



Melinda J. Tempelis, District Attorney

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September 27, 2022

Special Agent Tami Sleeman
P.O. Box 7167
Appleton, WI 54912

Dear Special Agent Sleeman,

Thank you for agreeing to do an independent investigation of the Appleton Police Department's (APD) officer involved shooting by Officers Bryce Rudebeck and Anthony Shuman, which led to the death of Daniel M. Pesavento on August 12, 2022.

I have reviewed the entire investigation that was provided to me related to this incident, which includes a very detailed report, photos, maps, medical records, interviews, videos, and other important information. It is my understanding there are a couple of items outstanding, including the final autopsy report from the medical examiner's report, which will include the toxicology result and ballistic reports from the Wisconsin State Crime Lab. I have been told these items could take months. However, after reviewing everything else, I do not believe the results of those items would change my decision based on other corroborating information in the investigation.

BRIEF SUMMARY OF FACTS

Domestic Incident

Daniel Pesavento (from hereafter referred to as "Pesavento") lived at a residence on N. Birchwood Ave., Appleton, Wisconsin with his wife and young child. Pesavento and his wife had been having some marriage issues for some time and he would often bring up and/or make threats about divorce. His wife, however, never threatened to leave or seek a divorce. She said Pesavento typically drank alcohol almost daily during the summer months because he was off of

school. She said sometimes he participated in Mixed Martial Arts (MMA) training a couple days a week; however, his drinking prevented him from his usual workouts/training.

On August 11, 2022, Pesavento had been consuming alcohol the entire time he was watching their young child while his wife was away, which greatly concerned her. On August 12, 2022, Pesavento's wife contacted her mother about staying at her mother's residence later that evening, as she was going to speak to Pesavento about moving out with their child and wanting a divorce.

When his wife and her child arrived home around 4:30 pm on August 12, 2022, she observed empty alcohol containers scattered throughout the home, including beer cans and an empty bottle of bourbon. She stated Pesavento was "heavily intoxicated." Late that afternoon, she told Pesavento she wanted a divorce. She said even though Pesavento had brought up divorce numerous times, she felt he was surprised, and his emotions eventually turned from sad to angry. She said he retrieved a firearm, which she believed was a 9mm pistol from a desk drawer in the home office, which he purchased during the summer of 2020.

After Pesavento retrieved his pistol, his wife said he began to make several suicidal comments, which lasted several hours. She said he did not point the pistol at her or their child, but he was pointing it at himself. She said she repeatedly tried to calm Pesavento down and was encouraging him to put the pistol away and tried to keep him away from their young child.

At approximately 6:19 p.m., the female's mother texted her, "*Did you make it to my apartment?*", after no response, her mother sent another text message to her at 6:37 p.m. that said, "*Is everything ok.*" The female victim responded at 6:37 p.m. with "*hold on*" and then again with the word "*Mayday.*" After receiving the "*Mayday*" message, her mother called 911 and requested a welfare check be conducted at the home.

Shortly thereafter, her mother called to check-in. The female victim was unable to talk but left the phone line open so her mom could hear what was occurring in the background.

The female victim confirmed she sent the "*Mayday*" text message to her mother after Pesavento started hitting her in the face with his closed fists and attempted to strangle her. At some

point after the physical altercation, she recalled seeing Pesavento walk into the garage and about 1-2 minutes later she heard one single gunshot. She said she was fearful Pesavento shot himself, so she called 911 as she was too afraid to walk into the garage and check on him.

After calling 911, the female victim was encouraged by dispatchers to exit the home with her child and meet police officers waiting outside of the house who would take her to safety. Prior to leaving the scene, she heard police shouting at Pesavento to “*put it down!*” She believed “it” was referring to the pistol she knew Pesavento had in his possession and believed the commands were being given by officers who were “trying to de-escalate the situation.” She said she knew Pesavento “was going to fight” with responding police officers because of the comments he made during an incident in December of 2020.

The female victim reported in December of 2020, Pesavento was heavily intoxicated and in possession of a firearm. She said there was a physical altercation, where he physical strangled and struck her. He then retrieved the pistol and started making several suicidal comments. During that incident, Pesavento made a comment to her about not “calling the cops” because if she did, Pesavento would have to “shoot” at responding officers. She said the only thing that resolved the incident was when he became so intoxicated, he eventually “passed out” and dropped the pistol and she was then able to secure it. She said there was another incident in the fall of 2021, when Pesavento was also heavily intoxicated and was “shoving” her.

Law Enforcement Response

At 7:22 pm, the female victim’s mother called 911 to report the “Mayday” text and the Appleton Police Department (APD) was dispatched to the home on Birchwood Avenue for a domestic disturbance. The female victim called 911 at 7:28 pm to report she believed her husband had shot himself, but she had not gone into the garage. As officers were responding, dispatch advised the male subject had a gun and one shot had already been fired, resulting in other officers upgrading their emergency response to assist. When officers arrived on scene, the garage door of the residence was closed and they worked with dispatch to get the female victim and her young child safely out of the residence, which occurred at approximately 7:33 pm.

Upon arriving on scene, Off. Rudebeck and Off. Shuman armed themselves with their APD issued tactical rifles based on the nature of the call and responded to the area of the residence. Off. Rudebeck and Off. Shuman each observed the female victim and a young child being escorted away from the scene by other officers. Off. Rudebeck observed she was crying. Off. Jenkins described her as “moving with a purpose” and that she quickly cleared the area.

Off. Rudebeck was asked to position himself near patrol vehicle #956, located approximately 30-35 yards east of the residence on West Brewster Street. Off. Rudebeck positioned himself near the hood of the squad, which provided additional cover from the engine block. Off. Rudebeck reports he heard over the radio the male subject, who was later identified as Pesavento, was in the garage with a handgun. However, he observed the garage door was down and could not see Pesavento. Off. Shuman and Off. Jenkins also positioned themselves behind the hood of the squad with Off. Rudebeck.

Eventually, Off. Rudebeck told Off. Anthony Jenkins, Off. Anthony Shuman and Sgt. Zieman the garage door had opened, but he could not see Pesavento. At this point, they were all positioned behind the engine block of patrol vehicle #956. Off. Rudebeck was positioned at the end of the hood closest to the bumper, Off. Jenkins was in the middle and Off. Shuman was positioned on the hood closest to the driver’s side mirror. Officers Rudebeck, Jenkins and Shuman heard radio traffic at approximately 7:35 pm indicating some APD officers could see Pesavento in the garage first sitting on a chair on the east side of the garage with a gun to his head and then moving around in the garage. Off. Jenkins stated he focused primarily on the driveway of the residence, in part because there was a utility pole vision obstruction.

Off. Rudebeck was aware there was a civilian vehicle parked in a driveway on the west side of N. Birchwood Ave, with several APD officers near that vehicle and additional APD officers near a civilian vehicle in a driveway on the south side of West Brewster Street.

Off. Rudebeck and Off. Shuman report Pesavento remained in the garage with a handgun for a while, but there was concern among all three officers about civilian safety and vehicle traffic traveling on Birchwood Ave. Off. Rudebeck heard other APD officers yelling at civilians to get into their homes. Civilians were told to stay away from windows and go into the basement

or somewhere safe within their residence. Off. Rudebeck advised civilians were being told this for their safety, as officers were concerned about civilians being shot or taken hostage. Off. Rudebeck and Off. Shuman were both concerned about civilians, who were watching outside, despite being told to go inside their homes.

Off. Rudebeck, Off. Jenkins and Off. Shuman report Pesavento exited the garage with a handgun to his head and under his chin. Off. Jenkins reports he said something like, "Hey brother, we're just here to help you" and "Drop the gun, put it down." They reported Pesavento would remove the gun from his head and then move it in various directions and then again back to his head. Off. Jenkins said at one point, Pesavento walked down the driveway holding the handgun backwards in his hand with his thumb on the trigger while the weapon's barrel was oriented to point under his own chin. Off. Jenkins also recalled Pesavento would continually scan the area when he would step outside of the garage. Off. Jenkins stated during one of his marching-like movements down the driveway, Pesavento took several aggressive steps in Off. Jenkins direction, looked at Off. Jenkins and yelled "Just kill me!" before returning to the garage.

At times, a telephone pole east of Pesavento's driveway would cause Officers Rudebeck, Jenkins and Shuman to lose sight of Pesavento. When this happened, they would confirm with each other which one of them had a visual, to ensure one of them always had visual on Pesavento.

Off. Rudebeck, Off. Jenkins and Off. Shuman were aware a less-than-lethal team was preparing to set up to move north of the residence and another officer was situated as a sniper south of the residence. They were also concerned about Pesavento's movements creating a dangerous crossfire concern for officers and prevented the less-than-lethal team from moving towards Pesavento.

Officer Rudebeck observed Pesavento standing at the edge of the driveway with his head looking at the ground then raising his head back up. Though Officers Jenkins, Rudebeck and Shuman may have all yelled commands at some point they were advised that voice commands were going to be done by the west group of officers. This is common for someone to 'take over commands' during an active situation to minimize confusing and to give clear direction to the

person they are addressing. Off. Rudebeck could hear Pesavento screaming and he appeared to be distraught. He heard Pesavento yell, "kill me!" and other unknown things in the direction of the negotiating officer. Off. Shuman reports hearing Pesavento yell "Shoot me!" and "She deserves better than me." Off. Shuman also noticed his speech was slurred. Off. Rudebeck said Pesavento would walk down the driveway toward the street with the handgun to his head and would reposition the gun from his head and move it in various directions yelling, "kill me!"

Officers Jenkins and Rudebeck discussed where they would lose their line or containment of Pesavento and where there would be crossfire with other APD officers located on the west side of the residence. Off. Jenkins indicated he was concerned about containing Pesavento given his display of mobility and he was worried about crossfire issues should Pesavento leave the driveway and enter further into the roadway. Off. Rudebeck was concerned that if Pesavento was out of the line of containment, Pesavento would be a greater danger to the public and other officers. Off. Rudebeck advised his line of containment would be lost at the public road on W Brewster.

Off. Rudebeck and Off. Jenkins reported Pesavento walked to the end of the driveway with the gun to his head. Off. Rudebeck heard him yelling "kill me!" Off. Jenkins reports he could hear commands from the other officers, but Pesavento disregarded those commands. Dispatch records indicate at 8:04 pm, Pesavento was talking about suicide by cop. Pesavento moved the handgun from the side of his head to his mouth. Off. Jenkins stated since Pesavento was continually moving and walking around, the barrel of his weapon would get pointed in the direction of Officers Rudebeck, Jenkins and Shuman as he moved. Off. Jenkins estimated he was 30-40 yards away during some of the movements when Pesavento was walking around in the vicinity of the garage. Pesavento was hunched over and was shaking, moving the barrel of the handgun from his mouth to the side of his head. Off. Jenkins switched his safety from 'safe' to 'fire' on several occasions during this time because of Pesavento's behavior and his concern for his own safety and the welfare of other people in proximity to the scene.

Pesavento turned again toward Officers Rudebeck, Jenkins and Shuman. Off. Rudebeck stated he was fearful for his safety and the safety of his fellow officers, Officers Jenkins and Shuman. Off. Rudebeck activated his weapon light. Off. Rudebeck observed Pesavento take a

shooting stance, stand straight up, with one foot back and gun down to his side and then brought the gun back to his head, yelling “kill me!” and “let’s get this over with” and “come on.”

Off. Jenkins felt Pesavento was becoming more agitated and even noticed he had clenched his left hand into a fist and appeared to be tensing up or flexing his muscles as he took an aggressive like stance. Sensing the escalation, Off. Jenkins once again switched his service rifle safety mechanism to ‘fire.’ Off. Jenkins stated Pesavento yelled in an angry voice, “Come on” before abruptly turning his body easterly now bladed in the direction of Jenkins, Officer Shuman, and Officer Rudebeck. Off. Jenkins stated he believed Pesavento was holding the handgun near his right hip just prior to the easterly turn and saw the barrel of his weapon begin to present/elevate as he squared his body off facing in Off. Jenkins’ direction. Off. Jenkins said at that moment he felt in fear for his own life and the lives of his fellow officers, Officer Shuman and Officer Rudebeck standing beside him. Off. Jenkins believed Pesavento intended to discharge his weapon at him or others.

Off. Shuman observed Pesavento turn towards them and plant his feet, assume a confrontational stance and square-off toward him and the officers.

Off. Jenkins reports in reaction to Pesavento’s series of movements, he felt he had no other choice but to stop the threat and attempted to discharge his service rifle. Off. Jenkins said when he squeezed his weapon’s trigger, the weapon did not fire. Almost simultaneous to this malfunction, Off. Jenkins believed he heard Officer Rudebeck discharge his service rifle. Off. Jenkins later reported when he attempted to fix his malfunction a double feed occurred, which rendered the weapon inoperable.

Off. Rudebeck stated he saw Pesavento move the handgun from his head towards the direction of Off. Rudebeck and his fellow officers, Officers Jenkins and Shuman. Off. Rudebeck then became fearful for the safety of his life, his fellow officers’ lives, and the public’s lives. Off. Rudebeck was aware of what was beyond Pesavento, that no other officers or civilians were in the area of a crossfire or harm’s way. Off. Rudebeck took the safety off his rifle and fired multiple rounds, which he believed was approximately five (5) at Pesavento to stop the threat.

Once Off. Rudebeck observed him fall to the ground and drop the handgun and the threat had stopped, Off. Rudebeck put the safety back on his rifle.

Off. Shuman was aware of citizens in the open and observed Pesavento had target acquisition on him and his fellow officers. He feared for his own life and those of the other officers and citizens in the area. Off. Shuman turned off his safety and aimed at Pesavento intending to fire, but Pesavento moved out of his rifle's optic. He re-aimed his rifle and fired one shot after just hearing Off. Rudebeck fire.

Dispatch records report at 8:06 pm shots had been fired. Commands were being given not to touch the gun or he would be shot again. Once it was confirmed there was no threat, officers and Appleton Fire Department Medics approached Pesavento to secure him and render aid.

Off. Rudebeck, Off. Jenkins and Off. Shuman stated they had never been to the residence before, nor did they know or have any prior knowledge of Pesavento.

Autopsy Findings

An autopsy was performed by Dr. Brian Peterson, M.D., Chief Medical Examiner and forensic pathologist at the Milwaukee County Medical Examiner's Office on August 15, 2022. The autopsy revealed Pesavento died from injuries due to four gunshot wounds to the torso and extremities. One bullet was recovered from the liver, near the spleen.

Evidence Collection

Investigators observed bruising to the female victim's right elbow and lower arm. She had bruising and redness underneath her left eye and temple and her lip appeared swollen and bleeding. She indicated these injuries were a result of the physical altercation that had occurred with Pesavento on August 12, 2022 prior to APD's arrival.

Investigators located four (4) fired .223 cartridges west of patrol vehicle #956, consistent with the location where Off. Shuman and Off. Rudebeck fired their weapons. Investigators were unable to locate the bullets or defects associated with the fired rounds at the scene.

Investigators learned that five (5) .223 rounds had been discharged by APD during the incident, all from a similar location. Four (4) fired .223 cartridges were located on W. Brewster St., west of APPD squad #956. Another fired .223 cartridge was located on the roof of APD squad #956, below the light bar. Evidence recovered at the scene was consistent with the information learned through the course of the investigation. Furthermore, involved officers' weapons were examined and their duty equipment was inventoried as a normal protocol in officer involved critical incidents.

Investigators also located a handgun in the area of the driveway apron associated with the residence on N. Birchwood Avenue, along with medical supplies and a pair of sandals. This was consistent with the location where Pesavento was when he was shot. The handgun was approximately ninety-six feet northwest of the front driver side wheel of patrol vehicle #956. The safety of the handgun was found to be disengaged and there was one (1) unfired 9mm round in the chamber of the handgun. It was identified as a black Beretta 92FS 9mm semi-automatic handgun. When the magazine was ejected, it was identified as a Beretta PB CAL.9 para with a fifteen (15) round capacity magazine with six (6) unfired 9mm rounds.

Investigators also located a fired 9mm handgun cartridge in the attached garage of the N. Birchwood Avenue residence. While examining the garage, investigators located what appeared to be a round bullet hole in the metal garage door which was consistent with the diameter of a 9mm handgun round. The hole appeared to reflect an initial penetration from the interior of the garage. The projectile continued traveling south passing through and exiting the other side (or exterior) of the garage door.

On 08/15/2022 a resident of another N. Birchwood Ave. residence located a fired bullet on their property and believed it may have been involved in the August 12, 2022 incident. This was turned over to investigators. The resident indicated they located the bullet in their driveway, west of their garbage containers, which had been stored on the north side of their residence at the time of the incident. This was consistent with the trajectory and path of the 9mm round discharged from within the garage of the N. Birchwood Ave. residence on August 12, 2022.

Inside the N. Birchwood Ave. residence, investigators located several empty 16-ounce cans of Budweiser Chelada Picante on the counter and two (2) empty 750 milliliter bottles of Bulleit brand bourbon near the garbage can in the kitchen. In addition, they located a Beretta brand hard side handgun case that was unclashed and on a desk in another room. Within the case was an unloaded handgun magazine and manuals pertaining to a Beretta semi-automatic pistol handgun, series 92. Also located in plain view within this room, were four (4) boxes of firearm ammunition. Investigators located one (1) box of RIO Royal Buck ammunition, one (1) box of Blazer 9mm ammunition, one (1) box of Hornaday Critical Defense ammunition and, one (1) box of Red Army Standard 9mm ammunition. The box of Red Army brand ammunition was examined more closely. The box was advertised to hold fifty (50) rounds. It contained forty (40) rounds. Ten (10) rounds were found to be missing from this box.

Video was also gathered from residents in the area. While these videos capture portions or moments of the incident, they do not represent the entirety of the incident. They are also captured from different positions and angles, separate and distinct from those of the officers involved in the shooting. Residents report seeing a female and her child exit the residence. One resident reported seeing a male subject at the residence raise and lower the pistol several times and yelling he was sorry and for the officers to shoot him, while the officers were giving him commands to drop the gun and they were there to help him and wanted to talk to him and figure out what was going on. Another resident reported seeing the male raise the pistol towards his head and observed the officers shoot the male.

LEGAL ANALYSIS

Wisconsin acknowledges privilege as a defense to otherwise criminal conduct where a privilege by statute, in this case, self-defense (defense of others) exists. Wis. Stat. §§ 939.45(6), 939.48(1) and (4).

Wis. Stat. § 939.48 (1) reads:

A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death

or great bodily harm **unless** the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

Jurors would be instructed that the law of self-defense allows a person (defendant) to use intentional force against another if he believed there was an actual or imminent unlawful interference with his person, the amount of force used was necessary to prevent or terminate the interference, and those beliefs were reasonable. The jurors would also be instructed that a defendant may intentionally use force intended to cause death or great bodily harm only if he reasonably believed that the force used was necessary to prevent imminent death or great bodily harm (to himself or others).

The jury instruction defines “reasonable beliefs” as follows:

- A belief may be reasonable even though mistaken.
- The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.
- The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

The jury is instructed to consider not only what a “reasonable person” would have believed but to make this determination from the standpoint of the person charged.

The State is required to prove, *beyond a reasonable doubt*, that the defendant did *not* act lawfully in self-defense. The jury is instructed to find a defendant not guilty if they find he acted in self-defense, if the State has not disproved the defense beyond a reasonable doubt.

In this type of situation, the United States Supreme Court says that in judging the reasonableness of a particular use of force, the focus must be “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” See *Plumhoff v. Rickard*, 572 U.S. 765, 775, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014). The law recognizes that officers are forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving.

Officers are trained that an imminent threat is an immediate threat or a threat “about to

happen.” To be considered *imminent*, a threat must meet three criteria:

- 1) the subject must indicate his intent to cause great bodily harm or death to you or someone else;
- 2) The subject must have a ... weapon capable of inflicting great bodily harm or death;
- 3) The subject must have a means of using the weapon to inflict harm.

Officers are instructed that in many deadly force situations, they will not have time or the ability to try other options.

Officers are trained that their judgment in deadly force situations is based on the totality of circumstances known to them at the time and provides this example: if a suspect points a firearm at you with the clear intent to shoot, you are justified in using deadly force. Even if the suspect’s gun is later found to be unloaded, that does not render the decision unjustified as the perception of the threat was reasonable, under the circumstances.

APPLICATION OF LAW TO FACTS

The questions in this case include:

1. Did the officers reasonably believe that there was an actual or imminent unlawful interference with their person (or another) and was the amount of force they used necessary to prevent or terminate the interference?
2. Did the officers reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to themselves or others?
3. If the officers were charged with the killing of Mr. Pesavento, could the State prove, *beyond a reasonable doubt*, that the officers in question did *not* act lawfully in self- defense?

CONCLUSION

The Outagamie District Attorney’s Office concludes Officer Rudebeck’s and Officer Shuman’s use of deadly force was justified. Officer Rudebeck and Officer Shuman were reasonable in their belief they and other officers and citizens were in imminent danger of death or great bodily harm when they observed Mr. Pesavento walk to the end of the driveway within 40 yards of them; in a neighborhood where other officers and civilians were at risk; where officers were aware of a crossfire situation developing; and continued to refuse to comply with officer’s

commands, Pesavento was yelling "Kill me!"; and he began walking around and moving his gun, which included the muzzle of Pesavento's weapon moving in the direction of the officers. Off. Rudebeck observed Pesavento take a shooting stance, stand straight up, with one foot back and gun down to his side and then brought the gun back to his head, yelling "kill me!" and "let's get this over with" and "come on." Off. Rudebeck stated he saw Pesavento move the handgun from his head towards the direction of Off. Rudebeck and his fellow officers, Officers Jenkins and Shuman. Off. Shuman observed Pesavento turn towards them and plant his feet, assume a confrontational stance and square-off toward him and the officers. Off. Shuman was aware of citizens in the open and observed Pesavento had target acquisition on him and other officers. Both officers feared for their lives, the lives of other officers and the public's causing them both to fire their weapons. It was also reasonable for Officer Rudebeck and Officer Shuman to believe Mr. Pesavento had the intent and the means to inflict death or great bodily harm to Officer Rudebeck and Officer Shuman and other officers and citizens in the area and that the force used was necessary to prevent imminent death or great bodily harm to themselves or others. If Officer Rudebeck and Officer Shuman were charged with the killing of Mr. Pesavento, the State could not overcome the self-defense privilege under Wisconsin statutes §§ 939.45(6) and 939.48(1) and (4).

Sincerely,

A handwritten signature in cursive script that reads "Melinda Tempelis". The signature is written in black ink and is positioned above the typed name.

Melinda Tempelis
District Attorney

cc: Chief Todd Thomas, Appleton Police Department
Attorney Andrew Schauer, WPPA
Business Agent Kevin Sorenson, WPPA