

EXECUTIVE SUMMARY



ACTION ASSESSMENT 24-24

Officer-Involved Shooting Review

Incident Occurrence: August 12, 2024
Administrative assessment of force used in incident FP24-16497
807 Whispering Pines Way, Fitchburg

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Assessment #: AA-24-24
Case #: FP24-16497
Incident Date: August 12, 2024
Incident Location: 807 Whispering Pines Way, Fitchburg

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On Monday, August 12, 2024, officers with the Fitchburg Police Department responded to 807 Whispering Pines Way for a 911 call that reported a physical disturbance between two males. During the course of their investigation, officers encountered a male subject armed with a knife who displayed intentional actions they interpreted as an imminent threat of great bodily harm to them. Sergeant Peter Johnston shot the subject four times with his handgun and Officer Michael O'Dell fired one less lethal 40mm round at the subject. The subject died of as a result of being shot two days later at a local hospital.

Wisconsin Statute 175.47 – Review of deaths involving officers, requires that an outside law enforcement agency investigate officer-involved deaths. The Wisconsin Department of Justice - Division of Criminal Investigation (DCI) conducted a thorough investigation into the use of force actions in this incident and referred their findings to the Dane County District Attorney's Office. District Attorney Ismael Ozanne publicly stated that after the facts of the incident were reviewed that there was no criminal liability for the officers involved. That decision was guided by the fact that Kevin Price's actions constituted a threat of great bodily harm and/or death to officers and responding to that threat with deadly force was permitted under the law (Wisconsin Statute 175.44 – Law Enforcement Use of Force.and Wisconsin Statute 939.45 – Privilege).

Fitchburg Police Department Policy 301 – Use of Force Review requires that a Use of Force Action Assessment be conducted when certain criteria are met. As this incident involved the use of deadly force, an action assessment was required to be conducted per this policy. An objective, thorough and timely analysis of this incident was conducted to determine policy relevance and compliance, training application and improvement, equipment usage and applicability, and ensuring best practices are followed.

While a post incident assessment affords the luxury of reviewing officer actions with all known cumulative facts and an abundance of time from a controlled environment, it is important to recognize this is contrary to what officers have at their disposal in the moment. They are often forced to act on limited and fragmented information that is known to them at the time and often with limited time to assess and appropriately react.

In this incident, officers initially responded to this address after a 911 hangup call. The caller, an unknown out of breath male, reported that there were no contact orders between him and another male who tried to break his neck. Responding officers recognized the address from prior investigations as one involving two or three romantically involved males routinely engaged in physical and verbal disturbances, many of which resulted in arrests. Upon arrival, officers briefly reviewed these historical responses from the records management system and believed the two males involved may have been Kevin Price and Javier Deluna. They verified through court records that active court orders prohibiting their contact with one another did exist. Officers were unable to establish contact with anyone at the residence during this initial response. While they initially cleared

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from the scene, an officer remained in the area based upon knowledge of the past violent history of the suspected involved individuals and the potential severity of assault referenced by the 911 caller. A witness approached the officer who remained in the area and expressed their concern with the disturbance that had been called in to 911. They were concerned as one of the males appeared “disheveled” and was yelling out for “help.” The witness had observed the domestic altercation that occurred between the two males outside, and they were able to partially record the disturbance prior to them returning to the residence. The officer briefly reviewed the cell phone recorded video in which he was able to determine two males appeared to be engaged in a tense verbal argument outside before walking into the residence. The witness further asserted that neither male had left the residence after they entered and identified both of their vehicles which were still parked in the parking lot, suggesting they were both still in the residence.

Based upon this additional information, officers were summoned back to the scene and again attempted contact at the residence, unsuccessfully. Officers observed that the window blinds on one of the windows were now in a closed state, which indicated someone inside the residence had closed them in between contact attempts. The officers decided it was prudent to make a forced entry into the residence, citing the Community Caretaker Doctrine¹, based on several factors and the need to verify the life status of the individuals involved:

- The 911 caller alleged another male tried to break his neck
- The 911 caller sounded out of breath to the 911 call taker
- Recent police contacts at the address involved physical altercations and domestic violence arrests
- Officers had knowledge of prior weapons history at this residence, particularly a knife
- Two males affiliated with the address had valid no contact orders issued by the courts
- A witness heard one of the males yelling for “help” and to “let go of me!”
- The same witness to the altercation was so concerned that they recorded them and proactively approached officers on scene with the video
- The witness indicated the males were still in the residence
- Officers ascertained someone must be inside the residence after observing the window blinds had been closed
- Numerous attempts to summon occupants to the front door were unsuccessful
- There was no observable movement or acknowledgement of police presence from occupants inside

Upon entering the apartment, Javier Deluna approached officers from one of the bedrooms. He had observable blood on his face and made hand gestures to officers suggesting they be quiet. He stated Kevin Price was hiding in the closet of one of the bedrooms and was possibly armed with a knife. Officers were still seeking to verify Price was not in need of immediate emergency medical attention but proceeded cautiously based on information from Deluna. It was not until Sgt. Johnston was standing on the bed that he was able to observe movement in the closet, the first indication to officers of Price’s whereabouts and potential physical condition.

Price stood up and affirmed he was in possession of a knife. Officers provided verbal commands to drop the knife which were not followed. Price then proceeded to unfold the knife in their presence. Between Sgt. Johnston and the bedroom door was Ofc. O’Dell, Ofc. Contreras and Ofc. Dretske. The



bedroom was heavily cluttered with piles of clothes and other debris. The bedroom door itself was also off of its hinges and obstructed the hallway outside the bedroom. Within a matter of seconds, Price displayed hostile intent to officers with his possession of the knife and advanced towards them. A safe and swift exit out of the bedroom was nearly impossible and there were no other plausible means to escape. Price was only a few feet from Sgt. Johnston, separated only by the pile of clothes he climbed over. Sgt. Johnston had no safe avenue to retreat from the threat and responded with lethal force to protect himself, fearing for his safety from possible great bodily harm threatened by Price. Ofc. O'Dell, who was directly next to Sgt. Johnston, fired one less lethal 40mm round at Price at the same time. Officers Dretske and Contreras, who were standing by the bedroom door, attempted to deploy their Tasers at Price, but did not have enough time to do so.

After being shot, Price dropped the knife and fell into the pile of clothes. Officers approached him and pulled him out of the closet and carried him outside to render aid. They had to carry him outside as the apartment was so heavily cluttered, adequate aid would have been nearly impossible inside. Officers tripped and fell while carrying Price due to the amount of clutter and very limited space to move.

The Community Caretaker Doctrine is regularly utilized by police officers in response to a variety of situations in which there is a significant concern for life safety. Recognizing the significance of entering a private residence under the doctrine, officers assess available information prior to entering a residence. These assessments often include reviewing previous call histories, including both police and EMS calls, the ability to contact potential occupants via other means, information from property management or neighbors, and known mental health issues.

The Fitchburg Police Department utilizes officers trained in mental health crisis intervention and a part-time social worker to maintain working relationships with mental health providers in Dane County. This team regularly receives response plans and other information from providers related to mental health consumers who reside in Fitchburg. In turn, this information can be utilized to better inform officer responses. In this instance, there was no information indicating mental health issues were directly related to the situation officers were handling.

There were three main department policies relevant to actions officers took in this incident:

1. Policy 300 – Use of Force: *Officers shall use only that amount of force that reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose.*

Officer actions were appropriate and within this policy.

2. Policy 303 – Control Devices and Techniques: *This department is committed to reducing the potential for violent confrontations. Kinetic energy projectiles, when used properly, are less likely to result in death or serious physical injury and can be used in an attempt to de-escalate a potentially deadly situation. The department has two methods of delivery for the kinetic energy projectile, which are the 40mm foam projectile launcher and the drag-stabilized bean bag round from the approved shotguns.*

Officer actions were appropriate and within this policy.



3. Policy 311 – Search and Seizure: *Officers are permitted to make warrantless searches when an established exception applies, such as exigent circumstances.*
Officer actions were appropriate and within this policy.

An officer's use of force is assessed using the objective reasonableness standard established under Graham v. Connor². The three factors used to determine if force is objectively reasonable are 1) the severity of the crime, 2) whether the suspect posed an immediate threat, and 3) whether the suspect was actively resisting arrest or attempting to evade arrest. This assessment should be based on what a reasonable officer would have believed given the totality of the circumstances, rather than on hindsight.

Sgt. Johnston, Ofc. O'Dell, and every other officer assigned to this incident were current on all training required by the State of Wisconsin Law Enforcement Standards Board and of the Fitchburg Police Department. Quarterly department in-service trainings routinely incorporate de-escalation, decision making, use of force justification, communication, and utilization of the lowest levels of force necessary to control a situation. These trainings are incorporated with both classroom-style trainings and scenario-driven, experiential trainings. Evidence of these training philosophies was demonstrated in this incident as several officers equipped themselves with different less lethal weapons in efforts to use the lowest level of force possible.

An outside use of force expert reviewed this incident and provided an independent review and conclusion. That review was conducted by the current Police Academy Director of the Milwaukee Area Technical College – Oak Creek Campus and retired 28-year veteran from the Milwaukee Police Department. They possess several certifications from the Wisconsin DOJ LESB to include Master Instructor for Defense And Arrest Tactics (DAAT), Master Instructor for Tactical Response, and Master Instructor for Handgun and Rifle, among other unified tactics instructor certifications. This expert concluded that all officers involved conducted themselves appropriately and in accordance with the Disturbance Resolution model trained in DAAT. They also employed de-escalation concepts throughout their investigation. Kevin Price was provided with several opportunities to comply with the lawful orders from officers but chose to ignore them and instead escalated the situation by becoming armed with a knife and displayed an attempt to reach officers with it. The assessment affirmed "the Fitchburg officers responded lawfully as officers in the State of Wisconsin are taught within the principles and concepts of the Defense And Arrest Tactics System".

All equipment worked as they were intended to. There were no failures in the equipment items themselves or in the preparation and storage of them, to include firearms, less lethal weapons, body-worn cameras, and radios.

As with any reviewed incident, there were alternative ancillary actions identified for potential future consideration, which were listed in the assessment. Officers in this incident reacted appropriately based upon the information available to them at the time, and the uses of force deployed were reasonable and justifiable within state law and department policies.

¹Community Caretaker Doctrine – *a legal principle that allows police to act without a warrant or reasonable suspicion of criminal activity when their primary purpose is to assist individuals or the*

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public in situations where a person's safety and well-being are at risk (Cady v. Dombrowski, 413 U.S. 433).

²Graham v. Connor, 490 U.S. 386 - The Fourth Amendment "reasonableness" inquiry is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation (490 U. S. 396-397).