



**INVESTIGATION INTO A COMPLAINT ALLEGING CALGARY
POLICE SERVICE OFFICERS USED EXCESSIVE FORCE IN AN
ARREST ON FEBRUARY 1, 2009 AND COMMITTED OTHER
OFFENCES INCLUDING PERJURY ON OCTOBER 17, 2011.**

**DECISION OF THE EXECUTIVE DIRECTOR OF THE ALBERTA
SERIOUS INCIDENT RESPONSE TEAM**

Executive Director:

Susan D. Hughson, Q.C.

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Introduction

This particular case is unlike most ASIRT investigations undertaken. It has a somewhat unusual and convoluted history that presented unique and significant challenges. To untangle the various allegations and evidence, and to adequately articulate the process, evidence and determinations made has resulted in a much more comprehensive report than usual.

In a 2012 decision in relation to an impaired driving trial, a trial judge made specific credibility and factual findings based on the evidence before her. This included findings that two officers had beaten a man during the course of an impaired driving related arrest and then had given evidence that distorted the truth. Based largely on the findings made by the trial judge in the reported decision, counsel on behalf of the Criminal Trial Lawyers Association corresponded with both the Calgary Police Service (CPS) and Calgary Police Commission (CPC) and demanded a criminal investigation into the conduct of the officers. CPS ultimately completed a 46.1 notification under the *Police Act* and on August 15, 2017, ASIRT was directed to investigate allegations that the involved officers had used excessive force in the arrest and, subsequently, had distorted their evidence or perjured themselves in an effort to cover-up the alleged prior inappropriate use of force.

The trial decision, based on the available evidence at the time, and relying heavily on findings of credibility, was highly critical of the involved officers and raised concerning allegations. ASIRT's investigation, however, has revealed a very different picture based on evidence that was not before the Court, or accessible to the Court, at that time, including the evidence of a completely independent civilian witness who observed the events but was not called at trial. Given the discrepancy between the trial findings and ASIRT's findings, it is necessary to provide some detail regarding ASIRT's investigation and the evidence to permit the now informed observer a better understanding as to how ASIRT's investigation came to a different conclusion.

Preliminary Issue – Naming the Affected Person, Subject Officers and Defence Witnesses

ASIRT does not normally name the affected person, witnesses or subject officers unless the investigation results in criminal charges, where the names of the involved parties become a matter of public record, unless protected by a judicially authorized publication ban.

In this case, there was no publication ban protecting identity sought or granted. The names of the involved parties that testified at trial are readily available in the publicly

available written decision of the trial judge. These parties testified in open court without any expectation of anonymity nor any ban on publication prohibiting their public identification. Lastly, shortly after the decision was released, it became the subject of scrutiny by media at which time some of the parties were publicly identified by name.

In these circumstances, given that the names of the five people who testified at the original trial were all released, those names are a matter a public record. As such, they will be referred to by name in this report. ASIRT's investigation did, however, identify and gather evidence from additional witnesses that were not called at trial, including a number of police witnesses and an independent civilian witness. Consistent with ASIRT's standard practice they will be identified as a civilian witness (CW) or a witness officer (WO).

Issues

Given the length of this report, it is advantageous to identify the focus of ASIRT's investigation and the relevant issues early to better understand the information laid out thereafter.

In this case, the issues are identified as follows:

- At the time of the arrest, were Cst. Johnston and/or Cst. McGregor lawfully placed and acting in the lawful execution of their duties?
- Did Cst. Johnston and/or Cst. McGregor use force in the arrest?
- If so, was the force used no more than reasonably necessary to achieve their lawful purpose?
- At trial, did Cst. McGregor and/or Cst. Johnston, with intent to mislead, make a false statement under oath or affirmation, knowing that statement to be false?
- If so, in doing so, did they willfully attempt to obstruct, pervert or defeat the course of justice?

Background Information, Chronology and Context

On February 1, 2009, Todd Girbav was arrested by Calgary Police Service (CPS) officers and charged with impaired driving related offences. On October 17, 2011, Mr. Girbav's trial commenced before the Honourable Provincial Court Judge A. Brown. In addition to the two officers involved in his arrest, Cst. McGregor and Cst. Johnston, both Mr. Girbav and his passenger on the date in question, Greg Hubbell, testified as to what occurred that night.

Defence brought an application for a *Charter* remedy for alleged *Charter* breaches relating to s. 7 security to the person – alleging excessive force, and at s. 10(b) breach of the right to counsel. The trial continued on March 27, 2012 for argument and was then adjourned for written decision. On July 26, 2012, the Court rendered its written decision.¹ The Court accepted the evidence of the Mr. Girbav and Mr. Hubbell, in whole, and rejected the evidence of the officers. Based on Mr. Girbav’s evidence, the Court found breaches of both ss. 7 and 10(b) of the *Charter* and directed a stay of proceedings. The Court was highly critical of the evidence of the involved officers and their conduct, as alleged by the accused and Mr. Hubbell.

On the strength of the reported decision, Mr. Engel, on behalf of the Criminal Trial Lawyers’ Association, corresponded with the Calgary Police Service and the Calgary Police Commission, and demanded a criminal investigation into the conduct of the involved officers. At s. 46.1 *Police Act* notification was made and on August 15, 2017, ASIRT was directed to investigate the circumstances surrounding the arrest of Mr. Girbav and allegations that the officers had perjured themselves at trial. The ASIRT investigation identified Cst. Tyler McGregor and Cst. Curtis Johnston as subject officers, as defined under the *Police Act*. Our investigation is complete.

The Scope of the Investigation and the Court Decision

While *R v Girbav*² 2012 ABPC 219 effectively triggered the complaint and ASIRT investigation, it must be noted that the trial decision itself, as contrasted with the evidence, has limited evidentiary value in what is now an independent and objective investigation focused on the conduct of the involved officers. The trial findings of fact and resulting determinations were made in the context of the available evidence at the time, in proceedings with a different overarching focus and burden of proof, and their value is limited to that context. Leaving aside the Court’s factual findings and determinations made, which are not binding, the actual evidence given at trial is relevant, admissible evidence for the purposes of the ASIRT investigation, and has been considered as such.

Investigation

ASIRT’s investigation was comprehensive and thorough, conducted using current investigative protocols, and in accordance with the principles of major case management (MCM). All available police and civilian witnesses were interviewed. Cst. Johnston and

¹ *R v Girbav*, 2012 ABPC 219

² *Ibid.*

Cst. McGregor, having testified in open court, both declined to provide any additional statement to ASIRT investigators, as is their constitutional right.

ASIRT's investigation also had access to additional evidence that was not available to the trial judge. An example of this would be that ASIRT obtained the investigative file relating to the arrest and charging of Mr. Girbav, including all involved officer reports and notes. These reports and notes were not put before the court or entered into evidence with the exception of brief cross-examination on specific issues in the notes of the two subject officers. The notes were not entered into evidence. Additionally, a review of the investigative file revealed a written statement from an independent civilian witness, not who had not been called at trial. In addition to the witness statement, ASIRT investigators conducted an additional interview of that witness. ASIRT also obtained a full transcript of the trial proceedings, which included the sworn evidence of all the witnesses.

Evidence at Trial

Evidence – Common Ground

While there were considerable inconsistencies in the witness evidence as it related to specific aspects of the events on the night in question, between the witness statements and sworn testimony, there are aspects of this event that were not in dispute and provide a very broad overview of what happened. In other words, while finer details might differ, the available evidence established certain basic facts.

The initial incident and police investigation occurred on February 1, 2009. At approximately 12:15 a.m., Mr. Girbav was driving his own vehicle eastbound on 70 Avenue SW in Calgary when he lost control of his vehicle and ended up becoming "high centred" on snow and ice on the median between the southbound and northbound lanes of Macleod Trail. Mr. Girbav was, at all times, seated in the driver's seat and his friend and roommate at the time, Mr. Hubbell, was a passenger in the vehicle.

On patrol together in a marked police vehicle, Csts. Johnston and McGregor were proceeding southbound on Macleod Trail when they observed Mr. Girbav's vehicle, which had been proceeding eastbound on 70 Avenue, enter onto Macleod Trail, spin out of control and come to rest on the median as noted above. They had concerns about the operation of the vehicle, so they pulled over to further investigate.

During the course of that investigation, Mr. Girbav was forcibly removed from the driver's seat of the vehicle. While they differ as to how it occurred, it is acknowledged

that Mr. Girbav sustained a laceration to his head and that EMS responded to the scene and examined him. As it was felt that he might need stitches, EMS offered to transport him to hospital but Mr. Girbav declined.

Cst. McGregor formed grounds to believe that Mr. Girbav's ability to operate a motor vehicle was impaired by alcohol or a drug and arrested him for impaired driving. Mr. Girbav was transported to a district office where he ultimately provided two samples of his breath, both resulting in readings rounded down to 210 mg/%, over twice the legal limit. He was charged with impaired operation of a motor vehicle and driving with a blood/alcohol level in excess of .08 mg/%.

The Chronology of the Criminal Trial

The trial on Mr. Girbav's criminal charges commenced on October 17, 2011 then was adjourned for continuation to March 27, 2012. The trial commenced with the initiation of a *voir dire*, or trial within a trial, to determine the *Charter* issues raised by defence. Csts. McGregor and Johnston were called by the Crown. Counsel for Mr. Girbav called three witnesses for the defence: Kathleen Ingram, Gregory Hubbell and Todd Girbav (in that order). Ms. Ingram was called solely to enter into evidence a total of nine photographs that she had taken on February 1, 7 and 14th that were said to depict Mr. Girbav's injuries.³ Both Mr. Hubbell and Mr. Girbav testified as to the circumstances surrounding Mr. Girbav's arrests. For reasons not stated, and contrary to preferred practice, Mr. Hubbell testified as a defence witness prior to Mr. Girbav giving evidence.⁴

Following witness testimony, the matter was adjourned to March 27, 2012 for continuation and argument on the *Charter* application. On that date, no additional witnesses were called. Counsel made legal argument and the matter was further adjourned for decision.

Girbav Trial Decision

As was mentioned above, the trial decision provides context into how ASIRT came to investigate the relevant allegations. The findings of the trial judge are not binding but, of

³ By the time of ASIRT's investigation, the court exhibits, including these photographs, had been destroyed, so these photographs were not recovered. Photographs were, however, obtained through Mr. Girbav.

⁴ While the order of defence witnesses remains fully within the discretion of the defence, it is considered preferable that the accused, who is present throughout the proceedings, be called as the first witness "otherwise, it is open to observation to the jury that the accused has coloured or adapted his evidence to fit in with the evidence of the witnesses who have preceded him". *R v Christensen* 1923 CarswellAlta 23, [1923] 1 W.W.R. 1307, [1923] 2 D.L.R. 379, 19 Alta. L.R. 337, 39 C.C.C. 203 at para. 26.

course, could be somewhat persuasive *if* the evidence obtained during the course of the investigation remained consistent. It should again be noted that the trial judge arrived at her decision based on the evidence that was called during the course of the trial. At the time, the court did not have the benefit of additional available evidence that was not called nor the evidence obtained subsequently in the course of the ASIRT investigation.

On July 26, 2012, the Trial Judge delivered her decision in the trial. She found that Mr. Girbav had established breaches of his rights under ss. 7 and 10(b) the *Charter of Rights and Freedoms*. These combined to end the prosecution, through a judicial stay and the exclusion of critical evidence. The Court accepted the evidence of Mr. Girbav and Mr. Hubbell as credible and reliable and the relevant findings of fact were made exclusively based on their evidence. The Court expressly rejected the evidence of the officers. The Court stated that Mr. Girbav had sustained a “beating” at the hands of police.⁵ Indeed, the Court found that, accepting Mr. Girbav’s evidence, he sustained “numerous blows from fists, feet and at least one blow from a baton”.⁶ The Court also found, again based on the evidence of Mr. Girbav, that Cst. McGregor interfered with Mr. Girbav’s opportunity to contact counsel of choice.

While the Court expressly distinguished this case from another wherein officers were found to have “perjured themselves”, in describing their testimony, the Court made findings using phrases such as “distortion by the police officers of the facts” and “exaggerations that smack of a “cover story” to support a violent takedown”. A review of the decision would have clearly left one with the belief that the officers in question used excessive force in the arrest of Mr. Girbav and may have committed the offence of perjury.

ASIRT’s Investigation

As noted above, ASIRT’s investigation was, in effect, a full investigation focused specifically on the alleged conduct of the involved officers. This was a fresh examination of the events from an objective and independent perspective that sought any available evidence regarding what had occurred. In addition to the witness statements and evidence obtained during the course of the initial CPS investigation into Mr. Girbav’s conduct, the evidence given at trial was obtained and considered and those involved were asked to provide additional evidence focusing on the conduct of the officers. It must be remembered that witness statements given at the time were focused on describing the actions, behaviour and contact with Mr. Girbav, as the subject of that investigation. As

⁵R v *Girbav*, 2012 ABPC 219 at para. 5

⁶ *Supra*, para. 29.

such, reference to the conduct of the involved officers was more incidental to a description of events related to Mr. Girbav.

Based on the available evidence both in the investigative file and the evidence given at trial, to ground an allegation of assault and/or perjury, evidence capable of providing reasonable grounds to believe those offences were committed would have to come, primarily, from Mr. Girbav and his friend and roommate at the time, Mr. Greg Hubbell, whose testimony at trial was accepted by the trial judge.

To be clear, the focus of this investigation and the subsequent analysis is not on whether Mr. Girbav committed criminal offences on the date in question or at the trial of this matter, nor is our focus on the lawfulness of the conduct of the passenger at the time of the incident or at trial. The focus is on the dynamics of what happened between Mr. Girbav, his passenger and police and an assessment of the credibility and reliability of all the witnesses based on all the evidence obtained in this investigation. Mr. Girbav's and Mr. Hubbell's evidence as to what occurred prior to police contact will not be detailed to the same degree as other aspects except as necessary to highlight factors that might have impacted their perceptions and/or memory of that night.

Witness Evidence

Cst. Tyler McGregor

In terms of evidence from this subject officer, ASIRT obtained the investigative report, Cst. McGregor's notes, and his sworn evidence at trial.

Cst. McGregor testified as the first witness on the *voir dire*. Cst. McGregor was partnered with Cst. Curtis Johnston, with Cst. Johnston driving the marked police vehicle.

Cst. McGregor testified that Mr. Girbav's vehicle first came to his attention travelling eastbound on 70th Avenue:

"travelling at a high rate of speed. My quick estimate of that time was between 70 to 80 kilometres an hour". (emphasis added)

As the vehicle approached Macleod Trail, it slammed on its brakes hard but he believed it still would have been proceeding at about 50-60 km/hr. It made a hard right turn onto Macleod, began sliding across Macleod Trail, then heavily accelerated and ended up high-centred on the snow and ice piled up on the centre median, with the back half of the vehicle on the southbound lanes and the front of the vehicle on the northbound lanes.

Macleod Trail was largely clear of snow but did have some icy patches. Cst. McGregor had not been on 70th Avenue so he could not comment on those road conditions. Macleod Trail has a speed limit of 60 km/hr, while 70th Avenue would have been 50 km/hr. He described the traffic as moderate, indicating that it tended to be a busier time because people were “clearing out” of nearby bars.

He advised that he and Cst. Johnston both exited the police vehicle. As he came up to the driver’s side window, Cst. Johnston was already there and had been asking the driver to turn off the vehicle. He did not observe or hear any response from the driver and believed there was no response. Cst. Johnston made his way to the front of the vehicle as Cst. McGregor took his place at the driver’s window. As he did so, the rear tires began to spin as the driver, Mr. Girbav, apparently pressed on the accelerator. At that point, it was Cst. McGregor’s belief that Mr. Girbav was trying to flee the scene.

Cst. McGregor was asked about breaking the window and whether he had given any instructions to Mr. Girbav prior to that. Cst. McGregor testified that after Cst. Johnston had made his way to the front of the vehicle, he himself had asked the driver, quite loudly, to turn off the vehicle and exit the vehicle. He indicated he did this twice before he broke the window. He advised that there was no response from the driver, who did not look at him but looked straight ahead the entire time while he was giving directions.

Cst. McGregor testified that he could hear the engine revving and see the tires spinning and smoke when the driver was pressing on the accelerator. Cst. McGregor used his baton to break the driver’s side window, reached into the vehicle to unlock the door and pulled Mr. Girbav from the vehicle, taking him immediately to the ground, where Mr. Girbav landed, face down. He handcuffed Mr. Girbav hands behind his back and then sat him up, at which point he observed a cut above Mr. Girbav’s left eye, which he attributed to having occurred during his removal from the vehicle and takedown to the ground. It was “bleeding pretty good”. They had been on scene approximately 4 minutes.

Cst. McGregor formed an opinion that Mr. Girbav’s operation of a vehicle was impaired by alcohol. Mr. Girbav was placed under arrest, Chartered and cautioned. He contact Emergency Medical Services (EMS) and requested their attendance for Mr. Girbav’s cut to his head. After Mr. Girbav had been seen by EMS and declined any further treatment, he was transported to the District 6 office and provided an opportunity to contact counsel. He was believed to have spoken with counsel. He was subsequently brought before an Intoxilyzer where he provided two samples of his breath. The Intoxilyzer technician prepared and provided Cst. McGregor with a Certificate of Analysis which Cst. McGregor served upon Mr. Girbav. The Certificate of Analysis, entered as an exhibit on

the *voir dire*, reflected that Mr. Girbav had provided two samples of his breath, that both resulted in an analysis of his blood alcohol level to be 210 mg/%.

On cross-examination, counsel for Mr. Girbav challenged Cst. McGregor on his notes, alleging they were not “detailed notes” as required. Those notes were not made an exhibit during the trial. Considerable cross-examination was also pursued in relation to Mr. Girbav’s detention at the 6 District office, the exercise of right to counsel and the observations during breath testing.

There is no doubt that there were aspects of the encounter that were not memorialized in fine detail in Cst. McGregor’s notes. To the extent that this was used to suggest recent fabrication, however, it should be noted that examining the whole of the officer’s report and notes, something that was not available to the trial judge, aside from very slight inconsistencies that one might expect could be consistent with the vagaries of time and memory, the information contained therein was consistent with Cst. McGregor’s testimony.

An example of an area of cross-examination on the failure to make complete notes related to Cst. McGregor’s directions to Mr. Girbav, when he was at the driver’s side door of the vehicle. In answer to questions from both Crown and defence counsel, Cst. McGregor repeatedly described those directions as having been made loudly, ultimately stating “I was yelling at him absolutely”. While he had documented in his notes and report that he had directed Mr. Girbav to turn off and exit the vehicle, Cst. McGregor had not specifically noted that these demands were made loudly, or were yelled at Mr. Girbav. This and other similar issues were used to suggest that Cst. McGregor was essentially fabricating the additional details not contained in his report and notes. Allegations of recent fabrication can be used to damage a potential witness’s credibility. As will be seen, however, with the availability of the independent civilian witness’s evidence, it would seem clear that this was not a fabrication and that, indeed, the demands or directions were made clearly and loudly, so much so that the civilian witness clearly heard them and advised that she believed they would have easily been heard in the vehicle.

Cst. Curtis Johnston

Cst. Johnston was the second witness to testify on the *voir dire*.

Cst. Johnston advised that he observed Mr. Girbav’s vehicle operating at a high rate of speed, he estimated that as it approached the intersection, it would have been going approximately 70-80 km/h in a 50 km/h zone. The vehicle appeared to slam on the brakes and began to spin, narrowly missing a vehicle, until it came to a rest on the median. Cst.

Johnston indicated that they activated their emergency equipment and pulled their marked police vehicle over to further investigate. Cst. Johnston testified that he told the driver to turn off the vehicle, and that the driver looked at him and seemed to shrug it off. He had his service weapon drawn at this point. He then went to the passenger side to deal with the passenger. The vehicle tires continued to spin. Cst. McGregor then broke the window and Mr. Girbav got out of the vehicle. He later noticed a cut on Mr. Girbav's forehead that he attributed to him falling while being walked to the police vehicle. There was no other physical altercation.

One somewhat innocuous fact that ultimately was relied upon as demonstrative of the position that the evidence of the involved officers was unreliable was that Cst. Johnston testified that in response to his demands to turn off and exit the vehicle, Mr. Girbav was smiling whereas Cst. McGregor testified that in observing Mr. Girbav, there was no response and that he simply faced forward. As an inconsistency, it was minor but the conflict concerned the Court.

Both Cst. McGregor and Cst. Johnston were consistent on the following chronology of events:

- Cst. Johnston exited the police vehicle first and moved to the driver's door first.
- Cst. Johnston had been dealing with Mr. Girbav and had made demands *before* Cst. McGregor made it to the driver's door.
- That Cst. McGregor would have been approaching Cst. Johnston's position from behind and slightly to the side.

Cst. Johnston was asked whether Cst. McGregor would have seen Mr. Girbav smiling and indicated that he believed he would had. It was a troubling question as it was asking the witness to speculate as to what another witness might have seen, particularly having already acknowledged that Cst. McGregor was somewhere behind and to the side of him. As was noted, Cst. McGregor indicated that Cst. Johnston had already been dealing with the driver and made demands *before* Cst. McGregor arrived at the driver's door. Cst. McGregor testified that he did not know what Mr. Girbav's response was to Cst. Johnston's demands.

In addition to Cst. Johnston's evidence at trial, his notes, made at the time and in his own handwriting, provided a much needed chronology, which clarified that his own observation of Mr. Girbav smiling occurred in response to his own demands. Furthermore, the chronology noted clearly that Cst. Johnston's demands were made, the driver smiled in response and made no effort to comply and that it is only after these

events that Cst. McGregor “approached” the driver’s door to make demands. As such, there was a very simple possible explanation as to why Cst. Johnston would have seen Mr. Girbav smiling and why Cst. McGregor might not have. This “exchange”, for lack of a better word, between Cst. Johnston and Mr. Girbav occurred *before* Cst. McGregor arrived at the driver’s door, at a point where Cst. McGregor’s ability to see the driver would have been obstructed partially or completely by Cst. Johnston. While Cst. Johnston believed that Cst. McGregor would have seen this, it is very clear on the evidence that his attention was on the driver in front of him and not Cst. McGregor, so a belief as to what Cst. McGregor might have seen was more of an assumption, if anything. Immediately thereafter, Cst. Johnston moved to the front of the vehicle and Cst. McGregor commenced making his own demands of Mr. Girbav. At that point, their perspective would not have been from the same vantage point. Cst. Johnston testified that once his partner moved towards the driver’s door, he started to make his way around the front of the vehicle and, ultimately, to the passenger side to deal with the passenger, Mr. Hubbell.

Another inconsistency related to Cst. Johnston’s recollection that once Cst. McGregor broke the driver’s side window, Mr. Girbav exited the vehicle and fell out of the car onto the pavement. This, of course, was distinctly different from Cst. McGregor’s evidence that he pulled Mr. Girbav from the vehicle and took him to the ground. It is clear, however, that as Cst. McGregor was dealing with Mr. Girbav, Cst. Johnston was moving to deal with the passenger, particularly because they were unaware at that point whether the vehicle might, in fact, be stolen. His attention was divided.

As this was an inconsistency, it had to be considered whether the officers were deliberately lying or whether one or both officers could have an honestly held but mistaken belief as to how Mr. Girbav ended up being on the pavement after exiting the vehicle. Given that both Mr. Girbav and Mr. Hubbell initially alleged that Mr. Girbav had been pulled from the vehicle, albeit their description of how that happened compared to Cst. McGregor’s evidence, on balance, the evidence would favour a finding that Mr. Girbav was pulled from the vehicle by Cst. McGregor and/or additional officers.

As such, the focus would have shifted to whether Cst. Johnston was mistaken or whether he deliberately lied. In making that assessment, one must be mindful that firstly, he viewed these events while moving to deal with the passenger from the front of the vehicle to the side. Additionally, when detailing his evidence, he testified that he could not see exactly what Mr. Girbav might have been doing when Cst. McGregor broke the window, as it was dark inside the vehicle and his position in front of the vehicle interfered with his ability to see what might be happening. Lastly, it should go without saying that

aspects of these events occurred in a fraction of a second while both officers were in a dynamic environment where they had to be situationally aware of their entire surroundings. Cst. Johnston clearly testified that while Cst. McGregor was dealing with the arrest of Mr. Girbav, he was dealing with the passenger and he wasn't right by Cst. McGregor when he "was taking him (Mr. Girbav) out". Practically speaking, in all the circumstances, the evidence could support an inference that Cst. Johnston was honestly mistaken.

Another source of concern for the trial judge was the alleged inconsistency on the issue of struggle/no struggle. The difficulty is that the inconsistency relies quite heavily on what the speaker might define as a struggle. Both officers described that at one point Cst. McGregor was physically engaged with Mr. Girbav. This is what Cst. Johnston, who was not immediately physically dealing with Mr. Girbav, described as a struggle. While Cst. McGregor did not define his contact with Mr. Girbav as a "struggle", he clearly testified that he physically pulled Mr. Girbav from the vehicle and took him to the ground. As such, is it truly a significant inconsistency that the one officer only briefly observing this contact while moving to deal with the passenger would describe that contact as a struggle? Respectfully, given that Cst. Johnston was unable to articulate exactly what he saw to be a struggle, it is an inconsistency that must be weighed but may be a distinction based on the eye of the beholder.

Gregory Hubbell

As mentioned earlier, any grounds to believe that the subject officers either used excessive force or perjured themselves would turn on the strength of the evidence of both Mr. Hubbell and Mr. Girbav as to what occurred that day.

Mr. Hubbell provided evidence on October 17, 2011 in Mr. Girbav's trial. He was also interviewed by ASIRT. Prior to the interview, he refreshed his memory by reviewing a transcript of his evidence at trial. In the interview, he maintained what he had stated at trial.

a) Evidence at trial

The evidence at the initial trial constituted, effectively, a prior statement of Mr. Hubbell for the purposes of our investigation. Mr. Hubbell was a friend of Mr. Girbav, was living with him at the time of trial, and was the only passenger in Mr. Girbav's vehicle at the time of the incident. Mr. Hubbell indicated that on the night in question, he had been with Mr. Girbav at a licenced premise over the period of approximately 6-6:30 pm to 12:30 – 1:00 a.m. watching UFC fights and that he would only have consumed 6 Kokanee beer

over the approximately 6 ½ hour period. He testified that he had no concerns about Mr. Girbav's condition or driving and attributed the event to terrible, icy road conditions. He characterized Mr. Girbav's driving as appropriate for the terrible road conditions. The road conditions caused Mr. Girbav's vehicle to slide as he reached the intersection in question. In response, he believed Mr. Girbav panicked and hit the gas instead of the brake, leading to the vehicle spinning out and coming to rest on the median.

Following their becoming caught up on the median embankment, Mr. Hubbell testified that as soon as that happened, "we were surrounded by police" and that he could see "a few policemen in front of him". He stated that he remembered the car "being surrounded, a lot of people yelling". The driver's window was smashed and that he saw Mr. Girbav being violently removed from the vehicle "by more than two police".

Mr. Hubbell also stated, unequivocally, that he was removed from the vehicle, although he could not recall anything about who removed him, and stated he was then handcuffed. He denied having exited the vehicle and tried to run from the scene.

He testified that he had no concerns about the speed of the vehicle given the road conditions and stated "I think we slipped on some ice, and as we were coming to the intersection, Todd maybe overcorrected to avoid a car, and I think might have hit the gas a little bit instead of the brake in a little bit of a panic".

He did mention that the intersection they were approaching was a T intersection and that they were going to a Wendy's on the left hand side of the intersection before it intersected with Macleod Trail.

At trial, Mr. Hubbell expressly denied that Mr. Girbav was going pretty fast before he started braking. He did not recall one officer at the driver's door loudly making commands and he did not recall any banging on the driver's side window. He expressly rejected the suggestion that there had only been one officer at the driver's side of the vehicle and one in front of the vehicle. His recollection was multiple officers in front of the vehicle. He also rejected any suggestion that only one officer removed Mr. Girbav from the vehicle. He testified that at least two, if not three, officers removed Mr. Girbav from the vehicle. On multiple occasions he maintained that multiple officers were present from the start, "more than five or six policemen at the scene at the time". Mr. Hubbell denied that he attempted to flee the scene.

b) Interview

During his interview, Mr. Hubbell provided additional evidence that had either not been provided at trial or was inconsistent with his trial evidence. Mr. Hubbell now stated that there was a chance that Mr. Girbav should not have been driving because of alcohol consumption but that this had been Mr. Girbav's decision to make. Contrary to his testimony at trial, he now stated Mr. Girbav may have been going a little too fast for the road conditions. He advised investigators that at the time of the incident, he thought police had shot out the window but now knows they smashed the window out. When they ended up on the median, he recalled police "vehicles" and that "police surrounded the vehicle". He now recalled hearing police yelling "stop, stop". He maintained that before Mr. Girbav was removed from the vehicle, 7-8 police officers were around the vehicle. Two to three officers were standing off to the side of the vehicle with their guns drawn near the front of the vehicle. He advised that he told Mr. Girbav to stop.

At the time of the interview, Mr. Hubbell now stated he had not been focusing on Mr. Girbav's removal from the vehicle but was, instead, focused on an officer at the passenger side door. He advised investigators that he couldn't recall exactly Mr. Girbav's removal from the vehicle but was still certain that there were several officers that removed Mr. Girbav. In the interview he indicated that he saw a group of police officers putting Mr. Girbav on the ground. At no time did he see any officer punch, strike, kick or use a baton on Mr. Girbav. He stated that an officer with a British accent removed him from the passenger side of the vehicle, handcuffed him and placed him in another police vehicle.

Todd Girbav

Mr. Girbav was interviewed by ASIRT in 2018. He advised that the trial transcript of his testimony accurately depicted what happened in 2009.

At the time of trial, Mr. Girbav testified that he was gainfully employed following obtaining a diploma, graduating with distinction. He referred to a scholarship for academic achievement. He acknowledged a dated related criminal record with impaired driving related offences from 1991 and 1998, as well as a conviction for theft in 2000.

He stated that, on that day, he lost control on an icy road and almost collided with another vehicle. He became stuck on the median and was trying to free his vehicle. While trying to free his vehicle, he had music playing and did not realize there police were present. Mr. Girbav stated that he "couldn't hear them yelling or whatever the case may be." Mr. Hubbell was the one that pointed out the police to him. The officer then smashed his window and assaulted him with a weapon. The first strike was with something metallic.

A second officer helped at this point, and he was dragged out of the car and taken hard to the ground. In his evidence, Mr. Girbav indicated that once pulled out of the vehicle he felt repeated punches to the head then was taken hard to the ground by several officers as he was tackled and “piled on” on the ground. He felt the weight of several officers on him and they ground his head into the ground. The blows continued at this point. He testified he “might have been kicked a couple of times”. He was eventually handcuffed, and then other officers arrived. An officer with a Scottish accent said, “you better get something on this guy or you could have a problem.” He maintained the officers could not have been at his vehicle for more than five seconds before the window was smashed out. At trial, his evidence was unable to identify who had smashed the window and struck him in the head, other than it was an officer in a CPS uniform. On cross-examination, he was firm in his belief that more than one officer pulled him from the vehicle, “it felt like it was several officers”. He was adamant that when he looked over, there were two officers at the door. He stated “I remember it actually both officers were beside my door when they effected the – when they removed me from the vehicle”. He indicated that in a moment, less than a minute, at least four officers were there.

Mr. Girbav acknowledged that he did not see the police emergency flashing red and blue lights. He also testified that he did not recall “ever seeing” an officer in front of his vehicle.

Mr. Girbav did not make a professional standards complaint at the time because he did not trust that process.

He testified that he attended a hospital after the event but left because he was advised there would be an extensive wait. He went to a physician the next day or a couple of days after and was diagnosed with a severe concussion. As the wound on his forehead had started to heal, it was decided that although it might have needed stitches, it was best just to leave it, to minimize additional potential scarring. Mr. Gorbav believed the bruising depicted in the photographs on his arms was from when he put his arms up to protect his head. Additionally, he testified that he had several goose eggs on the top of his head.

In his interview with investigators, there was visible scarring on Mr. Girbav’s forehead. Mr. Girbav was pleased that the matter was now being investigated. He described that he has had a number of negative experiences with CPS and that they had charged him twice for refusing to provide a breath sample when he wasn’t even driving. He referenced his most recent conviction and indicated that he was convicted of impaired driving when he wasn’t impaired and didn’t refuse to blow.

He maintained that after he lost control and came to a rest on the median, he did not see or notice the officers. He was trying to drive off the median when Mr. Hubbell said "Todd cops" at which point the driver's window was smashed and a "rain of blows" and strikes onto him started by a police officer. He said it all happened within five seconds of initially coming to a stop and trying to reverse his vehicle. It couldn't have been any more than five seconds. The officer's actions were overzealous. Mr. Girbav indicated that he probably could or should have gone into more detail about the beating in his evidence at trial.

Mr. Girbav advised investigators that he was struck in the head with what he believed was a hard metal object, essentially the baton. He then felt "repeated blows" and looked over and saw the officer. These blows were all being directed at his head. In this interview, he now stated he recognized the officer "It was Cst. McGregor, no doubt about it". Initially he indicated he didn't go fully unconscious but did see stars. Later in his statement, he volunteered that it was possible he lost consciousness. He advised he saw the "enraged face of an officer flailing blows at me. Once he was removed from the vehicle, during the take down, a second officer joined in. He then stated that it felt like there possibly could have been two people hitting him and someone kicking him because he had a bruise on his leg. It was his belief at this time that only one officer removed him from the vehicle.

In terms of his removal from the vehicle, he indicated that he was ripped out of the vehicle and tossed out of the vehicle with his feet still down towards the pedals (floorboard). He indicated that he was taken "hard" to the ground, kind of slammed down head first onto the ground and then "they" piled on top of him. He believed the second officer got involved at that point in time. It felt like a couple sets of knees were on him and his arms were ripped back behind to handcuff. It all happened within ten seconds. According to Mr. Girbav "These guys appear to like handling people roughly. They knocked me out, beat the crap out of me, jumped on me and cuffed me and then dragged me along and let me sit in the snow and ice."

He advised that he thought he had been arrested as a result of a case of mistaken identity and did not realize that he was arrested for impaired driving until he was brought to the police station and was shocked that a breath sample demand was made. He was surprised he blew over the legal limit.

Witnesses Not Called at Trial

Civilian Witness "CW1"

Of critical importance, upon commencement of the ASIRT investigation it was discovered that there had been, in fact, an independent civilian witness who had been there the night of the incident. This witness provided a written statement to police at the time of the event. This witness had observed the vehicle's driving pattern and loss of control, and the police contact with the driver and passenger in the vehicle.

This witness was not called as a witness at trial. It is unclear why. Based on our review of the original investigative file, however, without being able to predict what the defence might allege at trial or what Mr. Girbav or Mr. Hubbell might testify to, if, indeed, they even testified, the matter on its face would have appeared to be a relatively straight forward impaired prosecution, such that the evidence of the independent witness might have been viewed as potentially helpful but not necessary to prove the offences alleged. The witness no longer resides in Calgary.

a) Written statement provided February 1, 2009.

In her statement to police, provided on scene, the then 23 year old witness related that she had been walking to her vehicle after work when a particular vehicle, later identified as Mr. Girbav's vehicle, came to her attention. She first "heard" the vehicle and then watched it as it appeared to attempt to turn southbound onto Macleod Trail, lost control, "spun around" and ended up high-centred on the median. There was a single police vehicle travelling on McLeod Trail that would have been in a position to observe the vehicle's approach and loss of control. She saw the police vehicle activate its emergency lights and pull over. She heard the officers yelling to the driver to get out of the vehicle and turn off the ignition. It appeared to the witness that the driver was attempting to get the vehicle off the median to flee the scene. She described it as the police trying to deal with the driver who, in her words, appeared to be trying to "getaway", notwithstanding the police presence. When the driver didn't comply with their directions and appeared to be trying to get off the median to flee, she saw the officer break the driver's door window in what she perceived as an attempt to "to stop the driver". She mentioned that she observed the passenger leave the vehicle.

CW1 observed these events from the moment that Mr. Girbav's vehicle came to her attention travelling at what she described as a high rate of speed and then lost control until such time as she provided her written statement, still on scene. Her written statement was provided on the same date at approximately 12:38 a.m., as documented on

the statement itself. This would mean that she would have been on scene for approximately 25 minutes. The witness statement was provided to an officer on scene, WO2, as documented on the actual written statement form. WO2 had only arrived on scene *after* Mr. Girbav was in custody, and he had not seen any events leading up to Mr. Girbav's arrest. As such, it significantly diminishes any possibility that advertently or inadvertently, her evidence might have been influenced by the observations of others.

b) Interview

This witness was also interviewed as part of ASIRT's investigation. She has no known connection to any of the parties in the incident, including the subject officers.

The witness is now a physiotherapist and holds a Master's degree in physiotherapy. She recalled these events. She advised she had been working at the Keg and had finished her shift and was walking to her car in the parking lot on the east side of Macleod Trail. At the time of this incident, she would have been approximately 100 metres from the vehicle caught up on the median. When the incident occurred, her attention was first drawn to the affected person's vehicle when she heard what she believed was "tires squeal" and saw the affected person's jeep travelling eastbound on 70th Avenue, turning southbound onto Macleod Trail. She advised that the vehicle was travelling at quite a fast speed and lost control, eventually becoming high-centred on the median.

She related that the passenger in the vehicle exited and tried to run away and was tackled by a police officer. As she indicated in her initial statement, she heard the officers yelling repeated commands which were ignored. While she could not recall exactly how the driver was removed from the vehicle after the window was smashed, she did see the officer take/tackle the driver to the ground outside the vehicle. She was very clear that when the driver was removed and taken to the ground, only one officer was dealing with him and that the second officer ended up dealing with the passenger.

When she was asked whether she saw the driver "subjected to a beating", the description of the apprehension of the driver as accepted by the trial judge, she stated that "isn't what I saw" and that the only force that she observed between an officer and the driver was when he was removed from the vehicle and taken or "tackled" to the ground. Only one officer removed the driver from the vehicle and tackled him to the ground. Once both the driver and passenger had been taken into custody by the first two officers, additional officers arrived on scene. She got into her vehicle and drove over to where the incident occurred and the officers were gathered, and provided an officer with her information

and a statement of her observations. In the interview, when asked whether she had seen the officers do anything inappropriate, she indicated “nothing”.

Witness Officer 1 “WO1”

During the course of the trial, both Mr. Hubbell and Mr. Girbav referred to an officer with a “British” accent. At the conclusion of the ASIRT investigation, of the officers present at any point during these events, WO1 was the only one that could be described as having a particular accent. WO1, holding the rank of sergeant at the time of the interview, had been with CPS for eleven years and had fourteen years prior experience in the United Kingdom as a police officer. He had a marked Scottish accent.

In his interview on May 1, 2018, he indicated that he had refreshed his memory from his own limited notes made at the time but had also seen an article about the case that had been published by a media outlet. He had not reviewed the CPS occurrence report or other officer/witness statements and had only a vague recollection of this event that had occurred almost 10 years earlier. His recollection was poor, at best, and, as such, of very limited reliability. Based on the information he had and his recollection, he advised that he would have arrived on scene after the driver was in custody and had not been present for either the driving pattern or apprehension of the occupants. He had been tasked with taking a statement from the passenger, Mr. Hubbell. When provided a copy of that statement, he was able to identify his own handwriting for the questions in the statement and he believed the answers were in the passenger’s own handwriting. When asked if he would have told the passenger that he had to provide a statement or he would go to jail, as testified to by Mr. Hubbell, WO1 vehemently denied making any such statement and indicated that he would never threaten someone with jail, and to best of his recollection, the passenger’s release was not contingent on the provision of any statement. When provided the opportunity to respond to the suggestion that he made a statement at the scene to the effect that the initial officers “better get something on him quick or we could have a serious problem”, he denied making any such statement, indicating that this would not be something he would ever say.

Witness Officer 2 “WO2”

WO2 and WO3 had been dispatched to assist the two subject officers with an impaired driver. When they arrived on scene, the driver was in custody and seated in the back seat of the subject officers’ police vehicle. He had no contact with either of the occupants of the suspect vehicle. He could not recall if he had any conversation with the subject officers or the details of any such conversation but indicated that he likely would have

spoken with them regarding what had happened before his arrival, so he could understand what was going on and what assistance might be needed. He recalled WO1 being on scene but could not recall who arrived first. While on scene, he spoke with CW1 and took a written statement from her but cannot recall specifics about how that came about. The subject officers left with the impaired driver and he and WO3 remained on scene waiting for a tow truck for the suspect vehicle. Having read the occurrence report, he was aware that EMS had been called to the scene to assess the driver but he had no independent recollection of this.

Witness Officer 3 "WO3"

WO3 had no independent recollection of these events and had not made any notes that night to refresh his memory. At best, he could recall that they responded to offer assistance in an impaired driving case.

Witness Officer 4 "WO4"

WO4 was the Intoxilyzer technician at the CPS District 6 office who took breath samples from Mr. Girbav on the date in question. Based on his notes, made at the time, Mr. Girbav presented with an extremely strong odor of alcohol on his breath, appeared flushed, with glassy bloodshot eyes and that he exhibited "thick" speech, a dry mouth and that he would "click" his tongue. WO4 observed Mr. Girbav to be unsteady on his feet. He ultimately obtained two samples of Mr. Girbav's breath, being 214 and 217 mg/%, which were rounded down to 210 mg/% for the purposes of the contents of the Certificate of Analysis. He noted a cut over Mr. Girbav's left eye.

EMS witnesses

Of the two EMS witnesses, one was located but had no independent recollection of these specific events, which had occurred some 9 years earlier. Unfortunately, given the passage of time, the Patient Care Report (PCR), which would have constituted the members' record and notes in relation to this event, could not be located. As such, there were no records that the EMS member could review and refresh his memory from. ASIRT attempted to locate the second EMS member who responded to the call, but were unable to do so. The person was no longer an employee of Alberta Health Services. From a practical standpoint, it is likely that this witness would have been in the same position as the other EMS member, without the ability to refresh their memory given the loss of the Patient Care Report.

Communications

Due to the gap in time between the offence in 2009 and the ASIRT investigation in 2018, almost all police communications were no longer available. The only communication located was a call from CPS to EMS requesting an ambulance for a “drunk driver” with a cut on his forehead.

Injury Photographs

The Affected Person supplied photographs of his injuries and the damage to his vehicle to ASIRT. Those photographs depict a bloodied vertical laceration above his left eye, minor bruising and discoloration surrounding his left eye, bruising to his outer left bicep, and bruising underneath his right elbow.

Analysis

As a starting point, it is worthwhile to affirm that when a witness is incorrect in their evidence on a particular point, there are several possible explanations for that error. Firstly, a witness can be mistaken. Explanations as to why someone might be mistaken could be many and varied but could include a misperception of something, such as has been seen with the frailties of eyewitness identification, or impairment by drugs or alcohol, which can negatively impact perception, judgment and memory. Frailty of the human memory can also play a part, and as can be seen, for some witnesses who were interviewed years after this event, in the absence of notes, reliance solely on memory gave rise to reliability issues.

Another possible explanation, however, would be deliberate dishonesty. For the witnesses that testified at trial, knowingly providing false evidence under oath would be perjury. Any assessment of whether a witness had lied would include consideration of whether the witness has an interest or motive to colour the truth. For example, from the perspective of the trial judge, when it came to Cst. McGregor and Cst. Johnston, she inferred that their evidence was engineered to justify an overreaction to Mr. Girbav’s conduct and to cover up the “beating” that they had purportedly administered.

It should also be noted, however, that for Mr. Girbav, the possible consequences of a conviction for an impaired driving related offence would have been significant and would have included another criminal offence to his criminal record, a prohibition against driving for an extended period of time, and related insurance consequences. Additionally, although dated, Mr. Girbav had convictions for impaired driving related

offences in 1992 and 1998, which would have exposed him to more significant, higher penalties.⁷⁷

Mr. Hubbell was the friend and roommate of Mr. Girbav. That does not necessarily equate to a willingness to deliberately lie to protect Mr. Girbav but one would need to be mindful of that relationship to assess whether it might influence Mr. Hubbell's perception of the event or colour his evidence. This could range between a potential subtle influence or a subconscious bias in favour of his friend to a potential willingness to deliberately lie to protect his friend. This is really no different than how carefully one should assess any witness's evidence, including any police witness.

A further observation should be made regarding witness evidence generally. There will always be inconsistencies between witnesses. Some inconsistencies might be on minor points and might be the result of witnesses simply perceiving the event from a different position or perspective. Indeed, it can even be cause for concern when evidence between witnesses is too similar, potentially giving rise to a suspicion that the witnesses have collaborated, particularly when the witnesses use the same language. All this is to say that any inferences regarding reliability that are to be drawn from inconsistencies are highly influenced by the specific circumstances and the available evidence in any given case.

In this case, had the trial judge had the evidence from CW1, it is difficult to imagine that it would not have significantly changed or impacted the assessment of the credibility of not only Mr. Girbav and Mr. Hubbell, but also Cst. McGregor and Cst. Johnston. In turn, this would have significantly impacted the resulting findings of fact.

CW1 is an objective, independent, sober witness who had no ties to any of the involved parties. She was also in an immediate and ideal position to observe what was happening and was on scene for an extended period of time. She had no reason to lie or colour her evidence, either at the time of the incident or at the time of the ASIRT investigation. She was also unaware of what the witnesses called at trial might have said. As such, her evidence that is consistent and corroborative of the evidence of the subject officers is quite compelling. Equally important, her evidence clearly contradicted several key

⁷⁷ ASIRT is aware that Mr. Girbav has a subsequent conviction after trial for refusal to provide a breath sample related to a 2015 incident where he was operating a motor vehicle, again on McLeod Trail, and proceeded through a red light. He was stopped, officers formed grounds to make a breath demand and Mr. Girbav refused to comply. While a somewhat interesting coincidence as to location, it has little probative value to the issues relevant to this particular investigation.

components of the evidence of Mr. Girbav and Mr. Hubbell, critically impacting any findings in relation to the credibility of Mr. Girbav and Mr. Hubbell.

Both Mr. Girbav's and Mr. Hubbell's narrative of the events leading to the removal of Mr. Girbav from the vehicle and his arrest, accepted by the trial judge, are belied now not just by the evidence of the officers but more importantly, by CW1.

Looking at the whole of the evidence, and in particular, as augmented by the evidence from CW1, the following would reasonably appear now to be firmly established:

- Both Cst. Johnston and Cst. McGregor made multiple clear and very loud demands to Mr. Girbav to turn off the vehicle and also to exit the vehicle. Notwithstanding Cst. McGregor's failure to note at the time that these demands were made "loudly", this evidence was corroborated by CW1 who, despite being some distance away, had no difficulty hearing and understanding the demands being made.
- The evidence of Mr. Girbav and Mr. Hubbell was already somewhat inconsistent on this point to start. Evidence that no demands were made and that the "officers" immediately, within seconds of the vehicle having come to rest on the median, resorted to violence by pulling Mr. Girbav from the vehicle, or that upon coming to rest, brief demands may have been made but that they did not hear them, now appears unreliable.
- It appeared critical to the narrative of both Mr. Hubbell and Mr. Girbav that they were "surrounded" by multiple police officers and cars, and that at least two officers pulled Mr. Girbav from the vehicle and that he was then set upon by multiple officers. This also appears wholly unreliable.

With the additional independent evidence of CW1, it appears firmly established that both officers directions to Mr. Girbav to turn off the vehicle and exit were made very loudly, so loudly that CW1, who was some distance away, had no difficulty hearing them.

CW1, who would have had no information as to what Mr. Girbav and Mr. Hubbell would later allege, or that it would even be an issue, clearly recollected that in the moments following Mr. Girbav's vehicle being hung up on the median, there were only two officers on scene. This corroborates the evidence of Cst. McGregor and Cst. Johnston. It is also corroborated by the notes and statements of some of the witness officers as to the documented time they arrived on scene, clearly *after* Mr. Girbav had been arrested and placed in handcuffs. Both Mr. Girbav and Mr. Hubbell take great pains to describe an overwhelming and significant police presence, and that Mr. Girbav was removed from

his vehicle by several officers who then reportedly set upon him. Based on the evidence of CW1 alone, this *did not* happen. Indeed, CW1, who was on scene from the start of these events when Mr. Girbav lost control of his vehicle to the time she provided a written statement, approximately 25 to 30 minutes later, stated unequivocally that, aside from the removal of the driver and taking him down to the ground, she did not see any other use of force by police.

Based on the whole of the evidence, notwithstanding the findings of the trial judge at trial, the evidence of both Mr. Girbav and Mr. Hubbell is now demonstrably flawed and unreliable. Remarkably, even Mr. Girbav's and Mr. Hubbell's own evidence, between their trial testimony and subsequent interview with ASIRT, is internally inconsistent on some critical areas. In terms of Mr. Hubbell, he appears to have had some sort of epiphany since he gave evidence at trial, as he now indicated that Mr. Hubbell may have been driving "too fast" before braking and losing control of the vehicle and that he did not see any officers strike, kick or administer any force to Mr. Girbav other than forcibly removing him from the vehicle.

Perjury

Perjury is an offence that is often misunderstood or mischaracterized. It is not necessarily perjury when a witness asserts a particular fact that is later demonstrated or believed to be incorrect or false. To constitute perjury, a person must make a false statement, under oath or solemn affirmation, *knowing* that statement to be false, with the intent to mislead. As such, where a witness testifies to something they genuinely believe to be true, even if it is later determined not to be the case, it would not be considered perjury. Witnesses can be mistaken. Furthermore, to prove perjury requires substantially more than testimony that is contradicted by another witness.

The Trial Judge found seven specific areas of concern in the Subject Officer's testimony. These areas of concern are mostly inconsistencies, and one consistency. Taken on their own, the areas of concerns highlighted by the Trial Judge would require strong evidence to rise to the level of providing reasonable grounds to believe that the officers perjured themselves, since those inconsistencies do not appear to fall outside of the range of ordinary fluctuations between witnesses with different viewpoints and ordinary memory issues. Indeed, it appeared this was recognized by the Court, as it took great pains to distinguish this particular case from another case where perjury had been clearly found. Aside from the evidence of Mr. Girbav and Mr. Hubbell, the evidence gathered during the ASIRT investigation corroborates the evidence of the subject officers and provides no evidence to believe that either officer committed any alleged violent beating that day nor

that the subject officers perjured themselves when they provided evidence at trial. The trial judge's suspicion that the officers had a motive to colour or exaggerate their evidence to cover up an alleged violent beating fails if that beating never occurred.

In an overarching assessment of the reliability of the evidence of Cst. McGregor, Cst. Johnston, Mr. Girbav and Mr. Hubbell, there were inconsistencies identifiable in all their evidence. In considering the reliability of the evidence of Mr. Girbav and Mr. Hubbell, however, it is potentially compromised by an additional factor, that being the consumption of alcohol. Mr. Girbav provided breath samples that, if accurate, would have established at the time of these events that his ability to operate a motor vehicle was impaired by alcohol. Indeed, most experts providing evidence on the effects of alcohol on the human body generally accept, with very limited exceptions, that a person is impaired at a blood/alcohol level of 100 mg/% and that the effects of alcohol first impact, among other things, judgment and perception. Mr. Girbav's blood alcohol was more than twice over that 100 mg/% benchmark and almost three times over the legal limit. While impairment by alcohol does not mean that a trier of fact must, as a matter of law, reject the evidence of that person in its entirety, where there is a conflict in the evidence, one must consider whether alcohol might have compromised the evidence of that witness. Mr. Hubbell had also been consuming alcohol on the night in question.

It is also important to note that while there were inconsistencies between the evidence of the officers, based upon the evidence given at trial and provided in statements to ASIRT investigators, there were now significant inconsistencies between the evidence of Mr. Girbav and Mr. Hubbell. Based on the new evidence of Mr. Hubbell, he now thought that Mr. Girbav might have been driving too fast, and that is why they lost control and ended up on the median. This contradicted the evidence of Mr. Girbav and corroborated the evidence of Cst. McGregor, Cst. Johnston and CW1. Mr. Hubbell, seated further away from the driver's door than Mr. Girbav, now advised he clearly heard police making demands. Perhaps most importantly, Mr. Hubbell stated that aside from removing him from the vehicle, he did not see any assault, beating or use of force in relation to Mr. Girbav.

Overall, the evidence gathered during the investigation, when viewed as a whole and including the evidence from witnesses not called at the criminal trial, leads to likely conclusions that are different from the findings of the criminal trial.

The starting point is the loss of control of the vehicle by Mr. Girbav. On this point, the subject officers, CW1, and Mr. Hubbell all state that the vehicle was or may have been

travelling too fast, before Mr. Girbav lost control of the vehicle and that this appeared to have contributed to the loss of control.

There is little dispute that when the two officers approached his vehicle, Mr. Girbav ultimately began trying to drive the vehicle off the median. This takes us back to the original issues to be considered for the purposes of the ASIRT investigation.

At the time of the arrest, were Cst. Johnston and/or Cst. McGregor lawfully placed and acting in the lawful execution of their duties?

It is beyond dispute that both Cst. McGregor and Cst. Johnston were, at all times during this incident, lawfully placed and acting in the lawful execution of their duties. Having observed a concerning driving pattern and what might be described as a single vehicle accident (narrowly missing a collision with another civilian vehicle), they were entitled to investigate and/or provide assistance.

Did Cst. Johnston and/or Cst. McGregor use force in the arrest?

Based on the whole of the evidence, it is beyond dispute that some force was used in furtherance of their investigation and the arrest of Mr. Girbav, who was lawfully detained. At a minimum, Cst. McGregor acknowledged that he broke the driver's side window, opened the door and pulled the driver from the vehicle, taking him to the ground. This constitutes the use of force. During that use of force, Mr. Girbav sustained injuries as earlier identified.

If one were to believe that, as alleged by Mr. Girbav, multiple officers administered additional kicks, punches and at least one strike with a baton, once he had been removed from the vehicle, that would also constitute a use of force.

Regardless of whose evidence is believed, the evidence establishes that Cst. McGregor was involved in a use of force. As such, it is necessary to proceed to the next stage of analysis.

If so, was the force used no more than reasonably necessary to achieve their lawful purpose?

Under s. 25 of the *Criminal Code*, officers are entitled to use force during the execution of their lawful duties provided they use no more force than reasonably necessary. Lethal force will only be authorized, however, where officers are faced with a situation where there are objectively and subjectively reasonable grounds to believe that it is necessary to prevent grievous bodily harm or death to the officer or another person. Under S. 34 of the

Criminal Code, any person, including a police officer, is entitled to the use of reasonable force in defence of themselves or another.

In this case, even in the eyes of CW1, as police were attempting to deal with him, Mr. Girbav was attempting to set the vehicle in motion and appeared to be attempting to flee the scene. Additionally, both officers were in close proximity to the vehicle, one immediately to the side and one in front, potentially placing them in harm's way. Lastly, Mr. Girbav's driving had already resulted in a loss of control and near collision with a civilian vehicle. Mr. Girbav had disregarded clear, loud lawful demands to stop or turn off and exit the vehicle.

When a driver is not responding to lawful commands to stop and turn off the vehicle, that vehicle presents a safety risk to police and other nearby users of the road. Police are entitled to take reasonable actions to ensure that vehicle will not drive further. Getting into the vehicle and removing the driver is entirely reasonable where the driver is not following lawful commands. This can include smashing the window to gain access, where necessary. Where the force is minimal and follows the failure of other means, such force is permitted by s. 25 of the *Criminal Code*.

Breaking the window and pulling the non-compliant Mr. Girbav out of the driver's seat and taking him to the ground was reasonably necessary. In terms of a use of force, it was purposeful and ceased as soon as the driver was contained. It was not gratuitous nor punitive. The force used was no more than what was reasonably necessary to affect their lawful purpose.

If there was reliable evidence that once Mr. Girbav had been removed from the vehicle he had been set upon by multiple officers who administered a "violent beating", that would fall outside what was reasonably necessary to effect the arrest of Mr. Girbav based on the available evidence. To provide reasonable grounds, however, one would have disregard not just the evidence of the two officers but also the statement Mr. Hubbell provided to ASIRT investigators and, more importantly, the independent evidence of CW1. Mr. Girbav's evidence was self-serving, and his judgment and perception of these events would have been impaired by alcohol and potentially the blow to his head on the pavement. The evidence related to Mr. Girbav's injuries, as reflected in the photographs, was at least equally consistent with Cst. McGregor's description of the events, if not more so. The placement of the bruises on the arms was reasonably consistent with what one might expect from being grabbed and forcibly pulled from the vehicle, and the laceration to the forehead was consistent with hitting the pavement, which would also explain the bruising around the eye under the laceration. Although not impossible, one might expect

that the violent beating as described by Mr. Girbav, administered by multiple officers, would have resulted in more injuries. At a minimum, the observable injuries in the photographs would be consistent with the description of the officers, Mr. Hubbell and CW1. Respectfully, the evidence as a whole supports the evidence of Cst. McGregor as to the amount of force used during the arrest and does not provide reasonable grounds to believe that an assault, as described by Mr. Girbav, occurred.

At trial, did Cst. McGregor and/or Cst. Johnston, with intent to mislead, make a false statement under oath or affirmation, knowing that statement to be false?

Based on the whole of the evidence, there are no reasonable grounds to believe that either Cst. McGregor or Cst. Johnston, with intent to mislead, make a false statement under oath or affirmation, knowing that statement to be false. It should be noted that on some of the critical points that raised concerns for the Court, the evidence provided by CW1 *independently* corroborated the evidence of the officers, and contradicted the assertions to the contrary made by Mr. Girbav and Mr. Hubbell. This question having been answered in the negative, there is no need to go to the second stage of analysis as earlier set out.

Conclusions

As with other ASIRT files, once directed to investigate, ASIRT approached the matter from a neutral position, with the intention of following the evidence to objectively determine what had happened and whether the involved officers committed offences. ASIRT was also mindful, however, that in related proceedings, a Court had concluded that the officers had assaulted Mr. Girbav and that the officers had exaggerated or coloured their evidence to cover up an assault on Mr. Girbav.

Considerable evidence was gathered during the ASIRT investigation and the initial evidence given at trial was also included and examined in the overarching consideration of whether the subject officers had committed possible offences.

Leaving for a moment the specifics of this particular investigation, when an investigation is concluded and the evidence reviewed, there can be two possible end results: either the officer is charged or the officer is not charged. Within the possible circumstances that can result in an officer not being charged, the scope of the potential evidence can be very broad and range from that which provides a belief that reasonable grounds exist that an officer committed an offence, to a finding that the evidence establishes that the involved officers are factually innocent, that not only does the evidence not provide grounds to believe an offence was committed, it actually establishes the opposite, and provides compelling evidence that the officers did not commit any offences, essentially

establishing factual innocence. In this case, notwithstanding the strongly worded findings of the trial judge, ASIRT's investigation, and indeed, the compelling evidence of a completely independent civilian witness would seem to establish that the "beating" that was alleged to have occurred never happened. At trial, having found that a beating occurred, the Court found that the officers had a motive to lie or embellish their evidence to cover up the beating. If no beating occurred, any finding of a motive to lie falls with it.

In the circumstances of this case, based on the evidence gathered during the course of the ASIRT investigation, there are no reasonable grounds, nor even reasonable suspicion to believe that Cst. McGregor or Cst. Johnston committed any criminal offences on February 1, 2009 or when testifying at Mr. Girbav's trial on October 17, 2011. While these findings contradict the initial findings at trial, they are grounded in the additional available evidence that the trial judge did not have, that not only contradicts evidence given at trial but also directly impacts the findings of credibility that underpinned the findings of fact at trial.

The work ASIRT does is incredibly important. Investigations that find reasonable grounds to believe an offence was committed are important steps towards accountability that can result in prosecutions, but can also impact civil liability, disciplinary proceedings and, indeed, continued employment as a police officer. It is critically important to continuing public confidence that a body such as ASIRT investigate such events to determine what happened and whether the police acted lawfully. It would be trite to recognize that allegations of excessive force are, of course, always concerning. Allegations that a police officer may have committed perjury or obstruction of justice, however, go far beyond simply being concerning and strike at the very heart of the administration of justice. An officer who would commit these offences has no business being a police officer. A belief that a police officer has deliberately lied under oath impacts that officer's credibility every time they testify, properly so. That having been said, the impact of an incorrect belief that an officer has committed these acts is both personally and professionally damaging. It is a challenge to that officer's integrity and professionalism. As such, for so many reasons, an independent investigation was required in this case.

At the trial of Mr. Girbav, decisions were made based on the available evidence which painted an incomplete picture that would have directly affected any assessment of credibility. Based on the ASIRT investigation, having had the benefit of the evidence of additional witnesses, especially the independent civilian witness, a significantly different picture was painted that not only cast doubt on whether the officers engaged in excessive force and subsequently lied about it, but compellingly established that no beating

occurred and cast significant doubt on the reliability of the recollections of Mr. Girbav and Mr. Hubbell. More importantly, the evidence largely corroborated the evidence of Cst. McGregor and Cst. Johnston on critical points. In the specific circumstances of this case, based on the evidence, there is no longer reason to believe that Cst. McGregor or Cst. Johnston (or really any CPS officers that day) engaged in an assault or, more importantly, to believe that they lied under oath.

The delay in this case was unconscionable. No comprehensive investigation was initiated after the release of the trial decision. The matter languished from 2012 to 2017 before a 46.1 notification was made and an ASIRT investigation was initiated. While it was a complex case and required particularly careful analysis to understand and resolve the conflict between the findings made at trial and the evidence gathered during the course of the ASIRT investigation, the delay in the completion of the investigation, the determinations made and the public release of the results of this investigation, a function of the critical under-resourcing of ASIRT in the face of an overwhelming and complex workload, was also unconscionable. That having been said, ASIRT strives for investigative excellence and just outcomes at the end of the day. That the ASIRT investigation provided additional context and critically important evidence that directly impacted the facts of this case reflects the value that an independent investigation provides. It is just unfortunate that it had to take so long.

“Original Signed by Executive Director”

Susan D. Hughson, Q.C.
Executive Director

January 6, 2022

Date of Report