[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-11201

Non-Argument Calendar

CHRISTOPHER EUGEAN BROWN,

Plaintiff-Appellant.

versus

WARDEN,

Defendant,

SERGEANT ASHLEY KERN,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 7:20-cv-00204-HL-TQL

Before ROSENBAUM, ABUDU, and ANDERSON, Circuit Judges.

PER CURIAM:

Christopher Brown, a state prisoner proceeding *pro se*, filed a complaint alleging that, while he was incarcerated at Valdosta State Prison, prison officer Sergeant Ashley Kern used excessive force against him by deploying pepper spray into his cell after he refused to be handcuffed, and then displayed deliberate indifference to his medical needs by failing to ensure he received proper treatment. The district court granted summary judgment in favor of Kern, concluding that her use of pepper spray was reasonable given Brown's repeated refusal to "cuff up" when ordered by Kern, and that Kern was not deliberately indifferent since she took him to the showers as soon as he became compliant. After careful review, we affirm the grant of summary judgment.

I.

In the light most favorable to Brown, the relevant facts are as follows. Brown, who is serving a life sentence without parole for murder, was transferred to Valdosta in February 2019. He

refused his first housing assignment, requesting protective custody[1], and he was instead assigned to a "lockdown" unit. Brown explained that Valdosta was "the most violent prison" he had been in, and he feared being housed with a gang member, having been previously labeled as a "snitch." In his five months at Valdosta preceding the events in this case, Brown had two or three cellmates. None were affiliated with any gang, but one cellmate threatened Brown with a knife after Brown rejected his sexual advances. Brown informed a prison officer of this incident, and he was moved to another cell.

On July 26, 2019, Sergeant Kern and another prison officer came to Brown's cell and ordered him to "cuff up"—i.e., be handcuffed at the cell door—because he was getting a new cellmate. Brown refused, telling Kern that he had been trying to obtain protective custody and was "living in fear for [his] life," and that he did not feel safe with an unknown cellmate. Kern responded that housing assignments had "nothing to do with her," and she told Brown he would be pepper sprayed if he refused to be handcuffed. When Brown replied that he was "refusing," citing fears over his personal safety, Kern directed the other prison officer to start recording on her body-worn camera, and then gave another direct order to Brown to cuff up. Brown held firm and "still refused," trying to explain his need for protective custody. As a result, Kern deployed pepper spray through the flap on the cell door and closed the flap

[1] It appears Brown received protective custody sometime after the events of this case.

before again asking Brown to cuff up. Within two minutes, Brown "gave up" and submitted to handcuffing "because [he] couldn't take the spray no more."

Once Brown was in handcuffs, Kern and the other officer opened the cell door and escorted Brown to the showers, where he was permitted to wash while still in handcuffs. While showering, when Kern was away, Brown complained to the other officer that he was having vision problems. Thereafter, he was taken back to his cell, and his prospective cellmate was housed elsewhere. Brown continued to experience blurred vision after the pepper spray incident, but Kern did not have any role in his treatment apart from escorting him to medical appointments.

The district court granted summary judgment to Kern based on a report and recommendation prepared by a magistrate judge. In the court's view, no reasonable jury could conclude, based on Brown's version of events, that "Kern applied force maliciously and sadistically, rather than in a good-faith effort to restore order." The court also reasoned that Kern did not know about and was not deliberately indifferent to his vision problems. Brown appeals.

II.

We review the grant of summary judgment *de novo*, viewing the evidence in the light most favorable to the non-moving party, Brown, and drawing all reasonable inferences in his favor. *Pourmoghani-Esfahani v. Gee*, 625 F.3d 1313, 1315 (11th Cir. 2010). Because Brown is proceeding *pro se*, we liberally construe his filings. *Trawinski v. United Techs.*, 313 F.3d 1295, 1297 (11th Cir. 2002).

Nevertheless, "issues not briefed on appeal by a *pro se* litigant are deemed abandoned." *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008).

III.

The Eighth Amendment forbids prison officers using excessive force against prisoners. *Thomas v. Bryant*, 614 F.3d 1288, 1303–04 (11th Cir. 2010). The "core judicial inquiry" for an excessive-force claim is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (quotation marks omitted).

To determine whether force was applied maliciously and sadistically to cause harm, we consider the need for force, the amount of force used, the extent of any injury inflicted, the threat reasonably perceived by the responsible official, and any efforts made to temper the severity of the use of force. *Danley v. Allen*, 540 F.3d 1298, 1307 (11th Cir. 2008), *overruled on other grounds as recognized by Randall v. Scott*, 610 F.3d 701, 709 (11th Cir. 2010); *see Whitley v. Albers*, 475 U.S. 312, 320–21 (1986). Based on these factors, "inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Skrtich v. Thornton*, 280 F.3d 1295, 1300–01 (11th Cir. 2002), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). "Unless it appears that the evidence, viewed in the light most favorable to the

plaintiff, will support a reliable inference of wantonness in the infliction of pain . . . , the case should not go to the jury." *Whitley*, 475 U.S. at 322.

We have recognized that "correctional officers in a prison setting can use pepper-spray or a takedown to subdue an inmate as long as a valid penological reason supports the use of such force." *Sconiers v. Lockhart*, 946 F.3d 1256, 1265 (11th Cir. 2020). "Pepper spray is an accepted non-lethal means of controlling unruly inmates," and prison officers "need not wait until disturbances reach dangerous proportions before responding." *Danley*, 540 F.3d at 1307. Nor are officers required to "convince every inmate that their orders are reasonable and well thought out." *Id.* In short, we must give "a wide range of deference to prison officials acting to preserve discipline and security." *Sears v. Roberts*, 922 F.3d 1199, 1205 (11th Cir. 2019) (quotation marks omitted).

Here, the district court properly granted summary judgment on Brown's excessive-force claim. Undisputed evidence reflects that Sergeant Kern's use of pepper spray inside Brown's cell was supported by a "valid penological reason." *Sconiers*, 946 F.3d at 126. According to Brown's testimony, Kern shot a single burst of pepper spray and closed the door flap only after Brown refused multiple direct orders to be handcuffed, backed by warnings that he would be sprayed if he did not comply, so that another inmate could be added to his cell. Although Brown feared having a cellmate, he acknowledged that Kern's orders were valid and consistent with ordinary prison procedures, and that Kern herself had

no authority over housing assignments. Kern was not required to convince Brown that her orders were reasonable before acting to subdue him for being noncompliant and disruptive, *see Danley*, 540 F.3d at 1307, and we must give prison officials "wide ranging deference" when acting to preserve discipline and security, *see Sears*, 922 F.3d at 1205. Plus, immediately after Brown became compliant and submitted to being handcuffed, he was removed from the cell and taken to the showers to decontaminate.

Based on this record, no reasonable jury could conclude that Kern applied force maliciously and sadistically, rather than in a good-faith effort to maintain or restore discipline. *See Wilkins*, 559 U.S. at 37. And because Brown has not briefed his claim of deliberate indifference to his serious medical needs, he has abandoned any appeal of that ruling. *See Timson*, 518 F.3d at 874.

For these reasons, we affirm the district court's grant of summary judgment on Brown's complaint.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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December 29, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-11201-DD
Case Style: Christopher Brown v. Ashley Kern, et al
District Court Docket No: 7:20-cv-00204-HL-TQL

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against appellant.

Please use the most recent version of the Bill of Costs form available on the court's website at www.ca11.uscourts.gov.

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OPIN-1A Issuance of Opinion With Costs

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CHRISTOPHER EUGEAN BROWN,

Plaintiff,

v.

Sergeant ASHLEY KERN,

Defendant.

Civil Action No. 7:20-CV-204 (HL)

ORDER

Before the Court is the Recommendation of United States Magistrate Judge Thomas Q. Langstaff. (Doc. 71). The Magistrate Judge recommends granting Defendant's Motion for Summary Judgment. (Doc. 39). The Magistrate Judge further recommends denying Plaintiff's motions for emergency transfer. (Docs. 67, 70).

Plaintiff filed objections to the Recommendation. (Doc. 74). The Court has fully considered the record in this case and made a *de novo* determination of the portions of the Recommendation to which Plaintiff objects. The Court finds Plaintiff's objections unpersuasive and agrees with the Recommendation. Accordingly, the Recommendation is **ACCEPTED AND ADOPTED**. The Court **GRANTS** Defendant's Motion for Summary Judgment. (Doc. 39). The Court **DENIES** Plaintiff's motions for emergency transfer. (Docs. 67, 70).

SO ORDERED, this 25th day of March, 2022.

s/ Hugh Lawson
HUGH LAWSON, SENIOR JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CHRISTOPHER EUGEAN BROWN,

Plaintiff,

VS.

Sergeant ASHLEY KERN,

Defendant.

7 : 20-CV-204 (HL)

RECOMMENDATION

Plaintiff filed this action pursuant to 42 U.S.C. § 1983 in October 2020. (Doc. 1). After initial review, Plaintiff's excessive force and deliberate indifference to a serious medical need claims were allowed to proceed against Defendant Kern. (Doc. 5). Pending are Defendant's Motion for Summary Judgment, along with Plaintiff's motions seeking an emergency transfer. (Docs. 39, 67, 70). The Clerk of Court notified the Plaintiff of the filing of the Defendant's Motion for Summary Judgment, advised him of his obligations under the law, and directed him to respond thereto within thirty (30) days of the date of the notification. (Doc. 40). Plaintiff has responded to Defendant's motion. (Doc. 46).

Background

Plaintiff's claims arise out of events occurring during his incarceration at Valdosta State Prison. (Doc. 5). In his Complaint, Plaintiff alleges that on July 26, 2019, Defendant Kern and another corrections officer came to Plaintiff's cell to tell him he was getting a cellmate. *Id.* Plaintiff alleges that he had been seeking protective custody because he was a homosexual and had been beaten and robbed in the past. *Id.* Plaintiff was concerned about being assigned a cellmate

who was a gang member. *Id.* Plaintiff told Defendant Kern that his life would be in danger if he was housed with a gang member, but Kern responded that she did not care, threatened to pepper spray Plaintiff, and told the accompanying officer to turn on her camera. *Id.* Plaintiff approached the cell door to explain his concerns, and Defendant Kern pulled out a can of pepper spray, spraying Plaintiff in the face through the cell door tray flap. *Id.* She then closed the flap, and Plaintiff remained in the cell for "a minute or two", until Plaintiff begged for the tray flap to be opened. *Id.*

Kern then opened the door, handcuffed Plaintiff, and took Plaintiff out of the cell. *Id.* Kern and the other officer placed Plaintiff in the shower, although Plaintiff maintains that he remained handcuffed, and had difficulty turning on the shower. *Id.* He ultimately turned on the water, and Plaintiff asked for medical attention because his left eye was blurry. *Id.* Kern took Plaintiff out of the shower and escorted him back to his cell. *Id.* The new inmate was placed into an empty cell, and Kern and the other officer left the dorm without providing Plaintiff any medical care. *Id.* Days later, Plaintiff put in a sick call request and was seen by medical. Plaintiff maintains that because of the pepper spray, his vision in his left eye continued to be blurry. *Id.*

Defendant filed a Motion for Summary Judgment on August 26, 2021. (Doc. 39). Pursuant to Rule 56 of the Federal Rules of Civil Procedure, 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).

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> (B) showing that the materials cited do not establish the absence or

> presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

As the party moving for summary judgment, Defendant has the initial burden to demonstrate that no genuine issue of material fact remains in this case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record, including pleadings, discovery materials, and affidavits, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . grant summary judgment if the motion and supporting materials 'including the facts considered undisputed' show that the movant is entitled to it". Fed. R. Civ. P. 56(e)(3). Defendant has supported her Motion for Summary Judgment with Plaintiff's deposition testimony. (Doc. 39-3).

Excessive force claim

Plaintiff claims that Defendant Kern used excessive force against him when she pepper sprayed him without cause. The Eighth Amendment forbids cruel and unusual punishment, and this prohibition governs "the treatment a prisoner receives in prison and conditions under which he is confined." *Farrow v. West*, 320 F.3d 1235, 1242 (11th Cir. 2003). "[W]henever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley* [*v. Albers*, 475 U.S. 312 (1986)]: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 5 (1992). In analyzing an excessive

force claim, courts consider "the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted", as well as "the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." *Whitley*, 475 U.S. at 321. "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir. 1985) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)), *abrogated on other grounds by Graham v. Connor*, 490 U.S. 386 (1989).

The Supreme Court has clarified that "[t]he 'core judicial inquiry' . . . [is] not whether a certain quantum of injury was sustained, but rather 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (quoting *Hudson*, 503 U.S. at 7). Although the extent of any injury is not alone dispositive of an excessive force case, it is "one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation." *Hudson*, 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321).

In Plaintiff's deposition testimony, Plaintiff testifies that he had been transferred to Valdosta State Prison in February 2019, and was placed in segregation. (Doc. 39-3, pp. 11-12). Prior to July 2019, Plaintiff had been seeking protective custody based on his fear of attack from gang members. *Id.* at p. 16. On July 26, 2019, Defendant Kern and another officer came to Plaintiff's cell, where Plaintiff was housed alone. *Id.* at p. 20. Defendant Kern told Plaintiff to "cuff up" because they were putting a new cellmate in with Plaintiff. *Id.* Plaintiff told Defendant Kern that he was in fear of his life, had been asking to get into protective custody, and "just can't no anybody be

put in the cell with me . . . [and] I don't feel safe with, you know, nobody coming in the cell". *Id.* Defendant Kern told Plaintiff that "if I refused, I was going to get, you know, sprayed". *Id.* Plaintiff said, "I'm refusing, you know, to get a roommate because I'm living in fear for my life." *Id.* Defendant Kern then had the officer accompanying her begin recording the incident.

Plaintiff

> still refused the inmate . . . [and] [s]he pulled out the can of pepper spray and sprayed inside the cell and locked the flap back. So I'm in the cell. I'm basically still trying to catch my breath . . . [while] she was basically, you know, narrating the incident or whatever. So she asked me to cuff up again. So now I can't breathe because she locked the flap back. I ain't got no air in the cell. So I went ahead and gave up because I couldn't take the spray no more. So I came to the flap, and I was like I'm cuffing up. I'm cuffing up. So I put my hands through the flap, and she puts cuffs on me. And they escorted me to the showers. She put me in the shower, left me in handcuffs, didn't take the handcuffs off. I had to turn the shower on with my head because they got the pressure knobs that you can just, you know, press. So I turned the shower on with my head, you know, hitting the button and stuff. And it came on, and was letting it run over me.

Id.

Plaintiff states that he complained he could not see, but Defendant Kern had exited the area to retrieve the inmate to be escorted to Plaintiff's cell. *Id.* at p. 21. Plaintiff admitted that he refused to be handcuffed after Defendant Kern asked him to "cuff up" because he was afraid his new cellmate might be a gang member, although he did not know the new cellmate was a gang member. *Id.* at pp. 20-22. After Plaintiff refused to be handcuffed, Defendant Kern warned Plaintiff she was going to deploy pepper spray, according to Plaintiff "when I refused – it was because I was refusing". *Id.* at p. 23.

Plaintiff also testified that after Defendant Kern instructed the officer with her to start

recording the incident, "that's when she gave me another direct order to cuff up, to handcuff up from the back. While I was at the flap, I was looking out at her like this . . . and I was trying to explain to her that I need protective custody. . . [and] she just basically said that ain't got nothing to do with her or something to that extent and sprayed me". *Id.* The tray flap was the only place through which the pepper spray could be deployed into the cell. *Id.* at p. 25. After Defendant Kern deployed the spray

> [Plaintiff] walked around and it was even a few seconds, and she started narrating the incident from the camera: I'll advise Inmate Brown to cuff-up one more time . . . And I was like okay. Okay. I'll cuff up. And that's when she opened it back up, and I put my hands out. And she escorted me to the shower.

Id. at p. 27.

Plaintiff submitted a sick call request later that day. *Id.* at p. 30. Plaintiff testified to telling the dorm officer, someone other than Defendant Kern, that his vision was blurry after the incident. *Id.* at pp. 30-31. Plaintiff did see a nurse a couple of days later, and Plaintiff was fitted with glasses. *Id.* at p. 31.

Plaintiff's response and sworn statement

In a sworn statement filed prior to Defendant Kern filing her Motion for Summary Judgment, Plaintiff states that "a minute or two" passed between Defendant Kern deploying the pepper spray and closing the tray flap and Defendant Kern opening the cell door. (Doc. 38, p. 3). Plaintiff also states that Defendant Kern and the officer accompanying her placed Plaintiff back in his cell after he was allowed to shower, without providing him proper medical care. *Id.* at p. 5.

In his response to Defendant Kern's summary judgment motion, which does not contain any sworn statements, Plaintiff argues that the use of pepper spray was an unjustified use of excessive

force. (Doc. 46).

Analysis

To the extent that Plaintiff has submitted unsworn statements in opposition to Defendant's Motion for Summary Judgment, these statements will not be considered by the Court in determining Defendant's motion. *See Holloman v. Jacksonville Housing Authority,* 2007 WL 24555, *2 (11th Cir. 2007) ("unsworn statements, even from *pro se* parties, should not be considered in determining the propriety of summary judgment"); *Mosley v. MeriStar Management Co.*, 137 F. A'ppx 248, 252 n.3 (11th Cir. 2005) ("the complaint was unverified and therefore could not be considered evidence supporting [plaintiff's] claim" on summary judgment). "The allegations of plaintiff's complaint cannot be considered for purposes of determining whether a genuine dispute of material fact exists, because plaintiff's complaint is neither sworn, verified, nor subscribed as true under penalty of perjury." *Odom v. Florida Department of Corrections, et al.*, 2014 WL 4079910, *3 (N.D.Fla. 2014).

Viewing the facts in the light most favorable to the Plaintiff as the non-moving party, the evidence shows that Defendant Kern instructed Plaintiff to submit to handcuffing at least two (2) times before pepper spraying him on the day in question, deploying the spray after warning the Plaintiff that she was going to use the spray if he did not submit to handcuffing. Plaintiff refused to be handcuffed prior to the spraying. After deploying the pepper spray, Defendant Kern closed and locked the tray flap on the cell door, keeping Plaintiff enclosed in the cell. Plaintiff states that somewhere between a matter of seconds and two (2) minutes passed while Defendant Kern narrated the incident for the video recording, and Plaintiff then agreed to be handcuffed. Defendant Kern then opened the cell door, escorted Plaintiff to the shower, where he was able to rinse off. Defendant Kern exited the area while Plaintiff was in the shower, during which time Plaintiff

informed another officer that he was having trouble with his vision. Defendant Kern returned and escorted Plaintiff back to his cell. Plaintiff requested medical attention by submitting a sick call request to another officer, and was seen by a nurse and eye doctor to be fitted for glasses. The Court will consider Plaintiff's excessive force claim to include the one burst of pepper spray and the seconds to two (2) minute time period when he was enclosed in his cell after the spray. *See Danley*, 540 F.3d at 1308 (analyzing both the initial burst of pepper spray and the subsequent confinement without decontamination as excessive force).

In regard to the first use of force factor to be considered, the facts and reasonable inferences viewed in the light most favorable to Plaintiff establish the need for the use of some level of force. Plaintiff testified in his deposition that he refused multiple orders to be handcuffed and was warned that pepper spray would be used if he did not comply. Thus, the need for the use of force was established "by the undisputed evidence that [the inmate] created a disturbance." *Bennett v. Parker*, 898 F.2d 1530, 1533 (11th Cir. 2008). Prison guards "are not required to [convince every inmate that their orders are reasonable and well-thought out] where an inmate repeatedly fails to follow those orders." *Danley v. Allen*, 540 F.3d 1298, 1307 (11th Cir. 2008), *overruled in part on other grounds as recognized by Randall v. Scott*, 610 F.3d 701, 709 (11th Cir. 2010). Plaintiff does not deny that Defendant Kern ordered him to submit to handcuffing on multiple occasions, and that Plaintiff refused to comply with these orders. The Court notes that Plaintiff's confinement in the cell after the burst of pepper spray preceded his compliance with Defendant's orders to be handcuffed. *Cf. Danley*, 540 F.3d at 1309 (finding continued use of force in the form of confinement in the cell, after prisoner was disabled and compliant, was excessive force).

The second factor to be considered, the relationship between the need for force and the amount of force used, weighs in favor of Defendant Kern. "[A]s a means of imposing force, pepper

spray is generally of limited intrusiveness, and it is designed to disable a suspect without causing permanent physical injury." *Vinyard v. Wilson,* 311 F.3d 1340, 1348 (11th Cir. 2002). "Pepper spray is an accepted non-lethal means of controlling unruly inmates." *Danley*, 540 F.3d at 1307. Moreover, Defendant Kern deployed only one shot of the pepper spray. Short bursts of pepper spray are "not disproportionate to the need to control an inmate who has failed to obey a jailer's orders." *Id.* As previously noted, the "few seconds" (Doc. 39-3, p. 27) or "a minute or two" (Doc. 38, p. 3) of enclosure in the cell preceded Plaintiff's compliance with Defendant's order to submit to handcuffing, and was minimal in nature.

In regard to the third factor concerning resulting injury, Plaintiff states he initially suffered difficulty breathing and blurry vision. Plaintiff states in his deposition testimony that the shower helped clear up his breathing difficulties, but that some level of breathing difficulties and blurry vision did continue. (Doc. 39-3, pp. 28, 31; Doc. 38, p. 4). It appears that his injuries were greater than *de minimis*. *See Moore v. Tolliver*, 2021 WL 4234957, n.7 (S.D. Al. 2021) (recognizing that when injuries in addition to temporary discomfort from pepper spray are established, courts have found physical injury that is greater than *de minimis*). Defendant Kern, as the party moving for summary judgment and relying only on Plaintiff's deposition testimony, has not satisfied her initial burden to demonstrate that no genuine issue of material fact remains in this case as to the extent of Plaintiff's injury following the pepper spray. *Celotex Corp*, 477 U.S. at 325. As such, this factor weighs in favor of Plaintiff.

However, although "[t]he extent of injury may [] provide some indication of the amount of force applied. . . [t]he Eleventh Circuit has repeatedly held that a push or shove that causes pain and necessitates no or merely minor medical treatment is not a constitutional violation, even where the prisoner was restrained and no further force was necessary." *Hall v. Leavins*, 2009 WL

2905912 *4 (N.D.Fla. Sept. 4, 2009) *citing Jones v. City of Dothan*, 121 F.3d 1456, 1460-61 (11th Cir. 1997).

The fourth use of force factor weighs in favor of Defendant Kern, as Defendant Kern could have reasonably perceived Plaintiff to be a threat under Plaintiff's version of events. Plaintiff repeatedly refused to obey Defendant's orders to submit to handcuffing, creating a disturbance, and the use of pepper spray "is a reasonable alternative to escalating a physical confrontation." *Pearson v. Taylor,* 665 F. A'ppx 858, 864 (11th Cir. 2016). The extent of the threat reasonably perceived by Defendant Kern would reasonably permit the use of force in response. *Id.*

Fifth and finally, as to efforts made to temper the use of force response, the undisputed facts show that Defendant Kern deployed pepper spray into Plaintiff's cell only once, and that she gave Plaintiff repeated orders to be handcuffed, thereby providing multiple opportunities for Plaintiff to comply. *Nasseri v. City of Athens*, 373 F. A'ppx 15, 20 (11th Cir. 2010). Once Plaintiff was compliant with her order to submit to handcuffing, Defendant immediately removed Plaintiff from the cell and took him to the shower. Guards are "permitted to use some force in controlling the situation and preventing it from escalating". *Id.*

Thus, the Court finds that under Plaintiff's version of events, a reasonable jury could not conclude that Defendant Kern applied force maliciously and sadistically, rather than in a good-faith effort to restore order.

Deliberate indifference claim

In his deliberate indifference claim against Defendant Kern, Plaintiff maintains that Kern returned Plaintiff to his cell from the shower without providing him with medical care, despite him experiencing lingering side effects of the pepper spray, including blurry vision and trouble breathing.

It is well established that prison personnel may not subject inmates to "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). "To show that a prison official acted with deliberate indifference to serious medical needs, a plaintiff must satisfy both an objective and a subjective inquiry. First, a plaintiff must set forth evidence of an objectively serious medical need. Second, a plaintiff must prove that the prison official acted with an attitude of 'deliberate indifference' to that serious medical need." *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003) (internal citations omitted). "[D]eliberate indifference has three components: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence." *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999).

In his deposition testimony, Plaintiff states that while he was in the shower on the day in question, he complained to another officer that he could not see, but that Defendant Kern "had then left out and went back to the yard". (Doc. 39-3, p. 20-21). Defendant Kern subsequently came back into the shower area and, along with the other officer, placed Plaintiff back in his cell and left the area. *Id.* at p. 21. Plaintiff testified that the shower helped his breathing after the pepper spray incident, and his complaints regarding his vision were directed to another officer. *Id.* at p. 28. After Defendant Kern and the other officer returned Plaintiff to his cell, Plaintiff's eyes were still bothering him, and Plaintiff asked for a sick call request from the floor officer and asked to go to medical for his eyes. *Id.* at pp. 30-31. Plaintiff was seen by medical a few days later, and an appointment was scheduled for Plaintiff with an eye doctor, who prescribed glasses. *Id.* at p. 31. Plaintiff testified that Defendant Kern was only an escort officer, and would not be the person making the decision as to when Plaintiff was seen by medical for his vision issues. *Id.* Plaintiff's affidavit testimony corroborates his deposition testimony as to Defendant Kern's involvement in

medical treatment after he was placed in the shower. (Doc. 38).

Viewing the facts and reasonable inferences in the light most favorable to Plaintiff as the non-moving party, Defendant Kern placed Plaintiff back in his cell after he was taken to the shower. Plaintiff asked another officer for medical attention based on vision problems. Plaintiff did not voice any need for medical care directly to Defendant Kern, and there is no evidence that she heard or was aware of his requests for medical attention for blurry vision. Plaintiff eventually received medical care, days after the pepper spray incident.

Even if the Court considers that Defendant Kern had subjective knowledge of the risk of serious harm to Plaintiff immediately after the use of pepper spray, Plaintiff has nevertheless not come forth with facts sufficient to establish that Defendant Kern had knowledge of any need for medical treatment after Plaintiff's intervening shower, and that she was deliberately indifferent to this need. *Cf. Danley,* 540 F.3d at 1310-11 (exposure to pepper spray plus failure to decontaminate can constitute serious medical need).

The undisputed facts show that Defendant Kern removed Plaintiff from his cell once he agreed to be handcuffed and she escorted him to the shower, where he was able to rinse off until the point that he was "soaking wet". (Doc. 39-3, p. 28). Viewing the facts in the light most favorable to Plaintiff, there is no indication that Plaintiff's subsequent requests for medical attention and complaints regarding his vision were heard by Defendant Kern, who had exited the area at the time of Plaintiff's statements. Plaintiff's statements were made to another officer, and were ultimately the basis for a sick call request, the granting of which did not involve Defendant Kern. There is no indication that Defendant Kern was aware of any inadequacies in the length of the shower received by Plaintiff or of any continued effects from the pepper spray. *Cf. Danley,* 540 F.3d at 1312 (based on jail policy for decontamination after pepper spray, prisoner's pleas for help,

and complaints from other inmates, jailers were aware of risk of serious harm from pepper spray combined with a failure to decontaminate prisoner; jailers knew shower was not long enough to fully decontaminate prisoner and were aware of continued physical effects suffered by prisoner from spray).

Furthermore, the Plaintiff has failed to establish that any delay in treatment exacerbated his conditions. "[D]elay in medical treatment must be interpreted in the context of the seriousness of the medical need, deciding whether the delay worsened the medical condition, and considering the reason for the delay." *Hill v. DeKalb RYDC*, 40 F.3d 1176, 1189 (11th Cir. 1994), *overruled in part on other grounds*, *Hope v. Pelzer*, 536 U.S. 730 (2002). "An inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of delay in medical treatment to succeed." *Id.* at 1188.

"Prison officials must have been deliberately indifferent to a known danger before we can say that their failure to intervene offended 'evolving standards of decency', thereby rising to the level of a constitutional tort. The known risk of injury must be 'a strong likelihood, rather than a mere possibility'". *Brown v. Hughes*, 894 F.2d 1533, 1537 (11th Cir. 1990) (quoting *Estelle* , 429 U.S. 97 and *Edwards v. Gilbert*, 867 F.2d 1271, 1276 (11th Cir. 1989)). Plaintiff has failed to establish that Defendant Kern was aware of yet disregarded a serious medical condition or worsening of Plaintiff's condition. *Cf. McNeeley v. Wilson,* 2016 WL 1730651 at *4 (11th Cir. 2016) (corrections officers on notice that delaying decontamination after pepper spray for over 20 minutes despite complaints of effects of spray could result in clearly established constitutional violation).

Qualified immunity

As the Court finds no constitutional violation based on the facts provided, Defendant is also

entitled to qualified immunity. *Baltimore v. City of Albany, Ga.*, 183 F. A'ppx 891, 896 (11th Cir. 2006).

Conclusion

Inasmuch as Plaintiff has failed to establish that Defendant Kern used excessive force against him, and has failed to establish that Defendant Kern was deliberately indifferent to a serious medical need after Plaintiff was taken out of the shower, it is the recommendation of the undersigned that Defendant's Motion for Summary Judgment be **GRANTED**. (Doc. 39). It is further recommended that Plaintiff's motions for emergency transfer be **DENIED**. (Docs. 67, 70). Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. The District Judge shall make a de novo determination as to those portions of the Recommendation to which objection is made; all other portions of the Recommendation may be reviewed by the District Judge for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, this 8th day of February, 2022.

s/ Thomas Q. Langstaff

UNITED STATES MAGISTRATE JUDGE