

Public Report

July 8, 2019: Use of Force Complaint



Richard G. Schott
Fairfax County
Independent Police Auditor

July 8, 2019: Use of Force Complaint

A Public Report by the
Fairfax County Independent Police Auditor

Publication Date: July 28, 2020



A Fairfax County, Va., Publication

Office of the Independent Police Auditor
12000 Government Center Parkway, Suite 233A
Fairfax, VA 22035

www.fairfaxcounty.gov/policeauditor

Contact Us: IPAPoliceAuditor@fairfaxcounty.gov

To request this information in an alternate format, call 703-324-3459, TTY 711.

INCIDENT

A portion of this incident was recorded by a witness using her cellphone camera, and by store security cameras. In keeping with Supreme Court precedent which states that uses of force must be judged based on what the officers knew (or reasonably believed) at the time force was used, and not with the benefit of 20/20 hindsight,¹ I have endeavored to describe the incident based on interviews of the officers as well as interviews of witnesses conducted following the incident. I have reviewed the camera footage and will refer to my viewing of it where appropriate.

On July 8, 2019, at approximately 5:40 p.m., a Fairfax County Police Department (hereinafter “FCPD”) officer (hereinafter “OFFICER#1”) responded to a reported shoplifting at the Home Goods department store located in the Kingstowne Towne Center in the Franconia area of Fairfax County. Store personnel had contacted the FCPD to advise that they were detaining a cooperative 50-year-old female. OFFICER#1 reported to the store location.

OFFICER#1 began to speak to the female (hereinafter identified by the initials “E.V.”) in the store’s loss prevention office. The two were able to converse without E.V. needing any language assistance or translation help. Shortly after they began talking, an individual later identified as E.V.’s adult son with the initials M.V-S. (hereinafter “MVS”) came to the office and told OFFICER#1 that he needed to be present to help his mother with translation. OFFICER#1 explained to MVS that E.V. was having no trouble communicating and that he would not be allowed to participate in the interview of his mother. OFFICER#1 advised MVS that he was free to leave or wait in the store. After interviewing E.V. for approximately twenty minutes, OFFICER#1 decided to arrest E.V. for petit larceny rather than releasing her based on a summons because E.V. would not provide positive identification.

Before E.V. was arrested, however, MVS returned to the office accompanied by his brother (hereinafter “JVS”) and his sister (hereinafter “FVS”). When OFFICER#1 opened the door to the office, all three individuals loudly stated that their mother needed an interpreter and they tried to force their way into the office. OFFICER#1 requested that other officers quickly respond to the location. Police Officer First Class (hereinafter PFC#1) arrived at the store

¹ Graham v. Connor, 490 U.S. 386 (1989).

moments later, pushed through a gathering group of store customers who were now watching the commotion in the loss prevention office area, and got beyond the three individuals at the office door and into the office. OFFICER#1 and PFC#1 tried to close the office door but were unable because the three siblings were trying to force their way into the office. Both officers accessed their oleoresin capsicum spray² (hereinafter “OC”), verbally announced that all three were under arrest for obstruction and that OC was going to be used, and utilized the OC in the direction of the siblings.

The officers then came out of the office to arrest the three individuals. OFFICER#1 attempted to arrest JVS by placing his hands behind his back. He pushed his heel into OFFICER#1’s shin, slipped away and began to approach PFC#1, who was engaged with FVS several feet away. PFC#1 handcuffed FVS just before JVS aggressively approached after breaking away from OFFICER#1. PFC#1 reacted by kicking JVS one time in his mid-section. OFFICER#1 then handcuffed JVS with no additional force used on him. During the handcuffing of FVS and the struggle with JVS, MVS held his cellphone and appeared to be recording the interaction between his siblings and the officers. While PFC#1 kept control of FVS and JVS, OFFICER#1 tried to arrest MVS as well.

OFFICER#1 approached MVS and told him he was also under arrest for obstruction based on his actions at the door of the loss prevention office. MVS backed away from OFFICER#1, who then went “hands on” to handcuff him. However, he stiffened his body and refused to put his hands behind his back. While OFFICER#1 held MVS and struggled to handcuff him, a third officer (hereinafter “OFFICER#2”) arrived at the location. OFFICER#2 performed a controlled takedown of MVS by using an armbar technique. After getting him on the ground, the officers handcuffed and arrested MVS without any additional force being used.

After the three individuals were arrested, they were provided medical treatment by responding paramedics since OC had been used on them. They refused any further medical treatment and indicated that they were not injured. They were then transported to the Fairfax County Adult Detention Center.

² See GLOSSARY.

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted an administrative investigation into the officers' actions during this incident. No referral was made to the Office of the Commonwealth's Attorney.

FVS, JVS, and MVS were each charged with Obstruction of Justice,³ and JVS was also charged with Assault on a Law Enforcement Officer.⁴

INTERNAL ADMINISTRATIVE INVESTIGATION

The internal investigation of the officers' use of force during this incident was guided by FCPD policy.⁵ This review of the investigation was initiated by a complaint made by a witness of the incident to the sergeant (hereinafter "SGT#1") who responded to the Home Goods store. The witness expressed concern that the force used was excessive, or that at least the situation could have been handled differently. After a second interview of the witness, she provided cellphone video footage of the incident to SGT#1 which she had captured on her phone.

SGT#1 also interviewed a second witness to the incident; reviewed store surveillance camera footage; and interviewed the officers involved. SGT#1 attempted to interview the three individuals involved in the incident, and to obtain any cellphone video footage captured by MVS during the incident, but requests for interviews and the video footage were refused through an attorney representing JVS.

Following its investigation, the FCPD determined that the officers complied with the policy provisions governing their actions. Based on my review of the FCPD investigation, my opinion is that it was complete, thorough, objective, impartial, and accurate.

CONCLUSIONS

OFFICER#1 arrived at the Home Goods store to investigate a suspected shoplifting. The suspected shoplifter was cooperative. However, her adult children demanded access to their mother and tried to aggressively force their way into the loss prevention office. PFC#1 hurriedly went to the store to help OFFICER#1. When the officers could not close the door to the office,

³ Code of Virginia § 18.2-460.

⁴ Code of Virginia § 18.2-57.

⁵ FCPD General Order (hereinafter "G.O.") 540.7.

they announced that the three individuals would be arrested and that they were going to be subjected to OC spray. They were, in fact, sprayed with OC.

FCPD G.O. 540, *et seq.* governs its officers' use of force. Specifically, G.O. 540.0 provides that "[f]orce is to be used only to the extent it is objectively reasonable to defend oneself or another, to control an individual during an investigative or mental detention, or to lawfully effect an arrest. G.O. 540.1 I. L. goes on to define "objectively reasonable" as "[t]he level of force that is appropriate when analyzed from the perspective of a reasonable officer possessing the same information and faced with the same set of circumstances. Objective reasonableness is not analyzed with the benefit of hindsight, but rather takes into account the fact that officers must make rapid and necessary decisions regarding the amount of force to use in tense, uncertain, and rapidly evolving situations." Finally, FCPD G.O. 540.6 recognizes that the use of "less-lethal force"⁶—to include OC spray⁷—may be effective when "effecting an investigative stop or arrest"⁸ or to "[d]efend oneself or another from injury or assault."⁹ The use of OC spray to prevent the three individuals from gaining access to the office, and to enable the two officers to initiate the arrest of the three subjects, was objectively reasonable.

When FVS, JVS, and MVS retreated after being sprayed with OC, OFFICER#1 and PFC#1 attempted to arrest them. PFC#1 arrested FVS, but OFFICER#1 was not able to arrest JVS before he broke away and quickly approached PFC#1. Based on his aggressive approach, PFC#1 kicked JVS once. This allowed OFFICER#1 to handcuff and complete the arrest of him. OFFICER#1 then struggled to arrest MVS. MVS stiffened his body and refused to put his arms behind his back to be handcuffed. Based on MVS's actions, OFFICER#2 used an armbar technique to take MVS to the ground so that he could be handcuffed and arrested. These actions by the officers also complied with FCPD policy.

Again, FCPD G.O. 540.6 authorizes the use of "less-lethal" force to accomplish a lawful arrest, or to defend oneself from injury or assault.¹⁰ The officers involved in this incident did just that. JVS engaged in "aggressive resistance"¹¹ when he broke free from OFFICER#1 and

⁶ See GLOSSARY.

⁷ FCPD G.O. 540.4 II. A. 2. c.

⁸ FCPD G.O. 540.6 I. A. 1.

⁹ FCPD G.O. 540.6 I. A. 3.

¹⁰ Notes 8 and 9, *supra*.

¹¹ See GLOSSARY.

approached PFC#1. MSV engaged in “active resistance”¹² when he stiffened his body and refused to put his arms behind his back. The use of less-lethal force—to include “strikes, *kicks*, or *takedowns*”¹³—is allowed “when reasonably necessary to gain compliance by individuals offering resistance.”¹⁴

These FCPD policy provisions closely parallel the legal standard for uses of force by law enforcement officers as set forth in the Supreme Court’s Graham v. Connor decision.¹⁵ That case makes clear that that uses of force—deadly or non-deadly—must be analyzed under the Fourth Amendment to the United States Constitution.¹⁶ The Court in Graham further instructed that to be lawful under the Fourth Amendment, an officer’s use of force must be “objectively reasonable” under the circumstances confronting that officer. Finally, the Graham opinion stated that a police officer’s actions are not to be judged using the 20/20 vision of hindsight, but rather that an officer’s actions must be judged taking into account the fact that “police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.”¹⁷ This same language is included in FCPD G.O. 540.1 I. L. Consequently, the officers’ actions in the incident under review comported with the legal mandate as well as departmental standards governing the use of force.

RECOMMENDATIONS

The FCPD policies on the use of force thoroughly address the use of both deadly and “less-lethal” force and provide its officers guidance on the force techniques typically considered objectively reasonable in many different situations. Multiple types of “less-lethal” force were used by three officers against three individuals in this incident. Each was examined against the policies in place and found to comply with those policies. I agree with the conclusions of the FCPD’s investigation based on the analysis in the preceding section of this report. I have no recommendations to make based on this incident review.

¹² See GLOSSARY.

¹³ FCPD G.O. 540.4 II. 2. a. (emphasis added).

¹⁴ FCPD G.O. 540.4 II. 2.

¹⁵ *Supra*, note 1.

¹⁶ See GLOSSARY for text of the Fourth Amendment.

¹⁷ Graham v. Connor, 490 U.S. 386, 397 (1989).

APPENDIX: GLOSSARY OF TERMS

FCPD – Fairfax County Police Department

FCSO – Fairfax County Sheriff's Office

G.O. – General Order

SOP – Standard Operating Procedure

UOF – Use of Force

BWC – Body-worn Camera

ICV – In-Car Video

ADC – Adult Detention Center

CWA – Commonwealth's Attorney

Fourth Amendment to the United States Constitution - The right of the people to be free in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Force – defined in Fairfax County Police Department General Order 540.1 I. G. as any physical strike or instrumental contact with an individual, or any significant physical contact that restricts an individual's movement. Force does not include escorting or handcuffing an individual who is exhibiting minimal or no resistance. Merely placing an individual in handcuffs as a restraint in arrest or transport activities, simple presence of officers or patrol dogs, or police issuance of tactical commands does not constitute a reportable action.

Less-Lethal Force – defined in Fairfax County Police Department General Order 540.1 I. I. as any level of force not designed to cause death or serious injuries.

Deadly Force – defined in Fairfax County Police Department General Order 540.1 I. B. as any level of force that is likely to cause death or serious injury.

Serious Injury – defined in Fairfax County Police Department General Order 540.1 I. Q. as an injury which creates a substantial risk of death, disfigurement, prolonged hospitalization, impairment of the functions of any bodily organ or limb, or any injury that medical personnel deem to be potentially life-threatening.

ECW – Electronic Control Weapon; considered less-lethal force. Defined in defined in Fairfax County Police Department General Order 540.1 I. C. as a device which disrupts the sensory and motor nervous system of an individual by deploying battery-powered electrical energy sufficient to cause sensory and neuromuscular incapacitation. Often referred to as a Taser.

Empty-Hand Tactics – considered less-lethal force. Described in Fairfax County Police Department General Order 540.4 II. A. 2. as including strikes, kicks, and takedowns.

OC Spray – Oleoresin Capsicum; considered less-lethal force; often referred to as “pepper spray.”

PepperBall System – defined in Fairfax County Police Department General Order 540.1 I. N. as a high-pressure air launcher that delivers projectiles from a distance. Typically, the projectile contains PAVA powder which has similar characteristics to Oleoresin Capsicum. Considered less-lethal force.

Passive Resistance – defined in Fairfax County Police Department General Order 540.4 I. A. 1. as where an individual poses no immediate threat to an officer but is not complying with lawful orders and is taking minimal physical action to prevent an officer from taking lawful action.

Active Resistance – defined in Fairfax County Police Department General Order 540.4 I. A. 2. as where an individual’s verbal and/or physical actions are intended to prevent an officer from taking lawful action, but are not intended to harm the officer.

Aggressive Resistance – defined in Fairfax County Police Department General Order 540.4 I. A. 3. as where an individual displays the intent to cause injury, serious injury, or death to others, an officer, or themselves and prevents the officer from taking lawful action.

