

April 7, 2021

### **CPS officer's use of force reasonable and justified**

On April 10, 2018, the Alberta Serious Incident Response Team (ASIRT) was directed to investigate the circumstances surrounding the death of a 27-year-old man who was shot and killed during an encounter with a Calgary Police Service (CPS) officer shortly before midnight during what is believed to have been an attempted robbery.



*Folding knife recovered from incident scene.*

ASIRT's investigation was comprehensive and thorough, and was conducted using current investigative protocols. ASIRT interviewed all relevant police and civilian witnesses, directed a scene examination, obtained all relevant CPS dispatch and communications data, and submitted exhibits for forensic DNA testing and analysis. A canvass of the area failed to identify any CCTV cameras or civilian video of the encounter. As well, the officer was involved in a covert operation and therefore was operating an unmarked police vehicle that was not equipped with an in-car video system. ASIRT investigators attended the autopsy and later obtained an autopsy report from the Office of the Chief Medical Examiner (OCME).

The involved officer voluntarily provided evidence to ASIRT investigators in the form of his notes detailing the event. In law, the subject officer has the same constitutional right to remain silent as any other Canadian citizen. The *Police Act* provides an express prohibition against obtaining and using a subject officer's notes in the absence of his clear voluntary consent. Some subject officers choose to stand on their right to remain silent. When an officer does provide evidence, it is provided voluntarily and unconditionally with the knowledge that any evidence provided can be used for or against them.

While a subject officer cannot be compelled to provide evidence, the decision to remain silent can often leave a significant evidentiary gap, particularly on the issues of what the officer may have intended, perceived and believed, and any explanation of why an officer acted the way they did. Evidence from a subject officer, when voluntarily provided, can often prove instrumental to an understanding of the event. Such information becomes even more critical in cases where there are no other witnesses to detail what happened.

That said, where the only available eyewitness evidence comes from a subject officer, it is not automatically accepted without challenge. As with any witness evidence, any statement is carefully scrutinized and steps are taken to determine whether that evidence is corroborated or contradicted by any other available eyewitness, physical or forensic evidence.

On the evening of April 9, 2018, the officer was working in a covert capacity in the area of 2nd Avenue and 6th Street NE in Calgary. The officer had been tasked with conducting surveillance as part of a significant, unrelated criminal investigation. Given the covert nature of the unrelated investigation, the officer was in plainclothes and had been provided with a covert, unmarked police vehicle. At the time of the incident, nothing would have suggested to the ordinary observer that he was a police officer. Shortly before the incident, the officer had returned to the driver's seat of his covert vehicle, and was checking his cellphone.

While the 27-year-old man lived nearby, he was not known to the officer and was not associated with the matter the officer was conducting surveillance on. Very shortly after the incident, ASIRT investigators spoke with the 27-year-old man's common-law partner and two additional witnesses regarding his actions and possible mindset leading into the incident.

This evidence could provide relevant insight into what the man's possible actions and intentions might have been. To the extent that it may reflect potential criminal conduct or paint him in a negative light, it is important to recognize that the evidence is not intended to suggest that man was a bad person and therefore somehow deserved whatever happened to him. Notwithstanding any actions and decisions that man may have made that day, every life has value and every person is entitled to the full protection of the law and a carefully considered, fulsome investigation that scrutinizes the use of lethal force. Public confidence in policing not only for those involved but also the community at large requires an understanding of what occurred. It also requires an understanding of the relevant legal standards and how any determination of the lawfulness of an officer's conduct is made.

At the time of the incident, the man and his partner were living together. The man was unemployed and receiving social assistance. The partner advised that the man had been struggling with mental health and drug addiction issues. The man had a history of substance abuse and had been known to use marijuana, cocaine, methamphetamine, and fentanyl. According to the witnesses, the man's drug use had recently escalated, although none of the occupants of the home could say whether the man had consumed any drugs earlier that day.

That morning, the man told his partner he had had a nightmare in which someone had stabbed her and he had to try and save her. Shortly thereafter, they ended up in a verbal argument. His partner

advised that over the course of the day, the two argued several more times before the man left their residence to go for a walk to cool down. The man ultimately returned to the residence, but left again later that evening for what would prove to be the last time. The three witnesses from the residence, including the partner, all advised investigators that they believed or understood the man to be heading to a nearby convenience store in search of drugs. All three witnesses advised that when the man left the residence, he did not have any money. Investigators were advised that the man would become very agitated when he wanted or needed drugs and that he would steal to obtain money to pay for them. One of the witnesses indicated that about 20 minutes after the man left the residence, she heard a single gunshot, followed by sirens.

ASIRT investigators were told that earlier that day the man had talked about death and taking his own life, but the witness did not believe the man was serious.

The man's partner described his clothing that night and advised investigators that the man typically carried a knife with him. The knife was described as a folding knife that clipped to his belt, with the word "Dewalt" written in yellow. The man was seen playing with the knife that evening.

There was no relationship or connection between these civilian witnesses and the involved officer. Additionally, at the time these witnesses provided their statements, very little was known about what had led to the officer-involved shooting and the witnesses had no way of knowing what, if anything, the officer would say. As such, in light of what the officer would later describe, the evidence that the man would have to steal money to buy the drugs he needed, and the information regarding his possession of the knife, would turn out to be particularly probative.

#### *The Confrontation*

At the time of the encounter between the man and the officer, the evidence was that there were no other persons present in the vicinity who would have observed the event.

In the evidence provided, the officer advised that at about 11 p.m., he decided to take a short break from conducting surveillance and was seated in the front driver's seat of his unmarked police vehicle, which was parked in a school parking lot at 6th Street and 2nd Avenue NE. The doors to the vehicle were closed but not locked. Without warning, his car door was opened and the 27-year-old man stood alone in the open door, shouting and demanding that he hand over any money. The man produced a knife and threatened to stab the officer. The man blocked the door, preventing the officer from closing it, and held the knife, which the officer described as having about a five-inch blade, approximately three feet from the officer's head.

The man continued to yell at the officer, demanding money and threatening to stab him. The officer acted as if he were reaching for his wallet but instead drew his CPS service pistol and began to step out of the vehicle with his left hand extended. He yelled at the man to get back while physically pushing him. The officer reported that he struck the man in the face with his pistol, which he had in his right hand, hoping to stun him and cause him to drop the knife, but this attempt failed. As the man stood up after being pushed, he swung the knife in the officer's direction, causing the officer, who was holding his service pistol close to his torso, to discharge a single round. The single round struck the man in the upper chest, causing him to immediately fall to the ground and drop the knife. During the ensuing scuffle, the officer received a small scrape at the top of his forehead. Immediately following the shot, the officer radioed for backup.

No other officers witnessed the actual incident and shooting. The first officer on scene after the shooting observed the involved officer standing near the open driver's side door of his police vehicle, and the man lying on his back approximately 10 feet away. There was blood on the man's neck and chest, and a knife was observed near his left hand. When this officer checked the man, he

was unresponsive and had no vital signs. He stayed with the man until EMS arrived, who confirmed that the man was deceased.

The knife and the officer's service weapon were both seized as exhibits at the scene.

Civilian witnesses in the surrounding area were identified and interviewed. One witness, whose apartment faces 6th Street, indicated that he heard two people arguing, followed by a loud bang, but when he looked out his window, he was unable to see anything. A second witness confirmed that at approximately 11:22 p.m., he heard the sounds of an argument, which he believed to be people passing his house. Several minutes later, he heard a very loud voice say what he believed was the word "stop," or something similar, followed by a loud pop, which he believed to be a gunshot. The witness described "stop" as being delivered in the tone of someone attempting to stop a fight, but he did not know the context. He further indicated that the gunshot came approximately one to two seconds after the word "stop." A third witness gave a similar description of hearing an argument, followed by what the witness described as a woman screaming, and then the sound of a shot. None of the civilian witnesses observed the actual incident.

The scene was contained and examined. The man's body was observed to be several feet from the open driver's door of the officer's vehicle, and several small blood droplets were located on and near the vehicle's open door. As described above, a knife was recovered at the scene and was observed to be a Dewalt brand folding black knife with a belt clip. A single spent .40-calibre shell casing was also recovered and seized.

The man's autopsy was conducted on April 11, 2018, and it was determined that the cause of death had been a single gunshot wound to the chest. Blunt force injuries to the man's jaw, chin and lips were also observed. There was evidence of drug use, with needle marks visible on both arms. The toxicology report confirmed the presence of methamphetamine and its metabolites in the man's body.

The witnesses associated with the man had initially provided ASIRT investigators with a remarkably clear, cogent and ultimately accurate description of a knife carried by the man that matched the knife found at the scene. ASIRT investigators later attended upon these same witnesses, however, and showed them a picture of the knife that had been recovered at the scene. At that point, notwithstanding the obvious similarities to what had been described by them, none of the three witnesses were prepared to say that they recognized the knife in the picture as the same knife.

In order to determine whether the knife had been in the possession of or belonged to the man, given the witnesses' subsequent reluctance or inability to identify the knife in the picture, ASIRT sent the knife for forensic examination. The goal of this examination was to determine whether a DNA profile could be obtained from the knife, and if so, whether that profile was consistent with the profile obtained from known DNA samples from the man. A swab taken from the knife yielded a mixed-origin DNA profile with DNA identified as having come from two people, one male and one female. The contributor of the male profile matched the DNA profile of the known sample from the man. Based on the whole of the evidence, the only reasonable inference was that this knife was in the man's possession that day, both before and at the time of the incident.

The officer had indicated that prior to firing his weapon, he had struck the man with his firearm. The officer's duty firearm was swabbed and sent for forensic DNA extraction and analysis. The DNA swab from the officer's firearm, taken from the outside top of the barrel near the muzzle, was consistent with the officer's description of having struck the man with his gun, and conclusively matched the man's DNA profile. This was another small piece of evidence that corroborated and enhanced the reliability of the officer's description of the events.

At its core, the focus of an ASIRT investigation can be described as the collection of evidence to determine factually, as much as possible, what occurred during an incident, and to allow for a reasoned and principled analysis of whether those actions were lawful.

This case differed from many ASIRT investigations in that it involves a confrontation that did not result from an encounter between a police officer attempting to deal with a person while acting in the execution of their duties. Instead, the evidence would suggest that the encounter was initiated by the man who, based on the available evidence, was likely not initially aware that the person he confronted was a police officer. The officer's duties that day would also support this narrative. The importance of his covert surveillance on a significant, serious ongoing investigation made it unlikely that the officer would have compromised these duties by approaching or engaging the man.

Based on the available evidence, it would appear that when the man left his residence that day, he was attempting to purchase drugs, but had no money to do so, and, as such, required money. The information provided by those who knew him suggested that they expected that he would have to steal that money. This evidence is consistent with and corroborates the officer's evidence that the man attempted to rob him at knifepoint. While the man may have expressed possible suicidal ideation earlier in the day, given the available evidence, this is not believed to have been a factor in the unfolding of the event.

Confirmation from those associated with man that he carried a Dewalt folding knife consistent with the knife the officer identified as the one the man brandished during the robbery enhanced the officer's credibility and the reliability of his evidence. To remove any doubt, forensic DNA analysis identified the man's DNA profile on the knife. Further corroborating the officer's description of the events, everything on scene was consistent with his account, and no evidence contradicted or conflicted with it. The extraction of the man's DNA profile from the officer's service pistol also corroborated his evidence regarding his having struck the man with the gun as he exited the vehicle and pushed him back.

While it may be a very small piece of evidence, the statements from independent witnesses in the area who overheard some form of scuffle or disagreement and a person yelling "stop" or words to that effect shortly before they heard a single shot would also be consistent with the attempted robbery and the officer's description of the encounter.

Ultimately, the officer volunteered evidence in this case that assisted in developing the narrative of what occurred prior to and during the incident which resulted in the death of the man. Given the lack of other independent eyewitness evidence or video, significant investigative attention was focused on confirming or refuting aspects of the officer's explanation and determining whether it was consistent with the other available pieces of evidence, including physical evidence.

Having considered the evidence in this matter as whole, the evidence is wholly consistent with the officer's description of what occurred. Additionally, and equally importantly, there is no evidence that reasonably contradicts or refutes the officer's version of events. The evidence of the witnesses associated with the man regarding his activities and anticipated behaviour certainly allows for a reasonable inference to be drawn that the man robbed the officer to obtain money to buy drugs, and that it was an unforeseeable coincidence that the target he chose happened to be a police officer. The evidence provided by the witnesses residing with the man regarding his substance use, and frequent method of obtaining money for drugs are consistent with both the officer's version of the interaction, the observations at the scene and test results from the autopsy.

While the witnesses subsequently indicated that they were unable to identify the picture of the knife recovered from the incident scene, the similarity between that exhibit and the verbal description they previously provided is impossible to ignore. The man's partner accurately described the physical

characteristics of the knife and its brand name, as well as placing it within the man's possession on the night in question. This evidence is bolstered by the DNA evidence obtained from the knife, revealing the mixed-origin DNA of the man and a female contributor. The combination of the accurate description from the witness and the DNA lab result is unassailable evidence of the man's possession of the knife.

As stated, having considered all of the available evidence in this matter, executive director Susan D. Hughson, QC, was satisfied that the version of events provided by the officer is reasonably reliable. It is important to note that the officer's statement is not accepted simply because it is the only version available from someone present at the time. Great care was taken to ensure that the physical and other available evidence (including the position of the body) was consistent with that evidence. Having factually determined what occurred prior to and during the incident, the analysis shifts to the lawfulness of the officer's actions.

Under the *Criminal Code*, police officers are granted certain powers and authorities to facilitate the performance of what can be a challenging job. Under Section 25 of the *Criminal Code*, a police officer is authorized to use as much force as is reasonably necessary in administration or enforcement of the law. This can, in limited circumstances, include force that is intended or likely to cause grievous bodily harm or death. Resort to lethal force is only authorized in circumstances where an officer believes, on reasonable grounds, that it is necessary for the self-preservation of the person or the preservation of anyone under that person's protection from death or grievous bodily harm. Further, under Section 34 of the *Criminal Code*, any person, including a police officer, is entitled to use reasonable force in defence of themselves or another person.

Based on the evidence of those associated with the man, he left the residence that day upset, in search of drugs, and in need of money to buy those drugs. It is a reasonably strong inference that he attempted to rob the officer at knifepoint to obtain money. That this is consistent with the evidence of the officer is all the more powerful given the lack of association between the witnesses and the officer, as none of these witnesses could have known what the other would say. In that moment, the man was committing an indictable offence and the officer would have reasonable grounds to arrest him. Additionally, regardless of which section is applied, the man's actions during the robbery would have objectively constituted an immediate risk of grievous bodily harm or death to the officer.

An assessment of the reasonableness of force used under Section 34 requires consideration of a number of factors, including but not limited to: the nature of the threat presented; the urgency of the situation; and the availability of other alternatives. In this case, the man's attempt to rob the officer with a knife created a situation of immediate urgency, one capable of giving rise to an objectively reasonable fear of death or grievous bodily harm on the part of the officer. It is important to note that at the beginning of the incident, the officer was seated inside his vehicle, somewhat unaware of events outside, when the man suddenly opened his door and brandished knife. The officer had no role in initiating the confrontation, having been surprised when the door suddenly opened, and was placed in a situation where there was no viable way of avoiding the confrontation.

Before resorting to lethal force, the officer attempted both verbal and physical means of ending the confrontation, attempting to create space and safety, yelling at the man to get back, and striking him with his pistol in an attempt to stun and disarm him. When the man persisted and swung the knife at him, the officer discharged a single round from his service pistol. As stated, at this point the man's continued possession of the knife, and his actions with that knife, presented a risk of death or grievous bodily harm.

Based on the evidence available, the actions of the officer were only responsive to a situation created by the man in circumstances where, objectively and subjectively, he constituted an

immediate and significant risk of grievous bodily harm or death. As the officer's actions were taken for the purpose of defending himself from that very real risk and as outlined above, were reasonable in the circumstances, the force used by the officer is permissible pursuant to the provisions of the *Criminal Code*, and accordingly does not constitute an offence.

While it likely goes without saying, regardless of the outcome of the investigation, lives were profoundly changed on April 9, 2018. A person lost his life, a family and friends were left grieving, and a police officer who, by all accounts, had dedicated his life to public service was also irrevocably impacted. These events have a devastating impact for all involved, in many different ways. Simply because an event has been found lawful does not make the situation any less tragic.

ASIRT's mandate is to effectively, independently and objectively investigate incidents involving Alberta's police that have resulted in serious injury or death to any person, as well as serious or sensitive allegations of police misconduct.

**Media inquiries may be directed to:**

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