

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Anthony Randal-Ashley Villebrun,

Case No. 24-cv-504 (KMM/LIB)

Plaintiff,

**PLAINTIFF’S MEMORANDUM IN
OPPOSITION TO DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT**

v.

Brandon Keith Nienaber,

Defendant.

INTRODUCTION

In October 2021, White Earth Police Department officer Brandon Nienaber was on patrol when he thought he saw Anthony Villebrun excessively accelerate. Nienaber attempted to stop Villebrun’s vehicle, but Villebrun fled, causing Nienaber to pursue him. The pursuit ended in a wooded area where Villebrun exited his vehicle. Villebrun stumbled over the rough terrain, and Nienaber caught up to him. Nienaber ordered Villebrun to stop. Villebrun did so.

Villebrun went to his knees and placed his hands behind his back to surrender and be arrested. Rather than handcuff Villebrun in a kneeling position, Nienaber ordered Villebrun to lie on the ground. Villebrun could not do so because the ground was full of sticks, twigs, and logs that would have made it difficult and painful to lie down. Instead, Villebrun remained on his knees with his hands behind his back so that Nienaber could arrest him in a kneeling position. Without warning, Nienaber drew and used his taser on

Villebrun, which caused Villebrun to involuntarily collapse on the ground. While still reeling from the first taser shock, Nienaber again tased Villebrun.

Nienaber then put Villebrun in handcuffs and lifted Villebrun up from the ground. Villebrun was charged with Minnesota state law criminal violations, including fleeing a peace officer. Following the incident, Villebrun suffered increased back pain, and he has a scar where the taser probes were embedded in his back.

Villebrun has brought a claim under Section 1983 for Nienaber's excessive force. Nienaber's taser use was objectively unreasonable because Villebrun had surrendered and was in an arrest position making such force unnecessary. Nienaber wanted Villebrun to lie down, but it was unsafe for Villebrun to lie on the ground due to the wooded ground cover. Nienaber violated Villebrun's Fourth Amendment rights by using unnecessary and excessive force that only caused pain and injury in the absence of safety threat or flight risk.

Although Nienaber was a White Earth Police Department officer, Nienaber acted under color of state law in this incident. At the time of the incident, he was licensed by and subject to Minnesota law enforcement supervision authorities, he was enforcing Minnesota criminal law, and Villebrun was ultimately prosecuted in a Minnesota state court. These factors, and others, support that the relevant authority for Nienaber's conduct was Minnesota state law, not tribal law.

Nienaber's motion for summary judgment should be denied because material issues of fact exist whether a genuine safety threat was present that would have justified the use of a taser on a subject who had surrendered. Because no force was justified in the absence

of a safety threat or flight risk, and factual disputes about these risks must be resolved by a factfinder, this Court should deny Nienaber's motion for summary judgment.

FACTS

I. DEFENDANT NIENABER TASES VILLEBRUN TWICE AFTER VILLEBRUN HAD SURRENDERED.

On October 23, 2021, Defendant Nienaber was on patrol as an officer of the White Earth Police Department. (ECF 25-4 at 5.) While patrolling, Nienaber saw Villebrun's vehicle accelerate quickly while leaving an apartment building. (*Id.*) Nienaber attempted to follow Villebrun and observed that Villebrun continued to accelerate away from him. (*Id.*) At the time, Nienaber did not know who was driving the vehicle. (ECF 24-3 at 28:16-18.)

When Nienaber attempted to pull Villebrun over, Villebrun began to flee. (ECF 25-2 at 1:37.) During the pursuit, Villebrun's vehicle ran over a bag in the roadway. (*Id.* at 1:59.) Villebrun did not throw anything out of the vehicle. (*Id.*; Rice Decl. Ex. 1, Villebrun Dep. at 13:11-15:3.) The bag was later found to be a fast-food bag with napkins. (ECF 25-4 at 5.)

The pursuit continued until Villebrun drove into a wooded area. (ECF 25-2 at 8:32.) Villebrun exited the vehicle and continued fleeing on foot into the woods. (*Id.* at 8:39.) Villebrun stumbled on the rough ground, and Nienaber caught up to him. (*Id.* at 8:42.) Nienaber commanded Villebrun to stop, and Villebrun dropped to his knees. (*Id.* at 8:48.) Nienaber commanded Villebrun to get down on his belly. (*Id.* at 8:51.) Villebrun did not get down on his belly; instead, he remained on his knees with his back to Nienaber, and

Villebrun put his hands together behind his back. (*Id.* at 8:53.) Nienaber tried to push Villebrun to the ground. (*Id.* at 8:54.) Villebrun came back up to his knees, and he put his hands together behind his head. (*Id.* 8:55.)

Nienaber could have handcuffed Villebrun or pat searched for weapons. (Rice Decl. Ex. 2, Nienaber Dep. at 45:11-15, 45:19-22.) Nienaber believed that he could see Villebrun's back. (*Id.* at 44:21-23.) Nienaber did not recall seeing any weapons, bulges, or other indications that Villebrun was potentially armed. (*Id.* at 44:24-45:5.) Nienaber did not observe any indications that Villebrun was a flight risk at this time. (*Id.* at 47:2-12.) Nienaber understood that it would have been acceptable to pat frisk or handcuff Villebrun pursuant to officer training. (*Id.* at 59:7-20.)

Nienaber ordered Villebrun to get on his belly. (ECF 25-2 at 8:59.) Villebrun could not lie down because the ground was covered with twigs, branches, and logs. (Villebrun Dep. at 17:23-18:1.) Villebrun also had back pain that made lying down difficult. (*Id.* at 29:13-24; ECF 25-2 at 10:50.) Nienaber aimed a taser at Villebrun's back. (ECF 25-2 at 8:59.) Nienaber did not announce that he was going to use a taser before he used it on Villebrun. (*Id.*) While Villebrun was in a kneeling arrest position, Nienaber deployed the taser into Villebrun's back, causing Villebrun to fall onto the ground. (*Id.* at 9:01.) The taser caused Villebrun's body to stiffen, and Villebrun was unable to control his movements. (Villebrun Dep. at 19:19-20:1.) The taser caused Villebrun to go to the ground, and Villebrun had his hands together behind his back. (ECF 25-2 at 9:03.) Nienaber then rolled Villebrun onto his side. (*Id.* at 9:06.) Nienaber used the taser a second time on Villebrun. (*Id.*)

Nienaber placed handcuffs on Villebrun. (*Id.* at 9:32.) Nienaber helped Villebrun get up and brought him to the squad car. (*Id.* at 10:24.) Becker County Sheriff's Office deputies came to the scene to assist Nienaber. (Nienaber Dep. at 72:5-7.) Officers arrested Nienaber and cleared the scene. (ECF 25-4 at 5-6.) Due to the incident, Villebrun had taser probes in his back, which left a scar. (Villebrun Dep. at 21:23-25.) The incident caused him pain and suffering. (*Id.*) Due to the wound in his back, Villebrun had trouble sleeping afterward. (*Id.* at 26:5-15.) Villebrun also suffers from anxiety and trauma following the incident. (*Id.*)

II. DEFENDANT NIENABER'S CONDUCT OCCURRED WHILE ENFORCING MINNESOTA STATE LAW.

In October 2004, the White Earth Reservation of Chippewa Indians entered into a Cooperative Law Enforcement Agreement (the "Agreement") with Becker County, Minnesota. (ECF 25-6.) The Agreement was made pursuant to Minnesota statutes and regulated the "enforcement of the laws of the State of Minnesota [...] on that portion of the White Earth Reservation that lies within Becker County" among other purposes. (*Id.* at 1.) The Agreement stated that the White Earth Reservation was "authorized, pursuant to Minnesota Statute Section 626.93 to enforce the criminal laws of the State of Minnesota within that portion of the White Earth Reservation that lies within Becker County" subject to conditions set forth within the Agreement. (*Id.*) The terms included requiring White Earth to be subject to tort liability as other Minnesota municipalities were, licensing by the Minnesota Peace Officer Standards and Training ("POST") board, obtaining insurance for liability that included lawsuits against officers "under the United States Constitution," and

other provisions of Minnesota law applicable to government entities and law enforcement agencies. (*Id.* at 1-2.)

The Agreement required White Earth to provide to Becker County a list of officers licensed by the Minnesota POST board. (*Id.* at 2.) Officers who were not so licensed could not exercise authority under the Agreement. (*Id.*) Prosecutions of an individual by a White Earth officer would be by the Becker County Attorney “pursuant to applicable Minnesota law.” (*Id.* at 3.)

During his tenure at the White Earth Police Department, Nienaber was licensed by the Minnesota POST board. (Nienaber Dep. at 80:12-15.) Nienaber understood that POST licensing was required because he acted as an officer under White Earth tribal law and Minnesota state law. (*Id.* at 81:16-22.) Nienaber was directed to comply with the United States and Minnesota constitutions while executing his duties. (*Id.* at 83:7-10.)

At the time of the incident, Nienaber understood that felony offenses, such as fleeing, would be sent to the Becker County prosecutor for charging instead of being handled by tribal courts. (*Id.* at 71:20-72:1.) Nienaber expected that the matter involving Villebrun would be prosecuted by the county attorney, consistent with that custom. (*Id.* at 72:2-4.) Due to the suspicion of fleeing, Nienaber expected Becker County Sheriff’s Office deputies to participate in the incident involving Villebrun. (*Id.* at 73:8-11.) Nienaber was only aware of fleeing matters being prosecuted by the Minnesota county attorney and was unaware whether someone could be charged with fleeing under tribal law. (*Id.* at 27:11-28:5.)

Because a vehicle pursuit was involved, Nienaber filled out a pursuit report to be submitted to the Minnesota Bureau of Criminal Apprehension pursuant to Minnesota law. (Rice Decl. Ex. 3, BCA Pursuit Report.) Nienaber filled out these reports any time that there was a vehicle pursuit. (Nienaber Dep. at 74:3-6.) Nienaber also prepared a report with proposed charges for Villebrun. (*Id.* at 77:3-5.) Nienaber listed crimes charged under Minnesota law for all suspected offenses. (*Id.* at 77:6-78:1; ECF 25-4 at 1-2.) Villebrun was ultimately charged in Minnesota district court by the Becker County Attorney's Office. (Rice Decl. Ex. 4, Criminal Complaint.)

LEGAL STANDARD

Summary judgment is appropriate when a movant “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A material fact is one that affects the outcome of the suit. *Erickson v. Nationstar Mortg., LLC*, 31 F.4th 1044, 1048 (8th Cir. 2022) (citation omitted). On summary judgment, the record should be viewed in the light most favorable to the nonmoving party, and all reasonable inferences should be drawn in the nonmoving party's favor. *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 755 (8th Cir. 2016). When considering a summary judgment motion, a court should refrain from making credibility determinations or resolving disputed or conflicting evidence. *Wealot v. Brooks*, 865 F.3d 1119, 1128 (8th Cir. 2017) (citations omitted). Material disputes of fact preclude granting summary judgment. *Id.*

ARGUMENT

Nienaber offers two arguments in support of his motion for summary judgment: (1) that he acted under tribal law, not state law and (2) that qualified immunity should apply. Both arguments fail, however.

First, Nienaber was acting under color of state law because Minnesota law was the controlling authority. Nienaber was licensed by the Minnesota POST board and his conduct was subject to supervision by Minnesota agencies. Nienaber understood that the crime of fleeing an officer would always be charged under Minnesota state law and prosecuted in Minnesota district court. Nienaber was required to comply with Minnesota law enforcement responsibilities, including observing constitutional rights. Nienaber recommended criminal charges based on Minnesota state law following the incident. Villebrun was charged with Minnesota criminal law offenses in Minnesota district court, including fleeing a licensed peace officer acting in the lawful discharge of an official duty under Minnesota law. These circumstances support a finding that Nienaber was acting under state law when he was held to Minnesota law enforcement standards while pursuing a person suspected of violating Minnesota state law.

Second, qualified immunity should not apply on summary judgment. Fourth Amendment principles are clear that an officer cannot use a taser except in limited circumstances, such as in response to a safety threat or a flight risk. Force is least justified against a subject who has surrendered and made themselves able to be handcuffed and arrested. Nienaber himself understood that Villebrun did not pose a safety threat or flight risk and was in an arrest position. Instead of completing the arrest, however, Nienaber tased

Villebrun to drop him to the rough ground. Nienaber then used his taser a second time before Villebrun had an opportunity to recover from the first deployment. A reasonable factfinder could conclude that Villebrun had surrendered and presented himself for arrest when Nienaber used his taser. Under these circumstances, qualified immunity should not protect Nienaber's excessive and unnecessary force.

Because genuine issues of material fact exist and Nienaber is not entitled to judgment as a matter of law, Nienaber's summary judgment motion must be denied.

I. NIENABER ACTED UNDER COLOR OF STATE LAW WHEN HE USED EXCESSIVE FORCE.

A Section 1983 claim requires a defendant to have acted under color of state law. *Schmidt v. City of Bella Villa*, 557 F.3d 564, 571 (8th Cir. 2009). For a private person to be susceptible to a Section 1983 claim, they must have "exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (cleaned up). Without such authority from the state, an action against a private person for private conduct cannot be sustained. *Id.* at 50.

When there is no question that an officer was acting under governmental authority, a court should examine what type of authority gave rise to the alleged violation. *Yassin v. Weyker*, 39 F.4th 1086, 1088-89 (8th Cir. 2022). Underlying facts contributing to the analysis may be disputed and should not be resolved on summary judgment. *Id.* at 1090. But, when material facts are undisputed, the color-of-law determination is a legal question. *Id.*

When an officer is cross-deputized, a court should examine the “nature and circumstances of the officer’s conduct and the relationship of that conduct to the performance of ... official duties.” *Id.* (quotation omitted). In *Yassin v. Weyker*, the Eighth Circuit explained that when an officer worked on a federal task force and her conduct arose from a federal investigation, “[s]tate law had nothing to do with the ‘nature and circumstances’ of [the officer’s] conduct.” *Id.* (quotation omitted). The court explained that the color of law did not shift even though the officer introduced herself as a St. Paul police officer and used a St. Paul police form to advise a suspect of their *Miranda* rights. *Id.* at 1091. The court held that a Section 1983 action was not available against the officer because there was an absence of “any actual or purported relationship between [the officer’s] conduct and [her] duties as a [St. Paul] police officer[.]” *Id.* (cleaned up).

Using similar reasoning, the Ninth Circuit held in *Bressi v. Ford* that tribal officers enforcing state law when they set up a roadblock acted under the color of state law for Section 1983 purposes. 575 F.3d 891, 897 (9th Cir. 2009). The court explicitly condoned the result that its holding would require tribal officers enforcing state and tribal law to adhere to constitutional standards. *Id.* at 897-88. The court relied on precedent that held that officers acting under tribal and municipal authority in making arrests were subject to a Section 1983 claim. *Id.* (citing *Evans v. McKay*, 869 F.2d 1341, 1348 (9th Cir. 1989)).

Nienaber’s excessive force occurred during an arrest of Villebrun for a Minnesota criminal offense. The arrest was authorized by Minnesota state law—not White Earth tribal law. (Nienaber Dep. at 72:2-4.) After the arrest, Nienaber listed only Minnesota criminal offenses in his report. (*Id.* at 77:6-78:1; ECF 25-4 at 1-2.) Nienaber understood that a felony

fleeing charge would be prosecuted by the Becker County Attorney's Office in Minnesota state district court, not in tribal court. (*Id.* at 71:20-72:1.) Nienaber did not believe that White Earth tribal law would allow for felony prosecution even if there were a potential conflict. (Nienaber Dep. at 27:11-28:5.)

Following the incident, Nienaber reported his conduct to the Minnesota BCA for review. (Rice Decl. Ex. 3.) Becker County Sheriff's Office deputies assisted with the arrest and investigation. (Nienaber Dep. at 72:5-7.) Villebrun was prosecuted in Minnesota district court. (Rice Decl. Ex. 4.) In fact, tribal law did not apply to any part of the incident following the fleeing of Villebrun.

At the time, Nienaber was licensed by the Minnesota POST board to enforce Minnesota laws. (Nienaber Dep. at 80:12-15.) Nienaber had been directed to comply with constitutional requirements while executing his duties. (*Id.* at 83:7-10.) Enforcement of Minnesota law was authorized pursuant to Minnesota statute and a cooperation agreement in which the White Earth Reservation agreed to adhere to Minnesota laws and accept liability similar to state municipalities. (ECF 25-6.)

Thus, a Minnesota-licensed officer was directed to follow constitutional requirements while effecting an arrest for Minnesota criminal violations while assisted by a Minnesota law enforcement agency. The matter was then referred to and prosecuted by a Minnesota prosecutor in a Minnesota court in which the State of Minnesota was the opposing party to Villebrun. Villebrun was accused of fleeing a licensed peace officer acting in lawful discharge of an official duty under Minnesota law. Under these undisputed facts, it is beyond question that Nienaber was acting under authority given to him by the

State of Minnesota when he used excessive force during an arrest for violations of Minnesota criminal law.

In *Howard v. Weidemann*, the court explained that the existence of a cooperation agreement between tribal and state law enforcement agencies was insufficient to put all actions of tribal officers within the ambit of Section 1983. No. 20-cv-1004 (ECT/LIB), 2021 U.S. Dist. LEXIS 244155, at *10-11 (D. Minn. Dec. 22, 2021). Crucially, the court found that “[a]t no time did Defendants invoke their state-law authority or threaten [the plaintiff] with enforcement of state law.” *Id.* at *12 (citing *McDonough v. Toles*, 476 F. Supp. 3d 882, 889 (D. Minn. 2020)). The plaintiff in that matter was cited for tribal law violations and prosecuted in tribal court. *Id.* Thus, the court held that the plaintiff had not “created a trial-worthy dispute that Defendants acted under color of state law.” *Id.* at *10.

Here, the defendant enforced only Minnesota state law, which resulted in a prosecution of Minnesota offenses in a Minnesota court. Unlike *Howard*, there was only enforcement of state law offenses here, which supports a finding that Nienaber acted under color of state law for Section 1983 purposes.

In his argument that he acted under color of tribal law, Nienaber describes five factors that a court should consider. (ECF 23 at 9-10.) However, these factors do not come from precedent and appear to be a new test of Nienaber’s own making to tilt the field in his favor. The *McDonough* case that Nienaber cites as authority addressed a different question and examined different factors than those proposed by Nienaber. 476 F. Supp. 3d at 889.

In *McDonough*, an off-duty officer assaulted a bar patron. *Id.* at 885-86. The court examined the color of law issue, considering whether the officer acted under state law or as a private individual. *Id.* at 889. The court considered factors such as:

[W]hether the officers are on duty and in uniform, the motivation behind the officers' actions, [...] whether the officers had access to the victim because of their positions, [...] whether the officer specifically invoked his official status, whether the officer was in a place to which only officers have access, and whether the officer threatened to use official authority in the future.

Id. (cleaned up). The court held that the officer acted under color of state law because he invoked his authority as a police officer, the police department regulated the conduct of off-duty officers, and the officer completed a police report following the incident, among other facts. *Id.* Although a private security guard could also forcibly remove a patron from a bar, the court held that this commonality was not dispositive and did not render the conduct outside the color of state law. *Id.*

This incident has many similarities to those discussed in *McDonough*. Here, Nienaber completed a report citing only Minnesota law as the basis for arrest. Nienaber submitted a report to the Minnesota BCA for review. Nienaber was directed to protect constitutional rights. These actions are similar to those found by the court in *McDonough* to qualify as conduct under the color of state law.

Even the factors hand-picked by Nienaber do not support a finding that he acted under color of tribal law. First, Nienaber argues that because Villebrun was a member of the Tribe that Nienaber acted under color of tribal law. Nienaber claims that “regulating relations among Tribal members and punishing Tribal offenders is within the inherent authority of the Band.” (ECF 23 at 11.) However, concurrent authority existed. Villebrun

was subject to both tribal and state law. The fact that Nienaber acted pursuant to Minnesota law enforcement standards, believed that he was arresting someone for a violation of Minnesota criminal law, and recommended prosecution in a Minnesota court all strongly support that Minnesota law was the controlling authority. Further, there is no indication that Nienaber knew of Villebrun's status at any relevant time or that Villebrun's status affected Nienaber's conduct. Nienaber expected Villebrun to be charged with Minnesota criminal offenses regardless of Villebrun's tribal status. The fact that tribal law could have applied but was disregarded in favor applying Minnesota state law supports that Nienaber acted under color of state law.

Second, Nienaber argues that Villebrun was arrested due to violations of tribal laws. (ECF 23 at 11.) However, Nienaber only cites to traffic offenses that were never seriously considered by Nienaber or actually charged. Nienaber's own report states that Villebrun was arrested on suspicion of Minnesota criminal law offenses. Nienaber did not use a taser because Villebrun committed tribal traffic offenses. Nienaber believed that Villebrun had committed felony fleeing under Minnesota law. It was as part of an arrest for Minnesota criminal law violations that Nienaber is alleged to have used excessive force. The fact that tribal law had traffic violations that were never referenced or pursued supports that Nienaber acted under color of state law.

Third, Nienaber argues that his appearance and conduct support a finding that he acted under color of tribal law. (ECF 23 at 14.) An officer's announcement of their agency or their physical appearance are not dispositive, however. *See, e.g., Yassin*, 39 F.4th at 1091 (holding that an officer who introduced herself as a St. Paul police officer did not deprive

her of the color of federal law); *McDonough*, 476 F. Supp. 3d at 890 (finding that an officer acted under color of state law despite not wearing a uniform or badge). Just as the presence of Becker County Sheriff's Office deputies would not automatically convert an incident into one under color of state law, so too this matter was not conducted under color of tribal law merely because Nienaber was in a White Earth Police Department vehicle and uniform. As the cooperation agreement establishes, both agencies had concurrent jurisdiction and could act under either authority. An officer's appearance alone does not establish which authority they were acting under. Instead, other factors must be examined to determine which of the concurrent authorities applied.

Finally, Nienaber cannot contend that tribal law was the exclusive authority in this incident or that state law could not apply. The fact that Villebrun was prosecuted for Minnesota criminal offenses in a Minnesota court definitively establishes that state law could apply. In *State v. Manypenny*, the Minnesota Supreme Court recognized that the state has "broad criminal and limited civil jurisdiction over all Indian country in the state, with the exception of the Red Lake Reservation." 682 N.W.2d 143, 149 (Minn. 2004) (cleaned up). The Court further explained that under the cooperation agreement, Becker County "shar[ed] its law enforcement authority with the Band, and has not surrendered its jurisdiction to the Band." *Id.* at 150. The Court held that the "cooperative agreement gives concurrent powers of arrest and law enforcement to state-licensed tribal police officers, and the State of Minnesota, through Becker County, retains jurisdiction to charge and prosecute individuals alleged to have engaged in criminal conduct, as defined under

Minnesota Statutes.” *Id.* at 152. It is precisely this exercise of concurrent state law-enforcement authority that occurred here.

Because Nienaber acted pursuant to Minnesota law enforcement standards and made an arrest for Minnesota criminal offenses, this Court should deny Nienaber’s request to grant summary judgment because Nienaber did not act under color of state law.

II. QUALIFIED IMMUNITY CANNOT BE APPLIED BASED UPON THE DISPUTED FACTS REGARDING NIENABER’S EXCESSIVE FORCE.

The issue of qualified immunity “requires consideration of the ‘objective legal reasonableness’ of the officer’s conduct in light of the information he possessed at the time of the alleged violation.” *Winters v. Adams*, 254 F.3d 758, 766 (8th Cir. 2001) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). Qualified immunity is a two-part inquiry: “(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant’s alleged misconduct.” *Mitchell v. Shearrer*, 729 F.3d 1070, 1074 (8th Cir. 2013) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

A. Nienaber committed a constitutional violation when he used excessive force.

Force used during an arrest must be objectively reasonable to comply with the Fourth Amendment. *Jackson v. Stair*, 944 F.3d 704, 710 (8th Cir. 2019) (citing *Graham v. Connor*, 490 U.S. 386, 394-96 (1989)). Factors to consider include “the severity of the crime at issue, whether the suspect posed an immediate safety threat, and whether [the suspect] was actively resisting arrest or attempting to flee.” *Id.* (cleaned up). The relevant

facts should be judged “from the perspective of a reasonable officer on the scene, not with 20/20 hindsight vision.” *Id.* (cleaned up).

Each taser use can be analyzed independently to determine whether a constitutional violation occurred. *Id.* at 712. Although a taser may be used when a subject poses a safety threat, use of a taser does not continue to be justified when the subject is “no longer acting aggressively, no longer pos[ing] any immediate security concern, and [is] trying to comply with [...] orders.” *Id.* (summarizing *Smith v. Conway County*, 759 F.3d 853, 860-61 (8th Cir. 2014)).

Merely disobeying commands does not justify use of a taser. *See, e.g., Shekleton v. Eichenberger*, 677 F.3d 361, 366 (8th Cir. 2012) (holding that a subject’s failure to put arms behind his back did not justify use of a taser); *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009) (holding that whether a subject’s refusal to discontinue a phone call presented a realistic threat to an officer’s safety was “a matter for a jury to decide”). Even if a subject is initially noncompliant, threatening, or resisting arrest, officers may not use a taser once that behavior has stopped. *Jackson*, 944 F.3d at 711-13. When an officer uses a taser and causes a subject to writhe on the ground, an officer should give a subject a chance to comply before using the taser again. *Id.* Using a taser without giving a subject a chance to recover or comply can be unreasonable. *Id.* If there is uncertainty whether a subject posed a threat to officers or was resisting, that fact dispute should be decided by a jury, and summary judgment should be denied. *Id.* at 712.

Here, there is a genuine dispute of fact whether Villebrun posed a safety threat or was actively resisting arrest that would justify taser use. A reasonable factfinder could

determine that Villebrun surrendered and made himself available to be handcuffed, which would not require a taser to complete the arrest. Even if a factfinder found that the first taser use was justified, though, a factfinder could determine that Nienaber failed to give Villebrun a chance to recover or comply before Nienaber used the taser a second time. Nienaber's taser use on a subject who has surrendered and poses no safety threat is not permitted by the Fourth Amendment and would prevent the application of qualified immunity.

Facts and inferences resolved in Villebrun's favor support that he did not pose a safety threat when he was on his knees with his hands behind him. Although Villebrun had previously attempted to flee in a vehicle and on foot, he had stopped fleeing when Nienaber approached him. Villebrun's position when he was first tased was consistent with an effort to surrender and did not present a safety threat to Nienaber. Nienaber did not claim that he saw the appearance of any weapons or bulges on Villebrun that would have supported a safety threat. Nienaber admitted that he could have conducted a pat search or handcuffed Villebrun. Nienaber also admitted that Villebrun was no longer a flight risk. Under these circumstances, the Fourth Amendment does not allow an officer to use a taser.

Villebrun's failure to lie flat on the ground does not alone justify use of a taser without warning. A factfinder could determine that a reasonable officer would understand that Villebrun could not easily lie down on an uneven ground with twigs, branches, and logs without potentially suffering injury. It was this rough ground that caused Villebrun to stumble when he tried to flee on foot. Villebrun also had a back condition that made lying down difficult. Although Villebrun did not lie down, he did not otherwise pose a threat or

resist the arrest itself—handcuffing or a pat search. Unlike other cases where subjects refused to show their hands or otherwise engaged in threatening behavior, Villebrun was in a surrender position that facilitated arrest and did not pose a safety threat that would justify use of the taser. If it is disputed whether Villebrun posed a safety threat, that fact should be resolved by a jury, not summary judgment.

Even if the first taser would have been justified, though, there was no need for the second use of the taser. The first taser incapacitated Villebrun, dropping him to the ground. Nienaber failed to give Villebrun an opportunity to recover or otherwise comply before he was tased again. Nienaber used a second taser deployment in much the same manner as *Jackson*. This use of a taser was wholly unnecessary and objectively unreasonable.

The facts relied upon by Nienaber to justify his taser use are disputed or false. First, Nienaber did not observe a bag of narcotics thrown from Villebrun's vehicle while he was fleeing. Rather, Villebrun ran over a fast-food bag on the street. Thus, Nienaber's claim that he suspected that Villebrun was involved in narcotics trafficking and armed is unsupported by objective facts.

Nienaber also argues that other people may have been in the car or in the surrounding area. A potential threat from others does not justify repeated tasing of Villebrun. Villebrun surrendered and made himself available to be handcuffed. If Nienaber feared that others in the area posed a safety threat, he could have taken action to address that. However, the video shows that Nienaber only engaged with Villebrun and did not appear concerned about any other people in the area. Instead, this argument appears to be

an attempt to retroactively justify the use of a taser on a subject who had surrendered and no longer posed a safety threat or flight risk.

Finally, Nienaber argues that he could not arrest Villebrun because Villebrun would not lie flat on his belly. But, the video shows that the purpose of putting Villebrun on the ground was to put his hands behind his back so that they could be handcuffed. Once Villebrun was detained, Nienaber brought Villebrun back off of the ground. There is no reason why Nienaber could not handcuff Villebrun once Villebrun had surrendered. Nienaber explained that while he personally preferred Villebrun to lie down, Villebrun could have been pat searched and handcuffed in a kneeling position. The fact that Villebrun did not comport with Nienaber's preferred position does not justify use of a taser when Villebrun did not otherwise resist being handcuffed or pose a safety threat.

Nienaber relies on his retained expert, Chief Mark Bruley, to vouch that the taser use was objectively reasonable. Most of Chief Bruley's opinions must be excluded because they opine on the ultimate issue of whether force was reasonable. *Schmidt v. City of Bella Villa*, 557 F.3d 564, 570 (8th Cir. 2009) (holding that an expert's opinions on the reasonableness of officer's conduct were impermissible legal conclusions and were devoid of any standards or explanations that would assist the trier of fact in contextualizing his opinions). For example, Chief Bruley makes a conclusory statement that "[a]ny reasonable officer in this situation would be worried that Mr. Villebrun would resume fleeing, that he might be armed with a weapon, or that he might attempt to stage an attack upon the officer." (ECF 24-2 at ¶ 59.)

Chief Bruley offers no standards or framework that support this opinion. Instead, it appears to be the personal opinion of Chief Bruley that unsurprisingly strongly supports his client's preferred legal position. "Opinions that 'merely tell the jury what result to reach' are not admissible." *Youa Vang Lee v. Andersen*, 616 F.3d 803, 809 (8th Cir. 2010) (quoting Fed. R. Evid. 704 advisory committee's note). An expert's experience and training alone are not sufficient to assist the jury when the expert merely substitutes their perception of the evidence in place of the jury. *Id.* An expert should not usurp the jury's role by merely adopting and endorsing a particular version of events. *Thomas v. Barze*, 57 F. Supp. 3d 1040, 1059 (D. Minn. 2014). Nienaber cannot use Chief Bruley to offer personal opinions and vouch for Nienaber's arguments. Thus, this improper expert testimony should be stricken and should not be considered on the motion for summary judgment. Villebrun intends to bring a motion in limine at trial to further exclude such testimony.

Examination into the factual foundations of Chief Bruley's claims supports that Nienaber's taser use was improper. Chief Bruley agreed that the act of an arrest consists of placing handcuffs on a subject suspected of committing a crime. (Rice Decl. Ex. 5, Bruley Dep. 44:4-13.) Lying prone on the ground is not a requirement of an arrest—it is an officer's ability to successfully place the suspect in handcuffs, which Villebrun permitted by placing his hands behind his back and surrendering to Nienaber.

Chief Bruley also admitted that Villebrun complied with Nienaber's command to stop when Villebrun dropped to his knees. (*Id.* at 67:25-68:3.) Chief Bruley admitted that a subject's partial compliance should be considered by an officer during a use-of-force encounter. (*Id.* at 68:4-7.) Chief Bruley also admitted that he omitted recognizing

Villebrun's compliance in his report. (*Id.* at 68:8-15.) Chief Bruley stated that partial compliance would cause a reasonable officer to refrain from using force or to use less force during an encounter. (*Id.* at 70:10-13.) However, Chief Bruley contradicted that position when he said that a reasonable officer should not consider that Villebrun had complied with a command to stop when considering whether to use force in this incident. (*Id.* at 80:20-24.)

Chief Bruley agreed that Villebrun's hands were positioned behind his back in a position commonly directed by officers to permit handcuffing in a kneeling position. (*Id.* at 92:13-17.) Chief Bruley initially refused to concede that Villebrun's position suggested that Villebrun was trying to surrender. Rather, Chief Bruley claimed that subjects commonly put their hands behind their back to "[d]raw the officer in close proximity to be able to take control of them, disarm them, take their weapon from them, attack them, subdue them." (*Id.* at 100:5-17.) Upon further questioning, however, Chief Bruley conceded that Villebrun's position appeared to be a gesture to surrender. (*Id.* at 101:15-19.) Ultimately, Chief Bruley agreed that force used by Nienaber was not used to overcome resistance to a pat search, to prevent Villebrun from fleeing, or to prevent imminent harm. (*Id.* at 137:2-139:2.) Chief Bruley's refusal to consider factors weighing against force, such as Villebrun's partial compliance, and his reliance on baseless hypothetical possibilities that support his client, such as Villebrun trying to lure Nienaber close so that he could attack him without any indication that Villebrun was actually aggressive or hostile, undermine Chief Bruley's utility and credibility.

Chief Bruley's admission that Villebrun was in a kneeling arrest position supports that the force used by Nienaber was unreasonable. Chief Bruley admitted that the force was not used in response to a safety or flight risk. It was used merely to cause Villebrun to lie on the ground rather than kneel in a surrender position. Disobedience alone without active resistance, a safety threat, or flight risk does not justify use of a taser twice without warning. Thus, this Court should hold that the facts and inferences most favorable to Villebrun support that a constitutional violation occurred.

B. Nienaber violated a clearly established constitutional right when he used excessive force.

For a right to be clearly established, prior case law need not be directly on point, but “existing precedent must have placed the statutory or constitutional question beyond debate.” *White v. Pauly*, 580 U.S. 73, 79 (2017) (internal quotation omitted). It is “not necessary, of course, that the very action in question has previously been held unlawful.” *Thompson v. City of Monticello*, 894 F.3d 993, 999 (8th Cir. 2018) (internal quotation omitted). The key question is “whether there was a fair and clear warning of what the Constitution requires.” *Id.* (internal quotation omitted).

The *Jackson* decision discussed previously put Nienaber on notice that use of a taser upon a subject who has surrendered and no longer poses a safety threat or flight risk is unreasonable. In *Jackson*, the court held that a constitutional violation occurred under similar circumstances, even when a subject was previously threatening or disobedient. It is beyond question that Nienaber was not permitted to use a taser when Villebrun had surrendered, posed no safety threat, and had ceased fleeing. Villebrun further relies on his

previous discussion above regarding the constitutional violation, which relies on principles that were clearly established before this incident.

Because Nienaber committed a constitutional violation and violated clearly established principles, this Court should deny qualified immunity. Any disputes about the potential threat that Villebrun posed or whether he failed to surrender should be resolved by a factfinder. Thus, summary judgment must be denied.

CONCLUSION

Because Nienaber acted under color of state law and violated clearly established constitutional principles when he used excessive force upon Villebrun, the defendant's motion for summary judgment must be denied.

LAW OFFICE OF ERIC A. RICE, LLC

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s/Eric Rice
Eric A. Rice (MN #0388861)
1 W. Water St., Ste. 275
St. Paul, MN 55107
P: (651) 998-9660
F: (651) 344-0763
eric@ricedefense.com

RINGSTROM DEKREY

Dane DeKrey (MN #0397334)
814 Center Ave., Ste. 5
Moorhead, MN 56560
P: (218) 284-0484
dane@ringstromdekrey.com

Attorney for Plaintiff