

Public Report

May 27, 2020: Use of Force Complaint



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INCIDENT

On May 27, 2020, an individual later identified as having a name with the initials J.R. (hereinafter “JR”) was arrested by Fairfax County Police Department (hereinafter “FCPD”) officers in the parking lot of the Office Depot located at 2901 Gallows Road. On June 22, 2020, JR contacted the Office of the Independent Police Auditor to complain about the officers’ use of force (hereinafter “UOF”) against her during the arrest. She also alleged other misconduct by the officers which was considered by the Fairfax County Police Civilian Review Panel.¹ Specific to her UOF allegations, JR alleged that prior to and during the arrest, she was forcibly yanked out of her car, dragged across the concrete parking lot, lifted from the ground by her hair, and punched in her stomach.²

The incident resulting in JR’s arrest outside of the Office Depot location began when JR found herself locked inside the store after all other customers and employees had left the location and the doors had been locked for the night. JR called the Fairfax County Department of Public Safety Communications (hereinafter “DPSC”) to report that she needed assistance getting out of the locked store. FCPD Police Officer First Class #1 (hereinafter “PFC#1”), Police Officer First Class #2 (hereinafter “PFC#2”), and Officer #1 (hereinafter “OFFC#1”) responded to the location. The manager of the Office Depot returned to the store after being notified of the store’s alarm being activated.

When the officers arrived at the Office Depot, JR was instructed to leave the building through a rear door. She exited with a cart containing items from the store in Office Depot bags. JR stated that she had purchased the items before going back to look for one more item, and then got locked inside. Upon leaving the store, JR and the officers went to the front parking lot and

¹ After establishing both the Independent Police Auditor and the Fairfax County Police Civilian Review Panel (hereinafter “Panel”), the Fairfax County Board of Supervisors approved the Panel’s by-laws on July 11, 2017. In Article VI. at A. 3., those by-laws 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.” For a full discussion of the respective scopes of authority of the Auditor and the Panel, visit <https://www.fairfaxcounty.gov/policeauditor/> and <https://www.fairfaxcounty.gov/policecivilianreviewpanel/>. On February 4, 2021, the Panel voted not to undertake a review of the FCPD investigation into JR’s other, non-UOF, allegations (see the meeting materials available at <https://www.fairfaxcounty.gov/policecivilianreviewpanel/panel-meetings>).

² When JR was interviewed by the FCPD based on her complaint to the Auditor, she denied alleging that she had been punched in the stomach.

JR began putting the items into her car. When she was asked to show the receipt for the items, she said the receipt had been e-mailed and could be accessed from her cellphone.³ She did not produce an e-mailed receipt.

Now seated in her car, JR asked to leave and said she would return the following morning to clear things up at the store. However, the officers explained that she would be detained while they attempted to confirm that she had purchased the items from the store.

The following summary is how JR described subsequent events:⁴

One officer asked her to get out of her car, but she refused to do so for approximately two minutes because she thought the officers may hurt her if she did. At this point five male officers grabbed her and pulled her out of the car. She was then thrown to the ground and dragged across the pavement, causing her to feel as though the skin on her face had been burned off. When she did not stand up after being ordered to do so, the officers “hoisted [her] up” by her hair. Her face was now bleeding profusely, her lips were swollen, she had blood in her mouth and possibly a broken nose.

An ambulance responded, and JR had to be carried into it to receive treatment. While in the ambulance, one officer sat on her and held her handcuffed hands down while three other officers tried to intimidate the medics treating her. When she declined transport to a hospital, the ambulance left. JR was then placed in the back of a police cruiser and transported to the Fairfax County Adult Detention Center (hereinafter “ADC”). The following day JR went to an urgent care facility for treatment of her injuries resulting from her arrest.

The following summary is how the three officers described subsequent events:

The officers arrived at the Office Depot before the manager of the store. Because the front door was locked, they instructed JR to exit from a back door and then they proceeded to the

³ Before arresting JR, the store manager advised that e-mail receipts had been discontinued to avoid keypad contact during the Covid-19 pandemic.

⁴ This summary includes her allegations relating to UOF only. See footnote 1 and the link therein to learn JR’s myriad non-UOF allegations.

parking lot in front of the store. JR put the items from Office Depot into her car and got into the driver's seat. When OFFC#1 asked to see the receipt for the items, JR informed OFFC#1 that the electronic receipt was on her cellphone. The Office Depot manager returned to the store at this point and advised that electronic receipts were not being used due to the pandemic.⁵

When she did not produce a receipt, JR asked whether she could leave and return to resolve matters the following morning. OFFC#1 advised her that she could not leave until the officers were able to determine that the items were not, in fact, stolen. OFFC#1 asked JR to step out of her car. After again being asked to produce a receipt, JR locked her car door. OFFC#1 reached in to unlock the door, and JR started the engine. OFFC#1 thought JR was going to drive away, and PFC#1 remembered JR putting the car in gear to drive away. At this point PFC#2 told JR to turn the car off and step out of it. She was told repeatedly to get out of her vehicle for between two to three minutes. The officers finally decided to remove JR from the car. They opened the car door despite JR trying to keep it closed, and then OFFC#1 and PFC#1 pulled JR by her arms. She continued to resist their efforts while being told that she was now being detained. PFC#2 recalled JR bracing her legs against the car to avoid being removed from it, and he thought her head hit the door frame as she was being removed. OFFC#1 and PFC#1 then placed JR on the ground. To overcome her continued resistance, the three officers held JR down and handcuffed her. She was repeatedly told to stop resisting. The officers then got JR into a sitting position and lifted her to her feet. PFC#1 remembered JR craning her head back and hitting her nose on the door frame as she was removed from the car. He also recalled that her hands may have been scratched.

The officers observed that JR's nose was bleeding, so medical assistance was summoned through DPSC. An ambulance responded and two emergency medical technicians (hereinafter "EMT") treated JR for the nosebleed. She declined to be transported for any additional medical treatment. After being treated by the EMTs, JR was arrested and transported to the ADC.

⁵ The manager then viewed the surveillance video from the store and reported to the officers that JR had not paid for the items she removed from the store.

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted only an administrative investigation into JR's allegations of excessive force during her May 27, 2020, arrest. The results of that administrative investigation into the officers' UOF will be detailed in the following section of this report.

Based on this incident, JR was charged with Petit Larceny⁶ and Obstruction of Justice.⁷

INTERNAL ADMINISTRATIVE INVESTIGATION

JR's complaint included numerous allegations of misconduct by FCPD officers.⁸ The internal investigation into the UOF allegations during this incident was, in my opinion, complete, thorough, objective, impartial, and accurate. All appropriate interviews were conducted, and all potential evidence was pursued. Specifically, JR, the officers involved, the Office Depot manager, and the two responding EMTs who treated JR, were all interviewed. Office Depot surveillance camera footage was reviewed, and the existence of surveillance camera footage from the parking lot where the UOF and arrest took place was explored but none was found. DPSC logs were reviewed, and available medical records were obtained and reviewed. In-car video (hereinafter "ICV") camera footage was reviewed, and the audio was enhanced; however, even after enhancement the audio was mostly inaudible. The ICV footage did not capture the actual UOF or arrest but did clearly capture the events immediately thereafter.

Specific to the UOF allegations, the FCPD investigation concluded that no violations of policy or law occurred during the incident. I agree with the FCPD's conclusion and will articulate my reasons in the following section.

⁶ Virginia Code § 18.2-96.

⁷ Virginia Code § 18.2-460.

⁸ For discussion of JR's non-UOF allegations, see fn. 1, *supra*.

CONCLUSIONS

FCPD General Order (hereinafter “G.O.”) 540.0, USE OF FORCE, PURPOSE AND POLICY, states in part: “Force 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. Force should be based upon the totality of the circumstances known by the officer at the time force is applied, without regard to the officer’s underlying intent or motivation, and weighs the actions of the officer against their responsibility to protect public safety as well as the individual’s civil liberties. Force shall not be used unless it is reasonably necessary in view of the circumstances confronting the officer.”⁹ FCPD G.O. 540.1, USE OF FORCE, DEFINITIONS, 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. 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.”¹⁰

Furthermore, FCPD policy defines varying levels of resistance presented by individuals, to include passive and active resistance¹¹ which were engaged in by JR during the incident under review.

Finally, departmental policy defines “less-lethal” force, to include “empty-hand tactics, such as strikes, kicks, or takedowns,¹² as “[a]ny level of force not designed to cause death or serious injury that is reasonably necessary to gain compliance by individuals offering resistance,”¹³ and it specifically includes the “[e]ffecting of an investigative stop or arrest” as an “[i]nstance where less-lethal force may be effective.”¹⁴

In the incident under review, the officers were effecting an investigative detention to further investigate whether JR had committed larceny. When she refused to get out of her car for

⁹ FCPD G.O. 540.0 II.

¹⁰ FCPD G.O. 540.1 I. L.

¹¹ FCPD G.O. 540.4. See GLOSSARY for definitions.

¹² FCPD G.O. 540.4 II. A. 2. a.

¹³ FCPD G.O. 540.4 II. A. 2.

¹⁴ FCPD 540.6 I. A. 1.

over two minutes, started it and possibly even put it in gear to drive away, she was clearly resisting. She continued to actively resist when the officers reached into the vehicle to physically remove her from it. The amount of force was objectively reasonable to overcome that resistance and, therefore, complied with FCPD policy. It should be noted that JR’s allegations of being dragged across the pavement (causing profuse bleeding) and being lifted by her hair, are not substantiated by ICV footage, the statements from the officers, the EMTs, and the Office Depot manager, or by any available medical records.¹⁵

Much of FCPD’s policy language on UOF is taken directly from the United States Supreme Court’s 1989 Graham v. Connor decision.¹⁶ In that seminal UOF case, the Supreme Court pointed out “that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it,”¹⁷ that such uses of force by law enforcement officers in this country are to be analyzed under the Fourth Amendment to the United States Constitution,¹⁸ and that to be lawful under that Fourth Amendment standard, an officer’s use of force must be objectively reasonable. Consequently, for the same reasons the officers’ actions in this incident comported with FCPD policy, they complied with the applicable legal standards as well.

RECOMMENDATIONS

In a recent public report—published on December 14, 2020¹⁹—I recommended adding certain consensual encounters, investigative detentions, and arrests to the list of situations when the FCPD mandates the activation of ICV equipment. Specifically, I recommended that ICV be

¹⁵ Additionally, at least some of her non-UOF allegations are directly disputed by the individuals on the scene. See, for example, discussion by the Panel subcommittee at its February 2, 2021 meeting: <https://www.fairfaxcounty.gov/policecivilianreviewpanel/panel-meetings>.

¹⁶ 490 U.S. 386 (1989).

¹⁷ *Id.* at 396.

¹⁸ Amendment IV to the U.S. 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.

¹⁹ The full report is available at [OIPA Incident Report 4-28-19.pdf \(fairfaxcounty.gov\)](#).

activated whenever it is foreseeable that the consensual encounter, investigative detention, or arrest, will be initiated or occur within the range of the ICV equipment. Currently, FCPD G.O. 430.8—IN CAR VIDEO PROGRAM—which addresses the mandatory activation of ICV equipment does not mandate its use in these circumstances. Rather, FCPD G.O. 430.8 IV. A. mandates the use of ICV only in the following situations:

- 1) traffic stops, and the equipment can only be turned off after the traffic stop has ended and the violator and/or officer have left the scene;²⁰
- 2) pursuits, and the equipment can only be stopped when a suspect is taken into custody, a supervisor directs the deactivation, or the pursuit is terminated;²¹
- 3) emergency response driving situations;²²
- 4) transports of people.²³

Adding to this list the mandatory activation of ICV equipment—whenever it is foreseeable that a consensual encounter, investigative detention, or arrest, will be initiated or occur within the range of the ICV equipment—could possibly provide video footage in future incidents such as the one under review. While I am not suggesting that the ICV equipment needed to be activated prior to escorting JR to the front of the Office Depot in the incident under review,²⁴ the lack of footage from the actual extraction from the car and arrest of JR only reinforces why the recommendation made in the earlier report should be implemented by the FCPD.

With full implementation of the department’s body-worn camera program (hereinafter “BWC”), the need to capture ICV footage of an incident may lessen; however, full implementation is not projected until the county’s 2022 fiscal year. If the ICV activation recommendation described herein is implemented, the policy change will make the ICV policy consistent with the requirements of the current BWC policy. Specifically, FCPD Standard Operating Procedure (hereinafter “SOP”) 18-056 requires the activation of an officer’s BWC,

²⁰ FCPD G.O. 430.8 IV. A. 1.

²¹ FCPD G.O. 430.8 IV. A. 2.

²² FCPD G.O. 430.8 IV. A. 3.

²³ FCPD G.O. 430.8 IV. A. 4.

²⁴ In fact, the officers should be commended for activating the ICV following JR’s arrest and capturing video of subsequent events in the parking lot.

unless there is an immediate threat to the officer or others that would prevent activation, prior to the following situations:

- 1) the arrival at any call for service;²⁵
- 2) traffic or subject stops;²⁶
- 3) self-initiated events involving the rendering of public services or law-enforcement related activity;²⁷
- 4) the transportation of any person in-custody.²⁸

Aside from reiterating the earlier recommendation described above, I have no recommendations based on my review of the investigation into JR's UOF allegations during this incident.

²⁵ FCPD SOP 18-056 III. C. 3. a.

²⁶ FCPD SOP 18-056 III. C. 3. b.

²⁷ FCPD SOP 18-056 III. C. 3. c.

²⁸ FCPD SOP 18-056 III. C. 3. g.

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.

