

FINAL REPORT: IIU concludes investigation into deployment of “less lethal” firearm by Brandon Police Service

On January 20, 2020, the Brandon Police Service (BPS) notified the Independent Investigation Unit of Manitoba (IIU) of an incident where a police officer discharged a less lethal firearm, striking and injuring a fleeing suspect.

According to this notification, which read in part:

“At 11:04 p.m. on January 18, 2020, BPS received a 911 telephone call requesting police assistance to remove a male, later identified as the affected person (AP), from a residence as he was “acting crazy.” Two BPS officers attended and observed AP leaving out the back door of the residence as the caller let them in. The BPS officers spoke with AP outside and he made suicidal comments and threatened to use a knife on them if they approached. AP pulled out a large knife in a sheath and continued to get dressed. He mentioned having a sawed-off shotgun with him as well. He walked through the backyard with the members following at a distance. He made several more comments that were suicidal and was told repeatedly to drop the knife. Two additional BPS officers arrived on the scene... [A]t the rear of a neighbouring residence, AP stated to the members, “Just shoot me, I want to die.” He threw the knife at a vehicle that a BPS officer was behind and attempted to jump a fence. Another BPS officer attempted a Taser deployment, but due to the bulky winter clothing, it did not appear the probes were successful. A third BPS officer, later identified as the subject officer (SO), fired one beanbag round from his shotgun and struck AP in the lower back area. AP fell to the ground and was subsequently taken into custody. He was transported to Brandon Regional Health Centre (BRHC) for medical clearance. After an initial triage by the ER nurse, he was cleared. He was returned to BRHC for a further examination of the welt and swelling caused by the beanbag round. He was seen by the ER doctor and cleared. He appeared to be under the influence of something and with the extreme behaviour, he was lodged prior to being taken for a mental health assessment.

Use of Force reports completed and supplemental reports by members involved completed.”

The IIU civilian director has determined that the less lethal shotgun is a firearm for purposes under the Police Services Act (PSA). Any injury resulting from its use would constitute a serious injury pursuant to IIU regulation 99/2015. AP suffered an abrasion with an underlying hematoma to his lower back because of being struck with the less lethal projectile. Accordingly, the IIU is mandated, under the PSA, to investigate the conduct of the BPS officers. IIU investigators were assigned to this investigation.

Information obtained by IIU investigators included:

- officers' notes and reports
- major incident report
- audio of 911 telephone calls
- prisoner booking sheets
- use of force report
- photographs of AP
- medical reports for AP
- BPS policy on use of less lethal shotgun

As noted above, the civilian director designated the BPS officer who discharged the less lethal shotgun as SO. Additionally, the civilian director designated three other BPS officers as witness officers (WO1-3). IIU investigators met with and interviewed AP. IIU investigators met with and interviewed two civilian witnesses (CW1-2).

Affected Person (AP):

AP states that he was in an argument with his girlfriend that night. AP states he was sober and had not taken any drugs. AP states that he was on his way to his sister's place down the street. AP states that police arrived to remove him from the house. AP states that he first met the police inside the house, and then left, telling them to leave him alone. AP had a knife on him when the police were following him. AP also had a couple of machetes in his backpack. The police continued to follow AP, when he told them not to. While the officers were following him, they had Tasers and shotguns. AP states he saw three to four Tasers and five black shotguns. AP states that he told them he just wanted to *"walk away from it all"* and they may have been worried he was going to harm himself. AP states that he threw his knife and stuff down, yet they still shot him with the beanbag when he jumped over a fence. The police kept following him because his girlfriend said he was suicidal. The police told him to lay on the ground so they could shoot him. Before he was shot, there was about ten cops around him. AP does not know which officer shot him, but the officer had come out of one of the two cruisers. When he was on the ground, AP states the officers stomped, kicked and beat him. The officers kned him in the face and kicked him in the back, legs and face for a minute or two, then handcuffed him. AP states he was shot with a beanbag in the kidney area, but denied telling police officers that he had a shotgun. AP states that after being shot with the beanbag, he was *"pissing blood for three days"* and *"crapping blood for three days"* and was all bruised up. He confirmed the doctor looked at all his injuries.

Medical Reports:

AP provided IIU investigators with a consent for the release of medical information. The report indicated that AP sustained an abrasion, with an underlying hematoma, to the lower back, resulting from being struck with the less lethal projectile. AP did not have blood in his urine. There was no blood in his mouth and he was moving his jaw properly. AP denied having any head injuries. AP was cleared for release from hospital a short time following his examination. AP was subsequently detained on a psychiatric ward for observation, pursuant to The Mental Health Act.

Civilian Witnesses (CW):

CW1 advised that she did call police as AP was threatening to harm himself and he had grabbed a knife. She did not witness any interaction between the police and AP.

CW2 was participating in a ride-along¹ with WO1. CW2 states they were dispatched to a call from a female who wanted a male, causing a disturbance, removed from her residence. CW2 states that WO2 joined them on this call. On arrival, they entered the house and spoke to the female. The male had just left out the back door. Information was received that the male was suicidal and WO2 went out to speak to him. CW2 states he remained in the house with WO1, when he heard WO2 broadcast that the male had a knife. CW2 states that he followed WO1 outside and observed the male, later identified as AP, standing near a back fence holding a knife and threatening to slash the police if they came any closer. CW2 recalls hearing AP say he was going to pull out a sawed-off shotgun. Both WO1 and WO2 tried to de-escalate the situation when AP started walking away. CW2 states that they all followed him through the snow. Other BPS officers joined in this pursuit. One BPS officer had a gun out, another had a Taser and CW2 heard another BPS officer state he had a less lethal beanbag or something to that effect. The officers were telling the male to drop the knife, which he still had in his hand. When the male went towards a fence, CW2 states he heard a Taser deployed by WO1 and an unknown BPS officer discharged the beanbag gun. The BPS officers arrested the male and took him into custody without any further incidents. He later saw AP at the hospital when they brought the police camera to document his injuries. CW2 observed a softball size welt on AP's lower back area.

Witness Officers (WO)

WO1 was with a ride along passenger, when they were dispatched to a disturbance call to a residence concerning the presence of a suicidal male. On arrival, they were invited inside and were told that the male was upstairs. WO2, who also attended, went to locate the male. WO1 then saw the male go out the back door. WO2 followed the male outside and shortly radioed that the male had a knife. WO1 went outside onto a back deck and could see this male, later identified as AP, talking with WO2. AP had a long knife in his hand. WO1 drew out her Taser and WO2 drew his service pistol. Both WO1 and WO2 tried to get AP put the knife down, but he refused. WO1 states that AP said he wanted them to shoot him and he wanted to die. AP also said, "*what if I pulled out my sawed off?*," which WO1 believed was a reference to a shotgun. AP had a large backpack with him. As AP walked away, he said he would jump in front of a train. AP had the knife in his hand and WO1 and WO2 continued to follow him as they radioed for backup. AP continued to walk until WO3 and SO, who confronted AP, told him to drop the knife. AP eventually threw the knife at a parked car that was beside him. WO1 had her Taser drawn and the lights were focussed on AP. When AP turned to run, WO1 states she deployed her Taser, at the same time SO shot a beanbag round at AP. AP went over a fence, where he was arrested by WO2 and WO3.

WO2 states that BPS received a call for service to attend a house and remove a male. On arrival, police knocked on the door and the homeowner invited them in. As WO2 entered, he saw the male, later identified as AP, leaving the residence through a back door and was carrying a backpack. WO2 looked out a window and observed AP changing his clothing and footwear. On

¹ A **ride-along** is an arrangement for a civilian to spend a shift as a passenger in an emergency vehicle, observing the work day of a police officer

receiving further information that AP was talking about hurting himself, WO2 states that this call changed to a mental health concern for AP's well-being. WO2 states he went outside to speak to AP. During the conversation, AP said he wanted to jump in front of a train. WO2 observed train tracks nearby. AP said they should just shoot him. AP then pulled out a long bladed knife while continuing to say, "*shoot me.*" When WO1 exited the house and joined them, AP asked if they wanted to see his shotgun. WO2 states that the police officers continued to ask AP to put down the knife. However, AP started walking away with the knife in his hand. WO2 states they followed AP, maintaining a safe distance and uncertain what other weapons he may possess. At one point, AP said, "*I am going to hurt you with this knife.*" WO2 states other police officers arrived and AP was between all of them. WO2 went behind some parked cars and saw AP throw his knife in his direction. WO2 states that he ducked and then heard the sound of a bang. As he looked up, he saw AP going over a fence. WO2 saw SO holding the less lethal beanbag round shotgun after AP was going over the fence. WO2 states that he and another officer arrested AP and removed him from the scene. AP was taken into custody under The Mental Health Act.

WO3 states that BPS received a call from CW1 who wanted AP removed from the residence. WO3 states that he next heard officers on scene broadcast that AP had a weapon and may be suicidal. Shortly afterwards, WO3 states that the police officers broadcast that AP may have a firearm. WO3 states he attended the vicinity and observed AP walking. WO3 states he observed that AP had a knife in his hand and was saying, "*Just shoot me*" numerous times. WO3 states that he drew his Taser and saw AP throw his knife and take off his backpack. These actions made WO3 believe the AP was giving up. SO was near WO3 and they separated to remove any chance of a crossfire incident if shots were to be fired. AP then went to jump a fence, at which point, WO3 states he heard a shot. AP continued over the fence, where he taken into custody. WO3 did not know that the less lethal shotgun was on scene until he heard the shot.

Subject Officer

Pursuant to 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 provided his notes, narratives and use of force reports to IIU investigators. SO did not agree to participate in an interview with IIU investigators.

The narrative states that on January 18, at approximately 11:04 p.m., CW1 requested police attend her residence to remove AP, who was described as "*just nuts.*" WO1 and WO2 responded to this call for service. At approximately 11:16 p.m., WO1 broadcasted that AP had gone out the back door, was in possession of a knife and was suicidal. WO1 also stated that AP had a backpack, a large knife, and may have a machete. WO1 then advised that AP stated that he had a sawed-off shotgun. WO1 stated that AP was wearing too much clothing for the Taser to be effective. At approximately 11:21 p.m., SO wrote that he arrived in the area and was directly behind WO3. SO advised that he had "*bean bags.*" SO wrote that he spotted AP between a chain link fence and some parked cars. WO3, who had his Taser out, was yelling at AP to drop the knife. SO wrote that he came up behind WO3 and stepped to his left. SO was armed with a less lethal, 12 gauge, shotgun, loaded with beanbag rounds. AP was standing approximately 12 feet in front of SO and WO3, and had both arms out at his side, approximately shoulder high, with a large knife in his right hand. WO1 and WO2 both commanded AP to drop the knife. AP threw the knife to his right, at a parked car, striking it. WO2 was directly behind this car, using it for

cover. SO wrote that he yelled, "Get on the ground" to AP, who did not comply. AP dropped his hands and his backpack and made a quick move to jump over the chain link fence. SO fired one beanbag round from the less lethal shotgun, targeting AP on his side/back, as he was jumping over the fence. At the same time, WO1 deployed her Taser. AP immediately went to the ground. WO2 and WO3 then jumped the fence, controlled and handcuffed AP. SO provided cover with the less lethal shotgun. SO could see that the Taser probes did not penetrate AP's clothing. As AP was uncooperative, suicidal, and may be armed with a firearm or a secondary weapon, SO wanted to control him as quickly and safely as possible. SO wrote that this could have become a very dangerous situation for everyone involved. The less lethal beanbag round achieved the desired effect on AP, gaining control of him before he could run away.

BPS less lethal firearm policy:

IIU investigators reviewed the BPS less lethal firearm policy, in particular to determine the circumstances where the use of a firearm and deadly force shall not be used. The relevant policy portion states:

Circumstances Restricting the Use of Firearms/Deadly Force

Notwithstanding the provisions of Section 25 of the Criminal Code, members shall not resort to the use of firearms/deadly force under the following circumstances:

- 1) *To apprehend a person who is only committing, or who has only committed, or who is only about to commit, a property offence or an offence punishable on Summary Conviction*
- 2) *To apprehend a person who is committing or who has committed, or who is about to commit, any offence if the freedom of that person does not constitute a reasonable and serious threat to life*
- 3) *To apprehend a person who is committing, or who has committed, or who is about to commit, any offence if the use of firearms constitutes a greater threat to life than does or will the freedom of that person*
- 4) *To fire a warning shot*
- 5) *At a fleeing vehicle, except in self-defence*

On the basis of the information gathered in this investigation, I am satisfied that the conduct of SO in the use of the less-lethal firearm was within the BPS policy guidelines in effect at the time of this incident.

Conclusion:

Sections 25(1), 26 and 265(1) (a) of the Criminal Code of Canada state:

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.

265 (1) (a): A person commits an assault when... (a) without the consent of another person...he applies force intentionally to that other person, directly or indirectly

I am satisfied that at all material times, the BPS officers were operating under the authority of The Mental Health Act (MHA), in particular, sections 12(1) and 12(2), which state:

12 (1) A peace officer may take a person into custody and then promptly to a place to be examined involuntarily by a physician if

(a) the peace officer believes on reasonable grounds that the person

(i) has threatened or attempted to cause bodily harm to himself or herself,

(ii) has behaved violently towards another person or caused another person to fear bodily harm from him or her, or

(iii) has shown a lack of competence to care for himself or herself;

(b) the peace officer is of the opinion that the person is apparently suffering from a mental disorder of a nature that will likely result in serious harm to the person or to another person, or in the person's substantial mental or physical deterioration; and

(c) the urgency of the situation does not allow for an order for an examination under section 11.

12(2) A peace officer may take any reasonable measures when acting under this section or section 9 or 11 or subsection 44(1) or 48(2), including entering any premises to take the person into custody.

A police officer is also entitled to 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. If the force used is in excess of what is necessary or reasonable in the circumstances, such force is not justified and the acts may constitute an assault under the Criminal Code of Canada.

Where it is determined that reasonable grounds exist to believe a criminal offence has been committed, the IIU civilian director may charge the subject officer accordingly. The determination of whether reasonable grounds exist is based on a careful assessment of all the available evidence. The totality of the circumstances must be considered in assessing these 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.

Moreover, determination of whether the necessary reasonable 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 necessary reasonable 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 an injury from the use by police of a firearm (in this matter a less lethal shotgun that discharges beanbag rounds) during his arrest. The existence of an 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 the absence of the required reasonable grounds 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 matter under consideration.

On review of this investigation, I am satisfied that:

- SO was lawfully placed and acting in his capacity as a police officer in the execution of his duties during his interactions with AP.
- AP was suffering from mental health issues, was suicidal and armed with a weapon.
- AP was in possession of a knife and could have caused significant harm to others with it.
- AP expressed several times for police to shoot him.

- It was a real possibility that AP had the capacity to cause lethal harm to others.
- AP alleged to be in possession of a sawed-off shotgun.
- AP was in possession of a backpack, which was capable of carrying a sawed-off shotgun.
- SO assessed the situation as potentially dangerous and there was a heightened need to restrain and disarm AP, and prevent any further harm.
- Less lethal force options (Taser and beanbags) were employed and were successful in detaining and disarming AP.

In this investigation, part of the IIU mandate is to determine whether consequences should flow from the 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 SO exceeded the ambit of justifiable force during his contact with AP.

In summary, a less lethal force option was used to de-escalate a potentially dangerous situation. The police chose not to employ lethal options in dealing with AP. AP threw his knife towards police. AP alleged to be in possession of a sawed off shotgun. AP received a minor injury, which prevented him from further harming himself or anyone else, and ended this situation peacefully. It is my view that the force used by SO was necessary and in compliance with Section 25 of the Criminal Code of Canada.

Accordingly, I am not satisfied that reasonable grounds exist to charge SO. Accordingly, 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
June 02, 2020

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