2012 WL 8470267 (D.C.) (Appellate Brief)
District of Columbia Court of Appeals.

Jay Young LEANDER, a.k.a. Leander Young, Appellant,
v.
UNITED STATES OF AMERICA, Appellee.

No. 12-CM-227.
August 27, 2012.

Appeal from the Superior Court of the District of Columbia Criminal Division
Crim. No. 2011-DVM-2566

Brief for Appellee

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In the opinion of appellee, the following issues are presented:

I. Whether the trial court plainly erred when it failed to sanction the government *sua sponte* under Superior Court Criminal Rule 16(d)(2) and preclude admission of a videotaped interview of appellant, where the government hand-delivered a copy of the video to defense counsel's CJA mailbox the week preceding the trial and where the trial court took a luncheon recess of more than one hour during which defense counsel was able to watch the video no less than three times.

II. Whether the trial court improperly participated in plea negotiations and whether appellant was entitled to a presumption of judicial vindictiveness, where the trial court merely informed appellant that he would be entitled to leniency at sentencing if he pled guilty and accepted responsibility for his crimes, and where the court made clear that it did not care whether appellant proceeded to trial.

III. Whether the evidence was sufficient to support appellant's convictions for simple assault and attempted possession of a prohibited weapon, where appellant attempted to ***vii** strike the victim on the head with a cooking pot and, in deflecting the blow, the victim suffered a gash on his hand requiring stiches and permanent damage to one of his knuckles.

***1** COUNTERSTATEMENT OF THE FACTS

On November 25, 2011, the United States charged Jay Young Leander, a.k.a. Leander Jay Young ("appellant"), by criminal information with one count of simple assault, in violation of D.C. Code S 22-404, and one count of attempted possession of a prohibited weapon ("APPW(b)"), in violation of D.C. Code S 22-4514(b) (R. 1). [1]

***2** On January 24, 2012, a bench trial commenced before the Honorable Jennifer M. Anderson, after which the trial court found appellant guilty on both counts (R. 10). With respect to the simple assault, the trial court sentenced appellant to 180 days in jail and suspended all but 60 days (*id.;* Tr. 106). With respect to the APPW(b), the trial court sentenced appellant to 180 days in jail, all of which the trial court suspended (R. 10; Tr. 106). Further, the trial court sentenced appellant to 12 months' supervised probation and ordered him to: enroll in drug and alcohol treatment and anger management programs; stay away from the victim of the assault and the victim's residence; and pay a $100 assessment to the Victims of Violent Crime Compensation Fund (R. 10; Tr. 106-07).

Appellant filed a timely notice of appeal on February 23, 2012 (R. 11).

THE TRIAL

The Government's Evidence

Appellant and the victim, Steven Young, are brothers (Tr. 15). Young lives in the basement of the house located at 4300 3rd Street, Northwest (*id.*). Appellant's and Young's **elderly** mother also lives in the house with Young, who acts as her caregiver (*id.*). Appellant was removed from the house by court order in 2008 and soon thereafter took up residence in the ***3** detached garage on the property without Young's permission (*id.* 13-14).

On the evening of November 24, 2011 - Thanksgiving Day - appellant came to the house to have dinner with his mother (Tr. 17-18). While appellant and his mother watched television in the ground-floor den, Young ate dinner alone in the basement (*id.* 18). When Young came upstairs, he heard that the television in the second-floor bedroom was on and noticed that appellant was not in the den (*id.*). Young went to the foot of the stairs leading to the second floor and shouted up to appellant that he did

not have permission to watch television upstairs and that if appellant wished to remain in the house he had to stay downstairs (*id.*). The two started arguing, and Young went into the kitchen to call 'the police (*id.* 19). As Young was dialing, appellant lunged at him, grabbing him by the shirt (*id.* 22). Appellant and Young began to scuffle and careened into the den, living room, and dining room as they fought with each other (*id.* 23-24, 43).

During the fight, Young slipped in the living room, falling onto this knee and rupturing his tendon (Tr. 24). While Young sat immobilized on the floor, appellant went to the kitchen, took a pot of gravy from the stove, returned to where Young sat, and swung the pot at Young's head (*id.* 25). When Young raised ***4** his left hand to protect his head and deflect the blow, the pot caused a cut to Young's hand that required stitches and permanent damage to one of Young's knuckles (*id.* 30-31). [2]

The Defense Evidence

Appellant testified that after dinner he went upstairs to watch television against his mother's wishes (Tr. 52). Appellant recounted that he heard Young shout that he was not allowed upstairs and that the two began to argue (*id.* 52-53). Appellant claimed that after he came downstairs, Young "bumped" him from behind and tried to take the remote control from appellant's hand (*id.* 53). Appellant testified that when he turned around, Young rushed at him and that the two began to fight *(id.).* Appellant claimed that as he and Young struggled in the kitchen they bumped into the stove, causing some pots to fall and spill food onto the floor, and that Young cut his hand when Young hit the glass window in the pantry door *(id.).*

The Trial Court's Findings

The trial court found appellant guilty of both counts, observing that "[t]he exhibits" and "physical evidence" corroborated Young's testimony (Tr. 95-98). Specifically, the trial court found that Young was immobilized after he injured ***5** his knee and that the blood spatters in the living room surrounding the area where he fell were caused by the wound that Young suffered when appellant hit him with the cooking pot (*id.* 95-98). The trial court rejected appellant's self-defense claim and found that even had appellant been justified in defending himself at some point during the fight, that right was extinguished once Young was immobilized on the floor by the knee injury (*id.* 97).

ARGUMENT

I. THE TRIAL COURT DID NOT PLAINLY ERR BY ADMITTING THE VIDEOTAPED INTERVIEW OF APPELLANT.

Appellant contends that: (1) the government violated Superior Court Criminal Rule 16 when it delivered, the week before trial, a videotaped police interview of appellant to defense counsel's Criminal Justice Act ("CJA") mailbox; (2) the government's method of disclosure was an "intentional withholding" done in "bad faith;" (3) the "withheld" videotape was "material and prejudicial" to appellant's defense and that appellant's trial counsel "had insufficient time to review the tape;" and (4) the trial court "clearly erred" when it "failed to conduct a hearing on the allegations that the government failed to comply with Rule 16" (App. Br. 14-15, 17-21). These claims are meritless.

***6 A. Background**

Prior to trial, on January 19, 2012, the government hand-delivered an approximately 25-minute video of appellant's interview with a detective following his arrest to defense counsel's CJA mailbox in the basement of the courthouse (Tr. 5-6). On January 24, 2012 - the day of trial - appellant's trial counsel represented to the court that she had not received the video because she does not "regularly check" her CJA mailbox (*id.*). [3]

When the prosecutor informed the trial court that the government might use the video at trial to impeach appellant, the trial court said that it would adjourn proceedings prior to appellant's testimony so that defense counsel "can look at [the video] over lunch" (Tr. 6). Appellant's trial counsel agreed with the court's proposal, did not request additional time to watch the video, did not object to the admissibility of the ***7** video, and did not request that any sanctions be applied to the government. [4] The parties then proceeded with their opening statements (*id.*).

At the conclusion of the government's case-in-chief, the trial court adjourned for the luncheon recess at 12:52 p.m. (Tr. 45). Eighty-six minutes later, at 2:18 p.m., the defense commenced its case with the direct examination of appellant (*id.* 46). During appellant's cross-examination, the prosecutor asked to approach the bench and explained to the trial court that she intended to impeach appellant with a statement appellant made on the video regarding is arrest history (*id.* 65). Defense counsel stated that she had watched the video "three times" during the recess but "didn't see [sic] that [statement] on the tape" (*id.*). The prosecutor informed the court that the statement was made "at the 6 [minute] 20 [second] mark" on the recording ***8** (*id.*). Defense counsel then objected "as to relevancy and prejudice" (*Id.* 66). The trial court overruled the objection and explained that the statement was relevant to appellant's credibility because appellant "opened the door by saying he didn't lie at all to the police" (*id.*). The prosecutor then proceeded to use the video to impeach appellant on three topics: (1) his criminal history (Tr. 68-70); (2) whether he testified truthfully that Young "came upstairs" prior to their fight (*id.* 70-73); and (3) whether Young snatched a remote control out of appellant's hand before or after Young allegedly bumped appellant (*id.* 73).

B. Standard of Review & Applicable Law

Upon defendant's request, Rule 16 requires the government to provide "any relevant written or recorded statements made by the defendant within the possession, custody or control of the government." Super. Ct. Crim. R. 16(a)(1)(A). [5] If the trial court determines that a party violated Rule 16, "the Court may order such party to permit the discovery or inspection, grant a ***9** continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other orders as it deems just under the circumstances." Super. Ct. Crim. R. 16(d)(2); *see Allen v. United States*, 649 A.2d 548, 552 (D.C. 1994) (trial court has authority to apply appropriate sanctions for discovery violations).

"Rule 16 does not require a court to impose sanctions against the nondisclosing party." *Sandwick v. Dist. of Columbia*, 21 A.3d 997, 1002 (D.C. 2011) (*quoting Yoon v. United States*, 594 A.2d 1056, 1061 (D.C. 1991)). If, however, the trial court decides that sanctions are warranted, in fashioning an appropriate sanction it "must consider and weigh": (1) the reason for the nondisclosure; (2) the impact of the nondisclosure on the trial of the particular case; and (3) the impact of a particular sanction on the proper administration of justice in general. *Murphy-Bey v. United States*, 982 A.2d 682, 690 (D.C. 2009) (*quoting Ferguson v. United States*, 866 A.2d 54, 59 (D.C. 2005)). The range of possible sanctions the trial court may apply is "extremely broad, the only real limitation being that a sanction must be just under the circumstances." *Tyer v. United States*, 912 A.2d 1150, 1165 (D.C. 2006) (internal quotation marks and citations omitted).

***10** When a defendant has preserved a Rule 16 claim, this Court reviews the trial court's ruling for **abuse** of discretion. *United States v. Curtis*, 755 A.2d 1011, 1014 (D.C. 2000); *see Allen v. United States*, 649 A.2d at 554 (no **abuse** of discretion when "record supports the trial court's ruling that sanctions were unwarranted"). "In reviewing a trial judge's exercise of discretion, an appellate court must defer to the judge's choice if it was within the range of permissible alternatives, taking cognizance of the nature of the determination being made and the context within which it was rendered." *Wiggins v. United States*, 521 A.2d 1146, 1148 (D.C. 1987) (quoting *(James) Johnson v. United States*, 398 A.2d 354, 366 (D.C. 1979) (internal quotation marks omitted)). If the trial court **abused** its discretion, reversal is warranted "only where [this Court] find[s] **abuse** of discretion coupled with substantial prejudice to appellant's rights." *Graham v. United States*, 950 A.2d 717, 738 n.83 (D.C. 2008) (quoting *Davis v. United States*, 641 A.2d 484, 494 (D.C. 1994)).

Here, however, because appellant did not preserve his Rule 16 claim and failed to request discovery sanctions from the trial court, this Court should review for plain error only. *See Sheffield v. United States*, 397 A.2d 962, 968 (D.C. 1979) ("Where defense

counsel... does not request the imposition of ***11** sanctions against the government for failing to preserve discoverable material, the trial court's failure to [s]ua sponte impose a sanction will only be reversed upon a finding of plain error."); *Sandwick,* 21 A.3d at 1001 (applying plain-error standard where defendant failed to request Rule 16 sanctions). Appellant bears the "formidable" burden of showing plain error. *Hunter v. United States,* 606 A.2d 139, 144 (D.C. 1992). To prove plain error, appellant must show that: (1) the trial court erred; (2) the error "was plain and obvious;" (3) the error "affected substantial rights;" and (4) the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Marques v. United States,* 903 A.2d 815, 817 (D.C. 2006) (quoting *Olano v. United States,* 507 U.S. 725, 732 (1993)).

C. Analysis

Appellant's claims that the government violated Rule 16 and intentionally withheld the videotape in bad faith are unsupported by the record. As the prosecutor explained during the pretrial proceeding, the government disclosed the video five days prior to trial by delivering it to defense counsel's CJA mailbox (Tr. 5). The prosecutor also instructed her paralegal to telephone appellant's trial counsel to confirm receipt of the ***12** video (*id.* 6). [6] Appellant's trial counsel failed to receive the video prior to trial not because the government withheld it but, by her own admission, because she does not regularly check her mailbox and evidently did not check it for at least five days prior to appellant's trial (*id.* 5). [7]

The trial court thus did not **abuse** its discretion, let alone plainly err, by failing to sanction the government under Rule 16 *sua sponte.* Sanctioning the government would have been error because the government did not violate Rule 16: the videotape was disclosed in a reasonable time prior to the trial. Defense counsel did not argue that the government had violated Rule 16. Defense counsel did not request that the trial court impose discovery sanctions or suggest that sanctions were appropriate. Nor did defense counsel object when the government stated during the pretrial hearing that it might use the video impeach appellant. When the trial court explained that ***13** defense counsel could watch the video during the luncheon recess, defense counsel agreed, did not request additional time, and made no indication that the time the trial court afforded her was insufficient. Disclosure of the video was therefore sufficiently timely to satisfy Rule 16.

Whatever minimal prejudice appellant might have conceivably suffered by his trial counsel's failure to obtain the video prior to trial was certainly cured when the trial court provided defense counsel with a reasonable amount of time to watch the video. *See, e.g., Ferguson,* 866 A.2d at 65-66 (no substantial prejudice where defense counsel did not request "additional time to obtain its own medical expert" after receiving late-disclosed expert report); *Gethers v. United States,* 684 A.2d 1266, 1272-73 (D.C. 1996) (no **abuse** of discretion where defense counsel given time to inspect medical records during recess and did not request additional time); *Holiday v. United States,* 683 A.2d 61, 85 (D.C. 1996) (no substantial prejudice where defense counsel was allowed "to speak with government's fingerprint expert over the lunch recess"); *Washington v. United States,* 600 A.2d 1079, 1081-82 (D.C. 1991) (*per curiam*) (no substantial prejudice where defense counsel "did not request more time in which to decide whether to call the chemist for cross-examination"); *Lee v. United States,* 454 A.2d 770, 776 (D.C. 1982) (no **abuse** of ***14** discretion where defense counsel given opportunity to view video before introduction at trial). Appellant's argument, made for the first time on appeal, that his trial counsel had insufficient time to review the tape" (App. Br. 20) is further belied by trial counsel's admission that she watched the video "three times" during the luncheon recess (Tr. 65). Defense counsel had ample time to watch the video and never indicated otherwise.

Furthermore, the video contained no "material evidence favorable to appellant." *Graham,* 950 A.2d at 737 (no error where government disclosed videotaped interview of appellant's parents until after suppression hearing). The prosecutor attempted to impeach appellant on three topics related to statements he made on the video: (1) his criminal history (Tr. 68-70); (2) whether he testified truthfully that Young "came upstairs" prior to their fight (*id.* 70-73); and (3) whether Young snatched a remote control out of appellant's hand before or after Young allegedly bumped appellant (*id.* 73). None of these topics relates to what the trial court correctly recognized to be the crucial issue of the case: whether appellant or Young was the first aggressor (*id.* 92-95). Aside from the third topic, the trial court did not consider the ***15** impeachment testimony in its findings of fact. [8] The testimony related to appellant's videotaped statements was peripheral and largely irrelevant to the key facts elicited at trial

and, accordingly, the late receipt of the video did not substantially prejudice appellant's defense. *Cf. Wiggins v. United States*, 521 A. 2d 1146, 1149 (D.C. 1987) (defendant substantially prejudiced by nondisclosure of evidence that related to the "sole disputed fact" and was crucial to development of defense case).

Finally, the trial court properly overruled appellant's objection to the government's use of the video as impeachment evidence. Appellant's claim that he did not lie about his criminal history to the detective who interviewed him was obviously relevant to appellant's credibility, as the trial court ruled (Tr. 66). Moreover, with respect to each of the topics on which the prosecutor impeached appellant, the prosecutor first elicited testimony on the relevant topic and ***16** then introduced a prior inconsistent statement in the form of his recorded testimony to impeach him. The prosecutor's actions were faithful to proper impeachment techniques. *See R. & G. Orthopedic Appliances & Prosthetics, Inc. v. Curtin*, 596 A.2d 530, 537-38 (D.C. 1991). [9]

II. THE TRIAL COURT DID NOT PARTICIPATE IN THE PARTIES' PLEA NEGOTATIONS, AND ITS CONDUCT DOES NOT CREATE A PRESUMPTION OF JUDICIAL VINDICITIVENESS.

Appellant contends that: (1) the trial court improperly "participated" in the parties' plea negotiation when it informed appellant that he would be entitled to leniency if he chose to accept responsibility for his crimes and plead guilty; and (2) there is a "reasonable likelihood" that the court "punished" appellant at sentencing because he did not plead guilty and instead exercised his right to trial (App. Br. 26, 29). These claims have no merit.

A. Background

In pretrial proceedings, the trial court asked the parties whether the case could be resolved without a trial (Tr. 4). Should appellant choose to plead guilty, the court explained, ***17** appellant would be entitled to leniency at sentencing because the court "give[s] a lot of credit for acceptance of responsibility" (id.). When appellant started to respond, the court stopped him and took a short recess to allow him to consider a guilty plea with counsel (id.).

After the recess, defense counsel informed the trial court that the parties were unable to dispose of the case short of trial (Tr. 6-7). The trial court repeated that although it "give[s] a lot of credit for acceptance of responsibility," it did not desire to:

> get in the middle of plea negotiations. I mean, I just want to make sure that, although you have been sitting here watching all morning, so you kind of know my policy, but that - you know, I don't care one way or the other. I'm here. I'm going to be going to trial. If it's not your trial, it will be somebody else's trial. I just want to make sure that, you know, you've explored [the possibility of a guilty plea] if that's what you wanted to do. (Id. 7.)

When neither party asked the court for additional time to negotiate a plea, the trial began.

At sentencing, the trial court reiterated how the physical evidence supported Young's version of how he was injured and sentenced appellant with respect to the simple assault to 180 days in jail, all of which but 60 days were suspended, and, with respect to the APPW(b), to 180 days in jail, fully suspended, to be served concurrently (Tr. 106). The court did not suggest ***18** that appellant's failure to plead guilty in any way influenced it choice of sentence (*id.*).

B. Standard of Review & Applicable Law

1. Plea Negotiations under Rule 11

Rule 11 allows for the prosecutor and defense attorney to negotiate with a view toward reaching a plea agreement, but cautions that "[t]he Court shall not participate in any such discussions." Super. Ct. Crim. R. 11(e)(1). Failure to comply with Rule

11(e)(1) affects a defendant's substantial rights if the trial judge's participation may reasonably be viewed as having been a material factor influencing the defendant's decision to plead guilty. *See Boyd v. United States*, 703 A.2d 818, 823-24 (D.C. 1997). Alleged violations of Rule 11(e)(1) are reviewed for harmless error irrespective of a contemporaneous objection from the defendant. *Id.* at 822 n.7.

2. Judicial Vindictiveness

"[D]ue process of law requires that even the appearance of vindictiveness must be absent from judicial proceedings." *Thorne v. United States*, 46 A.3d 1085, 1088 (D.C. 2012) (quoting *United States v. Schiller*, 424 A.2d 51, 54 (D.C. 1980)). Where "action detrimental to the defendant has been taken after the exercise of a legal right," however, this Court will presume "an improper vindictive motive" only "under circumstances showing a ***19** reasonable likelihood of vindictiveness." *Thorne*, 46 A.3d at 1088 (quoting *United States v. Goodwin*, 457 U.S. 368, 372-74 (1982)). Appellant bears the burden of showing that a reasonable likelihood exists "because of the potential 'severity of such a presumption - which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct." *Simms v. United States*, 41 A.3d 482, 488 (D.C. 2012) (quoting *Goodwin*, 457 U.S. at 373). If appellant can make this showing, the burden shifts to the government, which may rebut the a presumption of vindictiveness - in this case, vindictiveness by the trial judge at sentencing - by offering "objective information in the record justifying the action" the trial court undertook. *Thorne*, 46 A.3d at 1088 (quoting *Goodwin*, 457 U.S. at 372-74).c The burden then returns to appellant, who must prove that the court's actual motivation in imposing the challenged sentence was vindictiveness at appellant's exercise of his right to trial. *See Shiel v. United States*, 515 A.2d 405, 411 (D.C. 1986) (footnote omitted).

C. Analysis

Appellant errs when he asserts that the trial court violated his right to due process by its "excessive participation" in the plea-bargaining process (App. Br. 31). This claim rests exclusively on the statement the trial court ***20** uttered before the parties engaged in their plea negotiation and then repeated after they returned and reported that they were unable to make a deal: "I do give a lot of credit for acceptance of responsibility" (Tr. 4, 7). The court then explicitly informed that parties that it had no desire to "really get in the middle of plea negotiations" and wished only to inform the parties that the court's "policy" was to consider favorably a defendant's acceptance of responsibility at sentencing (id.).

Whether analyzed individually or collectively, these statements come nowhere close to "participation" - excessive or otherwise - in the parties' plea negotiation. The court was not present when the parties negotiated. The court did not monitor or facilitate the negotiation. The court did not even inquire as to the substance of the negotiation - it asked only whether the parties had reached a deal (Tr. 6-7). Appellant's claim of improper "participation" finds no support in the record.

Nor was there anything improper in the trial court's statement that appellant would be entitled to leniency at sentencing if he accepted responsibility for his crimes. As this Court recently reiterated in *Thorne*,

> a defendant's acknowledgement of guilt, contrition, willingness to reform, and efforts to make amends are relevant and permissible considerations in sentencing. A sentencing judge may grant leniency to a ***21** defendant who, in such ways,, has accepted responsibility for his wrongdoing ...

46 A.3d at 1089 (citing *Coles v. United States*, 682 A.2d 167, 170 (D.C. 1996) (footnotes omitted)). Consequently, the trial court "may decline to be lenient if the defendant has failed to admit his guilt and accept responsibility." *Id.* Here, the trial court's explanation of its sentencing "policy" - awarding "a lot of credit for acceptance of responsibility" - was an accurate restatement of these well-established sentencing principles (Tr. 7). *Thorne* teaches that there was nothing improper in the trial court reminding appellant that acceptance of responsibility was something the trial court would consider favorably at sentencing in the event of his pleading guilty.

The improper judicial statements the *Thorne* Court criticized are readily distinguishable from the unremarkable statements the trial court made in this case. In *Thorne,* the trial court's statements at sentencing created the appearance that the trial court imposed a harsher sentence because the defendant exercised his constitutional right to trial: *"You have to live with the consequences of your strategic decision* [to cross-examine the government's chemist]. All of this, this does not happen in a vacuum and *I take all of that into account when I impose sentence. How a case is tried."* 46 A.3d at 1088 ***22** (emphasis in original). [10] Here, in contrast, the trial court did little more than explain to appellant that he would be entitled to leniency if he pled guilty and accepted responsibility. That was not improper. *Id.* at 1089. In fact, the trial court expressly disavowed any interest in whether appellant pled guilty, and explained that appellant was free to go to trial but that it wanted to ensure that appellant sufficiently "explored" the possibility of a plea with his trial counsel (Tr. 7). In contrast to the statements at issue in *Thorne,* here, the trial court never stated (or even intimated) that the sentence the court imposed was based on appellant's decision to go to trial or how or why appellant tried his case (Tr. 106-11). The record contains no evidence the trial court "urg[ed]" appellant to enter a guilty plea, that the court was "very intent on obtaining a plea," or that appellant's sentence was actuated by judicial vindictiveness in any respect (App. Br. 29).

***23** Because the trial court's statements were wholly proper, appellant cannot demonstrate the reasonable likelihood of judicial vindictiveness that he must to support his claim. The additional "evidence" he offers is so insubstantial that it no respect makes vindictiveness a reasonable probability on this record.

First, appellant claims that the trial court's repetition of its "policy" regarding acceptance of responsibility is evidence that the court "wanted [appellant] to enter a plea" and vindictively punished him when he refused to do so (App. Br. 30-31). As explained, *supra,* the court did not act improperly by informing appellant that he would be entitled to leniency if he accepted responsibility for his wrongdoing at sentencing. Nothing in the record suggests that the trial court "wanted" appellant to plead guilty. That the trial court mentioned acceptance of responsibility twice does not somehow render the statements improper. [11]

***24** Second, appellant claims that the trial court created an "appearance of vindictiveness" when it did not accede to Young's request (made during his victim-impact statement) that appellant be placed on probation (App. Br. 32). It is unreasonable to presume that a trial court is motivated by vindictiveness simply because it does not follow the victim's recommendation of probation and imposes jail time instead.

Third, appellant suggests that the trial court behaved vindictively by offering a "parsimonious" amount of time for appellant's trial counsel to review the videotape, whereas the court allowed "extra time" for plea negotiations (App. Br. 32). This argument ignores the fact that the trial court granted the parties a "10-minute break" to negotiate a plea but allowed appellant's trial counsel 86 minutes to view the 25-minute video (Tr. 4, 45-46). As stated, *supra,* appellant's trial counsel never requested additional time to watch the video or complained that the reasonable amount of time the trial court afforded her was insufficient.

Finally, appellant bootstraps his other claims of error the trial court improperly admitted the videotape into evidence; the trial court allowed the prosecutor to impeach appellant using the video; the trial court did not credit appellant's testimony - into a generalized claim that the trial court was ***25** ill-disposed toward appellant because of his refusal to plead guilty and then vindictively punished him at sentencing. Even assuming for the sake of argument that one (or more) of the court's rulings was error - though none was - it is unreasonable to attribute any error to a sinister motivation. To do so would automatically (and absurdly) vest every appellant who prevails on a claim of trial error with a presumption of judicial vindictiveness as well.

III. THE EVIDENCE WAS SUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS FOR SIMPLE ASSAULT AND APPW(b).

Appellant challenges the sufficiency of the evidence with respect to both convictions. First, appellant argues that the evidence did not support the trial court's finding that he assaulted Young by hitting him with the cooking pot (App. Br. 23-26). Second,

appellant argues that the pot is not a "dangerous weapon" within the meaning of D.C. Code § 22-4514(b) because the injury appellant inflicted with it was not serious and because "one blow was not sufficient to make the pot a prohibited weapon" (App. Br. 33-35). These arguments have no merit.

A. Standard of Review

In reviewing a sufficiency claim, this Court "must view the evidence in the light most favorable to the government, giving ***26** full play to the [fact-finder's] right to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *Ewing v. United States*, 36 A.3d 839, 844 (D.C. 2012) (citation omitted); see *Bolden v. United States*, 835 A.2d 532, 534 (D.C. 2003) (defendants challenging sufficiency of evidence "face a difficult burden"). "The evidence must be sufficiently weighty to allow a finding of guilt beyond a reasonable doubt, but it need not compel such a finding, nor must 'the government negate every possible inference of innocence." *(Courtney) Johnson v. United States*, 40 A.3d 1, 14 (D.C. 2012) (quoting *Timberlake v. United States*, 758 A.2d 978, 980 (D.C. 2000)). Instead, there merely has to be "some probative evidence on each of the essential elements of the crime" from which a reasonable person could fairly find guilt beyond a reasonable doubt. *Jennings v. United States*, 431 A.2d 552, 555 (D.C. 1981) (citation omitted). Thus, in reviewing a sufficiency claim, this Court will vacate a conviction only where there has been "no evidence" produced from which guilt can reasonably be inferred. *Joiner-Die v. United States*, 899 A.2d 762, 764 (D.C. 2006).

This deferential standard of review applies to jury and bench trials alike. *In re D.W.*, 27 A.3d 1164, 1167 (D.C. 2011). "In reviewing a bench trial, this [C]ourt 'will not reverse a conviction for insufficient evidence unless appellant ***27** establishes that the trial court's factual findings were 'plainly wrong' or 'without evidence to support them." *Joiner-Die*, 899 A.2d at 764 (quoting *Cannon v. United States*, 838 A.2d 293, 296-97 (D.C. 2003)). Accordingly, "[a]ny factual finding anchored in credibility assessments derived from personal observations of the witnesses is beyond appellate reversal unless those factual findings are clearly erroneous." *Stroman v. United States*, 878 A.2d 1241, 1244 (D.C. 2005).

B. Analysis

1. The evidence was sufficient to support appellant's conviction for simple assault.

The offense of assault consists of "unlawfully assaulting" or threaten[ing] another in a menacing manner." D.C. Code § 22-404(a)(1). To prove a charge of simple assault, the government must show beyond a reasonable doubt that the defendant: (1) committed an act; (2) had the apparent present ability to injure the victim at the time the defendant committed the act; and (3) intended to perform the act constituting the assault. *See Dunn v. United States*, 976 A.2d 217, 219-20 (D.C. 2009). Testimony that the defendant struck the victim satisfies the essential elements of simple assault and provides this Court sufficient evidence to affirm a simple-assault conviction. *See, e.g.,* ***28** *Stroman*, 878 A.2d at 1245 (testimony that defendant struck victim in the head with a "flip flop"); *Macklin v. United States*, 733 A.2d 962, 964 (D.C. 1999) (police officer's testimony that defendant elbowed him).

Young testified that as he sat immobilized on the floor, appellant grabbed a cooking pot from the stove and attempted to strike Young on the head with it (Tr. 24-25, 28, 39). Appellant would have succeeded in striking Young on the head had Young not deflected the blow with his left hand (*id.* 25, 39). Young explained how the pot caused a gash on his hand that required stitches and inflicted lasting damage to one of his knuckles (*id.* 31). In addition to Young's testimony, physical evidence presented by the government supported appellant's conviction: photographs showed blood spatters surrounding the location where Young fell to the ground (*id.* 96-97).

Young's testimony and the physical evidence offered at trial, viewed in light most favorable to the government, proved that appellant assaulted Young with the pot. *See Stroman*, 878 A.2d at 1245 (appellant's testimony, without more, is sufficient to prove simple assault). First, by striking Young with the pot, appellant committed an assaultive act. Second, because appellant actually struck Young and caused physical injury, appellant plainly had the present apparent ability to effect ***29** injury. And

third, appellant's assaultive intent "may be inferred from doing the act that constitutes the assault," here, grabbing the pot from the stove, returning to where Young sat, and taking a swing at Young's head. *Macklin*, 733 A. 2d at 964 (citing *Smith v. United States*, 593 A.2d 205, 206 (D.C. 1991)).

Appellant contends that the trial court erred because his testimony was more plausible than Young's (App. Br. 24-26). This Court, however, will not reverse the trial court's credibility findings unless they are clearly erroneous, which is not the case here. *See Ewing*, 36 A.3d at 844. Furthermore, this Court will vacate a conviction only when there is "no evidence" from which appellant's guilt could reasonably be inferred - not merely when the trial court based its findings on disputed testimony. Joiner-Die, 899 A.2d at 764. As stated, *supra*, Young's testimony alone is sufficient prove the assault.

The contrary interpretations of the evidence appellant offers on appeal are based on unsupported speculation, not evidence. *See, e.g.*, (App. Br. 24) (arguing that "[t]he blood on the door and the books could have also come from a cut" Young sustained by breaking the glass in the panty door); (id. 25) (arguing that gravy stains could have resulted from a spill in the kitchen, not from appellant swinging the pot at Young). According to appellant, the "most compelling" evidence that ***30** Young was in fact not injured by the pot is the "configuration" of the gash on Young's hand, which appellant claims "is not consistent with an injury cause by a pot swung at a person." (id.). In support of this baseless speculation appellant offers nothing more than his opinion - "[a] severe blow with a pot would likely cause massive swelling and black and blue marks, not a cut"- and comes nowhere close to satisfying the heavy burden of showing that "no evidence" supported the trial court's findings (*id.*) [12]

2. The evidence was sufficient to support the conviction for APPW(b).

To prove a charge of attempted possession of a prohibited weapon ("APPW(b)"), the government must show beyond a reasonable doubt "that the defendant possessed [a dangerous] weapon with the specific intent to use it unlawfully." *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005) (alteration in original). Because the weapon in this case, a cooking pot, is not enumerated under D.C. Code § 22-4514(b) and is thus not a "dangerous weapon per se," the government must prove that it is an object "known to be likely to produce death or great bodily ***31** injury in the manner it is used, intended to be used, or threatened to be used." *Alfaro v. United States*, 859 A.2d 149, 160 (D.C. 2004) (quoting *Harper v. United States*, 811 A.2d 808, 810 (D.C. 2002)). Great bodily injury is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental facility." *Stroman*, 878 A.2d at 1245 (quoting *Alfaro*, 859 A.2d at 161) (internal quotation marks omitted).

Whether an object is "dangerous" for purposes of D.C. Code §22-4514(b) is: (1) "ordinarily a question of fact" that this Court determines from "familiar and common experience," *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982); and (2) depends on "the circumstances surrounding its possession and use," *Coleman v. United States*, 619 A.2d 40, 47 (D.C. 1993); see D.C. Crim. Jury Instruction § 6.503 (5th ed. 2010). An ordinary object may therefore become a dangerous weapon "when it is used to injure another person." *Alfaro*, 859 A.2d at 160; *see Strong v. United States*, 581 A.2d 383, 386 (D.C. 1990) ("An object which is not inherently dangerous can become dangerous by its use as a weapon.").

***32** Because the evidence was sufficient to prove that appellant struck Young with the pot, the evidence likewise proves that appellant possessed the pot and used it in an unlawful manner. *See Stroman*, 878 A.2d at 1245 (affirming assault conviction where defendant struck victim in the head with a "flip-flop" and holding that appellant therefore used object in an unlawful manner). Moreover, Young's testimony provides ample evidence that appellant had the specific intent to use the pot unlawfully: appellant went to the kitchen, grabbed the pot, and swung it while "aiming at" Young's head (Tr. 24-25, 28, 39).

The evidence also shows that the government proved the final element of APPW(b): that the pot is "known to be likely to produce death or great bodily injury in the manner it is used, intended to be used, or threatened to be used." *Alfaro*, 859 A.2d at 160. Although the record does not reflect what material the pot was made of, Young's testimony described how the pot was used that evening to heat gravy on the stove (Tr. 25-26). It was therefore reasonable for the trial court to infer that the

pot was constructed of a sufficiently hard and durable material capable of withstanding cooking temperatures. [13] It stands to ***33** reason, given "familiar and common experience," *Williamson*, 445 A.2d at 979, that a blow to the head with such an object would likely result in great bodily injury and entail "a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental facility," *Stroman*, 878 A.2d at 1245. [14]

Appellant's contrary arguments miss the mark. First, appellant claims that the pot is not a dangerous weapon because appellant only hit Young with it once (App. Br. 35). As discussed, *supra*, this argument fails because it is common knowledge that even a single blow to the head with a cooking pot could result in serious physical injury, unconsciousness, or death.

***34** Second, appellant claims that the insignificant nature of Young's injury negates the dangerousness of the pot (App. Br. 35). Appellant errs again. Young testified that the injury caused a permanent inability to bend one of his knuckles (Tr. 31), precisely the type of "protracted loss or impairment of the function of a bodily member" that amounts to great bodily harm, *Stroman*, 878 A.2d at 1245. The dangerousness of a weapon for purposes of D.C. Code § 22-4514(b) does not depend exclusively on the nature of the actual injury the weapon inflicts; the Court also takes into account the nature of the injury that could have resulted from the "intended" or "threatened" use of the weapon. *Alfaro*, 859 A.2d at 160 (citation omitted). Accordingly, in *Stroman*, this Court considered the physical characteristics of a "flip flop" in determining whether it is an "object likely to cause death or great bodily harm." 878 A.2d at 1245. This Court similarly considered the inherent dangerousness (given its manner of use) of a belt with an "attached metal buckle" in affirming the trial court's finding that the belt was a dangerous weapon because of the "substantial risk" of serious impairment the victim could have suffered even though the victim's injuries amounted only to "a red bruise" and an "imprint on his arm." *Rivera v. United States*, 941 A.2d 434, 441 (D.C. 2008). *See Williamson*, 445 A.2d at 980-81 (finding ***35** that an "umbrella with [a] pipe attached" to it was a dangerous weapon because of its "dangerous character" even though the victim sustained only a "small bruise on her upper left arm"). Here, appellant intended to knock Young on the head with a cooking pot - an action that obviously could have serious if not fatal consequences and that therefore renders the pot a dangerous weapon. [15]

***36 CONCLUSION**

WHEREFORE, appellee respectfully requests that this Court affirm the judgment of the Superior Court.

Footnotes

1 "R." refers to the record on appeal. "Tr." refers to the transcript of the pretrial proceeding, bench trial, and sentencing held before the Honorable Jennifer M. Anderson on January 24, 2012. "App. Br." refers to appellant's brief.

2 Young testified that as a result of the injury he "can't bend [his] knuckle any longer" (Tr. 31).

3 Appellant claims that "there is no CJA mailbox available to counsel" and that his trial counsel "never received a copy of the videotape" (App. Br. 3 n.2). First, the CJA office in the basement of the courthouse contains a file cabinet commonly known to Superior Court criminal practitioners and Assistant United States Attorneys ("AUSAs") as the "CJA mailbox." AUSAs routinely deliver discovery materials to CJA attorneys at this location. Second, as discussed, infra, whatever prejudice appellant suffered from his trial counsel's failure to receive the video in advance of trial was cured when the court provided trial counsel ample time to review the video before appellant testified.

4 THE COURT: Well, how long is - how long is the video?
[PROSECUTOR]: It is I believe it's about 25 minutes. I would also submit the defendant is aware of the video.
THE COURT: All right. We'll start with the trial and we'll break for lunch. You can look at it over lunch.
[DEFENSE COUNSEL]: All right.
THE COURT: I don't think it's unreasonable that the Government put it in your CJA box. That's what it is there for. (Tr. 6.)

5 Rule 16 does not specify when a disclosure must be made to the opposing party. The government therefore assumes that the standard for disclosure of "potentially exculpatory information," *i.e.*, that the defense receive the information "in time to use it effectively at

trial," applies in the Rule 16 context. *Edelen v. United States*, 627 A.2d 968, 971 (D.C. 1993) (citing *Catlett v. United States*, 545 A.2d 1202, 1217 (D.C. 1988)).

6 Appellant's trial counsel represented to the court that she did not receive the call (Tr. 6).

7 Appellant argues that the trial court "clearly erred when it failed to conduct a [Rule 16] hearing" regarding the video (App. Br. 14-15). No hearing was necessary, however, because the trial court was already well acquainted with the facts concerning the disclosure of the video and defense counsel's claim that she did not receive it, as the transcript of the pretrial proceeding demonstrates (Tr. 5-6). Moreover, even assuming for the sake of argument that the government did violate Rule 16, no sanctions are warranted, as explained, *infra*.

8 To the extent appellant argues that the video contained material evidence because it related to appellant's credibility, whether or not a witness's testimony is credible is always an issue at trial, and a trial judge must, in most circumstances, make credibility assessments (App. Br. 21-23). Although the trial court observed that appellant was impeached by his videotaped statement regarding how Young grabbed the remote control out of appellant's hand, the trial court did not primarily rely on appellant's testimony or Young's in rendering its verdict but instead found that the physical evidence corroborated Young's testimony (Tr. 94-98).

9 Appellant raised the ancillary argument that the government "did not inform the defense" how it intended to use appellant's recorded statements in advance of trial (App. Br. 21). The government is not obligated to inform the defense how it intends to use evidence at trial, and appellant cites no authority to the contrary.

10 The Court likewise criticized analogous statements that improperly connected the sentence imposed by a trial court with the defendant's exercise of constitutional rights. *See, e.g.*, *Thorne*, 46 A.3d at 1092 ("[I]f I find that after the trial you didn't have a defense at all, you're going to get the maximum, because you're playing games with me.") (quoting *United States v. Cruz*, 977 F.2d 732, 733 (2d Cir. 1992)) (alteration in original); *id.* ("I think [that] imposing upon the time and resources of the Court to try a case which should not be tried is an imposition which deserves consideration when it comes time for me to sentence and I will do so.") (quoting *United States v. Crocker*, 788 F.2d 802, 808-09 (1st Cir. 1986)).

11 In this connection, appellant erroneously contends that the trial court attached "excessive importance" to consideration of appellant's acceptance of responsibility (App. Br. 30). As explained, *supra*, the trial court mentioned this factor once before the parties negotiated and once after. A fair reading of the record does not show "excessive" emphasis on acceptance of responsibility as a sentencing factor the court would have considered in the event of appellant's pleading guilty.

12 Appellant incorrectly claims that the government did not introduce "medical evidence" to prove that the pot caused the injury to Young's hand (App. Br. 25). The government introduced a photograph of the wound to Young's hand as well as photographs showing the blood spatters near the area where Young sat bleeding (Tr. 25-32).

13 The government introduced the pot into evidence, and the trial court examined it but did not make specific findings with respect to its physical characteristics, though it did find that the pot was a "prohibited weapon" given the manner in which appellant used it (Tr. 25-27).

14 Courts throughout the nation have held that similar kitchen implements constituted dangerous weapons when used to strike another person on the head or body. *See, e.g.*, *United States v. Chasing*, 39 F.3d 1185 (8th Cir. 1994) (unpub.) (affirming sentencing enhancement for aggravated assault where victim was struck on the head with an "iron skillet" because skillet constituted a "dangerous weapon" for purposes of U.S.S.G. § 1B1.1, *i.e.*, "an instrument capable of inflicting death or serious bodily injury"); *State v. Pearson*, 795 N.W.2d 99 (Iowa Ct. App. 2010) (frying pan used to strike victim on head was dangerous weapon); *State v. Blue*, 699 S.E.2d 661 (N.C. Ct. App. 2010) (attack using cooking pot constituted robbery with dangerous weapon).

15 Appellant claims that there was no "medical evidence[] that the pot was capable of causing injury beyond the cut" (App. Br. 35). As this Court explained in *Williamson*, however, the relevant consideration when determining whether an object is a dangerous weapon is not expert or medical testimony, but rather "familiar and common experience." 445 A.2d at 979.

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