

SiRT

SERIOUS INCIDENT
RESPONSE TEAM

Summary of Investigation

SiRT File # 2023-046

Referral from

Saint John Police Force

New Brunswick

October 5, 2023

Erin E. Nauss
Director
June 6th, 2024

MANDATE OF THE SiRT

The Serious Incident Response Team (“SiRT”) has a mandate under the Nova Scotia *Police Act*, and through agreement, under the New Brunswick *Police Act*, to investigate all matters that involve death, serious injury, sexual assault, and intimate partner violence or other matters determined to be of a public interest to be investigated that may have arisen from the actions of any police officer in Nova Scotia or New Brunswick.

At the conclusion of every investigation, the SiRT Director must determine whether criminal charges should result from the actions of the police officer. If no charges are warranted the Director will issue a public summary of the investigation which outlines the reasons for that decision, which must include at a minimum the information set out by regulation. Public summaries are drafted with the goal of including adequate information to allow the public to understand the Director’s rationale and conclusions.

INTRODUCTION

On October 5, 2023, the SiRT received a referral from the Saint John Police Force regarding an incident that occurred that day in a residential neighbourhood in the City of Saint John. Officers responded to the scene where there was an allegation that the Affected Party (AP) was outside with a knife and a handgun. When Subject Officer #1 (SO1) arrived on scene, the AP continually advanced toward him, pointing a firearm. As a result, SO1 deployed his firearm and shot at the AP. Subject Officer #2 (SO2) was nearby and aware of the unfolding situation. He heard gunshots fired and rushed to the scene in his police vehicle. When he arrived, the AP was on the ground and was trying to stand. He was still holding the firearm and pointing it at SO1. SO2 drove his police vehicle into the AP, which caused him to drop the firearm. The SOs immediately applied first aid. Emergency Medical Services were called and arrived on scene. The AP was transported to hospital, where he recovered, and was released later that month. The SiRT investigation was concluded on April 19, 2024. There was some delay in receiving the Forensic Identification Report, which was required to complete the investigation.

The decision summarized in this report is based on evidence collected and analyzed during the investigation, including, but not limited to, the following:

1. Civilian Witness Statements (18)
2. Witness Officer Statements and Notes (12)
3. Subject Officers' Use of Force Reports (2)
4. Body Camera Footage
5. Police Radio Transmissions
6. 911 call
7. Forensic Identification Report and Photos
8. Saint John Police Force Use of Force Policy

INCIDENT SUMMARY

On October 5, 2023, at 4:35 pm, the Saint John Police Force received a 911 call from Civilian Witness #1 ("CW1"). CW1 was the neighbour of the Affected Party ("AP") and she had observed him screaming outside of her house and smashing the windows out of her and Civilian Witness #2's ("CW2") car.

The house is a duplex, with the AP residing in one unit while CW1 resided in the other. CW2, who is the spouse of CW1, exited the house and asked the AP what he was doing. The AP replied "you're all after me. You're all out to get me. You're all filming me" and started to advance toward CW2 with a knife. CW2 retreated inside and watched the AP through the window. The AP was observed throwing an object into the window of a house across the street, slashing the tires of CW1 and CW2's vehicle, and threatening several people on the street with a knife. Prior to the police arrival, CW2 observed the AP pull out a handgun and start walking down the street, and he then heard the sound of a gun shot. The AP walked back toward his residence and went inside.

Subject Officer #1's Involvement

When Subject Officer #1 ("SO1") arrived on scene CW2 spoke with him through the window of his house. The officer was on the sidewalk, between CW2's house and vehicle. There is no front yard, and you can step onto the front deck directly from the sidewalk. The vehicle was parked on the side of the road next to the sidewalk. CW2 advised SO1 that the AP went inside his residence but was observed with both a gun and a knife. During this conversation, the AP emerged from his side of the duplex with a black handgun. The AP pointed it at SO1 and started to shout and advance toward him. Numerous civilian witnesses observed this and heard SO1 shout commands for the AP to drop his gun. SO1 took cover behind CW1 and CW2's vehicle.

CW2 stated that the AP walked from the rear of the vehicle around the passenger side, approaching SO1 while pointing the firearm. At no point did the AP respond to SO1's commands to drop the

firearm. CW2 observed SO1 discharge his firearm in the direction of the AP, causing the AP to fall backwards on the road. Multiple other civilian witnesses stated they observed SO1 discharge his firearm, heard 3-4 gunshots, and observed the AP on the ground following the gunshots. CW2 stated that he believed SO1 had no choice but to discharge his firearm in the circumstances. Through the course of the investigation, it was learned that SO1 had fired 4 shots, striking the AP's left leg. Forensic evidence showed that 4 discharged bullets (9mm calibre) were seized next to each other at the scene. The AP did not consent to the release of his medical documents. Therefore, it is not clear how many of those shots struck the AP's leg.

Although not required by law, SO1's Use of Force Report was turned over as part of the investigation. In that report, SO1 indicated that the AP threatened to kill him. The report also states that the AP was following him around the car and that SO1 believed the AP would kill him. When SO1 had a visual of the AP, he fired shots in his direction through the windows of the car.

Subject Officer #2's Involvement

Subject Officer #2 ("SO2") was in the area, approximately 400 feet away from the scene of the incident. He was sitting in his police vehicle conducting scene security on an unrelated matter. Shortly after the 911 call, SO2 advised dispatch that he was approached by a male (Civilian Witness # 3/ "CW3") who said the AP had threatened him with a handgun and pipe. CW3 had just dropped off his co-worker, when the AP started to walk towards him, carrying a silver pipe in one hand and a black handgun in the other hand. As CW3 proceeded through a stop sign, the AP dropped the pipe and raised the handgun. CW3 recalled the AP stating "What are you looking at? I'm going to kill you". CW3 knew that police were close by, as his coworker had mentioned there had been an incident the night before across the road from her apartment, and there was an unmarked police car there guarding the crime scene. CW3 went around the block, tracked down SO2, and advised him what had occurred.

SO2's Use of Force Report was also turned over as part of the SiRT investigation, although not required by law. In that report SO2 stated that he could see the scene of the incident from where he was parked. He observed the AP throw a rock through the window of a house. He then heard SO1 yell commands, although he could not make out the exact words he was saying. He then heard the sound of gunshots as he was driving toward SO1. SO2 heard SO1 shout "he's got a gun, he's got a gun". As SO2 was approaching the scene in his police car, the AP was trying to stand and had raised the firearm toward SO1. SO2 struck the AP with his marked police vehicle and immediately applied its brakes. The impact of the vehicle knocked over the AP and the handgun was found laying next to the AP.

Civilian witnesses stated that after the AP was shot by SO1, the AP was attempting to get to his feet. Civilian witnesses also stated that when SO2's police vehicle quickly arrived on scene, they noted the AP was back on the ground. No civilian witness was able to confirm that SO2's vehicle hit the AP, as they either retreated to their house or their view of the incident was obstructed. The

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SiRT investigation was unable to determine the exact speed of SO2's vehicle at the time of impact. Since SO2 was conducting surveillance, his GPS was turned off and any data regarding speed was not logged. It was noted that the impact of the police vehicle striking the AP did not leave any damage to the vehicle.

Once SO2 hit the AP with his police vehicle, both SOs took the AP into custody, called an ambulance, and started administering first aid. The AP had visible injuries to his leg from the firearm. There were no visible injuries as a result of being hit by SO2's vehicle. The AP did not give consent to release his medical documents, so it is not known whether there were any internal injuries or the extent of the injury to his leg.

Witness Officer 1 ("WO1") was dispatched to the scene and had a body camera. WO1's body camera footage shows that when he arrived the AP was on the ground and SO1 and SO2 were applying first aid, including a tourniquet to stop the bleeding. Civilian Witnesses stated that first aid was administered until Emergency Medical Services (EMS) arrived. From the body camera footage, it was noted that both SOs remained calm and focused on providing the AP with the appropriate care until EMS arrived.

The AP's Firearm

The firearm was described by Civilian Witness #4 ("CW4") as a black, glock-like, handgun. SO2's Use of Force Report stated that the firearm appeared to be real. As part of the investigation, the firearm was seized and it was learned that it was a replica pellet gun. However, this was not known at the time. A photo of the firearm is below:



Statements of the AP

The AP was transported to hospital and was released on a later date. The AP refused to participate in the investigation. As such, the SiRT was unable to get a statement from him or access to his medical records. It was learned through the course of the investigation that the AP had a lengthy history of suffering from addiction and mental health issues. Civilian Witness #5 ("CW5") stated

that the AP had been using crystal meth in the days leading up to this incident. On the day of the incident, CW5 had taken the AP to a methadone appointment, but he did not receive it as there was a delay in obtaining his prescription and the AP decided to leave. CW5 noted that the AP was acting paranoid, jumpy and shaky.

Concurrent Criminal Investigation

During the SiRT investigation there was a concurrent criminal investigation being conducted by the Saint John Police Force into the actions of the AP. While both the SiRT and the Saint John Police Force were required to be on the scene, the SiRT took control of the scene. The SiRT and Saint John Police Force were both responsible for interviewing witnesses and that information was shared between the agencies. The SiRT has conducted its own independent investigation and review of the evidence into the actions of the Subject Officers.

RELEVANT POLICIES

The Saint John Police Force has a Use of Force Policy (the “Policy”) which was obtained as part of the SiRT Investigation. The Policy states that the Saint John Police Force follows the National Use of Force Framework (the “Framework”), which is approved by the Canadian Association of Chiefs of Police. The Framework provides guidance to officers on how to assess situations and understand the various use of force options to respond to potentially violent situations. The Framework does not justify use of force or provide specific responses to situations. Rather, it is a tool that facilitates understanding of appropriate use of force and how to articulate the events associated to an incident when force is used.

RELEVANT LEGISLATION

Criminal Code:

Assault

s. 265 (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while opening wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Assault with a weapon

s. 267 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, in committing an assault,

(a) carries, uses or threatens to use a weapon or an imitation thereof,

...

Protection of persons acting under authority

25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(a) as a private person,

(b) as a peace officer or public officer,

(c) in aid of a peace officer or public officer, or

(d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

When not protected

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

When protected

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;

(b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;

(c) the person to be arrested takes flight to avoid arrest;

(d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and

(e) the flight cannot be prevented by reasonable means in a less violent manner.

Excessive force

26 Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

Defence -use of threat of force:

s.34 (1) A person is not guilty of an offence if

(a) they believe on reasonable grounds that force being used against them or another person or that a threat of force is being made against them or another person;

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use of threat of force; and

€ the act committed is reasonable in the circumstances.

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

€ the person's role in the incident;

(d) whether any party to the incident used or threatened to use a weapon;

€ the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person's response to the use or threat of force; and

(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

LEGAL ISSUES & ANALYSIS

Legal Test under s. 25 and s. 34 of the *Criminal Code*

Section 25 of the Criminal Code permits a peace officer, acting on reasonable grounds, to use as much force as necessary to enforce or administer the law, provided that the force used is not excessive based on all the circumstances. A peace officer is justified in using force that is intended or is likely to cause death or grievous bodily harm if they believe on reasonable grounds that the force is necessary for the purpose of protecting the peace officer or another person from imminent or future death or grievous bodily harm. The Supreme Court of Canada in *R v Nasogaluak* [2010] 1 S.C.R. 206, at paragraph 34-35 stated:

34 Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him – or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This means that the use of force, under s 25(3) is to be judged on a subjective-objective basis...

35 Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *R v Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude.

The law respecting self-defence or the defence of others is also applicable to police officers. Section 34 of the Criminal Code sets out how the defence applies to the use of force utilized in defending yourself or another person. It provides that conduct that would otherwise constitute an offence is legally justified if it was intended to deter a reasonably apprehended application of force, either actual or threatened to yourself or another person, and the conduct itself was reasonable. The reasonableness of the conduct must be assessed in light of all the relevant circumstances, including the following : that nature of the force or threat; the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force; whether any party to the incident used or threatened to use a weapon; the person's role in the incident; and, the nature and proportionality of the person's response to the use or threat of force.

Actions of SO1

SO1 was the first officer on scene. Shortly after arriving, he was approached by the AP while he was talking to the AP's neighbour in front of their duplex. The AP immediately pointed a black handgun toward SO1 and started to approach him. SO1 drew his service firearm and took cover behind the car. Despite commands made to the AP, the AP continued advancing toward SO1. There was minimal distance between the AP and SO1. While we now know the AP's handgun was a pellet gun, this was not known at the time. The handgun looked like a real firearm and it is reasonable to conclude that SO1 believed it to be a real firearm. SO1 made multiple commands in

attempt to have the AP drop the handgun and surrender peacefully. Once those commands failed, SO1 made the decision to fire 4 rounds from his service firearm. These shots hit the AP's leg. It is reasonable to conclude that SO1 feared the AP would fire the handgun toward him and that immediate action was necessary to stop the threat. It would not have been reasonable for him to have employed alternative use of force options, considering the weapon used by the AP and the distance between the parties. I find that the actions of SO1 were not excessive by discharging his firearm.

Actions of SO2

SO2 used his police vehicle to disarm the AP and prevent him from firing gunshots toward SO1. SO2 was aware an incident was unfolding close by, as he had contact with CW3 and heard a dispatch over the radio for the call. He also had a visual of the scene from his location. When he heard shots fired, SO2 left his post and drove to the scene. Upon arrival he observed the AP on the ground with the handgun, which is when he made the decision to strike the AP with the vehicle. The speed of the vehicle is unknown, however there was no damage to the vehicle and the AP did not suffer any visible injuries from the impact. The AP recovered in hospital and was eventually released.

Based on a review of the facts and law, I am convinced that there was a reasonable threat toward SO1 and that immediate action was required to stop the AP. As a result, I find that the actions of SO2 were not excessive when he decided to strike the AP with his vehicle.

Despite the threatening nature of the AP's actions and the response from the police, once the AP was disarmed, both SOs immediately took care to administer first aid and provide care to the AP until EMS arrived on scene.

National Use of Force Framework

It is also noted that both officers wrote Use of Force Reports which determined their actions were in line with the Saint John Police Force Policy (which follows the National Use of Force Framework). The National Use of Force Framework is not law and simply applying and articulating within the framework does not shield an officer from criminal wrongdoing. However, the Framework does provide guidance in determining whether police actions are justified. In this case, when considering the situational factors, subject behaviour, and the officers' perceptions it is reasonable to conclude that force needed to be applied to the AP. Tactical considerations relevant to this case are the fact of the close distance between SO1 and the AP, the AP failing to respond to the commands of SO1, and after SO1 fired shots at the AP, the AP still had the firearm and there was a continued threat to SO1.

I have also considered the fact that the AP's firearm was a replica. This was not known at the time of the incident. I have reviewed the accounts of the civilian witnesses, the use of force reports of the SOs, and the photos of the seized firearm, and it was reasonable for the SOs to believe that the AP's firearm was real.

CONCLUSION

My review of the evidence indicates that the force used by the SOs was reasonable in the circumstances and there are no reasonable grounds to lay a criminal charge against the SOs in connection with this incident.