

FINAL REPORT: IIU concludes investigation into injury involving off-duty officer

On November 21, 2016, at 12:43 p.m., the Independent Investigation Unit (IIU) was notified by the Winnipeg Police Service (WPS) of an incident that occurred on November 18, 2016. This incident occurred at the intersection of St. Mary's Road and Marion Street (the intersection) in Winnipeg, during which a male (the affected person – AP) allegedly suffered a serious injury during the course of his arrest.

According to this notification, on November 18 at 5:10 p.m., an off-duty Winnipeg police officer was operating his personal motor vehicle near the intersection when he observed two males fighting and chasing each other in and out of traffic. The off-duty officer, later designated as the subject officer (SO), immediately stopped his vehicle, identified himself as a member of WPS, and instructed both males to stop fighting. They both complied with these instructions.

SO spoke to one of the males. The other male, later identified as AP, with his fists closed, quickly and aggressively advanced on SO. SO stepped out of the way and threw one punch towards AP, striking him on the chin and knocking him unconscious. AP fell backwards and struck the pavement. Additional police resources arrived on scene to assist. An ambulance was dispatched and subsequently conveyed AP to St. Boniface Hospital where, following an examination, it was determined he had suffered a fractured jaw, which is a serious injury as defined by IIU regulation 99/2015. Once AP was treated and released from hospital, he was conveyed to and detained at the Provincial Remand Center. AP was charged with Criminal Code offences.

As this notification involved an allegation of a serious injury caused by a police officer, IIU assumed responsibility for the investigation in accordance with subsections 66(1) (b), (3) and (4) of *The Police Services Act* (PSA). The primary issue for this investigation was whether SO subjected the affected person (AP) to unnecessary and excessive force from the single punch to the jaw. A team of IIU investigators was assigned to this investigation.

WPS provided IIU with file materials pertinent to the investigation, including:

- CD containing recordings of a series of 911 telephone calls;
- Incident history report;
- Narrative reports and notes from attending WPS members;
- WPS Prisoner Log for AP;

- St. Boniface Hospital Emergency Department Patient Discharge Information.

IIU investigators identified the following individuals with information pertinent to this investigation:

- AP;
- Five civilian witnesses (CW1 – 5 respectively);
- A WPS cadet (WC);
- Four WPS officers, each designated as witness officers (WO1 – 4 respectively)

No witness to this investigation has ever identified the second male involved in the fight and his identity remains unknown.

IIU investigators conducted a neighborhood canvass around the area of the intersection. This canvassing identified the existence of video surveillance footage from transit buses that passed through the intersection at the relevant times. In particular, one bus was parked near the intersection between 5:09:44 p.m. and 5:12:45 p.m. on November 18 and captured part of the original fight, including the interaction between SO and AP.

Interviews

AP:

IIU investigators made numerous efforts to interview AP regarding the incident. However, on the advice of legal counsel representing him on his Criminal Code charge, AP declined to provide a statement to or cooperate with IIU investigators. As well, AP did not sign a release authorizing access to medical records concerning his injury, despite attempts by IIU investigators to have him do so.

Civilian Witnesses:

CW1:

CW1 had just left work and was driving northbound on St. Mary's Road approaching the intersection when he observed a larger male chasing a smaller male among cars on the road. He described the larger male as angry. CW1 believed he would have been attacked had he stopped to intercede. CW1 continued driving north on St. Mary's Road and did not see how the altercation ended.

CW2:

CW2 was driving southbound on St. Mary's Road between 5:00 and 5:20 p.m. on November 18. She observed two males, one tall and the other short and stocky, chasing each other around her vehicle as it was stopped at a traffic light at the intersection. They then walked to the west side of St. Mary's Road. A car, also driving south, pulled off the road and a male exited the vehicle. He immediately punched the taller male in the face, knocking him to the ground. CW2 did not see the taller male make any gestures toward the driver of the car or do anything to provoke a punch to the face.

CW3:

CW3 was operating a bus on November 18 in the area of the intersection. While the bus was at a stop at that location, she observed two males engaged in a fight on the road, with the larger male chasing the shorter male. The shorter male was backing into traffic while the larger male was swinging his fists at him. After a minute or two, the males made their way back to the sidewalk where the taller male picked up some bags of groceries off the sidewalk and started to walk south. She saw a grey car turn off the road and the driver exit the vehicle. This male talked with the shorter male. The taller male, who had been walking south, started yelling, turned around and came towards the shorter male and the other driver. CW3 could not see who punched the taller male, but the next thing she knew he was lying on the road. She pulled her bus around the male lying on the road and stopped the bus. The driver of the grey car was on his cell phone. CW3 asked if there was any way he could move the taller male, at which point the driver, appearing angry, said "*No, he got knocked out, and I'm not moving him.*"

CW4:

CW4 was with his father, AP, on the Norwood Bridge when a shorter male, described as a panhandler, approached them and wanted to use AP's cell phone. A fight broke out between the two and both were throwing punches. CW4 got in the middle of them but could not break it up so he ran down a back lane "*... and hid for 50 seconds.*" When he came out from his hiding spot his father was lying on the ground and the panhandler was walking away. Another male present showed him a badge and said he was a police officer. CW4 did not see his father get hit.

CW5:

CW5 was driving a transit bus on the Norwood Bridge on November 18. As he approached the intersection there were vehicles in the bus lane and he was forced to pull out into the left lane to pass. As he passed, he noticed a person lying in the bus lane and a lone male figure standing

above the one lying on the ground. He did not see how the male lying on the ground came to be in that position as he was focused on driving his bus.

WC:

WC was coming off his shift as a WPS cadet and had just exited a bus that had dropped him at a stop near the intersection. It was dark out and, as he walked southwest away from St. Mary's Road, he heard an altercation going on behind him. WC turned to see two males engaged in a fight between cars on St. Mary's Road; one of these males was later identified as AP. WC stated that AP was the aggressor in the fight and the shorter male was bleeding from his mouth. WC started back towards the fight when a small car turned off St. Mary's Road and a male got out of the driver's side. WC could hear that male identify himself as a WPS officer and call the two males off the road. SO was talking with the shorter male and had his body turned to the northwest. WC saw AP advancing on SO from the southeast, described as '*his blind side*'. AP was walking quickly towards SO and had his fists clenched. WC stated the actions were very aggressive and he believed AP meant to attack SO. When AP was approximately two feet away from SO, the officer noticed the approach and punched AP on the left side of his jaw with his right hand. AP immediately fell to the ground, half on the road and half on the sidewalk. WC arrived at the scene and identified himself to SO, asking if he could assist. SO was on his phone but told WC to call 911 and get an ambulance to the location. AP was unconscious for a short period and then got himself up from the ground. AP's son was also present by that time. The shorter male walked off to the northwest along the sidewalk of St. Mary's Road. WC believed AP was intoxicated, as he was unsteady on his feet and had an odour of liquor on his breath.

WC stated he read SO's incident report prior to attending the IIU offices for an interview. Although asked to separate his recollections of what transpired from that which he read in the file, his evidence may have been tainted from his reading of the incident report. As such, the weight given to his statement and information will be impacted.

Witness Officers:

WO1:

On November 18 at 5:15 p.m. WO1 was dispatched to a call of an off-duty officer being involved in an incident. SO told WO1 that he had been driving southbound on St. Mary's Road and had seen an altercation on the roadway involving two males. The males were punching each other. He pulled his car over, exited and announced he was a WPS officer as he displayed his badge. He broke up the fight and escorted the two males to the sidewalk. One of the males began to advance on SO with his fists clenched. Fearing for his safety and the safety of the other male

involved in the disturbance, SO "... *one punched him in the face under the jaw.*" That male went down and the second male involved left and walked northbound over the bridge.

WO2:

WO2 was partnered with WO3 during an evening shift when, at 5:14 p.m., they were dispatched to an incident involving an off-duty police officer near Norwood bridge. SO identified himself as an off duty officer and asked WO2 and WO3 to arrest AP for assault and to handcuff him. AP was placed in the back of their police vehicle. WO2 received an account of the incident from SO. SO said he had been traveling southbound on St. Mary's Road when he observed two males fighting in traffic at the intersection. SO pulled his vehicle to the side of the road, exited and identified himself as a police officer. While he was dealing with one of the males, the other, later identified as AP, advanced on SO with fists clenched and SO punched AP one time in the face. AP did not say anything more about the fight. AP was taken to St. Boniface Hospital via ambulance. AP was displaying signs of alcohol intoxication at time of contact; he was unsteady on his feet, had bloodshot eyes and slurred speech.

WO3:

WO3 was partnered with WO2 during an evening shift when they were dispatched to a complaint at 5:15 p.m. of two males having a dispute in the midst of traffic at the intersection. SO told WO3 that he had seen AP and another male, who was no longer on scene, fighting and he had pulled over his vehicle to intercede. SO said he had identified himself as a WPS officer. AP had come at SO aggressively and, fearing he would be struck, SO hit AP, knocking him to the ground. AP was conveyed to the hospital by ambulance. AP told WO3 that an off-duty police officer told him to stop fighting and showed his badge to him. WO3 noted that AP was intoxicated.

WO4:

WO4 was in the East District Station of WPS (EDS) during the evening of November 18. AP was brought to EDS at 9:33 p.m. and remained there until 10:19 p.m. WO4 described AP as calm and appearing to understand why he was in custody. WO4 also noted that AP was slightly intoxicated. Nothing happened to AP while he was at the EDS.

Subject Officer:

The IIU civilian director designated SO as the subject officer. Under the PSA, a subject officer cannot be compelled to provide his notes to IIU investigators nor to attend an interview with them. In this matter, SO declined an interview and also declined to provide his notes to IIU investigators.

While SO declined to be interviewed, he did supply the IIU investigators with a copy of his incident report on the incident. According to the report, dated November 18, 2016, SO observed two men fighting in traffic at the intersection. The officer was off-duty at the time, was in his personal vehicle, and stopped on the side of the road in an effort to break up the fight. He wrote, *“I had already retrieved my WPS issued wallet containing my WPS badge from my inside jacket pocket before I exited my vehicle. I walked to the sidewalk where I made my presence known by stating Winnipeg Police and presenting my badge.”*

As he was dealing with one of the parties involved, the second male, later identified as AP, *“... started advancing at a rapid rate in my direction with both hands at his mid section with closed fists. AP was approximately two feet behind me when I noted his aggressive motion ... Fearing for my safety and that of the other involved male due to his size and level of aggression, I stepped back with my right leg and threw a right hook to AP’s head area hitting his chin and rendering him unconscious. As a result, AP fell backwards on his back striking his head on the pavement.”*

Bus Video:

The relevant footage, shot between 5:09:44 p.m. and 5:12:45 p.m. on November 18, shows a pair of male subjects walking east to west across southbound traffic on St. Mary’s Road. One of the males appears tall while the second is shorter and stout. A car suddenly pulls across the southbound lanes of St. Mary’s Road, stops on Lilian Avenue and a man exits the vehicle from the driver’s door. This man appears to engage in conversation with the shorter male. The taller male, who is further south on the sidewalk, turns around and walks quickly towards the driver and shorter male. When they are almost touching, the driver strikes the taller male in the face with one punch, knocking him to the ground in the curb lane of St. Mary’s Road. Whether the taller male had his fists clenched cannot be discerned from a review of the video.

The video, however, calls into question the evidence of CW2 who indicated the driver of the vehicle immediately struck the pedestrian on exiting his vehicle. The video shows that a significant time passed between the vehicle stopping and the punch being thrown. In this instance, the video is more reliable.

Furthermore, the video raises concerns respecting the statement of WC regarding AP advancing upon SO in an aggressive manner. A detailed analysis of the video footage and a physical examination of the scene of the incident strongly suggests that WC’s vision of the interaction between SO and AP was obstructed by foliage, parked vehicles and darkness.

Issues and Conclusions

The relevant issue in this matter is whether SO subjected AP to unnecessary and excessive force when he punched him in the jaw.

Section 265 (1) (a) of the *Criminal Code of Canada* provides that:

A person commits an assault when...without the consent of another person, he applies force intentionally to that other person, directly or indirectly

Pursuant to section 25 of the PSA:

The duties of a police officer include

- a) preserving the public peace;*
- b) preventing crime and offences against the laws in force in the municipality;*
- c) assisting victims of crime;*
- d) apprehending criminals and others who may lawfully be taken into custody;*
- e) executing warrants that are to be executed by peace officers, and performing related duties;*
- f) laying charges and participating in prosecutions;*
- g) enforcing municipal by-laws; and*
- h) performing other duties assigned by the police chief.*

Those duties apply to all police officers, whether on duty or while off-duty they decide to exercise their role as a peace officer.

Section 25 (1) of the *Criminal Code of Canada* provides that:

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.

Finally, the self-defense provisions under the *Criminal Code of Canada* are found in section 34, which provide that:

(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.*

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

Any force that is in excess of that which is necessary in the circumstances is not justified and may constitute an assault in law.

Because of a dearth of medical information, I cannot ascertain, with clarity, the extent of the injury sustained by AP. I am, however, satisfied that the initial diagnosis of a fractured jaw is sufficient to conclude that AP suffered a serious injury as defined by IIU regulation 99/2015. AP's injuries constitute bodily harm under the *Criminal Code of Canada*.

This investigation was hampered by AP's decision to decline to participate and be interviewed by IIU investigators. On the other hand, the investigation was enhanced by the existence of video surveillance evidence from transit buses of the critical moments in this incident.

I am satisfied that AP and the other unknown male were involved in a physical altercation that spilled from the sidewalk and onto and through busy rush hour traffic at the intersection on November 18. I am satisfied that AP and this male were fighting in a public place and were breaching the peace. I am satisfied that SO was lawfully placed as a peace officer at the time he pulled his vehicle over and exited. I am also satisfied that SO identified himself as a peace officer and declared his intentions to preserve the public peace. Furthermore, I am satisfied that SO was in the lawful execution of his duties when he involved himself between AP and the other male. I am satisfied that SO was intent on diffusing a potentially violent situation and was not intending on escalating it. I am satisfied that as SO was speaking to the second male, AP turned and walked quickly towards him.

I am satisfied that SO used force on AP. He did not immediately strike AP upon exiting his vehicle as was stated by a witness. However, I cannot confirm whether AP's fists were clenched when he quickly approached SO.

A peace officer is authorized to use force in the lawful execution of his duties and as much as necessary for that intended purpose. Moreover, a peace officer is authorized to use force to defend or protect himself from the use or threat of force by another person, provided it is reasonable in all of the circumstances. Where it is determined that reasonable grounds exist to believe a criminal offence has been committed, the Civilian Director may charge the SO accordingly. The determination whether reasonable and probable grounds exists is based on a careful assessment of all the available evidence.

Following due consideration and a careful review of the available evidence and material facts obtained in this investigation, I am not satisfied that reasonable and probable grounds exist in these circumstances to justify the laying of a criminal code offence against SO.

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

Final report prepared by:
Zane Tessler, civilian director
Independent Investigation Unit
March 27, 2017

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