COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. APPEALS COURT
2022-P-1115

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

ERIKA MURRAY,
Appellant

On Appeal From a Conviction in
Worceseter Superior Court 1485CR1393

BRIEF OF APPELLANT
Erika Murray

by her counsel,

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STATEMENT OF ISSUES

1. Must the defendant's convictions on the Assault and Battery on a Child counts be reversed because the judge incorrectly applied a reasonable person state of mind standard, rather than a subjective state of mind standard, to the element of wanton and reckless conduct in denying the motion for required finding of not guilty?

STATEMENT OF CASE

The indictments were returned on December 16, 2014, charging the defendant with two counts of Murder (Counts 1 and 2, G.L. c.265, §1); two counts of Assault and Battery on a Child with Substantial Injury (Counts 3 and 4, G.L. c. 265 §13J(b)); two counts of Reckless Endangerment of a Child (Counts 5 and 6, G.L. c. 265 §13L); two counts of Animal Cruelty (Counts 7 and 8, G.L. c.272 §77); and one count of Concealing Fetal Death out of Wedlock (Count 9, G.L. c.272 §22). *See* A-3.[1] (docket sheet, Worcester Superior Court docket number 1485CR01393); A-33-41 (indictments).

[1] References to the record appendix are A-*page*. The trial transcripts are referred to by *volume-page number*.

A nine day jury-waived trial (Kenton-Walker, J., presiding) was held in Worcester Superior Court from June 4, 2019 until June 20, 2019. See A-26-27. The court found Ms. Murray guilty of two counts of Assault and Battery on a Child with Substantial Injury (Counts 3 and 4), and two counts of Animal Cruelty (Counts 7 and 8). A-27-28. A nolle prosse entered on count 9. A-28. The court found the defendant not guilty on all other counts. A-27-28.

On June 28, 2019, the defendant filed a Motion for Reconsideration, Renewed Motion for Directed Verdict and to Vacate Convictions on Counts 3 and 4. A-29. After hearing on July 11, 2019, the motion was denied. (Kenton-Walker, J.). A-30.

Ms. Murray was sentenced on July 11, 2019, to:

Count 3: Four to Five years in state prison;

Count 7: 2 to 3 years in state prison, from and after count 3;

Count 4: Probation for 5 years from and after release from prison;

Count 8: Probation for 5 years, from and after release from prison, concurrent with count 4.

A-29; 10-8.

On July 19, 2019, the defendant filed a timely Notice of Appeal. A-30.

STATEMENT OF FACTS

In the summer of 2014, thirteen-year-old Pete[2] and ten-year-old Jon[3] played together every day. 1-23, 24. Betsy Brown was Pete's mother. Id. at 24. Erika Murray was Jon's mother. Id. They boys were always at the Brown house, skateboarding and playing ball. Id.

On August 26th, at Jon's request, Brown spoke to Ms. Murray about watching Jon the next day when Ms. Murray would be out with her mother. 1-28. Ms. Murray agreed to the plan. Id.

The next day, August 27th, Pete and Jon were playing at the Brown house. 1-27,33. At one point in the afternoon, Brown left the boys riding skateboards in the driveway while she ran to the store. Id. at 33-34.

Before she arrived at the store, Brown received a phone call from her son. 1-34. He was very upset and wanted her to come home because he "could not get the babies to stop crying." Id.

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2 A pseudonym.
3 A pseudonym.

After talking to Pete and Jon further, Brown realized that Pete was calling from the Murray house. 1-34. When she drove up to the Murray house, the boys were in the driveway. Id. As soon as Brown got out of the car, she heard babies crying and screaming. Id. at 35. Jon led Brown into the house where she found an infant and a toddler, wet and soiled, in different upstairs bedrooms. Id. at 35,36. Their mattresses were soiled. Id. at 39-41.

Brown called 9-1-1 for help. 1-41,42. When the Blackstone police arrived, they observed the conditions just described. Id. at 83,89. In one bedroom, they found an approximately five-month-old girl lying on her back in a bed, covered in feces. Id. at 90,91,93,123. She was wearing only a diaper. Id. at 123. In addition, there was a dog carcass in that bedroom. 2-42.

They also found a third bedroom. 2-97. Lieutenant Gregory Gilmore attempted to open the door to that room. 1-125. He could only force it open a few inches. Id. at 98, 125. There was trash piled up against the door several feet high which prevented it from opening completely. Id. at 97,98,125. From

outside the room, the police could see human feces on the walls. Id. at 99.

Soiled diapers, trash, dirty clothing, food containers, and dirty diapers was strewn about all the rooms of the house, covering the floors. 1-88,91,125-126. The kitchen sink was full of dirty dishes. Id. at 102. There were flies and maggots flying around the kitchen and the other rooms. Id.

In the basement was a living room containing a couch, table and chairs. 1-127. A second basement room contained a dog inside a cage. Id. Gilmore discovered what appeared to be a potted marijuana plant with a light hanging over it in that room. Id. There were no other people in the house. Id.

About twenty to twenty five minutes after the police arrived at the residence, sometime after 4:00 p.m., Ms. Murray returned home. 1-154,116. She and her thirteen year old daughter Ann[4] were dropped off by someone in an SUV. Id. at 116. Blackstone Patrolman Anthony Lungarini spoke to Ms. Murray. Id. She told the officer that she had left the house around 10:00 that morning because she "had things to do." Id. at

[4] A pseudonym.

103, 116. When Officer Lungarini told her it was "unacceptable" to leave the children, she agreed. Id. at 103.

The Department of Children and Families ("DCF") came to the house. 1-104; 2-71,73. They told Ms. Murray that they were going to take custody of all the children. 1-104. She responded by inquiring about her cat's whereabouts. Id. Ms. Murray readily gave permission to DCF to take the children. Id.

Lieutenant Gilmore spoke to Ms. Murray at the house and then later at the police station. 2-12-13,37. She was very calm, cooperative, and "unemotional" when she spoke to Lieutenant Gilmore.[5] Id. at 12. Ms. Murray was not under arrest during the station interview. Id. at 13. It was not recorded. Id.

Ms. Murray told Gilmore that the infant and toddler, Lisa[6] and Gina,[7] were her children. 2-14. She told Gilmore that her boyfriend, Raymond Rivera, was the father of these children. Id. She kept her parentage a secret from her entire family, including Rivera and their two older children, Ann and Jon.

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[5] Gilmore was a lieutenant at the time of the incident and acting chief at the time of trial.

[6] A pseudonym.

[7] A pseudonym.

2-14. She was embarrassed that she gave birth to two more children that she "probably could not afford." Id. at 15,84. Ms. Murray told Ann and Jon that she was babysitting Lisa and Gina. Id. Ann and Jon told the police that the two young girls were not their siblings. Id. at 77.

Counts 3 and 4, the Assault and Battery on a Child with Substantial Injury allege that Lisa and Gina are the subject children. A-35,36. Counts 5 and 6, Reckless Endangerment of a Child, allege that Ann and Jon are the subject children. A-37,38.

Ms. Murray told the police that the younger girls were born at Milford Regional Hospital and that the hospital would have their birth records. 2-16. Ms. Murray later told DCF she had given birth to the two youngest children at home. Id. at 90. She stated that neither of the children had ever seen a doctor. Id.

Blackstone Board of Health Code Enforcement Officer William Walsh was called in to inspect and photograph the interior of the house. 2-8,39,40,42,43. He determined that the home was unfit for human habitation and condemned it. Id. at 45.

Kevin Sullivan, the Blackstone Regional Animal Control Officer, visited the residence on August 28,

2014. 2-55,56. The dog, a bloodhound, was in a crate in the basement. Id. at 57. He was very thin, with scabs, scars, and large areas of missing fur. His eyes were sunken and covered with "gook." Id. The dog was infested with fleas. Id.

Sullivan spoke to Ms. Murray, who told him she could not care for the family dog or cat. 2-58. She told him that neither animal was up-to-date on their vaccines. Id. at 60. The cat was also flea bitten. Id. Sullivan took both animals to the shelter, where they were treated for fleas and then taken to the veterinarian the next day. Id. at 61-62,63.

DCF placed the two younger children in foster homes. 5-48. On September 3, 2014, they were seen in the Foster Children Evaluation clinic at UMass Medical Center in Worcester. 5-48. They saw Dr. Heather Forkey and Dr. Peter Sell. Id.

Lisa, the older child, appeared to be about three years old. 5-48. She was frightened as the doctors approached her. Id. at 49. She did not react the way a normally developing three-year-old reacts when approached by strangers. Id. at 51-52,53. She folded herself up and closed her body down. Id. To Dr. Forkey, this was a sign that Lisa had adapted to the

lack of caregiver support when she had been exposed to constant threats. Id. at 53. When she sensed she was being threatened, Lisa tried to make herself as small as possible so that the threat would not notice her. Id.

Lisa also did not readily make eye contact with the doctors. 5-53. She rocked herself to console herself. Id. at 54. Her hair had not been managed. Id. Lisa's muscle tone was "doughy," which indicated she did not use her muscles. Id. That was also demonstrated by her difficulty keeping her body upright without support. Id. When she was propped up, she curled her legs into a fetal position. Id. at 55. She had a diaper rash. Id.

Lisa did not speak. 5-59. She made guttural sounds only. Id. Given the symptoms Dr. Forkey had identified, she believed that Lisa had experienced a profound amount of neglect, which resulted in physical, emotional, and developmental consequences. Id. at 57,59. Dr. Forkey also considered that Lisa may also suffer from an autism spectrum disorder. Id. at 60. The doctor acknowledged that rocking, lack of eye contact, delayed speech and language skills, and muteness are also symptoms of autism. Id. at 90-91.

Lisa was admitted to UMass Medical Center for further testing. 5-61. The tests were all negative for infection. Id. at 63. Her Vitamin D and albumin levels were low, indicating she was nutritionally deficient and had not been exposed to sunlight. Id. at 64.

Dr. Forkey also examined Gina. 5-66. She appeared to be about five months old. Id. Gina made eye contact with the doctors and engaged with them by smiling and reacting to them. Id. at 67. Her motor tone was also underdeveloped. Id. She did not move on the examining table like most children her age. Id. Rather, she lay on the table with her arms out to her sides. Id. The back of her head was flat. Id. She did not make any verbal sounds when examined, unlike normally developed five month old babies. Id. Dr. Forkey opined that Gina also had experienced significant neglect. Id. at 69.

Gina was also admitted to the hospital for additional tests. 5-70. She did not have any infections, fractured bones, or healed fractures. Id. at 81-82. Both children began their immunizations. Id. at 70.

Lisa and Gina did well in foster care and physically improved within a short period of time. 5-

83, 105. After Lisa was placed in foster care, her muscle tone improved. Id. at 83. According to Lisa's foster parent, she was walking withing two weeks after placement. Id. at 105.

On September 3rd, the DCF staff from the Whitinsville office met with Ms. Murray and Raymond Rivera. 2-86. According to DCF investigator Catherine Francy, Ms. Murray had a flat affect and appeared very calm. Id. Rivera was visibly upset and sobbing. Id. Neither parent inquired about the children. Id. at 88. Ms. Murray provided the dates of birth for Lisa and Gina. Id. at 89. She referred to Lisa as "it" several times during the meeting. Id.

The staff asked about someone named "Michelle Ridgeway." 2-90-91. Ms. Murray explained that Michelle Ridgeway was a fictional friend that she had created on Facebook. Id. at 91. She did that to explain the constant presence of the younger children in the house. Id. She told Ann and Jon that she was babysitting Ridgeway's young children because Ridgeway worked a lot. Id. at 91.

A search warrant was executed on the Murray house on September 10, 2014 by Blackstone police and Massachusetts State Police troopers. 2-18; 3-3. The

officers were looking for evidence regarding the identity of the younger children and their parentage.[8] Id. They discovered the remains of two babies and a dog in a bedroom closet. 3-82. In another bedroom they found the remains of a third infant in a box in the closet. Id. at 83. Further elaboration of the search is not necessary because the judge found Ms. Murray not guilty of crimes related to these remains. A-27, 72.

Ms. Murray moved for a required finding of not guilty at the close of the Commonwealth's case. 6-4,5. As to counts 3 and 4, counsel argued that the Commonwealth did not prove beyond a reasonable doubt that the personal injuries to Lisa and Gina were substantial. Id. at 5. The motion was denied as to those counts.[9] A-10,42; 10-38.

DEFENSE CASE

Dr. Judith Edersheim is a psychiatrist specializing in forensic psychiatry. 7-104, 106. She testified for the defense. Id. at 104. She concluded

[8] A motion to suppress the results of the first search warrant was denied. A-16. The defendant renewed her objection at trial. 2-25. This issue is now moot.
[9] The motion for required finding was allowed as to count 2 only (murder of Baby River no.2). A-42; 6-39.

that a combination of pre-existing and superimposed deficits combined to produce a mental state where Ms. Murray's thinking, decision-making, and ability to process information was very compromised. It caused her to exercise peculiar judgment and to be inured to surroundings around her. Id. at 113. Ms. Murray's relatively low IQ and severe deficits in working memory caused a very concrete, limited, inflexible mental way of functioning in the world. Id. at 114.

Dr. Edersheim diagnosed Ms. Murray as suffering from a major depression. 7-126. The doctor further diagnosed her as having a combined avoidant and dependent personality disorder. Id. at 118. Ms. Murray's avoidant personality affected the way she dealt with all her pregnancies. Id. at 121. She was unable to find a solution, so she avoided things, hid them, and did not plan for the future. Id. She hid her first pregnancy until a late stage. Id. Her parents, with whom she lived, found out that she was pregnant with her first child when one of Ms. Murray's coworkers greeted her mother with "Hi Grandma." Id. Ms. Murray's parents drove her places and took care of Ann's every need from the moment she came home from the hospital, while Ms. Murray continued to behave in

a very passive, dependent, and fearful way. Id. at 121-122.

Ms. Murray and Rivera moved to Blackstone when she became pregnant a second time. 7-123. They moved because Ms. Murray's parents had told the couple that if they had a second child they would need to move out. Id. at 79. After Ms. Murray and Rivera moved to Blackstone, she was completely dependent on Rivera for money and transportation. Id. at 128. She lost her family's day-to-day support. Id. at 79. Rivera pressed her to quit her job at Shaw's and stay at home. Id. Ms. Murray was afraid of Rivera's temper, so she always tried to please him. Id. He threatened to leave her and he got jealous if she made a friend or tried to socialize. Id. Her fear of abandonment set the stage for her tolerance of his verbal and emotional abuse. Id. at 130.

Dr. Edersheim had also considered and ruled out antisocial personality disorder. 7-33. The doctor described that condition as "a very specific and well-recognized constellation of symptoms," characterized by problems with rules, sadism toward animals and a lack of empathy. Id. She saw that disorder as "fairly

opposite from what [Ms. Murray's] personality testing and functioning [] revealed." Id.

Dr. Frank Dicataldo, a forensic psychologist, performed a series of six psychological tests on Ms. Murray. 6-80,87. On the *Wechsler* intelligence test Ms. Murray obtained an IQ of 84, which placed her in the low-average range compared to adults her age. Id. at 90. The results of the perceptional reasoning test results fell within the borderline intellectually-deficient range. Id. at 91. She has a very poor short-term memory. Id. Her ability to work with visual stimuli in an efficient and accurate manner was in the average range. Id. at 91-92.

Ms. Murray was vulnerable to becoming confused and forgetful. 6-94. Dr. Dicataldo explained that long-term memory is impaired by trauma. Id. In terms of mood functioning, Ms. Murray scored significantly higher than most test takers on internalizing problems, such as depression, stress, and anxiety. Id. at 95. The testing also showed that Ms. Murray had very low self-esteem. Id. at 97. She was very passive, without a strong sense of agency or control. Id. According to Dr. Dicataldo, she had a pathologically dependent relationship with Rivera. Id. at 98.

In summation, Dr. Dicataldo opined that Ms. Murray met the diagnostic criteria for a "Cluster C personality disorder", predominated by fear and anxiety. 6-102. She also met many criteria of the avoidant personality disorder and some criteria for dependent personality disorder. Id. She suffered from an inordinate fear of rejection. Id. at 104. She feared that Rivera would abandon her. Id. Her fear of rejection, coupled with low self-esteem, resulted in her having no friends or acquaintances. Id. at 107.

Dr. Lisa Rocchio is a clinical and forensic psychologist, whose areas of expertise are interpersonal violence and traumatic stress. 7-55, 56. She evaluated Ms. Murray's psychological state at the time of the alleged offenses, and in particular evaluated her relationship with Raymond Rivera. 7-63, 68.

Dr. Rocchio stated that Ms. Murray was not malingering or exaggerating. 7-65. She opined that Ms. Murray's relationship with Rivera was consistent with a pattern of Intimate Partner Violence (IPV). Id. at 68. In an IPV relationship, one party exerts coercive control, psychological, emotional, and economic abuse, coercive and financial control as well as profound

physical and social isolation. Id. at 68. Control is gained and maintained through the use of a variety of types of abusive behaviors consisting of things like physical violence, sexual violence, intimidation, psychological aggression, emotional abuse, financial control and economic abuse, degradation, and humiliation. Id. at 59.

Dr. Howard Kay, a pediatrician, also testified for the defense. 7-8. In his expert medical opinion, Gina was not Vitamin D deficient. Id. He further opined that in this current day, due to the medical advice that babies sleep on their backs, it is common for a child Gina's age to have a flattened back of the head. Id. at 13. Due to their normal immunity, the likelihood of serious harm or injury caused by living in the Murray home to Lisa and Gina "would not be very great." Id. at 21.

COMMONWEALTH'S REBUTTAL

Dr. Fabian Saleh, a psychiatrist, testified as a rebuttal witness. 8-14. He opined that Ms. Murray "did not suffer from a mental illness [] at any given point in time in her life. Id. at 31. He acknowledged that she may have been depressed. Id. While she may have some deficits in certain areas, she

had no deficits that would rise to the level of a diagnosis of being intellectually disabled. Id. at 33. Dr. Saleh suggested a diagnosis of Nonspecific Personality Disorder with traits that are antisocial in nature. Id. at 34. The judge did not credit any of Dr. Saleh's testimony. A-61. Accordingly, any further details of his testimony are not recited in this brief.

At the close of the case, Ms. Murray renewed the motion for required finding of not guilty on counts 3 and 4, without further argument. 8-129. It was again denied. A-27; 8-129.

After the verdict and before sentencing, the defense submitted a "motion for reconsideration, renewed motion for directed verdict and to vacate convictions on counts 3&4." A-29,73; 10-2. The defendant argued that the court erred in applying the objective person standard to Ms. Murray's conduct instead of the subjective person test required in reckless endangerment. Id. After a hearing, the motions were denied. A-30,73; 10-8.

ARGUMENT

I. THE DEFENDANT'S CONVICTIONS FOR ASSAULT AND BATTERY ON A CHILD MUST BE REVERSED BECAUSE THE JUDGE INCORRECTLY USED THE REASONABLE PERSON STATE OF MIND STANDARD, RATHER THAN THE SUBJECTIVE STATE OF MIND STANDARD, TO THE ELEMENT OF WANTON OR RECKLESS CONDUCT

The issue in this appeal is whether the trial court applied the correct state of mind standard to the assault and battery on a child with substantial bodily injury counts. The judge erred in applying an objective state of mind test. A-68.

The statute in question, Assault and Battery on a Child Causing Substantial Bodily Injury (hereinafter "A&B on a Child") can be proven in two ways. G.L. c. 265, §13J(b). Add-37. Under the first theory, "par. 2" of the statute, the Commonwealth must prove that the defendant committed an intentional touching on the alleged victim, however slight, that was harmful or offensive. Id.; Commonwealth v. Garcia, 94 Mass. App. Ct. 91, 105 (2018); Commonwealth v. Burno, 396 Mass. 622, 625 (1986). Under this theory, Reckless Endangerment is a general intent crime. Garcia, *supra* at 105. Thus, to convict on this theory, the Commonwealth must prove that a reasonable person intended the touching. Id.

Under the second theory, "par. 4" of the statute, the Commonwealth must prove that the defendant wantonly or recklessly permitted a child, of whom the defendant had care and custody, to suffer substantial bodily injury, or permitted another to commit assault and battery upon a child that caused such bodily injury. G.L. c.265, §13J(b); Add-37. Commonwealth v. Robinson, 74 Mass. App. Ct. 752 (2009). The statute does not define "wanton and reckless." Id.

As the instant indictments clearly state, the grand jury only indicted on the second theory. A-35,36. The trial was litigated accordingly. 6-36-37; 9-13.

Reckless endangerment of a child is a lesser-included offense of the "wanton or reckless" theory (par.4) of A&B on a Child.[10] G.L.c.265, §13L; G.L. c. 265, §13J(b); Commonwealth v. Roderiques, 462 Mass.

[10] Reckless Endangerment is not a lesser-included offense of A&B on a Child, par.2, a general intent crime. Commonwealth v. Garcia, 94. Mass. App. Ct. 91, 105 (2018).

If a greater statutory offense contains two independent theories of liability, a crime can be a lesser-included of one of the theories. *See* Commonwealth v. Ogden O., 448 Mass. 798, 808 (2007) (assault and battery by means of a dangerous weapon is lesser included offense of mayhem, second theory).

415 (2012); Commonwealth v. Garcia, 94 Mass. App. Ct. 91 (2018).

By definition, a "lesser-included offense is one which is necessarily accomplished on commission of the greater crime." Commonwealth v. Roderiques, 462 Mass. 415, 421 (2012), quoting Commonwealth v. Porro, 458 Mass 526, 531 (2010). As the Supreme Judicial Court in Roderiques explained, "… because each element of § 13J(b),fourth par., encompasses a corresponding element of § 13L, and because there are no additional elements in § 13L that are not in §13J(b), fourth par., §13L is a lesser included offense of §13J(b), fourth par." Id. at 424. *See also* Commonwealth v. Ogden O., 448 Mass. 798, 808 (2007).

The Reckless Endangerment statute similarly requires that the defendant's conduct be wanton and reckless. G.L. c.265, §13L. Add-. Unlike §13J(b), §13L *does* define that term. Id. Under §13L, a person acts wantonly or recklessly when they "are aware of and consciously disregard[] a substantial and unjustifiable risk that his/her acts, or omissions, where there is a duty to act, would result in serious bodily injury [or sexual abuse] to a child." G.L. c.265, §13L; Commonwealth v. Coggeshall, 473 Mass.

665, 670 (2016); Commonwealth v. Hardy, 482 Mass. 416, 421 (2019). Under this definition, the Commonwealth must prove **this** defendant's knowledge and whether **this** defendant "consciously disregarded" the risks. Hardy, *supra*, at 421. The standard is subjective to **this** defendant. Id. It is not an objective test of how a reasonable person would act. Id.

In Commonwealth v. Smith, 431 Mass. 417, 420 (2000), the Court stated that, "[w]hen interpreting undefined terms in a statute, it is certainly permissible to draw on the meaning that has settled on the same language in other legislation." This is particularly appropriate "[] when the two statutes relate to the same class of persons or things or share a common purpose." Cf. 2B. Singer, Sutherland Statutory Construction §§ 51.01-51.03 (5th ed. 1992), with §§ 53.03, 53.05; Smith, 431 Mass. at 420; Commonwealth v. Wynton W., 459 Mass. 745, 747 (2011) ("Where the Legislature uses the same words in several sections which concern the same subject matter, the words 'must be presumed to have been used with the same meaning in each section.'")

In United States v. Davis, _U.S._; 139 S.Ct. 2319 (2019), the Supreme Court reaffirmed the same

principle. Id. at 2336. Analyzing the statute in question, the Court stated, "After all, '[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning." Id. at 2328, quoting Cochice Consultancy Inc. v. United States ex rel. Hunt, 587 U.S. ___, 139 S. Ct. 1507, 203 L.Ed.2d 791, 798 (2019). The Court continued, "… "we normally presume that the same language in related statutes carries a consistent meaning." Davis, *supra* at 2329, *citing* Sullivan v. Stroop, 496 U.S. 478, 484, 110 S. Ct. 2499, 110 L.Ed.2d 438 (1990).

Accordingly, the statutory definition of "wanton and reckless" as found in the lesser-included offense of Reckless Endangerment must also apply to the greater offense, A&B on a Child. That is, the subjective state of mind standard must apply to both the greater offense and the lesser-included offense.

In discussing the "wanton or reckless" element of Assault and Battery on a Child, the judge in this case ruled that under that statute, the words have a broader definition than in the Reckless Endangerment

context.[11] A-68. She found that the "wanton or reckless" element can be proved using either a subjective or objective standard. Id. The judge applied the reasonable person test and found Ms. Murray guilty. A-68. She stated:

> Unlike the reckless endangerment statute, the definition of wanton and reckless conduct in 13J does not require that the Commonwealth prove that Ms. Murray was actually aware that her conduct would likely cause substantial harm. Here, wanton or reckless conduct involves a high degree of likelihood that substantial harm will result to another and depends on whether Ms. Murray realized the risk or harm, or if a reasonable person, who knew what Ms. Murray knew, would have realized such risk. Commonwealth v. Hardy, 482 Mass. 4126, 421-422 (2019); Commonwealth v. Earle, 458 Mass. 341, 347 &n.9 (2010); Commonwealth v. Welansky, 316 Mass. 383, 399 (1944). Thus, for this statute, the Commonwealth may prove wanton or reckless conduct by proving either Ms. Murray's subjective state of mind or her objective state of mind. Because the wanton and reckless conduct for this crime can be measured by the reasonable person standard, I find that (sic) Commonwealth has proved beyond a reasonable doubt that a reasonable person, who knew what Ms. Murray knew, despite her mental impairments, would have realized the risk. I, therefore, find that the Commonwealth has proved beyond a reasonable doubt that Ms. Murray wantonly or recklessly permitted Lisa and Gina to suffer substantial bodily injury. I find Ms. Murray

[11] The judge did not explicitly cite to the MCLE Model Jury Instruction for Use in the Superior Court §3.21 in stating the law she was applying to the A&B of a Child, but she virtually quoted that instruction. 9-13-14; Add-37.

> guilty of both counts of assault and battery on a child with substantial bodily injury. A-68.

As argued by trial counsel in his motion for reconsideration, the three cases cited by the judge, *supra*, in support of the objective reasonable person test are inapposite to the instant case. A-68. First, they are manslaughter cases. Commonwealth v. Hardy, 482 Mass. 416, 421-422 (2019); Commonwealth v. Earle, 458 Mass. 341, 347 &n.9 (2010); Commonwealth v. Welansky, 316 Mass. 383, 399 (1944).[12] The same is true of the case cited by the Commonwealth in its opposition to the Motion for Required Finding, Commonwealth v. Levesque, 436 Mass. 443 (2002). A-84.

Manslaughter is a common law crime. Hardy, *supra*, at 420. The elements of manslaughter are derived from the common law. Id. Accordingly, these cases cite the common law definition of "wanton and reckless," which allows for using the subjective or objective state of mind test to determine that element of the crime. Id.

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[12] Welansky is also cited in footnote 14 of the Model Jury Instructions on the crime of Assault and Battery on a Child §3.21.
Add-.

Here, the Legislature gave a specific definition for the term "wanton and reckless" in the related Reckless Endangerment statute. G.L. c.265, §13L. Add-. Furthermore, Reckless Endangerment is a lesser-included offense of the "wanton or reckless" theory of Assault and Battery of a Child (par.4.) Commonwealth v. Roderiques, 462 Mass. 415, 421 (2012); Commonwealth v. Garcia, 94 Mass. App. Ct. 91, 94 (2018).

There is no legal basis for applying the common-law definition of "wanton and reckless" to the A&B on a Child offense and a different definition to that identical term in the related lesser-included Reckless Endangerment offense. Commonwealth v. Wynton W., 459 Mass. 745, 747 (2011)("Where the Legislature uses the same words in several sections which concern the same subject matter, the words 'must be presumed to have been used with the same meaning in each section.'") *See* United States v. Davis, _U.S._, 139 S.Ct. 2319, 2336 (2019); Commonwealth v. Smith, 431 Mass. 417, 420 (2000).

To the extent that there is any ambiguity or uncertainty as to the manner in which "wanton or reckless" should be defined in the A&B on a Child statute, the defendant should receive the benefit of

the more demanding subjective state of mind element contained in the Reckless Endangerment statute's definition. Commonwealth v. Wynton W., 459 Mass. at 747("if it is a criminal statute [that] we interpret, the rule of lenity requires that the defendant be given the benefit of the ambiguity.") Commonwealth v. Deberry, 441 Mass. 211, 216 (2004); Commonwealth v. Rezendes, 88 Mass. App. Ct. 369, 377 (2015)("it is well established as a general matter that criminal statutes are to be construed narrowly, further constraining us to resolve any reasonable doubt as to the statute's use of the term deadly weapon in favor of the defendant.")

Ms. Murray was separately indicted for two counts of Reckless Endangerment, *viz.* Ann and Jon (counts 5 and 6). A-37,38. As to those counts, the judge applied the subjective person test to the term "wanton and reckless." A-59-60. She "considered the evidence of mental impairment that was presented" to find that "during the time period alleged in the indictment, Ms. Murray suffered from a combination of preexisting and superimposed deficits that produced a mental state that severely compromised Ms. Murray's thinking, her decision making, and her ability to process

information. The mental state also caused her to become completely inured to her surroundings, preventing her from either recognizing the severity of the conditions in the home or exercising reasoned judgment regarding the risk that those conditions posed to [Ann] and [Jon].” A-61-62. On that basis, the judge found Ms. Murray not guilty of those counts. A-65.

On the instant A&B on a Child counts *viz.* Lisa and Gina (counts 3 and 4), the judge applied the objective person standard to the “wanton and reckless” element.[13] A-68; Add-; 9-13-14.

Evidence of Ms. Murray’s mental illness and impaired appreciation of the dangers she was imposing on her children is no less applicable to the A&B on a Child counts than to the Reckless Endangerment counts, for which she was found not guilty. The Court’s finding that Ms. Murray did not appreciate the squalor

[13] The judge stated: In order to prove Ms. Murray guilty of this offense, the Commonwealth must prove the following elements beyond a reasonable doubt: First, that [Lisa] and [Gina] were children; Second, that Ms. Murray had care and custody of them; Third, that [Lisa] and [Gina] each suffered serious bodily injury; and, Fourth, that Ms. Murray wantonly or recklessly permitted {Lisa] and [Gina] to suffer substantial bodily injury. 9-13-14; A-65.

of her home and the related risks and injuries inflicted upon Lisa and Gina likewise requires the conclusion that the Commonwealth failed to prove wanton or reckless conduct under the A&B on a Child statute. The defendant previously made this argument in support of her request for a required finding of not guilty. A-79.

For the same reasons cited by the Court in its finding that the Commonwealth did not prove beyond a reasonable doubt that Ms. Murray acted wantonly or recklessly viz. counts 5 and 6, the Commonwealth did not prove that element for counts 3 and 4. Thus, in viewing the evidence in the light most favorable to the prosecution, the essential elements of the crime were not proven beyond a reasonable doubt. Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). Further, "findings based on legally insufficient evidence are inherently serious enough to create a substantial risk of miscarriage of justice." Commonwealth v. Van Bell, 455 Mass. 486, 411-412 (2009)(internal citations omitted). A required finding of not guilty should have been allowed on counts 3 and 4.

CONCLUSION

For all of the reasons stated herein, the defendant requests that her convictions on counts 3 and 4 be reversed and a required finding of not guilty enter on both counts.

Defendant Erika Murray
By her attorneys

/s/ Deborah Bates Riordan

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AUGUST 2022

APPELLANT'S M.R.A.P. RULE 16(k) CERTIFICATION

I, Deborah Riordan, Esq. hereby certify that the appellant's brief and appendix comply with the rules of court including, but not limited to: Mass.R.A.P. 16(a)(13), 16(e), 18, 20, and 21.

Rule 20 was complied with by using the monospaced font Courier New, 12 point, using Word software from Microsoft Office 365. This brief is less than fifty pages in length.

/s/ Deborah Bates Riordan

Dated: 08/23/22 Deborah Bates Riordan, Esq.

M.R.A.P. 13(e) Certificate of Service

I, Deborah Riordan, Esq., hereby certify that on August 23, 2022, I e-filed the defendant/appellant's principal brief and record appendix with the Appeals Court on the date specified below, accompanied by a motion for leave to file late, and that I simultaneously e-served the following counsel with those documents:

Worcester ADA Ellyn Lazar
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/s/ Deborah Bates Riordan

ADDENDUM
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CHAPTER 265. CRIMES AGAINST THE PERSON.

Section 13J. Assault and battery of a child; liability of person having custody; penalties.

Section 13J. (a) For the purposes of this section, the following words shall, unless the context indicates otherwise, have the following meanings:-

"Bodily injury", substantial impairment of the physical condition including any burn, fracture of any bone, subdural hematoma, injury to any internal organ, any injury which occurs as the result of repeated harm to any bodily function or organ including human skin or any physical condition which substantially imperils a child's health or welfare.

"Child", any person under fourteen years of age.

"Person having care and custody", a parent, guardian, employee of a home or institution or any other person with equivalent supervision or care of a child, whether the supervision is temporary or permanent.

"Substantial bodily injury", bodily injury which creates a permanent disfigurement, protracted loss or impairment of a function of a body member, limb or organ, or substantial risk of death.

(b) Whoever commits an assault and battery upon a child and by such assault and battery causes bodily injury shall be punished by imprisonment in the state prison for not more than five years or imprisonment in the house of correction for not more than two and one-half years.

Whoever commits an assault and battery upon a child and by such assault and battery causes substantial bodily injury shall be punished by imprisonment in the state prison for not more than fifteen years or imprisonment in the house of correction for not more than two and one-half years.

Whoever, having care and custody of a child, wantonly or recklessly permits bodily injury to such child or wantonly or recklessly permits another to commit an assault and battery upon such child, which assault and battery causes bodily injury, shall be punished by imprisonment for not more than two and one-half years in the house of correction.

Whoever, having care and custody of a child, wantonly or recklessly permits substantial bodily injury to such child or wantonly or recklessly permits another to commit an assault and battery upon such child, which assault and battery causes substantial bodily injury, shall be punished by imprisonment in the state prison for not more than five years, or by imprisonment in a jail or house of correction for not more than two and one-half years.

Section 13L. Wanton or reckless behavior creating a risk of serious bodily injury or sexual abuse to a child; duty to act; penalty

Section 13L. For the purposes of this section, the following words shall have the following meanings:

"Child", any person under 18 years of age.

"Serious bodily injury", bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death.

"Sexual abuse", an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under 14 under section 13B of said chapter 265; a repeat offense under section 13B% of said chapter 265; indecent assault and battery on a person age 14 or over under section 13H of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265; assault with intent to commit rape under section 24 of said chapter 265; and assault of a child with intent to commit rape under section 24B of said chapter 265.

Whoever wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act shall be punished by imprisonment in the house of correction for not more than 2 1/2 years.

For the purposes of this section, such wanton or reckless behavior occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury or sexual abuse to a child. The risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT
INDICT. NO. 1485CR1393

COMMONWEALTH

vs.

ERIKA MURRAY

FINDINGS & RULINGS

I. INTRODUCTORY REMARKS:

Before I begin, I would like to thank publicly the attorneys for their exceptional and hard work in this case. They have been thorough, but efficient, and have done an excellent job focusing the court on the issues raised by the facts, and in advocating on behalf of the Commonwealth and the defendant. Given the emotions this case has generated, I am extremely grateful for the professional and civil manner in which the attorneys have treated each other, as well as the respect they have shown to the witnesses, the defendant, and the court. Thank you both.

In a jury waived criminal trial, the court is not required to make specific findings of fact. However, my remarks today will include specific findings in order to explain my reasoning and resolve the theories of criminal liability presented by the evidence.

II. EVIDENCE:

In reaching my decision, I have considered only the evidence presented in this courtroom, as well as the relevant statutory and case law. That evidence includes the sworn testimony of the 24 witnesses and the 110 exhibits, as well as the reasonable inferences I have drawn from all the

evidence. Just like a jury, I must decide this case only on the evidence and the law. Emotion or sympathy can play no part in my decision. This is a court of law and not a court of public opinion.

III. FUNDAMENTAL PRINCIPLES:

I start with the basic Constitutional principles applicable to all criminal cases: the presumption of innocence, the burden of proof and the concept of reasonable doubt.

A person charged with a crime is presumed to be innocent until proven guilty beyond a reasonable doubt. That is a presumption that belongs to everyone, including Erika Murray.

The presumption of innocence means that Ms. Murray has no burden to prove her innocence. It is the Commonwealth that bears the sole burden of proving each element of every crime charged against Ms. Murray, beyond a reasonable doubt.

Our Supreme Judicial Court has said that proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after having compared and considered all of the evidence, I have in my mind an abiding conviction, to a moral certainty, that the charge is true based solely on the evidence that has been put before me in this case. When we refer to moral certainty, we mean the highest degree of certainty possible in matters relating to human affairs. It is not enough for the Commonwealth to establish a probability, even a strong probability, that Ms. Murray is more likely to be guilty than not guilty. Instead, the evidence must convince me of her guilt to a reasonable and moral certainty.

IV. LAW OF THE CASE:

Erika Murray is charged with one count of murder, two counts of assault and battery on a child with substantial bodily injury, two counts of reckless endangerment of a child, and two counts of cruelty to animals.

A. Cruelty To Animals – Counts 7 & 8 (G.L. c. 272, § 77)

In order to prove the defendant guilty of cruelty to animals, the Commonwealth must prove beyond a reasonable doubt that (1) the defendant had the charge or custody of an animal, either as an owner or otherwise, and (2) unnecessarily failed to provide it with proper food, drink, shelter, and a sanitary environment.

The Commonwealth does not have to prove the defendant knew she was violating the statute or that she specifically intended the harm that it forbids; but the Commonwealth must prove beyond a reasonable doubt that the defendant intentionally and knowingly did acts that were plainly of a nature that would violate the statute.

After considering all of the evidence, I find that the Commonwealth has proved beyond a reasonable doubt that Ms. Murray had the charge or custody of both the dog and the cat, and due to the deplorable conditions that existed in the house (the specifics of which I will discuss momentarily), Ms. Murray unnecessarily failed to provide each of them with proper shelter and a sanitary environment. Therefore, I find the defendant guilty of counts of both counts of cruelty to animals.

B. Reckless Endangerment of a Child – Counts 5 & 6 (G.L. c. 265, § 13L)

Ms. Murray is charged with two counts of reckless endangerment of a child under c. 265, § 13L. The relevant portions of the statute read as follows:

"Whoever wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury … or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act shall be punished . . ."

In its Bill of Particulars, the Commonwealth alleges that between January 2007 and August 28, 2014, Erika Murray, having custody of Kayla and Nicholas Rivera, wantonly or recklessly engaged in conduct that created a substantial risk of serious bodily injury to Kayla and Nicholas by living with them at 23 St. Paul Street in deplorable and uninhabitable conditions.

To prove Ms. Murray guilty, the Commonwealth must prove each of the following elements beyond a reasonable doubt:

First:	that both Kayla and Nicholas were children;
Second:	that Ms. Murray acted wantonly or recklessly;
Third:	that Ms. Murray's conduct created a substantial risk of serious bodily injury to Kayla and Nicholas; and
Fourth:	that Ms. Murray had custody of Kayla & Nicholas.

As for the first and fourth elements, the Commonwealth has proved beyond a reasonable doubt that Kayla and Nicholas were children at the time alleged (between January 2007 and August 28, 2014) in that they were under the age of eighteen. The Commonwealth has also proved beyond a reasonable doubt that Ms. Murray lived at 23 St. Paul Street with Kayla and Nicholas, that she was the parent of Kayla and Nicholas, and as a parent, she had a legal duty to take reasonable steps to prevent harm to Kayla and Nicholas.

As to the second element, the Commonwealth must prove beyond a reasonable doubt that Ms. Murray acted wantonly or recklessly, as specifically defined in the statute.

For this charge, wanton and reckless conduct occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that her acts, or omissions where there is a duty to act, would result in serious bodily injury to a child. The risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A substantial risk means a real or strong possibility, and its disregard must amount to substantially more than negligence, that is, simply acting in a manner that a reasonably careful person would not.

The definition of "wanton or reckless" under this statute is drawn from the common-law definition, with a major distinction. Unlike the common-law meaning, this statute requires the Commonwealth prove the subjective state of mind of the defendant, specifically that Ms. Murray actually must be aware of the risk (*Commonwealth v. Coggeshall, 473 Mass. 665 (2016); Commonwealth v. Hardy,* No. SJC-12637, slip.op. (Sup. Jud. Ct. June 12, 2019). The Supreme Judicial Court in its recent decision on June 12, 2019 in *Commonwealth v. Hardy, supra,* reaffirmed this distinction.

The third element the Commonwealth must prove beyond a reasonable doubt is that Ms. Murray, through her wanton or reckless conduct, created a substantial risk of serious bodily injury. Serious bodily injury is bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death. The Commonwealth does not have to prove that the defendant's conduct resulted in physical injury, but must prove that Ms. Murray's conduct created a substantial risk of serious bodily injury to Kayla and Nicholas.

The evidence proved beyond a reasonable doubt that as of August 2014, the conditions that existed at 23 St. Paul Street were deplorable. Those conditions included filth, piles of

garbage, litter and debris, mounds of soiled diapers in the bedroom where Kayla and/or Nicholas slept, as well as the presence of feces smeared on the walls and present on the floors in the bedrooms, as well as feces found in other living areas throughout the house. The house was infested with insects. All of which rendered the house uninhabitable. Based on the credible medical testimony from Drs. Sell and Forkey, I find that the Commonwealth has proved that the conditions in the house created a risk of substantial bodily injury to Kayla and Nicholas, as defined in the statute. I further find that the Commonwealth has proved beyond a reasonable doubt that Ms. Murray either created that risk or failed to alleviate that risk.

The real issue involves a decision as to whether the Commonwealth has proved that Ms. Murray engaged in wanton or reckless conduct as defined in this statute. I have considered the evidence of mental impairment that was presented in order to determine if Ms. Murray was aware of and consciously disregarded the substantial and unjustifiable risk of serious bodily injury to Kayla and Nicholas from her acts or omissions. This evidence consisted of the expert testimony of Drs. DiCataldo, Rocchio, Edersheim, and Saleh, along with all the other evidence, including Ms. Murray's statements to the police.

After considering the expert testimony presented by Drs. DiCataldo, Rocchio, Edersheim, and Saleh, I credit the testimony of Dr. Edersheim, Dr. DiCataldo and Dr. Rocchio. I did not credit the opinions of Dr. Saleh. From the credible expert testimony, as well as my observations of Ms. Murray's affect, demeanor and from her responses to questions by the police in her interviews, along with all the other evidence, and the reasonable inferences I have drawn from that evidence, I find that during the time period alleged in the indictment, Ms. Murray suffered from a combination of preexisting and superimposed deficits that produced a mental state that severely compromised Ms. Murray's thinking, her decision making, and her ability to process

information. That mental condition also caused her to become completely inured to her surroundings, preventing her from either recognizing the severity of the conditions in the home or exercising reasoned judgment regarding the risk that those conditions posed to Kayla and Nicholas.

I find that Ms. Murray suffered from long standing preexisting cognitive deficits, including working memory and processing deficits preventing her from processing information and formulating logical solutions. Ms. Murray's poor working memory and cognitive deficits seriously affected her decision-making and judgment, such that she coped with problems using moment-to-moment rigid, concrete thinking, without being conscious or aware of the consequences of those decisions. In addition, the evidence presented from Drs. DiCataldo, Rocchio and Edersheim convinces me that Ms. Murray suffers from a combined dependent and avoidant personality disorder, which significantly affected her relationships with others, characterized by an inordinate and inflated dependency, fear of rejection, isolation, and abandonment, particularly with Ray Rivera. Her personality disorder also created in her feelings of being unworthy, inept and inadequate, giving her excessively low self-esteem and making her submissive, suggestible, and vulnerable.

I also find that Ms. Murray was a victim of intimate partner violence in her relationship with Ray Rivera. Mr. Rivera exercised coercive, psychological and economic control over Ms. Murray. Although there is no evidence that he physically assaulted Ms. Murray, Mr. Rivera yelled at her, humiliated and belittled her, isolated her, checked up on her, forced her to leave her job, and demanded adherence to rules that were subject to change at any time. Mr. Rivera played on Ms. Murray's underlying fears of abandonment by threatening to leave her. Mr. Rivera exercised all economic control in the household. Ms. Murray had no access to any bank

accounts or credit cards. Mr. Rivera did all the shopping and presumably paid all the bills; however, the true financial circumstances of the household were dire. The family lived in poverty. Ms. Murray did not drive and was wholly dependent on her parents or Mr. Rivera for transportation.

I find that the combined effects of Ms. Murray's cognitive deficits, personality disorder, and victimization, along with the economic and life realities she lived in, pushed Ms. Murray into a depression further complicating her coping mechanisms. All of this produced extremely primitive and limited coping responses to an increasingly desperate chaotic daily life that resulted in the circumstances that gave rise to this case. Part of those circumstances included the degeneration of the house into absolute squalor, to which Ms. Murray became inured to. True to her dependent personality, Ms. Murray was dependent on her mother to take care of Kayla and Nicholas, which included basics such as washing their clothes, providing them with food and snacks, taking them to her house every weekend, getting them to school on Mondays and other appointments, as well as providing financial assistance to buy clothes and pay for extracurricular activities. Thus making her unaware that the two older children were at any risk.

As Dr. Edersheim credibly pointed out, Ms. Murray's responses to issues and problems were characterized by extreme avoidance, meaning simply not thinking about a problem, unless and until it become immediate and urgent. This was seen when she hid her first pregnancy from her parents for fear of what would happen when they found out. And again, when she was pregnant with Nicholas, she initially hid that knowing she would be forced to leave her parents' home. An event that occurred. An event that made her – mentally and physically and economically – completely dependent on Mr. Rivera, setting into motion the tragic circumstances that led to this case.

Although she knew how Mr. Rivera would react to her becoming pregnant, her mental condition, along with her general circumstances (no insurance, no health care), and victimization prevented her from being able to take appropriate steps to prevent a pregnancy. When she became pregnant, Ms. Murray's mental condition prevented her from realistically processing the situation she found herself in. She fully believed Mr. Rivera would abandon her (and Kayla and Nicholas), if she revealed the pregnancies. Her response, therefore, was rigid, primitive and in keeping with her personality disorder and cognitive deficits. She avoided the problem and concealed it from everyone, including the eventual result of going through the birth of five babies on her own. She was compelled to continue to avoid and conceal those pregnancies by hiding the bodies of the three babies that were either stillborn or did not survive. As for McKenzie and Madison, she simply followed the same primitive plan. She hid them, struggling to cope with caring for them without assistance, until they could not be hidden any longer. Once discovered, Ms. Murray created a babysitting scenario to explain their presence to Kayla, Nicholas and, eventually, to Mr. Rivera.

In her mind, Ms. Murray believed she was a good mother to all her children. She was not conscious or aware of how bad everything had become. Ms. Murray was so profoundly unaware of the circumstances that when confronted with the reality, Ms. Murray appeared to others to be uncaring, almost nonchalant, apathetic, and flat in her affect. This demeanor is obviously apparent in the police interviews. What is particularly striking is how submissive, passive and suggestible Ms. Murray is during those interviews. The police created the story. A story Ms. Murray was willing to adopt.

I find, therefore, that the Commonwealth has not proved beyond a reasonable doubt that Ms. Murray was aware of and consciously disregarded the substantial and unjustifiable risk of

serious bodily injury to Kayla and Nicholas from her acts, or omissions, regarding the conditions in the house. I find the Commonwealth has not met its burden of proving beyond a reasonable doubt Ms. Murray engaged in wanton or reckless conduct as defined in this statute; and, therefore, I find Ms. Murray not guilty of reckless endangerment of either Kayla (Count 5) or Nicholas (Count 6).

C. Assault & Battery On A Child, Subst'l Bodily Injury – Counts 3 & 4 (G.L. c. 265, § 13J (b), 4th par.)

The Commonwealth has also charged Erika Murray in counts 3 and 4 with assault and battery on a child with substantial bodily injury under G.L. c. 265, § 13J (b), par. 4. The two named victims in these counts are McKenzie and Madison. The relevant portions of the statute read as follows:

> "Whoever, having care and custody of a child, wantonly or recklessly permits substantial bodily injury to such child shall be punished . . . ."

In order to prove Ms. Murray guilty of this offense the Commonwealth must prove the following elements beyond a reasonable doubt:

First:	That McKenzie and Madison were children.
Second:	That Ms. Murray had care and custody of McKenzie and Madison.
Third:	That McKenzie and Madison suffered substantial bodily injury; and
Fourth:	That Ms. Murray wantonly or recklessly permitted McKenzie and Madison to suffer substantial bodily injury.

The Commonwealth has proved the first two elements beyond a reasonable doubt, namely that McKenzie and Madison were children as defined under this statute as they were under fourteen years of age; and that Ms. Murray had care and custody of McKenzie and Madison, as she is the parent of both.

The third element the Commonwealth must prove is that McKenzie and Madison suffered substantial bodily injury. Just as in reckless endangerment of a child, this statute defines substantial bodily injury as bodily injury which creates a permanent disfigurement, protracted loss or impairment of a function of a body member, limb or organ, or substantial risk of death.

Based on the credible medical evidence presented by Drs. Sell, Forkey and Kay, as well as from the medical records and photographs, I find that the Commonwealth has proved beyond a reasonable doubt that both McKenzie and Madison suffered substantial bodily injury as defined in the statute. Specifically, I find the evidence supports a finding that both children suffered protracted loss or impairment of the function of a body member and limb resulting from profound neglect. The statute does not define protracted; therefore, its ordinary meaning applies. "Protracted," according to Merriam-Webster dictionary, means lasting for a long time or longer than expected or usual.

Despite being three years old, McKenzie was unable to hold herself upright in either a sitting or standing position without assistance, nor was she able to walk. The evidence convinces me beyond a reasonable doubt that this condition was a protracted loss or impairment of the function of McKenzie's body member and limbs, in that was a condition that lasted longer than was expected or usual. Although the loss or impairment resolved after several months following proper stimulation and care, the Commonwealth is not required to prove that the loss or impairment existed for a protracted period of time after McKenzie was discovered, nor does the Commonwealth need to prove that it was permanent.

The evidence also supports a finding, beyond a reasonable doubt, that Madison suffered a protracted loss or impairment of the function of her body member and limbs evidenced by the fact that she did not move or kick like a normal five month old, and her arms were at an

abnormal increased extensor tone. Although the evidence showed that the condition would not have developed until Madison was at least two months old and would need to last a couple of months to be considered a problem, in the life of a five month old, two months is protracted since, again, it is longer than expected or usual.

Despite evidence of McKenzie's significant developmental delays, separate from physical delays, such delays do not meet the statutory definition of bodily injury. The statute defines bodily injury as "substantial impairment of the physical condition including any burn, fracture of any bone, subdural hematoma, injury to any internal organ, any injury which occurs as the result of repeated harm to any bodily function or organ including human skin or any physical condition which substantially imperils a child's health or welfare." Also, there is insufficient evidence to support a finding that the developmental delays observed in McKenzie were due to profound neglect as opposed to autism, or both. Such conflicting evidence is not sufficient for the Commonwealth to meet its burden of proof beyond a reasonable doubt.

The fourth element the Commonwealth must prove beyond a reasonable doubt is that Ms. Murray wantonly or recklessly permitted McKenzie and Madison to suffer substantial bodily injury. It is not enough for the Commonwealth to prove that the defendant acted negligently—that is, acted in a way that a reasonably careful person would not. The Commonwealth must show that the defendant's actions went beyond mere negligence and amounted to recklessness. In this statute, Ms. Murray acted recklessly if she knew, or should have known, that the conduct involved would likely cause substantial harm to McKenzie and Madison, but she ran that risk rather than alter such conduct. Thus, it is reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that substantial injury would very likely result.

Unlike the reckless endangerment statute, the definition of wanton and reckless conduct in 13J does not require that the Commonwealth prove that Ms. Murray was actually aware that her conduct would likely cause substantial harm. Here, wanton or reckless conduct involves a high degree of likelihood that substantial harm will result to another, and depends on whether Ms. Murray realized the risk or harm, or if a reasonable person, who knew what Ms. Murray knew, would have realized such risk. *Commonwealth v. Hardy, supra; Commonwealth v. Earle*, 458 Mass, 341, 347 & n. 9 (2010); *Commonwealth v. Welansky*, 316 Mass. 383, 399 (1944). Thus, for this statute, the Commonwealth may prove wanton or reckless conduct by proving either Ms. Murray's subjective state of mind or her objective state of mind. Because the wanton and reckless conduct for this crime can be measured by the reasonable person standard, I find that Commonwealth has proved beyond a reasonable doubt that a reasonable person, who knew what Ms. Murray knew, despite her mental impairments, would have realized the risk. I, therefore, find that the Commonwealth has proved beyond a reasonable doubt that Ms. Murray wantonly or recklessly permitted McKenzie and Madison to suffer substantial bodily injury. I find Ms. Murray guilty of both counts of assault and battery on a child with substantial bodily injury.

D. Murder & Involuntary Manslaughter – Count 1 (G.L. c. 265, §1)

In Count 1 of this indictment, the Commonwealth has charged Ms. Murray with second-degree murder. Specifically, the indictment alleges that Ms. Murray failed "to perform her legal duty as a parent to provide for the care and welfare necessary for the survival of baby Rivera #1, despite the ability to do so, and by said failure created a plain and strong likelihood of death for baby Rivera #1, resulting in the death of baby Rivera #1."

First, I want to address the issue raised in the defense motion to exclude testimony of regarding the neonatal tooth line. I have reviewed the respective motions, considered the testimony of Dr. Pokines and Dr. Hartnett-McCann, as well as the articles submitted. I credit the testimony of Dr. Hartnett-McCann and so much of the testimony of Dr. Pokines that there is agreement within the scientific community that the presence of a neonatal line is generally associated with birth; however, there is no agreement as to the exact time the line is formed or the period during which it forms. Nor is there any consensus within the scientific community that the presence of a neonatal line can be used to determine if there was a live birth or the lifespan of an infant. Therefore, only that portion of Dr. Pokines' testimony that he observed a neonatal line in Baby Rivera #1 is admissible, the remainder of his testimony is excluded.

Based on all the evidence presented, including the expert testimony of Drs. Pokines and Hartnett-McCann, as well as Ms. Murray's statements to the police, I find that the Commonwealth has proved beyond a reasonable doubt that one of the babies Ms. Murray gave birth to was born alive. I also find beyond a reasonable doubt that the baby survived for a period of time. However, the Commonwealth has not presented competent evidence for the court to make a finding as to how long the baby survived, and the statement from Ms. Murray is insufficient proof to determine that without speculation. Much of Ms. Murray's statements to the police lacked any detail, let alone sufficient details, to make a reasoned finding. At best, Ms. Murray's statement was agreement with the police version or simply uh-uh. The Commonwealth has not proved how long baby Rivera #1 survived. The evidence was also insufficient for the court to determine which of the three remains found in the closets was Baby Rivera #1 or the order in which Baby Rivera #1 was born – whether the baby was the first, the second or the third.

The evidence does support a finding that the baby lived for a few days and Ms. Murray cared for the baby during those days. At one point, Ms. Murray put the baby down and left it for a short time. When she did so, the baby did not have any signs of distress. When she returned, Ms. Murray found that the baby had died because she saw that it was not breathing and was blue, although the body was still warm. Ms. Murray wrapped it up and put it in the closet.

To prove Ms. Murray guilty of murder in the second degree, the Commonwealth must prove beyond a reasonable doubt:

First: That the defendant caused the death of Baby Rivera #1; and

Second: That the defendant intended to do an act, which, in the circumstances known to Ms. Murray, a reasonable person would have known created a plain and strong likelihood that death would result.

With regard to the first element, the law is clear that a defendant's act is the cause of death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.

In this case, the Commonwealth alleges that when Ms. Murray found baby Rivera #1 not breathing and blue, but still warm, she failed to perform her duty as a parent to take steps to either perform life saving measures on the baby and/or by failing to summon medical help for the baby.

The credible uncontroverted medical evidence from Dr. Grunebaum shows that newborn infants, even when born in a controlled hospital setting, can unexpectedly die for no reason and no life saving measures can revive the baby, and that the body can remain warm for hours after death. In this case, there was no evidence presented that CPR, even if performed by a medical professional, would have saved baby Rivera #1. Therefore, it would be preposterous for this

court to find that whatever training Ms. Murray had received regarding CPR would have been adequate to revive baby Rivera #1.

Equally important, there was no evidence that if Ms. Murray had called for help, by calling 911 as the Commonwealth suggests that Baby Rivera #1 would have lived. Therefore, either the failure of Ms. Murray to perform CPR or summons medical assistance cannot be the legal or proximate cause of Baby Rivera #1 death. Speculation that the baby might have survived if Ms. Murray had summoned medical help or performed CPR does not satisfy the Commonwealth's burden of proving causation beyond a reasonable doubt. See *Commonwealth v. Hardy, supra; Commonwealth v. Pugh*, 462 Mass. 482 (2012)

The same is true even if this court considers the lesser-included offense of involuntary manslaughter, since the first element required is the same as in second-degree murder, that is that the defendant caused the victim's death.

The Commonwealth urges this court to find that Ms. Murray caused the death of baby Rivera #1based on the totality of the circumstances of this case, most notably on the fact that she hid the bodies of three babies in closets and hid McKenzie's and Madison's existence. As the Supreme Judicial Court has pointed out, "In all cases, not just those in which there is a horrific tragedy…, [the court] must look at the conduct that caused the result, . . . not the resultant harm."

This case involves a senseless, tragic story about a dysfunctional parent and her family. Regardless of how disturbing the facts surrounding this case are to the community at large and to me as a parent, I cannot take into account those feelings. As Justice Zobel stated in the *Woodward* case, "as a judge I am duty-bound to ignore it. I must look only at the evidence and the defendant." *Commonwealth v. Woodward*, 1997 WL 694119, at *6 (Mass. Super. 1997)

The Commonwealth has failed to sustain its burden in proving beyond a reasonable doubt that Ms. Murray caused the death of Baby Rivera #1 and, therefore, I find her not guilty of murder.

Dated: June 20, 2019

Janet Kenton-Walker
Justice of the Superior Court

Massachusetts Superior Court Criminal Practice Jury Instructions

3RD EDITION 2018

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§ 3.20 RECKLESS ENDANGERMENT OF A CHILD (G.L. c. 265, § 13L)

The defendant is charged with reckless endangerment of a child. Our state legislature has specifically defined this crime in a statute—G.L. c. 265, § 13L. The relevant portions of the statute read as follows:

> **Whoever wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act shall be punished . . .**

The Commonwealth may prove the defendant is guilty of the charges in two ways.

First, the Commonwealth may prove the defendant wantonly or recklessly engaged in conduct that created a substantial risk of serious bodily injury [or sexual abuse] to a child;

Second, the Commonwealth may prove that the defendant wantonly or recklessly failed to take reasonable steps to alleviate such risk where there was a duty to act.

I will now further define each of these theories for you.[1]

In order to prove the defendant is guilty under the first theory, that is, the defendant wantonly or recklessly engaged in conduct that created a substantial risk of serious bodily injury [or sexual abuse] to a child, the Commonwealth must prove each of the following elements beyond a reasonable doubt:

First Element:	**that [the alleged victim/name] was a child;**
Second Element:	**that the defendant acted wantonly or recklessly;**
Third Element:	**that the defendant's conduct created a substantial risk of serious bodily injury [or sexual abuse] to [the alleged victim/name].**

I will now further define each of these elements for you.

The first element the Commonwealth must prove beyond a reasonable doubt is that [the alleged victim/name] was a child. Under Massachusetts law, a "child" is any person under the age of eighteen years old.

The second element the Commonwealth must prove beyond a reasonable doubt is that the defendant acted wantonly or recklessly. Wanton or reckless behavior is specifically defined for the purposes of this charge

and occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his/her acts, or omissions where there is a duty to act, would result in serious bodily injury [or sexual abuse] to a child. The risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.[2]

A substantial risk means a real or strong possibility, and its disregard must amount to substantially more than negligence, that is, simply acting in a manner that a reasonably careful person would not.[3]

The third element the Commonwealth must prove beyond a reasonable doubt is that the defendant, through his/her wanton or reckless conduct, created a substantial risk of serious bodily injury [or sexual abuse].[4] Serious bodily injury is bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death. The Commonwealth does not have to prove that the defendant's conduct resulted in physical injury [or the sexual abuse of victim] but must prove that the defendant's conduct created a substantial risk of serious bodily injury [or sexual abuse].

If the Commonwealth has proven each of these elements beyond a reasonable doubt—that [the alleged victim/name] was a child; that the defendant acted wantonly or recklessly; and that through his/her wanton or reckless conduct, the defendant created a substantial risk of serious bodily injury [or sexual abuse] to the child—then you should find the defendant guilty of reckless endangerment of a child. If the Commonwealth has failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty.

To prove the defendant guilty under the second theory—that is, that the defendant wantonly or recklessly failed to take reasonable steps to alleviate such substantial risk of serious bodily injury to a child where there was a duty to act—the Commonwealth must prove each of the following elements beyond a reasonable doubt:

First Element:	**that [the alleged victim/name] was a child;**
Second Element:	**the defendant acted wantonly or recklessly;**
Third Element:	**the defendant failed to take reasonable steps to alleviate a substantial risk of serious bodily injury [or sexual abuse] to the child;**
Fourth Element:	**that the defendant had a duty to act.**

The first element the Commonwealth must prove beyond a reasonable doubt is that [the alleged victim/name] was a child. Under Massachusetts law, a "child" is any person under the age of eighteen years old.

The second element the Commonwealth must prove beyond a reasonable doubt is that the defendant acted wantonly or recklessly. Wanton or reckless behavior is specifically defined for the purposes of this charge and occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his/her acts, or omissions where there is a duty to act, would result in serious bodily injury [or sexual abuse] to a child. The risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.[5]

A substantial risk means a real or strong possibility, and its disregard must amount to substantially more than negligence, which is defined as simply acting in a manner that a reasonably careful person would not.[6]

The third element the Commonwealth must prove beyond a reasonable doubt is that the defendant failed to alleviate a substantial risk of serious bodily injury [or sexual abuse].[7] Serious bodily injury is bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death. The Commonwealth does not have to prove that the defendant's conduct resulted in physical injury [or sexual abuse of victim] but must prove that the defendant's conduct created a substantial risk of serious bodily injury [or sexual abuse].

I will now turn to the fourth element. The Commonwealth must prove beyond a reasonable doubt that the defendant had a duty to act. Parents and legal guardians have a legal duty to take reasonable steps to prevent harm to a child in their care. Those who accept responsibility as caretakers also have a duty to take reasonable steps to prevent harm to a child who is in their care. Other persons may also have a duty to alleviate a risk of harm to a child. You should look to the facts of this case to determine whether the Commonwealth has proven that the defendant had this duty to act.[8]

If the Commonwealth has proven each of the elements beyond a reasonable doubt—that [complainant] was a child; that the defendant acted wantonly or recklessly; that the defendant, through his/her wanton or reckless conduct, failed to take reasonable steps to alleviate such risk of physical injury to a child where there was a duty to act—then you should find the defendant guilty of reckless endangerment of a child. If the Commonwealth has failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of reckless endangerment of a child.

ENDNOTES

[1] Where the indictment was filed more than twenty-seven years after the date of the offense, there must be independent evidence that corroborates the complainant's allegation. G.L. c. 277, § 63; *Commonwealth v. White*, 475 Mass. 724, 734–40 (2016). For a model instruction, see § 3.3.3(a), above.

[2] G.L. c. 265, § 13L. The wanton or reckless element, as specifically defined in G.L. c. 265, § 13L, differs from the common law standard. For the purposes of § 13L, the defendant must be shown to have been actually aware of the risk. *Commonwealth v. Coggeshall*, 473 Mass. 665, 670 (2016).

[3] *Commonwealth v. Coggeshall*, 473 Mass. 665, 668 (2016) ("The term 'substantial risk' can be understood to mean a 'real or strong possibility.' We have said that in the context of § 13L a 'substantial risk' means 'a good deal more than a possibility.' The risk also must be considered in conjunction with a particular degree of harm, namely 'serious bodily injury.' Section 13L explicates that '[t]he risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.' Disregard of this risk requires a showing that is 'substantially more than negligence.'") (quoting *Commonwealth v. Hendricks*, 452 Mass. 97, 103 (2008)) (citation omitted).

[4] For cases where the theory is that the defendant's conduct created a substantial risk of sexual abuse, "sexual abuse" is defined by the statute as indecent assault and battery on a child under fourteen in violation of G.L. c. 265, § 13B, aggravated indecent assault and battery on a child under fourteen in violation of G.L. c. 265, § 13B½, a repeat offense in violation of G.L. c. 265, § 13B¾, indecent assault and battery on a person age fourteen or over in violation of G.L. c. 265, § 13H, rape in violation of G.L. c. 265, § 22, rape of a child under sixteen with force under G.L. c. 265, § 22A, aggravated rape of a child under sixteen with force in violation of G.L. c. 265, § 22B, a repeat offense under G.L. c. 265, § 22C, rape and abuse of a child under G.L. c. 265, § 23, aggravated rape and abuse of a child in violation of G.L. c. 265, § 23A, a repeat offense in violation of G.L. c. 265, § 23B, assault with intent to rape in violation of G.L. c. 265, § 24, and assault of a child with intent to rape in violation of G.L. c. 265, § 24B. In such cases, the elements of the relevant offense should be read for the jury.

[5] G.L. c. 265, § 13L. See note 2.

[6] See note 3.

[7] See note 4.

[8] *Commonwealth v. Figueroa*, 83 Mass. App. Ct. 251, 263 & n.12, *review denied*, 464 Mass. 1109 (2013) (quoting *Criminal Model Jury Instructions for Use in the District Court* § 6.540 (MCLE, Inc. 3rd ed. 2009 & Supp. 2011, 2013, 2014, 2016, 2017, 2018)).

§ 3.21 ASSAULT AND BATTERY ON A CHILD (G.L. c. 265, § 13J)

In this case, the defendant is charged with assault and battery on a child causing [substantial] bodily injury.

Our state legislature has specifically defined this crime in a statute—G.L. c. 265, § 13J. The relevant portions of the statute read as follows:

> **Whoever commits an assault and battery upon a child and by such assault and battery causes [substantial] bodily injury shall be punished . . .**
>
> **Whoever, having care and custody of a child, wantonly or recklessly permits [substantial] bodily injury to such child or wantonly or recklessly permits another to commit an assault and battery upon such child, which assault and battery causes [substantial] bodily injury, shall be punished . . .**

The Commonwealth may prove the defendant is guilty of the charges in two ways.

First, the Commonwealth may prove that the defendant committed an assault and battery upon a child and that assault and battery caused [substantial] bodily injury to the child.

Second, the Commonwealth may prove that the defendant had care and custody of a child and wantonly or recklessly permitted bodily injury to the child or wantonly or recklessly permitted another to commit assault and battery upon the child, and the assault and battery caused [substantial] bodily injury to the child.[1]

I will now further define each of these theories for you.

In order to prove that the defendant is guilty of the first theory, that is that the defendant committed an assault and battery upon a child and such assault and battery caused [substantial] bodily injury to the child, the Commonwealth must prove these elements beyond a reasonable doubt.

First Element:	**(The alleged victim/name) was a child;**
Second Element:	**The defendant committed a touching on (the alleged victim), however slight;**
Third Element:	**The defendant intended to engage in the touching of (the alleged victim/name);**
Fourth Element:	**The touching was harmful or offensive;**

Fifth Element: **The touching was committed without justification or excuse;**

Sixth Element: **The touching caused [substantial] bodily injury to (the alleged victim/name).**

The first element the Commonwealth must prove beyond a reasonable doubt is that (the alleged victim/name) was a child. For the purposes of this charge, a child is defined as any person under fourteen years of age.[2]

The second element the Commonwealth must prove beyond a reasonable doubt is that the defendant engaged in a touching, however slight. This means in this particular case, you must be satisfied that the Commonwealth proved [applicable facts].

The third element the Commonwealth must prove beyond a reasonable doubt is that the defendant intended to commit the touching.[3] You the jury may or may not infer the defendant's intent to do the act by considering all of the facts and circumstances, as well as the evidence of the defendant's conduct offered during the trial.

The fourth element the Commonwealth must prove beyond a reasonable doubt is that the touching was harmful or offensive.[4] A harmful touching is touching that is physically harmful or potentially harmful. An offensive touching is an affront to a person's integrity.[5]

The fifth element the Commonwealth must prove beyond a reasonable doubt is that the battery was committed without justification or excuse. An example of justification is a physical examination by a doctor. An example of excuse is a situation where a person sees another in danger, reaches out, and while removing the other person from an oncoming vehicle, touches that person's breast.[6] In this case the Commonwealth must prove the absence of justification or excuse beyond a reasonable doubt.

The sixth element the Commonwealth must prove beyond a reasonable doubt is that the touching caused [substantial] bodily harm to (the alleged victim/name). Bodily injury is defined as substantial impairment of the physical condition including any burn, fracture of any bone, subdural hematoma, injury to any internal organ, any injury which occurs as the result of repeated harm to any bodily function or organ including human skin or any physical condition which substantially imperils a child's health or welfare.[7] [For substantial bodily injury, the following language should be used: Substantial bodily injury is bodily injury which creates a permanent disfigurement, protracted loss or impairment of a function of a body member, limb or organ, or substantial risk of death.][8]

If the Commonwealth has proven each of these elements beyond a reasonable doubt—that (the alleged victim/name) was a child; that the defendant touched (the alleged victim/name); that the defendant intended to touch (the alleged victim/name); that the touching was harmful or offensive; that the touching was committed without justification or excuse; and that the touching caused [substantial] bodily injury—then you should find the defendant guilty of intentionally committing an assault and battery on a child causing [substantial] bodily injury. If the Commonwealth has failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty.[9]

To prove the defendant guilty under the second theory, that is the defendant had care and custody of a child and wantonly or recklessly permitted [substantial] bodily injury to the child or wantonly or recklessly permitted another to commit assault and battery upon the child, and the assault and battery caused [substantial] bodily injury to the child, the Commonwealth must prove each of the following elements beyond a reasonable doubt.[10]

First Element:	**[The alleged victim/name] was a child.**
Second Element:	**The defendant had care and custody of [the alleged victim/name].**
Third Element:	**The child suffered [substantial] bodily injury.**
Fourth Element:	**The defendant wantonly or recklessly permitted the child to suffer [substantial] bodily injury [or wantonly and recklessly permitted another to commit assault and battery upon a child that caused [substantial] bodily injury].**

The first element the Commonwealth must prove beyond a reasonable doubt is that [the alleged victim/name] was a child. For the purposes of this charge, a child is defined as any person under fourteen years of age.

The second element the Commonwealth must prove beyond a reasonable doubt is that the defendant had care and custody of [the alleged victim/name]. A person having care and custody is defined as a parent, guardian, employee of a home or institution or any other person with equivalent supervision or care of a child, whether the supervision is temporary or permanent.[11]

The third element the Commonwealth must prove is that [the alleged victim/name] suffered [substantial] bodily injury. Bodily injury is defined as substantial impairment of the physical condition including any burn, fracture of any bone, subdural hematoma, injury to any internal organ,

any injury which occurs as the result of repeated harm to any bodily function or organ including human skin or any physical condition which substantially imperils a child's health or welfare. [For substantial bodily injury, the following language should be used: Substantial bodily injury is bodily injury which creates a permanent disfigurement, protracted loss or impairment of a function of a body member, limb or organ, or substantial risk of death].

The fourth element the Commonwealth must prove beyond a reasonable doubt is that the defendant wantonly or recklessly permitted the child to suffer [substantial] bodily injury [or wantonly or recklessly permitted another to commit assault and battery on the child that caused [substantial] bodily injury to the child].[12] It is not enough for the Commonwealth to prove that the defendant acted negligently—that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness.[13] The defendant acted recklessly if (he/she) knew, or should have known, that the conduct involved would likely cause substantial harm to the child, but (he/she) ran that risk rather than alter such conduct.[14]

Thus, it is reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that substantial injury would very likely result.[15]

If the Commonwealth has proven each of these elements beyond a reasonable doubt—that is, [the alleged victim/name] was a child; the defendant had care and custody of [the alleged victim/name]; [the alleged victim/name] suffered [substantial] bodily injury; and the defendant wantonly or recklessly permitted the child to suffer [substantial] bodily injury [or wantonly or recklessly permitted another to commit assault and battery upon a child that caused [substantial] bodily injury] to the child; you should find the defendant guilty of assault and battery on a child causing [substantial] bodily injury. If the Commonwealth has failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty.

ENDNOTES

[1] A parent or guardian may not be subjected to criminal liability for the use of force against a minor child under the care and supervision of the parent or guardian where the force used against the minor child is reasonable, the force is reasonably related to the purpose of safeguarding or promoting the welfare of the minor child, including the prevention or punishment of the minor child's misconduct, and the force used neither causes, nor creates a substantial risk of causing, gross degradation, severe mental distress, or physical harm beyond fleeting pain or minor, transient marks. *Commonwealth v. Dorvil*, 472 Mass. 1, 12 (2015); *Commonwealth v. Lark*, 89 Mass.

App. Ct. 905, 906–07, *review denied*, 475 Mass. 1103 (2016). See chapter 5 of this book, at § 5.13.

[2] G.L. c. 265, § 13J(a).

[3] *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 457–59 (1994). While the defendant must intend to touch the victim, the defendant need not have the specific intent to injure the victim. *See Commonwealth v. Cabral*, 46 Mass. App. Ct. 917, 918 (1999); *see also Commonwealth v. Macey*, 47 Mass. App. Ct. 42, 43 (1999) (assault and battery, as used in G.L. c. 265, § 13J, is treated identically as treated in G.L. c. 265, § 13A).

[4] While the legislature specifically amended G.L. c. 265, § 13B to provide that a child under fourteen was deemed incapable of consenting, similar language was not included in G.L. c. 265, § 13J. Accordingly, if the Commonwealth proceeds under the theory of an offensive touching, the jury must be instructed that the Commonwealth has to prove that the victim did not consent. Such instruction is not necessary where the Commonwealth proceeds under the theory of a harmful touching. *Commonwealth v. Burke*, 390 Mass. 480, 482–84 (1983).

[5] *Commonwealth v. Burke*, 390 Mass. 480, 482–83 (1983).

[6] See chapter 5 of this book, at § 5.9, Accident, or § 5.4, Self-Defense and Defense of Another.

[7] G.L. c. 265, § 13J.

[8] A finding of bodily injury or substantial bodily injury is not limited to cases where there is trauma; malnutrition or dehydration may amount to bodily injury or substantial bodily injury. *Commonwealth v. Chapman*, 433 Mass. 481, 484–85 (2001); *Commonwealth v. Robinson*, 74 Mass. App. Ct. 752, 758 (2009). The statutory definition of substantial bodily injury does not include death or a substantial risk of death. *Commonwealth v. LaBrie*, 473 Mass. 754, 766–67 (2016). However, death may be evidence of a substantial bodily injury as defined by the statute. *See Commonwealth v. Chapman*, 433 Mass. at 483–86 (asphyxiation from drowning amounted to substantial bodily injury).

[9] For cases where the indictment is based on a theory of reckless assault and battery, see § 3.10.2, above.

[10] *Commonwealth v. Robinson*, 74 Mass. App. Ct. 752, 757 (2009).

[11] G.L. c. 265, § 13J. The statute is not limited to those with formal roles such as parent or legal guardian. *See Commonwealth v. Torres*, 442 Mass. 554, 567–68 (2004); *see also Commonwealth v. Panagopoulos*, 60 Mass. App. Ct. 327, 328–30 (2004).

[12] Where the Commonwealth proceeds under the theory that the defendant wantonly or recklessly permitted another to commit assault and battery on the victim, the jury should be instructed on the elements of assault and battery as defined in the first theory.

[13] *Commonwealth v. Burno*, 396 Mass. 622, 625 (1986); *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 274 n.4 (1983); *see Commonwealth v. Welansky*, 316 Mass. 383, 400–01 (1944).

[14] *Commonwealth v. Dragotta*, 476 Mass. 680, 686 (2017); *Commonwealth v. Welansky*, 316 Mass. 383, 398 (1944); *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 274–75 (1983).

[15] It is not necessary to prove who injured the child. The Commonwealth satisfies its burden where it shows that injuries were inflicted on more than one occasion and an ordinary person having care and custody of the child would recognize that the child was being exposed to inflicted bodily injuries. *Commonwealth v. Garcia*, 47 Mass. App. Ct. 419, 423 (1999).