

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-13914

Non-Argument Calendar

SALVATORE BROES, III,

Plaintiff-Appellant,

versus

HALL COUNTY GEORGIA DISTRICT ATTORNEY, et al.,

Defendants,

AARON BOYCE,

Deputy Sheriff,

JENNIFER WRIGHT,

Lieutenant,

ALEISHA RUCKER-WRIGHT,

Director,

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SHELLY RENAE TEEMS

f.k.a. Shelly Broes,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 2:19-cv-00111-RWS

Before JORDAN, BRANCH, and BLACK, Circuit Judges.

PER CURIAM:

Salvatore Broes, III appeals the district court's grant of summary judgment to Aaron Boyce and Jennifer Wright, both employees of the Dawson County Sheriff's Department, and Aleshia Rucker-Wright, an employee of Dawson County's Emergency Communications Department (collectively, Dawson Appellees) in Broes' action alleging malicious prosecution against the Dawson Appellees. Broes asserts the district court erred in granting summary judgment by concluding probable cause existed for the

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charges against him. After review,¹ we affirm the district court's grant of summary judgment.

I. FACTUAL BACKGROUND

We begin with a brief introduction to the parties and Broes' theory of the case. This case arises from Broes' arrest following a domestic incident on March 6, 2017, in Dawson County, Georgia between Broes and his ex-wife Shelly Teems. Aaron Boyce was an investigator in the Criminal Investigations Division (CID) who determined there was probable cause to arrest Broes. Jennifer Wright was a sergeant who had authority to assign cases to investigators for review, and reviewed Boyce's investigation before it was sent to the District Attorney's office. Aleshia Rucker-Wright was the 911 Director for the Sheriff's Office and in that capacity had access to investigatory records maintained by the Sheriff's Department. Wright and Rucker-Wright are married and attended the gym Teems worked at in 2017, although they did not know Teems personally. Broes alleges "Teems apparently approached Wright about charging Broes," which set the alleged malicious prosecution in action. Specifically, before Boyce and Wright were involved, another investigator in the CID, Patrick Apoian, had decided there was not probable cause to charge Broes with any crimes. Additionally, the deputies responding to the scene of the domestic incident did not charge Broes at that time. Broes focuses on the responding

¹ "We review a grant of summary judgment de novo, drawing all reasonable inferences in the light most favorable to the non-moving party." *Ireland v. Prummell*, 53 F.4th 1274, 1286 (11th Cir. 2022) (quotation marks omitted).

deputies' failure to arrest him, and Apoian's decision not to charge him as well as Apoian's belief that the case had been closed, to allege that all further actions taken against him were malicious prosecution. He alleges Wright assigned the case to Boyce after Rucker-Wright destroyed Apoian's records of the investigation.

On March 6, 2017, Broes and Teems met at Broes' house to divide their personal property following their divorce. Teems had a list of items she was retrieving pursuant to the divorce decree on her iPhone. At some point during the meeting, Teems allowed Broes to look at and hold her phone to text the list of items to himself.² According to Teems, after Broes got Teems' phone, he then began looking at her personal text messages and sent at least two sexually explicit photographs of Teems to himself without Teems' consent. Teems repeatedly asked for her iPhone back, but Broes refused to return it and locked Teems out of his house. He called Teems a whore and threatened to post the pictures on Facebook. Teems then kicked the door open. Teems alleged Broes next put her in a choke hold, after which she bit him on the arm to escape. Teems alleged Broes then grabbed her by both of her arms and placed them behind her back. She dropped to her knees, which caused Broes to let go of her and drop her phone on the ground. After he laid Teems' phone on the ground, Teems called 911.

Broes' account of the incident is different. He alleges Teems attacked him for viewing her intimate photos while they were

² Many of the background facts are taken from a videotaped interview between Apoian and Teems.

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moving her property out of their former marital home. She attacked him and damaged his home and property. When they began arguing, Teems hit Broes' door with a log and then kicked in the door, entered his house, attacked him, took her phone, and he let her have it. Teems then bit Broes and hit him three times, after which he gave the phone back to her and told her to leave.

Deputies Brian Chester, Jacob Crawford, and Russell Lowery reported to the scene. The officers spoke to both Teems and Broes, and noticed an apparent bite mark on Broes' arm and redness on Teems' neck. The officers prepared an incident report stating they were "unable to determine the primary aggressor," and decided not to arrest either party on the scene.

Standard practice required the incident report be forwarded to the Dawson County Sheriff's Office CID. Sergeant Wright assigned the case to Deputy Apoian. Apoian interviewed Teems on March 14, 2017, and the interview was recorded. He also spoke to Broes, but that conversation was not recorded and there were no substantive notes on the conversation in the investigation file. Apoian testified his investigation concluded there was not probable cause for charges against Broes; however, that was not reflected in the file. Apoian believed he had closed the case, but it was also not reflected in the investigation file. Apoian believed Boyce, who was new to the CID, was selected to investigate this case after Apoian had already closed it because someone wanted to dictate the outcome of the case. However, Apoian did not have the authority to

close the case on his own. Shortly after his investigation, Apoian left the CID.

In May 2017, Boyce was assigned the Broes case. Boyce does not remember who assigned the case to him, but he assumed it was Captain Thurmond Atkinson, because he generally assigned cases. Wright testified that she did not assign the Broes case to Boyce, and that Atkinson reassigned Apoian's cases. Boyce understood the Broes case to still be open, and the file contained Apoian's videotaped interview with Teems and some brief notes. Boyce testified that when he has a case reassigned to him, he does not usually talk to the prior investigator, relying instead on the case file and incident reports in an effort to remain unbiased. In the course of his investigation, Boyce watched Apoian's interview with Teems and attempted to contact Broes several times to schedule an interview, but was unsuccessful. He ultimately concluded there was probable cause to arrest Broes for aggravated assault. Wright and other supervisors reviewed Boyce's completed investigation file. Wright agreed with Boyce's conclusion there was probable cause to arrest Broes and signed off on his application for an arrest warrant. Boyce obtained a warrant to arrest Broes on May 8, 2017, and Broes was arrested the same day. Boyce attempted to interview Broes the next day, but he invoked his right to an attorney. On May 11, 2017, Boyce interviewed Teems, and during the interview, personally viewed and took pictures of the text message thread on Teems' phone which showed Broes sent himself the sexually explicit pictures of Teems. With this evidence, on May 30, 2017, Boyce obtained warrants to arrest Broes for the additional crimes of theft by taking,

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computer trespass, and prohibition on nude or sexually explicit transmissions. He was arrested for those additional crimes.

On May 31, 2017, a magistrate judge held a hearing regarding probable cause for Broes' arrest for aggravated assault. Following testimony from and cross-examination of Boyce, the judge ruled there was probable cause to charge Broes with aggravated assault. Similarly, on September 27, 2017, another magistrate judge held a hearing regarding probable cause on the other charges. After Boyce's testimony, the judge concluded there was probable cause to charge Broes with theft by taking and computer trespass, but there was not probable cause to charge Broes with prohibition on nude or sexually explicit transmissions.

On December 18, 2017, Teems recanted her prior statements and said her allegations were blown out of proportion and she would like the charges against Broes dismissed. The district attorney dismissed the charges against Broes, but noted there was probable cause for his arrest. In a later deposition, Teems testified she only recanted under pressure and coercion from Broes and his family, and that her initial testimony and statements to officers were true.

II. PROCEDURAL BACKGROUND

The original summary judgment motion deadline for the parties was November 1, 2021. The Dawson Appellees requested an extension to November 15, 2021, which the district court granted. The Dawson Appellees filed a motion for summary judgment on the malicious prosecution claim on November 15, along

with a statement of material facts. Broes sought an additional extension to file his own motion for summary judgment, which the district court granted, giving Broes until November 26, 2021, to file his motion for summary judgment. On November 24, 2021, Broes filed a motion for leave to file excess pages as to his motion for summary judgment, which the district court granted on November 29, 2021, allowing Broes to file a motion for summary judgment up to 50 pages, and ordering the motion be filed by November 30, 2021. On December 1, Broes filed an amended motion for leave to file cross-motion for summary judgment by December 3, 2021, in response to the Dawson Appellees' motion. The district court denied Broes' motion, reasoning that Broes had "been granted ample time to submit his own Motion for Summary Judgment and failed to do so," and that Broes "did not meet the most recent (twice-revised) deadline set by this Court." The district court noted Broes still had an opportunity to address the merits of the Dawson Appellees' motion for summary judgment, and that the deadline for the response remained December 6, 2021.

Broes missed the deadline to file a response to the Dawson Appellees' motion for summary judgment, and filed a motion for reconsideration of the order denying him leave to file a cross-motion for summary judgment on December 8, 2021. The district court denied the motion for reconsideration on June 21, 2022, and the district court ordered Broes' response to the Dawson Appellees' motion for summary judgment was due no later than July 7, 2022. The response to the motion for summary judgment was filed on July 7, 2022. However, rather than responding to the Dawson

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Appellees' motion for summary judgment, the response argued that the Dawson Appellees' defenses were meritless.³ The response was in effect a motion for summary judgment in favor of Broes, rather than a response to the Dawson Appellees' motion for summary judgment. Broes also filed a response to the Dawson Appellees Statement of Facts.

III. DISTRICT COURT ORDER

The district court discussed Broes' failure to respond to the Dawson Appellees' motion for summary judgment, noting that where the nonmoving party has failed to respond to a motion for summary judgment, "the district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed, but, rather, must consider the merits of the motion." See *U.S. v. One Piece of Real Property Located at 5800 SW 74th Ave., Miami, Fla.*, 363 F.3d 1099, 1101 (11th Cir. 2004). And, while the district court need not review all the evidentiary materials on file, the district court must review the evidentiary materials submitted in support of summary judgment and determine whether they establish the absence of a genuine issue of material fact. See *id.*

³ Broes contends the district court erred in granting the Dawson Appellees' motion for summary judgment because the Dawson Appellees did not properly disclose the basis for their defenses in discovery. Because this is an argument Broes raised in what amounted to an improperly filed cross-motion for summary judgment, we do not address it. We note Broes does not appeal the district court's denial of his requested extension to file a cross-motion for summary judgment or the denial of his motion for reconsideration of the order denying him leave to file a cross-motion for summary judgment.

The district court discussed the standard for qualified immunity, finding it was undisputed the Dawson Appellees were acting within the scope of their discretionary authority, so the burden shifted to Broes to show the Dawson Appellees violated one of his constitutional rights and that the constitutional right was clearly established at the time of the violation. Broes asserted the Dawson Appellees violated his clearly established right under the Fourth Amendment to be free from an unreasonable seizure as a result of a malicious prosecution.

The district court then substantively analyzed Broes' claims of malicious prosecution, concluding there was at least arguable probable cause to support his arrest and prosecution. *See Black v. Wigington*, 811 F.3d 1259, 1267 (11th Cir. 2016) (“[T]he presence of probable cause defeats a claim of malicious prosecution.”). The district court concluded there was at least arguable probable cause to arrest Broes for the crimes of aggravated assault under O.C.G.A. § 16-5-21, theft by taking under O.C.G.A. § 16-8-2, nude electronic transmission under O.C.G.A. § 16-11-90, and computer trespass under O.C.G.A. § 16-9-93(b). Because there was no constitutional violation, the district court held the Dawson Appellees were entitled to qualified immunity. The court also granted summary judgment to the Dawson Appellees on Broes' state law malicious prosecution claim.

IV. ANALYSIS

As an initial matter, Broes argues the district court discarded certain facts in evidence in granting summary judgment.

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Specifically, Broes focuses on the fact the responding deputies did not find probable cause to arrest Broes at the scene of the incident, Apoian did not believe there was probable cause to arrest Broes, and Apoian believed he had closed the case.

First, the responding deputies did not make a final determination as to probable cause; rather, they filed an initial police report stating they were “unable to determine the primary aggressor.” They then forwarded the case to CID who investigated the case further. Thus, that the responding deputies did not find probable cause at the time of the incident does not mean another officer could not later find probable cause upon further investigation.

Second, Apoian’s determination of no probable cause and belief he had closed the case does not affect whether another investigator could find probable cause upon further investigation. Despite Apoian’s allegation he closed the case, the evidence supports that Apoian did not have authority to close the case and could not have closed it on his own. When Boyce received the case, it was still an active investigation, and he was entitled to make a probable cause determination independent of Apoian.

A. *Relevant Law*

To receive qualified immunity, an officer “bears the initial burden to prove that he acted within his discretionary authority.” *Dukes v. Deaton*, 852 F.3d 1035, 1041 (11th Cir. 2017). The plaintiff then bears the burden of proving “the defendant violated a constitutional right” and “the right was clearly established at the time of the violation.” *Barnes v. Zaccari*, 669 F.3d 1295, 1303 (11th Cir.

2012). Because Broes does not dispute the Dawson Appellees were engaged in a discretionary function, he bears the burden of proving they were not entitled to qualified immunity.

Broes claims the Dawson Appellees are liable under the Fourth Amendment for malicious prosecution. To succeed on this claim, Broes must prove (1) the Dawson Appellees “violated his Fourth Amendment right to be free from seizures pursuant to legal process” and (2) “the criminal proceedings against him terminated in his favor.” *Luke v. Gulley*, 975 F.3d 1140, 1144 (11th Cir. 2020). Because the existence of “[p]robable cause renders a seizure pursuant to legal process reasonable under the Fourth Amendment[,] ... the presence of probable cause defeats a claim that an individual was seized pursuant to legal process in violation of the Fourth Amendment.” *Washington v. Howard*, 25 F.4th 891, 898 (11th Cir. 2022) (quotation marks omitted).

In the context of an arrest, probable cause exists “when the facts, considering the totality of the circumstances and viewed from the perspective of a reasonable officer, establish ‘a probability or substantial chance of criminal activity.’” *Id.* (quoting *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018)). In assessing whether there was probable cause for an arrest, we “ask whether a reasonable officer could conclude that there was a substantial chance of criminal activity.” *Id.* at 902 (alteration adopted) (quotation marks and alteration omitted). “Probable cause does not require conclusive evidence and is not a high bar.” *Id.* at 899 (quotation marks omitted).

Thus, we now turn to whether there was probable cause to arrest Broes. To determine whether there was probable cause for Broes' arrests, we ask whether a reasonable officer could have concluded there was a substantial chance he had committed the crimes of aggravated assault under O.C.G.A. § 16-5-21; theft by taking under O.C.G.A. § 16-8-2; nude electronic transmission under O.C.G.A. § 16-11-90; and computer trespass under O.C.G.A. § 16-9-93(b). We will address each crime in turn.

B. Aggravated Assault

Under Georgia law, a person commits the offense of aggravated assault “when he or she assaults . . . (2) [w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; [or] (3) [w]ith any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in strangulation.” O.C.G.A. § 16-5-21(a). Georgia law provides that using one's hands to choke someone constitutes aggravated assault. *See Maxwell v. State*, 825 S.E. 2d 420, 422 (Ga. Ct. App. 2019).

There was probable cause to arrest Broes for aggravated assault. During Boyce's investigation, he reviewed the case file, including the initial report from the responding officers, watched the videotaped interview with Teems, and attempted to contact Broes for an interview. He learned that both on the day of the incident and afterward, Teems had stated that Broes had put her in a choke hold before she was able to escape, and the responding officers

noted her neck appeared red in the aftermath of the incident. These facts are enough for a reasonable officer to conclude there was a substantial chance Broes committed aggravated assault against Teems.

C. Theft by Taking

O.C.G.A. § 16-8-2 states a person commits theft by taking “when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.” Boyce’s investigation supported that Teems handed Broes her phone so he could review the list of items and take a screenshot of it, but he subsequently began searching through her messages, sent pictures to himself, refused her repeated demands to return the phone, and held onto it while he locked her out of the house. While Broes contends Teems voluntarily gave him her phone and he returned it after a few minutes, “[t]he manner in which the property is appropriated is irrelevant” since an individual can lawfully take possession of property and subsequently exceed their authorization to possess or use that property. *See Tate v. Holloway*, 499 S.E.2d 72, 74 (Ga. Ct. App. 1998). It is also “irrelevant whether deprivation was permanent or temporary,” because “[t]he intent to withhold property of another even temporarily satisfies the mens rea requirement of the theft by taking statute.” *Ferrell v. State*, 322 S.E.2d 751, 751 (Ga. Ct. App. 1984). There was probable cause to arrest Broes for theft by taking.

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D. Unlawful Nude Electronic Transmission

In relevant part, O.C.G.A. § 16-11-90 provides a person commits unlawful nude electronic transmission:

(b) . . . if he or she, knowing the content of a transmission or post, knowingly and without the consent of the depicted person:

(1) Electronically transmits or posts, in one or more transmissions or posts, a photograph or video which depicts nudity or sexually explicit conduct of an adult . . . when the transmission or post is harassment or causes financial loss to the depicted person, serves no legitimate purpose to the depicted person

Boyce learned Broes had searched through Teems' phone and located sexually explicit photographs of her, which he sent himself by text message and threatened to post on Facebook. While the magistrate judge ultimately concluded there was not probable cause to arrest Broes for a violation of the unlawful nude electronic transmission statute, there was at least arguable probable cause to arrest Broes for this offense. *See Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1257 (11th Cir. 2010) ("Indeed, it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and in such cases those officials should not be held personally liable (quotation marks omitted)).

E. Computer Trespass

O.C.G.A. § 16-9-93(b)(2) provides a person commits computer trespass when they “use[] a computer or computer network with knowledge that such use is without authority and with the intention of . . . [o]bstructing, interrupting, or in any way interfering with the use of a computer program or data.” Boyce learned Broes used Teems’ phone to send sexually explicit pictures of her to himself without her permission. While the Dawson Appellees acknowledge the Georgia Supreme Court has since held that actions similar to the one here do not amount to computer trespass, *see Kinslow v. State*, 860 S.E.2d 444, 451 (Ga. 2021), at the time of the events in question, there was at least arguable probable cause to arrest Broes for computer trespass.

V. CONCLUSION

The Dawson Appellees are entitled to qualified immunity as there was no Fourth Amendment violation. There was at least arguable probable cause to arrest Broes for all four offenses.⁴ *See Black v. Wigington*, 811 F.3d 1259, 1267 (11th Cir. 2016) (“[T]he

⁴ The district court also granted summary judgment to the Dawson Appellees on Broes’ state malicious prosecution claim. Broes does not plainly and prominently raise the state law claim as a basis for appeal in his brief, and has therefore abandoned it. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681-82 (11th Cir. 2014). To the extent Broes appeals the district court’s grant of summary judgment to the Dawson Appellees on his state malicious prosecution claim by arguing malicious prosecution generally, we affirm the district court.

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presence of probable cause defeats a claim of malicious prosecution.”). We affirm the district court.

AFFIRMED.