Some Thoughts on the Trial and Verdict in *People v. Johannes Mehserle*

BY MICHAEL L. RAINS

I am not usually at a loss for words, but it has taken me some time to gather my thoughts and dictate an article to my friends in PORAC concerning the trial and verdict in the criminal case against former BART police officer Johannes Mehserle. Before I address those issues, I want everyone who reads this article to think about this: We are now aware of a total of nine incidents in which police officers in either the United States or Canada, fully intent on deploying an M26 or an X26 Taser to subdue an arrestee, have instead mistakenly drawn and fired a firearm. Mehserle is the latest of these nine officers, and is the only officer to ever be charged criminally for the act. None of the officers in the other eight cases were terminated for their mistake, although some suffered disciplinary suspensions.

I am a firm believer that some good must come out of something bad and this case is no different: Mehserle, like most cops, had received hundreds of hours of training involving the drawing and firing of his firearm in the academy, on the range during periodic qualification, and while he was off duty. In contrast, he attended an eight-hour class on the X26 Taser three weeks before the incident that resulted in his being charged with murder by the Alameda County District Attorney's Office. Of that eight-hour course, only about an hour involved practicing drawing the Taser and firing it a single time into a stationary target. Much different than the firearm, there was no emphasis placed on officers engaging in repetitive exercises involving the drawing of the Taser — according to Johannes at trial, as a result of his training, he viewed the Taser as just another tool on his equipment belt, like his baton or OC spray.

On January 1, 2009, at approximately 2:11 a.m., Mehserle carried a yellow X26 Taser in a cross-draw fashion on his belt. It was set up so he would draw his Taser with his dominant (right) hand. As it turns out, when he intended to draw and fire his Taser with his dominant hand at the back of Oscar Grant — who was laying prone, face-down on a train platform, refusing to surrender his hands for handcuffing — he drew his Sig P-226 instead, and fired a single shot into Grant's back. Grant died some eight hours later after surgical attempts to save his life were unsuccessful.

As retired LAPD Captain and Taser expert Greg Meyer explained at the trial, every one of the other "weapons confusion" cases involved the officers' use of their dominant hand. There has not been a single accidental shooting of an individual when officers have been required to draw the Taser from its holster using the non-dominant hand. Some of the weapons confusion cases involved M26 Tasers and a lesser number have involved the X26 Taser. Some of the Tasers carried by the officers were black and some were yellow, but as explained by Dr. Bill Lewinski, when an officer is involved in a high-stress, high-threat situation, he becomes "inattentionally blind" to things going on around him or right in front of him. An officer who thinks he is drawing a Taser doesn't give thought to the weight or the color of the object in his hand — he simply points it at its intended target and fires a single time, as did Mehserle, expecting to see the darts spread and strike the intended target.

When I last saw Mehserle on December 3rd, on the ninth floor of the Downtown Los Angeles Criminal Courthouse, in the courtroom of Judge Robert J. Perry, Johannes told me to tell all of you that he hopes he will be the last law enforcement officer to ever make this mistake. Knowing what we know today, the best way to ensure that occurs is for Police Departments to have a strict policy that requires officers to draw their Tasers with the non-dominant hand. If officers are required or even allowed to draw Tasers using their dominant hand, Police Departments who employ those officers must require the identical type and quantity of training in drawing the Tasers in realistic, stress-induced scenarios that has typically occurred with firearms. If these suggestions are not implemented, I fear that Mehserle will not be the last officer to suffer from the knowledge that he has accidentally shot and killed an individual he had intended to Tase.

Now that I have discussed, initially, the lessons that all of us should learn from this tragic case, let me turn briefly to the case itself.

When I said goodbye to my family and drove out of my long front driveway one morning in late June, en route to Los Angeles to start the trial of *People v. Johannes Mehserle*, I thought about how this case was so much different than any other police case I had ever handled. I always tell myself and anyone who is working with me that a trial is really a war, and to be successful, we have to work harder, be smarter, tougher, more resilient and more strategic than the other side. But this case was different. This case had been a war long before we had gotten anywhere close to trial.

This case had been a war from the date I first appeared in Alameda County Superior Court on a motion to set bail and wasn't allowed to say anything to the Judge who stated my client had a "character flaw" and questioned his integrity. It had been a war from my first appearance when I got gagged because the Judge learned one of my partners had forwarded a copy of our bail motion to a reporter under the belief that it was, like any other filed document in a criminal case, a matter of public record.

Continued on page 12

MICHAEL L. RAINS

Continued from page 11

It was a war of words, with attorneys for Grant's family, local politicians and religious leaders lobbing epithets like "murderer" and "executioner" and the media seizing on their every word while Mehserle was essentially lying face down and unarmed in a fox hole without a voice from his former employer or his newly retained but gagged lawyer. It was a war of hatred and carnage when, on the weekend before I was due to start the preliminary hearing in Oakland, I received a call that four Oakland Police Officer friends had been shot and killed, and I saw signs posted suggesting that it was retribution for the conduct of Mehserle earlier that year.

It was a war in the preliminary hearing — a place where I had never had to wage war in any prior case — but I had never experienced a Court so unwilling to let the truth, the whole truth, and nothing by the truth, be told for the first time to a packed courtroom of media representatives and other individuals, at least some of whom were hopeful that Mehserle's message, that this was a tragic accident and not an intentional shooting, would find the light of day. Instead, in our battle to call witnesses and try to put on evidence to negate the element of malice, the Judge declared that he didn't need to hear from our expert to discuss why evidence established this to be a mistake. I shuddered when the same Judge declared that he had "no doubt" that Mehserle had intended to shoot Grant with a firearm.

So, as I drove out of my driveway that June morning, I realized that this case had been a war from January 1, 2009, at about 2:11 a.m., and that our singular victorious "battle" so far had been our successful motion to get this case moved as far from Oakland as humanly possible. Even that had been a war, and I had no sooner concluded the hearing on the motion for a venue change on a Friday afternoon when windows at our law office were shot at. This was more than just a war of ugly words and heated rhetoric and threats to Johannes and his family — it was a war that had no hope of being resolved in diplomatic discussions between representatives of the Alameda County DA's Office and Mehserle's lawyers.

In the legal world, just because you are waging war doesn't mean you have to be overtly angry, hostile and in the face of the other side. Before, during and after the trial, Judge Perry, a former Federal Prosecutor who had once prosecuted automaker John Delorean and who had presided over some 240 murder trials in 18 years on the bench, complimented the Alameda County Deputy District Attorney trying the case and myself for being professional and polite to one another as we went about our business. The mood in Judge Perry's courtroom in Los Angeles was decidedly different than the mood of the courtrooms I had experienced in Oakland, but this was still a trial and a war, and I intended to win because Mehserle was not and is not a murderer.

We got a good — but not great — jury. For the most part, they were people with good common sense and life experience, but there were no individuals who I believed could be counted on to be strong-willed and independent and hold out for acquittal if the majority of jurors wanted to convict. Still, I was convinced that the jury we picked would never convict Johannes of murder.

Before the trial started, we had won an extremely important battle concerning video tape the jury would be allowed to see and hear. We sought to introduce testimony of video imaging expert Michael Schott, who had constructed an amazing "synchronized video" from the six different cameras that captured portions of the events leading up to, including and after the shooting. Schott examined footage from these various cameras individually and in this synchronized video for hundreds of hours and analyzed the movement of officers, Grant and others. He was prepared to describe those movements to the jury. The District Attorney objected to our attempt to introduce Schott's testimony, but their undoing was the fact that they had misrepresented what the video showed three separate times in the Trial Brief they had filed with the court. The prosecution had simply intended to introduce the various videos to the jury without offering any explanation as to their content through a witness, which would allow the prosecution to characterize the video or describe it or misrepresent it any way they wished. Instead, Judge Perry handed them a defeat — Schott would be allowed to show the jury excerpts of the various videos so that the jury would see how Grant was actively resisting efforts by Mehserle to secure his hands for handcuffing. Schott would show the jury that Grant's hands were not behind his back when the shot occurred, as alleged by the prosecution in their declaration of probable cause to get an arrest warrant charging murder.

Every use of force expert who testified at trial stated that Mehserle's use of a Taser to achieve neuromuscular incapacitation of the actively resisting Grant was reasonable and consistent with the BART Taser policy; every use of force expert who had looked at the video of the shooting testified that a decision to fire a firearm by Mehserle would have been inconsistent with training he received, which required consideration of backdrop, and that Mehserle's stance and positioning of the firearm prior to the shot was inconsistent with training he had received on drawing and firing a firearm; the video showed Mehserle tugging at his Sig three separate times but unable to get it out of the holster, because he was using thumb movements to release his Taser; the video showed that when Mehserle finally and inexplicably pulled the Sig from it's holster, his thumb slid upward on the slide of the firearm as if to activate the safety switch of a Taser; the video showed Grant raising his left shoulder off the ground and his left hand up into the air as if he was starting to get up just after Mehserle had announced his intention to use his Taser on Grant; the video showed that just before the shot, Mehserle stood up from a kneeling position to create distance to achieve a proper spread of the darts; the video showed, and the Alameda County Pathologist who performed the autopsy on Grant confirmed, that the only scenario possible, given the left-to-right trajectory of the bullet through Grant's body, was that Grant's left shoulder was off the ground (and he was not prone and docile as suggested by the DA and Grant

family spokespersons) when the bullet emerged from the barrel of Mehserle's firearm, which was pointed downward at Grant's back as Mehserle stood between Grant's legs.

Not a single witness testified that they observed Mehserle engage in a display of angry speech or conduct in the scant two and a half minute period between his arrival on the BART platform and the shooting of Grant. Witnesses called by the prosecution testified that Grant was refusing to give up his arms, and one commented about how she had remarked to her friend that Grant seemed to be extremely strong given the level of resistance she observed. One witness testified to looking at Mehserle shortly before he shot Grant and that his face did not show any anger: "It just looked like he was doing what he had to do — get Mr. Grant's arms." Numerous witnesses testified — and the video graphically showed — Mehserle looking in apparent disbelief at fellow BART Officer Anthony Pirone immediately after the gunshot went off, then quickly holstering his firearm and thrusting his hands to his head in shock and disbelief. Mehserle testified that when he did not see the darts in Grant's back, he looked to his right hand thinking that his Taser must have malfunctioned and saw, instead, his firearm. He told the jury he felt sick to his stomach.

When the smoke and the dust of the approximate one-month war in Judge Perry's courtroom had cleared, it was time for the Judge to instruct the jury on the decisions they would be called upon to make. The Alameda County DA had succumbed to mob pressure to charge Mehserle with murder, and when we started to argue jury instructions, the prosecutor suggested to Judge Perry that the jury should be instructed on both first-degree murder (premeditation) as well as second-degree murder. The Judge quickly dismissed giving first degree instructions, noting that there was no evidence whatsoever that Mehserle had premeditated shooting Grant with his firearm. The DA also had submitted written requests to the Judge to instruct the jury on voluntary manslaughter and involuntary manslaughter, which are lesser-included offenses to second-degree murder. We had objected to the notion that the jury would be given lesser-included instructions from the beginning of the trial and continued our strenuous objections to the giving of such instructions at the conclusion of the trial. Our position, which Mehserle was in firm agreement on, was that the DA had charged this as a murder and they should prove it. My fear was that the giving of lesser-included instructions to a jury always has great potential to invite a compromise verdict, particularly in a case like this, where there is a death of an individual by an officer using equipment that had been provided to him by his employer, and that he had supposedly been properly trained to use.

When the jury instruction war was over, the Judge indicated his belief that he was required by law to instruct on both voluntary and involuntary manslaughter, despite our strenuous objections.

In deciding this case, the jury was told that they could not convict Mehserle of either murder or voluntary manslaughter if they believed that the shooting was an accident — that is, that Mehserle had intended to Tase Grant, and had accidentally shot him with his firearm instead. From what we know of deliberations, the jury quickly acquitted Mehserle of both murder and voluntary manslaughter.

The jury was instructed that they could convict Mehserle of involuntary manslaughter if they found that he had acted with criminal negligence. Judge Perry also instructed the jury — over our objection — that they could also convict Mehserle of involuntary manslaughter under an alternative theory, which had never previously been given in an involuntary manslaughter case based upon our research. Under this theory, if Mehserle *knew* or *should have known* that the initial officer on the scene, Anthony Pirone, had either (1) improperly detained Grant and his friends, (2) falsely arrested Grant for activity occurring before Mehserle arrived, or (3) used excessive force on Grant before Mehserle arrived, then Grant would have the right to resist attempts by Mehserle to arrest and handcuff him, and any type of force used by Mehserle against Grant, including a Taser, would be unreasonable and improper. We argued in a new trial motion, and will argue to any court which will listen, that it is contrary to law and completely impractical to expect a police officer who arrives at a scene in response to an assistance call to begin interrogating the officer requesting assistance about his/her conduct or the reasons for his/her decisions to make arrests.

The jury convicted Mehserle of involuntary manslaughter. To this day, we do not know how they arrived at their decision or which of the various alternative theories they might have employed to arrive at the verdict. We also know that they took approximately five minutes to consider the firearm "enhancement," and found that Mehserle intended to use a firearm, *despite* rendering a verdict which found that he did not intend to draw and fire a firearm. Needless to say, Judge Perry dismissed the firearm enhancement, acknowledging the jury's confusion on that issue.

I have received countless e-mails and telephone calls from members of the legal community, citizens and police officers congratulating me on the result in this case. I have appreciated their kind words, but have always remained of the belief that this was a war that could have been and should have been won with a finding by a jury that Mehserle did not commit *any crime* under the facts of the case.

With the incredible assistance of the PORAC Legal Defense Fund, we arrived in Los Angeles well armed to fight this fight for Mehserle, who was probably the last officer in the world to think he would ever be in any kind of trouble. This was a war fueled by politics, and anytime a Police Officer is swept into that arena, chances are decisions will be made that will hurl the officer squarely into harm's way, where the only way out is to wage war.

I am unhappy with the verdict. When I drive down my long driveway, I keep wanting to turn around and go back to Los Angeles. I hope that day comes. ✡