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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, -vs- Dondarro Jimmell Watts, Defendant and Appellant.	)))))))))	Supreme Court No. 20220206 Dist. Ct. No. 08-2022-CR-00221

BRIEF OF PLAINTIFF AND APPELLEE STATE OF NORTH DAKOTA

Appeal from Criminal Judgment Entered August 30, 2022

South Central Judicial District, Burleigh County
The Honorable Bonnie Storbakken, Presiding

ORAL ARGUMENT REQUESTED

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[¶ 3] Whether the district court committed reversible error by sustaining the State's objection to Watts' question on an ultimate issue.

[¶ 4] Whether the State committed prosecutorial misconduct during closing argument.

[¶ 5] Whether the district court abused its discretion in requiring Watts to register as a sexual offender.

REQUEST FOR ORAL ARGUMENT

[¶ 6] The term "public place," as found in N.D.C.C. § 12.1-20-12.1(1)(a), is not defined by statute, and this Court has not previously interpreted that term in a criminal case. The State therefore requests oral argument.

STATEMENT OF THE CASE

[¶ 7] The State charged Appellant Dondarro Jimmell Watts ("Watts") by Information with indecent exposure in violation of N.D.C.C. § 12.1-20-12.1(1)(a). (R1). A six-person jury convicted Watts of that offense on July 1, 2022. (R37). On that date, the district court sentenced Watts to one-hundred eighty days in jail, consecutive to sentences Watts was already serving in prison. (R55:58:8-9). The district court also ordered Watts to register as a sexual offender. (R55:57:21-25). Before the court entered judgment, the court entered a Rule 35 order correcting Watts' sentence to allow the court to consider whether to deviate from the requirement that Watts register as a sexual offender. (R38).

[¶ 8] The district court held a sentencing hearing on August 30, 2022. After that hearing, the district court again sentenced Watts to one-hundred eighty days in jail, consecutive to sentences Watts was already serving in prison, and the district court required Watts to register as a sexual offender. (R53). Watts timely filed a notice of appeal. (R60).

STATEMENT OF FACTS

[¶ 9] On August 22, 2021, Watts was incarcerated at the Burleigh Morton Detention Center. (R55:13:22-25). That evening, Detention Officer Allen passed out food to inmates, including to Watts. (R55:16:21-24). As Officer Allen approached Watts' cell, she noticed that Watts was in the shower. (R55:17:1-2). Watts then "poked his head out [of the shower] and asked if he'd be able to eat." (R55:17:19-20). At that time, Officer Allen could only see Watts' head; she could not see Watts' entire body. (R55:18:5-8). Because Watts was showering, Officer Allen planned to serve Watts his tray and move on to other inmates. (R55:17:25-18:1). Officer Allen responded that Watts would have time to eat and that she would take the tray when he was done eating. (R55:17:22-23).

[¶ 10] As Officer Allen began walking away to pass food to the next cell, Watts "asked do you want to see something, and he proceeded out of the shower." (R55:18:1-4). At that time, Officer Allen could see that "Watts had his penis in his hand and he was stroking it." (R55:18:11-12). At trial, Officer Allen testified that Watts stepped out of the shower to reveal that he was masturbating after asking Officer Allen whether she wanted to "see something[.]" (R55:18:13-18). Officer Allen testified that Watts was aroused at that time. (R55:18:22-25). She also testified that she would not have been able to see Watts masturbating or his genitals if he had not stepped out of the shower. (R55:19:1-8).

[¶ 11] Near the conclusion of Officer Allen's testimony, the State played a security camera video of the incident for the jury. (R34). In that video, Watts initially conceals his genitals and the fact that he is masturbating by standing behind a wall while he talks with Officer Allen. (R34 at 00:26 – 0:49). Watts then steps out from behind the wall to reveal to Officer Allen that he is masturbating. (R34 at 00:50 – 00:53).

[¶ 12] Before the jury trial, the State filed its proposed jury instructions on April 11, 2022. (R17). Watts filed his proposed jury instructions on April 12, 2022. (R22). Watts' proposed instructions were identical to the State's, except that Watts's proposed instructions did not include a definition of "public place." (*Compare* R17, at 11, *with* R22, at 11).

[¶ 13] The district court provided the parties with proposed jury instructions by email on June 28, 2022. Those proposed instructions included the definition of "public place" requested by the State. For that reason, Watts filed a "Defendant's Comment on Jury Instructions" on June 29, 2022. (R30). In that comment, Watts asked the district court to "adopt the pattern jury instruction rather than the jury instruction submitted by the State." (R22, at 3). The district court provided an updated version of the jury instructions to counsel for the parties by email on June 29, 2022. Those instructions became the jury instructions given to the jury at trial.

[¶ 14] The definition of "public place" appeared in the opening instructions given by the district court at trial. Although specifically asked about preliminary

matters before the court read opening jury instructions, Watts did not object to the jury instruction that included the definition of "public place." (R55:3:15-20). Nor did Watts object to the jury instruction on "public place" while the district court read it to the jury. (R55:6:10).

[¶ 15] A six-person jury found Watts guilty of indecent exposure on July 1, 2022. (R37). Following the verdict, the district court sentenced Watts to one-hundred eighty days' incarceration, consecutive to cases for which Watts had already been sentenced to prison. (R55:58:8-9). The district court also required Watts to register as a sexual offender. (R55:58:10-11). In imposing the sentence, the district court noted that "the reporting requirement is not something that I can adjust. All right. That is a minimum mandatory." (R55:57:23-25). Before judgment was entered, the district court filed a Rule 35 order allowing it to reconsider whether to require Watts to register as a sexual offender. (R38).

[¶ 16] The district court held a sentencing hearing on August 30, 2022. After hearing arguments from the State and from Watts' attorney, the district court again sentenced Watts to one-hundred eighty days' incarceration, consecutive to cases for which Watts had already been sentenced to prison. (R53). The district court also sentenced Watts to register as a sexual offender. (R53). Watts filed a notice of appeal. (R60).

ARGUMENT

I. Watts Failed to Preserve for Review his Argument that the District Court Improperly Instructed the Jury.

[¶ 17] Watts asks this Court to reverse his conviction because, he argues, the district court's instruction on "public place" was "an incorrect statement of the law" and was "misleading." (App. Br., at ¶¶ 21-22). But Watts failed to preserve that argument for appellate review because he failed to object to the jury instruction on "public place" before or during trial. Under N.D.R.Crim.P. 30(c)(1), "a party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter object to and the grounds of the objection." Although Watts provided "comment" on the State's proposed instruction of "public place," Watts did not object to the version of the instruction ultimately given by the district court at trial. Watts therefore failed to preserve the argument for appellate review. N.D.R.Crim.P. 30(c)(2).

[¶ 18] In his statement of the case, Watts claims that "[t]he record does not indicate . . . when/if the parties were given an opportunity to object to the court's instructions." (App. Br., ¶ 6). Watts had an opportunity to object to the jury instructions before the trial, but did not:

> THE COURT: Okay. All right. Are there any preliminary matters that need to be discussed?
>
> MR. INGOLD: Not from the State, Your Honor.
>
> THE COURT: Okay. Mr. Arthurs?
>
> MR. ARTHURS: Not from the defense.
>
> THE COURT: Okay. All right. Well, then we'll come back at nine. Be ready to go.

(R55:3:14-22). Watts could have objected to the jury instruction on "public place" at that time, but he failed to make any objection. As such, Watts failed to preserve the issue for appellate review. *State v. Flanagan*, 2004 ND 112, ¶ 5, 680 N.W.2d 241.

[¶ 19] Even if Watts did not have a final copy of the jury instructions at the time he failed to object before trial, Watts failed preserve his argument regarding the instruction for appellate review by failing to object at the time the instruction was given. Because Watts did not object promptly after learning that the instruction would be, or had been, given, any objection to instruction now is untimely. N.D.R.Crim.P. 30(c)(2)(B) (requiring party not informed of an instruction to "object[] promptly after learning that the instruction or request will be, or has been, given").

[¶ 20] Moreover, "[t]o preserve a challenge to a jury instruction, an attorney must except specifically to the contested instruction, regardless of whether the attorney proposed another instruction on the same issue." *State v. McNair*, 491 N.W.2d 397, 399 (N.D. 1992). Watts failed to do so here. Although Watts filed a "comment" before trial requesting the district court not give the State's proposed instruction on the definition of "public place,"—a comment which persuaded the court not to give the State's proposed definition—Watts did not specifically object to the definition of "public place" ultimately given by the district court at trial. As such, he failed to preserve for appeal any challenge to that instruction. *Id.*

[¶ 21] Because Watts failed to object to the district court's instruction on "public place" at trial, this Court's "inquiry is limited to determining whether the alleged error constitutes obvious error affecting substantial rights of the defendant under Rule 52(b), N.D.R.Crim.P." *McNair,* 491 N.W.2d at 399. This Court exercises its "power to notice obvious error cautiously and only in exceptional circumstances where the accused has suffered serious injustice." *State v. Olander,* 1998 ND 50, ¶ 12, 575 N.W.2d 658. This Court has "rarely noticed obvious error under N.D.R.Crim.P. 52(b)." *Id*. To establish obvious error, the appellant bears "the burden to show (1) error, (2) that is plain, and (3) that affects substantial rights." *State v. Johnson*, 2001 ND 184, ¶ 12, 636 N.W.2d 391.

[¶ 22] Watts cannot establish obvious error here because the district court's instruction on "public place" was not an error. The district court's instruction, in its entirety, was:

> "Public Place" has not been defined by the North Dakota Legislature within the criminal code. Whether an area is a public place is a question of fact for you to decide.

(R36, at 7). The first sentence in that instruction is correct; "public place" is not defined in Title 12.1. Nor is a definition of "public place" readily apparent form the legislative history. *Hougum v. Valley Memorial Homes*, 1998 ND 24, ¶ 43 n.5, 574 N.W.2d 812 (noting that the indecent exposure statute "was enacted in 1979 . . . to specifically criminalize masturbation in a public place, rather than to require use of the disorderly conduct statue to criminalize that conduct" and

that "[t]he legislative history does not help define 'public place' for purposes of N.D.C.C. § 12.1-20-12.1"). As such, the first sentence of the court's instruction is correct and was not error.

[¶ 23] Watts apparently takes exception to the second sentence, arguing that "[t]he court's jury instruction is misleading because it does not state the framework, such as words are given their plain, ordinary, and commonly understood meaning, which jurors are to use when deciding a fact." (App. Br., ¶ 22). Watts claims the district court "instruct[ed] jurors it is up to them to create a definition [of public place], even if it is not the commonly understood meaning of the word[.]" (App. Br., ¶ 22). That is not at all what the district court did here, as is apparent from a fair reading of the instruction. Watts fails to explain how instructing the jurors that they must decide whether an area is a public place amounts to an instruction that the jury must, in Watts' words, "create a definition [of public place], even if it is not the commonly understood meaning of the word[.]" (App. Br., ¶ 22). A fair reading of the instruction shows that it allowed the jurors to apply their common understanding of the term "public place" to the facts of this case. Nothing in the instruction suggested they do otherwise. As such, the district court's instructions did not constitute obvious error.

II. Watts' Conviction Was Supported by Sufficient Evidence.

[¶ 24] This Court's standard of review on sufficiency of the evidence is well-established:

> A defendant challenging the sufficiency of the evidence on appeal must show that the evidence, when viewed in the light most

> favorable to the verdict, reveals no reasonable inference of guilt. This Court's role is to merely review the record to determine if there is competent evidence that allowed the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. The Court does not weigh conflicting evidence or judge the credibility of witnesses.

State v. Mohammed, 2020 ND 52, ¶ 5, 939 N.W.2d 498 (citations and quotations omitted). This Court "assume[s] that the jury believed the evidence which supports the verdict and disbelieved any contrary or conflicting evidence." *State v. Olson*, 372 N.W.2d 901, 902 (N.D. 1985). "A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt." *State v. Gray*, 2017 ND 108, ¶ 15, 893 N.W.2d 484 (quotation omitted).

[¶ 25] Here, the State charged Watts with indecent exposure in violation of N.D.C.C. § 12.1-20-12.1(1)(a). That statute provides that "[a]n individual, with intent to arouse, appeal to, or gratify that individual's lust, passions, or sexual desires, is guilty of a class A misdemeanor if that individual . . . [m]asturbates in a public place[.]" N.D.C.C. § 12.1-20-12.1(1)(a). At trial, the evidence established that Watts masturbated, while aroused, after emerging from the privacy of his shower to an area in which he could be seen by Officer Allen. (R55:18:1-25). Although some of Watts' shower area could be seen by security camera, Officer Allen testified that the back right corner of Watts' shower area "is out of view" of the camera. (R55:16:18-20). As such, the State established

that Watts could have masturbated in a private area of his shower, out of view of Officer Allen and the security camera. Because Watts emerged from the area of his shower that Officer Allen could not see, the jury could reasonably have concluded that Watts masturbated in a public place with intent to arouse, appeal to, or gratify his lust, passions, or sexual desires. And because this Court views the evidence in the light most favorable to the prosecution and draws inferences in favor of the prosecution, the judgment of conviction should be affirmed.

[¶ 26] Watts argues that the evidence was insufficient for the jury to convict him of indecent exposure because his cell could not, as a matter of law, constitute a "public place." This Court has not previously interpreted the meaning of the phrase "public place" within the indecent exposure statute, but this Court has recognized that "[i]n criminal prosecutions for indecent exposure, other courts have defined a public place as a place where the actor might reasonably expect conduct to be seen by others." *Hougum*, 1998 ND 24, ¶44, 574 N.W.2d 812; *see also State v. Whitaker*, 793 P.2d 116, 119 (Ariz. Ct. App. 1990) ("We conclude, as other courts have, that 'public' or 'public place' as used in public indecency statutes means a place where the actor might reasonably expect his conduct to be viewed by another.").

[¶ 27] Because the jury did not have before it a definition of "public place," it was free to use its common understanding of that phrase in its consideration of the evidence here. Watts complains that the State "repeatedly told the jurors during closing arguments it was their decision what the definition of a public

place was. This is incorrect. The definition of a public place is not up to the jury, the definition is the ordinary, plain, and commonly understood meaning of the term." (App. Br., ¶ 24). Watts therefore wants jurors to use the "plain, and commonly understood meaning of words public place" but complains that the jurors should not be allowed to decide a definition of the phrase "public place." Watts does not explain how the jurors should have determined the "commonly-understood" meaning of "public place" differently than they did here. Because the jurors applied their common understanding of the term "public place," the judgment should be affirmed.

III. The District Court Did Not Commit Reversible Error by Sustaining the State's Objection to Watts' Question on an Ultimate Issue.

[¶ 28] At trial, the State objected to counsel for Watts asking Officer Allen whether she would describe Watts' cell as a public place. (R55:35:5-15). The State's objection to the question came after Officer Allen had already answered the question in a manner that benefitted Watts:

> Q. Would you describe that cell as a public place?
>
> A. No.
>
> MR INGOLD: Objection. That's for the jury. We've talked about it even in the instructions. I mean, it's not a proper question for a witness.
>
> MR. ARTHURS: Your Honor, I'm just asking if she would describe it as a public place.
>
> MR. INGOLD: And again, Your Honor, that's [for] the jury to decide. It's in the jury instructions, and we specifically discussed that before trial.

THE COURT: Sustained.

(R55:35:5-15). N.D.R.Evid. 704 provides that "[a]n opinion is not objectionable just because it embraces an ultimate issue[,]" Even if the State's objection was improper under that rule, Watts benefitted from the answer clearly given by Officer Allen: "No." (R55:35:5-6). As such, any error in sustaining the State's objection was harmless. *See, e.g. United States v. Zaccaria*, 240 F.3d 75, 82-83 (1st Cir. 2001) (holding that any error sustaining objection was harmless where witness answered the question and the court did not strike the answer).

[¶ 29] Moreover, Watts' counsel cross-examined Officer Allen extensively to establish that (1) Watts' cell was behind several locked doors (R55:26:12-23); (2) Watts' cell was in a lockdown pod (R55:27:8-21); (3) attorneys could not visit inmates in the lockdown pod (R55:32:9-20); (4) nobody other than Officer Allen was in the common area at the time of this incident. (R55:28:21-29:2); and (5) there were no members of the "general public" in the detention center at the time of this incident (R55:29:19-21). Because Watts benefitted from the answer given by Officer Allen before the objection, the district court did not strike the answer, and the jury heard extensive testimony on cross-examination regarding the issue of whether Watts' cell was a public place, any error in sustaining the State's objection to the question of whether Watts' cell was a public place was harmless error.

IV. The State Did Not Commit Prosecutorial Misconduct During Closing Argument.

[¶ 30] Watts complains that the State committed prosecutorial misconduct in closing argument by stating, "And I respectfully submit to you that a public place is somewhere where a person has a reasonable expectation that they might be seen by another person." (R55:42:8-10). Watts did not object to that statement at trial, and this Court therefore reviews the issue to determine "if the prosecutor's conduct prejudicially affected [the defendant's] substantial rights, so as to deprive him of a fair trial." *State v. Burke*, 2000 ND 25, ¶ 22, 606 N.W.2d 108. "When a defendant fails to object to alleged misconduct, [this Court] will not reverse unless the misconduct constitutes obvious error." *State v. Vondal*, 2011 ND 186, ¶ 12, 803 N.W.2d 578. This Court notices obvious error "only in exceptional circumstances in which the defendant has suffered a serious injustice." *State v. Duncan*, 2011 ND 85, ¶ 18, 796 N.W.2d 672.

[¶ 31] Watts cannot establish that the State engaged in misconduct or that, if the State engaged in misconduct, Watts suffered a serious injustice. First, Watts' argument ignores that, immediately before making the statement at issue, the State told the jury that the definition of "public place" was for the jury to decide:

> "And so the State recognizes that it's a difficult decision, but it is your decision to make. The State can't tell you what a public place is. The defense can't tell you what a public place is. It's your decision."

(R55:42:4-7).

[¶ 32] Second, although Watts complains that the State offered one possible interpretation of the phrase "public place," Watts' counsel did so as well. Going

even further, Watts' counsel explicitly told the jury that Watts' cell was *not* a public place:

> "The area within the solitary confinement jail cell is not a public place."

(R55:46:13-14). And during closing argument, Watts' counsel submitted his interpretation of the phrase "public place" as an alternative to the State's interpretation of that phrase:

> "So the possible definitions when we talk about public places are a public place is any place where the general public is regular allowed to enter or be in. Or a public place is any place where the general public has free access to go. Or a public place is a place that is generally open and accessible to ordinary people."

(R55:43:16-21). Watts specifically asked the district court before trial not to define the phrase "public place." (R30). The district court granted Watts' request and declined to include a definition of "public place" for the jury, instead instructing the jury that "public place" is not defined in the criminal code. (R36). During closing argument, Watts repeatedly offered his own definition of the phrase "public place" or told the jury how to interpret that phrase. (R55:46:13-14); (R55:47:5-12). As such, it was not misconduct for the State to explain to the jury how the State wanted the jury to interpret the phrase "public place" just as Watts' counsel explained for the jury how Watts wanted the jury to interpret the phrase.

[¶ 33] Third, courts have consistently held that the prosecutor's use of "the state submits" or "I submit" is not misconduct. *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000) (holding that the prosecutor's use of "I submit to you [victim]

was killed by her partner" was not misconduct because "the state was offering an interpretation of the evidence rather than a personal opinion as to guilt."); *State v. Reed*, 398 N.W.2d 614, 617 (Minn. Ct. App. 1986) ("Prefacing argument on various issues with 'the state submits' did not inject the personal opinion of the prosecutor or that of the State."); *United States v. Bentley*, 561 F.3d 803, 812 (8th Cir. 2009) ("Use of 'we know' and 'I submit' is not plain error if it is used 'to refer the jury to the government's evidence and to summarize the government's case against the defendant[].") (*quoting United States v. Lahey*, 55 F.3d 1289, 1299 (7th Cir. 1995)).

[¶ 34] Here, the State's use of the phrase "I submit" was quickly followed by a summation of the State's evidence against Watts. Because the State did not use the phrase "I think" or "I believe," and because the State used "I submit" during a summation of the State's evidence, the State did not engage in misconduct. *Bentley*, 561 F.3d at 812 (holding that, even if prosecutor's use of "I submit" resulted in plain error, reversal was not warranted because "the effect of any misconduct would have been minimized by the immediate exhortation that the jury examine the evidence on its own.").

[¶ 35] Finally, Watts cites no cases in which similar statements have been held to constitute misconduct, nor does Watts explain how the prosecutor's use of the phrase "I submit" to offer an interpretation of the phrase "public place" during closing argument constitutes a serious injustice when Watts' counsel repeatedly offered different, competing definitions during closing argument.

This Court should therefore conclude that the State did not commit misconduct during the closing argument.

V. The District Court Did Not Abuse its Discretion in Requiring Watts to Register as a Sexual Offender.

[¶ 36] Watts argues the district court abused its discretion by requiring him to register as a sexual offender. Watts argues the court erred in how it analyzed "predatory conduct" because the court did not find Watts attempted to establish a relationship with the victim for the purposes of victimization. Because registration for Watts' offense was mandatory, and because the court chose not to exercise discretionary deviation, there was no discretion to abuse.

[¶ 37] When interpreting statutes, this Court has held that use of "shall" creates a mandatory duty. *See State v. Glaser*, 2015 ND 31, ¶ 18, 858 N.W.2d 920 (*citing City of Devil's Lake v. Corrigan*, 1999 ND 16, ¶ 12, 589 N.W.2d 579). The word "may," on the other hand, "impl[ies] permissive, optional or discretional, and not mandatory action or conduct." *Id*. (citations omitted). Stated another way, the use of "may" "does not require action, and it operates simply to confer discretion." *Id*. (citations omitted).

[¶ 38] The term "sexual offender" is defined under North Dakota law as "a person who has pled guilty or been found guilty . . . of a violation of" one of a number of enumerated offenses. N.D.C.C. § 12.1-32-15(1)(g). One of those enumerated offenses is indecent exposure, a class A misdemeanor. *See id.*; *see also id.* § 12.1-20-12.1. If a person is convicted of an enumerated offense under subdivision 12.1-32-15(1)(g), then "[t]he court *shall* require an individual to

register" as a sexual offender. *See* N.D.C.C. § 12.1-32-15(2)(a), (b) (emphasis added). Because of the use of "shall," registration is mandatory upon conviction of an enumerated offense.

[¶ 39] If an individual is convicted of a misdemeanor enumerated offense, however, "the court may deviate from requiring an individual to register *if the court first finds*" three things, which are:

> (1) the individual is no more than three years older than the victim if the victim is a minor, (2) the individual has not previously been convicted as a sexual offender or of a crime against a child, and (3) the individual did not exhibit mental abnormality or predatory conduct in the commission of the offense.

See N.D.C.C. 12.1-32-15(2)(b) (emphasis added). There are two key points regarding interpretation of this subdivision. First, the use of "may," means deviation from registration is discretionary. Second, the statute makes deviation conditional upon making the three findings. The plain meaning of the clause "if the court first finds" is that the court must make the three findings prior to exercising its discretion.

[¶ 40] In the context of chapter 12.1-32, "'[p]redatory' means an act directed at a stranger or at an individual with whom a relationship has been established or promoted for the primary purpose of victimization." N.D.C.C. § 12.1-32-15(1)(e). In considering predatory conduct, "the court shall consider the age of the offender, the age of the victim, the difference in ages of the victim and offender, the circumstances and motive of the crime, the relationship of the

victim and offender, and the mental state of the offender." *Id*. § 12.1-32-15(4). The use of "shall" means the listed considerations are mandatory.

[¶41] If the district court deviates from registration, the statute states "the court *shall* state on the record in open court its affirmative finding for *not* requiring an offender to register." *Id*. (emphasis added). The interplay of "shall" and "not" in this subdivision mean the district court is required to make an affirmative finding on the record, but only if it exercises discretion and deviates from registration.

[¶42] Here, Watts was convicted of the misdemeanor enumerated offense of indecent exposure. By law, registration for that offense is mandatory. The district court, acting under Rule 35 of the North Dakota Rules of Criminal Procedure, however, chose to schedule a hearing to allow both parties to argue whether deviation from registration was appropriate in this case. (R38:1-2:¶3). After hearing argument from both parties, the district court stated, "[g]iven the fact that this statute is designed, essentially, to require reporting unless these findings are made specifically by the Court, the Court will uphold the decision to require reporting in this case." (R71:8:13-16). The court made no further findings on the record.

[¶43] Watts argues the district court was required to find that the primary purpose of the relationship between Watts and the corrections officer was for victimization. What this argument fails to recognize is that, for purposes of deviation from registration, the district court was not required to do anything at

all. Despite the fact the district court, *sua sponte*, chose to consider deviation, that consideration is not the discretionary act at issue here. The discretionary act here would have been a deviation from registration. The district court, however, declined to exercise that discretion.

[¶44] In arguing the court was required to find the primary purpose of the relationship, Watts misapplies the law. Specifically, Watts' argument implies the court was required to make a finding of predatory conduct upon declining to deviate from registration. That argument, however, states the contrapositive of what the law requires, which is that the court must make a finding of no predatory conduct if it exercises its discretion to deviate. The two statements are functionally different, and only the latter is supported by statute.

[¶45] *State v. Glaser* is instructive here. Like Watts, Glaser was convicted of indecent exposure, and following a sentencing hearing with argument from both parties, the district court ordered registration. 2015 ND 31, ¶ 3, 858 N.W.2d 920. At the sentencing hearing, Glaser presented a psychosexual risk assessment to support his argument there was no predatory conduct. *Id*. at ¶ 16. Glaser argued it was error for the court to ignore that risk assessment. *Id*. at ¶ 15. In analyzing Glaser's argument against the language of the statute, the Court found because the district court did not ultimately exercise any discretion, it was not required to consider Glaser's the psychosexual risk assessment. *Id*. at ¶ 23. The Court held that because deviation is discretionary, and because the district court

declined to exercise its discretion, there was no error in requiring registration despite the risk assessment. *Id*.

[¶46] *Glaser* stands for the principle that if an action on the part of the district court is discretionary, then any requirements flowing from the exercise of that discretion only apply if the district court actually exercises the discretion. Here, as in *Glaser*, the district court did not exercise its discretion. At that point, any requirements flowing from exercise of that discretion—such as the requirement the court finds no predatory conduct—do not apply. As such, any argument alleging error in how the court analyzed predatory conduct must fail because as soon as the court declined to exercise discretion regarding deviation, it was not required to make any findings at all.

[¶47] Further, the record strongly supports that the district court both "acted within the limits of statute" and did not "substantially rel[y] on an impermissible factor." Regarding the former, in announcing its decision, the district court stated on the record that the registration "statute is designed, essentially, to require reporting unless these findings are made specifically by the Court." *See* (R71:8:13-15). That was a correct statement of the law. Though the district court did not explicitly state the findings were not met, it was not required to do so because it did not exercise its discretion to deviate. Neither Watts' sentence nor the actions of the district court were outside the limits of the registration statute. Watts was ordered to register here because it was mandatory under law.

[¶48] Regarding an impermissible factor, aside from the argument regarding the unnecessary finding of predatory conduct, Watts has not identified any other factors that were impermissible. The district court scheduled a hearing on this matter, at which it heard argument from both the State and defense counsel. Both parties argued their interpretation of the law, and both parties referenced facts contained in the record. The State even attempted to introduce additional testimony in support of registration, but the court refused to hear it, stating "I will not entertain further testimony at this time. The decision will be based on the record as left at trial, and the arguments that are made today." (R71:5:21-23). Nothing in the record supports any argument the district court relied on an impermissible factor in ordering registration.

[¶49] Because the district court declined to exercise its discretion to deviate from the registration requirement for conviction of Indecent Exposure, there was no discretion to abuse. The district court imposed mandatory registration in accordance with the law, and in so doing it relied on the record in the underlying proceeding and on argument from the parties. There was no error in ordering registration.

CONCLUSION

[¶ 50] For the foregoing reasons, the criminal judgments should be affirmed.

Dated: December 13, 2022.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	Supreme Court No. 20220206
	)	Dist. Ct. No. 08-2022-CR-00221
-vs-	)	
	)	
Dondarro Jimmell Watts,	)	
	)	
Defendant and Appellant.	)	

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellee in the above matter, and as the authors of this brief, hereby certify that this brief complies with the page limitation in N.D.R.App.P. 32(a)(8)(A). This brief is twenty-seven pages in length.

Dated: December 13, 2022.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Appellee Plaintiff and ~~Appellant~~,	)	
-vs-	)	
Dondarro Jimmell Watts , Appellant Defendant and ~~Appellee.~~	)	Supreme Ct. No. 20220206
	)	Dist. Ct. No. 08-2022-CR-00221
STATE OF NORTH DAKOTA	)	
	) ss	
COUNTY OF BURLEIGH	)	

I, Mandy M. Pitcher, declare that I am a United States citizen over 21 years of age, and on the 13th day of December, 2022, I served the following:

1. Brief of Plaintiff and Appellee State of North Dakota
2. Certificate of Compliance

via electronic service through Odyssey to the following:

Kiara Kraus-Parr
Defense Attorney
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Which is the last reasonable ascertainable email address of the addressee.

I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the 13th day of December, 2022 at Bismarck, North Dakota.

/s/ Mandy M. Pitcher
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