

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

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**RONALD WALKER**  
Plaintiff,

v.

**Case No. 19-C-0144**

**ROBERT HERNANDEZ,**  
Defendant.

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**ORDER**

Plaintiff Ronald Walker, a state prisoner who is representing himself, filed a complaint under 42 U.S.C. § 1983. I allowed him to proceed on a Fourteenth Amendment due process claim where he alleges that defendant Robert Hernandez used excessive force. Before me now is defendant's motion for summary judgment and plaintiff's motion to appoint counsel. For the reasons set forth below, I deny defendant's motion for summary judgment and grant plaintiff's motion to appoint counsel.

**I. FACTS OF THE CASE**

*A. The Parties*

It is undisputed that on November 22, 2018, plaintiff was in custody as a pretrial detainee at Racine County Jail for a drug-related offense. Docket # 48 at ¶ 1. Defendant Correctional Officer Robert Hernandez was one of the correctional officers tasked with placing plaintiff into a padded security cell. Docket # 35 at ¶ 2.

*B. Plaintiff's Version of Events*

Plaintiff states that he was in intake at the Racine County Jail, and he had just been released from the Emergency Restraint Chair ("ERC"). Docket # 42 at ¶¶ 3-4; Docket # 43 at ¶¶ 2-3. Because he had been in the ERC, he was already in leg shackles.

Docket # 42 at ¶ 4. He was then placed into handcuffs and placed on a bench to wait for jail staff to clean the padded security cell. *Id.* at ¶¶ 4-5. At that point, plaintiff states that he “became agitated and began to verbally confront the defendant C.O. Hernandez due to past verbal altercations with Defendant Hernandez.” *Id.* at ¶ 6. Defendant then responded to plaintiff and according to plaintiff “began to engage in a verbal altercation.” *Id.* at ¶ 7.

Once the padded security cell was clean, the defendant and C.O. Vela attempted to place plaintiff in the cell. *Id.* at ¶ 8. Plaintiff states because of the “verbal altercation,” defendant requested that they wait to place him in the padded security cell until additional jail staff arrived. *Id.* at ¶ 9. Plaintiff saw C.O. Ervin come towards him, and plaintiff assumed that he would relieve Hernandez of the responsibility of restraining him, so he stood up to allow Ervin to approach him. *Id.* at ¶ 10. Instead, defendant grabbed plaintiff’s left arm aggressively, causing him pain. *Id.* at ¶ 12. Plaintiff states defendant’s actions scared him, so he shook off defendant’s grip and told him “don’t touch me.” *Id.* at ¶ 13. In response, defendant regained his tight grip on plaintiff’s left arm. *Id.* at ¶ 14.

As a result of the aggressive grip and the verbal altercation, plaintiff admits he threatened to head butt defendant “in a last attempt effort to attempt to have someone else assist with the escort and prevent the defendant from physically assaulting plaintiff.” *Id.* at ¶ 15. Plaintiff also states that he “made no attempt to headbutt the Defendant nor did I have any intentions on doing so.” *Id.* at ¶ 16.

Defendant then punched plaintiff, “causing excruciating pain and causing plaintiff to fall off his feet.” *Id.* at ¶ 17. Defendant then fell on top of plaintiff, grabbing plaintiff “by the throat applying pressure stating ‘You will not threaten to headbutt me’” several times.

*Id.* at ¶¶ 18, 29. Plaintiff states he experienced pain in his chest, his jaw, and his neck. *Id.* at ¶ 29. He asserts defendant choked him, and he had difficulty breathing. *Id.* He further states that the wound he had self-inflicted prior to this incident reopened as a result of the altercation. *Id.* at ¶ 48.

At that point Vela and Ervin intervened, putting themselves between defendant and plaintiff. *Id.* at ¶ 19. Plaintiff also states that several other jail officers responded to the intake area to assist in dealing with the incident. *Id.* at ¶ 20. Plaintiff was then placed in the padded security cell, where he asked for medical attention because he was “experiencing excruciating pain from my jaw area and my body.” *Id.* at ¶ 22. Medical staff examined plaintiff, and according to plaintiff discovered a chipped tooth as the source of his jaw pain. *Id.* at ¶ 23. Plaintiff’s restraints were then removed, and he was left in the padded security cell. *Id.* at ¶ 24.

### *C. Defendant’s Version of Events*

Defendant states that at approximately 11:20 p.m., he and two other correctional officers responded to the padded security cell in the intake unit to place plaintiff in the ERC. Docket # 35 at ¶ 2. They needed to place plaintiff in the ERC so a nurse could examine a wound plaintiff self-inflicted. *Id.* at ¶¶ 2-3. Plaintiff allowed the nurse to clean his wound but denied further medical treatment. *Id.* at ¶ 5. Plaintiff was then taken back to the padded security cell in the ERC where he remained until 1:20 a.m., when defendant and four other officers were tasked with removing him from the ERC. *Id.* at ¶¶ 7-8.

It is unclear from the defendant’s proposed findings of fact when exactly plaintiff was removed from the ERC, but at some point, he must have been removed. At that time, Vela states he “observed the Plaintiff to be verbally antagonizing CO Hernandez” when

he was handing plaintiff a blanket. *Id.* at ¶¶ 9-10. According to defendant, once plaintiff stood, he turned towards defendant and said “Don’t touch me. I’ll head-butt the shit out of you.” *Id.* at ¶ 12.

At that point, defendant states he “made physical contact with the Plaintiff using his left forearm.” *Id.* at ¶ 14. According to defendant, he then fell upon plaintiff and shoved him two or three times. *Id.* at ¶ 15. Defendant asserts that plaintiff was taunting him. *Id.* Again, defendant does not state what happened after he shoved plaintiff, but merely alleges that plaintiff was then escorted into the padded security cell while continuing to taunt him. *Id.* at ¶ 16.

Defendant does not dispute that plaintiff reported jaw pain and that plaintiff sought medical treatment. *Id.* at ¶ 17. Defendant notes the nurse stated there was no evidence of “swelling, redness, bruising or deformity” to plaintiff’s jaw, but plaintiff had a chipped tooth without any nerve exposure. *Id.* at ¶¶ 18,19. The nurse also treated scratches on plaintiff’s right wrist and an open wound on his right arm. According to defendant, plaintiff “had a prior history of self-harming, disruptive behavior and assaulting staff,” and when he was moved throughout the jail, he was required to be in restraints and be escorted by two officers. *Id.* at ¶ 25.

#### *D. The Surveillance and Bodycam Videos*

I also have the benefit of several angles of surveillance footage of the incident as well as the defendant’s body camera footage and the body camera footage of two other officers. Jail Intake Camera # 2 had the best angle out of the submitted surveillance footage. Docket # 37, Exh. F. At the very beginning of the video, plaintiff is clearly sitting on a bench hands bound and wrapped in a suicide smock. There is no audio, but after a

few seconds, defendant lunges towards plaintiff's neck and lays on top of plaintiff. He punches him and appears to shake defendant several times, holding him around the neck. Three other officers run to intervene. *Id.* at 1:33:48 a.m.-1:33:59 a.m.

Footage from Jail Intake Camera #1 shows a mostly obstructed view because of a partition, but it shows defendant lunging at plaintiff. Footage from Jail Intake Cameras #3 and #4 show three other officers, one female and two males, responding once defendant and plaintiff get in the physical altercation.

Defendant's body camera footage contains audio. It begins with defendant sitting on a bench wearing a spit mask and suicide smock. He is fully restrained. Docket # 37, Exh. F., Hernandez Bodycam at 2:28. A janitor is clearly visible, going to clean the padded security cell. *Id.* Plaintiff sits calmly on the bench with defendant and another correctional officer for several minutes. Then, plaintiff makes a comment about someone named Ellenberger, but because he has the spit mask over his face, it is hard to discern what exactly he said. *Id.* at 6:33. Defendant calls plaintiff "tough guy." *Id.* Both are then silent for more than a minute.

Defendant makes an unintelligible comment about something happening outside of the intake area, and plaintiff states, "You wanna whoop something, whoop me how about that?" *Id.* at 8:24-8:25. Plaintiff then asks defendant if he is feeling anxious and jumpy. *Id.* at 8:30. Defendant responds "Am I? You tell me since you know everything." Plaintiff becomes agitated at this point and states, "You tell me, pussy!" *Id.* Plaintiff keeps making comments on and off for a few minutes, and defendant keeps responding to plaintiff's comments. *Id.* at 8:36-10:50. At one point, plaintiff calls defendant fat, and defendant responds, "I know, you are in the best shape of your life." *Id.* at 10:20.

Defendant then says, irritated, “you are always trying to start something.” *Id.* at 10:51. Officer Vela intervenes at this point and says, “That’s enough.” *Id.*

Defendant and Vela then attempt to move plaintiff to the padded security cell, but the plaintiff clearly says, “I’m going to wait until one of your other co-workers gets here,” and explains it is because he is feeling rambunctious. *Id.* at 10:55. At this point, defendant verbally engages him, calling him a drunk, and they exchange verbal barbs. *Id.* at 10:56-11:16. Then, defendant makes to move plaintiff, and plaintiff clearly says, “Don’t touch me!” *Id.* at 11:54. Plaintiff is looking at defendant and says, “I will headbutt the shit out of you.” *Id.* at 11:57. Plaintiff does not appear to move towards defendant. *Id.* At this point, defendant raises his voice, shouting “You will headbutt nothing! Don’t you threaten me! You understand me!” *Id.* at 12:00-12:02. Vela is clearly telling Hernandez to stop. *Id.* The sound of defendant making contact with plaintiff’s body four times can be heard, but it is unclear from the video how defendant is making contact with plaintiff’s body. *Id.* Plaintiff is taunting defendant to punch him again. *Id.* at 12:03.

Defendant and other correctional officers begin to move plaintiff to the padded security cell. *Id.* at 12:03-12:32. As they are moving them, plaintiff says that he will exhaust his administrative remedies and file an excessive force claim. *Id.* It is unclear who, but someone responds “Ain’t nobody punched you.” *Id.* at 12:33. Plaintiff is then placed in the padded security cell without incident.

Vela, who was standing with plaintiff and defendant nearly the entire time, also had his body camera on. His footage shows the interaction play out between plaintiff and defendant as described above. When the physical altercation occurred, Vela’s angle does not clearly depict exactly how defendant made contact with plaintiff’s body. Docket # 37,

Exh. F, Vela Bodycam at 6:42-6:43. Vela can be heard repeatedly telling both plaintiff and defendant to relax, and specifically telling defendant to stop. *Id.* at 6:43-6:49. Also, Plaintiff's verbal responses are clearer on Vela's footage, and plaintiff can be heard yelling at defendant, "Punch me in my shit again!" repeatedly. *Id.*

Officer Ervin, who was also standing by to assist in transporting plaintiff to the padded security cell had his body camera on as well. His footage does not significantly augment footage previously reviewed, and the angle of his camera does not adequately capture exactly how defendant made contact with plaintiff's body. It is hard to tell whether defendant punched plaintiff or used his forearm as defendant asserts. Docket #37, Exh. F, Ervin Bodycam at 0:17-19. There also is no audio for the first thirty seconds.

#### *E. Sgt. Luther's Report*

I also have the benefit of a report written by Sgt. Eric Luther, who reviewed the surveillance and body camera footage and then wrote a report. Docket # 42-1<sup>1</sup>. The stated purpose of Luther's report was to record his observations while reviewing the videos and then offer his "opinion as a POSC and PCS instructor on the incident." *Id.* He acknowledged that he could be held liable for defendant's training and the review of the incident, so he intentionally wrote a detailed report. *Id.*

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<sup>1</sup> Plaintiff attached this document as an exhibit to his declaration. Docket # 42. Judging by the Bates labeling, it looks like it was produced in discovery. While plaintiff did not provide an affidavit from Sgt. Luther authenticating the report, I will still review it for the purposes of summary judgment. Plaintiff is *pro se*, and defendant did not object to plaintiff's use of this document. In fact, defendant responded to issues raised by plaintiff in this document in defendant's Response to Plaintiff's Additional Proposed Findings of Facts. Docket # 48 at ¶¶ 25-26. Under Federal Rule of Civil Procedure 56(c)(3), I may consider other materials in the record regardless of whether they are properly cited. Given the circumstances, such consideration is warranted here.

Luther described the contents of the Jail intake surveillance cameras, stating that defendant's "first physical contact with the inmate is delivered through CO Hernandez using his right arm to grab the inmate's left elbow and pull it towards him while simultaneously delivering a forearm strike to the chest with his left arm." *Id.* Luther then described how defendant "drives" towards plaintiff "pushing him into a prone position on his back." *Id.* He noted that defendant does appear to fall upon plaintiff in an uncontrolled manner. *Id.* Once defendant fell on plaintiff, Luther stated his

arm moves forward applying pressure to what appears to be the inmate's neck 3 additional times. CO Hernandez then removes his forearm from the neck area and mounts the bench by swinging his right leg up over the bench. CO Hernandez then simultaneously puts his hand at the inmate's throat area and again applies pressure, flexing his fingers. CO Hernandez swings his other leg over the bench and then holds the Inmate down on the bench at the chest and shoulder area.

*Id.*

Luther's review of the body camera footage recaps much of the dialogue described above, however he included observations about what was appropriate from his perspective as a training officer. He noted that while plaintiff was goading defendant, defendant should have ignored the comments. *Id.* at 2. Specifically, Luther wrote that "Inmate Walker continues to verbally harass CO Hernandez and CO Hernandez continues to 'have the last word' which officers are specifically trained to avoid in both the academy and in-service training." *Id.* Throughout the whole encounter, Luther observed that Hernandez consistently failed to deescalate the situation. *Id.*

Referencing the POSC Student Text, Luther then opined on the appropriateness of the level of force defendant used. He wrote

In my opinion, the first use of force (the reaction side forearm strike) would fall under 'a trained technique.' This level of force could theoretically be legally justified

based on Inmate Walker's threats to assault CO Hernandez, his physical positioning and previous knowledge of Inmate Walker. However, in my opinion I would not deem this a desirable use of force and alternative tactics could have been used.

*Id.* Regarding what he describes as the “continual use of pressure against the neck area and the grasping of the throat,” Luther opined it would not be classified as either a trained technique or a “dynamic application of a trained technique.” *Id.* Instead, the only category it could possibly be classified as is “[n]ot trained but justified under the circumstances.” *Id.* For this category, the force either must be used in self-defense or when the circumstances, after a “tactical evaluation,” required an amount of force “not available via a trained technique.” *Id.* at 2-3. After reviewing defendant's report, Luther determined that while the initial forearm strike “could be articulated as a dynamic application of a trained technique . . . the hand grasping the neck area . . . cannot be.” *Id.* at 3. Luther noted that defendant's stated purpose was to “create distance,” but considering how plaintiff was restrained, was in a spit mask, and had a cover officer nearby, defendant could have created distance “through other lower (or non) force options.” *Id.*

Luther also considered the legal standard—that force must be objectively reasonable and “accomplish a legitimate correctional objective.” *Id.* With that in mind, he considered that Hernandez is a veteran officer and, in his opinion, “most veteran officers would have used a lower force option if given the opportunity to do so.” *Id.* Luther declined to opine on whether the use of force was objectively reasonable, instead noting that it was “not desirable.” *Id.*

## II. Analysis

### A. Summary Judgment Standard

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 motion for summary judgment, I resolve all factual disputes and make all reasonable factual inferences in favor of the non-moving party. *Springer v. Durflinger*, 518 F.3d 479, 483-84 (7th Cir. 2008).

### B. Excessive Force Claim Against Hernandez

Plaintiff claims that defendant used excessive force in violation of his constitutional rights. Because plaintiff was a pretrial detainee, his claim of excessive force is governed by the Due Process Clause of the Fourteenth Amendment. The “Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.” *Kingsley v. Henderickson*, 576 U.S. 389, 135 S.Ct. 2466, 2473 (2015) (citing *Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989)). Under this standard, whether a defendant used excessive force is an objective, not a subjective, determination, and “a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.” *Id.* at 2472-2473. Whether the force was objectively unreasonable turns on the “facts and circumstances of each particular case.” *Id.* at 2473. “A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.” *Id.* In assessing

the officer's use of force, "a court must also account for the legitimate interests that stem from the government's need to manage the facility in which the individual is detained, appropriately deferring to policies and practices that in the judgment of jail officials are needed to preserve internal order and discipline and to maintain institutional security." *Id.* (internal quotations marks and citations omitted). Other considerations to determine whether the force is reasonable include "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer, and whether the plaintiff was actively resisting." *Id.*

There are genuine issues of material fact that implicate key components of the excessive force standard under the Fourteenth Amendment: the question of whether plaintiff posed a threat to defendant and the question of whether the level of force used was necessary and appropriate. As such, sufficient evidence exists that would allow a reasonable jury to return a verdict in favor of the plaintiff.

Plaintiff and defendant's versions of events differ significantly, and the video footage does not clearly settle the discrepancies in their stories. Accordingly, I must consider the video in the light most favorable to the plaintiff. *See Horton v. Pobjecky*, 833 F.3d 941, 944 (7th Cir. 2018) (holding that only where the video firmly settles the material factual issue can a court consider video footage without favoring the nonmovant).

#### 1. Defendant's Perceived Threat

Concerning the events leading up to the use of force, according to plaintiff, he and defendant were exchanging verbal barbs, mutually escalating the situation to the point

where plaintiff felt threatened by defendant. Plaintiff asserts he and defendant had a history of “verbal altercations” Docket # 42 at ¶ 6. After several minutes of trading insults, plaintiff says that defendant grabbed his arm aggressively, causing him pain and to cry out “don’t touch me.” *Id.* at ¶ 13. Because defendant grabbed his arm aggressively, plaintiff admits to feeling threatened and wanting someone other than defendant to assist in placing him in the padded security cell. That’s why he threatened to headbutt defendant. Plaintiff asserts that he “made no attempt to headbutt the Defendant nor did I have any intentions on doing so.” *Id.*

Defendant on the other hand paints a picture of plaintiff as a security risk. He alleges that plaintiff was verbally antagonizing him but does not assert that he was egging plaintiff on. He also argues that the fact that plaintiff turned towards him when issuing the threat to headbutt him suggests a headbutt was imminent.

The videos do not clearly contradict either party’s version of the events. The body cam footage details the verbal sparring and escalation between plaintiff and defendant, including defendant choosing to engage with plaintiff instead of ignoring him in order to de-escalate the situation. It also depicts exactly how restrained plaintiff was at the time, clearly showing his arms fully bound behind his back, his legs bound in shackles, and his body wrapped in a suicide smock. As such, a reasonable jury, after viewing these videos, could find that plaintiff was not a sufficient threat to justify the amount of force defendant used.

Sgt. Luther’s report summarizing the videos also detailed the heated verbal exchanges between plaintiff and defendant, noting that an officer with defendant’s training should have ignored plaintiff’s comments. He also highlighted that defendant needed to

“have the last word, which officers are specifically trained to avoid in both the academy and in-service training.” Docket # 42-1 at 2. Generally, Luther concluded that defendant consistently failed to de-escalate the situation.

Viewing all these facts in the light most favorable to the plaintiff, there is clearly a genuine issue of material fact as to whether plaintiff posed enough of a threat to justify defendant's use of force. Particularly against the backdrop of the videos and Sgt. Luther's report, a reasonable jury reviewing these facts would have to make several credibility determinations including whether defendant's actions, specifically engaging plaintiff verbally, exacerbated the situation instead of tempering it; whether plaintiff, being fully restrained, posed an actual threat; and whether the events necessitated the use of force.

## 2. Defendant's Use of Force

Then there is the question of whether the force the defendant used was appropriate and necessary. Plaintiff alleges the force was punitive. After he threatened to headbutt defendant, plaintiff states defendant punched him so hard he fell over and was in “excruciating pain,” Docket # 42 at ¶ 17. According to plaintiff, defendant then fell on top of him, applying pressure to his throat, repeatedly saying, “You will not threaten to headbutt me.” *Id.* at ¶¶ 18, 29. Plaintiff asserts the defendant was choking him to the point where he couldn't breathe. He also asserts defendant reopened his self-inflicted wound and chipped his tooth. Plaintiff required medical attention.

Defendant, on the other hand, downplays his use of force. Instead of punching plaintiff, defendant characterizes it as making “physical contact with the Plaintiff using his left forearm.” Docket # 35 at ¶ 14. His stated reason for engaging in the contact was to “create distance.” Docket # 37-3. Defendant then states he fell on plaintiff, implying it was

accidental. He admits to shoving plaintiff a few times. Defendant also downplays plaintiff's resulting injuries, asserting they were minor and suggesting that many of them were pre-existing injuries. Whether defendant punched or appropriately restrained plaintiff, and whether plaintiff's injuries were serious or *de minimis* are open material questions of fact.

The videos do not resolve those questions. Defendant's bodycam video is obscured by his movement, though defendant making forceful contact with plaintiff's body can clearly be heard. Vela's and Ervin's bodycams also do not clearly depict how defendant made contact with plaintiff's body. Thus, it is still unclear whether defendant punched plaintiff, as plaintiff asserts or whether defendant restrained plaintiff with his forearm, as defendant asserts. Both defendant's bodycam and Vela's body cam show that Vela was actively trying to calm defendant down and repeatedly telling him to stop, which supports plaintiff's claim that defendant acted unreasonably. But, the bodycam footage also shows how agitated plaintiff was, supporting defendant's contention that he needed to restrain plaintiff. Additionally, the surveillance videos are inconclusive as they appear to show defendant lunging on plaintiff and grabbing him by the throat, but they do not add any extra information that would tip the scale for either party.

Sgt. Luther's report also demonstrates there are material fact issues. He characterized the use of force as "undesirable" and noted non-force or "alternative tactics could have been used" to achieve defendant's stated purpose of creating distance, particularly because plaintiff was restrained, in a spit mask, and there were cover officers nearby. Docket # 42-1 at 2. He also opined that "most veteran officers would have used a lower force option if given the opportunity to do so." *Id.* at 3. However, he emphasizes

that he is not concluding that defendant's use of force was unreasonable, and he highlights several ways defendant could justify his use of force.

Thus, a reasonable factfinder would be left with several credibility determinations. They would have to consider whether the plaintiff experienced substantial pain; whether the defendant punched plaintiff or merely "engaged in physical contact" as an appropriate restraint technique; and whether the videos and Sgt. Luther's report gives more weight to either party's version of how and why the force was used. These credibility questions demonstrate that sufficient evidence exists to allow a reasonable jury to return a verdict in favor of the plaintiff, rendering summary judgment inappropriate. I will deny the defendant's motion for summary judgment.

### **III. MOTION TO APPOINT COUNSEL**

Plaintiff also filed a motion to recruit counsel. I will grant this motion on the basis that the plaintiff has a claim that survived summary judgment. Once I have found an attorney willing to represent plaintiff, I will provide plaintiff with an agreement, which plaintiff can sign if he agrees to accept representation under the conditions the court provides. Once counsel is on board, I will set up a scheduling conference with the lawyers, to discuss next steps.

### **IV. CONCLUSION**

For the reasons stated, **IT IS ORDERED** that defendant's motion for summary judgment (Docket # 34) is **DENIED**.

**IT IS FURTHER ORDERED** that plaintiff's motion to recruit counsel (Docket # 50) is **GRANTED**. A lawyer will be recruited to represent plaintiff.

Dated in Milwaukee, Wisconsin this 15th day of June, 2020.

s/Lynn Adelman  
LYNN ADELMAN  
United States District Judge