

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY FLORIDA

STATE OF FLORIDA)	
)	
Plaintiff)	CASE NUMBER: 15-15844CF10A
)	
vs.)	
)	JUDGE MICHAEL A. USAN
PETER PARAZA)	
)	
Defendant)	
_____)	

**ORDER GRANTING
DEFENDANT'S AMENDED MOTION TO DISMISS AND FOR
IMMUNITY PURSUANT TO
F.S. 776.032 AND F.S. 776.05**

THIS MATTER comes before the Court upon defendant's amended motion to dismiss. The defendant, Peter Paraza, has been charged with a single count of Manslaughter with a Firearm in violation of Florida Statutes 782.07 and 775.087(1). The indictment alleges the homicide was the result of intentionally committed acts or by the culpable negligence of the defendant. The defendant has asserted he is immune from prosecution pursuant to F.S. 776.032, commonly referred to as "stand your ground", or in the alternative pursuant to F.S. 776.05, which pertains specifically to justifiable use of force by law enforcement officers when making an arrest.

An evidentiary hearing was held beginning Monday, June 13th, 2016 and continuing through Tuesday, June 21st, 2016. Over the course of the hearing, the Court heard the sworn testimony

of 31 defense witnesses, including 6 witnesses tendered as experts, along with 5 state witnesses. The Court further listened to and/or examined 20 defense exhibits and 19 state exhibits which included 911 calls, police dispatch recordings, several dozen photographs, an air rifle, a .22 caliber rifle, items of clothing, diagrams, as well as numerous demonstrative aids. Finally, the Court participated in a live viewing of the scene.

During the course of the hearing, the Court had the opportunity to observe witnesses as they were testifying on the stand. The Court has taken into consideration certain intangible observations regarding the witnesses voices, emotions displayed, and body language exhibited during the hearing. Specifically, the Court was able to observe the following: the witness' demeanor while testifying; the frankness or lack of frankness of the witness; whether the witness was honest and straightforward in answering the attorney's questions; any interest the witness might have in the outcome of the case; the means and opportunity the witness had to know the facts about which they testified; the ability of the witness to remember the matters about which they testified; any prior inconsistent statements; whether the testimony agreed with the other testimony and evidence presented; and the reasonableness of the testimony in light of all the evidence presented.

After carefully reviewing the motion, the court file and record, along with the testimony, exhibits and other evidence presented during the evidentiary hearing, the arguments of counsel, applicable statutes and case law and otherwise being fully appraised in the premises, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Preliminary Facts

The following facts are undisputed:

In the midafternoon hours of July 31st, 2013, the victim, Jermaine McBean, (hereinafter “the victim” or “McBean”), was walking home with a .17 caliber air rifle he had just purchased from a pawn shop. Several concerned citizens called 911 emergency to report an individual walking north on Dixie Highway openly carrying what appeared to be a shotgun or rifle. BSO Deputies, including the defendant, Deputy Peter Paraza, (hereinafter “the defendant” or “Deputy Paraza”), were dispatched to the scene and observed McBean with the weapon moving north on Dixie Highway and then proceeding into the Greentree Apartments. In an area just outside the community pool, which was presently occupied by several persons to include children, the subject incident occurred. As Deputies closed in on McBean, repeated commands were given to stop and to drop the weapon. Deputy Paraza fired his weapon three times, striking McBean twice. Jermaine McBean did not survive the shooting.

Many of the other facts and circumstances of this case are in dispute. There is no shortage of opinions and theories from individuals who were either not present or not in a position to directly witness the events immediately preceding the fatal shots. The remaining findings of fact are based on careful, objective consideration and deliberation after being presented with all available relevant information, presented in an adversarial setting without the impermissible taint of bias, prejudice or sympathy. As we traditionally instruct jurors, “Our search for the truth deserves nothing less.”

Make no mistake, the death of Jermaine McBean was a tragedy. This Court is not unmindful of the passionate feelings on both sides of this case. Many citizens across this nation, particularly in disadvantaged or minority communities, feel oppressed by law enforcement and complain about cases which involve excessive use of force, profiling and inequities in the application of the law. Likewise, many in the law enforcement community feel under siege, continually portrayed in a negative light by the news media, facing hostility and danger in an increasingly dangerous world. These are fine topics for discussion and debate in the public arena, but they have no place in this courtroom concerning this case. This case involves the tragic death of one man and the liberty of another. To allow the conflicting agenda of supporters of either side to invade this legal process would be a far greater injustice.

The Victim and Events Preceding the Shooting

By all accounts Jermaine McBean was a good man. He obtained a college education, earned a Bachelor's Degree in Information Systems and a Master's Degree in Telecommunications. He pursued a successful career in a respectable profession. He was loved by his family and was well-liked by his friends and co-workers.

Yet, it is also clear that McBean suffered from significant and serious mental health issues. In reviewing approximately 4000 pages of mental health medical records from hospitalizations between 2011 and the incident date, Dr. Michael Brannon testified that the defendant suffered from severe and major mental disorders in the psychotic spectrum to include schizophrenia and

bipolar disorder which had also been diagnosed as schizoaffective disorder. Schizoaffective disorder involves psychosis in addition to a mood disorder. The psychosis includes delusions, hallucinations, disorganized speech, irrational thinking and behavior. Dr. Brannon further testified that studies show in individuals with an established psychotic disorder, cannabinoids can exacerbate symptoms, trigger relapse, and have negative consequences on the course of the illness.

The medical records indicated McBean had repeatedly reported hearing auditory hallucinations (hearing voices); had experienced paranoid delusions to include reporting beliefs that work supervisors, the police or other authority figures were keeping him under surveillance. There were similarities in the previous involuntary hospitalizations of McBean that occurred during the period from 2011 through the date of the shooting. These symptoms included “trashing” his living quarters, making public outbursts, yelling, shouting and rambling, using illogical, rapid speech. In each case, the outbursts were reported by nonmedical observers. In other words, ordinary individuals without psychiatric training were able to discern that McBean was not acting rationally, and appeared dangerous to the point where the authorities were summoned. Significantly, in each episode that ended in an involuntary hospitalization, there was evidence that McBean had not taken his prescribed anti-psychotic medications coupled with alcohol and/or marijuana abuse. In each case, the psychosis was stabilized after McBean was placed back on medications. Dr. Brannon opined that the paranoia coupled with cannabis abuse and the mania of bipolar disorder set the “perfect storm for disaster.”

On July 25th, 2013, one week before the incident date, McBean was involuntarily hospitalized pursuant to the *Baker Act* because of a psychotic episode that occurred at his work place.

McBean's neighbor, Amelia Dawson, testified that she lived in the apartment directly below the victim. She could hear McBean yelling, cursing, stomping, kicking walls and arguing with himself. She described it as if two people were arguing aggressively, with McBean cursing and shouting "leave me alone," but he was by himself. She later learned he was hospitalized. She also testified that on the date of the shooting, upon hearing the news that there was a shooting and then seeing Deputies, she knew without being told that McBean was involved.

With respect to the incident at his workplace, several witnesses testified about the events leading up to McBean's removal from work. Friend and fellow IT department employee Matt Sharp testified that McBean came into the lunchroom area yelling and screaming. He described the situation as "scary" and "uncomfortable." McBean was led to the office of Human Resources Director Jarrod Koesten. Koesten testified that McBean did not have control of his thought process. Among other things, McBean was agitated about a traffic ticket he had just received. McBean crumpled up the traffic citation and threw it on Koesten's desk. Koesten called 911 because he thought McBean posed a risk to himself or others.

As part of the 911 response, Fort Lauderdale Fire Rescue EMT Shannon Grant responded to the scene. She testified to the psychotic behavior of McBean. He would answer questions and then return to his erratic, irrational behaviors. McBean was mostly cooperative in route to Imperial Point Hospital. This hospital was chosen because they have a psychiatric ward. When

the ambulance arrived at the hospital and McBean saw where he was, he became aggressive. EMT Grant testified that McBean backed himself to a wall, looked around and clenched his fists. Fearing the escalating situation, EMT Grant called for hospital security. She told her partner that McBean's behavior indicated this was the type of call where the person hurts themselves or someone else. While at Imperial Point hospital, McBean was stabilized and placed back on his psychotropic medications. Upon being released from his involuntary hospitalization on July 29th, 2013, McBean was given a supply of psychotropic and anti-psychotic medications. On July 30th, 2016, McBean returned to his workplace unannounced to turn in paperwork clearing him to return to work. He asked Human Resources Director Koesten about short term disability leave and was told he did not have that coverage. On July 31, 2016, the date of the shooting, McBean returned to work, but shortly thereafter told his fellow employees and his supervisor that "he was not feeling well" and needed to go home. There is no evidence as to what McBean did directly after leaving work. However, a few hours later he purchased an air rifle at a pawn shop and was subsequently fatally shot.

Alexander Telly was manager of the Crown Pawn Shop. He was the last person to have any extended conversation with McBean. According to his testimony, McBean entered the pawn shop looking for a shotgun. He was informed that they did not sell firearms. McBean then inquired about a rifle that was displayed on the wall. Mr. Telly informed McBean that it was an air rifle. After handling the weapon, McBean decided to purchase it. He provided a debit card and his identification. The store manager told McBean he would hold the weapon until McBean could retrieve it in a vehicle. McBean insisted on taking the weapon with him.

Again, Mr. Telly advised that the weapon looked real and that it was not a good idea to openly carry it on Dixie Highway. The manager wrapped the gun in a white trash bag and specifically advised McBean to keep it in the bag. McBean left the store in a hurry and was preoccupied enough that he forgot his debit card and identification. The clerk had to go out of the store running after McBean to give him back these items.

After leaving the store, McBean decided to unwrap the weapon and carry it in a fashion that drew attention to himself, despite being warned not to do so. Three separate individuals were concerned enough to call 911 emergency to report McBean. One of these concerned citizens, Christina Turner, testified that she called 911 after she saw McBean walking with what appeared to be a gun. She testified to feeling uncomfortable and sensing that "something was not right." She described McBean as "walking fast," "stomping," "aggressive," "he looked distraught" and "in a state of unease." She also noted that McBean was "mumbling or grunting" to himself. At one point, according to the dispatch recording, McBean was sitting in the parking lot of Chase bank.

Additionally, Alexander Telly, the pawn shop manager, testified that shortly after McBean left, he stepped outside to have a smoke when he noticed several police units. He asked an officer what had happened and was told "there has been a shooting." With no more information than this, Mr. Telly was already thinking the shooting involved McBean and went back to his store to retrieve the receipt. Like Amelia Dawson, Alexander Telly did not have to be told that McBean was involved in the shooting, he knew it based on his interaction and McBean's behavior.

Dr. Gary Kunsman, chief toxicologist for the Broward County Medical Examiner's office, testified that the autopsy toxicology report indicated that there was no evidence of the presence of any of the psychotropic or anti-psychotic medicines prescribed to McBean in his system. Because of the nature of these medications and the way they are metabolized in the body, they do not take effect immediately, but build to the required level over time. Additionally, due to the extended half-life of these medications, they can be detected for an extended period after having been taken. The absence of detectable levels in a toxicology sample would indicate a significant period of time had passed since they were last administered. In other words, prior to the shooting incident, McBean failed to take his prescribed psychotropic and anti-psychotic medications. McBean's autopsy toxicology report also indicated the recent use of marijuana. Dr. Kunsman opined that the levels of cannabinoid metabolite would indicate use within the previous 2 to 4 hours. He also concurred with Dr. Brannon's opinion that marijuana use by someone with McBean's mental health disorders would lead to an increase in psychotic activity.

Analysis of Mental Health Conditions

Because application of F.S. 776.012, 776.032 and 776.05 concern the objectively reasonable beliefs of the defendant, a question arises as to the relevance of McBean's mental health disorders, his mental health history and the facts and circumstances surrounding previous psychotic episodes which resulted in involuntary hospitalizations. It is undisputed that the

defendant and the victim had not met before. McBean's mental health history was unknown to the defendant at the time of the shooting.

The relevancy is established in the following three ways:

First, in the Florida Standard Jury Instructions for criminal cases, instruction 3.6(f) is used to explain the justifiable use of deadly force. In the section explaining actions towards a victim alleged to have been an aggressor, the instruction states in part: "If you find that (victim) had a reputation of being a violent and dangerous person, you may consider this fact in determining whether [he] [she] was the initial aggressor." The note to the judge in the instruction specifies this instruction is to be given even though the reputation of the victim is not necessarily known by the defendant. Therefore, if it is established that the victim has a reputation for violent or dangerous behavior, even if this is unknown to the defendant, it is relevant to consideration of whether the victim provoked the attack. In this case, the evidence establishes that McBean, as a result of his mental health conditions, had numerous violent and dangerous psychotic episodes over the course of more than two years prior to the shooting, the most recent of which was just days before. In each of these episodes, the victim's behavior was such as to cause sufficient alarm in both people who knew him and by people who did not know him to prompt calling for emergency assistance, which ultimately lead to his involuntary hospitalization.

Secondly, McBean's mental health history is relevant to explain his behavior in the time leading up to the fatal encounter with law enforcement. It is established that he suffered a major

psychotic episode on July 25, 2013 when he was removed from his place of employment and involuntarily hospitalized. He remained at the hospital for several days and was released with a supply of psychotropic and anti-psychotic medicines, which had been administered while he was in the hospital. However, the medications were no longer evident in his system at the time of his death. Because of the half-life for these medications as discussed earlier, the autopsy toxicology report establishes he did not take these medicines as directed after leaving Imperial Point Hospital. It is also established that McBean asked to leave work early on the very day he returned because he stated he was not feeling well. Sometime in the 2 to 4 hour period prior to his encounter with law enforcement, McBean used marijuana, which can trigger the onset of a psychotic episode. As previously discussed, McBean's psychosis made him prone to delusions, irrational thinking and irrational behavior.

Finally, McBean's mental health history is relevant to help explain his encounter with law enforcement. While it is not strictly necessary to rule on this motion, questions have been raised as to why someone would point an unloaded air rifle at law enforcement officers. The defense suggests this may be evidence of "suicide by cop." The prosecution argues McBean did not hear the commands, never pointed the weapon, and there is no rational explanation for doing so. Neither side is entirely correct. There is not sufficient evidence to conclude that McBean was on a suicide mission. Equally, while no rational person would sit in a bank parking lot while openly carrying a rifle or turn and face several armed deputies pointing a rifle at them, the question presumes a rational actor. McBean was not acting rationally. His behavior was

consistent with someone having a psychotic episode and was likely reacting to paranoid delusions.

Sadly, only when it was too late, McBean himself understood why he had been shot by law enforcement. Among his last words were “it’s only a bb gun.” In these words, McBean showed that even in his current mental state, he understood that the deputies perceived his weapon as a threat.

Based on McBean’s behavior at the pawn shop where he purchased the weapon, his behavior as described by eye witnesses while openly carrying it back to his apartment and his reaction to law enforcement, this Court finds by the greater weight of evidence that McBean was in the midst of a psychotic episode at the time of his shooting.

Findings of Fact with Respect to the Fatal Shooting

This Court has listened to the 911 emergency calls as well as the dispatch recordings several times. The 911 calls are from three individual citizens who were concerned enough by the victim’s behavior and his openly carrying what appeared to be a rifle or shotgun in a heavily populated area to make emergency calls to authorities. The exact content of these calls was unknown to the defendant and the other officers that responded. The dispatch recordings depict the actual information relayed to the defendant and the other responding officers. The dispatch recording gives updates on McBean’s location and actions. The officers are told the weapon may be a .22 caliber rifle. The officers are told the individual is “marching” with a weapon on his shoulder, that he stops in a bank parking lot and later that he is

headed towards the Greentree Apartments. A loud priority one emergency tone is broadcast. When dispatch advises that the individual is headed into the Greentree Apartments, Sgt. LaCerra can be heard saying "This is going to end bad." Approximately 25 seconds pass from the moment dispatch advises the individual is headed into the apartment complex until the officers report "shots fired, one down."

What took place during those 25 seconds, specifically during the final 2 to 3 seconds prior to the shooting and the fraction of a second during which the defendant decided to and then fired his weapon, are the central focus for determining the issues presented in this case. It is well to remember that rarely, if ever, will two individuals view, perceive and recall an event in the same way. This is especially true if the event in question is rapidly evolving, startling, or stressful. The passage of time impacts the ability to precisely recall such events. Sometimes, the most immediate report can be the most accurate; other times, the passage of time will help the individual to reflect and think more clearly. Counsel are quick to attempt to impeach as a "prior inconsistent statement" that which is merely a natural variance in word selection or a failure to recall every detail. Nit-picking is not the same as impeachment by a truly inconsistent statement.

Ten witnesses were called to provide evidence as to the precise details of what happened at the time of the shooting. Two of the ten witnesses, State witnesses Norma Sisterna and Stephon Quenehen were unable to provide any relevant evidence. Sisterna was in her kitchen which faced the event scene, but she was preoccupied and looking down when the event took place. She only looked up after she heard the shots fired. Stephon Quenehen was swimming underwater and came up just as he heard shots fired and people screaming, so he took cover.

Three other witnesses provided relevant but limited information. Amanda Maher was at the pool with her two young children and their friend. She was positioned at the far end of the pool with respect to the area of the shooting. She saw the victim walking with something in his hands. Although she could not be sure what the item was, she described that it looked like a weapon. She adopted, albeit with some reluctance, descriptions given in previous statements that the victim looked “like he was in his own world,” “had stuff on his mind,” or was “under the influence.” In a previous statement she used the word “zombified.” She stated that the “vibe did not feel right.” She heard six or seven times loud commands, clearly audible from across the pool to “put the weapon down.” She did not visually witness the actual shooting, but heard the “pop” sound of three shots whereupon she grabbed her young son and directed the girls to hide behind a soda machine for safety.

Ashley Kovacs Tessier was at the near end of the pool closer to the incident location, but facing away from the scene. She did not visibly witness the encounter or the shooting, but heard “do not turn around” and “drop your weapon” repeated two times in a loud, stern command voice. She then heard three shots and ran for cover.

Isabella Needleman was visiting Amanda Maher’s daughter. She was 11 years old at the time. She was in the pool with her friend, in the shallow end near the steps. This was the far end with respect to the scene of the shooting. She recalled seeing the victim walking. She could see him only from the shoulder up. Her view was obstructed by a fence that surrounds the pool and the shrubbery behind the fence. She did not notice a weapon or anything else. She heard loud commands to “put the weapon down” repeated twice and then she heard two gunshots. She then got out of the pool and ran for cover. Although she had no present recollection, she agreed that in her previous statement she stated that she

saw the victim's eyes and she got the impression he "didn't care what the cops were saying, even after hearing their warnings."

The remaining five witnesses were all direct eye witnesses to the shooting and the events immediately prior. Deputy Luis Silberberg heard and responded to a dispatch concerning a black male "marching" northbound on Dixie Highway. He described the area as heavily populated and near some schools. He entered the Greentree Apartments after other Deputies had arrived. He pulled his vehicle in behind the vehicles of the defendant and Sgt. LaCerra. Due to the nature of the dispatch, he got out of his vehicle with a shotgun. He clearly heard Sgt. LaCerra and the defendant shouting commands to "drop the weapon, drop the weapon." He was approximately 60 to 80 feet behind the defendant and Sgt. LaCerra. Deputy Silberberg was running so fast, he tripped. Deputy Silberberg saw the victim with the rifle up over his shoulders resting on his neck with hands draped over the rifle. He testified that the weapon looked real. He does not recall what direction the barrel of the rifle was pointing nor whether the victim turned right or left. He testified that McBean lifted the weapon off his shoulders and turned, pointing the weapon towards the deputies, whereupon he heard shots fired. His testimony was that McBean "suddenly turned," and he saw him "pointing the weapon directly towards the deputies."

Lt. Ben Ostroff was the acting chief of the Oakland Park District station. He heard the initial dispatch concerning an individual marching northbound on Dixie Highway with a rifle. His immediate thoughts were that this is a high traffic area, with dense population and schools nearby. He heard Sgt. LaCerra on the radio directing units to block traffic and shut down the road. He was hoping that the individual would go past the apartments. He described his feelings as "high stress" and "uneasy" and he testified that he "knew there would be an encounter." When he arrived on scene, the defendant and Sgt. LaCerra were already out of their vehicles and in foot pursuit. He observed the victim with the rifle over his shoulders. Due to his prior military service, seeing the weapon carried in that position made him think the victim had military experience. Lt. Ostroff could hear children in the pool. He heard very loud

commands by Sgt. LaCerra to drop the weapon. He testified that McBean “looks over his shoulder and sees us,” and then takes the weapon and brings it forward into a “port arms” position. He described McBean bending his knees and getting into a crouching position. He stated that McBean was getting into “a ready position.” He admitted on cross examination that he did not see McBean “shoulder” the weapon and that in his previous statement he described the weapon being displayed in a “menacing manner,” rather than placed at “port arms and in a ready position.” The Court finds these differences to be nit-picking rather than truly inconsistent statements.

At this point, Lt. Ostroff testified that he “thought we were going into a fire fight.” He was unable to take a shot because he had no backstop and did not want to fire in a populated apartment complex without a backstop. He was moving to position himself between McBean and the people in the pool when the defendant fired his weapon. He also testified that if the defendant had not already fired, he was “mentally preparing to take a shot.” In other words, Lt. Ostroff was getting ready to fire at the moment Deputy Paraza fired.

Sgt. Richard LaCerra testified he responded to the dispatch regarding an individual carrying a rifle. He heard the defendant on the radio as a responding unit. He eventually saw the victim walking with the rifle. He told the defendant to block traffic. He said “this isn’t going to turn out good” into the radio. He was thinking about an incident just seven days previously in Hialeah where a man went into an apartment complex with a gun and killed several people. He believed that something tragic was about to happen. He viewed McBean take the weapon and put it over his shoulder and head into the Greentree Apartments. He and the defendant were in pursuit. Sgt. LaCerra drew his weapon immediately upon leaving his vehicle. He yelled “as loud as I could” also hoping that the people in the

pool would hear and move to safety. He shouted "BSO, police. Stop!" and "Drop the weapon, don't turn around, drop the weapon, drop the weapon." He observed McBean stop, look at the deputies, bring the weapon over his head and forward while turning towards the deputies. At this time, the defendant discharged his weapon, the victim was hit and fell forward. He transmitted on the radio, "shots fired, person down, call paramedics." He moved McBean's rifle away from McBean and then attempted to render aid. McBean fell forward, towards the deputies and then rolled on his back. McBean told him "it's only a bb gun."

Sgt. LaCerra testified this was all happening very fast in real time, a matter of split seconds. He admitted that he hesitated to fire because he saw movement in the background and did not want to fire with someone else in the line of fire. In that millisecond, the defendant fired. He also testified that he thought the victim was "going to kill someone," that McBean "pointed the weapon right at me" and that if the defendant had not shot McBean, he would have.

The State inquired about pedestrians on Dixie Highway that the victim passed without incident as well as a person standing at the laundry room, which McBean passed. The Court does not find these encounters to lessen the perceived threat environment. The armed individual may have had a specific target in mind, for example, people in the rental office, someone in an apartment, or a domestic. In other words, that he passed some people did not rule out that he was heading for others.

The defendant, Deputy Peter Paraza, also testified. He has 12 ½ years' experience with BSO. He was on patrol when he heard the dispatch involving a disturbance with a weapon. He heard the priority one

alert tone broadcast. He saw McBean with the rifle. The defendant believed the weapon was a shotgun or a rifle. He testified that he was fearful McBean would open fire on vehicles. The defendant was in a marked unit with overhead emergency lights on, but without activating the siren. As the defendant passed McBean, the defendant believed that McBean saw him, at which point McBean changes position of the weapon and began walking faster. Seeing McBean move faster after viewing a marked unit made the defendant think McBean was headed somewhere with a purpose. After blocking traffic, he lost sight of the victim. The defendant feared McBean was gaining a tactical advantage. He heard his Sergeant say "this is going to end bad," which added to his fear. The defendant and Sgt. LaCerra began foot pursuit. The victim was spotted about 20 yards ahead. Both the defendant and Sgt. LaCerra were shouting commands to "Stop," "Police," and to "Drop the weapon." The defendant testifies that he sensed fear in Sgt. LaCerra's voice. Sgt. LaCerra's commands are so loud the defendant could "feel" the commands. He was also able to hear people, including children's voices, coming from the pool area. As the defendant closed his distance with McBean to approximately 5 to 10 feet, he testified his heart was pounding and his thoughts were racing. He decided to react to McBean's actions. If the victim moved, the defendant would follow; if the victim stopped, the defendant would stop. The defendant and Sgt. LaCerra continued to give commands to "stop" and to "drop the weapon." McBean stopped, but he did not immediately drop the weapon. The defendant believed McBean was planning his next move. Unlike the testimony of Deputy Silberburg, Lt. Ostroff and Sgt. LaCerra, the defendant did not recall seeing McBean turn his head. The defendant testified that McBean stopped, brought the rifle over his head, turned towards the deputies and pointed the rifle right at him. He was focused on the rifle. When he perceived that the weapon was pointed directly at him, he fired. At one point, Deputy Silberburg had tripped and the defendant thought Deputy Silberburg was "hit" but saw him get up. The defendant could not recall at the time how many shots he fired, but came to learn he fired his weapon three times.

After the shooting the defendant lost track of time and his hearing was muffled. He knows Lt. Ostroff said something to him but he could not hear clearly. Lt. Ostroff testified the defendant was visibly shaken and he told the defendant to holster his weapon. The defendant was told to stand by the office and then to sit in an unmarked unit. The defendant testified he never saw any ear buds in the victim's ears.

Lt. Col. Robert Drago responded to the scene. The defendant told him "I had to stop him before he got to the pool. I could hear the children there." On cross examination, Lt. Col. Drago admitted he did not write that statement in his report. The defendant does not recall what he said to Lt. Col. Drago.

All of the defense eyewitnesses used either the actual weapon or a demonstrative model rifle to reenact McBean's movements. Not surprisingly, there were slight variations which the Court finds to be the result of differing perceptions as well as perspectives as all were standing in different positions relative to McBean. Nonetheless, all of the defense eyewitnesses gave a similar accounting with McBean bringing the rifle over his head, lowering it to the midrange of his body as he simultaneously turned towards the deputies. None of the witnesses noticed the presence of ear buds.

The State presented one eyewitness to the shooting. Michael McCarthy was driving east on Commercial Boulevard and turning north onto Dixie Highway when he observed people pointing at a man walking with a rifle. He saw the victim and testified that McBean walked directly in front of the witness's car. McCarthy thought it was unusual enough to call 911 emergency. He gave a detailed account of McBean's movement. He followed and saw law enforcement approach. McCarthy pulled into the

Greentree Apartments to watch. His vehicle was facing southbound, and he was looking west from his driver's seat through the passenger door window. He observed McBean walking away from his position down the sidewalk past the pool area to McCarthy's right and apartments to his left from his relative position. He saw three officers approach the victim and then heard shots. He saw McBean go down. McCarthy testifies that McBean started to turn but never moved the rifle from behind his neck.

McCarthy is the only witness who testified that the rifle never moved from behind McBean's head and remained resting on his shoulders. He testified that McBean never pointed the weapon at the deputies. The court finds McCarthy's testimony to be the least credible of the eyewitnesses. His testimony directly contradicts the physical and forensic evidence as well as the testimony of the other four eyewitnesses in the case. He also admitted that he felt guilty for having called 911 when it resulted in McBean's death. He met with the victim's mother and the investigator for the family's attorney pursuing civil damages. His testimony had to be frequently redirected to the question asked as he tended to drift off topic offering unsolicited opinions and all manner of speculation. He wrote a letter to the previous prosecutor assigned to the case indicating his displeasure with not being interviewed and the seeming disinterest of the investigators that arrived at the scene. He opined that the defendant never gave McBean a chance and shot him "in cold blood." Of the five eyewitnesses, he was the furthest from the shooting. The defendant and Sgt. LaCerra were between 5 and 10 feet away from the victim. Lt. Ostroff was a short distance behind and to the side of Sgt. LaCerra. Deputy Silberberg was approximately 60 to 80 feet behind the other deputies. McCarthy was seated in a vehicle, looking across the passenger compartment through a window and was approximately 147 feet from the spot of the encounter. In other words, the vantage point of the defendant and Sgt. LaCerra was between 15 and 30 times closer to McBean than McCarthy.

McCarthy admitted to having poor eyesight and although he could not remember if he was nearsighted or farsighted, he said he wore bifocals. He believed he was about 100 feet from the spot of the shooting but the distance was measured at approximately 147 feet according to the State and approximately 153 feet according to the defense. McCarthy had difficulty reading a clearly visible line written on an easel pad approximately 15 feet before him in the courtroom. He also admitted to having memory problems since his stroke in 2013 and that he was "losing it."

His inability to accurately recall events was demonstrated by several prior inconsistent statements. When asked by the State Attorney investigators if he saw McBean remove the wrapping from the weapon he told them "No. I'd be lyin' if I said I did." Yet, he can be heard in the 911 call recording saying "he's taking the bag off now." McCarthy opined that he saw about "40 kids at the pool," and previously stated that there were "probably 40 kids in the pool." The evidence shows there were only 3 kids at the pool along with 5 adults. He also denied that he lost sight of McBean but had previously stated that "he lost sight of him for a minute." Taking all relevant factors into consideration, the Court finds Mr. McCarthy's testimony to be less than credible.

The Court further finds by the greater weight of credible evidence that McBean did in fact turn and point the rifle towards the deputies. This finding is based not only on the greater weight of credible eyewitness testimony, but additionally, on the medical evidence, which supports the testimonial accounts of Deputy Silberburg, Lt. Ostroff, Sgt. LaCerra, and the defendant. The medical evidence presented directly conflicts with the account of McCarthy.

Medical and Forensic Evidence

Dr. Craig Mallak is the Chief Medical examiner for Broward County. He is an expert in forensic pathology. Dr. Mallak reviewed the autopsy report and findings prepared by Dr. Trelka, who was formerly his Chief Deputy Medical Examiner. Dr. Mallak used a demonstrative aid consisting of a life sized human torso model and trajectory rods to demonstrate the point of impact, trajectory and final resting place of the two projectiles (bullets) found in the victim's body. He was not able to determine which shot hit first. He was able to determine that the victim was facing towards the shooter (He was not shot in the back or while facing away). He testified that the victim was not standing straight up and that his arms were not up. He testified that the victims arms were below his shoulders and not parallel or above the shoulder. This finding is inconsistent with witness McCarthy's testimony that the gun never came off the victim's shoulder and his arms were draped over the weapon. Dr. Mallak testified that based on the trajectory of both wounds, the victim was bent over (towards the shooter) to a substantial degree at the time of impact. He further testified that there was "nothing inconsistent between Deputy Paraza's statement and the injuries."

Dr. Vincent Di Maio was formerly the chief medical examiner of San Antonio, Texas. He has authored several pathology textbooks, including *Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic Techniques*. He is a nationally recognized expert in the field of forensic pathology, especially in the area of gunshot wounds. He reviewed the autopsy reports, statements and former testimony of several witnesses and the clothing worn by the victim at the time of the shooting. He testified that the physical and medical evidence was consistent with the accounts of the defendant, Lt. Ostroff and Sgt. LaCerra. He further opined that based on the trajectory, the wounds were inconsistent with the State's demonstration of either standing straight up or being in the process of putting the weapon down.

Additionally, Dr. Di Maio testified that the weapon in question, a .17 cal. air rifle, had sufficient power to be deadly and in fact had been responsible for at least 4 or 5 homicides.¹

The Court also notes that both the State and Defense were eager to try to demonstrate the victim's stance and position based on the location and trajectory of the projectile and the resulting wounds. Because the victim was in motion, his exact position and stance at the point of firing will not be the same as at the point of impact. The impact of one projectile will also necessarily change the victim's position prior to the impact of the second projectile. Because it cannot be determined which projectile impacted first, and because of the passage of time, however brief, between the first, second and third shots, the Court cannot determine from the wounds alone the victim's exact stance and position at the time shots were fired. However, even with these given limitations, the testimony of both Dr. Mallak and Dr. Di Maio agree that the wounds are consistent with the testimony and demonstrations given by the defendant, Lt. Ostroff and Sgt. LaCerra and are entirely inconsistent with the testimony of Mr. McCarthy.

Ear Buds

There has been extensive discussion concerning the victim having "ear buds" (audio headphones) in his ears at the time of the shooting. The defendant had previously testified the victim "had nothing in his ears." When a photograph later surfaced showing ear buds in the victim's ears as he lay on the ground after being shot, suggestions were made that they had been removed by Deputies as a cover up. Tim Morrison, investigator for the State Attorney's Offices investigated this claim and determined there was no evidence to suggest a cover up or evidence tampering by BSO.

¹ Dr. Di Maio also offered several other opinions on matters outside his area of expertise and was not entirely objective in those opinions. The Court gave those statements and opinions no weight.

During the hearing, numerous witnesses were asked if they noticed ear buds in McBean's ears. Sgt. LaCerra, EMTs Olympio, Barnes, and Vaughn all were next to or in close proximity to the victim. None of them saw the ear buds. The only witness who saw the ear buds was EMT Sandola, who was administering aid to the victim as he was being transported in the ambulance. She only noticed them because they got in her way and she testified that she either cut them away or removed them because they were obstructing her ability to render aid.

Regardless of whether the ear buds were clearly visible or not, the Court finds the issue to be largely irrelevant to the determination of justifiable use of deadly force. There was no evidence offered to show whether or not the ear buds were broadcasting any audio at the time. No one testified that they could hear music coming from the buds after the victim fell. If they had been broadcasting music or other loud sounds, to a degree that any outside noise was obscured (to include the loud audible shouts and commands of Sgt. LaCerra), it should have been audible to those around the victim after he went down. Additionally, common experience suggests that even with music or audio playing, one should be able to hear loud noises and warning shouts above the sound of the music.

While the issue of ear buds might account for the victim's behavior, they do not change the perceived threat from the perspective of the defendant. A person pointing a weapon at a law enforcement officer, whether he hears or does not hear a command to drop the weapon, will not diminish the threat environment. It is clear from the testimony of all the witnesses that no one noticed the ear buds at the time of the shooting or directly afterward. In short, the ear buds may help explain how the tragic result happened, but they do not alter the legal determination regarding justifiable use of force.

Summary of Findings of Fact

Based on the facts as detailed above, the Court finds by the greater weight (preponderance) of credible evidence that:

On July 31, 2013, McBean had left work early because he did not feel well.

McBean was recently released from involuntary hospitalization due to a psychotic episode.

McBean did not take his prescribed psychotropic and antipsychotic medications.

McBean had used marijuana within the previous two to four hours.

Marijuana use by an individual with McBean's mental health conditions is particularly dangerous.

McBean went to a pawn shop and wanted to buy a shotgun but purchased a .17 cal. air rifle.

The air rifle qualifies as a deadly weapon.

McBean was advised not to openly carry the rifle from the pawn shop and not to remove the weapon from the bag until he arrived home.

McBean removed the weapon from a bag and openly carried the rifle in a populated area.

Three separate concerned citizens called 911 emergency to report McBean.

McBean entered an apartment complex and walked towards a pool occupied by children.

Several Broward Sheriff's Office Deputies responded.

McBean ignored repeated warnings and commands to stop, not to turn around and to drop the weapon.

McBean turned towards the Deputies.

McBean pointed the weapon at or in the direction of the Deputies.