**PEOPLE v. FORD**

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*THE PEOPLE, Plaintiff and Respondent, v. TRAVION TERRETT FORD, Defendant and Appellant.*

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

Filed July 8, 2011.

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

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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, J.

**INTRODUCTION**

Travion Terrett Ford appeals from a sentence of 16 years to life following his conviction for second degree murder. He contends the trial court erred in failing to give the jury, sua sponte, pinpoint instructions on self-defense. He also contends the trial court erred in excluding testimony about the victim's combat training. Finally, he contends the assessment of a $30 fee under Government Code section 70373 was improper. Finding no error, we affirm the judgment in its entirety.

**STATEMENT OF THE CASE**

On March 10, 2009, the Los Angeles County District Attorney filed an information charging appellant with murder (Pen. Code, § 187, subd. (a)).[1](https://www.leagle.com/decision/incaco20110708014#fid1) It was also alleged that appellant personally used a knife in the commission of the crime. (§ 12022, subd. (b)(1).) During the subsequent jury trial, the trial court instructed the jury on self-defense. Among other instructions, the court gave CALJIC Nos. 5.54 (Self-Defense by An Aggressor) and 5.56 (Self-Defense — Participants in Mutual Combat).[2](https://www.leagle.com/decision/incaco20110708014#fid2) On August 31, 2009, the jury found appellant guilty of second degree murder. It also found true the knife use allegation.

Appellant moved for a new trial on the ground that the court erroneously excluded evidence of the victim's "military combative training," arguing that this evidence would have tended to show that appellant's "reaction during the fight (using a knife in the quarrel) perhaps would not have been so unreasonable and his self-defense claim would have had more weight." The trial court denied the motion. It sentenced appellant to 16 years to life in state prison, and assessed him a $30 fee pursuant to Government Code section 70373. Appellant timely filed an appeal from the judgment.

**STATEMENT OF THE FACTS**

On the night of September 18, 2008, Nicholas Wisniewski, Christopher Funkhauser, and the victim, Bryan Frost, were walking to an apartment of one of Frost's friends for a party when they passed by a sliding gate of an apartment complex. The three men had been drinking that night, and they were somewhat intoxicated. The gate was open halfway, and as Frost walked by, he slammed it closed. The gate made a loud clang, and the men continued walking.

Funkhauser heard appellant call out and ask why they had slammed the gate. Frost responded that he had just closed the gate. Appellant then came out from the complex, and Frost and appellant had a heated conversation. Appellant then swung at Frost and hit him with a glancing blow. The two men began grappling with each other. A woman, later identified as appellant's girlfriend Anquenette Young, came out of the complex. When Wisniewski started to move towards appellant and Frost, Young stopped him by saying, "Don't you fucking touch him." By this time, appellant and Frost were both fighting on the ground. After several seconds, Frost gained control and pinned appellant to the ground by his shoulders. About 15 seconds later, Frost let go and walked back to Wisniewski and Funkhauser. Wisniewski and Funkhauser did not hear appellant say anything during the time he was pinned by Frost. Appellant then ran back into the apartment complex.

Wisniewski, Funkhauser, and Frost began walking away. Funkhauser apologized to Young, saying that there was no reason for appellant and Frost to be fighting. Young responded by yelling at him. Wisniewski walked over and began yelling at Young. He told her not to yell at his friend, and he called her a "fat bitch."

Appellant then came back out. He shouted something at Frost and walked quickly toward him. Frost turned around, took a step toward appellant, put his hands up, and asked appellant what he was doing. Appellant shoved Frost, and the two men swung their arms and grabbed aggressively at each other for about 10 seconds before they stopped. Both men then turned and walked away from each other. Frost and Wisniewski crossed the street. Funkhauser turned to appellant and asked "what their deal was" and "why do you guys keep wanting to fight?" Appellant told him to "get the hell out," and Funkhauser complied by walking after Frost and Wisniewski.

As Funkhauser reached Frost and Wisniewski, Frost paused, turned towards Wisniewski, and said, "Yo, dude, I think I just got stabbed." Frost pulled up his shirt, and blood was pouring out of a wound in the left side of his chest. He then collapsed to the ground. Funkhauser called 911, and tried to apply pressure to the wound.

Wisniewski turned and saw appellant and Young get into a car parked on the street. He ran toward the car and was able to get its license plate number. Wisniewski relayed the number to Funkhauser, who was on the phone with the 911 operator. The men were near the campus of the University of Southern California (USC), and Wisniewski called the USC Department of Public Safety to report the stabbing. He also tried to apply pressure to the stab wound.

USC campus public safety officers arrived, followed by paramedics and police officers. The paramedics put an oxygen mask on Frost and took him away. Frost died from the single stab wound to his chest, which the coroner testified was four inches deep. The autopsy also showed that Frost had abrasions on his head, forehead, nose, cheek and chin, scrapes on his arms and legs, and bite marks on his right forearm and right chest area.

A small kitchen knife was found under a bush inside the apartment complex. Biological evidence recovered from the knife's blade and handle matched the DNA profile obtained from Frost.

Appellant was quickly identified as the murder suspect. He was interviewed twice by police detectives. During the first interview on September 20, 2008, he told the detectives that he was not in town on the day of the murder. During the second interview, which lasted for several hours and was recorded, he admitted stabbing Frost but said he acted in self-defense.

Appellant testified at trial. His testimony was consistent with his taped statement to police officers. On the night of the murder, he was at his mother's home with Young when he heard the sound of the gate slamming "really hard." He walked to the gate and saw three men. He asked them why they had slammed the gate. Frost walked toward appellant and said, "What the fuck is your problem, bro? It's just a fucking gate."

As Frost drew closer, appellant held an arm out, and Frost walked up to appellant until his chest touched appellant's hand. Frost then slapped the hand away. Appellant felt threatened, so he hit Frost with a light blow. Frost swung and hit appellant three times. Frost then grabbed appellant, lifted him, and slammed him to the ground. Appellant testified that Frost was "very, very strong, much stronger than I am, you know." While they were on the ground, Frost held appellant down. Frost had one arm underneath appellant and another arm on appellant's "lower neck area." Appellant testified that he had previously been shot in the neck and, as a result, had trouble breathing when pressure was applied to his neck area. Appellant tried unsuccessfully to hit Frost. Appellant asked Frost to let him up, but Frost did not respond. Appellant started to panic. He scratched Frost in the face and chest but Frost would not let go, so appellant began biting him. Appellant also told Young to go get help, but he knew that she had not left when he heard her speaking with the other men.

Because Frost was "very, very, very strong, stronger than [appellant] would have imagined him to be," appellant decided that he had to stab Frost so that Frost would let go. Appellant was carrying a knife in a pouch in his front pocket. He grabbed it and because he could not pull it out while being held by Frost, he stabbed it in an upward motion through the pouch. Initially, Frost did not react but he eventually released appellant.

Appellant ran to his mother's apartment to get help, but the door was locked and no one answered. He then realized that Young was not with him so he went back outside to get her. When he came outside, he saw Young arguing with the men. He grabbed her and began walking to their car. Frost yelled at appellant, but appellant told the men to leave. They did so and appellant and Young drove off.

**DISCUSSION**

**A. *CALJIC No. 5.56***

Appellant first contends the trial court erred when it instructed the jury with CALJIC No. 5.56, the instruction on self-defense during "mutual combat." According to appellant, the trial court erred by failing to sua sponte define the term "mutual combat," which is a legal term that has a different meaning from the everyday connotation of the phrase. (*People v. Ross* (2007) [155 Cal.App.4th 1033](https://www.leagle.com/cite/155%20Cal.App.4th%201033), 1044, 1046-1047, italics omitted ["[M]utual combat" means "fighting by mutual intention or consent, as most clearly reflected in an express or implied agreement to fight."].) We examine de novo the validity and impact of a jury instruction. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) [52 Cal.App.4th 820](https://www.leagle.com/cite/52%20Cal.App.4th%20820), 831.)

CALJIC No. 5.56, as given in this case, provides that:

The right of self-defense is only available to a person who engages in mutual combat if he has done all the following:1. He has actually tried, in good faith, to refuse to continue fighting;2. He has clearly informed his opponent that he wants to stop fighting.3. He has clearly informed his opponent that he has stopped fighting; and4. He has given his opponent the opportunity to stop fighting.After he has done these four things, he has the right to self-defense if his opponent continues to fight.3

Appellant contends that if the trial court had defined "mutual combat," the jury would have determined that the actions of appellant and Frost did not fall within the definition, and therefore appellant would not have been bound by the requirements to invoke a self-defense claim under CALJIC No. 5.56. We disagree.

First, appellant did not object to the use of CALJIC No. 5.56 or request clarification of the term "mutual combat." Thus, he has forfeited this claim. (See *People v. Samaniego* (2009) [172 Cal.App.4th 1148](https://www.leagle.com/cite/172%20Cal.App.4th%201148), 1163 ["Generally, "`[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" [Citations.]"].)

Second, there was sufficient evidence to warrant the giving of CALJIC No. 5.56. (Cf. *People v. Guiton* (1993) [4 Cal.4th 1116](https://www.leagle.com/cite/4%20Cal.4th%201116), 1129 ["It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]"].) Here, there was testimony that after appellant came out of the complex for the second time, he shouted at and walked quickly towards Frost. Frost turned and stepped toward appellant, held up his arms, and asked appellant what he was doing. Appellant shoved Frost, and the two men then began fighting. On this record, there was sufficient evidence for the jury to find that appellant and Frost had the mutual intention to fight and thus that there was mutual combat.

Finally, any error was harmless. While the evidence supported the instruction, the prosecution's case did not hinge upon a theory of mutual combat. Rather, the principal theory of the prosecution's case was that appellant initiated the fight and committed either first degree or second degree murder by stabbing an unarmed man. In closing argument, the prosecutor made no mention of mutual combat or CALJIC No. 5.56. Instead, he referred to several other self-defense instructions the jury had been given, but argued that the evidence and appellant's lack of credibility did not support a claim of "straight" self-defense or unreasonable self-defense.

Appellant's reliance on *People v. Ross,* is misplaced. There, the appellate court found the evidence at trial did not support an instruction on mutual combat. (*People v. Ross, supra,* 155 Cal. App.4th at pp. 1049-1054.) In reviewing for prejudice under *People v. Watson* (1956) [46 Cal.2d 818](https://www.leagle.com/cite/46%20Cal.2d%20818), the court noted that the jury had expressed confusion over the meaning of the term "mutual combat" and had asked for clarification. (*People v. Ross, supra,* at pp. 1042, 1043, 1056.) The trial court not only refused to provide such clarification, but mistakenly advised the jury that none could be given, leading the appellate court to find it "entirely likely that the case was decided on the basis of a mistaken understanding of `mutual combat.'" (*Id.* at p. 1057.) No comparable record appears before us.

Moreover, appellant's appeal is premised on the notion that he would have been able to establish self-defense if only he had not been required to meet the four requirements to invoke self-defense under CALJIC No. 5.56. The jury was instructed, however, with CALJIC No. 5.54 (Self-Defense by an Aggressor) which provides that before the aggressor can claim self-defense, he (1) must try, in good faith, to refuse to continue fighting, (2) must clearly inform his opponent that he wants to stop fighting; and (3) must clearly inform his opponent that he has stopped fight. Appellant does not contend that CALJIC No. 5.54 was given in error. Nor does he challenge the jury's implied finding that he did not meet the three requirements to invoke self-defense under CALJIC No. 5.54. The three requirements to invoke self-defense in CALJIC No. 5.54, however, are identical to the first three requirements to invoke self-defense during mutual combat in CALJIC No. 5.56. Given appellant's acknowledgment that the jury could properly consider the limitations to any claims of self-defense imposed by CALJIC No. 5.54, there is no reasonable likelihood that he suffered any prejudice from the giving of CALJIC No. 5.56. Accordingly, any error in giving CALJIC No. 5.56 was harmless beyond a reasonable doubt.

**B. *Self-Defense Jury Instructions***

Appellant next contends the trial court erred when it failed to instruct the jury that regardless of whether appellant was the aggressor or there was mutual combat, "appellant had the right to use deadly force in self-defense if Frost responded to appellant's punch with such sudden and deadly force that [appellant] could not withdraw from the fight." Appellant failed to request such an instruction. Moreover, we conclude the court was under no obligation to give such an instruction sua sponte, as the evidence did not support it. (See *People v. Barton* (1995) [12 Cal.4th 186](https://www.leagle.com/cite/12%20Cal.4th%20186), 195 ["[A] trial court's duty to instruct, sua sponte, or on its own initiative, on particular defenses . . . [arises] `only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citations.]"].)

Here, evidence was presented that after appellant hit Frost with a glancing blow, the men began grappling until they were on the ground. It then took Frost several seconds to pin appellant down. While neither Wisniewski nor Funkhauser heard appellant say anything, appellant testified that while pinned, he was able to ask Frost to let him go. He also was able to ask Young to go get help. On this record, no reasonable jury could conclude that Frost responded with such sudden and deadly force that appellant could not clearly communicate that he was withdrawing from the fight. Appellant could have indicated that he was withdrawing prior to being pinned, and he testified that he could still communicate while being pinned. Accordingly, the trial court did not commit reversible error when it failed, sua sponte, to give the instruction now proposed by appellant.[4](https://www.leagle.com/decision/incaco20110708014#fid4)

**C. *Evidentiary Ruling***

Appellant next contends the trial court's refusal to allow testimony about Frost's combat training deprived him of his constitutional right to present a complete defense. We find no abuse of discretion in refusing to allow this testimony.

The proposed evidence about Frost's skill in fighting was duplicative of previously admitted testimony. During trial, Wisniewski and Funkhauser testified that once the fight went to the ground, Frost quickly got on top of appellant and pinned him to the ground. Appellant testified that after he swung at Frost, Frost hit him three times before grabbing him and slamming him to the ground. He also testified that Frost was "very, very strong, much stronger than I am, you know." He later reiterated this testimony, stating that Frost was "very, very, very strong, stronger than I would have imagined him to be." Because the evidence of Frost's physical dominance was uncontested, testimony that he was trained and skilled in combat was repetitive and of marginal relevance. (See *People v. Harris* (2005) [37 Cal.4th 310](https://www.leagle.com/cite/37%20Cal.4th%20310), 341 ["[T]he court had discretion to exclude . . . evidence under Evidence Code section 352 even if we assume it had some marginal relevance."].) Accordingly, the trial court did not abuse its discretion in excluding this testimony.

**D. *Government Code Section 70373 Fee***

Finally, appellant contends the $30 assessment fee under Government Code section 70373 violated the "ex post facto laws under the United States and California Constitutions" and "well-established principles of law regarding retroactivity." We disagree.

In *People v. Davis* (2010) [185 Cal.App.4th 998](https://www.leagle.com/cite/185%20Cal.App.4th%20998), this court affirmed previously "published opinions [that] have held that the rules against ex post facto laws and for prospective application of a new statute are not offended where the offense was committed before the effective date [of the statute] but the plea, verdict or sentence occurred after that date." (*Id.* at p. 1000.) Here, the murder occurred in 2008, and a jury found appellant guilty of second degree murder on August 31, 2009. Government Code section 70373 took effect on January 1, 2009. Accordingly, the $30 fee could lawfully be assessed on the murder count because the conviction on that charge occurred after the effective date of the statute.

**DISPOSITION**

The judgment is affirmed.

We concur:

EPSTEIN, P. J.

WILLHITE, J.

**FootNotes**

1. All further statutory citations are to the Penal Code, unless stated otherwise.

2. These instructions also included CALJIC No. 5.30 (Self-Defense Against Assault), CALJIC No. 5.32 (Use of Force in Defense of Another), CALJIC No. 5.50 (Self-Defense — Assailed Person Need Not Retreat), CALJIC No. 5.51 (Self-Defense — Actual Danger Not Necessary), and CALJIC No. 5.17 (Actual but Unreasonable Belief in Necessity to Defend — Manslaughter).

3. The jury was also instructed with CALJIC No. 5.54, "Self-Defense by An Aggressor." As given in this case, it provides:The right of self-defense is only available to a person who initiated an assault if he has done all of the following:A. He has actually tried, in good faith, to refuse to continue fighting;B. He has clearly informed his opponent that he wants to stop fighting; andC. He has clearly informed his opponent that he has stopped fighting.After he has done these three things, he has the right to self-defense if his opponent continues to fight.

Appellant assigns no error to the giving of this instruction.

4. On appeal, appellant also claims ineffective assistance of counsel based on trial counsel's failure to request jury instructions defining "mutual combat" and clarifying that appellant could invoke self-defense if he was prevented from withdrawing by the victim's use of sudden and deadly force. As we have considered and rejected the underlying claims on the merits, we also reject the claims of ineffective assistance of counsel.

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