

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367

AND

IN THE MATTER OF THE PUBLIC HEARING
INTO THE COMPLAINT AGAINST
CONSTABLE #134 KEN JANSEN
OF THE SOUTH COAST BRITISH COLUMBIA TRANSPORTATION
AUTHORITY

DECISION ARISING FROM PUBLIC HEARING

TO: Constable Ken Jansen

AND TO: Acting Deputy Chief Officer J.B. MacDonald, Discipline Authority

AND TO: Mr. Stan Lowe, Police Complaint Commissioner

AND TO: Mr. Joe Doyle, Public Hearing Counsel

AND TO: Mr. David Butcher, Counsel for Constable Jansen

Initiating event:

[1] On the 22nd of April, 2010, Constable Jansen, a member of the South Coast British Columbia Transportation Authority, was on duty and working in the area of the King George sky train station in Surrey. In the early evening hours he attended at the Surrey Memorial Hospital to meet with Constable Mitch Spears. Spears, a member of the Royal Canadian Mounted Police, was at the hospital with a patient he had arrested under the Mental Health Act. The officers expected the staff at the hospital to take charge of the patient once he had assessed and they then hoped to take their dinner break together.

[2] The patient, Robert Keith Booker, was agitated and on several occasions began yelling and cursing. Spears intervened. Jansen maintained a watch at the door of the interview room but did not enter. It was some time later after Booker had been seen by some of the nursing staff that Jansen reports that while Booker and Spears were waiting for one of the nurses to return, Booker rose from his chair and began punching Spears. Spears reacted immediately and then Jansen joined him. They overpowered the patient, placed him on the floor and put handcuffs on him. During this altercation Spears received a deep scratch to his neck. Booker suffered severe bruising to the area around his right eye and received a gash to his right brow that required suturing. Spears also used a Taser conducted energy weapon (the “Taser”) on the patient and this too resulted in some minor injuries.

Case history:

[3] Corporal Gillies was Spear’s commanding officer on the evening in question and Spears called him immediately to report the fact that he had deployed the Taser. Gillies attended and commenced an investigation into this use of force. On May 12, 2010, the Office of the Police Complaint Commissioner received information from the South Coast British Columbia Transportation Authority Police Service (SCBCTAPS) outlining allegations of professional misconduct against Constable Ken Jansen. On May 13, 2010, at the request of the SCBCTAPS, the Office of the Police Complaint Commissioner issued an Order for Investigation, pursuant to section 93(1) of the Police Act.

[4] An investigation was completed by a member of the SCBCTAPS and a subsequent supplementary investigation was directed pursuant to section 114 of the Police Act.

During the course of the investigations further allegations of misconduct were added including Abuse of Authority, Deceit and Discreditable Conduct. On September 30, 2011, then Acting Deputy Chief Officer J.B. MacDonald, as Disciplinary Authority, issued his Notice of Discipline Authority's Decision in which he determined that the evidence appeared to substantiate two allegations of Abuse of Authority, five allegations of Deceit and an allegation of Discreditable Conduct against Constable Jansen pursuant to the Police Act, the matter was directed to a discipline proceeding.

[5] On April 11, 2013, in concluding the discipline proceeding, Discipline Authority Inspector MacDonald, determined that the allegations of Deceit, Discreditable Conduct and only one of the allegations of Abuse of Authority had been proven by the available evidence and imposed the following disciplinary and corrective measures:

- i. Abuse of Authority – 5 day suspension;
- ii. Deceit – Dismissal for each allegation of Deceit both individually and collectively;
- iii. Discreditable Conduct – 3 day suspension.

[6] Pursuant to section 137(1) of the Police Act, a police member is entitled to a mandatory public hearing in circumstances where the proposed discipline is dismissal or a reduction in rank. On April 24, 2013, Constable Jansen requested a public hearing in this matter.

[7] On the 24th of May, 2013 the police complaints commissioner issued a Notice of Public Hearing pursuant to Section 137(1) Police Act. It alleged that Constable Jansen committed the following disciplinary defaults, pursuant to section 77 of the Police Act:

a) Abuse of Authority: contrary to section 77(3)(a)(ii)(A) of the Police Act, Constable Jansen, committed the disciplinary default of Abuse of Authority when he intentionally or recklessly used unnecessary force on Mr. Booker at Surrey Memorial Hospital on April 22, 2010.

b) Deceit – contrary to section 77(3)(f)(i)(B) of the Police Act, Constable Jansen, committed the disciplinary default of Deceit, when he made an entry in his notebook that to his knowledge was false or misleading and omitted to record in his notebook the use of force against Mr. Booker, to which he was a witness.

c) Deceit – contrary to section 77(3)(f)(i)(B) of the Police Act, Constable Jansen committed the disciplinary default of Deceit, when he made an entry in his PRIME synopsis page on May 1, 2010, that to his knowledge was false or misleading.

d) Deceit - contrary to section 77(3)(f)(i)(B) of the Police Act, Constable Jansen committed the disciplinary default of Deceit, arising out of an entry he made to his PRIME Police statement on May 6, 2010, that to his knowledge was false or misleading.

e) Deceit - contrary to section 77(3)(f) of the Police Act, Constable Jansen committed the disciplinary default of Deceit, when he provided a duty report to

Staff Sergeant Doug Fisher on August 30, 2010, that to his knowledge was false or misleading.

f) Deceit - contrary to section 77(3)(f)(i)(A) of the Police Act, Constable Jansen committed the disciplinary default of Deceit, when he provided an oral statement to Staff Sergeants Doug Fisher and Kent Harrison on December 7, 2010, that to his knowledge was false or misleading.

g) Discreditable Conduct – contrary to section 77(3)(h) of the Police Act, Constable Jansen committed the disciplinary default of Discreditable Conduct, when he used unnecessary force on Mr. Booker at Surrey Memorial Hospital on April 22, 2010, and conducted himself in a manner that he knew or ought to have known would bring discredit on the South Coast British Columbia Transportation Police Service.

[8] The writer was appointed to preside as Adjudicator in these proceedings, pursuant to section 142(2) of the Police Act. The public hearing was commenced on October 15th, 2013.

The issues and findings of fact:

[9] The three and a half years that have elapsed since these events occurred have resulted in problems of recollection for the witnesses. Mr. Booker's memory is further impacted by his mental health issues. There is a video that captured some of the action that evening but it too has its frailties. Since credibility of the various witnesses will be a critical

finding, and since the allegations of deceit will directly impact the findings of credibility, I propose to deal with those allegations first. Rather than dealing with them in the order in which they are set out in the Notice of Public Hearing I will analyze what I believe to be the most compelling count first and then discuss the other allegations with reference to that one.

[10] The deceit allegation referenced in paragraph 9(d) of the Notice of Public

Hearing is the officer's statement which forms part of the PRIME report. It is a single spaced one page document. It was entered into the police system on May 6th, 2010.

Constable Jansen reported that he prepared this document at home when he was on his days off. This is how he describes the events of April 22nd.

I was then standing outside the open door to the interview room about five feet away when I noticed BOOKER randomly throwing punches at PC Spears hitting him in the face 5-6 times. BOOKER was using a closed fist and was punching with his left and right hands connecting on every hit. PC SPEARS then backed into the wall put up his hands to block further punches. PC SPEARS then pushed BOOKER away from him.

[11] Jansen explains that it is at this point that he comes into the room. He says he grabbed Booker's arm to prevent him from striking Spears again. He describes a struggle where Booker was kicking at the two officers and trying to pull his arms away from them. He says he was eventually able to use a bent arm take down to get Booker onto the floor where he and Spears attempted to put the patient in handcuffs. Booker, he says, continued to try to punch and kick the officers. It was at this point that he says Spears deployed the Taser. This was effective; Booker ceased struggling and the officers were able to place the handcuffs on him. Security came and took over for them and it was it was then that Jansen turned his mind to the injuries Spears had sustained. He says in his report:

I then made sure that PC SPEARS got medical attention because he was complaining about pain in his hand and I noticed he had a 4 inch long cut on the left side of his face that was not there when I showed up. After about ten minutes, I noticed his left side of his face turn red and appeared to be swelling up from being hit. BOOKER was then strapped to a hospital bed.

So ends the narrative.

[12] Much has been made of the inadequacies of the video evidence adduced at this hearing. The interview room where these events occurred was equipped with a video camera situated high on the wall in one corner of the room. The system was motion activated and recorded one frame every second at any time when there was enough motion in the room to trigger the parameters which had been programmed into it. There is no doubt that there was activity in that room that was not caught on the video. The main problem was that most of the altercation which all witnesses agree occurred is not captured because the police officers' backs are to the camera and their bodies block any view of Booker. David McKay who studied the video and the system at the hospital and was qualified as an expert in forensic video said the video could not be relied upon to capture all movement. No one, however, has suggested that the images it did capture were in some way suspect. What they showed was that at the end of the interaction between Spears and Booker, Booker's forehead was bleeding profusely. There was blood on the floor where his head had been while he was being stunned with the Taser and placed in handcuffs. This blood was later shown covered by two large absorbent pads. The video shows nursing staff coming to assist Booker and later shows Booker with his head swathed in bandages. Jansen is present while all of this is happening. In his direct evidence on this hearing he even directed our attention to the frames from the video where he can be seen donning gloves. He said he did that when he noticed the blood. I

asked why none of this made its way into his PRIME report and he was unable to provide an answer.

[13]In his direct evidence before this hearing he characterized the injury to Spears face as a small cut. He made no reference to the overall redness or swelling he reports in the PRIME entry perhaps because Carissa Recknagel, the nurse who tended to Spears injured hand said he had a scratch on his neck but that there was no redness or swelling. Also he had been present when Spears gave evidence that he had not noticed the scratch until Jansen brought it to his attention.

The room in which this incident took place is a small one but Spears says that when Booker punched him he may have taken a step backwards before retaliating and forcing Booker back into the chair. He says that the furthest Booker moved from the chair was maybe one step. This must be contrasted with Jansen's version of events when he says Spears was forced back against the wall holding his hands up in front of his face to protect himself from Booker's ongoing blows.

In his evidence before this hearing Jansen described Booker's situation once he was taken to the ground this way.

I then saw Constable Spears take out his taser from his leg holster. What he did from there is he took off the cartridge and the intention was obviously to use it in -- in a drive stun mode, he reached across Mr. Booker, and when I saw him doing this, my left leg was on Mr. Booker's lower back, I was trying to control him, and my right leg was on his upper shoulders, and when I saw the taser coming, I took my leg off of his lower back because I actually thought the taser was going to hit me.

One must wonder how, while face down on the floor with Jansen on his back like this, Booker was managing to try to throw punches as Jansen described in his PRIME report.

This document misrepresented the facts by exaggerating the peril that Spears was facing and my omitting the injuries Booker sustained as well as any evidence that might have explained how they were inflicted. I find on these facts that I must conclude that Jansen intentionally falsified his report in a way that he hoped would assist Spears in defending his decision to use the Taser. I find that the allegation set out in paragraph 9(d) of the Notice of Public Hearing is substantiated.

[14 In discussing the PRIME police statement I have not given any weight to the fact that Jansen neglected to mention the earlier assault on Booker which took place while he was still in handcuffs. Nor was I convinced that his failure to mention his own use of a knee strike during the time he and Spears were struggling with Booker in the chair was intentional. I am of the view that Jansen may have been so focused on his efforts to defend the use of the Taser that he forgot about these other use of force incidents. What might escape mention in an unstructured summary cannot be so readily missed when responding to a direct question.

[15] The substance of the allegation set out at **paragraph 9(e) of the Notice of Public Hearing** is that Jansen misrepresented the level of force used when he filled in his General Occurrence Duty Report and more particularly that portion of the report dealing with officer response options. On that form, the officer is asked specifically about his own actions. Under the heading “physical control hard,” there is a subheading “stuns/strikes” followed by a “Y/N” choice. Jansen circled the “N” for no.

[16] He now acknowledges that answer is wrong but says that at the time he had forgotten the knee strike or strikes he had used. If, as he says, he had forgotten about this use of force until he saw the video some time after October 20, 2010 the memories have

certainly come back in a very complete form. He now claims to remember every detail of his action and the thought process that led to it. I don't believe him. His omission of his own use of hard force is totally consistent with the false impression he has sought to create in the police statement which is discussed above and which formed part of the same PRIME report. I find that the allegation set out in paragraph 9(e) of the Notice of Public Hearing is substantiated.

[17] **Paragraph 9(c) of the Notice of Public Hearing** alleges deceit in filling out the synopsis section of this same PRIME report. In that synopsis Jansen says that he witnessed Booker punch PC Spears in the face multiple times, that he and Spears took Booker to the ground where he continued to fight. He reports that Spears deployed the Taser and that Booker was then handcuffed.

[18] This is an accurate summary of the Police Statement provided a couple of pages later in the PRIME report. Since I have already found that that document was intentionally misleading, this summary must share its fate. It is certainly brief enough that it cannot contain all of the facts but since it serves to advance the same erroneous impression that is fleshed out in the police statement, I find that it too is intentionally misleading and that the allegation set out in paragraph 9(c) of the Notice of Public Hearing is substantiated.

[19] **Paragraph 9(b) of the Notice of Public Hearing** alleges that Jansen committed deceit by failing to mention the use of force against Booker in his notebook entry. An officer's note book is intended to refresh his memory. Notes are typically made contemporarily with the events and one does not expect them to render a complete account of an incident. In this case, however, Jansen acknowledges making this note several days after the event at about the same time as he was preparing the materials for

the PRIME report. Not surprisingly then the handwritten notes exhibit precisely the same pattern of omissions seen in the PRIME synopsis and police report. I find that the omissions here are intentional and were part of the package that was intended to conceal or justify any excessive use of force by Jansen or Spears.

[20] **Paragraph 9(f) of the Notice of Public Hearing** alleges that Constable Jansen committed the disciplinary default of Deceit, when he provided an oral statement to Staff Sergeants Doug Fisher and Kent Harrison on December 7, 2010, that to his knowledge was false or misleading. By the time he attended for this interview, Jansen had received crown disclosure on the criminal charges that resulted from this incident. He had viewed the video and seen witness statements. After a few preliminaries, Staff Sergeant Fisher confronted him. “Why,” he asked “does the documentation that you provide in your general occurrence report bear no resemblance to what happened on the video?”

[21] There follows from this an attack by Jansen on the accuracy of the video. He points to many things that are not shown there. He says that it does not show the blows exchanged between Booker and Spears, it does not show the Taser being deployed. He does not think it shows his knee strike though he says that seeing the video is what made him remember the knee strike. From his questions it appears that Fisher views Spear’s attack on Booker as unprovoked and unjustified. Since I have concluded on a balance of probabilities that Booker did initiate this interchange by punching Spears, I am more sympathetic to Jansen’s efforts to explain what happened and what was not caught on the video. If he was wrong about when it was during the video stream that the physical exchange between Spears and Booker occurred, I am not inclined to attribute that to any attempt to deceive.

[22] Fisher spent some time on the fact that Jansen had said nothing about the earlier incident when Spears had aggressively manhandled Booker while he was in handcuffs. Jansen acknowledged that seeing this on the video he realized it was totally inappropriate but said at the time he really did not think much of it. I believe he may well be telling the truth about this. There is also a lot of interrogation about how he came to file his report. Fisher suggests that it took repeated requests from the RCMP investigator. Jansen denies this. No evidence was called on this hearing to substantiate Fisher's suggestions so I accept Jansen's evidence on this issue.

[23] The allegations of deceit against Jansen do not extend to the evidence he gave in this hearing but I am left to struggle with the discrepancies in his various stories. When he told Fisher one thing and me something else, which version was accurate? Was either? During his interview with Fisher describes the physical interchange between Booker and Spears. At page 125 of the transcript he is talking about the 12 second gap in the video and says that is when Booker punched Spears multiple time and Spears punched him back multiple times. He says that is how Spears broke his hand. He carries on:

...and then I enter the room because I *saw* Booker—I was—I was on the outside of the room –punch Spears and Spears punching back. (emphasis mine)

[24] At page 131 there is further discussion about Jansen's version of what happened in that twelve second gap in the video. He says, "All I know is what I say. I *saw* that happen."

At page 132 he says "So the video doesn't show Spears punching him back and I saw that."

I think he might be telling the truth but I have to contrast that with his evidence on this hearing.

Jansen gave evidence on November 19th. In his direct examination by Mr. Butcher he said:

Initially, I thought that he (Spears) pushed him back, but again after seeing the evidence and -- and hearing evidence of -- of Constable Spears and everybody else, I believe now that he punched him back.

When cross examined on this Jansen explained:

Q When did you realize that Mr. Booker had been punched by Constable Spears?
A Again, I don't know the exact date that I remembered -- remembered that. I believe it -- a lot of that could have come to me after I read the Crown and I saw the video, because in -- in the Crown report there was the statement from Constable Spears, which I didn't know or had seen any time before that.

[25] So wherein lies the truth? Did he ever think it was a push he saw? Did he come to *believe* his initial assessment was wrong after he heard Constable Spear's evidence? Or is he actually able to report what he saw happened? He is not a reliable witness. That being said, it takes more than that to establish a case of deceit.

[26] This leaves the issue of the knee strike. Nurse Adrien Zucerman reported that he saw Jansen knee Booker several times in the lower right quarter of his back. In his notebook entry and his PRIME report, Jansen does not mention the knee strike at all. At page 125 of his statement to Fisher he raises it for the first time.

I try to control his right arm and I couldn't. I couldn't get ahold of it. So I knee strike him once. I -- believe it was in, like, the leg. Leg or the right side---the right side of him.
And it works because I get control of his hand. And then that's where it goes to the ground.

[27] At page 126 he says the video doesn't show the knee strike but that after watching the video he remembered that he did it because he was trying to get control of Booker's hands.

On November 19th, during the course of this public hearing Jansen was told that Zucerman had said he witnessed Jansen knee strike Booker several times in the lower back. He was asked if Zucerman was correct and responded:

No, he wasn't. I was there, I was -- as I say, I was really close to Mr. Booker, and the part that was exposed to me where he was, and my attention to where I was to deliver the knee strike was to the leg. To the leg and -- and his butt area. And that was my intention to where the knee strike was going to land, and the reason why is -- is I was using it as a stun tactic. You know, I couldn't get his arm out from underneath him because he was either pulling it away or there was a lot of resisting going on, a lot of, you know, fighting. So that was my intention to -- to use that level of force to see if it worked, and one knee strike to that area to me I felt like it worked because obviously I got his arm, and from there we took him down to the ground. So there was no need for me to deliver multiple knee strikes to Mr. Booker.

Jansen is asked if he can see the knee strike on the video and he directs us to frame 293.

[28] Mr Butcher asks how he can tell it happened in frame 293 at 9:49:19 and Jansen says:

I was able to say that because I -- I'm dominant with my right leg, so I would have delivered a knee strike with my right leg more likely than my left, and the position that was exposed of Mr. Booker at that time is he was on his side and his leg and his butt area were close to my right knee, that that's the -- yeah, you can see in this -- this still image, you can see my foot and it almost looks like it's in a position to deliver a knee strike, and that's when I remember I did it. So that's how I can tell you that that's when I delivered the knee strike.

[29] Jansen is asked about the position of his left foot and leg in several of the following frames but says it that he thinks it is on the floor and it is just the perspective of the camera that makes it appear that it might be in the air. In frame 303 at 9:49:32 he and Spears can be seen taking Booker to the floor. He was asked what was happening in that 23 seconds between frame 293 and frame 303.

Well, after I applied the knee strike and I was able to get his arm free, I think we're -- we're in the process of taking him off the chair to the ground. I don't know if it was a combined effort, I don't believe Constable Spears and I communicated with each other that we were going to do that, I think it was just instinct. But Mr. Booker, he was -- he was still resisting to the point where, you know, like we were struggling, we were struggling with him and -- and, you know, I guess we both made that -- that conscious decision to -- to take him down to the ground, so we're taking him off the chair to the ground.

[30] He is asked why there is no reference to the knee strike in his notes or in his statement or in his Subject Behaviour-Officer Response form and says:

At this point I don't remember using the knee strike until I saw the video. The knee strike was -- was something that -- it was a -- it was an instinctive reaction, and then as I was seeing the video, I was -- I was able to tell, you know, and point out in the section, no, I -- I knee struck him here.

In discussing his interview with Fisher he says:

I wanted to see this video. And I had the chance to see it and I was -- I was able to go through it and say, oh, you know what, this is what happened there. And -- and I pointed out this is where I did my knee strike, and during that interview with Staff Sergeant Fisher like I had told him and I pointed out this is where I knee struck him.

[31] That is not what happened in the interview at all. It was in fact Jansen who asked Fisher if the knee strike was shown on the video. When Fisher said it was, Jansen asked to be shown where it was. Fisher advanced the video to frame 293 and pointed out the position of Jansen's right leg. Jansen disputed the fact that this frame or the one that followed showed a knee strike. (In fairness to him, it may be that again he was trying to show the deficiencies in the video since he pointed out that the video did not show the actual contact with Booker.)

[32] Zucerman is the only witness that reported seeing the knee strikes. In the statement that he gave a few weeks after the event and again at this hearing he was sure he had seen repeated knee strikes. He was also consistent in saying that it was while Booker was in the chair that Spears Tasered him. Spears and Jansen both say this happened after they had taken Booker to the ground. Zucerman is an independent third party witness and I can see no reason for him to fabricate evidence. That being said, I can see no reason for Jansen and Spears to lie about this either. I note that Jansen reported the deployment of the Taser before he saw Spear's statement and yet his version of events is almost

identical to the other officer's. I accept their evidence in this regard and find that Zucerman was probably mistaken.

[33] Does this make his evidence about multiple knee strikes suspect too? It certainly suggests that despite his absence of a motive to lie, his evidence must be viewed with caution. The video too has its frailties and I cannot say with certainty that it shows more than one knee strike but between the initial strike at frame 293 and the point at which Booker was pulled from the chair in frame 303, there are several times that Jansen's left foot appears to be in the air. While not conclusive, this lends credence to Zucerman's assertion that there were multiple knee strikes.

Finally there is the 23 second gap between that first knee strike and the point at which the officers start to get Booker out of the chair.

[34] On page 125 of the transcript of Jansen's interview with Fisher he says:

I try to control his right arm and I couldn't. I couldn't get ahold of it. So I knee strike him once. I --believe it was in, like, the leg. Leg or the right side---the right side of him.
And it works because I get control of his hand. And then that's where it goes to the ground.

In his direct evidence on this trial, again he stresses the effectiveness of this one blow.

...was my intention to -- to use that level of force to see if it worked, and one knee strike to that area to me I felt like it worked because obviously I got his arm, and from there we took him down to the ground. So there was no need for me to deliver multiple knee strikes to Mr. Booker.

[35] Clearly that first knee strike was not as effective as Jansen would have us believe. In his interview with Fisher and to a lesser extent during the course of this hearing, Jansen has made much of the 12 second gap in recording that takes place between frame 283 and 284. He describes it as huge. There is a lapse of 23 seconds between the time that Jansen says and the video seems to confirm he delivered the first knee strike and the point at

which he and Spears were able to pull Booker from the chair. That too is a lot of time.

When asked what happened during that time he says:

Well, after I applied the knee strike and I was able to get his arm free, I think we're -- we're in the process of taking him off the chair to the ground. I don't know if it was a combined effort, I don't believe Constable Spears and I communicated with each other that we were going to do that, I think it was just instinct. But Mr. Booker, he was -- he was still resisting to the point where, you know, like we were struggling, we were struggling with him and -- and, you know, I guess we both made that -- that conscious decision to -- to take him down to the ground, so we're taking him off the chair to the ground.

[36] So the subject continued to struggle. And it is during that continuing struggle that Jansen's left foot is seen in the air in several frames. In conclusion I find that Zucerman's evidence, the video evidence and Jansen's own report of the struggle with Booker, taken together, support a finding on a balance of probabilities that Jansen knee struck Booker repeatedly. I find that the allegation of deceit set out in paragraph 9(f) of the Notice of Public Hearing is substantiated.

[37] **Paragraph 9(a) of the Notice of Public Hearing** alleges that Jansen committed the disciplinary default of Abuse of Authority when he intentionally or recklessly used unnecessary force on Mr. Booker at Surrey Memorial Hospital on April 22, 2010.

Paragraph 9(g) alleges that Jansen committed the disciplinary default of Discreditable Conduct, when he used unnecessary force on Mr. Booker at Surrey Memorial Hospital on April 22, 2010, and conducted himself in a manner that he knew or ought to have known would bring discredit on the South Coast British Columbia Transportation Police Service.

[38] These allegations both relate to the knee strikes. Did they, in the circumstances in which they were used amount to excessive force? I was assisted in making a determination on this issue by the evidence of Kerry Solinski and John MacKay, both of whom were qualified as experts on the use of force by peace officers. In their analysis

both of these witnesses referred to the Incident Management Intervention Model. In assessing the appropriateness of Jansen's action the starting point involves a determination of the initiating situation. On a balance of probabilities I find that Booker did punch Spears in the face and that this was what gave rise to the officers' response. I find that Booker continued being actively resistant and assaultive in more minor ways by flailing at Spears and by kicking at both officers even though he was not wearing shoes and this would not do much damage. This is what Spears has said all along and what Jansen now says.

[39] Booker gave evidence in this hearing but because of his mental health issues his testimony was not much help. He says he slapped at Spears and that he was Tasered in the head when he was being arrested at his suite. He does not recall the use of the Taser at the hospital, the blows that split his brow open and blackened his eyes or any of Jansen's knee strikes. On the 23rd of April 2010, Booker was interviewed by Nurse Dosanjh. She noted that he believed he was an undercover cop. When asked about the altercation with the RCMP the previous day he reported that he punched him because he wasn't a "real cop." This provides some corroboration for the version of events relayed by the officers.

[40] Finally, I note that on the video, immediately preceding the point at which Spears attacks Booker things appear to be peaceful. There is a twelve second stretch where the cameras detect no motion; Booker is seen sitting back with his hands on the arms of the chair. There is nothing shown on the video that would give the viewer any indication of what might have given rise to assaultive behaviour by either of the individuals shown. Absent any evidence of misbehaviour on Booker's part there would be no reason for Spears to attack him. Booker, on the other hand, as part of his illness, had before and

after the incident indicated an animus toward the police in general and toward Spears, as the arresting officer, in particular.

[41] John MacKay says that if Jansen saw Booker punch Spears he had a duty to assist his fellow officer in bringing Booker under control. MacKay when discussing what the officers should do in these circumstances says:

...the objective will be to handcuff Mr. Booker again. He was handcuffed earlier. When I say again, place him in handcuffs again. And to do that generally during these combative situations they'll take him to the floor. The reason that -- and they'll put him in a prone position, which means that he's on his stomach. People aren't -- aren't able to resist very well from that position. They're able to resist better if they're on their back, they can bicycle with their feet and they can use their hands, whereas on -- when they're on their stomach in a prone position and you can pin them there, then the next phase is to bring their hands behind their back and -- and finish the handcuffing and get them to their feet.

On the IMIM chart, active resistance and assaultive behaviours fall in the area that would justify the use of physical control hard. Knee strikes are designated as hard physical control. That being said the level of force used must be appropriate, necessary and proportionate. In cross-examination Butcher posed the following questions and received these answers:

The fact that Booker continues to actively struggle and the officers are not able to quickly bring him into a position where they can hand cuff him suggests that a move up the scale may be necessary. Now, if when the two officers are on top of Booker he is continuing to resist and trying to kick them, his assaultive behaviour is continuing and not under control?

A Yes.

Q Even if it's not being very effective?

A Well, that's right, it's still the behaviour, it doesn't matter much if it's effective or not, it's still occurring and they have to deal with it.

[42] In hindsight one wishes someone had asked the use of force expert what Jansen should have done as a next step. A single knee strike to the leg I was told would not be inappropriate. Multiple knee strikes to the lower back would be. Though the risk of injury

to the subject increases with the number of times he is hit, it is the area struck rather than the number of blows which is most significant. The force of the blows is another factor to be considered.

[43] I am satisfied on all the evidence that the knee strike used by Jansen did not bear much resemblance to those which officers study and practise during their training period. MacKay points out that a knee strike to the leg which is intended to distract and cause a muscle spasm would not work on a seated subject. Zucerman speaks of Jansen “kneeing” Booker. He offers no more description of the move itself. Jansen said he forgot the knee strike because he had been acting instinctively. At this point I am inclined to believe Jansen. Despite his efforts to justify his actions by trying to fit them into the parameters he had been given in his training, it is more likely that in the pressure of the moment he was simply reacting to the circumstances. The space was very confined. Jansen and Spears were side by side in front of the easy chair Booker occupied. Booker received no bruises or other injuries. Though I concluded that Jansen kneed the subject repeatedly, I find that he did not use much force.

[44]The most critical issue is where those blows were landing. Zucerman says it was in the lower right quartile of the Booker’s back. Jansen says it was in the upper leg or buttocks. When Zucerman speaks of the lower back, would the buttocks and hip area be included in that description? Would that he had been asked that question. The ordinary dictionary definition of “back” is the rear part of the human body, extending from the neck to the lower end of the spine. Typically when we speak of the lower back we are referring to the area below the waistline. If that is the area that Zucerman was referring to then his evidence does not contradict Jansen’s. Neither Solinsky nor MacKay was asked

whether they would consider knee strikes to the buttocks area excessive. When asked about back blows they were concerned with the potential for kidney damage or broken ribs which might in turn cause further organ damage. Clearly they were thinking of the lower quartile of the back extending further up the body and that would make sense if one were to section the area off with a tape measure. Still most of us think of the waist line as the dividing point between the lower back and the middle and upper back.

[45] On the evidence adduced I am not able to find on a balance of probability that the knee strikes were aimed at or hit the area above Booker's waist. I find that several knee strikes of moderate to mild force connecting with the subject's buttocks area would pose no danger of significant injury. The evidence establishes that there was no injury. I do not find that the allegation of abuse of authority by using unnecessary force has been substantiated. Since paragraph 9(g) of the Notice of Public hearing is also dependent on a finding that Jansen used unnecessary force on Mr. Booker, I find that it too is unsubstantiated.

[46] In summary then, my findings on the allegations set out in the Notice of Public Hearing are:

a) Abuse of Authority: contrary to section 77(3)(a)(ii)(A) of the Police Act, Constable Jansen, committed the disciplinary default of Abuse of Authority when he intentionally or recklessly used unnecessary force on Mr. Booker at Surrey Memorial Hospital on April 22, 2010. **Unsubstantiated**

b) Deceit – contrary to section 77(3)(f)(i)(B) of the Police Act, Constable Jansen, committed the disciplinary default of Deceit, when he made an entry in his

notebook that to his knowledge was false or misleading and omitted to record in his notebook the use of force against Mr. Booker, to which he was a witness.

Substantiated

c) Deceit – contrary to section 77(3)(f)(i)(B) of the Police Act, Constable Jansen committed the disciplinary default of Deceit, when he made an entry in his PRIME synopsis page on May 1, 2010, that to his knowledge was false or misleading.

Substantiated

d) Deceit - contrary to section 77(3)(f)(i)(B) of the Police Act, Constable Jansen committed the disciplinary default of Deceit, arising out of an entry he made to his PRIME Police statement on May 6, 2010, that to his knowledge was false or misleading.

Substantiated

e) Deceit - contrary to section 77(3)(f) of the Police Act, Constable Jansen committed the disciplinary default of Deceit, when he provided a duty report to Staff Sergeant Doug Fisher on August 30, 2010, that to his knowledge was false or misleading.

Substantiated

f) Deceit - contrary to section 77(3)(f)(i)(A) of the Police Act, Constable Jansen committed the disciplinary default of Deceit, when he provided an oral statement to Staff Sergeants Doug Fisher and Kent Harrison on December 7, 2010, that to his knowledge was false or misleading.

Substantiated

g) Discreditable Conduct – contrary to section 77(3)(h) of the Police Act, Constable Jansen committed the disciplinary default of Discreditable Conduct, when he used unnecessary force on Mr. Booker at Surrey Memorial Hospital on April 22, 2010, and conducted himself in a manner that he knew or ought to have known would bring discredit on the South Coast British Columbia Transportation Police Service. **Unsubstantiated**

[47 With respect to s.126 of the Police Act I invite the parties to make submissions with respect to the appropriate disciplinary penalty or corrective measure in relation to the five allegations of deceit that have been proved. The date for those submissions can be arranged with the Registrar.

DATED at Surrey B.C this 6th day of December, 2013



Carole D. Lazar
Adjudicator