



**IN THE MATTER OF THE INJURY OF A MALE
WHILE BEING APPREHENDED BY MEMBERS OF THE
VICTORIA POLICE DEPARTMENT IN
THE CITY OF VICTORIA, BRITISH COLUMBIA
ON JULY 21, 2018**

**DECISION OF THE CHIEF CIVILIAN DIRECTOR
OF THE INDEPENDENT INVESTIGATIONS OFFICE**

Chief Civilian Director:

Ronald J. MacDonald, Q.C.

IIO File Number:

2018-085

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Introduction

In the early morning hours of July 21, 2018, a Victoria Police Department ("Vic PD") officer responded to a location in downtown Victoria after a complaint from three individuals about the behaviour of the Affected Person ("AP"). In the course of the officer's interaction with AP there was a struggle, joined in by other Vic PD officers. AP was placed under arrest, and was then transported to hospital with significant injuries. He was released by police on a Promise to Appear in court, but was not prosecuted, ultimately, for any offence.

The narrative that follows is based on evidence collected and analyzed during the investigation, including the following:

- statements of AP, five civilian witnesses, one witness police officer and two first responders;
- police Computer-Aided Dispatch ("CAD") and PRIME records, 911 line and police radio recordings;
- Vic PD use of force policies; and
- medical records.

Pursuant to section 17.4 of the Memorandum of Understanding between the IIO and BC Police Agencies, officers who are the subject of an investigation are not compelled to submit their notes, reports and data. In this case, Subject Officer 1 ("SO1") provided his notes and a voluntary written statement, and SO2 permitted access to his written reports. SO3 declined to provide any notes or reports.

Narrative

Affected Person

AP told IIO investigators that on the evening of July 21, 2018, he went to a musical event at a downtown Victoria bar, and then went for pizza with friends. He was giving a friend a ride home from the bar, said AP, when he pulled over to let his dog "use the washroom." He walked away a block and a half to the north, and on the way back engaged in conversation on the street with a person who wanted to pet the dog. As he walked on, he noticed a police vehicle turn "kind of aggressively" and stop across the street.

AP said he noticed a vehicle parked to the south of his van, with its windows down, and asked the occupants if they knew what was "going on." They told him they were "with the police," so he decided to "keep walking." At that point, he said, an officer came toward him with his arm out and told him he was being arrested. AP told investigators that he put his hands in his pockets to get his phone. When the officer told him to take his hands out

of his pockets, he said, “I of course complied.” He said his hands were in his pockets for “less than a second.” AP said that he told the officer that he was injured, and asked not to be touched. At the time of the incident, he said, he had a pre-existing work injury—a torn pectoral muscle—that made it impossible for him “to throw a punch or even do a push-up.”

AP said that he noticed there were now three other police officers behind him. He told investigators that nothing more was said to him, and that he said nothing more except “you must have me confused with someone else,” and made no aggressive moves, before he “started receiving one or two punches,” which turned into “thirty to forty punches ... and next thing I know, I’m on the ground spitting blood and in a pool of blood, you know, savagely beaten.” AP said he sustained multiple broken ribs, a broken nose, “multiple shots to the head,” and “at least 25 to 35 hits to the rib area while I was on the ground ... way over the top.” The strikes to his ribs, he said, were “definitely not from fists,” but from “tools or instruments.” By “shots”, it was clear AP was referring to punches rather than gun shots.

AP told investigators that once he was handcuffed, and while being moved into an ambulance, “I kinda kept quiet the whole time. I really didn’t say too much ... I didn’t act out in any anger, swear, I wasn’t aggressive.” He said he was completely sober at the time of the incident, had not consumed any alcohol since dinner the evening before, and had not consumed any drugs.

Civilian Witnesses

The car that AP approached just before his confrontation with police was occupied by three civilian witnesses. The driver, Civilian Witness 1 (“CW1”), told investigators how the incident began. On July 21, 2018, between 3:30 and 4:00 a.m., she drove two co-workers to their vehicle, which was parked beside the street just outside downtown Victoria. When she pulled over to let her passengers out, said CW1, a large white van pulled up beside them, and the van’s front seat passenger was “very creepily staring at us.” The van pulled ahead, turning to park around the corner, and the passenger continued staring at them, she said, so she locked the car’s doors and drove back a few blocks to where she had earlier seen police on the street.

CW1’s front seat passenger, CW2, described the van’s passenger as “leering out the window at us.” She said she got “the sick feeling” that the “two creepy strangers” in the van were “looking for drunk and alone people,” saying “My blood ran cold. I instantly felt as though they were preying on us and we were targeted.”

CW3, riding in the back seat of CW1’s vehicle, told IIO investigators that a “real grungy looking” van had stopped alongside them as CW1 parked to let her friends out, and had

then pulled down the block and stopped around the corner. The three friends, he said, “felt frightened,” so they went back to where they had seen police dealing with an incident, back along the street.

CW1 said that she and her friends told a female officer what had happened and that it had made the three feel “very uncomfortable,” and the officer said police would “check it out.” A male officer (SO1) then suggested they wait for him to deal with an unrelated traffic matter and he would then escort them. After about ten minutes, said CW1, she drove back to the scene behind SO1’s vehicle. The van, she said, was still there, and the front seat passenger was still “staring out the window.”

While SO1 was at the corner talking with the van passenger, a man (AP) came up to CW1’s vehicle, she said, leaned against the passenger side and knocked on the window. She rolled down the window “about an inch.” AP, she said, asked what was going on and whether he could “come hang out with us, be with us, all this kind of stuff, very uncomfortable, actually, I felt very scared.” CW1 said that SO1 approached and told AP to step away from the vehicle, and AP asked why he had to do that.

CW2 described seeing SO1 talking with someone on the street corner, and then saw AP, who was accompanied by a dog. She said AP walked towards CW1’s vehicle with his hands in his pockets, telling SO1 he was just walking his dog, and to leave him alone. AP knocked on CW2’s window, and CW1 opened the window “a crack.” AP asked if he could “hang out” and “pretend I am with you guys for a bit.” SO1 approached and told AP to step away from the vehicle.

AP, said CW2, put his hands in his pockets and would not remove them even when told repeatedly by SO1 to do so. CW2 told investigators that when SO1 tried to pull AP’s hands from his pockets, AP pushed SO1, and “that’s when they got into a fight.” Other police vehicles arrived, with three more police officers. AP, said CW2, was “very aggressive,” but she saw little more because the struggle went to the ground beside the car. She said she heard officers saying “stop fighting, stop fighting,” and “eventually” AP said “okay, okay, okay.”

CW3 said that when he and his friends told AP that they were “with the police,” AP got very “stand-offish ... and very sketchy looking.” CW3 said that AP told the officers that he was just walking his dog, “which didn’t seem very likely, seeing it was almost four a.m.” One officer asked to see AP’s hands, but AP responded repeatedly, “I’m not doing anything.” The officer tried to grab one of AP hands, but AP “immediately lashed out and started fighting back.” CW3 said AP was “yelling and screaming and trying to push back ... he was like shoving this way and at one point they were slammed against the car.” Ultimately, “four police officers subdued the guy and were able to get him on the ground.”

CW2 said that “suddenly the guy was against the front passenger side of the vehicle and taken down until the officers knew he was not in possession of any weapons.” She described AP as “completely violent thrashing around resisting everything.” Overall, she said, “this whole situation made me shudder, feeling very rapey [sic] vibes from the strangers and their actions.”

IIO investigators were only able to speak briefly with CW4, who was the individual riding as a passenger in AP’s van on the night in question. CW4 indicated that he did not see anything of the incident. CW4 had told police when he was questioned after AP’s arrest that he had become really drunk that night and had simply passed out in AP’s van.

Investigators also made repeated attempts to obtain a statement from an individual, CW5, believed to be the person with whom AP had an exchange while walking his dog, but were told she did not wish to provide any information.

Police Witnesses

In his voluntary written statement to the IIO, SO1 said that when he was first approached by CW1 and her friends, they were “clearly frightened,” and were talking about “fear of sexual assault, kidnapping and violence,” which he considered “a serious issue.”

Arriving at the scene, SO1 said he walked towards AP’s parked van, passing a man (AP) with a dog. AP was talking to two sex trade workers. In the passenger seat of the van was a sleeping male (CW4). SO1 woke CW4, who explained that the vehicle belonged to AP, and pointed him out for the officer. Believing, SO1 said, that he was dealing with a case of “sexual assault, a threat of violence and a possibly attempted kidnapping,” SO1 called for backup.

The Witness Officer (WO) said that he was on patrol in the area when he heard a call to be on the lookout for a suspect van, the occupants of which were said to have “harassed or interfered with female parties.” WO was unable to find the van, but went to SO1’s location when SO1 called for assistance. SO1 asked WO to check “the guy walking his dog,” but WO could not initially see AP.

SO1 said he next heard the sound of yelling between a male and a female, and one of the sex trade workers ran past him, looking back fearfully over her shoulder. The other sex trade worker was also leaving. AP, SO1 continued, was now at the passenger side of CW1’s car, talking to the occupants “in a very aggressive and animated way.” AP, he said, was leaning on the car and rapping his hands on the window “forcefully and aggressively”:

I immediately concluded that this was the driver of the van, that the van was the same one that had blocked in [CW1's] car, that the man had caused great fear in the sex trade workers, and he was acting aggressively towards the occupants of [CW1's] car, again.

WO told investigators he saw AP and SO1, "engaged in conversation," and walked towards them. He said he heard SO1 say "something to likes of 'we can do this with your hands cuffed behind your back'." AP, said WO, "questioned why he needed his hands behind his back."

SO1 said that he asked AP to step away from the car, and attempted to explain that he was investigating a complaint from the car's occupants. AP, he said, was "defensive and angry," and was yelling aggressively. SO1 said he told AP he was under arrest for causing a disturbance, by "shouting and swearing in public," by "impeding and obstructing" the three complainants earlier, and by "molesting" them subsequently.

When AP refused to take his hands out of his pockets, and "bladed his body," (a phrase used to describe someone positioning themselves as if to fight) said SO1, he tried to grasp AP's arm. AP resisted and, in SO1's words, "the fight was on."

WO said that, seeing SO1 grab one of AP's arms, he moved in to take hold of the other arm. As WO was trying unsuccessfully to gain control of AP, said WO, SO2 "moved in to assist and in the process knocked [WO] out of the way."

SO2, in his police duty report, stated that he and SO3 arrived on scene just in time to see SO1 "go hands on" with AP. It was clear, he said, that AP was "pulling away from [SO1] and appeared to be attempting to flee."

SO1 said that "it seemed that [AP] was trying to punch me and get me to the ground," so he "delivered a number of punches to [AP's] face and abdomen." Unable to take AP down to the ground, even with the aid of SO2 and SO3, SO1 said he "aimed some punches towards [AP's] face and abdomen, and some knee strikes towards his abdomen." After the officers got AP down on the ground, SO1 "aimed an elbow strike at his head," which "slowed him down a little bit."

SO2, in his own report, said that he saw SO1 and SO3 take AP to the ground. Because AP was still resistant, though, he said,

[SO2] delivered a series of between 4-5 hammer fists into the side midsection of [AP]. [SO2] did not see any reaction or compliance from [AP] and as such switched from the hammer fists to knee strikes, 2 knee strikes were delivered again to the midsection of [AP].

Once AP was in handcuffs, WO called an ambulance, and AP was transported to hospital in the company of SO3.

Medical Evidence

Paramedics who dealt with AP at the scene and transported him to hospital described him as “very agitated and hyper” with dilated pupils, and as having “slurred speech, smelt of alcohol and was very agitated, what you might see from somebody under the influence of drugs like cocaine or amphetamine.” AP was said to be angrily screaming profanities at police and calling them “pigs.” A medical assessment at the scene was not possible because of AP’s agitation and screaming.

Hospital records indicate a diagnosis on admission of “pneumothorax, rib fractures, nasal injury”. AP was also suffering from bruising to his face. Intoxication by alcohol was indicated, and the comments “Patient appears to be on a stimulant drug” and “Patient angry yelling at writer that he needed an Rx for Percocet [an opioid pain medication]” and “drug seeking behaviour” were added. The Assessment Record included the note “Patient has displayed aggression and verbal abuse in ER.” X-rays subsequently showed one “mildly displaced” rib fracture. The pneumothorax (collapsed lung) was treated with a temporary drain, and AP was discharged.

According to hospital records, a few minutes after being discharged, AP re-attended at the Emergency Room, insisting that he be prescribed opioids for dental pain. The physician on duty reported the AP as “quite forceful and pressured and became angry” when he encountered resistance to his demands, and left empty-handed and unhappy.

With respect to pre-existing muscle injuries, AP told investigators that at the time of this incident he still had “major pain” from a previous injury involving a torn pectoral muscle. He said he had just weened himself off prescription opiates and was undertaking a few light workouts, but had a very limited range of motion and no strength in his right arm. He said he could “barely put my arm up over my head” and had no pushing power in the arm.

Medical records show that on May 12, 2018, AP was seen at a hospital emergency department. He was diagnosed as having “possibly a right pectoralis major minor tear,” and had “significant discomfort” and “abnormal passive range of motion” in his right shoulder. On May 25, an ultrasound scan confirmed a tear in the pectoralis major (the chest muscle). By June 19, he was reported as having “quite good range of motion,” but “obvious asymmetry and some discomfort with loading the pec itself.” The medical report from that visit noted that AP could lift the injured arm above his shoulder. AP was scheduled to attend for physiotherapy on July 17, 2018, four days before the incident under investigation, to work on residual issues. He did not attend on that date. Records

indicate that AP did attend for physiotherapy about ten weeks after the incident, on October 2, 2018.

Legal Analysis

The purpose of any IIO investigation is to determine whether an officer, through an action or inaction, may have committed any offence in relation to the incident that led to the injury to AP. If the officers who dealt with AP were acting as required or authorized by law, on reasonable grounds, they were justified in using as much force as was necessary. If, on the other hand, they used unauthorized or excessive force, they may have committed the offence of assault causing bodily harm.

In this case, it is necessary to consider whether the force used was unauthorized or whether the force was excessive, as two separate inquiries.

Authority – SO1

The basis offered by SO1 for arresting AP had two components: (1) the allegations by three individuals about the actions of the van driver and his passenger; and (2) the actions of AP actually observed by SO1 at the scene.

With respect to component 1, a reasonable person might well view the complaints presented to SO1 by CW1 and her companions as remarkably exaggerated, given the very limited objective basis for reaching a conclusion the people in the van were targeting them for potential serious crimes of violence. SO1, though, had only that narrative to work with. It was not unreasonable for him to arrive at the scene with the subjective belief that he had grounds to arrest, or at least to detain AP for further investigation, and to be alert for a potentially dangerous or violent confrontation.

Regarding component 2 – the behaviour of AP actually observed by SO1 – the versions presented to IIO investigators differ significantly. As noted above, SO1 stated that he saw AP rapping on the window of SW1's car "forcefully and aggressively," and talking to the occupants "in a very aggressive and animated way." AP said he had simply asked the vehicle's occupants a question, and none of the three civilian complainants described anything more forceful or aggressive than the AP knocking on the window and asking something to the effect of "can I hang out with you?" or "can I pretend I'm with you?" Given the apparent level of sensitivity of the three, it is unlikely that any of them would have minimized any threatening behaviour on AP's part. It is also unlikely that any of them would have been prepared even to partially open the window if the manner of AP's approach had been as described by SO1.

Nevertheless, even discounting SO1's characterization of AP's observed behaviour, the unfocussed but colourful allegations he had received, of would-be rapist kidnappers apparently scouting for victims, would be sufficient to justify at least his detention of AP.

Authority – SO2 and SO3

The assessment of justification for SO2 and SO3 is more straightforward. They arrived on scene to find SO1 already 'hands on' with a resistant AP, and were entitled to assume that SO1 was acting lawfully and needed assistance in restraining AP (WO, whose actions did not apparently cause any physical injury to AP, was justified in the same manner when he attempted to help SO1 by grabbing one of AP's arms).

Force Used – SO1, SO2 and SO3

A consistent thread in the evidence gathered from witnesses in this case is that AP put his hands in his pockets when approached by SO1, and refused to take them out. In his own interview, AP mentioned specifically a number of times that he had put his hands in his pockets, though he denied disobeying SO1's direction to take them out. When dealing with a suspect individual on the street, it is a common concern of a police officer that a weapon may be produced, and equally predictable that refusal by the individual to show empty hands may lead to an application of a degree of physical force by the officer.

On the evidence as a whole, it does not appear that the force used by the officers was quite as extensive as AP recalled, though it was clearly sufficient in total to cause a rib fracture and facial injuries. For his part, AP was said by the civilian witnesses to be actively and violently fighting the officers, lashing out, thrashing around, yelling and screaming.

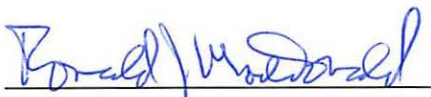
There is no evidence that any of the officers had prior acquaintance with AP, or that there was any pre-existing animosity towards him. On the evidence as a whole, it appears that the force used was significant, given that there were four officers able to apply force more in the nature of restraint rather than blows delivered by more than one officer. On the other hand, the spirited resistance offered by AP as described by the civilian witnesses cannot be ignored. According to their evidence, AP actively engaged in a fight with the officers.

Thus, while it can be said that the force used was at the high end of the scale, the evidence is not sufficient to say it was outside the range of reasonable force in these particular circumstances. Importantly, the evidence of the civilian witnesses supports a conclusion that blows struck to gain compliance on AP's part ceased when that compliance was obtained and he was in handcuffs. CW2's evidence is significant in this

regard: as detailed above, she told investigators that the officers were telling AP to “stop fighting, stop fighting,” and she finally heard him say, “okay, okay, okay.”

Conclusion

In summary, as the Chief Civilian Director of the IIO I do not consider that the facts of this case are sufficient to give reasonable grounds to believe the actions of the officers exceeded what would be seen as reasonable in this particular case. As a result I will not be referring this matter to Crown counsel for the consideration of charges.



Ronald J. MacDonald, Q.C.
Chief Civilian Director

July 12, 2019

Date of Release