IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20–cv–02753–DDD–KMT

MARY M. DUVALL,

Plaintiff,

v.

DEPUTY ROBERT SIROIS, individually,
DEPYTY CHRISTOPHER BEYRLE, individually,
SERGEANT CLIFF PORTER, individually,
EL PASO COUNTY, COLORADO,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Kathleen M. Tafoya

This case comes before the court on Defendants' "Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)" (Doc. No. 15 [Mot.], filed November 16, 2020). Plaintiff filed a response in opposition (Doc. No. 43 [Resp.], filed March 10, 2021), and Defendants filed a reply (Doc. No. 46, filed March 24, 2021).

PROCEDURAL HISTORY

Plaintiff, through counsel, filed her Complaint on September 10, 2020. (Doc. No. 1 [Compl.].) Plaintiff asserts jurisdiction pursuant to 42 U.S.C. §§ 1983 and 1988. (*Id.*, ¶ 5.)

Plaintiff asserts claims pursuant to 42 U.S.C. § 1983 for excessive force against all defendants; failure to intervene against Defendants El Paso County, Beyrle, and Sirois; failure to train and supervise against Defendant El Paso County; malicious prosecution against all

defendants; and retaliation against all defendants. (*Id.* at 23–32.) Plaintiff sues the individual defendants in their individual capacities, seeking money damages. (*Id.* at 1, 33.)

Defendants move to dismiss the claims against them in their entirety pursuant to Federal Rule of Civil Procedure 12(b)(6). (*See* Mot.)

STANDARDS OF REVIEW

A. Pro Se *Plaintiff*

Plaintiff proceeds *pro* se. The court, therefore, "review[s] [her] pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). *See also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (holding allegations of a *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers").[1] However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). *See also Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (court may not "supply additional factual allegations to round out a plaintiff's complaint"); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any

[1] Plaintiff's counsel withdrew on December 29, 2020. (Doc. No. 26.) Thus, the court considers Plaintiff to be represented until that date and liberally construes only Plaintiff's filings made subsequent to December 29, 2020.

discussion of those issues"). The plaintiffs' *pro se* status does not entitle them to application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

B. Failure to State a Claim Upon Which Relief Can Be Granted

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The *Iqbal* evaluation requires two prongs of analysis. First, the court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusion, bare assertions, or merely conclusory. *Id.* at 679–81. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 679.

Notwithstanding, the court need not accept conclusory allegations without supporting factual averments. *S. Disposal, Inc., v. Texas Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S at 678. Moreover, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does the complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Id.* (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.* (citation omitted).

C. Body Camera Footage

Plaintiff incorporated the defendants' body camera footage in her Complaint by reference and also conventionally filed it as an exhibit with the Court Clerk. (Doc. No. 5.) Plaintiff also refers to the body camera footage and relies on its contents throughout the complaint. (*See* Compl., ¶¶ 23, 30, 65, 68, 71.) Neither side appears to challenge the body camera footage's authenticity. *See Scott v. Harris*, 550 U.S. 372, 379 (2007) (in a case involving allegations of excessive force, the Supreme Court considered the contents of a videotape "capturing the events in question" for which there were no allegations or indications of doctoring or tampering in any way). Thus, the court will review the body camera footage and consider it in analyzing the motion to dismiss. In so doing, the court views the video in the light most favorable to Plaintiff, except where the video "blatantly contradicts" Plaintiff's version of the events. *See Thomas v. Durastanti*, 607 F.3d 655, 672 (10th Cir. 2010) (on a motion for summary judgment, a court may

reject a plaintiff's version of the events when video evidence "blatantly contradicts" that version); *Choate v. City of Gardner, Kansas*, No. 16–2118–JWL, 2016 WL 2958464, at *3 (D. Kan. May 23, 2016) (applying this standard to a motion to dismiss).

FACTUAL BACKGROUND

"The first step in assessing the constitutionality of the [Defendants'] actions is to determine the relevant facts," *Scott*, 550 U.S. at 378, which, in the context of this case, means Plaintiff's well-pleaded allegations, as well as the actions clearly captured on the video recording. Thus, to the extent Defendants' description of the events captured on video are not clear, they are not included in this summary.

Plaintiff alleges she is a 53-year-old, five feet, two-inch woman who weighs approximately 150 pounds. (*Id.*, ¶ 15.) On November 22, 2108, Plaintiff traveled by airplane from Pennsylvania to Colorado Springs, Colorado, to pick up her son, Jordan Duvall ("Mr. Duvall"), and drive him and his vehicle and attached trailer back to Pennsylvania. (*Id.*, ¶ 16.)

At approximately 2:30 a.m. on November 23, 2018, Plaintiff was driving Mr. Duvall's truck eastbound on Highway 24 in Colorado Springs. (*Id.*, ¶ 17.) Plaintiff states Defendant Sirois was on duty as a deputy sheriff with El Paso Sheriff's Office ("ESPO") patrolling the area of eastbound Highway 24 between Constitution Avenue and Garrett Road, located within El Paso County, State of Colorado. (*Id.*, ¶ 18.) Defendant Sirois claimed that he saw the vehicle being driven by Plaintiff traveling at 55 mph (estimated via pacing), which was ten mph less than the posted 65 mile-per-hour speed limit. (*Id.*, ¶ 19.) According to his written statement, Defendant Sirois claimed that he observed the truck cross the "fog line." (*Id.*, ¶ 20.)

Defendant Sirois activated his overhead lights and conducted a traffic stop. (*Id.*, ¶ 21.) Plaintiff pulled the truck onto Garrett Road and parked in the shoulder on the opposite side of the road, as there was not a shoulder wide enough to accommodate the truck and trailer on the right side. (*Id.*, ¶ 22.) Defendant Sirois asked for Plaintiff name and date of birth, which Plaintiff provided. (*Id.*, ¶ 24.) Defendant Sirois also asked for Plaintiff's drivers' license, which Plaintiff apparently could not find. (*Id.*, ¶ 25.) Plaintiff asked Defendant Sirois why he stopped her, and Defendant Sirois advised her that the truck matched a description of a vehicle that was used for mailbox thefts earlier that day. (*Id.*, ¶ 26.) Plaintiff became upset that she was stopped and raised her voice at Defendant Sirois while she looked for her driver's license. (*Id.*, ¶, 28.)

On the BWC, Defendant Beyrle arrived on the scene at 2:36:53 a.m. and activated his body camera. (*Id.*, ¶ 30.) Video from Defendant Beyrle's Body Worn Camera ("BWC") shows Plaintiff yelling at Defendant Sirois, poking her hand outside the truck window in his direction, and shaking her finger at him as he was asking Plaintiff to exit the truck. (*See* Mot., Ex. A, Beyrle BWC, [0:00:06] to [0:00:27] ("Beyrle, [time start] to [time finish]").) When Defendant Beyrle advised Mr. Duvall to keep his hands on the dash, Plaintiff can be heard screaming at the deputies, yelling at them to "leave us alone," telling the deputies that they are disgusting, and yelling at her son to "unlock the door, unlock the fucking door!" (Beyrle, [0:00:28] to [0:01:00].)

When Plaintiff exited the vehicle, both Defendant Sirois and Defendant Beyrle commanded her to face the vehicle. (Beyrle, [0:01:01] to [0:01:06].) Plaintiff alleges she attempted to comply with Defendant Sirois' order and did not make any aggressive movements. (*Id.*, ¶¶ 34–35.) Plaintiff alleges as she was stepping down from the truck, Defendant Sirois

grabbed her, spun her towards the truck, tackled her from behind, threw her to the ground and fell on top of her with his full body weight on her back. (*Id.*, ¶ 36.) Plaintiff alleges Defendant Siros caused her head to repeatedly slam against the truck/camper. (*Id.*, ¶ 37.)

Defendant Beyrle can be heard yelling at Plaintiff that she is going to be tased. (Beyrle, [0:01:07] to [0:01:10].) Defendant Sirois took Plaintiff to the ground and landed beside her on both knees. Defendant Sirois then moved his left knee up onto Plaintiff's buttock while continuing to try to secure her hands. (Beyrle, [0:01:10] to [0:01:14].) Plaintiff continued to struggle, and Defendant Beyrle then deployed his taser into Plaintiff's buttocks. Plaintiff cried out and screamed. (Beyrle, [0:01:14] to [0:01:20]; Compl., ¶ 41.) Plaintiff states the pain of the attack, coupled with the tasing, caused her to urinate and defecate on herself. (*Id.*, ¶ 44.)

Defendant Sirois' BWC activated once Plaintiff was on the ground. (*See* Mot., Ex. B, Sirois BWC, [0:00:00] to [0:00:21] ("Sirois, [time start] to [time finish]").) Plaintiff continued to flail about on the ground, and Defendant Sirois got to his feet beside her. Defendant Beyrle is heard advising Plaintiff that she is going to get tased again, but Defendant Sirois was able to secure the second handcuff, and Defendant Beyrle backed off to check on Mr. Duvall. (Beyrle, [0:01:21] to [0:01:35].) Plaintiff continued to fight against Defendant Sirois, causing him to give her additional commands to stop fighting and her son to yell at her to stop. (Beyrle, [0:01:36] to [0:01:50].) Plaintiff states she was not resisting; rather she was incapacitated from the Taser and writhing in pain because of the internal injuries she suffered, and the damage caused by the taser. (*Id.*, ¶ 46.)

Defendant Sirois escorted Ms. Duvall to the rear of one of the Defendants' patrol cars. (*Id.*, ¶ 60.) Plaintiff continued to yell and scream at Sirois and tell him he is hurting her.

(Beyrle, [0:01:50] to [0:02:45].) Defendant Beyrle went to assist Sirois in securing Plaintiff. (Beyrle, [0:02:46] to [0:02:53].) Plaintiff loudly advised the defendants that she has lymphoma and is dying, that her arm hurts, and that Defendant Sirois "just smashed my face on the car." Defendant Sirois continued to try to control Plaintiff while Defendant Beyrle conducted the rest of the search. Plaintiff was then seated in the back seat of the vehicle. (Beyrle, [0:02:46] to [0:03:45].)

Defendant Porter advised Mr. Duvall that Plaintiff might not be bonding out of jail for a while if she had committed second degree assault on a peace officer and that because she fought Defendant Sirois and if she in any way harmed him, she would be going to jail for a felony. (*See* Mot., Ex. C, Porter BWC, [0:13:24] to [0:13:50] ("Porter, [time start] to [time end]").) Defendant Porter advised Mr. Duvall that Plaintiff would be charged either with second degree assault on a peace officer, second degree attempted assault on a peace officer or resisting arrest. (Porter, [0:13:51] to [0:14:02].)

Defendant Porter advised medical that Plaintiff needed a medical clearance and removal of the taser probe. (See Mot., Ex. C, Porter BWC, [0:14:25] to [0:14:50] ("Porter, [time start] to [time end]").) When Defendant Porter advised Plaintiff that medical had arrived, Plaintiff exited the backseat, screamed at Defendant Porter, "Pull my pants up, asshole!" and turned toward Defendant Sirois. (Porter, [0:14:50] to [0:15:03].) Plaintiff alleges Defendant Porter responded by again slamming her head against the patrol car and forced Plaintiff back into the vehicle. (*Id.*, ¶ 64.) Plaintiff screamed and yelled, "You do not hit a woman like that!" Defendant Porter ordered Plaintiff to sit back in the car. (Porter, [0:15:04] to [0:15:08].)

Plaintiff was seated back in the car while complaining of having her head and face hit against the vehicle and being mistreated as a woman. The medical responder checked Plaintiff for the probe. Plaintiff continued to argue with and question Defendant Porter about why she was being charged with a crime before she was seated once again in the patrol vehicle. (Porter, [0:15:09] to [0:17:19].) Defendants Porter and Sirois returned to Defendant Sirois' vehicle to adjust Plaintiff's handcuffs. Defendant Porter advised Plaintiff that, after discussion with Defendant Sirois, the plaintiff was thought to be "more of a resister than an assaulter," so she would be charged with resisting arrest." (Porter, [0:19:55] to [0:20:05.]) Plaintiff asked why she was pulled over, and Defendant Sirois responded, "For weaving." (Porter, [0:21:35] to [0:21:49.]) Plaintiff asked what she is going to be charged with, and Defendant Porter responded, "Driving under the influence and resisting arrest." (Porter, [0:22:30] to [0:22:38.]) Plaintiff then stated, "If you guys planted something in that car you're dead meat, you're dead meat." (Porter, [0:22:46] to [0:22:48.])

Plaintiff was taken to Memorial Hospital North ("Memorial") in Colorado Springs for her injuries. (*Id.*, ¶ 67.) While at Memorial, Defendant Beyrle's BWC remained active while he spoke with Defendant Sirois. (*Id.*, ¶ 68.) Defendant's Sirois and Beyrle engaged in conversation in which they discussed an apparent road rash injury on Defendant Sirois' elbow, and Defendant Beyrle stated he "tased [Plaintiff] in the butthole." (*Id.*, ¶ 69.)

Defendant Porter directed the deputies to file the felony charge of second-degree assault on a peace officer. Plaintiff alleges Defendant Porter explained to Mr. Duvall, his reasoning, as follows: "Hey sir- the deputy was injured. His hand is bloody, and his elbow is bloody, and your mom's actions are the proximate cause of that. So, I am ordering that he charge that felony

because it's a felony." (*Id.* at 71.) Plaintiff alleges Defendants Porter, Sirois, and Beyrle knew that the second-degree assault charge was factually unsupportable but proceeded anyway. (*Id.*, ¶ 74.) Plaintiff also alleges Defendants Sirois and Beyrle falsified police reports to cover their brutal attack. (*Id.*, ¶ 75.)

Plaintiff alleges Defendants Sirois, Beyrle, and Porter conspired to present false charging information and recommendations to The People of the State of Colorado as represented by 4th Judicial District Attorney's Office ("People"). (*Id.*, ¶ 76.) The People criminally charged Plaintiff with Assault in the Second Degree (a class 4 felony), Driving Under the Influence (an unclassified misdemeanor), Resisting Arrest (a class 2 misdemeanor), Obstructing a Peace Officer (class 2 misdemeanor), and Changing of Lanes (class A traffic infraction). (*Id.*, ¶ 77.) Plaintiff was arrested, taken to jail, and spent approximately a day in custody. (*Id.*, ¶ 78.) Plaintiff states she was forced to remain in Colorado for approximately seventeen days until a Court gave her permission to return home to Pennsylvania. (*Id.*)

Plaintiff states EPSO provided body cameras of the incident to the District Attorney's Office, Plaintiff, and Plaintiff's criminal defense counsel in March of 2019, almost four months after the attack and the filing of charges. (*Id.*, ¶ 79.) Plaintiff states on September 5, 2019, the People dismissed the charges of Assault in the Second Degree, Driving Under the Influence, Obstructing a Peace Officer, and Resisting Arrest against Ms. Duvall in case number 18CR7188. (*Id.*, ¶ 81.) Plaintiff entered a plea of guilty, through her attorney, to Changing of Lanes (commonly known as "weaving"). (*Id.*, ¶ 82.) Plaintiff alleges that, in dismissing the charges, the People admitted that it could not establish even a *prima facie* case for the Driving Under the Influence charge. (*Id.*, ¶ 83.)

Plaintiff alleges that, as a direct and proximate cause of Defendants' actions, she suffered devasting injuries to her hand, pelvis, back, and head. (*Id.*, ¶ 85.) From the date of the attack until April 2, 2019, Plaintiff suffered from excruciating and debilitating back pain, leg pain, and urinary incontinence. (*Id.*, ¶ 86.) On April 2, 2019, Plaintiff underwent a L3-4 Transforaminal Lumbar Interbody Fusion spinal fusion surgery for the damage the attack caused to her back. (*Id.*, ¶ 87) Plaintiff alleges on or about July 31, 2019, a computerized tomography scan was administered on her abdomen and pelvis, which revealed an incidental sided pelvic ramus fracture that, Plaintiff alleges, almost certainly resulted from the attack on her by Defendants. (*Id.*, ¶ 88.) Plaintiff also states she suffered an injury to her right middle finger. (*Id.*, ¶ 89.)

Plaintiff alleges Defendant El Paso County did not discipline Defendants Sirois, Beyrle, and Porter for their blatantly unconstitutional use of excessive force and instead expressly ratified their conduct. (*See id.*, ¶¶ 95–100.) Plaintiff further alleges Defendant El Paso County has deliberately indifferent customs, practices, and training with respect to excessive force and unlawful seizures. (*See id.*, ¶¶ 101–34.)

ANALYSIS

A. Excessive Force Claim

Defendants move to dismiss Plaintiff's excessive force claim. (Mot. at 6–10.)

The question in every Fourth Amendment excessive force case is whether the amount and nature of the force used in a particular situation was unreasonable. *Scott v. Harris*, 550 U.S. 372, 383 (2007). In *Graham v. Connor*, the Supreme Court held that determining the objective reasonableness of a particular seizure "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing

governmental interests at stake." 490 U.S. 386, 396 (1989) (internal quotation marks omitted). This balancing requires analyzing the totality of the circumstances, particularly considering (1) the alleged crime's severity, (2) the degree of potential threat that the suspect poses to officers' and others' safety, and (3) the suspect's efforts to resist or evade arrest. *Est. of Ronquillo v. City & Cnty. of Denver*, No. 16–CV–01664–CMA–KMT, 2016 WL 10843787, at *3 (D. Colo. Nov. 17, 2016), *aff'd*, 720 F. App'x 434 (10th Cir. 2017). The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham*, 490 U.S. at 396.

The court first analyzes the force used by Defendants in initially handcuffing and tasing Plaintiff and then analyzes the force used by Defendant Beyrle after Plaintiff's arrest.

1. Force Used in Handcuffing and Tasing

As to the first factor—the severity of the crime—the record shows conflicting reasons why Defendant Sirois stopped Plaintiff's vehicle. Plaintiff alleges Defendant Sirois advised her that the truck matched a description of a vehicle that was used for mailbox thefts earlier that day. (*Id.*, ¶ 26.) However, Defendant Porter's BCW video shows that when Plaintiff asks why she was pulled over, Defendant Sirois responds, "For weaving." (Porter, [0:21:35] to [0:21:49.]) Neither mailbox theft nor driving under the influence is a violent crime. However, Plaintiff was acting aggressively and erratically while still in her vehicle, and, by her own admission, was angry at being stopped. The court finds this factor weighs slightly in Defendants' favor. *But see McCowan v. City of Las Cruces, New Mexico*, No. 217CV00902MLCGJF, 2018 WL 9961325, at *4 (D.N.M. Oct. 24, 2018), *aff'd sub nom. McCowan v. Morales*, 945 F.3d 1276 (10th Cir. 2019) (driving under the influence where the plaintiff was not noncompliant or acting aggressively

during arrest is not an inherently violent crime under the first *Graham* factor); *Wagner v. Jones*, No. CV–13–771 CG/WPL, 2015 WL 13662791, at *4 (D.N.M. May 8, 2015) (suspicion of driving under influence where the plaintiff was not behaving aggressively or erratically is not an inherently violent crime under the first *Graham* factor).

As to the second and third factors—the degree of potential threat plaintiff posed to officers' and others' safety and the plaintiff's efforts to resist or evade arrest —the BWC footage does not clearly capture what happened when Plaintiff exited her vehicle. Thus, the court must accept as true Plaintiff's allegations that, as she exited the vehicle, she attempted to comply with Defendant Sirois' order and did not make any aggressive movements (*id.*, ¶¶ 34–35), when "Defendant Sirois grabbed her, spun her towards the truck, tackled her from behind, threw her to the ground and fell on top of her with his full body weight on her back (*id.*, ¶ 36), causing her head to repeatedly slam against the truck/camper (*id.*, ¶ 37). The court also must accept as true Plaintiff's statement that she was not resisting, but rather was writhing in pain because of the injuries she suffered, and the damage caused by the taser. (*Id.*, ¶ 46.)

Accordingly, the second and third factors weigh in favor of Plaintiff, and Defendants' motion to dismiss Plaintiff's excessive force claim based on the force used in handcuffing and tasing Plaintiff should be denied.

2. Force Used Post-Arrest

As discussed above, the first *Graham* factor only marginally supports the use of force against Plaintiff. However, regarding the post-arrest force alleged by Plaintiff by Defendant Porter, the second and third *Graham* factors weigh heavily in Plaintiff's favor. Again, the BWC footage does not clearly capture what happened when Plaintiff exited Defendant Sirois' vehicle.

Thus, the court must accept as true Plaintiff's allegations that, after she called Defendant Porter an "asshole" (Compl., ¶ 63), he responded by slamming her head against the patrol car (*id.*, ¶ 64). Plaintiff posed little immediate threat to the safety of the officers at this time and was neither resisting arrest nor attempting to flee.

Defendants' motion to dismiss Plaintiff's excessive force claim based on Defendant Porter's alleged post-arrest conduct should be denied.

B. Failure to Intervene

"To establish a constitutional violation under a 'failure to intervene' theory, [a plaintiff] must show: (i) the defendant officer was present at the scene; (ii) the defendant officer witnessed another officer applying force; (iii) the application of force was such that any reasonable officer would recognize that the force being used was excessive under the circumstances; and (iv) the defendant officer had a reasonable opportunity to intercede to prevent the further application of excessive force, but failed to do so." *Martinez v. City & Cnty. of Denver*, No. 11–cv–00102–MSK–KLM, 2013 WL 5366980, at *5 (D. Colo. Sept. 25, 2013) (citing *Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996)).

Here, Plaintiff alleges that "despite reasonable opportunity to do so, at no point did Defendant Beyrle intervene on Defendant Sirois' unconstitutional use of force on Ms. Duvall." (Compl., ¶ 51.) However, the Complaint fails to plausibly allege that Defendant Beyrle could have intervened given the very short time involved preceding the use of force. Defendant Beyrle's BWC footage clearly shows that from the time Plaintiff exited her vehicle to the time Defendant Sirois took her to the ground was a total of six seconds, and the actual event of taking Plaintiff to the ground lasted less than three seconds. (Beyrle [0:01:01] to [0:01:07].) Given the

timeframe involved, the court finds Defendant Beyrle did not have a reasonable opportunity to prevent the application of force. Additionally, Defendant Beyrle's BWC footage shows he was not present when Plaintiff alleges that Defendant Sirois smashed her face into the patrol car, so Defendant Beyrle could not have physically intervened into that alleged use of force by Defendant Sirois.

Similarly, as to Plaintiff's claim that Defendant Sirois failed to intervene in Defendant Beyrle's alleged unconstitutional force on Plaintiff, Plaintiff fails to plausibly allege that Defendant Sirois was in a position to intervene in Defendant Beyrle's use of the taser because of the very short time between Defendant Beyrle's warning to Plaintiff about the use of the taser and the actual deployment of the taser into Plaintiff's buttock, which was approximately 7 seconds. Moreover, as Defendant Beyrle was warning Plaintiff he was going to tase her and when he actually did tase her, Defendant Sirois is involved in attempting to restrain Plaintiff.

Plaintiff's failure to intervene claim should be dismissed.

C. Fourteenth Amendment Malicious Prosecution Claim

In *Myers v. Koopman*, the Tenth Circuit explained that "[t]he Fourteenth Amendment protects individuals against deprivations of liberty without due process of law. If a state actor's harmful conduct is unauthorized and thus could not be anticipated pre-deprivation, then an adequate post-deprivation remedy—such as a state tort claim—will satisfy due process requirements." 738 F.3d 1190, 1193 (10th Cir. 2013) (citations omitted). The Tenth Circuit has held that, where a law enforcement officer is alleged to have falsified the facts in support of an arrest warrant and subsequent prosecution, "[s]uch lawlessness could not have been anticipated or prevented pre-deprivation, but a post-deprivation malicious-prosecution claim serves as an

effective antidote." *Id.* As was the case in *Myers*, Plaintiff here has an adequate post-deprivation remedy arising as a malicious prosecution claim grounded in Colorado state law. *See id.* at 1193–94.

Therefore, to the extent Plaintiff is asserting a violation of her due process rights under the Fourteenth Amendment, she fails to state a claim, *id.* at 1193, and the claim should be dismissed.

D. Fourth Amendment Malicious Prosecution Claim

To state a Fourth Amendment malicious prosecution claim, Plaintiff must allege (1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages. *Margheim v. Buljko*, 855 F.3d 1077, 1082, 1085 (10th Cir. 2017).

Moreover, "a plaintiff must allege facts which, if true, would allow a reasonable jury to find the proceedings terminated 'for reasons indicative of innocence.' " *Montoya v. Vigil*, 898 F.3d 1056, 1066 (10th Cir. 2018) (quotations omitted). The Tenth Circuit has observed:

> [M]any times the disposition terminating a criminal proceeding does not on its face say anything at all about the plaintiff's guilt. In those cases, we 'look to the stated reasons for the dismissal as well as to the circumstances surrounding it in an attempt to determine whether the dismissal indicates the accused's innocence.' If, in view of the circumstances, 'the case [was] disposed of in a manner that leaves the question of the accused's innocence unresolved, there generally can be no malicious prosecution claim by the accused.'

Id. at 1066 (internal citations omitted).

Here, Plaintiff notes that the District Attorney dismissed the DUI charge because of an inability to establish a *prima facie* case but fails to explain why the other charges—Second

Degree Assault, Resisting Arrest and Obstruction—were dismissed. (Compl., ¶ 83.) Absent an explanation of why these charges were dismissed, Plaintiff cannot satisfy her burden of establishing a favorable termination of her entire criminal case. *See Montoya*, 898 F.3d at 1066.

Moreover, Plaintiff entered a plea of guilty to the charge of Changing of Lanes. (Compl., ¶ 82.) "[T]he favorable termination of some but not all individual charges does not necessarily establish the favorable termination of the criminal proceeding as a whole." *Kossler v. Crisanti*, 564 F.3d 181, 188 (3d Cir. 2009).

> It is rare that a defendant pleads guilty to every charge against him when there are multiple charges. The more logical approach is to consider as a total transaction whether the activity forming the basis for the arrest is the same as the activity to which the defendant pleaded guilty. *See, e.g., Franklin v. Thompson*, 981 F.2d 1168, 1170 (10th Cir. 1992) ("plaintiff's misdemeanor convictions foreclose her from challenging the legality of her arrest in a subsequent civil action"); *Sealy v. Fishkin*, 1998 WL 1021470 (E.D.N.Y. Dec. 2, 1998) ("By pleading guilty to disorderly conduct, plaintiff necessarily acknowledged that he was engaged in some unlawful activity for which the police could properly take him into custody.")

Guinn v. Unknown Lakewood Police Officers, No. 10–CV–00827–WYD–CBS, 2010 WL 4740326, at *5 (D. Colo. Sept. 30, 2010), *report and recommendation adopted*, No. 10–CV–00827–WYD–CBS, 2010 WL 4740316 (D. Colo. Nov. 16, 2010). Thus, because Plaintiff entered a guilty plea to the charge of Changing of Lanes, she Plaintiff cannot meet her burden of establishing the "original action terminated in favor of the plaintiff." *Margheim*, 855 F.3d at 1082.

Plaintiff's Fourth Amendment malicious prosecution claim should be dismissed.

E. Retaliation Claim

To establish a First Amendment retaliation claim, Plaintiff must first make a threshold showing that there was no probable cause for her arrest. *Hinkle v. Beckham Cnty. Bd. of Cnty. Comm'rs.*, 962 F.3d 1204, 1227 (10th Cir. 2020) (citing *Nieves v. Bartlett*, --- U.S. ---, 139 S.Ct. 1715, 1727 (2019)).

Probable cause "is not a high bar." *Kaley v. United States*, 571 U.S. 320, 338 (2014) (citations omitted). Officers need "only the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Id.* (internal quotations and alternations omitted). That is why, in addressing § 1983 claims for an unlawful arrest, "courts assess probable cause 'from the standpoint on an objectively reasonable officer' under the totality of the circumstances." *Donahue v. Wihongi*, 2020 WL 370188, at * 4 (10th Cir. Jan. 17, 2020) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

Under the circumstances presented here, the court finds there was probable cause for Plaintiff's arrest for Driving Under the Influence of Drugs because a reasonable officer could have concluded that, due to Plaintiff's weaving and her belligerent behavior when she was stopped by Defendant Sirois, Plaintiff was operating a motor vehicle while under the influence of one or more drugs. *See* Colo. Rev. Stat. § 42–4–1301(1)(a).

The court also finds there was probable cause for Plaintiff's arrest for Obstructing a Peace Officer, Resisting Arrest, and Second-Degree Assault on a Peace Officer, because a reasonable officer would have understood that Plaintiff actively resisted Defendant Beyrle and Sirois's orders, and because Defendant Sirois was injured in the process of arresting Plaintiff. *See* Colo. Rev. Stat. §§ 18–8–102(1)(a)–(b), 18–8–104(1)(a), 18–3–203.

F. Qualified Immunity

The individual defendants assert they are entitled to qualified immunity on Plaintiff's claims. (Mot. at 14–16.)

"Qualified immunity is an affirmative defense to a section 1983 action, providing immunity from suit from the outset." *DeSpain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001) (quoting *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995)). "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.'" *Ullery v. Bradley*, 949 F.3d 1282, 1289 (10th Cir. 2020) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Once a defendant has asserted a qualified immunity defense, the burden shifts to the plaintiff to establish that: (1) the defendant violated a constitutional right; and (2) the right was "clearly established" at the time of the defendant's alleged misconduct. *Estate of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1168 (10th Cir. 2020) (quoting *Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016)). "[I]f the plaintiff fails to establish either prong of the two-pronged qualified-immunity standard, the defendant prevails on the defense." *A.M. v. Holmes*, 830 F.3d 1123, 1134–35 (10th Cir. 2016); *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 877–78 (10th Cir. 2014) ("[T]he record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to qualified immunity.") (internal quotation marks omitted).

"Although qualified immunity defenses are typically resolved at the summary judgment stage, district courts may grant motions to dismiss on the basis of qualified immunity." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). "Asserting a qualified immunity defense via a

Rule 12(b)(6) motion, however, subjects the defendant to a more challenging standard of review than would apply on summary judgment." *Id.* (quoting *Peterson v. Jensen*, 371 F.3d 1199, 1201 (10th Cir. 2004)); *see Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) ("At [the motion to dismiss] stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for objective legal reasonableness.") (internal quotation marks omitted) (emphasis in original). "In resolving a motion to dismiss based on qualified immunity, the court considers (1) whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and (2) whether the right at issue was clearly established at the time of [the] defendant's alleged misconduct." *Keith v. Koerner*, 707 F.3d 1185, 1188 (10th Cir. 2013) (quoting *Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011)) (internal quotation marks omitted). The court has "discretion to decide which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Brown*, 662 F.3d at 1164 (quoting *Pearson*, 555 U.S. at 236) (alterations omitted).

Because Plaintiff has failed to state claims for failure to intervene, malicious prosecution, and retaliation against Defendants Sirois, Beyrle, and Porter, they are entitled to qualified immunity as to those claims.

As to the excessive force claim, however, the court has determined Plaintiff has stated a claim against Defendants Sirois, Beyrle, and Porter. The defendants argue that "the law was not so clearly established that, on November 23, 2018, every officer would have understood that, under the circumstances presented her, the use of force against Plaintiff was excessive. The court disagrees. Defendants failed to show to Plaintiff attempted to flee or actively resisted arrest. "*Graham* establishe[d in 2012] that force is least justified against nonviolent

misdemeanants who do not flee or actively resist arrest." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007) (citing *Graham*, 490 U.S. at 396). Thus, Defendants should have been aware that their alleged use of force was excessive. The defendants are not entitled to qualified immunity on Plaintiff's excessive force claims.

G. *Municipal Liability*

The defendants argue the plaintiffs have not plausibly pleaded their claim for municipal liability under Section 1983. (Mot. at 16–18.)

The Supreme Court recognizes that municipalities and other local government units are "persons" to whom Section 1983 applies. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 n.55 (1978). However, local governments can be liable under Section 1983 "only for their own illegal acts." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (internal quotation and citations omitted) (emphasis in original). Hence, "[a] municipality may not be held liable under § 1983 solely because its employees inflicted injury on the plaintiff." *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993) (citing *Monell*, 436 U.S. at 692). A plaintiff cannot state a claim for relief under Section 1983 by pointing merely to an isolated or single incident. *See Butler v. City of Norman*, 992 F.2d 1053, 1055–56 (10th Cir. 1993) (isolated incident of excessive force by a police officer, even coupled with municipality's failure to discipline the officer, was inadequate to form the basis of municipal liability). Rather, to prove a Section 1983 claim against a municipality, a plaintiff must demonstrate (1) the existence of a municipal policy or custom, which (2) directly caused the injury alleged. *Hinton*, 997 F.2d at 782 (citing *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)).

In establishing the first requirement, a plaintiff may show a municipal policy or custom in the form of any of the following:

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Bryson v. City of Okla. City, 627 F.3d 784, 788 (10th Cir. 2010) (quoting *Brammer–Hoetler v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189–90 (10th Cir. 2010)) (internal quotations omitted).

Plaintiff asserts a single *Monell* claim entitled "42 U.S.C. § 1983 – Failure to Train and Supervise" alleging that "El Paso County failed to properly train, supervise, and discipline its employees, including Sirois, Beyrle, and Porter, with respect to the use of excessive force." (Compl., ¶ 172.) To state a *Monell* claim based on the failure to train or supervise, "a plaintiff must sufficiently allege that the failure 'amounts to deliberate indifference to the rights of persons with whom the police come into contact.' " *Rehberg v. City of Pueblo*, 10–cv–00261–LTB–KLM, 2012 WL 1326575, at *4 (D. Colo. Apr. 17, 2012) (quoting *Harris*, 489 U.S. at 388). However, "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011); *see also Oklahoma City v. Tuttle*, 471 U.S. 808, 822–823 (1985) (plurality opinion) ("[A] 'policy' of 'inadequate training' " is "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*."). Plaintiff does not set forth any facts

concerning how the individual defendants were trained, by whom they were trained, or why their training was deficient. *See Bark v. Chacon*, No. 10–cv–01570–WYD–MJW, 2011 WL 1884691, at *3 (D. Colo. May 18, 2011) (dismissing municipal liability claim where plaintiff had "generally allege[d]" that the individual defendants were not properly trained but had not "allege[d] specific deficiencies in training and supervision, or explain how the incident described in the Amended Complaint could have been avoided with different or better training and supervision"); *see also Rehberg*, 2012 WL 1326575, at *5 (dismissing *Monell* claim where plaintiff had failed to allege specific facts regarding the officers' training, did not identify individuals that allegedly failed to adequately supervise or train).

Plaintiff has not plausibly stated a *Monell* claim, and her claims against El Paso County should be dismissed.

WHEREFORE, for the foregoing reasons, this court respectfully

RECOMMENDS that the "Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)" (Doc. No. 15) be **GRANTED in part and DENIED in part** as follows:

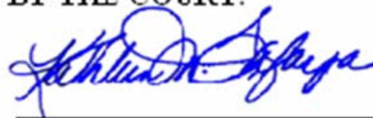
1. The motion to dismiss Plaintiff's excessive force claim should be DENIED;
2. The motion to dismiss the failure to intervene claim, the failure to train and supervise claim, the malicious prosecution claim, and the retaliation claim should be GRANTED, and these claims should be dismissed with prejudice;
3. Defendant El Paso County, Colorado should be dismissed as a defendant; and
4. Defendants Sirois, Beyrle, and Porter should be granted qualified immunity on Plaintiff's failure to intervene, malicious prosecution, and retaliation claims.

ADVISEMENT TO THE PARTIES

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).

Dated this 26th day of August, 2021.



Kathleen M. Tafoya
United States Magistrate Judge