

FINAL REPORT: IIU concludes investigation into injury to male during arrest

On August 8, 2018 at 6:04 p.m., the Winnipeg Police Service (WPS) notified the Independent Investigation Unit of Manitoba (IIU) that a male adult arrested by WPS that morning was being treated at Health Sciences Center (HSC) for a collapsed lung. According to the notification (as provided by WPS):

”At 07:55 a.m., police were contacted and advised that AP (the affected person) was outside Siloam Mission, 303 Stanley Street, and in an agitated state. He was yelling and swearing at people, causing a disturbance and trying to start fights. In fact, AP had started a fight which escalated with AP arming himself with a 4-foot piece of wood. Staff attempted to intervene but were unsuccessful due to his agitated and aggressive manner. At 8:03 a.m., two members of WPS attended and observed AP still in the state of aggression. AP was placed under arrest but refused to obey any police commands. He continued to struggle and disobeyed commands. OC spray (pepper spray) was deployed as AP was reaching into a bag. AP continued to struggle with the officers by pulling away and resisting. A conducted electrical weapon (Taser) was deployed to gain compliance. AP was taken into custody and an ambulance was called for safety precautions as both a Taser and pepper spray were used. AP was taken to HSC where he was sedated due to his continued agitated state. It was subsequently determined that AP had sustained a collapsed lung and was scheduled for a procedure that evening. He would be held for observation for a further 48 hours following the procedure.”

As AP suffered an internal injury that required admission to hospital on an in-patient basis, the IIU was mandated under *The Police Services Act* (PSA) to investigate the conduct of the WPS members.

The two WPS officers who responded to the original call for service at Siloam Mission and were involved in the arrest and detention of AP were designated as subject officers (SO1 and SO2). A WPS supervisor who attended the scene of the incident was designated as a witness officer (WO).

IIU investigators interviewed AP and five civilian witnesses (CW1 - CW5) who were staff members of Siloam Mission. AP also provided IIU investigators with a signed consent to obtain medical information.

IIU investigators interviewed two members (PW1 and PW2) of Winnipeg Fire and Paramedic Service (WFPS) who attended the scene, treated AP and subsequently transported him to HSC by ambulance. IIU investigators also interviewed the attending physician (DW) at HSC who examined and initially treated AP.

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,

SO1 declined to be interviewed by IIU investigators but did supply them with a copy of his use-of-force report. SO2 did not respond to any requests by IIU investigators for an interview nor to queries as to whether he would supply his notes and reports.

IIU investigators conducted a canvass of the area in the vicinity of Siloam Mission for any video surveillance footage but none was located.

IIU investigators received from WPS and reviewed, among other items:

- narrative reports;
- CEW (Taser) downloads and examination report;
- occurrence summary;
- GPS data for cruiser car;
- Forensic Identification Services report;
- WPS radio communications;
- 911 telephone calls; and
- arrest report.

Civilian Witnesses

CW1 arrived at work at 7:55 a.m. to find AP engaged in a dispute with another Siloam Mission patron in an adjacent parking lot. AP and the other patron were each armed with pieces of wood and were threatening to strike one another. CW1 stated she did not see AP get struck during this altercation, adding that AP had put down the piece of wood he had been holding.

Shortly after AP and the other patron were separated, CW1 said two police officers arrived and told AP, who was yelling, to put his hands up and get on the ground. AP put his hands in the air but did not get on the ground despite being told at least five times by the officers to do so. CW1 saw some sort of spray in the air and then saw AP either drop to his knees or fall onto his hands and knees. According to CW1, one of the officers used a Taser on AP, who then collapsed onto the ground, followed by both police officers getting on top of AP. CW1 did not see either police officer strike or kick AP, but added that she looked away from the incident twice for several seconds.

CW2 was working the front door of Siloam Mission on August 8 and, at 6:30 a.m. that day, encountered AP who, according to CW2, was agitated and appeared to be under the influence of a drug. AP was denied access to Siloam Mission due to his behaviour. CW2 said he next saw AP at approximately 8:00 a.m. that day when AP became involved in an altercation with another patron of the Mission in the parking lot, during which time both males brandished pieces of wood and tried to hit one another. CW2 said he broke up this fight and did not see AP get hit during this time. Police were called and two WPS officers attended and approached AP, who by then was holding a two-foot-long piece of copper wire.

According to CW2, the two officers instructed AP to drop the copper wire multiple times, to which AP responded: "*Why should I drop it?*", "*Why?*", and "*What did I do?*" AP did not comply with the officers' commands. AP was "pepper-sprayed" by police. AP dropped down to his hands and knees and began to swear at the police, telling them "*I'm going to f*** you up.*" CW2 said the police rushed at and wrestled with AP but were not successful in gaining control of his hands. One officer then deployed a CEW, striking AP on his right side. AP fell onto the ground and was handcuffed. CW2 stated he did not see either of the police officers strike or hit AP.

CW3, another staff member, stated that AP had been agitated and yelling at other Siloam Mission patrons over several days prior to this incident. CW3 said that on August 8 he observed AP and another patron trying, unsuccessfully, to strike one another with pieces of wood before they were separated by CW2. Police were called and two officers attended the location, approached AP, and told him he was under arrest and to put his hands behind his back. AP did not comply and responded by asking why he was being arrested. One of the police officers pepper sprayed AP, causing him to squat on the ground, at which point officers moved in and tackled him. CW3 stated one of the police officers kned AP in the chest while the other deployed a CEW. CW3 said, *“The police officers probably honestly warned him about four or five times before they had to use other stuff.”* CW3 did not state that AP was holding any type of weapon during his interaction with the police.

CW4 was at her desk at Siloam Mission that morning when she looked out her window and observed a male standing in the parking lot with something in his right hand, but she could not identify it. She stated it was the size of a cellphone and dark in colour. CW4 saw a police officer walking towards the male and pointing a CEW at him. The male’s arms were moving, sometimes up, as if he was questioning the officer. CW4 said she looked away briefly, and upon looking back noted that the male was now on the ground and was shaking. The police officer was standing nearby with a CEW in his hand and the device was pointed at the man’s chest. CW4 then stated that another police officer ran up and put his knee on the male, followed by both officers getting on top of him and handcuffing him.

CW5 was outside Siloam Mission and observed two police officers approach an unknown male. The officers told the male to get down on the ground at least five times but the male did not do so. CW5 stated one of the officers shot a CEW at the male and he went down to the ground. The male subject was handcuffed and police waited for an ambulance to arrive. The witness did not see anything in the hands of the man, and he did not see either police officer hit, kick or knee the male.

Affected Person

IIU investigators attempted to interview AP while he was at HSC. However, he was unable to provide any details about the incident to them. AP responded to questions with nonsensical answers and information while repeatedly stating his name and birth date. IIU investigators again attempted to speak with AP following his release from hospital. His erratic behavior and nonsensical answers were repeated. AP did sign medical releases at his meetings with IIU investigators.

Paramedics

PW1 recalls attending Siloam Mission to find AP handcuffed and lying face down on the ground, in the custody of two WPS officers. AP was yelling that he had been hit but he did not specify by whom. One of the WPS officers said that AP had been “tasered” but did not say anything about any other physical contacts sustained by him. PW1 did not remember being advised that pepper spray had been used. PW1 stated that PW2 was the primary caregiver on the call and did not recall locating any significant injuries on AP. PW1 said she observed police use force on AP following arrival at HSC when AP began to spit and police applied a “spit sock” to his face.

PW2 stated that when the ambulance arrived on scene at Siloam Mission, AP was lying face down on the ground in handcuffs and in the custody of two unknown police officers. AP was yelling continuously and complaining of rib pain. PW2 stated one of the officers told him AP had been tasered and pepper sprayed, but the officer made no mention of any strikes or blows to AP. PW2 said there was no indication of a pneumothorax (collapsed lung) during his physical examination of AP at the scene. PW2 did not observe any use of force on AP by police other than the application of a spit sock at HSC, and police had no contact with AP's rib area during this process.

Witness Officer

WO was acting as a supervisor when the call to attend Siloam Mission was received. On his arrival on scene, WO noted that AP was already in police custody, lying face down on the ground and handcuffed. AP was yelling and had CEW probes still attached to his body. SO1 was holding the CEW. WO spoke with both SO1 and SO2, but could not remember if either officer mentioned the use of pepper spray or applying knee strikes to AP. WO did not see any use of force directed at AP.

Subject Officers

As previously stated, SO1 declined to be interviewed by IIU investigators but did supply them with a copy of his use-of-force report. SO2 did not respond to requests by IIU investigators for an interview nor to queries as to whether he would supply his notes and reports.

According to the use-of-force report, SO1 and SO2 attended Siloam Mission on the morning of August 8 in response to a complaint of two males fighting with weapons. SO1 wrote:

*“[SO1] approached and observed erratic mannerisms and loud verbal incoherent rants coming from [AP] including “f*** you, I am the devil” ... Given these verbal rants and mannerisms [SO1] believed [AP] was under the influence of narcotics or suffering a significant psychotic episode making [AP] unpredictable*

[AP] started reaching into a bag whereas [SO1] feared [AP] was reaching for a weapon ... [SO1] ordered him to stop ... where [AP] stood up, started yelling and tensing up, all indicators that [AP] wanted to fight ... At about 10 feet away [SO1] informed [AP] he was under arrest and to go down to his stomach ... This order angered [AP] and no change in his behaviour was noted.”

SO1 wrote that he deployed a two second burst of pepper spray at AP, at which point he and SO2 rushed AP, tackling him in an effort to gain control. While struggling with AP, SO1 delivered a single knee strike to AP's lower body and leg area but it was unsuccessful in changing his behaviour. SO1 then wrote that he drew his CEW and discharged it into the back of AP “... for an approximate 5-10 second exposure causing an immediate involuntary change in [AP]'s behaviour”. SO2 was able to roll AP onto his stomach and apply handcuffs.

It was further stated in the use-of-force report that AP began to spit once paramedics arrived on scene, so a spit sock¹ was applied over AP's face for the safety of the paramedics. SO1 also

¹ A mesh hood that is designed to prohibit the transfer of saliva

wrote that once AP was at HSC, he began to kick the wall and police officers applied a “Ripp™ hobble²” restraint to his feet to prevent him from hurting himself or others.

It should be noted that an examination was conducted of SO1’s CEW following the interaction with AP. The report disclosed the CEW was deployed for eight seconds at 8:04 a.m. on August 8, 2018.

Medical Reports, Files and Opinions

The medical records from WFPS indicate an ambulance attended Siloam Mission at 8:14 a.m. on August 8, 2018 after they were contacted by WPS. PW2, who was the primary caregiver on the call, recorded the following in his report:

48 y/o male tasered and pepper sprayed.

Pt was involved in an altercation in shiloam (sic) parking lot with another person, WPS showed up and pt resisted arrest, pepper sprayed and tasered by WPS.

The report references an analysis of AP’s breathing, which was determined to be normal when examined on scene. It was also noted that AP was antagonistic to WFPS personnel and police while being treated. AP was complaining of right back/rib pain during his interaction with WFPS personnel.

HSC records showed that AP was examined on August 8 and treated for a right pneumothorax, often referred to as a collapsed lung, and non-displaced fractures of three ribs on his right side. His triage document, completed at 8:45 a.m., cited the reason for AP’s attendance at hospital as:

“brought by EMS and police. pt having an altercation at the shaloam (sic). pt resisting arrest with police tasered and sprayed. pt very combative, handcuffed, denies drug and alcohol use.

pt complaining of ride sided back pain. c/o productive yellowish cough X 1 week.”

The triage document also noted “*mental health deterioration*” as a diagnosis for AP during his examination at HSC that day.

IIU investigators interviewed one of the attending physicians, DW, who treated AP during his attendance at HSC. During his interview, DW made the following observations:

- It was highly probable that AP’s pneumothorax was caused by a traumatic event, as in a blow to his rib cage that resulted in the non-displaced fracture of his ribs;
- A CEW deployment was highly unlikely to be the cause of the non-displaced fracture of the ribs (fractures where the structure of the bone remains in place) or the pneumothorax;
- It was his belief that AP had the pneumothorax at the time he was examined by paramedics but there were minimal or no symptoms at that time;
- It was possible that AP had the rib injury and pneumothorax prior to his interaction with police and he was able to function for a period of time;

² A restraint device used by police to secure a subject’s ankles together (without connecting them to the wrists) in order to inhibit the subject from placing the soles of their feet in contact with the ground and prevent kicking

- DW could not provide an estimate as to how long AP may have had the pneumothorax.

Conclusion

Sections 25(1) and 26 of the *Criminal Code of Canada* states:

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.

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.

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

A person commits an assault when...

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly*

A police officer is entitled to arrest a person he finds committing, or has reasonable grounds to believe has committed, an indictable offence. Police can also arrest anyone to prevent a breach of the public peace. A police officer is authorized to use force in the lawful execution of his duties and as much as is necessary for that intended purpose. Moreover, a police 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.

Force used that is in excess of what is necessary or reasonable under the circumstances is not justified and may constitute an assault under the *Criminal Code of Canada*.

AP's injuries would constitute bodily harm under the *Criminal Code of Canada*.

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, the considerations 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.

This investigation was undertaken by IIU because AP had sustained a serious injury. The existence of a serious injury does not presuppose that a criminal offence has occurred. The mandate of IIU does not include authorizing criminal charges in the absence of evidence to support that significant 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.

The laying of a charge solely for the sake of laying a charge is not in keeping with the mandate of this office. This legal analysis and process is not restricted solely to investigations related to police officer conduct but is the very cornerstone of any justice system in a free and democratic society regardless of the subject of the matter under consideration.

On review of this investigation, I am satisfied that:

- SO1 and SO2 were lawfully placed and acting in their capacities as police officers in the execution of their duties during their respective interactions with AP;
- AP had been agitated and yelling at other Siloam Mission patrons over several days prior to August 8;
- On August 8, at 6:30 a.m., AP was agitated and believed to be under the influence of a drug. AP was denied access to Siloam Mission due to his behaviour. AP was next observed at approximately 8:00 a.m.;
- AP's whereabouts and involvements between 6:30 a.m. and 8:00 a.m. are unknown;
- Of the civilian eyewitnesses to the arrest of AP, only one stated that one of the police officers kned AP in the chest while the other deployed a CEW. The witness did not indicate where on AP's chest he was kned;
- AP was unable or incapable of providing any cogent information respecting the circumstances of the morning of August 8, 2018;
- Neither subject officer is compellable to be a witness against themselves;
- SO1, in his use-of-force report, records that he delivered a single knee strike to AP's lower body and leg area;
- It was highly probable that AP's pneumothorax was caused by a traumatic event, as in a blow to his rib cage that resulted in the non-displaced fracture of his ribs;
- A CEW deployment was highly unlikely to be the cause of the non-displaced fracture of the ribs (fractures where the structure of the bone remains in place) or the pneumothorax;
- It was possible that AP had the rib injury and pneumothorax prior to his interaction with police and he was able to function for a period of time;
- SO1 and SO2 did apply force through their actions to arrest and restrain AP.

In this investigation, part of the IIU mandate is to determine whether consequences should flow from the actions of SO1 and SO2, 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, the absence of knowledge regarding the whereabouts and actions of AP between 6:30 a.m. and 8:00 a.m. significantly impact the assessment of whether SO1 and/or SO2

had involvement with AP and were a probable cause of the injury. Coupled with the medical opinion that the injury leading to the pneumothorax may have occurred any time prior to contact with the police officers, I am not satisfied there are reasonable grounds to believe either SO1 or SO2 exceeded the ambit of justifiable force during their contact with AP.

It is my view that SO1 and SO2 did apply force in arresting and restraining AP (recognizing that the force used escalated as the contact with AP continued - from verbal warnings, pepper spray, CEW and through to physical force to gain compliance) but that it was necessary and in compliance with Section 25 of the Criminal Code of Canada. Furthermore, given the possibility that the injury sustained by AP may have occurred prior to his interaction with the subject officers, I have doubt that excessive and unnecessary force was employed by either officer on AP, in particular sufficient to fracture his ribs and cause the pneumothorax.

Accordingly, I am not satisfied that reasonable and probable grounds exist to charge either or both SO1 and SO2. No charges will be authorized against either SO1 or SO2.

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

Final report prepared by:

Zane Tessler, civilian director
Independent Investigation Unit
December 14, 2018

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