

Cite as 465 A.2d 823 (D.C.App. 1983)

to raise the point below. . . ." *Robinson v. United States*, 322 A.2d 271, 273 (D.C.1974), citing *Williams v. United States*, 237 A.2d 539, 540 (D.C.1968). We do not so find, particularly in this case where the jury, after being instructed that malice is an element of the offense, found appellant guilty of first-degree premeditated murder.

In re S.P., Jr.

No. 82-898.

District of Columbia Court of Appeals.

Argued May 2, 1983.

Decided Aug. 15, 1983.

## VII.

The final question presented is whether the trial court erred when it sentenced appellant for felony-murder (robbery) and felony murder (larceny), as well as for the underlying felonies of robbery and larceny.

[17-20] Until recently, this court found no merger between the underlying felony and a felony murder provided the sentences were to run concurrently. The application of concurrent sentences, however, has been held to be improper as a safeguard against "potential collateral consequences." *Doepel v. United States*, 434 A.2d 449, 459 (D.C.), cert. denied, 454 U.S. 1037, 102 S.Ct. 580, 70 L.Ed.2d 483 (1981). See also *Harling v. United States*, 460 A.2d 571 (D.C.1983). The law in this jurisdiction as stated in *Doepel*, compels us to conclude that the trial court's imposition of sentence was improper. In remanding the case to the trial court for resentencing, we observe that in the instance of a felony murder prosecution, where there is one death, and the jury returns a verdict of guilty as to felony murder and the underlying felony as well, then the court may impose sentence on only one of those charges, but not both. Similarly, where one killing is involved, and the government advances alternate theories of felony murder based upon more than one underlying felony, the accused may not be convicted of more than one felony murder.<sup>5</sup>

*Remanded for further proceedings consistent with this opinion.*

5. In a recent case the government recognized and acknowledged this problem. *Eugene Dixon v. United States*, --- A.2d --- No. 82-817

Defendant was convicted in the Superior Court, Paul R. Webber III, J., of carrying a deadly or dangerous weapon capable of being concealed on or about his person, and he appealed. The Court of Appeals, Belson, J., held that evidence was sufficient to support finding that defendant, in carrying and twirling around his body a nunchaku in the midst of a crowd of onlookers, was carrying a deadly or dangerous weapon in violation of the dangerous weapons statute.

Affirmed.

## 1. Criminal Law ⇔ 260.11(1, 3)

The Court of Appeals is not to set aside the trial court's judgment, except for errors of law, unless the Court of Appeals finds that it was plainly wrong or unsupported by the evidence. D.C.Code 1981, § 17-305(a).

## 2. Criminal Law ⇔ 260.11(2)

In assessing defendant's insufficiency-of-the-evidence claim, the Court of Appeals was required to review the evidence in the light most favorable to the government and give the government the benefit of all reasonable inferences.

## 3. Criminal Law ⇔ 561(1)

The government is not required to negate every possible suggestion of innocence, and the evidence need only be such that reasonable persons could find guilt beyond a reasonable doubt.

(D.C. July 21, 1983) (memorandum opinion and judgment). See government's brief, note 24.

**4. Weapons** ⇌6, 7

In order to show a violation of statute providing that no person shall carry either openly or concealed on or about his person a pistol, without a license therefor, or any deadly or dangerous weapon capable of being so concealed, the government must prove beyond a reasonable doubt that the defendant carried either openly or in a concealed manner any deadly or dangerous weapon, that he had the intent to do the acts constituting carrying such a dangerous weapon, and that the defendant's purpose in carrying the instrument was its use as a dangerous weapon; the government is not required to show a defendant's specific intent to use the instrument unlawfully. D.C.Code 1981, § 22-3204.

**5. Weapons** ⇌7

In determining whether one's purpose in carrying an object was its use as a deadly or dangerous weapon, the fact finder must consider the circumstances surrounding its possession and use, and such circumstances include, inter alia, the design or construction of the instrument, the conduct of the defendant prior to his arrest, any physical alteration of the instrument, and the time and place the defendant was found in possession. D.C.Code 1981, § 22-3204.

**6. Weapons** ⇌17(3)

In prosecutions under the dangerous weapons statute, in the absence of any explanation from the defendant, the conceivable legitimate reasons for carrying an instrument alleged to be a dangerous weapon and the location of his arrest are a proper subject of inquiry. D.C.Code 1981, § 22-3204.

**7. Weapons** ⇌17(4)

In prosecution for carrying a deadly or dangerous weapon capable of being concealed on or about the person, evidence that defendant both intended to and did carry and twirl around his body a nunchaku in the midst of a crowd of onlookers and had no explanation as to any reasons he had for

carrying the nunchaku at time and in the area of his arrest was sufficient to support finding that defendant was carrying a deadly or dangerous weapon in violation of dangerous weapons statute. D.C.Code 1981, § 22-3204.

**8. Weapons** ⇌6

It is not simply possession of, but rather the use of an instrument and the circumstances surrounding its use which render it dangerous for purposes of dangerous weapons statute. D.C.Code 1981, § 22-3204.

Thomas C. Devlin, Washington, D.C., appointed by this court, for appellant.

Steven H. Leventhal, Asst. Corp. Counsel, Washington, D.C., with whom Judith W. Rogers, Corp. Counsel, and Charles L. Reichel, Deputy Corp. Counsel, Washington, D.C., were on brief, for appellee.

Before KERN and BELSON, Associate Judges, and GALLAGHER, Associate Judge, Retired.

BELSON, Associate Judge:

Appellant seeks a review of a judgment of conviction for carrying a deadly or dangerous weapon, nunchaku sticks, capable of being concealed on or about his person in violation of D.C.Code § 22-3204 (1981). Appellant contends that there was insufficient evidence to support his conviction. We affirm.

## I

On May 7, 1982, Metropolitan Police Officer Steven Gilmore and a fellow officer were on patrol in an unmarked police cruiser. As they approached the intersection of 14th and W Streets, N.W., they saw a crowd gathering in the middle of the block. They observed appellant in the midst of the crowd, swinging and twirling around his body what the officers recognized as nunchaku sticks (nunchaku).<sup>1</sup> The two officers

device consists of two pieces of wood, metal, plastic, or like substance, each approximately

1. Nunchaku sticks are of Oriental origin and are commonly used in the martial arts. The

lost sight of appellant briefly, but soon saw him walking north on 14th Street, holding the nunchaku in his right hand.

The two officers drove up to appellant, identified themselves and exited the cruiser with their guns drawn, a precaution normally taken when approaching someone with nunchaku. Appellant dropped the nunchaku on the ground. Officer Gilmore asked appellant whether he was taking karate lessons.<sup>2</sup> Appellant answered that he was not. Gilmore then asked appellant whether he knew that carrying the nunchaku was against the law. Appellant responded that he thought it was against the law only "if he had them inside someplace, not outside." Officer Gilmore then arrested appellant.

At trial, Officer Michael Vitug was qualified by the court as an expert in the martial arts and related weaponry. Vitug was highly trained and skilled in the martial arts, and had instructed on them. He testified that although the nunchaku was historically an agricultural tool, it is used now almost exclusively as a weapon in the martial arts. Vitug stated that the nunchaku is used by martial arts experts at sports events in individual demonstrations of dexterity and fitness, but is not used in combative sports because of its capacity to cause great injury or death.

Vitug testified that the nunchaku derives its dangerous and potentially lethal qualities from its design and construction. He noted that the nunchaku can be handled with silence and great speed and that when swung, it becomes a potent offensive weapon. Vitug physically demonstrated how the nunchaku easily can be concealed in an individual's clothing and how it can be used by an expert in demonstrating his proficiency in martial arts weaponry.

Officer Vitug identified the instrument appellant carried as a speedchaku, a variant of the nunchaku, and noted that it was

one to two feet in length, one end of each of which is connected to one end of the other by a chain, rope, leather or other flexible material.

available at many local stores. The speedchaku contains "swivels . . . [with] ballbearings" making it faster when swung. It is also heavier than the usual nunchaku. Vitug testified that the speedchaku is considerably more dangerous than the usual nunchaku. He stated that the only purpose for which a person would be carrying nunchaku on the street would be either for use as a weapon or for transporting it to and from martial arts classes.

Appellant's counsel called one defense witness, appellant's mother. She testified that she had seen appellant and other neighborhood boys using the nunchaku during the previous summer as part of informal physical exercises conducted and supervised by a man she identified as "Doc." She noted that "Doc" showed appellant and other boys how to construct and exercise with the nunchaku, but that this "training" was not focused on the martial arts and was only one of a number of physical exercises which Doc conducted with the boys. Appellant's mother was unable to explain the reasons for or circumstances surrounding appellant's possession and use of the nunchaku at the time of his arrest.

In finding appellant guilty of carrying a dangerous weapon, after a bench trial, the trial judge stated:

Based on the evidence presented the Court finds . . . that your purpose in carrying the nunchakus was its use as a deadly or dangerous weapon. Not to say that you had the specific intent at the time to use the instruments unlawfully against another person but that a description of what you were doing and how you were demonstrating to the people in the crowd, how you twirled them, indicates to me that you knew the purpose of the nunchakus. And, the testimony of the expert witness has been that its use as a weapon is its purpose, and that you knew

2. Gilmore testified that he asked appellant this question because he understood it was normal police practice to allow the carrying of nunchaku to and from karate lessons.

that as inferred from the manner in which you were demonstrating to others their use.

## II

Appellant contends that the evidence presented to the court was insufficient to support conviction for carrying a dangerous weapon in violation of D.C.Code § 22-3204 (1981). Appellant maintains that the government failed to adduce sufficient evidence either that appellant's purpose for carrying the nunchaku was its use as a dangerous weapon or that, under the circumstances, the nunchaku was in fact a dangerous weapon. Appellant asserts that the evidence simply showed that he was demonstrating his proficiency in exercising with the nunchaku, that such use of the nunchaku is identical to its permitted use in sport and the martial arts, and that his conduct did not demonstrate a purpose to use the nunchaku as a weapon against another person.

[1-3] We are not to set aside the trial court's judgment, except for errors of law, unless we find that it was plainly wrong or unsupported by the evidence. See D.C.Code § 17-305(a) (1981). In assessing appellant's insufficiency claim, we must review the evidence in the light most favorable to the government and give the government the benefit of all reasonable inferences. See *In re Q.L.J.*, 458 A.2d 30, 32 (D.C.1982) (per curiam); *Blackledge v. United States*, 447 A.2d 46, 49 (D.C.1982). The government is not required to negate every possible suggestion of innocence, and the evidence need only be such that reasonable persons could find guilt beyond a reasonable doubt. *In re Q.L.J.*, *supra*; *Blackledge*, *supra*. Based upon our review of the record, we are satisfied that there was sufficient evidence to support the court's judgment of conviction of appellant.

[4] Section 22-3204 of the D.C.Code provides in relevant part:

[N]o person shall within the District of Columbia carry either openly or concealed

on or about his person . . . a pistol, without a license therefore . . . , or any deadly or dangerous weapon capable of being so concealed . . . .

In order to show a violation of § 22-3204, the government must prove beyond a reasonable doubt that the defendant carried either openly or in a concealed manner any deadly or dangerous weapon, that he had the intent to do the acts constituting the carrying of such dangerous weapon, and that the defendant's purpose in carrying the instrument was its use as a dangerous weapon. See Criminal Jury Instructions for the District of Columbia, No. 4.81 (3d ed. 1978); see also *Nelson v. United States*, 280 A.2d 531, 533 (D.C.1971) (per curiam); *Scott v. United States*, 243 A.2d 54, 56 (D.C.1968). The government is not required to show a defendant's specific intent to use the instrument unlawfully. *Leftwitch v. United States*, 251 A.2d 646, 649 (D.C.1969); see also Criminal Jury Instructions, *supra*.

[5, 6] There was no real dispute as to any issue other than whether appellant's purpose in carrying the nunchaku was its use as a dangerous weapon. In determining whether one's purpose in carrying an object was its use as a deadly or dangerous weapon, the factfinder must consider the circumstances surrounding its possession and use. See Criminal Jury Instructions, *supra*; see also *Clarke v. United States*, 256 A.2d 782, 786 (D.C.1969); *Scott*, *supra*, 243 A.2d at 56. Such surrounding circumstances include, *inter alia*, the design or construction of the instrument, see *Scott*, *supra*, 243 A.2d at 56; the conduct of the defendant prior to his arrest, see *Gilmore v. United States*, 271 A.2d 783, 784 (D.C.1970) (per curiam); any physical alteration of the instrument, and the time and place the defendant was found in possession, see *Scott*, *supra*, 243 A.2d at 56. In the absence of any explanation from the defendant, the conceivable legitimate reasons for carrying the instrument in the location of his arrest are a proper subject of inquiry. See *Clarke*, *supra*, 256 A.2d at 786.

[7, 8] It was undisputed at trial that appellant both intended to and did carry and twirl around his body the nunchaku in the midst of a crowd of onlookers. Officer Vitug's expert testimony established that the particular type of nunchaku found in appellant's possession, the speedchaku, is heavier, more flexible, more difficult to control, and potentially more lethal even in expert hands than an ordinary nunchaku. Furthermore, appellant's mother's testimony established that while appellant had had sporadic informal training in the use of the nunchaku generally as part of a more extensive exercise routine, he had not engaged in any such training for several months before being arrested. Finally, without suggesting that appellant bore any burden of proof in this regard, we note that his failure to testify left the court without his explanation as to any reasons he had for carrying the nunchaku at the time and in the area of his arrest. See *Clarke, supra*. While it is conceivable that one standing on a public sidewalk would engage in a demonstration of how the nunchaku is used in body building or in the martial arts, there is no record indication that such was appellant's purpose. Moreover, as illustrated by Officer Vitug's answers on cross-examination by appellant's counsel, such streetside demonstrations can well serve the impermissible purpose of intimidating others

3. The following exchange took place during appellant's counsel's cross-examination of Officer Vitug:

A. . . . A lot of people don't know the formal name of the weapon but they know what it can do. You can almost be the bully of the block if you have a pair of nunchakus and you're trying to use it on the street and you're trying to impress somebody. There's a reason.

Q. Or, Officer, you could be the show-off of the block, isn't that correct?

A. But there's a reason for being a show-off. You want to say to people, "Hey, I have nunchakus. I use them. I know how to use them. Don't mess with me or I'll knock your block off."

4. We find inapposite the cases from other jurisdictions cited by appellant which have held that nunchaku were not per se dangerous weapons within the general sweep of particular statutes which specify weapons the mere pos-

session of which is a felony or misdemeanor and include by general reference other similar weapons. See *State v. Muliufi*, 64 Hawaii 485, 643 P.2d 546 (1982) (per curiam); *Commonwealth v. Adams*, 245 Pa.Super. 431, 369 A.2d 479 (1976); cf. *State v. Tucker*, 28 Or.App. 29, 558 P.2d 1244 (1977). As we have discussed, it is not simply possession of, but rather the use of an instrument and the circumstances surrounding its use which render it dangerous for purposes of § 22-3204. See *Clarke, supra*; *Scott, supra*; see also Criminal Jury Instructions, No. 4.81, *supra*.

5. In Maryland, for example, legislation has placed it in the same category as switchblade knives and metal knuckles, and no purpose to use it as a weapon need be shown in order to establish a violation. 3A Md. Ann. Code art. 27, § 36 (1982). Although under D.C. Code § 22-3214(b) certain weapons are similarly classified, the nunchaku is not so classified.

Since we are making a ruling concerning a weapon which apparently has not previously been the subject of any published opinions in this jurisdiction, it is worth making a few further observations about the nunchaku. Like the courts of other jurisdictions, we are cognizant of the cultural and historical background of this Oriental agricultural implement-turned-weapon. We recognize that the nunchaku has socially acceptable uses within the context of martial arts and for the purpose of developing physical dexterity and coordination. Nevertheless, because of the inherent character of the nunchaku as an offensive weapon and its ready commercial availability, as established by the record in this case, we must be cognizant also of its potential for illicit use. In some jurisdictions legislation has been adopted which deals explicitly with the nunchaku.<sup>5</sup> It is for the legisla-

session of which is a felony or misdemeanor and include by general reference other similar weapons. See *State v. Muliufi*, 64 Hawaii 485, 643 P.2d 546 (1982) (per curiam); *Commonwealth v. Adams*, 245 Pa.Super. 431, 369 A.2d 479 (1976); cf. *State v. Tucker*, 28 Or.App. 29, 558 P.2d 1244 (1977). As we have discussed, it is not simply possession of, but rather the use of an instrument and the circumstances surrounding its use which render it dangerous for purposes of § 22-3204. See *Clarke, supra*; *Scott, supra*; see also Criminal Jury Instructions, No. 4.81, *supra*.

ture to determine whether the existing statutory framework makes appropriate provision for the possession or use of nun-chaku.

*Affirmed.*



**Erwin ALPERN, Appellant,**

v.

**Bernard FRISHMAN, Appellee.**

**No. 82-304.**

District of Columbia Court of Appeals.

Argued Jan. 12, 1983.

Decided Aug. 15, 1983.

Judgment creditor appealed from decision of the District of Columbia Superior Court, Nicholas S. Nunzio, Motions Judge, denying discovery of judgment debtor's wife's personal finances upon condition that wife execute affidavit denying that judgment debtor had transferred any assets to her. The Court of Appeals held that trial court did not abuse its discretion in manner in which it limited discovery of wife.

*Affirmed.*

**1. Execution ⇐ 397**

Generally, judgment creditors may inquire into third party's knowledge of judgment debtor's finances, but may not delve into third party's personal finances. Civil Rule 69-I(a).

**2. Execution ⇐ 397**

Where spouses are involved, even a slight showing that there had been a transfer of property from judgment debtor spouse to the other spouse could suffice to establish that discovery of the other

spouse's assets should be allowed. Civil Rule 69-I(a).

**3. Execution ⇐ 397**

Trial court did not abuse its discretion in denying discovery of judgment debtor's wife's personal finances on condition that wife execute affidavit denying that judgment debtor had transferred any assets to her. Civil Rule 69-I(a).

Lawrence S. Lapidus, Washington, D.C., for appellant.

James K. Foley, Silver Spring, Md., for appellee.

Before KERN, NEBEKER and BELSON, Associate Judges.

**PER CURIAM:**

In the case before us the trial court was faced with the difficult task of striking a balance between the interest of a judgment creditor in obtaining discovery concerning the assets of the judgment debtor and the interest of a third party deponent in being free from harassment and unnecessary intrusion into her personal business. The matter was complicated by the fact that the third party deponent was the wife of the judgment debtor. We hold that the trial court did not abuse its discretion in the manner in which it limited the taking of discovery of the third party.

In 1973 appellant, an attorney, sued appellee to recover approximately \$14,000 in unpaid legal fees. A default judgment was entered for the full amount. To date the judgment has remained unsatisfied.

This appeal stems from appellant's efforts to learn, by taking the deposition of appellee's wife, whether appellee had fraudulently conveyed assets to his wife in order to avoid attachment. As required by Super.Ct.Civ.R. 69-I(a), appellant obtained a court order authorizing such discovery. Mrs. Frishman appeared at the deposition and complied with the literal terms of the court order: she produced joint tax returns and answered questions concerning the cou-