintiff,
18 pursuant to Cal. Welf. & Inst. Code § 5150, Cal. Penal Code § 422, and Cal. Penal Code §
19 273.5, and summary judgment is accordingly DENIED on this basis, with respect to
20 plaintiff's second claim for relief.

21 Defendants argue that, even if probable cause did not exist, qualified immunity
22 applies to the defendant officers' actions. "The doctrine of qualified immunity protects
23 government officials from liability for civil damages insofar as their conduct does not violate
24 clearly established statutory or constitutional rights of which a reasonable person would
25 have known." Pearson v. Callahan, 129 S. Ct. 808, 815 (2009)(citation and quotations
26 omitted).

27 A court considering a claim of qualified immunity must determine whether the
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1 plaintiff has alleged the deprivation of an actual constitutional right and secondly, whether
2 such right was clearly established such that it would be clear to a reasonable officer that his
3 conduct was unlawful in the situation he confronted. See Pearson, 129 S. Ct. at 818
4 (overruling the sequence of the two-part test that required determination of a deprivation
5 first and then whether such right was clearly established, under Saucier v. Katz, 533 U.S.
6 194, 201 (2001)). The court may exercise its discretion in deciding which prong to address
7 first, in light of the particular circumstances of each case. Id. (noting that while the Saucier
8 sequence is often appropriate and beneficial, it is no longer mandatory).

9 The relevant, dispositive inquiry in determining whether a right is clearly established
10 is whether it would be clear to a reasonable officer that his conduct was unlawful in the
11 situation he confronted. See, e.g., Pearson, 129 S. Ct. at 822 (concluding that officers
12 were entitled to qualified immunity because their conduct was not clearly established as
13 unconstitutional, as the doctrine upon which the officers relied had been generally accepted
14 by the lower courts though not yet ruled upon by their own federal circuit). If the law did not
15 put the officer on notice that his conduct would be clearly unlawful, summary judgment
16 based on qualified immunity is appropriate. Saucier, 533 U.S. at 202.

17 Here, taking the totality of circumstances into account, the court concludes that there
18 are material disputes of fact as to whether the deprivation of an actual constitutional right
19 occurred and furthermore, whether such right was clearly established such that it would be
20 clear to a reasonable officer whether defendants' conduct was lawful under the
21 circumstances apparent from the record.

22 In sum, summary judgment as to plaintiff's second claim for relief, both with respect
23 to the existence of probable cause to arrest plaintiff pursuant to any of the statutes
24 discussed herein, and defendant officers' qualified immunity in undertaking plaintiff's arrest,
25 is hereby DENIED.

26 4. Excessive Force/Battery as to Officer Odum (First and Third Causes of
27 Action)

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1 Defendants' argument in connection with plaintiff's first and third causes of action –
2 alleging excessive force and battery, respectively – is limited to plaintiff's claim against
3 defendant Officer Odum alone. Defendants note that defendant Odum testified that there
4 was no room for her to assist in the actual arrest of plaintiff, that she did not testify that she
5 used any force on plaintiff, and that plaintiff, for his part, cannot recall that any female
6 officer took him to the ground or restrained him. See Zaheer Decl., Ex. C at 79:1-85:21;
7 Ex. B at 212:5-213:3. Since this evidence presents no basis for a reasonable inference
8 that defendant Odum was one of the officers who participated in plaintiff's arrest,
9 defendants argue that summary judgment as to the excessive force/battery claims against
10 her is appropriate. Plaintiff, in opposition, contends that because he was face down most
11 of the time he was allegedly being assaulted, he has "no recollection" of who participated in
12 the purported assault, and furthermore, that the inability to specifically recollect the officers
13 acting against him poses no impediment to his claim.

14 On balance, the court concludes that a material dispute of fact exists with respect to
15 defendant Odum's participation in the events surrounding plaintiff's arrest. Notably,
16 defendant submits no testimony from defendant Odum in which she states that she
17 affirmatively did *not* use any force on plaintiff. Plaintiff, by contrast, testified that he "[could
18 not] remember" whether a female officer grabbed him or forced him to the ground amidst
19 the events occurring, and that he "[couldn't] tell" whether a female officer rushed him,
20 although "all" the officers were in his house. See Zaheer Decl., Ex. B at 212:5-213:3.
21 Thus, it is unclear, and far from undisputed, whether defendant Odum actually participated
22 in the events surrounding plaintiff's arrest, as currently in evidence.

23 Accordingly, summary judgment with respect to plaintiff's section 1983 excessive
24 force claim as to defendant Odum only is DENIED, and for the same reasons, plaintiff's
25 third cause of action alleging a state claim for battery against defendant Odum is also
26 DENIED. See Edson v. City of Anaheim, 63 Cal. App. 4th 1269, 1271-75 (1998)(state law
27 claim of battery by police officer considered co-extensively with federal claim under Fourth
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1 Amendment).

2 5. Monell Claim Against the City (Fifth Cause of Action)

3 Defendant seeks summary judgment as to plaintiff's fifth claim, on grounds that
4 plaintiff has offered no evidence of a policy or custom that was the motivating force behind
5 defendants' conduct, as required for a section 1983 Monell claim to be viable against a
6 municipality. Plaintiff, in his opposition brief, and at the hearing on the instant motions,
7 conceded his lack of evidence in support of the Monell claim, and has therefore agreed to
8 dismiss the claim.

9 Accordingly, the Monell claim is hereby DISMISSED with prejudice.

10 6. IIED claim (Fourth Cause of Action)

11 Finally, defendants seek summary judgment in connection with plaintiff's fourth
12 cause of action alleging intentional infliction of emotional distress. The elements of a
13 successful claim are: (1) extreme and outrageous conduct by the defendant; (2) plaintiff's
14 severe or extreme emotional distress; and (3) actual and proximate causation of the
15 emotional distress by defendant's outrageous conduct. See Christensen v. Superior Court,
16 54 Cal. 3d 868, 903 (1991). Defendants specifically assert that, regardless whether plaintiff
17 is ultimately able to support his intentional infliction of emotional distress claim with a
18 successful excessive force claim (as plaintiff alleges), plaintiff nonetheless lacks evidentiary
19 support demonstrating his "severe" or extreme emotional distress, thereby dooming his
20 claim.

21 Defendant is correct. Plaintiff has not come forward with any evidence
22 demonstrating his severe or extreme emotional distress. As defendants concede, plaintiff
23 has testified that he is angry with the police, experiences stress and mood swings at times,
24 and trouble sleeping at night at times. See Zaheer Decl., Ex. B at 91:3-93:24, 95:1-5,
25 105:11-13. However, this is insufficient to satisfy the "severe" or "extreme" degree of
26 emotional distress required in order to prove a valid claim. See Potter v. Firestone Tire &
27 Rubber Co., 6 Cal. 4th 965, 1004 (1993)(noting that in intentional infliction actions, recovery
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1 is allowed only for “severe or extreme emotional distress,” meaning “emotional distress of
2 such substantial quality or enduring quality that no reasonable [person] in civilized society
3 should be expected to endure it”); see also e.g., Hughes v. Pair, 46 Cal. 4th 1035, 1051
4 (2009)(“plaintiff's assertions that she has suffered discomfort, worry, anxiety, upset
5 stomach, concern, and agitation as the result of [defendant’s alleged actions] do not
6 comprise ‘emotional distress of such substantial quality or enduring quality that no
7 reasonable [person] in civilized society should be expected to endure it.’”). Plaintiff,
8 furthermore, has failed, either in his opposition or at the hearing on the matter, to rebut
9 defendants’ showing with any evidentiary showing of his own.

10 In short, given the undisputed and unrebutted evidence regarding the nature and
11 degree of emotional distress suffered by plaintiff as a result of defendants’ alleged
12 excessive force, plaintiff has failed to come forward with sufficient evidence to establish a
13 triable issue of fact with respect to the “severe and extreme” element of his emotional
14 distress claim.

15 Accordingly, the court hereby GRANTS defendants’ motion for summary judgment,
16 with respect to plaintiff’s claim for intentional infliction of emotional distress.

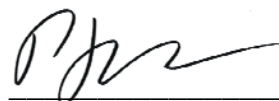
17 C. Conclusion

18 For the foregoing reasons, the court hereby GRANTS defendant’s motion for
19 summary judgment in part, and DENIES it in part, consistent with the foregoing.

20 The parties are referred by separate order for a mandatory settlement conference.

21 **IT IS SO ORDERED.**

22 Dated: May 3, 2010



23 _____
24 PHYLLIS J. HAMILTON
25 United States District Judge
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