

QUESTION 4 THE ANSWER TO THIS QUESTION SHOULD GO IN BLUEBOOK II

Dan Defendant was playing poker at a local casino with Victor Victim. During the course of the game, a dispute broke out when Victor accused Dan of unethical conduct. The two men exchanged words and tensions escalated until the poker room manager intervened. After hearing a recount of what occurred, the manager concluded that Dan acted improperly and asked Dan to leave. Dan became so infuriated that two security guards had to restrain him and escort him to his car. As he was exiting the poker room, Dan pointed at Victor and proclaimed, "You will not make it home alive!" Dan got in his car, drove to the rear of the casino and retrieved a .38 caliber loaded handgun that he had in the trunk of his car. Dan then drove back to the front of the casino and parked across the street from the valet entrance, where he sat with gun in hand and waited for Victor to leave the casino.

When Victor exited from the casino three hours later, Dan rolled down his window and fired six shots in the direction of Victor, emptying his gun. Dan immediately left the scene. Victor died at the scene from a gunshot wound to the head. Dan was arrested and charged with first-degree premeditated murder. During the jury trial, it was undisputed that five bullets were found in the wall over the door from which Victor exited, 25 feet above the ground. It was also undisputed that the fatal bullet ricocheted off the carport overhang 30 feet above the ground, before it struck and killed Victor. Dan testified and admitted to all of the facts stated above. Nonetheless, Dan testified that he did not intend to kill Victor. Dan testified that he intended "only to scare Victor by shooting over his head into the wall of the casino."

At the close of the evidence, the trial judge indicated her intent to instruct the jury on first-degree premeditated murder and asked the litigants if other instructions should be given. Dan Defendant's lawyer asked that the jury also be instructed on involuntary manslaughter. The prosecution objected to the involuntary manslaughter instruction, and asked for an instruction on second-degree murder. Defense counsel objected to the second-degree murder instruction.

Should the trial court give the jury an instruction on second-degree murder? Explain your answer.

Should the trial court give the jury an instruction on involuntary manslaughter? Explain your answer.

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