UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0680

September Term, 2014

JAMES BURICK

v.

OLGA DANCHENKO

Meredith,
Woodward,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: July 8, 2015

James Burick, appellant, contends that the Circuit Court for Montgomery County erred when it entered a protective order against him requiring him to stay away from the appellee, Olga Danchenko, with whom he shares a minor son.

QUESTIONS PRESENTED

Appellant presents three questions for our review:

1. Whether the Circuit Court [e]rred in [e]ntering a [p]rotective [o]rder in [f]avor of Ms. Danchenko.

2. Whether Maryland Domestic Violence Protective Order Statute [v]iolates the United States Constitution and the Maryland Constitution and Declaration of Rights.

3. Whether Md. Code Ann., Fam. L. § 4-506 [v]iolates the Second Amendment to the United States Constitution.

We answer "no" to Question One. Questions Two and Three raise issues that were not argued in the circuit court and, consequently, have not been preserved for our review. Accordingly, we affirm the judgment of the Circuit Court for Montgomery County.

FACTS AND PROCEDURAL HISTORY

The parties to this case have a son ("Son") who was five years old at the time of the incident at issue herein. Although the couple lived together briefly after their son's birth, they never married, and, at some point, discord developed between them. At the time of the incident that gave rise to this case, their son resided with appellee, along with her husband and an infant by her husband; appellant was allowed visitation with Son. On March 24, 2014, the parties met in a parking lot adjacent to appellee's home in Laytonsville to make the transfer of Son from appellee to appellant for visitation. The parties got into an argument. Appellee contended that appellant shut the door of his truck on her head, causing a lump and

bruise. Appellant, on the other hand, claimed that he was "very pleasant" during the exchange on March 24; that appellee was cursing at him and harassing him for insurance information; that he had no idea how she got the bruise on her head, but that he believed it was self-inflicted; and that he has never laid a hand on her at any time.

On March 26, 2014, appellee filed a petition in the Circuit Court for Montgomery County seeking protection from appellant. She obtained a temporary protective order on the basis of the March 24 incident. By its terms, the temporary protective order was to be effective until a hearing on a final protective order could be held. The hearing was initially scheduled for April 2, 2014, but was rescheduled for April 9, 2014.

At the April 9 hearing on the final protective order, following testimony by the parties and their witnesses, and the admission into evidence of two photographs of appellee's claimed injury and of surveillance video of the parking lot where the incident occurred, the Circuit Court for Montgomery County found appellant's version of the events not credible. The court credited the testimony of appellee and her witnesses, and found by clear and convincing evidence that appellant committed an assault on appellee by shutting the vehicle's door on her head. Accordingly, the court granted appellee's Petition for Protection from appellant.

In the Final Protective Order entered on April 9, 2014, the court ordered appellant to have no contact with appellee, other than to discuss issues related to their son (which was to be done only via texting, e-mail or phone calls); to stay away from appellee's home and work addresses; and to "participate in and meet the requirements of" the Abused Persons Program.

The court further ordered appellant to "immediately surrender all firearm(s) to . . . the Montgomery County Sheriff's Dept, and refrain from possession of any firearm, for the duration of this Final Protective Order." The Final Protective Order provided that it expired after one year, *i.e.*, April 9, 2015.[1]

On April 21, 2014, appellant filed a timely "Motion to Alter, Amend, and Revise, and for a New Trial," in which he made three contentions: 1) that the court's findings were clearly erroneous; 2) that he should be granted a new trial because one of his witnesses had been under subpoena, but had failed to appear at the April 9 hearing; and 3) "Items 7 and 8 on the Final Protective Order (as to attendance of a program and possession of firearms) are not intended for the protection of any party, are purely punitive, and, as such, are violative of the defendant's due process and other constitutional rights." On June 19, 2014, the court denied appellant's motion to alter or amend. This appeal followed.

STANDARD OF REVIEW

This case was tried without a jury, and our review is governed by Maryland Rule 8-131(c), which provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

[1] Although appellee urged us to dismiss the appeal as moot after the order expired, we recognize that the question of whether such an order was properly entered is an issue that does not expire when the order does.

As this Court observed in *Mayor and Council of Rockville v. Walker*, 100 Md. App. 240, 256 (1994):

> It is hornbook law, memorialized in Md.Rule 8-131(c), that "[w]hen an action has been tried without a jury, the appellate court . . . will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of witnesses." This means that if, considering "the evidence produced at trial in a light most favorable to the prevailing party . . . ," there is evidence to support the trial court's determination, it will not be disturbed on appeal. *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 41, 382 A.2d 564 (1978). Moreover, **"[i]f there is any competent, material evidence to support the factual findings below, we cannot hold those findings to be clearly erroneous."** *Staley v. Staley*, 25 Md. App. 99, 110, 335 A.2d 114, cert. denied, 275 Md. 755 (1975).

(Emphasis added.)

DISCUSSION

I. Sufficiency of the evidence to support the court's finding that appellant committed an assault on appellee

Appellant's argument regarding the sufficiency of the evidence is essentially a recasting of the evidence in a light favorable to his version of the encounter that took place on March 24, 2014. But the standard of review governing our analysis of a sufficiency-of-the-evidence claim requires us to view all evidence and all inferences from the evidence in a light most favorable to the prevailing party, here the appellee. In *Morris v. State*, 153 Md. App. 480, 489-90 (2003), we said:

> In determining whether the evidence was sufficient, as a matter of law, to support the ruling, the appellate court will accept that version of the evidence most favorable to the prevailing party. **It will fully credit the prevailing party's witnesses and discredit the losing party's witnesses. It will give maximum weight to the prevailing party's evidence and little or no weight to the losing party's evidence. It will resolve ambiguities and draw inferences in favor of the prevailing party and against the losing party.** It

> will perform the familiar function of deciding whether, as a matter of law, a *prima facie* case was established that could have supported the ruling.

(Emphasis added.)

In this case, appellee sought, and was granted, a final protective order against appellant pursuant to Maryland Code (1984, 2012 Repl. Vol.), Family Law Article ("FL"), § 4-506, which provides, in relevant part, that, "if the judge finds by clear and convincing evidence that the alleged abuse has occurred . . . the judge may grant a final protective order to protect any person eligible for relief from abuse." FL § 4-506(c)(1)(ii).[2] As a person with a child in common with appellant, appellee was a "person eligible for relief" pursuant to FL § 4-501(m)(6).

The statute defines "abuse" in FL § 4-501(b)(1) as follows:

> (b)(1) "Abuse" means any of the following acts:
>
> (i) an act that causes serious bodily harm;
>
> (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm;
>
> (iii) **assault in any degree;**
>
> (iv) rape or sexual offense under §§ 3-303 through 3-308 of the Criminal Law Article or attempted rape or sexual offense in any degree;
>
> (v) false imprisonment; or

[2]Effective October 1, 2014, the standard for issuance of a final protective order changed from "clear and convincing evidence" to "a preponderance of the evidence." Family Law Article (1984, 2012 Repl., 2014 Supp.). In the present case, the trial court applied a "clear and convincing" standard.

(vi) stalking under § 3-802 of the Criminal Law Article.

(Emphasis added.)

In this case, the court found "that there was an assault committed on the [appellee] by the [appellant]." Assault is defined in Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 3-201(b) as "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings." In *Lamb v. State*, 93 Md. App. 422, 428-29 (1992), we made the following observation about the term "assault":

> By way of informal (or sometimes even formal) shorthand, both the case law and the statutory law frequently use the simple noun "assault" to connote a consummated battery alone and at other times to connote the combination of the inchoate attempt to beat or to batter followed immediately by the consummation of that attempt. Thus used, "assault" is a synonym for "battery" and is also a synonym for the combined form "assault and battery." It was of this we spoke in *Anderson v. State*, 61 Md. App. 436, 440, 487 A.2d 294, 295–296 (1985):
>
> > "One of the varieties of criminal conduct embraced by the word 'assault' or phrase 'assault and battery' is a consummated battery.
> >
> > [Footnote quoted in *Lamb*] The single word 'assault' and the whole expression 'assault and battery' are frequently used as loosely synonymous terms. Just as 'assault' can mean an actual battery, as used above, it also embraces two other varieties of criminal conduct, not here pertinent: 1) an attempted battery, and 2) an intentional placing of another in apprehension of receiving an immediate battery."
>
> The cognate noun "assailant," moreover, designating the assaulting criminal agent, embraces with equal certainty 1) one who attempts to beat, 2) one who only threatens to beat, 3) one who actually beats, and 4) one who both attempts to beat and then beats. Conversely, we do not describe the criminal agent of a battery as a "batterer" or "beater" (except in such exotic forms as "wife-beater" or "child-beater"). The single term "assailant" does nicely for all of the assaultive modalities.

The Maryland Pattern Jury Instructions ("MPJI-Cr") define, at 4:01C, the "battery" form of assault, as:

> Assault is causing offensive physical contact to another person. In order to convict the defendant of assault, the State must prove:
>
> (1) that the defendant caused [offensive physical contact with] [physical harm to] (victim);
>
> (2) that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and
>
> (3) that the contact was not consented to by (victim) [or not legally justified].

Here, the trial court found, by clear and convincing evidence, that appellant committed an assault on appellee by shutting the vehicle door on her. The court stated: "I do find by clear and convincing evidence that the [appellant] shut the door on her head, and caused that bruise. So I'll find that there was an assault committed on the [appellee] by the [appellant], and I base that on the film and the testimony." Our review reveals that there was sufficient evidence in the record, viewed in the light most favorable to appellee, for the court to have made such a finding.

The "film" to which the court referred was a surveillance video recording of the parking lot in which the incident occurred. The video recording was made by a business (Boyland Electric) which had offices located at the edge of the parking lot. Following the assault, appellant entered the Boyland Electric offices and asked an employee there, Mary Piper, to come outside and witness the exchange. Ms. Piper testified at trial, and she indicated that she saw nothing out of the ordinary on the day of the exchange. She testified

that she was only outside "probably like a minute or two." She saw "a clean exchange and that was it."

Following Ms. Piper's testimony, the surveillance video recording was played in open court. The court and counsel followed along, offering comments as the video played. The physical contact described by appellee, however, was not captured on the video; but appellant agreed that "something" happened during the 20 seconds in which the couple was out of range of the video camera that "cause[d] [appellant] to go in and get a witness." Appellant's counsel also, as part of his commentary during the portion of the video in which appellant left to go get a witness from Boyland Electric, noted that appellee was "crying" at that time.[3]

The transcript includes the following comments made by the court and counsel while they watched the video:

> [BY APPELLANT'S COUNSEL]: So Mr. Burick is now walking over to Boyland Electric.
>
> [BY APPELLEE'S COUNSEL]: [Appellee] is crouching over by [Son].
>
> [BY THE COURT]: Okay.
>
> [BY APPELLANT'S COUNSEL]: But Mr. Burick —
>
> [BY THE COURT]: Talking to [Son].
>
> [BY APPELLEE'S COUNSEL]: And it looks like they're hugging —

[3]Appellant claimed that appellee was "mock[ing] [him]," and "that's when I realized that I was in trouble and that I need to go get help." This was appellant's stated reason for going to Boyland Electric to get a witness. As noted above, however, we are required to consider the evidence in the light most favorable to the appellee because she prevailed at trial.

[BY APPELLANT'S COUNSEL]: Mr. Burick is heading into Mary Piper's office.

[BY THE COURT]: Okay.

[BY APPELLEE'S COUNSEL]: **You can see the child reach up to the [appellee's] head.**

[BY THE COURT]: What's [appellee] doing now?

[BY APPELLEE'S COUNSEL]: She's crouching down.

[BY APPELLANT'S COUNSEL]: **She's crying**.

(Emphasis added.)

Appellee testified that, on the day in question, she and appellant were arguing over "insurance for [Son]" and visitation issues. Her testimony regarding physical contact with appellant was as follows:

[BY THE COURT]: Can you tell me what you allege that Mr. Burick did to cause you to get this [temporary protective] order?

[BY APPELLEE]: We had an argument over insurance for [Son] and when they were on the schedule pick-up days for Mr. Burick. And then he was getting ready to leave, he was very angry with me so he shoved me in — shoved me and hit me with the car door. He was —

Q. Did he shove you with one hand or two hands?

A. One hand.

Q. Okay. And when he shoved you, what part of your body did he shove you?

A. On the side and then he hit me with the car door with the other hand. And I had the bruise in my hand [sic]. First it was a bump but then it turned into bruise.

* * *

Q. Okay. So the door was all the way open and you both were looking at [Son], both — were you, like, standing side by side?

A. Yes, next —

Q. Pardon?

A. Next to each other.

Q. You and Mr. Burick were?

A. Yes.

Q. So did he tell you not to go and kiss [Son] goodbye?

A. We were still arguing about the insurance.

Q. Okay. And — so your head wasn't in the car when it hit you?

A. No.

Q. So how do you — how'd the door close?

A. He slammed the door into my head.

Q. Did you see him do it?

A. Yes.

Q. What part — what side of your head did it hit? The right side?

A. Yes.

Q. Okay. Then what happened?

A. I started crying because I was hurt and, I don't know, I was hurt and confused and Mr. Burick went inside the business on the parking lot of which it happened. And then he came out and left with [Son].

Two photographs of appellee's head, showing a visible bruise were admitted into evidence. Appellee testified that these photographs fairly and accurately depicted how she looked as a result of appellant shutting the car door on her head on March 24, 2014.

Appellee also testified about earlier incidents of abuse by appellant. She testified that, a few days prior to March 24, appellant called her at her place of business and threatened to kill her. According to appellee, appellant told her that he was "fucking tired of me ruining his life." This made her feel threatened. A co-worker, Fernando Fernandez, testified that he knew appellant's voice because he usually answered the phones at the pawn shop where he and appellee worked. Mr. Fernandez testified that he overheard a disturbing phone conversation between appellee and appellant:

> [BY MR. FERNANDEZ]: Well, Olga[, appellee,] was crying like always, every single time that they talk on the phone at work. She — like I said, she closes the door so that way people don't hear in the front part.
>
> [BY THE COURT]: But you could hear.
>
> A. Yeah. I had to go to the back because I had to grab something from the safe. And while I was waiting for the safe to be opened, I could overhear them talk and because she was crying, she put him on speaker phone. And pretty much I heard — I didn't want to overhear too much, but I did hear something about killing and things like that. So I quickly gathered my stuff and left. And that was after the bruises — the bruise — no, yeah, around the time when she got the bruise.

Appellee also testified about an incident that occurred on March 2, 2014, when appellant showed up at her house after his scheduled visitation time had ended, "demand[ing] to have [Son]." The parties ended up "screaming and arguing," and appellant pushed her "pretty hard" into a railing.

Appellee's mother witnessed the March 2 incident and corroborated it during her testimony at the hearing. She was asked what she saw on that date, and replied:

> [BY MRS. DANCHENKO]: Late at night, like — after 8:00 p.m., [appellant] was knocking on the door. [Appellee] didn't want to open the door. Then, she decided to open the door. They were arguing very long and very loud. [Son] was crying. Then [appellant] pushed [appellee]. She fell on the railing.

Appellee's mother also testified that she saw a bump on her daughter's head on March 29.

Appellee further testified that, in mid-February of 2014, she was at home breastfeeding her newborn when she had a conversation with appellant. This conversation occurred over speakerphone, because appellee's hands were otherwise occupied, and it was heard by appellee's husband. In a "very angry" tone of voice, appellant "promised to kill me." Appellee's husband, Shane Meely, testified and corroborated appellee's testimony in this regard. He testified that he knew appellant's voice, and that he overheard the speakerphone conversation in which appellant told appellee, "I'm going to effing kill you." Mr. Meely also testified that he saw his wife's injury on March 24; that it was "a bruise, a bump" that looked red when he got home from work on the night of March 24, but which turned brown a few days later.

Appellant testified that no assault occurred on March 24. He testified that, on the day in question, he remained "very calm," while appellee was "constantly buzz[ing] in my face, pointing her finger at me, just screaming at me," about insurance information that he claimed

he had already given her. He denied ever having hit or pushed appellee at any time. He also claimed that there was no bruise on appellee's head on April 1 or April 2.[4]

In the course of explaining his ruling, the trial judge noted that it found appellee and her witnesses to have been credible, but that it "didn't believe [appellant's] testimony that he was cool, calm, and collected during this[,] and that everything was swell. . . . I don't think he was completely honest or credible with the court." In other words, the judge who heard the witnesses testify was simply not persuaded that appellant's version of events was credible.

In *Starke v. Starke*, 134 Md. App. 663, 683 (2000), we observed:

> Resolving disputed credibility and weighing disputed evidence are matters, of course, in the unfettered control of the fact finder. Where either the credibility of a witness or the weight of the evidence is in dispute, therefore, there is no way in which a fact finder, with such matters properly before him, could ever be clearly erroneous for not being persuaded.

Deferring, as we must, to the trial judge's assessment of witness credibility determinations, we conclude that there was sufficient evidence in the record to support the court's finding that appellant committed an assault on appellee on March 24, 2014. Accordingly, we perceive no error in the court's issuance of a final protective order pursuant to FL § 4-506.

[4]As noted, two photographs depicting appellee with a bruise on her upper-right forehead were admitted into evidence. One of those photographs has an electronic date stamp of "04.02.2014."

II. Appellant's constitutional challenges are not preserved

Pursuant to Maryland Rule 8-131(a), appellate courts generally will not review issues that were not raised and argued in the circuit court. The rule provides, in pertinent part:

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

In *University System of Maryland v. Mooney*, 407 Md. 390, 401 (2009), the Court of Appeals commented on the rationale for Rule 8-131(a)'s preservation requirement, noting that it is "'to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings'" and "'to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation.'" (Citations omitted.) In *Chaney v. State*, 397 Md. 460, 468 (2007), the Court of Appeals recognized that, although an appellate court does have the discretion to consider an unpreserved issue,

> appellate courts should rarely exercise [such discretion], as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Here, appellant's constitutional challenges to the validity of FL § 4-506 did not appear until his "Motion to Alter, Amend, Revise, and for a New Trial," and then stated only: "Items 7 and 8 on the Final Protective Order (as to attendance of a program and possession of firearms) are not intended for the protection of any party, are purely punitive, and, as such,

are violative of the defendant's due process and other constitutional rights." When the court read the terms of the Final Protective Order from the bench, appellant made no objection to any of the provisions, let alone to the validity of the authorizing statute.

Appellant failed to preserve for our review the arguments he makes on appeal, in which he asserts that the "Maryland Domestic Violence Protective Order Statute" violates the United States Constitution, the Maryland Constitution, and the Maryland Declaration of Rights, and that FL § 4-506 violates the Second Amendment to the United States Constitution. Although he included a one-sentence reference to a violation of "the defendant's due process and other constitutional rights" in his post-trial motion to alter or amend or grant a new trial, he provided the circuit court no citations to any supporting authority for that proposition, and failed to make the arguments he urges us to consider on appeal. Because he did not properly preserve these arguments, we will not consider them.

Appellant insists that we must address his arguments that the statute is unconstitutional because, he posits, an unconstitutional statute is void and any judgment based upon a void statute is likewise void. His sole citation supporting this argument is *Ex parte Siebold*, 100 U.S. 371 (1879). But he reads that case too broadly, and ignores completely the multitude of opinions from the appellate courts of Maryland that have consistently held that preservation of arguments is required in order for a litigant to be entitled to pursue an issue on appeal, even if the argument attacks the constitutionality of the pertinent statute.

In *Robinson v. State*, 410 Md. 91 (2009), the defendant argued on appeal that his constitutional right to a public trial — guaranteed by the Sixth Amendment and recognized in Maryland common law and in Article 21 of the Maryland Declaration of Rights — had been violated. The Court of Appeals granted *certiorari* prior to this Court's review, but did not reach the merits, despite its acknowledgment of "the importance of the question presented," because Robinson had failed to properly preserve his constitutional argument by raising the issue in the circuit court. In the Court of Appeals's discussion of the preservation requirements, the Court acknowledged that the language of Rule 8-131(a) provides some discretion for an appellate court to consider an unpreserved claim, but the Court emphasized that it is an exception to the preservation rule that should be "rarely exercised." *Id*. at 104. The Court explained that it would decline to review Robinson's constitutional arguments on appeal, stating, *id*. at 106-08:

> That Appellant's claim of error implicates a constitutional protection, moreover, does not excuse his failure to make a contemporaneous objection to the court's order. **We have made it abundantly clear that " '[e]ven errors of Constitutional dimension may be waived by failure to interpose a timely objection at trial.' "** *Taylor v. State*, 381 Md. 602, 614, 851 A.2d 551, 558 (2004) (quoting *Medley v. State*, 52 Md. App. 225, 231, 448 A.2d 363, 366, *cert. denied*, 294 Md. 544 (1982)). And we have applied that proposition in a number of situations. *See, e.g., Taylor*, 381 Md. at 626-27, 851 A.2d at 565 (applying Md. Rule 8-131(a) and holding that the petitioner's claim of a double jeopardy violation was not raised at trial and therefore was not preserved for appellate review); *Walker v. State*, 338 Md. 253, 262-63, 658 A.2d 239, 243 (citing Md. Rule 8-131(a) and holding that issues related to the denial of due process because of prosecutorial misconduct and denial of the Sixth Amendment right to counsel during pre-trial proceedings would not be considered because they were not properly raised below), *cert. denied*, 516 U.S. 898, 116 S.Ct. 254, 133 L.Ed.2d 179 (1995); *cf. White v. State*, 324 Md. 626, 640, 598 A.2d 187, 194 (1991) (citing Md. Rule 8-131(a) and stating that a claim of deprivation of the constitutional right to present defense witnesses

was not properly before the Court because the argument had not been made to the trial court, but also finding no error on the part of trial court, "[e]ven if the issue had been preserved for appellate review").

Further, the fact that the Sixth Amendment right to a public trial can be characterized as "fundamental" does not change the requirement that any claimed violation of that right be preserved by contemporaneous objection. We held in [*State v.*] *Rose*, 345 Md. [238] at 248-49, 691 A.2d at 1319 [(1997)], that a postconviction petitioner is not excused from the requirement of timely objection to an allegedly incorrect reasonable doubt jury instruction, notwithstanding that the instruction bears on the defendant's due process entitlement to have the State prove its case beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368, 375 (1970). Pertinent here, we rejected Rose's argument that, because the right to be convicted only upon proof beyond a reasonable doubt is "fundamental," the applicable waiver standard is the standard set forth in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938). We said in that regard: "[A]n intelligent and knowing relinquishment of a right is not required for a waiver of that right to occur simply because the right is of constitutional origin." *Rose*, 345 Md. at 248, 691 A.2d at 1318. We continued:

> Our cases make it clear that, simply because an asserted right is derived from the Constitution of the United States or the Constitution of Maryland, or is regarded as a "fundamental" right, does not necessarily make the "intelligent and knowing" standard of waiver applicable. Rather, most rights, whether constitutional, statutory or common-law, may be waived by inaction or failure to adhere to legitimate procedural requirements.
>
> * * *
>
> For the same reasons, we reject the proposition that Appellant is entitled to review of the court's order simply because the deprivation of the right to a public trial is a "structural error," not subject to review for harmless error.

(Footnote omitted.) *Accord Taylor v. State*, 381 Md. 602, 612-15 (2004) ("'Even errors of Constitutional dimension may be waived by failure to interpose a timely objection at trial. . . .'" (quoting *Medley v. State*, 52 Md. App. 225, 231 (1982)); *Fisher v. State*, 233 Md.

48, 51 (1963) ("Even constitutional rights, under certain circumstances, may be waived if State procedural rules are not complied with."); *Shand v. State*, 103 Md. App. 465, 485 (1995) ("As an apparent afterthought, appellants now argue certain violations of their constitutional rights, including the right to confront and cross-examine an accuser and the right of due process. These arguments were not made to the circuit court and thus are not properly before us."); *Johnson v. State*, 63 Md. App. 485, 496 (1985) ("A constitutional question which was not tried and decided in the circuit court has not been preserved for appellate review.").

The Court of Appeals has applied similarly strict preservation requirements in cases in which a statute is alleged to be unconstitutional. For example, in *Robinson v. State*, 404 Md. 208 (2008), the defendant argued on appeal — although he had not made the argument in the circuit court — that the statute under which he was convicted was unconstitutionally vague. The Court of Appeals flatly declined to consider the unpreserved argument regarding the constitutional validity of the statute, stating: "It is well-settled that an appellate court ordinarily will not consider any point or question 'unless it plainly appears by the record to have been raised in or decided by the trial court.'" *Id*. at 216 (quoting Rule 8-131(a)).

This Court has a long history of declining to review claims, when raised for the first time on appeal, that a statute is unconstitutional. In *Vuitch v. State*, 10 Md. App. 389 (1970), a doctor who had been charged with performing an abortion in violation of Maryland Code (1957), Article 43, § 149G, argued at the close of prosecution's case in chief that the statute was "invalid and unconstitutional under the due process and equal protection clauses of the

Fourteenth Amendment to the United States Constitution." *Id.* at 394. But, "he presented no argument whatsoever in support of his constitutional claims, and the [trial] court denied the motion without commenting thereon." *Id*. At the close of all evidence, the doctor "orally renewed the motion, again without advancing any argument to support his constitutional claims, and again the court denied the motion without commenting thereon." *Id*. After the doctor was convicted, he appealed, and argued "that 'the conviction is void because of the facial unconstitutionality of Section 149G.'" *Id*.

We declined to consider the doctor's challenge to the constitutional validity of the statute. We observed:

> [A]ppellant's constitutional defense is not directed to a determination of his guilt of the offense charged; rather, it asserts, not as a matter of the sufficiency of evidence, but as a matter of constitutional law, that the State is without constitutional authority to criminally charge him with having terminated a human pregnancy outside of a licensed and accredited hospital. So viewed, we hold that the motion for judgment of acquittal was not the proper motion by which to test the constitutionality of the Maryland abortion statute. The law of other jurisdictions is in accord.

Id. at 397.

Moreover, we held in *Vuitch* that we would not consider the doctor's inadequately preserved constitutional challenge on appeal, and explained:

> In concluding that the constitutional questions now sought to be raised were not properly preserved for appellate review, we do not seek to delay the day when these important public issues must be squarely met and decided, either by us, or the Court of Appeals of Maryland. But it would be foolhardy in the extreme to undertake the resolution of such complex constitutional questions upon a record as procedurally and substantively deficient as that now before us — one in which the constitutional questions, though readily apparent prior to trial, were raised for the first time after the State had concluded its case-in-chief, and then only by an inappropriate motion (generally alleging

> unconstitutionality along a front far more limited in thrust than that presently sought to be aired), submitted without comment, or illuminating argument. Whether the trial judge actually considered appellant's constitutional claims cannot be ascertained from the record since in denying the motion he made no comment thereon, and may well have concluded, quite properly, that the constitutional questions could not be raised at that juncture of the proceedings by motion for judgment of acquittal. Of course, **nothing is better settled than the rule that a question as to the constitutionality of a statute will not be considered on appeal when not properly raised and decided by the lower court.**

Id. at 397-98 (emphasis added) (citations omitted).

Other cases have reached a similar result when confronted with a constitutional challenge to a statute if that argument was first raised on appeal. *E.g.*, *In re John H.*, 293 Md. 295, 303 (1982) ("The parents did not argue the issue of constitutionality [of Maryland Code (1974, 1980 Repl. Vol.), Courts & Judicial Proceedings Article, § 3-829, permitting imposition of vicarious liability upon parents for their children's destruction of property] to the trial judge. Accordingly, we decline to pass upon the issue, leaving that interesting question to another day in a case where the issue is squarely presented."); *Andresen v. Bar Ass'n of Montgomery County*, 269 Md. 313, 322 (1973) ("Since Andresen did not challenge the constitutionality of [Maryland Code (1957, 1966 Repl. Vol., 1971 Cum. Supp.), Article 21, § 42] on the ground that it was unconstitutionally vague and indefinite in the lower court, nor there raise any question with respect to his Fourth Amendment right not to be subjected to illegal seizures, these constitutional issues have not been preserved for appellate review, and we do not pass upon them. *Schiller v. Lefkowitz*, 242 Md. 461, 219 A.2d 378 (1966); *Hewitt v. State*, 242 Md. 111, 218 A.2d 19 (1966); Maryland Rule 885."); *Seat Pleasant Baptist Church Bd. of Trustees v. Long*, 114 Md. App. 660, 677-78 (1997) ("appellant's

argument that [Maryland Code, Corporations and Associations Article,] § 5–310 is unconstitutional as applied . . . was not raised in the court below and is therefore not before us on review"); *Devine Seafood, Inc. v. Attorney General of Maryland*, 37 Md. App. 439, 444 (1977) ("With respect to the constitutionality of the Consumer Protection Act, the short answer is that the constitutionality was not questioned at the trial stage and will not, therefore, be considered on appeal."); *Lukas v. Bar Ass'n of Montgomery County*, 35 Md. App. 442, 443 (1977) ("Lukas complains in this Court that Md. Ann. Code art. 10, §§ 26A (action for an injunction), 32 (prohibiting practice for compensation unless admitted to the bar), and 33 (falsely representing self as an attorney) are 'so ill-defined by Maryland legislative and judicial authority that prohibition thereof is violative of due process.' As interesting as that question may be, we are precluded from deciding it because it was not raised in the trial court and, hence, is not properly before us. Even questions of constitutional law must be first raised and decided in the trial court." (Citations omitted.)); *In re Appeal No. 1258(75) from Dist. Court of Montgomery County*, 32 Md. App. 225, 237 (1976) ("[W]hat he is urging is that the statutes were unconstitutional as applied. This point was not tried and decided below."); *Bell v. Myers*, 28 Md. App. 339, 346 (1975) ("In their brief to this Court, the appellees argue that Section 99A [of Article 81, Maryland Code (1957, 1975 Repl. Vol.)] violates the equal protection clause of the 14th Amendment of the U. S. Constitution. The record does not reflect that this issue was raised below either by the pleadings or in argument before the chancellor. We decline to consider it now.").

As in the cases cited above, we decline to consider appellant's arguments, set forth for the first time in this litigation on appeal, challenging the constitutional validity of the subject statute.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.