**PEOPLE v. THEUS**

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*THE PEOPLE, Plaintiff and Respondent, v. RICHARD THEUS et al., Defendants and Appellants.*

Court of Appeals of California, Second District, Division Four.

Filed May 18, 2011.

***Attorney(s) appearing for the Case***

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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

SUZUKAWA, J.

Following a joint trial, appellants Richard Theus and Bernard Harris were convicted of the first degree murder of Marcus Peters (Pen. Code, § 187, subd. (a))[1](https://www.leagle.com/decision/incaco20110518031#fid1) and the attempted willful, deliberate, and premeditated attempted murders of Derick Holman and Aaron Thomas (§§ 664/187). Theus also was convicted of the first degree murder of Emanuel Sauer-Chambers. The jury found the following special allegations to be true: (1) in the commission of the murders of Peters and Sauer-Chambers and the attempted murder of Holman, Theus personally used and intentionally discharged a firearm and caused great bodily injury (§ 12022.53, subds. (b), (c), &(d)); (2) in the commission of the attempted murder of Thomas, Theus personally used and intentionally discharged a firearm (12022.53, subds. (b) & (c)); (3) Theus committed multiple murders within the meaning of section 190.2, subdivision (a)(3); (4) the crimes were committed with the intent to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)); (5) in the commission of the murder of Peters, a principal personally and intentionally discharged a firearm and caused great bodily injury (§ 12022.53, subds. (d) & (e)); (6) in the commission of the attempted murder of Holman, a principal personally used and intentionally discharged a firearm and caused great bodily injury (§ 12022.53, subds. (b) through (e)); and (7) in the commission of the attempted murder of Thomas, a principal personally used and intentionally discharged a firearm (§ 12022.53, subds. (b), (c), & (e)).

Theus was sentenced to life without the possibility of parole for the murder of Sauer-Chambers and consecutive terms of 130 years to life and 20 years on the remaining counts.[2](https://www.leagle.com/decision/incaco20110518031#fid2) Harris was sentenced to 105 years to life plus 20 years. Each was ordered to pay direct restitution to the victims in the amount of $15,311.08.

Theus and Harris appeal, contending the trial court erred by denying their motion for a mistrial, refusing to read a special curative instruction, and admitting a letter that had been confiscated by bailiffs. Theus also claims the court erred by refusing to give self-defense instructions. The People contend there are errors in the abstract of judgment that must be corrected.

We find no basis for disturbing the convictions. However, we conclude the abstracts of judgment must be amended.

**FACTUAL AND PROCEDURAL BACKGROUND**

**I. The Prosecution Case**

***A. The May 30 Shooting***

In the afternoon of May 30, 2007, Theus and Todd Montgomery were riding their bicycles in the area of Paramount Boulevard and South Street in Long Beach. This area, referred to as the Parwoods or Langports, is claimed by the Sex Money Murder gang. Three men approached and grabbed Theus and Montgomery. Montgomery heard gunshots and was able to break away and run. When he returned to the location, he found Theus on the ground bleeding from his forehead. Theus did not suffer a gunshot wound. The bicycles were gone.

That evening, Derick Holman and Marcus Peters were walking to a gas station in Long Beach. Holman noticed a male walking near the alley, "looking kind of suspicious." The men continued to the gas station. While they were in the station lot, a silver car drove up and a male, wearing a sweatshirt with either the number "31" or "32" on the back, got out of the vehicle and approached them. The male asked Holman and Peters if they were members of the Sex Money Murder gang. They replied they were not.

A few minutes later, as they walked down the street, Holman and Peters were joined by Aaron Thomas. As the three men stood together on the sidewalk, a silver car approached. Someone got out of the vehicle, pointed a handgun at them, and fired multiple rounds. As a result, Peters was killed and Holman was shot three times. Thomas escaped injury.

Shortly after the shooting, detectives collected a surveillance video from the gas station where Holman and Peters had been confronted. The video showed the two victims and an individual wearing a dark-colored "Cal" sweatshirt or jersey. It also showed a silver car at the location.

The following day, Theus was shot on a street in Long Beach. He suffered two wounds. A member of the Sex Money Murder gang was later arrested for the shooting.

On June 1, detectives showed Holman a photographic lineup. He circled a picture of Harris and said Harris was the man who approached Holman and Peters in the gas station lot. This led the detectives to obtain a search warrant for Harris's apartment.

Long Beach police officers served the warrant on the apartment and found a sweatshirt with the word "Cal" on the front and the number "32" on the back. They also found a piece of paper with a telephone number. The number was to Harris's girlfriend's cell phone. Cell-site information showed that the phone was in the general area of the Peters shooting at the time it occurred and phone records led police to a person named Ryan Scott.

At trial, Holman was shown the surveillance video from the gas station where he and Peters were approached shortly before the shooting. Holman identified Harris as the man shown in the video wearing a "Cal" jersey. Holman said Harris was the person who approached at the gas station and asked if they were members of the Sex Money Murder gang. Holman was shown a picture of the sweatshirt seized from Harris's residence and said it was the one Harris wore on the night of the murder. Holman looked at a picture of a Lexus owned by Ryan Scott, and stated it appeared to be the silver car he observed in the lot.

Holman recalled that detectives asked him to view two photographic lineups. In one, he selected Harris's photograph and said he was the person who "hit us up" at the gas station. Approximately six months later, in December 2007, he was shown a second lineup. Holman understood he was trying to identify the shooter. He circled two pictures, including one of Theus, saying each man had features similar to the shooter.

In court, Holman identified Theus as the man he saw in the alley while Holman and Peters were walking to the gas station. Thomas joined Holman and Peters as they were walking away from the station. Holman testified that Theus approached, looked the three males in the eye, and started shooting.

Holman denied being a gang member. However, he admitted that he associated with members of the Sex Money Murder gang.

Thomas testified and denied that he was a gang member. He claimed he was intoxicated when the shooting started and could not identify the shooter.

Todd Montgomery was called as a witness. He acknowledged that in February 2008, he was interviewed by detectives while in custody at the county jail. The interview was recorded. During the interview, Montgomery said Theus showed up at Montgomery's girlfriend's house about a month after Peters and Holman were shot. Theus told Montgomery that he had been shot while on the street and had been hit twice. Montgomery said, referring to Theus, "Then I guess um the same day or whatever that he got shot or the next day or whatever, he seen some dudes he said um they fell and he kept shooting at [them] and stuff like that." Theus said he committed the shooting in the Parwoods area. (Holman and Peters were shot in that neighborhood.) The detective inquired, "And . . . he tells you that he shot these guys?" and Montgomery responded, "Yes." Montgomery was asked whether Theus's shooting of the three men was payback for the incident earlier in the day when Montgomery and Theus were attacked. Montgomery replied, "I know it was a payback, you know what I'm saying. He got beat up, they shot at him, almost tried, tried to kill him so you know, I guess he did what he did."

In court, Montgomery claimed he could not recall making the statements and suggested he was intimidated by detectives because they had implied he was involved in the shooting. He also feared that if he did not cooperate with police, they would prevent his impending release from custody. On cross-examination, when asked if Theus had ever said that he had shot someone, Montgomery answered, "No."

On May 23, 2009, five days before the start of the trial, Deputy Sheriff Aaron King was working at the courthouse shuttling inmates to and from the lockup area to the courtroom. He was asked by a bailiff to escort Harris from the courtroom back to the lockup area. Inside lockup, Harris pointed to a brown folder that inmates use to hold personal property and legal documents. Harris said he had left it there before entering the courtroom and wanted to retrieve it. King allowed Harris to take the folder and continued to escort him into a cell. As King began to remove Harris's handcuffs, another bailiff told King that he had taken Harris into the courtroom and Harris did not have the folder. King took the folder and looked inside, believing that it might contain contraband. King found a greeting card addressed to Harris and a court pass bearing Theus's name. Inside the card was a folded letter. King spoke to the bailiff who escorted Theus into court that morning. That deputy said he told Theus to put the folder he was carrying on the same table where Harris later retrieved it.

The letter that was inside the card was from "2 Pistols." The author wrote that "G-Rich" (Theus's nickname) was his "lil fam Bam." The letter went on to state in part:

I don't like what [I']m hearing. I went to court the other day and I hear[]d a nigga say G-Rich is snitchin, so I got at cuzz and told cuzz G-Rich is my lil c[o]usin[.] Why is you speakin up on cuzz if you have[n't] seen any paper work and cuzz said that's what he heard. But anyway let cuzz keep the paperwork so he can clear his name up. . . . But clear cuzz name up, let niggas know he ain't snitchin. But if cuzz is snitchin then you know he's a grown man, he got to deal with it. . . .

King said defendants were kept apart while in court to prevent them from communicating. Based on his training and experience, he believed the letter was an attempt by Theus and Harris to transmit a message.

Detective Chris Zamora testified as a gang expert. He had been assigned to the gang detail for eight years and primarily investigated Crip and Hispanic gangs. The Crip gang had grown into a nationwide criminal organization with many cliques and rivals within the organization. MOB is a coalition of three different North Long Beach gangs, including the Boulevard Crips. Zamora testified that Ryan Scott was a member of the Boulevard Crips and the parties stipulated that Harris and Theus also belonged to the gang. MOB's main rival is the Sex Money Murder gang, which claims the Parwoods area of Long Beach. Marcus Peters was affiliated with Sex Money Murder.

It was Zamora's opinion that the three people who assaulted Theus and Montgomery in the afternoon of May 30 were members of Sex Money Murder. He referred to the incident where Theus was shot on May 31, the day after the Peters murder, and noted that a member of Sex Money Murder was arrested for that offense. Zamora opined that the incidents were interrelated, as each was an act performed in retaliation. The Peters shooting was payback for the earlier assault on Theus and benefitted the Boulevard Crips.

***B. The October 4, 2007 Shooting***

On October 4, 2007, at about 7:30 in the morning, Theus, in the company of three girls, walked to a bus stop on the corner of Downey Avenue and South Street. The bus stop was in an area claimed by MOB on the border of Sex Money Murder territory. Emanuel Sauer-Chambers approached the bus stop carrying a backpack. He was a member of Sex Money Murder and was wearing green, one of the gang's colors. He also wore a cap with the letter S, which signified his membership in the gang. Theus asked him where he was from and Sauer-Chambers dropped his backpack and assumed a fighting stance. Theus pulled out a gun and shot Sauer-Chambers. After the incident, Theus and the girls ran.

William Ward was at a gas station near the bus stop. Theus and the three girls walked through the station and past Ward on their way to the corner. A few minutes later, Ward heard one gunshot. He looked up and saw Theus standing over Sauer-Chambers's body, holding what appeared to be a revolver. Theus fired at Sauer-Chambers as he was lying prostrate on the ground. Theus put the gun in his waistband and trotted away. Ward estimated he was approximately 40 to 50 yards from where the shooting took place; however, he was absolutely certain of his identification of Theus as the shooter. Ward acknowledged that he had been previously convicted of grand theft and perjury.

Ten-year-old Kionni M. knew Theus because they used to live in the same area. On the morning of October 4, Kionni was in a car traveling near the gas station. He saw Theus running through the station followed by two girls. As Theus ran, he was holding up his pants. As the car Kionni was in drove by the bus stop, he noticed a body on the ground.

**II. The Defense Case**

Irma Johns is Kionni's grandmother. On the morning of October 4, she was taking him to school. As she drove by the bus stop, she observed a body lying on the ground and saw a male and two females running from the scene. She was interviewed by police. She denied that she described the male as Hispanic or that Kionni told her the male's name was "Jose."

Detective Daniel Mendoza interviewed Johns after the shooting. She told him she saw a male and two females running from the bus stop. She said the male was possibly Hispanic. Her grandson told her the male's name was "Jose."

William Ward testified that the shooter was wearing a brown hooded sweat jacket. Detective Mark McGuire interviewed Ward on the morning of the shooting. Ward told him the shooter was wearing a red shirt.

**DISCUSSION**

**I. The Prosecutor's Comment in Opening Statement Does Not Warrant Reversal**

During the prosecutor's opening statement, he told the jury, "Bernard Harris came back to this location with Richard Theus and a person you'll learn, whose car that was, by the name of Ryan Scott, who you're gonna learn through the evidence that Ryan Scott was a third defendant in this case and has since pled out, so that's why he's not here. But Ryan Scott drove there." Harris's attorney objected, stating that Ryan Scott's plea was irrelevant. The court overruled the objection, saying, "He's explaining what the evidence is going to show." The prosecutor completed his opening statement, Harris's attorney delivered his opening statement, and the court took a recess.

Following the recess, Harris's counsel sought to revisit the issue. He argued that it was improper to mention to the jury that a prior codefendant had pled guilty and requested a mistrial. Although the court agreed that Scott's plea was irrelevant, it declined to grant a mistrial, concluding that the prosecutor's statement was "a fleeting reference." The court ordered the prosecutor to not mention Scott's plea again.

The following court day, Harris's counsel requested that the court give a special instruction, citing *People v. Bolton* (1979) [23 Cal.3d 208](https://www.leagle.com/cite/23%20Cal.3d%20208), 215.[3](https://www.leagle.com/decision/incaco20110518031#fid3) The court declined to give the instruction, noting that the prosecutor in *Bolton* had implied during closing argument that the defendant had a prior record. It concluded that "*Bolton* does not control what happened in this case." The court pointed out that the jury had already been told that what the attorneys say is not evidence and that that instruction would be repeated at the end of the trial.

During testimony, a detective stated that phone records led him to Ryan Scott. The prosecutor asked if Scott "was also arrested and charged with the same crime." Defense counsel's relevance objection was sustained and the court admonished, "We're not going to go any further than that."

At the close of trial, the court informed the jury that "[y]ou must base your decisions on the facts and the law. . . . First, you must determine what facts have been proved from the evidence received in the trial and not from any other source." Further, the jury was told that "[s]tatements made by the attorneys during trial are not evidence."

With respect to the participation of third parties in the crime, the court instructed: "There has been evidence in this case that a person other than the defendants was or may have been involved in the crimes for which the defendants are on trial. There may be many reasons why that person is not here on trial. Therefore, do not speculate or guess as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. [¶] Your sole duty is to decide whether the People have proved the guilt of each of the defendants on trial."

Appellants contend the prosecutor's reference to Scott's guilty plea denied them a fair trial. They argue the court should have granted a mistrial or, at the very least, given a curative instruction.

Initially, we address the People's argument that appellants forfeited their claim by failing to object below. The assertion is based on the fact that the trial court urged appellants to file a written mistrial motion after the prosecutor gave his opening statement and they failed to do so. The People ignore the fact that appellants objected twice, once during opening statement and again when the prosecutor attempted to elicit testimony that Scott had been arrested for the same offense as appellants. This was sufficient to preserve their claim. (*People v. Williams* (1998) [17 Cal.4th 148](https://www.leagle.com/cite/17%20Cal.4th%20148), 162.)

We agree with appellants that, in the context of this case, Scott's guilty plea was not relevant. (*People v. Cummings* (1993) [4 Cal.4th 1233](https://www.leagle.com/cite/4%20Cal.4th%201233), 1322.) Although the prosecutor correctly suggested that the plea would be relevant if he called Scott as a witness, the fact remains that Scott did not testify. Thus, the prosecutor erred by mentioning Scott's plea. Next, we examine whether appellants were prejudiced as a result.

We reject appellants' assertion that the error in question rendered their trial fundamentally unfair. As the trial court noted, the single comment by the prosecutor was fleeting. As a result, we decline to use the federal harmless error standard of *Chapman v. California* (1967) [386 U.S. 18](https://www.leagle.com/cite/386%20U.S.%2018), and instead determine whether, based on the totality of the evidence, it is reasonably probable a result more favorable to appellants would have resulted absent the prosecutor's error. (*People v. Watson* (1956) [46 Cal.2d 818](https://www.leagle.com/cite/46%20Cal.2d%20818), 836.) Under that test, appellants fail to demonstrate any undue prejudice for several reasons.

First, as we discussed, the reference to Scott's plea occurred once and was extremely brief. Second, the jury was instructed twice that it was to base its decisions on the facts, that the facts were to be determined by the evidence, and that statements made by the attorneys were not evidence. "Jurors are presumed to understand and follow the court's instructions." (*People v. Holt* (1997) [15 Cal.4th 619](https://www.leagle.com/cite/15%20Cal.4th%20619), 662.) Third, notwithstanding appellants' claim otherwise, the evidence of their guilt in the Peters killing was strong. Theus was identified by Derick Holman as the shooter and he made damaging admissions to Todd Montgomery. Harris's involvement was established by Holman's identification, which was bolstered by the video from the gas station. Harris asserts that but for Scott's link as the driver of the vehicle, the jury could have concluded that Harris's presence was mere "`happenstance.'" We are not persuaded. The gang motive was compelling. Appellants and the victims were members or affiliates of rival gangs. Theus was the victim of an attack in rival gang territory hours before the shooting and the Peters killing was in retaliation for that attack. The motive puts Harris's approach of Peters and Holman in the gas station in context. He confronted them and asked their gang affiliation. Minutes later, Theus shot at Peters, Holman, and Thomas. Harris's participation and intent to aid the shooting is independently established by his conduct. Finally, Theus attempted to communicate with Harris in the courthouse shortly before trial. In the letter that was confiscated, the author tried to allay Harris's fear that his codefendant was a snitch. If Harris were simply an innocent bystander who happened to be in Scott's vehicle on the night of the shooting, why would he be concerned that Theus was a snitch? The answer is clear. Theus could potentially provide damaging information linking Harris to the crime. After considering the totality of the circumstances, we are satisfied that appellants would not have received a more favorable verdict in the absence of the prosecutor's single comment made during opening statement.

We also find there was no error in denying appellants' requests for the special instruction. In *People v. Bolton, supra,* [23 Cal.3d 208](https://www.leagle.com/cite/23%20Cal.3d%20208), the prosecutor insinuated in closing argument that the defendant had a history of prior convictions but that he was not allowed to tell the jury due to certain rules of evidence. The court admonished the jury to disregard the statements. (*Id.* at p. 212.) The Supreme Court held the prosecutor's misconduct was harmless. (*Id.* at pp. 214-215.) But in a footnote, the court suggested a cautionary instruction which "may prove effective against prosecutorial conduct": "`Ladies and Gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about the defendant. I want you to know that the prosecutor has absolutely no evidence to present to you to back up these insinuations. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks.'" (*Id.* at pp. 215-216, fn. 5.) The *Bolton* court, however, did not believe that the facts warranted this cautionary instruction. (*Ibid.*)

In this case, the prosecutor's brief reference to the guilty plea did not amount to an insinuation that he had other information which would support conviction. No cautionary instruction was warranted.

**II. The Letter Seized in the Courthouse Was Properly Admitted**

Appellants claim the court erred by admitting the jailhouse letter seized by the bailiffs in the courthouse. They argue the letter was unreliable, inadmissible hearsay, and there was no exception allowing its admission. They urge that the adoptive admission exception contained in Evidence Code section 1221, which the trial court relied on in finding the letter admissible, does not apply. The problem with appellants' position is they start with the wrong premise. The court did not find the evidence was hearsay. Instead, it determined the letter was circumstantial evidence that tended to establish appellants' guilt.

The court held an Evidence Code section 402 hearing after appellants contended the letter was inadmissible. Theus's attorney claimed the letter was irrelevant, unreliable (in that the author was unknown), and contained hearsay. In response, the prosecutor noted that Harris's liability was as an aider and abettor and argued the letter showed consciousness of guilt. He said, "It's evidence that can support that defendant Harris was an accompli[ce] in this murder regardless of his role, a shooter or nonshooter. But here we are, that he's getting information from somebody, and we don't have to know who it was, but somebody's telling him, don't worry, Theus is not a snitch. Everything's gonna be okay. That's basically what it's being offered for. In addition, again, it shows that these two are working together. They're in the same game. [¶]. . . It's circumstantial evidence that he had a role in this crime, and it shows, after the fact, a person — an innocent person is not gonna be concerned about somebody snitching on them."

After Harris's attorney suggested the evidence was not relevant, he argued the prosecutor's interpretation was speculation and it was a "stretch" to suggest the contents of the letter proved that appellants were together at the time of the murder.

Following extensive argument by the parties, the court concluded the evidence was "circumstantial evidence of the underlying crimes given by the date on the envelope, given by the contents contained in the letter that defendant Harris doesn't have to worry, that Theus is not going to be a snitch, and under Prop 8 all relevant evidence is admissible, and this is incriminatory, and as circumstantial evidence, it's not hearsay and, therefore, admissible." As pointed out by appellants, the court did also note, "And I analogize it to an adoptive admission by both defendants."

It is clear from the record that the trial court admitted the evidence after concluding it was nonhearsay, circumstantial evidence tending to establish guilt. Appellants' argument is confined to whether the letter contained an adoptive admission. They do not address the finding of the trial court. "[I]t is the appellant's responsibility to affirmatively demonstrate error, and our review is limited to issues that have been raised and briefed adequately." (*Teachers' Retirement Bd. v. Genest* (2007) [154 Cal.App.4th 1012](https://www.leagle.com/cite/154%20Cal.App.4th%201012), 1028.) By failing to address the merits of the trial court's ruling, appellants have not met their burden.[4](https://www.leagle.com/decision/incaco20110518031#fid4)

**III. The Court's Failure to Give CALJIC No. 2.70 Was Not Prejudicial**

As discussed above, the prosecution presented the testimony of Todd Montgomery, which included his recorded interview with detectives. During the interview, Montgomery said that he had a conversation with Theus, during which Theus made certain admissions indicating he was responsible for the Peters killing. Despite this testimony, the trial court neglected to instruct the jury with CALJIC No. 2.70,[5](https://www.leagle.com/decision/incaco20110518031#fid5) as it was required to do. (*People v. Slaughter* (2002) [27 Cal.4th 1187](https://www.leagle.com/cite/27%20Cal.4th%201187), 1200 [when evidence of defendant's oral admission is admitted, trial court has a sua sponte duty to instruct jury that such evidence should be viewed with caution, unless tape recording of admission was presented].) Theus contends the failure to instruct constitutes reversible error. The People concede the trial court erred, but argue that Theus was not prejudiced as a result. We agree with the People.

In order to find prejudicial error, we must conclude that upon a reweighing of the evidence it is reasonably probable that a result more favorable to Theus would have been reached absent the error. (*People v. Padilla* (1995) [11 Cal.4th 891](https://www.leagle.com/cite/11%20Cal.4th%20891), 921, overruled on another point by *People v. Hill* (1998) [17 Cal.4th 800](https://www.leagle.com/cite/17%20Cal.4th%20800), 823, fn. 1.) Theus correctly observes that the purpose of the cautionary instruction is to assist the jury in ascertaining whether the statement was in fact made. (*People v. Stankewitz* (1990) [51 Cal.3d 72](https://www.leagle.com/cite/51%20Cal.3d%2072), 94.) He asserts that "[a]bsent the cautionary instruction, the statement was unassailable. However, if the jury had been warned that, before considering the statement as proof of [his] guilt, the jury must first determine whether they believed that [he] actually made the statement in whole or in part, there is more than a reasonable probability that they would have rejected the evidence." We are not persuaded.

Theus's position at trial was that due to pressure the detectives placed on Montgomery during the interview, Montgomery's "statement to the officers is totally untrustworthy." Theus's claim that the failure to instruct the jury to view Montgomery's testimony with caution rendered his testimony unassailable is unsupportable.

We find the case of *People v. Dickey* (2005) [35 Cal.4th 884](https://www.leagle.com/cite/35%20Cal.4th%20884) instructive. In that case, two witnesses claimed that Dickey had made admissions concerning his involvement in a murder. Dickey testified that he did not make the statements attributed to him. (*Id.* at pp. 896-899.) In concluding that the failure to give CALJIC No. 2.70 was harmless error, the *Dickey* court observed, "the court, while neglecting to give the cautionary instruction, did in other respects thoroughly instruct the jury on judging the credibility of witnesses. The jury was instructed on the significance of prior consistent or inconsistent statements of witnesses, discrepancies in a witness's testimony or between his or her testimony and that of others, witnesses who were willfully false in one material part of their testimony being distrusted in other parts, weighing conflicting testimony, evidence of the character of a witness for honesty and truthfulness to be considered in determining the witness's believability, and was given a general instruction on witness credibility that listed other factors to consider, including a witness's bias, interest or other motive, ability to remember the matter in question, and admissions of untruthfulness." (*Id.* at p. 906.) The court noted that "given these instructions, and given the extensive impeachment of [the witnesses who testified to the alleged admissions] raising credibility issues to which the instructions were pertinent [fn. omitted], the jury was unquestionably aware their testimony should be viewed with caution." (*Id.* at pp. 906-907.)

The jury in the present case had every reason to view Montgomery's testimony with caution. It heard the recorded interview during which Montgomery told detectives Theus admitted to shooting some males in the Parwoods. From the stand, Montgomery claimed he had been pressured to say Theus was responsible for the Peters killing and emphatically denied that Theus made the admissions in question. The manner in which the evidence unfolded required the jury to determine whether to believe Montgomery's statement to detectives or his in-court testimony. As in *Dickey,* the court's instructions adequately alerted the jury to view Montgomery's testimony with caution. With the exception of the instruction regarding a witness's character to tell the truth, Theus's jury received every instruction the *Dickey* jury did.[6](https://www.leagle.com/decision/incaco20110518031#fid6) In addition, Theus's jury was told that it may consider Montgomery's felony conviction for the purpose of determining his believability as a witness.[7](https://www.leagle.com/decision/incaco20110518031#fid7) We find there is no reasonable probability that Theus would have received a more favorable verdict but for the court's error.

**IV. The Self-defense Instructions Were Properly Denied**

After the prosecution rested, Theus requested that the jury be instructed on self-defense and imperfect self-defense with respect to the Sauer-Chambers killing based on the following evidence: (1) the Boulevard Crips, Theus's gang, was at war with Sauer-Chambers's gang, Sex Money Murder; (2) Theus had been attacked on one occasion and was later shot during a separate incident by members of Sex Money Murder; (3) Sauer-Chambers was wearing gang colors when he approached Theus at the bus stop; and (4) Sauer-Chambers took an aggressive stance when he confronted Theus.[8](https://www.leagle.com/decision/incaco20110518031#fid8)

In denying self-defense instructions, the court found there was no substantial evidence that Theus acted in self-defense. It determined the evidence demonstrated that Theus was the aggressor, as he initiated the confrontation by asking Sauer-Chambers his gang affiliation. Sauer-Chambers responded by taking a fighting stance. Despite the fact that Sauer-Chambers was unarmed, Theus shot him at close range.

After the close of evidence, Theus's counsel renewed his request for self-defense instructions. Again, the court declined to give the instructions on the ground that there was no substantial evidence that Theus acted in self-defense.

Theus contends that the events preceding the October 7 shooting of Sauer-Chambers must "be considered in the context of [his] knowledge of gang culture because [his] subjective intent must be inferred from circumstantial evidence." He also claims there is evidence "from which it could be inferred that [he] perceived a threat to his person when he shot at Sauer-Chambers."

"For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is `imperfect self-defense,' i.e., `the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter. [Citation.] To constitute `perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable. [Citations.] As the Legislature has stated, `[T]he circumstances must be sufficient to excite the fears of a reasonable person . . . .' (Pen. Code, § 198; see also § 197, subds. 2, 3.) Moreover, for either perfect or imperfect self-defense, the fear must be of imminent harm. `Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury.' [Citation.]" (*People v. Humphrey* (1996) [13 Cal.4th 1073](https://www.leagle.com/cite/13%20Cal.4th%201073), 1082.)

Three females who were with Theus at the time of the Sauer-Chambers shooting testified and described the incident. We examine their testimony to determine whether substantial evidence supports Theus's assertion that he was in fear of imminent danger when he fired. (*People v. Manriquez* (2005) [37 Cal.4th 547](https://www.leagle.com/cite/37%20Cal.4th%20547), 581 [court required to give self-defense instructions where "there was substantial evidence supportive of the defense, and the defense was not inconsistent with the defendant's theory of the case"].)

Reegis J. testified at trial that she did not hear what Theus and Sauer-Chambers said to each other at the bus stop, but at the preliminary hearing she stated that "He [Theus] banged on him, and I guess he shot him." On cross-examination at trial, she said that a young boy came up to the bus stop, there was an argument, and the young boy took off his backpack and took a fighting stance. She was worried there was going to be a fight, but Theus did not try to provoke the boy. On redirect, she said that Theus fired 30 seconds after the confrontation began. The males were about eight feet apart from each other at the time of the shooting. Reegis did not hear them say anything to each other and did not hear Theus ask the boy where he was from.

Roshara J. testified that the victim walked up and exchanged words with Theus. She did not hear what was said. She saw the backpack on the ground but did not see the victim drop it. She said she did not see Theus fire a gun, but later testified that she heard a loud bang and saw Theus holding a gun with his arm extended. Roshara did not believe the males were arguing because they were speaking in a normal tone and she did not see Sauer-Chambers take a fighting stance.

Falicitey Watson testified she saw the victim approach the bus stop, she heard a gunshot, and she ran. She did not see who did the shooting.

The evidence supports the trial court's refusal to give the requested self-defense instructions. According to Reegis J., Theus started the confrontation by issuing a gang challenge. In response, Sauer-Chambers dropped his backpack and assumed a fighting stance. He did not draw a weapon or suggest that he possessed one. None of the witnesses saw Sauer-Chambers advance toward Theus. Reegis J. said the men were approximately eight feet from each other when Theus fired. Simply put, there is no evidence Theus was in fear of imminent danger when he shot Sauer-Chambers. As Theus's self-defense theory was wholly unsupported by the evidence, there was no error in refusing his requested instructions. (*People v. Marshall* (1997) [15 Cal.4th 1](https://www.leagle.com/cite/15%20Cal.4th%201), 40.)

**V. Cumulative Error Does Not Exist**

Theus contends the cumulative effect of the trial court's errors deprived him of a fair trial. Although we have discussed two instances of error, we are satisfied that either individually or taken together, they did not affect the fairness of the trial. (*People v. Cain* (1995) [10 Cal.4th 1](https://www.leagle.com/cite/10%20Cal.4th%201), 82.)

**VI. The Abstract of Judgment Must Be Corrected**

The People claim there are several errors in the abstracts of judgment. As to each appellant, the abstract of judgment (1) states the judgment is the result of a plea, instead of a trial, (2) states that the term on the section 12022.53, subdivision (d) enhancement as to count 1 is 25 years, rather than 25 years to life, and (3) fails to reflect the court-ordered restitution in the amount of $15,311.08. In addition, Harris's abstract of judgment incorrectly reflects that the term on the section 12022.53, subdivision (d) enhancement on count 2 is 25 years, rather than 25 years to life, and Theus's abstract does not reflect the jury's true finding of the section 12022.53, subdivision (d) allegation with respect to count 4.

After a review of the record, we conclude the People are correct and we will direct the superior court clerk to prepare an amended abstract of judgment.

In his reply brief, Harris contends the abstract should reflect that restitution is joint and several with Theus. He is correct, as joint and several liability for restitution was ordered by the trial court.

**DISPOSITION**

We modify the judgments by ordering the abstracts of judgment to reflect the trial court's pronouncements as follows: (1) Theus and Harris were convicted by trial, not a guilty plea; (2) each was ordered to pay $15,311.08 in victim restitution and liability is joint and several; (3) Theus's term for the section 12022.53 subdivision (d) enhancement on count 1 is 25 years to life; (4) as to Theus, the jury found true a section 12022.53, subdivision (d) enhancement on count 4; (5) Harris's terms on the section 12022.53, subdivision (d) enhancements on counts 1 and 2 are 25 years to life. The trial court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

We concur.

WILLHITE, Acting P.J.

MANELLA, J.

**FootNotes**

1. All further undesignated statutory references are to the Penal Code.

2. At sentencing, the trial court stated it was sentencing Theus to life without the possibility of parole and 25 years to life for the murder of Sauer-Chambers. The abstract of judgment correctly does not include the 25-year-to-life term.

3. The instruction read: "Ladies and gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about Ryan Scott. I want you to know that the prosecutor has absolutely no evidence to present to you to back up these insinuations. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks."

4. Given our conclusion, we need not address Theus's claim of instructional error relating to adoptive admissions.

5. As pertinent here, the instruction provides: "A confession is a statement made by a defendant in which he has acknowledged his guilt of the crimes for which he is on trial. In order to constitute a confession, the statement must acknowledge participation in the crimes as well as the required criminal intent or state of mind. [¶] An admission is a statement made by the defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made a confession or an admission, and if so, whether that statement is true in whole or in part. [¶] Evidence of an oral admission or an oral admission of the defendant not made in court should be viewed with caution.

6. In his reply brief, Theus contends *Dickey* is distinguishable because Dickey's jury was instructed to view an accomplice's testimony with caution. He is incorrect. In the case the *Dickey* court discussed, *People v. Bunyard* (1988) [45 Cal.3d 1189](https://www.leagle.com/cite/45%20Cal.3d%201189), the jury received the accomplice instruction. (*People v. Dickey, supra,* 35 Cal.4th at p. 906.)

7. During the prosecutor's questioning, Montgomery admitted he had a prior burglary conviction and, as a minor, had pled guilty to assault.

8. The instructions requested by Theus were as follows: "CALJIC 5.13: Homicide is justifiable and not unlawful when committed by any person in the defense of himself or another if he actually and reasonably believed that the individual killed intended to commit a forcible and atrocious crime and that there was imminent danger of that crime being accomplished. A person may act upon appearances whether the danger is real or merely apparent.

"CALJIC 5.14: The reasonable ground of apprehension does not require actual danger, but it does require (1) that the person about to kill another be confronted by the appearance of a peril such as has been mentioned; (2) that the appearance of peril arouse in his mind an actual belief and fear of the existence of that peril; (3) that a reasonable person in the same situation, seeing and knowing the same facts, would justifiably have, and be justified in having, the same fear; and (4) that the killing be done under the influence of that fear alone.

"CALJIC 5.17: A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of manslaughter. [¶] As used in this instruction, an `imminent' peril or danger means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at that time to the slayer. [¶] However, this principle is not available, and malice aforethought is not negated, if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force or attack."