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OPINION OF THE SUPREME
JUDICIAL COURT OF MASSACHUSETTS
(FEBRUARY 6, 2019)

SUPREME JUDICIAL COURT OF
MASSACHUSETTS

COMMONWEALTH

v.

MICHELLE CARTER

SJC-12502

Before: GANTS, C.J., LENK, GAZIANO,
LOWY, BUDD, CYPHER, & KAFKER, JJ.

KAFKER, J.

At age seventeen, Michelle Carter was charged with involuntary manslaughter as a youthful offender for the suicide death of Conrad Roy, age eighteen. In *Commonwealth v. Carter*, 474 Mass. 624, 52 N.E.3d 1054 (2016) (*Carter I*), we affirmed the Juvenile Court judge’s denial of the motion to dismiss the youthful offender indictment, “conclud[ing] that there was probable cause to show that the coercive quality of the defendant’s verbal conduct overwhelmed whatever willpower the eighteen year old victim had to cope with his depression, and that but for the defendant’s admonishments, pressure, and instructions, the victim would not have gotten back into [his] truck and poisoned himself to death.” *Id.* at 635-636. Thereafter,

the defendant waived her right to a jury trial, and the case was tried to a judge in the Juvenile Court over several days. The defendant was convicted as charged and has appealed. We now consider whether the evidence at trial was sufficient to support the judge's finding of proof beyond a reasonable doubt that the defendant committed involuntary manslaughter as a youthful offender, and whether the other legal issues raised or revisited by the defense, including that the defendant's verbal conduct was protected by the First Amendment to the United States Constitution, require reversal of the conviction. We conclude that the evidence was sufficient to support the judge's finding of proof beyond a reasonable doubt that the defendant committed involuntary manslaughter as a youthful offender, and that the other legal issues presented by the defendant, including her First Amendment claim, lack merit. We therefore affirm.¹

FACTS

In *Carter I*, 474 Mass. at 625-630 & nn.3-8, we discussed at length the facts before the grand jury, including the numerous text messages exchanged between the defendant and the victim in the days leading up to the victim's death on July 12, 2014. Viewed in the light most favorable to the Commonwealth, *Commonwealth v. Latimore*, 378 Mass. 671, 676-677, 393 N.E.2d 370 (1979), the evidence supporting the

¹ We acknowledge the amicus briefs submitted by the youth advocacy division of the Committee for Public Counsel Services and the Massachusetts Association of Criminal Defense Lawyers, and by the American Civil Liberties Union and the American Civil Liberties Union of Massachusetts.

defendant's conviction was not substantially different at trial and revealed the following facts.

On July 13, 2014, the victim's body was found in his truck, which was parked in a store parking lot in Fairhaven. He had committed suicide by inhaling carbon monoxide that was produced by a gasoline-powered water pump located in the truck.

The defendant, who lived in Plainville, and the victim, who divided his time between his mother's home in Fairhaven and his father's home in Mattapoisett, first met in 2012, when they were both visiting relatives in Florida. Thereafter, they rarely saw each other in person, but they maintained a long-distance relationship by electronic text messaging² and cellular telephone (cell phone) conversations. A frequent subject of their communications was the victim's fragile mental health, including his suicidal thoughts. Between October 2012 and July 2014, the victim attempted suicide several times by various means, including overdosing on over-the-counter medication, drowning, water poisoning, and suffocation. None of these attempts succeeded, as the victim abandoned each attempt or sought rescue.

At first, the defendant urged the victim to seek professional help for his mental illness. Indeed, in early June 2014, the defendant, who was planning to go to McLean Hospital for treatment of an eating disorder, asked the victim to join her, saying that the professionals there could help him with his depression and that they could mutually support each other. The victim rebuffed these efforts, and the tenor of their

² Voluminous text messages between the defendant and victim—apparently their entire text history—were admitted in evidence.

communications changed. As the victim continued researching suicide methods and sharing his findings with the defendant, the defendant helped plan how, where, and when he would do so,³ and downplayed his fears about how his suicide would affect his family.⁴

³ For example, on July 7, 2014, between 10:57 P.M. and 11:08 P.M., they exchanged the following text messages:

DEFENDANT: “Well there’s more ways to make CO.
Google ways to make it”

VICTIM: “Omg”

DEFENDANT: “What”

VICTIM: “portable generator that’s it”

DEFENDANT: “That makes CO?”

VICTIM: “yeah! It’s an internal combustion engine.”

DEFENDANT: “Do you have one of those?”

VICTIM: “There’s one at work.”

Similarly, on July 11, 2014, at 5:13 P.M., the defendant sent the victim the following text message: “. . . Well in my opinion, I think u should do the generator because I don’t know much about the pump and with a generator u can’t fail”

See Commonwealth v. Carter, 474 Mass. 624, 626 n.4, 52 N.E.3d 1054 (2016) (*Carter I*).

⁴ During the evening of July 11 and morning of July 12, 2014, the victim and the defendant exchanged the following text messages (Note: misspellings in original):

VICTIM: “I have a bad feeling tht this is going to create a lot of depression between my parents/sisters”

[. . .]

DEFENDANT: “I think your parents know you’re in a really bad place. Im not saying they want you to do it, but I honestly feel like they can except it. They

know there's nothing they can do, they've tried helping, everyone's tried. But there's a point that comes where there isn't anything anyone can do to save you, not even yourself, and you've hit that point and I think your parents know you've hit that point. You said you're mom saw a suicide thing on your computer and she didn't say anything. I think she knows it's on your mind, and she's prepared for it"

DEFENDANT: "Everyone will be sad for a while, but they will get over it and move on. They won't be in depression I won't let that happen. They know how sad you are and they know that you're doing this to be happy, and I think they will understand and accept it. They'll always carry u in their hearts"

[. . .]

VICTIM: "i don't want anyone hurt in the process though"

VICTIM: "I meant when they open the door, all the carbon monoxide is gonna come out they can't *see* it or smell it. whoever opens the door"

DEFENDANT: "They will see the generator and know that you died of CO"

[. . .]

VICTIM: "Idk I'm freaking out again" . . .

[. . .]

DEFENDANT: "I thought you wanted to do this. The time is right and you're ready, you just need to do it! You can't keep living this way. You just need to do it like you did last time and not think about it and just do it babe. You can't keep doing this every day"

VICTIM: "I do want to. but like I'm freaking for my family. I guess"

VICTIM: "idkkk"

DEFENDANT: "Conrad. I told you I'll take care of them. Everyone will take care of them to make sure they won't be alone and people will help them get thru it.

She also repeatedly chastised him for his indecision and delay, texting, for example, that he “better not be bull shiting me and saying you’re gonna do this and then purposely get caught” and made him “promise” to kill himself.⁵ The trial judge found that the defen-

We talked about this, they will be okay and accept it.
People who commit suicide don’t think this much
and they just do it”

See Carter I, 474 Mass. at 627 n.5.

⁵ On July 12, 2014, between 4:25 A.M. and 4:34 A.M., they exchanged the following text messages (Note: misspellings in original):

DEFENDANT: “So I guess you aren’t gonna do it then, all that for nothing”

DEFENDANT: “I’m just confused like you were so ready and determined”

VICTIM: “I am gonna eventually”

VICTIM: “I really don’t know what I’m waiting for . . . but I have everything lined up”

DEFENDANT: “No, you’re not, Conrad. Last night was it. You keep pushing it off and you say you’ll do it but u never do. Its always gonna be that way if u don’t take action”

DEFENDANT: “You’re just making it harder on yourself by pushing it off, you just have to do it”

DEFENDANT: “Do u wanna do it now?”

VICTIM: “Is it too late?”

VICTIM: “Idkk it’s already light outside”

VICTIM: “I’m gonna go back to sleep, love you I’ll text you tomorrow”

DEFENDANT: “No? Its probably the best time now because everyone’s sleeping. Just go somewhere in your truck. And no one’s really out right now because it’s an awkward time”

DEFENDANT: “If u don’t do it now you’re never gonna do it”

DEFENDANT: “And u can say you’ll do it tomorrow but you probably won’t”

See Carter I, 474 Mass. at 626 n.4.

At various times between July 4 and July 12, 2014, the defendant and the victim exchanged several similar text messages (Note: misspellings in original):

DEFENDANT: “You’re gonna have to prove me wrong because I just don’t think you really want this. You just keeps pushing it off to another night and say you’ll do it but you never do”

[. . .]

DEFENDANT: “SEE THAT’S WHAT I MEAN. YOU KEEP PUSHING IT OFF! You just said you were gonna do it tonight and now you’re saying eventually”

[. . .]

DEFENDANT: “But I bet you’re gonna be like ‘oh, it didn’t work because I didn’t tape the tube right or something like that’ . . . I bet you’re gonna say an excuse like that”

[. . .]

DEFENDANT: “Do you have the generator?”

VICTIM: “not yet lol”

DEFENDANT: “WELL WHEN ARE YOU GETTING IT”

[. . .]

DEFENDANT: “You better not be bull shiting me and saying you’re gonna do this and then purposely get caught”

[. . .]

DEFENDANT: “You just need to do it Conrad or I’m gonna get you help”

DEFENDANT: “You can’t keep doing this everyday”

dant's actions from June 30 to July 12 constituted wanton or reckless conduct in serious disregard of the victim's well-being, but that this behavior did not cause his death. This and other evidence, however, informed and instructed the judge about the nature of their relationship and the defendant's understanding of "the feelings that he has exchanged with her—his ambiguities, his fears, his concerns," on the next night.

In the days leading to July 12, 2014, the victim continued planning his suicide, including by securing a water pump that he would use to generate carbon monoxide in his closed truck.⁶ On July 12, the victim

VICTIM: "Okay I'm gonna do it today"

DEFENDANT: "Do you promise"

VICTIM: "I promise babe"

VICTIM: "I have to now"

DEFENDANT: "Like right now?"

VICTIM: "where do I go? :("

DEFENDANT: "And u can't break a promise. And just go in a quiet parking lot or something" (emphasis added).

See Carter I, 474 Mass. at 628 n.6.

⁶ During that same time period, the defendant carried out what the prosecutor called a "dry run." On July 10—two days before the victim's suicide—the defendant sent text messages to two friends, stating that the victim was missing, that she had not heard from him, and that his family was looking for him. She sent similar messages to those friends the following day, stating that the victim was still missing and that she was losing hope. In fact, at that time, the defendant was in communication with the victim and knew he was not missing. She also asked a friend in a text message, "Is there any way a portable generator can kill you somehow? Because he said he was getting that and some other tools at the store, and he said he needed to replace the generator at work and fix stuff . . . but he didn't go to work

drove his truck to a local store's parking lot and started the pump. While the pump was operating, filling the truck with carbon monoxide, the defendant and victim were in contact by cell phone. Cell phone records showed that one call of over forty minutes had been placed by the victim to the defendant, and a second call of similar length by the defendant to the victim, during the time when police believe the victim was in his truck committing suicide. There is no contemporaneous record of what the defendant and victim said to each other during those calls.

The defendant, however, sent a text to a friend at 8:02 P.M., shortly after the second call: "he just called me and there was a loud noise like a motor and I heard moaning like someone was in pain, and he wouldn't answer when I said his name. I stayed on the phone for like 20 minutes and that's all I heard." And at 8:25 P.M., she again texted that friend: "I think he just killed himself." She sent a similar text to another friend at 9:24 P.M.: "He called me, and I heard like muffled sounds and some type of motor running, and it was like that for 20 minutes, and he wouldn't answer. I think he killed himself." Weeks later, on September 15, 2014, she texted the first friend again, saying in part:

today so I don't know why he would have got that stuff." In fact, the defendant and the victim had previously discussed the use of a generator to produce carbon monoxide. As the Commonwealth argued at trial, this dry run demonstrated the defendant's motive to gain her friends' attention and, once she had their attention, not to lose it by being exposed as a liar when the victim failed to commit suicide. Arguably, these desires caused her to disregard the clear danger to the victim.

“I failed [the victim] I wasn’t supposed to let that happen and now I’m realizing I failed him. [H]is death is my fault like honestly I could have stopped him I was on the phone with him and he got out of the car because it was working and he got scared and I fucking told him to get back in . . . because I knew he would do it all over again the next day and I couldn’t have him live the way he was living anymore I couldn’t do it I wouldn’t let him.”

The judge found that the victim got out of the truck, seeking fresh air, in a way similar to how he had abandoned his prior suicide attempts. The judge also focused his verdict, as we predicted in *Carter I*, 474 Mass. at 634, on “those final moments, when the victim had gotten out of his truck, expressing doubts about killing himself.” The judge found that when the defendant realized he had gotten out of the truck, she instructed him to get back in, knowing that it had become a toxic environment and knowing the victim’s fears, doubts, and fragile mental state. The victim followed that instruction. Thereafter, the defendant, knowing the victim was inside the truck and that the water pump was operating—the judge noted that she could hear the sound of the pump and the victim’s coughing—took no steps to save him. She did not call emergency personnel, contact the victim’s family,⁷ or instruct him to get out of the truck. The victim

⁷ The defendant eventually texted the victim’s sister, but not until 10:18 P.M., more than two hours after the second lengthy phone call with the victim. In that text, the defendant asked, “Do you know where your brother is?” and did not explain what she knew about the victim.

remained in the truck and succumbed to the carbon monoxide. The judge concluded that the defendant's actions and her failure to act constituted, "each and all," wanton and reckless conduct that caused the victim's death.

DISCUSSION

In *Carter I*, we considered whether there was probable cause for the grand jury to indict the defendant as a youthful offender for involuntary manslaughter, whereas here we consider whether the evidence at trial was sufficient to support her conviction of that offense beyond a reasonable doubt, a much higher standard for the Commonwealth to meet. In *Carter I*, however, we also addressed and resolved several legal principles that govern this case. We rejected the defendant's claim that her words to the victim, without any physical act on her part and even without her physical presence at the scene, could not constitute wanton or reckless conduct sufficient to support a charge of manslaughter. *Carter I*, 474 Mass. at 632-633. Rather, we determined that verbal conduct in appropriate circumstances could "overcome a person's willpower to live, and therefore . . . be the cause of a suicide." *Id.* at 633. We also ruled that "there was ample evidence to establish probable cause that the defendant's conduct was wanton or reckless under either a subjective or objective standard." *Id.* at 635. *See id.* at 631, quoting *Commonwealth v. Pugh*, 462 Mass. 482, 496-497, 969 N.E.2d 672 (2012) (wanton or reckless conduct may be "determined based either on the defendant's specific knowledge or on what a reasonable person should have known in the circumstances"). As we explained, "an ordinary person under the circumstances would have realized the

gravity of the danger posed by telling the victim, who was mentally fragile, predisposed to suicidal inclinations, and in the process of killing himself, to get back in a truck filling with carbon monoxide.” *Carter I, supra* at 635. We further explained that “the defendant—the victim’s girl friend, with whom he was in constant and perpetual contact—on a subjective basis knew that she had some control over his actions.” *Id.* We also rejected the defendant’s claims that the involuntary manslaughter statute, G. L. c. 265, § 13, was unconstitutionally vague as applied to her, *Carter I, supra* at 631 n.11; that her reckless or wanton speech having a direct, causal link to the specific victim’s suicide was protected under the First Amendment or art. 16 of the Massachusetts Declaration of Rights, *Carter I, supra* at 636 n.17; and that her offense did not involve the infliction or threat of serious bodily harm, as required by G. L. c. 119, § 54, the youthful offender statute, *Carter I, supra* at 637 n.19. For the most part, we decline to revisit these legal issues today, as we discern no error in our earlier analysis. With these principles in mind, we turn to the defendant’s arguments on appeal, providing further explication, particularly on the First Amendment claim, where we deem necessary or appropriate.

1. Sufficiency of the Evidence

The defendant argues that her conviction was unsupported by sufficient evidence.⁸ In particular,

⁸ The defendant suggests that she was indicted for involuntary manslaughter based on wanton or reckless conduct, but wrongly convicted based on a wanton or reckless failure to act. In our view, the indictment charging the defendant with manslaughter “by wanton and reckless conduct” subsumed both theories. *See Commonwealth v. Pugh*, 462 Mass. 482, 497, 969 N.E.2d 672 (2012),

she argues that, to the extent her conviction was based on the victim's getting out of the truck and her ordering him back into it, it was improperly based on her after-the-fact statement, in her text message to a friend, that the victim "got out of the [truck] because it was working and he got scared and I fucking told him to get back in," a statement she asserts is uncorroborated. It is true that a conviction cannot be based solely on the defendant's extrajudicial confession. *Commonwealth v. Forde*, 392 Mass. 453, 458, 466 N.E. 2d 510 (1984). The defendant's statement, however, was not uncorroborated. "The corroboration rule requires only that there be some evidence, besides the confession, that the criminal act was committed by someone, that is, that the crime was real and not imaginary." *Id.* Indeed, "in a homicide case, the corroborating evidence need only tend to show that the alleged victim is dead." *Id.*

Here, the defendant's statement was more than adequately corroborated not only by the victim's death but also by text messages exchanged with the victim encouraging him to commit suicide, and by the fact that the defendant and the victim were in voice contact while the suicide was in progress—that is, despite the physical distance between them, the defendant was able to communicate with the victim, hear what was going on in the truck, and give him instructions.

quoting *Commonwealth v. Welansky*, 316 Mass. 383, 399, 55 N.E.2d 902 (1944) ("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'"). Moreover, it is clear from the judge's findings that the conviction was not based solely on a failure to act but also on the defendant's affirmative conduct, namely, directing the victim to get back in the truck.

The trial judge also expressly “looked for independent corroboration of some of the statements that [the defendant] made, to make sure that there was no undue reliance on any one source of evidence.” The judge emphasized that the “photos taken at the scene of the crime, where [the victim’s] truck was located, clearly illustrate the location of the water pump immediately adjacent to where he would have been sitting in the truck, next to his upper torso and his head, thereby giving a good explanation to [the defendant’s description] that the noise was loud within the truck. [The defendant] at that point, therefore, had reason to know that [the victim] had followed her instruction and had placed himself in the toxic environment of that truck.” Clearly, the defendant was not “confessing” to an imaginary crime. In sum, the judge was entitled to credit the defendant’s statement, and the corroborating details, that the victim had in fact gotten out of the truck and that the defendant ordered him back into the truck, ultimately causing his death.

The defendant also argues that the judge did not properly apply the legal principles set forth in *Carter I*. She points out that the judge’s remarks on the record, explaining the guilty verdict, contain no express finding that her words had a “coercive quality” that caused the victim to follow through with his suicide. See *Carter I*, 474 Mass. at 634. However, those remarks were, as the judge stated, not intended as a comprehensive statement of all the facts he found or of all his legal rulings. Moreover, “judges in jury-waived trials are presumed to know and correctly apply the law.” *Commonwealth v. Healy*, 452 Mass. 510, 514, 895 N.E.2d 752 (2008), quoting *Commonwealth*

v. Watkins, 63 Mass. App. Ct. 69, 75, 823 N.E.2d 404 (2005). Finally, and perhaps most importantly, rather than use our formulation, the judge expressly tracked the elements of manslaughter. He found: “She instructs [the victim] to get back into the truck, well knowing of all of the feelings that he has exchanged with her—his ambiguities, his fears, his concerns.” This, the judge found, constituted “wanton and reckless conduct by [the defendant], creating a situation where there is a high degree of likelihood that substantial harm would result to [the victim].”⁹ The judge then further found that this conduct caused the victim’s death beyond a reasonable doubt. His finding of causation in this context, at that precise moment in time, includes the concept of coercion, in the sense of overpowering the victim’s will.

This finding is supported by the temporal distinctions about causation drawn by the judge. Until the victim got out of the truck, the judge described the victim as the cause of his own suicidal actions and reactions. This period of “self-causation” and “self-

⁹ There is no question in this case that the Commonwealth proved beyond a reasonable doubt that the defendant engaged in wanton or reckless conduct, that is, “intentional conduct . . . involv[ing] a high degree of likelihood that substantial harm will result to another.” *Pugh*, 462 Mass. at 496, quoting *Welansky*, 316 Mass. at 399. Both the objective and subjective standards discussed above are satisfied. Given the victim’s mental illness, his previous suicide attempts, and his suicide plans, there can be no doubt that an ordinary person such as the defendant, his girlfriend who constantly communicated with him, would understand the grave danger to his life, and yet she continued to pressure him to follow through with his plan. The difficult issue before us is not whether the defendant’s conduct was wanton or reckless, as this is not a close question, but whether her conduct was the cause of the victim’s death.

help,” which is completely consistent with his prior behavior, ended when he got out of the truck. As the judge explained:

“It is apparent to this Court in reviewing the evidence that [the victim] was struggling with his issues and seeing a way to address them and took significant actions of his own toward that end. His research was extensive. He spoke of it continually. He secured the generator. He secured the water pump. He researched how to fix the generator. He located his vehicle in an unnoticeable area and commenced his attempt by starting the pump.

“However, he breaks that chain of self-causation by exiting the vehicle. He takes himself out of the toxic environment that it has become. This is completely consistent with his earlier attempts at suicide. In October of 2012, when he attempted to drown himself, he literally sought air. When he exited the truck, he literally sought fresh air. And he told a parent of that attempt.

“Several weeks later, in October of 2012 again, he attempts, through the use of pills, to take his life but calls a friend and assistance is sought and treatment secured. That [the victim] may have tried and maybe succeeded another time, after July 12 or 13 of 2014, is of no consequence to this Court’s deliberations.” (Emphasis added.)

The judge found that, once the victim left the truck, the defendant overpowered the victim’s will and thus

caused his death. As the defendant herself explained, and we repeat due to its importance, “[The victim’s] death is my fault like honestly I could have stopped him I was on the phone with him and he got out of the [truck] because it was working and he got scared and I fucking told him to get back in . . . because I knew he would do it all over again the next day and I couldn’t have him live the way he was living anymore I couldn’t do it I wouldn’t let him.”

Although we recognize that legal causation in the context of suicide is an incredibly complex inquiry, we conclude that there was sufficient evidence to support a finding of proof of such causation beyond a reasonable doubt in the instant case. The judge could have properly found, based on this evidence, that the vulnerable, confused, mentally ill, eighteen year old victim had managed to save himself once again in the midst of his latest suicide attempt, removing himself from the truck as it filled with carbon monoxide. But then in this weakened state he was badgered back into the gas-infused truck by the defendant, his girlfriend and closest, if not only, confidant in this suicidal planning, the person who had been constantly pressuring him to complete their often discussed plan, fulfill his promise to her, and finally commit suicide. And then after she convinced him to get back into the carbon monoxide filled truck, she did absolutely nothing to help him: she did not call for help or tell him to get out of the truck as she listened to him choke and die.

In sum, the evidence at trial, in the light most favorable to the Commonwealth, was sufficient to establish the defendant’s guilt beyond a reasonable doubt.

2. Due Process Claims

The defendant argues that she lacked fair notice that she could be convicted of involuntary manslaughter for her role in the victim's suicide¹⁰ and that her conviction therefore violated her right to due process. That is, she argues that the law of involuntary manslaughter is unconstitutionally vague as applied to her conduct. We rejected this argument in *Carter I*, 474 Mass. at 631 n.11, and we remain of the view that the law is not vague. "A statute is unconstitutionally vague if [people] of common intelligence must necessarily guess at its meaning If a statute has been clarified by judicial explanation, however, it will withstand a challenge on grounds of unconstitutionality vagueness." *Id.*, quoting *Commonwealth v. Crawford*, 430 Mass. 683, 689, 722 N.E.2d 960 (2000). "Manslaughter is a common-law crime that has not been codified by statute in Massachusetts." *Carter I, supra*, quoting *Commonwealth v. Rodriguez*, 461 Mass. 100, 106, 958 N.E.2d 518 (2011). It has long been established in our common law that wanton or reckless conduct that causes a person's death constitutes involuntary manslaughter. *See, e.g., Commonwealth v. Campbell*, 352 Mass. 387, 397, 226 N.E.2d 211 (1967), and cases cited ("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"). There is no doubt in

¹⁰ The defendant characterizes her conduct as merely "encouraging" the victim's suicide. As we have discussed at length, however, it is clear from the judge's findings that she did not merely encourage the victim, but coerced him to get back into the truck, causing his death.

this case that the defendant wantonly or recklessly instructed the victim to kill himself, and that her instructions caused his death.

Moreover, in the development of our common law, “conduct similar to that of the defendant has been deemed unlawful.” *Carter I*, 474 Mass. at 631 n.11, citing *Persampieri v. Commonwealth*, 343 Mass. 19, 22-23, 175 N.E.2d 387 (1961). In *Persampieri, supra*, the defendant was charged with murder, and pleaded guilty to manslaughter, after his wife threatened to commit suicide and he taunted her, saying she was “chicken—and wouldn’t do it,” loaded a rifle and handed it to her, and, when she had difficulty firing the rifle, told her to take off her shoes and reach the trigger that way. She did so and killed herself. *Id. at 23*. We held that these facts would “have warranted a jury in returning a verdict of manslaughter.” *Id.* Nor is *Persampieri* the only case in which we upheld a defendant’s conviction based on his participation in a suicide. See *Commonwealth v. Atencio*, 345 Mass. 627, 627-628, 189 N.E.2d 223 (1963) (affirming conviction of involuntary manslaughter arising from game of “Russian roulette”). Indeed, the principle that a defendant might be charged and convicted of a homicide offense merely for “repeatedly and frequently advis[ing] and urg[ing] [a victim] to destroy himself,” with no physical assistance, can be found in centuries-old Massachusetts common law. *Commonwealth v. Bowen*, 13 Mass. 356, 356 (1816). In the *Bowen* case, the defendant was in the adjoining jail cell of the victim, whom the defendant harangued into hanging himself.¹¹

¹¹ The victim committed suicide by hanging hours before he was to be hanged publicly for his own killing of his father. *Commonwealth v. Bowen*, 13 Mass. 356, 356 (1816).

Id. It is true, as the defendant points out, that the defendant in *Bowen*, who was charged with murder for such alleged conduct, was in fact acquitted by the jury. *Id.* at 360-361. But the legal principle that procuring a suicide “by advice or otherwise” may constitute a homicide is clear from the instructions reported in *Bowen*. *Id.* at 359. In sum, our common law provides sufficient notice that a person might be charged with involuntary manslaughter for reckless or wanton conduct, including verbal conduct, causing a victim to commit suicide. The law is not unconstitutionally vague as applied to the defendant’s conduct.¹²

3. Free Speech Claims

The defendant argues that her conviction of involuntary manslaughter violated her right to free speech under the First Amendment and art. 16.¹³ We disagree and thus reaffirm our conclusion in *Carter I* that no constitutional violation results from convicting a defendant of involuntary manslaughter for reckless and wanton, pressuring text messages and phone calls,

¹² The defendant points out that, unlike Massachusetts, several other States, rather than relying on the common law, have enacted statutes prohibiting aiding or assisting suicide and specifying what conduct runs afoul of such statutes. However, the fact that some State Legislatures have chosen to address this problem by statute in no way prevents us from concluding that Massachusetts common law provided the defendant with fair notice that her conduct was prohibited.

¹³ As in *Commonwealth v. Walters*, 472 Mass. 680, 690 n.26, 37 N.E.3d 980 (2015), S.C., 479 Mass. 277, 94 N.E.3d 764 (2018), we apply the same analysis under the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights.

preying upon well-known weaknesses, fears, anxieties and promises, that finally overcame the willpower to live of a mentally ill, vulnerable, young person, thereby coercing him to commit suicide. *Carter I*, 474 Mass. at 636 n.17. We more fully explain our reasoning here.

The crime of involuntary manslaughter proscribes reckless or wanton conduct causing the death of another. The statute makes no reference to restricting or regulating speech, let alone speech of a particular content or viewpoint: the crime is “directed at a course of conduct, rather than speech, and the conduct it proscribes is not necessarily associated with speech” (quotation and citation omitted). *Commonwealth v. Johnson*, 470 Mass 300, 308, 21 N.E.3d 937 (2014). The defendant cannot escape liability just because she happened to use “words to carry out [her] illegal [act].” *Id.* at 309, quoting *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982). *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 93 L. Ed. 834 (1949) (upholding conviction for speech used as “essential and inseparable part” of crime).

Although numerous crimes can be committed verbally, they are “intuitively and correctly” understood not to raise First Amendment concerns. Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265, 279 (1981). *See* K. Greenawalt, *Speech, Crime, and the Uses of Language 6-7* (1989) (listing twenty-one examples of crimes committed using speech). The same is true under art. 16. *See, e.g., Commonwealth v. Disler*, 451 Mass. 216, 222, 224-226, 884 N.E.2d 500 (2008) (defendant could not assert art. 16 defense to conviction of child enticement even though crime could be committed by “words

[spoken or written] and nothing more”); *Commonwealth v. Sholley*, 432 Mass. 721, 727, 739 N.E.2d 236 (2000), *cert. denied*, 532 U.S. 980, 121 S. Ct. 1621, 149 L. Ed. 2d 484 (2001) (“no violation” of art. 16 where defendant was convicted of making threat under G. L. c. 275, § 2). “It has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed” (citation omitted). *Johnson*, 470 Mass. at 309.¹⁴ Indeed, the United States Supreme Court has held that “speech or writing used as an integral part of conduct in violation of a valid criminal statute” is not protected by the First Amendment. *Giboney*, 336 U.S. at 498. Accord *United States v. Stevens*, 559 U.S. 460, 468-469, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010). See *Commonwealth v. Chou*, 433 Mass. 229, 236, 741 N.E.2d 17 (2001) (“true threats” lack First Amendment protection because “purpose is to cause injury rather than to add to, or to comment on, the public discourse”).

The defendant contends nonetheless that prosecuting and convicting her of involuntary suicide effected a content-based restriction on speech that does not withstand strict scrutiny. In particular, she acknowledges the Commonwealth’s compelling interest in pre-

¹⁴ Crimes committed using text messages or other electronic communications are treated no differently. See *Walters*, 472 Mass. at 696 (threat conveyed by “telecommunication device or electronic communication device” would not receive First Amendment or art. 16 protection [citation omitted]); *Commonwealth v. Johnson*, 470 Mass. 300, 312, 21 N.E.3d 937 (2014) (there is no First Amendment protection for electronic communications and Internet postings used to commit harassment).

serving human life but argues that we failed to determine in *Carter I*, 474 Mass. at 636 n.17, that the restriction on speech was narrowly tailored to further that interest. We disagree. The only speech made punishable in *Carter I* was “speech integral to [a course of] criminal conduct,” *Stevens*, 559 U.S. at 468, citing *Giboney*, 336 U.S. at 498, that is, a “systematic campaign of coercion on which the virtually present defendant embarked—captured and preserved through her text messages—that targeted the equivocating young victim’s insecurities and acted to subvert his willpower in favor of her own,” *Carter I, supra*. Other involuntary manslaughter prosecutions and convictions have similarly targeted a course of criminal conduct undertaken through manipulative wanton or reckless speech directed at overpowering the will to live of vulnerable victims. *See Persampieri*, 343 Mass. at 22-23; *Bowen*, 13 Mass. at 359-360.

As the Supreme Court has explained, “From 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas . . . which have never been thought to raise any constitutional problems,” including “speech integral to criminal conduct” (quotations and citations omitted). *Stevens*, 559 U.S. at 468-469. We do not apply the narrow tailoring required by strict scrutiny in these contexts but rather determine whether the speech at issue falls within these “well-defined and narrowly limited classes of speech” (quotation and citation omitted). *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 804, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011). Thus, there is nothing in the prosecution or conviction of the defendant in the instant case, or the prior involuntary manslaughter cases in the

Commonwealth involving verbal criminal conduct, to suggest that the First Amendment has been violated in any way. The only verbal conduct punished as involuntary manslaughter has been the wanton or reckless pressuring of a vulnerable person to commit suicide, overpowering that person's will to live and resulting in that person's death. We are therefore not punishing words alone, as the defendant claims, but reckless or wanton words causing death. The speech at issue is thus integral to a course of criminal conduct and thus does not raise any constitutional problem.

Regardless, even if we were to apply strict scrutiny to the verbal conduct at issue because it might implicate other constitutionally protected speech regarding suicide or the end of life, we would conclude that the restriction on speech here has been narrowly circumscribed to serve a compelling purpose. As we explained in *Carter I*, 474 Mass. at 636, and reemphasize today, this case does not involve the prosecution of end-of-life discussions between a doctor, family member, or friend and a mature, terminally ill adult confronting the difficult personal choices that must be made when faced with the certain physical and mental suffering brought upon by impending death.¹⁵ Nor

¹⁵ In *Carter I*, 474 Mass. at 636, we stated: "It is important to articulate what this case is not about. It is not about a person seeking to ameliorate the anguish of someone coping with a terminal illness and questioning the value of life. Nor is it about a person offering support, comfort, and even assistance to a mature adult who, confronted with such circumstances, has decided to end his or her life. These situations are easily distinguishable from the present case, in which the grand jury heard evidence suggesting a systematic campaign of coercion on which the virtually present defendant embarked—captured and

does it involve prosecutions of general discussions about euthanasia or suicide targeting the ideas themselves. *See Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”). Nothing in *Carter I*, our decision today, or our earlier involuntary manslaughter cases involving verbal conduct suggests that involuntary manslaughter prosecutions could be brought in these very different contexts without raising important First Amendment concerns. *See Commonwealth v. Bigelow*, 475 Mass. 554, 562, 59 N.E.3d 1105 (2016) (“In considering the First Amendment’s protective reach, critical to the examination is the context and content of the speech at issue” [quotation omitted]). We emphasize again, however, that the verbal conduct targeted here and in our past involuntary manslaughter cases is different in kind and not degree, and raises no such concerns. Only the wanton or reckless pressuring of a person to commit suicide that overpowers that person’s will to live has been proscribed. This restriction is necessary to further the Commonwealth’s compelling interest in preserving life. Thus, such a prohibition would survive even strict scrutiny.

4. “Infliction” of Serious Bodily Harm

The defendant argues that her conviction as a youthful offender cannot survive under G. L. c. 119,

preserved through her text messages—that targeted the equivocating young victim’s insecurities and acted to subvert his willpower in favor of her own.”

§ 54, because she did not inflict serious bodily harm on the victim. She argues that the term “infliction” in § 54 requires direct, physical causation of harm, not mere proximate causation, and that from her remote location, she could not have inflicted serious bodily harm on the victim within the meaning of the statute. We reject this unduly narrow interpretation of the statutory language. The youthful offender statute authorizes an indictment against a juvenile who is “alleged to have committed an offense . . . involv[ing] the infliction or threat of serious bodily harm” (emphasis added). G. L. c. 119, § 54. By its terms, the statute requires that the offense involve the infliction of serious bodily harm, not that the defendant herself be the one who directly inflicted it. If we were to interpret the statute to include such a requirement, it is difficult to *see* how a juvenile could be indicted as a youthful offender for, say, hiring a third party to carry out an attack on a victim. It is enough, as we said in *Carter I*, that “involuntary manslaughter in these circumstances inherently involves the infliction of serious bodily harm.” *Carter I*, 474 Mass. at 637 n.19.

5. “Reasonable Juvenile”

The defendant next argues, as she did in *Carter I*, that her actions should have been evaluated under a “reasonable juvenile” standard rather than a “reasonable person” standard.¹⁶ As we said before,

¹⁶ Unlike in *Carter I*, 474 Mass. at 636 n.18, the defendant raised this claim at trial by moving for a required finding of not guilty on this ground (among others). The judge denied the motion without stating his reasons, making it unclear to us whether he rejected a “reasonable juvenile” standard as a matter

“Whether conduct is wanton or reckless is ‘determined based either on the defendant’s specific knowledge or on what a reasonable person should have known in the circumstances If based on the objective measure of recklessness, the defendant’s actions constitute wanton or reckless conduct . . . if an ordinary normal [person] under the same circumstances would have realized the gravity of the danger If based on the subjective measure, *i.e.*, the defendant’s own knowledge, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter [his or her] conduct so as to avoid the act or omission which caused the harm’ (quotations and citation omitted).”

Carter I, 474 Mass. at 631, quoting *Pugh*, 462 Mass. at 496-497. The defendant argues essentially that, when considering a juvenile’s actions under the objective measure of recklessness, we should consider whether an ordinary juvenile under the same circumstances would have realized the gravity of the danger. It is clear from the judge’s findings, however, that he found the defendant’s actions wanton or reckless under the subjective measure, that is, based on her own knowledge of the danger to the victim and on her

of law, determined that the evidence would be sufficient to establish the defendant’s guilt under a “reasonable juvenile” standard, or determined that, regardless of whether an objective “reasonable juvenile” standard was proper, the evidence was sufficient to establish her guilt under a subjective standard. The defendant did not press for a “reasonable juvenile” standard in her closing argument. The Commonwealth does not claim that the issue was not preserved.

choice to run the risk that he would comply with her instruction to get back into the truck. That finding is amply supported by the trial record. Because the defendant's conduct was wanton or reckless when evaluated under the subjective standard, there is no need to decide whether a different objective standard should apply to juveniles.

Moreover, it is clear from the judge's sentencing memorandum that he did in fact consider the defendant's age and maturity when evaluating her actions and that he was familiar with the relevant case law and "mindful" of the general principles regarding juvenile brain development. He noted that on the day of the victim's death, she was seventeen years and eleven months of age and at an age-appropriate level of maturity. Her ongoing contact with the victim in the days leading to his suicide, texting with him about suicide methods and his plans and demanding that he carry out his plan rather than continue to delay, as well as the lengthy cell phone conversations on the night itself, showed that her actions were not spontaneous or impulsive. And, as the judge specifically found, "[h]er age or level of maturity does not explain away her knowledge of the effects of her telling [the victim] to enter and remain in that toxic environment, leading to his death." Where the judge found that the defendant ordered the victim back into the truck knowing the danger of doing so, he properly found that her actions were wanton or reckless, giving sufficient consideration to her age and maturity.

6. Expert Witness

Finally, the defendant argues that the judge wrongly denied her motion in limine to admit expert

testimony by a forensic psychologist. The witness would have testified as to general principles and characteristics of the undeveloped adolescent brain, but not as to the defendant specifically, as he had never examined her. It is true, as the defendant argues, that we have upheld the admission of similar testimony in the past. *See Commonwealth v. Okoro*, 471 Mass. 51, 66, 26 N.E.3d 1092 (2015). But the fact that one judge properly exercised his discretion to admit expert testimony in one case does not mean that another judge abused his discretion by excluding similar testimony in a different case. We have reviewed the voir dire testimony of the defendant's expert witness and conclude that the judge did not abuse his discretion by determining that the proffered testimony would not have aided the finder of fact in the circumstances of this case. Moreover, after the judge ruled on the motion in limine, the defendant waived her right to a jury trial and proceeded before the same judge. Where an experienced judge of the Juvenile Court sat as the finder of fact in the defendant's case, we cannot perceive any prejudice to the defendant in his decision to preclude this expert testimony in the circumstances of this case.

CONCLUSION

The evidence against the defendant proved that, by her wanton or reckless conduct, she caused the victim's death by suicide. Her conviction of involuntary manslaughter as a youthful offender is not legally or constitutionally infirm. The judgment is therefore affirmed.

So ordered.

**DECISION OF THE TRIAL JUDGE,
BRISTOL JUVENILE COURT
(JUNE 16, 2017)**

COMMONWEALTH OF MASSACHUSETTS
BRISTOL JUVENILE COURT
TAUNTON SESSION

COMMONWEALTH OF MASSACHUSETTS

v.

MICHELLE CARTER

Docket No. 15YO0001NE

Before: The Hon. Lawrence MONIZ, Associate Judge

(Court called to order.)

THE COURT OFFICER: Court, all rise.

THE COURT: Good morning, everyone.

THE COURT OFFICER: You may be seated. Court is now in session. Please remain quiet.

THE CLERK: Good morning, Your Honor. June 16, 2017. You have before you the matter of *Commonwealth v. Michelle Carter*, scheduled to (indiscernible) decision on the trial.

THE COURT: All right. So before I begin, I want to thank the members of the media and the members of the public who have been here for the appropriate decorum that they have shown throughout this trial. Please understand, I expect that

same level of decorum today. Should there be any breach of that decorum, you can expect that there will be a harsh response from this judge.

The law does not require that any explanation as to a verdict be given, when the judge is the fact-finder, unless a request for rulings has been made, and that has not been done in this case. Nonetheless, I am of the opinion that some explanation of my verdict is warranted. My comments that follow should not be construed as a complete explanation of my findings as to the facts, my deliberative process or all of the law that has been analyzed and applied by me to the facts as I have found them to be. Rather, they are provided to you to provide some context for the decisions that have been made.

I have essentially divided the evidence in this case into three components. The first component comprises roughly the period of June 29, 2014 through the ending of the text messages between Ms. Carter and Mr. Roy on or about July 12, 2014. The second period commences immediately thereafter and encompasses primarily the phone conversations and activity occurring until the—I'm sorry—occurring from the ending of the text messages through July 13, 2014. But that area of evidentiary consideration is strongly informed by all of the other evidence in this case. The third period is all of the evidence not encompassed in those two areas that I have just described.

This Court first finds that the Commonwealth has proven beyond a reasonable doubt that the actions taken by Ms. Carter as to the period from June 30 to July 12 constituted wanton and reckless

conduct by her, in disregard—in serious disregard of the wellbeing of Mr. Roy.

The Commonwealth has not proven as to that time period that said reckless or wanton behavior caused the death of Mr. Roy. It is apparent to this Court in reviewing the evidence that Mr. Roy was struggling with his issues and seeing a way to address them and took significant actions of his own toward that end. His research was extensive.

He spoke of it continually. He secured the generator. He secured the water pump. He researched how to fix the generator. He located his vehicle in an unnoticeable area and commenced his attempt by starting the pump.

However, he breaks that chain of self-causation by exiting the vehicle. He takes himself out of the toxic environment that it has become. This is completely consistent with his earlier attempts at suicide. In October of 2012, when he attempted to drown himself, he literally sought air. When he exited the truck, he literally sought fresh air. And he told a parent of that attempt.

Several weeks later, in October of 2012 again, he attempts, through the use of pills, to take his life but calls a friend and assistance is sought and treatment secured. That Mr. Roy may have tried and maybe succeeded another time, after July 12 or 13 of 2014, is of no consequence to this Court's deliberations.

Although some have suggested for this case that the legal principles involved are novel, that is not accurate. Approximately 200 years ago a man

in Hampshire County, in the Commonwealth of Massachusetts, an inmate at the Hampshire jail, was charged with causing the murder of the man in the next cell. Case is *Commonwealth v. Bowen*. The law was different in those days but some of the similarities existed.

The person who ended up taking his life in the Bowen case was named Jewett. Jewett in fact hung himself in his jail cell approximately six hours before he was to be publicly hanged for killing his father. Whether Mr. Roy in this case would have taken his life at another time does not control or even inform this Court's decision. In the Bowen case, where they refer to Mr. Jewett, the person who took his life, as the culprit, the Court writes, "The culprit, though under sentence of death, is cheered by hope to the last moment of his existence."

Returning to this case. When Ms. Carter realizes that Mr. Roy has exited the truck, she instructs him to get back into the truck, which she has reason to know is or is becoming a toxic environment inconsistent with human life. She is mindful that the process in the truck will take approximately 15 minutes. Whether that is a true fact is not relevant. What is relevant is that that is her state of mind based upon a text exchanged between she and Mr. Roy during the period of June 30 to July 14.

She instructs Mr. Roy to get back into the truck, well knowing of all of the feelings that he has exchanged with her-his ambiguities, his fears, his concerns. This Court finds that instructing Mr. Roy to get back in the truck constituted willful

and reck—I'm sorry—wanton and reckless conduct by Ms. Carter, creating a situation where there is a high degree of likelihood that substantial harm would result to Mr. Roy.

Ms. Carter knows, through her own admission, that Mr. Roy has followed her instruction. As she indicates in various text messages, subsequently created, to some of her friends, she indicates that she can hear him coughing and she can hear the loud noise of the motor. The Court notes that I looked for independent corroboration of some of the statements that Ms. Carter made, to make sure that there was no undue reliance on any one source of evidence.

The photos taken at the scene of the crime, where Mr. Roy's truck was located, clearly illustrate the location of the water pump immediately adjacent to where he would have been sitting in the truck, next to his upper torso and his head, thereby giving a good explanation to Ms. Carter's definition that the noise was loud within the truck. Ms. Carter at that point, therefore, had reason to know that Mr. Roy had followed her instruction and had placed himself in the toxic environment of that truck.

At this point in the Court's analysis, the Court took direction from a case *Commonwealth v. Levesque*. In *Commonwealth v. Levesque*, it is indicated that "where one's actions create a life-threatening risk to another, there is a duty to take reasonable steps to alleviate the risk. The reckless failure to fulfill this duty can result in a charge of manslaughter."

Knowing that Mr. Roy is in the truck, knowing the condition of the truck, knowing—or at least having a state of mind that 15 minutes would pass, Ms. Carter takes no action in a furtherance of the duty that she has created by instructing Mr. Roy to get back into the truck. She admits in a subsequent text that she did nothing. She did not call the police or Mr. Roy's family.

She knew his location, again, according to a text that she sent, as being at the Kmart plaza. According to one of her emails, and other credible evidence—I'm sorry. According to other credible evidence—the police officers who testified—the location where Mr. Roy's truck was located was approximately one half mile from the public services office of Fairhaven, which included both the fire department and the police department.

She did not notify his mother or his sister, even though just several days before that she had requested their phone numbers from Mr. Roy and had obtained them, and had opened a line of communication with Camdyn Roy on, I believe, July 10, but just a few days before the events in question. She called no one.

And finally, she did not issue a simple additional instruction—get out of the truck.

Consequently, this Court has found that the Commonwealth has proven beyond a reasonable doubt that Ms. Carter's actions—and also her failure to act, where she had a self-created duty to Mr. Roy, since she had put him into that toxic environment—constituted, each and all, wanton and reckless conduct.

And this Court further finds that the Commonwealth has proven beyond a reasonable doubt that said conduct caused the death of Mr. Roy.

This Court does not find that the intentionality necessary for such wanton and reckless conduct is obviated by Dr. Breggin's theory of involuntary intoxication in that the Court did not find that analysis credible.

Ms. Carter, please stand.

This Court, having reviewed the evidence and applied the law thereto, now finds you guilty on the indictment charging you with the involuntary manslaughter of the person Conrad Roy, III.

This Court further finds that the Commonwealth has proven beyond a reasonable doubt that you are a youthful offender, and you are adjudged so at this time.

You may be seated.

That verdict is now recorded, and it is in writing as well.

Commonwealth, do you wish to be heard?

MS. FLYNN: The Commonwealth moves for sentencing, Your Honor.

THE COURT: Pardon me?

MS. FLYNN: The Commonwealth moves for sentencing.

THE COURT: Sentencing is not appropriate at this time. Chapter 119, Section 58 requires that a presentencing report be prepared and given to the judge before sentencing can be imposed.

MS. FLYNN: Understood, Your Honor. With that, the Commonwealth would ask that Ms. Carter's bail be revoked and she be taken into custody.

THE COURT: And the basis for that request?

MS. FLYNN: She's now been convicted of a felony, and clearly she's a danger not only to others but, based on the testimony, to herself.

THE COURT: All right. Thank you.

Mr. Cataldo, Mr. Madera, do you wish to be heard on the Commonwealth's request?

MR. CATALDO: Yes. I ask you not to revoke the bail, Your Honor. This case has been pending for a couple of years now. She's showed up each and every time, she's obeyed the conditions—all the conditions that she had of her release, and I do not think that the evidence shows that she is a danger to the public if she's released.

THE COURT: Mr. Cataldo, are you willing to inquire of your client as to whether she has a passport?

MR. CATALDO: Yes. One moment, please.

(Ms. Carter confers with Counsel.)

MR. CATALDO: No, she does not have a passport, Your Honor.

THE COURT: All right. The Court notes that, as Mr. Cataldo points out, this case has a long history. To my knowledge, Ms. Carter has never failed to appear. When she was interviewed by the police at the King Philip Regional High School, she was cooperative with that interview. She's cooperative with allowing the police into her home. I believe that revised conditions of bail release will suffice

to secure the concerns of the Commonwealth as well as to allow for the completion of the sentencing report before it is done.

Consequently, Mr. Cataldo, assuming that your client accepts the following conditions, I will allow her to remain on bail. She will have no contact with any member of the Roy family or any of the witnesses who have testified in this case. And by no contact, obviously I mean no texting, no Facebook, no Snapchat—none of those things that provide for any type of direct or indirect communication, including of course anything through a third party.

She shall not apply for nor obtain a passport. She shall not leave the Commonwealth of Massachusetts except by further order of this Court. But I do not restrict that to just me, in the event I am not available. A request may be made of any judge who is sitting here in the Juvenile Court.

Commonwealth, recognizing the Court's position on this, do you have any other requests as to additional bail conditions of release?

MS. FLYNN: No, thank you, Your Honor.

THE COURT: All right. Okay. I'm going to ask that a probation sentencing report be provided by July 21. Can that be done?

MS. TAYLOR: Yes, Your Honor.

THE COURT: Thank you very much, Ms. Taylor.

I want the attorneys to understand that it is the position of this judge that sentencing reports prepared by the Probation Department are for the

judge. In fairness, since they—I give them careful reflection in coming to a sentencing determination. I will allow the attorneys, as well as any necessary individuals within the District Attorney’s Office, to be provided with one copy that may be read by those individuals that I have just identified. And that, Mr. Cataldo, you, Mr. Madera and your legal defense team, may similarly be provided with one copy.

It is not a public document. It is not filed with the clerk’s office, and there is no public access to that document. So you are prohibited from disseminating any of the information contained in that sentencing report to any individual other than within your own defense or prosecution team.

Now, that being done on July 21, I would like to *see* if we could schedule a sentencing hearing perhaps for the week of July 31, subject, of course, to the respect that I have for people’s vacations, or the first week in August.

MR. CATALDO: August 3, please?

THE COURT: I’m sorry, August 3?

MR. CATALDO: August 3.

THE COURT: What day is that. I don’t have—

MR. CATALDO: A Thursday.

THE COURT: Thursday. Is that okay, Madam Clerk?

THE CLERK: That’s fine, Judge.

THE COURT: All right. Then this matter will stand continued to August 3 for a sentencing hearing. We’ll be in recess until that date.

Counsel, I have a copy of the verdict for all of you, if you'd like it.

MS. FLYNN: Thank you, Your Honor.

MS. RAYBURN: Thank you, Your Honor. Thank you, Madam

Clerk. Thank you, Mr. Clerk.

THE COURT: Thank you very much.

THE COURT OFFICER: All rise.

(Court adjourned.)

**VERDICT OF THE TRIAL JUDGE,
BRISTOL JUVENILE COURT
(JUNE 16, 2017)**

COMMONWEALTH OF MASSACHUSETTS
BRISTOL JUVENILE COURT
TAUNTON SESSION

COMMONWEALTH

v.

MICHELLE CARTER

Docket No. 15YO0001NE

This Court, having considered and weighed all of the evidence presented, and having applied the laws of the Commonwealth of Massachusetts to said evidence, now finds the Defendant, Michelle Carter, guilty on the indictment charging her with involuntary manslaughter of Conrad Roy, III.

This Court further finds, as to said indictment, that the Commonwealth has proven, beyond a reasonable doubt, that Michelle Carter is a youthful offender, as that term is defined in G.L c 119 s 52, and she is adjudged to be a youthful offender on this date.

App.42a

By the Court

/s/ Lawrence Moniz

Associate Justice

Dated: June 16, 2017

cc: Attorneys Rayburn, Flynn, Cataldo, and Madera

A true copy

Attest /s/ {illegible}

Magistrate

OPINION OF THE SUPREME
JUDICIAL COURT OF MASSACHUSETTS
(JULY 1, 2016)

SUPREME JUDICIAL COURT OF
MASSACHUSETTS

COMMONWEALTH

v.

MICHELLE CARTER

SJC-12043

Before: GANTS, C.J., SPINA, CORDY,
BOTSFORD, DUFFLY, LENK, & HINES, JJ.

CORDY, J.

On February 6, 2015, the defendant, Michelle Carter, was indicted as a youthful offender under G. L. c. 119, § 54, on a charge of involuntary manslaughter after she, at the age of seventeen, encouraged Conrad Roy (the victim), then eighteen years of age, to commit suicide. To indict a juvenile as a youthful offender, the grand jury must hear evidence establishing probable cause that (1) the juvenile is between the ages of fourteen and eighteen at the time of the underlying offense; (2) the underlying offense, if committed by an adult, would be punishable by imprisonment in State prison; and (3) the underlying offense involves the infliction or threat of serious bodily harm. G. L. c. 119, § 54. The defendant moved in the Juvenile Court

to dismiss the youthful offender indictment, arguing that the Commonwealth failed to present the grand jury with sufficient evidence of involuntary manslaughter and that the defendant's conduct did not involve the infliction or threat of serious bodily harm. The motion was denied.

The principal question we consider in this case is whether the evidence was sufficient to warrant the return of an indictment for involuntary manslaughter where the defendant's conduct did not extend beyond words. We conclude that, on the evidence presented to the grand jury, the verbal conduct at issue was sufficient and, because a conviction of involuntary manslaughter is punishable by imprisonment in State prison and inherently involves the infliction of serious bodily harm, the grand jury properly returned an indictment under the youthful offender statute. Accordingly, we affirm the order of the Juvenile Court.¹

1. Background

The grand jury heard evidence from four witnesses over the course of three days. That evidence, viewed in the light most favorable to the Commonwealth, *see Commonwealth v. Moran*, 453 Mass. 880, 885, 906 N.E.2d 343 (2012), included the following:

On the afternoon of July 13, 2014, an officer with the Fairhaven police department located the deceased in his truck, parked in a store parking lot. The medical examiner concluded that the victim had died after inhaling carbon monoxide that was produced by a

¹ We acknowledge the amicus brief submitted by the Youth Advocacy Division of the Committee for Public Counsel Services and the American Civil Liberties Union of Massachusetts.

gasoline powered water pump located in the truck. The manner of death was suicide.

The victim had been receiving treatment for mental health issues since 2011. In 2013, the victim attempted to commit suicide by overdosing on acetaminophen. A friend saved his life by contacting emergency services.

During the course of the investigation into the victim's suicide, a police review of his recent electronic communications caused them to further explore his relationship with the defendant. The victim and the defendant met in 2011 and had been dating at various times during that period, including at the time of the victim's death. Because they did not live in the same town, the majority of their contact took place through the exchange of voluminous text messages and cellular telephone calls.² The grand jury heard testimony and were presented with transcripts concerning the content of those text messages in the minutes, days, weeks, and months leading up to the victim's suicide. The messages revealed that the defendant was aware of the victim's history of mental illness, and of his previous suicide attempt, and that much of the communication between the defendant and the victim focused on suicide. Specifically, the defendant encouraged the victim to kill himself,³ instructed him as to when and

² In a written memorandum of decision, the judge stated that, although the defendant and the victim rarely were in the same physical location, "[t]he rapidity of the[ir] electronic exchanges was almost immediate, similar to a conversation."

³ On July 8, 2014, between 8:09 P.M. and 8:18 P.M., the defendant and victim exchanged the following text messages:

how he should kill himself,⁴ assuaged his concerns over killing himself,⁵ and chastised him when he

DEFENDANT: “So are you sure you don’t wanna [kill yourself] tonight?”

VICTIM: “what do you mean am I sure?”

DEFENDANT: “Like, are you definitely not doing it tonight?”

VICTIM: “Idk yet I’ll let you know”

DEFENDANT: “Because I’ll stay up with you if you wanna do it tonight”

VICTIM: “another day wouldn’t hurt”

DEFENDANT: “You can’t keep pushing it off, tho, that’s all you keep doing”

⁴ The defendant helped the victim determine the method he eventually used to kill himself. On July 7, 2014, between 10:57 P.M. and 11:04 P.M., they exchanged the following text messages:

DEFENDANT: “Well there’s more ways to make CO. Google ways to make it. . . .”

VICTIM: “Omg”

DEFENDANT: “What”

VICTIM: “portable generator that’s it”

On July 11, 2014, at 5:13 P.M., the defendant sent the victim the following text message: “. . . Well in my opinion, I think u should do the generator because I don’t know much about the pump and with a generator u can’t fail”

On July 12, 2014, between 4:25 A.M. and 4:34 A.M., they exchanged the following text messages:

DEFENDANT: “So I guess you aren’t gonna do it then, all that for nothing”

DEFENDANT: “I’m just confused like you were so ready and determined”

VICTIM: “I am gonna eventually”

VICTIM: "I really don't know what I'm waiting for . . . but I have everything lined up"

DEFENDANT: "No, you're not, Conrad. Last night was it. You keep pushing it off and you say you'll do it but u never do. Its always gonna be that way if u don't take action"

DEFENDANT: "You're just making it harder on yourself by pushing it off, you just have to do it"

DEFENDANT: "Do u wanna do it now?"

VICTIM: "Is it too late?"

VICTIM: "Idkk it's already light outside"

VICTIM: "I'm gonna go back to sleep, love you I'll text you tomorrow"

DEFENDANT: "No? Its probably the best time now because everyone's sleeping. Just go somewhere in your truck. And no one's really out right now because it's an awkward time"

DEFENDANT: "If u don't do it now you're never gonna do it"

DEFENDANT: "And u can say you'll do it tomorrow but you probably won't"

⁵ During the evening of July 11, 2014, and morning of July 12, 2014, the victim and the defendant exchanged the following text messages:

VICTIM: "I'm just to sensitive. I want my family to know there was nothing they could do. I am entrapped in my own thoughts"

VICTIM: "like no I would be happy if they had no guilt about it. because I have a bad feeling tht this is going to create a lot of depression between my parents/sisters"

VICTIM: "i'm overthinking everything . . . fuck. I gotta stop and just do it"

DEFENDANT: "I think your parents know you're in a really bad place. Im not saying they want you to do it, but I honestly feel like they can except it. They

know there's nothing they can do, they've tried helping, everyone's tried. But there's a point that comes where there isn't anything anyone can do to save you, not even yourself, and you've hit that point and I think your parents know you've hit that point. You said your mom saw a suicide thing on your computer and she didn't say anything. I think she knows it's on your mind and she's prepared for it"

DEFENDANT: Everyone will be sad for a while, but they will get over it and move on. They won't be in depression I won't let that happen. They know how sad you are and they know that you're doing this to be happy, and I think they will understand and accept it. They'll always carry u in their hearts"

[. . .]

VICTIM: "i don't want anyone hurt in the process though"

VICTIM: "I meant when they open the door, all the carbon monoxide is gonna come out they can't see it or smell it. whoever opens the door"

DEFENDANT: "They will see the generator and know that you died of CO. . . ."

[. . .]

VICTIM: "hey can you do me a favor"

DEFENDANT: "Yes of course"

VICTIM: "just be there for my family :)"

DEFENDANT: "Conrad, of course I will be there for your family. I will help them as much as I can to get thru this, ill tell them about how amazing their son/brother truly was"

[. . .]

VICTIM: "Idk I'm freaking out again"

VICTIM: "I'm overthinking"

DEFENDANT: "I thought you wanted to do this. The time is right and you're ready, you just need to do it! You

delayed doing so.⁶ The theme of those text messages can be summed up in the phrase used by the defend-

can't keep living this way. You just need to do it like you did last time and not think about it and just do it babe. You can't keep doing this every day"

VICTIM: "I do want to. but like I'm freaking for my family. I guess"

VICTIM: "idkkk"

DEFENDANT: "Conrad. I told you I'll take care of them. Everyone will take care of them to make sure they won't be alone and people will help them get thru it. We talked about this, they will be okay and accept it. People who commit suicide don't think this much and they just do it"

⁶ At various times between July 4, 2014, and July 12, 2014, the defendant and the victim exchanged several text messages:

DEFENDANT: "You're gonna have to prove me wrong because I just don't think you really want this. You just keeps pushing it off to another night and say you'll do it but you never do"

[. . .]

DEFENDANT: "SEE THAT'S WHAT I MEAN. YOU KEEP PUSHING IT OFF! You just said you were gonna do it tonight and now you're saying eventually. . . ."

[. . .]

DEFENDANT: "But I bet you're gonna be like 'oh, it didn't work because I didn't tape the tube right or something like that' . . . I bet you're gonna say an excuse like that"

[. . .]

DEFENDANT: "Do you have the generator?"

VICTIM: "not yet lol"

DEFENDANT: "WELL WHEN ARE YOU GETTING IT"

ant four times between July 11 and July 12, 2014 (the day on which the victim committed suicide): “You just [have] to do it.”

Cellular telephone records that were presented to the grand jury revealed that the victim and defendant also had two cellular telephone conversations at the time during which police believe that the victim was in his truck committing suicide.⁷ The content of those cellular telephone conversations is only available as reported by the defendant to her friend, Samantha Boardman. After the victim’s death, the defendant sent a text message to Boardman explaining that, at one point during the suicide, the victim got out of his

[. . .]

DEFENDANT: “You better not be bull shiting me and saying you’re gonna do this and then purposely get caught”

[. . .]

DEFENDANT: “You just need to do it Conrad or I’m gonna get you help”

DEFENDANT: “You can’t keep doing this everyday”

VICTIM: “Okay I’m gonna do it today”

DEFENDANT: “Do you promise”

VICTIM: “I promise babe”

VICTIM: “I have to now”

DEFENDANT: “Like right now?”

VICTIM: “where do I go? :(”

DEFENDANT: “And u can’t break a promise. And just go in a quiet parking lot or something” (emphasis added).

⁷ One call, at 6:28 P.M. on July 12, came from the victim’s cellular telephone and the other, at 7:12 P.M., came from the defendant’s cellular telephone. Each call lasted over forty minutes.

truck because he was “scared,” and the defendant commanded him to get back in.⁸

It was apparent that the defendant understood the repercussions of her role in the victim’s death. Prior to his suicide, the defendant sought (apparently unsuccessfully) to have the victim delete the text messages between the two, and after learning that the police were looking through the victim’s cellular telephone, the defendant sent the following text message to Boardman: “Sam, [the police] read my messages with him I’m done. His family will hate me and I can go to jail.” During the investigation, and after cross-referencing the text messages in the defendant’s cellular telephone and those in the victim’s cellular telephone, the police discovered that the defendant had erased certain text messages between her and the victim. The defendant also lied to police about the content of her conversations with the victim. Finally, the defendant acknowledged in a text message to Boardman that she could have stopped the victim from committing suicide: “I helped ease him into it and told him it was okay, I was talking to him on the phone when he did it I could have easily stopped him or called the police but I didn’t.”

Based on the foregoing evidence, the Commonwealth successfully sought to indict the defendant for involuntary manslaughter, as a youthful offender,

⁸ The text message to Samantha Boardman, in relevant part, stated: “Sam, [the victim’s] death is my fault like honestly I could have stopped him I was on the phone with him and he got out of the [truck] because it was working and he got scared and I fucking told him to get back in Sam because I knew he would do it all over again the next day and I couldnt have him live the way he was living anymore I couldnt do it I wouldnt let him.”

asserting that the defendant's wanton or reckless conduct was the cause of the victim's death. After a judge of the Juvenile Court denied the defendant's motion to dismiss, the defendant filed a petition for relief under G. L. c. 211, § 3. On February 1, 2016, a single justice of this court reserved and reported the case to the full court.

2. Discussion

“Ordinarily, a ‘court will not inquire into the competency or sufficiency of the evidence before the grand jury.’” *Commonwealth v. Rex*, 469 Mass. 36, 39, 11 N.E.3d 1060 (2014), quoting *Commonwealth v. Robinson*, 373 Mass. 591, 592, 368 N.E.2d 1210 (1977). However, in *Commonwealth v. McCarthy*, 385 Mass. 160, 163, 430 N.E.2d 1195 (1982), we recognized a limited exception for when the grand jury “fail[] to hear any evidence of criminal activity by the defendant.” “At the very least, the grand jury must hear enough evidence to establish the identity of the accused and to support a finding of probable cause to arrest the accused for the offense charged” (footnote omitted). *Rex, supra* at 40. “Probable cause requires sufficient facts to warrant a person of reasonable caution in believing that an offense has been committed . . . ; this standard requires considerably less than that which is required to warrant a finding of guilt” (citations omitted). *Commonwealth v. Levesque*, 436 Mass. 443, 447, 766 N.E.2d 50 (2002).

a. Involuntary manslaughter⁹

Involuntary manslaughter can be proved under two theories, either (1) wanton or reckless conduct or (2) wanton or reckless failure to act. *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 456 Mass. 826, 832, 926 N.E.2d 206 (2010). The indictment was returned

⁹ The Model Jury Instructions on Homicide 73 (2013) define “[i]nvoluntary manslaughter” as “an unlawful killing unintentionally caused by wanton and reckless conduct.” Wanton or reckless conduct

“is conduct that creates a high degree of likelihood that substantial harm will result to another. It is conduct involving a grave risk of harm to another that a person undertakes with indifference to or disregard of the consequences of such conduct. Whether conduct is wanton and reckless depends either on what the defendant knew or how a reasonable person would have acted knowing what the defendant knew. If the defendant realized the grave risk created by his conduct, his subsequent act amounts to wanton and reckless conduct whether or not a reasonable person would have realized the risk of grave danger. Even if the defendant himself did not realize the grave risk of harm to another, the act would constitute wanton and reckless conduct if a reasonable person, knowing what the defendant knew, would have realized the act posed a risk of grave danger to another. It is not enough for the Commonwealth to prove the defendant acted negligently, that is, in a manner that a reasonably careful person would not have acted. The Commonwealth must prove that the defendant’s actions went beyond negligence and amounted to wanton and reckless conduct as . . . defined”

Id. at 76-79. The 2016 proposed model jury instructions are substantially similar in content to the 2013 model jury instructions.

on the basis of the defendant's wanton or reckless conduct.¹⁰

Wanton or reckless conduct is “intentional conduct . . . involv[ing] a high degree of likelihood that substantial harm will result to another.” *Commonwealth v. Pugh*, 462 Mass. 482, 496, 969 N.E.2d 672 (2012), quoting *Commonwealth v. Welansky*, 316 Mass. 383, 399, 55 N.E.2d 902 (1944). Whether conduct is wanton or reckless is

“determined based either on the defendant’s specific knowledge or on what a reasonable person should have known in the circumstances. . . . If based on the objective measure of recklessness, the defendant’s actions constitute wanton or reckless conduct . . . if an ordinary normal [person] under the same circumstances would have realized the gravity of the danger. . . . If based on the subjective measure, i.e., the defendant’s own knowledge, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter [his or her] conduct so as to avoid the act or omission which caused the harm” (quotations and citations omitted).

Pugh, supra at 496-497.

¹⁰ Our case law uses the phrases “wanton and reckless conduct” and “wanton or reckless conduct” interchangeably. *See, e.g., Commonwealth v. Pugh*, 462 Mass. 482, 496-497, 969 N.E.2d 672 (2012).

b. Sufficiency of the Evidence Presented to the Grand Jury¹¹

¹¹ Before we consider whether the grand jury heard testimony sufficient to warrant an indictment against the defendant for involuntary manslaughter, we address her argument that G. L. c. 265, § 13 (punishing involuntary manslaughter), is unconstitutionally vague as applied to her. Specifically, the defendant argues that no one of ordinary intelligence—never mind a juvenile—would understand that encouraging suicide is prosecutable under existing law.

A criminal statute must be “sufficiently explicit to give clear warning as to proscribed activities.” *Commonwealth v. Orlando*, 371 Mass. 732, 734, 359 N.E.2d 310 (1977). “A statute is unconstitutionally vague if men of common intelligence must necessarily guess at its meaning. . . . If a statute has been clarified by judicial explanation, however, it will withstand a challenge on grounds of unconstitutional vagueness” (quotation and citation omitted). *Commonwealth v. Crawford*, 430 Mass. 683, 689, 722 N.E.2d 960 (2000). “Where a statute’s literal scope . . . is capable of reaching expression sheltered by the First Amendment [to the United States Constitution], the [vagueness] doctrine demands a greater degree of specificity than in other contexts” (citation omitted). *Commonwealth v. Abramms*, 66 Mass. App. Ct. 576, 581, 849 N.E.2d 867 (2006).

The crime the defendant is charged with is neither objectively nor subjectively vague as applied to the defendant. “Manslaughter is a common-law crime that has not been codified by statute in Massachusetts” (citation omitted). *Commonwealth v. Rodriguez*, 461 Mass. 100, 106, 958 N.E.2d 518 (2011). General Laws c. 265, § 13, does not describe the crime; instead, it sets out only the punishment, while the elements of the crime are created as part of the common law. Under common law, conduct similar to that of the defendant has been deemed unlawful, *see Persampieri v. Commonwealth*, 343 Mass. 19, 22-23, 175 N.E.2d 387 (1961) (jury warranted in convicting defendant of involuntary manslaughter where he provided wife with gun, taunted her, and encouraged her to commit suicide, resulting in her killing herself), and it is therefore not objectively vague.

The Commonwealth bore the burden of presenting the grand jury with sufficient evidence to support a finding of probable cause that the defendant's conduct (1) was intentional;¹² (2) was wanton or reckless; and (3) caused the victim's death. *Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832.

The defendant argues that, because she neither was physically present when the victim killed himself nor provided the victim with the instrument with which he killed himself, she did not cause his death by wanton or reckless conduct.¹³ She maintains that verbally encouraging someone to commit suicide, no matter how forcefully, cannot constitute wanton or reckless conduct. Effectively, the argument is that verbal conduct can never overcome a person's willpower

On a subjective basis, the evidence presented by the Commonwealth showed that the defendant was personally aware that her conduct was both reprehensible and punishable: the defendant asked the victim to delete the text messages between the two of them, deleted several of those messages from her own cellular telephone, and, after police began investigating the victim's cellular telephone, lied about her involvement and told her friend that, if the police uncovered the text messages between her and the victim, she could go to jail. The charge of involuntary manslaughter is not vague as applied to the defendant.

¹² Viewed in the light most favorable to the Commonwealth, there was evidence that the defendant intended to pressure the victim into killing himself. The defendant told her friend, Samantha Boardman, that she "couldn't have [the victim] live the way he was living anymore. [She] couldn't do it. [She] wouldn't let him."

¹³ Although not physically present when the victim committed suicide, the constant communication with him by text message and by telephone leading up to and during the suicide made the defendant's presence at least virtual.

to live, and therefore cannot be the cause of a suicide. We disagree.

We have never required in the return of an indictment for involuntary manslaughter that a defendant commit a physical act in perpetrating a victim's death.¹⁴ We also never have had occasion to consider such an indictment against a defendant on the basis of words alone. This is not, however, the first time that we have contemplated the charge of involuntary manslaughter against a defendant where the death of the victim is self-inflicted. *See, e.g., Commonwealth v. Atencio*, 345 Mass. 627, 189 N.E.2d 223 (1963); *Persampieri v. Commonwealth*, 343 Mass. 19, 175 N.E.2d 387 (1961).

At issue in *Atencio* was a “game” of “Russian roulette” played by the two defendants, *Atencio* and *Marshall*, and the deceased. *Atencio, supra* at 628. *Marshall* took the gun first, pointed it at his own head, and pulled the trigger; nothing happened. *Id.* at 628-629. He passed the gun to *Atencio*, who also pointed the gun at his own head and pulled the trigger, again with no result. *Id.* at 629. *Atencio* then passed the gun to the deceased; when he pointed it at his own head and pulled the trigger, “[t]he cartridge exploded, and he fell over dead.” *Id.*

In affirming the involuntary manslaughter convictions against both defendants, we reasoned that

¹⁴ Physical acts are certainly one means by which the Commonwealth can show the commission prong of involuntary manslaughter. *See Pugh*, 462 Mass. at 497. However, the defendant does not point to—and our research has not uncovered—any case in which physical acts have been made a prerequisite of involuntary manslaughter.

“the Commonwealth had an interest that the deceased should not be killed by the wanton or reckless conduct of himself and others” (emphasis added). *Id.* “Such conduct could be found in the concerted action and cooperation of the defendants in helping to bring about the deceased’s foolish act,” *id.*, as “[i]t would not be necessary that the defendants force the deceased to play or suggest that he play.” *Id.* at 630. We concluded that it did not matter that Atencio was the one who handed the gun to the deceased, as opposed to Marshall, affirming both defendants’ convictions. *Id.* Indeed, had the deceased been the first to participate in the “game,” and killed himself before either Atencio or Marshall touched the gun, his acts would still have been imputable to the defendants. *Id.* It was, instead, the atmosphere created in the decision to play the “game” that caused the deceased to shoot himself, as there was “mutual encouragement” to participate. *Id.*

In *Persampieri*, 343 Mass. at 22, the defendant told his wife that he intended to divorce her. She threatened to commit suicide. *Id.* The defendant, knowing that the victim had already attempted suicide twice, said she was “chicken—and wouldn’t do it.” *Id.* When she retrieved a .22 caliber rifle, he helped her to load it and handed it to her, noting that the safety was off. *Id.* With the gun barrel on the floor, the victim struggled to pull the trigger. *Id.* at 23. The defendant told her that if she took off her shoe she could reach the trigger, at which point she successfully shot and killed herself. *Id.* We concluded that the jury were warranted in returning a verdict of involuntary manslaughter based on the theory of wanton or reckless conduct, *id.*, noting that the

defendant, “instead of trying to bring [the victim] to her senses, taunted her, told her where the gun was, loaded it for her, saw that the safety was off, and told her the means by which she could pull the trigger. He thus showed a reckless disregard of his wife’s safety and the possible consequences of his conduct.”
Id.

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. We need not—and indeed cannot—define where on the spectrum between speech and physical acts involuntary manslaughter must fall. Instead, the inquiry must be made on a case-by-case basis.

Here, the particular circumstances of the defendant’s relationship with the victim may have caused her verbal communications with him in the last minutes of his life on July 12, 2014, to carry more weight than mere words, overcoming any independent will to live he might have had. It is in those final moments, when the victim had gotten out of his truck, expressing doubts about killing himself, on which a verdict in this case may ultimately turn. In that moment of equivocation, the victim could have continued to delay his death, perhaps attempting suicide again at a later date, or perhaps seeking treatment; or he could have gotten back into the truck and followed through on his suicide. The grand jury heard that the victim, after the defendant commanded him to “get back in,” obeyed, returning

to the truck, closing the door, and succumbing to the carbon monoxide.

In our view, the coercive quality of that final directive was sufficient in the specific circumstances of this case to support a finding of probable cause. Those circumstances included the defendant's virtual presence at the time of the suicide, the previous constant pressure the defendant had put on the victim, and his already delicate mental state.¹⁵ In sum, there was ample evidence to establish probable cause that the defendant's conduct was wanton or reckless, under either a subjective or an objective standard. The grand jury could have found that an ordinary person under the circumstances would have realized the gravity of the danger posed by telling the victim, who was mentally fragile, predisposed to suicidal inclinations, and in the process of killing himself, to get back in a truck filling with carbon monoxide and "just do it." *See Levesque*, 436 Mass. at 452. And significantly, the grand jury also could have found that the defendant—the victim's girl friend, with whom he was in constant and perpetual contact—on a subjective basis knew that she had some control over his actions.¹⁶

¹⁵ As in the case against the husband in *Persampieri*, the Commonwealth's evidence here shows that the defendant fully understood and took advantage of the victim's fragility. Prior to July 12, 2014, the defendant had helped to plan the victim's suicide, assuaged the victim's guilt about leaving his family, expressed her frustration that the victim had, at various times, delayed killing himself, and threatened to seek mental health treatment for the victim (despite his protestations) if he did not kill himself.

¹⁶ The defendant admitted to Boardman: "I helped ease him into it and told him it was okay, I was talking to him on the

The defendant argues that, even if she was wanton or reckless, her words (spoken when she was miles away from the victim) could not be the cause of the victim's death. Instead, it was his decision to get back in the truck that resulted in his suicide. We are not convinced. Because there was evidence that the defendant's actions overbore the victim's willpower, there was probable cause to believe that the victim's return to the truck after the defendant told him to do so was not "an independent or intervening act" that, as a matter of law, would preclude his action from being imputable to her. *See Atencio*, 345 Mass. at 629-630. The text messages suggest that the victim had been delaying suicide for weeks; to ignore the influence the defendant had over the victim would be to oversimplify the circumstances surrounding his death. His delay of that suicide and subsequent excuses for such delays were followed by his girl friend's disappointment, frustration, and threats to seek unwanted treatment on his behalf. In sum, we conclude that there was probable cause to show that the coercive quality of the defendant's verbal conduct overwhelmed whatever willpower the eighteen year old victim had to cope with his depression, and that but for the defendant's admonishments, pressure, and instructions, the victim would not have gotten back into the truck and poisoned himself to death. Consequently, the evidence before the grand jury was sufficient for a finding of probable cause that the

phone when he did it I could have easily stopped him or called the police but I didn't."

defendant, by wanton or reckless conduct, caused the victim's death.¹⁷

It is important to articulate what this case is not about. It is not about a person seeking to ameliorate the anguish of someone coping with a terminal illness and questioning the value of life. Nor is it about a person offering support, comfort, and even assistance to a mature adult who, confronted with such circumstances, has decided to end his or her life. These situations are easily distinguishable from the present case, in which the grand jury heard evidence suggesting a systematic campaign of coercion on which the virtually present defendant embarked—captured and preserved through her text messages—that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own. On the specific facts of this case, there was sufficient

¹⁷ The speech at issue in this case is not protected under the First Amendment to the United States Constitution or art. 16 of the Massachusetts Declaration of Rights because the Commonwealth has a compelling interest in deterring speech that has a direct, causal link to a specific victim's suicide. *See Mendoza v. Licensing Bd. of Fall River*, 444 Mass. 188, 197 n.12, 827 N.E.2d 180 (2005) (content-based restrictions on expressive conduct must satisfy "strict scrutiny" standard, meaning government must "demonstrate that the restriction is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" [citation omitted]); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011); *Washington v. Glucksberg*, 521 U.S. 702, 728, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (State "has an unqualified interest in the preservation of human life" [citation omitted]). *See also State v. Melchert-Dinkel*, 844 N.W.2d 13, 23 (Minn. 2014) (affirming in part constitutionality of statute prohibiting "assist[ing]" suicide as against First Amendment challenge).

evidence to support a probable cause finding that the defendant's command to the victim in the final moments of his life to follow through on his suicide attempt was a direct, causal link to his death.

3. Conclusion¹⁸

The grand jury were justified in returning an indictment of involuntary manslaughter against the defendant. Because involuntary manslaughter carries a potential punishment of incarceration in State prison and is inherently a crime that involves the infliction of serious bodily harm,¹⁹ and because the

¹⁸ The defendant argues that the indictment is flawed where the grand jurors did not consider the charges from the perspective of a "reasonable juvenile of the same age" standard. Massachusetts currently does not require that a grand jury consider charges based on such a standard. This issue was not raised below. *See* G. L. c. 277, § 47A ("In a criminal case, any defense or objection based upon defects in the institution of the prosecution or in the complaint or indictment, other than a failure to show jurisdiction in the court or to charge an offense, shall only be raised . . . by a motion in conformity with the requirements of the Massachusetts Rules of Criminal Procedure"). There was not an evidentiary hearing on the issue, the judge did not offer any opinion as to the argument's merits, and the arguments presented by the defendant and amici at this stage regarding the impact of juvenile indictments are being raised for the first time on appeal. The argument was therefore waived.

¹⁹ The defendant argues that her conduct cannot constitute the infliction or threat of serious bodily harm, as is required for an indictment under the youthful offender statute, G. L. c. 119, § 54. Having concluded that the grand jury were justified in returning an indictment for involuntary manslaughter, we are convinced that they were also justified in returning such indictment under the youthful offender statute, given that involuntary manslaughter under these circumstances inherently involves the infliction of serious bodily harm.

defendant was seventeen years of age at the time of the offense, her indictment as a youthful offender on the underlying involuntary manslaughter charge was also supported by the evidence. The motion judge's denial of the defendant's motion to dismiss is affirmed.

So ordered.

INDICTMENT

COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH

v.

MICHELLE CARTER

Involuntary Manslaughter 265/13

THE JURORS for the said Commonwealth on their oath preset, that

Michelle Carter,

on or about July 12, 2014, at Fairhaven, in the County of Bristol aforesaid, did commit an unlawful killing of Conrad Roy III, by wanton and reckless conduct, and by such wanton and reckless conduct did cause the death of said Conrad Roy III.

/s/_____

Foreperson of the Grand Jury

A True Bill

/s/_____

Assistant District Attorney

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On this ___ day of ___ in the year Two Thousand and Fifteen this indictment was returned and presented to said Superior Court by the Grand Jury and ordered to be filed and filed.

Attest:

/s/

Clerk/Magistrate

And the JURORS, aforesaid, for the COMMON-WEALTH OF MASSACHUSETTS, on their oath, aforesaid, do further present that

MICHELLE CARTER,

Was between the ages of fourteen and eighteen on the date of the aforementioned offense; and that the aforementioned offense, if committed by an adult, would be punishable by imprisonment in the state prison, and that the aforementioned offense involved the infliction or threat of serious bodily harm in violation of law; and that the said Michelle Carter, is therefore a youthful offender, as defined by Chapter 119, section 54.

A True Bill

/s/
Assistant District Attorney

/s/
Foreperson of the Grand Jury

A true copy

Attest: /s/
Magistrate

**MICHELLE CARTER TEXT TO SAM BOARDMAN
(SEPTEMBER 15, 2014 AT 8:24-8:32 P.M.)**

Note: spelling errors in original are reproduced here

[Lynn Roy is] divorced so she like tells me that a lot of people on his side of the family (some aunts and uncles) and Conrads grandpa like treats her kinda poorly and not supportive of what happened and stuff like Coco [Conrad's nickname] was very sensative and he took things to heart. And his grandpa and dad (her ex) didnt treat him that good and always pressured him and stuff and it gave him so much anxiety. And I always told him to not spend as much time with them because he just couldn't handle it and it made him worse being around them but he worked for them like they owned that tug boat company and Coco always felt pressured to live up to their expectations. But with all his issues and stuff he couldn't and that was a big part of his decision to commit suicide. And so his mom just tells me how they and like some aunts and uncles on that side just dont have much sympathy and his grandpa especialy doesnt seem to even care at all which drives me insane but his mom and I both agree he will live with the guilt. And she just like tells me all about that and about her new boyfriend and stuff and I mean I like that she tells me these things I want to help her I just get ovwhelmed sometimes with what she says like she expects me to know what to tell her and I want to tell her the best things I can because I promised Coco I'd help his mom and sisters get thru this like I told him I wont let them go thru depression and I told him I'd help them and always be there but now that I think of it, youre right she is depressed

App.69a

so I failed Coco I wasnt supposed to let that happen and now I'm realizing I failed him. Sam his death is my fault like honestly I could have stopped him I was on the phone with him and he got out of the car because it was working and he got scared and I fucking told him to get back in Sam because I knew he would do it all over again the next day and I couldnt have him live the way he was living anymore I couldnt do it I wouldnt let him. And therapy didnt help him and I wanted him to go to McLean with me when I went but he would go in the other department for his issues but he didnt wanna go because he said nothing they would do or say would help him or change the way he feels. So I like started giving up because nothing I did was helping and but I should of tried harder like I should of did more and its all my fault because I could of stopped him but I fucking didnt all I had to say was I love you dont do this one more time and hed still be here and he told me he would give me signs to know he is watching over me but I havent seen any and I just idk I'm sorry about this rant I just needed to get that off my chest and its finally all sinking in

Ex.20 (9/15/14 8:24-8:32 pm).