

Public Report

July 9, 2022: Use of Force
Complaint - Pointed Firearms
IPA-22-09



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A Public Report by the Fairfax County
Independent Police Auditor

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Language Disclaimer: This report contains harsh (potentially offensive) language, quoting an officer who was involved in the incident. My reference to the language is not gratuitous; rather, the officer's use of the language was a part of the investigation conducted by the Fairfax County Police Department.

INCIDENT

On July 9, 2022, four officers from the Fairfax County Police Department (hereinafter “FCPD”) responded to a “weapons brandishing” call at the IHOP restaurant located at 6655 Arlington Boulevard in Falls Church. Their response was prompted by a 9-1-1 call to the Fairfax County Department of Public Safety Communications (hereinafter “DPSC”) at approximately 11:00 p.m. The caller stated that three people had come to the IHOP earlier in the evening—at approximately 8:00 p.m.—and one of them had lifted his shirt above his waistband to reveal a gun to the caller. The caller knew one of the three to be her ex-boyfriend’s friend. During the 9-1-1 call, she stated that the same three people were now back outside of the restaurant and were sending her threatening texts. The texts included threats that they were going to shoot her and her mother. The caller provided a brief description of the weapon that had been displayed to her earlier, and descriptions of the three individuals involved.

FCPD Police Officer First Class #1 (hereinafter “PFC#1”) arrived at the location first, and immediately saw three individuals, who matched the descriptions provided, walking toward the nearby Toyota dealership. He pulled his cruiser behind them, got out, and told them to stop. Initially, the three kept walking. After just seconds, one of the three (hereinafter identified as “Juvenile A”) complied by stopping while the other two continued walking away. PFC#1 quickly handcuffed Juvenile A, explained that he was being detained, and patted him down.

Meanwhile, the other two individuals separated from each other with one (hereinafter identified as “Juvenile B”) veering off to the left of the dealership. Police Officer First Class #2 (hereinafter “PFC#2”) arrived and immediately focused his attention on the third individual (hereinafter identified as “Juvenile C”) wearing a red jacket. PFC#2 got out of his cruiser, unholstered his weapon and held it in the “low-ready” position.¹ With his weapon out, he immediately shouted, “Show me your fucking hands!” twice, followed by, “Get on the fucking

¹ While PFC#2 described holding his weapon in a “low-ready,” FCPD’s General Order 540.1 defines a “ready-gun” position and describes it as being used in, among other situations, “to cover a threat area (high or low).” Review of camera footage revealed that PFC#2 did, in fact, briefly point his weapon at Juvenile C.

ground!” two times. Juvenile C went to the ground, placing the phone he was holding in his hand down when he did. Juvenile C was handcuffed, detained, and patted down.

By this point, Police Officer First Class #3 (hereinafter “PFC#3”) arrived and provided backup to PFC#2 as he began to pat down Juvenile C. When Police Officer First Class #4 (hereinafter “PFC#4”) arrived, PFC#1 advised her that Juvenile B—who had circled back towards PFC#2, Juvenile C, and PFC#3—was behind her. When PFC#2 said “Hey, stop him,” PFC#4 drew her weapon, pointed it at Juvenile B, and told him to “Stop right there!” Juvenile B had begun to use his cellphone to record the encounter involving Juvenile C when PFC#4 gave her command to him. Juvenile B replied by asking, “Why did you pull the gun on me?,” to which PFC#4 immediately responded, “Because you have a weapon!” Recognizing that PFC#2 now had Juvenile C safely secured, PFC#3 approached Juvenile B and told him to put his phone down. He repeated the command once more. When Juvenile B continued to hold his phone, PFC#3 drew his weapon, pointed it at Juvenile B, and shouted for him to “Get on the ground!” He repeated the command to “Get on the ground” until Juvenile B did, in fact, kneel on the ground. When he did so, he let his phone drop to the ground. He was handcuffed, detained, and patted down for weapons.

No other force was used, and no weapon was discovered on any of the three individuals or in the vicinity of their apprehensions. After a brief investigation while the individuals were detained, they were each released to a respective parent.

A recording of the incident² was posted online and members of the public lodged complaints with the Office of the Independent Police Auditor (hereinafter “OIPA”) and with the Police Civilian Review Panel (hereinafter “PCR”).³ One of those complaints alleged that the FCPD officers used “extremely excessive” force when “approaching a person with their guns in a ready position at a person who was doing nothing more than video recording an arrest.” FCPD Police Chief Kevin Davis held a press conference on July 15, 2022,⁴ during which he released the officers’ body-worn camera footage (hereinafter “BWC”) in response to the viral reaction to

² <https://streamable.com/bs0jre>.

³ Article VI. A. 3 of the PCR Bylaws provide that “[w]here a Complaint alleges misconduct within both the Panel’s scope of authority and the Auditor’s scope of authority, the Panel and the Auditor shall each conduct a review of the Investigation within their requisite scope of authority. The Auditor and Chair shall coordinate the work of the Panel and Auditor to ensure efficient use of resources and avoid duplication of effort.”

⁴ [See Chief Davis Releases Body-Worn Camera Footage from Viral Brandishing Video](#).

the online video. This review of the FCPD's investigation into the incident will focus primarily on the excessive force and weapons pointing allegations.

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted only an administrative investigation of the officers' actions during this incident. In addition to the limited investigation conducted while the three individuals were detained, a detective conducted follow-up investigation into what had happened at the IHOP before the 9-1-1 call was made. No criminal charges were brought against anyone.

INTERNAL ADMINISTRATIVE INVESTIGATION

The internal investigation of this matter was conducted by a district station-level investigator and an Internal Affairs Bureau (hereinafter "IAB") investigator. The investigation included: the review of DPSC records (to include multiple 9-1-1 calls), an event chronology, individual officer unit histories showing their response to the incident, all radio traffic relating to the incident, incident reports completed following the incident, and computer-aided dispatch messages. The investigation also consisted of the review of all BWC footage from the incident as well as IHOP and the Toyota dealership security camera footage capturing the incident; interviews of all officers and the other parties involved (only Juvenile B agreed to be interviewed by an administrative investigator and none of the three spoke to the detective investigating possible criminal charges) in the incident, to include the 9-1-1 caller. During his interview, Juvenile B stated his belief that the officers "pointed [their] guns at me after I pulled out my phone recording them, cause they didn't want to be recorded."⁵

The FCPD concluded that no departmental policies relating to the use of force,⁶ or the recording of police activity, were violated during this incident.⁷ I agree with this conclusion;

⁵ Administrative investigation interview of Juvenile B conducted on July 14, 2022.

⁶ While the pointing of a firearm is not considered an actual use of force by the FCPD, it is a reportable action which is documented and reviewed.

⁷ Although no policy violation was noted, PFC#2 was counseled on communication strategies because of the language he directed at Juvenile C when he first detained him.

and, in my opinion, that conclusion was reached based on an investigation that was complete, thorough, objective, impartial, and accurate.

CONCLUSIONS

The FCPD investigation into this incident examined whether its policies on pointing a firearm at someone and on recording police activity were violated.⁸

I. General Order 540 – USE OF FORCE

Pointing a weapon at a person is a serious matter⁹ and there are valid arguments against officers drawing or displaying their weapons.¹⁰ Among the valid concerns are the apprehension and anxiety suffered by people who have weapons pointed at them; the possibility that the pointed weapon will only escalate a situation; and, of course, the increased possibility that an accidental discharge will occur. While the FCPD does not consider the pointing of a firearm at a person to be an actual “use of force,” it does treat it as a “reportable action.”¹¹

Although the FCPD does not consider the pointing of a firearm to be an actual use of force, the importance of the department treating it as a reportable action is reflected in departmental policy which provides that “[t]he notification *and investigation* of the pointing of a firearm will be conducted in accordance with General Order 540.7, Less-Lethal Force Notification and Investigation.”¹² Consequently, just like any actual use of force, the pointing of a firearm at a person will be documented and investigated. And, in order to comply with departmental policy, it must have been “objectively reasonable”¹³ at the time.

⁸ Both the comprehensive policy on the use of force (G.O. 540)—which includes the policy on pointing a firearm at a human, and the policy on recording police activity (current G.O. 607), were revised shortly after the incident under review. The officers’ actions were analyzed under the policies in place on July 9, 2022, namely G.O. 540 and G.O. 603.1., and those provisions will be discussed in this report.

⁹ See, for example, the University of Texas at San Antonio researchers’ discussion on the severity of force that a brandished firearm constitutes in its recent report, [An Investigation of the Use of Force by the Fairfax County Police Department](#) (in Section IX. Addendum) [presented](#) to the Fairfax County Board of Supervisors on [June 29, 2021](#).

¹⁰ See, for example, Americans for Effective Law Enforcement, 2010 (11) AELE Mo. L.J. 101, available at [2010-11MLJ101.pdf \(aele.org\)](#).

¹¹ FCPD G.O. 540.20 III. A. clearly states that “[t]he pointing of a firearm at a human to gain control and compliance is considered a reportable action, not a use of force.”

¹² G.O. 540.20 III. B. (*emphasis added*).

¹³ FCPD G.O. 540.0 II.

The FCPD defines 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” and explains that it must not be 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.”¹⁴

The officers in this incident responded to a tense and rapidly evolving situation. The information provided to them before arriving was that a weapon had been displayed in the IHOP restaurant and that an employee was being threatened. When PFC#1 arrived first, he quickly located three people matching the descriptions provided, and they continued to walk away from him after being told to stop. When PFC#2 arrived, he drew and briefly pointed his weapon at Juvenile C to gain compliance from him. PFC#3 and PFC#4 both pointed their weapons at Juvenile B when first detaining him. The officers not only had reasonable suspicion to detain the three individuals, they also had reasonable suspicion that they were armed.¹⁵ Based on the information known to the officers at the time of this incident, the pointing of their firearms was objectively reasonable.¹⁶

II. G.O. 603.1 – Recording of Police Activity

In his interview with the FCPD administrative investigator, Juvenile B stated that the officers pointed their weapons at him because they did not want to be recorded.¹⁷ Doing so would have been a clear violation of FCPD policy as well as the law.¹⁸ However, the administrative investigation concluded that the officers were not concerned with Juvenile B recording them, but rather with safely detaining him as part of an investigation into the brandishing of a firearm.

At the time of the incident under review,¹⁹ FCPD General Order (hereinafter “G.O.”) 603.1 II. stated very clearly that “officers shall not prevent, prohibit, or interfere with any

¹⁴ FCPD G.O. 540.1 I. M.

¹⁵ See Terry v. Ohio, 392 U.S. 1 (1968); Maryland v. Pringle, 540 U.S. 366 (2003); and United States v. Di Re, 332 U.S. 581 (1948).

¹⁶ L.A. County v. Rettele, 501 U.S. 609 (2007) and Muehler v. Mena, 544 U.S. 93 (2005).

¹⁷ Note 5, *supra*.

¹⁸ Sharpe v. Winterville Police Dep't, No. 21-1827 (4th Cir. Feb. 7, 2023); Glik v. Cunniffe, 655 F.3d 1 (1st Cir. 2011).

¹⁹ The policy governing the Public Recording of Police Activity is now G.O. 607 (effective date August 11, 2022).

individual's ability to observe or record police activity from the public domain, except as provided in this General Order." The policy, however, does not compromise an officer's ability to safely detain or arrest an individual. In fact, the policy provides that individuals are free to record only if their recording "does not *interfere with police activity*, jeopardize safety, violate the law, or incite others to violate the law."²⁰ PFC#3 initially commanded Juvenile B to put his phone down two times, but then commanded him to get on the ground. To handcuff Juvenile B, PFC#3 and PFC#4 needed his hands to be empty and, therefore, for him to put his phone down. When Juvenile B ultimately complied by going to the ground and putting his phone on the ground, he was safely handcuffed and patted down. Juvenile B was not detained because he was recording police activity; had he been, the officers doing so would have blatantly violated departmental policy.²¹

It is worth noting that Juvenile B was not told to stop recording, nor did any of the officers ask him to either delete or provide to them what he had recorded before he put his phone down.²² Interviews with PFC#3 and PFC#4, as well as a review of BWC footage, make clear that their intent was to safely detain Juvenile B, not to prevent the recording of police activity.

III. G.O.002 – HUMAN RELATIONS

Separate from the use of force and recording of police activity policy provisions examined above, the FCPD also explored whether PFC#2's use of language when detaining Juvenile C was appropriate. Section IV. A. of G.O. 002 HUMAN RELATIONS, which addresses "community relations," provides that "[e]mployees shall conduct themselves professionally at all times when representing the Department. They shall use respectful, courteous forms of address to all persons. While in the performance of their duties, or while otherwise representing the Department, officers shall refrain from using offensive words and language. Any exceptions shall be documented in an appropriate report and carefully reviewed. At times it may be appropriate to use raised voices to issue commands and to gain compliance, however, epithets or terms that tend to denigrate any particular gender, race, nationality, sexual

²⁰ G.O. 603.1 IV. B. (*emphasis added*).

²¹ G.O. 603.1 IV. B. 2. provides that "[o]fficers shall not detain an individual solely because the individual is recording police activity."

²² G.O. 603.1 IV. A. 3. prohibits officers from deleting any recordings from a person's device or from intentionally damaging the recording device.

orientation, ethnic or religious group will not be tolerated, except when necessary, to quote another person in reports or in testimony.”

While the language used by PFC#2 may be considered by members of the community to be disrespectful, discourteous, and even offensive, it was used in an attempt to gain immediate compliance from Juvenile C. FCPD’s policy recognizes that “[a]t times it may be appropriate to use raised voices to issue commands and to gain compliance,” and it even provides that exceptions to the rule against using the type of language that PFC#2 addressed to Juvenile C will be “documented and . . . carefully reviewed.” That was done in this case, and although the department found no policy violation, PFC#2 was counseled on communication strategies.

RECOMMENDATIONS

The officers whose actions were examined in this incident responded to a 9-1-1 call reporting that three individuals, one of whom was armed with a weapon, were outside of a restaurant and making threats against one of the restaurant’s employees. They responded quickly and took decisive action upon their arrival. They lawfully detained and patted down all three individuals they located. When their ensuing investigation failed to develop probable cause to arrest, or to locate a weapon, the three individuals were released. The investigation into the officers’ actions examined many aspects of their behavior during the incident—namely, the pointing of firearms, whether they wrongfully prevented anyone from recording their actions, and the use of offensive language.

After examining the actions of the officers involved, the investigation into the incident, and the departmental policies which governed the situation, I have no recommendations to make based on my review.

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.

