UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

FRANK "NITTY" SENSABAUGH,
Plaintiff,

v. **Case No. 20-cv-1502**

MICHAEL KRZNARICH, et al.,
Defendant.

DECISION AND ORDER

Plaintiff Frank "Nitty" Sensabaugh brings this action under § 1983 alleging that several members of the Milwaukee County Sheriff's Office's Mobile Response Team violated his constitutional rights by arresting him in retaliation for the exercise of his First Amendment Rights, by unreasonably seizing him and using excessive force under the Fourth Amendment and by violating his rights to equal protection under the Fourteenth Amendment. Plaintiff also asserts a ratification claim against Captain Tricia Carlson of the Milwaukee County Sheriff's Office under the First, Fourth, and Fourteenth Amendments.

I. BACKGROUND

Defendants Michael Krznarich, Sarah Byers, Corie Richardson, Brandon Rogers, Daniel Humphreys and Steven Haw were, at all relevant times, employees of the Milwaukee County Sheriff's Office and members of the Mobile Response Team ("MRT). The MRT is a unit within the Milwaukee County Sheriff's Office that responds to large public gatherings, demonstrations and disturbances which disrupt public order. Defendant Tricia Carlson was, at all relevant times, a captain in the Milwaukee County Sheriff's Office.

On May 25, 2020, George Floyd was killed by police officers in the City of Minneapolis, sparking nationwide protests. Plaintiff Frank "Nitty" Sensabaugh, an African American, was participating in one such protest on June 2, 2022, in Milwaukee. At approximately 6:30 p.m., the demonstration proceeded up an onramp from Clybourn Street and onto Interstate 794 and the Hoan Bridge. Plaintiff marched with the demonstration up the onramp. As the demonstrators were marching onto the interstate, the MRT was dispatched to the scene. Members of the MRT hurried up the ramp and onto I-794 in an attempt to get in front of the demonstration. As they were doing so, they heard plaintiff shouting to other demonstrators to "fill it in, fill it in," "close it off," and "stay together." The officers believed plaintiff to be ordering the demonstrators to prevent the officers from moving up the ramp. Shortly after, a group of demonstrators blocked the path of several MRT members near the edge of the interstate. This resulted in a shoving match, with demonstrators bracing against and blocking the MRT members who were attempting to push past the demonstrators. Plaintiff approached the scuffle, shouted at the officers to stop, and plaintiff's hand made contact with Officer Richardson's face shield. The parties dispute whether plaintiff intentionally pushed Richardson. Members of the MRT also witnessed demonstrators throwing water bottles at officers.

Defendant Krznarich, who had reached the front of the demonstration, was informed over the radio by the Incident Command Center that plaintiff had led the protesters onto the interstate. Once the MRT had reached the front of the protest, a member of the MRT ordered the crowd to disperse and the officers fired smoke grenades. Some demonstrators threw or kicked the smoke cannisters back at the officers. The MRT officers then formed a line in front of the protest and began marching toward the

demonstrators, forcing them to move back the way they had come. The protesters moved backward toward the onramp but continued to shout at the officers. The line of officers advanced, Krznarich directed defendants Rogers and Haw to arrest plaintiff. Rogers and Haw rushed forward through the line directly at the plaintiff. They did not announce that he was under arrest or otherwise order him to stop. When the officers reached him, Rogers tackled plaintiff. Plaintiff hit the ground hard and landed on broken glass, causing lacerations that later required stitches. Haw then fell on plaintiff and helped Rogers hold plaintiff down. After Rogers tackled plaintiff, video of the incident shows the line of MRT officers quickly advancing forward and separating the plaintiff from the rest of the demonstrators. The officers then applied flex cuffs, a form of handcuffs similar to a zip tie, and helped plaintiff to his feet. Plaintiff informed the officers that the handcuffs were extremely tight and causing him pain, and the officers replied that they would remove the cuffs and replace them with a new pair once they reached a squad car. After plaintiff was taken to a squad car, his handcuffs were replaced. The record is not clear on how much time passed before plaintiff's handcuffs were replaced, but plaintiff described it as "a nice amount of time." After the incident, plaintiff was taken to the hospital where he refused treatment.

II. DISCUSSION

Summary judgment is required where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, I view the evidence in the light most favorable to the non-moving party and must grant the motion if no reasonable juror could find for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986).

A. First Amendment Retaliation Claim

Plaintiff asserts that defendants arrested him in retaliation for the exercise of his First Amendment rights. The First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech. *Nieves v. Bartlett*, 139 S.Ct. 1715, 1722 (2019). At the summary judgment stage, plaintiff has the initial burden to make out a prima facie case of First Amendment retaliation by showing that: (1) he was engaged in activity protected by the First Amendment; (2) he suffered a deprivation likely to deter such activity; and (3) plaintiff's protected speech caused the deprivation. *Hawkins v. Mitchell*, 756 F.3d 983, 996 (7th Cir. 2014). To show causation, plaintiff "must establish a causal connection between the government defendant's retaliatory animus and the plaintiff's subsequent injury." *Nieves*, 139 S.Ct. at 1722 (internal quotations omitted). Generally, a "plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest."[1] *Nieves*, 139 S.Ct. at 1724 (2019). "Probable cause to justify an arrest exists if the totality of the facts and circumstances known to the officer at the time of the arrest would warrant a reasonable, prudent person in believing that the arrestee had committed, was committing, or was about to commit a crime." *Abbott v. Sangamon County, Ill.*, 705 F.3d 706, 714 (7th Cir. 2013). The existence of probable cause "requires something more than a hunch," but "does not require a finding that it was more likely than not that the arrestee was engaged

[1] In addition to his retaliatory arrest claim, plaintiff briefly suggests defendants retaliated against him by "trying to charge him with several crimes." ECF no. 42 p. 5. However, plaintiff does not develop this argument and cites to no facts or law in support of it. Accordingly, the argument is waived. *See Crespo v. Colvin*, 824 F.3d 667, 673 (7th Cir. 2016).

in criminal activity – the officer's belief that the arrested was committing a crime need only be reasonable." *Id.*

Defendants that Krznarich, Rogers and Haw had probable cause to arrest plaintiff for unlawful assembly and disorderly conduct. I agree. Wis. Stat. § 947.06(2) prohibits unlawful assembly, which "includes an assembly of persons who assemble for the purpose of blocking or obstructing the lawful use by any other person, or persons of any private or public thoroughfares … and which assembly does in fact so block or obstruct the lawful use by any other person, or persons of any such private or public thoroughfares." At the time of the arrest, it is undisputed that plaintiff and other demonstrators had marched onto Interstate 794 and were blocking traffic. Given these facts, a reasonable officer in the position of defendants could have believed that the demonstrators had assembled for the purpose of blocking a public thoroughfare and were, in fact, blocking the thoroughfare. Accordingly, the defendants had probable cause to arrest plaintiff for violating Wis. Stat. § 947.06(2).

The arresting officers also had probable cause to arrest plaintiff for disorderly conduct. Under Wisconsin law, an individual commits disorderly conduct when he "engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." Wis. Stat. 947.01(1). Wisconsin's disorderly conduct statute is intended to root out conduct that unreasonably disturbs the public peace and proscribes conduct in terms of the results that can reasonably be expected rather than attempting to enumerate the "limitless number" of acts that could disrupt public order. *State v. Schwebke*, 2002 WI 55, ¶ 27. Accordingly, "otherwise disorderly conduct" is interpreted

as a catchall which proscribes any conduct "having a tendency to disrupt good order and to provoke a disturbance." *State v. Givens*, 28 Wis. 2d 109, 115 (Wis. 1965). By the time plaintiff was arrested, Krznarich had been told by the Incident Command Center that plaintiff had led the protestors onto the onramp. Plaintiff argues that he did not, in fact, lead the protestors onto the onramp, but a reasonable officer in Krznarich's position could have believed the Incident Command Center's account. Defendants also heard plaintiff direct the crowd to "fill it in" and "close it off" as officers attempted to move past the crowd. Shortly after, a group of demonstrators engaged in a shoving match with officers, briefly preventing them from moving forward. Plaintiff argues he was only directing the demonstrators to stay together for their safety, but given the circumstances a reasonable officer could have concluded that plaintiff had directed the crowd to block the officers' path. Plaintiff then made contact with defendant Richardson's face shield while shouting at the officers to stop pushing protestors. Plaintiff argues this contact was unintentional, but a reasonable officer could have believed that plaintiff intentionally pushed Richardson's face shield, particularly because plaintiff was shouting at Richardson to stop when the contact occurred. All told, a reasonable officer could have concluded that plaintiff had led protesters onto the interstate, directed them to block the MRT's path, and pushed an officer's face mask while shouting at him. Taken together, these facts could lead a reasonable officer to conclude that plaintiff had engaged in disorderly conduct that tended to cause or provoke a disturbance. Accordingly, the arresting officers had probable cause to arrest the plaintiff under Wis. Stat. 947.01(1).

Although probable cause is usually sufficient to defeat a claim of retaliatory arrest, it may not be if the offense involved is so minor that police "typically exercise their

discretion not to" arrest for it. *Nieves*, 139 S.Ct. at 1727. For example, if a plaintiff critical of police brutality is arrested for jaywalking, the plaintiff might prevail on a retaliatory arrest claim by showing that "jaywalking is endemic but rarely results in arrest." *Id.* at 1728. But plaintiff fails to satisfy this exception because the conduct for which he was arrested—leading a crowd onto the interstate—is not conduct that the police typically overlook. Accordingly, I will grant the defendant's motion as regards retaliatory arrest.

B. False Arrest Claim

Plaintiff argues that Rogers and Haw violated his Fourth Amendment rights by unlawfully seizing him. But to state a claim for false arrest under § 1983, a plaintiff must show that the defendants lacked probable cause for the arrest. *Gonzalez v. City of Elgin*, 578 F.3d 526, 537 (7th Cir. 2009). Put differently, the existence of probable cause is an absolute defense to a § 1983 false arrest claim. *Id.* As I explained above, the officers had probable cause to arrest plaintiff for both unlawful assembly and disorderly conduct. Thus, his false arrest claim necessarily fails and I will grant summary judgment to the defendants on this issue.

C. Excessive Force Claim

Plaintiff argues that Rogers and Haw used excessive force both when they tackled plaintiff and when they applied tight handcuffs. Police officers may use force to seize another person under appropriate circumstances, but the Fourth Amendment protects against the use of excessive force. *Weinmann v. McClone*, 787 F.3d 444, 448 (7th Cir. 2015). Excessive force claims under the Fourth Amendment are analyzed under an objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989). The analysis "require[s] a careful balancing of the nature and quality of the intrusion on the

individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (internal quotations omitted). "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. The analysis is inherently fact dependent. *Williams v. Ind. State Police Dep't*, 797 F.3d 468, 472-73 (7th Cir. 2015). In assessing such a claim, I remain cognizant of the difficult task facing law enforcement officers called to address fluid situations. *Id.* Accordingly, "the reasonableness of an officer's actions must be assessed from the perspective of a reasonable officer on the scene, not based on the 20/20 vision of hindsight." *Id.* (internal quotations omitted). That assessment must include a recognition that officers are often forced to make split second judgments in tense, uncertain, and rapidly evolving situations, as to the amount of force necessary in a particular situation. *Graham*, 490 U.S. at 396-97. Thus, I must give considerable leeway to law enforcement officers' assessments regarding the degree of force appropriate in dangerous situations. *Williams*, 797 F.3d at 473.

Plaintiff argues that Rogers and Haw used excessive force when they tackled him because disorderly conduct and unlawful assembly are not severe crimes and because he was not resisting arrest. Although the severity of the crime at issue and whether the individual is resisting arrest are relevant considerations, they do not outweigh the other circumstances in this case. At the time Rogers tackled plaintiff, hundreds of demonstrators had entered the interstate creating a situation that was dangerous to demonstrators, to commuters, and the police. The officers heard plaintiff order the demonstrators to "fill it in" and "close it off," orders which were quickly followed by a

shoving match between demonstrators and police. The crowd was unruly and several confrontations with officers had already occurred; some of the demonstrators were throwing water bottles at the police and kicking smoke cannisters toward them. The officers witnessed plaintiff shouting "stop" at a group of officers and pushing Richardson's face shield. They had also been advised that plaintiff was leading the demonstrators and had directed them onto the interstate. The situation was volatile, with demonstrators shouting at the advancing officers. In addition, the officers had reason to believe that plaintiff was willing and able to incite the crowd to interfere with their efforts to move the demonstrators off the interstate. The officers were outnumbered and faced a dangerous and fluid situation that they reasonably believed might escalate.

Finally, the force the officers used was relatively minor. Although tackling an individual is not *de minimis*, neither is it notably dangerous. Many cases have upheld the use of a tackle takedown to end even "mild resistance." *Johnson v. Rogers*, 944 F.3d 966, 969 (7th Cir. 2019) (collecting cases). Bearing in mind the leeway I must give officers regarding the degree of force necessary, it was objectively reasonable for Rogers and Haw to use a tackle to gain control of plaintiff as quickly as possible and separate him from the crowd. Plaintiff argues that the use of force was excessive because there was broken glass on the interstate. But there is no evidence that Rogers and Haw knew that there was broken glass on the interstate, and the excessive force assessment is an objective one: "the question is whether the force used is reasonable, not whether things turned out badly." *Johnson v. Rogers*, 944 F.3d 966, 969 (7th Cir. 2019).

Even if plaintiff could show that the officers' actions were objectively unreasonable, Rogers and Haw would still be protected by qualified immunity. "Qualified immunity

attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly*, 580 U.S. 73, 137 (2017). To defeat qualified immunity, a plaintiff must show not only that he was deprived of a constitutional right but also that the right was "clearly established at the time and under the circumstances presented." *Bianchi v. McQueen*, 818 F.3d. 309, 317 (7th Cir. 2017). To show a right was clearly established, plaintiff must "show either a reasonably analogous case that has both articulated the right at issue and applied it to a factual circumstance similar to the one at hand or that the violation was so obvious that a reasonable person would have recognized it as a violation of the law." *Canen v. Chapman*, 847 F.3d 407, 412 (7th Cir. 2017) (quoting *Chan v. Wodnicki*, 123 F.3d 1005, 1008 (7th Cir. 1997)). The Supreme Court has repeatedly directed courts not to define "clearly established law" at a high level of generality. *See Mullenix v. Luna*, 557 U.S. 7, 12 (2015). The inquiry must be undertaken in the specific context of the case, not as a broad general proposition. *Id.*

Again, Rogers and Haw reasonably believed plaintiff had led hundreds of demonstrators onto the interstate and had directed them to interfere with the police. They then made the decision to tackle him in an effort to secure him as quickly as possible. Plaintiff points to no cases, nor am I aware of any, that establish his right to be free from the use of force in an analogous situation. And I cannot conclude that, given the circumstances, Rogers' and Haw's use of force was so egregious that it was obviously illegal. Accordingly, Rogers and Haw are protected by qualified immunity on this issue.

Plaintiff next argues that Rogers and Haw used excessive force by applying handcuffs too tightly. The Seventh Circuit has recognized that an excessive force claim

may be founded on overly tight handcuffs. *See Payne v. Pauley*, 337 F.3d 767, 774-75 (7th Cir. 2003). However, to demonstrate the officer's conduct was objectively unreasonable, plaintiff must usually show that either he told the officers the handcuffs were tight, and that the officers failed to adjust them in a reasonable amount of time or that the handcuffs caused a serious injury. *See Tibbs v. City of Chicago*, 469 F.3d 661, 663 (7th Cir. 2006); *Sow v. Fortville Police Dept.*, 636 F.3d 293, 304 (7th Cir. 2011). A delay of 25 minutes has been found reasonable to replace tight handcuffs. *Tibbs,* 469 F.3d at 663. Plaintiff makes neither showing here. Plaintiff informed Rogers and Haw that the handcuffs were tight, but the record indicates that the officers replaced the handcuffs after they took plaintiff to a squad car. Moreover, there is no evidence that they waited too long to replace them. Further, plaintiff does not argue that the handcuffs caused serious injury. Accordingly, plaintiff cannot show the officers' conduct was objectively unreasonable and I will grant the defendants' motion for summary judgment as regards excessive force.

D. Equal Rights Claim

Plaintiff asserts that the Krznarich, Rogers and Haw violated his Fourteenth Amendment right to be free of discrimination on the basis of race. A plaintiff challenging police conduct under the Equal Protection Clause is required to show "that the defendant's actions had a discriminatory effect and were motivated by a discriminatory purpose." *Chavez v. Illinois State Police*, 251 F.3d 612, 635-36 (7th Cir. 2001). To show a discriminatory effect, a plaintiff must establish that (1) he is a member of a protected class; (2) he is similarly situated to persons who are not members of a protected class; and (3) that he was treated differently from those persons. *Id.* at 636. "To be considered

'similarly situated,' a plaintiff and his comparators (those alleged to have been treated more favorably) must be identical or directly comparable in all material respects." *Labella Winnetka, Inc. v. Vill. of Winnetka*, 628 F.3d 937, 942 (7th Cir. 2010).

Plaintiff argues he is a member of a protected class because he is African American. He also argues that he was similarly situated to the other demonstrators on the interstate, many of whom were not African American, and that they were treated differently because they were not arrested. But plaintiff was not directly comparable to the other demonstrators in all material respects. Unlike the other demonstrators, Krznarich, Rogers and Haw believed plaintiff had led the demonstration onto the freeway and had directed protestors to interfere with the police. Plaintiff's perceived leadership role was a material difference between himself and the other protesters and was not founded on plaintiff's membership in a protected class. Accordingly, plaintiff was not similar to the other protesters in all material respects. Because plaintiff does not show any comparators who were similar to him in all material respects and who were treated better, plaintiff's Fourteenth Amendment claim fails and I will grant summary judgment on this issue to the defendants.

E. Remaining Claims

Plaintiff argues that Carlson violated his constitutional rights by ratifying the violations committed by Krznarich, Rogers, and Haw. However, because plaintiff has not shown an underlying constitutional violation, his ratification claim necessarily fails. *See Carlson v. Bukovic*, 621 F.3d 610, 623 (7th Cir. 2010). Plaintiff's failure to intervene claims against Byers, Richardson and Humphreys also fail because he has not shown an underlying violation. *Harper v. Albert*, 400 F.3d 1052, 1066 n. 18 (7th Cir. 2005).

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that defendants' motion for summary judgment at ECF no. 32 is **GRANTED**. The Clerk of Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 26th day of October, 2022.

/s/Lynn Adelman
LYNN ADELMAN
United States District Judge