(14)

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2576CR00080

COMMONWEALTH

vs.

LINDA WHITACRE

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

A Berkshire County Grand Jury indicted Linda Whitacre ("Ms. Whitacre") of (1) involuntary manslaughter, in violation of G. L. c. 265, § 13; (2) reckless endangerment of a child, in violation of G. L. c. 265, § 13L; and (3) recklessly permitting bodily injury to a child, in violation of G. L. c. 265, § 13J(b). Ms. Whitacre moves to dismiss the indictments, pursuant to *Commonwealth* v. *McCarthy*, 385 Mass. 160 (1982), arguing that the Commonwealth failed to present sufficient evidence to the Grand Jury to establish probable cause that she acted recklessly, an element of each of the charged offenses. On April 6, 2026, the court held a hearing on the defendant's motion and took the matter under advisement.

For the following reasons, the defendant's motion is **ALLOWED**.

BACKGROUND

On June 24, 2025, the Commonwealth presented the following evidence to the Grand Jury.

In the summer of 2024, Ms. Whitacre worked for Pittsfield Public Schools as an Interim Coordinator of the 21st Century Program, a grant-funded program through the Massachusetts Department of Elementary and Secondary Education ("DESE"). The 21st Century Program

provides school children with before-school, after-school, and summer camp activities throughout Massachusetts.

In her role, Ms. Whitacre was responsible for, among other things, applying for funding, managing grant-funds and budgets, providing evaluations to DESE, hiring staff, preparing payroll on a weekly basis, and planning activities for the children. She did not directly supervise the children.

The Pittsfield 21st Century Program was based at two "sites," Reid Middle School and Herberg Middle School. Each school had a "Site Coordinator," who had more of a "hands-on" role than Ms. Whitacre's role. Site Coordinators were responsible for the administration and supervision of the daily activities for the children.

In the summer of 2024, the Pittsfield 21st Century Program provided a four-week summer-camp program for students at Herberg Middle School. Meghan Braley ("Braley") was the Site Coordinator for the summer-camp program at Herberg Middle School. The themes of the summer camp program activities were environmentalism, outdoor skills, and survival skills. Pittsfield Public Schools hired staff to teach and supervise the students and subcontracted with an organization called "Greenagers" that taught outdoor and survival skills including "fire starting, how to properly leave no trace, [and how to] pick up after yourself when camping." G.J. Trans.[1] at p. 54.

On July 17, 2024, at the end of the four-week program, approximately thirty to thirty-five middle-school-aged campers went on a field trip to Beartown State Forest. The planned activities for the field trip included swimming in Benedict Pond, a small body of water within Beartown State Forest with a designated swimming area. To supervise the children, the field trip was staffed

[1] The transcript of the June 24, 2025, Grand Jury hearing is cited as "G.J. Trans.," followed by page numbers.

with approximately twelve people, including Braley, six adult employees of the 21st Century Program, two staff members of Greenagers, and "three or four" high school interns. *Id.* at 114. Ms. Whitacre also hired a lifeguard to attend and assist with the swimming portion of the field trip. Ms. Whitacre did not attend the field trip.

The field trip's itinerary instructed that the children be split into two equal groups for the swimming activities, so that only one group would be in the water at a time. While one group was in the water, the other group would participate in camp games. After some time, the groups would switch activities. Ms. Whitacre had originally planned to hire two lifeguards to accommodate a group of that size, but was only able to "find one." *Id.* at 176. Based on the number of supervising staff members and the plan to split the children into two groups before swimming,[2] Ms. Whitacre determined that one lifeguard was sufficient.

Due to time constraints, and unknown to Ms. Whitacre, field trip staff on site ignored the plan to split the children into two groups when it came time for the campers to go swimming, and almost all of the children entered the water at once. The children swam for approximately thirty minutes and were supervised by the lifeguard and several adult staff members. The children eventually came out of the water to dry, collect their belongings, and board the bus to go home. Around that time, the staff members performed a head count and noticed that Earl Giver Essien ("Essien"), a twelve-year-old girl, was not present.

One of the staff members, who herself was previously a lifeguard, went back into the water to search for Essien. Essien's body was found shortly thereafter and pulled to shore. The staff members called for help and attempted to give Essien cardiopulmonary resuscitation ("CPR")

[2] "As a guideline, it is suggested that one lifeguard be provided for each 25 bathers." 105 Code Mass. Regs. 435.23.

before medical assistance arrived, but were unsuccessful. It was later determined that Essien had drowned.

DISCUSSION

I. Legal Standard

Generally, courts do not inquire into the competency or sufficiency of the evidence serving the basis of an indictment. *Commonwealth* v. *Stirlacci*, 483 Mass. 775, 780 (2020); *Commonwealth* v. *Moran*, 453 Mass. 880, 883-884 (2009). However, to support an indictment, the grand jury must receive sufficient evidence to establish both the identity of the accused and probable cause to arrest him of the crime charged. *Commonwealth* v. *Barbosa*, 477 Mass. 658, 675 (2017); *McCarthy*, 385 Mass. at 163.

"Probable cause is a 'considerably less exacting' standard than that required to support a conviction at trial." *Stirlacci*, 483 Mass. at 780, quoting *Commonwealth* v. *O'Dell*, 392 Mass. 445, 451 (1984). Probable cause requires reasonably trustworthy information sufficient to justify a prudent person in believing the defendant committed the charged offense. *Commonwealth* v. *Hanright*, 466 Mass. 303, 311-312 (2013). See *Commonwealth* v. *Humberto H.*, 466 Mass. 562, 565 (2013) (probable cause requires more than mere suspicion, but considerably less proof to support conviction at trial). Accordingly, "[t]o survive a motion to dismiss, the grand jury must simply be presented with evidence supporting a finding of probable cause as to 'each of the . . . elements' of the charged crime." *Commonwealth* v. *Walczak*, 463 Mass. 808, 817 (2012), quoting *Moran*, 453 Mass. at 884. The court views the evidence presented to the grand jury in the light most favorable to the Commonwealth. See *Commonwealth* v. *Buono*, 484 Mass. 351, 362 (2020).

II. Analysis

Ms. Whitacre argues that the indictments must be dismissed because the evidence before the Grand Jury was insufficient to establish probable cause that she acted recklessly, which is an element of each of the three charged offenses[3]. This court agrees.

"[W]anton or reckless conduct is that which a defendant knew or should have known created a substantial risk of death or serious bodily injury." *Kligler* v. *Attorney Gen.*, 491 Mass. 38, 49 (2022). "As a general rule, the requirement of 'wanton or reckless conduct' may be satisfied by either the commission of an intentional act or an intentional omission where there is a duty to act." *Commonwealth* v. *Hardy*, 482 Mass. 416, 421 (2019), quoting *Commonwealth* v. *Pugh*, 462 Mass. 482, 497 (2012). "To constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent, and the defendant must have chosen to run the risk rather than alter [their] conduct so as to avoid the act or omission which caused the harm" (quotation omitted). *Commonwealth* v. *Levesque*, 436 Mass. 443, 452 (2002). "[W]anton or reckless conduct does not require that the actor intended the specific result of her conduct, but only that he or she intended to do the wanton or reckless act." *Hardy*, 482 Mass. at 421.

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[3] Indictment 1, Involuntary Manslaughter: "Involuntary manslaughter is an unlawful homicide, unintentionally caused . . . by an act which constitutes such a disregard of probable harmful consequences to another as to constitute *wanton or reckless conduct*" (emphasis added) (internal quotation omitted). *Commonwealth* v. *Barlow-Tucker*, 493 Mass. 197, 204 (2024).

Indictment 2, Reckless Endangerment of a Child: "Whoever *wantonly or recklessly* engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act shall be punished . . ." (emphasis added). G. L. c. 265, § 13L.

Indictment 3, Recklessly Permitting Bodily Injury to a Child: "Whoever, having care and custody of a child, *wantonly or recklessly* permits bodily injury to such child or *wantonly or recklessly* permits another to commit an assault and battery upon such child, which assault and battery causes bodily injury, shall be punished . . ." (emphasis added). G. L. c. 265, § 13J(b)

The Commonwealth's theory of Ms. Whitacre's criminal liability is that she was reckless because she failed to ensure the administration of a swim test and to provide the children with personal flotation devices, in violation of G. L. c. 111, § 127A½ and the regulations promulgated under that statute. See 105 Code Mass. Regs. § 432.001 et seq. The Court concludes that Ms. Whitacre's failure to take certain actions in violation of these statutes is not an intentional omission demonstrating reckless behavior.

> "[T]he intentional failure to comply with statutory precautions, by itself, does not rise to the level of reckless conduct . . . . Such conduct, if proved, will typically constitute negligence or gross negligence . . . . However, the intentional failure to comply with statutory precautions, coupled with a clear subjective or objective recognition that the omission of the required precautions creates a high degree of risk that death or grave physical harm will result to those very persons for whom the safety precautions were enacted may constitute recklessness"

(citations omitted). *Boyd* v. *National R.R. Passenger Corp.*, 446 Mass. 540, 549 (2006).[4] See also *Hardy*, 482 Mass. at 425 ("[t]he defendant's failure to comply with the Massachusetts [vehicle safety statute] does not, by itself, amount to wanton or reckless conduct").

The *Hardy* decision is particularly persuasive in supporting that Ms. Whitacre's omissions did not constitute recklessness. The defendant in *Hardy* had been offered a booster seat by her father to secure a four-year-old child in the back seat of her car before driving, which the defendant was required by statute to use. 482 Mass. at 418. See G. L. c. 90, § 7AA (requiring passenger under age eight to use booster seat unless passenger taller than fifty-seven inches). The defendant in *Hardy* decided not to secure the four-year-old child with the booster seat, instead merely using a seatbelt. *Id.* She was familiar with the use of safety seats having used them for her own children.

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[4] The court disagrees with the Commonwealth's contention that *Boyd*'s status as a civil case precludes this court's application of its discussion of reckless and wanton conduct to the case at hand. See *Montes* v. *Massachusetts Bay Transp. Auth.*, 446 Mass. 181, 185 (2006) ("Whether it is alleged as the basis for liability in tort or as guilt of involuntary manslaughter, reckless conduct is measured by the same test.").

She also was provided with a safety seat to use on the day of the accident, and instead of securing it in the rear of her vehicle, instead stowed it in the trunk. The defendant's vehicle was subsequently involved in a severe accident, resulting in the tragic death of an unsecured four-year-old child. *Id.* at 419. The Supreme Judicial Court held that the defendant's failure to use the booster seat – thereby violating G. L. c. 90, § 7AA – was clearly negligent but did not, without more, rise to level of "reckless or wanton conduct." *Id.* at 425.

While the mere act of violating a safety statute typically does not constitute reckless conduct, "it can with other evidence contribute to such a finding if the resulting harm falls within the purpose of the safety provision." *Commonwealth* v. *Power*, 76 Mass. App. Ct. 398, 407 (2010). Essien's drowning undoubtedly falls within the purpose of the swim test statute; evidence that Ms. Whitacre objectively or subjectively recognized that her failure to follow the statute created a high likelihood of substantial harm is nevertheless required.

The defendant in *Power* had illegally operated an unlicensed daycare service, which constituted multiple safety statute violations designed to protect children, and resulted in emergency suspension, nonrenewal of licensure, and three cease-and-desist orders. *Id.* In that case, the defendant was found to have acted recklessly when a child in her care died from violent shaking because she had blatantly ignored the sanctions given to her and understood that the governing State agency regarded her operation as unsafe for the children in her care. *Id.*

Here, the Commonwealth only presented evidence that Ms. Whitacre failed to order a swim test for the campers and provide personal floatation devices, both of which are required by G. L. c. 111, § 127A½. While such actions may be evidence that Ms. Whitacre's omissions violated a safety statute, they do not, without more, rise to the level of reckless or wanton conduct required for the charged offenses. Ms. Whitacre ensured that the field trip's itinerary instructed that the

children should be split into two smaller groups, thereby making them easier to monitor, specifically while they swam. She staffed the field trip with approximately twelve supervisors and one lifeguard to monitor the children while they swam. Cf. *Commonwealth* v. *Chapman*, 433 Mass. 481, 488 (2001) (recklessness where defendant left infant unattended in water for three minutes, waited three to five minutes after seeing infant drowned to call 911, and made no effort to administer CPR). These actions demonstrate that Ms. Whitacre here is less culpable for Essien's death than the defendant in *Hardy* was for the child killed in that case, for which the SJC declined to find that she acted recklessly. See 482 Mass. at 426 ("Our cases demonstrate that something much greater than negligence is necessary to affirm convictions of involuntary manslaughter and reckless endangerment of a child.").

There is no indication that Ms. Whitacre was presented with the option to make the field trip safer and rejected it like the defendants in *Hardy* and *Power*, nor that she intentionally made a decision or omission that resulted in a high likelihood of danger or harm. Based on the evidence that was before the Grand Jury, Ms. Whitacre's role in this tragedy simply cannot rise to the level of reckless and wanton conduct as a matter of law, and the Commonwealth's indictments for three offenses that each require a showing of such a mental state therefore cannot stand.[5]

[5] As the indictments must be dismissed for lack of probable cause, the court need not reach the defendant's second argument that the Commonwealth's instruction given to the Grand Jury regarding the legal definition of recklessness impaired the Grand Jury.

ORDER

It is hereby **ORDERED** that the defendant's motion to dismiss the indictments against her is **ALLOWED**.

Hon. Michael K. Callan
Justice of the Superior Court

Dated: May 13, 2026

ENTERED
THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT

MAY 13 2026

Lisa A. Denault-Veale