

DISTRICT COURT, CLEAR CREEK COUNTY, COLORADO 405 Argentine Street, PO Box 367 Georgetown, Colorado 80444 Phone: (303) 569-0820	DATE FILED: April 7, 2023 3:05 PM
PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. KYLE GOULD, Defendant.	▲ COURT USE ONLY ▲ Case Number: 2022CR129 Div. C
ORDER DENYING REQUEST FOR COLLOQUY AND DENYING MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE AND INSUFFICIENT INDICTMENT	

THIS MATTER comes before the court on Defendant’s Motion for in Camera Review of Transcripts of Grand Jury Colloquies (Colloquy Motion) and Defendant’s Motion to Dismiss for Lack of Probable Cause and Insufficient Indictment (Motion to Dismiss). The court, having considered Defendant’s motions and the People’s responses, hereby FINDS and ORDERS as follows:

I. PROCEDURAL HISTORY

Defendant Kyle Gould was indicted by the Grand Jury of the Fifth Judicial District on charges of Criminally Negligent Homicide (a class 5 Felony) and Reckless Endangerment (a class 2 Misdemeanor) on November 22, 2023. The Grand Jury met on November 14, 2022, and November 22, 2022. Agent Derek Graham of the Colorado Bureau of Investigation was the sole witness.

The Defendant was a former Sergeant with the Clear Creek County Sheriff's Office (CCSO). He was the shift supervisor on June 10, 2022, when he was contacted by former CCSO Deputy Andrew Buen about a situation in Silver Plume, Colorado, involving Christian Glass. Mr. Glass contacted 911 requesting assistance after having hit a boulder and becoming stuck. Mr. Glass was expressing paranoid, delusional and/or hallucinatory thoughts, "which would indicate to anyone listening that he was . . . experiencing a mental health crisis." Grand Jury Indictment (Indictment) p. 2. Sgt. Gould was monitoring the events remotely through the CCSO deputies' bodycams. Deputy Buen called Sgt. Gould at some point, but turned off his bodycam audio during that call. After the phone call, Deputy Buen informed other officers present at the scene, that the decision had been made to extract Mr. Glass from his vehicle. The situation escalated from attempts to coax Mr. Glass from his car, a Deputy jumping on the hood of Mr. Glass's vehicle, attempts to break out the car windows with a baton, shooting the glass with bean bags rounds, tasing Mr. Glass, and finally to the use of a firearm by Deputy Buen which resulted in Mr. Glass' death.

The Defendant's first appearance in Clear Creek District Court was on December 12, 2022. He waived advisement of his rights and charges. At that hearing, the Defendant, through counsel, indicated he would be requesting the court to conduct an in camera review of the grand jury testimony including the colloquies, which the court granted. Also, in his *Colloquy Motion*, the defense suggested there were portions of the transcript which were redacted and should be reviewed by the court to assess whether any inappropriate conduct occurred on the part of the District Attorney's Office and

whether these redacted portions should be released to the defense. Specifically, the defense noted many pages of redacted materials with no indication that the grand jury was entering colloquy. Moreover, the defense has “questions and concerns” regarding the lack of any record about a charge of Official Misconduct with which the grand jury was instructed, but the Defendant was not charged.

Subsequently, the Defendant also filed his Motion to Dismiss which alleges both a lack of probable cause and that the indictment is insufficient. In particular, the Defendant argues that the indictment, pursuant to *People v. Tucker*, 631 P.2d 162 (Colo. 1981), fails to accurately state the evidence presented to the grand jury. The defense also argues that the “Tucker Statement” fails to answer the questions of “who, what, where and how” the Defendant committed the offenses upon which he was indicted.

The People responded by clarifying the requirements of *Tucker* regarding the purpose of the indictment, outlining the legal standards of a probable cause analysis, and setting forth their arguments on each of these issues. In particular, the People dispute portions of the defense’s argument, instead suggesting that issues such as reasonableness are ones to be made by a jury as opposed to being decided in a probable cause analysis.

II. COLLOQUY

A. Legal Standards

C.R.S. §16-5-204(4)(k) provides that motions testing the validity of any grand jury indictment must be based on the “grand jury record without argument or further evidence.” The record does not include the colloquy between the district attorney and the grand jury. *People v. District Court*, 610 P.2d 490, 492 (Colo. 1980); *See also* R.Crim.P.

16(I)(1)(II) (People must disclose “all transcripts of grand jury testimony and tangible evidence presented to the grand jury in connection with the case.”).

In order to consider any additional evidence (i.e. the colloquy), C.R.S. §16-5-204(4)(n) requires the moving party to show cause. Only in instances where there are clear examples of inappropriate conduct by the district attorney that may affect the validity of the indictment should the court release a transcript of the grand jury colloquy to the defense. *People v. District Court*, 610 P.2d at 494. While the statute suggests that a particular showing must be made prior to an in camera review to occur, in reality, most courts conduct the in camera review regardless of the strength of the party’s showing. *See, e.g., Id.*

B. Findings and Order

The Court has conducted an in camera review of the entirety of the grand jury proceedings, including the colloquy. The court finds that cause does not exist, pursuant to C R S § 16-5-204(4)(n), to release the colloquy portion of the grand jury proceedings to Defendant. The Defendant’s suggestion that there are numerous redacted pages does not in and of itself give rise to concern. Further, the “questions and concerns” regarding the lack of any record regarding non-charged conduct against the Defendant does not rise to the level of good cause. This line of inquiry is speculative and is not supported by the court’s review. Moreover, weighed against the grand jury’s right and need for confidentiality, the release of the colloquy would be improper in fact and law. *See People v. District Court*, 610 P.2d at 493-94.

Cause was not shown to support disclosure of the colloquy. There were no examples of any inappropriate conduct by the District Attorney, let alone “clear examples.” Thus, the court denies Defendant's request for the colloquy.

III. PROBABLE CAUSE and SUFFICIENCY OF THE INDICTMENT

A. Legal Standards

1. Sufficiency of the Indictment

Pursuant to *People v. Tucker*, 631 P.2d 162 (Colo. 1981), a grand jury indictment must give a defendant sufficient notice of the alleged crime so that a defense can be prepared and it must define the acts constituting the crime with sufficient definiteness. *Id.* at 163. This means that the “indictment must clearly state the essential facts which constitute the offense.” *Id.* An indictment that merely repeats the language of the criminal statute without explaining the “who, what, where, and how” is deficient. *Id.* at 164.

2. Probable Cause.

A defendant charged by an indictment may challenge the grand jury's determination of probable cause. C.R.S. § 16-5-204(4)(k); *see also People v. District Court*, 199 Colo. 398, 401, 610 P.2d 490, 492-493 (1980). Upon motion of a defendant, “[t]he district court before which the indicted defendant is to be tried shall dismiss any indictment of the grand jury if such district court finds . . . based upon the grand jury record without argument or further evidence, that the grand jury finding of probable cause is not supported by the record.” C.R.S. § 16-5-204(4)(k).

To establish probable cause at a preliminary hearing, the prosecution must present evidence sufficient to induce a person of ordinary prudence and caution to entertain a

reasonable belief that the defendant committed the crime charged; the prosecution does not have to establish beyond a reasonable doubt that the defendant committed the crime or even the likelihood that the defendant committed the crime. *People v. Hall*, 999 P.2d 207, 224 (Colo. 2000). The court must draw all inferences in favor of the prosecution and leave questions of fact to be resolved at trial. *Id.*; *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975).

Review of grand jury proceedings pursuant to C.R.S. § 16-5-204(4)(k) is similar to a preliminary hearing in that the court's function is to determine whether probable cause exists to establish each element of the indicted offenses. *People v. Luttrell*, 636 P.2d 712, 714 (Colo. 1981); *People v. Summers*, 593 P.2d 969, 970 (Colo. 1979). "The probable cause standard requires evidence sufficient to persuade a person of ordinary prudence and caution to have a reasonable belief that the defendant committed the crime charged." *People v. Moyer*, 670 P.2d 785, 791 (Colo. 1983).

Much like a preliminary hearing, "The evidence presented must be viewed in the light most favorable to the prosecution; evidence sufficient to support a conviction is not necessary at this stage of the proceedings." *Luttrell*, 636 P.2d at 714. Moreover, defendants are not entitled to present any defenses or gain the favor of any inferences to be drawn from the evidence at this stage of the proceedings. *Id.* If testimony or evidence conflicts, the court must leave resolution of the factual conflict for the jury at trial, and instead grant the prosecution the benefit of all inferences. *Summers*, 593 P.2d at 970. Finally, "Because the grand jury is an accusatory and not an adjudicatory body, there is no constitutional requirement that a grand jury hear and consider exculpatory evidence."

People v. Ager, 928 P.2d 784, 788 (Colo. App. 1996) (citing *United States v. Williams*, 504 U.S. 36 (1992)).

B. Findings and Order

1. Sufficiency of the Indictment.

The indictment in this case, as it relates to Defendant Gould's conduct, indicates the following:

At some point during the encounter, Deputies Buen and Collins were in communication with Clear Creek Sheriff's Sergeant Kyle Gould, the shift supervisor, regarding the events at the scene. Deputy Buen spoke with Sgt. Gould using Deputy Buen's cellular telephone and during this conversation, Deputy Buen muted his body worn camera audio and did not record the conversation. Sgt. Gould was viewing the encounter utilizing a remote viewing feature through the deputies' body cams. After this conversation between Deputy Buen and Sgt. Gould, Deputy Buen told Chief Williams that the decision had been made to extract Mr. Glass from the vehicle. At that point, no one on the scene had made a determination that there was probable cause or reasonable suspicion that a crime had been committed or was being committed.

Indictment, p. 3. The indictment also thoroughly outlines the series of events from law enforcement's initial contact with Mr. Glass through the point where Deputy Buen "fired his service pistol five times into Mr. Glass." *Id.*

Taken as a whole, the court finds that this *Tucker Statement* satisfactorily outlines for the defense the who (Sgt. Gould), the where (Clear Creek County, June 10, 2022), the what (death of Mr. Glass) and the how. The indictment makes clear that Defendant, while not present in person at the scene, was remotely viewing the entire episode. The Defendant authorized the extraction of Mr. Glass. The Defendant was aware of: Mr.

Glass's mental health state and his paranoia; the course of the interaction between various law enforcement officers and Mr. Glass; the nature of the knife Mr. Glass had in his possession which law enforcement had told him not to throw out of the car; the lack of any firearm in Mr. Glass's possession, and the determination that this was a mental health situation, where there was not probable cause or reasonable suspicion to believe a crime had been committed. The Defendant could see and hear remotely the specific interaction between Deputy Buen and Mr. Glass which "fluctuated between conversational in tone to being verbally aggressive with Mr. Glass." *Id.* While the indictment does not "spell out" the Defendant's criminal negligence or recklessness, the "essential facts" are set forth in the indictment so that the "how" of the offenses are understandable.

The court did consider the "deficiencies" the defense argues exist in the *Tucker Statement*. The court does not find any blatant "misstatements" and certainly nothing which undermines the validity of the indictment. Whether the Defendant made the decision to extract Mr. Glass or authorized the extraction of Mr. Glass, his responsibility, at least for purposes of assessing the sufficiency of the indictment, was the same. The statements about whether there was or was not a criminal offense are supported by the testimony and the evidence presented by the grand jury. During grand jury proceedings, the prosecution is entitled to all favorable inferences that can reasonably be drawn from the evidence and the defense is not entitled to the presentation of any defenses or exculpatory evidence at this stage of the proceedings. *Luttrell*, 636 P.2d at 714. Thus, so long as the statements can be reasonably drawn from the evidence when viewing it in the light most favorable to the prosecution, there is nothing improper that would be just

cause for dismissing the indictment. Here, the challenged statements can be reasonably inferred from the evidence presented. The defendant may argue the falsity of these statements at trial, but not at this stage of the proceedings.

2. Probable Cause - Criminally Negligent Homicide.

The elements of the crime of Criminally Negligent Homicide as the jury was instructed are: 1) that the defendant; 2) in the State of Colorado at or about the date and place charged; 3) caused the death of another person; 4) by conduct amounting to criminal negligence. Grand Jury Transcript, November 22, 2022, p. 84, l. 2-4; C.R.S. §18-3-105. Criminal negligence occurs when “[a] person . . . through a gross deviation from the standard of care that a reasonable person would exercise . . . fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.” Tr. November 22, 2022, p. 77, l. 6-11; C.R.S. §18-1-501(3).

Unlike reckless manslaughter, criminally negligent homicide does not require the actor to be aware that his or her actions present a substantial and unjustifiable risk of death to the victim. *Moore v. People*, 925 P.2d 264, 267 (FN6) (Colo. 1996). Rather, criminally negligent homicide is by its very nature unintentional. *People v. Palumbo*, 555 P.2d 521, 524-25 (Colo. 1976) (“The defendant cannot avoid his conviction on the ground that he did not intend death to result from his act.”); *People v. Nhan Dao Van*, 681 P.2d 932, 935 (Colo. 1984) (“Criminally negligent homicide is an unintentional killing caused by the actor's failure to perceive a substantial and unjustifiable risk that a certain result will occur.”); *People v. Eggert*, 923 P.2d 230, 236 (Colo. App. 1995) (“Indeed, in an offense based upon negligence, the individual is charged for acting *without awareness*, that is, for failing

to perceive that his or her behavior involves a substantial and unjustified risk of death.”) (emphasis in original); *Moore*, 925 P.2d at 267 (FN6) (“Criminally negligent homicide involves defendant’s *failure to perceive* a substantial and unjustifiable risk that death might occur.”) (emphasis in original). “The defendant’s guilt stems from his culpable failure to perceive the risk.” *People v. Jones*, 565 P.2d 1333, 1335 (1977).

Though most cases involve the direct actions or conduct of the defendant which leads to the death of the victim (defendant shoots a gun, throws a punch, etc.), that does not necessarily mean that one cannot be guilty of criminally negligent homicide as a result of his words, decisions, or encouragement of another. For example, Colorado recognizes the complicitor theory of liability for criminally negligent homicide – meaning that a defendant could be guilty of the offense, even though someone else’s conduct actually caused the death:

Therefore, for a person to be guilty of criminally negligent homicide through a theory of complicity, he need not know that death will result from the principal's conduct because the principal need not know that. However, the complicitor must be aware that the principal is engaging in conduct that grossly deviates from the standard of reasonable care and poses a substantial and unjustifiable risk of death to another. In addition, he must aid or abet the principal in that conduct and, finally, death must result from that conduct.

People v. Wheeler, 772 P.2d 101, 105 (Colo. 1989). Complicitor liability may apply so long as the defendant and the person who actually killed the victim were engaged in a common enterprise. *Grissom v. People*, 115 P.3d 1280 (Colo. 2005). *Grissom* gives an example of complicitor liability where the defendant was not even present at the time of death:

[W]here A gave B a knife with which to guard the victim after both A and B had assaulted the victim, so that A could find a rape victim who could perhaps identify the victim as the rapist and B killed the victim while A was gone, A could be convicted of criminally negligent homicide as an accomplice.

Grissom, 115 P.3d at 1284.

After reviewing the grand jury transcripts and most particularly the body cam evidence presented to the grand jury, the court finds that there is probable cause to believe that the Defendant committed the crime of criminally negligent homicide. The death of Mr. Glass was caused directly by Deputy Buen. But the Defendant's role in the case as supervisor, not only in authorizing extraction, but in witnessing the course of events and the conduct of the various law enforcement officers on the scene, could be determined, after viewing the evidence in the light most favorable to the People as "deviating from the standard of care that a reasonable person would exercise [and failing to] perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists."

3. Probable Cause - Reckless Endangerment

The elements of the crime of Reckless Endangerment as read to the grand jury are: 1) that the defendant; 2) in the State of Colorado on or about the date and place charged; 3) recklessly; 4) engaged in conduct which created a substantial risk of serious bodily injury to another person. Tr. November 22, 2022, p. 85, l. 4-9; C.R.S. §18-3-208. Recklessness is defined as "consciously disregard[ing] a substantial and unjustifiable risk that a result will occur or that a circumstance exists." Tr. November 22, 2022, p. 77, l. 4-6; C.R.S. §18-1-501(8).

Again, the court finds, based upon the review of the grand jury transcript and evidence presented, that there is probable cause to support the charge of reckless endangerment. When viewed in the light most favorable to the People, the court finds that given the circumstances on the night of June 10, 2022, there is sufficient support for a determination that the Defendant consciously disregarded a substantial and unjustifiable risk that Mr. Glass would be injured or killed if he were extracted from his vehicle and that as the supervisor who both authorized the extraction and was monitoring the situation, he engaged in conduct which created the risk of serious bodily injury to Mr. Glass.

IV. CONCLUSION

Having reviewed the entirety of the grand jury proceedings in camera, the court concludes that there is no cause to release the colloquy portion of the proceedings to the defense. The court further finds that the indictment in this case satisfies the requirements of *People v. Tucker* and accordingly denies the Defendant's Motion to Dismiss related to an insufficient indictment. Finally, the court finds that there is probable cause to support both the criminally negligent homicide count and the reckless endangerment count against the Defendant and so likewise denies the Defendant's Motion to Dismiss for lack of probable cause.

SO ORDERED this April 7, 2023.

BY THE COURT:





DISTRICT COURT JUDGE