NOT FOR PUBLICATION

FILED

JAN 6 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID GETZEN,

Plaintiff-Appellee,

v.

J. LONG,

Defendant-Appellant,

and

COUNTY OF YAVAPAI; STATE OF ARIZONA; YAVAPAI COUNTY SHERIFF'S OFFICE; SHELA SULLIVAN POLK, Yavapai County Attorney's Office; YAVAPAI COUNTY SUPERIOR COURT; STEPHENCE A. WILLISON, Yavapai County Public Defenders Office; YAVAPAI COUNTY JAIL; JAMES STEWARD, Yavapai County Jail, mental health, PH, Dr., MD; WILLIAM LANDRY, Verde Valley Justice Court; ATTORNEY GENERAL FOR THE STATE OF ARIZONA; CHARLES L. RYAN, named as Charle Ryan, Director of ADOC; ROBERT BURDINE, Director of Nursing; RICHARD PRATT, Director of Health ADOC; ROBERTSON, Dr., Corizon medical staff; DE GUZMAN, Dr.; AQUIAO, Sr adon, RN; DAVIS, named as U. Davis,

No. 21-16437

D.C. No.
3:18-cv-08093-SRB-DMF

MEMORANDUM*

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

assist RN - director; DOES, Arizona State Governor; Yavapai County Sheriff; Yavapai County Jail Supervisor, Booking Does 1-3; Director of Nursing, Medical Supervisor Does 1-3; Supervisor for Solitary Confinement Does 1-3; John Does 1-4; Yavapai County Jail, finger officer, jail officers, jail officer supervisor, booking unit of the jail; CEO John Doe, Corizon Medical Inc.,

Defendants.

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted August 11, 2022
Seattle, Washington

Before: CHRISTEN, LEE, and FORREST, Circuit Judges.

Defendant Jeff Long, a former Yavapai County Sheriff's Deputy, appeals the district court's denial of his motion for summary judgment against Plaintiff David Getzen's 42 U.S.C. § 1983 excessive force claim. We have jurisdiction under 28 U.S.C. § 1291 and may hear Long's interlocutory appeal "to decide whether, taking the facts in the light most favorable to [Getzen], [Long 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. *Excessive Force.* Although non-lethal, deploying pepper spray "present[s] a significant intrusion upon an individual's liberty interests." *Young v. County of Los Angeles*, 655 F.3d 1156, 1161 (9th Cir. 2011). Likewise, using a taser in dart mode is "an intermediate, significant level of force," *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010), and tasing someone in drive-stun mode causes "extreme pain" that can constitute "constitutionally excessive" force when employed repeatedly on someone who is merely passively resistant, *Mattos*, 661 F.3d at 446. We consider these means of force to be "non-trivial." *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093–94 (9th Cir. 2013).

Taking the facts in the light most favorable to Getzen, a reasonable jury could conclude that Long's use of force was "greater than [was] reasonable under the circumstances." *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) (quoting *Santos v. Gates*, 287 F.3d 846, 854 (9th Cir. 2002)); *see also Rice v. Morehouse*, 989 F.3d 1112, 1121 (9th Cir. 2021). Although the deputies were responding to a domestic violence call, it is undisputed that Getzen was never

aggressive with the deputies, never attempted to flee, and did not say anything to indicate that he was a threat. The facts demonstrate that the deputies could have reasonably believed that they had a legitimate interest in removing Getzen from the premises and that Getzen was a threat when they first found him on the bathroom floor with his hands behind him. But Long continued using non-trivial force after it became clear that Getzen was not holding a weapon or otherwise threatening the officers. Specifically, the facts and reasonable inferences derived therefrom strongly suggest that Getzen's hands were no longer obscured when Long pepper sprayed Getzen the second time. Therefore, without addressing the first pepper spray deployment and the two prior tasings, we conclude that, at a minimum, a reasonable jury could find that the second pepper spray deployment—occurring after Getzen calmly asked the deputies to stop tasing him—was excessive in violation of the Fourth Amendment. *See Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1130–31 (9th Cir. 2002) (finding use of pepper spray on passive subjects who were sitting peacefully and did not threaten or harm officers was "plainly in excess of the force necessary under the circumstances").

2. *Clearly Established Right.* When Getzen was arrested, "[t]he right to be free from the application of non-trivial force for engaging in mere passive resistance" was clearly established. *Gravelet-Blondin,* 728 F.3d at 1093. It was also established that tasers and pepper spray are "non-trivial" force, *id.* at 1093–94, and

that peacefully refusing to comply with an officer's command is passive, not active, resistance, *see Thomas v. Dillard*, 818 F.3d 864, 890 (9th Cir. 2016) (plaintiff resisted "passively and not actively" when he refused to permit a frisk, moved backward to avoid the officer's attempt to grab him, and did not comply with commands to raise his hands and kneel (internal quotation marks omitted)).

For the entirety of the relevant events, Getzen was sitting or lying on the bathroom floor. He did not make any aggressive movements or statements. His sole means of resistance was not complying with the deputies' initial commands to come out of the house and then to show his hands once they located him in the bathroom. Based on the facts presented, we conclude that any reasonable officer would know that Getzen was not actively resisting when Long pepper sprayed him the second time and, therefore, that this use of non-trivial force was unlawful.

AFFIRMED.