IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-00884-CMA-STV

CHAYCE ANDERSON,

Plaintiff,

v.

JASON SHUTTERS,

Defendant.

AMENDED[1] RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This matter comes before the Court on Defendant Jason Shutters' Motion for Summary Judgment (the "Motion") [#128], which has been referred to this Court [#134]. The Court has carefully considered the Motion and related briefing, the entire case file, and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the Motion. For the following reasons, the Court respectfully **RECOMMENDS** that the Motion be **GRANTED** and that this case be **DISMISSED**.

I. BACKGROUND[2]

This matter arises out of the arrest of Plaintiff Chayce Anderson. On August 28, 2015, Defendant Detective Shutters initiated a sexual assault investigation involving

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[1] The original Recommendation was amended solely to add the notice in footnote 7.

[2] The undisputed facts are drawn from the record appendices and exhibits filed in conjunction with the briefing on Defendant's Motion. [*See, e.g.*, ##128-1, 133-1-133-12, 136-1, 136-2] The Court also has reviewed and referenced the audio recording of the interaction between Plaintiff and Defendant during Plaintiff's arrest. [#129]

Plaintiff. [#128-1 at 9-10] After completing the necessary paperwork, and securing a warrant for Plaintiff's arrest, Defendant responded to Plaintiff's location. [*Id.* at 10] Officer Andrew Edmonds and Detective Tammy Tracy also arrived on the scene. [#133-1 at 3; #133-3 at 7 (23:22-25); *see generally* #133-7] Sergeant Kim Cochran was also present, and had been engaging Plaintiff before the other officers arrived with respect to a separate incident involving Plaintiff's vehicle. [*See generally* #133-1]

Defendant began to speak with Plaintiff about the case he was investigating. [#128-1 at 10] Plaintiff stated that he did not want to speak to Defendant without a lawyer present, and Defendant then informed Plaintiff that he was under arrest. [*Id.*; *see also* #129, Audio Recording at 2:38-2:57] Defendant used a recording device in his pocket to record the interaction with Plaintiff. [#133-4 at 6 (36:10-24); #129]

Defendant gave multiple verbal commands to Plaintiff and Plaintiff complied. [#128-1 at 10; #133-4 at 7 (38:3-12); #133-7 at 3 (16:4-9); *see also* #129, Audio Recording at 3:12-6:17] Plaintiff did not resist or question Defendant, and was very cooperative throughout the interaction, including as Defendant placed Plaintiff into handcuffs. [*Id.*] Defendant used the "stand-and-cuff," or "standing modified," handcuffing technique, which Defendant's supervisor, Sergeant Cochran, testified is a technique that officers "probably" use the most. [#133-3 at 3 (12:3-7); #133-4 at 8 (43:19-24)] With that technique, the arrestee turns away, puts his hands behind his head, interlaces his fingers, and then the officer takes hold of the hands, puts one behind the arrestee's back while searching the arrestee, and then places the handcuffs. [#133-4 at 8 (43:20-24)]

After placing the handcuffs on Plaintiff, Defendant asked Plaintiff if the handcuffs were too tight, to which Plaintiff responded, "No, that's fine, completely fine." [#128-1 at

10; #129, Audio Recording at 4:30-32] In reviewing the Audio Recording, Defendant testified that he then checked the cuffs for tightness, found one to be a little bit too loose, "so it sounded like there w[ere] . . . two more clicks" to tighten the loose cuff. [#133-4 at 11 (47:1-15); *see also* #129, Audio Recording at 4:31-39] A few seconds later, Defendant asked another officer if they had a double lock, and explained to Plaintiff that Defendant was double locking the handcuffs so that they would not get tighter. [#129, Audio Recording at 4:37-50; *see also* #128-1 at 10] Defendant stated in his police report that after double locking, he again checked for tightness "by inserting [his] index finger between the side of [Plaintiff's] wrist and the handcuff." [#128-1 at 10]

The interaction between Plaintiff and Defendant lasted between two and three more minutes after Defendant completed the handcuffing. [*See generally* #129, Audio Recording at 4:30-7:32] During that time, Defendant asked Plaintiff to observe Defendant locking Plaintiff's vehicle. [#128-1 at 10; #129, Audio Recording at 5:19-48] Defendant then asked Plaintiff if he had any questions, and Plaintiff responded that he did not. [#129, Audio Recording at 6:15-6:17] Defendant also asked Plaintiff if there was a passcode for his phone, and Plaintiff confirmed that there was but would not provide it. [*Id.* at 6:43-53] Approximately three minutes after the additional tightening of the handcuffs, an officer can be heard making another statement to Plaintiff, to which Plaintiff responds, "Of course." [*Id.* at 7:30-7:32]

Plaintiff was then transported to the Fort Collins Police Station for processing by Officer Andrew Edmonds. [#128-1 at 11] The transport lasted approximately 10 to 15 minutes. [#133-6 at 6 (20:2-5)] On the way to the station, Plaintiff complained that the handcuffs were too tight, were causing him wrist pain, and that he had severe nerve

damage. [#128-1 at 11; #133-11 at ¶ 11] Officer Edmonds testified that Plaintiff complained of general discomfort and that his wrists hurt, but was not "screaming out in pain." [#133-6 at 6 (20:14-20)] Because they were "pretty close to the station" when Plaintiff began complaining about the wrist pain, Officer Edmonds decided to wait until they arrived at the police station, where he notified fellow officers that Plaintiff was experiencing discomfort in his wrists. [*Id.* at 3 (11:13-18)]

After arriving at the station, Plaintiff also complained of his pain to Detective Tracy, and stated that the handcuffs were too tight. [#133-7 at 4 (17:2-19)] Detective Tracy brought Plaintiff to an interview room where she removed the handcuffs in order to photograph his wrists. [*Id.* (17:22-24)] The photographs are before the Court. [#133-12] Detective Tracy observed some redness, and also noted that Plaintiff's hands were shaking. [#133-7 at 4, 5 (17:20-24, 18:6-12)] Plaintiff asked to be seen by a doctor, and officers called for an ambulance. [#133-6 at 3 (11:19-21); #133-11 at ¶ 16] Sergeant Cochran also was informed of Plaintiff's wrist pain, and was involved in ensuring that medical personnel took Plaintiff to the hospital. [#133-1 at 4; *see also* #133-3 at 12 (33:12-19)]

Plaintiff was transported to the hospital by Poudre Valley Hospital Emergency Medical Services ("EMS"). [*See* #133-10 at 18] Plaintiff complained to the paramedics of bilateral wrist numbness and pain, and unspecified left shoulder pain. [*Id.*] The EMS report noted that "no trauma [was] visualized," and that Plaintiff had "equal grip strength." [*Id.*] Physician Assistant Erin Carnahan examined Plaintiff at Poudre Valley Hospital. Mr. Carnahan's clinical impression was "medical clearance for incarceration" and "paresthesia," which the hospital records describe as "numbness and tingling." [*Id.* at 4;

#128-1 at 19] Mr. Carnahan noted that Plaintiff's wrists had no visual evidence of trauma, and that there was "no swelling[,] no erythema, no laceration, [and] no abrasion." [*Id.* at 15, 38] Mr. Carnahan also observed that Plaintiff had full range of motion in the distal appendages. [#133-10 at 5] Plaintiff was shaking initially, but ultimately stopped. [*Id.*] Mr. Carnahan noted the following in his differential diagnoses: wrist numbness, wrist trauma, medical clearance for incarceration, and malingering. [*Id.* at 4-5] Mr. Carnahan's final diagnosis was "disturbance of skin sensation." [*Id.* at 2]

Mr. Carnahan testified that in his training and experience, "disturbance of skin sensation" means "an excoriation," or "scratch"—in other words, "[a]nything that disturbs the epidermis." [#133-9 at 4 (13:22-25)] Mr. Carnahan concluded that Plaintiff did not suffer any injury to his wrists. [#128-1 at 40-41 (36:20-22, 37:2-7)] At the same time, Mr. Carnahan testified that there were no diagnostic tests capable of providing conclusive evidence of nerve damage that he could have ordered, and instead he would have had to send Plaintiff to a neurologist for a nerve conduction study. [#133-9 at 5 (42:3-14)]

According to Plaintiff, he has continued to experience "intermittent shooting pains in both of [his] wrists," since the arrest over four years ago. [#133-11 at ¶¶ 24-25] The ongoing pain has restricted the activities Plaintiff is able to participate in, and he is unable to exercise in ways that put a strain on his wrists, including doing pull-ups and push-ups. [*Id.* at ¶ 26; #133-2 at 10 (79:7-11)] Plaintiff has limited resources to manage the pain, but he has complained of the pain to nurses on several occasions and has obtained over-the-counter pain medication. [#133-11 at ¶ 28; #133-2 at 12 (81:19-23)] Plaintiff's transfer among several different facilities has complicated his ability to seek treatment for his condition. [*See* #133-2 at 3 (45:8-24)]

Plaintiff claims that Defendant used excessive force in handcuffing Plaintiff in violation of the Fourth Amendment.[3] [#61 at 23] Defendant filed the instant Motion on July 5, 2019, seeking summary judgment on the excessive force claim, and arguing that the force used to arrest Plaintiff was objectively reasonable, Plaintiff has failed to demonstrate that his injuries were more than *de minimis*, and that Defendant is thus entitled to qualified immunity. [#128] Plaintiff has filed a response [#133] and Defendant has filed a reply [#136]. Plaintiff has also filed a sur-reply [#137-1], and Defendant has filed a sur-response [#147], with leave of the Court [#146].

II. STANDARD OF REVIEW

Summary judgment is appropriate only 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); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Henderson v. Inter–Chem Coal Co.,* 41 F.3d 567, 569 (10th Cir. 1994). The movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact, which the movant may do "simply by pointing out to the court a lack of evidence . . . on an essential element of the nonmovant's claim" when the movant does not bear the burden of persuasion at trial. *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 670-71 (10th Cir.1998). If the movant carries this initial burden, the burden then shifts to the nonmovant "to go beyond the pleadings and set forth specific facts that would be admissible in evidence in the event of trial." *Id.* at 671 (quotation omitted).

[3] Plaintiff's excessive force claim against Defendant is the only remaining claim in this matter. On June 13, 2019, United States District Judge Christine M. Arguello adopted this Court's Recommendation that Plaintiff's other claims be dismissed. [##85, 93]

"[A] 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury. *See Anderson,* 477 U.S. at 248–49; *Stone v. Autoliv ASP, Inc.,* 210 F.3d 1132, 1136 (10th Cir. 2000); *Carey v. U.S. Postal Serv.,* 812 F.2d 621, 623 (10th Cir. 1987). 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 party could return a verdict for either party. *Anderson,* 477 U.S. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (*citing First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). In reviewing a motion for summary judgment, the Court "view[s] the evidence and draw[s] reasonable inferences therefrom in the light most favorable to the non-moving party." *See Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1216 (10th Cir. 2002).

III. ANALYSIS

In the instant Motion, Defendant argues that he is entitled to summary judgment on Plaintiff's excessive force claim because the force used to arrest Plaintiff was objectively reasonable, Plaintiff has failed to demonstrate that his injuries were more than *de minimis*, and accordingly Defendant is entitled to qualified immunity. [#128]

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Once a defense of qualified immunity is asserted, "the onus is on the plaintiff to demonstrate '(1) that the official violated a statutory or constitutional right, *and* (2) that the right was "clearly established" at the time of the challenged conduct.'" *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). "If the plaintiff fails to satisfy either part of the two-part inquiry, the court must grant the defendant qualified immunity." *Gross v. Pirtle*, 245 F.3d 1151, 1156 (10th Cir. 2001). Here, the Court concludes that Plaintiff has failed to establish either prong of his qualified immunity analysis.

Personal liability for an excessive force claim is individual, based on each officer's actions and omissions. *See Casey v. City of Fed. Heights*, 509 F.3d 1278, 1281, 1285 (10th Cir. 2007). The Supreme Court has held that a small amount of force, such as an arrest where an individual is handcuffed, placed in a police vehicle, and taken to the police station, while inconvenient and embarrassing, does not rise to the level of excessive force. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354-55 (2001); *see also Fisher v. City of Las Cruces*, 584 F.3d 888, 896 (10th Cir. 2009) ("[I]n nearly every situation where an arrest is authorized, or police reasonably believe public safety requires physical restraint, handcuffing is appropriate."). Moreover, the Fourth Amendment "does not require [police] to use the least intrusive means in the course of a detention, only reasonable ones," *Fisher*, 584 F.3d at 894 (alteration in original) (quotation omitted), and "[h]andcuffing inevitably involves some use of force . . . and it almost inevitably will result in some

irritation, minor injury, or discomfort where the handcuffs are applied," *United States v. Rodella*, 804 F.3d 1317, 1328 (10th Cir. 2015) (citation and quotation omitted). However, "[i]n some circumstances, unduly tight handcuffing can constitute excessive force where a plaintiff alleges some actual injury from the handcuffing and alleges that an officer ignored a plaintiff's timely complaints (or was otherwise made aware) that the handcuffs were too tight." *Cortez v. McCauley*, 478 F.3d 1108, 1129 (10th Cir. 2007); *see also Zartner v. Miller*, 760 F. App'x 558, 561 (10th Cir. 2019) (noting that to "trigger liability for unduly tight handcuffs," the plaintiff must show "an actual injury," "a causal link between this injury and the unduly tight handcuffs," and "the officer's knowledge that the handcuffs were too tight").

But, while excessive handcuffing may constitute excessive force, a plaintiff cannot prevail on an excessive force handcuffing claim unless either: (1) the plaintiff timely informs the officer that the handcuffs are too tight, or (2) the officer is otherwise made aware that the handcuffs are too tight. *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1208-09 (10th Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009); *see also Lewis v. Sandoval*, 428 F. App'x 808, 811-12 (10th Cir. 2012) (finding defendant officer was entitled to qualified immunity where plaintiff did not complain of any discomfort from the handcuffs until he arrived at the police station, at which point the officer checked the tightness and ultimately loosened the handcuffs); *Silvan W. v. Briggs*, 309 F. App'x 216, 224-25 (10th Cir. 2009) (finding plaintiff could not maintain an excessive force claim based on his handcuffs because he never "notified the officers that his handcuffs were painful"); *Lyons v. City of Xenia*, 417 F.3d 565, 575-76 (6th Cir. 2005) ("In the absence of an obvious physical problem caused by the handcuffs or a plea by the defendant to loosen them, it

is fair to ask how a reasonable officer should know that a problem has occurred."). In other words, absent obvious injury, "a plaintiff must make a contemporaneous complaint to the arresting officer(s) of pain or exacerbation of injury." *Nauman v. Utah Highway Patrol*, No. 2:14-cv-00560-CW-DBP, 2016 WL 11188474, at *4 (D. Utah Aug. 31, 2016) (collecting cases), *report and recommendation adopted*, 2017 WL 76918 (D. Utah Jan. 9, 2017), *aff'd*, 689 F. App'x 622 (10th Cir. 2017).

For example, in *Zartner v. City and County of Denver*, the plaintiff claimed that soon after he was handcuffed, he began to experience numbness in his hands and arms. No. 15-cv-02218-PAB-KLM, at *2 (D. Colo. Sept. 7, 2017), *aff'd on other grounds sub nom.*, *Zartner v. Miller*, 760 F. App'x 558 (10th Cir. 2019). Although the plaintiff informed a deputy that his wrists were injured once he had been brought to the police station, *id.* at *3, the plaintiff admitted that he could not recall informing the arresting officer that the handcuffs were too tight, and he presented no evidence that the officer could otherwise tell that they were, *id.* at *11. This District concluded that the plaintiff failed to demonstrate that the defendant had violated a constitutional right. *Id.*; *see also Osei v. Brooks*, No. 11-cv-01135-PAB-KMT, 2013 WL 1151619, at *9 (D. Colo. Mar. 19, 2013) ("[B]ecause [plaintiff] did not alert the police officers that his handcuffs were too tight, the police officers cannot be liable for ignoring his complaints.").

This District came to a similar conclusion in *Kisskalt v. Fowler*, No. 13-cv-01113-WYD-KLM, 2014 WL 6617136 (D. Colo. Nov. 21, 2014). There, the defendant officer testified that after handcuffing the plaintiff, he ensured the handcuffs were double locked to prevent them from becoming too tight, and also made sure there was a finger space between the handcuffs and the plaintiff's wrists. *Id.* at *1. After being handcuffed, the

plaintiff "did not immediately complain about the tightness of the handcuffs . . . nor did he complain about pain." *Id.* at *2. Instead, he complained "approximately five minutes later," when the officer returned to the squad car to buckle the plaintiff's seatbelt before they left the scene. *Id.* The officer knew they would be arriving at the police department within minutes and decided to wait to check the handcuffs then. *Id.* at *3. The court concluded that in light of these facts, and because the plaintiff had not presented evidence of anything more than a mild injury, the defendant officer was entitled to qualified immunity on the excessive force claim. *Id.* at *9; *see also Webb v. Scott*, No. 1:11-CV-00128, 2015 WL 1257513, at *8 (D. Utah Mar. 18, 2015) (finding officer entitled to summary judgment on excessive force claim because "Plaintiff never complained to him," "never grimaced aloud in pain" when he was handcuffed, "never made any statement to Defendant . . . that he wanted the handcuffs adjusted," and "only stated his handcuffs hurt him when he sat alone in the patrol vehicle"), *aff'd in part, rev'd in part and remanded on other grounds*, 643 F. App'x 711 (10th Cir. 2016). *Cf. Vondrak*, 535 F.3d at 1209 (finding plaintiff had presented evidence that officers ignored his timely complaints that the handcuffs were too tight because plaintiff told the arresting officer that his wrists hurt immediately when she put them on, continued to complain to that officer on the way to the police station, and made several requests at the police station that the handcuffs be loosened because his wrists were hurting, but the officers ignored him); *Kraus v. Ferrari*, No. 08-cv-02808-WDM-BNB, 2010 WL 3430839, at *2-3, 6 (D. Colo. Aug. 30, 2010) (finding summary judgment precluded where there was evidence that plaintiff promptly complained that the handcuffs were too tight to the defendant officer, and had asked the officer to loosen them, but she refused).

Applied here, during the several minute interaction between Defendant and Plaintiff, Plaintiff never once complained about tight handcuffs or wrist pain. When Defendant initially placed Plaintiff in handcuffs, Defendant asked if the handcuffs were too tight, to which Plaintiff responded, "No, that's fine, completely fine." [#128-1 at 10; *see also* #129, Audio Recording at 4:30-32] Defendant testified that he then realized that one of the handcuffs was too loose, so he tightened it by two clicks (the "additional tightening"). [#133-4 at 11 (47:1-5); *see also* #129, Audio Recording at 4:34-36] According to Plaintiff, this tightening of the handcuffs was the source of his wrist pain and injuries. [*See, e.g.*, #133 at 3-4 (acknowledging that Plaintiff initially responded that the handcuffs were not too tight, but arguing that "Defendant proceeded to tighten the handcuffs," and that the "cranking from the additional tightening . . . can be plainly heard in the audio recording")] Nevertheless, the audio recording, and other undisputed evidence, plainly demonstrate that Plaintiff never informed Defendant of any discomfort from the additional tightening, nor is there any other evidence suggesting that Defendant should have been aware that the handcuffs were too tight. *See Nauman*, 2016 WL 11188474, at *4 (finding plaintiff's excessive force claim failed when plaintiff failed to make "a contemporaneous complaint to the arresting officer(s)," and testified that he did not tell the officer "of any pain when [the officer] made the adjustment in question"). Nor is there any indication that Plaintiff was somehow precluded from telling Defendant about the tightness of the handcuffing. Indeed, moments before the extra tightening, Defendant had asked Plaintiff about the tightness of the handcuffs, clearly evidencing a willingness to adjust them if Plaintiff experienced discomfort.

After the additional tightening, Defendant asked fellow officers on the scene for a double lock, explaining to Plaintiff that he was going to double lock the handcuffs so that they would not get tighter. [#129, Audio Recording at 4:37-48] Plaintiff responded, "Of course." [*Id.* at 4:48-53] Like the officer in *Kisskalt*, Defendant stated in his police report that after double locking, he again checked for tightness "by inserting [his] index finger between the side of [Plaintiff's] wrist and the handcuff." [#128-1 at 10] Plaintiff does not dispute that statement, or offer competing evidence.

Defendant then asked Plaintiff to confirm the identify of his vehicle, and requested that Plaintiff watch as Defendant locked it. [#129, Audio Recording at 5:06-19] Plaintiff responded, "Yep that's fine," and Defendant turned off the light in the car, left Plaintiff's drink in the trunk, and locked the vehicle. [*Id.* at 5:19-52] Defendant next explained to Plaintiff that he was going to be transferred to the police department with another officer, and asked if Plaintiff had any questions before Defendant "g[ot] going." [*Id.* at 5:59-6:16] Plaintiff responded, "Nope." [*Id.* at 6:17] Finally, Defendant asked Plaintiff if his cell phone had a passcode. [*Id.* at 6:43] Plaintiff confirmed that it did, but declined to provide it. [*Id.* at 6:46; *see also* #133-5 at 7] Defendant explained that he would get a warrant. [#129, Audio Recording at 6:50-53] Approximately three minutes after the additional tightening of the handcuffs, and just before the recording ends, an officer[4] can be heard making a statement to Plaintiff, to which Plaintiff responds, "Of course." [*Id.* at 7:30-32] Defendant testified that the recording ends after he finished speaking with Plaintiff, when Plaintiff was in the back of Officer Edmonds' patrol car. [#133-4 at 13 (50:14-20)] In her police report, Sergeant Cochran noted that Plaintiff "got into Officer Edmond[s'] vehicle on his

[4] It is unclear if this officer is Defendant, or another officer on the scene.

own and did not say anything about his handcuffs being too tight." [#133-1 at 3] Again, Plaintiff presented no contradictory evidence.

In short, during the two to three minutes of interaction and conversing between Plaintiff and Defendant after the additional tightening, Plaintiff never raised any complaints with Defendant. Instead, Plaintiff first complained of wrist pain and tight handcuffs to Officer Edmonds minutes later, while he was being transported to the police station. [#133-11 at ¶ 11] *See Zartner*, No. 15-cv-02218-PAB-KLM, at *3, *11 (finding defendant was entitled to summary judgment where plaintiff never informed the arresting officer of his wrist pain, though he informed a deputy at the police station). Like the officer in *Kisskalt*, Officer Edmonds testified that because they were nearing the police station when Plaintiff made these complaints, he decided to wait until arriving to the police station to act.[5] [#133-6 at 3 (11:13-18)]

Because Plaintiff did not inform Defendant that his handcuffs were too tight, or that his wrists were in pain, and has not set forth specific facts or evidence to demonstrate

[5] In *Kisskalt*, this District held that the officer was entitled to qualified immunity despite the brief delay between the plaintiff's complaint about the handcuffs and the officer's checking of the handcuffs. 2014 WL 6617136, at *9. Here, it is undisputed that transport to the police station from the site of the arrest took approximately 10 to 15 minutes. [#133-6 at 6 (20:2-5)] But even assuming that Officer Edmonds should have checked Plaintiff's handcuffs sooner, Officer Edmonds is not a defendant in this case. And, at the time Plaintiff complained to Officer Edmonds, Defendant Shutters was not present. [#133-5 at 7 (explaining that Defendant Shutters turned Plaintiff over to Officer Edmonds for transport, then went to the police department in his own vehicle); #133-11 at ¶¶ 10-11 (Plaintiff explaining that he complained to the transport officer while inside the transport vehicle)] The parties agree that upon arrival to the station, Plaintiff also complained of his pain to Detective Tracy, and stated that the handcuffs were too tight. [#133-7 at 4 (17:2-9); #133-11 at ¶ 13] But Defendant Shutters was not present for that conversation either [#133-11 at ¶ 14], and Detective Tracy is not a party to this lawsuit. Moreover, after Plaintiff complained to Detective Tracy, Detective Tracy removed the handcuffs in order to photograph Plaintiff's wrists. [#133-7 at 4 (17:22-24); #133-11 at ¶ 15]

Defendant should have otherwise been aware of any problems with the handcuffs, Defendant cannot be liable for ignoring Plaintiff's complaints and Plaintiff's excessive force claim fails. Because Plaintiff has failed to demonstrate a violation of his constitutional rights, Defendant is entitled to qualified immunity on Plaintiff's excessive force claim.[6]

The Court's analysis is not impacted by Defendant's method of handcuffing. The parties argue at length with respect to whether Defendant used an appropriate handcuffing technique. But the Tenth Circuit has held that "a small amount of force," including grabbing an arrestee, handcuffing him, and placing him in the back of a patrol car, "is permissible in effecting an arrest under the Fourth Amendment." *Cortez*, 478 F.3d at 1128. It is undisputed that Defendant used the "stand-and-cuff" handcuffing technique, which according to Sergeant Cochran is the technique that officers "probably" use most frequently. [#133-3 at 3 (12:3-7); #133-4 at 8 (43:19-24)] In contrast, the "twist and lock" technique is known as the "low-profile" level of handcuffing, and is generally used when the arrestee is being compliant, and the situation dictates that it is not unsafe to use. [#133-3 at 3 (12:8-19)] With twist and lock, the arrestee does not have his hands behind his head, but the officer administers "a type of control hold of the arm" while handcuffs

[6] Plaintiff has likewise failed to satisfy the second prong of the qualified immunity analysis. Certainly, the right to be free from unduly tight handcuffs is clearly established. *See, e.g.*, *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1209 (10th Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009). Nonetheless, as set forth above, Plaintiff failed to notify Defendant that the handcuffs were too tight and failed to present evidence that Defendant otherwise knew that the handcuffs were too tight. Plaintiff has not identified a case that clearly establishes a violation of Plaintiff's rights under such circumstances. See *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) ("We have repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.")

are applied. [#133-3 at 3 (14-19)] Defendant testified that from his perspective, both techniques are essentially "interchangeable," with stand and cuff being "just a little bit more secure." [#136-2 at 5 (44:3-8)] Defendant stated that with the twist and lock method, "sometimes it works, sometimes it doesn't," and an officer must "rely[] on" the subject's "pain complaints." [*Id.* (44:8-15)] He further explained that some arrestees are "freak[ed] . . . out" by the twist and lock technique and "try [to] twist out of it and sometimes hurt themselves a bit." [*Id.* (44:12-15)]

Plaintiff has not presented any evidence to rebut the officers' testimony on various handcuffing techniques. But regardless of the parties' disagreements about whether Defendant could have used a lower profile handcuffing technique, Plaintiff does not contend that the method of placing him into handcuffs was the source of his injuries, but rather claims that the additional tightening of the handcuffs caused his wrist pain. *See Cortez*, 478 F.3d at 1128-29 (holding that while initial handcuffing may be permissible, failure to adjust handcuffs may still constitute excessive force); *see also Fisher*, 584 F.3d at 894 (holding that to recover on an excessive force claim, "plaintiff must show: (1) that the officers used greater force than would have been reasonably necessary to effect a lawful seizure, and (2) some actual injury *caused by the unreasonable seizure* that is not de minimis" (emphasis added) (quotation omitted)). It is undisputed that after Defendant used the stand and cuff technique to place Plaintiff in handcuffs, Defendant asked Plaintiff if the handcuffs were too tight, to which Plaintiff responded, "No that's fine, completely fine." [#128-1 at 10; #129, Audio Recording at 4:30-32] And again, the Fourth Amendment "does not require [police] to use the least intrusive means in the course of a detention, only reasonable ones." *Fisher*, 584 F.3d at 894 (alteration in original)

(quotation omitted). And as explained above, even after the additional tightening of the handcuffs, Defendant was not aware that Plaintiff believed the handcuffs were too tight.

The Court is also unpersuaded by Plaintiff's argument that the "string of circumstantial evidence"—Plaintiff's complaints to Officer Edmonds, and then to other officers when he arrived at the police station—"proves Defendant's knowledge." [#133 at 10] In *Santos v. Gates*, cited by Plaintiff to support this argument, the Ninth Circuit explained that "excessive force claims typically boil down to an evaluation of the various accounts of the same events," and therefore "the circumstances surrounding those events may be critical to a jury's determination of where the truth lies." 287 F.3d 846, 852 (9th Cir. 2002). But here, the Court is not faced with different accounts of the arrest and the handcuffing. Neither party has disputed the veracity of the audio recording of the interaction between Defendant and Plaintiff, which plainly demonstrates that Plaintiff never raised complaints about the handcuffs or any wrist pain with Defendant. While certainly Defendant became aware of those complaints after the fact [*see, e.g.*, #133-5 at 8], there is no evidence that Plaintiff made a contemporaneous complaint to Defendant, which Defendant ignored, as required for an excessive force claim. *See, e.g.*, *Nauman*, 2016 WL 11188474, at *4 (collecting cases). As a result, Plaintiff's excessive force claim fails and Defendant is entitled to summary judgment.

IV. CONCLUSION

For the foregoing reasons, the Court respectfully **RECOMMENDS** that Defendant's Motion for Summary Judgment [#128] be **GRANTED** and that Plaintiff's excessive force claim be **DISMISSED.** [7]

DATED: November 19, 2019

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

[7] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc*., 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).