

FINAL REPORT: IIU concludes investigation into alleged misrepresentation by police officer at trial

On June 29, 2018, the Royal Canadian Mounted Police (RCMP) notified the Independent Investigation Unit of Manitoba (IIU) that an RCMP member (later identified as the subject officer (SO))--in the course of testimony given as a witness at a criminal trial in Court of Queen's Bench--identified herself as a drug recognition expert while failing to disclose that she was not currently certified and unable to complete evaluations on behalf of the RCMP. The crown attorney in charge of the prosecution alleged that SO may have committed perjury as a result.

According to this notification, in part:

- SO was served with a subpoena for a Court of Queen's Bench murder trial;
- The trial was held in Thompson, Manitoba in early 2018;
- SO was called as a witness for the prosecution to testify to the accused's level of intoxication while interacting with police;
- SO was permitted to testify at the Queen's Bench trial via video conferencing from Edmonton, Alberta;
- Under cross examination by the defence, SO indicated she was a drug recognition expert (DRE) and testified to being an expert in this field;
- The crown prosecutor was later informed by a colleague that SO was suspended as a DRE and required to undergo training because she was not meeting the requirements of a DRE;
- RCMP confirmed that SO was a DRE but that her certification expired on December 30, 2016.

The allegation of perjury is a prescribed offence under IIU regulation 99/2015 and as such constitutes a mandatory investigation for IIU under the *Police Services Act* (PSA). A team of IIU investigators was assigned to this matter.

IIU investigators obtained and received, among other items:

- letter from crown attorney outlining the complaint;
- transcript of SO's testimony;
- correspondence and emails between SO and crown attorney;
- SO's DRE training records and previous certifications.

One member of the RCMP was designated as a witness officers (WO). The crown attorney who prosecuted the trial (CA) was also interviewed by IIU investigators.

Under 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 agreed to be interviewed by IIU investigators.

The following facts and circumstances have been determined:

The incident that led to the murder trial occurred in 2013. SO received training as a DRE in 2014 and was certified effective December 30, 2014, expiring December 30, 2016. There is no information from the RCMP to show that SO was a certified DRE prior to December 30, 2014 or after December 30, 2016.

SO was affirmed as a witness at the trial. The transcript of her evidence was reviewed and consists of 15-pages of testimony. The first 12 pages relate to SO's direct evidence during questioning by CA. Midway through page 12 of the transcript, cross-examination of SO commences through questioning by the defence counsel. Up to this point in the proceedings, there had been no discussion or testimony regarding SO being a DRE. However, the following testimony is noted during SO's cross-examination:

Page-13:

line 22 Q Okay. And in terms of -- we've had that
line 23 discussion about the thousand-mile stare. I won't get into
line 24 that, I think you've clarified that but you, you did say
line 25 highly intoxicated in your testimony and your notes?

line 26 A Correct.

line 27 Q And you've had a lot of experience with
line 28 intoxicated people I take it?

line 29 A Absolutely.

line 30 Q I take it in your, how many years have you been
line 31 an RCMP officer?

line 32 A Seven years.

line 33 Q So you've been in traffic where you've arrested
line 34 impaired drivers, that type of thing?

Page-14:

line 1 A Yeah. I'm also one of our drug recognition
line-2 experts for drive impaired driving and one of our collision
line 3 analysts as well for the province so I, I get a lot of
line 4 impaireds. (sic) (IIU emphasis)

line 5 Q All right.

line 6 A Deal with a lot of impaireds. (sic)

line 7 Q All right. So you have an expertise in analyzing
line 8 symptoms and in your expertise if I could put it that way,
line 9 you say he was highly intoxicated?

line 10 A Correct. (IIU emphasis)

line 11 Q All right. And of course when people are highly
line 12 intoxicated they tend to have imperfect balance; isn't that
line 13 correct?

line 14 A Correct. Usually that, that is a sign.

CA was the assigned prosecutor of the murder trial. CA confirmed that SO was subpoenaed as a witness for the prosecution and was called to testify about her interaction in 2013 with the accused. SO's disclosure as a DRE first arose during her cross-examination by defence counsel. CA had not discussed SO's DRE training status with her. He did not advance her as a DRE to the Court. SO was not qualified as an expert witness by the Court.

At some point after SO's testimony, one or two other crown attorneys mentioned to CA that SO had either been suspended or required re-training as a DRE. CA was not certain who mentioned this.

SO attended and met with IIU investigators. SO confirmed that the transcript of proceedings was accurate. SO was aware that her DRE certificate was valid from December 30, 2014 to December 30, 2016 and that it had expired on December 30, 2016. SO stated that her intention was not to mislead the Court when she testified that she was a DRE. SO stated that although her DRE certificate had expired and was no longer valid, trained DRE's do not lose their training and experience. SO stated that when she was testifying and answering defence counsel's question with respect to dealing with persons under the influence of alcohol, she was referring to her experience and training. SO stated she was not claiming to be "DRE trained" at the time of her dealings with the accused. SO stated that her current DRE status is "expired".

Further, she stated that she was not going to throw away her career with the RCMP by lying in court. SO said she had no intent to mislead the Court or commit perjury during her testimony.

IIU investigators spoke with WO, who is the RCMP DRE coordinator. WO confirmed that SO is a DRE but is currently uncertified. Accordingly, SO is unable to complete any DRE evaluations until recertified. As SO's official DRE status has been expired more than one year but less than five years, she may be reinstated as a certified DRE by completing the appropriate recertification process.

Conclusion

Sections 131 to 134 of the *Criminal Code of Canada* state:

131 (1) Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.

(1.1) Subject to subsection (3), every person who gives evidence under subsection 46(2) of the [Canada Evidence Act](#), or gives evidence or a statement pursuant to an order made under section 22.2 of the [Mutual Legal Assistance in Criminal Matters Act](#), commits perjury who, with intent to mislead, makes a false statement knowing that it is false, whether or not the false statement was made under oath or solemn affirmation in accordance with subsection (1), so long as the false statement was made in accordance with any formalities required by the law of the place outside Canada in which the person is virtually present or heard.

(2) Subsection (1) applies, whether or not a statement referred to in that subsection is made in a judicial proceeding.

(3) Subsections (1) and (1.1) do not apply to a statement referred to in either of those subsections that is made by a person who is not specially permitted, authorized or required by law to make that statement.

132 Every one who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

133 No person shall be convicted of an offence under section 132 on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

134 (1) Subject to subsection (2), every one who, not being specially permitted, authorized or required by law to make a statement under oath or solemn affirmation, makes such a statement, by affidavit, solemn declaration or deposition or orally before a person who is authorized by law to permit it to be made before him, knowing that the statement is false, is guilty of an offence punishable on summary conviction.

(2) Subsection (1) does not apply to a statement referred to in that subsection that is made in the course of a criminal investigation.

Where it is determined that reasonable and probable grounds exist to believe a criminal offence has been committed, the IIU civilian director may charge the subject officer(s) accordingly. The determination of whether reasonable and probable grounds exist is based on a careful assessment of all the available evidence. The totality of the circumstances must be considered in the assessment of grounds. The purpose of emphasizing the totality of the circumstances is to avoid concentrating on individual pieces of evidence. Accordingly, consideration of the evidence cannot be piecemeal.

Furthermore, determination of whether the necessary reasonable and probable grounds exist must not be based solely on speculation. The absence of evidence on essential elements of the offence means there is an absence of the necessary reasonable and probable grounds. Therefore, in those circumstances, there is no legal support for the laying of a criminal charge. That is how the law is to be applied.

To establish the offence of perjury, there must exist proof beyond reasonable doubt that:

1. The testimony was false;
2. The witness knew the testimony was false;
3. The witness had the intent to mislead.

Actual misleading of the Court is not an essential element of the offence. Carelessness or recklessness in giving testimony--without the intent to mislead and give false evidence--does not amount to the offence of perjury. In other words, knowingly giving false evidence is not enough for a conviction. There must be an intent to mislead.

This investigation was undertaken by IIU because a criminal offence is alleged to have occurred. The mandate of IIU does not include authorizing criminal charges in the absence of cogent evidence to support that decision. It would be wholly inappropriate to authorize the laying of criminal charges in absence of the required reasonable and probable grounds to support such authorization.

On review of this investigation, I am satisfied that:

- SO was affirmed as a witness to give testimony in Court at a trial;
- SO was a member of the RCMP and had received training and certification as a DRE as of December 30, 2014;
- SO's certification as a DRE expired on December 30, 2016 and was not renewed by the time she gave evidence at the trial in 2018;
- SO was a witness for the prosecution and was not offered to the Court as an expert nor was she qualified as an expert witness;
- It was during cross examination that SO testified she was "...one of our drug recognition experts for drive impaired driving and one of our collision analysts as well for the province so I, I get a lot of impaireds. (sic)";
- Defence Counsel, during his cross examination of SO, did not seek to qualify her as an expert witness;
- SO also testified during cross examination that she had experience dealing with intoxicated persons through her experiences as a police officer;
- The only reference to expertise was the following question and answer between defence counsel and SO:

Q All right. So you have an expertise in analyzing symptoms and in your expertise if I could put it that way, you say he was highly intoxicated?

A Correct

- It is uncertain whether the question concerns her expertise as a DRE or as a police officer in general;
- CA did not re-examine or attempt to clarify SO's evidence as disclosed during cross examination;
- The statement by SO that she was "...one of our drug recognition experts for drive impaired driving..." is technically a true statement though one that should have been qualified with reference to the fact that she was no longer certified to conduct evaluations as of the date of her testimony. This was a very careless and reckless omission by SO.

In this investigation, part of the IIU mandate is to determine whether consequences should flow from SO's actions in consideration of all the circumstances and information known at the time. On careful review of the available evidence and material facts obtained in this investigation, I am not satisfied there are reasonable grounds to believe that:

1. SO gave false testimony to the Court. SO's statement that she was a DRE is technically a true statement and not a full falsehood. The RCMP consider her a DRE, though not currently certified to perform evaluations;

2. SO intended to mislead the Court. Again, SO's statement that she was a DRE is technically a true statement and not a full falsehood. There is nothing in the evidence that would infer any intent to mislead the Court.

Accordingly, I am not satisfied that reasonable and probable grounds exist to charge. No charges will be authorized against SO.

IIU has completed its investigation and this matter is now closed.

Final report prepared by:

Zane Tessler, civilian director
Independent Investigation Unit
February 12, 2019

Ref #2018-033