

Use of Force Fatality of
Mitchell Nelson

Valley Independent Investigation Team
Des Moines Police Department 2018-0785



King County Prosecuting Attorney
Public Integrity Team

April 12, 2024



DECLINE MEMORANDUM

Law Enforcement Use of Force Fatality Regarding: Mitchell Nelson

April 12, 2024

I. INTRODUCTION

1. Purpose of the Memorandum

The King County Prosecuting Attorney's Office (KCPAO) is mandated by law to analyze certain incidents regarding police use of force and to determine if the action was justified or if there was a criminal action such that criminal charges should be filed.¹ Because the investigation and analysis are mandatory if specific criteria are met, the KCPAO's review of an incident does not implicitly signal that the use of force was either justified or that criminal charges are appropriate. Instead, the KCPAO is required to assist in independent investigations involving police use of deadly force to enhance accountability and increase trust to improve the legitimacy of policing for an increase in safety for everyone.²

Pursuant to the Law Enforcement Training and Community Safety Act, an independent investigation must be completed when the use of deadly force by a peace officers results in death, substantial bodily harm, or great bodily harm.³ The independent investigation is conducted in the same manner as a criminal investigation.⁴

Additionally, the KCPAO shall inform the King County Executive whenever the

¹ Except as required by federal consent decree, federal settlement agreement, or federal court order, where the use of deadly force by a peace officer results in death, substantial bodily harm, or great bodily harm, an independent investigation must be completed to inform any determination of whether the use of deadly force met the good faith standard and satisfied other applicable laws and policies. RCW 10.114.011. Similarly, if the Office of Independent Investigation is the lead investigation agency, the prosecutorial entity must review the investigation. RCW 43.102.020. 2021 c 318 § 101.

² Id. See also WAC 139-12-010.

³ RCW 10.114.011. See also WAC 139-12-010.

⁴ WAC 139-12-010.

investigation into a death involving a member of any law enforcement agency in King County is complete and also advise whether an inquest should be initiated in accordance with the King County Charter.⁵ There shall be an inquest into the manner, facts, and circumstances of any death of an individual where an action, decision, or possible failure to offer the appropriate care by a member of any law enforcement agency might have contributed to an individual's death unless the County Executive determines, based on a review of the investigation, that the role of law enforcement was de minimis and did not contribute in any discernable way to a person's death.⁶

2. Scope of the Memorandum

The KCPAO's determination if the police action was justified or if there was a criminal action such that criminal charges should be filed is based entirely on the investigation materials provided to the KCPAO, relevant criminal laws, rules of evidence governing criminal proceedings, the applicable burden of proof, and the KCPAO's Filing and Disposition Standards. This determination is not intended to address matters outside the scope of this memorandum including, but not limited to, an administrative action by the involved agency or any other civil action. The KCPAO expresses no opinion regarding the propriety or likely outcome of any such actions.

3. Status of the Independent Investigation

After a thorough review of the independent investigation and applicable laws, the Special Operations Unit Public Integrity Team (the Team) has determined the investigation into this matter is complete.

II. OVERVIEW

On April 4, 2018, Mitchell Nelson was involved in a hit and run collision and fled the scene of the collision. Nelson entered a nearby home without permission and armed himself with

⁵ Executive Order PHL 7-1-5 EO.

⁶ Id.

the homeowner's handgun. Police officers surrounded the home and, over the course of several hours, a SWAT team commanded Nelson to exit the home, which he ignored. The SWAT team inserted chemical munitions into the home and Nelson discharged the handgun at officers who were standing on the roof of the home. The SWAT team eventually entered the home and determined Nelson was hiding in a crawl space. The SWAT team again used chemical munitions to force Nelson to exit, but he refused. A police K9 was sent into the crawl space and Nelson began to fight the K9 and he discharged his weapon two additional times. A SWAT team member observed Nelson moving and holding a handgun, so he discharged his rifle at Nelson, striking him.

III. INVESTIGATION AND EVIDENCE

1. Independent Investigation Team Reports
2. Police Reports – Kent Police Department 2018-5317
3. Police Reports – Kent Police Department 2018-5313
4. Police Reports – Des Moines Police Department 2018-0785
5. Police Reports – Federal Way Police Department 2018-4410
6. Police Reports – Tukwila Police Department 2018-2332
7. Police Reports – Renton Police Department 2018-0004
8. Police Reports – Port of Seattle Police Department 2018-20841
9. Police Reports – Auburn Police Department 2018-4550
10. Police Reports – King County Sheriff's Office 18-15089
11. Police Reports – King County Sheriff's Office 18-14701
12. Police Reports – King County Sheriff's Office 18-14701
13. Police Reports – Tacoma Police Department 18-8901356.1
14. Police Reports – Valley SWAT Notes
15. CAD
16. Search Warrants
17. Medical
18. Other Video
19. Photos

IV. INVESTIGATION SUMMARY⁷

1. Information Before and During the Use of Force

On April 4, 2018, at approximately 11:39 am, Federal Way Police Department (FWPD) Witness Officer 1 responded to a single vehicle collision near the area of 28200 Military Rd S. in Federal Way. The FWPD dispatcher reported that a witness observed the vehicle spin out of control and collide into a tree. Additionally, a 911 caller reported that the occupants of the vehicle, a male and a female, exited the vehicle and fled on foot. When Witness Officer 1 arrived, he saw that the vehicle had extensive rear damage. According to a records check, the vehicle was not reported stolen. As Witness Officer 1 wrote a collision report, he heard the FWPD dispatcher report that a 911 caller reported someone attempted to enter an occupied home near 28th Ave. S. and that the possible occupants of the vehicle were near 28100 29th Ave. S.

Witness Officer 2 and Witness Officer 3 responded first to 28104 28th Ave. S. and conducted an area check. While looking in the area, Witness Officer 3 noticed that the rear sliding door to a neighboring house was partially open with no screen door present. Witness Officer 3 thought this was odd, given the current weather conditions and the recent 911 calls about suspects in the area. As they continued to look in the area, the owner of 28101 29th Ave. S., called 911 and reported that two individuals had just attempted to enter his home. Witness Officer 2 and Witness Officer 3 traveled one block east to 29th Ave. S. and saw a male and female enter a black Chrysler 300, located in front of 28106 29th Ave. S.

⁷ The Investigation Summary is based upon the investigation and evidence outlined in Section III. When necessary, the Team will identify the source of the information. It is common for witnesses, including law enforcement officers, to provide multiple statements about the events witnessed. Similarly, it is common for multiple witnesses to provide information about the same event. If a witness provides multiple statements and the statement contains material and substantial differences that could affect the investigation or analysis, the Team will identify information that is materially and substantially different. However, if the information has a de minimis effect on the investigation or analysis, the differences may not be identified. Similarly, although some events may be observed by more than one witness, the Team may not summarize each witnesses' statement unless it has a material and substantial effect on the investigation and analysis.



Witness Officer 3 approached the male and female to ask if they saw anyone suspicious in the area. When he arrived at the car, Witness Officer 3 observed the male, later identified as Mitchell Nelson (Nelson), matched the description of the male that fled the earlier collision. Additionally, he saw that Nelson was frantically attempting to start the vehicle. Witness Officer 3 ordered Nelson to exit the vehicle, but Nelson ignored his order and started the vehicle, revving the engine repeatedly. Given that Nelson appeared frantic, did not comply with Witness Officer 3's order, and Nelson appeared to be trying to move the vehicle into drive, Witness Officer 3 believed Nelson was trying to flee. Witness Officer 2 placed his vehicle in front of the Chrysler to prevent Nelson from driving forward. At that time, Witness Officer 1 arrived and used his vehicle to block the Chrysler from fleeing.

Nelson abruptly opened the driver's door and fled into the home located at 28106 29th Ave. S. through a garage door, which was partially opened. Witness Officer 3 was concerned

that Nelson fled into a home because there are often weapons or items that can be used as weapons inside a home, an occupant of the home could be taken hostage, or a suspect could conceal themselves within the home. Given these concerns, Witness Officer 3 requested additional police resources and set up a perimeter around the residence with Witness Officer 2 and Witness Officer 1.

Witness Officer 3 observed Nelson running through the house frantically, searching through cabinets and drawers in the kitchen, and then running upstairs. This led Witness Officer 3 to believe that Nelson was searching the home for possible weapons. Additionally, Witness Officer 3 advised responding officers that there was probable cause to arrest Nelson for hit and run, obstructing a law enforcement officers, and residential burglary.

For the next thirty minutes, Witness Officer 3 and other officers who were positioned around the home yelled for Nelson to exit the house and that he was under arrest; however, Nelson ignored their orders. Another officer also used a public address system to inform Nelson he was under arrest and should exit the house, but Nelson ignored that order as well. Additionally, an officer used a public address system to inform Nelson that a police K9 was on the scene and that the K9 may be used to apprehend him, but Nelson did not exit the home. During this time, Witness Officer 3 continued to observe Nelson searching throughout the home.

Officers also spoke with the female who was with Nelson inside the Chrysler. She provided the officers with Nelson's name. She also confirmed she did not know the owner of the Chrysler, she did not know the owner of the home Nelson entered, and she and Nelson were involved in the collision on Military Road earlier. A criminal history check revealed that Nelson had prior arrests for burglary, possession of a stolen vehicle, robbery, and that he was classified as a violent offender. Witness Officer 3 noted this information was disseminated to officers at the scene.

Civilian Witness 1, the owner of the home that Nelson entered, contacted the police after a neighbor notified her there was police activity at her home. She confirmed no one should be inside her house, she is the owner of the Chrysler, and no one had permission to possess the vehicle, and she did not know Nelson nor the female. Civilian Witness 1 also told police there

were two unsecured handguns with ammunition inside the home and a safe with additional firearms inside.

Given that Nelson was inside a home with access to handguns and ammunition, supervising officers believed the situation could exceed the capabilities of patrol officers, so they requested the Valley SWAT team⁸ to assist. Witness Officer 4, the FWPD SWAT team commander, requested other members of the SWAT team to respond, including hostage negotiators, a bomb unit, and medics. Once the SWAT team arrived, Witness Officer 3 provided Witness Officer 4 with all the information that occurred previously, and Witness Officer 4 provided this information to the other SWAT team members. During this time, an FWPD detective sought a search warrant to enter the home and arrest Nelson, which was approved by a judge. The SWAT team was provided with Nelson's Department of Licensing photo, and they were notified that a judge approved the search warrant to enter the home and arrest Nelson. Officers were also aware that Nelson had an outstanding arrest warrant.

At approximately 1:35 pm, SWAT team members relieved the patrol officers containing the perimeter of the home and two negotiators used public address systems to inform Nelson he was under arrest and ordered him to exit the home, which he did not respond to. An officer used the homeowner's garage door opener to open the garage door and they deployed a noise flash diversionary device (NFDD) near the front porch, but Nelson did not respond.

At approximately 2:00 pm, commanding officers approved the officers to use a high energy breach to open the front door to provide Nelson a safe area to surrender. The breach was successfully accomplished, but Nelson did not respond. The officers made several other public address system announcements and deployed additional NFDDs, but Nelson did not respond.

At approximately 2:12 pm, Witness Officer 5 flew a drone into the home to provide a visual of the interior of the home. The officers did not locate Nelson, but they saw multiple firearm cases throughout the house, leading officers to believe that Nelson located the homeowner's firearms and armed himself. Photographs of the firearm cases were shown to the

⁸ The Valley SWAT team is composed of officers from several police departments, including Auburn, Federal Way, Kent, Renton, Tukwila, and the Port of Seattle.

homeowner, and they confirmed that firearms had previously been inside these cases. Based on this information, the officers determined it would be unsafe to enter the home and they were authorized to insert chemical munitions into the residence to make Nelson exit. Per the SWAT team's protocol, chemical munitions would be used if there was a significant danger present, which the current situation represented.

Based on the information the SWAT team had thus far, officers believed it was most likely that Nelson was in an upstairs room with a door closed or in the attic. At approximately 3:15 pm, negotiators warned Nelson that if he did not exit the home, he could be exposed to chemical munitions. Nelson did not respond, so officers inserted chemical munitions into the upper level of the home at approximately 3:40 pm. Officers that had accessed the roof of the home heard movement, coughing, and sneezing coming from the attic area, but Nelson did not communicate to them or leave the home.

At approximately 3:50 pm, the SWAT team noticed that it did not appear that the chemical munitions reached one of the sides of the home. Witness Officer 6, Witness Officer 7, and Witness Officer 8 were tasked with placing additional chemical munitions into the attic vent. While doing so, Witness Officer 6 heard approximately four gunshots from the attic directly below where he and the other officers were standing, which led him to believe that Nelson was shooting at the officers. A sniper, who was providing coverage for the officers on the roof, also heard the gunshots, saw bullet holes in the roof, and saw debris flying into the air. He used his radio to notify the other officers that Nelson had discharged a weapon through the roof. The officers on the roof evacuated for their safety and additional chemical munitions were inserted into the home. Witness Officer 8 also notified officers of the shooting, which led officers to believe that there was additional probable cause to arrest Nelson for attempted murder.

At approximately 4:00 pm, after the additional chemical munitions were used, Witness Officer 5 flew a drone into the home and landed it on the split staircase to determine if Nelson attempted to evacuate the attic. He heard officers advise over the radio that they may have seen Nelson running through the home. While watching the live feed of the drone's camera, Witness Officer 5 observed a blurred movement and it appeared as if the drone was thrown into the kitchen area, landing upside down. Given that Witness Officer 5 had not touched the controls,

nor had he ever witnessed the drone spontaneously take off or land on its own, he concluded it was likely that Nelson had either kicked or thrown the drone while running throughout the home.

At approximately 4:15 pm, the SWAT team believed that Nelson was most likely hiding in an area of the home described as a “man cave,” which was located next to the garage and near the gun safe. At 4:40 pm, officers breached the exterior wall of the home and deployed additional chemical munitions into the area. A small fire started, and officers used fire extinguishers to put out the flames.

By 6:20 pm, the SWAT team requested additional supplies and the King County Sheriff's Office SWAT team responded to assist. Additionally, officers recorded a message from Nelson's sister, asking him to surrender, which was played on the public address system over twenty times. Nelson did not respond or surrender.

By approximately 8:30 pm, daylight was exhausted, and Nelson had not surrendered or communicated with officers. The SWAT team was authorized to covertly enter the home and locate Nelson. Officers previously terminated power to the home and entered the home using night vision goggles. After thoroughly searching the home, officers could not locate Nelson. However, at approximately 9:35 pm, officers located a crawl space that had not been previously detected. Officers breached the door to the crawl space and inserted chemical munitions inside. Officers could not see directly into the crawl space given the chemicals, the lack of light, and the risk that entering the crawl space posed to them. After a few minutes, Witness Officer 9 heard dry heaving coming from the crawl space, which led him and other officers to believe that Nelson was inside, but Nelson did not exit the crawl space nor communicate with officers.

At approximately 10:07 pm, officers heard what sounded like a single gunshot come from inside the crawl space, followed by silence. This led officers to believe that Nelson may have committed suicide. Witness Officer 10, Involved Officer 1, and Witness Officer 11 were also covering the crawl space from outside of the residence on the porch through a window that had been removed. Witness Officer 10 utilized a thermal imaging camera and saw the shape of one human figure, later identified as Nelson, inside the crawl space approximately ten to fifteen feet away from the crawl space opening. Additionally, Witness Officer 10 observed a dark spot near Nelson's stomach, which he thought may be the shape of a firearm. Although Nelson was not

moving, officers were concerned that he may be pretending to be injured so that he could ambush them if they entered the crawl space. Therefore, a police K9 was authorized to contact Nelson.

Involved Officer 1 joined Witness Officer 10 at his location. Witness Officer 10 noted that the other officers, including Involved Officer 1, were still wearing their night vision goggles, but if he put his own on then he could not see the thermal imaging screen. Therefore, Witness Officer 10 removed his night vision goggles, but given the darkness of the home, he could only see the thermal imaging screen. At approximately 10:35 pm, the K9 entered the crawl space and Witness Officer 10 saw the moving shape of a dog inside. Initially, the K9 walked on top of Nelson but neither the K9 nor Nelson responded. The K9 exited the crawl space, but he was sent back inside to search again. On his second search, the K9 discovered Nelson and bit him. Nelson yelled and began to strike the K9 with his arms and hands. As Nelson struggled with the K9, a single gunshot was fired from inside the crawl space, leading officers to believe that Nelson had shot or shot at the K9. The K9 and Nelson continued to struggle, and another single gunshot was fired from the inside the crawl space, leading Witness Officer 10 to believe that Nelson may be firing at the officers on the outside of the crawl space. Witness Officer 10 observed the K9 biting at Nelson's arm or hand and observed Nelson put the K9 into a headlock. The K9's handler ordered him out of the crawl space and the K9 eventually exited.

While Nelson and the K9 struggled, Witness Officer 10 observed that Nelson's location was now closer to Witness Officer 10. He reported that this caused him to feel very concerned for his life and the lives of the other officers near the crawl space. His feeling was based on Nelson's prior actions, including Nelson continuously ignoring law enforcement commands to exit the home for several hours, he had discharged a firearm at officers on the roof, he subsequently discharged a firearm twice in the crawl space, and Witness Officer 10 noted that he had never seen a suspect appear to be unaffected by chemical munitions or a K9 in the same way.

During Nelson's struggle with the K9, Involved Officer 1 communicated to Witness Officer 10 that he could not see Nelson through the opening into the crawl space. However, at approximately 10:45 pm, Involved Officer 1 stated that he saw Nelson and saw a firearm in his

hand. Although Witness Officer 10 did not look at Involved Officer 1, he believed that Involved Officer 1 was wearing night vision goggles because Witness Officer 10 noted there was no light inside the home. Witness Officer 10 heard Involved Officer 1 fire multiple rounds from his rifle and saw via the thermal imaging camera that the bullets impacted Nelson. Involved Officer 1 stated that Nelson was still waving the handgun and discharged multiple rounds. Witness Officer 10 observed through the thermal imaging camera that Nelson fell to the ground and did not move.

At approximately 11:25 pm, Officers opened a hole in the floor to enter the crawl space. As officers entered the crawl space, they observed a handgun in Nelson's right hand, which was removed so that officers could remove him from the crawl space and provide medical assistance; however, medics reported that Nelson was deceased.

2. Independent Investigation Conducted by the Des Moines Police Department

The Valley Independent Investigation Team was requested to respond to the scene and to conduct an independent investigation. Des Moines Police Department Investigator 1 was assigned as the lead investigator. After being briefed on what occurred, the independent investigation team (IIT) divided assignments between themselves and began their investigation.

3. Civilian Witnesses

The IIT attempted to interview several people who lived in the nearby homes. Neighbors were generally aware of the police presence, heard announcements over the public address system, observed the police deploy chemical munitions, and heard gunshots. However, none of the neighbors viewed any of the incidents that occurred inside the home or the use of force inside the crawl space.

4. Involved Officer Statement

The investigation into this incident occurred prior to the implementation of RCW 10.114.011 and WAC 139-12-030, which established the requirements for an Independent Investigative Team to conduct independent investigations into police use of force cases. As was

often the practice of the involved agencies, the investigative material supplied in this case included the involved officer's compelled statements. Such compelled statements are inadmissible against an officer in a subsequent criminal trial.⁹ Police and prosecutors are also barred from making "indirect evidentiary use" of the officer's compelled statement, which includes investigative efforts or testimony that has been shaped, altered, or affected, directly or indirectly, by the officer's compelled statement.¹⁰ While the compelled statement and information derived from such a statement cannot be used to support criminal charges against an officer, a credible compelled statement provides insight into the potential testimony of an involved officer. While it may be useful to the Team in analyzing the current incident and may be used in support of a finding of no criminal liability for the officer's actions, the Team did not rely upon Involved Officer 1's compelled statement to ensure that the Team's analysis comprised only of admissible evidence.

5. Medical

The King County Medical Examiner's Office performed an autopsy of Nelson, which opined the cause of death is multiple gunshot wounds of the torso sustained in a confrontation with police and the manner of death is homicide.¹¹ The pathological diagnoses included evidence of four gunshot wounds:

- One perforating gunshot wound of the chest.¹²
- Two penetrating gunshot wounds of the abdomen.
- Two tunnelling gunshot wounds of the chest.

The Washington State Patrol Toxicology Laboratory performed a drug analysis of Nelson's blood. The results showed that Nelson's blood tested positive for amphetamine (.30

⁹ *Garrity v. State of N.J.*, 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed. 2d 562 (1967).

¹⁰ *U.S. v. North*, 910 F.2d 843, 857-858 (D.C. Cir., 1990).

¹¹ Homicide is defined as the killing of one person by another. HOMICIDE, Black's Law Dictionary (11th ed. 2019). Thus, the term homicide as used in an autopsy report refers to the mechanism of death and does not refer to legal liability or culpability.

¹² A penetrating gunshot wound occurs when a bullet pierces the skin, enters the body creating an entrance wound, but the bullet does not exit the body. In contrast, a perforating gunshot wound occurs when the bullet pierces the skin, enters the body creating an entrance wound, and exits the body creating an exit wound.

mg/L), methamphetamine (1.3 mg/L), codeine (.026 mg/L), hydromorphone (11 ng/mL), and morphine (1.0 mg/L).

V. LEGAL STANDARD AND APPLICABLE LAW

1. Burden of Proof

The State must prove each element of a criminal charge by competent evidence beyond a reasonable doubt.¹³ The KCPAO will file charges if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defenses that could be raised under the evidence, would justify conviction by a reasonable and objective factfinder.¹⁴

In addition, the State must disprove the existence of a defense that negates an element of the crime.¹⁵ Prosecution should not be declined because of an affirmative defense unless the affirmative defense is of such nature that, if established, would result in a complete defense for the accused and there is no substantial evidence to refute the affirmative defense.¹⁶ Therefore, the State may be required to disprove one or more of the following defenses:

- Justifiable Homicide by Peace Officer;¹⁷
- Justifiable Homicide Defense of Self or Others;¹⁸
- Justifiable Homicide Resistance to Felony;¹⁹

2. Applicable Law

This incident occurred on April 4, 2018. At the time of this incident, the applicable statute and pattern jury instruction required the State to prove the officer acted with malice.²⁰

¹³ RCW 9A.04.100; WPIC 4.01.

¹⁴ KCPAO Filing and Disposition Standards.

¹⁵ WPIC 14.00.

¹⁶ Id.

¹⁷ RCW 9A.16.040; WPIC 16.01.

¹⁸ RCW 9A.16.050(1); WPIC 16.02.

¹⁹ RCW 9A.16.050(2); WPIC 16.03.

²⁰ For offenses committed on or prior to December 6, 2018, the former version of WPIC 16.01, based upon RCW 9A.16.040, required the prosecution to prove the officer acted with malice. For offenses committed between December 7, 2018, and February 3, 2019, RCW 9A.16.040, based upon Laws of 2019, Chapter 1, § 7, removed the malice standard and required the prosecution to prove the officer did not act in good faith. There are no pattern jury instructions for offenses committed between December 7, 2018, and February 3, 2019. For offenses committed on or

VI. ANALYSIS AND CONCLUSION

Under the KCPAO filing standards, “Homicide cases will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder. Prosecution should not be declined because of an affirmative defense unless the affirmative defense is of such nature that, if established, would result in complete freedom for the accused and there is no substantial evidence to refute the affirmative defense.”

The KCPAO declines to file charges against Involved Officer 1 or any other officer involved in this incident because the independent investigation and the Team’s analysis reveal that there is insufficient evidence to prove any criminal charges or disprove applicable affirmative defenses beyond a reasonable doubt.

1. Justifiable Homicide by a Peace Officer

Under the former RCW 9A.16.040, homicide is justifiable when used by a peace officer to arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony.²¹

In considering whether to use deadly force to arrest or apprehend any person for the commission of any crime, the peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others.²² Among the circumstances which may be considered by peace officers as a “threat of serious physical harm” are the following:

- The suspect threatens a peace officer with a weapon or displays a weapon in a matter that could reasonably be construed as threatening; or

after February 4, 2019, the current version of WPIC 16.01, based upon RCW 9A.16.040, requires the prosecution to prove the officer did not act in good faith. RCW 9A.16.040(1)(a) utilizes the malice and good faith standard, but this section only applies when a “public officer applied deadly force in obedience to the judgment of a competent court.”

²¹ RCW 9A.16.040(1)(c)(i); WPIC 16.01.

²² RCW 9A.16.040(2).

- There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.²³

A public officer or peace officer shall not be held criminally liable for using deadly force without malice and with a good faith belief that such act is justifiable pursuant to this section. In order to prove malice, the State must prove beyond a reasonable doubt that the officer acted with an evil intent, wish, or design to vex, annoy, or injure another person.²⁴ Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.²⁵

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.²⁶ “The calculus of reasonableness must embody allowance for 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.”²⁷

First, the independent investigation showed there was probable cause for the officers to believe that Nelson committed or was in the process of committing various felonies. Specifically, Nelson entered a home without permission, discharged a handgun at officers standing on the home’s room, and discharged a handgun at a police K9 or offices from inside the crawl space. Therefore, there was probable cause to believe that Nelson committed several felonies, including residential burglary and multiple counts of assault in the first degree or attempted murder.

Second, the independent investigation showed there was probable cause to believe that Nelson, if not apprehended, posed a threat of serious physical harm to the officers or others. The investigation showed that officers commanded Nelson to exit the home and surrender over the course of several hours and multiple chemical munitions. During this time, Nelson shot through

²³ Id.

²⁴ RCW 9A.04.110(12).

²⁵ Id.

²⁶ Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989).

²⁷ Id. 490 U.S. at 396-97.

the home's roof, indicating his intent to harm officers. There was no indication that Nelson intended to leave the home peacefully given that he discharged a firearm several times.

Third, the evidence obtained by the independent investigation team would support a jury finding that Involved Officer 1 used deadly force with a good faith belief that his actions were justifiable and without malice. The investigation showed that Involved Officer 1 did not use force until he saw Nelson moving through the crawl space with a firearm. The evidence would highly likely show that Involved Officer 1 was aware of Nelson's prior actions that were discussed at the briefing given to the SWAT team. Additionally, the evidence would highly likely show that Involved Officer 1 was aware that Nelson discharged a firearm at officers on the roof and from within inside the crawl space. Under these circumstances as they would likely appear to Involved Officer 1, Nelson did not intend to surrender and, very likely, would continue to disobey police commands and attempt to shoot at officers if given another opportunity. Thus, there is insufficient evidence to disprove that Involved Officer 1 acted without good faith and that he acted with malice towards Nelson.

2. Justifiable Homicide in Defense of Self or Others

Homicide is justifiable in defense of self or others when the slayer reasonably believed the person slain intended to commit a felony, to inflict death, or to inflict great personal injury; the slayer reasonably believed that was imminent danger of such harm being accomplished; and the slayer employed such force and means as a reasonably prudent person would under the same or similar conditions as they reasonably appeared to the slayer.²⁸ Great personal injury includes an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering, if it were inflicted upon either the slayer or another person.²⁹

The reasonable person standard used in this instruction does not expressly require the jury to compare the slayer to a reasonable officer. However, because law enforcement officers –

²⁸ RCW 9A.16.050(1); WPIC 16.02.

²⁹ WPIC 2.04.01.

especially compared to non-law enforcement civilians – receive significant amounts of training on weapons, defensive tactics, and the use of force, it is prudent to assume the jury would be required to take Involved Officer 1’s training into account. Therefore, the same evidence and testimony used to determine whether Involved Officer 1 acted as a reasonable peace officer are also relevant to this instruction.

While it can be argued Involved Officer 1 could not have known what Nelson intended at the exact moment Involved Officer 1 used force, the Washington Instruction Committee noted that “Imminence does not require an actual physical assault. A threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out.” Additionally, a person is entitled to act on appearances in defending himself, if that person acts in good faith and on reasonable grounds, although it afterwards might develop that the person was mistaken as to the extent of the danger. In other words, Justifiable Homicide in Defense of Self or Others does not require the slayer to be certain that the person slain was in the process of an actual physical assault. Instead, based on the instruction, Involved Officer 1 was permitted to act on the appearance that Nelson would continue to present a deadly threat to officers because he acted in good faith and on reasonable grounds, as described earlier.

VII. INQUEST FINDINGS

An inquest was held to determine the manner, facts, and circumstances of Nelson’s death. On August 22, 2023, an inquest jury unanimously determined that Involved Officer 1 complied with FWPD policies and trainings, his use of deadly force was justified, and he did not cause Nelson’s death by criminal means. The inquest jury’s findings, which are permitted to rely on admissible and inadmissible evidence, are consistent with the Team’s analysis of the independent investigation.
