

FINAL REPORT: IIU concludes investigation into injuries to youth during confrontation with WPS

On October 4, 2018, the Winnipeg Police Service (WPS) notified the Independent Investigation Unit of Manitoba (IIU) of a non-fatal officer-involved shooting that occurred in a back lane at the rear of an address on Mountain Avenue in Winnipeg. As a result of this incident, a 16-year-old male (later identified as the affected person (AP)) received a gunshot injury to his right ring finger when a WPS officer discharged his service pistol at him.

As this matter involved an injury to a person that resulted from a police officer's discharge of a firearm, the IIU assumed responsibility for this mandatory investigation in accordance with section 65(1) of *The Police Services Act* (PSA). A team of IIU investigators was deployed to the scene.

IIU investigators obtained and received:

- Agency information from WPS, including officer notes and reports;
- Audio of 911 telephone calls;
- WPS radio transmission files;
- WPS interviews with witnesses;
- Forensic Investigation Service (FIS) photographs;
- Firearm examinations and reports;
- Medical report respecting AP.

In addition to publishing an appeal for witnesses through the media, IIU investigators attended the vicinity of the shooting and conducted a canvass of the surrounding area, including residences on Mountain Avenue, Salter Street and College Avenue. No video footage was discovered; however, the IIU was able to identify eye and ear witnesses.

The WPS officer who discharged his service pistol which caused the injury to AP was designated as the subject officer (SO). The WPS officer who was partnered with SO at the time of the shooting was designated as a witness officer (WO). IIU investigators met with and interviewed AP. IIU investigators also met with and interviewed 14 civilian witnesses (CW1- CW14).

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 provide his notes and a prepared written statement to IIU investigators. SO did not attend for an in-person interview with IIU investigators.

For the sake of brevity, and to avoid undue repetition, summaries of only the most significant and revealing statements by the civilian witnesses are included in this report.

Facts and Circumstances

On October 4th, 2018 at approximately 12:04 a.m., a 911 call was received by WPS. The caller reported the sound of shots fired in the vicinity of an address on Mountain Avenue. The caller reported hearing 10 shots in succession in front of her residence. The caller also indicated there was an unknown number of individuals banging on her door as well as on other residential doors in the vicinity. The caller further stated she could see males running westbound from her residence and they were armed with "machine guns." The caller advised she could see three to four guns and 10 males in total. Another person took the phone and advised that he was the one who had heard the gun shots and not the previous caller. He advised that the males were now running towards College Avenue. The male caller told the police operator that police had arrived at the scene. During a running commentary being given by this caller to the police operator, the sound of two bangs are heard in the background followed by the male caller saying, "...they just shot him. The cop shot him. They f*****g shot him, holy s**t."

Multiple WPS units were dispatched to this location, with SO and WO arriving at the scene at approximately 12:07 a.m. At 12:08 a.m., SO and WO advised via their portable radio that they were in foot pursuit of two males. This was followed immediately by their radio broadcast that shots had been fired. A subsequent radio broadcast from the two officers confirmed shots had been fired and that a suspect male was running southbound from Mountain Avenue. SO and WO indicated two shots had been fired by police and it was not known if the suspect had been struck.

After an extensive search of the area utilizing the dog unit, two males were located hiding on the roof at an Alfred Avenue home. The males were taken into custody without incident. The first male arrested was found to have sustained a gunshot wound to his right ring finger. This male (AP) was conveyed to Children's Hospital in stable condition, where he was treated and released back into police custody a short time later.

Scene and Forensic Information

SO's WPS-issued service pistol was seized after the incident and a subsequent round count revealed that of the 15 rounds of nine-millimetre ammunition in the pistol's magazine, 12 live rounds of ammunition remained and one live round was removed from the chamber. This meant that 13 live nine-mm rounds of ammunition remained in the firearm and two rounds were missing.

An examination of a Dodge Caravan motor vehicle that was parked facing south at the rear of 389 College Avenue had signs of ballistic damage to the rear lower right side of the vehicle's door and the rear passenger side light cluster. A subsequent examination determined that the damage was caused by two separate bullet entries to the rear of the vehicle. This is consistent with the two rounds discharged by SO. Investigators recovered two spent nine-mm cases at the scene. There was no evidence that WO discharged his service pistol.

A rifle with an attached scope was found laying in between the Dodge Caravan and another pick up truck parked directly next to it. The rifle was found to have no bolt action and was partially covered by a household black garbage bag.

AP

AP acknowledged he was in possession of a .308 rifle at the time police arrived in the back lane behind the Mountain Avenue residence. AP confirmed he was going to check out a house when

the police came out of nowhere. AP ran because he did not want to surrender and he had a warrant outstanding. AP stated that he heard someone shout, “*Winnipeg Police, stop*” or something similar and heard a police officer shout at him to get on the ground. AP said he was shot at when he was running and while holding the rifle in his right hand. AP stated that if he had pointed his rifle at the police officer, he would have shot him. *‘I would have smoked a cop if I’d have seen him.’* AP said he heard only two shots fired. AP stated that when he was shot, the rifle fell out of his hand. He did not realise he had been hit, though he did see that his hand was bleeding. AP said the rifle could not fire bullets as it had no bolt action.

Civilian Witnesses

IIU investigators attended the vicinity of the shooting and conducted a canvass of the surrounding area for potential witnesses and video footage. Additionally, IIU published an appeal for witnesses through the media. Although no video footage was discovered, the IIU was able to identify a number of eye and ear witnesses.

CW1 lived at an address on Mountain Avenue. She heard three ‘*pops*’ coming from the back lane area.

CW2 lived at an address on Mountain Avenue. He stated he heard two pop sounds around 12:30 a.m. He looked onto the back lane and saw two police officers present.

CW3 was in a residence on Mountain Avenue when he heard bangs and saw bright lights from the back alley. He was told by police to get in the house. He said he heard approximately four to five gun shots in total and all shots were fired within a second. He saw a police officer standing in the back alley by a truck and said that officer had fired his gun. CW3 thought there were shots fired from both directions. He did hear that same officer say, “*Winnipeg Police. Drop your gun.*” He believed the person spoken to turned around and fired. CW3 said he believed that gun was a shotgun because it sounded like one.

CW4 lived at an address on College Avenue. He heard what he believed to be three gunshots from the back lane area.

CW5 lived at an address on College Avenue. He was inside his house and heard two bangs and then a third bang shortly afterwards. He later saw a shotgun in the neighbor’s back yard and saw it subsequently seized by the police¹.

CW6 lived at an address on Mountain Avenue. She saw a black police SUV driving east on Mountain Avenue. A male police officer on the passenger side of the vehicle rolled down his window and asked her if she had called police. CW6 stated she did not make a call but believed her mother had telephoned for the police. The police officer told her to go inside her home and lock the door. From her home, she could hear through a window someone say, “*It’s the Winnipeg Police. Stop.*” She then heard shots fired from the backyard but was unable to say how many shots she heard. She thought the first two shots sounded the same, then the next sounded different.

CW7 lived at a residence on Mountain Avenue with a view over the back lane where the shooting occurred. CW7 was the male on the 911 call with the police operator at the time of the incident. Initially, he had looked outside his window and saw a group of 10 people running

¹ A shotgun was recovered by WPS from the location and yard as described by CW5.

north. He noticed at least three long barrel guns were being carried by group members and some of the guns looked like “*M-16 rifles.*” A police vehicle, which he described as a black SUV, drove up with its headlights out. A police officer got out and yelled something like, “*freeze, stop.*” He saw the people in the alley run off. CW7 noted that one person, wearing all black, was slower than the others and was left behind. That person appeared to raise a gun with his right hand towards the officer as he ran off. He said he saw the person pointing the gun behind his back and trying to run. He stated he thought this running male shot at the police officer. He saw the police officer shoot twice and could see two flashes. He believed the officer did what he had to do to protect himself.

CW8 lived at an address on Mountain Avenue. Her son, CW7, told her to call 911 as there were people with guns attempting to break into their home. She observed two police officers running between her home and the neighbour's home to the west. The police officers had guns out and she heard them yelling, “*Winnipeg Police, get down,*” “*Winnipeg Police, freeze,*” “*Stop, Winnipeg Police,*” “*Winnipeg Police, don't f*****g move.*” She estimated she heard them say “stop” seven to eight times. She stated that she heard three shots that did not sound the same. She heard the first shot as someone was yelling, “*Winnipeg Police*” and then another shot right behind it, followed by the third.

Witness Officer (WO)

On October 4, WO was partnered with SO. They responded to a police dispatch “*shots call*” at an address on Mountain Avenue. The dispatch information included a reference to “*10 shots in succession*” in front of the location and “*people yelling and banging on...doors.*” WO was aware of further updated information that “*10 males with machine guns*” had been observed and as many as three to four guns were involved. WO knew they were entering into a potential volatile situation and was conscious that persons could be laying in wait for them.

On arrival, WO and SO were to the rear of the residence. WO stated that he followed behind SO and had his service pistol drawn. SO began running and was heard shouting, “*male or males running.*” SO ran toward the back lane area and WO heard him shout, “*police – stop, get down on the ground*” and “*police, drop the gun, drop the gun.*” WO saw a person dressed in dark clothing, coming from the southeast of his position, running westbound in the lane. According to WO, the background information was now more credible and risk was heightened.

WO noted the person was holding a long-barreled firearm he believed to be a rifle, anchored tightly at the right hip and levelled parallel to the ground. WO saw a right hand positioned where the trigger or trigger guard of the firearm was situated and a left hand on the fore stock of the rifle. Although WO did not see the male point his firearm at SO, in his mind, the way the male was holding his firearm, he could have turned it on the officers very quickly.

This male did not react to SO's commands. WO saw SO fire two shots from his service pistol. WO saw the person throw his rifle down and it came to rest under a parked vehicle. The person made good his escape at that time. After SO fired his service pistol, WO heard the sound of a loud single gunshot, that sounded like a shotgun discharge, coming from southeast of his position in the back lane.

Subject Officer (SO)

SO provided IIU investigators with a nine-page typed statement. SO did not consent to attend an interview with IIU investigators. In his statement, SO confirms he was partnered with WO and was working in full police uniform with the word 'police' clearly emblazoned on it. They attended a call at an address on Mountain Avenue in response to information received by 911 about “*sounds of 10 shots in succession, people yelling and banging at the complainants door*” and about males running in possession of machine guns. There were reportedly 10 males involved and three to four guns had been observed.

Upon arrival at the residence, SO made his way around the house to the backyard. He activated his flashlight and witnessed two males running west to east. He believed one male was holding a shotgun or a rifle due to the way his hands were positioned and the nature of the call. The street lights were on and his visibility was good.

SO stated that a male running was carrying a rifle with both hands in front of his body. He stated that the male was holding the stock with his left hand, with the barrel pointing up towards the left shoulder and the stock towards his right hip across his body.

SO shouted, “*Winnipeg Police – stop,*” but the male began to run faster. Then, according to SO, the male with the rifle started to run back in an east to west direction and was now carrying the rifle with the butt stock of the rifle tucked in tight to his right hip, pointed forwards toward SO. SO saw that a black garbage bag was around the butt stock and over the trigger assembly.

SO shouted at this male again: “*Police, drop the gun, drop the gun, drop the gun*” but the male ignored his commands. When the male was approximately 15 feet from SO, he feared for his and WO’s life. SO raised his service pistol and fired two quick shots to stop the threat. He witnessed the male jump in response to the shots discharged and continue to run. SO immediately radioed that he had fired shots.

Medical Records

Medical records were received from Health Sciences Centre which documented that AP sustained a gunshot injury to his right ring finger. Diagnostic reports stated that bullet fragments were observed.

Conclusion

Was SO’s decision to discharge his firearm at and wound AP justified at law?

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

25 (1) Everyone 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 under section 34 of the *Criminal Code of Canada*:

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.

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person's role in the incident;

- (d) whether any party to the incident used or threatened to use a weapon;*
- (e) the size, age, gender and physical capabilities of the parties to the incident;*
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat; (f.1) any history of interaction or communication between the parties to the incident;*
- (g) the nature and proportionality of the person's response to the use or threat of force; and*
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.*

Effectively, the question is whether the decision of SO to fire at AP was reasonable and justified in the 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 considered in light of the dangerous and demanding work and the expectation the officer will react quickly to emergencies. In those situations where the force used is intended or likely to cause death or grievous bodily harm, there must be a reasonable belief by the subject officer that use of this force is necessary for his or her 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).

The fact AP was wounded, and did not suffer grievous or life threatening injuries, is not determinative of whether the use of force was reasonable and justified in these circumstances. The critical facts to be considered in this analysis are:

- SO was acting in the lawful execution of his duty when he and his partner attended and dealt with AP;
- Information had been broadcast that 10 males were in the area and in possession of firearms. Reports were that machine guns were present and three to four firearms were observed;
- When AP was first observed by SO, he was running and in possession of a rifle;
- AP continued to run from police and refused all demands to stop and surrender;
- Given the way AP was holding his firearm, he could have turned it on the officers very quickly;
- The threat posed by AP to the lives of SO and WO was real, potentially imminent and likely lethal.

In these circumstances, and based on the facts known, it was reasonable, both objectively and subjectively, to believe that AP had the means and intention to shoot the police officers. SO was faced with a dangerous and dynamic situation that was unfolding quickly. It would be unreasonable to expect the police officer to wait before acting in these circumstances. Delay could have led to the death of police officers and civilians. Therefore, it was reasonable, in these circumstances, for SO to fire at AP to prevent the death of any of them.

In this matter, all of the evidence makes sense and is consistent with statements given by each witness. Minor variations in the recollections of witnesses are not unusual or unexpected. When considered as a whole, I am satisfied that this finding of consistency is appropriate.

In this investigation, the IIU mandate was to determine whether consequences should flow from the actions of SO, in consideration of all the circumstances and information known at the time of the shooting. On careful review of the available evidence and material facts obtained in this investigation, and in consideration of the applicable law, I am not satisfied there are reasonable or probable grounds to believe that SO exceeded the ambit of justifiable force in the circumstances. Accordingly, no charges will issue against SO.

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

Final report prepared by:

Zane Tessler, civilian director
Independent Investigation Unit
March 01, 2019

Ref #2018-0049