DISTRICT OF COLUMBIA COURT OF APPEALS

24-CT-276

MICHAEL D. FLOWERS,

Appellant

v.

DISTRICT OF COLUMBIA,

Appellee

Appeal from the Superior Court of the
District of Columbia – Criminal Division
2022 CDC 3737

BRIEF FOR APPELLANT

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D.C. App. R. 28(a)(2)(A) Statement

Appellant Michael D. Flowers and appellee the District of Columbia were the parties in the trial court. Adrian E. Madsen, Esq., represented Mr. Flowers in the Superior Court. Assistant Attorneys General Morgan Gray, Esq., and Christina Fox, Esq., represented the District of Columbia in the Superior Court. Adrian E. Madsen, Esq. represents Mr. Flowers before this court. Solicitor General Caroline Van Zile, Esq., represents the District of Columbia before this court. There are no interveners or amici curiae. No other provisions of D.C. App. R. 28(a)(2)(A) apply.

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ISSUES PRESENTED

1. Whether the trial court abused its discretion by granting over objection a government motion for continuance which failed to make four parts of the "fivefold showing"[1] required under this court's jurisprudence.
2. Whether the trial court erred by interpreting D.C. Code § 22-1312 to proscribe exposure of the genitalia while on private property.
3. Whether the trial court erred by rejecting Mr. Flowers' necessity defense where the complainant took Mr. Flowers' cell phone from his immediate or actual possession, where Mr. Flowers, wearing only a sweatshirt, then followed the complainant onto public property in an effort to retrieve his phone, and where the statutory penalty for robbery far exceeds that for lewd, indecent, or obscene acts.

STATEMENT OF THE CASE

Mr. Flowers was charged by information with one count of lewd, indecent, and obscene acts in violation of D.C. Code § 22-1312 based on events alleged to have occurred on July 2, 2022. R. 1, 82 (PDF).[2] After the Honorable Judith Pipe

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[1] *Bedney v. United States*, 684 A.2d 759, 766 (D.C. 1996).

[2] "R. [page number] (PDF)" refers to the record on appeal by page number of the pdf file, with citations to the page number of the original document as appropriate. "S.R." refers to the sealed, supplemental record on appeal. "Tr." refers to transcript by date of proceeding.

vacated Mr. Flowers' conviction, finding that Mr. Flowers' prior counsel had rendered constitutionally ineffective assistance of counsel,[3] Mr. Flowers rejected the District's plea offer, and the case was set for trial on January 24, 2024. 11/8/23 Tr.

About three weeks later, over Mr. Flowers' objection,[4] the trial court granted the District's motion for a continuance[5] without making any findings regarding the required "fivefold showing,"[6] and trial was reset for March 18, 2024. 1/24/24 Tr.

At trial, the government presented two witnesses, Laura Okpala, a resident of the same building in which Mr. Flowers resided as of the date of the alleged offense,[7] and Metropolitan Police Department Officer Nathan Clarke. 3/18/24 Tr. 110-23. The defense did not present any witnesses. The trial court rejected Mr. Flowers' argument that D.C. Code § 22-1312 applies only on public property[8] and rejected his necessity defense, predicated on the need to retrieve his phone, with which Ms. Okpala had left the building in which the two resided after dislodging it from Mr. Flowers during a physical struggle. 3/20/24 Tr. 32-34. Finding Mr. Flowers guilty of the sole charged offense, the court sentenced him to 80 days' incarceration,

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[3] Because Mr. Flowers had appealed from his conviction (in 23-CT-176), the trial court first issued an indicative order (R. 541 (PDF)), before issuing an order vacating Mr. Flowers' conviction after this court granted Mr. Flowers' consent motion to remand in 23-CT-176. R. 542 (PDF).
[4] R. 549-59 (PDF).
[5] R. 544-48 (PDF).
[6] R. 560.
[7] 3/18/24 Tr. 9-109.
[8] 3/20/24 Tr. 31.

execution of sentence suspended as to all, in favor of 30 days of unsupervised probation. R. 571-72 (PDF). This timely appeal followed. R. 573-77 (PDF).

STATEMENT OF FACTS

On July 2, 2022, Mr. Flowers was charged by information of lewd, indecent, or obscene acts in violation of D.C. Code § 22-1312 based on events alleged to have occurred the same day. R. 1, 82 (PDF). After Mr. Flowers' conviction in this case was vacated pursuant to D.C. Code § 23-110,[9] Mr. Flowers rejected a plea offer, and the case was set for trial. 11/8/23 Tr.

The District's Motion for a Continuance

On December 1, 2023, without citation to court rule, statute, or other authority, moved for a continuance, asserting that witness Laura Okpala "was no longer available for trial on January 24, 2024" because she was "scheduled to present at a work conference in Las Vegas." R. 545 (PDF) (Mtn. p. 2). The District proffered that the conference was "scheduled from January 22, 2024 through January 25, 2024," that "Ms. Okpala's presentation [wa]s tentatively scheduled for January 23, 2024," but "the exact timing ha[d] not been determined." *Id.* Regarding any content of Ms. Okpala's expected testimony, the District proffered only that "Ms. Okpala is an essential witness… and is expected to testify at length about her observations of [Mr. Flowers] on the incident date." *Id.* The District did not state whether Ms.

[9] R. 542 (PDF).

Okpala was under subpoena, whether any efforts had been made to place Ms. Okpala under subpoena, whether Ms. Okpala was expected to present alone or with others at the "work conference," whether anyone else from her employer was available to present in her stead at the work conference, the necessity or importance of giving such a presentation to Ms. Okpala's employment, what specifically the District expected Ms. Okpala's testimony would be, or how often Ms. Okpala has similar work commitments. R. 544-48 (PDF).

The next day, Mr. Flowers opposed the motion. R. 549-59 (PDF). As an initial matter, Mr. Flowers argued, the District had not shown any actual conflict between the witness's presentation, "tentatively scheduled" for January 23, 2024, and the trial, scheduled for January 24, 2024. R. 550-51 (PDF) (Mtn. 2-3). Mr. Flowers also argued that the District had failed to make four of the five required showings under *Bedney* and its progeny, arguing, in short, that: 1) the single, conclusory statement that Ms. Okpala was "an essential witness… and… expected to testify at length about her observations of [Mr. Flowers] on the incident date"[10] was insufficient under *Moctar*[11] and *Daley*[12] to show "what the witness['s] testimony would be,"[13] 2) that the District necessarily failed to establish the relevance and competence of

[10] R. 545 (PDF) (Mtn. p. 2).
[11] *Moctar v. United States*, 718 A.2d 1063 (D.C. 1988).
[12] *Daley v. United States*, 739 A.2d 814 (D.C. 1999).
[13] *Bedney*, 684 A.2d at 766 (quoting *Kimes v. United States*, 569 A.2d 104, 114 (D.C. 1989)).

Ms. Okpala's expected testimony where it failed to proffer what her testimony would be,[14] 3) that the District failed to establish that Ms. Okpala's testimony could probably be obtained if the request for a continuance was granted where it failed to proffer whether Ms. Okpala was under subpoena, whether it sought to place Ms. her under subpoena, whether Ms. Okpala might have similar commitments in the future, and, if so, how often she might have such commitments,[15] 4) that the District failed to show that it exercised due diligence in attempting to secure Ms. Okpala's presence where it failed to proffer whether Ms. Okpala was under subpoena or whether any efforts had been made to place her under subpoena,[16] and 5) that "the public's interest in the prompt, effective, and efficient administration of justice"[17] likewise weighed against granting the requested continuance where the then-scheduled trial date was approximately eighteen months after the alleged offense, where Mr. Flowers had consistently sought to have the case tried expeditiously, and where it was unclear how far into the future another trial date convenient for all parties would exist. R. 556-58 (PDF) (Mtn. p. 8-10).

Days later, without any findings regarding the required "fivefold showing," the trial court granted the District's motion in a one-page order. R. 560 (PDF).

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[14] R. 553-54 (PDF) (Mtn. p. 5-6).
[15] R. 554-55 (PDF) (Mtn. p. 6-7).
[16] R. 555 (PDF) (Mtn. p. 7).
[17] *Smith v. United States*, 180 A.3d 45, 64 (D.C. 2018) (quoting *Brooks v. United States*, 130 A.3d 952, 960 (D.C. 2016)).

Laura Okpala

On March 18, 2024, the parties appeared for a non-jury trial before the Honorable Robert Morin. The District first called Laura Okpala. 3/18/24 Tr. 9. On direct examination, Ms. Okpala testified that in the early morning hours of July 2, 2022, after she exited a rideshare outside of the building in which she then lived, located at 1825 T Street NW, she "saw a man," whom Ms. Okpala later identified as Mr. Flowers, "naked from the bottom half," "exposed," and "in the bushes." 3/18/24 Tr. 9-10. Characterizing the man's actions as "following" her "as [she] was walking out" of the rideshare and "into the building," Ms. Okpala testified that the man had on a "sweatshirt" that "wasn't sufficiently long… to cover his genitals and buttocks." 3/18/24 Tr. 11. Ms. Okpala used her key fob to enter the building, after which time she observed the man "attempting to break in" through a "glass" entry door. 3/18/24 Tr. 11-12. According to Ms. Okpala, the man was "yelling at [her] and screaming," "looked very much in distress," and seemed "very…disorganized" and "discombobulated." 3/18/24 Tr. 12. After Ms. Okpala closed the entry door behind her, Mr. Flowers used "some sort of metal grate or something" to "pry the door open," during which time Mr. Flowers "was [not] making any attempt to cover his genitalia" or "anus." 3/18/24 Tr. 12-13.

Ms. Okpala testified that the building had CCTV cameras and that, as the condo board president, she would be aware "if there were any issues with th[e]

CCTV." 3/18/24 Tr. 15. After some discussion, the court sustained Mr. Flowers' objection to a portion of video footage, identified as government exhibit 1, containing events which the witness, who was not the custodian of records for the building, did not personally observe. 3/18/24 Tr. 17-19. Without objection, the government then introduced (as government exhibit 1) video footage depicting events Ms. Okpala did observe from the time she exited the rideshare to Mr. Flowers entering 1825 T Street NW. 3/18/24 Tr. 19-21.

After Mr. Flowers entered the building, according to Ms. Okpala, he "went into the lobby, took the steps there up to the elevator, and then started to, you know, charge at [her] at the top of the stairs," during which time Mr. Flowers did not "make any attempt to cover his genitalia" or "anus." 3/18/24 Tr. 22. After Mr. Flowers "charged at" Ms. Okpala, he "r[an] away," at which time Ms. Okpala "attempt[ed] to call the police," and "pick[ed] up a phone [she] believe[d] [Mr. Flowers] had dropped and went outside to call police." 3/18/24 Tr. 22. Ms. Okpala testified that Mr. Flowers "chased" her out of the building and that, when police arrived, she told them that she had Mr. Flowers' phone. 3/18/24 Tr. 22. Ms. Okpala then reiterated this testimony while portions of government exhibit 1 were published to the court. 3/18/24 Tr. 23-24. After the government again sought to move into evidence earlier portions of government exhibit 1, depicting events Ms. Okpala did not personally observed, the court reserved ruling. 3/18/24 Tr. 25-27.

On cross-examination, Ms. Okpala agreed that 1825 T Street NW is a privately owned condominium building, that she told police on July 2, 2022, that Mr. Flowers did not reside at 1825 T Street NW, and that this was incorrect; i.e., that Mr. Flowers did reside at 1825 T Street NW as of July 2, 2022. 3/18/24 Tr. 29-31. Ms. Okpala was impeached with her prior testimony and statements to police that Mr. Flowers was "covered in blood" when she first saw him on July 2, 2022. 3/18/24 Tr. 32-35. When pressed about where on Mr. Flowers' body Ms. Okpala claimed the blood was, Ms. Okpala indicated that it was "all over his bottom half." 3/18/24 Tr. 35. When Mr. Flowers' moved into evidence a still image from video footage depicting Mr. Flowers shortly after Ms. Okpala's arrival at 1825 T Street NW on July 2, 2022,[18] Ms. Okpala "c[ould] not identify" any such blood "in this photo." 3/18/24 Tr. 36-38. Ms. Okpala was similarly unable to identify blood in two additional still images admitted as defense exhibits 2 and 3. 3/18/24 Tr. 38-40.

Ms. Okpala did not immediately see Mr. Flowers after getting out of the rideshare, which she attributed to it being dark and Mr. Flowers being near some bushes. 3/18/24 Tr. 41-42. After being impeached with body-worn camera footage from the night of the incident, Ms. Okpala agreed that she told police that Mr. Flowers "jumped out of the bushes," before testifying that what she meant by saying that Mr. Flowers "jumped out of the bushes" was that she "was fearful." 3/18/24 Tr.

[18] The image was admitted as defense exhibit 1.

42-47. Ms. Okpala agreed that government exhibit 1 did not depict Mr. Flowers jumping between the time she exited the rideshare and entered 1825 T Street. 3/18/24 Tr. 50-52.[19] After some evasion, Ms. Okpala agreed that Mr. Flowers asked her to let him in the building before she entered, that she refused to do so, and that Mr. Flowers lived in the building as of July 2, 2022. 3/18/24 Tr. 53-56.

After a lunch recess, Mr. Flowers introduced as defense exhibit 5 still another still image depicting Mr. Flowers in the lobby of 1825 T Street NW in which Ms. Okpala could not identify any blood on him. 3/18/24 Tr. 59-60. Mr. Flowers admitted as defense exhibits six and seven two additional still images showing the lobby, stairs, landing, and elevator of 1825 T Street NW. 3/18/24 Tr. 61-64. After a substantial amount of questioning and being confronted with video footage from the interior of 1825 T Street NW, Ms. Okpala agreed that she did "push" Mr. Flowers when he went up the stairs depicted in defense exhibit eight, at a time when Ms. Okpala was between Mr. Flowers and his apartment, and that she had previously testified under oath that she had "absolutely not" done so.

> Q: And but again here today, right, you admit that you did push him down the stairs?
> A: I -- yes, I agree that there was probably some force. As I stated, I don't recall ever doing that, but I do anticipate that any reasonable person would push him off of me if an unclothed person was running at you.

[19] Ms. Okpala agreed that government exhibit 1 depicted events occurring more quickly than the events occurred in real time. 3/18/24 Tr. 49.

3/18/24 Tr. 64-71.

Ms. Okpala denied that, after Mr. Flowers made his way past her at the top of the stairs, she tried to grab him, including when confronted with video footage of their interaction, admitted as defense exhibit 10. 3/18/24 Tr. 74-77. After Mr. Flowers moved past her at the top of the stairs, Ms. Okpala picked up what she believed to be Mr. Flowers' phone, before leaving the building. 3/18/24 Tr. 78-81.

On redirect examination, Ms. Okpala testified that a portion of video admitted as government exhibit two did not show Mr. Flowers attempting to cover his buttocks. 3/18/24 Tr. 103-05. Ms. Okpala also testified that Mr. Flowers did not put on any pants or underwear before "chas[ing]" her "outside." 3/18/24 Tr. 105. The government also admitted as government exhibit 4 a photo of "Mr. Flowers running down the hall" which Ms. Okpala testified depicted the "reddish brown liquid that" she claimed to have seen "all over his legs." 3/18/24 Tr. 105-07. Ms. Okpala also testified that Mr. Flowers' "genitalia" and "buttocks" were "exposed" when he "exited the building the second time" and that Mr. Flowers did not "make any attempt to cover" either. 3/18/24 Tr. 106-07.[20]

Officer Nathan Clarke

The government next called MPD Officer Nathan Clarke. Officer Clarke

[20] The trial court resolved an earlier Jencks issue, *see* Super. Ct. Crim. R. 26.2, concluding that the assigned prosecutors had not taken any notes related to this case during a witness conference. 3/18/24 Tr. 107-09.

testified that at around 12:45 am on July 2, 2022, he was on patrol in the 1800 block of S Street NW when he received a call for "a sexual assault in front of 1825 T Street NW." 3/18/24 Tr. 110-12. When on T Street NW, Officer Clarke saw standing in the street "a male in a pink hoodie with blood on him with a fully exposed penis beside a lady in a vehicle." 3/18/24 Tr. 112. Officer Clarke testified that he could see the man's penis, and that the man's hoodie was not long enough to cover his penis. 3/18/24 Tr. 113.

Through Officer Clarke, the government introduced body-worn camera video of Officer Clarke "running into 1825 T Street NW." 3/18/24 Tr. 113-15. Officer Clarke testified that the "street that [he] first arrived on before [he] went into this building[] is… a public street," but that he did not "see any other cars or pedestrians besides the lady and the man that [he] described that night." 3/18/24 Tr. 116. Without objection, Officer Clarke identified Mr. Flowers in court as the man in the hoodie. 3/18/24 Tr. 115-16. Narrating video footage, Officer Clarke testified that he went down a hallway in 1825 T Street before arresting Mr. Flowers. 3/18/24 Tr. 116-18.

On cross-examination, Officer Clarke testified that Mr. Flowers was about 90 feet away when Officer Clarke first saw him. 3/18/24 Tr. 119. When Officer Clarke denied that Mr. Flowers was out of sight by the time Officer Clarke got out of his police car, he was impeached with a still image from his body-worn camera footage, admitted as defense exhibit 18, showing that Mr. Flowers was not visible when

Officer Clarke got out of the car. 3/18/24 Tr. 119-21. Officer Clarke agreed that Mr. Flowers was not touching Ms. Okpala when Officer Clarke turned onto T Street, and that he never saw Mr. Flowers touch Ms. Okpala. 3/18/24 Tr. 121. Ms. Okpala told Officer Clarke that Mr. Flowers did not live in the building, did not tell Officer Clarke that "any of her hair had been pulled out." 3/18/24 Tr. 122.

Motion for Judgment of Acquittal

Before moving for a judgment of acquittal ("MJOA"), Mr. Flowers argued that, based on 2011 amendments, D.C. Code § 22-1312 proscribed "indecent" behavior only on public property, and, in order to violate the statute, "has to both at the same time, concurrently, willfully expose themselves and willingly be on public property." 3/18/24 Tr. 124-29. The court then denied the MJOA. 3/18/24 Tr. 129.

Defense Memorandum

Prior to closing arguments, Mr. Flowers submitted a memorandum regarding the elements of the offense, in which he expanded upon his position at MJOA, arguing that evidence sufficient to support a conviction under D.C. Code § 22-1312 by "mak[ing] an obscene or indecent exposure of his or her genitalia or anus" requires proof that "1) the accused exposed his or her genitalia or anus, 2) the exposure occurred while the accused was on public property, 3) the accused was willfully present on public property, 4) that the accused willfully exposed his or her genitalia or anus, and, 5) that the accused intended to draw attention to his or her

exposed condition." R. 563-68 (PDF).

Closing Arguments

After the trial court ruled that an earlier portion of government exhibit 1, on which it had reserved ruling, was admissible,[21] the government gave its closing argument. 3/20/24 Tr. 7-12. The government argued that D.C. Code § 22-1312 reaches private property and applies "in public view before the people at large," and that Mr. Flowers was guilty based both on when he was "outside on a public street" and when "in the lobby." 3/20/24 Tr. 8-10. The government also argued that "the criminal intent for this offense is general" and that it had proven such intent by (the government argued) Mr. Flowers: 1) "trying to yank open the door, using the metal grates [to] open the door, yelling at the victim, and 2) being "in the lobby of a condominium building" and "also on the public street." 3/20/24 Tr. 10-11.

Mr. Flowers reiterated his argument that "in public" within the meaning of D.C. Code § 22-1312 means on public property, and divided the evidence into three time periods: 1) the time before Ms. Okpala arrived, 2) the time between Ms. Okpala arriving and entering 1825 T Street NW, and 3) the time between Mr. Flowers leaving 1825 T Street NW in an effort to retrieve his phone from Ms. Okpala and returning to the building. 3/20/24 Tr. 14-16. Regarding the first period, Mr. Flowers argued that he was making consistent efforts to cover and conceal himself, both with

[21] 3/20/24 Tr. 7.

his sweatshirt and bushes, and reenter 1825 T Street NW. 3/20/24 Tr. 14-15. Regarding the second period, Mr. Flowers argued that he was not guilty both because he was on private property and not willfully exposing himself. 3/20/24 Tr. 15-17. Regarding the third period, Mr. Flowers argued that necessity—retrieving his phone from a robbery after unsuccessful, repeated requests for Ms. Okpala to return his phone—excused any exposure of his genitalia during that time. 3/20/24 Tr. 17-18.

In rebuttal, the government argued that *Bolz v. District of Columbia*[22] stands for the proposition that D.C. Code § 22-1312 applies on private property so long as a person is "in public view," and that Mr. Flowers could have "take[n] his sweatshirt off, [and] wrap[ped] it around his genitals to cease the exposure." 3/20/24 Tr. 20-22. The court then viewed the earlier portions of government exhibit 1 which it had admitted after previously reserving ruling on the admissibility of those portions. 3/20/24 Tr. 22-28.

Findings and Verdict

The trial court found that, "for some reason, unexplained," Mr. Flowers "f[ound] himself outside of the condominium," and that "the portion of the video to which [Mr. Flowers] objected, which is the beginning, I think actually helps [him]." 3/20/24 Tr. 29. "For the first portion of" government exhibit 1, the court found that Mr. Flowers "ma[de] consistent efforts to hide himself or cover himself." 3/20/24

[22] 149 A.3d 1130 (D.C. 2016).

Tr. 29. The court found that when "Ms. Okpala appear[ed] walking to the condominium, and [Mr. Flowers] start[ed] following her to the entrance of the condominium…[,] a reasonable interpretation is he [was] trying to get back into the building." 3/20/24 Tr. 29. However, the court "credit[ed] that Ms. Okpala didn't recognize the defendant, didn't know what he was trying to do." 3/20/24 Tr. 29.

"[F]rom that point forward," "that is when [Mr. Flowers] attempt[ed] to follow Ms. Okpala into the building," the court found that "there [was] no attempt to cover himself… no substantial… [he] doesn't appear to stop any attempt or become intent on gaining access to the building as opposed to covering himself." 3/20/24 Tr. 29-30. "[F]rom that point forward," the court found, Mr. Flowers' genitalia [wa]s exposed on a consistent basis." 3/20/24 Tr. 30.

The court found that Ms. Okpala's actions at the top of the stairs in the lobby of 1825 T Street NW, which it characterized as "fight[ing back or tr[ying] to prevent [Mr. Flowers] from coming in," were not "unreasonable" because, the court found, Ms. Okpala thought Mr. Flowers was "not a resident of the building trying to get in and d[id] not know his intent." 3/20/24 Tr. 30. The court found that there was a "scuffle" on or at the top of the stairs in 1825 T Street NW, and "as a result [Ms. Okpala] gain[ed] access to [Mr. Flowers] phone." 3/20/24 Tr. 30.

The court rejected Mr. Flowers' argument that the "indecent acts" portion of D.C. Code § 22-1312 only applies on public property, relying principally on *Bolz*.

3/20/24 Tr. 31. The court also found that Mr. Flowers "had the requisite intent; [he]] knew he was naked, [and] knew actions by him he would be exposing himself to other people -- exposing his genitalia to other people," and so "f[ound] [Mr. Flowers] guilty." 3/20/24 Tr. 31-32. When Mr. Flowers requested additional findings regarding the court's ruling on Mr. Flowers' necessity defense, the court clarified its ruling, and seemed to indicate that the conduct on which it based its guilty verdict was the time Mr. Flowers "was in the walkway of the condominium that was open to the public… trying to break into the building,"; i.e., at the time when Mr. Flowers attempted to enter 1825 T Street NW behind Ms. Okpala. 3/24/20 Tr. 32-33. This point was reinforced by the court's statement that "if it were the portion of the video to which [Mr. Flowers] objected," i.e., before Ms. Okpala arrived, it "would not find the defendant guilty because I think you correctly observed that he was trying to cover himself." 3/20/24 Tr. 34.

Sentencing

Consistent with *Blackledge v. Perry*,[23] the trial court sentenced Mr. Flowers to 80 days' incarceration, suspended as to all, in favor of 30 days of unsupervised probation. 3/20/24 Tr. 36-45. This timely appeal followed. R. 573-77 (PDF).

[23] 417 U.S. 21 (1974).

SUMMARY OF THE ARGUMENT

"A party seeking a continuance of a trial to locate a missing witness 'must make a showing that such continuance is 'reasonably necessary for a just determination of the cause.'" *Bedney*, 684 A.2d at 766 (quoting *O'Connor v. United States*, 399 A.2d 21, 28 (D.C. 1979)). More specifically, "the movant must make a fivefold showing"—"[h]e or she must establish (1) who the missing witness is, (2) what the witness'[s] testimony would be, (3) the relevance and competence of that testimony, (4) that the witness could probably be obtained if the continuance were granted, and (5) that the party seeking the continuance has exercised due diligence in trying to locate the witness." Id. (citing *Kimes*, 569 A.2d at 114). A trial court abuses its discretion by "fail[ing] to consider a relevant factor." *In re K.C.*, 200 A.3d 1216, 1233 (D.C. 2019) (quoting *In re Ko.W.*, 774 A.2d 296, 303 (D.C. 2001)).

Where the District, when moving to continue trial, failed to proffer what Ms. Okpala's testimony would be, whether Ms. Okpala was under subpoena, whether it had many any efforts to place Ms. Okpala under subpoena, and whether and how often Ms. Okpala might have similar work "obligations" in the future, the trial court abused its discretion by granting the District's December 1, 2023 motion for a continuance, without making findings regarding any of the five required showings.

The trial court additionally erred by failing to make findings of fact and conclusions of law necessary to permit meaningful appellate review.

The trial court also erred by interpreting D.C. Code § 22-1312's "indecent" provision to apply on public property, where this court has interpreted "indecent" to mean exposure of genitalia "at such a time and place, where as a reasonable man he kn[ew] or should [have] know[n] his act w[ould] be open to the observation of others,"[24] and where the D.C. Council, aware of this interpretation,[25] amended D.C. Code § 22-1312 in 2011 to add the phrase "in public": "It is unlawful for a person, *in public*, to make an obscene or indecent exposure of his or her genitalia or anus…" D.C. Code 22-1312 (emphasis added).[26] This court reviews this issue of law de novo. This case presents a question of statutory interpretation, which we review de novo. *Lucas v. United States*, 305 A.3d 774, 776 (D.C. 2023) (citing *Reese v. Newman*, 131 A.3d 880, 884 (D.C. 2016)). Where "indecent" already meant "at such a time and place, where as a reasonable man he kn[ew] or should [have] know[n] his act

[24] *Parnigoni v. District of Columbia*, 933 A.2d 823, 826 (D.C. 2007) (quoting *Peyton v. District of Columbia*, 100 A.2d 36, 37 (D.C. 1953)).

[25] *See* D.C. Council, Report on Bill 18–425 at 7 (Nov. 19, 2010) ("The drafting of section 2(b) is intended to be simple, so that it is easily understood and uncomplicated to enforce. It is important to understand that this provision does not criminalize any kind of sexual act, rather, it retains the crime of having sex *in public*—meaning in open view; before the people at large; not in privacy or secrecy. The revision strikes outdated phrases. It replaces "any obscene or indecent exposure of his or her person" with "any obscene or indecent exposure of his or her genitalia or anus"; this is consistent with court interpretation.") (emphasis in original).

[26] D.C. Code § 22-1312 statute also proscribes "mak[ing] an obscene or indecent sexual proposal to a minor," "engag[ing] in masturbation," and "engag[ing] in a sexual act as defined in § 22-3001(8)." There was no allegation, evidence, or finding that Mr. Flowers violated D.C. Code § 22-1312 in any of these ways.

w[ould] be open to the observation of others,"[27] and the legislature amended D.C. Code § 22-1312 to add the phrase "in public," interpreting § 22-1312 as the trial court did would run afoul of the basic canon of statutory construction "that each provision of the statute should be construed so as to give effect to all of the statute's provisions, not rendering any provision superfluous." *Thomas v. Dep't. of Employment Services*, 547 A.2d 1034, 1037 (D.C. 1988) (citing *Tuten v. United States*, 440 A.2d 1008, 1010 (D.C. 1982)). Said another way, interpreting D.C. Code § 22-1312 as did the trial court would lead the statute, in effect, to read: "It is unlawful for a person [at such a time and place, where as a reasonable man he kn[ew] or should [have] know[n] his act w[ould] be open to the observation of others] to make an… exposure of his or her genitalia or anus[at such a time and place, where as a reasonable man he kn[ew] or should [have] know[n] his act w[ould] be open to the observation of others]."

Bolz, which addressed an overbreadth challenge to D.C. Code § 22-1312,[28] is not to the contrary, and in any event not does not bind this court. *Poth v. United*

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[27] This court has questioned whether such "should have known" language, importing a negligence standard into criminal liability, survived its analysis in *Carrell v. United States*, 165 A.3d 314 (D.C. 2017) (en banc). *See, e.g.*, *Wicks v. United States*, 226 A.3d 743, 749-50 (D.C. 2020); *Larson-Olson v. United States*, 309 A.3d 1267, 1274 n.6 (D.C. 2024). As in both *Wicks* and *Larson-Olson*, this court need not reach that issue to decide this appeal.

[28] 149 A.3d at 1142 ("The only remaining issue to address is Mr. Givens's overbreadth challenge to the indecent exposure statute…").

States, 150 A.3d 784, 788 n.7 (D.C. 2016) ("The rule of stare decisis is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question.") (quoting *Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994)).

Where the trial court found Mr. Flowers guilty based on conduct occurring on private property,[29] an area the statute, properly construed, does not reach, his conviction must be vacated.

Finally, to the extent the trial court's findings can be construed to suggest that Mr. Flowers' committed the offense during the brief period when he left 1825 T Street NW to retrieve his phone from Ms. Okpala, who had intentionally taken the phone, knowing it belonged to Mr. Flowers, after dislodging it from him, the trial court erred in rejecting his necessity defense. "In essence, the necessity defense exonerates persons who commit a crime under the "pressure of circumstances," if

[29] 3/20/24 Tr. 33-34 ("THE COURT: Right. But it seems to me the actions that occurred before then when he was in the walkway of the condominium that was open to the public, he was no longer covering himself but trying to break into the building. And again, Ms. Okpala didn't know who he was or didn't recognize him and was trying to prevent him from coming into the building. MR. MADSEN: And so just on that, so Your Honor is finding that at minimum at least it sounds like—THE COURT: Yes. MR. MADSEN: -- at that time was the offense? THE COURT: Yes. MR. MADSEN: Okay. THE COURT: And that was the beginning of the offense. It's a continuous event. But I would say -- let me put it this way, if it were the portion of the video to which you objected, I would not find the defendant guilty because I think you correctly observed that he was trying to cover himself. He found himself outside the building and was trying to cover himself.").

the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law." *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) (citing *State v. Marley*, 509 P.2d 1095, 1109 (Haw. 1973)).[30] "The defense is not available where: (1) there is a legal alternative available to the defendants that does not involve violation of the law; (2) the harm to be prevented is neither imminent, nor would be directly affected by the defendants' actions; and (3) the defendants' actions were not reasonably designed to actually prevent the threatened greater harm. *Id.* (internal citations omitted). Said another way, "[a]s the Supreme Court stated, '[i]f there was a reasonable legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the [necessity] defens[e] will fail.'" *Id.* at 778 (quoting *United States v. Bailey*, 444 U.S. 394, 410 (1980)).

Where Mr. Flowers left 1825 T Street for approximately two minutes to attempt to retrieve his cell phone from Ms. Okpala,[31] which she dislodged from him before picking it up and leaving the building,[32] the trial court erred by rejecting the necessity defense, as the imminent harm to be avoided—a robbery—would have

[30] This court reviews de novo a trial court's ruling that a necessity defense did not apply and the factual findings underlying that legal conclusion for clear error. *See, e.g.*, *Budoo v. United States*, 677 A.2d 51, 54 (D.C. 1996).
[31] 3/18/24 Tr. 92-93.
[32] 3/18/24 Tr. 78-80.

significantly exceeded the harm caused by Mr. Flowers' brief exposure, a misdemeanor offense punishable by a maximum of 90 days' incarceration.[33]

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING OVER OBJECTION AND WITHOUT EXPLANATION A GOVERNMENT MOTION FOR CONTINUANCE WHICH FAILED TO MAKE FOUR PARTS OF THE REQUIRED "FIVEFOLD SHOWING."

a. Standard of Review.

"The trial court has considerable discretion in deciding whether to grant or deny a continuance,"[34] a decision this court reviews for abuse of discretion. *Moctar*, 718 A.2d at 1065. Where Mr. Flowers objected to the granting of a continuance,[35] this court reviews the trial court's decision to grant the District's motion for a continuance for abuse of discretion.

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[33] *See, e.g.*, *Cardozo v. United States*, No. 17-CF-774, slip op. at 30 (D.C. May 23, 2024) (en banc) ("And it is hard to see how the harm of a lost wallet or of a fight breaking out would significantly exceed the harm of a kidnapping-if indeed the above are kidnappings, as the government maintains-given that the legislature has adjudged kidnapping to be a far more serious offense than the simple assault of a person or theft of a wallet, both generally misdemeanor offenses. 'Under any conception of legal necessity, one principle is clear: The defense cannot succeed when the legislature itself has made a determination of values.' Kidnapping is simply the greater evil, not the significantly lesser one, so that the necessity defense would not apply to skirt these absurdities in the government's interpretation.") (quoting *United States v. Oakland Cannabis Buyers' Co-op*., 532 U.S. 483, 491 (2001)).

[34] *Bernal v. United States*, 162 A.3d 128, 133 n.8 (D.C. 2017) (citing *Moctar*, 718 A.2d at 1065).

[35] R. 549-59 (PDF).

b. The Trial Court Abused Its Discretion in Granting the District's Motion for a Continuance Where the Government Failed to Proffer the Expected Testimony of the Missing Witness, Whether the Witness Was Under Subpoena, Whether the District Had Exercised Diligence in Trying to Secure the Witness's Presence, and Whether and How Often the Witness Might Have Similar Work "Obligations" in the Future.

"A party seeking a continuance of a trial to locate a missing witness 'must make a showing that such continuance is 'reasonably necessary for a just determination of the cause.'" *Bedney*, 684 A.2d at 766 (quoting *O'Connor*, 399 A.2d at 28). More specifically, "the movant must make a fivefold showing"—"[h]e or she must establish (1) who the missing witness is, (2) what the witness'[s] testimony would be, (3) the relevance and competence of that testimony, (4) that the witness could probably be obtained if the continuance were granted, and (5) that the party seeking the continuance has exercised due diligence in trying to locate the witness." *Id*. (citing *Kimes*, 569 A.2d at 114). A trial court may also "properly consider the public's interest in the prompt, effective, and efficient administration of justice." *Smith*, 180 A.3d at 64 (quoting *Brooks*, 130 A.3d at 960). Aside from identifying the missing witness—Ms. Okpala—the District's motion failed to make four of the five required showings and failed to consider the public's interest in the prompt, effective, and efficient administration of justice.

In *Moctar*, during trial, the defense requested an overnight continuance to secure the presence of a witness. 718 A.2d at 1065. "During the discussion" of the

witness, "no proffer was made as to the nature of [the witness's] testimony nor its importance to the defendant." *Id.* While the trial court learned "that defense counsel had not subpoenaed the witness for the[]" current "trial date[]," the witness "had been under subpoena four times previously when the trial date was postponed." *Id.* The trial court the "noted the absence of a subpoena and again denied the request for more time." *Id.* This court found no abuse of discretion in the denial, relying on "ample opportunity to prepare [the defense] case," the mid-trial nature of the request, the witness not having been subpoenaed, and the absence of a "proffer…as to the relevance of the witness to the defendant's case." *Id.* at 1066.

In *Daley*, 739 A.2d at 815-16, by contrast, this court found abuse of discretion in the trial court's denial of a defense request for a continuance to secure the presence and testimony of an eyewitness—then apparently in custody—whose testimony, the defense proffered, would support Daley's claim of self-defense. In concluding that the trial court abused its discretion, this court relied on the "clear indication to the court not only of the missing witness'[s] identity, but also of the subject matter of [the witness's] proposed testimony, and of that testimony's relevance and competence," the probability that the witness's presence could likely have been obtained with minimal delay where he was in custody in the District, and the fact that the witness was under subpoena. *Id.* at 817-18. "Although the trial court made no finding on this point, Daley's inability to produce [the witness] on the day in

question would not appear to be due to a lack of diligence on his part," this court concluded, where defense counsel "had been in contact with [the witness] shortly before trial began" and the witness was under subpoena. *Id.* at 818.

In *Bernal*, when ultimately adopting the "consonant with justice" standard regarding motions for reconsideration, this court considered a defense challenge to the trial court granting the government over objection a one-week continuance, which permitted the government to permissibly secure inculpatory evidence previously suppressed on Fourth Amendment grounds. 162 A.3d at 130. This court considered it "questionable whether the trial court's actions" in granting a one-week continuance could "be characterized as a grant of a motion for reconsideration when [the trial court] had affirmatively denied the government's request for a thirty-day continuance, twice" and where "[a]t no time did the government seek a one-week continuance," concluding it "more accurate to characterize the court's allowance of a one-week continuance as a *sua sponte* action by the court to give the government time to consider appellant's late disclosure of its expert witness." *Id.* at 133 n.8. Although different factors guide a trial court's determination of whether to grant a continuance based on a missing witness as opposed to continuances requested for other reasons,[36] this court concluded that the trial court "appropriately considered the factors that weighed in favor of a one week continuance," to permit the

[36] *Compare Bedney*, 684 A.2d at 766 *with Brooks*, 130 A.3d at 960.

government to consider whether it would seek a rebuttal expert to counter Bernal's late-noticed expert. *Bernal*, 162 A.3d at 133 n.8.

Unlike the facts of *Daley*, the District failed to proffer Ms. Okpala's expected testimony. Like the facts of *Moctar*, the District failed to proffer Ms. Okpala's expected testimony, as its proffer[37] could only plausibly be read to state that it expected to call Ms. Okpala as a lay witness, not an expert witness. Where the District fail[ed] to proffer Ms. Okpala's expected testimony, it necessarily failed to establish the relevance and competence of her expected testimony, the third required showing. Although Ms. Okpala appeared for a previous trial in November 2022 and notified the District of the asserted "obligation" upon which the District's motion was premised, where the District failed to proffer whether Ms. Okpala was under subpoena, whether it had sought to place Ms. Okpala under subpoena, whether Ms. Okpala might have similar commitments in the future, or how often she might have such commitments, stronger than the facts of *Bedney* and *Daley*—in which witnesses were under subpoena and in some circumstances had previously appeared for trial—the District's motion failed to establish that Ms. Okpala's testimony could probably be obtained if its motion for a continuance was granted. Similarly, where the District failed to proffer whether Ms. Okpala was under subpoena or whether it took any

[37] The District proffered only that Ms. Okpala would "testify at length about her observations" of Mr. Flowers "on the incident date." R. 545 (PDF) (Mtn to Continue p. 2).

steps to seek to place Ms. Okpala under subpoena after trial was set on November 8, 2023, it failed to make the required showing that it exercised due diligence in attempting to secure Ms. Okpala's presence.

Put simply, the trial court abused its discretion by apparently failing to consider[38] four of the five elements[39] relevant to its decision—all of which must be shown[40]—receiving only that a potential witness, Ms. Okpala, might not be available on the then-scheduled trial date, with no specific proffer regarding what Ms. Okpala's testimony would be (and therefore no showing of the relevance or competence of such testimony), whether Ms. Okpala was under subpoena, whether the District had attempted to place Ms. Okpala under subpoena, or whether her testimony could probably be obtained in the future.

c. The Trial Court's Errors Were Not Harmless.

The trial court relied exclusively on Ms. Okpala's testimony and video footage admitted through her to conclude that Mr. Flowers was guilty of the charged offense. 3/20/24 Tr. 24-34. For non-constitutional errors, this court "appl[ies] the harmless error standard set forth by the Supreme Court in *Kotteakos v. United States*,

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[38] A trial court abuses its discretion by "fail[ing] to consider a relevant factor." *Johnson*, 163 A.3d at 753.

[39] The only factor the trial court appears to have considered is whether the witness's testimony could probably be obtained if the continuance were granted. 3/15 Tr. at 11-14.

[40] *Bedney*, 684 A.2d at 766.

328 U.S. 750, 764-65 (1946), and ask[s] whether [it] can say 'with fair assurance, after pondering all that happened, without stripping away the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" *Moore v. United States*, 285 A.3d 228, 252 (D.C. 2022) (quoting *Andrews v. United States*, 922 A.2d 449, 458 (D.C. 2007)). Where the trial court relied exclusively on Ms. Okpala's testimony[41] and evidence admitted through her to find that Mr. Flowers' genitalia were exposed, one cannot say that the judgment was not substantially swayed by the trial court's errors. This court should thus reverse and remand for further proceedings.

d. The Trial Court Failed to Make Findings Sufficient to Permit Meaningful Appellate Review.

A trial court must also make "findings of fact and conclusions of law sufficient for meaningful appellate review." *George Washington Univ. v. District of Columbia*, 563 A.2d 759 (D.C. 1989); *accord Maye v. United States*, 260 A.3d 638, 643 (D.C. 2021) ("We did not resolve most of his legal arguments in that initial appeal because we determined that the trial court's findings were insufficient to permit meaningful appellate review."). To the extent that this court does not hold on the merits that the trial court abused its discretion in granting the District's motion for a continuance, where the trial court provided no findings of fact or conclusions of law in granting

[41] The District characterized Ms. Okpala as an "essential witness" in its motion to continue trial. R. 545 (PDF) (Mtn to Continue p. 2).

the District's motion for a continuance by written order, stating only that "good cause ha[d] been shown,"[42] remand is nonetheless required for the trial court to make findings of fact and conclusions of law and to consider whether, without Ms. Okpala's testimony, it nonetheless would have found Mr. Flowers guilty beyond a reasonable doubt.

II. THE TRIAL COURT ERRED BY INTERPRETING D.C. CODE § 22-1312 TO PROSCRIBE EXPOSURE OF THE GENITALIA WHILE ON PRIVATE PROPERTY DESPITE 2011 AMENDMENTS SPECIFYING THAT THE STATUTE APPLIES ONLY "IN PUBLIC."

a. Standard of Review.

This court reviews questions of statutory interpretation, including the meaning of a statute, de novo. *See, e.g.*, *Lucas*, 305 A.3d at 776 (citing *Reese*, 131 A.3d at 884). Such "interpretation is a holistic endeavor." *Tippett v. Daly*, 10 A.3d 1123, 1127 (D.C. 2010) (en banc) (internal quotation marks omitted). The text of the statute is "generally the best indication of the legislative intent." *Meta Platforms, Inc. v. District of Columbia*, 301 A.3d 740, 748 (D.C. 2023) (quoting *In re B.B.P.*, 753 A.2d 1019, 1021 (D.C. 2000)). However, this court "do[es] not read statutory words in isolation [and] the language of surrounding and related paragraphs may be instrumental to understanding them." *In re Am. H.*, 299 A.3d 584, 587 (D.C. 2023) (quoting *Tippett*, 10 A.3d at 1127). This court also takes into account "statutory

[42] R. 560 (PDF).

context and structure, evident legislative purpose, and the potential consequences of adopting a given interpretation." *In re Macklin*, 286 A.3d 547, 553 (D.C. 2022) (quoting *In re G.D.L.*, 223 A.3d 100, 104 (D.C. 2020)). It "may also look to the legislative history to ensure that [its] interpretation is consistent with legislative intent.'" *Id.* (quoting *Facebook, Inc. v. Wint*, 199 A.3d 625, 628 (D.C. 2019)). However, "[i]f the plain meaning of statutory language is clear and unambiguous and will not produce an absurd result, [this court] will look no further." *Eaglin v. District of Columbia*, 123 A.3d 953, 956 (D.C. 2015) (quoting *Smith v. United States*, 68 A.3d 729, 735 (D.C. 2013)).

b. *Bolz* Does Not Bind This Court Because "the Rule of *Stare Decisis* is Never Properly Invoked Unless in the Decision Put Forward as Precedent the Judicial Mind Has Been Applied to and Passed Upon the Precise Question."

As an initial matter, *Bolz*, on which the trial court relied, does not bind this court, as "[t]he rule of stare decisis is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question." *Poth*, 150 A.3d at 788 n.7 (quoting *Murphy*, 650 A.2d at 205).

This court has "'equated binding precedent under *M.A.P.*[43] with the rule of stare decisis," and, "for purposes of binding precedent, a holding is a narrow concept, a statement of the outcome accompanied by one or more legal steps or conclusions

[43] *M.A.P. v. Ryan*, 285 A.2d 310 (D.C. 1971).

along the way that—as this court and others have repeatedly held—are "necessary" to explain the outcome; other observations are dicta." *Parker v. K & L Gates, LLP*, 76 A.3d 859, 873 (D.C. 2013) (Ferren, J., & Easterly, J., concurring).

In *In re Q.B.*, 116 A.3d 450 (D.C. 2015), this court, applying the principle, rejected the government's argument that two earlier cases of this court, *Caldwell*[44] an *Vest*,[45] affirming contempt convictions under D.C. Code § 11-944(a) for violations of pretrial release conditions, foreclosed the trial court's ruling (and Q.B.'s argument) that the petition failed to state an offense under § 11-944(a) because it did not contain a "free-standing requirement" that Q.B. observe a curfew, only a requirement that Q.B. do so in order to remain on pretrial release.

> '[Q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents'… That we have affirmed a conviction under a particular statute in the past does not foreclose subsequent parties from bringing legal challenges that could have been, but were not, raised in an earlier case.

Q.B., 116 A.3d at 455 (quoting *United States v. Debruhl*, 38 A.3d 293, 298 (D.C. 2012)) (internal citations omitted).[46]

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[44] *Caldwell v. United States*, 595 A.2d 961 (D.C. 1991).
[45] *Vest v. United States*, 834 A.2d 908 (D.C. 2003).
[46] This court also highlighted several other cases illustrating the same principle, including *Alfaro v. United States*, 859 A.2d 149 (D.C. 2004) (rejecting government argument that affirming in unrelated case convictions for simple assault and attempted second-degree cruelty to children foreclosed argument that same offenses merged) and *English v. United States*, 25 A.3d 46 (D.C. 2011) (rejecting government argument that affirming fleeing convictions for automobile passengers in unrelated

In *Bolz*, this court did not and was not asked to address the challenge raised here—whether "in public" means on public property (or, said another way, whether D.C. Code § 22-1312 applies on private property). Instead, in *Bolz*, this court addressed a First Amendment (overbreadth challenge) to D.C. Code § 22-1312. 149 A.3d at 1142-44. In order to resolve that challenge, this court considered, under the test for overbreadth whether "the overbreadth of [the] statute [was] not only… real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 1143 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Applying the test, this court considered "the reach of the challenged provision" only insofar as it implicated the First Amendment; i.e., expressive conduct. *Id.* This broad, brief analysis of the impact of D.C. Code § 22-1312 on constitutionally protected activities differs markedly from the challenge raised by Mr. Flowers; whether, as a matter of statutory interpretation, the statute applies on public property. Said another way, where Mr. Flowers raises a "legal challenge[] that could have been, but w[as] not, raised in an earlier case," *Bolz* does not foreclose his challenge.[47]

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case foreclosed argument that fleeing statute did not apply to passengers). *Q.B.*, 116 A.3d at 455-56.

[47] The facts of *Bolz* also differ markedly from the facts of the instant case, in which, so far as this court's opinion reveals, Givens, the co-appellant raising the overbreadth challenge, was exclusively on public property. 149 A.3d at 1133 & 1135. In the fall of 2011, Occupy D.C. protesters began demonstrating in McPherson Square, a federal park… [O]ne morning in early December, they assembled a wooden structure in the park, the "Occubarn"… One of the protesters, Mr. Givens, had climbed up into the rafters of the Occubarn and resisted multiple attempts by the police to

c. The Plain Meaning of "in Public" is Clear and Unambiguous, and Construing D.C. Code § 22-1312 to Apply Only on Public Property Will Not Produce an Absurd Result and Instead "is Easily Understood and Uncomplicated to Enforce."

Prior to 2011 amendments, D.C. Code § 22-1312 (2001) provide[d]:

> (a) It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal in the District of Columbia under penalty of not more than $300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense.

Rolen-Love v. District of Columbia, 980 A.2d 1063, 1064 n.1 (D.C. 2009).

In a series of decisions, this court interpreted "person" to mean "genitalia." *Id.* (quoting *Duvallon v. District of Columbia*, 515 A.2d 724, 728 (D.C. 1986)). This court also held that, prior to 2011 amendments to D.C. Code § 22-1312, "[a]n exposure bec[ame] indecent when the defendant expose[d] himself at such a time and place, where as a reasonable man he kn[ew] or should [have] know[n] his act w[ould] be open to the observation of others." *Parnigoni*, 933 A.2d at 826 (quoting *Peyton*, 100 A.2d at 37).

In legislation made effective in 2011, the legislature, responding in part to criticism that the District's various disorderly conduct statutes were "vague[]" and used terms that were "difficult to define," set out to "enable everybody—police,

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remove him. While there, he developed an urgent need to urinate and relieved himself off the top of the structure in full view of the people on site.").

citizens, and the accused—to understand what conduct is sufficiently undesirable that it warrants criminal sanction." Report on Bill 18–425 at 2-3. As relevant here, D.C. Code § 22-1312 was amended to read, in relevant part, "It is unlawful for a person, in public, to make an obscene or indecent exposure of his or her genitalia or anus," replacing "person" with "genitalia or anus," leaving unchanged the word "indecent," and adding the phrase, "in public."

Before looking to the plain meaning of "in public," it is important to note what "in public" *cannot* mean. That is, the legislature, aware of this court's decisions construing "indecent"[48]—in the context of earlier versions of lewd, indecent, or obscene acts statutes—to mean where "as a reasonable man he kn[ew] or should [have] know[n] his act w[ould] be open to the observation of others." *Parnigoni*, 933 A.2d at 826 (quoting *Peyton*, 100 A.2d at 37). Where the legislature did not remove the word "indecent" and added the phrase "in public," "in public" must, in order to avoid running afoul of the basic canon of statutory construction "that each provision of the statute should be construed so as to give effect to all of the statute's provisions,

[48] *See* Report on Bill 18–425 at 7 ("The drafting of section 2(b) is intended to be simple, so that it is easily understood and uncomplicated to enforce. It is important to understand that this provision does not criminalize any kind of sexual act, rather, it retains the crime of having sex *in public*—meaning in open view; before the people at large; not in privacy or secrecy. The revision strikes outdated phrases. It replaces "any obscene or indecent exposure of his or her person" with "any obscene or indecent exposure of his or her genitalia or anus"; this is consistent with court interpretation.") (emphasis in original).

not rendering any provision superfluous,"[49] mean something other than "open to the observation of others" or "before the people at large." Otherwise, the statute would, in effect, read "It is unlawful for a person, in public, to make… [in public, an] exposure of his or her genitalia or anus."

With this backdrop in mind, the meaning of "in public" is clear and unambiguous—on public property, an interpretation supported by this court's interpretation of that phrase. Mr. Flowers acknowledges that *Campbell v. United States*, 163 A.3d 790 (D.C. 2017), like *Bolz*, did not address the precise question raised in this appeal. However, notably, when addressing a government argument that a jury could have found that Campell was on property that was not privately owned and thus violated D.C. Code § 25-1001(a)(2), prohibiting possession of an open container of alcohol in certain areas, this court observed that:

> Even if this were so, Mr. Campbell's presence on public property would not be sufficient to place him within the reach of the statute. While § 25–1001 seeks to curtail public possession of open containers of alcohol… it does so through prohibition of possession in enumerated places… Where the Council has meant to prohibit an act in any public place it has done so. *See, e.g.,* D.C. Code § 22–1312 ("It is unlawful for a person, in public, to make an obscene or indecent exposure of [private areas of the body].").

Id. at 798.
Said another way, this court construed "in public" to mean "on public property."

[49] *Thomas*, 547 A.2d at 1037 (D.C. 1988) (citing *Tuten*, 440 A.2d at 1010).

This observation, however, lends support to Mr. Flowers' argument that "in public" means on public property.

In *Robinson v. United States*, 263 A.3d 139, 142 (D.C. 2021), this court, when considering a sufficiency challenge under a subsection of the voyeurism statute making it unlawful "for a person to intentionally capture an image of a private area of an individual… under circumstances in which the individual has a reasonable expectation of privacy, without the individual's express and informed consent," relied in part on the statute's use of "circumstances" rather than "locational terms." This court observed that, "unlike these statutes, D.C. Code § 22-3531(d) does not look to physical location to define expectations of privacy; instead it more broadly refers to 'circumstances in which the individual has a reasonable expectation of privacy.'" *Id.*

Unlike D.C. Code § 22-3531(d), D.C. Code § 22-1312 *does* look to physical location, not solely "circumstances." That is evidence sufficient to support a conviction under D.C. Code § 22-1312 requires proof not only that a person willfully exposed his or her genitalia in a place "open to the observation of others," based on the legislature's decision to retain the word "indecent," but such a location that is on public property.

If the legislature wished to criminalize exposure of genitalia on private property, it could have simply written "It is unlawful for a person… to make an

obscene or indecent exposure of his or her genitalia or anus," or "It is unlawful for a person, in public, to make an… exposure of his or her genitalia or anus." That the Council elected instead to require that an exposure, to be unlawful, be both "indecent" and "in public" reinforces that "in public" means on public property.

Even if this court were to look beyond the plain meaning of "in public" to mean "in public property" under D.C. Code § 22-1312, the legislative history of the statute only reinforces Mr. Flowers' position. That is, the legislature's stated goal was to make D.C. Code § 22-1312 "simple, so that it is easily understood and uncomplicated to enforce." Report on Bill 18–425 at 7. In order to avoid complaints of selective and inconsistent enforcement, the legislature amended D.C. Code § 22-1312 to "enable everybody—police, citizens, and the accused—to understand what conduct is sufficiently undesirable that it warrants criminal sanction." *Id.* at 3. When rejecting a proposed amendment to proscribe "simulated" sex acts, the Committee on the Judiciary observed that it is "[b]etter that the criminal law strikes a bright line." *Id.* at 8. Construing "in public" to mean "on public property" serves this goal. Willfully exposing genitalia on public property is a crime. Willfully exposing genitalia on private property, however undesirable in some circumstances, is not. Construing "in public" to mean "open to public view" alone would create the very "vagueness" and make D.C. Code § 22-1312 incredibly subjective, subject to interpretation, and ripe for inconsistent enforcement.

d. Mr. Flowers' Conviction Must Be Vacated.

"In reviewing for sufficiency of evidence, [this court] must sustain the conviction unless there is 'no evidence upon which a reasonable mind could fairly conclude guilt beyond a reasonable doubt,'" and "view the evidence in the light most favorable to the government." *Larson-Olson*, 309 A.3d at 1273 (quoting *High v. United States*, 128 A.3d 1017, 1020 (D.C. 2015)). Where the trial court found Mr. Flowers guilty based on conduct occurring on private property,[50] the "walkway of the condominium that was open to the public,"[51] an area the statute, properly construed, does not reach, his conviction must be vacated.[52]

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[50] 3/20/24 Tr. 33-34 ("THE COURT: Right. But it seems to me the actions that occurred before then when he was in the walkway of the condominium that was open to the public, he was no longer covering himself but trying to break into the building. And again, Ms. Okpala didn't know who he was or didn't recognize him and was trying to prevent him from coming into the building. MR. MADSEN: And so just on that, so Your Honor is finding that at minimum at least it sounds like—THE COURT: Yes. MR. MADSEN: -- at that time was the offense? THE COURT: Yes. MR. MADSEN: Okay. THE COURT: And that was the beginning of the offense. It's a continuous event. But I would say -- let me put it this way, if it were the portion of the video to which you objected, I would not find the defendant guilty because I think you correctly observed that he was trying to cover himself. He found himself outside the building and was trying to cover himself.").

[51] Ms. Okpala testified that the building was privately owned, 3/18/24 Tr. at 29-30, and there was no additional evidence presented regarding the property line separating the condominium from public property.

[52] Although the District may respond that Mr. Flowers' genitalia was exposed while he was on public property when attempting to retrieve his phone from Ms. Okpala, as discussed, *infra*, the trial court erred in rejecting Mr. Flowers' necessity defense regarding this time period.

Assuming, *arguendo*, that this court does not vacate Mr. Flowers' conviction, the appropriate remedy is to remand for the trial court to determine in the first instance whether it would have issued a guilty verdict if it understood D.C. Code § 22-1312 to apply only on public property. *See, e.g.*, *Carrell*, 165 A.3d at 328-29 ("It is thus beside the point that we have already concluded that the evidence was legally sufficient; the pertinent question is whether we can say, beyond a reasonable doubt, that the trial court would have issued a guilty verdict in this case based on a determination that Mr. Carrell acted with purpose or knowledge when he threatened the complainant. On this record, we cannot… Accordingly, we remand the case to allow the trial court to make the necessary mens rea finding, based on the law as set forth in this opinion, to determine if Mr. Carrell is guilty of the crime of attempted threats.").

III. THE TRIAL COURT ERRED IN REJECTING MR. FLOWERS' NECESSITY DEFENSE WHERE THE COMPLAINANT TOOK MR. FLOWERS' CELL PHONE FROM HIS IMMEDIATE OR ACTUAL POSSESSION, WHERE MR. FLOWERS, WEARING ONLY A SWEATSHIRT, THEN FOLLOWED THE COMPLAINANT ONTO PUBLIC PROPERTY IN AN EFFORT TO RETRIEVE HIS PHONE, AND WHERE THE STATUTORY PENALTY FOR ROBBERY FAR EXCEEDS THAT FOR LEWD, INDECENT, OR OBSCENE ACTS.

a. Standard of Review.

This court reviews de novo a trial court's ruling that a necessity defense did not apply and the factual findings underlying that legal conclusion for clear error. *See, e.g.*, *Budoo*, 677 A.2d at 54.

b. The Law of Necessity.

"In essence, the necessity defense exonerates persons who commit a crime under the "pressure of circumstances," if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law." *Griffin*, 447 A.2d at 777 (citing *Marley*, 509 P.2d at 1109). "The defense is not available where: (1) there is a legal alternative available to the defendants that does not involve violation of the law; (2) the harm to be prevented is neither imminent, nor would be directly affected by the defendants' actions; and (3) the defendants' actions were not reasonably designed to actually prevent the threatened greater harm. *Id.* (internal citations omitted). Said another way, "[a]s the Supreme Court stated, '[i]f there was a reasonable legal

alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the [necessity] defens[e] will fail.'" *Id.* at 778 (quoting *Bailey*, 444 U.S. at 410). While the accused bears the initial burden of producing some evidence of necessity, as an affirmative defense,[53] where the defense carries that initial burden and there is any evidence of necessity, the government bears the burden of proving beyond a reasonable doubt that the accused did not act out of necessity. *See, e.g.*, *United States v. Unser*, 165 F.3d 755, 764 (10th Cir. 1999). "Th[e] defense of necessity does not require proof that harm is actually occurring, but only that the defendant have a reasonable belief that harm is imminent." *Morgan v. Foretich*, 546 A.2d 407, 411 (D.C. 1988) (citing *Griffin*, 447 A.2d at 778).

c. The Trial Court's Findings Regarding Necessity.

In its initial findings, the trial court did not address Mr. Flowers' argument that, during the portion of time Mr. Flowers' was on T Street NW attempting to retrieve his phone, necessity excused his conduct. 3/20/24 Tr. 29-32. When Mr. Flowers inquired about the trial court's resolution of his necessity argument, the following exchange occurred:

> MR. MADSEN: No, Your Honor. I think implicitly Your Honor is of course rejecting the necessity defense, but obviously that is implicit in Your Honor's ruling. I don't think you need to make additional finding.

[53] *See, e.g.*, *Emry v. United States*, 829 A.2d 970, 974 (D.C. 2003).

> THE COURT: Well, not completely in the following sense --
> MR. MADSEN: Oh, sure.
> THE COURT: -- in the following sense. At portions, he is on the sidewalk and he's not covering himself.
> MR. MADSEN: I guess now --
> THE COURT: Even --
> MR. MADSEN: -- I'm sorry.
> THE COURT: -- before the time he's following Ms. Okpala. I guess I would -- one could make a legal argument that she would not be guilty of robbery because she wasn't intending to by force of violence personally take and permanently deprive the victim; she just didn't know who he was but did know it was his phone. But was using it -- from my point of view, you could argue that she has a necessity defense to her use of the phone to try to call the police, which she did to report naked man in her condominium who was not a resident. Now, she was mistaken in that belief. I think that's clear. But that's how I weigh that argument.
> MR. MADSEN: Understood, Your Honor. I guess I would say -- I don't mean to, of course, argue with Your Honor, but I don't think the question is whether or not she was guilty but his perception of the need to avoid the offense.
> THE COURT: Right. But it seems to me the actions that occurred before then when he was in the walkway of the condominium that was open to the public, he was no longer covering himself but trying to break into the building. And again, Ms. Okpala didn't know who he was or didn't recognize him and was trying to prevent him from coming into the building.

3/20/24 Tr. 32-34.

That is, the trial court did not expressly indicate whether it was also finding Mr. Flowers' guilty based on his conduct in attempting to retrieve his phone from Ms. Okpala on T Street NW.

d. The Harm That Would Have Resulted From Compliance With the Law—Permitting a Robbery—Significantly Exceeded the Harm, if Any, Actually Resulting From Any Breach of the Law, a Very Brief "Indecent Exposure," a Low-Level Misdemeanor Offense.

Robbery is defined as "by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, tak[ing] from the person or immediate actual possession of another anything of value." *In re Z.B.*, 131 A.3d 351 (D.C. 2016) (quoting D.C. Code § 22-2801). "As used in the robbery statute," immediate actual possession "'refers to the area within which the victim can reasonably be expected to exercise some physical control over the property,'"[54] and "'[A] thing is within one's 'immediate actual possession' so long as it is within such range that he could, if not deterred by violence or fear, retain actual physical control over it.'" *Id.* (quoting *Rouse v. United States*, 402 A.2d 1218, 1220 (D.C. 1979)). Ms. Okpala dislodged Mr. Flowers' phone from him after using force against him at the top of a stairwell, then picked up his phone, knowing it was his, left the building with it, and refused to return it to Mr. Flowers. 3/18/24 Tr. 64-81, 87; Defense Exs. 8 (20:17-20:29), 10, 12. The trial court did not find that Ms. Okpala did not commit a robbery, stating instead that "one could make a legal argument that [Ms. Okpala] would not be guilty of robbery because she wasn't intending to by force of violence

[54] *Winstead v. United States*, 809 A.2d 607, 610 (D.C. 2002) (quoting *Head v. United States*, 451 A.2d 615, 624 (D.C. 1982)).

personally take and permanently deprive the victim; she just didn't know who he was but did know it was his phone. But was using it—from my point of view, you could argue that she has a necessity defense to her use of the phone to try to call the police, which she did to report naked man in her condominium who was not a resident." 3/20/24 Tr. 33. As Mr. Flowers stated below,[55] and as this court observed in *Morgan* and *Griffin*, "[t]h[e] defense of necessity does not require proof that harm is actually occurring, but only that the defendant have a reasonable belief that harm is imminent." *Morgan*, 546 A.2d at 411.

Robbery, a felony offense, is punishable by up to fifteen years in prison, a $37,500 fine, or both. D.C. Code §§ 22-2801, -3571.01(b)(8). Lewd, indecent, or obscene acts, a misdemeanor offense, is punishable by up to 90 days in jail, a $500 fine, or both. D.C. Code §§ 22-1312, -3571.01(b)(3). The harm from robbery far exceeds any harm from lewd, indecent, or obscene acts, ever more so where any period of exposure when attempting to retrieve his phone from Ms. Okpala was less than two minutes.[56] *See Cardozo*, No. 17-CF-774, slip op. at 30) ("And it is hard to see how the harm of a lost wallet or of a fight breaking out would significantly exceed the harm of a kidnapping-if indeed the above are kidnappings, as the government maintains-given that the legislature has adjudged kidnapping to be a far

[55] 3/20/24 Tr. 33 (14-16) ("I don't think the question is whether or not she was guilty but his perception of the need to avoid the offense.").
[56] 3/18/24 Tr. 92-93; Defense Ex. 17.

more serious offense than the simple assault of a person or theft of a wallet, both generally misdemeanor offenses. 'Under any conception of legal necessity, one principle is clear: The defense cannot succeed when the legislature itself has made a determination of values.' Kidnapping is simply the greater evil, not the significantly lesser one, so that the necessity defense would not apply to skirt these absurdities in the government's interpretation.") (quoting *Oakland Cannabis Buyers' Co-op*., 532 U.S. at 491). While the trial court did not make any explicit legal conclusion regarding the relative harm of the offenses, to the extent its findings can be read to reject the necessity defense based on any such conclusion, this was error.

e. No Legal Alternative Would Have Reasonably Allowed Mr. Flowers to Promptly Retrieve His Phone From Ms. Okpala.

In *Emry*, addressing a claim of medical necessity as a defense to possession of marijuana (to treat multiple sclerosis), this court found no error in the trial court's conclusion that Emry failed to put forward sufficient evidence to demonstrate that there was no reasonable alternative to avoid the threatened harm and avoid the criminal act. 829 A.2d at 973. In so doing, this court relied both on the fact that Emry had not tried several prescription drugs available to treat symptoms of multiple sclerosis and evidence that marijuana had not improved Emry's symptoms. *Id.* This court similarly found no error in the trial court's conclusion in *Griffin* that the defense of necessity was unavailable where legal alternatives to opening cathedrals to the homeless existed. 447 A.2d at 778 ("Here, appellants failed to proffer any

evidence that would have established that on February 9, 1980, the appellants had exhausted all other legal alternatives, such as other churches, civic buildings and private residences. While appellants' motion recounted their extensive and continuing efforts to provide shelter for the city's homeless, it provided no evidence which would have established that, on the night in question, appellants, after having checked out all other shelters, had no other choice but to open up the two cathedrals.").

Unlike the facts of *Emry* and *Griffin*, Mr. Flowers lacked legal alternatives to leaving the condominium to attempt to retrieve his phone from Ms. Okpala. That is, where Ms. Okpala had taken his phone and refused to return it, he lacked another means to alert police. While Mr. Flowers might conceivably at some unknown point in the future been able to contact police, the defense of necessity does not take such a narrow view. After pausing at the front door of the condominium building for approximately fifteen seconds, imploring Ms. Okpala to return his phone, which she refused to do, Mr. Flowers left the building briefly to attempt to retrieve his phone. 3/18/24 Tr. 84-87. While the trial court did not make any explicit legal conclusion regarding available legal alternatives, to the extent its findings can be read to reject the necessity defense based on any such conclusion, this was error.

f. The Harm to be Prevented—Completion of a Robbery—Was Imminent and Directly Affected By Mr. Flowers' Actions.

The defense of necessity is also unavailable "if the harm to be prevented is neither imminent, nor would be directly affected by the defendants' actions." *Griffin*, 447 A.2d at 778. Thus, this court upheld the trial court's conclusion in *Emry* that the defense was unavailable where "the record does not indicate that Ms. Emry was in 'imminent' harm of experiencing an attack of spasticity at the moment she smoked marijuana… nor that her use of marijuana at that particular time would have affected her condition." 829 A.2d at 973.

Here, unlike the facts of *Emry*, the harm was indisputably imminent, as Ms. Okpala had already taken Mr. Flowers' phone and left the building with it. 3/20/24 Tr. 33.[57] Mr. Flowers' actions—attempting to retrieve his phone—likewise directly affected the threatened greater harm, the completed robbery. Accordingly, the defense would not have been unavailable to him for this reason.

g. Mr. Flowers' Actions Were Reasonably Designed to Prevent the Threatened Greater Harm.

The defense of necessity is also unavailable "if the defendant[']s actions were not reasonably designed to actually prevent the threatened greater harm. *Griffin*, 447 A.2d at 777. While Mr. Flowers' efforts proved unsuccessful, as Ms. Okpala refused

[57] The trial court appeared to mistakenly believe (or state) that the phone from which Ms. Okpala called 911 was Mr. Flowers' phone. 3/20/24 Tr. 33. Ms. Okpala called 911 from her phone. 3/20/24 Tr. 22 (14-18).

to return his phone to him, his actions were reasonably designed to prevent completion of the robbery by Ms. Okpala. Thus, the defense of necessity would not have been unavailable to him on this basis.

h. Mr. Flowers' Conviction Must be Vacated.

Because the evidence was insufficient to prove beyond a reasonable doubt that necessity did not excuse Mr. Flowers' brief exposure of his genitalia on public property, his conviction must be vacated. Assuming, *arguendo*, that this court does not vacate Mr. Flowers' conviction, the appropriate remedy is to remand for the trial court to make additional findings regarding the defense of necessity. *See, e.g.*, *Carrell*, 165 A.3d at 328-29.

Conclusion

The trial court abused its discretion by granting over objection a government motion for a continuance which failed to make four parts of the "fivefold showing" required under this court's jurisprudence and likewise failed to make findings sufficient to permit meaningful appellate review regarding this issue. To the extent this court does not vacate Mr. Flowers' conviction on other grounds, this court should remand for additional findings of fact and conclusions of law. The trial court also erred by interpreting D.C. Code § 22-1312 to proscribe exposure of the genitalia while on private property. Under a proper construction of the statute, the evidence was insufficient to support Mr. Flowers' conviction for lewd, indecent, or obscene

acts, which must therefore be vacated. Assuming, *arguendo*, that this court does not vacate Mr. Flowers' conviction, the case must be remanded for the trial court to determine whether in the first instance it would have found Mr. Flowers guilty beyond a reasonable doubt under a proper construction of the statute. Finally, to the extent the trial court's findings can be read to indicate that it was also finding Mr. Flowers guilty based on his conduct on T Street NW in attempting to retrieve his phone from Ms. Okpala, the evidence was insufficient to prove beyond a reasonable doubt that the defense of necessity did not excuse Mr. Flowers' conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was electronically served upon the Office of the Attorney General for the District of Columbia, this 5th day of August, 2024.

/s/ Adrian E. Madsen
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