

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12439
Non-Argument Calendar

D.C. Docket No. 1:15-cv-21910-MGC

ARIEL MARANTES,

Plaintiff-Appellant,

versus

MIAMI-DADE COUNTY,
RUSSELL GIORDANO,

Defendants-Appellees,

RUPERTO PEART, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

(September 5, 2019)

Before BRANCH, GRANT and HULL, Circuit Judges.

PER CURIAM:

Plaintiff Ariel Marantes appeals from the district court's order granting final summary judgment to defendant Officer Russell Giordano on his 42 U.S.C. § 1983 claim of excessive force and to defendant Miami-Dade County on his state law battery claim. On appeal, Marantes argues that the district court erred in (1) accepting the defendants' statement of material facts, (2) concluding that he was a resisting arrestee at the time the force was used, and (3) ruling that, even if the force used was excessive, Officer Giordano was entitled to qualified immunity. After review, we affirm.

We begin by outlining the details of Marantes's altercation with police. Like the district court and as explained below, we largely accept the defendants' version of events because (1) Marantes did not properly dispute the defendants' facts in opposing summary judgment and (2) those facts are supported by evidence in the record.

I. FACTUAL BACKGROUND

On August 14, 2012, Officers Ruperto Peart, Russell Giordano, Jose Gonzalez, and Jorge Rodriguez, all of whom were plainclothes narcotics officers, met for coffee at the Latin American Café in Miami, Florida at the start of their shift around 2:00 p.m. The officers were standing outside of the Café next to the

order window where coffee is served. As they stood at the window, the officers saw plaintiff Marantes and another individual walk out of the Café. Shortly thereafter, the officers heard Marantes begin yelling profanities at someone in a car that was driving through the parking lot.

Marantes took his shirt off, and the person he was yelling at (the passenger) got out of the car. Marantes and the passenger started to get into a fistfight. Officers Peart and Giordano saw Marantes and the passenger actually exchanging blows, while Marantes admitted only that he and the passenger were “about to get into a fight” and “about to engage.”

As the fight broke out, Officer Peart immediately moved to intervene, while Officer Giordano ran to his car to retrieve his badge and gun. According to Officer Peart, as he approached, Marantes pushed away from the passenger and began to run. Officer Peart pursued Marantes. Marantes tripped and fell. When Officer Peart reached him, Marantes was lying on his back. Officer Peart stood over Marantes and identified himself as a police officer, but did not touch Marantes at that time. Officer Giordano then returned to assist Peart. Marantes was still on the ground and remaining calm. Officer Peart left to assist Officers Gonzalez and Rodriguez, who were attempting to gain control over the passenger from the car, with whom Marantes had been fighting, as well as the car’s driver, who also had

exited the vehicle. Officer Giordano told Marantes to stay where he was, and at first Marantes complied.

After a while, however, Marantes “started to become more aggressive,” flailing around and trying to stand up. According to Officer Giordano, Marantes pulled him closer and attempted to punch him in the face, but the punch did not connect. Marantes then continued flailing and trying to get up, and Officer Peart returned to assist Officer Giordano. Officer Peart saw Marantes and Officer Giordano in “a tussle” as he returned to help, and that Marantes was resisting while Officer Giordano attempted to subdue him.

Once Officer Peart returned, Officer Giordano went back to his car to get his handcuffs to secure Marantes. According to Officer Peart, while Officer Giordano was getting the handcuffs, Marantes continued to struggle and, at one point, struck Officer Peart. Officer Peart began hitting Marantes in the face, and Marantes hit him back. When Officer Giordano returned with the handcuffs, Marantes was “actively squirming and fighting with Peart.” Marantes was still on his back on the ground and was not allowing the officers to put his hands behind his back and arrest him.

As Officer Peart was on top of Marantes attempting to control and handcuff him, Officer Giordano issued several “distractionary” kicks to Marantes’s arm area, in an attempt to get Marantes to comply with the officers’ commands and

allow himself to be handcuffed. Officer Peart explained that distractionary kicks are used to distract a person so that officers can effect an arrest and are not done for the purpose of causing harm. According to both Officer Peart and Officer Giordano, Marantes continued actively resisting while Officer Giordano was kicking him. Officer Giordano testified that he did not kick Marantes as hard as he could, but rather just used the amount of “force necessary to effect the arrest.” Despite the kicks, the officers were unable to handcuff Marantes from behind, but managed to handcuff Marantes with his hands in front. No other force was used against Marantes, and Marantes was transported to the hospital shortly thereafter.

In addition to the officers’ depositions, the defendants filed a partial video of the altercation between Marantes and the officers in support of their motion for summary judgment. That video, taken by a bystander using a cell phone, begins at the point in the encounter when Officer Giordano administers the kicks to Marantes and continues up to the point at which other uniformed officers arrive on scene.

At the beginning of the video, three officers can be seen struggling with Marantes, who appears to be kneeling on the ground. Officer Peart, who is wearing a light blue shirt, is located near Marantes’s head, attempting to control Marantes’s arms and upper body, while Officer Gonzalez, in a red shirt, is near

Marantes's legs, attempting to control his lower body. Officer Giordano, who is wearing a navy blue shirt, is standing to the side of Marantes.

The officers flip Marantes onto his back, and Officer Giordano leans over him and appears to push or hit Marantes. Officer Giordano then administers four kicks to the side of Marantes's body, which hit Marantes in his arm and/or ribs. As the kicks are being administered, Officer Peart appears to have a grip on one of Marantes's arms, but Marantes's other arm is unsecured, and he seems to be flailing that free arm and attempting to push Officer Peart away. In kicking Marantes, Officer Giordano does not draw his leg back fully or appear to use his full force.

After administering the kicks, one of the officers can be heard instructing Marantes to "turn over." The officers then flip Marantes over onto his stomach. When he is initially flipped over, Marantes puts his hands on the ground and attempts to push himself up. Officer Peart then straddles Marantes's body and pushes him back down to the ground. At that point, Marantes is lying on one side with one arm tucked under his body. Officer Giordano is holding onto Marantes's other hand.

Over the next few seconds, both Officer Peart and Officer Giordano can be seen straddling Marantes, and Officer Giordano had flex cuffs in his hand. Marantes rolls over onto his back again, and Officer Giordano gets up while

Officer Peart remains hunched over Marantes and appears to be grabbing Marantes's neck. The officers continue attempting to grab Marantes's arms to handcuff him, but Marantes again rolls over toward one side. Over the next 17 seconds, the officers gain control over Marantes, and Officer Gonzalez manages to handcuff Marantes's arms in front of his body.

As the video continues, Officer Giordano is seen trying to maintain control over Marantes and trying to flip Marantes over onto his stomach, while Marantes continues to move around and attempt to sit up. Uniformed officers then arrive, and Officer Giordano can be seen helping Marantes to stand up and leading him toward a marked police vehicle. Several seconds later, Marantes can be seen lying on the ground again next to the police vehicle with Officers Peart and Giordano standing next to him but not touching him. Marantes was arrested on two charges of battery on a law enforcement officer and one charge of resisting arrest with violence. He later pled *nolo contendere* to a single count of resisting arresting without violence.¹

¹The defendants submitted the state court judgment, which lists Marantes's offense as "resisting an officer with violence to his/her person," and the degree of the crime as "3/F," meaning a third-degree felony. See Fla. Stat. § 843.01. However, the judgment also cites Florida Statute § 843.02 as the offense of conviction, which is the statutory provision for resisting an officer without violence, a first-degree misdemeanor. See Fla. Stat. § 843.02 ("Whoever shall resist, obstruct, or oppose any officer . . . without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree."). The parties agree that Marantes actually pled to resisting without violence. Thus, for purposes of appeal, we assume that Marantes pled no contest to the misdemeanor offense of resisting an officer without violence.

After the altercation with the officers, Marantes was taken to Jackson South Community Hospital. Marantes arrived at the hospital's emergency room at approximately 3:50 p.m. and remained there until 7:24 p.m. Marantes complained of moderate head, face, and neck pain and had a laceration to his left upper lip with minimal bleeding. Medical staff noted redness, bruising, swelling, and abrasions to Marantes's head, "mild abrasions on the trunk and upper extremities," a two-centimeter laceration to Marantes's left upper lip that required stitches, and tenderness and pain in Marantes's neck.

A computerized tomography ("CT") scan was taken of Marantes's head and neck, which showed a "suggestion of a cephalohematoma in the right frontal region" (i.e., a collection of blood between the skull and the skin on the right frontal portion of Marantes's head), but did not show any intracerebral hemorrhage (i.e., internal bleeding in the brain). The CT scan did not show any facial bone fractures, but did show a deviated septum. Marantes was diagnosed with abrasions to the face and scalp, hematoma, contusion, and laceration.

Marantes returned to Jackson South Community Hospital two days later, on August 16, 2012. Marantes complained of persistent nausea, vomiting, and abdominal pain, and told medical personnel he had spent the last two days at home taking pain medication. Marantes was admitted for 24-hour observation and given

IV fluids and potassium. Marantes was diagnosed with: (1) “[r]habdomyolysis^[2] secondary to assault by police as per the patient’s statement”; (2) “[a]cute renal insufficiency^[3] related secondary to above”; (3) “[p]ersistent nausea and vomiting related with acute renal failure”; (4) “[h]ypokalemia”⁴; (5) “[d]ehydration”; and (6) “[r]ight frontal cephalohematoma with no intracranial lesions.” Medical personnel performed a CT scan of Marantes’s abdomen, which was “unremarkable.” An ultrasound of Marantes’s kidneys was likewise “unremarkable.” Marantes’s condition and symptoms improved over the course of the 24-hour observation period, and he was discharged the next day.

II. PROCEDURAL HISTORY

A. Amended Complaint and Dismissal

In March 2015, Marantes filed an amended complaint in state court alleging violations of his federal constitutional rights and Florida law in connection with his August 2012 arrest by the defendant Miami-Dade police officers. Specifically,

²Rhabdomyolysis is a medical condition resulting from the breakdown of damaged muscle tissue, which causes the release of muscle fiber contents into the bloodstream and can lead to kidney damage. See Rhabdomyolysis, <https://medlineplus.gov/ency/article/000473.htm> (last visited Aug. 2, 2019). Rhabdomyolysis can be caused by trauma or injury to the skeletal muscles. Id.

³Acute renal insufficiency or acute kidney failure refers to the sudden loss of the kidney’s ability to filter waste products from the bloodstream. See Acute kidney failure, <https://www.mayoclinic.org/diseases-conditions/kidney-failure/symptoms-causes/syc-20369048> (last visited Aug. 2, 2019).

⁴Hypokalemia refers to lower-than-normal levels of potassium in the blood. See Low potassium level, <https://medlineplus.gov/ency/article/000479.htm> (last visited Aug. 2, 2019).

Marantes alleged that: (1) Officers Giordano and Peart used excessive force during his arrest (the excessive force claim); (2) Officers Peart, Gonzalez, and Rodriguez failed to intervene in Officer Giordano's use of excessive force (the failure-to-intervene claim); (3) Miami-Dade County had a policy or custom of permitting the use of excessive force and of conducting internal affairs investigations in a manner that ratified police misconduct (the Monell⁵ claim); and (4) Miami-Dade County was liable for battery under state law based on Officer Peart's and Officer Giordano's excessive use of force (the state law battery claim). Of relevance to the instant appeal, Marantes's amended complaint alleged that Officer Giordano had kicked him four times in the head and body after he was already restrained by another officer and was pleading for help, causing injuries that required him to be placed on "advanced life-support."

The defendants removed the case to federal court and filed a partial motion to dismiss Marantes's three federal-law claims (the excessive force, failure-to-intervene, and Monell claims). The district court granted the motion, dismissed Marantes's federal claims, and remanded his state law battery claim to the state court.

B. First Appeal

⁵Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018 (1978).

Marantes appealed the district court's dismissal of his amended complaint. On appeal, this Court affirmed in part and vacated in part the district court's order. Marantes v. Miami-Dade Cty., 649 F. App'x 665, 667 (11th Cir. 2016) (unpublished). Specifically, this Court affirmed the dismissal of Marantes's claims of (1) excessive force against Officer Peart, (2) failure to intervene against Officers Peart, Gonzalez, and Rodriguez, and (3) Monell liability against Miami-Dade County. Id. at 670, 672-74. However, this Court vacated the dismissal of Marantes's excessive force claim against Officer Giordano. Id. at 670-72, 674.

This Court explained that, according to Marantes's amended complaint, which had to be taken as true at the motion to dismiss stage, "Officer Giordano kicked Marantes four times on the head and body with enough force to cause injuries warranting life support" while Marantes was already subdued, restrained by another officer, and not resisting. Id. at 671. This Court explained that "[h]aving established that Marantes's amended complaint, when properly construed in his favor, states that he was subdued and asking for help at the time Officer Giordano kicked him four times, we must conclude that there was a constitutional violation." Id. This Court noted that the use of injurious force against a subdued and non-resisting suspect is a clear constitutional violation. Id.

Thus, "[b]ased on the facts in the amended complaint," this Court concluded that "Officer Giordano was not entitled to qualified immunity for repeatedly

kicking Marantes after Officer Peart had him already restrained.” Id. at 671-72.

Accordingly, this Court directed the district court to reinstate Marantes’s excessive force claim against Officer Giordano, as well as his related state law battery claim against Miami-Dade County. See id. at 672, 674. However, this Court “express[ed] no opinion on . . . the ultimate outcome of Marantes’s case.” Id. at 674.

C. Defendants’ Motion for Summary Judgment

On remand from this Court, the remaining defendants (Officer Giordano and Miami-Dade County) answered Marantes’s complaint, and the parties conducted discovery. Following discovery, the defendants moved for summary judgment. In support of their motion, the defendants filed a statement of material facts, with record citations supporting each fact, and several exhibits, including the depositions of Officer Peart, Officer Giordano, and Marantes, some of Marantes’s medical records from Jackson South Community Hospital, and the cell phone video described above.

In their motion for summary judgment, the defendants argued that Marantes was not subdued when Officer Giordano kicked him, but instead was still a resisting arrestee at that point. The defendants therefore submitted that Officer Giordano’s use of force against Marantes was not excessive, and Giordano was entitled to qualified immunity. The defendants further contended that, even

assuming Marantes could show Officer Giordano's use of force was excessive, Officer Giordano would still be entitled to qualified immunity because Marantes could not point to a substantially similar case putting Officer Giordano on notice of a clearly established right. Finally, the defendants asserted that, because Officer Giordano's use of force was not excessive, Marantes's state law battery claim against the County also failed.

D. Marantes's Response to the Motion for Summary Judgment

Marantes filed a response in opposition to the defendants' motion for summary judgment along with several exhibits, including excerpts from the depositions of Officers Peart, Gonzalez, and Giordano and additional medical records from Jackson South Community Hospital. Marantes's summary judgment response presented a materially different version of his altercation with the officers. However, Marantes did not file his own separate statement of material facts. He also did not provide record citations to support each fact contained in the "statement of facts" section of his response.

In his response, Marantes asserted that he was "restrained, subdued, and pinned by the Police Officers to the pavement" when Officer Giordano kicked him, that "his body was exposed to the hot asphalt," causing him to "scream[] out trying to obtain some relief from the heat," and that he "had to undergo life support procedures" as a result of the injuries he suffered during his arrest. Marantes

maintained that, contrary to the defendants' account, the video showed that he was subdued when Officer Giordano kicked him, and thus provided indisputable evidence that the force used was excessive. Accordingly, Marantes submitted that Officer Giordano was not entitled to qualified immunity and that the defendants' motion for summary judgment should be denied.

E. District Court's Order

In an August 14, 2017 order, the district court granted the defendants' motion for summary judgment. As a threshold matter, the district court noted that Marantes failed to comply with Southern District of Florida Local Rule 56.1, which governs motions for summary judgment, in two significant ways. First, Marantes failed to submit a separate statement of material facts that corresponded with the paragraph numbering used by the defendants. Second, the statement of facts in Marantes's response in opposition to summary judgment did not include supporting record citations. Therefore, the district court deemed as admitted all of the material facts set forth in the defendants' statement of material facts, "since they [were] supported by evidence in the record." The district court then (1) recited the details of the altercation between Marantes and the officers, as recounted in the defendants' statement of facts and the officers' depositions,

(2) described the events depicted in the cell phone video, and (3) described the medical treatment Marantes received at Jackson South Community Hospital.

Turning to Marantes's claims, the district court first concluded that, under the totality of the circumstances, Officer Giordano's kicks were not excessive, and Officer Giordano was entitled to qualified immunity on Marantes's excessive force claim. The district court determined that, "[b]ased on the facts as laid out by the Parties, it is clear that Mr. Marantes was a resisting arrestee." The district court also reasoned that, "[a]fter seeing Mr. Marantes instigate a physical altercation with another person, after having been swung at by Mr. Marantes and seeing Mr. Marantes swing at Officer Peart, and given the fact that Mr. Marantes continued for several minutes to resist arrest, Officer Giordano could have reasonably believed that Mr. Marantes posed a threat and could be attempting to flee." Furthermore, the district court noted that "[e]ven if Mr. Marantes had simply been trying to get himself off the hot asphalt, Officer Giordano, in the heat of the moment, could easily have interpreted his actions as resisting arrest." The district court also emphasized that the medical records belied Marantes's claim that his injuries necessitated life support, and Marantes submitted no evidence showing those injuries resulted specifically from Officer Giordano's kicks, as opposed to the force used by other officers during the incident.

The district court next concluded that, even if Marantes could show Officer Giordano's use of force was excessive, he could not show a violation of clearly established law. The district court reasoned that clearly established law in this Circuit has "frequently granted qualified immunity to officers using force when dealing with a resisting arrestee," and the case Marantes cited in arguing that Officer Giordano should have used less force was readily distinguishable because the plaintiff in that case was not resisting when the force was used. In addition, the district court determined that Marantes had not shown Officer Giordano's conduct was so egregious that every reasonable officer would have known the force used was excessive even in the absence of caselaw.

Having concluded that Officer Giordano's kicks did not constitute excessive force, the district court ruled that Marantes's state law battery claim against the County—which was premised on Officer Giordano's use of force—also failed. The district court therefore granted summary judgment to the defendants on those remaining claims.

E. Marantes's Motion to Alter or Amend the Judgment

After the district court issued its August 14 order, Marantes filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59. With that Rule 59 motion, Marantes also filed a statement of material facts, which

responded to the defendants' statement of facts and contained citations to evidence in the record.

In his Rule 59 motion, Marantes argued that there was a genuine issue as to whether the force Officer Giordano used in kicking him was excessive. Marantes contended that the cell phone video showed that he was being restrained by other officers when Officer Giordano kicked him and that he was subdued and not resisting at that time. Marantes submitted that the use of injurious force on a suspect who is not resisting or attempting to flee is clearly excessive, and thus Officer Giordano's conduct here clearly violated Marantes's constitutional rights. Marantes also maintained that his injuries had "necessitated the use of life support systems."

The district court denied Marantes's motion to alter or amend the judgment. The district court noted that Marantes's newly submitted statement of material facts was "woefully untimely and still not compliant with Local Rule 56.1." The district court emphasized that Marantes's motion simply disagreed with the district court's ruling on summary judgment, was devoid of newly discovered evidence or manifest errors of law or fact, and attempted to relitigate old matters.⁶

⁶Although Marantes discusses his Rule 59 motion in the Course of Proceedings section of his brief on appeal, he does not raise any claim that the district court erred in denying that motion in the Argument section of his brief. Accordingly, Marantes has abandoned any challenge to the denial of his Rule 59 motion on appeal, and we do not address the district court's ruling on that Rule 59 motion. See Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1330 (11th Cir.

III. DISTRICT COURT'S APPLICATION OF LOCAL RULE 56.1

Southern District of Florida Local Rule 56.1 governs motions for and oppositions to summary judgment. Local Rule 56.1 provides that parties must file a separate statement of material facts, supported by specific references to pleadings and evidence in the record. See S.D. Fla. Local Rule 56.1(a).⁷

In particular, Local Rule 56.1 requires that the statement of facts “[c]onsist of separately numbered paragraphs,” “[b]e supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court,” and that “[s]tatements of material facts submitted in opposition to a motion for summary judgment shall correspond with the order and with the paragraph numbering scheme used by the movant.” Id. Local Rule 56.1(b) further provides: “All material facts set forth in the movant’s statement filed and supported as required above will be deemed admitted unless controverted by the opposing party’s statement, provided that the Court finds that the movant’s statement is supported by evidence in the record.” S.D. Fla. Local Rule 56.1(b).

2004) (stating that claims not briefed on appeal are deemed abandoned and will not be addressed).

⁷ Specifically, Local Rule 56.1(a) provides: “A motion for summary judgment and the opposition thereto shall be accompanied by a statement of material facts as to which it is contended that there does not exist a genuine issue to be tried or there does exist a genuine issue to be tried, respectively.” S.D. Fla. Local Rule 56.1(a).

We review the district court's application of its local rules for an abuse of discretion and give great deference to the district court's interpretation of its own rules. United States v. McLean, 802 F.3d 1228, 1233 (11th Cir. 2015). A district court abuses its discretion when it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures, or makes clearly erroneous factual findings. Id. The party challenging the district court's action bears the burden of showing the district court made a clear error of judgment in applying its local rules. Id.

Here, we see no clear error in the district court's application of Local Rule 56.1. As recounted above, and as the district court explained in its order, Marantes's summary judgment response did not include a separate statement of material facts controverting the defendants' statement of facts, as required by Local Rule 56.1(a). See S.D. Fla. Local Rule 56.1(a). Though Marantes's response contained a section entitled "statement of facts," that section did not "consist of separately numbered paragraphs" and did not contain "specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits" supporting each alleged fact or "correspond with the order and with the paragraph numbering scheme" of the defendants' statement of material facts. See id. Because Marantes failed to comply with Local Rule 56.1(a), and therefore did not properly contest the defendants' statement of material facts, it was within the

district court's discretion under Local Rule 56.1(b) to deem the defendants' facts admitted. See S.D. Fla. Local Rule 56.1(b).

Marantes contends that Local Rule 56.1 is inconsistent with Federal Rule of Civil Procedure 56, but we disagree. Under Rule 56, a party opposing summary judgment must support each assertion of a genuine issue of fact with cites to particular parts of the record, and if the nonmoving party fails to do so, the district court may consider the fact undisputed. See Fed. R. Civ. P. 56(c)(1)(A), (e)(2). Local Rule 56.1's requirement that facts be supported by specific references to the record and its provision that facts not properly supported may be deemed admitted are thus fully consistent with Rule 56.

Marantes also complains that the district court's ruling amounted to a grant of summary judgment by default. This argument fails as well. Even when a summary judgment motion is deemed unopposed, the moving party still bears the burden to show by citations to the record an absence of a genuine dispute. Mann v. Taser Int'l, Inc., 588 F.3d 1291, 1302 (11th Cir. 2009). Consistent with this principle, Local Rule 56.1(b) plainly states, and the district court recognized, that the movant's facts may be deemed admitted only if they are supported by evidence in the record. S.D. Fla. Local Rule 56.1(b). And here, the district court determined, after reviewing the record, that the defendants' statement of facts was supported by record evidence, including the officers' depositions, Marantes's

medical records, and, most importantly, the cell phone video. As we explain below, the cell phone video does indeed support the defendants' assertion that Marantes was, or, at the very least, could reasonably have been perceived to be, a resisting arrestee at the time of Officer Giordano's use of force—the key fact that Marantes contends is disputed here. Under these circumstances, the district court did not abuse its discretion in its application of Local Rule 56.1. See McLean, 802 F.3d at 1233; see also Mann, 588 F.3d at 1302-03 (concluding district court did not clearly err in applying a similar Northern District of Georgia local rule to exclude the plaintiffs' noncompliant statement of material facts).

IV. EXCESSIVE FORCE CLAIM

A. Applicable Law

We review de novo a district court's grant of summary judgment based on qualified immunity. Stephens v. DeGiovanni, 852 F.3d 1298, 1313 (11th Cir. 2017). In doing so, we resolve all issues of material fact and draw all reasonable inferences in favor of the nonmoving party, and then make the legal determination of whether, under those facts, the defendant is entitled to qualified immunity. Id. The Supreme Court has explained, however, that “[w]hen 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, 127 S. Ct. 1769, 1776 (2007); see also Glasscox v. City of Argo, 903 F.3d 1207, 1213 (11th Cir. 2018). In particular, the Supreme Court in Scott indicated that where video evidence exists of the events at issue and that video evidence “utterly discredit[s]” one party’s version of events, courts should not rely on a “visible fiction” and should instead “view[] the facts in the light depicted by the videotape.” See Scott, 550 U.S. at 380-81, 127 S. Ct. at 1776; see also Lewis v. City of West Palm Beach, 561 F.3d 1288, 1290 n.3 (11th Cir. 2009) (“The entire incident was captured on videotape, which was submitted as evidence to the district court, and is part of the record on appeal. We have followed the Supreme Court’s example and reviewed de novo the videotape evidence that was presented to the district court at the summary judgment stage.”).

Qualified immunity protects government officials from liability for actions taken while performing their discretionary duties unless their conduct violates clearly established statutory or constitutional rights. Stephens, 852 F.3d at 1314. Qualified immunity is intended to “protect[] from suit all but the plainly incompetent or one who is knowingly violating the federal law.” Brown v. City of Huntsville, 608 F.3d 724, 733 (11th Cir. 2010) (internal quotations omitted). Thus, “[a] law enforcement officer is entitled to qualified immunity if an objectively reasonable officer in the same situation could have believed that the force used was not excessive.” Id. (internal quotations omitted); see also Stephens, 852 F.3d at

1314 (explaining that qualified immunity turns on whether, on the facts alleged, “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted” (internal quotations omitted)).

Once an officer has shown that he was acting within the scope of his discretionary authority at the time of the alleged violation, the plaintiff bears the burden of demonstrating that qualified immunity is not appropriate. Stephens, 852 F.3d at 1314; Brown, 608 F.3d at 734 & n.14. To do so, the plaintiff must satisfy both elements of the following two-pronged inquiry. Brown, 608 F.3d at 734. The plaintiff must show: (1) that the facts, taken in the light most favorable to the plaintiff, establish that the officer violated a federal right; and (2) if such a violation is shown, that the right violated was “clearly established” at the time of the violation. Stephens, 852 F.3d at 1314; Brown, 608 F.3d at 734.

In excessive force cases, whether a plaintiff’s constitutional rights were violated is governed by the Fourth Amendment’s objective reasonableness standard. Stephens, 852 F.3d at 1314-15. Under that standard, we judge the officer’s use of force “on a case-by-case basis from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Brown, 608 F.3d at 738 (internal quotations omitted). To evaluate whether the force an officer used was reasonable, we must pay “careful attention to the facts and circumstances of each particular case.” Stephens, 852 F.3d at 1315 (internal quotations omitted).

In doing so, we must consider several factors, including (1) the severity of the crime at issue, (2) whether the plaintiff posed an immediate threat to the safety of the officers or others, and (3) whether he was actively resisting arrest or attempting to flee. Brown, 608 F.3d at 738. We also consider the nature and extent of the arrestee's injuries in determining whether the force used was excessive. Glasscox, 903 F.3d at 1214. The critical time period for purposes of determining whether an officer's use of force against an arrestee was excessive is the time period from just before the force was used until the use of force ceased. See id. at 1214-15 (addressing the repeated deployment of a taser).

This Court has held that the gratuitous use of force against a non-resisting criminal suspect is excessive. See, e.g., Hadley v. Gutierrez, 526 F.3d 1324, 1330 (11th Cir. 2008) (holding officer used excessive force when he punched suspect who was handcuffed and not struggling or resisting); Lee v. Ferraro, 284 F.3d 1188, 1199 (11th Cir. 2002) (holding that officer's use of force after the plaintiff was "arrested, handcuffed, and completely secure, and after any danger to the arresting officer as well as any risk of flight had passed" was excessive).

Conversely, this Court has also held that an officer's use of force against a suspect who is resisting and not subdued is not excessive. See, e.g., Mobley v. Palm Beach Cty. Sheriff Dep't, 783 F.3d 1347, 1351, 1355 (11th Cir. 2015) (concluding officers' use of force in striking, kicking, and tasing suspect was not excessive

where the suspect, though pinned on the ground, was “refusing to surrender his hands to be cuffed”); Crosby v. Monroe Cty., 394 F.3d 1328, 1334-35 (11th Cir. 2004) (concluding officer’s use of force was not excessive where suspect, though lying facedown on the ground “had not yet been handcuffed” and “was able to wrestle his hand loose and push [the officer’s] foot away”).

Even if an officer’s actions violated a plaintiff’s constitutional rights, the officer is still entitled to qualified immunity unless the plaintiff also shows that the right violated was clearly established at the time. See Lewis, 561 F.3d at 1291. A plaintiff may do so in one of three ways: (1) by presenting caselaw with indistinguishable facts that clearly establishes the constitutional right; (2) by showing that a broad statement of principle within the Constitution, a statute, or caselaw clearly establishes the right; or (3) by showing that the officer’s conduct was so egregious that it violated a constitutional right, even in the absence of case law. Id.

The parties do not dispute that Officer Giordano was acting within his discretionary authority during the encounter with Marantes. Our task then is to determine whether Marantes has shown that (1) Officer Giordano violated Marantes’s constitutional rights—that is, he used excessive force—when he issued the distractionary kicks, and (2) if so, that Marantes’s right to be free of such force was clearly established at the time of the incident. See Stephens, 852 F.3d at 1314.

B. Constitutional Violation

As to the first question, we agree with the district court that Marantes has not demonstrated that Officer Giordano used excessive force when he issued the four distractionary kicks to Marantes's arm and ribs. We begin by addressing the most important (and contested) factor in determining whether Officer Giordano's use of force was justified—that is, whether Marantes was actively resisting or attempting to evade arrest. Crucially here, the critical time period relevant to our analysis—the period during which the kicks were issued—was captured on the bystander's cell phone video. See Glasscox, 903 F.3d at 1214.

That video shows that during the brief, five-second period in which the kicks were issued, Marantes was only partially restrained by Officers Peart and Gonzalez and had one arm free, which he was flailing around and using to try and push Officer Peart away. This is consistent with the officers' testimony that, at the time the kicks were issued, Marantes was moving around and not allowing himself to be handcuffed. It is worth noting, too, that Officer Giordano did not kick Marantes for a prolonged period or employ the maximum amount of force possible in administering each kick. The video clearly contradicts Marantes's claim that he was restrained and subdued at the time. Accordingly, we are obligated to “view[] the facts in the light depicted by the videotape.” See Scott, 550 U.S. at 380-81, 127 S. Ct. at 1776.

Given the fact that Marantes was not fully secured and was continuing to flail around as the officers attempted to handcuff him, a reasonable officer in Officer Giordano's position could have believed that Marantes was actively resisting arrest, or attempting to break free from the officers and flee, and that the use of some force was necessary to bring Marantes into compliance. See Mobley, 783 F.3d at 1351, 1355; Crosby, 394 F.3d at 1334-35.

This is true even accepting Marantes's assertion that his movements, rather than being attempts to resist arrest, were merely attempts to remove his bare skin from the hot asphalt. As the cell phone video shows, the scene was chaotic, with a number of bystanders milling around. Indeed, the bystander who was taking the cell phone video was moving freely around the area. The officers also had to contend with and secure the passenger and the driver of the car, who were involved in the altercation. A reasonable officer, reacting quickly under these hectic circumstances, could have interpreted Marantes's flailing, squirming, and arm movements as attempts to resist arrest. See Lewis, 561 F.3d at 1292 (“[T]he decisions of the officers confronted with circumstances that are tense, uncertain, and rapidly evolving should not be second-guessed.” (internal quotations omitted)). Notably too, at no point during the kicks did Marantes ask to be let up from the hot pavement or tell the officers that it was burning him, nor did he make any statements indicating an intent to comply with the officers' commands and allow

himself to be handcuffed. Cf. Glasscox, 903 F.3d at 1215 (noting that the plaintiff repeatedly expressed his intent to comply with the officer's request to get out of his vehicle and was only thwarted from doing so by the officer's repeated tasings).

Similarly, as to the second factor, under the circumstances of this case, a reasonable officer could have believed that Marantes posed an immediate threat to the officers or other bystanders in the area. Just moments before the kicks occurred, Officer Giordano had observed Marantes yelling profanities at the passenger of a car driving through the parking lot and then instigating a fistfight with that person. Even if, as Marantes contends, he and the passenger were only "squar[ing] up" and had not yet exchanged blows, Marantes's aggressive behavior would suggest to a reasonable officer that Marantes might pose a threat. Knowing that Marantes had so recently been engaged in, or about to engage in, a physical confrontation, a reasonable officer in Officer Giordano's position could have believed that Marantes posed a safety threat if he remained unsecured, necessitating the use of force to bring him fully under the officers' control.

As to the third factor, the severity of the crime, as noted above, Marantes initially was arrested on charges of battery on a law enforcement officer and resisting arrest with violence, but ultimately entered a nolo contendere plea to a charge of resisting arrest without violence. Certainly, the felony charges for which Marantes was arrested are serious offenses. See Fla. Stat. § 784.07(2)(b)

(providing that battery on a law enforcement officer is a third-degree felony); id. § 843.01 (providing that resisting an officer with violence is a third-degree felony); id. § 775.082(3)(e) (providing that a third-degree felony is punishable by a term of up to five years' imprisonment). And even the misdemeanor resisting without violence offense to which Marantes ultimately pled is not trivial. See id. § 843.02 (providing that resisting without violence is a first-degree misdemeanor); id. § 777.082(4)(a) (providing that a first-degree misdemeanor is punishable by a term of up to 1 year in prison). Under the circumstances here, this factor also weighs in Officer Giordano's favor, or at least does not weigh strongly in Marantes's favor. Cf. Lee, 284 F.3d at 1198 (stating the seriousness factor weighed in favor of the plaintiff, who was arrested for improperly honking her horn, because "it is difficult to imagine a less serious crime than honking one's horn on a busy downtown thoroughfare").

The final factor—the extent of Marantes's injuries—is admittedly a closer question and weighs more in Marantes's favor than Officer Giordano's. Though the record does not support Marantes's contention that his injuries were so severe that life support measures (at least of the kind one would typically associate with that term)⁸ were required, the complications he suffered as a result of those injuries

⁸The term "life support" generally refers to "equipment, material, and treatment needed to keep a seriously ill or injured patient alive," see Life support, <https://www.merriam-webster.com/dictionary/life-support> (last visited Aug. 2, 2019), or "[a] therapy or device

were not inconsequential. The medical records from Jackson South Community Hospital show that Marantes was treated for just three hours on the day of his arrest, and the injuries noted were relatively minor—cuts, bruises, and the like. When Marantes returned to the hospital two days later, however, his condition had become more serious. At that time, Marantes was suffering from rhabdomyolysis, which in turn caused him to experience renal insufficiency, nausea, vomiting, low potassium levels, and dehydration. Nevertheless, these issues were relatively quickly and easily resolved—after 24 hours of rest, IV fluids, and potassium, Marantes’s condition improved and he was discharged from the hospital. Importantly, neither the CT scan of Marantes’s abdomen nor the ultrasound of his kidneys indicated any damage.

Ultimately, even assuming that Marantes’s kidney issues were caused solely by Officer Giordano’s kicks, we cannot say that Marantes’s injuries were so severe as to mandate a finding of excessive force in this case. To be sure, Marantes did suffer serious medical issues shortly after his encounter with the officers. But when considered alongside the other factors discussed above, which weigh in Officer Giordano’s favor, and the record as a whole, we conclude that Officer

designed to preserve someone’s life when an essential bodily system is not doing so,” see Medical Definition of Life Support, <https://www.medicinenet.com/script/main/art.asp?articlekey=38577> (last visited Aug. 2, 2019). Typical examples include feeding tubes, ventilators, and heart/lung machines. See Medical Definition of Life Support, supra; What is Life Support?, <https://www.webmd.com/palliative-care/what-is-life-support#1> (last visited Aug. 2, 2019).

Giordano's use of force was not objectively unreasonable and, thus, not excessive under the totality of the circumstances in this case. See Stephens, 852 F.3d at 1314-15, 1321; Brown, 608 F.3d at 733, 738.

C. Clearly Established Law

Because we conclude that Marantes has failed to establish the first prong of our qualified immunity analysis—violation of a constitutional right—Officer Giordano is entitled to qualified immunity on that basis alone. See Grider v. City of Auburn, 618 F.3d 1240, 1254 (11th Cir. 2010) (stating that both prongs of the two-part test must be satisfied). Even assuming arguendo, however, that the seriousness of Marantes's injuries demonstrated that Officer Giordano's use of force was excessive, we agree with the district court that Marantes did not show that the law at the time clearly established the illegality of Officer Giordano's conduct. See Lewis, 561 F.3d at 1291-92.

Marantes contends that this Court's caselaw clearly establishes that the use of force against a non-resisting arrestee violates the Fourth Amendment. As noted above, Marantes is correct that this Court has regularly held that the use of force against a subdued, compliant, and non-resisting arrestee is excessive. See, e.g., Hadley, 526 F.3d at 1330; Lee, 284 F.3d at 1199. The problem for Marantes is that, as we explained above, the uncontested facts in this case—which are supported by the summary judgment record, including the cell phone video—show

that Marantes was only partially restrained by the other officers, was not fully subdued, and, in the eyes of a reasonable officer, could be perceived as resisting. Marantes has not identified any case, and we have found none, clearly establishing that an officer faced with those or substantially similar circumstances uses excessive force by briefly administering distractionary kicks to effect an arrest. See Lewis, 561 F.3d at 1291-92. Neither has Marantes shown, or even argued for that matter, that broad Fourth Amendment principles clearly establish the illegality of Officer Giordano's conduct or that his conduct was so egregious as to constitute a clear violation in the absence of relevant caselaw. See id.

V. STATE LAW BATTERY CLAIM

As a final matter, we conclude that the district court did not err in granting summary judgment to defendant Miami-Dade County on Marantes's state law battery claim. Under Florida law, force used by a police officer during an arrest is transformed into a battery only where the force used was clearly excessive. See Davis v. Williams, 451 F.3d 759, 768 (11th Cir. 2006) (citing City of Miami v. Sanders, 672 So. 2d 46, 47 (Fla. Dist. Ct. App. 1996)). And to determine whether the force used was excessive, Florida courts analyze whether the amount of force used was reasonable under the circumstances. Sanders, 672 So. 2d at 47. In light of our conclusion above that Officer Giordano did not use excessive force in

arresting Marantes, we conclude Marantes's state law battery claim against the County likewise fails.

VI. CONCLUSION

For all of the foregoing reasons, we conclude that the district court did not err in granting summary judgment to defendant Officer Giordano on Marantes's § 1983 excessive force claim and to defendant Miami-Dade County on his state law battery claim.

AFFIRMED.