

FINAL REPORT: IIU concludes investigation into officer-involved shooting in Waywayseecappo

On May 29, 2019, the Manitoba First Nations Police (MFNP) notified the IIU of an officer-involved shooting that occurred at the Waywayseecappo Gaming Centre (Gaming Centre), at the Waywayseecappo First Nation (WFN) near Rossburn, Manitoba. According to the notification, which read in part:

“On May 29 Manitoba First Nations Police attended a disturbance complaint at the Waywayseecappo Gaming Center. Upon arrival police accessed the scene and arrested a male. As police was dealing with this male, another male, later identified as the affected person (AP) approached the officer (later designated as the subject officer (SO) and stabbed him multiple times in the head and back. Police was able to pull and discharge his sidearm and shot AP. Gaming Center security came to the aid of the officer and secured both males in the police unit. The officer was able to enter the gaming center and call for help. Ambulance attended and took both injured to Russell Hospital. RCMP attended and secured the scene. RCMP Major Crimes was called and updated and will take over the investigation until further direction from IIU.”

According to this notification, SO discharged his service handgun and shot once, striking AP in the face. As any injury caused by the discharge of a firearm by a police officer is defined by regulation as a serious injury, IIU assumed responsibility for this matter in accordance with section 65(1) of *The Police Services Act* (PSA). A team of IIU investigators was assigned to this investigation.

Information obtained by IIU investigators included:

- 911 call audio recordings and transcripts;
- police radio transmissions and transcripts;
- RCMP forensic identification service report;
- scene photographs;
- parking lot surveillance video and enhancements;
- medical reports respecting AP.

SO was the only police officer to be designated by the civilian director in this matter. IIU investigators interviewed AP and nine civilian witnesses (CW1- CW9).

Facts and Circumstances

Scene Examination and Video Surveillance review

The shooting scene, in the parking lot of the Gaming Centre, was examined by RCMP Forensic Identification personnel from Dauphin. A knife and one spent bullet casing were located, along with bloodstains on the ground inside and near a parked MFNP vehicle.

The Gaming Centre is located in an isolated part of the WFN. There are no homes nearby. Video footage of the parking lot area was obtained from the Gaming Centre. The video footage was sent for enhancements to zoom in on the area where the critical action occurred. A review of the original and enhanced video shows a lone police officer (later identified as SO) arriving in the parking lot and engaging in conversation with a number of individuals. One of the individuals, believed to be AP, removes his shirt, appears to walk away from SO, and then turns suddenly--striking SO six times in the head and neck region, with rapid downward motions of his right hand, before the two fall to the ground in front of the police vehicle. At that point, they are no longer seen on the video. However, after a few seconds elapse on the video, SO gets to his feet and begins to back away. SO is pointing something towards the spot where he and AP had fallen. A flash of light is seen at the end of this object pointed by SO. This is believed to be the muzzle flash from a gunshot.

Affected Person

AP stated he went to the Gaming Centre with CW1 and two others, arriving between 10:00 p.m. and 11:00 p.m. AP said they had been drinking and were intoxicated. AP denied using any drugs that evening. AP stated they were sitting in the parking lot of the Gaming Centre when a police officer, known to him, approached and said they were causing a disturbance. AP said they denied they were doing that and asked SO to leave them alone as they were waiting for a ride home. AP said he could not really remember what else happened other than SO pulled out his pistol and shot him twice, once in the face and once in the shoulder. AP said he did not know why the officer shot him. When asked if he stabbed SO, AP replied, "*I don't know.*"

AP signed a medical release authorizing IIU investigators to access his medical records. AP was taken by ambulance to Russell Health Centre (RHC) and then to Health Sciences Centre in Winnipeg. The medical records confirm that AP was treated for a gunshot wound to the right side of his face. A wound to AP's right shoulder was initially regarded as a possible second gunshot injury but it was later determined to be consistent with the course of the bullet that entered his face. In essence, one gunshot wound caused two separate injuries to AP. AP's urine tested positive for cocaine that night.

Civilian Witnesses

CW1 said he and AP each consumed eight beers and marijuana prior to attending the Gaming Centre that evening. Respecting the incident in the parking lot, CW1 stated that AP and SO got into an altercation. According to CW1, SO pushed himself away from AP, drew his pistol and shot AP. According to CW1, SO said he shot because AP had stabbed him, although CW1 said he did not see that happen.

CW2 stated that he, CW1 and AP were in a vehicle in the parking lot of the Gaming Centre and drinking beer when SO arrived and told them to pour out the beer. CW2 said SO was harassing AP, calling him stupid and an idiot. As CW2 was cleaning up the empty cans of beer, he

observed AP swinging his right arm in an overhand motion at SO, four to six times. CW2 said he did not see AP holding anything in his hand at the time, and both SO and AP fell to the ground. According to CW2, SO then got to his feet, drew his service pistol, began to back up, and fired his gun at AP two or three times.

CW3 was seated in a van parked in the parking lot of the Gaming Centre when the altercation between AP and SO occurred. WO3 said AP was seated in a car in which everyone was consuming beer. A lone male police officer arrived in the parking lot and approached the vehicle containing AP. The police officer instructed everyone in the car to pour out their beer and clean up the empty cans. CW3 stated that AP was uncooperative. The officer repeatedly told AP to calm down but then grabbed him by the arm, pushing AP against a car. CW3 then observed both AP and the police officer on the ground, wrestling. CW3 stated that the police officer got up, drew his service pistol and began to back up from AP. CW3 stated the police officer stopped retreating and shot AP once. CW3 did not see AP strike the police officer, did not see a knife, and did not hear the police officer say anything prior to the shot being fired.

CW4 did not see the shooting incident, did not hear any gunshots, and came out of the Gaming Centre after everything had happened.

CW5 was seated in a parked car in the Gaming Centre lot when AP arrived in another vehicle. CW5 said they spoke briefly and he noted that AP appeared intoxicated. A male police officer arrived a short time later and approached the vehicle in which AP was situated. CW5 then saw AP strike the police officer four times in the chest area with his right hand. CW5 did not see AP hold any weapon in the right hand. CW5 looked away for between two and 15 seconds as he stated he was disturbed by what he saw. When he looked back, CW5 observed AP and the police officer on the ground. CW5 stated the police officer got to his feet, backed away as he drew his service pistol and shot AP one time.

CW6 did not see the shooting incident. However, CW6 assisted SO following the shooting and observed approximately seven wounds to the back of the officer's neck.

CW7 observed AP striking SO from behind, with his arm moving in a downward motion towards SO. CW7 stated he could see a shiny object in AP's hand that was hitting SO. CW7 believed AP was either stabbing or hitting SO with a weapon. CW7 stated the two fell to the ground and he lost sight of them. CW7 then observed SO holding something in both hands and pointing it at AP who was lying on the ground. CW7 did not hear any gunshots.

CW8 is a security guard at the Gaming Centre. CW8 stated AP had been acting in an erratic fashion "... *hopping and howling*" that evening, leading CW8 to believe AP was intoxicated. MFNP had been contacted to assist in dealing with AP. SO arrived a short time later. CW8 stated that an altercation broke out between SO and AP, with AP stabbing SO repeatedly. CW8 said AP was "... *standing over him stabbing him in the back.*" The two then fell to the ground. SO got up immediately, stepped back and fired one shot at AP with his pistol.

CW9 was also a security guard at the Gaming Centre on the night of the shooting. CW9 was inside the building at the time of the altercation between SO and AP but watched the incident on the security camera monitor. CW9 stated he did not believe he saw the shooting on the video monitor.

Subject Officer

Pursuant to the provisions of the PSA, a subject officer cannot be compelled to provide his or her notes regarding an incident nor participate in any interview with IIU investigators. In this case, SO declined an in-person interview during this investigation. He did supply a prepared statement and copies of his notebook entries to IIU investigators. His prepared statement and review of his notes contained the following information:

“On May 29th, 2019 I had received a complaint shortly before 11pm of four intoxicated people outside the Gaming Center refusing to leave.

I was working alone and attended the parking lot of the Gaming Center. Upon arrival I observed a black hatch back car parked in the parking lot with people standing beside it. I approached the vehicle and observed CW4 sitting the [sic] driver’s seat of the vehicle and CW5 sitting in the back of the vehicle. Standing beside the vehicle was AP and CW1. All of the individuals appeared to be intoxicated on either drugs or alcohol.

I asked CW4 if she had a driver license and she advised she did not have it on her but provided her temporary registration and insurance papers for the vehicle. During this time AP and CW1 had walked over to their vehicle which was also parked in the parking lot. It was a red dodge [sic] car. I then proceeded to walk over to their vehicle to ensure that they were not going to drive, as they appeared intoxicated. At this time AP began getting agitated, swearing and going from calm to angry. I observed another individual sitting the [sic] back seat of the red car and open alcohol inside the vehicle as the front passenger window was rolled down. I told AP, CW1 and the other individual that they had to pour out the alcohol that was inside the vehicle. AP then became more angry and began throwing the beers [sic] cans everywhere or I would arrest him. CW1 then stepped in and tried to calm AP down. AP then walked away from the vehicle and I continued to ensure all the alcohol was poured out.

AP then returned a short time later while I was still at the car speaking with CW1 and the other individual. AP then proceeded to step very close to me into my personal space. I told AP to step back and noticed at that time he was eyeballing me. As I was speaking CW1 [sic], AP then started acting up again swearing and getting angry. At that point I told AP that he was under arrest. Before I could tell AP it was for the Intoxicated Person Detention Act he had started to walk away from me so I grabbed his left hand and he turned around and punched me in the left side of my head near my ear with his right hand.

As he punched me, I felt something sharp cut into my head and instantly felt a lot of blood rushing down the side of my head. At that point I knew that he had stabbed me with something and things happened very quickly after that within seconds. AP then continued to rapidly stab me in the back of my neck and my back several times. I could feel the object go through my bullet proof vest that I was wearing and into my back several times, and into the back of my neck.

I am not sure when I got onto the ground but was repeatedly getting stabbed and I thought I was going to die. AP was also on the ground on the left side of me. I struggled to draw my firearm as I was lying on my right side of my body however was able to get

my gun out of my holster and had pointed it in his direction. I remember pulling the trigger but did not hear my gun fire and thought it had jammed. I racked another round and was able to get free. I was then able to stand up and feared for my life as I believed he was about to get up so fired my gun at him.

SO's duty pistol and two extra magazines were seized by IIU investigators. An examination of them showed that his duty pistol contained one live round and fifteen live rounds in the magazine. The two extra magazines that were seized each contained eighteen live rounds.

SO also consented to the release of his own medical records in the course of this investigation. The medical records confirmed that SO was treated for nine stab wounds on his back, neck and head when he was transported to RHC on May 29.

Conclusion

Sections 25 (1), (3), (4) and Section 26 of the Criminal Code of Canada are applicable to this analysis:

25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office, is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

- (a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;
- (b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;
- (c) the person to be arrested takes flight to avoid arrest;
- (d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and
- (e) the flight cannot be prevented by reasonable means in a less violent manner.

26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

In addition, police officers are entitled to rely on the self-defence provisions of the Criminal Code under section 34:

34. (1) A person is not guilty of an offence if
- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
 - (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
 - (c) the act committed is reasonable in the circumstances.

Effectively, the question is whether the decisions of the subject officer to discharge his firearm at AP was reasonable in the given circumstances.

Reasonableness of an officer's use of force must be assessed in regards to the circumstances as they existed at the time the force was used, particularly when it is considered in light of the dangerous and demanding work engaged in by police and the expectation that they react quickly to all emergencies. The police officer's actions must be assessed in light of these exigencies.

Where lethal force is used (intended or likely to cause death or grievous bodily harm), there must be a reasonable belief by the subject officer that the use of lethal force was necessary for his own self-preservation or the preservation of any one under their protection from death or grievous bodily harm.

The allowable degree of force to be used remains constrained by the principles of 'proportionality, necessity and reasonableness' (see *R. v. Nasogaluak*, [2010] 1 S.C.R. 206). In that decision, the Supreme Court noted, at para. 35:

"Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances."

Also see *R. v. Power*, 476 Sask. R. 91 (CA), where at para. 35, the court notes:

"On the basis of the foregoing, a determination of whether force is reasonable in all the circumstances involves consideration of three factors. First, a court must focus on an accused's subjective perception of the degree of violence of the assault or the threatened assault against him or her. Second, a court must assess whether the accused's belief is reasonable on the basis of the situation as he or she perceives it. Third, the accused's response of force must be no more than necessary in the circumstances. This needs to be assessed using an objective test only, i.e. was the force reasonable given the nature and quality of the threat, the force used in response to it, and the characteristics of the parties involved in terms of size, strength, gender, age and other immutable characteristics."

This investigation has determined:

- SO was lawfully placed and acting in the execution of his duties as a police officer at all material times;
- SO responded to a call for service regarding an identified individual who was intoxicated and causing a disturbance;
- SO came in contact with AP in the parking lot area of the Gaming Centre and requested that AP and his friends pour out their beer as they were consuming it in a public place;
- SO was also concerned about the possibility that AP or any of his friends may choose to operate a motor vehicle in their present condition;
- AP became agitated and combative with SO;
- SO was alone and had no support with him or available;
- AP, without warning or provocation, attacked SO;
- AP was seen striking SO on his head, neck and upper body with a series of rapid downward blows;
- SO was able to separate himself from AP, stand up and draw his service pistol;
- SO suffered a series of stab wounds to his neck and back;
- SO believed that he "...was going to die" as a result of AP's stabbing him;
- SO's belief that he may be subject to death from potentially lethal strikes by AP was reasonable and supported on both objective and subjective grounds based on the available evidence.

Was it reasonable, in these circumstances, for the subject officer to fire his service pistol at AP to prevent injury or death to himself? I am satisfied that all the evidence gathered supports the singular conclusion that, pursuant to both Sections 25 and 34 of *The Criminal Code of Canada*, SO's use of potentially lethal force in shooting AP to prevent further harm was both reasonable and justified in these circumstances.

In conclusion, there are no grounds to justify any charges against the subject officer.

There are Criminal Code charges pending in court against AP arising from the circumstances of the parking lot incident of May 29, 2019. I will direct that this investigative file be forwarded to Manitoba Prosecution Service to be incorporated into the prosecution materials on request.

This report will be released publicly once that prosecution has been completed.

The IIU investigation is now complete and this file is closed.

Final report prepared by:

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Independent Investigation Unit
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