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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRYCE WATKINS, Plaintiff - Appellant, v. BRIAN WUNDERLICH, in his individual capacity; KEVIN NICHOLS, in his individual capacity; TAMMY BLACK, in her individual capacity, n/k/a Tammy Bozarth, Defendants - Appellees.	No. 22-1358 (D.C. No. 1:20-CV-01172-RM-MEH) (D. Colo.)

ORDER AND JUDGMENT*

(Filed Jun. 23, 2023)

Before **HARTZ**, **MATHESON**, and **McHUGH**, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Plaintiff-Appellant Bryce Watkins appeals the district court's order granting summary judgment against him on his 42 U.S.C. § 1983 claims that defendant police officers unlawfully entered his home and used excessive force on him in violation of the Fourth Amendment. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *Factual History*[1]

In April 2018, Mr. Watkins and his then-spouse Denise Watkins—now Denise Zamora—lived in a house that they co-owned. On April 28, Ms. Zamora called 911 and reported that Mr. Watkins had physically attacked her in their home. Three officers from the Douglas County Sheriff's Office came to the home and spoke with Ms. Zamora. At that point, Mr. Watkins had left the house. Ms. Zamora told the officers she was afraid Mr. Watkins would kill her.

The next morning, Ms. Zamora called 911 again to report that Mr. Watkins had returned to their home. She left the home and went to a nearby park, where she met with Defendant-Appellee Kevin Nichols, a deputy with the Douglas County Sheriff's Office. She

[1] The summary judgment record consists of depositions and declarations, interrogatory answers, document request responses, and officer bodycam footage. We present the facts in the light most favorable to Mr. Watkins, resolving all factual disputes and drawing all reasonable inferences in his favor. *Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014); *Helvie v. Jenkins*, 66 F.4th 1227, 1232 (10th Cir. 2023).

told him that she felt unsafe around Mr. Watkins. In response to a question about whether Mr. Watkins had any weapons, Ms. Zamora said there was a baseball bat in the home.

While Ms. Zamora and Deputy Nichols were talking, Mr. Watkins called Ms. Zamora on her cell phone. She answered and handed the phone to Deputy Nichols. Deputy Nichols asked Mr. Watkins to come to the front door of the home to speak with him. Mr. Watkins refused and said, "[Y]ou cannot come inside my house. I do not want to talk to you." App., Vol. II at 253.

After this conversation, Deputy Nichols asked Ms. Zamora for the code to the home's garage door. She provided the code and explained how to open the door and enter the home. Deputy Nichols went to the house, where he met with the other Defendant-Appellees, Deputy Tammy Bozarth[2] and Sergeant Brian Wunderlich, who were also employees of the Sheriff's Office. Deputy Nichols opened the garage door using the code he obtained from Ms. Zamora. He and Deputy Bozarth entered the garage.

At that point, Sergeant Wunderlich asked whether Ms. Zamora had given explicit verbal permission for Deputy Nichols to enter the house. Deputy Nichols said she had not and returned to the park to ask. Ms. Zamora, who thought she had already authorized

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[2] During the relevant events, Deputy Bozarth's last name was Black. The parties and record occasionally refer to her as such.

Deputy Nichols to enter the house, gave explicit verbal consent.

Deputy Nichols returned to the house. He and Deputy Bozarth re-entered the garage and walked through a door into the living room. Sergeant Wunderlich entered the house through the front door. Wunderlich bodycam at 16:07:15-16:07:32.[3] Deputy Bozarth announced they were Sheriff's officers and called Mr. Watkins's name. Mr. Watkins, who was on the second floor of the home and not in view of the officers, shouted that he was getting dressed. Bozarth bodycam at 16:07:31. Deputy Bozarth told Mr. Watkins to keep his hands up. *Id.* at 16:07:32. Deputy Nichols told Mr. Watkins to "come down, show us your hands." *Id.* at 16:07:35-16:07:36.

Mr. Watkins appeared at the top of the stairs, wearing only a towel wrapped around his waist. *Id.* at 16:07:40-16:07:43. He said, "Excuse me, you're in my home." *Id.* at 16:07:40-16:07:43. Deputy Bozarth repeated her command to descend the stairs, and Mr. Watkins said, "You're in my home. What is going on?" *Id.* at 16:07:43-16:07:46. The officers continued asking Mr. Watkins to come down with his hands up. *Id.* at 16:07:46-16:08:03. Mr. Watkins continued protesting that the officers were in his home. *Id.* Eventually, Mr. Watkins began descending the stairs. *Id.* at 16:08:04-16:08:05.

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[3] All bodycam citations refer to the cameras' internal timestamp, not the time relative to the beginning of the video file.

As Mr. Watkins reached the bottom of the stairs, Deputy Nichols grabbed him, and Mr. Watkins began retreating up the stairs. *Id.* at 16:08:11-16:08:13. Then Mr. Watkins fell backwards against the stairs and yelled, "What's going on?" *Id.* at 16:08:17-16:08:18. Deputy Nichols got on top of him and told him not to resist. *Id.* Mr. Watkins broke free and ran backwards up the stairs, with all three officers in pursuit. *Id.* at 16:08:20-16:08:24. Deputy Nichols and Sergeant Wunderlich eventually grabbed Mr. Watkins and subdued him near the top of the stairs. *Id.* at 16:08:26-16:08:30. The officers then instructed Mr. Watkins to put his hands behind his back and placed handcuffs on him. *Id.* at 16:08:44-16:09:06. He complied. *Id.* Deputy Nichols told Mr. Watkins he was under arrest for "second degree assault, domestic violence." *Id.* at 16:09:16. The deputies' efforts to arrest Mr. Watkins took about one minute. *Id.* at 16:08:05-16:09:06.

Mr. Watkins was charged with felony domestic assault. App., Vol. III at 189 ¶ 55. He later pled guilty to misdemeanor harassment.

B. ***Procedural History***

Mr. Watkins filed his § 1983 suit in April 2020. The district court dismissed parts of the complaint on the officers' motion, leaving Fourth Amendment claims for (1) unlawful entry into Mr. Watkins's (a) garage and (b) home, and (2) excessive force based on (a) the officers'

use of force to subdue and arrest Mr. Watkins and (b) their use of tight handcuffs.[4]

After discovery, the officers moved for summary judgment, asserting they were entitled to qualified immunity. The district court granted the motion. It reasoned that the officers' entry into Mr. Watkins's garage and home was valid due to Ms. Zamora's consent and that Mr. Watkins failed to present any authority clearly establishing the wrongfulness of the entry. It also determined that Mr. Watkins had not shown a constitutional violation on his excessive force claim because the officers' use of force was reasonable and Mr. Watkins suffered minimal injuries. Mr. Watkins timely appealed.

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[4] The scope of Mr. Watkins's claims narrowed in district court. In his complaint, he asserted his unlawful entry and excessive force claims against all three officers, along with a supervisory liability claim against Sergeant Wunderlich and a municipal liability claim against Douglas County. On the defendants' motion to dismiss, the district court determined that Deputy Bozarth was entitled to qualified immunity for her entry into the house, but not the garage, and that Sergeant Wunderlich was entitled to qualified immunity for the entire unlawful entry claim. It denied qualified immunity to all three officers on the excessive force claim. The court also dismissed Mr. Watkins's supervisory and municipal liability claims.

Mr. Watkins's remaining claims were (1) unlawful entry (a) into his garage against Deputies Nichols and Bozarth, and (b) into his home against Deputy Nichols; and (2) excessive force against all three officers for (a) their use of force to subdue and arrest him and (b) placing him in tight handcuffs. At summary judgment, the district court granted qualified immunity to Deputies Nichols and Bozarth on the unlawful entry claim, and to all three officers on the excessive force claim.

II. DISCUSSION

A. *Legal Background*

1. Standard of Review

"We review grants of summary judgment based on qualified immunity de novo," applying the same standard as the district court. *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014). "The court shall grant summary judgment 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." Fed. R. Civ. P. 56(a). "When applying this standard, we review the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1216 (10th Cir. 2021) (quotations omitted).

2. Section 1983 and Qualified Immunity

Title 42 U.S.C. § 1983 provides that a person acting under color of state law who "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983.

"Individual defendants named in a § 1983 action may raise a defense of qualified immunity." *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) (quotations omitted). "Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly

established statutory or constitutional rights." *Wilkins v. City of Tulsa*, 33 F.4th 1265, 1272 (10th Cir. 2022) (quotations omitted).

"When a defendant asserts qualified immunity in a summary judgment motion, the plaintiff must show that (1) a reasonable jury could find facts supporting a violation of a constitutional right and (2) the right was clearly established at the time of the violation." *Id.*; *see also Duda v. Elder*, 7 F.4th 899, 909 (10th Cir. 2021). A defendant is entitled to qualified immunity if the plaintiff fails to satisfy either prong. *See Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009); *Soza v. Demsich*, 13 F.4th 1094, 1099 (10th Cir. 2021).

"A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (quotations omitted). "A Supreme Court or Tenth Circuit decision on point or the weight of authority from other courts can clearly establish a right." *A.N. ex rel. Ponder v. Syling*, 928 F.3d 1191, 1197 (10th Cir. 2019) (quotations omitted); *see also Lowe v. Raemisch*, 864 F.3d 1205, 1208 (10th Cir. 2017). The relevant "precedent is considered on point if it involves *materially similar conduct* or applies with *obvious clarity* to the conduct at issue." *Lowe*, 864 F.3d at 1208 (quotations omitted). "[A] case directly on point" is not necessary if "existing precedent [has] placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam) (quotations omitted). Thus, "[g]eneral statements of the law can clearly

establish a right for qualified immunity purposes if they apply with obvious clarity to the specific conduct in question." *Halley v. Huckaby*, 902 F.3d 1136, 1149 (10th Cir. 2018) (quotations omitted).

B. ***Application to Mr. Watkins's Claims***

1. **Unlawful Entry**

Mr. Watkins contends the district court erred in granting summary judgment on his unlawful entry claims. First, he argues that Deputies Nichols and Bozarth violated the Fourth Amendment by entering the garage without a warrant and without consent or any other exception to the warrant requirement. *See* Aplt. Br. at 27-29. Second, he argues that even though Deputy Nichols later obtained Ms. Zamora's consent to enter the house, he violated the Fourth Amendment because Mr. Watkins negated that consent by objecting to any entry—to either the garage or the house. *See id.* at 29-32. These arguments fail to overcome the officers' qualified immunity.

a. *Ms. Zamora's consent*

The Fourth Amendment's protection against "unreasonable searches and seizures" generally requires the police to obtain a warrant before entering a home. *United States v. Harrison*, 639 F.3d 1273, 1278 (10th Cir. 2011). Consent is an exception to the warrant requirement. *Id.* Consent may be verbal, or it "may instead be granted through gestures or other indications of acquiescence." *United States v. Guerrero*, 472 F.3d

784, 789-90 (10th Cir. 2007). The test is whether the defendant's actions are "clear" and "sufficiently comprehensible to a reasonable officer." *Id.*

Here, the officers had Ms. Zamora's consent to enter both the garage and the home. She initially provided Deputy Nichols with the code to open the garage door and explained how to use it to gain access to the house. Later, when Deputy Nichols returned to ask for her explicit verbal consent to enter the house, she thought that she had already given it. Her providing Deputy Nichols with the means to enter her home—the garage access code—was a "gesture[] or [] indication[] of acquiescence" to home entry that would be "comprehensible to a reasonable officer." *Guerrero*, 472 F.3d at 789-90. Deputy Nichols nonetheless obtained express consent from Ms. Zamora to enter the home.

Mr. Watkins's argument that officers entered the garage without Ms. Zamora's consent fails because they had her consent to enter the garage and the house. He is thus left with his argument that the officers violated his Fourth Amendment rights because he negated his then-wife's consent to enter the garage and the house.

b. *Additional legal background*

i. Supreme Court cases

In *Georgia v. Randolph*, 547 U.S. 103 (2006), the Supreme Court discussed whether the consent exception applies if one occupant of a dwelling consents to

entry and another occupant objects. In *Randolph*, following a marital dispute, the wife told police officers there were drug paraphernalia in the home she shared with the defendant husband. *Id.* at 107. She "readily gave" the officers consent to search the home. *Id.* The defendant, who was present, "unequivocally refused" to give the officers permission to enter the home. *Id.* Relying on the wife's consent, the officers searched the home and found evidence of drug use. *Id.*

The Court determined that the warrantless search was unconstitutional. *Id.* at 115. It held the consent exception does not apply when a co-occupant is present and denies permission to conduct a search: "[A] warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable to him on the basis of consent given to the police by another resident." *Id.* at 120.

The *Randolph* Court expressly limited its holding to "merely evidentiary searches" and stated that the decision "has no bearing on the capacity of the police to protect domestic victims." *Id.* at 118-19. "No question has been raised," the Court wrote,

> about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or

> threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected.

Id. at 118.

The Supreme Court narrowed *Randolph* in *Fernandez v. California*, 571 U.S. 292 (2014). There, police officers knocked on the door of an apartment where they suspected the perpetrator of a crime was hiding. *Id.* at 295. A woman answered the door crying, with blood on her shirt and a bump on her nose. *Id.* The suspect appeared behind her and told the police "You don't have any right to come in here." *Id.* at 296. The officers believed the suspect had assaulted the woman and entered the apartment to arrest him. *Id.* Later, after the suspect had been arrested and removed, and with the woman's permission, they conducted a full search of the apartment. *Id.*

The *Fernandez* Court held that the arrest was valid because "the police had reasonable grounds for removing [the suspect] from the apartment so that they could speak with the [woman], an apparent victim of domestic violence, outside of [the suspect's] potentially intimidating presence." *Id.* at 302-03. It also held that the search was valid because the woman consented to it. *Id.* The Court characterized the *Randolph* decision as a "narrow exception" to the general rule permitting consent searches, stating that it "applies only when the objector is standing in the door saying 'stay out' when officers propose to make a consent search." *Id.* at 300, 306.

ii. Circuit court cases

The Tenth Circuit has not applied *Randolph* in a case where one occupant consented to police entry into a dwelling, another occupant objected to entry, and the police entered to arrest the latter for domestic violence. We thus have no precedent interpreting *Randolph*'s scope in cases like this one. Other courts of appeals are divided.

In *Bonivert v. City of Clarkston*, 883 F.3d 865 (9th Cir. 2018), the Ninth Circuit read *Randolph* broadly. In that case police officers, dispatched to a home where a "physical domestic" dispute had been reported, found the defendant's girlfriend outside the home. *Id.* at 869. She said the defendant had thrown her to the ground and that he was inside the home. *Id.* The officers knocked on the door, but the defendant refused them entry. *Id.* at 870. The officers then requested and received the girlfriend's permission to enter the home, did so, and tased the defendant. *Id.* at 870-71. The court held the consent exception did not justify the warrantless search because "[e]ven though the officers secured [the girlfriend's] consent, [the defendant] was physically present inside and expressly refused to permit the officers to enter." *Id.* at 875.

In *United States v. Tatman*, 397 F. App'x 152 (6th Cir. 2010) (unpublished), the Sixth Circuit adopted a similarly broad construction. There, the defendant and his wife had a violent altercation, and the defendant kicked his wife out of their shared home. *Id.* at 155-56. The wife returned with police officers and opened the

door to invite them into the house. *Id.* at 156. The defendant then appeared at the door and told the police they could not enter. *Id.* After further discussion, the defendant agreed to leave the house, but first went upstairs to collect some personal items. *Id.* The wife informed the police that the defendant had automatic weapons. *Id.* They followed the defendant upstairs, found the weapons, and arrested the defendant. *Id.* The court held that the defendant's explicit denial of permission to enter the house while he was standing at the doorway invalidated his wife's consent. *Id.* at 161. It rejected the government's argument that the actual entry occurred only after the defendant had left the threshold, stating that "the [*Randolph*] Court . . . did not intend the 'at the door' language to be talismanic." *Id.*

By contrast, the Eighth and Fourth Circuits have adopted narrower interpretations of *Randolph*. In *United States v. Coleman*, 909 F.3d 925 (8th Cir. 2018), the defendant's partner called 911 to report that he had hit her. *Id.* at 929. When a police officer arrived at the residence, he found her crying and visibly injured. *Id.* She opened the door, and one of the officers entered the residence. *Id.* The defendant objected shortly after the officer entered the residence, *id.* at 930, but the officer ignored the objection and arrested him. *Id.* at 929 The Eighth Circuit held that the partner's consent justified the officer's entry into the residence. *Id.* at 930. It rejected the defendant's *Randolph* argument because *Randolph* "made clear that a co-tenant's consent to entry will suffice if a potential objector is nearby but

not part of the threshold colloquy." *Id.* The court pointed to the *Randolph* Court's statement that "this case has no bearing on the capacity of the police to protect domestic victims." *Id.* (quoting *Randolph*, 547 U.S. at 118). Because the defendant "did not object until after [the officer] entered the residence with [the partner's] consent to investigate her report of domestic violence," the Eighth Circuit held that *Randolph* did not apply. *Id.*

In *Trull v. Smolka*, 411 F. App'x 651 (4th Cir. 2011) (unpublished), a § 1983 action, the Fourth Circuit also declined to extend *Randolph*. There, officers responded to a 911 call reporting a domestic dispute between a husband and his wife. *Id.* at 653. When the wife invited the officers into the home, the husband had locked himself in a bathroom. *Id.* The officers ordered him to leave the bathroom. *Id.* He refused. *Id.* The officers then burst into the bathroom and removed the husband. *Id.* He sued under § 1983, arguing the officers' entry into the bathroom violated *Randolph* because his objection to their entry trumped his wife's consent. *Id.* at 655. The Fourth Circuit disagreed, finding the case distinguishable from *Randolph* "because here the officers were investigating a domestic situation rather than conducting a search for evidence of a crime." *Id.* at 655.

c. *The district court order*

The district court granted the officers' summary judgment motion on Mr. Watkins's unlawful entry claim, holding there was no constitutional violation. It

said *Randolph* was distinguishable "for multiple reasons." App., Vol. III at 225:

- Unlike the officers in *Randolph*, the officers here "were not conducting a search but effecting an arrest." *Id.*
- *Randolph* applied only when "the person objecting to the search was standing at the door." *Id.*
- Because "it is undisputed that [Mr. Watkins] was not standing at any door [the officers] opened in the course of arresting him," *Randolph* did not invalidate Ms. Zamora's consent for the officers to enter the home. *Id.* at 226.

Finally, even if Mr. Watkins were able to show a constitutional violation under *Randolph*, the court concluded that *Randolph*'s "application . . . to the facts of this case is not clearly established," entitling the officers to qualified immunity. *Id.* at 226-27.

d. *Analysis*

We agree with the district court that Mr. Watkins failed to show that the officers' entry into his garage and home violated clearly established law. His reliance on *Randolph* for clearly established law falls short.

First, unlike *Randolph*, this case involved police investigating domestic violence. The *Randolph* Court said police may enter a home to "determine whether violence (or threat of violence) has just occurred," regardless of whether the alleged domestic abuser

protested the officers' entry. *See* 547 U.S. at 118; *see also Coleman*, 909 F.3d at 930 (holding that *Randolph* did not apply in part because the Court stated its holding "has no bearing on the capacity of the police to protect domestic victims" (quotations omitted)); *Trull*, 411 F. App'x at 655.

Second, unlike the officers in *Randolph*, the officers here entered Mr. Watkins's home to arrest him, not to search for evidence. The Court limited its holding in *Randolph* to "merely evidentiary searches." 547 U.S. at 118-19; *see also Trull*, 411 F. App'x at 655 (distinguishing *Randolph* "because here the officers were investigating a domestic situation rather than conducting a search for evidence of a crime").

Third, the Supreme Court narrowed *Randolph* in *Fernandez*. It held that where officers enter a dwelling based on one co-tenant's consent over another co-tenant's objection, *Randolph* applies only if there is a close temporal and spatial connection between (1) the objection and (2) the officer's entry. *Fernandez*, 517 U.S. at 306. The Court said *Randolph*'s "narrow exception" to the consent rule "applies only when the objector is standing in the door saying 'stay out' when officers propose to make a consent search." *Id.* at 294, 306. Here, Mr. Watkins objected to the officers' entry several minutes before they came to the home—not when they stood at the threshold. App., Vol. III at 171 ¶¶ 15-16. Moreover, Mr. Watkins communicated his objection to Deputy Nichols over the phone, and Deputy Nichols was located at a nearby park. *Id.* Thus, there was no

"threshold colloquy" between the officers and Mr. Watkins. *Coleman*, 909 F.3d at 930.[5]

Without on-point Supreme Court or Tenth Circuit authority, Mr. Watkins is left with out-of-circuit cases. *See Quinn v. Young*, 780 F.3d 998, 1005 (10th Cir. 2015). Although he relies heavily on the Ninth Circuit's *Bonivert* decision, *see* Aplt. Br. at 33-34, 41, the circuits are split on *Randolph*'s application when officers enter a dwelling to arrest someone for domestic violence. "[A] circuit split will not satisfy the clearly established prong of qualified immunity." *Mocek v. City of Albuquerque*, 813 F.3d 912, 929 n.9 (10th Cir. 2015).

Finally, Mr. Watkins does not advance an obviousness argument, nor could he given the scant case law on this subject and the unsettled precedent.

We conclude that Mr. Watkins has failed to present clearly established law that "place[s] the . . . constitutional question beyond debate." *White*, 580 U.S. at 79 (quotations omitted). We therefore affirm the district court's grant of qualified immunity to the officers on Mr. Watkins's unlawful entry claims.

2. **Excessive Force**

Mr. Watkins contends the district court erred in granting the officers qualified immunity on his excessive force claim. He has failed to show a violation of

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[5] Ms. Zamora's absence from the home may also make a difference, but *Randolph* does not clearly establish what that difference would be.

clearly established law at prong two of qualified immunity on the use of force to subdue and arrest him, and he has not shown a constitutional violation based on tight handcuffs. We therefore affirm.

a. *Additional factual history*

As noted, the officers first saw Mr. Watkins when he was standing at the top of a flight of stairs, wearing only a towel. Nichols bodycam Part 1 at 16:07:41. The officers were located at the bottom of the stairs looking up at him. *Id.*; Wunderlich bodycam at 16:07:59. After they commanded Mr. Watkins to come down, he initially complied. Bozarth bodycam at 16:08:05. When he reached the bottom of the stairs, Deputy Nichols grabbed at his arm. Nichols bodycam Part 1 at 16:08:12. Mr. Watkins began retreating up the stairs and repeatedly asked "what's going on?" *Id.* at 16:08:13. Deputy Nichols jumped on top of Mr. Watkins to subdue him. *Id* at 16:08:14.

Mr. Watkins escaped from Deputy Nichols and continued retreating up the stairs. Bozarth bodycam at 16:08:23; Wunderlich bodycam at 16:08:23. Deputy Nichols and Sergeant Wunderlich pursued him. Bozarth bodycam at 16:08:26. One of the officers yanked away the towel from around Mr. Watkins's waist. App., Vol II at 263. The officers eventually caught Mr. Watkins. Wunderlich bodycam at 16:08:27. Sergeant Wunderlich lay on top of him so that Deputy Nichols could place him in handcuffs. Bozarth bodycam at 16:08:35. Sergeant Wunderlich shifted his weight so

that he was lying beside Mr. Watkins on the stairs rather than on top of him. *Id.* at 16:08:52. Mr. Watkins continued to struggle, and one of the male officers told him, "Stop fighting or you're going to get tased." Bozarth bodycam at 16:08:37. Mr. Watkins stopped fighting and Deputy Nichols placed him in handcuffs. *Id.* at 16:08:52-16:09:07. The encounter lasted about one minute. *See id.* at 16:08:12-16:09:07.

Despite the use of multiple bodycams, the collective footage does not fully depict the incident. Deputy Bozarth's bodycam recorded the most, but she kept turning away from the other two officers who were subduing Mr. Watkins. *See generally id.* at 16:08:40-16:09:10. Deputy Nichols's bodycam turned off when he first jumped onto Mr. Watkins. Nichols bodycam Part 1 at 16:08:16. Sergeant Wunderlich's bodycam footage appears to depict him jumping at Mr. Watkins, but after that shows only a close-up of the stairs and Mr. Watkins's back. Wunderlich bodycam at 16:08:27-16:09:32.

Mr. Watkins later testified that Deputy Nichols put his hand on his neck, choking him, and that Sergeant Wunderlich "body slammed" him into the stairs and also choked him. App., Vol. II at 263. He further said that he twisted his ankle when he fell onto the stairs, that one of the officers injured his finger by yanking away his towel, and that Deputy Nichols placed the handcuffs on too tight, cutting off circulation. *Id.* Mr. Watkins reported suffering bruising and pain, but no lasting or permanent injury. *Id.*

After Mr. Watkins was handcuffed, the officers assisted him in getting dressed and took him to a patrol car. He repeatedly complained his handcuffs were too tight, but the officers kept them on for several hours until Deputy Bozarth eventually loosened them. Mr. Watkins reported suffering pain and bruising on his hands due to the handcuffs. He consulted a doctor, who said "everything was fine." App., Vol. II at 256.

b. *Additional legal background*

An officer violates the Fourth Amendment by effecting an arrest using excessive force. *Surat v. Klamser*, 52 F.4th 1261, 1274 (10th Cir. 2022). But "there is no doubt th[at] officers [a]re justified in employing *some* force" against a suspect who is "actively resisting arrest." *Hooks v. Atoki*, 983 F.3d 1193, 1200 (10th Cir. 2020). The question is whether the force used was reasonable. *Surat*, 52 F.4th at 1274.

We consider the "*Graham* factors" to determine whether an officer's use of force was reasonable: (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." *Id.* (quoting *Graham*, 490 U.S. at 396). "But a qualified immunity excessive force case does not always call for a *Graham* analysis." *Hemry v. Ross*, 62 F.4th 1248, 1258 (10th Cir. 2023). Although "general statements of the law are not inherently incapable of giving fair and clear warning to officers," "*Graham* does not by itself

create clearly established law outside an obvious case." *Id.* (alterations omitted) (quoting *White*, 580 U.S. at 80). Instead, to show clearly established law, the burden is on the plaintiff "to identify a case where an officer acting under similar circumstances as [the defendants] was held to have violated the Fourth Amendment." *White*, 580 U.S. at 79.

c. *The district court order*

The district court determined that, under the *Graham* factors, the officers' use of force in arresting Mr. Watkins was reasonable. It noted that Mr. Watkins conceded he "retreated a handful of steps" when Deputy Nichols grabbed him at the bottom of the stairs, and that Mr. Watkins was "being arrested for a violent felony based on the allegation he had attempted to strangle his wife the day before." App., Vol. III at 227. The court also observed that, despite Mr. Watkins's claims that the officers treated him roughly, he failed to identify "any evidence of an actual injury that is not de minimis resulting from [the officers'] conduct." *Id.* at 227-28. The court did not address prong two of qualified immunity. It also did not clearly distinguish between Mr. Watkins's claim based on the force used to subdue and arrest him and his claim based on tight handcuffs.

d. *Analysis*

We hold that (1) even if a reasonable jury could conclude that the officers used excessive force to arrest

him, Mr. Watkins has not shown that any such violation was one of clearly established law; and (2) Mr. Watkins's complaint about tight handcuffs fails because he has not shown non-de minimis injury.[6] We therefore affirm.

i. Force in effecting Mr. Watkins's arrest

The district court rejected Mr. Watkins's claim that the officers used unreasonable force in effecting his arrest, holding that Mr. Watkins could not show excessive force under the *Graham* factors. We affirm on the alternative ground that even if the officers used excessive force, Mr. Watkins has not shown a violation of clearly established law. The officers are therefore entitled to qualified immunity.

Mr. Watkins's brief lacks a single "on-point Supreme Court or published Tenth Circuit decision" that is factually analogous to his arrest. *Quinn*, 780 F.3d at 1005. As the Supreme Court has repeatedly said, "[t]he dispositive question [for qualified immunity] is

[6] Although Mr. Watkins alleges that all three officers were responsible for using excessive force to effect his arrest, the record shows that Deputy Bozarth made no or minimal contact with him during the scuffle on the stairs. *See* Bozarth bodycam at 16:08:12-16:09:07. Also, Mr. Watkins did not allege that Sergeant Wunderlich was personally responsible for the tight handcuffs. The record shows that Deputy Nichols handcuffed Mr. Watkins and Deputy Bozarth ignored his requests to loosen them. Thus, Mr. Watkins appears to assert the tight handcuffs claim just against Deputies Nichols and Bozarth. Because we affirm, for ease of discussion, we refer to the officers' actions collectively as to both aspects of the excessive force claim. *See Est. of Booker*, 745 F.3d at 421.

whether the violative nature of *particular* conduct is clearly established," and "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 577 U.S. at 12 (quotations omitted). Because Mr. Watkins presents no case that is factually similar to this one, he has not met his burden "to identify a case where an officer acting under similar circumstances as [the defendants] was held to have violated the Fourth Amendment." *White*, 580 U.S. at 79.[7]

First, Mr. Watkins argues that the officers violated clearly established law by using any force to arrest him

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[7] At oral argument, Mr. Watkins's counsel, when asked to identify his most factually analogous case, said that "a good starting point is *Allen v. Muskogee* and then also *Medina v. Cram,*" arguing they establish that courts can consider "law enforcement's own reckless or deliberate conduct that essentially creates the need to use force." Oral Arg. at 11:50-12:10. These cases are unavailing. Both are factually different from this one.

In *Allen*, police officers responded to a 911 call reporting a husband was making suicidal threats after a marital dispute. 119 F.3d 837, 839 (10th Cir. 1997). They found the husband holding a gun to his head. They attempted to grab the gun, causing him to swing the gun toward the officers. *Id.* The officers opened fire and killed him. *Id.* His wife sued for excessive force under § 1983 on behalf of his estate.

In *Medina*, after an individual threatened a bail bondsman, officers attacked him with non-lethal ammunition and an attack dog, causing him to reveal a staple gun. 252 F.3d 1124, 1127 (10th Cir. 2001). Believing the staple gun was a firearm, the officers opened fire, severely injuring him. *Id.* He brought a § 1983 excessive force claim. *Id.*

Unlike *Allen* and *Medina*, the officers here did not provoke Mr. Watkins to create a threat of deadly force, nor did they use deadly force themselves.

because "*Graham* establishes that force is least justified against violent misdemeanants who do not flee or actively resist arrest." Aplt. Br. at 49 (quotations omitted). He cites *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007). But *Casey* is not analogous. There, the § 1983 plaintiff had committed a nonviolent misdemeanor—taking his court file from a public building—and officers attacked him "without warning or explanation." 509 F.3d at 1279-80, 1285. Here, Mr. Watkins was suspected of a violent felony—domestic violence—and resisted arrest by scrambling up the stairs despite the officers' commands for him to hold still. Bozarth bodycam at 16:08:13-16:08:23.

Second, Mr. Watkins suggests the officers should not have used force on him because they "did not give him a chance to comply with commands." Aplt. Br. at 49 n.14. He cites *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 665 (10th Cir. 2010). The video evidence shows otherwise—that the officers repeatedly ordered Mr. Watkins to come down the stairs, stop struggling, and allow them to put handcuffs on him. Bozarth bodycam at 16:08:13-16:08:23. And *Cavanaugh* is inapposite. In that case, the officer "gave [the plaintiff] no verbal commands" and used a taser on her when she "was neither actively resisting nor fleeing arrest," and she was suspected only of a misdemeanor. 625 F.3d at 665. Not only did the officers here repeatedly issue verbal commands, but they also (1) subdued Mr. Watkins without using a taser, (2) suspected him of a violent crime, and (3) used force only to prevent him from evading arrest.

Third, Mr. Watkins says that Deputy Nichols "choked Mr. Watkins," in violation of *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991). *See* Aplt. Br. at 49. Deputy Nichols testified that he "inadvertently" placed his hand on Mr. Watkins's neck when he initially jumped on top of him. App., Vol. II at 207. Any choking lasted no more than a few seconds because Mr. Watkins quickly broke free of Deputy Nichols and continued to retreat up the stairs. *See* Bozarth bodycam at 16:08:13-16:08:23. And *Dixon* is inapposite. There, two police officers were patting down the already-subdued plaintiff—who was "not suspected of committing any crime"—for weapons. 922 F.2d at 1462. Then, "[w]ithout warning, one of them kicked [the plaintiff] so forcefully that he started to fall," "hit him in the stomach with a metal flashlight," and "got on top of him and began to beat and choke him." 922 F.2d at 1458. Here, the officers did not beat Mr. Watkins with a weapon or continue using force after subduing him.[8]

Fourth, Mr. Watkins argues that "[t]hrowing [him] down very hard to the ground, especially face-first, as at least Nichols and Wunderlich did here, violated

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[8] In his interrogatory answer, Mr. Watkins claimed that Sergeant Wunderlich "put me in a choke hold." App., Vol. II at 263. In our case law, the word "chokehold" has a specialized meaning, referring to circumstances where "an officer positioned behind a subject places one arm around the subject's neck and holds the wrist of that arm with his other hand." *See Est. of Booker*, 745 F.3d at 413 n.6 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 98 n.1 (1983)). At oral argument, Mr. Watkins's counsel conceded that Sergeant Wunderlich did not put Mr. Watkins in this kind of chokehold. Oral Arg. at 38:13-38:31.

clearly established law." Aplt. Br. at 50. Once again, this characterization does not square with the video evidence. After Mr. Watkins first escaped Deputy Nichols, he did not regain his footing on the stairs but continued to scramble backward. *See* Bozarth bodycam at 16:08:22-16:08:26. Although Sergeant Wunderlich may have caused Mr. Watkins to fall face-first into the stairs, Mr. Watkins was not standing, the stairs were carpeted, and he suffered no significant injury. *See id.* at 16:08:26-16:08:36.

Mr. Watkins's cases do not clearly establish the unlawfulness of the officers' conduct. They involved significantly more forceful takedowns against more compliant suspects who were accused of less serious crimes.[9]

Fifth and finally, Mr. Watkins argues that Sergeant Wunderlich violated Mr. Watkins's clearly established rights by "crush[ing] Mr. Watkins under his body weight even though he was not resisting at the

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[9] *Compare Morris v. Noe*, 672 F.3d 1185, 1190 (10th Cir. 2012) (finding a violation of clearly established law when "two [ ] police officers lunged toward [the plaintiff] and put their hands on his shoulders, twisted him around[,] and ran him into the bushes[,] throwing him to the ground," and the plaintiff was compliant and suspected of only a misdemeanor (quotations and alterations omitted)); *Becker v. Bateman*, 709 F.3d 1019, 1021 (10th Cir. 2013) (granting qualified immunity to an officer who threw a compliant DUI suspect to the ground without warning, causing him to suffer a traumatic brain injury); *Casey*, 509 F.3d at 1280 (officers violated clearly established law when they forced the misdemeanant plaintiff to the ground, "handcuffed him tightly, [ ] repeatedly banged his face into the concrete," and tased him).

time." Aplt. Br. at 51. This is apparently a reference to Sergeant Wunderlich's lying on top of Mr. Watkins for a few seconds to stop him from struggling so that Deputy Nichols could place him in handcuffs. *See* Bozarth bodycam at 16:08:35-16:08:52. The only published case[10] Mr. Watkins cites to show the impropriety of this conduct is *Est. of Booker v. Gomez*, 745 F.3d 405 (10th Cir. 2014), which is factually dissimilar. There, the plaintiff was placed in a "carotid restraint"—a type of hold that cuts oxygen to the brain—by one officer, while another officer put his knee on the plaintiff's back, a third officer used a pain compliance device on his ankle, and a fourth tasered him. *Id.* at 413-14. The plaintiff died as a result. *Id.* at 416. The officers spent two minutes and 55 seconds to subdue the plaintiff. *Id.* at 414. Here, by contrast, the officers used significantly less force—there was no taser, no carotid restraint, and no pain compliance device. Nor did Mr. Watkins suffer any lasting or significant injuries, much less death. And the entire encounter lasted about a minute, only a fraction of which involved Sergeant Wunderlich

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[10] Mr. Watkins also cites *Long v. Fulmer*, 545 F. App'x 757, 761 (10th Cir. 2013), *Cook v. Peters*, 604 F. App'x 663, 667, 669 (10th Cir. 2015), and *Lynch v. Bd. of Cnty. Comm'rs*, 786 F. App'x 774, 778-80, 782 (10th Cir. 2019), to support various portions of his clearly established law argument. But these cases are unpublished, and "[i]n determining whether the law was clearly established, we have held that we may not rely upon unpublished decisions." *Green v. Post*, 574 F.3d 1294, 1305 n.10 (10th Cir. 2009).

placing body weight on Mr. Watkins.[11] Bozarth bodycam at 16:08:05-16:09:10.

ii. Tight handcuffs

An excessive force claim based on tight handcuffs requires the plaintiff to show "some actual injury that is not de minimis." *Koch v. City of Del City*, 660 F.3d 1228, 1247-48 (10th Cir. 2011) (quotations omitted) (granting qualified immunity on a tight handcuffs claim where the plaintiff alleged only "superficial abrasions"); *see also Donahue v. Wihongi*, 948 F.3d 1177, 1197 (10th Cir. 2020) (finding that the plaintiff's "handcuffing was not an act of excessive force" because the plaintiff "allege[d] [only that] he sustained bruising," but "the record reveal[ed] no evidence of permanent injury"); *Cortez v. McCauley*, 478 F.3d 1108, 1129 (10th Cir. 2007) (en banc) ("[U]nduly tight handcuffing can constitute excessive force where a plaintiff alleges some actual injury from the handcuffing . . . that is not de minimis. . . .").

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[11] Mr. Watkins suggests that each officer's "failure . . . to intervene to stop their Co-Appellees['] excessive use of force as described herein supplies a basis for holding them liable." Aplt. Br. at 52. But he does not otherwise develop or explain this failure-to-intervene theory, which he has waived through inadequate briefing. *See Valdez v. Macdonald*, 66 F.4th 796, 834 (10th Cir. 2023) (holding a conclusory and underdeveloped argument was inadequately briefed and waived); *Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019) ("[A]n appellant may waive an issue by inadequately briefing it."); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived.").

Although Mr. Watkins claims the officers cuffed his hands too tightly and refused to loosen the handcuffs for hours, he alleged bruising and temporary pain only and conceded that a medical evaluation revealed no lasting damage. App., Vol. II at 256. He has failed to show a constitutional violation.

III. **CONCLUSION**

We affirm the district court.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 20-cv-01172-RM-MEH

BRYCE WATKINS,

Plaintiff,

v.

BRIAN WUNDERLICH, in his individual capacity,
KEVIN NICHOLS, in his individual capacity, and
TAMMY BLACK n/k/a Tammy Bozarth,
in her individual capacity,

Defendants.

ORDER

(Filed Sep. 22, 2022)

This lawsuit brought under 42 U.S.C. § 1983 is before the Court on Defendants' Motion for Summary Judgment. (ECF No. 20.) The Motion has been fully briefed. (ECF Nos. 23, 28.) For the reasons below, the Motion is granted.

I. BACKGROUND

The following facts are not disputed for purposes of the Motion. On the evening of April 28, 2018, Plaintiff's wife called 911 and reported an incident of domestic violence that had occurred that morning at the home she jointly owned with Plaintiff. (ECF No. 87,

¶¶ 1, 2.) Plaintiff's wife reported that Plaintiff had tried to strangle her, and that she believed he might try to kill her. (*Id.* at ¶¶ 6, 7.) The next morning, she called 911 again to report that Plaintiff had returned home for the first time since the incident. (*Id.* at ¶ 10.) Defendants Nichols and Black, Douglas County Sheriff's Office deputies, and Defendant Wunderlich, a sergeant, responded to the call. (*Id.* at ¶¶ 11, 21.)

Defendant Nichols met with Plaintiff's wife at a park around the corner from the home, where she reported that she did not feel safe with Plaintiff. (*Id.* at ¶¶ 11, 12.) While there, Plaintiff's wife received a call from Plaintiff on her cell phone, and she handed the phone to Defendant Nichols, who spoke with Plaintiff for about thirty seconds. (*Id.* at ¶ 14.) Defendant Nichols asked Plaintiff to come to the front door and speak with him, but Plaintiff refused and told Defendant Nichols that the police could not enter his home. (*Id.* at ¶¶ 15, 16; ECF No. 86 at 1.) Defendant Nichols reported over the radio to the other officers that Plaintiff was refusing to come to the door. (ECF No. 87, ¶ 17.) Before heading over to the home, Defendant Nichols asked Plaintiff's wife for the code to open the home's garage. (*Id.* at ¶ 18.) She provided the code, explained how to enter it, and added that it could also be used for the front door. (*Id.* at ¶ 19.)

At the home, Defendant Nichols used the code to open the garage door, and he and Defendant Black entered the garage. (*Id.* at ¶ 22.) Defendant Wunderlich then asked Defendant Nichols if Plaintiff's wife had explicitly given them permission to enter the home,

and Defendant Nichols acknowledged that she had not. (*Id.* at ¶ 23.) Defendant Nichols then returned to the park, where he received explicit permission from Plaintiff's wife for the officers to go into the home. (*Id.* at ¶ 25.) Defendant Nichols relayed the information to the other officers, and moments later they entered the living area of the home, announcing they were from the sheriff's office. (*Id.* at ¶¶ 26, 29.) From a different location in the home, Plaintiff responded by stating, "Excuse me. I'm actually getting dressed right now." (*Id.* at ¶ 31.) Defendants encountered Plaintiff when he was on the stairs above them, shirtless and with a towel wrapped around his waist. (*Id.* at ¶¶ 34, 35.) Defendant Nichols repeatedly commanded Plaintiff to come down the stairs, but he remained on the landing, asking what was going on and stating, "You're in my house." (*Id.* at ¶¶ 36, 37.) Defendant Nichols responded, "Your wife gave us permission." (*Id.* at ¶ 37.)

Plaintiff then began to walk down the stairs, stating, "I did not do anything." (*Id.* at ¶ 39.) As Defendant Nichols reached for one of Plaintiff's arms, he stepped back from the officers while still facing them and retreated up the stairs. (*Id.* at ¶¶ 40, 41.) A struggle ensued, but the officers apprehended Plaintiff on the stairs and placed him in handcuffs in about thirty seconds. (*Id.* at ¶¶ 42-47.) Defendant Nichols advised Plaintiff he was being arrested for "second degree assault, domestic violence." (*Id.* at 47.) Defendant Wunderlich asked Plaintiff where his clothes were and for permission to bring him some clothing, which Plaintiff agreed to. (*Id.* at ¶ 49.) After Defendant

Nichols helped Plaintiff into his pants, Plaintiff was escorted out the front door and into a patrol car. (*Id.* at ¶¶ 50, 51.)

While in the car, Plaintiff was examined by medical personnel. (*Id.* at ¶ 52.) He remained in handcuffs as he was transported to the jail and underwent the booking process. (*Id.* at ¶ 53.) Plaintiff later testified that he experienced some bruising around his wrists from the handcuffs. (*Id.* at ¶ 54.) He was charged with a felony for the domestic assault on his wife. (*Id.* at ¶ 55.)

In their Motion, Defendants contend they are entitled to qualified immunity on Plaintiff's remaining claims: an unlawful entry or search claim against Defendants Nichols and Black and an excessive force claim against all Defendants.

II. LEGAL STANDARDS

A. Summary Judgment

Summary judgment is appropriate only if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Gutteridge v. Oklahoma*, 878 F.3d 1233, 1238 (10th Cir. 2018). Applying this standard requires viewing the facts in the light most favorable to the nonmoving party and resolving all factual disputes and reasonable inferences in his favor. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). However, "if the nonmovant bears the burden of

persuasion on a claim at trial, summary judgment may be warranted if the movant points out a lack of evidence to support an essential element of that claim and the nonmovant cannot identify specific facts that would create a genuine issue." *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1143-44 (10th Cir. 2013). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Qualified Immunity

Qualified immunity shields individual defendants named in § 1983 actions from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Gutteridge*, 878 F.3d at 1238; *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014). "Once the qualified immunity defense is asserted, the plaintiff bears a heavy two-part burden to show, first, the defendant's actions violated a constitutional or statutory right, and, second, that the right was clearly established at the time of the conduct at issue." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir.

2014) (quotation omitted). "If, and only if, the plaintiff meets this two-part test does a defendant then bear the burden of the movant for summary judgment—showing that there are no genuine issues of material fact that he or she is entitled to judgment as a matter of law." *Gutteridge*, 878 F.3d at 1238 (quotation omitted).

III. ANALYSIS

Defendants assert that their entry into the home and arrest of Plaintiff did not violate his clearly established Fourth Amendment rights because his wife consented to the entry and the force used to effect the arrest was not clearly unreasonable. The Court agrees with both assertions.

A. Unlawful Entry or Search Claim

"Voluntary consent is a longstanding exception to the general requirement that law enforcement officers must have a warrant to enter a person's home." *United States v. Guillen*, 995 F.3d 1095, 1103 (10th Cir. 2021). "The exception applies when the government proves (1) the officers received either express or implied consent and (2) that consent was freely and voluntarily given." *Id.*

Plaintiff first argues that a jury question exists as to whether Defendants Nichols and Black had legal justification for their initial entry into Plaintiff's garage. But based on the undisputed facts, these

Defendants could have reasonably believed Plaintiff's wife impliedly consented to the entry by providing the code to open the home's front door and garage. Although consent must be clear, it need not be verbal. *See United States v. Guerrero*, 472 F.3d 784, 789 (10th Cir. 2007). Consent may be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer. *Id.* at 789-90. The fact that Defendants subsequently obtained—seemingly out of an abundance of caution—Plaintiff's wife's express consent to enter the home does not render ambiguous or invalid the implied consent she gave earlier by providing Defendant with the code and explaining how to use it. Plaintiff has adduced no evidence that this implied consent was not "unequivocal and specific" (ECF No. 72 at 6), and the Court finds it was sufficient to provide reasonable officers with a basis for believing they had a lawful basis to enter the home.

The Court also rejects Plaintiff's contention that either the implied or express consent given by his wife was invalidated by any statement he made either to Defendant Nichols over the phone or to Defendants directly once they were inside the home. Plaintiff's reliance on *Georgia v. Randolph*, 547 U.S. 1515, 1526 (2006), in this context is misplaced. There, the officer asked the defendant's wife for permission to search the house after she told him there were items of drug evidence in the home, and the defendant had unequivocally refused the officer's request for *his* permission to conduct a search. *Id.* at 1519. The *Randolph* Court held

that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of the consent given to the police by another resident." *Id.* at 1526. But *Randolph* is distinguishable from this case for multiple reasons—one if which is because the officers were not conducting a search but effecting an arrest. "[W]hen the police may enter without committing a trespass, and the police may enter to search for evidence" are "two different issues." *Id.* at 1525.

More importantly, however, the *Randolph* Court repeatedly emphasized that the person objecting to the search was standing at the door. *See id.* at 1522-23 ("[I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.' "); *id.* at 1526 ("The undoubted right of the police to enter in order to protect a victim, however, has nothing to do with the question in this case, whether a search with the consent of one co-tenant is good against another, standing at the door and expressly refusing consent."); *id.* at 1527 ("[W]e have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search."). As noted in *Fernandez v. California*, 571 U.S. 292, 303-04 (2014), expanding *Randolph* by allowing a previously made objection to remain effective even when the objector is not standing

at the door would create numerous "practical complications that *Randolph* sought to avoid." *See id.* at 306 ("If *Randolph* is taken at its word—that it applies only when the objector is standing in the door saying 'stay out' when officers propose to make a consent search—all of these problems disappear.").

Here, it is undisputed that Plaintiff was not standing at any door Defendants opened in the course of arresting him. Based on the rationales behind *Randolph* and *Fernandez*, the Court declines Plaintiff's invitation to apply Randolph "to all circumstances when the expressly objecting occupant is physically present in their home." (ECF No. 72 at 13.) The Court also finds that no statements or conduct tending to show that Plaintiff did not want the officers in his home—made either beforehand or during his arrest—overrode or revoked the consent given by his wife. *Cf. Manzanares v. Higdon*, 575 F.3d 1135, 1146 (10th Cir. 2009) (concluding officer was compelled to leave after consent was withdrawn by the person who initially granted it); *see also Williams v. People*, 455 P.3d 347, 348 (Colo. 2019) (concluding that husband's subsequent objection to search, after the officers had already entered his home and were in the process of taking possession of drugs and paraphernalia, could not vitiate his wife's previously given consent). Because Defendants had valid consent to enter the home, there is no genuine issue as to whether the entry by Defendants Nichols and Black violated his Fourth Amendment rights, and they are entitled to qualified immunity on this claim. At the very least, the application of *Randolph* to the facts of

this case is not clearly established. This provides a further basis for concluding that qualified immunity applies.

B. Excessive Force Claim

"[T]he right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Determining whether the force used to effectuate a seizure is reasonable under the Fourth Amendment "requires careful consideration of the facts and circumstances of each particular case, including 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." *Id.* The "reasonableness" of a particular use of force is judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, and 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.*

Here, Plaintiff admits he "retreated a handful of steps" despite repeated commands to come down the stairs. (ECF No. 72 at 16.) Moreover, he was being arrested for a violent felony based on the allegation he had attempted to strangle his wife the day before. Nonetheless, he attempts to salvage his excessive force claim by contending that, in the relatively brief time it took for the officers to arrest him, they "all beat him";

"Defendant Nichols grabbed and tackled him, throwing [him] down hard to the ground with his back pointed towards the stairs"; Defendant Nichols "intentionally choked him"; the officers "threw [him] down to the ground very hard (again), this time face-first"; and Defendant Wunderlich "crushed [his] body while he was lying face-down on his stairs." (ECF No. 72 at 17.) He further contends he was "excessively tightly handcuffed" for over two hours. (*Id.*) Tellingly, however, Plaintiff does point to any evidence of an actual injury that is not de minimis resulting from Defendants' conduct. "[A] claim of excessive force requires some actual injury that is not de minimis, be it physical or emotional." *Cortez v. McCauley*, 478 F.3d 1108, 1129 (10th Cir. 2007). In his Response, Plaintiff contends that his "actual injury here included but is not limited to unnecessary and severe pain, bruising, and lingering damage to at least his finger." (ECF No. 72 at 20 n.9.) The Court finds Plaintiff's allegations and evidence are insufficient to establish that Defendants exceeded what was reasonable to effectuate his arrest. In the absence of a constitutional violation, Defendants are entitled to qualified immunity on this claim as well.

IV. CONCLUSION

Therefore, the Motion (ECF No. 66) is GRANTED, and the Clerk is directed to CLOSE this case.

DATED this 22nd day of September, 2022.

BY THE COURT:

/s/ Raymond P. Moore
RAYMOND P. MOORE
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRYCE WATKINS, Plaintiff - Appellant, v. BRIAN WUNDERLICH, in his individual capacity, et al., Defendants - Appellees.	No. 22-1358 (D.C. No. 1:20-CV-01172-RM-MEH) (D. Colo.)

ORDER

(Filed Jul. 17, 2023)

Before **HARTZ**, **MATHESON**, and **McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk