No. 24-CT-276

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MICHAEL D. FLOWERS,
APPELLANT,

V.

DISTRICT OF COLUMBIA,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA

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STATEMENT OF THE ISSUES

The Superior Court found beyond a reasonable doubt that Michael D. Flowers violated the District of Columbia's indecent exposure statute, D.C. Code § 22-1312, by exposing his genitalia outside of 1825 T Street NW, a privately owned condominium building, in the early morning hours of July 2, 2022. The issues on appeal are:

1. Whether the trial court abused its discretion in granting the District a less-than-two-month continuance to obtain the testimony of the victim and key witness, and if so, whether Flowers identified any prejudice from the delay.

2. Whether the trial court erred in holding that Section 22-1312, which makes it "unlawful for a person, in public, to make an obscene or indecent exposure of his or her genitalia or anus," applies to exposures that occur on private property in open view of the public.

3. If not, whether this Court must credit Flowers's purported necessity defense and vacate his conviction even though it is undisputed that Flowers engaged in conduct prohibited by Section 22-1312 while on public property and had multiple legal alternatives available to him besides venturing onto the public street with his genitalia exposed.

STATEMENT OF THE CASE

On July 2, 2022, the District charged Flowers with one count of lewd, indecent, and obscene acts in violation of D.C. Code § 22-1312, based on the events that occurred that same day at Flowers's residence. R. 1 (PDF) (Super. Ct. Docket Sheet, Item No. 1), 82 (Information). On November 8, 2022, following a bench trial, the court found Flowers guilty. R. 7 (Super. Ct. Docket Sheet, Item No. 47), 246 (11/8/22 Tr. 153). On October 4, 2023, however, the court vacated that conviction, finding Flowers had received ineffective assistance of trial counsel, and reset Flowers's trial to begin on January 24, 2024. R. 545 (12/1/23 Mot. 2).

On December 1, 2023, the District moved to continue Flowers's trial. R. 544-47 (12/1/23 Mot.). A few days earlier, the District had learned that Laura Okpala, the victim and the District's primary witness, would no longer be available on January 24. R. 545 (12/1/23 Mot. 2). Flowers objected to the requested continuance. R. 549-59 (12/2/23 Opp'n). On December 7, 2024, the court granted the continuance and reset Flowers's trial for March 18, 2024. R. 560 (12/7/23 Order).

On March 20, 2024, after a two-day bench trial, the trial court found Flowers guilty and sentenced him to 80 days' incarceration, which the court suspended in favor of 30 days of unsupervised probation. R. 18-19 (Super. Ct. Docket Sheet, Items 147, 155), 571-72 (Sentence); 3/20/24 Tr. 32. Flowers filed this timely appeal the next day. R. 573-77 (Notice of Appeal).

STATEMENT OF FACTS

1. Flowers's Arrest, First Trial, And Successful Motion To Vacate His Conviction.

In July 2022, the District arrested Flowers and charged him with lewd, indecent, and obscene acts in violation of D.C. Code § 22-1312. R. 1 (Super. Ct. Docket Sheet, Item No. 1), 82 (Information). The District alleged that Flowers exposed his genitalia on the walkway and in the lobby of his apartment building, and on the public street in front of the building. R. 100 (11/8/22 Tr. 7). The District grounded its allegations on the testimony of Laura Okpala, another resident of the building, who witnessed Flowers's conduct. R. 100 (11/8/22 Tr. 7).

In November 2022, Magistrate Judge Judith E. Pipe oversaw a bench trial of Flowers's case. R. 94-491 (11/8/22 Tr.). The court heard from several witnesses, including Okpala. R. 104-73 (11/8/22 Tr. 11-80). Okpala testified in detail about Flowers's conduct, and her testimony was tested by cross examination. R. 104-73 (11/8/22 Tr. 11-80). Judge Pipe found Okpala to be "genuine and credible and sincere" and "fully credit[ed]" her testimony. R. 489 (11/8/22 Tr. 151). Judge Pipe found Flowers guilty and sentenced him to 90 days, with all but ten days suspended, and to 12 months of probation. R. 491 (11/8/22 Tr. 153), 509 (11/8/22 Tr. 16). In February 2023, Associate Judge Craig Iscoe rejected Flowers's motion for review and upheld Magistrate Judge Pipe's findings. R. 280-92 (2/8/23 Order).

Three months later, represented by new counsel, Flowers moved the Superior Court under D.C. Code § 23-110 to vacate his conviction due to ineffective assistance of trial counsel. R. 39-80 (5/8/23 Mot.). After briefing and an evidentiary hearing, the court granted that motion, finding that Flowers rejected a plea offer and proceeded to trial because his original counsel incorrectly advised him of the elements of the offense. 10/4/23 Tr. 6-7. Accordingly, the court vacated Flowers's conviction and ordered the District to reextend its plea offer to Flowers. R. 542 (10/20/23 Order). Flowers subsequently rejected that plea offer and the trial court reset his case for trial on January 24, 2024. 11/8/23 Tr. 2, 9.

2. The District's Motion For A Continuance.

On December 1, 2023, the District filed a motion to continue the trial date. R. 544-47 (12/1/23 Mot.). The District noted that Okpala was no longer available for trial on January 24, 2024 due to a work obligation. R. 545. The District explained that Okpala was scheduled to present at a work conference in Las Vegas that ran from January 22 through January 25, 2024. R. 545 (12/1/23 Mot. 2). Okpala learned of this obligation on November 27, 2023 and promptly notified the District. R. 545 (12/1/23 Mot. 2). The District underscored that Okpala was an "essential witness" for the case and would "testify at length about her observations of [Flowers] on the incident date." R. 545 (12/1/23 Mot. 2). The District further underscored that a continuance would not prejudice Flowers because he was not incarcerated pending

trial. R. 546 (12/1/23 Mot. 3). And the District represented to Flowers's counsel that it would be "happy to select a trial date at the court's earliest availability" after January 24, 2024. R. 557 (12/2/23 Opp'n 9 n.10).

Flowers objected to the continuance. R. 549-58 (12/2/23 Opp'n). The trial court granted the continuance nonetheless and reset Flowers's trial for less than two months later, on March 18, 2024. R. 560 (12/7/23 Order); 1/24/24 Tr. 4.

3. Flowers's Second Trial.

Flowers's second trial occurred on March 18 and March 20, 2024 before Associate Judge Robert E. Morin. R. 18-19 (Super. Ct. Docket Sheet, Item Nos. 147, 155). The District called two witnesses: Okpala and Nathan Clarke, the first police officer to respond to the scene. The defense called no witnesses. According to the District's witnesses, for reasons unknown, Flowers exited his apartment building, located at 1825 T Street NW, in the early hours of July 2, 2022. 3/18/24 Tr. 9-10, 29-30. He wore no pants or underwear, only a sweatshirt that was not long enough to cover his genitals. 3/18/24 Tr. 11. The events that followed can be broken down into two phases—Flowers's reentry and subsequent second exit from the building.

A. Flowers reenters the apartment building behind Okpala.

At approximately 12:15 AM, Okpala, also a resident of 1825 T Street NW, pulled up to the building in a rideshare. 3/18/24 Tr. 9-10. When Okpala arrived,

Flowers was standing in shrubbery in a small garden area at the front of the building. 3/18/24 Tr. 42, 46. Okpala entered the building using her key fob, and Flowers tried to enter behind her. 3/18/24 Tr. 11. Okpala did not recognize Flowers, however, or know that he lived in the building, and he did not appear to have a key fob, so she closed the door behind her to prevent Flowers's entry. 3/18/24 Tr. 11.

Standing on the walkway just outside the door, Flowers yelled at Okpala and asked to be let into the building. 3/18/24 Tr. 12, 56, 59. He kicked and pulled the door and attempted to pry it open using a metal grate. 3/18/24 Tr. 12, 20-21, 61; Gov.'s Ex. 1 at 11:50-12:39.[1] As he did so, Flowers made no effort to conceal his genitals, which were on full display for any passersby on the street. 3/18/24 Tr. 13, 14. His genitals were also on full display to anyone in the building lobby because the lobby was well-lit and the building's door and façade were made of glass. Def.'s Ex. 7; 3/18/24 Tr. 11-12.

Eventually Flowers pried the door open and entered the lobby. 3/18/24 Tr. 64. By this point, Okpala had retreated to the top of a small flight of stairs that connected the lobby to an elevator bank and to a short hallway leading to Flowers's apartment. 3/18/24 Tr. 21-22, 61, 64; Def.'s Exs. 7, 8. As Flowers climbed the

[1] The timestamps here and below refer to the time of the video clip, rather than the embedded timestamp in the video. For this citation, the embedded timestamp is 00:18:17-00:20:19 for this same period.

stairs, Okpala pushed him away. 3/18/24 Tr. 22, 70-71. Flowers eventually passed Okpala and proceeded down the hallway towards his apartment. 3/18/24 Tr. 74, 82. Okpala noticed that a phone, which she believed was Flowers's, had fallen to the floor during the scuffle. 3/18/24 Tr. 22, 79-80. She picked the phone up and went outside to call the police. 3/18/24 Tr. 22-23, 78. Flowers presented some evidence that he tried to cover his buttocks during this episode in the lobby, but no evidence that he tried to cover his genitals. *See* Def.'s Ex. 11.

B. Flowers subsequently exits the building to pursue Okpala.

Flowers subsequently followed Okpala back to the building's front door, where he stood for approximately fifteen seconds. 3/18/24 Tr. 85-86. During this time, Okpala was standing on the sidewalk, approximately 10-20 feet from the building entrance, and was on the phone with a 911 operator. 3/18/24 Tr. 84, 86, 87. Flowers propped the building door open. Gov. Ex. 1 at 13:35-58; 3/18/24 Tr. 24. He repeatedly asked Okpala for his phone back. 3/18/24 Tr. 86-87, 95. Flowers then pursued Okpala onto the walkway, sidewalk, and the street, still without pants on. 3/18/24 Tr. 23-24, 92-93, 105, 112-13, 116; Gov. Ex. 1 at 13:42-47. Once outside, Flowers "grabbed" Okpala by her hair and "slammed" her against a car. 3/18/24 Tr. 24, 93-94.

While out on the walkway, sidewalk, and street, Flowers did not cover his genitals. 3/18/24 Tr. 22-23, 107. The police soon arrived, and Flowers ran back into the building to his apartment, where he was arrested. Gov. Ex. 4; 3/18/24 Tr. 92.

C. The trial court's findings.

The court found that from the point when Flowers tried to "follow . . . Okpala into the building" there was "no attempt to cover himself." 3/20/24 Tr. 29-30. "And from that point forward, his genitalia [wa]s exposed on a consistent basis." 3/20/24 Tr. 30. Specifically, Flowers was exposed while he was standing on the building walkway attempting to pry the building door open using a metal grate, and when he was later in the building lobby, and later on the sidewalk. 3/20/24 Tr. 30; *see* 3/20/24 Tr. 31 ("And this occurred in the condominium lobby, condominium walkway, and the sidewalk outside the condominium.").

The court concluded that the offense began when Flowers tried to follow Okpala back into the building and that, at a minimum, Flowers violated Section 22-1312 while he "was in the walkway of the condominium that was open to the public," when "he was no longer covering himself" and was "trying to break into the building." 3/20/24 Tr. 33-34. In so holding, the court rejected Flowers's argument that Section 22-1312 applies only to exposures on public property. The court reasoned that Flowers's interpretation was inconsistent with *Bolz v. District of Columbia*, 149 A.3d 1130 (D.C. 2016), which held that Section 22-1312 criminalizes

"public viewing as opposed to private viewing of individuals' genitalia." 3/20/24 Tr. 31.

The court also rejected Flowers's invocation of a necessity defense. Flowers argued that he could not be convicted based on any exposure that occurred when he went onto the sidewalk and street to reclaim his phone from Okpala because he acted out of necessity. 3/20/24 Tr. 17-18. But the trial court found the necessity defense inapplicable because, regardless of Flowers's conduct on the sidewalk and street, he violated Section 22-1312 before Okpala took his phone when he stood on the building walkway "trying to break into the building." 3/20/24 Tr. 33-34.

STANDARD OF REVIEW

A motion for continuance is "addressed to the sound discretion of the trial court, and its decision either way will not be reversed except on a showing of 'clear abuse.'" *Bedney v. United States*, 684 A.2d 759, 766 (D.C. 1996) (quoting *Adams v. United States*, 502 A.2d 1011, 1025 (D.C. 1986)); *see Bernal v. United States*, 162 A.3d 128, 133 & n.8 (D.C. 2017).

This Court reviews questions of statutory interpretation de novo. *Eaglin v. District of Columbia*, 123 A.3d 953, 955 (D.C. 2015). This Court also reviews a trial court's legal conclusions de novo. *Griffin v. United States*, 618 A.2d 114, 117 (D.C. 1992). The trial court's findings, including its "recital of . . . events and the credibility of . . . narrators," are reviewed under the "clearly erroneous" standard.

Id. (internal quotation marks omitted). This Court must accept inferences made by the trial court so long as they are supportable by a reasonable view of the evidence. *Id.*

SUMMARY OF ARGUMENT

1. The trial court acted well within its discretion in granting a continuance to secure the testimony of an "essential" witness. The decision to grant or deny a continuance is committed to the sound discretion of the trial court and should not be disturbed absent a showing of prejudice. Here, there was no abuse of discretion: the District explained that Okpala, the victim and central witness, was no longer available for trial on January 24, 2024 because of a work conflict. The trial court could readily assess the content and relevance of Okpala's testimony based on her testimony in Flowers's first trial, and the District offered to make itself available for an alternate trial date "at the court's earliest availability." R. 557 (12/2/23 Opp'n 9 n.10). Anyways, Flowers suffered no prejudice from a roughly two-month delay in his trial. Absent a showing of any prejudice, this Court should leave Flowers's conviction undisturbed.

2. The trial court correctly held that D.C. Code § 22-1312, which makes it unlawful for any person, "in public, to make an obscene or indecent exposure of his or her genitalia," restricts conduct on both public and private property so long as the exposure occurs in open view of the public at large. Flowers errs in proposing an

alternate reading of Section 22-1312 that would limit the provision to conduct on public property. That reading is out of step with this Court's existing case law, which has already defined "in public" to mean "in open view; before the people at large." *Bolz*, 149 A.3d at 1143 (quoting D.C. Council, Report on Bill 18-425 at 7 (Nov. 18, 2010) ("Report")). It is also out of step with the provision's plain meaning and the legislative history. And adopting Flowers's cramped reading would create absurd loopholes and workability concerns.

3. If this Court rejects Flowers's restrictive reading of Section 22-1312, it need not reach his necessity defense at all. Even if it does broach the issue, this Court should find the defense unavailable. The necessity defense can immunize criminal conduct only if there were no legal alternatives available to the defendant besides violation of the law. Flowers argues that he had to go onto the public street with his genitalia exposed to prevent Okpala from robbing him of his phone. But at trial, Flowers proffered no evidence that there were no legal avenues available to him, and the evidence suggests that there were, in fact, several legal alternatives. The most obvious is that Flowers could have walked a few doors down to his apartment and put on clothes before going out into the street. Because he had not exhausted all legal options, Flowers cannot invoke a necessity defense.

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion In Granting A Continuance.

Flowers's retrial was originally set to start on January 24, 2024. After Okpala learned that she had an out-of-town work obligation on that date, the District promptly moved for a continuance. The court granted the motion, postponing the trial by less than two months, until March 18. Flowers argues that this was an abuse of discretion requiring reversal of his conviction. This Court should reject that contention, both because there was no error, and even if there was, the continuance did not prejudice Flowers.

The decision to grant or deny a continuance is committed to the discretion of the trial court, which has "wide latitude" to assess whether a continuance is needed. *Bernal*, 162 A.3d at 133 n.8; *Little v. United States*, 709 A.2d 708, 715 n.17 (D.C. 1998). The trial court's decision may be disturbed only upon a showing of an abuse of discretion, which requires "at a minimum, . . . some showing of prejudice." *Moctar v. United States*, 718 A.2d 1063, 1065 (D.C. 1998) (quoting *Mack v. United States*, 637 A.2d 430, 432 n.3 (D.C. 1994)). This makes good sense because the linchpin of the trial court's inquiry is whether the continuance is "reasonably necessary for a *just determination* of the cause." *Kimes v. United States*, 569 A.2d 104, 114 (D.C. 1989) (internal quotation marks omitted) (emphasis added).

To provide the trial court with signposts for assessing the prejudicial effect of granting or denying a continuance, a movant seeking a continuance to obtain the testimony of a witness must show "(1) who [the witness is], (2) what their testimony would be, (3) the relevance and competence of such testimony, (4) that the witness can probably be obtained if the continuance is granted, and (5) that due diligence has been used to obtain their attendance at trial." *Id.*

The District did just that, so there was no abuse of discretion. It identified Okpala by name and explained that she was the "victim in this case." R. 545 (12/1/23 Mot. 2). The District explained that a continuance was needed because Okpala was an "essential witness" and was "expected to testify at length about her observations of the defendant on the incident date." R. 545 (12/1/23 Mot. 2). The relevance and competence of Okpala's testimony were also clear to all parties and the trial court because Okpala had testified during Flowers's first trial. R. 93-248 (11/8/22 Tr.). In that proceeding, the trial court found Okpala to be "genuine and credible and sincere" and "fully credit[ed]" her testimony. R. 489 (11/8/22 Tr. 151). Even though Associate Judge Weisberg—who adjudicated the District's continuance request—did not oversee Flowers's first trial, he had access to Okpala's prior testimony, which was available on the docket as an exhibit to Flowers's motion to vacate his conviction and was summarized in Associate Judge Iscoe's order affirming Flowers's first conviction. R. 93-248 (11/8/22 Tr.), 280-93 (2/8/23 Order),

560 (12/7/23 Order). It also makes no difference that trial counsel representing Flowers during his first trial provided ineffective assistance of counsel—Flowers and the trial court still had notice of the general content of Okpala's testimony and could use that testimony for impeachment purposes if needed.

Further, there was no question about Okpala's commitment to testifying at a future trial date. The District requested a continuance solely because Okpala was "scheduled to present at a work conference in Las Vegas from January 22, 2024 through January 25, 2024." R. 545 (12/1/23 Mot. 2). But, as the District explained, as soon as Okpala learned about the conference on November 27, 2023, she "immediately notified" the District, which then promptly sought a limited continuance until "the court's earliest availability" after the conflict with Okpala's schedule. R. 545 (12/1/23 Mot. 2), 557 (12/2/23 Opp'n 9 n.10). These facts demonstrated both that Okpala's testimony could likely be obtained if a continuance was granted and that the District was exercising due diligence. Viewed in light of the entire case history, the District carried its burden, and the trial court did not abuse its discretion in finding "good cause" existed for a continuance. R. 560 (12/7/23 Order).

In any event, even if the trial court misjudged any of the relevant factors, the grant of the continuance caused Flowers no prejudice. Flowers did not even try to argue in his opposition below that the continuance would be prejudicial. *See* R. 549-

58 (12/2/23 Opp'n). That makes sense because the continuance requested was minimal: The District would accept an alternate trial date "at the court's earliest availability," R. 557 (12/2/23 Mot. 9 n.10), and the actual delay turned out to be less than two months, R. 17-18 (Super. Ct. Docket Sheet, Item Nos. 136-42). Flowers was not incarcerated pending trial. Nor did this limited delay of the trial impair his defense in any way. And no evidence favorable to Flowers was lost between January 24 and March 18. This lack of prejudice is, on its own, sufficient reason to affirm. *See Moctar*, 718 A.2d at 1065. Indeed, Flowers does not cite, and the District is not aware of, any decision of this Court reversing the grant of a continuance in similar circumstances. If anything, *denying* the District's motion would have been an abuse of discretion. *See Harris v. Akindulureni*, 342 A.2d 684, 686-87 (D.C. 1975) (finding the trial court abused its discretion in *denying* a continuance when the movant acted promptly and in good faith and there was no evidence of prejudice to the other party).

Flowers's arguments to the contrary lack merit. To start, his contention that the District inadequately proffered Okpala's testimony, Br. 26, blinks the reality of this case. As discussed, the content, relevance, and competence of her expected testimony was entirely clear to everyone given her testimony in the previous trial. Flowers and the trial court had more than a mere proffer—they had a complete transcript of Okpala's prior testimony. R. 93-248 (11/8/22 Tr.).

Flowers also complains that the District did not state whether it had subpoenaed Okpala. Br. 26. But none of the cases Flowers cites suggest a witness *must* be subpoenaed; a subpoena is just one form of evidence that could substantiate a litigant's diligence in obtaining a witness's attendance. *See, e.g.*, *Moctar*, 718 A.2d at 1065-66 (discussing whether witness had been subpoenaed but not stating a subpoena is required); *Daley v. United States*, 739 A.2d 814, 818 (D.C. 1999) (same). Even in states that have statutorily codified the showing required for a continuance and mandated that a witness be subpoenaed, courts have relaxed that requirement when considering the "grant of a continuance" as opposed to the denial of a continuance. *See Parker v. State*, 655 S.E.2d 582, 584 (Ga. 2008) (explaining that "the terms of [Georgia's] continuance statutes are strictly applied 'in reviewing the denial, rather than the grant, of a motion for continuance'") (quoting *Hicks v. State*, 472 S.E.2d 474 (Ga. 1996)).

This asymmetry makes sense because the ultimate concern is "a just determination of the cause." *Kimes*, 569 A.2d at 114 (internal quotation marks omitted). *Denying* a continuance will undermine a just determination of the case if it precludes relevant testimony from a witness. But *granting* a continuance can have that effect only if the party opposing the continuance will be prejudiced by the delay—which it often will not if the delay is modest, as it was here.

Although, as noted, Flowers identified no prejudice in his trial court opposition, he now tries to fundamentally reshape the prejudice inquiry. He suggests that Okpala's testimony *itself* constitutes prejudice. *See* Br. 27-28. But Flowers identifies no case that has treated the admission of a witness's testimony following the grant of a continuance as itself prejudicial. To the contrary, in one of the cases Flowers relies upon—*Bernal*, 162 A.3d 128—a criminal defendant challenged the trial court's grant of a one-week continuance, which gave the government time to procure a DNA test substantiating the defendant's guilt, yet this Court still affirmed the trial court's finding that there was a "lack of prejudice" to the defendant. *Id.* at 132, 133 n.8. Moreover, to treat the availability of relevant evidence itself as prejudicial, even when the delay in securing that testimony causes the defendant no other harm, would be antithetical to reaching "a just determination of the cause." *Kimes*, 569 A.2d at 114.

Flowers also complains that the trial court did not make express findings to support the grant of a continuance. Br. 28-29. But no rule compels a trial court to make express findings in these circumstances. In fact, this Court has previously affirmed a trial court's denial of a continuance even though the "exact basis" for the denial "[wa]s unclear." *M.M. & G., Inc. v. Jackson*, 612 A.2d 186, 190-91 (D.C. 1992). Implicit in the trial court's finding of "good cause" to support a continuance is the court's agreement with the District's justifications for the continuance. R. 560

(12/7/23 Order). That suffices. *Cf. Jordan v. Jordan*, 14 A.3d 1136, 1149-50 (D.C. 2011) (excusing absence of express trial court findings required by statute because "the record so plainly supports the conclusion that the required findings were actually (though implicitly) made"). It would also be pointless to remand the case now for findings when the continuance caused Flowers no prejudice.

Finally, this Court should consider the implications of the remedy Flowers seeks. He asks this Court to "reverse and remand for further proceedings" or else to "remand" so that the trial court can assess whether Flowers could be found guilty *without* Okpala's testimony. Br. 27-29. Reading between the lines, Flowers asks for either a retrial or an outright acquittal. In the case of a retrial, the remedy awarded for a purportedly improper delay would be only further delay—a nonsensical result. And an outright acquittal would be unprecedented and unjustified—the opposite of a "just determination" of the case. *Kimes*, 569 A.2d at 114. Granting either remedy would only incentivize criminal defendants to object to every request for a continuance in hopes of securing a windfall on appeal if the trial does not go their way. That would not further the just resolution of criminal prosecutions on the merits; it would only clog this Court's docket. The Court should affirm the trial court's grant of a continuance.

II. The Trial Court Correctly Interpreted D.C. Code § 22-1312 To Proscribe Flowers's Exposure Of His Genitalia On The Walkway Of His Apartment Building.

Section 22-1312 makes it unlawful for any person, "*in public*, to make an obscene or indecent exposure of his or her genitalia." D.C. Code § 22-1312 (emphasis added). Flowers contends that "in public" limits the provision's scope to exposures occurring on public property and that the trial court therefore erred in finding Flowers violated Section 22-1312 by exposing his genitalia while on the walkway in front of his privately owned apartment building. But Flowers's restrictive reading of Section 22-1312 conflicts with this Court's case law, the ordinary meaning of the provision's text, and the legislative history. Adopting Flowers's interpretation would also create absurd loopholes and workability concerns.

This Court should instead reaffirm what it has already held: Section 22-1312 proscribes indecent and obscene exposures of genitalia that occur *in view of* the public, whether or not they occur *on* public or private property. If the Court does so, it need not reach the issue of Flowers's necessity defense at all. *See infra* Part III. It can affirm Flowers's conviction based solely on Flowers's conduct as he reentered the building, which undisputedly occurred before Flowers's purported necessity defense is implicated. Flowers has forfeited any other challenge to the trial court's finding that he violated Section 22-1312 while reentering the building. *See Barber*

v. United States, 179 A.3d 883, 893 n.19 (D.C. 2018) (arguments not raised in an opening brief on appeal are forfeited); 3/20/24 Tr. 33-34.

A. This Court has already held in *Bolz v. District of Columbia* that "in public" means "in open view" "before the people at large."

In *Bolz v. District of Columbia*, 149 A.3d 1130 (D.C. 2016), this Court rejected a First Amendment overbreadth challenge to Section 22-1312. The *Bolz* defendant argued that by prohibiting "indecent," and not just "obscene" exposures, Section 22-1312 criminalized expressive nudity, including "theatrical and artistic displays of nudity," in violation of the First Amendment. *Id.* at 1142-43. This Court disagreed. It acknowledged that the provision touched upon "certain kinds" of expressive nudity but noted that any "imposition on First Amendment rights is limited" because the provision applies only "in public." *Id.* at 1143. And "in public," the Court explained, means "in open view; before the people at large." *Id.* at 1143 (citing Report at 7). In other words, Section 22-1312 governs settings where "minors might be present or nonconsenting adults are not easily shielded from displays of nudity." *Id.* In so holding, this Court gave no indication that "in public" meant only on public property. To the contrary, this Court adopted a commonsense reading of "in public" that proscribes indecent and obscene exposures that occur in open view of the public at large, regardless of whether they occur on public or private property.

Bolz's discussion of the meaning of "in public" resolves this issue. *Bolz* is binding precedent from this Court interpreting the precise statutory language at issue. Flowers's contrary arguments and attempts to rely on decisions other than *Bolz* are unavailing.

First, Flowers contends that *Bolz* is not binding because it did not pass upon the "precise question" at issue and "questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon" have not been definitively decided. Br. 30-31 (quoting *In re Q.B.*, 116 A.3d 450, 455 (D.C. 2015)). But the meaning of "in public" in Section 22-1312 did not "lurk in the record" in *Bolz*. This Court was required to pass upon the phrase's meaning to assess the extent of the provision's infringement on First Amendment rights. It was thus a "necessary" step in the Court's conclusion and is a binding holding of this Court. *See Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) (courts are bound by not only the "result" of a prior decision, but also "portions of the opinion necessary to that result"); *Lee v. United States*, 668 A.2d 822, 828 (D.C. 1995) (similar).

Indeed, the very cases Flowers cites make clear that the rule of stare decisis is fairly invoked when the "judicial mind" has been "applied to and passed upon" the question at issue. *See, e.g.*, *Poth v. United States*, 150 A.3d 784, 788 n.7 (D.C. 2016); *Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994). The question before the *Bolz* Court and before this Court today is the same: what does "in public" in

Section 22-1312 mean? This Court squarely resolved that question in *Bolz*. And while Flowers emphasizes that the facts of *Bolz* "differ markedly" from those of this case, Br. 32 n.47, that makes no difference when the question of statutory meaning at issue remains the same.

Second, Flowers suggests that *Bolz* is counterbalanced by *Campbell v. United States*, 163 A.3d 790 (D.C. 2017), which he contends construed "in public" to mean "on public property." Br. 35. But that construction appears nowhere in *Campbell*. *Campbell* considered whether D.C. Code § 25-1001, which criminalizes the possession of open containers of alcohol in "parking area[s]," governs a median between parking lots that is not intended for vehicles. In passing on that question, this Court stated that "when the Council has meant to prohibit an act in *any public place* it has done so," citing Section 22-1312 as an illustrative example. *Id.* at 798 (emphasis added). That suggests only that the Court believed Section 22-1312 governs "all public places"; it does not limit the provision to conduct on "public property." Indeed, in other provisions of the Code, the Council has defined "public place" as "a place to which the general public has access" including the "parking lot of a store, restaurant, tavern, shopping center, or other place of business." D.C. Code § 7-2509.07(g)(2)(A); *id.* § 47-2885.17a (defining "public place" to include "the doorways or entrance ways to any building which fronts" "any street" or "sidewalk").

Third, Flowers directs the Court to the discussion of the District's voyeurism statute in *Robinson v. United States*, 263 A.3d 139 (D.C. 2021). That statute makes it unlawful to photograph an individual without their consent "under circumstances" in which they have a reasonable expectation of privacy. *Id.* at 141 (citing D.C. Code § 22-3531(d)). Flowers emphasizes that the voyeurism statute is tethered to the "circumstances" of the act, not the act's "location[]." Br. 36 (citing *Robinson*, 263 A.3d at 142). Fair enough. But Flowers then argues—without citation to authority—that Section 22-1312, unlike the voyeurism statute, *is* tethered to "physical location, not solely [to] 'circumstances.'" Br. 36. *Robinson* does not support that leap in logic. It does not discuss Section 22-1312 at all. And Flowers has not mustered any additional support for his preferred statutory reading.

B. The ordinary meaning of Section 22-1312's plain text and its legislative history make clear that "in public" does not mean on public property.

Even if this Court were writing on a blank slate without the benefit of *Bolz*, it should reject Flowers's reading of Section 22-1312. This Court's first step in interpreting statutory text is to ascertain whether the language is "plain and admits of no more than one meaning." *Roberts v. United States*, 216 A.3d 870, 876 (D.C. 2019). As part of that inquiry, the Court considers "statutory context and structure" and "evident legislative purpose." *Id.* The Court may also rely on 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)). Each of these factors refute Flowers's "on public property" interpretation.

To start, the ordinary meaning of "in public" is clear. It means "in a place where one can be seen by many people." *in public*, MERRIAM-WEBSTER (2024), https://bit.ly/3TKhTo8; *see also in public*, COLLINS DICTIONARY (2024) ("not in private; in a situation open to public view or access"), https://bit.ly/3zwRMKH; *public*, NEW OXFORD AMERICAN DICTIONARY 1411 (3d ed. 2010) ("**in public** in view of other people; when others are present: *men don't cry in public*") (emphases in original); *public*, THE AMERICAN HERITAGE DICTIONARY 1424 (5th ed. 2011) ("**in public** [i]n such a way as to be visible to the scrutiny of the people") (emphasis in original). No dictionary appears to equate the phrase "in public" with "on public property."

Rather than grapple with its ordinary meaning, Flowers contends that "in public" cannot mean "in open view" of the public because that would render part of the statutory language superfluous. Specifically, "in public" would be coterminous with "indecent," which this Court has defined as "at such a time and place" where a reasonable person would know or should have known that their "act w[ould] be open to the observation of others." Br. 34-35 (citing *Parnigoni v. District of Columbia*, 933 A.2d 823, 826 (D.C. 2007)). But, as this Court has repeatedly and recently emphasized, the "preference for avoiding surplusage constructions is not absolute"

or necessarily "dispositive of the case." *Czajka v. Holt Graphic Arts, Inc.*, 310 A.3d 1051, 1061 (D.C. 2024) (collecting authorities). And the canon carries even less weight when there are "unquestionabl[e] redundancies" in the statute "under any reading of it." *Cardozo v. United States*, 315 A.3d 658, 667-68 (D.C. 2024). That is the case here where there is necessarily some overlap between acts that are "obscene" and "indecent."

And, regardless, the legislative history suggests that the Council added "in public" in 2011 to codify, and to make explicit, the judicial understanding of Section 22-1312 that had developed through case law—not to upend it. In other words, the redundancy Flowers points to is a *feature* of the statutory scheme, not a bug. The "redundancy serv[es] to amplify and clarify the two words' intended meanings." *Cardozo*, 315 A.3d at 668; *see* Brett M. Kavanaugh, *The Courts and the Administrative State*, 64 Case W. Rsrv. L. Rev. 711, 718 (2014) ("members of Congress often want to be redundant" "to make doubly sure about things").

The Council stated that the 2011 amendments to Section 22-1312 were made to "clarify" the Code because "case law has changed the applicability of the[] statute[] dramatically." Report at 1. And changes were needed to "clarify" the statutory text to ensure it was not "vague or unenforceable." *Id.* at 6. Specifically, prior to the 2011 amendments, the statute prohibited "obscene or indecent exposure of [an individual's] person." *Id.* at 7. As noted, courts interpreted "indecent" to

mean at a time and place where a reasonable person would know or should have known that their acts were "open to the observation of others," and "person" to mean genitalia. *Parnigoni*, 933 A.2d at 826. Rather than leaving the specifics of that judicial construction to case law, the Council opted to incorporate it into the text itself by adding "in public," which it equated with "in open view; before the people at large; not in private or secrecy," and replacing "person" with "genitalia or anus." Report at 7.

As the Council explained, that Amendment is nothing more than an excision of "outdated phrases" and an addition of clarifying language so that the statutory text better reflects the state of the law. Report at 7. There is nothing suspect about this practice. "It is a common and customary legislative procedure to enact amendments strengthening and clarifying existing laws." *Dupont Circle Citizens Ass'n v. D.C. Zoning Comm'n*, 431 A.2d 560, 567 n.12 (D.C. 1981) (quoting *United States v. Tarpet*, 625 F.2d 111, 120-21 (6th Cir. 1980)).

Flowers suggests that if the legislature wanted to criminalize exposure of genitalia on private property it could have written the statute to read (1) "[i]t is unlawful for a person . . . to make an obscene or indecent exposure of his or her genitalia or anus" or (2) "[i]t is unlawful for a person, in public, to make an . . . exposure of his or her genitalia or anus." Br. 36-37. But neither rewrite fulfills the Council's purpose. The first leaves the public nature of the prohibited conduct

implicit (and therefore vague), and the second risks running afoul of the First Amendment because it is not limited to obscene or indecent nudity.

Conversely, had the Council wanted to limit Section 22-1312's application to public property, there was an obvious phrase to use: "on public property." The Council has used that phrase many times. *See, e.g.*, D.C. Code § 50-2201.04b (prohibiting the use of all-terrain vehicles and dirt bikes "on public property"); *id.* § 5-132.21 (tethering school safe passage emergency zones to "public space or public property"); *id.* § 7-1731 (prohibiting the distribution of tobacco products on "public property"); *id.* § 22-3312.02 (prohibiting defacement of certain symbols and displays of certain emblems "on public property"); *id.* § 25-726 (restricting litter on "public property"). It did not do so here, however, and Flowers has provided no reason to depart from the ordinary plain meaning of the text.

C. Flowers's contrary reading would generate absurd results and workability concerns.

This Court "avoid[s] interpretations of statutes which lead to implausible results" because it assumes that the legislature "acted logically and rationally." *Wade v. United States*, 173 A.3d 87, 95 (D.C. 2017) (internal quotation marks omitted). The Court thus carefully considers "the potential consequences of adopting a given interpretation." *In re G.D.L.*, 223 A.3d 100, 104 (D.C. 2020).

Flowers's proposed interpretation would lead to absurd loopholes. Section 22-1312 would no longer proscribe the exposure of one's genitalia in a private

daycare or elementary school simply because one was on private property. One could streak naked through the Capital One Arena or expose oneself in a crowded Trader Joes checkout line. That stark and nonsensical departure from longstanding law cannot have been the Council's intent.

Flowers's interpretation would also cause workability concerns. The propriety of an arrest would turn on an officer's ability to discern, on the spot, whether property was public or private, rather than the ability to make a commonsense assessment of whether an exposure occurred in a location likely to be seen by others. That would only muddy enforcement efforts.

Defining "in public" to mean "on public property" would also risk nullifying a statutory scheme that cross-references Section 22-1312. Federal law makes it a crime to commit an act in the "special aircraft jurisdiction of the United States" above the District that violates Section 22-1312. 49 U.S.C. § 46506 (enacted in 1994) (cross-referencing D.C. Code § 22-1112, the prior codification of Section 22-1312). Flowers's reading of Section 22-1312 would nullify that statute for acts on all privately owned airplanes.

III. This Court Need Not Consider Flowers's Necessity Defense—But If It Does, It Should Affirm Flowers's Conviction Because The Defense Is Unavailable.

As Flowers concedes, the trial court found him guilty based on conduct that occurred on the private walkway in front of his building. Br. 38. If this Court finds

that Section 22-1312 extends to private property, Flowers's conviction can be sustained on that basis alone and the Court need proceed no further. After all, Flowers offers no necessity that would excuse his exposures on the private walkway. Flowers's necessity defense is relevant only if the Court finds that Section 22-1312 is limited to exposures occurring on public property—in which case, this Court would need to consider whether Flowers's conduct on the public sidewalk and street, after Okpala had taken his phone, violated Section 22-1312.

If it reaches this step, the Court should find the defense unavailable. The necessity defense exonerates "persons who commit a crime under the pressure of circumstances" only if the "harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant's breach of the law." *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) (internal quotation marks omitted). The defense is unavailable if: "(1) there is a legal alternative available to the defendant[] that does not involve violation of the law, (2) the harm to be prevented is neither imminent, nor would be directly affected by the defendant['s] actions, and (3) the defendant['s] actions were not reasonably designed to actually prevent the threatened greater harm." *Id.* at 778.

Because necessity is an affirmative defense, Flowers bore the burden of putting forth sufficient evidence to establish it. *Emry v. United States*, 829 A.2d

970, 973 (D.C. 2003). This Court has "rarely found" the defense of necessity "viable." *Cardozo*, 315 A.3d at 673.

This case is no exception. Flowers argues that the necessity defense immunizes his decision to follow Okpala onto the public sidewalk and street because she took his phone. *See* Br. 40-48. But Flowers presented no evidence that he had exhausted all other legal alternatives before following Okpala. *See Griffin*, 447 A.2d at 778 (necessity defense unavailable if defendant "failed to proffer any evidence" that "all other legal alternatives" had been "exhausted"); *see also United States v. Bailey*, 444 U.S. 394, 410 (1980) (similar).

For example, Flowers provided no evidence that he could not have gone to his apartment and put on clothes before following Okpala outside. If anything, the opposite seems true. Flowers was just a few doors down from his apartment when Okpala took his phone, so he could have clothed himself in a matter of seconds. 3/18/24 Tr. 74, 82. And when the police arrived several minutes later, Flowers fled inside his individual unit—so he either had his key or had left the door open. Gov. Ex. 4; 3/18/24 Tr. 92. Flowers also proffered no evidence that other plausible legal avenues were foreclosed. For example, Flowers could have taken his sweatshirt off and tied it around his waist to make a good faith effort at covering his genitals, or he could have simply waited for the police to arrive to report the alleged robbery of his

phone. Flowers's failure to even explain why he could not have taken one of these steps forecloses any necessity defense.

CONCLUSION

The Court should affirm Flowers's conviction.

Respectfully submitted,

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October 2024

CERTIFICATE OF SERVICE

I certify that on October 21, 2024, this brief was served through this Court's electronic filing system to:

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