

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 5 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GERARDO RODARTE,

Plaintiff-Appellee,

v.

JOSEPH GUTIERREZ, an individual and in
his official capacity as a Skagit County
Employee,

Defendant-Appellant,

and

SKAGIT COUNTY,

Defendant.

No. 21-35973

D.C. No. 2:20-cv-00885-BJR

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

Argued and Submitted October 21, 2022
Seattle, Washington

Before: R. NELSON, FORREST, and SUNG, Circuit Judges.

Defendant Joseph Gutierrez, a former Skagit County Sheriff's Deputy,

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

appeals the district court’s denial of summary judgment on Plaintiff Gerardo Rodarte’s 28 U.S.C. § 1983 fabrication-of-evidence claim. We have jurisdiction under 28 U.S.C. § 1291 and may hear Gutierrez’s interlocutory appeal “to decide whether, taking the facts in the light most favorable to [Rodarte], [Gutierrez is] entitled to qualified immunity.” *Isayeva v. Sacramento Sheriff’s Dep’t*, 872 F.3d 938, 945 (9th Cir. 2017). We review the denial of summary judgment de novo, *Mattos v. Agarano*, 661 F.3d 433, 439 (9th Cir. 2011) (en banc), and we affirm.

In assessing whether a defendant is entitled to qualified immunity, we ask two questions: (1) “whether the facts taken in the light most favorable to the plaintiff show that the officer’s conduct violated a constitutional right,” and (2) “whether the right in question was clearly established at the time of the officer’s actions, such that any reasonably well-trained officer would have known that his conduct was unlawful.” *Orn v. City of Tacoma*, 949 F.3d 1167, 1174 (9th Cir. 2020).

1. *Constitutional Violation.* To prevail on his fabrication-of-evidence claim, Rodarte must show that “(1) [Gutierrez] deliberately fabricated evidence and (2) the deliberate fabrication caused [Rodarte]’s deprivation of liberty.” *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017). We conclude that Rodarte made both showings for purposes of summary judgment.

First, the summary judgment record—taken in the light most favorable to Rodarte—establishes that a material dispute of fact exists regarding whether

Gutierrez deliberately fabricated evidence against Rodarte. Gutierrez arrested Rodarte and the Skagit County prosecuting attorney prosecuted Rodarte for domestic assault against his niece and interfering with reporting of domestic violence based on Gutierrez's police report. Rodarte's wife submitted a declaration stating that she told Gutierrez that the niece had attacked Rodarte, that Gutierrez asked her to lie for his police report and she refused, and that she did not make the statements incriminating Rodarte that Gutierrez attributed to her in his report. Rodarte also submitted a declaration stating that after Gutierrez arrested him, he heard Gutierrez tell the niece "that they needed to change their story because it did not fit with the evidence, and that they had to fix it so it looked real." Rodarte also reiterated that he did not strangle his niece and the marks on her neck in Gutierrez's photos were not there when she left his home. At this stage of the proceedings, we lack jurisdiction to address Gutierrez's "fact-related" arguments challenging the sufficiency of Rodarte's evidence.¹ See *Estate of Anderson v. Marsh*, 985 F.3d 726, 731 (9th Cir. 2021).

Second, Rodarte has "raised a triable issue that the fabricated evidence was the cause in fact and proximate cause of his injury." *Caldwell v. City and County of San Francisco*, 889 F.3d 1105, 1115 (9th Cir. 2018). Being criminally charged is

¹Because we need not consider Rodarte's evidence submitted in response to Gutierrez's motion for reconsideration to the district court, the "motion to exclude" included in Gutierrez's reply brief is DENIED as moot.

enough to constitute injury. *See id.*; *Devereaux v. Abbey*, 263 F.3d 1070, 1074–75 (9th Cir. 2001) (en banc). There is a presumption that the filing of a criminal complaint “immunizes investigating officers” because the prosecutor is presumed to have “exercised independent judgment in determining that probable cause for an accused’s arrest exists at that time.” *Caldwell*, 889 F.3d at 1115 (citation omitted). But that presumption may be rebutted where “officers either presented false evidence to or knowingly withheld crucial information from the prosecutor.” *Id.* at 1116. Rodarte has presented evidence that Gutierrez did both here because Gutierrez’s police report and his affidavit, which the prosecutor relied on to establish probable cause for the charges, contained fabricated evidence. And neither of these documents referenced the exculpatory statements made by Rodarte’s wife, which contradict the allegedly falsified inculpatory statements attributed to her in the police report.

2. Clearly Established Right. We have held that it “is virtually self-evident” that “there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government.” *Devereaux*, 263 F.3d at 1074–75. We have reiterated that this “clearly established” right existed well before Gutierrez’s actions at issue in cases describing similar types of deliberate fabrication. *See, e.g., Richards v. County of San Bernadino*, 39 F.4th 562, 569–71 (9th Cir. 2022) (1993 manipulation of physical

evidence); *Caldwell*, 889 F.3d at 1112, 1114–15 (1990 attribution of fabricated statement to plaintiff in notes). Regardless, it is patently obvious that, if true, Gutierrez’s alleged conduct ran afoul of the constitution. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

Because there is evidence of record from which, if true, a jury could conclude that Gutierrez falsified evidence against Rodarte, the district court’s denial of Gutierrez’s motion for summary judgment asserting qualified immunity is

AFFIRMED.