SJC-13213

COMMONWEALTH vs. KYLE DAWSON.

Bristol. March 7, 2022. - August 24, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Homicide. Wanton or Reckless Conduct. Retroactivity of Judicial Holding. Grand Jury. Evidence, Grand jury proceedings, Indictment. Probable Cause. Practice, Criminal, Grand jury proceedings, Indictment.

Indictments found and returned in the Superior Court Department on August 27, 2018.

A motion to dismiss was heard by Raffi N. Yessayan, J., and a conditional plea of guilty was accepted by Renee Dupuis, J.

The Supreme Judicial Court granted an application for direct appellate review.

Suzanne Renaud for the defendant.

Shoshana E. Stern, Assistant District Attorney, for the Commonwealth.

Anthony D. Gulluni, District Attorney, & John A. Wendel, Assistant District Attorney, for district attorney for the Hampden district & others, amici curiae, submitted a brief.

GAZIANO, J. On August 10, 2018, the defendant and his friend, Christopher Dunton, attempted to rob a taxicab driver in New Bedford. After the cabdriver brought the men to the location they had requested, Dunton choked the cabdriver from behind while demanding money. At the same time, the defendant pressed a knife to the cabdriver's side. The cabdriver managed to escape from the vehicle, spun around wielding a previously concealed handgun, and shot and killed Dunton. Based on these facts, a grand jury returned indictments charging the defendant with involuntary manslaughter for the death of his accomplice and other crimes.

In this appeal from a conditional guilty plea, we consider whether an individual may be charged with involuntary manslaughter where the individual wantonly or recklessly commits a felony, and an accomplice is killed by the victim of that offense. It has been well settled in our homicide jurisprudence for more than 150 years that the Commonwealth is precluded from charging a defendant with the crime of felony-murder for the death of an individual who is killed by someone resisting an underlying felony. See Commonwealth v. Campbell, 7 Allen 541, 547 (1863). The defendant contends that the common-law limitation on homicide liability, set forth in Campbell, supra, extends to the crime of wanton or reckless involuntary manslaughter. In the alternative, he maintains that the

Commonwealth failed to present sufficient evidence to the grand jury to support an indictment for involuntary manslaughter.

For the following reasons, we conclude that Campbell and its progeny do not preclude an indictment for wanton or reckless involuntary manslaughter where the deceased is killed by someone resisting a felony. We conclude as well that the evidence presented to the grand jury was sufficient to support the indictment. Accordingly, we affirm the denial of the defendant's motion to dismiss.[1]

1. Background. a. Prior proceedings. On September 27, 2018, a grand jury returned indictments charging the defendant with involuntary manslaughter, armed assault with intent to rob, assault and battery by means of a dangerous weapon, and assault and battery. The indictment charging involuntary manslaughter alleged that the defendant "did intentionally engage in conduct (an [a]rmed [a]ssault with intent to rob Albert Miguel, a cab driver) that was wanton and reckless and by his intentional conduct, created a high degree of likelihood that substantial harm would result to another person, and by such intentional participation in this conduct, caused the death of Christopher Dunton."

[1] We acknowledge the amicus brief submitted by the district attorneys for the Hampden, Cape and Islands, eastern, middle, Norfolk, northwestern, and Plymouth districts in support of the Commonwealth.

The defendant filed a motion to dismiss the indictment for involuntary manslaughter due to a lack of probable cause; he attached to the motion a transcript of the grand jury proceedings. After a nonevidentiary hearing, a Superior Court judge denied the motion. The defendant then entered a conditional guilty plea to the charge of involuntary manslaughter, preserving his right to appeal that charge on the ground of a lack of probable cause. See Mass. R. Crim. P. 12 (b) (6), as appearing in 482 Mass. 1501 (2019); Commonwealth v. Gomez, 480 Mass. 240, 252 (2018). He also pleaded guilty to the remaining charges. The appeal was entered in the Appeals Court, and we granted the Commonwealth's application for direct appellate review.

b. The shooting. The grand jury could have found the following. On August 10, 2018, at around 1 A.M., Miguel, driving his taxicab, picked up the defendant and Dunton on Cottage Street in New Bedford. Dunton sat behind Miguel in the rear passenger's seat on the driver's side; the defendant sat next to Dunton. The two passengers asked to go to an address on Bentley Street in New Bedford.

During the short ride, the defendant, Dunton, and Miguel discussed a recent New Bedford crime wave. They "were talking about what's been happening in the city because the guy that just killed the guy on Cottage, the shooting on Grinnell and

Purchase. There was also another guy shot in the back." The three men reached a consensus that the "city's all fucked up." The conversation about issues with crime put Miguel at ease; he thought he generally noticed warning signs, but he did not detect any "red flags" from his passengers and believed that they were "being cool guys, just normal dudes."

When they reached the stated destination, Miguel placed the taxicab in park and turned on the interior dome light. He then informed the passengers that the fare was five dollars. The defendant asked Miguel for change for a fifty dollar bill. For his own safety, Miguel only carried twenty dollars when working a nighttime shift; he informed the defendant, "I only carry enough to break a [twenty] because this city's crazy and, you know, you know, cabdrivers get robbed all the time." Miguel offered to drive the defendant and Dunton to a nearby gasoline station to get change. He then heard the defendant shuffling his hand around in his pocket "like he was looking for money."

Without warning, Dunton reached over the driver's seat and wrapped both arms around Miguel's neck in a choke hold.[2] Miguel struggled to breathe. Dunton shouted at him to turn off the interior light and hand over his money. Brandishing a three-inch tactical-style knife, the defendant also demanded money.

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[2] The taxicab was not equipped with a partition dividing the driver's and passenger's compartments.

He pressed the blade against the right side of Miguel's body. Miguel reported, "[The defendant] actually only got me a little bit, but he was trying to puncture me . . . like he was trying to get me in the stomach." Dunton then urged the defendant to "shank" Miguel, yelling, "[J]ust stab this fucking, nigga, you know, fucking kill him," and "[K]ill this motherfucker." The two robbers "hyp[ed] each other up," exclaiming, "[W]e're going to do it."

Miguel thought that he was going to die. As he explained, "[W]e're bouncing all around [the taxicab] . . . and he [Dunton] got me and his friend [the defendant] is really trying to stab me." Headlights from an oncoming vehicle then illuminated the taxicab, causing a moment of distraction. Miguel seized the opportunity to attempt to get away from the robbers. With one arm still around Miguel's throat, Dunton warned, "[D]on't move or I'll fucking kill you." Miguel managed to break free from the choke hold, got out of the taxicab using his knee to open the door, spun around, and drew a previously concealed handgun from a holster. He ordered the robbers to freeze. The defendant left the taxicab, while Dunton continued to move around in the rear seat. Fearing that Dunton was armed, and unable to see his hands, Miguel fired into the rear of the taxicab three times, hitting Dunton. When Miguel fired the shots, the defendant was approximately five to eight feet away

from the vehicle. He ran up the street and out of sight, and he was not present when emergency responders arrived a few minutes later.

Miguel contacted his dispatcher by radio, telling him that he had been robbed and had shot someone, and that the dispatcher should summon help; he then called 911. The call was received at 1:12 A.M. Miguel told the responding officers that he had shot someone trying to rob him and asked them to help Dunton, who was lying on the ground, bleeding, and making a "noise." The officers observed a three-inch scratch on Miguel's side. Dunton was transported to a hospital, where he was pronounced dead at 1:48 A.M.

When the defendant fled the taxicab, he left his cellular telephone behind. While investigating the scene, police found the telephone; they subsequently learned its owner was the defendant, whom Miguel was able to identify from a photographic array. The defendant was arrested a few days later.

During questioning at the New Bedford police station, the defendant corroborated Miguel's account of the incident, other than maintaining that he only had pretended to have a knife. The defendant described the events by saying that he had planned to pay the fare if Miguel did not hand over the money that he and Dunton demanded, but once Dunton placed Miguel in a choke hold, "it escalated from there."

2. Discussion. a. Liability for involuntary manslaughter. At issue in this case is the existence of common-law homicide liability for the death of an individual killed by someone resisting a felony. See generally Commonwealth v. Duke, 489 Mass. 649, 656-657 (2022), and cases cited.

The defendant contends that the "clear" and "unambiguous" law that emerged from Campbell, 7 Allen at 546, is that an individual could not be held criminally liable for any homicide offense where a person resisting the individual's crime was the one who killed the decedent. Accordingly, the defendant argues, the trial judge erred in denying his motion to dismiss, because Campbell, supra at 543-544, 546, "established that where, as here, the decedent is killed by an unaffiliated person resisting a crime, the defendant cannot be considered criminally responsible for the non-agent's action." Under the defendant's reading, Campbell mandates that the "act causing death in a homicide case originate from the defendant or his or her agent -- not a person resisting the criminality."

In the Commonwealth's view, by contrast, the common-law restrictions on homicide liability addressed in Campbell, 7 Allen at 546, apply only to the crimes addressed in that case, i.e., felony-murder and the since-abolished crime of unlawful

act (misdemeanor) manslaughter.[3] Under this reasoning, Campbell and its progeny do not preclude an indictment for involuntary manslaughter brought under a theory of wanton or reckless conduct. We agree. A close examination of the court's decision in Campbell makes clear that the court did not specifically address wanton or reckless involuntary manslaughter, and nothing in the decision precludes the Commonwealth from bringing such charges.

Because an understanding of the facts and the reasoning in Campbell is critical to our analysis, we first discuss the case in some detail.

i. The Campbell decision.[4] Campbell's trial began in December of 1863 before the justices of the Supreme Judicial

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[3] Unlawful act (misdemeanor) manslaughter was defined as an unlawful homicide, unintentionally caused during the commission of an unlawful act, malum in se, not amounting to a felony or likely to endanger life. See Commonwealth v. Catalina, 407 Mass. 779, 783-784 (1990), quoting Commonwealth v. Campbell, 352 Mass. 387, 397 (1967); Commonwealth v. Lacasse, 365 Mass. 271, 273 (1974). An act is malum in se if it is done "wilfully or corruptly which causes injury to person or property." Catalina, supra at 783 n.4.

[4] In 1863, the Federal government instituted a national draft requiring general conscription into the army but permitting a substitute payment of $300 in lieu of military service. J. Tager, Boston Riots: Three Centuries of Social Violence 134 (2001). This wealth-based exemption "pronounced the poor as cannon fodder for the war machine," and exacerbated animosity between establishment Yankees and working-class Irish immigrants. Id. Sparked by an attempt to serve draft notices in an Irish neighborhood of Boston, a mob rushed a fortified armory on Cooper Street seeking arms to protect themselves from

Court. Campbell, 7 Allen at 541. The defendant was indicted on charges of "feloniously, wilfully and of [his] malice aforethought" killing and murdering William Currier by gunshot. At trial, the Attorney General alleged that the defendant had participated "in [a] riotous assembly" gathered in Boston to protest enforcement of the draft of men into the army to fight in the Civil War. Id. at 542-543. Evidence established that the defendant engaged in "riotous acts" at about 1 P.M., several hours before the fatal shooting. Id. at 541-542. A military force was called out to suppress the riot and was stationed inside an armory on Cooper Street. Id. at 542. During an attack on the armory, "the mob were fired upon by the soldiers,

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draft marshals. Id. at 135-136. Witnesses later testified that rioters rebuffed calls to disperse, showered soldiers with "stones and brickbats," while shouting slogans such as "Hurrah for Jeff Davis," and "We'll kill the damned Yankees." The Cooper Street Riot: Trial of James Campbell for Murder, Boston Daily Advertiser, Dec. 16, 1863 (Campbell Trial, First Day); The Cooper Street Riot: Trial of James Campbell for Murder, Second Day, Boston Daily Advertiser, Dec. 17, 1863 (Campbell Trial, Second Day). The two sides exchanged gunfire, and the soldiers responded by firing canister shot from a cannon into the crowd to prevent the armory from being overrun. Campbell Trial, First Day, supra. "The shot tore the door down almost entirely and battered a hole six feet across in the wall and stone work of the house opposite." Campbell Trial, Second Day, supra. Repelled from the Cooper Street armory, the crowd continued to search for weapons by looting gun and hardware stores in Dock Square and Faneuil Market. Tager, supra at 137-138. Because many protesters were dragged away in the darkness, there was no verifiable record of the number who were killed or wounded. Id. at 137. Officially, eight people were confirmed to have been killed, including four children. Id.

and the soldiers by the mob." Id. According to the indictment, at approximately 7 P.M., Currier was killed by a projectile that entered his "left side and [traveled] through [his] body." The fatal shot was fired either by one of the rioters, with whom the defendant was acting in concert, or by a soldier within the armory. Id. at 541.

At the close of all the evidence, the Attorney General requested the justices to instruct the jury that, regardless of who fired the fatal shot, the defendant could be found guilty of murder or "at least" manslaughter. Id. at 543. Under the Commonwealth's theory, the defendant, as a participant in the riot, was liable for a death that was the result of the unlawful acts of the mob. Id. at 541-542, 543. That is, the Commonwealth claimed that "the [defendant] was a participator in an unlawful assembly and riot, during the progress of which the alleged homicide was committed, and that he [was] responsible for the homicidal act, having been engaged in the unlawful and criminal transactions during which it was committed." Id. at 542.

The Campbell court examined whether this theory of vicarious liability had "any just foundation in the recognized principles of law by which criminal responsibility for the acts of others is regulated and governed." Id. at 543. The court concluded that the defendant was liable for any unlawful acts he

committed, or that were committed by his accomplices, that naturally or necessarily flowed from the criminal conduct. Id. at 543-544. See Commonwealth v. Brown, 477 Mass. 805, 828-830 (2017) (Gants, C.J., concurring), cert. denied, 139 S. Ct. 54 (2018) (discussing Campbell's adoption of "agency theory" of accessory liability). Criminal liability for the acts of others "is subject to the reasonable limitation that the particular act of one of a party for which his associates and confederates are to be held liable must be shown to have been done for the furtherance . . . of the common object and design for which they combined together." Campbell, supra at 544.

As to the defendant's liability for a fatal shot that had been fired by someone opposing the riot, the court stated that no person may be guilty of homicide "unless the act is either actually or constructively his, . . . committed by his own hand or someone acting in concert with him or in furtherance of a common object or purpose." Id. It followed that an individual was not responsible for an act committed by "a person who is his direct and immediate adversary, and who is, at the moment when the alleged criminal act is done, actually engaged in opposing and resisting him."[5] Id. at 545. Rejecting the Commonwealth's

[5] To illustrate the flaws in the Attorney General's "but for" theory of liability, the court considered several hypothetical scenarios. For example, suppose the soldiers had fired the armory's cannon to repel the mob, and that the cannon

theory of vicarious liability, the court held that "[t]he jury will . . . be instructed that, unless they are satisfied beyond a reasonable doubt that the deceased was killed by means of a gun or other deadly weapon in the hands of [the defendant], or of one of the rioters with whom he was associated and acting, he is entitled to an acquittal."[6] Id. at 547-548.

Campbell is often cited as the seminal case on the issue of "liability for a death occurring during the commission of a felony (felony-murder liability)." See Brown, 477 Mass. at 828 (Gants, C.J., concurring). See also Commonwealth v. Balliro, 349 Mass. 505, 513 (1965), S.C. 370 Mass. 585 (1976) (noting that Campbell "appear[ed] to have become the leading case on the subject [of felony-murder liability] and has generally been followed in other jurisdictions"). See, e.g., State v. Branson, 487 N.W. 2d 880, 882-883 (Minn. 1992) (Campbell offers "classic statement" of agency theory of felony-murder).

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burst due to an unknown defect, killing several soldiers in the immediate vicinity. Campbell, 7 Allen at 545. Or, suppose a soldier mishandled his musket and accidentally shot himself. "[I]t would hardly be contended that . . . the whole body of rioters could be legally responsible for criminal homicide, by reason of the lives that were thus destroyed." Id. Yet, in both scenarios, the taking of a human life would be, in certain respects, the result of the unlawful acts of the rioters. Id. "[I]t would not have occurred but for the riot which furnished the cause and occasion of the use of the musket or cannon [by the soldiers]." Id.

[6] The jury acquitted the defendant. Campbell, 7 Allen at 548.

As the defendant points out, the court in Campbell, 7 Allen at 544, stated that "[n]o person can be held guilty of homicide unless the act is either actually or constructively his," and the court concluded that "[i]f the homicide was the result of a shot fired by the soldiers or other persons in the armory, acting together in defence against the riotous assembly, the defendant cannot be held guilty of either murder or manslaughter," id. at 547. The court also determined, however, that "there can be no valid reason for holding the defendant guilty of manslaughter only." Id. This gives rise to the question of the form or forms of manslaughter liability that the Campbell court prohibited where the deceased was killed by someone resisting a felony. The Commonwealth and the defendant dispute whether the Campbell court's holding included the offense of wanton or reckless involuntary manslaughter. To determine the breadth of the holding, we first examine the confines of the crime of manslaughter at that time, and the nature of the charges the Attorney General brought against Campbell.

ii. Manslaughter liability at the time of Campbell. In the Nineteenth Century, involuntary manslaughter was divided into two categories. See Coldiron, Historical Development of Manslaughter, 38 Ky. L.J. 527, 545, 550 (1950) (Coldiron). The first category encompassed a death resulting from an unlawful

act not amounting to a felony. A leading treatise, cited by the Campbell prosecutor, see 7 Allen at 546-547, described unlawful act manslaughter liability as follows: "[W]here an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter according to the nature of the act . . . ; if it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it is manslaughter." F. Wharton, Law of Homicide in the United States, at 36 (1855) (Wharton). See, e.g, Commonwealth v. Fox, 7 Gray 585, 589 (1856) (discussing manslaughter liability for assault and battery where blows inflicted on victim "hastened" her death, and there was no evidence of malice because defendant was unaware of victim's "weak and feeble condition"). In Massachusetts, unlawful act (misdemeanor) manslaughter subsequently was abolished, except for cases where the death occurred because of a battery. See Commonwealth v. Catalina, 407 Mass. 779, 783-784 (1990); Commonwealth v. Cunningham, 405 Mass. 646, 658-659 (1989).

As to the second category, when Campbell was decided, involuntary manslaughter also was defined as a death resulting from "gross" or "criminal" negligence. See Wharton, supra at 149; Coldiron, supra at 548. One example of a death "which arose from negligence or inattention" was where "a man lays

poison to kill rats, and another man takes it, and it kills him, if the poison was laid in such a manner and place as to be mistaken for food, it is, perhaps, manslaughter, if otherwise misadventure [accident] only." Wharton, supra at 149, 151. Another example of criminal negligence amounting to manslaughter was "[t]he wilful neglect of a dangerous beast, known to be likely to cause harm, which escapes and kills an innocent person." Coldiron, supra at 549. See Commonwealth v. Hawkins, 157 Mass. 551, 553 (1893) (it is "well established, that one who wantonly, or in a reckless or grossly negligent manner, [causes] the death of a human being, is guilty of manslaughter, although he did not contemplate such a result"); Commonwealth v. Pierce, 138 Mass. 165, 175, 180 (1884) (evidence was sufficient to establish manslaughter based on physician's reckless or grossly negligent use of kerosene to treat patient).

The defendant contends that the Campbell court's ruling encompassed the act of "recklessly" putting innocent victims in danger. We agree with his observation that, as stated, the crime of wanton or reckless involuntary manslaughter existed, at least in nascent form, at that time.[7] But the argument only goes

[7] Subsequently, in Commonwealth v. Welansky, 316 Mass. 383, 399-400 (1944), this court held that a conviction of involuntary manslaughter requires more than negligence or gross negligence. See Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010).

so far; Campbell was not a case of involuntary manslaughter based on wanton or reckless conduct, or indeed on any type of criminal negligence. Rather, the theory of the prosecution was that the defendant was liable because he participated in an illegal "riotous assembly," and Currier's death by gunshot was the result of the unlawful acts of the mob. Campbell, 7 Allen at 541-542, 543. See Brown, 477 Mass. at 828-829 (Gants, C.J., concurring) (discussing Campbell's limitations on liability for death that occurred during commission of underlying felony); Commonwealth v. Tejeda, 473 Mass. 269, 273 (2015), S.C., 481 Mass. 794 (2019) (same). The Campbell court observed that the defendant could be held responsible for the actions of fellow rioters only if the killing was "in furtherance of a common [unlawful] object[ive]." Campbell, supra at 544.

The defendant cannot overcome the evident fact that Campbell did not address the crime that the defendant was convicted of committing -- wanton or reckless involuntary manslaughter. Consequently, the decision in Campbell does not preclude an indictment for the crime of wanton or reckless involuntary manslaughter where the decedent is killed by someone resisting a felony.

iii. Whether prospective application is required. We turn to the defendant's contention that imposing liability for

involuntary manslaughter in these circumstances announces a new common-law rule requiring prospective application.

"Decisional law usually is retroactive" unless it creates a "new rule." Commonwealth v. Breese, 389 Mass. 540, 541 (1983). "When a decision announces a new rule, however, the issue arises whether it will be applied only prospectively." Id. "[F]or a rule to be considered 'new,' it must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed" (quotation and citation omitted). Commonwealth v. Ennis, 398 Mass. 170, 173 (1986).

The conclusion we reach today does not overrule Campbell. Moreover, our holding today clearly was foreshadowed in our prior cases. For instance, in Tejeda, 473 Mass. at 270-271, as here, the defendant's accomplice was shot by the victim of a robbery. The court reaffirmed the principle articulated in Campbell that "vicarious liability in felony-murder is limited to the acts resulting in death committed by a joint venturer." Id. at 273-274. Responding to the Commonwealth's concern that the rejection of proximate cause liability created the "risk that no one will be punished for the death of a bystander mistakenly shot by an armed robbery victim or by a police officer," the court in Tejeda explained that this "does not mean

that the joint venturers will escape punishment." Id. at 279. The death of a bystander might constitute manslaughter, the court noted, where the killing was committed under mitigating circumstances, or unintentionally but recklessly. Id. "In circumstances where a defendant committing an underlying felony engaged in reckless conduct that 'created a high degree of likelihood that substantial harm w[ould] result to another person,'" the court observed, "the Commonwealth might obtain an involuntary manslaughter conviction." Id., quoting Model Jury Instructions on Homicide 74 (2013).

A few years later, in Brown, 477 Mass. at 807, the court narrowed the scope of felony-murder and eliminated the theory of proof of criminal intent by constructive malice. As a result, felony-murder was limited, prospectively, to its statutory role under G. L. c. 265, § 1, as an aggravating element of murder. Brown, supra. In a concurring opinion, the late Chief Justice Gants noted that a participant in a felony resulting in a death, where the participant lacked the requisite intent for murder, would "be found guilty of involuntary manslaughter if he or she acted wantonly or recklessly." Id. 832-833. For example, an armed robber who accidentally discharged a fatal shot while vaulting over a counter "might be found guilty of involuntary manslaughter if the jury found that the death arose from [the] wanton or reckless conduct that created a high degree of

likelihood that substantial harm w[ould] result to another person." Id. at 835.

Although narrowing the scope of felony-murder, these decisions rested on the well-established foundation that, where the Commonwealth proceeds on a theory of felony-murder, a defendant is not entitled to an instruction on wanton or reckless involuntary manslaughter as a lesser included offense. See Commonwealth v. Donovan, 422 Mass. 349, 352 & n.4 (1996). See, e.g., Commonwealth v. Evans, 390 Mass. 144, 151-152 (1983) (that defendant maintained that gun was accidentally discharged during robbery was of no consequence in prosecution for felony-murder); Commonwealth v. LePage, 352 Mass. 403, 419 (1967) (in case of unintended death where there was no evidence from which jury could find that defendant was engaged in commission of crime other than felony when killing occurred, instruction on manslaughter was not required).

Conversely, where the Commonwealth does not proceed on a theory of felony-murder, a defendant could be liable for wanton or reckless involuntary manslaughter. See Donovan, 422 Mass. at 353. For example, in Commonwealth v. Neves, 474 Mass. 355, 368-369 (2016), the defendant argued that he was entitled to an instruction on involuntary manslaughter at his trial for felony-murder because the shooting was accidental and outside the scope of the alleged armed robbery. We concluded that the defendant

was not entitled to such an instruction. Id. at 369-370. Reviewing the case pursuant to G. L. c. 278, § 33E, however, we determined that the judge should have considered whether involuntary manslaughter was a lesser included offense of murder on theories of deliberate premeditation and extreme atrocity or cruelty. Id. at 370-371. An instruction on wanton or reckless involuntary manslaughter "should have been given, because the jury reasonably could have concluded that the shooting was accidental, based on the defendant's statements to police that the gun discharged accidentally." Id. at 371. See Commonwealth v. Campbell, 352 Mass. 387, 397-398 (1967) (instruction on involuntary manslaughter was required where defendant committed misdemeanor by placing arm around victim's throat to quiet her, as circumstances were "consistent with a failure to regard the consequences of his action or an indifference to what the consequences of his action might have been").

In sum, because we have not announced a new common-law rule of involuntary manslaughter, the defendant is not entitled to application of our holding today that is prospective only.

b. Sufficiency of the evidence. The defendant also argues that there was insufficient evidence to indict him for involuntary manslaughter, and therefore his motion to dismiss should have been allowed. The defendant contends that the Commonwealth failed to present sufficient evidence to the grand

jury that his participation in the attempted armed robbery was conduct involving a high degree of likelihood that substantial harm to another would result. He asserts that he was unaware of "the gravity of the danger," and that "a reasonable person also would not [have] appreciate[d] the danger." The defendant recognizes that "some type of resistance might have been a natural consequence of the act of stabbing" the taxicab driver, but he contends that armed resistance with a firearm was not.

In general, "the adequacy or competency of evidence before a grand jury is not a matter for judicial inquiry" (citation omitted). Commonwealth v. Clemmey, 447 Mass 121, 130 (2006). A court will make an exception, however, where a defendant maintains that there was not sufficient evidence to establish the identity of the accused and to establish probable cause to arrest the accused for the crime charged. See Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982). A reviewing court considers the evidence underlying a grand jury indictment in the light most favorable to the Commonwealth. See Commonwealth v. Stirlacci, 483 Mass. 775, 780 (2020). Whether the grand jury heard sufficient evidence to establish probable cause to indict is a question of law that we review de novo. Commonwealth v. Long, 454 Mass. 542, 555 (2009), S.C., 476 Mass. 526 (2017).

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." Commonwealth v. Hardy, 482 Mass. 416, 420-421 (2019), quoting Commonwealth v. Carter, 481 Mass. 352, 364 (2019). Wanton or reckless conduct "involves a high degree of likelihood that substantial harm will result to another" (citation omitted). Hardy, supra at 421. See Commonwealth v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010) ("act causing death must be undertaken in disregard of probable harm to others in circumstances where there is a high likelihood that such harm will result"). The requirements of a "high degree" of risk and the "substantial harm" that likely will result distinguish wanton or reckless conduct from the unreasonable risk of harm that constitutes ordinary or gross negligence. See Commonwealth v. Carrillo, 483 Mass. 269, 275-276 (2019). "Whether conduct is wanton or reckless depends either on what the defendant knew or how a reasonable person would have acted knowing what the defendant knew." Model Jury Instructions on Homicide 88-89 (2018), citing Commonwealth v. Earle, 458 Mass. 341, 347 n.9 (2010), and Commonwealth v. Welansky, 316 Mass. 383, 398 (1944).

The defendant contends that the evidence presented to the grand jury did not establish that he knew, or reasonably should have known, that Miguel likely would defend himself with a handgun. The Commonwealth, however, is not required to prove

that the defendant "intended the specific result of his or her conduct, . . . only that he or she intended to do the reckless act." Life Care Ctrs. of Am., Inc., 456 Mass. at 832. See Carrillo, 483 Mass. at 275 ("we focus on the conduct that caused the result, . . . not the resultant harm" [quotation and citation omitted]); Commonwealth v. Bouvier, 316 Mass. 489, 494 (1944) ("one who wantonly or recklessly does an act that results in death of a human being is guilty of manslaughter although he did not contemplate such a result"). "What must be intended is the conduct, not the resulting harm." Welansky, 316 Mass. at 398. It is for this reason that "[t]he Massachusetts doctrine of involuntary manslaughter by wanton or reckless conduct has not required specific foreseeability of the manner of harm or death. The major cases have never imposed proof of such specificity upon the Commonwealth, even though the circumstances . . . may make obvious the nature of danger to a potential victim." Commonwealth v. Power, 76 Mass. App. Ct. 398, 404-405 (2010). See Commonwealth v. Crawford, 430 Mass. 683, 691 (2000) (crime of involuntary manslaughter does not require proof of awareness of particular victim because "[w]antonness and recklessness are determined by the conduct involved, not the resulting harm").

This issue was addressed extensively in Commonwealth v. Levesque, 436 Mass. 443 (2002). In that case, the court

determined that there was sufficient evidence to charge the defendants with involuntary manslaughter in connection with the death of six fire fighters. Id. at 453. The defendants unintentionally had started a fire in a warehouse where they were living by knocking over some candles, were cognizant of the danger posed by the rapid spread of the fire, and did not take adequate steps to report it to authorities. Id. The defendants asserted that they did not act wantonly or recklessly because it was unforeseeable that grievous harm would result to the responding fire fighters. Id. A Superior Court judge agreed, noting that "fire fighters ordinarily do not lose their lives in the course of fighting a fire and that even the fire fighters themselves failed to appreciate the gravity of the danger." Id. Reversing the allowance of the defendants' motion to dismiss, this court held that the Commonwealth was not required to establish specific foreseeability in the manner of the deaths. Id. The court observed that "an uncontrolled fire is inherently deadly to all who may come into contact with it, whether fire fighters or ordinary citizens. The defendants are charged with this knowledge." Id.

Here, having carefully reviewed the grand jury minutes, we conclude that the Commonwealth presented sufficient evidence to establish that the defendant engaged in conduct that created a high degree of likelihood that substantial harm to another

person would result. Among other things, there was testimony that the defendant and an accomplice attempted to rob a taxicab driver in the early morning hours; the defendant was on notice that the taxicab driver was aware of violence in the city that had been directed at taxicab drivers and had taken certain steps to protect himself; the defendant's accomplice choked the taxicab driver from behind with both arms, restricting his ability to breath; and the defendant held a knife against the driver's side, pressing the blade into his body. The combined attack by both robbers against the victim of the robbery created an extremely dangerous situation -- the victim "bouncing" around the taxicab while being strangled and prodded with a knife. Thereafter, the defendant's accomplice several times urged the defendant to stab the driver and to "kill" him, and both robbers then exclaimed, "[W]e're going to do it."

Based on this evidence, the grand jury could have found that the taxicab driver was placed in imminent danger of substantial bodily harm. The same evidence was sufficient to establish that a reasonable person, in similar circumstances, would have recognized the reckless nature of his or her own conduct, and the risk of death or severe bodily harm inherent in such circumstances. A reasonable person would have been aware of the grave danger to another created by an armed robbery by two assailants in the tight confines of a taxicab, where one was

choking the victim while the other held a knife against the victim's side. And a reasonable person surely would have expected that a victim placed in a life-or-death situation would be likely to fight back in some manner in order to save his or her life.

We emphasize that our holding should not be read to create a substitute to the crime of felony-murder labeled as something such as felony-manslaughter. As discussed, the defendant's liability for involuntary manslaughter arises from his wanton or reckless conduct in the course of committing an armed robbery that created a high degree of likelihood that substantial harm to another would result. His conduct is one example of the wide array of affirmative acts or omissions that we have determined are sufficient to support convictions of wanton or reckless involuntary manslaughter. "These cases elucidate that, because wanton or reckless conduct requires a consideration of the likelihood of a result occurring, the inquiry is by its nature entirely fact-specific. The circumstances of the situation dictate whether the conduct is or is not wanton or reckless." Commonwealth v. Carter, 474 Mass 624, 634 (2016). See, e.g., Commonwealth v. Colas, 486 Mass. 831, 840-841 (2021) (charge of wanton or reckless involuntary manslaughter was supported by evidence -- defendant's act of pointing firearm at rival on crowded street -- that "likely would provoke a deadly

response"); Commonwealth v. Michaud, 389 Mass. 491, 496 (1983) (sufficient evidence of recklessness from parents' failure adequately to feed infant or to seek medical care); Commonwealth v. Wallace, 346 Mass. 9, 12 (1963) (evidence was sufficient to warrant finding that defendant's handling of shotgun, which discharged and killed victim, was wanton or reckless).

The mere commission or attempted commission of a felony resulting in a death does not, standing alone, constitute wanton or reckless involuntary manslaughter. In Carrillo, 483 Mass. at 283, for example, we rejected the creation of a per se rule of liability for manslaughter for the crime of unlawful distribution of heroin. We reasoned that "the transfer of heroin to a person addicted to heroin, without more, is [not] sufficient to support a finding of the required element of wanton or reckless conduct." Id. To support a charge of involuntary manslaughter, "[t]he Commonwealth must introduce evidence showing that, considering the totality of the particular circumstances, the defendant knew or should have known that his or her conduct created a high degree of likelihood of substantial harm, such as overdose or death." Id. at 270. In the context of the distribution of heroin, such evidence might include knowledge of unusually potent narcotics, or a specific victim's particular vulnerability. Id. at 271. Likewise, in other contexts involving the commission or

attempted commission of a felony, the Commonwealth is required to prove that a defendant's conduct created a high degree of likelihood that substantial harm to another person would result.

Given the facts presented to the grand jury in this case, and our jurisprudence defining wanton or reckless involuntary manslaughter, the judge properly denied the defendant's motion to dismiss. Our decision in Campbell, 7 Allen at 547-548, did not limit the Commonwealth's ability to seek such charges, nor, by our decision today, have we expanded our definition of involuntary manslaughter.

Order denying motion to dismiss affirmed.