UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1900

September Term, 2015

MOHAMMED SAHID SESAY

v.

STATE OF MARYLAND

Wright,
Berger,
Shaw Geter,

JJ.

Opinion by Wright, J.

Filed: April 14, 2017

Following a jury trial in the Circuit Court for Prince George's County, appellant, Mohammed Sahid Sesay, was found guilty of second-degree rape and second-degree sexual offense. On October 16, 2015, he was sentenced to concurrent terms of twenty years' incarceration, with all but ten years suspended. On October 26, 2015, Sesay timely appealed, presenting two issues for our review:

1. Did the trial court err in allowing the prosecutor to make improper and prejudicial remarks at closing argument?

2. Did the trial court err in failing to instruct the jury that they must be unanimous as to the act on which the second-degree sexual offense conviction was based?

For the reasons that follow, we affirm the circuit court's judgments.

Facts

The charges underlying the convictions in this case stemmed from allegations of repeated sexual contact between Sesay and the victim, M.J. At trial, M.J. testified that she was 11 years old and in the fifth grade when Sesay began sexually assaulting her in March of 2014. M.J. and her siblings lived with their parents but occasionally stayed at the home of Adama Kpundeh, who watched them during the week while their parents worked. Adama, who is Sesay's grandmother, lived with Isata Kpundeh, who is Sesay's mother, and Sesay often came by the home to visit his family and to eat. M.J. testified that on at least 15 occasions between March 1, 2014, and July 26, 2014, Sesay pulled her into a bathroom at the home and put his penis in her mouth, "butt," and vagina. M.J. also stated that Sesay threatened to kill her if she told anyone.

On July 27, 2014, the Kpundehs and M.J.'s family attended a party at the home of Isata's sister, Frances Kpundeh. At some point, M.J. went downstairs, where some other children and teenagers were present, and used a bathroom. As she was coming out, Sesay came and "dragged" her back into the bathroom, where he proceeded to put his penis in M.J.'s mouth, vagina, and butt. During that time, M.J. could hear her parents and siblings calling her name, but she could not respond. M.J. recalled that, at one point, M.J.'s father knocked on the bathroom door and Sesay responded that he was in there. Shortly thereafter, Sesay pushed M.J. out of the bathroom, and M.J. reported what he had done.

M.J.'s father testified that on July 27, 2014, he and his wife dropped their kids off at a cookout and returned later in the day to pick them up. When they returned, they saw two of the children but not M.J., so they searched the house. M.J.'s father went downstairs and knocked on the door of a locked bathroom. Upon knocking, he heard a voice that he identified as Sesay inform him that he was inside and that M.J. was not there. M.J.'s father then began to go up the stairs, but "something . . . pulled [him] back," and he went back downstairs to "check one more time." At that time, he saw M.J. and asked her where she had been. According to M.J.'s father, Sesay "was out of the bathroom" and was sitting inside a small boiler room nearby.

Detective Cleo Savoy, who later conducted a search of the home, testified that the basement consists of a living room with a narrow hallway that leads to a boiler room and a bathroom "which is in very close proximity."

M.J. was taken to the Prince George's County Hospital, where she was interviewed and examined by Paulette Dendy, a forensic nurse examiner. Dendy swabbed for DNA in the vaginal area, anal area, and breasts. She testified that M.J. complained of tenderness in the vaginal area, indicating some sort of trauma, but Dendy did not notice any tearing, bruising, swelling, or abrasions there. Dendy, however, noticed some tearing of the skin around the anus, and her records indicated that M.J. told her that Sesay had ejaculated inside her anus.

Shavon Smith, a forensic chemist with the Prince George's County Police Department, testified as an expert in serology and stated that she received several items of evidence for testing, including underpants, a pair of pants, a shirt, a vaginal swab, a cervical swab, and anal/perianal swabs. She conducted a presumptive test (an acid phosphatase test), followed by a microscopic test where she looked at a sample for the presence of sperm cells. The tests came back negative as to semen and blood except for one of the anal/perianal swabs; that one was positive for acid phosphatase but negative under the microscope. Smith conducted an additional "P30" test on that swab to see whether a protein secreted only from the prostate gland was present, and it came back negative. On cross-examination, Smith testified that acid phosphatase may be present in small amounts of vaginal fluids.

Sandra Gault, a DNA analyst at Bode Cellmark Technology, testified as an expert in DNA interpretation and analysis. She stated that she received several items of evidence, including a left breast sample, a right breast sample, a known sample from M.J., and a known sample from Sesay, for testing. Gault testified that none of the

samples contained Sesay's DNA. She further testified that if a condom is used, anything touching the penis on the inside of the condom would not transfer over to other areas, and if a condom touches vaginal fluid and then touches another area, it could transfer the vaginal fluid to the other area.

Sesay testified on his own behalf and denied having any sexual contact with M.J. at any time.

Additional facts will be included as they become relevant to our discussion, below.

Discussion

I. Closing Argument

Sesay first argues that the circuit court erred in allowing the prosecutor to make improper prejudicial statements at closing arguments. Specifically, he points to four statements that, he alleges, "individually and cumulatively, deprived [him] of his right to a fair trial." In response, the State asserts that Sesay's challenges to two of the four comments are not preserved and should not be reviewed for plain error. As to the other comments, the State avers that the circuit court properly exercised its discretion in permitting the prosecutor to argue reasonable inferences from the evidence. We agree with the State.

The Court of Appeals has previously made clear that "[t]he regulation of argument rests within the sound discretion of the trial court." *Grandison v. State*, 341 Md. 175, 224 (1995) (citation omitted). "Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom[.]" *Warren v. State*, 205 Md. App. 93, 132 (2009) (citation omitted). "He may indulge in oratorical

conceit or flourish and in illustrations and metaphorical allusions." *Whaley v. State*, 186 Md. App. 429, 452 (2009) (quoting *Spain v. State*, 386 Md. 145, 153 (2005)). During rebuttal, "prosecutors may address . . . issues raised by the defense in its closing argument." *Degren v. State*, 352 Md. 400, 433 (1999) (citing *Blackwell v. State*, 278 Md. 466, 481 (1976)). Moreover "[j]urors may be reminded of what everyone else knows, and they may act upon and take notice of those facts which are of such general notoriety as to be matters of common knowledge." *Wilhelm v. State*, 272 Md. 404, 439 (1974) (citations omitted).

"Closing argument, however, is not without limitation, in that the court should not permit counsel to state and comment upon facts not in evidence or to state what he or she would have proven." *Smith v. State*, 388 Md. 468, 488 (2005) (citing *Wilhelm*, 272 Md. at 414-15). "It is also improper for counsel to appeal to the prejudices or passions of the jurors, or invite the jurors to abandon the objectivity that their oaths require." *Mitchell v. State*, 408 Md. 368, 381 (2009) (citations omitted).

Previously, the Court of Appeals has recognized that "[a] trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case." *Ingram v. State*, 427 Md. 717, 726 (2012) (citing *Mitchell*, 408 Md. at 380-81). As such, appellate courts will not disturb a trial court's judgment "unless there has been an abuse of discretion by the trial judge of a character likely to have injured the complaining party." *Donaldson v. State*, 416 Md. 467, 496 (2010) (citation and emphasis omitted). "We must determine, upon our own independent review of the record, whether we are able to declare a belief, beyond a reasonable doubt, that the error

in no way influenced the verdict." *Id.* (citation and quotation marks omitted). Thus, an improper closing argument remark will only warrant reversal if it "actually misled the jury or w[as] likely to have misled or influenced the jury to the prejudice of the accused." *Frazier v. State*, 197 Md. App. 264, 283 (2011) (citation omitted); *see Lee v. State*, 405 Md. 148, 164 (2008) ("Not every improper remark . . . necessitates reversal") (citations omitted).

A. Unpreserved Challenges

Sesay first takes issue with the prosecutor's statement that M.J.'s father saw M.J. "coming out of the bathroom" – which, according to Sesay, was "a critical point of corroboration."[1] He also challenges the prosecutor's statement, made during rebuttal

[1] In pertinent part, the prosecutor stated:

> The father comes down the stairs, is checking, he is checking, every door. Where is she? Only locked door is where the Defendant is in the bathroom. He is knocking on the door. The Defendant even tells you, the dad is knocking on the door. Where is my daughter? He is like, she is not here. And the father walks away while walking away that paternal that gut instinct kicks in and he goes back down. And who does he see? He sees his 11-year old daughter coming out of the bathroom. Where are you? Where were you? She is like I was in the bathroom. He is like how could that be? How could that be Mohammed is in bathroom what set [sic] going on. He is frantic.

According to Sesay, this contradicts the following testimony given by Mr. J.:

> Okay. So I turn around. I start proceed to climb up the stairs to go to the main hall of the building. And, like, something just pulled me back. I said let me check one more time see if I'm missing something. I'm coming downstairs I saw my daughter. I was like where are you coming from? I searched. She said, I was in the bathroom. I said, it can't be, because Mohammed said you are not there and the door is locked so there

closing argument, that when someone has repeated vaginal intercourse, the vagina is not "going to be all torn up" as "[i]t is made to lubricate itself."[2] As there were no objections to either of these comments, however, Sesay's argument that neither one was based on the evidence is not preserved for review. *See Height v. State*, 185 Md. App. 317, 337 (reiterating that objections to improper argument must be made "either (1) immediately after the allegedly improper comments . . . or (2) immediately after the argument is completed") (citation omitted), *vacated and remanded on other grounds*, 411 Md. 662 (2009).

Sesay urges us to exercise plain error review, but we decline to do so. Although we have discretion under Md. Rule 8-131(a) to address an issue that was not raised in or decided by the trial court, "plain error review[] is a discretion that appellate courts should

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> is no way you are there. Where are you coming from? She said, dad, I was in there.

[2] After defense counsel argued in closing argument that M.J.'s injuries were inconsistent with her testimony that she had been raped more than 15 times, the prosecutor stated in rebuttal:

> And now, the vagina, when it's - - when there is vaginal intercourse over and over again, it's not full of rips everywhere, because then every - - but not every woman but every woman [sic] having vaginal intercourse would have tears up the wazoo on their vagina. It's not like the vagina, even if there is tears, that the vagina doesn't heal itself.
>
> The fact that there was - - she said this happened to her about 15 times, doesn't mean that her vagina is going to be all torn up. Part of the purpose of the vagina is intercourse. It is made to lubricate itself. And, in fact, it does lubricate itself. Vaginal fluids build up.

According to Sesay, these statements constituted "facts that were never admitted into evidence at trial."

rarely exercise, as considerations of both fairness and judiciary 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[.]" *Malaska v. State*, 216 Md. App. 492, 524 (2014) (quoting *Chaney v. State*, 397 Md. 460, 468 (2007)). "The mere existence of error, in and of itself, has very little to do with the distinct question of why the appellate court, in its discretion, would wish to take official notice of the error, even assuming it to have occurred." *Morris v. State*, 153 Md. App. 480, 511 (2003). Given the limited set of interests vindicated by plain error review, it remains "a rare, rare phenomenon," *id.* at 507, reserved only for "blockbuster errors." *Martin v. State*, 165 Md. App. 189, 196 (2005) (citation and internal quotation marks omitted).

B. Preserved Challenges

Sesay challenges two more of the prosecutor's statements during rebuttal argument, made in response to defense counsel's assertion that there was no DNA evidence linked to Sesay found anywhere on M.J. The following is pertinent:

> [PROSECUTOR:] And it was interesting about the DNA, that when they went over, when she is reviewing, you heard the serologist talk about how she analyzed the anal swabs. It's interesting she said there was acid phosphatase. I'm probably mispronouncing the word, but something like that. She said that, in there, she found that it was tested positive for acid phosphatase. And when I asked her what else tests positive for that, the vaginal fluids. She is very telling, because the victim said he had vaginal intercourse with her and then anal intercourse with her. How would vaginal fluid get in her anus?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

> [PROSECUTOR]: How would it? And she does say that he ejaculated in her anus. That he is having anal intercourse, he is behind her, right. Can't be in front of her. He is having anal intercourse.
>
> And you heard from DNA analyst that, if he was wearing a condom all that semen coming out of his penis would stay inside that condom.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: But, guess what would transfer, what is on the outside of that condom. The outside of the condom would have touched her vagina, her vaginal fluids.

According to Sesay, "at no point during the trial did anybody ever claim that [he] was wearing a condom nor was there any evidence that the complaining witness ever indicate[] that a condom had been used." Thus, he contends that "the prosecution resorted to speculation based on non-existent evidence and encouraged the jury to convict on that basis." Sesay is mistaken.

As to the prosecutor's statement regarding the serologist, the argument was properly based on the evidence. At trial, Smith, the serology expert, testified that none of the items submitted for evidence reacted to the presumptive test for semen – the acid phosphatase test – except for one of the anal/perianal swabs. Smith also conducted an additional P30 test for the presence of a protein secreted only from the prostate gland, which was negative. On cross-examination, Smith testified that acid phosphatase, which was present on one of the anal swabs, may be present in small amounts of vaginal fluids. Taken together, the evidence presented through Smith's testimony supported the prosecutor's presumption that vaginal fluid was present in the victim's anus due to

Sesay's conduct. *See Lee*, 405 Md. at 161 ("It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case.") (Quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)).

With regard to the prosecutor's statement regarding Gault, the DNA analyst, the argument was properly based on Gault's testimony that anything inside a condom would not transfer over to other areas. The prosecutor was allowed to argue, and the jury could reasonably infer, that there are other reasons – other than the lack of intercourse – for negative findings of semen. Moreover, as the State notes, it is a matter of common knowledge that semen would not be detected if a condom was worn. *See Recreational Developments of Phoenix, Inc. v. City of Phoenix*, 83 F. Supp. 2d 1072, 1101 (D. Ariz. 1999), *aff'd*, 238 F.3d 430 (9th Cir. 2000) ("It is common knowledge that engaging in sexual intercourse and oral sex without the use of condoms place people at risk for sexually transmitted diseases, including HIV/AIDS."). Therefore, we agree with the State that the prosecutor's statement was not in error.

C. Cumulative Error

Lastly, Sesay relies on *Lawson v. State*, 389 Md. 570 (2005), to argue that the cumulative effect of the prosecutor's comments merit plain error review and reversal. *Lawson*, however, is distinguishable. In that case, the defendant was convicted of raping and assaulting a seven-year-old girl. *Id.* at 575-77. During closing arguments, the

prosecutor erroneously: (1) used a "golden rule" argument,[3] (2) insinuated that the burden was upon Lawson to prove that the victim was lying, (3) appealed to the jury's prejudices and fears, and (4) alluded to the fact that Lawson's conviction might prevent harm to another specific child in the future. *Id.* at 593-94. On review, the Court of Appeals concluded that although "taken alone the statements may not affect the appellant's right to a fair and impartial trial, [] their cumulative effect leads to a different conclusion." *Id.* at 600. Thus, it held that "the cumulative effect of the prosecutor's improper remarks during closing argument and rebuttal was prejudicial, that the evidence presented did not overcome the prejudice created, and absent any attempts by the trial court to cure such prejudice the admission of the remarks constituted plain error." *Id.* at 577.

The present case differs because, as we previously explained, two of the four statements being challenged were not improper. And, even assuming that the two comments to which Sesay did not object were impermissible, Sesay has failed to show that he was prejudiced[4] or that the errors were so extraordinary that plain error review is warranted.[5] *See Martin*, 165 Md. App. at 196.

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[3] "A 'golden rule' argument is one in which an arguing attorney asks the jury to place themselves in the shoes of the victim." *Lawson*, 389 Md. at 594 n.11 (citations omitted).

[4] In fact, Sesay was ultimately acquitted of eight of the ten charges submitted to the jury. *Cf. Williams v. State*, 342 Md. 724, 755 (1996) (reversing convictions where the Court could not "conclude beyond a reasonable doubt that the jury's verdict was not influenced"), *disapproved of on other grounds* by *Wengert v. State*, 364 Md. 76 (2001).

[5] Plain error is reserved for "instances of truly outraged innocence[.]" *Jeffries v. State*, 113 Md. App. 322, 326 (1997). This is not such a case because, as the State points out, there was substantial evidence supporting Sesay's convictions. Sesay told M.J.'s father that he was in the bathroom alone and, moments later, M.J.'s father saw M.J.

It is also worth noting that the circuit court instructed the jury that "closing arguments of the lawyers are not evidence. They are intended only to help you understand the evidence and to apply the law." Because "Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary," *Spain*, 386 Md. at 160 (citations omitted), we decline to exercise plain error review here.

II. Jury Instructions

Sesay was convicted of one count of age-based second-degree rape and one count of age-based second-degree sexual offense, each of which took place on July 27, 2014. On appeal, he argues that the circuit court erred in failing to instruct the jury that they must be unanimous as to the act on which the verdict for second-degree sexual offense was based. According to Sesay, the court provided the jury with an ambiguous instruction and verdict sheet that allowed it to convict him without ensuring unanimity as to the predicate offense that provided the basis for the verdict. Citing *Crispino v. State*, 417 Md. 31 (2010), and cases from other jurisdictions, he urges us to exercise our discretion to exercise plain error review and subsequently reverse his conviction. In

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walking down a nearby hallway. M.J. was taken to the hospital, where the SAFE nurse found two tears to her anus, with jagged edges indicating that the skin had been pulled or stretched. According to the prosecutor, the photographs of M.J.'s anus were "very graphic" and the tears could easily be seen. Therefore, although we decline to exercise plain error review, we agree with the State that it would not be warranted in any event.

response, the State argues that this issue was affirmatively waived and that, in any event, plain error review is not warranted.

In this case, the State originally charged Sesay with second-degree rape (Counts 1 & 13), second-degree sexual offense (Counts 2-3 & 14-15), third-degree sexual offense (Counts 4-6 & 16-18), fourth-degree sexual offense (Counts 7-9 & 19-21), and second-degree assault (Counts 10-12 & 22-24). Counts 1-12 charged alleged offenses that took place between March 1, 2014, and July 26, 2014, while Counts 13-24 were for alleged offenses that took place on July 27, 2014. During the trial, the State *nol prossed* Counts 4-9 and 16-21. The State's reply to a motion for bill of particulars stated that, as to second-degree sexual offense, Count 14 was based on the sexual act of anal intercourse, which included the modalities of both force and age, and Count 15 was based on the sexual act of fellatio, which also included the modalities of both force and age.

The circuit court ultimately submitted 10 charges to the jury. With respect to the two counts of second-degree sexual offense that took place on July 27, 2014, the court instructed the jury that they could convict if they found that Sesay committed fellatio or anal intercourse, but it did not state that they must be unanimous as to the individual act. In pertinent part, the court instructed:

> The second and final theory of second-degree sexual offense is also based on age difference here. In order to convict the Defendant of second-degree sexual offense, the State must prove: number one, that the Defendant committed fellatio and/or anal intercourse with [M.J.]; number two, that [M.J.] was under 14 years of age at the time of the act; and number three, that the Defendant was at least four years older than [M.J.].
>
> Again, fellatio means that another applied her mouth to the sexual organ of the male Defendant.

> Anal intercourse means that the Defendant placed his penis into the organ of another, even the slightest amount.

Thereafter, the circuit court asked counsel to approach the bench, at which time the defense failed to lodge an objection to the instructions. Rather, defense counsel expressed concern that the jury would not agree on which modality applied: force or age difference. In response, the court noted that the issue was "easy to fix" and agreed to identify on the verdict sheet "the particular theory that is being put forth for that particular issue that's before them." As a result, the verdict sheet required the jury to consider only a *single* count of second-degree sexual offense that took place on July 27, 2014, and whether it was based on force and/or age difference:

> 8. Do you find the Defendant not guilty or guilty of a Second-Degree Sexual Offense (by force) on [M.J.] on or about July 27, 2014?
>
> 9. Do you find the Defendant not guilty or guilty of a Second-Degree Sexual Offense (by age) on [M.J.] on or about July 27, 2014?

It did not set forth questions relating to the second count of second-degree sexual offense that took place on July 27, 2014, nor did it ask the jury to distinguish each offense by the sexual act: fellatio or anal intercourse.

When the circuit court showed defense counsel the proposed verdict sheet, the following transpired:

> [DEFENSE COUNSEL]: May I speak to my client?
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> THE COURT: Absolutely.
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> (Defense counsel and Defendant have a discussion at counsel table off the record.)

> [DEFENSE COUNSEL]: I am going to suggest we leave it as you have it. You've already given the instruction. The only concern I have in your instructions you don't articulate the battery, the touching would have to be one of these three offenses. You left it open.
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> THE COURT: I can certainly go back and reinstruct on that, if you would like.
>
> [DEFENSE COUNSEL]: I just discussed that with my client. I'm inclined to leave it as is. And I have reviewed that with my client. I want to be sure he understands that.
>
> Nothing further, Your Honor. Thank you.

After the jury indicated that it had reached a verdict, the prosecutor realized the error that "[t]here is only one . . . count of second-degree sex offense" where "[t]here should have been two counts of the second-degree sex offense when it was split into force and by age." The prosecutor noted that "the jury received the instruction for both fellatio and anal intercourse but they did not receive [a verdict sheet indicating] two separate counts for those." Realizing that "it could be an issue if they come back guilty," the prosecutor asked that "the verdict sheet be amended and include the other two counts."

Defense counsel disagreed, stating:

> I think it would send the wrong signal to the jury. They have reached a verdict and . . . if it's not guilty it's done. If it's a guilty, then I think the State would put on the record how they want to deal with it. Maybe you want to ask the jury to indicate whether they - - that verdict was based on one or both of the counts if it's a guilty. But I would not agree to when they have told us they have a verdict to suddenly change the verdict sheet on them. That, again, it might be misunderstood and it might influence the verdict they have already reached improperly.

Acknowledging the "mistake and [] over sight," the circuit court ruled that it would "take the verdict and . . . proceed accordingly." The verdict was then announced, polled, and hearkened. Sesay did not object to the jury's verdict, nor did he challenge its unanimity in his motion for new trial filed on September 1, 2015.

Based on this record, we agree with the State that Sesay affirmatively waived any error on the circuit court's part. When the court offered to "go back and reinstruct," both Sesay and defense counsel agreed to "leave it as is." In other words, "defense counsel affirmatively advised the court that there was no objection to the instruction which the court immediately thereafter gave to the jury. Error, if any, has been waived." *Booth v. State*, 327 Md. 142, 180 (1992) (citations omitted).

Then, when the prosecutor brought the mistake on the verdict sheet to light, defense counsel objected to the State's request to amend, presumably because tactically, Sesay would benefit from having only one count of second-degree sexual offense presented to the jury, rather than two. "As was said in *Madison v. State*, 200 Md. 1, 8-9 (1952), where as a matter of trial tactics certain objections were not made during the trial, [we are] 'without authority to review errors in trial tactics of defense counsel or to speculate as to possibilities that different tactics might have produced a different result.'" *Martelly v. State*, 230 Md. 341, 345 (1963). *See also* Md. Rule 8-131(a) ("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"); *State v. Rich*, 415 Md. 567, 580 (2010) (explaining that unlike forfeiture of a right, waiver – or the intentional relinquishment or abandonment of a known right – is not reviewable for plain error); *McCree v. State*, 214

Md. App. 238, 272 (2013) (reiterating that in order for an appellate court to exercise plain error review, there must first be an error that was not affirmatively waived), *aff'd*, 441 Md. 4 (2014). Accordingly, we need not address the merits of this issue on appeal.

For all of the foregoing reasons, we affirm the circuit court's judgments.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.