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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL PAUL HOWARD,

Defendant and Appellant.

H041426

(Santa Clara County

Super. Ct. No. C1239565)

Defendant Michael Paul Howard appeals from a judgment following a jury trial in which he was found guilty of second degree murder for stabbing a former coworker. He contends that the trial court prejudicially erred by admitting evidence that in a prior uncharged act, defendant uttered a racial slur while threatening the victim with a knife. Defendant further contends that the court improperly instructed the jury with CALCRIM No. 370 on the inferences a jury may draw from the presence or absence of motive in the charged crime. We find no evidentiary or instructional error and must therefore affirm the judgment.

*Background*

In 2008 defendant and the victim, Juan Munoz, both worked at a Pizza Hut on South White Road in San Jose. Their shift leader, Ibeth Barreras, testified that defendant's relationship with the other employees was "not the greatest." He resisted Barreras's directives and was disrespectful to the other employees. When they complained to Barreras about problems with defendant, she would report the problem to

the store manager. Munoz, on the other hand, was “nice to everybody” and helpful to his coworkers. On one occasion in December 2008, Barreras saw defendant walking toward Munoz. After some discussion between them, Munoz slapped defendant in the face. The two were separated by a driver, and Barreras reported the incident to the store manager, who told her to send both employees home. Munoz had already “sent himself home” without being asked or directed to do so.

The store manager, Jazmin Mendoza, recalled that it was “very hard for [defendant] to take direction from other managers,” and a “universal complaint” from the other employees was that they were overworked because of defendant’s refusal to comply with orders. When Barreras reported the slapping incident to her, Mendoza conducted an investigation, and soon thereafter both defendant and Munoz were disciplined. Mendoza considered defendant “a problem employee.”

Sometime after Mendoza transferred to a Pizza Hut in Cupertino, Munoz became a shift manager at the South White Road location. Defendant was ultimately terminated from Pizza Hut.

On August 21, 2012, defendant entered a Safeway store on Story Road in San Jose, where he was a frequent shopper. Veronique Carillo (aged 17 by the time of trial) was there with her mother, sister, and niece. Veronique was standing in the produce section looking at fruit when she saw a tall man with a backpack come around the corner from the dairy cases and approach a smaller man, identified as Munoz, from the back.<sup>1</sup> At trial she identified defendant as the man with the backpack. As he came around the corner, Veronique heard defendant say in a loud and angry voice, “What’s up bitch?” At the same time defendant pushed Munoz from behind. A few punches were thrown by

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<sup>1</sup> Munoz was described by the medical examiner as 24 years old, five feet four inches tall and 175 pounds.

defendant,<sup>2</sup> and then Veronique heard the click of a knife opening and saw it in defendant's right hand. It had a blade of four or five inches. At the time she heard the knife click Veronique saw that Munoz was standing holding his hands up by his shoulders with his palms facing outward. Munoz slowly backed up, still keeping his hands up. Veronique saw defendant's right hand move up and his arm move forward toward Munoz in a stabbing motion. Munoz kept backing up, while defendant continued toward him; then, at the corner where the eggs were, defendant ran away. Munoz collapsed into some crates. At some point he dropped the juice and cheese he had been carrying. Both were found near his body when police arrived. Munoz died from the stab wound; also recorded at his autopsy were multiple abrasions on his face that could have been sustained from being hit or in his fall.

San Jose Police Officer Patrick Kirby of the city's homicide crime scene unit searched the Super Taqueria across the street from the Safeway. Recovered from a trash can in the men's restroom was a knife with a five-inch handle and a four-inch blade. To use the knife one had to apply pressure first to release the blade and then to lock it into place. DNA from blood stains found in the restroom sink and paper towel dispenser primarily matched defendant. DNA extracted from blood on the knife blade matched Munoz, while DNA on the handle matched defendant.

Loss prevention investigator Celia Kettle provided DVD copies of Safeway's camera recordings of activity that night to law enforcement and to the coroner. A forensic analysis of the still photos and compiled video footage tracked both individuals' paths through the store that night. It showed defendant following Munoz and later an interaction between them in the produce section. The two faced each other, and

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<sup>2</sup> At trial Veronique recalled the punches having been thrown only by defendant. On cross-examination, however, defense counsel reminded her of her preliminary hearing testimony, in which she answered "yes" to the question, "is it fair to say that both were trying to hit each other?"

defendant held his hand out as Munoz backed up. There appeared to be contact between defendant's hand and Munoz's torso, and then defendant pulled back his hand, which held something black. Munoz was shown collapsing in the produce section and defendant running out of the store.

Defendant was charged with murder, with the personal use of a deadly weapon. (Pen. Code, §§ 187, 12022, subd. (b)(1).) At trial he testified in his own behalf, telling the jurors that Munoz often had verbally and physically harassed him, with name calling and shoving, while the two worked at Pizza Hut. He described an occasion on which he was leaving work in his car when Munoz challenged him to fight. Another time after a physical altercation, Munoz struck him in the face with pizza pliers.<sup>3</sup> These incidents made defendant feel "horrible"; he reported the harassment to Mendoza, but things got worse.<sup>4</sup> Later, after he no longer worked at Pizza Hut, defendant was driving home from school when he saw Munoz in another car, staring at him. Another time he was on foot when Munoz drove up and began "taunting" him, yelling, " 'What's up? You got a problem? You got a problem?' "

Defendant's version of what happened on August 21, 2012, depicted Munoz as the aggressor. Munoz saw defendant first and gave him "a dirty look." After using the store restroom, defendant was looking for milk when he saw Munoz at his side. Although he felt "fear for [his] life," defendant went over to talk to Munoz. Munoz ignored him and walked away, but defendant still felt afraid. He went up and pushed Munoz from behind

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<sup>3</sup> In the prosecutor's rebuttal, homicide detective John Barg testified that in his investigation of Munoz's death he interviewed defendant. Defendant claimed that at the Pizza Hut Munoz had struck him in the face with some plastic, but he never mentioned pliers being used against him. Defendant also never told the detective that in the Safeway he was afraid for his life during the encounter with Munoz. He did claim that he "wasn't even trying to stab [Munoz]."

<sup>4</sup> On rebuttal, Mendoza testified that defendant had never complained to her that Munoz had pushed or bumped defendant or called him names.

“to make him get away” from him, and he said “What’s up, bitch?” to Munoz. Then he kicked and punched Munoz. Munoz scratched defendant with a plastic bag, close to his eye, and then hit defendant in the face with the bottle in his hand. Defendant was “really scared” at that point and went numb. He pulled out his knife, opened it, walked up to Munoz, and stabbed him. He did not want Munoz dead; he did not even know he had stabbed him. Munoz did not even act hurt; he was talking and smiling. When defendant realized he had the knife in his hand, he was shocked and ran out. It was only when he pulled the knife out again at the taqueria that he saw the blood and realized he had stabbed Munoz. He tried to wash the blood off, but as he was drying the blade he cut his finger. He then threw the knife away and went home. He had not wanted to kill Munoz, he had not wanted revenge, and he was sorry he had killed him. On cross-examination defendant admitted that compared to Munoz, he was bigger and stronger and was on the offensive in the Safeway, but it was because he was afraid.

On June 25, 2014, the jury found defendant guilty of second degree murder and found true the weapon allegation. On August 29, 2014, the court sentenced defendant to 15 years to life in prison consecutive to one year. This timely appeal followed.

### *Discussion*

#### *1. Admission of Racial Epithet in Uncharged Prior*

Before trial the prosecutor moved in limine to present the testimony of DeShawn Brandon, who had been threatened by defendant on June 11, 2012. Part of that anticipated testimony was defendant’s statement to Brandon, “[Y]ou fucking nigger, I’m gonna kill you.” The prosecutor offered the evidence pursuant to Evidence Code section 1101, subdivision (b)<sup>5</sup> (hereafter, section 1101(b)) to show intent to kill and a common plan.

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<sup>5</sup> All further statutory references are to the Evidence Code except as otherwise indicated.

The defense opposed admission of this prior bad act evidence, citing section 352. It particularly sought exclusion of any mention of defendant's racist remarks, because they constituted irrelevant and "highly inflammatory" character evidence. The court initially agreed, ruling that no witness would be permitted to portray defendant as a racist. As to Brandon specifically, the court ruled that the prior conduct was admissible to show intent, and it was more probative than prejudicial. The court further ruled, however, that "sanitizing the word 'Nigger' out of the case" was necessary, because "that word is so despicable to people and rightfully so, and so derogatory that it would cause the jury to be so prejudiced perhaps against the defendant that he would not be able to receive a fair trial." In addition, there was insufficient evidence that the attack on Munoz "had anything to do with race or ethnicity." The court added that it was "really a close call" because without a motive for the attack on Brandon, the jurors might speculate that there were "mental health issues and other things." The court cautioned that its ruling could change if other issues developed in the case.

The subject arose again during trial. The prosecutor argued that the evidence could be admitted not only for intent but for impeachment should defendant testify. The defense continued to assert excessive prejudice under section 352. The court subsequently held a hearing under section 402 at which a police officer at the local university testified. Officer Rafael Vargas stated that he was in a police uniform sitting in a Starbucks with two other officers when Brandon approached them. Brandon pointed behind him and said in an excited voice, "That guy out there tried to stab me." Brandon appeared relieved to see the officers, but also "nervous, very afraid." He kept looking back over his shoulder, pointing at defendant. Vargas and another officer approached defendant and told him they wanted to talk to him. Defendant ran off, and the officers chased him. When they caught up with him, they asked him if he had any knives on him. Defendant indicated that he did, and the officers retrieved a folding knife from

defendant's front pocket. Brandon later identified the knife. Officer Vargas identified defendant and recalled that he had had a backpack when he was apprehended.

Following Officer Vargas's testimony the court ruled that the evidence would not come in under section 1101(b) because the incident did not relate directly to the intent to kill in this case. It did qualify as an excited utterance, which could be used if Brandon testified. The court reaffirmed its admissibility for impeachment if defendant testified.

Both anticipated circumstances took place. The court first instructed the jurors that an uncharged act would be presented, which they could consider only in deciding whether defendant acted with the intent to kill. Brandon then testified that at 8:30 or 9:00 p.m. on June 11, 2012, he was walking through the parking lot to a McDonald's restaurant when he saw defendant, whom he had never seen before. Defendant was wearing a backpack and "seemed agitated, really aggravated." He asked in a rude manner, "What are you looking at?" Brandon asked him "did he have a problem, was something wrong." Defendant responded, "F U." Brandon looked away and went on into the McDonald's. Defendant went inside as well. Brandon had left the restaurant and was waiting at the light-rail station when defendant pulled a knife out of his pocket and began chasing Brandon, saying in a belligerent, angry, frustrated way, "I will fucking kill you." Brandon believed that he ran at least a mile to another station, where he waited for a few trains in case defendant got on one of them. Brandon got off at a downtown station, but defendant was there, and he was still trying to go toward Brandon in an angry manner. Brandon went into the Starbucks and explained the situation to the officers there.

Officer Vargas testified that Brandon said, "He tried to stab me" or "wants to stab me." The officer described catching defendant and finding the knife in defendant's pocket.

In his own testimony defendant said that Brandon initiated the encounter by staring at him as he left the McDonald's. Defendant avoided eye contact, but Brandon

put his hand close to defendant's face and said, "What's up, Homie?" Defendant responded, "Do I know you?" Brandon, again staring, then stepped back and said, "What did you say? Say it again. Say it again." Defendant went on inside the restaurant, bought food, changed clothes, and walked back to the light-rail station. There he spotted Brandon, standing across the street at least 30 feet from him. Brandon said, "Should rob your ass. I should rob your ass. I'm going to follow you and kill your ass." Defendant said nothing, but he was scared. Brandon then closed the distance between them, and defendant reached for his knife. He took out the knife and opened it, saying "get the fuck away from me" as he flashed the knife at Brandon. Brandon then stared at defendant and called him a "bitch." Defendant made a motion toward Brandon, who ran away. Thinking the danger was over, defendant started to put the knife away, but Brandon approached again with a big smile on his face. Defendant said, "Are you serious?" and pulled out the knife again, only this time without unfolding the blade. Brandon again ran away, and defendant did not see him again until he reached the stop near the Starbucks. Defendant was walking past the Starbucks when he heard Brandon say, "I'm going to get you now." Brandon then went into the Starbucks where the police officers were.

After defendant completed his testimony, the court reconsidered the issue of whether to admit the racial epithet uttered to Brandon. The court explained, "I did not allow previously the [section] 1101 witness to say that the defendant called him the 'N' word . . . I kept it out as substantially more prejudicial than probative at the time. And left it unclear putting the DA at some disadvantage. [¶] But I didn't think it was extremely important at the time leaving unclear the defendant's motive, possible motive for the attack on Mr. Brandon. Now, the defendant has testified and this information comes of course for the first time that the victim, alleged victim of that attack[,] Mr. Brandon[,] had a motive and that motive was that Mr. Brandon said he was going to rob him and follow him and kill him. [¶] And that's why he pulled out the knife that day. The court seems to think it would be unfair to allow the defense now to present a

motive on the victim's part and whereas the DA was not allowed to bring in his motive based on the words of the defendant according to Mr. Brandon in the police report that he called him the 'N' word. [¶] And there was no other motive according to Mr. Brandon.”

In a further discussion defense counsel objected to any mention of race. The prosecutor, however, believed that defendant had opened the door to cross-examination on his having made the racial slur as well as having been reprimanded at work for making racist statements. The court acknowledged its prior opinion that the prosecutor could establish an unprovoked attack without the racial slur, but now defendant's statement to Brandon was “extremely probative” evidence of a racial motive. The court also noted, “I learned for the first time that employment records contained statements from the defendant regarding white power and black power. Apparently a black person was hired and he said ‘oh black power’ and at some other point said ‘white power.’ [¶] When I was told that, I told the parties that would have been a much closer case on my ruling originally and I don't know how I would have ruled, but my ruling was going to remain the same for the reasons stated earlier in the ruling before I found out about white power and black power. [¶] Now very importantly the defendant has testified that the victim, alleged victim in the case[,] Mr. Brandon[,] had a motive that day and that he said that he was going to rob and kill the defendant; threatened to rob him and kill him. To not allow the DA to present their [*sic*] motive now puts the defendant with a motive and when the jury compares that evidence, leaves the DA without a motive. [¶] What would make more sense as the jury looks at it, out of the blue the defendant pulls a knife on someone he has no grudge with and threatens to kill him; not rob him or do anything else for no reason when the DA stated all along[,] ‘[J]udge, we have reason to believe . . . that he was black and that was the reason.’ [¶] And the defendant would be left with a motive for the jury that the alleged victim[,] Mr. Brandon[,] tried to rob him and kill him and has a whole story behind it. That seems highly unfair to the DA and the court is open to change that ruling. It would be highly unfair for the DA not to present a situation with no

motive when they have an alleged motive that the jury might adopt especially based on the statements of white power and black power the defendant allegedly made to someone else and now does this to Mr. Brandon, calls him ‘Nigger.’ ”

The court thus concluded that to prevent the prosecutor from being at a “severe disadvantage” in trying to prove the uncharged attack on Brandon, the racist comment would be admitted. The court further ruled that a statement defendant made when a Black person was hired, “Black power,” clearly showed that defendant harbored prejudice “and that might explain his actions toward Mr. Brandon that day.” It did not allow a separate comment in which defendant allegedly uttered “White power” at work, because it would impermissibly suggest a racial motive for the homicide of Munoz.

On cross-examination defendant denied chasing Brandon because he was Black and denied saying, “You fucking nigger. I’m going to kill you.” He also denied having made racist comments at work. He admitted signing a written reprimand for saying something like, “There’s now Black power in this place” when a Black employee was hired; he did make that comment, but he “didn’t say it like that.” They were friends, and he said it only to make the employee laugh.

Subsequently, however, the court informed the jury that the parties had stipulated that Officer Lott, one of the university police officers Brandon contacted at Starbucks, would testify that Brandon “stated the following: He saw a black knife in [defendant] Howard’s right hand and Howard was yelling quote, you fucking nigger. I’m going [to] kill you. Close quote.”

The relevance of prior bad acts “depends, in part, on whether the act is sufficiently similar to the current charges to support a rational inference of intent, common design, identity, or other material fact. [Citation.] ‘The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] . . . In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant “ ‘probably harbor[ed]

the same intent in each instance.’ [Citations.]” [Citation.]” (*People v. Leon* (2015) 61 Cal.4th 569, 598, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 402; see also *People v. Lang* (1989) 49 Cal.3d 991, 1015 [defendant’s threat to “waste” anyone who interfered with his desires or plans was relevant to prove intent to kill and to defeat claim of self-defense]; *People v. Quartermain* (1997) 16 Cal.4th 600, 626-627 (*Quartermain*) [admission of section 1101(b) evidence proper in murder conspiracy to show intent to kill was genuine, not sham].) More specifically, evidence of racial animus is not prohibited where it is used to impeach the defendant’s testimony regarding his intent. (See, e.g., *Quartermain, supra*, at pp. 627-628 [racial epithets defendant made during police interviews relevant to show attitude toward victim and victim’s race]; *People v. Medina* (1995) 11 Cal.4th 694, 766 [rejecting claim of prejudice from defendant’s swastika tattoo and racial epithet during uncharged crime.]

On appeal, defendant contends that the court abused its discretion under section 352 by admitting the testimony that defendant had used the “provocative and inherently prejudicial” racial slur against Brandon. Citing *Ewoldt, supra*, 7 Cal.4th 380, defendant urges “heightened scrutiny” to expose the harm that inevitably resulted from the jury’s having heard this “powerful and decisive” testimony. In his view, the prejudicial effect was “overwhelming,” as jurors might well have inferred that ethnic prejudice against Hispanics was behind the homicide.

Defendant adds, justifiably, that the motive for threatening Brandon was not material to the charged crime. The probative value of the racial epithet with respect to the homicide was “nil,” he argues, because there was no evidence that the killing of Munoz was racially motivated; and even to negate his credibility the epithet reflected only “commonplace street truculence often exhibited by young males.” By the same token, however, we cannot agree that the court abused its discretion in admitting this part of Brandon’s account of defendant’s attack. Defendant’s testimony clearly suggested to the jury that he was only flashing his knife to ward off Brandon’s attack on him.

The court properly determined that if it left the racial slur excluded in conformance to its prior ruling, the jury would have been left with the unrebutted impression that defendant had no motive to threaten Brandon but was only defending himself against a threatened robbery. The court thoughtfully weighed the anticipated effect on the jury of admitting the evidence. It properly determined that the slur could be used to impeach defendant's credibility and rebut the inference that Brandon was the aggressor with an intent to harm defendant. In changing its ruling to accommodate the new evidence, the court struck a careful balance between protecting defendant against potential prejudice and fairness to the prosecution: it restricted the prosecutor from using the evidence to argue a comparable motive in killing Munoz, and it instructed the jury with the limited use it could make of the uncharged conduct, pursuant to CALCRIM No. 375.<sup>6</sup> The prosecutor himself reminded the jury that the evidence was to be used as "just one more piece . . . on the issue of wilfulness, of intent to kill."

Unlike defendant, we cannot assume that by its nature the racial epithet was so prejudicial as to offend due process. In *Quartermain*, where the defendant used racial epithets during a police interview, their admission not only was relevant on the issue of motive, but met the constraints of section 352: "[T]he racial epithets were not so inflammatory that their probative value was substantially outweighed by their potential for undue prejudice. (Evid. Code, § 352.) The unfortunate reality is that odious, racist language continues to be used by some persons at all levels of our society. While offensive, the use of such language by a defendant is regrettably not so unusual as to

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<sup>6</sup>The court added to its earlier instruction on section 1101(b) evidence: "If you decide the defendant committed the uncharged act, you may but are not required to consider the evidence for the limited purpose of deciding whether or not . . . the defendant acted with the intent to kill in this case. . . . Do not consider this evidence for any other purpose except for the limited purpose of intent, and to determine the defendant's credibility."

inevitably bias the jury against the defendant.” (*Quartermain, supra*, 16 Cal.4th at p. 628.)

As in *Quartermain*, here, defendant’s racial epithet to Brandon was only a small portion of the evidence that he actively threatened Brandon rather than merely flashing his knife in a defensive gesture. And as in *Quartermain*, the prosecutor did not place special significance on the content or draw any direct connection between prejudice against Brandon’s race and prejudice against the Hispanic victim of the charged crime. Indeed, there is even less danger of improper inferences by the jury than in *Quartermain*, where the defendant’s prejudice was directed at the victim of the *charged* crime. There is no indication in the record that the jury wrongly convicted defendant based on this section 1101(b) evidence.

Thus, we cannot conclude that the admission of the racial slur against Brandon was so prejudicial that exclusion was compelled under section 352 or that defendant’s constitutional rights to due process were infringed. Taking into account the court’s cautious, evenhanded approach to the admissibility of the disputed evidence, we find no “arbitrary, capricious, or patently absurd exercise of discretion” in the court’s decision to admit this impeachment evidence. (*People v. Coddington* (2000) 23 Cal.4th 529, 587, overruled on another point by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

## 2. CALCRIM No. 370 Instruction

The court instructed the jury with CALCRIM No. 370 as follows: “The People are not required to prove that the defendant had a motive to commit the crimes [*sic*] charged. In reaching your verdict you may[, ] however[, ] consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show [that] the defendant is guilty. Not having a motive may be a factor tending to show [that] the defendant is not guilty.” Defendant now contends that this instruction should not have been given because his motive was at issue, through the prosecutor’s assertion of malice and his own

claim of self-defense. According to defendant, the instruction lightened the prosecutor's burden of proof and encouraged the jury to reach a verdict of murder rather than imperfect self-defense.<sup>7</sup>

Defendant relies primarily on *People v. Maurer* (1995) 32 Cal.App.4th 1121 (*Maurer*), where one instruction told the jurors that to convict the defendant of misdemeanor child annoyance (Pen. Code, § 647.6), the People had to prove that defendant's conduct was motivated by an unnatural or abnormal sexual interest in the victim. (*Maurer, supra*, at pp. 1125, 1127.) Another instruction, CALJIC No. 2.51 (the predecessor to CALCRIM No. 370), told the jurors that “ ‘[m]otive is not an element of the crime charged and need not be shown.’ ” (*Maurer, supra*, at p. 1127.) The appellate court reversed, because the motive instruction conflicted with the instruction on the requisite mental state of those offenses, i.e., of being motivated by an unnatural or abnormal sexual interest in the victim. (*Ibid.*) The court concluded that the trial court had erred by not excluding the Penal Code section 647.6 offenses from the motive instruction. (*Maurer, supra*, at p. 1127.)

*Maurer*, however, is inapposite. Defendant is correct that at issue in this trial was whether defendant killed Munoz with malice or, instead, killed him out of the belief—reasonable or unreasonable—that it was necessary to defend himself. Malice, however, reflects intent, not motive. “ ‘Motive, intent, and malice—contrary to appellant's assumption—are separate and disparate mental states. The words are not synonyms.’ . . . Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice.” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503-504; *People v. Wilson* (2008) 43 Cal.4th 1, 22; see also *People v. Smith* (2005) 37 Cal.4th 733, 741 [evidence of motive not required to establish

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<sup>7</sup> We reach this issue even though defendant failed to object to the instruction. (Cf. *People v. Casares* (2016) 62 Cal.4th 808, 831 (*Casares*).)

intent to kill].) Malice will be negated if imperfect self-defense exists. “Self-defense, when based on a *reasonable* belief that killing is necessary to avert an imminent threat of death or great bodily injury, is a complete justification, and such a killing is not a crime. [Citations]. A killing committed when that belief is *unreasonable* is not justifiable. Nevertheless, ‘one who holds an honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury does not harbor malice and commits no greater offense than manslaughter.’ [Citation.]” (*People v. Elmore* (2014) 59 Cal.4th 121, 133-134.) Informing the jury that the prosecutor need not prove motive did not abate his duty to prove all of the elements of murder, including the requisite intent.

Nor did the instruction reduce or shift the prosecutor’s burden of proof. This argument has been rejected numerous times by our Supreme Court. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750 [CALJIC No. 2.51 instruction did not shift burden of proof to defendant, nor undercut instruction on reasonable doubt]; *Casares, supra*, 62 Cal.4th at p. 831 [CALJIC No. 2.51 does not lessen prosecution’s burden of proof]; *People v. Cage* (2015) 62 Cal.4th 256, 284 [CALJIC No. 2.51 does not shift burden of proof to defendant to show absence of motive to establish his innocence]; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1192-1193 [no impermissible burden-shifting by instruction with CALCRIM No. 370.]) Nothing in the facts or defense theory of this case convinces us that any defect in the instruction rendered it constitutionally infirm.

#### *Disposition*

The judgment is affirmed.

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ELIA, ACTING P.J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.