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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (MARCH 15, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROBERT F. ABERCROMBIE, JR.,

Plaintiff–Appellant,

v.

TREY BEAM,

Defendant–Appellee.

No. 17-13930
Non-Argument Calendar

D.C. Docket No. 1:15-cv-04452-ELR

Appeal from the United States District Court
for the Northern District of Georgia

Before: WILSON, JORDAN,
and ROSENBAUM, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Robert Abercrombie, Jr., brought this civil-rights action under 42 U.S.C. § 1983 for false arrest and malicious prosecution, in violation of the Fourth and Fourteenth Amendments, and under Georgia state law for false imprisonment and malicious

prosecution. Abercrombie alleges that then-Deputy Trey Beam arrested and prosecuted him without probable cause after conducting a one-sided and constitutionally deficient investigation. The district court granted Beam summary judgment, finding that he was entitled to qualified immunity under federal law and to official immunity under Georgia state law. For the reasons that follow, we affirm in part and vacate and remand in part.

I.

We review *de novo* the district court's disposition of a summary-judgment motion based on qualified immunity. *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002). Our analysis begins "with a description of the facts in the light most favorable to the plaintiff." *Id.* "[W]hen conflicts arise between the facts evidenced by the parties, we credit the nonmoving party's version." *Evans v. Stephens*, 407 F.3d 1272, 1277–78 (11th Cir. 2005) (*en banc*) (emphasis omitted). Summary judgment is appropriate when "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).

The relevant facts, in the light most favorable to Abercrombie, are these. At around 5:30 p.m. on December 10, 2014, Deputy Beam was dispatched to respond to a 911 "fight" call at an AAMCO shop in Conyers, Georgia. The 911 caller, Priscilla Nixon, reported that Abercrombie, a co-owner of the AAMCO, "had thrown a document at [her] and struck [her]." Beam's incident report states that he knew before he arrived that "the fight was no longer in progress."

When Beam arrived in the lobby of the AAMCO, he identified and spoke with Nixon and her fiance, who

were standing at the counter directly across from Abercrombie and Laura Byrant, a part-time employee who is also Abercrombie's sister. Nixon told Beam that Abercrombie became "irate" and threw an invoice for the repairs to her car at her face. She said that she feared for her safety. Meanwhile, Abercrombie assisted another customer, who was standing in the lobby when Beam arrived.

After Beam spoke with Nixon, he went to find Abercrombie, who had left the main lobby area to retrieve the other customer's keys from a back room. Soon after, Beam handcuffed Abercrombie, walked him outside, and secured him in a patrol car. Both Abercrombie and Bryant testified that Beam, before he handcuffed Abercrombie, did not ask Abercrombie any questions about the incident and instead simply told him that he needed to come along and that he was under arrest.[1] Abercrombie further testified that

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[1] Beam claims that he asked Abercrombie for his side of the story before handcuffing him, but Abercrombie was uncooperative and repeatedly refused to answer Beam's questions. In support of his version of events, Beam relies on the dash-camera footage from Deputy Charles Dixon's patrol car. The dash camera recorded video of the front doors of the AAMCO and audio of a small part of events inside the AAMCO (the audio malfunctioned after a couple minutes). From a distance, the dash-camera footage shows Dixon opening the door to the AAMCO and asking, "What's going on?" Though we cannot see anything going on in the store beyond that, we can hear a woman respond, "That young man there is trying to get a statement from him and he is going away." Citing the woman's statement, Beam attests that he "attempted to speak with Plaintiff to get his side of the story, but Plaintiff ignored Beam." But nothing in the footage shows the woman or whom she is talking about. And nothing in the footage shows any of the events about which the woman is speaking. The problem here is that based on the limited footage, we cannot rule out Abercrombie's sworn

Beam refused to tell him why he was being arrested and "just told [him] to shut up." Abercrombie testified that Beam likewise told Bryant and Anthony Diamond, a part-time AAMCO technician, to "shut up or they'd be arrested." Abercrombie was in handcuffs less than three minutes after Beam arrived.

As Abercrombie was being led out in handcuffs, another deputy, Charles Dixon, arrived on the scene. While Dixon remained inside, Beam secured Abercrombie in a patrol car, and then spoke briefly with Bryant outside of the AAMCO. But, Bryant testified, Beam "never asked [her] what had happened in the shop and it was obvious he had no interest in finding out."[2] Instead, he told her "to shut up unless [she] wanted to be arrested" for obstruction of justice.

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version of the facts in which he states that "[a]t no time on December 10, 2014, did Mr. Beam attempt to get my side of the story either before he handcuffed me or after he handcuffed me." So the dash camera footage does not render Abercrombie's version of events incredible as a matter of law. *Cf. Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013) ("[W]here an accurate video recording completely and clearly contradicts a party's testimony, that testimony becomes incredible."). Resolving all factual disputes in favor of Abercrombie, we credit his version of events for purposes of summary judgment. *See Evans*, 407 F.3d at 1278.

[2] Again, Beam offers a different version of events. According to Beam, he attempted to speak with Bryant, but she was "being belligerent" and refused to answer his questions about the incident. That fact is disputed, however. Beam also claimed that Bryant's belligerence prevented him from interviewing other witnesses, as he feared the situation would devolve if he stayed and attempted further investigation inside the store. However, that claim is also subject to dispute. Bryant denies being belligerent, Beam offered no specific details about Bryant's obstructive conduct either in his testimony or in the incident

Beam then interviewed and took statements from Nixon and her fiancé. In a statement, the fiancé wrote that Abercrombie "blatantly pushed" a receipt in Nixon's face, hitting her with it as he tried to prevent her from signing a document. According to Abercrombie, Beam did not question Abercrombie, Bryant, Diamond, or the other customer, though he claimed in his incident report that Abercrombie and Bryant refused to speak with him about the incident.

Later, Beam completed an arrest-warrant affidavit, writing that Abercrombie placed Nixon in reasonable apprehension of immediately receiving a violent injury "when he shoved a three page invoice in [Nixon's] face causing her to fall back." A magistrate judge signed the warrant. It appears that Abercrombie posted bond a day or two after his arrest, and the charge was later dismissed.

II.

Abercrombie sued Beam under § 1983 for false arrest and malicious prosecution, in violation of his rights under the Fourth and Fourteenth Amendments, and under state law for false imprisonment and malicious prosecution. Abercrombie claimed that Beam conducted a constitutionally deficient investigation

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report, Beam did not actually attempt further investigation, and there was another deputy at the AAMCO for most of the time that Beam was on the scene. Although AAMCO's surveillance footage depicts Bryant walking in and out of the AAMCO several times, nothing in the footage appears to show Bryant interfering or attempting to interfere with Beam's investigation. Accordingly, for purposes of summary judgment, we credit Bryant's testimony on these issues. *See Evans*, 407 F.3d at 1278.

and arrested and prosecuted him without probable cause.

Among other allegations, Abercrombie faulted Beam for failing to interview available witnesses or to review AAMCO's surveillance footage. Abercrombie argued that Beam should have been aware of the surveillance footage because, on his way in to the AAMCO, he passed a sign on the door that clearly stated, "VIDEO SURVEILLANCE IN PROGRESS 24/7."

The AAMCO surveillance footage, which lacks audio, depicts Nixon and her fiancé enter the AAMCO on December 10, 2010. After a discussion, Abercrombie and Bryant prepared the receipts or invoices at issue. Meanwhile, Nixon made a call on her cell phone, apparently to 911. Bryant then placed two documents on the counter between them. As Nixon leaned over to look at the documents, Abercrombie attempted to put another document on top, but it curled up as he did so. Abercrombie flipped his wrist upward, which caused the document to flap in Nixon's face and possibly make contact with her before straightening out, and then placed the document on top of the other two documents and Nixon's hand. While the surveillance footage suggests that Nixon may have been lightly hit with a piece of paper that was in Abercrombie's hand, it is not consistent with Nixon's claim that Abercrombie angrily threw an invoice at her face.

In addition, both Bryant and Diamond testified that they were present in the AAMCO at the time of the incident between Nixon and Abercrombie. Neither recalled seeing Abercrombie throw an invoice or otherwise take any action that would give Nixon reason to fear for her safety. At her deposition, Bryant

testified that Abercrombie simply gave Nixon a receipt. Diamond likewise testified that he saw Abercrombie place a piece of paper in front of Nixon, who then exclaimed, "Did you just assault me?"

The district court granted summary judgment to Beam, concluding that he was entitled to qualified immunity under federal law and to official immunity under Georgia state law. The court found that Abercrombie's § 1983 claims failed because at least arguable probable cause supported the arrest and subsequent prosecution. Further, the court concluded that Beam's investigation was not constitutionally deficient because he interviewed the victim and a witness. As for the state-law claims, the court determined that Beam was entitled to official immunity because there was no evidence that he acted with "actual malice." Abercrombie now appeals.

III.

We first address Abercrombie's claims under § 1983, which are subject to the defense of qualified immunity. Qualified immunity protects government officials from individual liability for job-related conduct unless they violate clearly established law of which a reasonable person would have known. *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2013). "It serves the purpose of allowing government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation." *Carter v. Butts Cty., Ga.*, 821 F.3d 1310, 1318–19 (11th Cir. 2016) (quotation marks omitted).

Because Beam was engaged in discretionary duties at the AAMCO, Abercrombie bore the burden to show that qualified immunity did not apply. *Id.* at 1319.

"This inquiry turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (quotation marks omitted). Specifically, overcoming qualified immunity requires two showings: (1) that the defendant violated a constitutional right and (2) that the right was clearly established at the time of the misconduct. *Carter*, 821 F.3d at 1319.

A. False Arrest

A warrantless arrest without probable cause is an unreasonable seizure that violates the Fourth Amendment and forms a basis for a § 1983 claim of false arrest. *Kingsland v City of Miami*, 382 F.3d 1220, 1226 (11th Cir. 2004). Conversely, the existence of probable cause is an absolute bar to a § 1983 false-arrest claim. *Id.*

Probable cause to arrest exists when the facts and circumstances, of which the officer has reasonably trustworthy information, would cause a prudent person to believe that the suspect has committed, is committing, or is about to commit an offense. *Jordan v. Mosley*, 487 F.3d 1350, 1355 (11th Cir. 2007). We assess probable cause based on the "totality of the circumstances." *Id.*

"If an officer lacked probable cause to arrest, we must consider whether arguable probable cause supported the arrest at the time." *Carter*, 821 F.3d at 1319. "If so, the officer is still entitled to qualified immunity, even in the absence of actual probable cause." *Id.* Arguable probable cause "exists where reasonable officers in the same circumstances and possessing the same knowledge as the [d]efendant[]

could have believed that probable cause existed to arrest." *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1257 (11th Cir. 2010) (quotation marks omitted). In other words, qualified immunity still applies if the officer reasonably but mistakenly believed that probable cause existed. *Id.* Arguable probable cause may exist even though an officer may not have definitive proof that every element of a crime has been established. *See Brown v. City of Huntsville, Ala.*, 608 F.3d 724, 735 (11th Cir. 2010). But "[w]here an officer arrests without even arguable probable cause, he violates the arrestee's clearly established Fourth Amendment right to be free from unreasonable seizures." *Carter*, 821 F.3d at 1320.

Beam contends that he had at least arguable probable cause to arrest Abercrombie for simple assault. In Georgia, a person commits simple assault when he either (1) "[a]ttempts to commit a violent injury to the person of another," or (2) "[c]ommits an act which places another in reasonable apprehension of immediately receiving a violent injury." O.C.G.A. § 16-5-20(a); *see Skop v. City of Atlanta, Ga.*, 485 F.3d 1130, 1137–38 (11th Cir. 2007) (explaining that our probable-cause analysis "depends on the elements of the alleged crime and the operative fact pattern" (citation omitted)). Beam relies solely on the latter theory, under which the offense "is complete if the assailant has made such a demonstration of violence, coupled with an apparent ability to inflict injury so as to cause the person against whom it is directed reasonably to fear the injury unless he retreats to secure his safety." *Bearden v. State*, 662 S.E.2d 736, 738 (Ga. Ct. App. 2008) (quotation marks omitted).

Abercrombie first argues that the events as portrayed by Nixon did not support the existence of arguable probable cause. And if no reasonable officer could have believed that probable cause existed based on her version of events, which was the least favorable to Abercrombie, Beam would not be entitled to summary judgment based on qualified immunity, regardless of the adequacy of his investigation. *See Carter*, 821 F.3d at 1320. So the question is whether a reasonable officer in Beam's position could have concluded that the act of angrily throwing a piece of paper in Nixon's face placed her in reasonable apprehension of immediately receiving a violent injury.

In analyzing this issue, we find instructive the Georgia Court of Appeals's decision in *Daniels v. State*, 681 S.E.2d 642 (Ga. Ct. App. 2009). In that case, the court affirmed a simple-assault conviction arising out of a parent-teacher conference gone bad. *Id.* at 643–44. During the conference, the defendant angrily "lashed out in a tirade" directed at the teacher of his grandchild. *Id.* at 644. When the conference ended, the defendant prevented the teacher from leaving the area by continually moving in front of her, getting within an inch of her face and shouting at her. *Id.* The teacher testified that she felt threatened by the defendant's behavior, including his body language, tone, and blocking of her movement. *Id.*

On these facts, the Georgia Court of Appeals held that the defendant's "agitated and angry demeanor, while standing in close proximity to her and blocking her movement in a narrow hall," constituted "a demonstration of violence." *Id.* Further, the court stated, the defendant clearly "had an apparent present ability to inflict injury, in light of the fact that he was

standing only inches from his victim's face." *Id.* at 644–45. The victim also testified that she feared harm from the defendant, and other witnesses likewise stated that they feared for her safety. *Id.* at 645. Thus, the court found sufficient evidence to support the assault conviction. *Id.*

In light of *Daniels*, we agree with the district court that arguable probable cause could have existed based on Nixon's version of events. The record is undisputed that Nixon told Beam that Abercrombie was "irate," that he angrily threw an invoice in her face, and that she feared for her safety. As the district court reasoned, "angrily throwing an invoice in someone's face could potentially constitute a 'demonstration of violence,' and the close physical proximity that would be necessary to take such an action could likewise convey 'an apparent and present ability to inflict injury.'"[3] Some of the facts here are weaker than those in Daniels, of course, but there was no discrete and arguably violent act in that case, like the alleged act of throwing a document here, and "[s]howing arguable probable cause does not . . . require proving every element of a crime." *Brown*, 608 F.3d at 735. Looking solely to Nixon's statements, it would not be unreasonable for an officer to conclude that Abercrombie may have committed simple assault.

Nevertheless, probable cause is evaluated under the totality of the circumstances and must be based

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[3] This comment comes from the district court's order denying Beam's motion for judgment on the pleadings. While the district court did not directly address this same issue in its summary-judgment order, we assume it relied on this same reasoning to find arguable probable cause to arrest.

on "reasonably trustworthy information." *See Jordan*, 487 F.3d at 1355. And the crux of Abercrombie's false-arrest claim is that there was not arguable probable cause under the totality of the circumstances because Nixon's story was not credible and Beam failed to conduct a constitutionally adequate investigation. Citing this Court's decision in *Kingsland*, Abercrombie contends that Beam failed to interview readily available witnesses or review easily obtainable evidence.

In *Kingsland*, we recognized that police officers objectively "should not be permitted to turn a blind eye to exculpatory information that is available to them and instead support their actions on selected facts they chose to focus upon." *Kingsland*, 382 F.3d at 1228. We explained that "a police officer is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest," *id.* at 1229; but an officer may not "conduct an investigation in a biased fashion or elect not to obtain easily discoverable facts." *Id.* (internal quotation and citation omitted).

In that case, the plaintiff Kingsland alleged that a Miami police officer ran a red light and crashed into the truck she was driving. *Id.* at 1223. Thereafter, about 20 police officers arrived at the scene, but none of them took statements from Kingsland or any other witness except the police officer involved in the crash, who claimed Kingsland was at fault. *See id.* Two officers on the scene reported smelling an odor of cannabis coming from her truck and person, and they arrested her for driving under the influence. *Id.* at 1223–24. They never searched her vehicle or summoned drug-sniffing dogs to the scene, however,

and Kingsland later tested negative for narcotics. *See id.* at 1223–25.

Presented with these facts, we concluded that the "defendants did not act in an objectively reasonable manner under the totality of the circumstances." *Id.* at 1231. We explained that

> [i]t was within the officers' knowledge that Kingsland was involved in an accident, was injured and crying, and faulted Officer De Armas. It may also have been within the officers' knowledge that no evidence of drug use existed in Kingsland's truck or on her person. Yet, Kingsland has come forward with some evidence here that the defendants chose to either ignore or misrepresent those facts, which, if true, makes the information on which they based their arrest less than "reasonably trustworthy" under the circumstances.

Id. Because genuine issues of material fact existed as to whether the defendants manufactured probable cause and failed to conduct a reasonable investigation, we found that summary judgment was inappropriate. *Id.*

Beam responds that *Kingsland* is inapposite because here, there was no exculpatory evidence obviously and clearly available to him, there were no allegations of fraudulent conduct, and he relied on the statements of the victim and a witness and not just the claims of another officer. He also argues that he was "entitled to rely on a victim's criminal complaint as support for probable cause." *Rankin v. Evans*, 133 F.3d 1425, 1441 (11th Cir. 1996).

We conclude that genuine issues of material fact remain as to whether Beam conducted a reasonable investigation and whether reasonable trustworthy information supported the existence of arguable probable cause.[4] According to the AAMCO surveillance video, when Beam arrived at the AAMCO, he observed Nixon standing at the counter directly across from and in close proximity to Abercrombie. Despite her claims that she was afraid that Abercrombie would commit violence to her person, Nixon had not moved away from him. Beam also knew that the AAMCO employees (Abercrombie, Bryant, and Diamond) were confused as to why Abercrombie was being handcuffed. These facts would suggest the need to further investigate by, for instance, speaking with the other likely witnesses who were then present in the small AAMCO shop.

Yet under the version of events that we must accept as true for purposes of resolving this appeal, Beam made no attempt to "investigate objectively" and clarify the factual situation. *See Kingsland*, 382 F.3d at 1229. Specifically, in Abercrombie's version of events, Beam failed to question Abercrombie, Bryant, Diamond, or the other customer about the incident. The first three all testified that Abercrombie did not throw an invoice at Nixon. And on the surveillance

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[4] Abercrombie makes several arguments about what a jury could conclude about the actual facts of the incident, but we evaluate whether an officer had arguable probable cause based on "the information known to the defendant officers or officials at the time of their conduct, not the facts known to the plaintiff then or those known to a court later." *Wilkerson v. Seymour*, 736 F.3d 974, 978 (11th Cir. 2013). The actual facts are relevant only insofar as they were within Beam's knowledge or could have been obtained in a reasonable investigation.

footage, the other customer did not react in any way to the alleged assault despite being just a few feet away and looking in that general direction. So had she been asked about the events, she seemed to be in a position to speak knowledgeably.

Nor did any exigency prevent Beam from questioning these persons, particularly after he had detained Abercrombie, as another deputy was on the scene and there was no ongoing altercation. Therefore, Abercrombie has offered evidence that Beam "elect[ed] not to obtain easily discoverable facts, such as . . . whether witnesses were available to attest to" what occurred during the incident. *See id.* at 1229.

Not only that, but under Abercrombie's version of events, Beam's actions could be construed as preventing Abercrombie, Bryant, and Diamond from offering information relevant to the investigation. According to Abercrombie, Beam handcuffed Abercrombie within three minutes of arriving at the AAMCO, yet he refused to tell Abercrombie why he was being arrested and instead "just told [him] to shut up." As for Bryant, Beam likewise told her to "shut up" if she did not want to be arrested, and Diamond testified that he heard Beam threaten Bryant with arrest for asking why Abercrombie was being arrested. In light of evidence that Beam not only failed to interview available witnesses but also actively dissuaded some of them from talking to him, we must conclude that a triable issue exists as to whether Beam conducted an objectively reasonable and unbiased investigation into the alleged assault.

The district court found Beam's investigation sufficient based on the fact that he interviewed Nixon's fiancé. But even the fiancé's statement did not fully

support Nixon's version of events. He said that Abercrombie "raise[d] his voice" and was "being difficult," but he did not characterize Abercrombie as "irate" or "angry" like Nixon did. In addition, he wrote that Abercrombie "pushed" a receipt in the complainant's face to prevent her from signing a document, not that he "threw" the invoice at her face. And his statement does not indicate that he felt Nixon was in danger from Abercrombie. Therefore, the fiancé's statements did not obviate the need "to investigate both sides of the story." *See Kingsland*, 382 F.3d at 1229.

Based on the totality of the circumstances, and construing the record and drawing all reasonable inferences in Abercrombie's favor, we conclude that there are genuine issues of material fact that make summary judgment inappropriate.[5] Specifically, Abercrombie has come forward with some evidence to show that a reasonable officer in the same circumstances, possessing the same knowledge as the defendant and conducting a reasonable investigation based on that knowledge, could not have believed that probable cause existed to arrest him. Because Abercrombie has produced evidence which, if true, casts doubt on whether Beam had arguable probable cause to arrest, qualified immunity is not appropriate

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[5] In making this determination, we do not rely on Beam's alleged failure to review the AAMCO surveillance video. Although Beam may have been aware that there was a surveillance video, this information was not "offered to him," *Kingsland*, 382 F.3d at 1229, and "a police officer is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest," *id.* (quotation marks omitted).

at this stage. *See Carter*, 821 F.3d at 1320. Accordingly, we vacate the grant of summary judgment on this claim and remand for further proceedings.

B. Malicious Prosecution

Abercrombie's claim for malicious prosecution under § 1983 is based on the same facts as his false-arrest claim, plus the additional fact that Beam submitted an arrest-warrant affidavit, which was signed by a magistrate judge. The district court concluded that a malicious-prosecution claim failed for the same reason as a false-arrest claim: the presence of arguable probable cause to arrest.

A § 1983 claim for malicious prosecution requires a plaintiff to "prove two things: (1) the elements of the common law tort of malicious prosecution; and (2) a violation of his Fourth Amendment right to be free from unreasonable seizures." *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1256 (11th Cir. 2010); *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003). Thus, in addition to the common-law elements, the plaintiff must prove that he was "seized in relation to the prosecution, in violation of [his] constitutional rights." *Kingsland*, 382 F.3d at 1235.

As this Court expressed in *Kingsland*, a plaintiff's warrantless arrest "cannot serve as the predicate deprivation of liberty because it occurred prior to the time of arraignment, and was not one that arose from malicious prosecution as opposed to false arrest." *Id.* (quotation marks omitted). For purposes of a malicious-prosecution claim when a warrantless arrest occurs, "the judicial proceeding does not begin until the party is arraigned or indicted." *Id.* And the normal conditions of pretrial release, such as bond and a

summons to appear, do not constitute a seizure, "barring some significant, ongoing deprivation of liberty, such as a restriction on the defendant's right to travel interstate." *Id.* at 1236.

Under the facts of this case, Abercrombie cannot maintain a separate § 1983 claim for malicious prosecution. The record does not show that Abercrombie suffered a Fourth Amendment "seizure" after the prosecution began. It appears that, after arraignment, Abercrombie was released once he posted bond. At some point thereafter, the prosecutor dismissed the charge. Nothing in the record indicates any significant or ongoing deprivation of liberty imposed as a condition of pretrial release. Consequently, Beam is entitled to summary judgment on this claim. *See Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1251–52 (11th Cir. 2013) (stating that we may affirm the district court's judgment on any ground supported by the record).

IV.

Abercrombie also brought claims under Georgia state law for false imprisonment and malicious prosecution. The district court concluded that Beam was entitled to official immunity under Georgia state law.

Under Georgia's doctrine of official immunity, state public officials are not personally liable for discretionary acts performed within the scope of their official authority. *Cameron v. Lang*, 549 S.E.2d 341, 344 (Ga. 2001). Public officials do not enjoy official immunity under Georgia law, however, when "they act with actual malice or with actual intent to cause injury in the performance of their official functions." Ga. Const. art. I, § 2, ¶ IX(d); *Murphy v. Bajjani*, 647 S.E.2d 54, 60 (Ga. 2007).

According to the Georgia Supreme Court, "'[a]ctual malice,' as that term is used in the constitutional provision, denotes 'express malice,' i.e., a deliberate intention to do wrong, and does not include 'implied malice,' i.e., the reckless disregard for the rights or safety of others." *Murphy*, 647 S.E.2d at 60 (quoting *Merrow v. Hawkins*, 467 S.E.2d 336, 337 (Ga. 1996)). Although "ill will" may contribute to a finding of actual malice, "its presence alone cannot pierce official immunity; rather, ill will must also be combined with the intent to do something wrongful or illegal." *Adams v. Hazelwood*, 520 S.E.2d 896, 898 (Ga. 1999).

Under Georgia law, the record may support an inference of actual malice where evidence indicates that the police officer arrested the plaintiff despite having knowledge that the plaintiff did not commit the crime for which he was arrested. *See City of Atlanta v. Shavers*, 756 S.E.2d 204, 206-07 (Ga. Ct. App. 2014), *overruled on other grounds by Rivera v. Washington*, 784 S.E.2d 775, 780 n.7 (Ga. 2016); *Bateast v. Dekalb County*, 572 S.E.2d 756, 758 (Ga. Ct. App. 2002). However, the mere lack of probable cause does not permit an inference of actual malice. *Anderson v. Cobb*, 573 S.E.2d 417, 419 (Ga. Ct. App. 2002). Similarly, allegations of an improper or inadequate investigation do not, without more, show actual malice. *See id.*

Here, a reasonable jury could not infer from the evidence that Beam deliberately intended to do wrong. Even assuming that the evidence is sufficient to show that Beam exhibited a reckless disregard for Abercrombie's rights to be free from unlawful arrest, that is not enough to pierce official immunity under Georgia law. *See Murphy*, 647 S.E.2d at 60. In light of the statements from Nixon and her fiancé, "there

was not such a lack of evidence of [Abercrombie's] guilt" that a jury could infer that Beam arrested Abercrombie and pursued his prosecution "with the knowledge that [he] was not guilty and so intended to do wrong." *Marshall v. Browning*, 712 S.E.2d 71, 74–75 (Ga. Ct. App. 2011). While there is some evidence of Beam's "ill will" after the arrest, such as a snide comment by Beam to an AAMCO employee about Abercrombie's arrest, "its presence alone cannot pierce official immunity; rather, ill will must also be combined with the intent to do something wrongful or illegal." *Adams*, 520 S.E.2d at 898. Because there was not sufficient evidence of intentional wrongdoing, we conclude that Beam is entitled to official immunity under Georgia state law.

Although it might at first glance seem incongruous for us to find that Beam is entitled to official immunity under Georgia law but not to qualified immunity under federal law, the difference flows from the nature of the standard. Qualified immunity is evaluated based on an objective standard of reasonableness and "evidence of improper motive is irrelevant to . . . [the] analysis." *Koch v. Rugg*, 221 F.3d 1283, 1295 (11th Cir. 2000); *see Kingsland*, 382 F.3d at 1229 ("[T]he constitutional reasonableness of a police investigation does not depend on an officer's subjective intent or ulterior motive in conducting the investigation . . . ."). Official immunity, by contrast, is based on a subjective standard of "actual malice," which means a "deliberate intention to do wrong." *See Murphy*, 647 S.E.2d at 60. And the facts construed in Abercrombie's favor show objectively unreasonable investigatory conduct but no deliberate intention to do wrong.

Accordingly, we affirm the district court's grant of official immunity on Abercrombie's state-law claims. Without a viable claim under Georgia law, Abercrombie's state-law claim for punitive damages cannot survive, so we affirm the court's judgment on this claim also.

V.

For the reasons stated, we conclude that genuine issues of material fact preclude summary judgment on Abercrombie's claim for false arrest under § 1983. We therefore vacate and remand for further proceedings on that claim. We affirm the judgment of the district court in all other respects.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

ORDER OF THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION (AUGUST 2, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
GEORGIA ATLANTA DIVISION

ROBERT F. ABERCROMBIE, JR,

Plaintiff,

v.

TREY BEAM,

Defendant.

No. 1:15-CV-04452-ELR

Before: Eleanor L. ROSS
United States District Judge
Northern District of Georgia

This matter comes before the Court on Defendant's Motion for Summary Judgment [Doc. 39]. For the reasons stated herein, the Court grants the Motion.

I. Background

Plaintiff Robert F. Abercrombie, Jr. brings this action against Defendant Trey Beam for violation of his constitutional rights. Viewed in the light most favorable to Plaintiff, the facts of the case are as

follows:[1] On December 10, 2014, Priscilla Nixon was a customer at the Aamco owned by Plaintiff Robert Abercrombie, located at 16662 Georgia Highway NE in Conyers, Georgia. Def.'s Statement of Material Facts at ¶¶ 1-2 [Doc. 39-4]; Pl.'s Resp. to Statement of Material Facts at ¶ 1 [Doc. 40-1]. Ms. Nixon called 911 and reported that Plaintiff had thrown a document at her and struck her. [Doc. 39-4 at ¶ 2]; Decl. of Priscilla Nixon at ¶ 2 [Doc. 39-2]. Defendant Officer Trey Beam[2] responded to the call at the Aamco. [Doc. 39-4 at ¶ 3]. Ms. Nixon told Defendant that Plaintiff had thrown paper in her face, striking her, and that she feared for her safety. [Doc. 39-4 at ¶ 4]; [Doc. 40-1 at ¶ 4].

Defendant asserts that he attempted to speak with Plaintiff but Plaintiff was uncooperative and walked away from Defendant. Dep. of Trey Beam at 28:4-12 [Doc. 36]. Plaintiff asserts that Defendant never attempted to get Plaintiff's side of the story. [Doc. 40-

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[1] Defendant filed with his Motion for Summary Judgment [Doc. 39] a Statement of Material Facts as to which there is no genuine issue to be tried [Doc. 39-4]. Plaintiff timely filed a Response to Motion for Summary Judgment [Doc. 40] and Plaintiff's Response to Statement of Material Facts [Doc. 40-1]. Plaintiff did not, however, file a statement of additional facts which the respondent contends are material and present a genuine issue for trial, as required by Local Rule 56.1(B)(2)(b). Thus, the Court relies solely on Defendant's Statement of Material Facts [Doc. 39-41 and Plaintiff's Response to Statement of Material Facts [Doc. 40-1], and will view these facts in the light most favorable to Plaintiff.

[2] Defendant Trey Beam was a police officer with the Rockdale County Sheriff's Office at the time of the incident underlying this matter. Mr. Beam is no longer an officer with Rockdale County, but the Court will nonetheless refer to him as Officer throughout this order.

1 at ¶ 5]; Aff, of Robert F. Abercrombie, Jr. at ¶ 2 [Doc. 40-4]; Dep. of Anthony Ray Diamond at 13:2-14:19 [Doc. 40-7]. Ray Diamond, an employee of the Aamco, was around the corner from the lobby during the time that Plaintiff and Defendant were there. [Doc. 40-7 at 12:12-13:4].

While Defendant was inside with Plaintiff, Deputy Charles Dixon arrived on the scene. [Doc. 39-5 at ¶ 6]; [Doc. 40-1 at ¶ 6].

Next, Defendant detained Plaintiff and placed him in the back of his patrol car. [Doc. 39-5 at ¶ 7]; [Doc. 40-1 at ¶ 7]. Defendant Questioned Ms. Nixon and her fiancé, Clinton Whitfield, about the incident. [Doc. 39-5 at¶ 8]; [Doc. 40-1 at ¶ 8].

While Defendant was outside by the patrol car, Laura Bryant, Plaintiff's sister and part-time employee, went outside to discuss Plaintiff's arrest with Defendant. [Doc. 40-5 at ¶ 8]. Bryant witnessed the interaction between Plaintiff and Ms. Nixon. [Doc. 39-5 at ¶ 9]; [Doc. 40-1 at ¶ 9]. Defendant contends that he attempted to speak with Ms. Bryant, but she would not speak with him and remained agitated, upset, and belligerent. [Doc. 39-4 at¶ 10].[3] Defendant asserts that Defendant feared that Ms. Bryant's conduct would make the situation "more than it needed to be because of Ms. Bryant's belligerent behavior." [Doc. 36 at 27:19-25]. As a result, Defendant asked Ms. Bryant to go outside. [*Id.* at 50:5-12].

Defendant arrested Plaintiff and swore to an arrest warrant for simple assault before a Magistrate Judge,

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[3] Plaintiff asserts that Ms. Bryant was never agitated, belligerent, or upset towards Defendant. [Doc. 40-5 at¶ 7].

which the Magistrate Judge granted. [Doc. 39-5 at ¶ 14]; [Doc. 40-1 at ¶ 14]. The charges against Plaintiff were subsequently dismissed. [*Id.* at ¶ 15]; [*Id.* at ¶ 15].

Plaintiff then filed a complaint against Defendant Officer Beam, alleging federal and state law claims, discussed in detail *infra*. Defendant has now moved for summary judgment on all of Plaintiff's claims.

II. Legal Standard

A party is entitled to summary judgment only if "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 this context, "materiality" is determined by the applicable substantive law; "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). Further, the Court must view the facts in the light most favorable to the party opposing the motion and must draw all reasonable inferences in that party's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The party requesting summary judgment bears the initial burden of showing the Court, by reference to the record, the absence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the non-movant has the burden of proof at trial, as is the case here, the movant can support its motion by either: 1) showing the nonmoving party has no evidence to support an essential element of its case; or 2) presenting "affirmative evidence demonstrating that the nonmoving party will be unable to prove its

case at trial." *See Young v. City of Augusta*, 59 F.3d 1160, 1170 (11th Cir. 1995) (citing *Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1970) (quoting *U.S. v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir. 1991))). Notably, "it is never enough simply to state that the non-moving party cannot meet its burden at trial." *Clark v. Coats & Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). If the Court determines the movant has carried its initial burden, however, the non-movant must then "go beyond the pleadings" and demonstrate that there is indeed a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324.

III. Discussion

A. Nature of Plaintiff's Claims

Before addressing Defendant's pending motion, the Court finds it necessary to first consider exactly the claims the Amended Complaint purports to set forth. Plaintiff does not identify his cause of action by name.[4] For example "Count One" contains a string of factual and Jurisdictional allegations, as well as Plaintiff's assertion that he was arrested without arguable probable cause. "Count Two" alleges that Defendant falsely imprisoned plaintiff. "Count Three" alleges Defendant maliciously instituted the proceedings despite a lack of probable cause. "Count Four"

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[4] The Court notes that this is not the first time it has addressed this pleading issue with Plaintiff's counsel. *Kinzy v. Cannon et al.*, 1:12-cv-03941-ELR, Doc. No. 75 (May 12, 2015); *McKenzie v. Thompson* 1:15-cv-00050-ELR, Doc. No. 49 (Feb. 22, 2017). Should counsel fail to address this deficiency in future cases, the Court will not hesitate to dismiss the complaint or require further clarification.

alleges that Defendant maliciously prosecuted Plaintiff pursuant to state law.

In his response brief, Plaintiff indicates that, despite the structure of his Complaint, there are the following claims in this case: (1) Defendant failed to conduct an adequate investigation; (2) Defendant falsified facts in his incident report; and (3) Plaintiff has claims for false imprisonment and for malicious prosecution pursuant to state law. Plaintiff states that, with regard to the first two claims, Defendant "acted Intentionally or with reckless and deliberate disregard or [P]laintiff's right" and "that these actions were taken maliciously." [Doc. 40 at 11 (Internal quotations omitted)]. Plaintiff fails to cite to any Georgia statute to support his state law claims.

Based on this, the Court Interprets Plaintiff's Complaint as presenting claims for (1) false arrest pursuant to 42 U.S.C. § 1983, (2) malicious prosecution pursuant to 42 U.S.C. § 1983, (3) false Imprisonment pursuant to O.C.G.A. § 51-7-20, and (4) malicious prosecution pursuant to O.C.G.A. § 51-7-40. The Court construes Plaintiff's claims for false arrest and malicious prosecution pursuant to § 1983 to be based on the alleged constitutional violations of Defendant Officer Beam's failure to conduct an adequate Investigation and falsifying material facts in the Incident report, respectively.

Defendant argues he is entitled to qualified immunity with respect to Plaintiff's claims for illegal arrest and malicious prosecution pursuant to § 1983 and official immunity with respect to Plaintiff's state law claims.

B. Qualified Immunity with Respect to Plaintiff's § 1983 Claims

In this case, Defendant asserts that he is entitled to qualified immunity for Plaintiff's claims of false arrest and malicious prosecution brought pursuant to § 1983. Generally, government officials have qualified immunity "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Maughon v. Bibb County*, 160 F.3d 658, 660 (11th Cir. 1998) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

> When asserting the affirmative defense of qualified immunity, an officer must first establish that he was engaged in a discretionary function when he performed the acts at issue in the plaintiff's complaint. If the officer satisfies his burden of proof to show that he was engaged in a discretionary function, the burden shifts to the plaintiff to show that the defendant is not entitled to qualified immunity. To do so, the plaintiff must prove that: (1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation. If the plaintiff succeeds, the defendant may not obtain summary judgment on qualified-immunity grounds.

Kinzy v. Warren, 633 F. App'x 705, 706 (11th Cir. 2013) (internal citations omitted). Here, it is undisputed that Defendant was engaged in a discretionary function when he conducted his investigation and obtained the arrest warrant for Plaintiff. Accordingly, the burden shifts to Plaintiff to show that Defendant violated a

clearly established constitutional right. Importantly, qualified immunity provides "protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

i. False Arrest

It is well established that "[a] warrantless arrest without probable cause violates the Fourth Amendment and forms a basis for a section 1983 claim." *Ortega v. Christian*, 85 F.3d 1521, 1525 (11th Cir. 1996). However, the existence of probable cause for an arrest serves as a complete bar to Fourth Amendment claims of false arrest pursuant to § 1983. *Id.* ("An arrest made with probable cause, however, constitutes an absolute bar to a section 1983 action for false arrest."). As a general rule, "[p]robable cause to arrest exists if the facts and circumstances within the officer's knowledge, of which he has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed or is committing an offense." *Ortega*, 85 F.3d at 1525. "This probable cause standard is practical and non-technical, applied in a specific factual context and evaluated using the totality of the circumstances." *Skop v. City of Atlanta, Ga.*, 485 F.3d 1130, 1137 (11th Cir. 2007) (citing *Maryland v. Pringle*, 540 U.S. 366, 370 (2003)).

To receive qualified immunity protection, an officer "need not have actual probable cause but only 'arguable probable cause.'" *Montoute v Carr*, 114 F.3d 181, 184 (11th Cir. 1997) (emphasis added). Because only arguable probable cause is required, "the inquiry is not whether probable cause actually existed, but instead whether an officer reasonably could have believed

that probable cause existed, in light of the information the officer possessed." *Id.* Thus, "[e]ven law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Hunter v. Bryant* 502 U.S. 224, 227 (1991) (citation omitted).

Plaintiff argues that Defendant is not entitled to qualified immunity on his § 1983 false arrest claim because Defendant failed to conduct a proper investigation. Specifically, Plaintiff asserts that Defendant never tried to get his version of events. [Doc. 40-4 at ¶ 2]. Furthermore, Plaintiff argues that Defendant did not ask Mr. Bryant or Mr. Diamond, who were present at the Aamco when the incident occurred, what happened. Dep. of Laura Bryant at 24:18-24:22 [Doc. 37]. Plaintiff asserts that Defendant acted intentionally or with reckless deliberate disregard of Plaintiff's constitutional rights.

> An officer must conduct a constitutionally sufficient investigation before making an arrest. While officers may not ignore known exculpatory information in deciding whether to arrest, they need not explore every proffered claim of innocence or take every conceivable step to eliminate the possibility of convicting an innocent person. An officer may normally rely on a victim's criminal complaint to support probable cause.

Weinerth v. Ayers, No. 2:10-cv-170-FtM-29SPC, 2012 WL 390512, at *2 (M.D. Fla. Feb. 7, 2012) (citing *Kingsland v. City of Miami*, 382 F.3d 1220, 1229 (11th Cir. 2004) and *Rankin v. Evans*, 133 F.3d 1425, 1441 (11th Cir. 1998)).

The undisputed facts in this case reveal that Defendant and then later Deputy Dixon responded to a fight call at the Aamco; Defendant spoke to Ms. Nixon, who said Plaintiff had thrown paper in her face, striking her, and that she feared for her safety;[5] Defendant detained Plaintiff and placed him in the back of his patrol car; Defendant took the statements of Ms. Nixon and her fiancé, Mr. Whitfield; and Ms. Bryant witnessed the interaction between Plaintiff and Ms. Nixon. Defendant's reliance on their statements is sufficient for an officer to have reasonably believed that probable cause existed. *Rankin*, 133 F.3d at 1441 ("[A]n officer is entitled to rely on a victim's criminal complaint as support for probable cause.").

Plaintiff asserts that Defendant never asked Plaintiff, Ms. Bryant, or Mr. Diamond what happened. [Doc. 40-1 at ¶ 13]; [Doc. 37 at 24:18-25:1]. While it is certainly possible that Defendant could have conducted a more detailed investigation, by thoroughly questioning Plaintiff, Ms. Bryant, or Mr. Diamond or by reviewing surveillance footage, qualified immunity does not require the officer to leave no stone unturned. *See Fronczak v. Pinellas Cty.*, Fla., 270 F. App'x 855, 858 (11th Cir. 2008) (holding that for the purpose of probable cause and qualified immunity, the officer need not "ignore the probable cause standard to amass convincing proof of guilt." (quoting *Rankin*, 133 F.3d at 1435-36)).

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[5] Plaintiff asserts that he did not raise his voice with Ms. Nixon and was remarkably calm. [Doc. 40-1 at ¶ 2]; Dep. of Robert Abercrombie at 38:16-22 [Doc. 42]. Plaintiff asserts that Ms. Nixon did not appear to fear for her safety. [Doc. 40 at ¶ 3]; Aff. of Laura Bryant at ¶ 5 [Doc. 40-5].

Even construing the record in the light most favorable to Plaintiff, the Court finds that Defendant has established, for purposes of qualified immunity, that he had at least arguable probable cause, if not probable cause, before arresting Plaintiff for simple assault.

Plaintiff suggests that the Eleventh Circuit's decision in *Kingsland* is "exactly on point."[6] [Doc. 40 at 9]. *Kingsland* "cautions that an officer investigating the existence of probable cause 'should not be permitted to turn a blind eye to exculpatory information that is available to them, and instead support their actions on selected facts they ch[o]ose to focus upon.'" *Buckner v. Williamson*, No. 3:06-cv-79 (CDL), 2008 WL 2415265, at *13 (M.D. Ga. June 12, 2008) (quoting *Kingsland*, 382 F.3d at 1228). However, "the Eleventh Circuit was careful to note that *Kingsland* was 'a unique and exceptional case wherein the investigating officers were responding to a call made by a fellow officer . . . to an accident involving that very officer' and the 'plaintiff 'complain[ed] of a conflict of interest and suggest[ed] a possible motive for allegedly covering up a fellow officer's wrongdoing.'" *Id.* (quoting *Kingsland*, 382 F.3d at 1228 n.9). Critically, no such allegations exist in this case, and therefore, the Court finds the facts of *Kingsland* inapposite.

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[6] In addressing Plaintiff's arguments, the Court has endeavored to follow the structure of Plaintiff's Response to Motion for Summary Judgment [Doc. 40]. However, there are instances where Plaintiff's arguments are not logically organized to support Plaintiff's claims. The Court will address each of Plaintiff's arguments with the claims for which the Court determines Plaintiff's arguments are strongest.

Plaintiff also cites the Eleventh Circuit's decision in *Howard v. Gee*, 538 F. App'x 884 (11th Cir. 2013). Similar to *Kingsland*, *Howard* was a case in which an officer relied solely on another officer's evidence. 538 F. App'x at 886. The plaintiff in *Howard* brought a § 1983 malicious prosecution claim against officers whom he alleged charged him with battery without probable Cause and falsified facts and evidence to establish probable cause. *Id.* at 888. The Eleventh Circuit found that the arresting officer made little or no attempt to investigate the incident. *Id.* at 890. The arresting officer did not attempt to speak to the plaintiff or any witnesses. *Id.* Moreover, the arresting officer relied solely on the incident report written by the officer involved in the altercation—the arresting officer did not even interview the other officer. *Id.* at 891. The Eleventh Circuit concluded that the arresting officer was unable to establish, for purposes of qualified immunity, that he conducted a reasonable investigation. *Id.* at 891. In Contrast, here, Defendant conducted his own investigation by interviewing the victim and a witness, and did not rely at all on another officer's statement of the incident.

Because the Court finds that Defendant had arguable probable cause to arrest Plaintiff, the Court grants Defendant's claim for qualified immunity as to Plaintiff's § 1983 claim of false arrest.

ii. Malicious Prosecution

Malicious prosecution is a violation of the Fourth Amendment and a viable constitutional tort cognizable under § 1983. *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003). A Fourth Amendment malicious prosecution claim can arise even if a magistrate approves an arrest

warrant, where the officer who applied for the warrant presented evidence insufficient to establish probable cause. *Carter v. Gore*, 557 F. App'x 904, 908 (11th Cir. 2014) (citing *Malley v. Briggs*, 475 U.S. 335, 345 (1986)). "[T]he Constitution prohibits a police officer from knowingly making false statements in an arrest affidavit about the probable cause for an arrest . . . ." *See Jones v. Cannon*, 174 F.3d 1271, 1285 (11th Cir. 1999); *see also Riley v. City of Montgomery*, 104 F.3d 1247, 1253 (11th Cir. 1997) (holding, in the context of a plaintiff's § 1983 and state law malicious prosecution claims against police officers, that "fabricating incriminating evidence violate[s] constitutional rights"). An omission or false statement renders an arrest warrant invalid only if the officer intentionally or recklessly omitted information and probable cause is no longer present without that information *See Holland v. City of Auburn, Alabama*, 657 F. App'x 899, 903 (11th Cir. 2016); *see also Madiwale v. Savaiko*, 117 F.3d 1321, 1326-27 (11th Cir. 1997) ("[A] warrant affidavit violates the Fourth Amendment when it contains omissions made intentionally or with a reckless disregard for the accuracy of the affidavit . . . even intentional or reckless omissions will invalidate a warrant only if inclusion of the omitted facts would have prevented a finding of probable cause.") (Citation and quotation omitted) (emphasis added)); *Dahl v. Holley*, 312 F.3d 1228, 1235 (11th Cir. 2002) ("[T]he warrant is valid if, absent the misstatements or omissions, there remains sufficient content to support a finding of probable cause.").

Plaintiff argues that Defendant is not entitled to qualified immunity because Defendant "falsified his incident report to make it look like he had interviewed plaintiff and some of his witnesses." [Doc. 40 at 11].

First, Defendant obtained an arrest warrant for Plaintiff's arrest for simple assault in violation of O.C.G.A. § 16-5-20, swearing to the fact that "Robert Abercrombie did commit the offense of simple assault when he placed Priscilla Nixon in reasonable apprehension of immediately receiving a violent injury when he shoved a three page invoice in Ms. Nixon's face causing her to fall back." Arrest Warrant [Doc. 5-3]. Plaintiff does not dispute that probable cause existed on the face of the arrest warrant, and therefore there is no malicious prosecution claim based on the warrant.

Second, even assuming that there were false statements in the incident report upon which Defendant relied to obtain the arrest warrant, the statements did not affect Defendant's probable cause determination. Defendant's incident report states that Defendant asked for Plaintiff's side of the story but Plaintiff ignored Defendant's request to speak to him.[7] [Doc. 5-2 at 3]. The incident report later states that Defendant advised Ms. Bryant to go outside so they could have a discussion, that Ms. Bryant complied but did not want to give her side of the story, and that no fur-

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[7] Specifically, the incident report states

> The owner came to the front of the shop and threw up his hands and walked to the back when I asked for his side of the story. I then asked the owner a Robert Abercrombie to stop walking so I could get his side of the story. Plaintiff stated "I don't have time to talk to you right now I've got paying white customers to deal with." Plaintiff continued to ignore my request to speak with him in reference to the incident.

[Doc. 5-2 at 3]. The page numbers referenced herein refer to the Court's page number system found at the top of each page.

ther discussion occurred.[8] [*Id.* at 4]. The report says nothing about Mr. Diamond.

Viewing the facts in the light most favorable to Plaintiff, the Court does not agree that these allegedly false statements amount to a constitutional violation. While the Court does not look lightly upon any misstatement made in an incident report, the statements in this report do not prevent a finding of probable cause. Even If Plaintiff is correct that Defendant included a false version of events in his incident report, Defendant still has sufficient probable cause

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[8] As to Ms. Bryant, the report states

> The white female employee a Laura Bryant stepped in front of me preventing me from detaining Plaintiff. Ms. Bryant stated "you're not going to arrest him he has done nothing wrong." I advised Ms. Bryant to step out of the way or she would be placed in handcuffs as well. Ms. Bryant complied and I detained Plaintiff without incident. I then walked outside and placed Plaintiff in my patrol car. Ms. Bryant ran out the front door of Aamco yelling at me stating "Officer what you're doing is wrong you can't take him to jail." I advised Ms. Bryant that she needed to go back in the shop before she went to jail for obstruction.[] Ms. Bryant continued to yell at me so I advised her to stand where she was I would deal with her in just a second. Ms. Bryant did not comply with my commands and walked back inside. I then went back inside and advised Ms. Bryant to step back outside so we could have a discussion. Ms. Bryant stated "Are you going to take me to jail officer." I advised Ms. Bryant she was not being very cooperative and that I needed to speak with her outside. Ms. Bryant complied but did not wish to give me her side of the story and was extremely rude. I advised Ms. Bryant to go back inside, I was finished speaking with her.

[*Id.* at 3-4].

for the arrest based on the victim's statement. Stated differently, If the statements in the incident report regarding Interviewing Plaintiff and Ms. Bryant were false and then omitted from the incident report, a reasonable officer could still find probable cause to arrest based on the facts as described in the incident report.

In sum, the record reveals no genuine issue of material fact regarding whether Defendant had arguable probable cause because any alleged omissions or misstatements alleged by Plaintiff were inconsequential. Having found that Defendant had arguable probable cause, there can be no constitutional violation, and, therefore, Defendant is entitled to summary judgment on Plaintiff's § 1983 malicious prosecution claim based on the allegation that Defendant falsified his incident report. *See Bracey v. Jolley* 1:10-cv-4064-TCB, 2013 WL 12097643 at *6 (N.D. Ga. Mar. 27, 2013) (finding that the defendants were entitled to qualified immunity on the plaintiff's malicious prosecution and false arrest claims because the warrant affidavit was supported by arguable probable cause and the plaintiff failed to raise a genuine dispute as to whether the defendants intentionally or recklessly omitted known facts that would have defeated arguable probable cause).

C. State Law Claims

Defendant argues that official immunity protects him with respect to Plaintiff's state law claims for false imprisonment and malicious prosecution. [Doc. 39-1 at 15-18]. The Georgia Constitution provides, in relevant part, that State officers and employees "may be liable for injuries and damages if they act with

actual malice or with actual intent to cause injury in the performance of their official functions." Ga. Const. art. I, § II, ¶ IX(d). Thus, "'[a] suit against a public officer acting in his or her official capacity will be barred by official immunity unless the public officer (1) negligently performed a ministerial duty, or (2) acted with actual malice or an actual intent to cause injury while performing a discretionary duty.'" *Tant v. Purdue*, 278 Ga. App. 666, 668 (2006) (quoting *Wanless v. Tatum*, 244 Ga. App. 882, 882 (2000)).

"In the context of official immunity, 'actual malice' means a deliberate intent to do wrong." *Reed v. DeKalb Cnty.*, 264 Ga. App. 83, 86 (2003) (citing *Merrow v. Hawkins*, 266 Ga. 390, 392 (1996)). Proof of ill will, standing alone, is insufficient to establish actual malice. *Adams v. Hazelwood*, 271 Ga. 414, 415 (1999). Instead, "in the context of official immunity, actual malice means a deliberate intention to do a wrongful act." *Id.* at 415. "Such act may be accomplished with or without ill will and whether or not injury was intended." *Id.*

Here, Defendant was performing a discretionary act when he conducted the investigation and arrested Plaintiff. *Reed*, 264 Ga. App. at 86, ("[T]he decision to effectuate a warrantless arrest generally is a discretionary act requiring personal judgment and deliberation on the part of the officer."). Further, unlike the facts in the cases cited to by Plaintiff,[9] nothing in the record indicates that Defendant acted with actual

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[9] Plaintiff cites to the following: *City of Atlanta v. Shavers*, 326 Ga. App. 95 (2014); *Mitchell v. Stewart*, 26 F.Supp. 2d 1322, 1337 (M.D. Ga. 2014) *aff'd.* 608 Fed. Appx. 730 (11th Cir. 2015); *Lagroon v. Lawson*, 328 Ga. App. 614, 619 (2014); *Bateast v. Dekalb County*, 258 Ga. App. 131 (2002); *Jones v. Warner*, 301 Ga. App. 39 (2009).

malice or with a deliberate intent to do wrong. As discussed, *supra*, Defendant's actions were reasonable and based on arguable probable cause. The Court's "task is not to decide, with the benefit of hindsight, what the officer[ ] should have done. [The Court is] concerned only with whether [his] behavior showed a deliberate intention to commit a wrongful act." *Mercado v. Swoope*, 340 Ga. App. 647, 651 (2017). No such intention is shown here, and so official immunity therefore protects Defendant as to Plaintiff's state law claims.

Plaintiff cites to the statement of Mr. Shane Fuqua to support his allegation that Defendant taunted Plaintiff and bragged about arresting him. [Doc. 40 at 14].

At the time Plaintiff was arrested, Mr. Fuqua was Plaintiff's employee at the Aamco. Statement of Shane Fuqua at ¶ 2 [Doc. 40-6]. Mr. Fuqua states that, a few days after Plaintiff's arrest, Mr. Fuqua ran into Defendant at a Quick Trip, but did not know at the time that the man he ran into was Defendant. *Id.* at ¶ 3. Mr. Fuqua states that while in line at a Quick Trip bathroom, he called out "are there any marines here?" *Id.* at ¶ 6. A man, who the Court understands to be Defendant,[10] turned to Mr. Fuqua, who was wearing a shirt with the Aamco logo on it, and said "No, is your boss out of jail yet?" and smirked at Mr. Fuqua. *Id.* at ¶ 7. While this statement may prove ill will, it is insufficient to establish actual malice. *Adams*, 271 Ga. at 415. *cf. Berger v. Lawrence*, 1:13-cy-03251 -HLM, 2014 WL 12547268 at *11 (N.D. Ga. Sept. 19,

[10] Mr. Fuqua does not clearly state that the man in front of him in line was Defendant. The Court makes the connection based on all the evidence available to it.

2014) (denying summary judgment to defendant on plaintiff's state law claims where plaintiff's evidence indicated that defendant arrested plaintiff without probable cause, and, after plaintiff was in handcuffs and while plaintiff was complying with defendant's commands, struck plaintiff's knee with sufficient force to tear plaintiff's ACL); *Cipriani v. Fulton Cnty.*, 1:07-cv-0069-CAP, 2008 WL 7070790 at *8 (N.D. Ga. Nov. 18, 2008) (concluding that evidence was sufficient to allow jury to determine that defendant acted with actual malice, where evidence indicated that deputy hogtied and beat plaintiff, despite lack of resistance or provocation).

D. Punitive Damages and Attorneys' Fees

Plaintiff's complaint alleges that Defendant should be liable for punitive damages and that Plaintiff should be able to recover for his attorneys' fees. As summary judgment is due to be granted as to all of Plaintiff's substantive claims, Plaintiff is also not entitled to punitive damages because such damages are derivative of his substantive claims. *See Dareing v. Bank of America Corporation*, 1:14-cv-1525-RWS-LTW, 2016 WL 7839427 at *8 (N.D. Ga. Aug. 8, 2016). Furthermore, Plaintiff's claims for attorneys' fees are also derivative of his substantive causes of action. *See id.* Because this Court has found summary judgment is due to be granted as to each of Plaintiff's substantive causes of action, Defendant is entitled to summary judgment as to Plaintiff's derivative claims for attorneys' fees and punitive damages.

IV. Conclusion

For the reasons stated herein, the Court GRANTS Defendant's Motion for Summary Judgment. [Doc. 39]. The Court DIRECTS the Clerk to enter judgment in favor of Defendant and CLOSE this case.

SO ORDERED, this 2nd day of August, 2017.

/s/ Eleanor L. Ross
United States District Judge
Northern District of Georgia

ORDER OF THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (MAY 16, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROBERT F. ABERCROMBIE, JR.,

Plaintiff–Appellant,

v.

TREY BEAM,

Defendant–Appellee.

No. 17-13930-GG

Appeal from the United States District Court
for the Northern District of Georgia

Before: WILSON, JORDAN, and ROSENBAUM, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing *En Banc* are DENIED.

ENTERED FOR THE COURT

/s/ Rosenbaum
United States Circuit Judge