

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

ANTHONY IT,
Plaintiff,

v.

Case No. 18-C-634

COREY NICHOLS, *et al.*,
Defendants.

ORDER

Plaintiff Anthony It, a Wisconsin state prisoner who is representing himself, filed this lawsuit under 42 U.S.C. § 1983. U.S. Magistrate Judge Jones (the judge assigned to the case at that time) allowed the plaintiff to proceed on an excessive-force claim against defendants Corey Nichols and Andrew Larson based on his allegations that they tased him without cause. Judge Jones also allowed the plaintiff to proceed on a failure-to-intervene claim against defendants Terri Gable, Ronald Kellar, Jr., Joshua Johnson, Britany Bonen, Bruce Harder, Scott Schuster, Scott Witzke, Kim Builderbac, Mikel Robl, Corey Bantleon, Deborah Wirkes, Joseph Kilsdonk, Paul Chapa, Jr., Andrew Londos, Lucas Allen, Jessica Schultz, Justin Putzer, and Blake Vandeenboom based on his allegations that they failed to stop Nichols and Larson from tasing him. On June 27, 2019, the defendants moved for summary judgment. That motion is fully briefed and ready for my decision.

I. BACKGROUND

At the time of the event at issue, the plaintiff was an inmate at the Wisconsin Resource Center (WRC). The defendants were employed by the Department of Health Services at the WRC.

On the afternoon of February 21, 2018, Nichols was assisting Harder, Chapa, Witzke, and Schultz with removing the plaintiff from the shower. The plaintiff explains that he was on a “three man escort, with supervisor present” after being placed on control status for covering his cell window. Docket No. 51 at ¶ 5. After the plaintiff finished his shower and was fully dressed, Chapa, Witzke, and Harder placed mechanical wrist restraints and a tether on the plaintiff so they could escort him back to his cell. Plaintiff clarifies that they placed a waist belt on him, to which his handcuffs were attached, and they shackled his legs. He states that the tether connecting his handcuffs to the shower door had only a few inches of slack.

The defendants assert that, after restrained, the plaintiff made a lunging motion towards Witzke. Nichols believed that the plaintiff was trying to use his head to assault Witzke. The plaintiff denies that he tried to assault any staff member. Nichols asserts that he, Chapa, Witzke, and Harder ordered the plaintiff to stop resisting and that Chapa, Witzke, and Harder tried to stabilize the plaintiff against the shower door while Harder tried to stabilize the plaintiff’s head against the door to stop him from spitting at staff. The plaintiff disputes this characterization. He asserts that the defendants were completely unprovoked and were verbally and physically over-aggressive. He states that he never tried to spit at them.

According to the defendants, the plaintiff continued to resist and tried to move his head around to assault the staff. They assert that the plaintiff ignored their verbal orders to stop resisting. The plaintiff denies that he resisted staff members’ attempts to stabilize him. He explains that he was immobilized by the short tether that connected his handcuffs

to the shower door. The plaintiff asserts that he did not resist or try to assault staff; he says he looked straight forward.

At this point, Nichols instructed Schultz to radio for extra staff and to have someone bring a camera to record the situation. Nichols explains that Harder tried to gain control of the plaintiff's head, but the plaintiff continued to resist and did not comply. The plaintiff asserts that he did not resist, but stood facing forward while staff pinned him to the shower door. The plaintiff emphasizes that there was very little slack in the tether connecting him to the shower door.

Nichols asserts that he continued to try to gain the plaintiff's compliance; he states that he applied pressure below the plaintiff's jaw along with a "verbal 'stun' to stop resisting, pursuant to trained techniques" (Nichols does not explain what a verbal stun is). Docket No. 47 at ¶ 13. The plaintiff characterizes Nichols' actions differently. He asserts that Nichols grabbed his throat and was choking him. He states that he tried to verbalize that he was not resisting, but it was impossible to talk with "the force and pressure with which Defendant Nichols held and strangled [his] throat." Docket No. 51 at 4.

According to Nichols, the plaintiff continued to resist by trying to push back against staff members by pushing his hands against the shower door. Nichols asserts that Harder was able to take control of the plaintiff's head and gave the plaintiff an order to stop resisting staff. The plaintiff maintains that he did not resist at any point. He highlights that, given the limited slack in the tether, it would have been impossible for him to create space between himself and the shower door.

According to the defendants, Harder gained the plaintiff's compliance for a short period, which allowed Nichols an opportunity to ask the plaintiff if he would comply with

staff moving him back to his cell and applying a spit mask to deter him from spitting on staff. The defendants assert that the plaintiff continued stating verbal obscenities and trying to push himself off the shower door. The plaintiff asserts he never resisted; he says he stood still, facing forward. He also denies using verbal obscenities toward the staff.

At this point, additional staff arrived, including Larson. Larson states that, when he entered the shower area, he noticed staff on both sides of the plaintiff with their shoulders against his shoulder blade area. He states that they were ordering the plaintiff to stop resisting. He asserts that Harder was securing the plaintiff's head with one hand under his chin and the other across his forehead. The plaintiff agrees that staff had physical contact with him; he denies that any of it was necessary.

Nichols states that, because staff could not gain control of the plaintiff, he asked Larson to present his taser. Nichols also asked Schuster to get the restraint chair so they could escort the plaintiff to the observation cell. Larson then placed his taser on the plaintiff's right shoulder and told him to stop resisting or he would activate his taser. The plaintiff asserts that Larson did not give him any warnings, although he concedes that it was difficult to hear any one person because all of the defendants were yelling at him.

Larson states that he said, "Taser, Taser, Taser, stop resisting staff." Docket No. 47 at ¶ 27. He then activated his taser on the plaintiff's right shoulder. He asserts that the taser had only intermittent contact with the plaintiff and seemed to have minimal effect because the plaintiff continued to resist staff. However, Larson states that the plaintiff did briefly stop resisting, which allowed staff to stabilize him against the wall and regain control of him. The plaintiff asserts that he never resisted, Larson never warned him, and

the activation of the taser caused “frightening and painful shocks throughout [his] body.” Docket No. 51 at ¶ 27.

Nichols asserts that, after the taser was activated, he was able to secure the waist belt around the plaintiff (the plaintiff maintains that the waist belt had been secured around him before the defendants became aggressive) and instruct staff that, once the restraint chair arrived, they would remove the tether and walk the plaintiff backwards to the chair. Larson states that he checked on the staff and the plaintiff. He asserts that he told the plaintiff that the taser was still on him and he needed to comply with all orders to move him to the restraint chair. At this point, a staff member arrived with a camera and began recording the incident.

Larson asserts that he heard the plaintiff making a sound consistent with someone gathering saliva in their mouth. He states that he ordered the plaintiff not to spit and the plaintiff complied. The plaintiff denies that he tried to spit on or assault staff. He explains that any noises he made were his efforts to communicate his compliance while being choked.

Schuster then arrived with the restraint chair, and Kellar removed the plaintiff’s wrist restraints. According to the defendants, staff attempted to direct the plaintiff backwards to the restraint chair, but the plaintiff immediately resisted by lunging forward. The defendants assert that staff was able to get the plaintiff in a semi-seated position, but the plaintiff continued to resist by bringing his legs out in front him, preventing the restraints from being applied. Nichols asserts that he was able to control the plaintiff’s legs just enough to keep him from kicking staff, and Schuster was able to secure the

plaintiff's head against the head pad. The defendants assert that, during this time, the plaintiff continually tried to kick his legs out to prevent staff from securing his leg restraints.

The plaintiff asserts that he was given no option to walk backwards to the restraint chair. Instead, he asserts that the defendants picked him up by the legs and forcefully dragged him backwards and slammed him into the chair. The plaintiff denies lunging forward or kicking his legs out. He states that he did not resist commands or the defendants' actions.

In the midst of this, Larson says he placed his taser on the plaintiff's left thigh and told him to stop resisting or he would have to activate his taser. Larson asserts that the plaintiff refused and lunged forward with his hand and tried to grab the taser. Larson states that he said, "Taser, Taser, Taser stop resisting staff now," and then activated his taser on the plaintiff's thigh for five seconds. Docket No. 47 at ¶ 38. Larson explains that the taser had minimal effect because the plaintiff's leg was not yet secured, so he was able to move it from side to side. Larson asserts that several staff members were giving the plaintiff orders to stop resisting, but he did not comply. According to the defendants, the plaintiff continued to move his leg and to try to grab the taser. Larson explains that, despite the plaintiff's efforts to resist, staff members were able to apply the leg restraints.

The plaintiff denies that he resisted at any time. He explains that, after he was slammed into the restraint chair, Larson activated his taser, causing him extreme pain. He states that he was handcuffed with a waist belt and seated in a restraint chair that was not elevated that high off the ground. He states that he could not and did not reach up to grab anyone's taser.

Nichols asserts that, while this was happening, he tried to gain control of the plaintiff's hands in a compression hold by placing his hands over the plaintiff's hands to deter the plaintiff from grabbing at Larson's taser. Nichols states that the plaintiff grabbed his hand and began to squeeze it very hard, causing him pain. According to Nichols, he ordered the plaintiff to let go of his hand, but the plaintiff just squeezed harder. Larson asserts that he heard Nichols say, "It, let my hand go do it now." Docket No. 47 at ¶ 45. He states that the plaintiff was squeezing Nichols' hand so tightly that the plaintiff's fingers were turning red. Larson says he ordered the plaintiff to let go of Nichols' hand, but the plaintiff refused. Larson states that, contrary to the plaintiff's assertion, there is about a foot of slack between the waist belt and the handcuffs, which is how the plaintiff was able to grab Nichols' hand and attempt to grab Larson's taser. Larson states that he said, "Taser, Taser, Taser let him go," and then activated his taser on the plaintiff's thigh, at which time Nichols was able to break free and get ahold of the plaintiff's wrist. Docket No. 47 at ¶ 48. Larson states that other defendants were then able to start applying the ankle restraints and then transport the plaintiff to the observation cell, where he remained in the restraint chair.

The plaintiff states that the defendants' version is a complete fabrication. He explains that he never resisted and that he could not reach up to grab Nichols' hand because of the restraint belt. He states that, as soon as the defendants secured the waist strap followed by the leg/ankle strap, Nichols, who was bent over the plaintiff, pulled out his taser and started yelling at the plaintiff and tased him out of anger for a prolonged period of time. (Nichols denies that he every presented or used his taser.) The plaintiff

asserts that Larson also tased him again just to cause harm. He asserts that the leg and ankle restraints were applied before Nichols and Larson started tasing him that final time.

II. ANALYSIS

A party is entitled to summary judgment if it shows that there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). To survive a motion for summary judgment, a non-moving party must show that sufficient evidence exists to allow a jury to return a verdict in its favor. *Brummett v. Sinclair Broad. Grp., Inc.*, 414 F.3d 686, 692 (7th Cir. 2005). For the purposes of deciding the defendants' motion, I resolve all factual disputes and make all reasonable factual inferences in favor of the plaintiff, who is the non-moving party. *Springer v. Durflinger*, 518 F.3d 479, 483-84 (7th Cir. 2008).

"The 'unnecessary and wanton infliction of pain' on a prisoner violates his rights under the Eighth Amendment." *Lewis v. Downey*, 581 F.3d 467, 475 (7th Cir. 2009) (citing, in part, *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). When the force used is more than *de minimis*, the court must consider whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* (citations omitted). It is well settled that the use of a taser is more than a *de minimis* application of force. *See id.*

The defendants assert that Larson had to use his taser because the plaintiff repeatedly refused to comply with orders as they tried to restrain him before transporting him to his cell. They assert that he pushed against the shower door, lunged at staff, tried to spit at staff, and refused to be restrained in the restraint chair by kicking his legs, grabbing Nichols' hand, and trying to grab Larson's taser. The plaintiff denies the

defendants' characterization of the incident. He asserts that he never resisted and he consistently complied with staff's orders. He states that he never lunged at staff, nor did he try to spit at or grab staff. He states that both Nichols and Larson tased him for no reason.

Clearly, based only on the conflicting statements of the parties, disputes of material fact abound. However, the parties' versions of the incident are not the only evidence before me. Defendants have submitted a video, which starts shortly after the first time Larson tased the plaintiff. Both parties insist that the video corroborates their version of the incident.

The U.S. Supreme Court has explained that, "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). As this relates to video evidence, the Seventh Circuit has explained that, even if the entire incident is not captured on video, summary judgment is proper when the video confirms the parts of a defendant's version that the video captures and other evidence fails to corroborate a plaintiff's version. *Boyd v. Pollard*, 621 Fed. App'x 352 (7th Cir. 2015).

During the vast majority of the incident, the video captures only the backs of staff members who are surrounding the plaintiff. The plaintiff is visible for only a few seconds when he is being moved from the shower door to the restraint chair. In those few seconds, the plaintiff can be seen arching his back and writhing. He is being carried by his legs,

and his head is being controlled in a manner consistent with the defendants' description. Once he is in the restraint chair, only staff members are visible.

There are periods of calm throughout the video, during which staff members can be heard speaking to the plaintiff in a normal tone, but the calm is punctuated by outbursts of activity and yelling. Although the plaintiff can be heard speaking in the background, I could not determine what he was saying—he was not yelling. During the transfer from the shower door to the restraint chair, a staff member can be heard forcefully yelling, “Stop resisting,” shortly before a taser is activated. It is not clear who activates the taser. At several points, staff members appear to be struggling, but it is unclear from the video why they are struggling. The plaintiff cannot be seen during those struggles. The plaintiff asserts that he was not resisting and the defendants were taking out their anger on him; the defendants assert that they were trying to gain the plaintiff's compliance. The video does not resolve that dispute.

The defendants assert that the professional manner of the staff members throughout the video supports their version. I agree that the staff largely maintains an even and professional attitude throughout the incident. When the plaintiff is finally secured in the restraint chair, staff can be heard speaking calmly to him, explaining what would happen next, encouraging him to demonstrate compliance, and offering him medical care. But, the video also shows *the plaintiff* to be calm and compliant. He is not yelling obscenities, thrashing about, or struggling against his restraints. He seems dazed and appears to be talking to himself. At one point he sounds like he may spit, but he quickly stops when a staff member tells him not to.

I find that the video does not so blatantly contradict the plaintiff's version that no jury could reasonably credit his version as true. Accordingly, I will deny the defendants' motion for summary judgment as to Larson and Nichols, the two staff members who the plaintiff alleges tased him without reason.

I will, however, grant summary judgment in favor of the remaining defendants on the plaintiff's failure-to-intervene claim. Under a failure-to-intervene theory, a plaintiff must establish that the defendant "(1) had reason to know that a fellow officer was using excessive force or committing a constitutional violation, and (2) had a realistic opportunity to intervene to prevent the act from occurring." *Lewis v. Downey*, 581 F.3d 467, 472 (7th Cir. 2009). The video establishes that none of the staff members could have known that Nichols or Larson was going to use their taser or that any of the staff members had a realistic opportunity to intervene to stop them from using it.

The incident took place in a very small space with staff members crowded around the plaintiff, jostling each other to maintain contact with him. Those in the huddle all appear to have their hands on the plaintiff. The events unfold quickly. The plaintiff himself asserts that Nichols and Larson tased him unnecessarily, without provocation or warning. Accordingly, no reasonable jury could conclude that the other staff members had reason to know that Larson and/or Nichols would activate their tasers. And, given how quickly the activation of the taser comes about, no reasonable jury could conclude that the other staff members had a realistic opportunity to intervene to stop Nichols and/or Larson from using their tasers. Accordingly, the defendants other than Nichols and Larson are entitled to summary judgment. See *Hughes v. Durrent*, Case No. 15-C-6432, 2017 WL 2378702, at *8 (N.D. Ill. Sept. 11, 2017) (collecting cases).

Finally, Nichols and Larson are not entitled to qualified immunity. Government officials are entitled to qualified immunity unless their conduct violated a federal statutory or constitutional right, and the unlawfulness of their conduct was clearly established at the time. *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018). The defendants argue that Larson tased the plaintiff to gain his compliance with orders. But the plaintiff does not assert that the use of taser was an unreasonable response to his failure to comply. The plaintiff asserts that he was complying with staff's orders and that Nichols and Larson tased him anyway. Tasing a prisoner for no reason (which is what the plaintiff alleges) has long been established to be a violation of the Eighth Amendment, so Nichols and Larson are not entitled to qualified immunity.

For the reasons stated, **IT IS ORDERED** that the defendants' motion for summary judgment (Docket No. 45) is **GRANTED** as to defendants Terri Gable, Ronald Kellar, Jr., Joshua Johnson, Britany Bonen, Bruce Harder, Scott Schuster, Scott Witzke, Kim Builderbac, Mikel Robl, Corey Bantleon, Deborah Wirkes, Joseph Kilsdonk, Paul Chapa, Jr., Andrew Londos, Lucas Allen, Jessica Schultz, Justin Putzer, and Blake Vandenboom and **DENIED** as to defendants Corey Nichols and Andrew Larson.

IT IS FURTHER ORDERED that defendants Terri Gable, Ronald Kellar, Jr., Joshua Johnson, Britany Bonen, Bruce Harder, Scott Schuster, Scott Witzke, Kim Builderbac, Mikel Robl, Corey Bantleon, Deborah Wirkes, Joseph Kilsdonk, Paul Chapa, Jr., Andrew Londos, Lucas Allen, Jessica Schultz, Justin Putzer, and Blake Vandenboom are **DISMISSED**.

The court will attempt to recruit a lawyer to represent the plaintiff on his surviving claim against Corey Nichols and Andrew Larson.

Dated in Milwaukee, Wisconsin, this 6th day of November, 2019.

s/Lynn Adelman
LYNN ADELMAN
United States District Judge