

# KING COUNTY PROSECUTING ATTORNEY'S OFFICE



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## **Review of SPD 10-386198**

In September, 2015, the KCPAO was requested to review SPD 10-386198 for consideration of assault charges against SPD Officer D. Bauer. Ordinarily, an event from 2010 would be barred by the statute of limitations. However, under RCW 9A.04.080(1)(b)(i), the State has 10 years to consider charges against a public officer but only if the officer committed a felony offense. Since we have jurisdiction for a felony charge, our focus shifts to whether the evidence supports a felony crime against Officer Bauer and/or other officers who responded to the scene.

The underlying incident stemmed out of a police response to a 911 call about a disturbance at 5606 First Avenue South, the Last Chance Shack, on November 4, 2010. The bartender called 911 and stated that two intoxicated individuals had been thrown out of the bar and were now hovering around outside the bar making threatening gestures to those inside. The bartender stated that she was frightened for her own physical safety to leave the bar. Seattle Police Officers B. Eggers, D. Bauer, and L. Brown were the primary officers to respond to the call. Upon arriving, the officers made contact with two individuals, matching the description from the bartender, sitting in a small car near the Last Chance Shack and in the parking lot of the Viking Bank Building. Quickly, two more individuals, relatives of the men in the car, exited the bank building and became involved in the event.

Police in-car-video ("ICV") recorded much of what took place as the officers engaged the individuals in conversations and then made arrests. But the video is limited because much of the activity relevant to the State's consideration took place on the far side of the suspect's car and out of view of any video recordings.

All four individuals who were arrested suffered a variety of injuries. Based upon the discovery provided, only one individual suffered any injury which could possibly support a felony assault charge. That individual, Emmanuel Ocampo Morales, was transported to a medical facility and had three stitches placed on his upper lip. Recently, detectives located him in Mexico and he reported that his injury occurred when his face made contact with the cement while he was (admittedly) resisting arrest. He also stated that he has suffered from headaches since that incident. While he states he received medical treatment in Mexico, he did not follow up on law enforcement's request to provide medical records or sign a waiver of release for medical records.

Assault in the Second Degree (RCW 9A.36.021) requires that the suspect commit an intentional assault that recklessly inflicts substantial bodily harm upon a victim. Substantial bodily harm is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” Our Filing and Disposition Standards state that the level of injury is sufficient if the victim sustained an “injury requiring a *significant* number of stitches or staples.” With a lack of medical records and a report of only three stitches, this injury does not satisfy our felony filing standards.<sup>1</sup>

Nevertheless, while this injury does not satisfy our office standards, we acknowledge that it arguably satisfies the statutory definition of substantial bodily injury. However, felony charges are unwarranted because (1) the injuries occurred while the suspect was admittedly actively resisting arrest, and (2) there is some uncertainty as to who caused those injuries.

At the outset, we note that officers are allowed to use force when arresting an individual. RCW 9A.16.020 provides: “The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases: (1) Whenever necessarily used by a public officer in the performance of a legal duty....” In addition, RCW 10.31.050 provides, “If after notice of the intention to arrest the defendant, he or she either flee or forcibly resist, the officer may use all necessary means to effect the arrest.” The State bears the burden of proving beyond a reasonable doubt that the use of force was not lawful.

In this event, the officers quickly used commands and force to gain compliance from the suspects being placed under arrest. The force inflicted on the driver by Officer Bauer in full view of the in car video stopped when the suspect complied with their demands. The events that unfold behind the vehicle are more difficult to discern. At one point Officer Bauer appears to kick one of the three suspects who is behind the car. The video shows a kicking motion, but the result of that motion is unclear because it is out of view of the camera. Furthermore, Officer Brown, who is also behind the car, is struggling with the other suspect at that time and did not see Officer Bauer kick either suspect behind the car. Finally, the person we believed was kicked cannot be located, is likely living outside of the country, and has given no statement to law enforcement.

In addition, it is not entirely clear which officer even caused the facial injury to Mr. Morales due to the fact it occurs outside the view of the camera. In his 2015 statement, Mr. Morales told investigators he thought the person who caused the injury was a male officer and the injury was caused when his face was rubbed against the cement while he was resisting arrest. However, it is the State’s opinion based on a complete review of the evidence that this injury was likely caused by Officer L. Brown, who is female. Officer Brown has stated that she had contact with the two individuals leaving the bank building and ultimately placed the male into custody. Upon review of the ICV (both from the incident along with the patrol car video of the transport of Mr. Morales) this injury was most likely caused by Officer L. Brown who was having difficulty putting the suspect into custody and scuffled with him on the ground. Indeed, on the

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<sup>1</sup> The remaining individuals, who were arrested by Officer D. Bauer, suffered minor injuries that do not qualify as substantial bodily harm. The only possible charge would be fourth-degree assault, a gross misdemeanor. The statute of limitations on gross misdemeanors is 2 years and expired in 2012.

ICV during Mr. Morales's transport to the police station, his anger over the arrest is solely focused on the female officer, and the only female officer at the scene was Officer L. Brown.

In summary, the only felony level crime that could be prosecuted stems from a scuffle with an officer struggling to arrest a non-compliant suspect. The State cannot file any criminal charges arising out of this incident against Officer D. Bauer – or any other officer who was involved in this incident in 2010. This case is returned to the Seattle Police Department for any additional consideration outside of criminal prosecution.