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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 ERIC T. DICKS,

12 Plaintiff,

13 vs.

14 R.L. WITTE,

15 Defendant.

Case No. 16cv713-MMA (BLM)

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

[Doc. No. 30]

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20 Plaintiff Eric T. Dicks, a state prisoner proceeding *pro se*, has filed a civil rights
21 complaint pursuant to 42 U.S.C. § 1983 alleging that Defendant R. L. Witte violated his
22 Eighth Amendment rights by using excessive force to break up a fight between Plaintiff
23 and another inmate. *See* Doc. No. 1. Defendant moves for summary judgment as to
24 Plaintiff's claim. *See* Doc. No. 30. Plaintiff filed a response to Defendant's motion, to
25 which Defendant replied. *See* Doc. Nos. 33, 35. The Court took Defendant's motion
26 under submission on the briefs and without oral argument pursuant to Civil Local Rule
27 7.1.d.1. *See* Doc. No. 36. For the reasons set forth below, the Court **GRANTS**
28 Defendant's motion for summary judgment.

1 BACKGROUND¹

2 This matter arises out of events occurring on or about March 18, 2015 at Calipatria
3 State Prison in Calipatria, California.² At approximately 6:00 p.m., the Calipatria prison
4 alarm sounded because Plaintiff was involved in a physical altercation with Inmate
5 Corral. This involved the two inmates striking one another with their fists. Plaintiff
6 wound up on his back, on the ground, while Inmate Corral struck Plaintiff in the face and
7 upper torso. Officer Alvarado observed the altercation from his position in the control
8 booth, and ordered both inmates to “get down.” Neither inmate complied with his
9 instruction, resulting in Officer Alvarado utilizing a 40-millimeter direct impact launcher
10 from approximately one-hundred-feet away.³ Officer Alvarado aimed at Inmate Corral’s
11 left calve area and fired one 40-millimeter round. The inmates continued to fight, and
12 Officer Alvarado was unable to determine whether his round struck either inmate.

13 Defendant Witte responded to the alarm and observed the inmates fighting. Upon
14 arrival, Defendant commanded the inmates to “get down.” Neither inmate complied with
15 Defendant’s instruction, resulting in Defendant utilizing a 40-millimeter direct impact
16 launcher from approximately twenty-five away. Plaintiff disputes Defendant’s distance
17 estimation, and maintains that Defendant utilized the launcher from less than twenty feet
18 away. *See* Pl. Decl. ¶ 2. Defendant aimed at Plaintiff’s “buttocks and right thigh area,”
19 firing one 40-millimeter round. Witte Decl. ¶ 4. Defendant was unable to determine
20 where his round struck. The inmates still did not heed the instruction to “get down,” so
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22 ¹ The material facts set forth herein are taken from the exhibits attached to Plaintiff’s complaint;
23 Defendant’s Separate Statement of Undisputed Material Facts; the declarations submitted by Defendant
24 in support of his motion for summary judgment; and Plaintiff’s declaration in support of his opposition
25 to Defendant’s motion for summary judgment. Where a material fact is in dispute, it will be so noted.
Facts that are immaterial for purposes of resolving the current motion are not included in this recitation.

26 ² Plaintiff is currently housed at Kern Valley State Prison in Delano, California.

27 ³ “The 40-millimeter direct impact launcher is a ‘less-than-lethal’ device designed to be fired directly at
28 violent subjects in situations to disable instigators. It fires a ‘foam round.’” Witte Decl. ¶ 6.

1 Defendant chambered a second 40-millimeter round, but the weapon malfunctioned and
2 he was unable to fire. Officers Romero and Celaya then sprayed both inmates in the head
3 and facial area with oleoresin-capsicum spray, resulting in the inmates' compliance with
4 previous instructions to lie face down on the ground in the requisite prone position.
5 Subsequent to the altercation, Plaintiff received medical treatment for a laceration to the
6 right side of his head and decontamination from the oleoresin-capsicum spray.

7 Based on these events, Plaintiff claims that Defendant used excessive force against
8 him in violation of Plaintiff's Eighth Amendment rights.

9 DEFENDANT'S MOTION

10 Defendant moves for summary judgment as to Plaintiff's Eighth Amendment
11 claim, arguing that the undisputed facts demonstrate that Defendant acted lawfully in an
12 attempt to stop an inmate fight and without the requisite intent to cause Plaintiff serious
13 harm.⁴ Plaintiff contends that genuine issues of fact exist regarding whether Defendant
14 violated Plaintiff's Eighth Amendment rights by firing a direct impact launcher at
15 Plaintiff from too near a distance.

16 *I. Legal Standard*

17 "A party may move for summary judgment, identifying each claim or defense – or
18 the part of each claim or defense – on which summary judgment is sought. The court
19 shall grant summary judgment if the movant shows that there is no genuine dispute as to
20 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.
21 P. 56(a). The party seeking summary judgment bears the initial burden of establishing
22 the basis of its motion and of identifying the portions of the declarations, pleadings, and
23 discovery that demonstrate absence of a genuine issue of material fact. *Celotex Corp. v.*
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26 ⁴ Defendant also moves for summary judgment as to Plaintiff's negligence claim. Plaintiff states in his
27 declaration filed in support of his response brief that although he alleges in his complaint that Defendant
28 acted negligently, this allegation supports his Eighth Amendment claim. *See* Doc. No. 33, ¶ 3. Plaintiff
does not allege a separate state law negligence claim. Accordingly, Defendant's motion is moot in this
respect.

1 *Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it could affect the outcome of the
2 suit under applicable law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49
3 (1986). A dispute about a material fact is genuine if there is sufficient evidence for a
4 reasonable jury to return a verdict for the non-moving party. *Id.* at 248.

5 The party opposing summary judgment cannot “rest upon the mere allegations or
6 denials of [its] pleading but must instead produce evidence that sets forth specific facts
7 showing that there is a genuine issue for trial.” *Estate of Tucker v. Interscope Records*,
8 515 F.3d 1019, 1030 (9th Cir.), cert. denied, 555 U.S. 827 (2008) (internal quotation
9 marks omitted). In applying the standard set forth under Rule 56, district courts must
10 “construe liberally motion papers and pleadings filed by *pro se* inmates and . . . avoid
11 applying summary judgment rules strictly.” *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th
12 Cir. 2010).

13 **2. Eighth Amendment Claim**

14 The Eighth Amendment prohibits the use of excessive physical force by
15 correctional officers against prison inmates. *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010)
16 (per curiam); *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992). The core judicial inquiry is
17 whether the officer applied force in a “good faith effort to maintain or restore discipline,
18 or maliciously and sadistically to cause harm.” *Wilkins*, 559 U.S. at 37 (quoting *Hudson*,
19 503 U.S. at 7). Importantly, “not every malevolent touch” by a correctional officer
20 results in an Eighth Amendment violation. *Id.* (quoting *Hudson*, 503 U.S. at 9). “In
21 determining whether the use of force was wanton and unnecessary, courts may evaluate
22 the extent of the prisoner’s injury, the need for application of force, the relationship
23 between that need and the amount of force used, the threat reasonably perceived by the
24 responsible officials, and any efforts made to temper the severity of a forceful response.”
25 *Hudson*, 503 U.S. at 7.

26 Even when viewed in the light most favorable to Plaintiff, the facts demonstrate
27 that Defendant discharged the direct impact launcher to restore order and to deter a
28 physical altercation between inmates. Plaintiff offers no evidence to suggest that

1 Defendant fired the non-lethal weapon for a malicious or sadistic purpose. Plaintiff
2 conceded during his deposition that he failed to follow the officers’ instructions to “get
3 down” because he was “tussling” with Inmate Corral. Pl. Depo. at 23.⁵ The evidence
4 shows that neither the verbal commands nor Officer Alvarado’s initial use of a direct
5 impact launcher stopped the inmates’ fight. And while Plaintiff speculates that
6 Defendant fired a 40-millimeter round from less than twenty-feet away, which he argues
7 constitutes excessive force, Plaintiff has not provided any evidence that the force used
8 was more than necessary to stop the fight under the circumstances. *See Hudson*, 503 U.S.
9 at 7. Even if Defendant fired the direct impact launcher from a twenty-foot distance,
10 there is no evidence to suggest it was an unreasonable action at that distance.

11 Plaintiff contends that Defendant’s use of the direct impact launcher was
12 unnecessary because multiple responding officers were carrying oleoresin-capsicum
13 spray. However, Plaintiff presents no evidence to suggest that the responding officers
14 should have used one type of non-lethal force instead of another. Moreover, Officer
15 Romero was significantly closer than Defendant to Plaintiff – approximately twelve feet
16 – when he utilized oleoresin-capsicum spray on Plaintiff. *See Crime Incident Report* at 2
17 [Doc. No. 1 at 22]. Plaintiff further argues that Defendant’s use of the direct impact
18 launcher was unreasonable because Plaintiff posed no threat to the officers and was
19 already on the ground. Yet Plaintiff does not dispute that he and inmate Corral were
20 involved in a physical altercation and had ignored commands to “get down” at the time
21 Defendant deployed the force at issue. Plaintiff presents no evidence to support his
22 assertion that the responding officers should have known Plaintiff posed no threat to
23 them, or that Plaintiff’s position on the ground would have reasonably assured the
24 officers of their safety and that of Inmate Corral such that the further use of force would
25 have been unnecessary.

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28 ⁵ Citation refers to original pagination assigned by the document’s author.

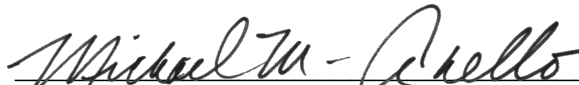
1 Finally, no reasonable jury could find based on this record that Defendant used the
2 direct impact launcher against Plaintiff maliciously and sadistically to cause harm.
3 Plaintiff admitted during his deposition that Defendant had no reason to want to cause
4 Plaintiff harm. *See* Pl. Depo. at 57. Defendant confirms in his sworn declaration that he
5 did not “use any force against Plaintiff with a malicious or sadistic intention to cause him
6 harm, pain, or injury.” Witte Decl. ¶ 7. Rather, Defendant “fired the 40-millimeter-foam
7 round at the fighting inmates for the purposes of stopping the fighting and to prevent
8 great bodily injury or an escalating situation.” *Id.* Plaintiff presents no evidence to the
9 contrary. As such, Defendant is entitled to summary judgment.⁶

10 **CONCLUSION**

11 Based on the foregoing, the Court **GRANTS** Defendant’s motion for summary
12 judgment. The Clerk of Court is instructed to enter judgment in Defendant’s favor and
13 close the case.

14 **IT IS SO ORDERED.**

15 DATE: January 4, 2018

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17 HON. MICHAEL M. ANELLO
18 United States District Judge
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26 ⁶ Defendant also argues that, even if there are triable issues of fact as to Plaintiff’s Eighth Amendment
27 claim, he is entitled to qualified immunity from suit. Because the Court finds that no constitutional
28 violation occurred, “there is no necessity for further inquiries concerning qualified immunity.” *Saucier*
v. Katz, 533 U.S. 194, 201 (2001) (overruled in part by *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)
(overruling *Saucier*’s requirement that the two prongs of the qualified immunity analysis be decided
sequentially)).