



OFFICE OF THE DISTRICT ATTORNEY
TWENTIETH JUDICIAL DISTRICT

Michael T. Dougherty, District Attorney

February 2, 2023

VIA ELECTRONIC MAIL

Maris Herold, Chief of Police
Boulder Police Department
City of Boulder
Boulder, Colorado

Re: Investigation into the use of force against John Lee Fleming on November 28, 2022, involving Police Officer Bryan Pedigo, of the Boulder Police Department, at 3360 Broadway Street in Boulder, Colorado

Dear Chief Herold:

The investigation and legal analysis of the use of force against John Lee Fleming involving Boulder Police Department Officer Bryan Pedigo is complete.

The Boulder County Investigation Team, also known as the Boulder Critical Incident Team ("BCIT"), investigated this case. The multi-agency team is designated to investigate use-of-force incidents in which any law enforcement officer within the 20th Judicial District uses deadly, or potentially deadly, physical force against a person, while acting under the color of official law enforcement duties. This definition and team protocol are broader than that required by state law, which is limited to incidents involving the discharge of a firearm by a peace officer that results in injury or death. The review of this incident is not required by statute. Rather, the Boulder Police Department, BCIT, and District Attorney's Office initiated this investigation and review consistent with the protocol for our jurisdiction.

I want to acknowledge the Boulder Police Department ("BPD") for notifying the BCIT following the incident. By doing so, BPD enabled the BCIT to respond and investigate the use of force by BPD officers. Consistent with Boulder County protocol, BPD did not

participate in this use-of-force investigation involving Officer Pedigo. BPD Detectives remained involved in the investigation only to the extent potential kidnapping, felony assault, and felony menacing charges for Mr. Fleming's actions were warranted prior to law enforcement's use of force. Consistent with protocol and statute, BPD remains legally responsible for enforcing any criminal violations which took place prior to the officers using force against an individual.

The BCIT investigation was conducted for the purpose of determining whether criminal charges are warranted against Officer Pedigo for the use of force against John Lee Fleming (DOB: 01/20/1966) on November 28, 2022, within the City of Boulder. The investigation and review of this incident does not evaluate nor review the appropriateness of police tactics or whether policies and procedures were followed. The Boulder Police Department will be responsible for conducting the review of police tactics and the response by their officers.

My decision, based on criminal law standards, does not limit administrative action by BPD or any civil action where less-stringent laws, rules, and levels of proof would apply. The authority and role of the District Attorney is to determine solely whether Officer Pedigo committed a criminal offense that can be proved beyond a reasonable doubt.

BACKGROUND

The BCIT completed an investigation into this incident and generated detailed reports and documentation. The file is voluminous and includes recorded witness interviews, diagrams, police communications, reports, photographs, and video recordings related to the incident.

A review of the reports and documentation filed with my office has been completed and I, along with members of my staff, have been fully briefed regarding this incident by Team Commanders in charge of the investigation. I conclude that, under the applicable Colorado law, no criminal charges should be filed against Officer Pedigo. He did not commit any crime that could be proven beyond a reasonable doubt.

My findings, analysis, and conclusions of law with respect to Officer Pedigo's use of force in this incident are as follows:

SUMMARY OF DECISION

Under Section 20-1-114(1), C.R.S., "The district attorney shall, if no criminal charges are filed following the completion of an investigation pursuant to section 16-2.5-301, C.R.S., release a report and publicly disclose the report explaining the district attorney's findings, including the basis for the decision not to charge the officer with any criminal conduct. The district attorney shall post the written report on its website or, if it does not have a website, make it publicly available upon request."

The discharge of a firearm in this case did not result in injury or death and therefore this report in not mandated by §20-1-114(1). However, as District Attorney, I believe this report is necessary to inform the public of the nature and reasons for my decision. I will release this report in the interest of transparency and to explain the circumstances under which the law enforcement officer fired his weapon and is not criminally liable. Although it is not required by law, I believe the public release of this report is appropriate since the BCIT investigated the use of physical force against a person by a member of law enforcement, acting in his official law enforcement duty.

This report is not, however, to be construed as commentary on the criminal charges pending against John Lee Fleming, who was arrested for felony menacing and felony assault charges related to this incident. Those charges are merely accusations. Mr. Fleming remains presumptively innocent of all the charges against him unless and until a jury finds him guilty beyond a reasonable doubt.

Applying the applicable statutes to the facts presented through this investigation, Officer Pedigo is not subject to criminal prosecution for his actions. In all cases, including those involving law enforcement officers, the District Attorney's Office criminal filing standard requires that there be a reasonable likelihood of conviction to bring criminal charges against an individual. As in other cases prosecuted by this office, this legal and ethical requirement guides our analysis.

DETAILED STATEMENT OF FACTS

On November 28, 2022, at 9:13 p.m., George Guerrero called 911 emergency to report that he and his wife, Kimberly Kyle, were currently being held hostage inside of a residence located at 3360 N Broadway Street, in the City of Boulder. Mr. Guerrero said the suspect, later identified as John Fleming, was armed with a stick and a knife, and told dispatch they “were not going to make it out alive.” Mr. Guerrero, Ms. Kyle, and Mr. Fleming were living at this residence at the time.

According to Mr. Guerrero, Mr. Fleming made threats towards them, describing how he would kill them or any police who may respond. Mr. Guerrero stated he feared Mr. Fleming would hurt them, that Mr. Fleming was striking walls with a baton, and has made similar threats to them in the past.

While they were retreating to the bedroom, Mr. Guerrero stated Mr. Fleming then struck him in the back of the head with the baton. Mr. Guerrero and Ms. Kyle barricaded themselves in their bedroom while on the phone with the 911 operator. Mr. Guerrero said, he was in shock at the time and did not feel pain but later in the evening, while being interviewed, the area of his head struck by the baton was quite painful.

The 911 operator could hear Mr. Guerrero asking someone to shut the door. A male can also be heard shouting, "get your ass out of there, move it, move!" Loud banging can also be heard on the call. Mr. Guerrero described John as "going crazy out there," adding, "he's dangerous, he has weapons" and "he's loaded, he has a weapon on him." Dispatch advised responding officers that the suspect Fleming was holding hostages, was armed with a stick and a knife, was extremely mentally unstable and held anti-police sentiments. This information was received by the officers before they encountered Mr. Fleming and was based on information provided by Mr. Guerrero as well as information Boulder Police had from previous encounters with Mr. Fleming.

Numerous Boulder police officers were dispatched and responded to the scene after verifying that this address was Fleming's home. Officers Pedigo and Snyder encountered Fleming at the front door and asked him to open the door. Around the corner from the front door, Officer Snyder stated he could see Mr. Guerrero and Ms. Kyle through a window, describing them as scared, "like they were about to be murdered, type of look" and "the clearest indicator of fear I've ever seen on a person." Officer Snyder began to assist Ms. Kyle and Mr. Guerrero out of the window of the room where they had barricaded themselves. Ms. Kyle, who uses a wheelchair, required additional assistance from officers to escape. Officer Snyder saw Fleming briefly open the door to Mr. Guerrero and Ms. Kyle's room and then retreat into the house. This prompted the decision to make immediate entry into the house out of fear that Fleming was retrieving a weapon before Ms. Kyle and Mr. Guerrero could be extracted.

Officers Pedigo and Snyder identified themselves as police officers several times and called to Fleming by name no less than four times. Officers tried to get Fleming to come out of the house to separate him from the victims by asking him to "open the door" ten to fifteen times. Officers kicked the door several times to gain entry and free the hostages. Fleming can be heard shouting back through the closed door. Officers breached the door and made entry.

The entry way was dimly lit by lights from other rooms of the house. Officers Pedigo and Snyder broke the threshold of the doorway and began giving Fleming commands. The commands included, "Get on the ground, now! Get on the ground now, sir!" and "Get your hands out of your pockets! Hands out of your pockets!" Officer Pedigo saw Fleming turn his back toward him, step away from the entry and go around the corner with his right hand in his right jacket pocket. Officer Pedigo described that Fleming then turned back, pulling out a black metal object with a 'silver dollar sized hole' in the front of it and raised it toward him.



Officers Pedigo and Snyder in the foreground, the suspect's hand holding the black object is encircled

Officer Snyder followed Officer Pedigo across the doorway threshold and stated that he could see Fleming retrieve what appeared to be a metal object and raise it. Officer Snyder, viewing the object from a different angle, remembers the object as a blunt metal object, similar to a track baton, but did not believe it to be a gun. Officer Snyder was displaying his Taser and Officer Pedigo was displaying his firearm, pointing it at the suspect. Officer Pedigo was directly in front of Fleming, wherein Officer Snyder was slightly behind Officer Pedigo and more angled in the direction of Fleming. Officer Snyder estimated the distance between Officer Pedigo and Fleming to be six feet. Officer Snyder explained that the next events occurred almost simultaneously. Fleming sprayed the Officers with an unknown aerosol spray, Officer Snyder discharged his Taser cartridges towards Fleming, and Officer Pedigo discharged his firearm.



Officers Pedigo and Snyder are seen with the mist of pepper spray and Taser wire encircled

Officer Snyder stated Fleming sprayed Officer Pedigo with the pepper spray as he was shouting at Fleming to remove his hands from his pockets. Officer Snyder described Officer Pedigo as being heavily doused with the pepper spray, blinding him. Officer Pedigo's single shot missed Fleming and hit the wall to the right and behind him. During this confrontation, Officer Snyder deployed his Taser twice, which was ineffective. Officer Pedigo was blinded by the

pepper spray and Officer Snyder felt some exposure to the spray. Officer Snyder dropped his Taser to the ground as he attempted to help Officer Pedigo. Both officers retreated out of the home, concerned that Fleming was still possibly armed with a weapon and could make a second attack on them while Officer Pedigo was blinded. After the officers retreated, Fleming is seen on Officer Snyder's body worn camera following them outside with the pepper spray before returning inside the house and shutting the door.



John Fleming seen following Officers Pedigo and Snyder, spraying them as they retreated

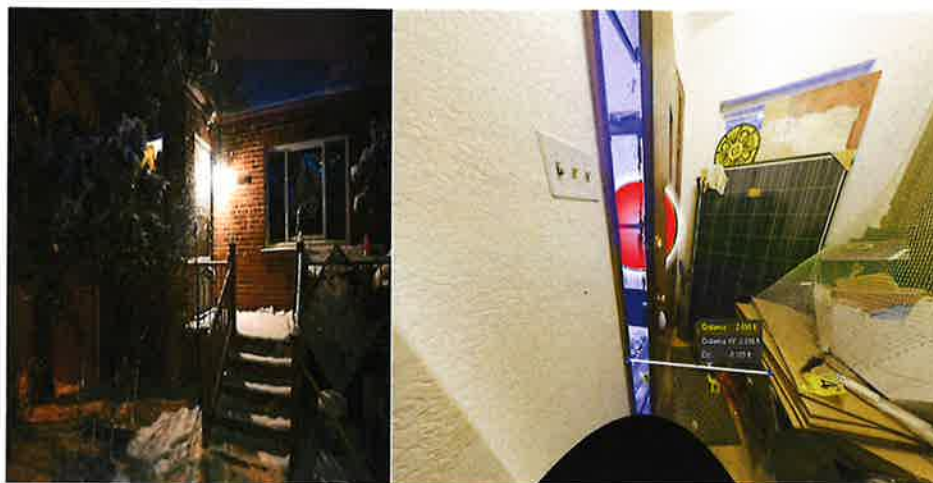
As this was occurring, Mr. Guerrero and Ms. Kyle escaped through the bedroom window with the help of other officers. Mr. Guerrero was also suffering from exposure to pepper spray. After the confrontation, Fleming secured the door to the house, and it was unknown what other weapons he possessed at the time. Additional resources arrived on scene, including SWAT teams and the bomb squad, based on further information obtained by the victims.

In subsequent interviews with Mr. Guerrero and Ms. Kyle, they described how Fleming had numerous firearms hidden throughout the house, they recently observed Fleming making explosives, and that Fleming had many knives, batons, cans of pepper spray and booby-traps situated throughout the house.

After Fleming eventually surrendered to law enforcement, a search warrant was applied for and approved. The house was then searched and processed by Boulder Police detectives and members of the BCIT. While knives, air guns, a baton, and pepper spray were recovered, no evidence of explosives, firearms or functional booby traps were ultimately found despite the statements that Fleming had made to the two of them and any observations by them.

Scene Preservation

Members of the BCIT and the Longmont Police Department assisted Boulder Police Officers with processing, documenting, and completing a canvas of the area where this incident occurred. The Longmont Police Department completed the bulk of the scene documentation and provided the images below.



Front door could only open 2.69 ft due to interior items obstructing path

A single bullet casing was found just outside the front door, consistent with where it would be expected to have ejected from Officer Pedigo's firearm.



Single Winchester 9mm shell casing found near the front door

The door frame had damage to it caused by the officers' entry. A Taser probe and Officer Snyder's Taser were located near the threshold of the door. The front door was obstructed from opening all the way by items stored in the foyer. A second Taser probe was found further inside the house.

Directly inside the front door was a stack of cardboard. A black folding knife was stabbed into the edge of the cardboard closest to the door.



A knife as it was found near the front door

Investigators found a can of pepper spray in a kitchen cabinet. The can had “Magnum 3” written on it and a sticker covering its other markings.



Pepper spray used by John Fleming against Officer Pedigo found in the kitchen



The baton used to strike George Guerrero was found



A large knife in a sheath was found in the living room

A bullet hole was found 70 inches high, on the East wall of the living room, above a picture frame. There was drywall dust on top of the picture frame that appeared new and to have come from the hole.



Bullet hole from Officer Pedigo's firearm



From left to right: the positions of Officer Pedigo, John Fleming, and bullet hole in the wall

Officer Pedigo's Firearm

Officer Pedigo was carrying a Smith and Wesson M&P 9mm. The firearm was inspected by an armorer who determined that the firearm's trigger pull weight was within the manufacturer's specifications, the safety mechanisms functioned properly, as did the firing mechanisms.

Officer Pedigo carried two magazines on his duty belt, one of the magazines was loaded with 16 rounds and one was loaded with 17 rounds. The magazine ejected from his handgun had 15 rounds and there was one round in the chamber. Officer Pedigo possessed a total of 49 rounds when he was inspected by BCIT investigators.

Interview of Officer Pedigo

Officer Bryan Pedigo was interviewed at the Boulder County Sheriff's Office Headquarters building on November 30th, 2022. Boulder County Sheriff's Office Detective Trevor Soole and District Attorney Investigator Kristin Weisbach conducted the voluntary interview. The interview was audio and video recorded and was also recorded on Detective Soole's body worn camera. Officer Pedigo explained that he has been with the Boulder Police Department for 21 years and had a year of service with a police department in Las Vegas. He said that he is currently assigned to swing shift, working from 2 p.m. to 12:00 a.m.

On November 28th, 2022, he was working his normal shift and completing a report from a previous call at the Police Department. A call then came out as a "male party on the line who says the male who's living with them is keeping them hostage and he's armed with a stick and a knife..." and that a hostage situation was in progress. Officer Pedigo quickly went out to his car and responded to the call with his emergency equipment activated. As he was driving to the address, he heard the dispatcher advising that the subject, John Fleming, had weapons in the house and that people were being held against their will. He then realized that he had left his body worn camera docked at the police department uploading video from his last call¹.

He arrived on scene at the same time as Officer Gaines. He told her that he did not have his camera and asked her to stay with him. Approaching the home, he saw George Guerrero at a window with a phone in his hand, waving for help. Officer Pedigo then saw Officer Snyder calling for him and Officer Gaines to come to the front door. Officer Pedigo knocked on the front door and announced himself. As they knocked, the suspect opened a window near the door. Officer Pedigo said he placed the suspect at gun point because he knew he was possibly armed. He said the male suspect said to "go away, what do you want?" Officer Pedigo said he responded loudly and asked for the male to come outside as they needed to talk. The male responded, "No, I'm not coming out" and shut the window.

Officer Pedigo said he continued to knock on the door and then he heard Officer Snyder to his left saying, "Come out the window! Come out the window!" then heard him say, "Go in! Go in!"

¹ Although Officer Pedigo did not have his body worn camera on his person, his actions and involvement that are subject to this investigation were captured on cameras worn by fellow officers at his side and/or near him.

At this point, Officer Pedigo thought the suspect went into the back room where he had seen the potential victims. Officers Snyder and Pedigo began kicking the door to break it open. While they were attempting to gain entry, the suspect came back and demanded that they stop kicking the door. Officer Pedigo said they would stop kicking if he came outside. Officer Pedigo looked at the door and it appeared that it only needed one more kick to gain entry. He gave another warning to the male inside that if he did not come out, they would kick the door in. The suspect refused. Officer Snyder kicked the door, and the door gave way.

Officer Pedigo saw the male standing just inside the door, and the male backed away from the entry way. Officer Pedigo quickly followed the male inside and could see him walking away approximately 10 feet from him. He then saw the male turn with his right hand in his jacket pocket. Officer Pedigo said he screamed at the male to get his hand out of his pocket multiple times, as the male brought his right hand out of his pocket, Officer Pedigo could see something in his hand. He explained that the male's right hand was in his jacket pocket and the jacket may have been a parka or another large type of jacket. Officer Pedigo said he screamed twice at the male to "get your hand out of your pocket!" He saw the male's hand come out, saw something in his hand, and saw the male raise the thing in his hand, which he described as black with a hole the size of a "silver dollar," and raised it toward him.

Officer Pedigo stated he believed it was a gun and the male was going to shoot, so he took a single shot at the male. Officer Pedigo said he thought he was going to get shot, so he "took a shot." As something was being sprayed at him in his direction, he was then able to reassess the situation and realize that it was not a gun because a spray was coming at him. He felt the spray hit him in the face. Officer Pedigo holstered his weapon after he heard the pop of Officer Snyder's Taser go off. He did not see the Taser hit anything and then he told Officer Snyder to retreat. He pushed through the door to get out because he was now in pain. He remembered seeing Officer Gaines and another woman, who could not walk, in the yard. He then assisted the woman to safety. He also saw Sergeant Marquez and informed him that he fired a shot. He was able to help the woman to the first ambulance and then he waited for the second ambulance to be treated for the pepper spray exposure.

As he went through his statement, Officer Pedigo believed the male was approximately seven to eight feet away. When he fired his single shot, he was aiming at the male's center of mass, but he was not sure where the shot went.

After being sprayed by the suspect, Officer Pedigo did not immediately feel pain, but soon the spray dripped into his eyes. His eyes began watering and mucus was coming out of his nose, and he felt intense pain. Officer Pedigo explained that he had been sprayed with pepper spray during police academy training, and it was "the worst." He also said that he carries pepper spray on duty and the canister the male had was like the one he carries.

Officer Pedigo's Injuries

Officer Pedigo was treated by American Medical Response (AMR) on scene. Their report documented that they treated a Boulder police officer for pepper spray exposure and then released him. Boulder Police Detectives photographed Officer Pedigo. They noted that while photographing Officer Pedigo, he continued to cough, blow his nose, and his eyes were bloodshot and watery. The pictures below were taken at the Boulder Police Department, over two and a half hours after his exposure, at approximately 12:15 a.m.



Officer Pedigo's bloodshot eyes and discoloration of his external vest from the pepper spray residue

Interview of John Fleming

John Fleming was interviewed by Boulder Police Detective Keomani Sidara on the night of the incident at the Boulder Police Department. The interview was audio and video recorded. Fleming was advised of his Miranda rights, agreed to waive those rights, and agreed to speak with investigators. The following is a summary of the interview.

Detective Sidara asked Fleming to explain his recollection of the events of that evening. Fleming explained that he helped "them" by taking them into his residence and "this" is what I get in return. He said they were in their room and the next thing he knew they had gone out of the window.

When Fleming was asked about the police presence at his house, he said that a SWAT team showed up and broke down his door. He said his house guests were pathological liars. Fleming said the police were knocking at the door and he would not answer and, instead, answered them through the window. He said that the police officers "tased" him twice. When he was asked if he did anything during the interaction with the police. He said that he "merely opened the door and they tased me."

Fleming explained that the Officers tased him twice after they broke down the door but never made entry into the residence. Detective Sidara asked about the possibility of pepper spray being used during this incident and Fleming responded that he did not know what the Detective was talking about.

Interview of Additional Witnesses

The BCIT also interviewed several additional witnesses, including Officer Jonah Snyder, Officer Tsering Gaines, Officer Andrew Stiso, Officer Matthew Cooper, Officer Gabriele Frasier, Sergeant Michael Marquez, George Guerrero, and Kimberly Kyle. Apart from Officer Snyder, whose account is summarized above, those witnesses were unable to provide additional information relating to what transpired inside the front door when Officers Pedigo and Snyder made entry and had contact with John Fleming.

LEGAL AUTHORITY

Criminal liability is established in Colorado only if it is proven beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and further proven beyond a reasonable doubt that the offense was committed without any statutorily recognized justification or excuse. While knowingly or intentionally shooting at another human being is generally prohibited by statute as an attempted assault or attempted homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force by a peace officer is justified.

C.R.S. §18-1-707 defines the circumstances under which a peace officer can justifiably use physical force in Colorado. In pertinent part, the statute reads as follows:

- (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 injuries 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.

Independent of the analysis under C.R.S. §18-1-707, an officer can also be justified in using force pursuant to C.R.S. §18-1-704, which provides in relevant part:

[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.

See C.R.S. §18-1-704(1).

Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and...[t]he person is committing or reasonably appears about to commit kidnapping as defined in section 18-3-301[.]

See C.R.S. §18-1-704(2)(c).

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 upon 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 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.

Young v. People, 107 P. 274 (Colo. 1910).

LEGAL ANALYSIS

In this case, the actions of Officer Pedigo are legally justified under Colorado law. The investigation establishes that one round was fired from Officer Pedigo's 9mm handgun in the general direction of John Fleming, but he was not struck by that bullet. Officer Pedigo stated that he knowingly fired his weapon at Fleming after seeing him pull a black object that he believed to be a gun from his right jacket pocket and after raising it in an aggressive manner toward him. Officer Pedigo feared that his life and Officer Snyder's life were in immediate danger. The determination of whether the officer's conduct was criminal is primarily a question of legal justification.

The question of legal justification is whether a reasonable officer, confronted with the same facts and circumstances, could have concluded that it was necessary to use physical force to defend himself or another and stop the threat that Fleming presented, and if so, whether that use of force was reasonable and appropriate in response to the threat. In this case, the answer to those questions is yes as applied to Officer Pedigo's personal observations and beliefs. The investigation revealed that, at the time he discharged his service weapon, Officer Pedigo's actions were objectively reasonable to prevent the imminent threat of injury to himself, Officer Snyder, and, arguably, George Guerrero and Kimberly Kyle. Although Officer Snyder indicated he did not initially believe the black object in Fleming's hand to be a gun, his observations were

made from a different vantage point and do not negate the facts and circumstances believed to be true by Officer Pedigo.

In his voluntary interview, Officer Pedigo repeatedly explained that he believed Fleming was armed with a pistol and was refusing to comply with repeated commands to show his hands. It is important to note that Officer Pedigo already had information that weapons were involved in the hostage situation before he even made entry through the doorway. Before Officer Pedigo discharged his service weapon, he saw Fleming draw a black object from concealment in his pocket. Additionally, Fleming turned toward him still holding the object in his hands, raising his hand at him in an aggressive manner.

Officer Pedigo articulated his fear for his own safety, that of Officer Snyder, and the safety of the victims being extricated from the other room. Officer Pedigo believed that Fleming was drawing a pistol to fire at himself and Officer Snyder. Officer Pedigo had to make a split-second decision to protect himself, a fellow officer, and members of the community. The threat posed by a suspect drawing a perceived firearm from concealment and raising it to a firing position poses an "imminent threat of injury." Officer Pedigo fired one shot and then reassessed the situation when he realized he was being sprayed with pepper spray. Such a reaction was reasonable under the circumstances and, therefore, justified under C.R.S. §18-1-707(1).

An analysis under C.R.S. §18-1-704 is the same for law enforcement officers as it is for any other individual. Officers are entitled to rely on the doctrine of "apparent necessity" so long as the conditions and circumstances are such that a person would reasonably believe, erroneously or not, that action was necessary. *See People v. La Voie*, 155 Colo. 551, 395 P.2d 1001 (1964); *People v. Silva*, 987 P.2d 909 (Colo. App. 1999). It is immaterial whether the suspect was actually trying to injure the officers or another, so long as a reasonable person, under like conditions and circumstances, would believe appearances were sufficient to require the action taken. *Silva*, 987 P.2d at 909; *see also Sanchez v. People*, 820 P.2d 1103 (Colo. 1991) (person asserting self-defense may act on appearances rather than reality; question is whether the person's conduct was reasonable under the circumstances as he or she perceived them to be).

C.R.S. §18-1-704(1) provides that an officer may use physical force where he reasonably believes that such force is necessary to protect himself or another from imminent death or serious bodily injury. Under Colorado case law, the facts must be viewed as they appeared to the officer at the time; future developments are irrelevant to the legal analysis. Specifically, whether it was later revealed that a suspect possessed a firearm or some other object, the legal analysis is required to focus on what was known to the officers at the time of the incident. Given that Officer Pedigo observed Fleming not only concealing an object in his pocket, but was also repeatedly refusing to follow commands, it was objectively rational and reasonable for Officer Pedigo to believe Fleming was an imminent danger when he suddenly withdrew a black object and raised it in an aggressive stance toward him, believing it to be a gun that could ultimately lead to serious injury or death to himself or Officer Snyder.

The statutory provision governing body worn cameras has not gone into effect and, therefore, is not relevant to the issue of Officer Pedigo's forgotten body worn camera. C.R.S. §24-31-902(1)(a)(I) states that "[b]y July 1, 2023, all local law enforcement agencies in the state...shall provide body-worn cameras for each peace officer...who interacts with members of the public." Furthermore, if it were in effect, C.R.S. section 24-31-902(1)(a)(III) states the following:

If a peace officer fails to activate a body-worn camera...as required by this section or tampers with body-worn...footage or operation when required to activate the camera, there is a permissive inference in any investigation or legal proceeding, excluding criminal proceedings against the peace officer, that the missing footage would have reflected misconduct by the peace officer.

Therefore, if the statutory provision was in effect, it would not apply to criminal proceedings against the officer but would apply in the prosecution of defendant. However, Officer Pedigo recognized the issue, he told his fellow officer to stay close, and was, in fact, with someone the whole time. As a result, the entire incident was video and audio recorded. There is no reason to believe that he engaged in misconduct.

After viewing the totality of the evidence in the case, Officer Pedigo's actions in using physical force were legally justified under both C.R.S. §18-1-707(1) and C.R.S. §18-1-704(1) and are not subject to criminal prosecution.

CONCLUSION

We find in our review of this incident that Officer Pedigo reasonably believed he was in imminent danger and responded to prevent injury to himself and others, and therefore, his actions do not rise to the level of a criminal offense. It is the conclusion of my office that, based on the applicable law and the facts and circumstances of this case, Officer Pedigo's actions during this incident were legally justified as set forth in C.R.S. §18-1-707(1) and C.R.S. §18-1-704(1). As a result, my office will not be filing criminal charges against Officer Pedigo.

These cases are important to the officers and civilians involved, as well as to our community as a whole. I appreciate the cooperation provided by BPD and the investigation conducted by the BCIT.

Consistent with Boulder County protocol, I will be releasing this letter to the public. These materials will also be posted on the District Attorney's website. Pursuant to our policy, BPD will become the custodian of records related to this case. Any future records inquiries will be directed to the BPD after the District Attorney's Community Town Hall is conducted. Please contact me if you require further information.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael T. Dougherty", with a long horizontal flourish extending to the right.

Michael T. Dougherty
District Attorney