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No. 17-1749

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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MATT BRAX, Plaintiff-Appellant, v. CITY OF GRAND RAPIDS, MICH.; COUNTY OF KENT, MICH.; MATT DZIACHAN; CHRIS BERNARDO; KENT BERACY; BRADLEY LYONS; STACY KUTSCHE; BECKY MCGINNIS; NIKALUS SHERIDAN, in their individual and official capacities, Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: BOGGS, BATCHELDER, and THAPAR, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. Matt Brax spent an evening drinking with friends in Grand Rapids, MI. At their third bar of the night, a now-drunk Brax touched a woman on her buttocks without her consent. After a bouncer ejected Brax from the bar, a Grand Rapids police officer arrested Brax and took him to a Kent County, MI, correctional facility for the night. Brax later sued, arguing that he was subjected to excessive force during the arrest, excessive force in a booking room at the correctional facility, and unconstitutional conditions of confinement. The district court granted summary judgment to all defendants, and we **AFFIRM**.

I.

Plaintiff-Appellant Matt Brax was a then-twenty-five-year-old resident of Hoffman Estates, a suburb of Chicago, IL. Defendants-Appellees are the City of Grand Rapids, MI; the County of Kent, MI; three Grand Rapids police officers, Kent Beracy, Chris Bernardo, and Nikalus Sheridan; and four Kent County correctional officers, Matt Dziachan, Bradley Lyons, Becky McGinnis, and Stacy Kutsche.

The incidents underlying Brax's claims occurred on the night of December 7, 2013. The parties tell different stories of what happened that night, but because the district court granted summary judgment to all defendants, the following facts are drawn entirely from Brax's complaint, Brax's deposition testimony, and video and audio files from that night.

A.

On the evening in question, Brax traveled from the Chicago area with a group of friends to Grand Rapids, MI. At dinner, Brax drank two beers. Afterwards, the friends went to a bar, where Brax drank one or two beers and "a shot." At the next bar, Brax "may have had a beer." Finally, the friends went to the Tavern On The Square, where Brax drank more beer for the next "couple of hours." All told, Brax drank as many as ten beers and a shot.

Brax headed to the restroom of the Tavern to "take a number two." The restroom was messy, so Brax decided he would use the restroom at the next bar. But he never made it to the next bar. After leaving the restroom, Brax "saw some girl that was smiling to [him]" and "tapped her with the back of [his] hand on the butt to say hi."

A bouncer ejected Brax from the Tavern, and according to Brax, on their way outside, the bouncer punched him in the mouth. A photograph taken later that night shows injuries to Brax's mouth, and Brax later testified that he received those injuries from the bouncer.

Once Brax was outside the bar, Defendant-Appellant Beracy, a Grand Rapids police officer, arrested him. As Brax tells the story, he was standing outside the Tavern when Beracy grabbed him from behind and tried to tackle him. Brax then "spun around and threw the person to the ground," using a "spin move" that included pushing Beracy to the ground. Brax testified that Beracy had not yet identified himself as a police officer, and that Brax did not realize Beracy was a police officer until after Brax had pushed him to the ground. Once he realized that Beracy was a police officer, Brax testified, he "put [his] hands in the air immediately to show that [he] was . . . submissive," but "the officer got up, charged at [him] and punched [him] in the face right in the eye." Beracy then took Brax to the ground, put his knee in Brax's back, and handcuffed him. During this process, Brax defecated on himself.

B.

After arresting Brax, Beracy took him to the Kent County Correctional Facility ("KCCF"). On the way, Beracy briefly stopped at a Grand Rapids police facility where a police officer took a photo of Brax's face. During the ride to the KCCF, Brax boasted that he was a "professional fighter" and bragged about how he "could've beat the s--- out of all you guys," how he "really wanted to," and how "lucky" they were that he did not do so.]

When Beracy and Brax arrived at the KCCF, Beracy walked Brax into a booking room, where two other officers stood around a table. Brax identifies them as Defendants-Appellants Bernardo and Sheridan, both Grand Rapids police officers. The events in the booking room are captured on video. Brax stood handcuffed at one end of the table, while the three officers stood around the other end of the table, going through Brax's belongings. One officer appeared to count cash and, as he finished, to say something to Brax. Brax walked towards the officer, but once they were within arm's reach, the officer stiff-armed him and then forced him onto the booking table,

with assistance from the other officers. Over approximately the next two minutes, the three officers, along with some KCCF officers who joined them, held Brax down on the table. Brax was not entirely cooperative, and unsuccessfully tried at least once to force his way up. Brax claims that during his time at the booking table, the officers choked him "in and out of consciousness" using a "rape choke."

Eventually, Brax did force his way up, and five officers tussled him to the ground. For approximately the next ninety seconds, the officers held Brax down while they tried to secure his feet. Two officers knelt on Brax's arms or back during this time, and one officer lay on top of his head and neck area. Throughout this time, Brax continued to struggle with the officers, and at some point during this encounter, Brax defecated on himself a second time.

C.

Once the officers finally restrained Brax, several officers—whom Brax identifies as KCCF officers—carried him to a holding cell. In the holding cell, the officers removed Brax's leg restraints, but left him handcuffed. The officers then left the cell. Shortly afterwards, Brax kicked the glass portion of the holding cell once or twice. He then took off his pants, wiped himself with them, and then wiped the cell window with them. Brax then sat on a bench in the cell, getting up at least one additional time to kick the glass portion of the door. He admitted to yelling and screaming and cursing at the officers while he was in the holding cell. At some point, he asked for clothing, which the officers did not immediately provide. Later, although Brax could not remember when, the officers gave him a jumpsuit, but denied him a shower at that point. "The next morning," Brax showered, and after he slept "for an hour," the KCCF officers gave him back his clothes and told him to leave.

D.

In November 2015, Brax filed this suit under 42 U.S.C. § 1983. In his complaint, Brax alleged that Officer Beracy used excessive force while arresting him and that the officers used excessive force in the booking room.[1] In December 2016, the defendants filed motions for summary judgment. In response to those motions, Brax also argued that the KCCF officers subjected him to unconstitutional conditions of confinement. The district court granted summary judgment to all the defendants on all of Brax's claims. Brax appealed.

II.

We review de novo the district court's grant of summary judgment, viewing the facts in the light most favorable to the nonmoving party. *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 171 (6th Cir. 2011). Summary judgment is appropriate where "the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining this, district courts must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009). The nonmovant must present "specific facts showing that there is a genuine issue for trial," and a "scintilla of evidence" will not suffice. *Id.* (citations omitted).

In qualified-immunity cases, this usually means adopting the plaintiff's version of the facts. *Scott v. Harris*, 550 U.S. 372, 378 (2007). But "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380. Record evidence that can displace the nonmovant's version of the facts

[1] Brax also initially brought *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), municipal-liability claims against the City of Grand Rapids and the County of Kent, but later conceded that these were meritless. The district court dismissed Brax's claims against both municipalities, and Brax does not challenge that dismissal. We therefore review only Brax's claims against the individual defendants.

includes videos, *id.* at 381, and photographs, *Womack v. Wal-Mart Stores, Inc.*, 677 F. App'x 296, 297–98 (6th Cir. 2017) (per curiam).

A.

The Fourth Amendment "guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures.'" *Graham v. Connor*, 490 U.S. 386, 394 (1989) (alteration in original) (quoting U.S. Const. amend. IV)). We analyze claims that police officers used excessive force during an arrest under the Fourth Amendment's "reasonableness" standard. *Id.* at 395 This standard is objective, and the officers' "underlying intent or motivation" is immaterial. *Id.* at 397. In applying this standard, we look at the totality of the circumstances, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether the suspect was actively resisting arrest. *Id.* at 396.

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." *Id.* (citation omitted). In reviewing the reasonableness of a police officer's conduct, we must "allow[] 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." *Id.* at 396–97. We give a "measure of deference to the officer's on-the-spot judgment about the level of force necessary," and this measure of deference "carries great weight when all parties agree that the events in question happened very quickly, as here." *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir. 2008) (internal quotation marks and citations omitted).

Brax argues that Beracy used excessive force in arresting him. On Brax's version of the facts, after Brax did his "spin move" and threw Beracy to the ground, Beracy got up, charged at him, and punched him once in the eye before taking him to the ground and arresting him. Even accepting Brax's version of the facts as true, Beracy did not use excessive force when arresting him. Beracy observed a commotion outside the Tavern, and as he approached, a woman told him he "need[ed] to do something" because "there was a man in there punching everybody." Upon Beracy's initiating contact with him, Brax did a "spin move" and threw Beracy to the ground. Only after this did Beracy purportedly punch Brax, and—by Brax's own account—only once. Applying the *Graham* factors and viewing the incident from the perspective of a reasonable officer at the scene, we conclude that a single punch in these circumstances was not unreasonable. Although the crime Beracy was responding to was not especially serious—"drunk and disorderly" conduct, as the district court put it—a drunk Brax physically resisted Beracy's initial attempt to arrest him, using a "spin move" and throwing Beracy to the ground. "Drunk persons are generally unpredictable" and "heavy intoxication create[s] a more volatile situation," *Marvin v. City of Taylor*, 509 F.3d 234, 246 (6th Cir. 2007), and we have before upheld as reasonable an application of force that allegedly broke a seventy-eight-year-old man's arm where that man was "very drunk" and arguably only passively resisting arrest, *id.* at 238, 245–48. Here, by contrast, the force Beracy exercised inflicted far less significant—if any—damage, Brax was much younger and stronger than the arrestee in *Marvin*, and Brax was actively resisting arrest. In light of the tense, uncertain, and rapidly evolving circumstances that Beracy faced, we cannot say that his split-second judgment that a single punch was necessary to subdue a drunk, strong, and resisting young Brax was unreasonable.

But where a party's version of the facts is "blatantly contradicted" by the record, we do not accept that version of the facts, *see Harris*, 550 U.S. at 380, and after reviewing the photo of Brax's face from that night, we have our doubts whether Beracy punched Brax at all. The only visible damage is to Brax's mouth, where Brax says the bouncer, not Beracy, punched him. There is no visible damage whatsoever to Brax's eye. This confirms our conclusion that Beracy did not use excessive force when arresting Brax.

The Supreme Court's and our "Fourth Amendment jurisprudence has long recognized that the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion . . . to effect it." *Graham*, 490 U.S. at 396; *Rodriguez v. Passinault*, 637 F.3d 675, 688 (6th Cir. 2011) (citation omitted). Beracy was entitled to use some force to arrest Brax, and whatever force Beracy used under these circumstances was not excessive.

B.

Brax next argues that the officers used excessive force in the booking room at the KCCF. Specifically, he testified that the officers choked him "in and out of consciousness with a rape choke" during the tussle at the booking table. Although Brax equivocated about whether he was ever medically unconscious—"consciousness is a philosophical term in my perspective"—he was not equivocal about how the alleged choke happened. According to Brax, a "rape choke" is a "very dangerous" "choke that is expressly forbidden in the martial arts world." This choke is accomplished by a person putting his "hand around [your] carotid arteries" with his thumb on "the other side of your Adam's Apple" and "press[ing] on both sides of [your] carotid arteries." "Rape chokes" are "meant to block off the circulation of the brain to either suffocate you or kill you or rape you."

Brax's insistence that the officers used a "rape choke" on him while they were at the booking table is fatal to his claim. Where a plaintiff's version of the facts 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." *Harris*, 550 U.S. at 380. Video from the booking room blatantly contradicts Brax's claim that the officers "rape choke[d]" him. Although the video shows that the officers several times placed their open hands on Brax's head or the back of his neck to force him onto the booking table, no officer grabbed Brax's throat in the manner Brax described. And contrary to Brax's claim that he went in and out of consciousness, the video shows Brax moving around and unsuccessfully attempting to force his way up off the table at least once before succeeding in doing so, despite multiple officers' attempting to hold Brax down, all within a two-minute span.

To the extent that Brax alleges that the officers used other forms of excessive force during the tussle at the booking table or the tussle on the floor, we reject that claim as well. Fourth Amendment protections against excessive force "extend through police booking," and "assaults on subdued, restrained[,] and nonresisting detainees, arrestees, or convicted prisoners are impermissible." *Coley v. Lucas Cty.*, 799 F.3d 530, 537, 540 (6th Cir. 2015). But the video clearly shows that throughout the incident in the booking room, Brax was never subdued, fully restrained, and nonresisting and the force the officers used to subdue and restrain him was not objectively unreasonable.

C.

Brax finally argues that the KCCF officers subjected him to unconstitutional conditions of confinement by not immediately giving him clean clothes and a shower despite knowing that he had defecated on himself twice that evening. But Brax did not raise a conditions-of-confinement

claim in his complaint. The first mention of this claim appeared in Brax's brief in response to the defendants' summary-judgment motions, and a plaintiff "may not raise a new legal claim for the first time in response to the opposing party's summary judgment motion." *Tucker v. Union of Needletrades, Indus. & Textile Emps.*, 407 F.3d 784, 788 (6th Cir. 2005) (citation omitted). Where a plaintiff attempts to do so, we do not consider that claim on appeal. *Traster v. Ohio N. Univ.*, 685 F. App'x 405, 407 (6th Cir. 2017) (citing *Bridgeport Music, Inc. v. WB Music Corp.*, 508 F.3d 394, 400 (6th Cir. 2007)).

III.

For the foregoing reasons, we **AFFIRM** the judgment of the district court.