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OPINIONS AND ORDERS

OPINION, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (MAY 15, 2025)

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEAN HART; TIFFANY GUZMAN,

Plaintiffs-Appellants,

v.

CITY OF GRAND RAPIDS, MICHIGAN; PHILLIP REININK, BRAD BUSH, and BENJAMIN JOHNSON, Officers, in their individual and official capacities,

Defendants-Appellees.

No. 23-1382

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids. No. 1:20-cv-00899—
Jane M. Beckering, District Judge

Argued: June 13, 2024

Decided and Filed: May 15, 2025

Before: GILMAN, STRANCH, and LARSEN, Circuit Judges.

OPINION

JANE B. STRANCH, Circuit Judge. Sean Hart and Tiffany Guzman appeal the district court's dismissal of their excessive force claims under 42 U.S.C. § 1983 against the City of Grand Rapids, Sergeant Brad Bush, and Officers Benjamin Johnson and Phillip Reinink. Hart and Guzman claim that the officers employed excessive force during a 2020 Black Lives Matter demonstration in Grand Rapids and that the City ratified this unlawful conduct. The officers moved for summary judgment based on qualified immunity, and the City moved for summary judgment based on the failure of Hart and Guzman to establish municipal liability. The district court granted the motions, dismissing the federal claims and declining to exercise jurisdiction over Hart and Guzman's state law claims. For the reasons that follow, we **AFFIRM** the grant of summary judgment based on qualified immunity as to Officer Johnson and Sergeant Bush and **AFFIRM** the grant of summary judgment in favor of the City, but we **REVERSE** the grant of summary judgment based on qualified immunity as to Officer Reinink, and **REMAND** for further proceedings on that claim.

I. Background

The facts of this case are largely undisputed. Around 8:30 p.m., on May 30, 2020, after fishing near Grand Rapids, Michigan, Sean Hart and Tiffany Guzman heard sirens and began driving downtown. There, a crowd had gathered for a racial justice demonstration. Based on reports of violence at similar demonstrations across the country, members of the Grand

Rapids Police Department (GRPD)'s Special Response Team (SRT) were stationed around the crowd.

SRT had prepared "crowd control" packs containing specialty munitions, which included Muzzle Blast, designed to be fired at individuals at close range, and Spede-Heat, intended for long-range firing at crowds. Muzzle Blast and Spede-Heat can be fired using the same 40-millimeter launcher, and their cartridges look similar. But as described in Officer Reinink's incident report, "[a] Muzzle Blast 40mm round is a powder dispersion round," and "is used as a crowd control management tool for intermediate and close deployment." In contrast, Spede-Heat munitions, which contain cannisters of a chemical "commonly known as tear gas[,] . . . w[ere] designed to be launched into a target area and not directly at a subject."

Around 7:45 p.m., some demonstrators began to surround officers and throw items, including rocks, bricks and bottles containing unknown substances at them; that behavior continued to escalate, and included property damage and increasing crowd volatility and violence. Officers issued orders using the public announcement system, notifying listeners that failure to disperse could result in arrest or other officer intervention, such as the use of chemical agents or less-than-lethal munitions that could nonetheless result in serious injury. The district court found that "[t]he hours of video footage provided by the parties confirm that downtown, initially the site of a peaceful protest, had become complete mayhem."

When Hart and Guzman arrived downtown, they observed "people going crazy," "breaking windows" and "[t]hrowing things." Around 11:40 p.m., Hart and Guzman arrived at an intersection by a police line,

where they lingered, playing the N.W.A. song "F**k tha Police." Officers had cleared the intersection earlier. About two minutes after Hart and Guzman's arrival, a group of three officers, concerned that the car would drive into the police line, approached the vehicle. Officer Benjamin Johnson approached the vehicle with his launcher loaded with Muzzle Blast, poised in the "high ready" position, and pointed toward the passenger side of the vehicle where Guzman sat. Officer Johnson commanded Hart and Guzman to leave the area, which they eventually did.

But less than two minutes later, Hart and Guzman returned. Hart parked and exited the car, leaving his door open, and approached the officer line, placing his left hand in his pocket. Sergeant Brad Bush and Officer Phillip Reinink, both standing in the officer line, were unsure of Hart's intentions and feared that Hart might assault the officers. As Hart approached, officers yelled at him to get back.

Hart stopped several feet from the officer line, withdrew his left hand from his pocket and pointed at the police line; he was unarmed. Sergeant Bush then stepped forward to meet Hart and fired pepper spray at Hart's head for two to three seconds. On impact, Hart turned and took a few steps away from the officer line, lifted his head, took a drag from the cigarette he held in his right hand, and began to turn back to face the officers again. Bystander video recordings show Office Reinink left the police line to confront Hart after Sergeant Bush began pepper spraying him and Hart had started to retreat. As Hart was turning back toward the police line, Officer Reinink launched a Spede-Heat cannister at Hart, who was then "a few feet away." Reinink testified that he believed the can-

ister—which he loaded without a witness, contrary to GRPD policy—contained Muzzle Blast; however, it was Spede-Heat. The cannister hit Hart's left shoulder area. Hart remained on his feet, turned around, flicked his cigarette on the ground, and "flipped off" the officers before walking back to his car.

Once back in the car, Hart drove slowly toward the officers, stopped, and revved his engine while the crowd cheered. Hart stuck his left hand out of the car window and raised his middle finger at the police before driving over the median. "F**k tha Police" continued playing from the car window; a man got on top of the car, and officers called out additional dispersal orders, warning that those who remained would be in violation of state law. Less than a minute later, Hart drove away.

Hart received treatment at the emergency room for left shoulder pain from the Spede-Heat cannister and eye irritation from the pepper spray. Photos corroborate Hart's testimony that the impact from the canister left an abrasion and bruising on his left shoulder. Guzman had no physical injuries. Officer Reinink was investigated for excessive force and GRPD sustained that charge. The GRPD's investigation also concluded that Officer Reinink violated the department's procedures by loading his launcher with a specialty munition, Spede-Heat, without a witness and by turning off and not reactivating his body camera earlier that day. GRPD Chief Eric Payne disciplined Officer Reinink with two days of unpaid leave.

Plaintiffs filed this lawsuit on September 16, 2020; their operative complaint contains three counts: (1) excessive force in violation of the Fourth and Fourteenth Amendments against Officers Reinink,

Bush, and Johnson; (2) failure to train, inadequate policies and procedures, and illegal custom and practices against the City of Grand Rapids (City); and (3) state law claims against Officers Reinink, Bush, and Johnson. At the close of discovery, the City, Sergeant Bush, and Officer Johnson filed a joint motion for summary judgment; Officer Reinink filed a separate motion for summary judgment. On March 31, 2023, the district court granted the defendants' motions as to the federal claims, dismissing them with prejudice, and declined jurisdiction as to the state claims, dismissing them without prejudice. Plaintiffs timely appealed.

II. Analysis

We review a district court's order granting summary judgment de novo. *King v. Steward Trumbull Mem'l Hosp. Inc.*, 30 F.4th 551, 559 (6th Cir. 2022). Summary judgment is proper only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(c)); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). We "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the summary judgment motion,'" but insofar as the events at issue are recorded on video, we will not adopt a version of the facts that is "blatantly contradicted by the" video evidence, such "that no reasonable jury could believe it." *Scott v. Harris*, 550 U.S. 372, 378, 380 (2007) (brackets omitted) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)).

A. Claims Against the Officers

To prevail on a § 1983 claim, a plaintiff must demonstrate "(1) the deprivation of a right secured by the Constitution or laws of the United States; (2) caused by a person acting under the color of state law." *Baynes v. Cleland*, 799 F.3d 600, 607 (6th Cir. 2015). "Government officials," however, "are entitled to qualified immunity from civil suits for damages arising out of the performance of their official duties as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994). In the context of excessive-force claims, the qualified immunity inquiry is "(1) whether the officer violated the plaintiff's constitutional rights under the Fourth Amendment; and (2) whether that constitutional right was clearly established at the time of the incident." *Est. of Hill v. Miracle*, 853 F.3d 306, 312 (6th Cir. 2017) (quoting *Kent v. Oakland County*, 810 F.3d 384, 390 (6th Cir. 2016)). A reviewing court may address these prongs in either order, determining "in light of the circumstances in the particular case at hand" which step in its "sound discretion" it makes sense to address first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Under this standard, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning." *United States v. Lanier*, 520 U.S. 259, 271 (1997). In some cases, "a general constitutional rule already identified in the decisional law may apply with obvious clarity

to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Id.* (quoting *Anderson*, 483 U.S. at 640). The touchstone of this analysis is whether the official received "fair warning" that his conduct was unlawful, such that "existing precedent . . . placed the statutory or constitutional question beyond debate"; "the specific conduct," however, "need not have been found unconstitutional." *Baynes*, 799 F.3d at 613 (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)). Whether the officer violated clearly established law and whether the plaintiff offered "evidence sufficient to create a genuine issue as to whether the defendant in fact committed" the unlawful act are both "questions of law for the court to decide." *Adams*, 31 F.3d at 386. Beyond that, "weighing the evidence and determining whether an officer should be liable are tasks exclusively for the jury." *Baynes*, 799 F.3d at 615.

"The sole constitutional standard for evaluating excessive force claims is the Fourth Amendment's criterion of reasonableness." *Gaddis ex rel. Gaddis v. Redford Township*, 364 F.3d 763, 772 (6th Cir. 2004). We apply "an 'objective reasonableness' standard" to excessive force claims. *Baynes*, 799 F.3d at 607 (quoting *Morrison v. Bd. Of Trs. Of Green Twp.*, 583 F.3d 394, 401 (6th Cir. 2009)). Intent is irrelevant: "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Graham v. Connor*, 490 U.S. 386, 397 (1989).

In reviewing an excessive force claim, a court must "balance the government's interests in protecting others (including the police) and curbing crime against

a suspect's right [] not to be injured." *Puskas v. Delaware County*, 56 F.4th 1088, 1093 (6th Cir. 2024). This is a fact-intensive inquiry, requiring particular attention to "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Taking into consideration "that police officers are often forced to make split-second judgments" under "tense, uncertain, and rapidly evolving" conditions, the "particular use of force must be judged from the perspective of a reasonable officer on the scene," not "with the 20/20 vision of hindsight." *Id.* at 396-97.

When reviewing a case involving allegations of multiple instances of excessive force, we must "analyze the claims separately." *Gaddis*, 364 F.3d at 772 (ellipses omitted) (quoting *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6th Cir. 1996)). Under this analysis, we "carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage." *Dickerson*, 101 F.3d at 1161 (quoting *Plakas v. Drinski*, 119 F.3d 1143, 1150 (7th Cir. 1994)). "When more than one officer is involved, the court must consider each officer's entitlement to qualified immunity separately." *Wright v. City of Euclid*, 962 F.3d 852, 865 (6th Cir. 2020) (quoting *Smith v. City of Troy*, 874 F.3d 938, 944 (6th Cir. 2017) (per curiam)). In keeping with this precedent, and consistent with the approach of the district court, we analyze each contested use of force by each officer separately below.

1. Officer Johnson

Guzman claims that Officer Johnson engaged in excessive force when he pointed the launcher, which she believed was a gun, at her, an exchange that was captured on video. We begin with the second qualified immunity prong: whether the constitutional "right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct." *Pearson*, 555 U.S. at 232 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

Here, Hart and Guzman stopped at an intersection located near the police line, playing the song, "F**k tha Police," loudly with the car windows down. This occurred after GRPD's initial dispersal orders, which Guzman and Hart stated they did not hear. Three officers, including Officer Johnson, then approached the passenger's side of the vehicle. Officer Johnson held a launcher containing Muzzle Blast, which Guzman testified she believed was a gun, and pointed it at the passenger-side window.

The district court determined that the plaintiffs failed to produce "any existing precedent on this issue," and granted qualified immunity because the plaintiffs "ha[d] not shown that Officer Johnson violated a clearly established right." Guzman argues on appeal that Officer Johnson employed excessive force by pointing the launcher, which she believed was a firearm, at her, which caused Guzman to fear for her life. She relies on the holding in *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010), that detaining a suspect at gunpoint can constitute excessive force under the Fourth Amendment. Guzman also points to a Ninth Circuit decision, *Robinson v. Solano County*, 278 F.3d 1007, 1015 (9th Cir. 2002) (en banc), cited with approval in *Binay*, 601 F.3d at 650, for the proposition

that pointing a gun at an unarmed suspect who poses no danger constitutes excessive force.

We begin with the applicability of *Binay*'s principles to Guzman's situation. *Binay* concerned an officer holding the plaintiffs—who "had no criminal record, cooperated throughout the ordeal, posed no immediate threat to the officers, and did not resist arrest or attempt to flee"—at gunpoint while executing a search warrant for the plaintiffs' apartment. *Binay*, 601 F.3d at 644-45, 650. The search took about an hour. *Id.* at 644. Here, Officer Johnson approached Hart and Guzman in the context of an ongoing, disorderly demonstration in the public streets, not in a private home. Hart and Guzman aver that they had not heard the dispersal orders, but from Officer Johnson's perspective, the pair appeared to ignore or resist that command by driving toward the police line. The encounter took place over a couple of minutes, not an hour. And, as emphasized by the district court, the officers in *Binay* pointed an actual gun capable of inflicting lethal force, whereas here, Officer Johnson carried a launcher loaded with non-lethal chemical spray. The context of Officer Johnson's interaction with Hart and Guzman, then, is distinct on several key bases from *Binay*.

Robinson is also distinguishable. Although the court concluded that "pointing a gun to the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment," 278 F.3d at 1015, *Robinson* involved officers pointing a gun at plaintiff's head as he exited his home, *id.* at 1010. Here, Officer Johnson approached Hart and Guzman in their car, a context where "the risk of a violent encounter," *Arizona v. Johnson*, 555 U.S. 323, 331 (2009), arises "from the fact that evidence of a more

serious crime might be uncovered during the stop," *id.* (quoting *Maryland v. Wilson*, 519 U.S. 408, 414 (1997)). The tense scene surrounding the car added to the risk that a reasonable officer would perceive. On the facts of this case, we cannot say that a clearly established constitutional right was violated by the actions of Officer Johnson. We therefore affirm the district court's grant of summary judgment to Officer Johnson based on qualified immunity.

2. Sergeant Bush

Turning to Sergeant Bush's deployment of pepper spray, an interaction that was also documented on video, we again begin the analysis with the second qualified immunity prong: whether the constitutional "right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct." *Pearson*, 555 U.S. at 232 (quoting *Saucier*, 533 U.S. at 201).

After Hart's and Guzman's initial encounter with GRPD officers, Hart drove away from the officer line. Shortly thereafter, Hart and Guzman drove back to the intersection, where Hart parked his vehicle around 50 feet from the line of police officers, left the driver's side door open, and approached the line of police. Sergeant Bush then sprayed Hart with pepper spray from eight to ten feet away.

On appeal, Hart relies on three cases to show that Sergeant Bush violated clearly established law when deploying pepper spray: *Wright v. City of Euclid*, 962 F.3d 852 (6th Cir. 2020); *Grawey v. Drury*, 567 F.3d 302 (6th Cir. 2009); and *Ciminillo v. Streicher*, 434 F.3d 461 (6th Cir. 2006). *Wright* concerned plain-clothes officers' deployment of a taser and pepper spray on an unarmed man in a parked vehicle. 962 F.3d at 860.

We concluded "that the right to be free from being pepper sprayed when a suspect is not actively resisting arrest was . . . clearly established" at the time of that incident. *Id.* at 871. Unlike in *Wright*, however, here the record shows that Hart actively disobeyed officers' orders in advancing toward the police line. *Wright* thus does not provide clearly established precedent applicable here.

In *Grawey*, as the district court emphasized, the plaintiff was passively awaiting police arrival, not advancing toward officers, when officers assaulted him with pepper spray. *Grawey*, 567 F.3d at 307, 311. And unlike *Grawey*, where officers' use of pepper spray occurred at such a "close range," that the force subjected the plaintiff to "an intense burning" that caused him to "collaps[e] to the sidewalk, unconscious," *id.* at 307, Sergeant Bush did not "spray Hart with enough pepper spray to cause Hart to lose even the ability to walk or drive away," which he did. Given the factual distinctions between the use of pepper spray in *Grawey* and Sergeant Bush's pepper spraying of Hart, Hart cannot rely on *Grawey* to establish that Sergeant Bush's conduct violated clearly established law.

Ciminillo presents a more similar context; the plaintiff's claims there also stemmed from police attempting to disperse a crowd during a riot. There, officers had ordered a crowd to disperse after it "had become rowdy" and some of its members "set fires in the street" and "were throwing bottles at police officers and civilians." *Ciminillo*, 434 F.3d at 463. Unlike Hart, the plaintiff in *Ciminillo* was slowly walking toward an officer with his hands above his head when the officer shot him "allegedly without provocation and at point blank range" with "a beanbag propellant."

Id. We held that "[t]he use of less-than-deadly force in the context of a riot against an individual displaying no aggression is not reasonable." *Id.* at 468. Here, Hart was not attempting to leave, but had driven back to the scene, exited his car, and was approaching the police line to confront the officers when Sergeant Bush pepper sprayed him. Hart's provocative advance toward the officer line sufficiently distinguishes his conduct from that in *Ciminillo*.

In sum, none of the cases that Hart cites establish that it was "beyond debate" at the time of this incident that Sergeant Bush's pepper spraying of Hart was unlawful. *See District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). We therefore affirm the district court's grant of summary judgment to Sergeant Bush.

3. Officer Reinink

Hart alleges that Officer Reinink used lethal force against him. When Sergeant Bush pepper sprayed Hart, Hart turned away and retreated from the police line. As Hart began to turn around again, Officer Reinink fired a Spede-Heat canister, which is intended for long-range deployment, directly at Hart, who was located several feet away from the officers, striking his left shoulder area.

We begin with whether Officer Reinink's use of a Spede-Heat munition constituted deadly force. Officer Reinink argues that the district court appropriately analyzed his mistaken discharge of Spede-Heat as the use of "the wrong non-lethal munition" in tumultuous circumstances. At his deposition, however, Officer Reinink admitted that he was trained that some uses of Spede-Heat could result in serious injury and even

death, and thus, Spede-Heat could "be considered a deadly weapon." Deposition testimony by others corroborates this understanding. For instance, as GRPD Lieutenant Matthew Ungrey—the SRT unit commander—explained, Spede-Heat cannisters' "muzzle velocity" requires the munition be shot into the air at an angle of 45 to 60 degrees and not directly at a person "unless it would be a life or death situation" because it would "absolutely" constitute lethal force. Likewise, GRPD Chief Eric Payne acknowledged that firing Spede-Heat at a person "at . . . that distance is considered potential deadly force."

It is true that the record contains some support for the inference that Officer Reinink had intended to deploy Muzzle Blast and mistakenly fired the Spede-Heat canister. But, under governing law, officer intent is irrelevant. *Graham*, 490 U.S. at 397; *see also Henry v. Purnell*, 652 F.3d 524, 532 (4th Cir. 2011) (ignoring the officer's intent when he alleged that he mistakenly fired his gun instead of his Taser at a fleeing suspect). Viewing the record evidence in the light most favorable to Hart, as we must, Officer Reinink did deploy Spede-Heat at close range, such that it could have exerted lethal force. Though deadly force precedent centers on firearms, the reasoning of these cases clarifies that it is the nature of the force, not the weapon, that matters. *See, e.g.*, *Walker v. Davis*, 649 F.3d 502, 503-04 (6th Cir. 2011) (recognizing that "ramming a motorcycle with a police cruiser involves the application of potentially deadly force"); *see also Tennessee v. Garner*, 471 U.S. 1, 9 (1985) ("The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elab-

orated upon."). Thus, we evaluate Officer Reinink's firing of the Spede-Heat under the deadly force rubric.

"Qualified immunity in cases involving claims of deadly force is difficult to determine on summary judgment because liability turns upon the Fourth Amendment's reasonableness test." *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 902 (6th Cir. 1998). "When an officer uses *deadly* force, that force is unreasonable unless 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" *Puskas*, 56 F.4th at 1095 (quoting *Palma v. Johns*, 27 F.4th 419, 432 (6th Cir. 2022)). This "threat of serious bodily harm" must also be "imminent." *Palma*, 27 F.4th at 432. Factors that weigh on "whether an officer reasonably believed that a person posed an imminent threat of serious bodily harm" include: "(1) why the officer was called to the scene; (2) whether the officer knew or reasonably believed that the person was armed; (3) whether the person verbally or physically threatened the officer or disobeyed the officer; (4) how far the officer was from the person; (5) the duration of the entire encounter; (6) whether the officer knew of any ongoing mental or physical health conditions that may have affected the person's response to the officer; and (7) whether the officer could have diffused the situation with less forceful tactics." *Palma*, 27 F.4th at 432 (internal citations omitted).

We begin with the context of Officer Reinink's actions. First, in anticipation of the potential need for emergency intervention at the demonstration, GRPD officers had received an email on April 3, 2020, "which directed personnel to ensure their body cameras are appropriately charged." Yet Officer Reinink admits that,

in violation of GRPD policy, his body camera was not on during the incident. Though he asserts that his body camera was off because "the battery died," likely "early in the night," GRPD's investigation concluded that Reinink turned it off "due to a privileged conversation that he engaged in, which is permitted[,]" but failed to reactivate it. Officer Reinink also admits that he knew, based on his training, that he needed a witness to observe him loading the munition, but nevertheless failed to enlist one prior to loading and firing the Spede-Heat. Sergeant Bush, moreover, testified that he had never heard of an officer, not at GRPD nor anywhere else in the nation, mistaking a Spede-Heat canister for a Muzzle Blast. Though these violations of departmental policy do not, on their own, deprive an officer of qualified immunity, they are "relevant to the first prong of the qualified immunity analysis." *Latits v. Phillips*, 878 F.3d 541, 553 (6th Cir. 2017). On this record, a jury could find that Officer Reinink's failure to follow police department required protocol and his deployment of potentially deadly force evidences "plainly incompetent" behavior that falls outside the ambit of qualified immunity's protection, *see Stanton v. Sims*, 571 U.S. 3, 6 (2013) (quoting *al–Kidd*, 563 U.S. at 744) rather than the type of reasonable "split-second judgment[]" under "tense uncertain, and rapidly evolving" conditions that supports qualified immunity, *see Graham*, 490 U.S. at 396.

With this context in mind, we assess the reasonableness of the use of deadly force, guided by the *Palma* factors.[1] First, Officer Reinink "was called to

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[1] Although *Palma* was decided in 2022, with one exception, the factors identified in its deadly force analysis come from cases decided before 2020. *See Palma*, 27 F.4th at 432. The one

the scene," *Palma*, 27 F.4th at 432, to deal with tumultuous crowd conditions, which included individuals throwing objects at officers. These facts support a finding that Officer Reinink faced an imminent risk of serious physical harm.

Second, the video shows that Hart possessed a cigarette, not any weapons, an observation corroborated by testimony of both parties. *Palma* noted that "even if the person's hands are not visible—and even if he appears to be suspiciously reaching for something in his clothing—these facts would not lead a reasonable officer to believe that the person posed an immediate threat of serious harm." 27 F.4th at 434; *see also id.* (collecting authorities). Video footage shows Hart placing his left hand in his pocket as he approached the officers, but, before Officer Reinink fired the Spede-Heat cannister at him, Hart had withdrawn his hand from the pocket, and no weapons could be seen. We cannot say that the evidence supports Officer Reinink's contention that he "reasonably believed" that Hart "posed an imminent threat of serious bodily harm." *See id.* at 432.

The third factor is "whether [Hart] verbally or physically threatened the officer or disobeyed the officer." *Id.* "When a person does not act 'aggressively' towards an officer, that fact undermines the officer's claim that the person presented an immediate threat

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exception is *Wright*, decided in June 2020, which *Palma* cites for the third factor—whether the plaintiff engaged in threatening or disobedient behavior toward the officer. *See Palma*, 27 F.4th at 432. *Wright*, however, relies on a 2017 case, *Smith v. City of Troy*, 874 F.3d 938 (6th Cir. 2017), for this proposition. *See Wright*, 962 F.3d at 867-68. *Palma*, therefore, did not create new law; it merely consolidated existing clearly established law.

of bodily harm." *Id.* at 434. Hart initially approached the police line at a walking pace and stopped several feet away before Sergeant Bush stepped out of the line to pepper spray him. When he was pepper sprayed, Hart turned away from Sergeant Bush, retreated a number of steps, and then began turning back. At that point, he was unarmed, had not verbally or physically threatened the officers, and had stopped advancing toward the police line. Construing the evidence in Hart's favor and focusing on the moment that Officer Reinink shot Hart with a Spede-Heat cannister, we cannot say that Hart presented an immediate threat of serious bodily harm to the officers.

The fourth factor is "how far the officer was from the person." *Palma*, 27 F.4th at 432. Although a few feet of distance may be meaningless when a firearm is involved, the distance is highly relevant when an officer fears a hand-to-hand confrontation. *Id.* at 435. Hart's unarmed status—affirmed by Hart's holding of a cigarette in his right hand and removal of his left hand, unarmed, from his pocket—might indicate a reasonable fear of "a hand-to-hand confrontation." *Id.* at 435. But critically, Officer Reinink approached Hart only after Hart had turned his back to the police line and stepped away from pepper spray. Sergeant Bush had also backed away from Hart. The facts that Hart was approximately eight to ten feet away when Officer Reinink shot him with Spede-Heat, that the officers on the scene did not observe Hart with any weapons, and that Hart's progress toward the officers had already been halted by the deployment of pepper spray weigh in favor of finding that Hart "did not pose an imminent threat of harm." *Id.* at 435-36.

Turning to the fifth consideration—the duration of the encounter, *Palma*, 27 F.4th at 432—Hart began turning around only seconds after being pepper sprayed. This "very brief moment" between Hart's turn and Officer Reinink's split-second decision to deploy Spede-Heat weighs in favor of Officer Reinink. *See Untalan v. City of Lorain*, 430 F.3d 312, 317 (6th Cir. 2005); *Graham*, 490 U.S. at 397.

Because the sixth *Palma* factor, "whether the officer knew of any ongoing mental or physical health conditions that may have affected the person's response to the officer," *Palma*, 27 F.4th at 432, is not at issue, we need not address it.

As to the final factor, "whether the officer could have diffused the situation with less forceful tactics," *Palma*, 27 F.4th at 432, Officer Reinink's testified that he intended to deploy Muzzle Blast, "a powder dispersion round" suitable for "crowd control management" at "intermediate and close deployment," not Spede-Heat. This indicates that less forceful tactics were available and, accordingly, that Officer Reinink did not face an imminent threat of harm.

All the facts, viewed at this stage in the light most favorable to Hart, demonstrate that Officer Reinink faced a split-second decision during a potentially dangerous demonstration-turned-riot. But "[t]he fact that a situation 'unfolds quickly' is not . . . sufficient to justify the application of deadly force," *Palma*, 27 F.4th at 432, when it is not accompanied by a credible threat to the safety of an officer or the public. *Id.* In the moments before Officer Reinink deployed deadly force, Hart did not present such a threat. And the tumultuous scene is the only other factor weighing in Officer Reinink's favor. As a result, "a reasonable jury

could find that [Officer Reinink] used excessive force" when he fired Spede-Heat at Hart at point-blank range. *See Palma*, 27 F.4th at 432.

Turning to the "clearly established" prong, we consider "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Baynes*, 799 F.3d at 610 (quoting *Saucier*, 533 U.S. at 202). "It has been well settled law for a generation that, under the Fourth Amendment, '[w]here a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Walker*, 649 F.3d at 503 (quoting *Garner*, 471 U.S. at 11). The question in this case is whether Officer Reinink could reasonably conclude that Hart posed a serious danger to those on the scene.

Hart's conduct resembles that in *Sample v. Bailey*, 409 F.3d 689 (6th Cir. 2005). There, we determined that the officer's use of deadly force "was constitutionally impermissible" where the suspect's "movement was . . . limited and he could not quickly charge the officers," "[h]e was not verbally threatening," and "[h]is hands were visible and empty." *Id.* at 697. Similarly, here, the video footage reflects that Hart's movement was impaired due to Officer Bush's deployment of pepper spray. Officer Johnson provided deposition testimony that Hart "turned his body away from us after being hit with the chemical spray, and then he turned back towards us," but "did not make an advance" on the officer line. Hart did not make verbal threats or approach the officers aggressively after Sergeant Bush sprayed him. And, as reflected in the video, Hart was visibly unarmed. On this record, no

reasonable officer could have thought he had probable cause to use deadly force against Hart.

Our precedent makes clear that officers have fair warning that they may not use deadly force "[w]here the suspect poses no immediate threat to the officer and no threat to others [in the area]," *Smith v. Cupp*, 430 F.3d 766, 775–76 (6th Cir. 2005) (quoting *Garner*, 471 U.S. at 11), and we have affirmed the denial of qualified immunity where video footage "d[id] not conclusively show whether that was the case." *Lewis v. Charters Twp. of Flint*, 660 F. App'x 339, 347 (6th Cir. 2016). Given that a suspect resisting arrest and fleeing the crime scene does not justify deadly force, Hart's lesser disobedience—turning back around to face the officer line—could not warrant deadly force.

As Plaintiffs point out, our precedent also makes clear that "[t]he use of less-than-deadly force in the context of a riot against an individual displaying no aggression is not reasonable." *Ciminillo*, 434 F.3d at 468. Though inapposite with regard to Sergeant Bush's response to Hart's initial approach, *Ciminillo* becomes far more applicable to Officer Reinick's actions in the moments immediately after Hart was pepper sprayed. Again, Hart was visibly unarmed and had retreated several steps from where Sergeant Bush pepper sprayed him when Officer Reinick left the police line to confront Hart. And Hart was in the process of turning back to look at the police line when Officer Reinick launched the cannister of Spede-Heat at him at point blank range. In that moment, Hart's hands were at his sides, he was leaning on his back foot, and he was not advancing from his point of retreat. Viewing the facts in the light most favorable to Hart and drawing all reasonable inferences in his

favor, as we must, *Scott*, 550 U.S. at 378 (quoting *Diebold, Inc.*, 369 U.S. at 655), Hart no longer presented the aggressive behavior that he had demonstrated moments earlier when he was advancing toward the police line.

"Precedent involving similar facts can help move a case beyond the otherwise 'hazy border[] between excessive and acceptable force' and thereby provide an officer notice that a specific use of force is unlawful." *Kisela v. Hughes*, 584 U.S. 100, 104–05 (2018) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7, 18 (2015) (per curiam)). *Ciminillo* demonstrates that, to the extent any "hazy border" existed in this context at the time, it obscured whether officers may use some degree of nonlethal force. That an officer may not use deadly force against a person displaying no aggression, even during a riot, was and remains squarely "beyond debate." *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021) (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017)).

The dissent quibbles over facts that it suggests separate *Ciminillo* from the case at hand—that Hart's hands were not raised like Ciminillo's were, that Hart approached the police line despite officers' dispersal orders, and that Hart turned back toward the officers after he was pepper sprayed. But Ciminillo also approached the police officer after "officers ordered the crowd to disperse via megaphones." *Ciminillo*, 434 F.3d at 463. And, although the dissent has identified two other purported differences, it fails to explain how either might be material. An unarmed man is not displaying "aggressive behavior" by keeping his arms at his sides or by turning around in place. Thus, these differences do not diminish the principle regarding reasonable force against a person not demonstrating

aggressive behavior during a riot that we clearly established in *Ciminillo*. *See Rivas-Villegas*, 595 U.S. at 5, 7 (requiring "similar facts" but not cases that are "directly on point").

Taken together, under our precedent, it was clearly established in May 2020 that the deployment of deadly force against an unarmed individual who posed no imminent threat to officers, such as Hart, was constitutionally impermissible. We therefore reverse the grant of summary judgment in favor of Officer Reinink.

B. Claims Against the City

Recognizing that "there can be no doubt that § 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights," the Supreme Court has long held that a municipality can be sued under § 1983 for constitutional violations for which "the government as an entity is responsible." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 700-01 (1978). The preliminary question in a *Monell* analysis is "whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). "Municipal liability for the actions of employees may not be based on a theory of respondeat superior." *Berry v. City of Detroit*, 25 F.3d 1342, 1345 (6th Cir. 1994) (emphasis omitted).

Our precedent provides at least "four methods" to prove a municipality's illegal policy or custom—the plaintiff may prove "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified

illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Wright*, 962 F.3d at 880 (quoting *Jackson v. City of Cleveland*, 925 F.3d 793, 838 (6th Cir. 2019)). "[T]he dismissal of a claim against an officer asserting qualified immunity in no way logically entails that the plaintiff suffered no constitutional deprivation, nor, correspondingly, that a municipality . . . may not be liable for that deprivation." *Doe v. Sullivan County*, 956 F.2d 545, 554 (6th Cir. 1992).

Both before the district court and on appeal, Hart and Guzman connect their record evidence to the theory that the City ratified the officers' unconstitutional conduct by insufficiently investigating and punishing that conduct. *See Pineda v. Hamilton County*, 977 F.3d 483, 494-95 (6th Cir. 2020).[2] To establish *Monell* liability for ratification based on a failure to investigate, a plaintiff needs to show "'not only an inadequate investigation in this instance,' but also 'a clear and

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[2] Elsewhere in their briefing, Hart and Guzman discuss the legal standard for a different form of *Monell* liability—failure to train. Hart and Guzman likewise alluded to that claim in their complaint. A plaintiff can waive a potential appellate argument by failing to first argue it to the district court. *See Laake v.Benefits Comm., W. & S. Fin. Grp. Co. Flexible Benefits Plan*, 68 F.4th 984, 995 (6th Cir. 2023). And a plaintiff can forfeit an argument on appeal by failing to adequately develop it though argumentation. *See Ogbonna-McGruder v. Austin Peay State Univ.*, 91 F.4th 833, 843 (6th Cir. 2024), *cert. denied*, No. 23-1238, 2024 WL 3089575 (U.S. June 24, 2024). Hart and Guzman did not brief the failure to train claim to the district court, and their appellate briefing does not connect this theory to any record evidence. In light of precedent and this record, Hart and Guzman abandoned any failure-to-train claims, so we confine our *Monell* analysis to the preserved ratification claim.

persistent pattern of violations' in earlier instances." *Pineda*, 977 F.3d at 495 (quoting *David v. City of Bellevue*, 706 F. App'x 847, 853 (6th Cir. 2017)). This requires the plaintiff to present evidence of "multiple earlier inadequate investigations . . . concern[ing] comparable claims." *Id.* (quoting *Stewart v. City of Memphis*, 788 F. App'x 341, 344 (6th Cir. 2019)). "[A]n allegation of a single failure to investigate a single plaintiff's claim" fails to satisfy this standard. *Id.* (emphasis omitted). In contrast, the testimony of several witnesses to persistent patterns of failure to correct excessive force and/or details of past instances of excessive force can sustain *Monell* claims based on a ratification theory. *See Berry*, 25 F.3d at 1355 (discussing cases).

Hart and Guzman present a spreadsheet listing every reported excessive force claim against GRPD officers between 2015 and 2020, which they submit demonstrates that "every single officer in nearly 90 complaints for excessive force over a five-year span was exonerated or cleared by the department." Only two claims were sustained. This, coupled with the GRPD imposing only two days of unpaid leave on Officer Reinink for the sustained charge of unreasonable force, Hart and Guzman argue, evidences the City's deliberate indifference to officers' deployment of unconstitutionally excessive force. The City responds that, absent additional context, "the raw number of excessive force complaints" renders Hart's and Guzman's arguments purely speculative, and thus, insufficient to proceed to trial.

The spreadsheet contains seven columns of information, and all but two columns identify the complaint and the subject officer. Those two columns, labeled "Allegation" and "Finding," offer little in the

way of substance. Every row of the "Allegation" column reads, "Unreasonable Force." The "Finding" column contains the result of GRPD's investigation—indicating only that the claim was sustained, not sustained, withdrawn, or unfounded, or that the subject officer was exonerated. Accordingly, the spreadsheet lacks any substantive description of the events giving rise to the complaint or of any specifics of GRPD's investigation or its results.

Without some qualitative specifics, the district court lacked a basis under our precedent to conclude that genuine disputes of material fact regarding Hart's and Guzman's single ratification claim remain. Some information or evidence indicating that GRPD failed to properly investigate the unreasonable force complaints it received or that dismissed complaints were well-founded could have provided the requisite foothold. *Pineda*, 977 F.3d at 495-96; s*ee also Wright*, 962 F.3d at 882 (reserving the grant of summary judgment based on testimony that the sergeant "had never heard of a use of force incident by a[n] . . . officer that seemed inappropriate to him"). But Hart and Guzman did not adduce information or evidence indicating a pattern supporting their claim of ratification based on a failure to investigate past unreasonable force complaints. Thus, the district court's grant of the City's motion for summary judgment on Hart's and Guzman's municipal liability claims is supported by governing law.

III. Conclusion

For the foregoing reasons, we **AFFIRM** the grants of summary judgment to Officer Johnson, Sergeant Bush, and the City, **REVERSE** the grant of

summary judgment in favor of Officer Reinink, and **REMAND** for further proceedings consistent with this opinion.

CONCURRENCE/DISSENT
OPINION JUSTICE LARSEN
(MAY 15, 2025)

LARSEN, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority opinion to the extent that it affirms the district court's grant of qualified immunity to Officer Johnson and Sergeant Bush and the grant of summary judgment to the City. I respectfully disagree, however, with the majority opinion's analysis of Officer Reinink's liability. Because Hart has failed to meet his burden of establishing that Officer Reinink violated his clearly established rights, I would affirm the district court's grant of qualified immunity to Officer Reinink.

Two long-established qualified immunity principles compel this result. To overcome an officer's qualified immunity defense, "[t]he plaintiff bears the burden of showing that the right was clearly established." *Bell v. City of Southfield*, 37 F.4th 362, 367 (6th Cir. 2022). That is, the "plaintiff must point to a case showing that reasonable officers would have known their actions were unconstitutional under the specific circumstances they encountered." *Id.*; *see also Mosier v. Evans*, 90 F.4th 541, 547 (6th Cir. 2024) (The plaintiff bears the "burden of identifying a case that should have put [the officer] on notice that his specific conduct was unlawful." (citation omitted)).

That principle dovetails with the second—specificity. "[W]hen it comes to excessive force, the Court has repeatedly told us that specific cases are especially important." *Bell*, 37 F.4th at 367 (citation omitted).

That's because "excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (quoting *Mullenix v. Luna*, 577 U.S. 7, 13 (2015)). So while Supreme Court "case-law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 104.

Hart stumbles from the start. In his briefing, Hart offers just a single case to show that Officer Reinink violated his clearly established constitutional rights—*Ciminillo v. Streicher*, 434 F.3d 461 (6th Cir. 2006). *Ciminillo*, however, is not a lethal force case. Hart's lone argument is that *Ciminillo* shows that no amount of force whatsoever could be justified in these circumstances; *a fortiori*, lethal force was inappropriate here. But *Ciminillo* is, as even the majority opinion recognizes, distinguishable from the circumstances of this case.

Hart says *Ciminillo* shows that an officer's use of less-than-lethal force was excessive when a plaintiff "slowly walked toward an officer in a non-threatening manner during a riot." Appellant Br. at 23. Maybe so, but that isn't this case. It is true that *Ciminillo* shares some features of the instant case. The use of force in *Ciminillo* occurred within the setting of a riot while the police broadcasted dispersal orders over the unrest. *Ciminillo*, 434 F.3d at 463. But the record in *Ciminillo* also reveals critical differences in the plaintiff's behavior that significantly distinguish Hart's actions in the instant case.

Ciminillo approached the police with *both of his hands held above his head in the surrender position*. *Id.* He was attempting to comply with their dispersal order by peacefully leaving the scene of the riot, having been turned away from his first attempted exit path by a bat-wielding occupant of a neighboring home. *Id.* The court concluded that no reasonable police officer would believe that a person in this posture presented a serious threat. *Id.* at 468.

In contrast, Hart was not attempting to peacefully leave the scene. Quite the opposite. As the district court explained, "[T]he record is undisputed that Hart, despite multiple orders to leave, returned to the scene, exited his car and advanced toward the officers." R. 132 Opn. & Order, PageID 1563. The situation was tense as Hart approached the officers—given that he walked to the "line of officers with his hand in his pocket." *Id.* His hands were not raised in a surrender position that "demonstrated that he was not armed, and thus posed no threat to the officers' safety." *Ciminillo*, 434 F.3d at 467. Eventually, Hart exposed both of his hands while pointing one at the police officers. It was then that Sergeant Bush sprayed Hart with pepper spray. Hart, however, "was undisputedly not deterred by Sergeant Bush's use of pepper spray." R. 132 Opn. & Order, PageID 1563. Rather than retreat, Hart "lifted his head, took a drag on his cigarette, and turned back again toward the police line." *Id.* In his own testimony, Hart explained "that he 'turned back' because he was 'mad.'" *Id.* at 1539 (quoting Hart. Dep., Ex. M at 256).

This court in *Ciminillo* determined that no force was warranted because Ciminillo "posed no risk" to the safety of officers, largely due to the fact that

Ciminillo held his hands in the surrender positions. *Ciminillo*, 434 F.3d at 467-68; *see also Baker v. City of Hamilton*, 471 F.3d 601, 607 (6th Cir. 2006) ("By raising his hands in the surrender position, [the plaintiff] arguably showed that he was unarmed, was compliant, and was not a significant threat to [the officer's] safety."). The facts aren't the same here. The fact that both of Hart's hands were visible in the seconds directly before Officer Reinink's use of force does not bring the instant case within the scope of *Ciminillo*. Hart's hands were never in the surrender position; he was unwilling to comply with the officers' directives (including one from Officer Reinink to leave and get back); and he turned back toward the officers, "mad" and undeterred by non-lethal force. So, *Ciminillo* does not place the conclusion that a reasonable officer would perceive Hart as nonthreatening beyond debate.

The majority opinion offers two cases of its own—*Sample v. Bailey*, 409 F.3d 689 (6th Cir. 2005), and *Lewis v. Charters Township of Flint*, 660 F. App'x 339, 357 (6th Cir. 2016). *Sample* is factually distinguishable and not sufficiently on point to create a clearly established right. *See Bell*, 37 F.4th at 368. Among many distinguishing factors, the police in *Sample* found the defendant in a cabinet, meaning that "[h]is movement was therefore limited and he could not quickly charge the officers." *Sample*, 409 F.3d at 697. Here, however, Hart was roughly eight to ten feet away from the officers and presumably could charge at any moment, especially given that the pepper spray appeared to have little effect on him. As for *Lewis*, it is also factually distinguishable. Hart was not "a fleeing suspect," *Lewis*, 660 F. App'x at 347, rather he was advancing seconds before he was pepper sprayed, and undeterred,

had turned back toward the officers again. Moreover, the majority opinion doesn't tie the facts of *Lewis* to this case but instead relies on *Lewis* in support of the general proposition that "officers have fair warning that they may not use deadly force '[w]here the suspect poses no immediate threat to the officer and no threat to others [in the area].'" Maj. Op. at 16 (alterations in the original) (quoting *Smith v. Cupp*, 430 F.3d 776, 775-76 (6th Cir. 2005)). Such general rules don't suffice in this context, and in any event, *Lewis* is an unpublished opinion and cannot create clearly established law. *Bell*, 37 F.4th at 368. Finally, it is Hart's burden to come forward with a case, not this court's. *Id.* at 367. I would affirm the district court's grant of qualified immunity to Officer Reinink.

For these reasons, I respectfully dissent in part.

JUDGMENT, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (MAY 15, 2025)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEAN HART; TIFFANY GUZMAN,

Plaintiffs-Appellants,

v.

CITY OF GRAND RAPIDS, MICHIGAN; PHILLIP REININK, BRAD BUSH, and BENJAMIN JOHNSON, Officers, in their individual and official capacities,

Defendants-Appellees.

No. 23-1382

Before: GILMAN, STRANCH, and LARSEN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED

IN PART, REVERSED IN PART, and REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Clerk

**OPINION AND ORDER,
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
(MARCH 31, 2023)**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SEAN HART and TIFFANY GUZMAN,

Plaintiffs,

v.

CITY OF GRAND RAPIDS, ET AL.,

Defendants.

Case No. 1:20-cv-899

Before: Jane M. BECKERING,
United States District Judge.

OPINION AND ORDER

Plaintiffs filed this § 1983 action against the City of Grand Rapids ("the City") and three Grand Rapids Police Department (GRPD) officers, alleging federal claims under this Court's federal-question jurisdiction and state-law claims under this Court's supplemental jurisdiction. Plaintiffs' claims arise from their two encounters with GRPD officers on the evening of May 30, 2020 in downtown Grand Rapids, Michigan,

encounters that were captured on several videos. Defendants moved for summary judgment (ECF Nos. 111 & 112), and, for the following reasons, the Court grants the motions as to the federal claims and denies the motions as to the state-law claims, which are dismissed without prejudice.

I. Background

A. Factual Background

The Protest. The Special Response Team (SRT) is a full-time unit of the GRPD that responds to high-risk tactical situations, including barricaded gunmen, hostage situations, search warrants, and civil unrest (JSMF[1] ¶ 7). GRPD Sergeant Brad Bush and GRPD Officers Benjamin Johnson and Phillip Reinink, the three individual Defendants in this case, were members of the SRT on Saturday, May 30, 2020 (*id.* ¶¶ 8-9).

On that date, a "Justice for George Floyd" protest was scheduled in downtown Grand Rapids (Police Incident Report, Jt. Ex. A [ECF No. 109-1] at 4; Payne Dep., Jt. Ex. Y [ECF No. 109-19] at 18). The SRT was activated to be on standby due to recent spikes in violence during similar protests across the country (Police Incident Report, Jt. Ex. A at 4 & 11; Payne Dep., Jt. Ex. Y at 17-18). Sergeant Johnson indicated that because of the "anti-police climate" across the country, the GRPD was "prepared for the worst" (Police Incident Report, Jt. Ex. A at 11).

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[1] Unless otherwise noted, and for purposes of resolving only the motions at bar, the Court derives the factual background from the parties' Joint Statement of Material Facts (ECF No. 108).

In pertinent part, the SRT prepared for the event by organizing "crowd control" packs containing specialty munitions they might need based on available information (Ungrey Dep., Jt. Ex. R [ECF No. 109-12] at 26-27; Garrett Dep., Jt. Ex. T [ECF No. 109-14] at 13-23). GRPD Officer Joseph Garrett II, an SRT member and munitions instructor, related that when he organized the packets, he kept the "Muzzle Blasts," which are designed to be used directly on an individual at close range, separate from the "Spede Heat" munitions, which are aerial crowd control devices meant to be shot from a long distance (Garrett Dep., Jt. Ex. T at 7-10, 13-14, 71-72). Both Muzzle Blasts and Spede Heat contain the chemical agent orthochlorobenzalmalononitrile or "CS," a form of tear gas (Reinink Dep., Jt. Ex. O [ECF No. 109-9] at 31; Garrett Dep., Jt. Ex. T at 45; JSMF ¶¶ 15 & 21), although Muzzle Blast delivers the chemical in powder form (Wortz Dep., Jt. Ex. V [ECF No. 109-16] at 8). Both are deployed from a 40mm launcher (Reinink Dep., Jt. Ex. O at 30; Wortz Dep., Jt. Ex. V at 9). Spede Heat is delivered with the launcher pointed skyward at a 30- to 60-degree angle to the intended target zone up to 150 yards away (JSMF ¶ 21). Spede Heat is not designed to be directly fired at a person, and, if used incorrectly, can cause significant injury, including death (*id.*). GRPD Officer Jeremy Wortz testified that, in contrast, "there's no projectile whatsoever" in a Muzzle Blast canister, just the "powder that comes out of the barrel" (Wortz Dep., Jt. Ex. V at 8). GRPD Lieutenant Matthew Ungrey and several SRT officers indicated that the SRT was trained that the "target area" at which to aim a Muzzle Blast is a person's chest or "center mass" (Reinink Dep., Jt. Ex. O at 30;

Johnson Dep., Jt. Ex. P at 27; Ungrey Dep., Jt. Ex. R at 16-17; Wortz Dep., Jt. Ex. V at 9).

Lieutenant Ungrey testified that "all of the 40-millimeter cartridges look very similar" and that the Muzzle Blast and Spede Heat canisters additionally have very similar "markings and whatnot" (Ungrey Dep., Jt. Ex. R at 35). Officer Garrett testified that the Muzzle Blast canisters and the Spede Heat canisters look "very, very much alike" and could be easily mixed up in the dark (Garrett Dep., Jt. Ex. T at 31). The parties included the following photograph of the canisters as a joint exhibit:

(Jt. Ex. E [ECF No. 109-5 at PageID.647] at 6).

The protest on May 30, 2020 began peacefully at around 3:00 p.m. (Police Incident Report, Jt. Ex. A at 6). However, according to the officers and Plaintiffs in this case, downtown Grand Rapids devolved in the evening into a chaotic scene that included—

- unruly and violent rioters throwing bottles and bricks, causing explosions, starting fires, and breaking windows (Police Incident Report, Jt. Ex. A at 4-13);
- sirens, "people breaking windows" and "throwing things" (Hart Dep., Jt. Ex. M [ECF No. 109-7] at 125-133);
- sirens, police cars, fires, fire trucks, destruction, "random people smashing everything—cars and windows" (Guzman Dep., Jt. Ex. N. [ECF No. 109-8] at 58-62);
- rioters throwing "anything that someone could find on the ground" at law enforcement, starting fires and explosions, smashing windows, yelling, swearing, and threatening to kill the police (Reinink Dep., Jt. Ex. O at 169-71);
- rioters assaulting officers with rocks, bricks, cements, pipes, explosives and fireworks; "outrageous things that . . . [fell] outside of the scope of normal training" (Ungrey Dep., Jt. Ex. R at 22); and
- a level of "destruction" and "violence" that an officer of 12 years indicated he had "never encountered," including "hundreds of rioters throwing various objects from full water

> bottles, concrete bricks, rocks, glass bottles"; setting fires to police cars; and "causing destruction throughout the downtown area" (Umano Dep., Jt. Ex. U at 44-45).

GRPD Police Chief Eric Payne described the evening as "unprecedented" (Payne Dep., Jt. Ex. Y at 112). The hours of video footage provided by the parties confirm that downtown, initially the site of a peaceful protest, had become complete mayhem.

GRPD officers established a "Field Force line" across Fulton Street at Sheldon Avenue prohibiting any vehicular or pedestrian traffic heading to the west (JSMF ¶ 12). Officer Reinink testified that the purpose of the line was to "protect the area surrounding the police department" (Reinink Dep., Jt. Ex. O at 59-60). The GRPD called all available law enforcement for assistance, including all off-duty GRPD personnel and officers from other agencies including the state police and neighboring city and county law enforcement (Payne Dep., Jt. Ex. Y at 20-21).

Unlawful Assembly. At 9:16 p.m., the GRPD declared an "unlawful assembly," repeatedly issuing an announcement over the public announcement system on its armored vehicle for the crowds to disperse (Dispatch Tr., Jt. Ex. C [ECF No. 109-3] at 574; Dispersal Announcement, Jt. Ex. D; Bush Dep., Jt. Ex. Q [ECF No. 109-11] at 57-58). Specifically, the announcements provided the location of escape routes and warned that failure to disperse would subject those assembled to arrest or other police action, including the use of chemical agents or less-than-lethal munitions that may inflict significant pain or result in serious injury (Dispersal Announcement, Jt. Ex. D). At 9:41 p.m., police were given the order to don gas

masks, and the first deployment of a chemical agent (*i.e.*, tear gas) occurred at 9:48 p.m. (Dispatch Tr., Jt. Ex. C at 572-73).

Officer Garrett testified that the crowd control packets they had prepared were eventually depleted, and officers "were going back into the vault and grabbing special munitions" (Garrett Dep., Jt. Ex. T at 10-12). Lieutenant Ungrey testified that on more than one occasion, he "sen[t] personnel into headquarters to retrieve as many specialty munition as they could carry up to our staging point" (Ungrey Dep., Jt. Ex. R at 26–27). Lieutenant Ungrey testified that "we were being overrun" (*id.* at 27).

First Encounter. At approximately 11:40 p.m., Plaintiff Sean Hart was driving a Chevy Suburban with Plaintiff Tiffany Guzman in the passenger seat (JSMF ¶ 10). Plaintiffs were residents of Muir, Ionia County, Michigan (*id.* ¶¶ 1-2). According to Plaintiff Hart, they had been "fishing" and were previously unaware of the protests and decided to drive around downtown Grand Rapids and "just go see what's going on" before heading home (Hart Dep., Jt. Ex. M at 118-128). They further testified that they did not hear the orders over the loudspeakers from the GRPD to disperse (Hart Dep., Jt. Ex. M at 143-44, 156-57, 177; Guzman Dep., Jt. Ex. N at 107-08).

Plaintiff Hart stopped the Suburban at the intersection of Sheldon Avenue and Fulton Street downtown (JSMF ¶ 11). Testimony from Plaintiffs and the officers, as corroborated by the video footage from several officers' body cameras, indicated that the Suburban lingered in the intersection, and that some in the crowd began gathering at the Suburban, singing along with the song that Plaintiffs played through

their amplified speakers and open car windows, a song called "Fuck the Police" (Ort Body Camera Video, Jt. Ex. G at 03:40:33[2]-03:42:03; Wortz Body Camera Video, Jt. Ex. H at 03:40:46-03:42:30; Barnett Body Camera Video, Jt. Ex. I at 03:40:10- 03:42:09; Hart Dep., Jt. Ex. M at 135, 194 & 234; Guzman Dep., Jt. Ex. N at 65 & 71; Reinink Dep., Jt. Ex. O at 173; Johnson Dep., Jt. Ex. P [ECF No. 109-10] at 14). Hart conceded that he "might have put [the song] on deliberately" (Hart Dep., Jt. Ex. M at 135). Hart remained stopped in the intersection playing his music for close to two minutes before police took any action (Barnett Body Camera Video, Jt. Ex. I at 03:40:24-03:42:08; Lynema Body Camera Video, Jt. Ex J at 03:40:24-03:42:08).

The officers present at the intersection were concerned with the high potential that the Suburban would drive into the Field Force line of officers (Police Incident Report, Jt. Ex. A at 9; Johnson Dep., Jt. Ex. P at 17). Officers Johnson and Reinink indicated that the Suburban was also blocking their view of the crowd that had assembled that evening in the nearby park (Police Incident Report, Jt. Ex. A at 9; Johnson Dep., Jt. Ex. P at 17). According to Officer Johnson, Hart "placing his vehicle in the position that he did was amping the crowd up, which was causing this to be a much more dangerous situation for all of us" (Johnson Dep., Jt. Ex. P at 17).

GRPD officers in riot gear, including Officer Johnson, came to the open passenger side window of

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[2] The time stamps indicated herein from the Body Camera Videos (ECF Nos. 109-6 & 110-7) reference the time stamp on the upper right corner of the footage.

the Suburban where Plaintiff Guzman was sitting (JSMF ¶ 13). The parties do not dispute that Officer Johnson approached the vehicle with his 40mm launcher in the "high ready" position pointed in the direction of the passenger side of the vehicle, *i.e.*, in the direction of Hart and Guzman (*id.* ¶ 14). Officer Johnson testified that his launcher was loaded with a Muzzle Blast CS gas munition (*id.* ¶ 15). Officer Johnson testified that he gave Hart and Guzman "commands to move and to leave in a very . . . loud voice so that they could hear over the crowd and over their . . . music" (Johnson Dep., Jt. Ex. P at 17-18). According to Johnson, that was the "extent of their conversation," and Hart "eventually complied" (*id.* at 18). Hart testified that he moved the Suburban forward, then stopped, then moved forward and stopped two more times (Hart Dep., Jt. Ex. M at 199). Video footage reveals that Hart remained in the intersection for another a minute-and-a-half after being ordered to leave (Ort Body Camera Video, Jt. Ex. G at 03:42:07-03:43:43; Lynema Body Camera Video, Jt. Ex, J at 03:42:08-03:43:43). Hart testified that he was "upset they pointed a weapon at the vehicle" and that moving and stopping the car in this manner was "how I expressed it" (Hart Dep., Jt. Ex. M at 199). Hart subsequently drove the Suburban eastbound away from the officer Field Force line (JSMF ¶ 16).

Second Encounter. However, Plaintiff Hart did not head home. Instead, Hart turned around and headed back to the scene, parking approximately 40 to 50 feet or more from the police Field Force line (JSMF ¶ 17). On footage recorded by a civilian bystander, the crowd can be heard shouting, "Yeah, he's coming back!" (Veldman Video, Jt. Ex. L at 18:42).

Hart exited the Suburban, leaving his door open, and walked toward the officer line (JSMF ¶ 18). Hart walked out in front of the crowd (Reinink Dep., Jt. Ex. O at 95). Sergeant Bush and Officer Reinink both indicated that based on the prior interaction and Hart's return and aggressive manner of approach, they feared that Hart had returned to assault the officers (Police Incident Report, Jt. Ex. A at 9; Use of Force Reports, Jt. Ex. B at 4; Reinink Dep., Jt. Ex. O at 91-92; Bush Dep., Jt. Ex. Q at 51-52). According to Sergeant Bush, and as corroborated by video footage, the dispersal announcements were "very loud" and were being made throughout Plaintiffs' second encounter downtown with the GRPD (Wortz Body Camera Video, Jt. Ex. H at 3:45:12-03:48:54; Veldman Video, Jt. Ex. L at 18:44-21:40; Bush Dep., Jt. Ex. Q at 57-58). Additionally, the video footage capturing the second encounter consistently indicates that Plaintiff Hart put his left hand in his pocket as he walked toward the Field Force line of officers, and the crowd can be heard shouting "yeah, get 'em" (Ort Body Camera Video, Jt. Ex. G at 03:45:12-03:45:24; Wortz Body Camera Video, Jt. Ex. H at 3:45:12-03:45:34; Veldman Video, Jt. Ex. L at 18:48-19:03).

Sergeant Bush left the Field Force line and "yelled at [Hart] to get back," twice raising his arm that held a canister of pepper spray and pointing away from the Field Force line (Police Incident Report, Jt. Ex. A at 8; Ort Body Camera Video, Jt. Ex. G at 03:45:20-03:45:24; Wortz Body Camera Video, Jt. Ex. H at 03:45:32-03:45:36; Bush Dep., Jt. Ex. Q at 57-58). After Sergeant Bush's first gesture to leave, Hart removed his left hand from his pocket and pointed at an officer holding a launcher (Ort Body Camera Video,

Jt. Ex. G at 03:45:21; Barnett Body Camera Video, Jt. Ex. I at 03:45:22; Veldman Video, Jt. Ex. L at 19:01; Hart Dep., Jt. Ex. M at 163). Hart was then only 10 to 15 feet away from the officer Field Force line (Hart Dep., Jt. Ex. M at 165; Reinink Dep., Jt. Ex. O at 95; Bush Dep., Jt. Ex. Q at 36). Like Sergeant Bush, Officer Reinink testified that he also commanded Hart to "leave" and "get back" (Police Incident Report, Jt. Ex. A at 3; Reinink Dep., Jt. Ex. O at 95-99). Hart acknowledged that an officer "could have" been asking him to leave (Hart Dep., Jt. Ex. M at 164).

Nonetheless, Hart "continued advancing" (Bush Dep., Jt. Ex. Q at 57–58). Sergeant Bush sprayed Hart with oleoresin capsicum (OC), *i.e.*, pepper spray (JSMF ¶ 19). Sergeant Bush indicated that he was 8 to 10 feet away from Hart when he sprayed a 2 to 3 second burst of pepper spray from his canister at Hart's head (Bush Dep., Jt. Ex. Q at 39). Video footage captured by a bystander confirms that when the pepper spray first hit Hart, he turned around, facing away from the direction of the police and instead facing the crowd (Veldman Video, Jt. Ex. L at 19:05-19:06). The video clips capturing this moment all consistently indicate that Hart lifted his head and took a drag on the cigarette he was holding in his right hand, then turned back toward the police line (Barnett Body Camera Video, Jt. Ex. I at 03:45:29-03:45:31; Lynema Body Camera Video, Jt. Ex. J at 03:45:26-3:45:30; Veldman Video, Jt. Ex. L at 19:06-19:09). Hart himself testified that he "turned back" because he was "mad" (Hart Dep., Jt. Ex. M at 256).

He indicated that he "turned . . . like to see what else" (*id.* at 166).[3]

Officer Reinink testified that he saw Hart "turn away from [the officers]" and then "turn[] back into us again" in an "aggressive manner," which Reinink opined was "unusual behavior for being pepper-sprayed" (Reinink Dep., Jt. Ex. O at 103-04). Officer Reinink testified that he decided to launch a "Muzzle Blast . . . to try to change that behavior and get him to leave" (*id.* at 104). Officer Reinink testified that using a Muzzle Blast after pepper spray is an "option" that the officers are taught in training (*id.* at 104-07 & 110), a statement that Officer Garrett, the munitions instructor, corroborated (Garrett Dep., Jt. Ex. T at 55-56). Contrary to GRPD training, however, Officer Reinink did not have anyone witness him load the munition into his 40mm launcher (JSMF ¶ 22). Video footage indicates that with his arms holding the launcher level and pointed at Hart's chest, Officer Reinink launched a munition at Hart (Veldman Video, Jt. Ex. L at 19:09-19:10).

Officer Reinink's 44mm launcher did not contain a Muzzle Blast. Instead, it contained a Spede Heat munition, which he launched a few feet away from Hart, striking Hart in the left shoulder area (JSMF ¶ 20). The munition appears to careen off the left shoulder of Hart, who remained on his feet (Wortz Body Camera Video, Jt. Ex. H at 03:45:41-03:45:47; Lynema Body Camera Video, Jt. Ex. J at 03:45:31-

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[3] In an interview with Wood TV8, Hart indicated that as he took a hit on his cigarette, he was "thinking about doing something that probably would have ended bad," and then he turned around to face the police again (Jt. Ex. I, at 1:15-1:25).

03:45:32; Veldman Video, Jt. Ex. L, 19:09-19:11). Consistent with the officers' recollections and their body camera footage, Plaintiff testified that after being struck, he turned around, flicked his cigarette at the officers, "flipped them off" and walked back to the Suburban (Police Incident Report, Jt. Ex. A at 4; Ort Body Camera Video, Jt. Ex. G at 03:45:34-03:46:05; Wortz Body Camera Video, Jt. Ex. H at 03:45:43-03:45:47; Lynema Body Camera Video, Jt. Ex. J at 03:45:32-03:45:38; Veldman Video, Jt. Ex. L at 19:10-19:14; Hart Dep., Jt. Ex. M at 166-67; Guzman Dep., Jt. Ex. N at 81).

Hart still did not leave the scene. Hart concedes that he drove the Suburban forward toward the officers, stopped, backed up a few feet, and "revved" his engine (Police Incident Report, Jt. Ex. A at 9; Use of Force Reports, Jt. Ex. B at 4; Wortz Body Camera Video, Jt. Ex. H at 03:46:21-3:48:55; Veldman Video, Jt. Ex. L at 19:49-20:15; Hart Dep., Jt. Ex. M at 158-60 & 168; Johnson Dep., Jt. Ex. P at 32). Additionally, someone in the crowd audibly shouted "Kill cops!" (Wortz Body Camera Video, Jt. Ex. H at 03:46:35; Lynema Body Camera Video, Jt. Ex. J at 03:46:23; Veldman Video, Jt. Ex. L at 20:04). Other encouragements from the crowd included, "get em!" "massacre the police," and "only good cop is a dead cop!" (Veldman Video, Jt. Ex. L at 19:57-20:00). Hart further concedes, and video footage captures, that each time he revved his engine, the crowd cheered him on (Police Incident Report, Jt. Ex. A at 9; Use of Force Reports, Jt. Ex. B at 4; Ort Body Camera Video, Jt. Ex. G at 03:45:59; Wortz Body Camera Video, Jt. Ex. H at 3:46:41-3:46:52 & 3:47:23-3:47:26; Veldman

Video, Jt. Ex. L at 20:13-20:23; Hart Dep., Jt. Ex. M at 159-60).

Plaintiff Guzman testified that she told Hart "don't do it," because she feared Hart was thinking about addressing the police line again (Guzman Dep., Jt. Ex. N at 100-01). Hart testified that Guzman "might" have told him that, and Hart conceded that he was, in fact, thinking about "getting back out" (Hart Dep., Jt. Ex. M at 169-70). Sergeant Bush and Officer Reinink unholstered their firearms in fear that Hart might attempt to drive his vehicle into the officer line (Police Incident Report, Jt. Ex. A at 9; Use of Force Report, Jt. Ex. B at 4). `

Eventually, as a rioter climbed down from the Suburban's roof, Hart left the scene and drove southbound on Sheldon Avenue, "flipping off" the officers through the sunroof as he drove away (Police Incident Report, Jt. Ex. A at 9; Veldman Video, Jt. Ex. L at 21:02-21:37; Hart Dep., Jt. Ex. M at 169). Guzman testified that she asked Hart if he wanted her to drive them home, but Hart indicated that he was "fine to drive" (Guzman Dep., Jt. Ex. N at 82).

On Monday, June 1, 2020, Plaintiff Hart went to the emergency room for left shoulder pain as well as eye irritation from the pepper spray (Hart Dep., Jt. Ex. M at 174-76; Guzman Dep., Jt. Ex. N at 83-84). Hart testified that he had bruising and a small abrasion on his left shoulder that was photographed (Hart Dep., Jt. Ex. M at 89-92). The parties included the following joint photograph of his shoulder:

(Jt. Ex. HH [ECF No. 110-8]; *see also* Jt. Ex. E [ECF No. 109-5]). Hart experienced no permanent physical injuries (Hart Dep., Jt. Ex. M at 95). Plaintiff Guzman had no physical injuries resulting from the incident (Guzman Dep., Jt. Ex. N at 41).

The GRPD subsequently took disciplinary action against Officer Reinink arising out of the incident (JSMF ¶ 23). Officer Reinink indicated that because Hart "didn't appear to be injured" and walked away from the officers back to the Suburban, Reinink did not even know that he had mistakenly used a Spede Heat until a day or two after the riot (Reinink Dep., Jt. Ex. O at 112-13). Reinink indicated that because the evening was so "chaotic," he was "carrying different types of munitions" and "mistakenly had the wrong

round in [his] 40mm launcher" (Police Incident Report, Jt. Ex. A at 4, 10). Officer Reinink conceded that he should have used a Muzzle Blast (Reinink Dep., Jt. Ex. O at 110-12). Reinink was placed on 20 hours of unpaid leave and required to be retrained and recertified on chemical and less-than-lethal munitions (Reinink Dep., Jt. Ex. O at 17-20; Payne Dep., Jt. Ex. Y at 123-24). The GRPD did not take any action against Sergeant Bush or Officer Johnson arising out of the incident (JSMF ¶ 23).

B. Procedural Posture

A few months later, Plaintiffs initiated this action on September 16, 2020. In their Second Amended Complaint filed on March 22, 2021, which is the operative pleading, Plaintiffs allege the following three counts:

I. Federal Law Claims—Excessive Force Pursuant to 42 U.S.C. § 1983 and/or 4th or 14th Amendments to the United States Constitution—Reinink, Bush and Johnson;

II. Federal Law Claim—Failure to Train, Inadequate Policies and/or Procedures, Illegal Custom and/or Practices—City; and

III. State Law Claims—Gross Negligence, Willful and Wanton Misconduct, Assault and/or Battery— Reinink, Bush and Johnson

(*id.*). Defendants filed their respective Answers (ECF Nos. 50-51).

On April 22, 2022, following completion of discovery, the City, Sergeant Bush, and Officer Johnson filed their motion for summary judgment (ECF No.

111), and Defendant Reinink filed his motion for summary judgment (ECF No. 112). Plaintiffs filed their respective responses in opposition on May 20, 2022 (ECF Nos. 118 & 119). On May 27, 2022, Defendants filed their respective replies (ECF Nos. 120 & 121). The parties collaborated on a joint statement of undisputed facts (ECF No. 108) and a joint exhibit book (ECF Nos. 109 & 110), including nine clips of video footage (ECF Nos. 109-6, 110-5 & 110-7). The video footage consists of body camera video footage from five GRPD officers, the video footage captured by a bystander, video footage from a local news report, and video footage of the GRPD's press conference on July 28, 2020. Having considered the parties' submissions, the Court concludes that oral argument is not necessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d).

II. Analysis

A. Motion Standard

A party may move for summary judgment under Federal Rule of Civil Procedure 56, identifying each claim on which summary judgment is sought. Fed. R. Civ. P. 56(a). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* In resolving a motion for summary judgment, a court must consider the evidence and all reasonable inferences in favor of the nonmoving party. *Burgess v. Fischer*, 735 F.3d 462, 471 (6th Cir. 2013); *U.S. S.E.C. v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 327 (6th Cir. 2013).

The moving party has the initial burden of showing the absence of a genuine issue of material fact. *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 200 (6th Cir. 2010). The burden then "shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "There is no genuine issue for trial where the record 'taken as a whole could not lead a rational trier of fact to find for the non-moving party.'" *Burgess*, 735 F.3d at 471 (quoting *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The function of the court is not "'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Moran v. Al Basit LLC*, 788 F.3d 201, 204 (6th Cir. 2015) (quoting *Anderson*, 477 U.S. at 249).

"A dispute is genuine only if based on evidence upon which a reasonable jury could return a verdict in favor of the non-moving party." *Shreve v. Franklin Cnty., Ohio*, 743 F.3d 126, 132 (6th Cir. 2014) (citation omitted). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Record evidence that can displace the nonmovant's version of the facts includes both videos and photographs. *Brax v. City of Grand Rapids, Mich.*, 742 F. App'x 952, 956 (6th Cir. 2018) (citations omitted). *See, e.g., Mitchell v. Schlabach*, 864 F.3d 416, 424 (6th Cir. 2017) (indicating that its decision to affirm the district court's award of summary judgment was "largely driven

by the available video evidence, which documents most of the relevant events from a helpful angle").

B. Plaintiffs' Federal Claims

The Court turns first to examining Plaintiffs' claims in Counts I and II, which are brought under 42 U.S.C. § 1983, as these claims form the basis of this Court's exercise of original jurisdiction under 28 U.S.C. § 1331 (Federal Question). Section 1983 makes "liable" "[e]very person" who "under color of" state law "subjects, or causes to be subjected," another person "to the deprivation of any rights, privileges, or immunities secured by the Constitution[.]" 42 U.S.C. § 1983. Section 1983 does not confer substantive rights but merely provides a statutory vehicle for vindicating rights found in the United States Constitution. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Dibrell v. City of Knoxville, Tennessee*, 984 F.3d 1156, 1160 (6th Cir. 2021). To bring a claim under § 1983, a plaintiff must "identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of state law." *Troutman v. Louisville Metro Dep't of Corr.*, 979 F.3d 472, 482 (6th Cir. 2020) (citation omitted). A court's threshold inquiry under § 1983 is always to identify the specific constitutional right at issue. *Dibrell, supra.* Once the right is identified, the court must then consider the statutory "elements of, and rules associated with, an action seeking damages for its violation" under § 1983. *Id.*

1. Count I: Plaintiffs' § 1983 Claims against the Individual Defendants

In Count I, which Plaintiffs title "Federal Law Claims—Excessive Force Pursuant to 42 U.S.C. § 1983 and/or 4th or 14th Amendments to the United States Constitution—Reinink, Bush and Johnson," Plaintiffs allege three instances of excessive force by the individual officers: (1) Officer Johnson "pointing a loaded weapon at them"; (2) Sergeant Bush using "mace spray on [Plaintiff] Sean [Hart]"; and (3) Officer Reinink "shooting a long-range projectile directly at and hitting [Plaintiff] Sean [Hart]" (2d Amend. Compl. ¶ 38).

a. General Legal Principles Governing Excessive Force Claims under the Fourth Amendment

The parties analyze Plaintiffs' excessive force claims under the Fourth Amendment. *See* Defs. Briefs, ECF No. 111-1 at PageID.1352 and ECF No. 113 at PageID.1393 n.2; Pls. Resps., ECF No. 118 at PageID.1424 and ECF No. 119 at PageID.1461, 1477. The constitutional right to be free from the use of excessive force by law enforcement officers flows from the Fourth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment. *Graham v. O'Connor*, 490 U.S. 386, 388, 395 (1989); *Thomas v. City of Columbus, Ohio*, 854 F.3d 361, 365 (6th Cir. 2017). "An excessive force inquiry turns on 'whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them.'" *Stricker v. Twp. of Cambridge*, 710 F.3d 350, 364 (6th Cir. 2013) (quoting *Graham*, 490 U.S. at 397 (internal quotation marks omitted)). "Analyzing whether force was excessive

involves balancing 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Vanderhoef v. Dixon*, 938 F.3d 271, 276 (6th Cir. 2019) (quoting *Muehler v. Mena*, 544 U.S. 93, 108 (2005) (quoting *Graham*, 490 U.S. at 396)).

"Factors used to gauge whether there has been excessive force include 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [an arrestee] is actively resisting arrest or attempting to evade arrest by flight.'" *Stricker, supra* (quoting *Graham*, 490 U.S. at 396). The Fourth Amendment's reasonableness test is not capable of "mechanical application," and these three factors are not exhaustive. *Id.* at 396. "This is an objective test, to be 'judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,' and making "'allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation[.]'" *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 903 (6th Cir. 1998) (quoting *Graham*, 490 U.S. at 396-97). Hence, where video footage of an incident exists, as here, a district court would commit reversible error in relying upon "screen shots" from the footage to decide the reasonableness of the officers' use of force, because the officers' perspective "did not include leisurely stop-action viewing of the real-time situation that they encountered." *Cunningham v. Shelby Cnty., Tennessee*, 994 F.3d 761, 767 (6th Cir. 2021).

The reasonableness standard does not consider "whether it was reasonable for the officer 'to create the circumstances,'" and "it does not require them to perceive a situation accurately." *Thomas v. City of Columbus*, 854 F.3d 361, 365 (6th Cir. 2017) (citation omitted). Moreover, "the definition of reasonable force is partially dependent on the demeanor of the suspect." *Solomon v. Auburn Hills Police Dep't*, 389 F.3d 167, 172 (6th Cir. 2004) (internal quotation marks omitted). Hence, "[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." *Saucier v. Katz*, 533 U.S. 194, 205 (2001), overruled on other grounds by *Pearson v. Callahan*, 555 U.S. 223 (2009). "In the excessive-force context, the focus is on the extent of the force used rather than the extent of the injuries, although the two are at least imperfectly correlated." *Roberts v. Coffee Cnty., Tennessee*, 826 F. App'x 549, 556 (6th Cir. 2020) (citing *Wilkins v. Gaddy*, 559 U.S. 34, 37-38 (2010) (per curiam)).

"At the summary judgment stage, . . . once [a court has] determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, . . . the reasonableness of [the defendant's] actions . . . is a pure question of law." *Scott*, 550 U.S. at 381 n.8 (2007). *See Zuress v. City of Newark, Ohio*, 815 F. App'x 1, 8 (6th Cir. 2020) (relying on the proposition of law from *Scott*, 550 U.S. at 381 n.8); *Pelton v. Perdue*, 731 F. App'x 418, 422 (6th Cir. 2018) (same); *Chappell v. City of Cleveland*, 585 F.3d 901, 909 (6th Cir. 2009) (same); *Dunn v. Matatall*, 549 F.3d 348, 353 (6th Cir. 2008) (same). In *Scott,* for example, given the video evidence and lack of

dispute about the material facts, the United States Supreme Court decided to "slosh [its] way through the factbound morass of 'reasonableness'" and ultimately concluded that it had "little difficulty" deciding that it was reasonable for the officer to take the action that he did. 550 U.S. at 383-84.

Last, "[e]ach defendant's liability must be assessed individually based on his own actions." *Pollard v. City of Columbus, Ohio*, 780 F.3d 395, 402 (6th Cir. 2015). A plaintiff must demonstrate that "each defendant, through that defendant's own actions, 'subject[ed]' him (or 'cause[d]' him to be subjected) to the constitutional deprivation." *Rudd v. City of Norton Shores, Mich.*, 977 F.3d 503, 512 (6th Cir. 2020) (citation omitted).

b. Qualified Immunity Defense, in General

It is undisputed that the individual officers in this case were government officials acting under the color of state law and in the course and scope of their employment (JSMF ¶¶ 3-5).[4] "The doctrine of qualified immunity shields 'government officials performing discretionary functions' from liability 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Puskas v. Delaware Cnty., Ohio*, 56 F.4th 1088, 1093 (6th Cir. 2023) (quoting *Harlow*, 457 U.S. at 818). *See also Shumate v. City of Adrian,*

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[4] Plaintiffs sued the officers in both their individual and official capacities. Plaintiffs' official-capacity claims, however, are "only another way of pleading an action against the entity of which the officer is an agent." *Graham*, 473 U.S. at 165-66. The official capacity claims are therefore duplicative of Plaintiffs' municipal liability claim in Count II.

Mich., 44 F.4th 427, 439 (6th Cir. 2022) (holding that the ability to go forward on a § 1983 claim against an individual government official is "limited by the qualified immunity exception") (quoting *Ahlers v. Schebil*, 188 F.3d 365, 372-73 (6th Cir. 1999)). The doctrine "affords officers 'breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.'" *Abdur-Rahim v. City of Columbus, Ohio*, 825 F. App'x 284, 286 (6th Cir. 2020) (quoting *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (quotation marks and citation omitted)).

"[A] defendant is entitled to qualified immunity on summary judgment unless the facts, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and (2) the right was clearly established." *Puskas, supra* (quoting *Williams v. Maurer*, 9 F.4th 416, 430 (6th Cir. 2021)). "Once invoked, the plaintiff must show that the defendant is not entitled to qualified immunity." *Id.* (emphasis in original). Both prongs must be met "for the case to go to a factfinder to decide if [the] officer's conduct in the particular circumstances violated a plaintiff's clearly established constitutional rights. If either one is not satisfied, qualified immunity will shield the officer from civil damages." *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013) (citing *Pearson*, 555 U.S. at 236). "The court may address these prongs in any order, and if the plaintiff cannot make both showings, the officer is entitled to qualified immunity." *Brown v. Lewis*, 779 F.3d 401, 412 (6th Cir. 2015) (citing *Pearson*, 555 U.S. at 236).

Regarding the second prong, the right at issue must have been "'clearly established' when the event occurred such that a reasonable officer would have known that his conduct violated it." *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013) (citing *Pearson*, 555 U.S. at 232). The "relevant, dispositive inquiry" is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Binay v. Bettendorf*, 601 F.3d 640, 652 (6th Cir. 2010) (quoting *Saucier*, 533 U.S. at 202). "[C]learly established law" should not be defined "at a high level of generality." *White v. Pauly*, 580 U.S. 73, 79 (2017) (citations omitted). Such an abstract framing "avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Beck v. Hamblen Cnty., Tenn.,* 969 F.3d 592, 599 (6th Cir. 2020) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)). Rather, the precedent must be "particularized" to the facts of the case. *White, supra* (citation omitted). There does not need to be a case directly on point, but "existing precedent must have placed the . . . constitutional question beyond debate." *Id.* (citation omitted). *Cf. Abdur-Rahim*, 825 F. App'x at 288 (indicating that the Sixth Circuit generally disregards out-of-circuit cases as "clearly established law" because "we can't expect officers to keep track of persuasive authority from every one of our sister circuits") (quoting *Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020)).

The United States Supreme Court has instructed that "[s]pecificity proves especially important in the excessive force context, an 'area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified

immunity unless existing precedent squarely governs the specific facts at issue.'" *Abdur-Rahim*, 825 F. App'x at 286 (quoting *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148, 1153 (2018)). "In the excessive-force context, the law is 'clearly established' only if the plaintiff 'identif[ies] a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment.'" *Evans v. Plummer*, 687 F. App'x 434, 440 (6th Cir. 2017) (citation omitted).

"When more than one officer is involved, the court must consider each officer's entitlement to qualified immunity separately." *Wright v. City of Euclid, Ohio*, 962 F.3d 852, 865 (6th Cir. 2020) (quoting *Smith v. City of Troy*, 874 F.3d 938, 944 (6th Cir. 2017) (per curiam)).

c. Individual Officers

(1) Officer Johnson

In support of summary judgment in his favor based on qualified immunity, Officer Johnson first argues that his actions did not violate clearly established law particularized to the facts of this case (ECF No. 111-1 at PageID.1354). Indeed, Officer Johnson contends that Plaintiffs "cannot cite a case which would have put officers on notice that it was unconstitutional to point a less-than-lethal force option at a vehicle and its occupants that remained in the middle of a riot in a manner that increased the already dangerous situation facing the officers" (*id.*). Officer Johnson argues that he is also entitled to summary judgment on the merits of Plaintiffs' claim against him because he acted reasonably in holding a less-than-lethal force option at the "high ready" where his "action was a low

level of force in response to Plaintiffs' behavior in remaining in the area, blocking traffic and the officers' view of the crowd, and drawing the unruly crowd back toward the field force perimeter line, increasing the danger to the officers and others in the area" (*id.* at PageID.1353, 1356-1357).

In response, Plaintiffs argue that Officer Johnson improperly invites this Court to view the evidence in his favor rather than in the light most favorable to them (ECF No. 119 at PageID.1470-1471). Plaintiffs contend that this Court must believe that Plaintiffs were "simple motorists not connected to the protests that night who found themselves being targeted with force for reasons they did not understand" (*id.* at PageID.1472). Plaintiffs argue that a reasonable finder of fact could certainly conclude that Officer Johnson utilized excessive and unreasonable force in pointing a weapon at Plaintiffs "despite neither [Plaintiff] being armed, committing a crime or posing a threat" (*id.* at PageID.1473-1474). Plaintiffs point out that Guzman believed Officer Johnson was "going to kill her" (*id.* at PageID.1473). Regarding Officer Johnson's assertion of qualified immunity, Plaintiffs briefly indicate that they have "yet to see any precedent that permits an officer to point a weapon at an individual that the officer admits did 'nothing'" (*id.* at PageID. 1477).

Because Officer Johnson has invoked a qualified immunity defense, this Court's threshold inquiry is whether the defense limits Plaintiffs from going forward on their § 1983 excessive force claim against him. "Qualified immunity is intended not only to protect officials from civil damages, but just as importantly, to protect them from the rigors of litigation

itself[.]" *Everson v. Leis*, 556 F.3d 484, 491 (6th Cir. 2009). Plaintiffs bear the burden of showing that (1) Officer Johnson violated a constitutionally protected right and (2) the right was clearly established at the time the act was committed. As the United States Supreme Court and the Sixth Circuit have held, it is not mandatory to address the two qualified immunity prongs sequentially; rather, discussion of only one prong will in some cases result "in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." *Tlapanco v. Elges*, 969 F.3d 638, 656-57 (6th Cir. 2020) (quoting *Pearson*, 555 U.S. at 236-37). In assessing this claim against Officer Johnson, the Court finds the clearly-established prong is dispositive and entitles him to summary judgment on Plaintiffs' excessive force claim against him in Count I.

The Sixth Circuit has held that pointing a *firearm* at an individual may, in some particularized circumstances, constitute excessive force. *See, e.g., Wright*, 962 F.3d at 866; *Vanderhoef*, 938 F.3d at 277–78. However, as Officer Johnson points out in reply (ECF No. 120 at PageID.1498), the mere fact that Plaintiff Guzman *thought* she saw a firearm does not make the law on pointing firearms applicable to the less-than-lethal option that Officer Johnson possessed. There is no dispute that the device Officer Johnson held was a 40mm launcher loaded with a Muzzle Blast CS gas munition.

Plaintiffs have wholly failed to identify *any* precedent "particularized" to the facts of this case, *i.e.*, precedent that places the constitutional question "beyond debate." *See* Pls.' Resp., ECF No. 119 at PageID.1477 ("Plaintiff has yet to see any precedent

that permits an officer to point a weapon at an individual that the officer admits did 'nothing' that showed she was a threat, as Johnson did at pp 16-17 of his deposition."). Hence, Plaintiffs have simply not made the showing necessary to demonstrate that Officer Johnson is not shielded by the doctrine of qualified immunity. As the Sixth Circuit has previously found, the qualified immunity question can properly "begin with, and could end with, the reality that [the plaintiff] points to no Supreme Court or Sixth Circuit case" that constitutes clearly established precedent. *Arrington-Bey v. City of Bedford Heights, Ohio*, 858 F.3d 988, 993 (6th Cir. 2017).

Indeed, Officer Johnson points out that the Sixth Circuit has addressed the topic in only two cases—*Stricker* and *Evans*, within the context of pointing a taser—and has not yet held that pointing a less-than-lethal munition constitutes excessive force in violation of the Fourth Amendment. "[W]hen the facts confronting an officer leave ambiguity about whether the officer's actions violate a constitutional right, the officer is entitled to qualified immunity." *Meadows v. City of Walker*, 46 F.4th 416, 423-24 (6th Cir. 2022).

First, in *Stricker*, 710 F.3d at 364, a 2013 decision, the plaintiff called 911 and requested medical assistance for her son, who was incoherent and losing consciousness after a drug overdose. However, the plaintiff subsequently refused to allow police officers into the family home to check on her son, and the officers eventually forced entry to do so. *Id.* at 354-56. By that point, the plaintiff was in her locked bedroom. *Id.* at 356. An officer kicked in the door, "pointed a taser gun" at the plaintiff, "put a forceful pressure hold" on her to "force her to stand," checked her for

weapons, and "roughly handcuffed her." *Id.* (internal citations omitted). The Sixth Circuit found no constitutional violation, explaining that the officer's actions were objectively reasonable because the plaintiff admitted "repeatedly disobey[ing] lawful officer commands," had "attempt[ed] to prevent medical personnel's access" to her son, and had "attempt[ed] to evade arrest by flight" by hiding in the bedroom. *Id.* at 364-65.

Second, in *Evans v. Plummer*, 687 F. App'x at 442, a 2017 case, the plaintiff claimed that the defendant used excessive force when he "threatened to tase her, then twice pointed his taser at her." The district court concluded that the defendant was not entitled to qualified immunity because "[a] jury could reasonably conclude that [the defendant] intended to maliciously inflict gratuitous fear when he aimed his [t]aser directly at Evans' head." *Id.* On appeal, the defendant argued that the relevant law was not clearly established, and the Sixth Circuit agreed. *Id.* Noting that *Stricker* was the only time that it had even addressed this scenario, the Sixth Circuit indicated that "our court has never found that pointing a taser, as opposed to actually discharging one, constitutes the use of excessive force." *Id.* (footnote omitted). Because it was not apparent from pre-existing caselaw that pointing a taser at the plaintiff violated the Fourth Amendment, the Sixth Circuit reversed the district court's denial of qualified immunity to the defendant. *Id.* at 444.

The absence of any existing precedent on this issue is dispositive of Plaintiffs' excessive force claim against Officer Johnson. Absent any precedent providing notice to the contrary, a reasonable officer in Officer Johnson's position during the unlawful assembly on May 30, 2020 would not have known that he

was committing a constitutional violation when he approached Hart's Suburban with a less-than-lethal force option in the "high ready" position pointed in Plaintiffs' direction. Because Plaintiffs have not shown that Officer Johnson violated a clearly established right, qualified immunity shields Officer Johnson from liability on Plaintiffs' excessive force claim, and the Court grants him summary judgment on this basis.

(2) Sergeant Bush

Next, turning to Plaintiff Hart's claim against Sergeant Bush, Sergeant Bush argues that he is also entitled to qualified immunity where he could not have been on notice that it constitutes excessive force to directly pepper spray a lingering individual blocking an intersection after crowd dispersal orders and warnings have been issued (ECF No. 111-1 at PageID.1358). Alternatively, Sergeant Bush argues that he is entitled to summary judgment on the merits of Plaintiff Hart's claim because his actions were reasonable where Hart "came back to the scene of the riot, after being specifically directed by officers to leave" and after seeing the officers use chemical munitions like pepper spray on the crowd gathering around Hart's car during the first encounter (*id.* at PageID.1359-1360).

In response, Plaintiffs argue that a reasonable finder of fact could conclude that Sergeant Bush utilized excessive force when he sprayed Plaintiff Hart in the face with a chemical agent from close range (ECF No. 119 at PageID.1474). Plaintiffs argue that even though this case involves a riot, the factors in *Graham* are still properly applied (*id.* at PageID. 1475-1476). Plaintiff Hart only briefly addresses Sergeant Bush's assertion of qualified immunity, citing

two cases in support of his contention that Hart had a "clearly established right to not be sprayed at close range with a chemical agent" (*id.* at PageID.1477).

Like Officer Johnson, Sergeant Bush invokes a qualified immunity defense, and Plaintiff Hart bears the burden of showing that Sergeant Bush is not entitled to this defense. In assessing the claim against Sergeant Bush, the Court again finds the clearly-established prong dispositive and entitles Sergeant Bush to summary judgment.

Plaintiff Hart identifies two cases in support of his burden under the clearly-established prong (ECF No. 119 at PageID.1477). Neither case satisfies the requisite showing. The first case Hart identifies is *Ciminillo v. Streicher*, 434 F.3d 461 (6th Cir. 2006). According to Hart, "it was well-established by *Ciminillo* well before 2020 that Bush was not permitted to use any force against a non-aggressor like Hart simply because he was present at an alleged riot scene" (*id.*). *Ciminillo* involved an officer shooting a plaintiff "allegedly without provocation and at point blank range, in the chin and chest with a beanbag propellant." 434 F.3d at 463. Under the plaintiff's version of facts, Ciminillo was walking with his hands above his head in the "surrender" position and "cooperating with police." *Id.* at 463, 467.

Ciminillo does not "squarely govern the specific facts at issue," which, as Plaintiff Hart concedes, are evident in the video evidence in this case (ECF No. 119 at PageID.1474). *Ciminillo* concerned a use of force (beanbag propellant) different from the force used in this case (pepper spray). More importantly, *Ciminillo* did not concern any provocation by the plaintiff whereas Hart was undisputedly advancing on a Field

Force line of police officers. In other words, *Ciminillo* would not have put Sergeant Bush on notice that his action violated the Fourth Amendment.[5] "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that 'every reasonable official' would know." *D.C. v. Wesby*, ___ U.S. ___, 138 S. Ct. 577, 590 (2018).

The second decision Plaintiff Hart identifies is *Grawey v. Drury*, 567 F.3d 302 (6th Cir. 2009). According to the plaintiff's version of facts in *Grawey*, the officer in that case discharged his pepper spray while Grawey "had his hands against the wall, after waiting for the officer to catch up to him, without any indication of resistance." *Id.* at 311. Grawey further contended that the officer "continued to spray [him] from close range" and that "Grawey felt an intense burning before collapsing to the sidewalk, unconscious." *Id.* at 307. The *Grawey* panel held that based on prior precedent of the Sixth Circuit, "[a]n officer has used excessive force when he pepper sprays a suspect who has not been told she is under arrest and

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[5] Sergeant Bush also references the Sixth Circuit's crowd-dispersal decision in *Abdur-Rahim v. City of Columbus, Ohio*, 825 F. App'x 284, 287-88 (6th Cir. 2020), where the Sixth Circuit granted qualified immunity to an officer who used pepper spray first to "fog" the crowd then to take a direct shot at the plaintiff, who did not leave the area after forty-five minutes of dispersal orders (ECF No. 111-1 at PageID.1358). Defendants acknowledge that the Sixth Circuit decided *Abdur-Rahim* in August 2020, *i.e.*, three months after the incident in this case, and the decision therefore could not provide notice to Sergeant Bush for this incident, although the Sixth Circuit's analysis, including its discussion of *Ciminillo*, is consistent with the Court's conclusions herein.

is not resisting arrest." *Id.* at 311 (citing cases therein). The *Grawey* panel additionally held that "[e]ven if [the officer's] use of pepper spray *per se* on Grawey was not excessive force, [the officer's] discharging enough pepper spray at a very close distance to cause Grawey to pass out supports a claim of excessive force." *Id.* at 312.

Plaintiff Hart asserts that "it was established [in] *Grawey* that Plaintiff Hart had a clearly established right not to be sprayed at close range with a chemical agent" (ECF No. 119 at PageID.1477). The Court disagrees. Neither holding in *Grawey* "squarely governs" the undisputed facts at bar. Plaintiff Hart, unlike Grawey, was not merely waiting for an officer to arrive when he was pepper sprayed; rather, it is undisputed that Hart was advancing toward a Field Force line of police during a protest-turned-riot. Additionally, while the video clips in this case do not allow for a precise determination of the distance between Sergeant Bush and Hart, the record is clear that Sergeant Bush did not spray Hart at "close range," nor did Sergeant Bush spray Hart with enough pepper spray to cause Hart to lose even the ability to walk or drive away, let alone lose consciousness. In sum, the decision in *Grawey* would not have put Sergeant Bush on notice that his particularized action violated the Fourth Amendment. Again, unless the precedent is clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply, the rule is not one that every reasonable official would know. *Wesby, supra.*

In conclusion, Plaintiff Hart has not identified precedent showing that a reasonable officer in Sergeant Bush's position on the evening of May 30, 2020 would have known that he was committing a constitutional

violation when he sprayed Hart with a short burst of pepper spray while Hart was advancing toward the Field Force line during a protest-turned-riot. Because Plaintiff has not shown that Sergeant Bush violated a clearly established right, qualified immunity shields Sergeant Bush from liability on Plaintiff Hart's excessive force claim, and the Court grants Sergeant Bush summary judgment on this basis.

(3) Officer Reinink

Last, in support of summary judgment in his favor, Officer Reinink argues that he chose to deploy what he believed to be a less-than-lethal Muzzle Blast only after Plaintiff Hart, in the midst of a riot, chose to "return to the scene, further incite the crowd, exit his vehicle and approach the police line, an individual who had defied police commands, aggressively approached the officers after specifically being ordered to leave, and after an initial deployment of OC spray proved ultimately ineffective at gaining compliance" (ECF No. 113 at PageID.1398-1399). Reinink points out that Muzzle Blast and Spede Heat are the same size, color and weight, with the difference between the two munitions "not readily discernible from the outside when dealing with a fast-paced situation" (*id.* at PageID.1400). Reinink asserts that his mistake was objectively reasonable and/or protected by qualified immunity (*id.* at PageID.1398–1400). According to Officer Reinink, "the only admissible evidence establishes that Reinink made a mistake, one that [a] rational jury would find was reasonable under the circumstances facing him and the other officers during that unprecedented night" (*id.* at PageID.1403).

In response, Plaintiffs assert that it is *not* uncontested that Officer Reinink mistakenly used the munition in question, and Plaintiffs contend that the question of mistake rests on the credibility of Officer Reinink's testimony, which is to be determined by a finder of fact (ECF No. 118 at PageID.1432-1433). Plaintiffs argue that even if other people on the day in question were committing crimes during the protest, force was not justified against Plaintiffs, who were not committing any crimes, engaging in any threatening conduct, or attempting to resist or evade arrest (*id.* at PageID.1433-1435). Plaintiffs opine that during moments of civil unrest, the prohibition on excessive force takes on more significance, not less (*id.* at PageID.1435).

Officer Reinink invokes qualified immunity, and Plaintiff Hart therefore bears the burden of satisfying both prongs of the qualified immunity analysis before his claim may go forward, to wit: (1) whether Officer Reinink violated a constitutionally protected right; and (2) if so, whether the right was clearly established at the time the act was committed. Here, the Court determines that the most efficient approach is to analyze the first prong.

The Supreme Court has held that the doctrine of qualified immunity "affords officers 'breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.'" *Abdur-Rahim*, 825 F. App'x at 286 (quoting *Stanton*, 571 U.S. at 6). *See also Chappell*, 585 F.3d at 907 ("Qualified immunity applies irrespective of whether the official's error was a mistake of law or a mistake of fact, or a mistake based on mixed questions of law and fact.") (citing *Pearson*, 555 U.S. at 231).

According to Plaintiff Hart, however, qualified immunity is not available to Officer Reinink because his claimed mistake—launching a Spede-Heat munition rather than a Muzzle Blast—rests exclusively on finding Officer Reinink's testimony credible. The Court disagrees. As Officer Reinink points out in his reply brief (ECF No. 121 at PageID.1509), his testimony is not the only basis supporting the proposition that a mistake occurred. Rather, the record also contains testimony from other GRPD officers that the training for discharging Spede Heat required an upward-angled trajectory, launched over a crowd, and from a significant distance away, *e.g.*, "150 yards," whereas the training for discharging a Muzzle Blast required an officer to point the launcher in the direction of the subject's chest from a relatively short distance, *e.g.*, two to five feet (Ungrey Dep., Jt. Ex. R at 16-17 & 30; Garrett Dep., Jt. Ex. T at 9-10; Umanos Dep., Jt. Ex. U at 11-12 & 46). The record also contains video evidence showing that Officer Reinink discharged the launcher consistent with the training for Muzzle Blast rather than the training for Spede Heat (Veldman Video, Jt. Ex. L at 19:09-19:10; Umanos Dep., Jt. Ex. U at 46).

In contrast, Plaintiff Hart has presented no evidence to contradict Officer Reinink's claimed mistake. Plaintiff Hart cannot merely announce that a genuine issue of material fact exists. Rather, as the Supreme Court has emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Scott*, 550 U.S. at 380 (quoting *Matsushita*, 475 U.S. at 586-87). To withstand a properly supported motion

for summary judgment, a plaintiff is obliged to come forward with "specific facts," based on "discovery and disclosure materials on file, and any affidavits," showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Scott, supra.* Plaintiff Hart has failed to carry this burden by adducing evidence refuting Officer Reinink's account and has concomitantly failed to demonstrate that the claimed mistake is a genuine issue for trial.

Of course, an officer's "good intentions" cannot make "an objectively unreasonable use of force constitutional." *Graham*, 490 U.S. at 397. Conversely, an officer's violation of police department policies does not alone equate to a violation of the Fourth Amendment's objective reasonableness standard. *See Latits v. Phillips*, 878 F.3d 541, 553 (6th Cir. 2017); *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992) (holding that the officer's use of force was reasonable, even though the use of force arguably violated police policy). In analyzing excessive force claims brought under § 1983, "the issue is whether the officers violated the Constitution, not whether they should be disciplined by the local police force." *Hocker v. Pikeville City Police Dep't*, 738 F.3d 150, 156 (6th Cir. 2013) (quoting *Smith*, 954 F.2d at 347). "[T]he Supreme Court has been cautious to draw a distinction between behavior that violates a statutory or constitutional right and behavior that violates an administrative procedure of the agency for which the officials work." *Coitrone v. Murray*, 642 F. App'x 517, 522 (6th Cir. 2016) (citation omitted). Hence, "[e]ven if an officer acts contrary to her training, . . . that does not itself negate qualified

immunity where it would otherwise be warranted." *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 616 (2015).

Under *Graham,* 490 U.S. at 396-97, this Court must give careful attention to the particular facts and circumstances before it, including (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." Further, this Court must give a "measure of deference to the officer's on-the-spot judgment about the level of force necessary," a measure of deference that "carries great weight when all parties agree that the events in question happened very quickly[.]" *Brax*, 742 F. App'x at 956 (quoting *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir. 2008)).

As Plaintiff Hart indicates, "the undeniable reality of these events" is evident in the video footage (ECF No. 119 at PageID.1474). In examining the relevant facts at bar, including all inferences in Plaintiff Hart's favor that are supportable by the record, the Court finds that the circumstances that confronted Officer Reinink during the unlawful assembly on May 30, 2020 were archetypal "tense, uncertain, [or] rapid[.]" *See Graham*, 490 U.S. at 397.

Under the first *Graham* factor, Plaintiff Hart's conduct, which included not only remaining at the scene of an unlawful assembly but also returning to the same scene after being directed to leave, presumably violated more than one state statute but most notably Mich. Comp. Laws § 750.523 (providing that "[i]f any person . . . when required by any such magistrate or officer to depart from the place of such

riotous or unlawful assembly, shall refuse or neglect so to do, he shall be deemed to be 1 of the rioters or persons unlawfully assembled, and shall be liable to be prosecuted and punished accordingly"). *See also* Mich. Comp. Laws § 752.542 (Incitement to riot). While Plaintiff Hart emphasizes that he was not charged with this or any other crime, the pertinent question is the severity of the crime witnessed by an officer in Officer Reinink's position, not whether a prosecutor subsequently decided to bring charges. *See, e.g., Schliewe v. Toro*, 138 F. App'x 715, 722 (6th Cir. 2005) (indicating that "[w]hile [the plaintiff] was not charged with a serious crime, it was difficult for the officers to judge his intentions," and ultimately holding that "[t]he amount of force used to subdue [the plaintiff] was reasonable"). Again, the reasonableness standard focuses on the particular moment the officer made his decision to use force and the information he had at that time. *See, e.g., Bouggess v. Mattingly*, 482 F.3d 886, 889 (6th Cir. 2007). Here, refusing or neglecting to leave an unlawful assembly is a serious crime, and this first factor weighs in favor of Officer Reinink.

Turning to the second *Graham* factor, the Court concludes that under the relevant facts, including all inferences in Plaintiff's Hart favor that are supportable by the record, a reasonable officer on the scene on the evening of May 30, 2020 would find that Hart posed an immediate threat to the safety of the officers in the Field Force line. Specifically, the record is undisputed that Hart, despite multiple orders to leave, returned to the scene, exited his car and advanced toward the officers. Hart undisputedly walked toward the Field Force line of officers with his hand in his pocket. Hart was undisputedly not deterred by Sergeant Bush's use

of pepper spray. And just before Officer Reinink launched the munition, Hart undisputedly lifted his head, took a drag on his cigarette, and turned back again toward the police line. The second factor likewise weighs in favor of Officer Reinink.

Regarding the third *Graham* factor, the Sixth Circuit has held that "[a] plaintiff's resistance to an officer's commands is relevant even if the officers were not attempting to arrest him." *Kelly v. Sines*, 647 F. App'x 572, 575 (6th Cir. 2016) (citing *Caie v. West Bloomfield Twp.,* 485 F. App'x 92, 96 (6th Cir. 2012)). Again, the record is replete with unobeyed orders to leave. This factor also weighs in favor of Officer Reinink.

In sum, balancing the use of force with the level of threat, the Court concludes from the totality of the circumstances that Officer Reinink's conduct did not violate the Fourth Amendment, and he is entitled to qualified immunity. Under the tense and uncertain circumstances provoked by Hart's conduct, Officer Reinink made a split-second judgment to launch a munition toward Hart. While Officer Reinink mistakenly launched the wrong munition, his split-second judgment was not objectively unreasonable. Even when hindsight desires a different result and even when the conduct at issue violates an internal department policy, courts must apply the legal principles that govern claims of excessive force under the Fourth Amendment, including application of the doctrine of qualified immunity. *See, e.g., Kelly*, 647 F. App'x at 577 (holding that the officer's actions did not violate the Fourth Amendment where the officer reasonably, but mistakenly, believed that the plaintiff was not restrained by his seatbelt during the incident). Based

on these principles as applied to the undisputed facts, the Court holds that Plaintiff Hart has not met his burden of demonstrating a constitutional violation. Accordingly, Officer Reinink, like Officer Johnson and Sergeant Bush, is entitled to qualified immunity.

2. Count II: Plaintiffs' § 1983 Claim against the City

In Count II, which Plaintiffs title "Failure to Train, Inadequate Policies and/or Procedures, Illegal Custom and/or Practices—City," Plaintiff alleges that the City violated the "4th and/or 14th Amendments" by its—

> a. Negligent training, policy and/or procedures resulting in the use of force under the circumstances of this case such that the police officers used force when no force was necessary, leading to deliberate indifference as to whether [Plaintiffs] Sean [Hart] and/or Tiffany [Guzman] would be injured;
>
> b. Negligent and/or inadequate and/or failure to train defendant officers on the proper encountering of unarmed individuals, including [Plaintiffs] Sean [Hart] and/or Tiffany [Guzman]; [and]
>
> c. Negligent supervision or failure to supervise the standards and certifications of defendant officers, and further, lack of proper discipline of said officers for this and all other incidents learned through the course of discovery.

(2d Am. Compl. ¶ 43).

In support of summary judgment in its favor, the City first argues that because Plaintiffs have failed to show an underlying constitutional violation by the individual Defendants, their *Monell* claim fails (ECF No. 111-1 at PageID.1367). The City further argues that Plaintiffs cannot show that the City's SRT training is constitutionally inadequate where the SRT officers were annually trained on the use of specialty munitions and use of force, as recently as one month before the riot (*id.*). Last, the City argues that Plaintiffs' "deliberate indifference" claims fail because there are no prior instances of unconstitutional conduct that would have put the City on notice that additional training was necessary (*id.* at PageID.1367-1368).

In response, relying only on *Marchese v. Lucas*, 758 F.2d 181 (6th Cir. 1985), Plaintiffs argue that the "'slap on the wrist' punishment to defendant Reinink" and the fact that "every single officer in nearly 90 complaints for excessive force over a five-year span was exonerated or cleared by the department" are practices and procedures that "embolden" officers to use excessive force (ECF No. 119 at PageID.1481-1482). Plaintiffs argue that "[a] reasonable finder of fact could conclude that it was that climate or culture of ratification within the department that was the driving force behind the constitutional violations in the present case" (*id.* at PageID.1482).

A city is a "person" under § 1983 and so "can be held liable for constitutional injuries for which it is responsible." *Greene v. Crawford Cnty., Mich.*, 22 F.4th 593, 616 (6th Cir. 2022) (citing *Morgan v. Fairfield Cnty.*, 903 F.3d 553, 565 (6th Cir. 2018) (citing *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 (1978))). However, municipalities cannot

be held liable "under § 1983 on a respondeat superior theory—in other words, 'solely because it employs a tortfeasor.'" *D'Ambrosio v. Marino*, 747 F.3d 378, 388-89 (6th Cir. 2014) (quoting *Monell*, 436 U.S. at 691). Rather, municipal liability under § 1983 depends on whether the plaintiff's constitutional rights have been violated as a result of "a 'policy' or 'custom' attributable" to the local government. *Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir. 2000).

The Sixth Circuit has held that "the dismissal of a claim against an officer asserting qualified immunity in no way logically entails that the plaintiff suffered no constitutional deprivation, nor, correspondingly, that a municipality (which, of course, is not entitled to qualified immunity) may not be liable for that deprivation." *Doe v. Sullivan Cnty., Tenn.*, 956 F.2d 545, 554 (6th Cir. 1992). *See also Winkler v. Madison Cnty.,* 893 F.3d 877, 899-901 (6th Cir. 2018) (explaining that a municipality may be held liable under § 1983 in certain cases where no individual liability is shown). Assuming, then, that Plaintiffs' *Monell* claim against the City remains viable following the dismissal of Count I, the Court determines that the City is nonetheless entitled to summary judgment on the claim.

"There are at least four avenues a plaintiff may take to prove the existence of a municipality's illegal policy or custom." *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005). The plaintiff can look to "(1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations." *Id.* (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469,

480 (1986)). Here, Plaintiffs do not identify any enactment or policy of the City in support of their claim. Neither do Plaintiffs pursue in briefing the inadequate training and supervision theory alleged in their pleading. Plaintiffs' briefing of Count II is limited to addressing only an alleged history or custom by the City of ratifying unconstitutional conduct, as exemplified by the City's alleged failure to adequately discipline Officer Reinink and other GRPD officers over the years. *See* Pls. Resp., ECF No. 119 at PageID.1481-1482.

The City's alleged failure to adequately discipline or seriously investigate Officer Reinink's conduct is not, on its own, enough to create municipal liability under a ratification theory. "'A claim based on inadequate investigation' requires 'not only an inadequate investigation in this instance,' but also 'a clear and persistent pattern of violations' in earlier instances." *Pineda v. Hamilton Cnty.*, 977 F.3d 483, 495-96 (6th Cir. 2020). The case upon which Plaintiffs rely, *Marchese*, does not compel a different result. In *Meirs v. Ottawa Cnty.*, 821 F. App'x 445, 453 (6th Cir. 2020), the Sixth Circuit rejected the plaintiff's argument that *Marchese* stood for the proposition that failure to investigate a single incident can be evidence of deliberate indifference. The Sixth Circuit explained that the sheriff's deliberate indifference in *Marchese* was established by the failure to conduct an investigation after the district court ordered one. *Id.* The Sixth Circuit reiterated that "a single instance of a failure to investigate, as alleged here, is insufficient to 'infer a policy of deliberate indifference.'" *Id.* (quoting *Thomas*, 398 F.3d at 433). Hence, in *Meirs*, the Sixth Circuit rejected the plaintiff's ratification claim where

there was "no evidence that [the county official's] ratification of inadequate cell checks was part of a persistent pattern." *Id.* at 452.

Additionally, as the City points out in reply, Plaintiffs cannot support their claim of municipal liability by "simply counting excessive force complaints and disagreeing with their outcomes without any qualitative analysis" (ECF No. 120 at PageID.1502-03, citing *Berry v. City of Detroit*, 25 F.3d 1342, 1354 (6th Cir. 1994) (holding that "nothing more than raw numbers, with no information surrounding the actual circumstances of the incidents" was insufficient to "show a consistent pattern of ignoring constitutional violations")).

In short, the Court concludes that Plaintiffs have not submitted evidence from which it is reasonable to infer liability on the part of the City for the alleged constitutional injuries in this case. Accordingly, the City is entitled to summary judgment of Plaintiffs' claim in Count II.

C. Plaintiffs' State-Law Claims

Having dismissed Counts I and II, the Court, in its discretion, declines to exercise supplemental jurisdiction over Plaintiffs' remaining state-law claims in Count III. *See* 28 U.S.C. § 1367(c)(3) ("[D]istrict courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—(3) the district court has dismissed all claims over which it has original jurisdiction"); *Gamel v. City of Cincinnati*, 625 F.3d 949, 952 (6th Cir. 2010) ("When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims. . . . "). *See, e.g., Brooks v. Rothe*, 577 F.3d 701, 709 (6th

Cir. 2009) ("Upon dismissing Brooks' federal claims, the district court properly declined to exercise supplemental jurisdiction over Brooks' remaining state-law claims.").

III. Conclusion

Therefore, for the foregoing reasons,

IT IS HEREBY ORDERED that the motion for summary judgment filed by the City, Sergeant Bush, and Officer Johnson (ECF No. 111) is GRANTED IN PART and DENIED IN PART; specifically, the motion is granted as to Counts I and II, which are DISMISSED WITH PREJUDICE, and the motion is otherwise denied as to Count III, which is DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that Defendant Reinink's motion for summary judgment (ECF No. 112) is GRANTED IN PART and DENIED IN PART; specifically, the motion is granted as to Count I, which is DISMISSED WITH PREJUDICE, and the motion is otherwise denied as to Count III, which is DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that the Court declines to exercise supplemental jurisdiction over Plaintiffs' state-law claims in Count III.

Because this Opinion and Order resolves all pending claims, the Court will also enter a Judgment to close this case. *See* Fed. R. Civ. P. 58.

/s/ Jane M. Beckering
United States District Judge

Dated: March 31, 2023