

ANSWER TO QUESTION NO. 4

Defendant was charged with first-degree premeditated murder. Second-degree murder and involuntary manslaughter are necessarily included lesser offenses to first-degree premeditated murder. A trial court must instruct on the primary charge plus any lesser included offenses that are supported by a rational view of the evidence. *People v Mendoza*, 468 Mich 527, 541 (2003).

Should the trial court give the jury an instruction on second-degree murder?

As stated above, the trial court must instruct on second-degree murder if that instruction is supported by a rational view of the evidence. The elements of second-degree murder are:

1. Defendant caused the death of the decedent.
2. Defendant had one of the following three states of mind:
 - a. defendant intended to kill the decedent;
 - b. defendant intended to do great bodily harm to the decedent; or
 - c. defendant knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be a likely result of his actions.
3. The killing was not justified, excused or done under circumstances that reduce it to a lesser crime. CJI2d 16.5; See *People v Roper*, 286 Mich App 77, 84 (2009).

Here a rational view of the evidence would support giving a second-degree murder instruction. The evidence presented at trial establishes that Dan Defendant shot the bullet that killed Victor Victim. Therefore, the first element of second-degree murder is satisfied. The evidence may also support the second element of second-degree murder--that Dan had the state of mind required for a second-degree murder conviction. Specifically, the evidence established that Dan threatened that Victor "will not make it home alive." Dan waited in his car with a loaded handgun for three hours, until Victor exited the casino. Upon seeing Victor, Dan fired his gun repeatedly in the direction of Victor, ultimately killing him with a bullet to the head. The final element of second-degree murder is one of exclusion by factual finding. That is, the fact finder must conclude as a matter of fact that the killing was not justified, excused or done under circumstances that reduce it to a lesser crime. There is no evidence that would suggest the killing was justified or excused. As discussed below,

Dan's testimony that he did not intend to harm Victor may support an involuntary manslaughter conviction. The mere possibility of a lesser conviction, however, is not enough to keep the trial court from instructing on second-degree murder. If the jury rejects Dan's testimony, there is ample evidence to support a second-degree murder conviction.

For these reasons, the trial court should give an instruction on second-degree murder.

Should the trial court give the jury an instruction on involuntary manslaughter?

Pertinent to the facts presented here, the elements of involuntary manslaughter are:

1. Defendant caused the death of the decedent.
2. Defendant acted in a grossly negligent manner in doing the act that caused the death.
3. Defendant caused the death without lawful excuse or justification. CJI2d 16.10; See *People v Herron*, 464 Mich 593, 604 (2001).

Elements one and three are not at issue. Dan Defendant shot the bullet that resulted in the death of Victor Victim and nothing presented at trial suggests that Dan Defendant had a legal justification or excuse for killing Victor. Thus, whether the trial court should instruct the jury on involuntary manslaughter will turn on whether a rational view of the evidence supports the conclusion that Dan Defendant acted in a grossly negligent manner when causing the death of Victor.

Gross negligence, by its terms, means something more than carelessness. "It means willfully disregarding the results to others that might flow from an act or failure to act." CJI2d 16.18; see *People v Orr*, 243 Mich 300, 307 (1928). In order to establish gross negligence in criminal law, a prosecutor must establish the following elements beyond a reasonable doubt:

1. Defendant knew of the danger to another.
2. Defendant could have avoided injuring another by using ordinary care.
3. A reasonable person would conclude that a likely result of defendant's conduct was serious injury. *Id.*

Here, based on the proofs admitted by Dan Defendant at trial, a fact finder could reasonably conclude that firing a gun in a public area results in danger to those in the area. A reasonable

person exercising ordinary care and good judgment would not fire a gun in a public area under the circumstances presented in this case. Finally, a reasonable person would recognize the substantial risk of serious injury that likely would result from Dan's actions. Dan Defendant testified that he intended "only to scare Victor by shooting over his head, into the wall of the casino." If the fact finder accepts this testimony, there would be sufficient evidence to support the conclusion that Dan did not act with the intent to kill. Nonetheless, Dan's conduct could be deemed grossly negligent and sufficient to support a conviction of involuntary manslaughter.

For this reason, the trial court should also give an instruction on involuntary manslaughter.