

Beth McCann
District Attorney
Second Judicial District



201 W. Colfax Ave. Dept. 801
Denver, CO 80202
720-913-9000

Beth.McCann@denverda.org

April 19, 2023

Art Acevedo
Chief of Police
Aurora Police Department
15001 E. Alameda Parkway
Aurora, CO 80012

RE: Investigation of the shooting death of Abel Semere Yohannes (dob 8-16-92) which occurred October 1, 2022, at the entrance to the Pikes Peak Shuttle parking lot in the 7400 block of N. Gun Club Road, Denver, Colorado; DPD General Offense 22-506554.1

Dear Chief Acevedo,

Our office has reviewed the investigation of the officer involved shooting that occurred on October 1, 2022, at the entrance to the Pikes Peak Shuttle parking lot near DIA in Denver, Colorado. The shooting occurred after an authorized high-speed police pursuit by Aurora officers that began in Aurora. When the suspect vehicle was finally stopped in Denver, the driver pointed a replica of an AR-15 rifle at an Aurora Police Department officer. Three Aurora officers, Garrett Strode (badge #1821), Eric Dunston (badge #1727), and Brad Jesik (badge #2120) fired their weapons in response, resulting in the death of the driver, Abel Semere Yohannes (age 30).

I am writing to inform you that I find the force used by all three officers was legally justified under Colorado law, and no criminal charges will be filed. My decision, which is based on criminal law standards, does not limit administrative action that may be taken by the Aurora Police Department, or civil actions, in which different laws, rules, and legal levels of proof apply.

As is my practice, I will hold a community meeting during which members of the public may ask questions about this incident. This letter will be posted to our website.

Summary of Facts

7-11 Store

On Oct 1, 2022, Aurora Police Officers Garrett Strode and Angelo Mujica (Emp. Id. #319255) responded to a 7-11 store at 14490 East Colfax Ave., Aurora, Colorado, on a

report of a robbery that occurred at approximately 1:14 a.m. The clerk reported that a man shoplifted some items and went outside to a black car, getting into the front passenger seat. When the clerk followed and confronted the man, the driver of the car got out and pointed a long black “shotgun” at the clerk, frightening him. The clerk believed the weapon was real. A customer of the 7-11 witnessed this. He drew a handgun that he carried as a concealed weapon and told the driver to put the gun down. The driver got back into the car and drove off.

The officers viewed the store’s video recording and compared the vehicle to photos online. They reported the vehicle was a black Volkswagen “Tiguan” SUV with black rims, with no license plate in front. Officer Strode noted a distinctive piece of white paper on the dashboard.

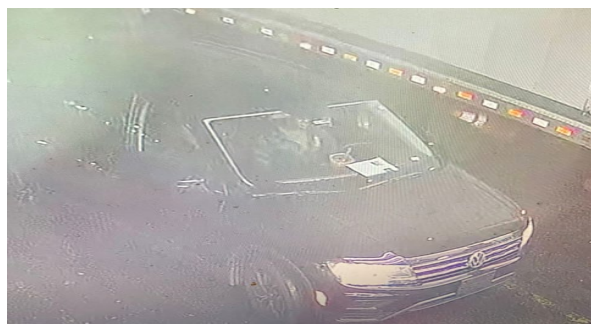


Photo 1. VW Tiguan parked at the 7-11 (from 7-11 video)

The “shotgun” was described by the customer as a “short-barreled shotgun”, all black in color, with “cutouts” on the barrel, “kind of like a tactical style shotgun”. The officers could not see the weapon on the store video, however, because the menacing incident did not occur in camera view.

Wolf’s Motor Inn

About four hours later at approximately 5:32 a.m., Officer Strode responded to a call on an unrelated matter at the Wolf’s Motor Inn at 15691 E. Colfax Ave. in Aurora. While there, he noticed a car fitting the description of the Volkswagen Tiguan. Officer Strode confirmed that it matched the car he saw on the 7-11 video, including the paper on the dash that he noticed on the video.



Photo 2. VW Tiguan at Wolf's Motor Inn (from Officer Strode's BWC)

The VW was backed into a parking space in front of a row of rooms at the Inn. It appeared that the driver was either sleeping or was passed out in the driver seat. Officer Strode radioed for assistance from additional officers, noting that the driver had been reported to be armed with a "tactical shotgun" and the vehicle was now at a hotel. Several Aurora police officers in police vehicles arrived at Wolf's Motor Inn to assist.

The officers developed a plan to contact the driver without risking a close approach to the vehicle and to protect the occupants of the Inn in case the driver ran from the vehicle with a weapon. Officers took positions on-foot in the parking lot near the VW and alongside the Inn protecting the rooms. Some officers were waiting in their vehicles nearby in the surrounding area. A pursuit was authorized, if necessary, by Sergeant Paulmichael Trenergy (313114), who was on scene.

At 6:16 a.m. Officer Eric Dunston announced the presence of police by yelling very loudly toward the VW: "Aurora Police. Driver, you are surrounded. Put your hands up." When the driver failed to respond, Officer Kyle Stoeppel (315942) fired a 40mm round (a less than lethal foam projectile) at the windshield to get the driver's attention. The 40mm round hit the windshield and bounced off. The driver then began to look around and move but he ignored additional police commands shouted by Officer Dunston.

The officers then saw there was a passenger in the VW they had not previously seen, and who apparently had awakened and sat up. The driver put the VW into reverse and backed up a few feet, then drove forward and drove out of the parking lot. The VW turned eastbound on Colfax Ave. It was 6:17 a.m.

Eluding and Pursuit

Officers who were staged nearby saw the VW and followed it onto Colfax with lights and sirens activated. The driver refused to stop. For the next twenty minutes, the driver fled at very high speeds, reaching over 120 mph on interstate highways. Multiple Aurora police vehicles followed.

The VW was driven east on Colfax Ave.; east on I-70; then exited and came back westbound on I-70; north on E 470; then exited onto Peña Blvd eastbound; and exited

eastbound on 75th Ave. It turned right (south) on N. Gun Club Road and traveled southbound to where the road curved left to become the west entrance to the Pikes Peak Shuttle parking lot near DIA.



Photo 3. From Google Maps.

At the curve in the road, just as the VW approached the gates at the parking lot entrance, Officer Dominic Ferris (319032) performed a PIT¹ maneuver that successfully caused the VW to spin counterclockwise and crash. It was 6:37 a.m..



Photo 4. From Google Maps.



Photo 5. From parking lot surveillance video.

The front of the VW impacted a yellow pole barrier protecting the ticket dispensing area at the parking lot entrance. This impact caused the safety airbags of the VW to deploy. The PIT maneuver also caused Officer Ferris to lose control and crash into the guardrail bordering the roadway on his right. Officer Strode was close behind on the curve followed by Officer Jesik.

¹ Precision Immobilization Technique.



Photo 6. From parking lot surveillance video

Officer Garrett Strode

Officer Strode then drove the front of his police SUV into the driver’s side door of the VW to pin it in place at the yellow pole. The VW was facing northeast. Strode’s SUV was facing southeast.

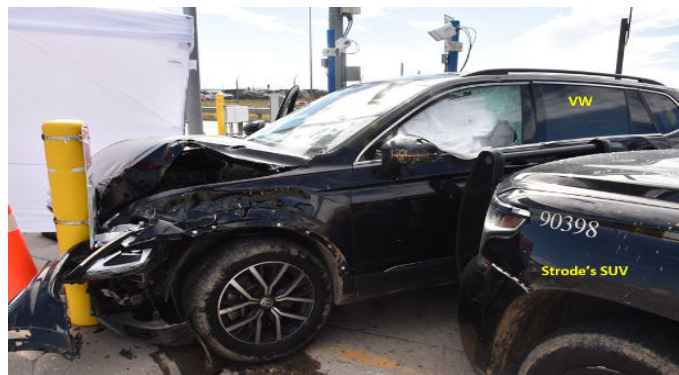


Photo 7. From crime scene photo taken 10/1/22

After the VW was pinned, the passenger got out and ran east into the parking lot, holding his hands in the air. Meanwhile, Officer Jesik pulled up and stopped on the passenger side of Officer Strode.



Photo 8. From parking lot surveillance video

Officer Strode got out of his police SUV and began yelling commands at the driver of the VW to “Put your hands on your face”. However, he could not see the driver because the side curtain airbags blocked his view.



Photo 9. From Officer Strode's BWC

Officer Strode moved closer to the VW and to his left, trying to look through the windshield to see the driver. He had a light affixed to the bottom of his handgun that was illuminating where he pointed it. He continued to yell, “Put your hands on your face” as he was “clearing” the VW. His body worn camera shows that after four seconds he was standing in front of the A pillar on the VW driver's side, facing the windshield. He could see through the windshield.



Photo 10. From Officer Strode's BWC

Suddenly, Officer Strode saw movement of an object above the dashboard in front of the driver. The movement was from left to right from Strode's perspective. It is clearly shown on Strode's body worn camera when played in video mode. The following four images (photos 11 - 14) are still images from Officer Strode's body worn camera taken at 6:37:39 a.m. showing the progression of the movement during that second.

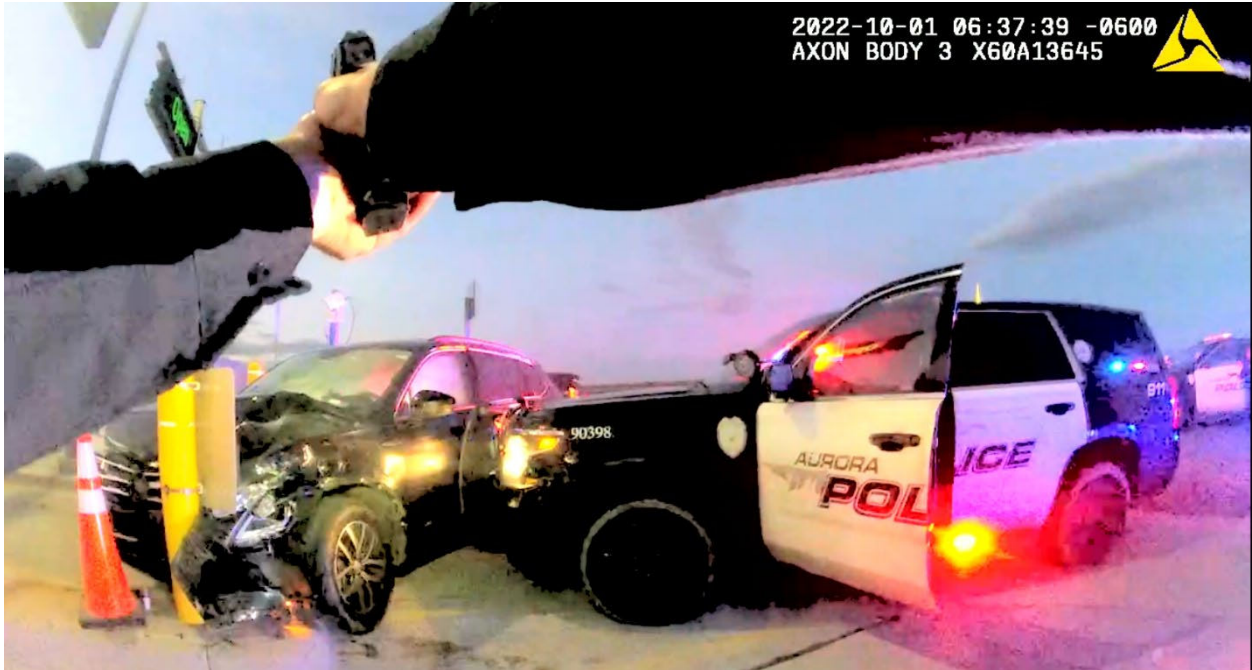


Photo 11. From Officer Strode's BWC. Movement above the driver's dashboard



Photo 12. From Officer Strode's BWC. Movement, from left to right, above the driver's dashboard



Photo 13. From Officer Strode's BWC. Movement, from left to right, above the driver's dashboard.



Photo 14. From Officer Strode's BWC. Movement, from left to right, above the driver's dashboard.

Office Strode stated in his interview that he could see a rifle and that it appeared to be pointing at him or about to be pointing at him from the driver's position when he saw the movement. After seeing this, Officer Strode began firing. His first shot was at 6:37:40

a.m. For the next five seconds, he fired at the driver through the windshield. He fired 18 rounds, emptying his magazine. He ceased firing when his slide locked at 6:37:45 a.m.



Photo 15. From Officer Strode's BWC. Officer Strode's first gunshot, fired into the front windshield of the VW.



Photo 16. From Officer Strode's BWC. Officer Strode has finished firing. Officer Dunston is seen to his right.

Officer Eric Dunston

Officer Eric Dunston was behind Officer Strode during the pursuit. As Officer Strode was on foot, moving to get in the front of the VW, Officer Dunston stopped his SUV behind Officer Strode's SUV, flanking his driver side. Officer Strode was standing directly in front of him facing the VW. Officer Dunston got out of his SUV and around his driver's side door at 6:37:41 a.m. Gunshots fired by Officer Strode can be heard on Officer Dunston's body worn camera recording. Officer Dunston said in his statement that he also could see a rifle between the windshield and the top of the dashboard from the driver's position in the vehicle.



Photo 17. From Officer Dunston's BWC.



Photo 18. From Officer Dunston's BWC.

Officer Dunston ran toward the VW's driver side as Officer Strode was firing. It appears that Officer Dunston also fired his weapon as he ran to the VW. He stopped running at a point to Strode's right and continued firing toward the driver compartment of the VW. Officer Dunston fired 18 rounds, emptying his magazine, until his slide locked at 6:37:46 a.m. No shots were fired by any officers after that.



Photo 19. From Officer Dunston's BWC. Officer Strode, not seen in this photo, is to Officer Dunston's left.



Photo 20. From Officer Dunston's BWC. Officer Dunston has stopped firing.

Officer Brad Jesik

Officer Jesik arrived at the parking lot entrance just after Officer Strode, and before Officer Dunston. He pulled to the passenger side of Officer Strode's SUV and stopped. He got out of his SUV and began running east, passing behind the VW, following where he saw the passenger run.



Photo 21. From crime scene photo taken 10/1/22. Looking southeast toward the parking lot.

As Officer Jesik passed behind the rear of the VW, he was on the opposite side of the VW from where Officer Strode was firing through the windshield at the driver. Officer Jesik turned to his left and faced the passenger side of the VW.



Photo 22. From Officer Jesik's BWC.

He then moved to the front of the VW and faced the windshield and the A pillar on the passenger side. Both Officer Strode and Officer Dunston were to his right. They were firing. Officer Jesik then fired two or three shots at the driver, believing that the driver was firing.



Photo 23. From Officer Jesik's BWC after he fired three shots. All three officers have ceased firing at this point.



Photo 24. From parking lot surveillance video. All three officers have ceased firing at this point.

When the officers ceased firing, they approached the VW. Officer Dunston went to the driver's window, lifted the air bag curtain, and could see the driver was incapacitated, sitting in the driver's seat. He noted "agonal breathing". He also noted that the driver had the "shotgun". He saw it being held on the driver's right side, under his right arm. Officer Strode saw the weapon as well, while viewing through the passenger side of the windshield. Officer Dunston came around to the passenger side of the VW and removed the rifle from the driver and placed it on the ground. He also removed a green and brown duffel bag that was on the passenger seat.



Photo 25. From Officer Strode's BWC.

The driver was then removed from the VW through the passenger side door and placed on the ground. Officer Dunston and other officers performed chest compressions on the driver next to the VW while awaiting an ambulance. Paramedic Edward Ferratti attended to the driver and contacted Dr. Tomberg of the Denver Health Medical Center, who pronounced the driver deceased at 6:59 a.m.

Other officers went into the parking lot to look for the passenger who had fled from the VW. He was found on a shuttle bus and was apprehended and placed into a police car. He was identified as Xavier Johnson (dob 7-23-96). He was later interviewed by Denver Police Department investigators.

Per police protocol for officer involved shootings, the officers who fired their weapons were instructed by the Aurora officers and DPD investigators not to talk about the incident, not to view body worn camera videos, and were separated into different cars and later taken to Denver Police Department headquarters for interviews. The investigation into this shooting was then conducted by the Denver Police Department in conjunction with the Colorado Bureau of Investigation and the Colorado State Patrol.

Many written statements and reports about this incident were provided by officers, crime scene investigators, crime lab personnel, paramedics, and others. Video recorded statements were given by some witnesses. Surveillance video from the parking lot was obtained, as well as body worn camera recordings from the officers of the Aurora Police Department. Detective Joseph S. Trujillo (00042) of the Denver Police Department was assigned as primary investigator for this investigation, and Detective Brian Lang (03014) of the Denver Police Department, was assigned as the secondary investigator. They reviewed and compiled the numerous reports, documents, videos, photographs, etc., and prepared a supplemental report. This is reported under Denver Police Department GO #22-506554 and GO #22-506554.1. Also assisting in this investigation were Colorado State Patrol Investigator Nathan Garard (3060), and Colorado Bureau of Investigation Investigators Doug Pearson and Traci Kupka.

Crime Scene / Firearms / Casings

DPD Forensic and Evidence Division Crime Scene Unit personnel responded to the scene of the shooting. Photographs and video recordings were taken to document the scene, and evidence was marked and collected.

Multiple bullet defects were observed to the VW. The VW was later towed to the Denver Police Department Crime Laboratory Forensic Garage for more detailed processing and further documentation.

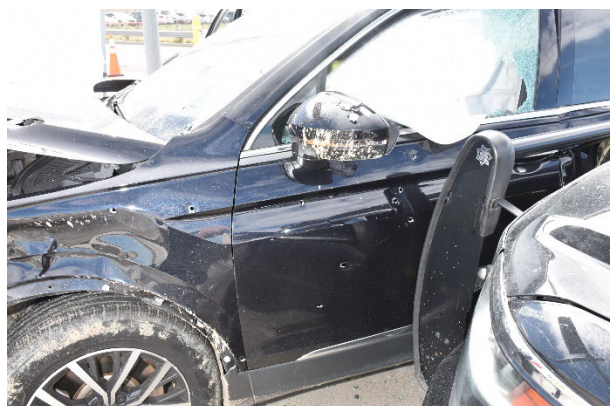


Photo 26. From crime scene photo taken 10/1/22.

Photo 27. From crime scene photo taken 10/1/22.

38 spent 9mm cartridge casings were recovered on the ground in the area near the VW and the police SUVs of officers Strode and Dunston. An empty magazine from Officer Strode's handgun was found on the ground in front of the VW (Marker 37). An empty magazine from Officer Dunston's handgun was found near the driver's side door of Officer Strode's SUV (Marker 32).



Photo 28. From crime scene photo taken 10/1/22.



Photo 29. From crime scene photo taken 10/1/22.

A realistic replica of an AR-15 was recovered on the ground where it was placed after it was taken from the driver of the VW. It was a black "Crossman" 4.5 mm BB rifle.



Photo 30. From crime scene photo taken 10/1/22.

Weapons unload accounting, conducted at the Denver Police Department, showed that Officer Strode fired 18 bullets; Officer Dunston fired 18 bullets; and Officer Jesik fired three bullets.

Autopsy

The driver was identified by fingerprints as Abel Semere Yohannes. On October 3, 2022, beginning at 8:47 a.m., an autopsy was performed on Yohannes' body by Assistant Medical Examiner, Sterling J. McLaren, M.D., and Forensic Pathology Fellow, Amanda Jo Hersh, D.O. An Autopsy Report was completed on March 14, 2023. The death was

determined to be “a result of multiple gunshot wounds” and the manner of death was “homicide”. Twelve gunshot wounds were noted and described to Yohannes’ head, chin, neck, chest, abdomen, left hip, left thigh, right axilla and both arms. Six bullets and two bullet fragments were recovered from the body and preserved.

Firearm Testing & Bullet Comparisons

The handguns used by the three officers were examined and test-fired by the Denver Crime Laboratory Firearms Unit. Each of the handguns was a Glock Model 45, 9mm Luger caliber semi-automatic pistol. Each weapon was found to function properly. The test-fired cartridge cases, barrel swabs, and bullets were preserved.

The six bullets and two fragments recovered from Yohannes’ body during the autopsy were examined and compared to the test-fired bullets. However, no identifications or eliminations of any of the bullets or fragments to any of the officers’ firearms could be made.

Statements

The following are selected portions of interviews of the passenger, Xavier Johnson, and of the three officers who fired their weapons.

Xavier Johnson

The passenger who ran from the VW was Xavier Johnson (dob 7/23/96), age 26. He was found inside a bus in the parking lot and was taken into custody. A few hours later, he was interviewed by Denver Police Department Detective Joseph Trujillo. Johnson confirmed that he was the passenger in the VW at the 7-11 store earlier, and Abel Yohannes was the driver. When the clerk came outside to confront him after Johnson took some items without paying, Yohannes pulled a black rifle from a green bag inside the car and flourished it at the clerk. A customer in the parking lot then pointed a handgun at Yohannes and told him to drop the gun. Yohannes then drove away in the VW.

Later, Johnson was in the VW with Yohannes in the parking lot of the Wolf’s Motor Inn and fell asleep. He woke up and noticed flashlights and police officers yelling at them. Yohannes drove away from the police, and Johnson saw the police chasing them, using their emergency lights and sirens. Johnson said that Yohannes was “freaking out” and was driving as fast as the VW could go. He repeatedly said, “I am not going back.” Johnson wanted Yohannes to stop to let him out.

When the VW crashed, the air bags went off. Johnson noticed that Yohannes was reaching into the back seat to get the rifle. He felt Yohannes grabbing for the rifle with his right arm and hand. Johnson said he knew that Yohannes had “no care in the world”,

and he kept saying “I am not going back”. Because of this, Johnson got out of the VW and ran with his hands up in the air because “I just wanted to get as far away from him as I could. I don’t want to die.”

Officer Garret Strode

Officer Strode was interviewed at DPD headquarters by DPD Lieutenant Joel Bell and Chief Deputy District Attorney Matthew Wenig on October 1, 2022, at 12:05 p.m.

Officer Strode explained the 7-11 incident and explained what he later observed at Wolf’s Motor Inn and during the ensuing pursuit. He said that when they got near the parking lot at DIA, he saw the VW spin and hit a yellow pillar between the parking lot gates. He saw a male wearing black [the passenger] running from the car into the parking lot and he saw the officer who did the PIT maneuver [Officer Ferris] get out of his car and run after the passenger.

“At this point the vehicle [VW] was essentially facing like ... north and south in front of those gates. I came in at about 90 degrees, and I used my front bumper to pin in the driver’s door of the suspect vehicle.”

He estimated that he was going 10 mph or less when he hit the side of the VW. The curtain air bags of the VW had deployed and were all the way down, so Officer Strode could not see inside the car.

“So, I exited my vehicle ... I was standing in my driver’s door, and I gave orders. I believe I said, ‘Driver put your hands on your face. Don’t move.’ And I believe I said it three times. At this point, no verbal response. No visual cues. Nothing. ... So, I walk around [moving to his left] ...slowly pieing [pieing is approaching an unseen area (like around a corner in a house) and clearing it very slowly in parts (like slices of a pie) before going forward. It is a safety measure.] out the windshield. ... And as I’m walking around to see the windshield, slowly, so I can see into the car, I see a – just a red arm, like a sweatshirt, an arm of a red sweatshirt, reach over to the right, and I see the – up comes what looks like the – a short barrel with a four-grip that’s got a bunch of cutouts in it, and I can see it comes over, and I’m still pieing out and I see this. ... And I can see into the windshield where basically we’re, you know, front to front to each other. I can see the barrel of what looks to be a rifle sitting kind of up. ... It’s a short barrel. It’s got – I can see the handguard clearly.

“The person and I are essentially face to face. He’s facing me. He’s not turned away. His head is towards me. ... I believe at this point, like okay. He’s got a rifle. I have a handgun. [I’m] kind of out-gunned here, and at any moment he’s going to be able to shoot through this windshield and kill me because my vest is not going to stop this. At this point, I made a decision with all these factors, that I need to shoot him now to be able to save my life

or anyone else's here. I thought he was going to kill me, so I fired into the windshield.

"I heard another officer [Dunston] firing to my right just a moment after I started shooting.

"There was, you know, glass and the fractures in the windshield going and the sound of everything, I couldn't be certain if he [the driver] wasn't, or was, shooting back at me. ... At this point, all I knew was he had a rifle. He was armed in the car. I needed to save my own life or any other officer there, so I – I shot. I finished my magazine with 17 rounds. Reloaded. I believed I needed to shoot this much to make sure I'm safe and make sure the threat is done. I didn't want to stop and then get shot with a rifle and killed in this situation.

"So, I went to slide-lock. I did a combat reload, dropping my magazine on the ground and putting another one in there. And I assessed, seeing into the windshield after the glass has – and all the – everything stopped. I could see the driver was no longer moving and he was slumped back with his head back into the driver's seat.

"At this point we moved up on the car. ... I could see that next to his arm was what looked to be a short-barreled AR-15-style rifle."

Officer Eric Dunston

Officer Dunston was interviewed at DPD headquarters by DPD Lieutenant Joel Bell and Chief Deputy District Attorney Matthew Wenig on October 4, 2022, at 12:07 p.m.

On the morning of October 1, 2022, Officer Dunston was partnered with recruit Officer Eduardo Landeros (319815). They were aware of the 7-11 incident and that the driver was described as having a "tactical shotgun". They responded to Wolf's Motor Inn after Officer Strode aired that the VW was parked, and the driver was possibly asleep. When the driver ignored police commands and drove out of the parking lot, they got into their police SUV and followed in pursuit. Their vehicle was the fourth police vehicle in the pursuit. Officer Dunston was driving.

At the Pikes Peak Shuttle parking lot, Officer Dunston stopped his SUV behind and to the left of Officer Strode's vehicle.

"I see that Officer Strode is clearing the vehicle [the VW]. He's got his gun pointed toward the windshield. I start running up so that I can be of assistance.... I began running toward the vehicle, weapon drawn.

"As I began running toward the vehicle, I saw the barrel of the long gun between the windshield and the top of the dashboard. And I heard Officer

Strode issuing orders and he was issuing orders before this as I was running up, 'Put your hands on your face! Put your hands on your face!' And then everything sort of happened at the same time so I can't swear to what the sequence was.

"I saw the gun. I had my gun trained on the vehicle. I could tell from where I saw the barrel of the gun that the person holding it must be sitting in the driver seat still. And then sort of all at the same time, either he began firing or Officer Strode began firing. And I, at that point, was in fear for Officer Strode, for the people who were in pursuit of the other suspect, and whoever else might be in that parking lot. So, I discharged my firearm into where I could approximate the driver would be sitting. ... I continued to hear gunshots and I could see explosions of glass from the windshield as rounds were exchanged. So, I continued to fire, attempting to stop the threat."

Officer Brad Jesik

Officer Jesik was interviewed at Denver Police Department headquarters on October 4, 2022, at 1:25 p.m., by DPD Lieutenant Joel Bell and Chief Deputy District Attorney Matthew Wenig.

He was aware of the 7-11 incident and that the driver reportedly had a "tactical shotgun". He assisted at the Wolf's Motor Inn and set up on the south side of the parking lot on Colfax. When the VW drove out of the parking lot, he was the second pursuit vehicle. By the time the VW approached the DIA parking lot, he was the third pursuit vehicle, behind Officer Strode.

At the entrance to the Pikes Peak parking lot, he saw that the VW had become disabled, and that Officer Ferris had crashed into the guardrail to the right. Officer Jesik pulled his vehicle behind and to the right of Officer Strode's SUV. He saw the passenger run from the VW. The passenger was not carrying a rifle or shotgun. He saw Officer Ferris run after the passenger. Officer Jesik got out of his SUV and ran to assist Officer Ferris. He said he then began hearing multiple gunshots that he believed were coming from the driver of VW.

"As I was running towards him [Officer Ferris], I heard multiple gunshots going off, and ... they were sounding like they were coming from the car [VW]. And at this moment is when I realized that the – I had seen the passenger run, which I could see he did not have, you know, a weapon, especially a shotgun. He wasn't carrying a shotgun, so then I kind of shifted focus back towards the – I realized the driver was still in the vehicle, and I - - since the passenger didn't have the shotgun, I believed that the driver was in possession of the shotgun. And at that moment, I believed he was shooting at me and the fellow officers, and I was afraid that he was going to kill me, or the fellow officers that were in that second car [Officer Strode's SUV] that was in front of me that had gone to approach that vehicle. ... I, well, honestly think I'm going to die at that point, and I turn around and shift

focus to the driver. I believed that he was shooting the shotgun that he was known to have, and so I fired two rounds towards the driver.”

When asked what his point of aim was and whether he could see the driver, Officer Jesik replied that he was aiming, *“At the driver, sitting in the driver seat. I can see the driver, yes.”* But Officer Jesik said he could not see the driver’s hands at that point.

When asked why he fired his weapon, he responded:

“My concern was that I believed that he was shooting the tactical shotgun. ... I was initially facing away from that vehicle as I was going to run to check on Officer Ferris. And so, when the shots started happening, my only thought was that he was shooting at me and my partners, and I was afraid that, you know, we were going to die, and that he was the one that was shooting at me and my partners, so that’s when I had turned around and returned fire.”

Officer Jesik said he did not know other officers were firing. He thought all the gunshots he heard were being fired by the driver of the VW. After he fired his rounds, he heard one of the officers to his right say “reloading” and he realized that the other officers had fired. There were 38 shell casings found at the site which would indicate that Officer Jesik fired two shots. However, the unload at the Denver Police Department indicated that there were three shots fired from his gun. I do not find the number of shots fired by Officer Jesik material in any way to my analysis of his actions.

Legal Analysis

Criminal liability is established only if it is proved beyond a reasonable doubt that all elements of an offense defined by a statute have been committed and it is proved that the offense was committed without legal justification as set forth in Colorado statutes.

Colorado’s statutory justification of using physical force in self-defense or defense of others is described in C.R.S. §18-1-704. As pertinent to this case, C.R.S. §18-1-704 states:

- (1) ... a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.
- (2) Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and:
 - (a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury....

The justification of the use of physical force by peace officers while carrying out their duties is described in C.R.S. §18-1-707. As pertinent to this case, C.R.S. §18-1-707 states:

- (1) Peace officers, in carrying out their duties, shall apply nonviolent means, when possible, before resorting to the use of physical force. A peace officer may use physical force only if nonviolent means would be ineffective in effecting an arrest, preventing an escape, or preventing an imminent threat of injury to the peace officer or another person.
- (2) When physical force is used, a peace officer shall:
 - (a) Not use deadly physical force to apprehend a person who is suspected of only a minor or nonviolent offense;
 - (b) Use only a degree of force consistent with the minimization of injury to others;
 - (c) Ensure that assistance and medical aid are rendered to any injured or affected persons as soon as practicable; and
 - (d) Ensure that any identified relatives or next of kin of persons who have sustained serious bodily injury or death are notified as soon as practicable.
- (3) A peace officer is justified in using deadly physical force to make an arrest only when all other means of apprehension are unreasonable given the circumstances and:
 - (a) The arrest is for a felony involving conduct including the use or threatened use of deadly physical force;
 - (b) The suspect poses an immediate threat of death or serious bodily injury to the peace officer or another person;
 - (c) The force employed does not create a substantial risk of injury to other persons.
- (4) A peace officer shall identify himself or herself as a peace officer and give a clear verbal warning of his or her intent to use firearms or other deadly physical force, with sufficient time for the warning to be observed, unless to do so would unduly place peace officers at risk of injury or would create a risk of death or injury to other persons.
- (4.5) Notwithstanding any other provision in this section, a peace officer is justified in using deadly force if the peace officer has an objectively reasonable belief that a lesser degree of force is inadequate and the peace officer has objectively reasonable grounds to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving serious bodily injury.

Under Colorado law, when the facts of a case on trial raise an issue of self-defense or defense of another, the person charged does not have a burden to prove that he or she acted within the justification for self-defense or defense of another. Instead, the prosecution must show the justification does not apply by proving all the elements of the crime beyond a reasonable doubt.²

Accordingly, the question I must answer for each officer is: After considering the statutory justifications for the use of deadly physical force, would a jury deciding the facts of this case find, unanimously, and beyond a reasonable doubt, that all the elements of a crime have been proved? My conclusion, as explained below, is that a jury would not find any criminal culpability on the part of these officers.

In this case, it is significant to note that neither C.R.S. § 18-1-704 (2) (a), nor C.R.S. § 18-1-707 (4.5), require any of the officers to be in actual danger. Instead, both statutes require the individual officer in question to (i) *believe* he or another is in imminent danger of being killed or of receiving great/serious bodily injury, and to (ii) *have objectively reasonable grounds to believe* that he or another is in imminent danger of being killed or of receiving great/serious bodily injury.³

Not requiring the presence of actual danger to act in self-defense has long been a principle of Colorado's self-defense law. In 1910, the Colorado Supreme Court noted this, and noted the principle that "apparent necessity" would justify self-defense in certain circumstances:

It is fundamental that the law of self-defense, which is emphatically a law of necessity, involves the question of one's right to act on appearances, even though such appearances may prove to have been deceptive; also the question of whether the danger is actual or only apparent, and as well the fact that actual danger is not necessary, in order to justify one in acting in self-defense. Apparent necessity, if well-grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent as actual or real necessity. ... When a person has reasonable grounds for believing, and does in fact actually believe, that danger of his being killed, or of receiving great bodily harm, is imminent, he may act on such appearances and defend himself,

² For crimes alleging a culpable mental state of acting intentionally or knowingly (e.g., murder), the issue of self-defense or defense of another is handled at trial as an "affirmative defense", which is a defense that admits the commission of the elements of the charged crime but argues the defendant's actions were legally justified or excused. This affirmative defense becomes an additional element of the charge at trial, and it is the prosecution's burden to disprove it by proof beyond a reasonable doubt. For crimes alleging a culpable mental state of acting recklessly, or with criminal negligence or extreme indifference, the evidence of self-defense or defense of another is handled as a "traverse" defense that seeks to refute, or to cast doubt upon, the proof of the mental state element alleged. The prosecution must prove the alleged mental state element by proof beyond a reasonable doubt. See C.R.S. § 18-1-704 (4); *People v Pickering*, 276 P.3d 553 (Colo. 2011).

³ These two parts are expressed in the nearly identical phrases in both statutes: "...the actor [peace officer] has [objectively] reasonable ground[s] to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great [serious] bodily injury."

even to the extent of taking human life when necessary, although it may turn out that the appearances were false, or although he may have been mistaken as to the extent of the real or actual danger. Young v. People, 107 P. 274, 276 (Colo.1910).

In 1990, the Colorado Supreme Court, in *Beckett v. People*, 800 P.2d 74, (Colo.1990), again recognized the principle of “apparent necessity” and found that the language of Colorado’s self-defense statute⁴ encompassed the principle of apparent necessity as expressed above by the Court in *Young v. People*. The Court in *Beckett* stated:

We do not construe section 18-1-704 as eliminating an individual’s right to use self-defense based on “apparent necessity.” The statute “reflects what has long been the settled law of this jurisdiction, namely, reasonable belief rather than absolute certainty is the touchstone of self-defense.” People v. Jones, 675 P.2d 9, 13 (Colo. 1984). *Beckett v. People*, 800 P.2d 74, (Colo.1990).

I note here these principles of Colorado self-defense law, namely, that actual danger is not necessary, “apparent necessity”, and “reasonable belief”, because the weapon wielded by Yohannes was a BB-gun which was likely not capable of producing death or serious bodily injury in this instance if fired from behind the windshield. Yet, by its physical appearance, it looked lethal, and like a genuine AR-15 rifle.

Yohannes must have thought it looked lethal as well, since he used it as a threat when he pointed it at the 7-11 clerk. Both people at the 7-11 who saw the rifle believed it was a real deadly weapon and reported it as such. Colorado law instructs that the proper analysis under the justification statutes of self-defense should focus on what each officer *reasonably believed* about the threat they faced, not on the authenticity of the threat. Thus, the fact that others believed the weapon was “real” is relevant to assess the reasonableness of the officers’ beliefs.

With the reports from the two witnesses at the 7-11 about the driver menacing them with a “tactical shotgun”, coupled with his non-compliant behavior at Wolf’s Motor Inn, followed by the high-speed vehicular eluding, the officers had probable cause that Yohannes had committed the crimes of felony menacing with a deadly weapon, and felony vehicular eluding. They also had significant and credible reason to believe the driver had the weapon with him in the VW. On the other hand, they had no reason to suspect the weapon was a BB-gun.

Therefore, Officer Strode had good reason to have his service weapon ready as he carefully assessed the danger while moving to the front of the VW. Suddenly, he saw the driver’s arm reaching. Then he saw an object being moved above the dashboard in front of the driver, as we can see on his body worn camera. He said he could see it was a rifle

⁴ Section §18-1-704, 8B C.R.S. (1986). The statutory provisions considered in *Beckett* were identical to the provisions of C.R.S. § 18-1-704 (1) and (2) that are applicable today.

with similarities to the description given by the 7-11 witnesses. In his interview, he expressed the fear he felt, namely, that his vest would not save him from the power of the weapon he saw, and he would be killed.

Based on the body worn camera evidence showing the movement above the dashboard, and Xavier Johnson's statement that Yohannes was purposefully reaching for the weapon after the crash, I draw the conclusion that Yohannes directed the weapon toward Officer Strode to threaten him.

Based on all the evidence, including the appearance of the rifle resembling an AR-15; the way the driver wielded the rifle at the 7-11; the witnesses' description of it as a deadly weapon; the body worn camera evidence; and Officer Strode's video statement to investigators, I find that Officer Strode did believe that he was in imminent danger of being killed. I further find that it was objectively reasonable for him to have that belief.

I also find that Officer Strode's response to the apparent danger he faced was reasonable. None of his actions were negligent or reckless. His shots were in defensive response to what objectively appeared to be an imminent attack by the driver using the rifle. He is not required to wait for the driver to fire shots at him to protect himself. I find that Officer Strode's use of deadly physical force was intentional and reasonable and was justified by C.R.S. § 18-1-704 (2) (a) and by C.R.S. § 18-1-707 (4.5). I believe a jury would conclude the same.

I note that the body worn camera evidence corroborates what Officer Strode described in his interview. The movement behind the windshield is clearly seen before Officer Strode fires. The threat he perceived by the movement and his recognition that it was a rifle is what prompted him to fire.

Officer Dunston had the same information as did Officer Strode about the driver and the "tactical shotgun". When he stopped his vehicle, he saw Officer Strode standing in front of the VW, pointing his weapon at it. He heard gunshots as he ran toward the VW. He said he saw the barrel of a rifle above the dashboard, pointed toward Officer Strode. Thus, he fired at the driver compartment where he believed the driver was sitting in order to protect Officer Strode and himself.

Based on all the evidence, I find that Officer Dunston believed Officer Strode was in imminent danger of being killed, as well as possibly others and himself, and that it was objectively reasonable for him to so believe. I also find that Officer Dunston's response was reasonable. None of his actions were negligent or reckless. I find that Officer Dunston's gunshots were justified by C.R.S. § 18-1-704 (2) (a) and by C.R.S. § 18-1-707 (4.5).

Officer Brad Jesik heard the gunshots and, although he could not see the driver at first, he believed the shots were coming from the driver. Given what Officer Jesik knew about the driver's possession of the weapon earlier at the 7-11, and the fact that he saw the passenger running empty handed, he had a reasonable belief that the driver was armed.

This meant the driver was the only threat to the officers from the VW. He said he believed the driver was shooting at him or at the other officers, and he was afraid that he or the other officers were going to be killed. Officer Jesik said that when he moved to a position in front of the windshield, he could see the driver and fired at him.

Based on all the evidence, I find that Officer Jesik believed that he and the other officers were in imminent danger of being killed or injured, and that it was objectively reasonable for him to have that belief. I also find that Officer Jesik's response in firing at the driver was reasonable. None of his actions were negligent or reckless. I find that Officer Jesik's gunshots were justified by C.R.S. § 18-1-704 (2) (a) and by C.R.S. § 18-1-707 (4.5).

Conclusion

Because I find that all three officers were legally justified in using deadly physical force, no criminal charges will be filed against any of the officers based on this incident.

Sincerely,

A handwritten signature in black ink that reads "Beth McCann". The signature is written in a cursive, flowing style.

Beth McCann
Denver District Attorney

cc: Armando Saldate, Director of Public Safety; Deputy Chief Barb Archer; Division Chief Joe Montoya; Commander Matt Clark; Commander Layla DeStaffany; Lieutenant Joel Bell; Sergeant Scott Murphy; Sergeant Scott Hagan; Sergeant Tony Lopez, Jr.; Detective Joseph Trujillo; Detective Brian Lang; Detective Louis Estrada; Officer Garret Strode; Officer Eric Dunston; Officer Brad Jesik; Michael Lowe, Esq., Attorney for Officer Garret Strode; Bradley Hansen, Esq., Attorney for Officer Eric Dunton & Officer Brad Jesik; Denver City Attorney Kerry Tipper; Director of the Office of Independent Monitor Lisabeth Pérez Castle