Circuit Court for Howard County
Case No. C-13-CR-23-000538

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1164

September Term, 2024

KEVIN MOBLEY

v.

STATE OF MARYLAND

Leahy,
Zic,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: April 17, 2026

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Kevin Mobley, was convicted following a bench trial in the Circuit Court for Howard County of: illegal possession of a regulated firearm after having been convicted of a disqualifying crime (Md. Code (2003, 2022 Repl., 2023 Supp.), Public Safety ("PS") § 5-133(b)(1)); illegal possession of a regulated firearm after having been convicted of a narcotics offense (PS § 5-133(c)(1)(ii)); illegal possession of ammunition (PS § 5-133.1)); and illegal possession of a firearm after having been convicted of a felony (Md. Code (2002, 2021 Repl.), Crim. Law ("CL") § 5-622). After denying Mr. Mobley's motion for new trial, Mr. Mobley was sentenced to fifteen years' incarceration for illegal possession of a firearm after having been convicted of a narcotics offense, with all but seven years suspended, and a concurrent sentence of one year for illegal possession of ammunition and five years for illegal possession of a firearm after having been convicted of a felony, to be followed by five years' supervised probation. In this timely appeal, Mr. Mobley asks us to address the following two questions:[1]

1. Did the absence of a valid jury trial waiver deprive Mr. Mobley of his constitutional right to a trial by jury?

2. Was the evidence insufficient to sustain a conviction, and did the trial court err in denying a motion for new trial on this basis?

For the following reasons, we shall affirm.

[1] According to the Maryland Electronic Courts system, Mr. Mobley was first represented by a public defender and then by private counsel. Both attorneys timely filed briefs on his behalf. The public defender withdrew from the case, but did not strike her brief. The amended brief filed by private counsel raises the identical issue with respect to the jury trial waiver raised by the public defender and adds a sufficiency argument. The State responded to both issues raised in the Amended Brief, as shall we.

BACKGROUND

On October 19, 2023, officers of the Howard County Police Department executed a search and seizure warrant for a townhouse in Columbia, Maryland. The residence was an end-unit townhouse located across the street from Howard Community College. The warrant was executed in connection with an armed robbery investigation involving Ja'Varr Stewart, Mr. Mobley's stepson. Mr. Mobley was seen at the residence on multiple occasions prior to execution of the search warrant.

At the time the warrant was executed, Mr. Mobley was present in the home along with his wife and three of their children.[2] During the search, officers detained the occupants of the residence in the living room while the search was conducted. Officers searched multiple areas of the townhouse, including the upstairs primary bedroom. Testimony established that the primary bedroom was shared by Mr. Mobley and his wife. Mr. Mobley was not present in the bedroom during this search.

In the primary bedroom, officers observed several plastic storage bins stacked in a corner behind a reclining chair. The bins were surrounded by shoeboxes, including men's and women's shoes, and a leather garment was removed from the top of the bins during the search. The bins were not locked or secured.

Inside one of the lidded plastic storage bins, officers discovered a handgun. The bin contained clothing, and when the lid was lifted, the handgun was immediately

[2] Although there was evidence that Mr. Stewart lived in the home, the record does not appear to establish whether Mr. Stewart was also present in the home during the execution of the warrant.

apparent inside the container. The firearm had a round chambered, meaning it was ready to fire, and the magazine contained eight additional rounds of ammunition. Photographs and body-worn camera video documenting the location and recovery of the firearm were admitted into evidence.

In addition to the firearm recovered from the primary bedroom, officers located firearms in a bedroom associated with Mr. Stewart, which was located on a different floor of the split-level residence. Those firearms were identified as 3D-printed, whereas the firearm recovered from the primary bedroom was not.

Following the search, officers collected evidence for forensic testing. A crime scene technician swabbed the firearm recovered from the primary bedroom for DNA, taking swabs from the grip, trigger, and slide. The magazine recovered with the firearm was also swabbed for DNA, with swabs taken from the bottom, back, and follower of the magazine. Police also obtained a buccal swab from Mr. Mobley. No buccal swab was taken from Mr. Mobley's wife, and it was unclear if one was taken from Mr. Stewart.

The DNA evidence was submitted to Bode Technology for analysis. At trial, the State's DNA analyst testified the swabs taken from the grip, trigger, and slide of the firearm revealed DNA consistent with a mixture of three or more individuals, including at least one male contributor. Due to the complexity of the mixture, however, the analyst was unable to make any conclusions regarding contributors to that DNA profile.

Testing of swabs taken from the bottom, back, and follower of the magazine also revealed a mixture of DNA from three or more individuals, with a major mixture component of two individuals, including at least one male contributor. When the analyst

compared Mr. Mobley's known DNA sample to the DNA profile obtained from the magazine, she testified "that Kevin Davon Mobley could not be excluded as a possible contributor to the major mixture DNA profile." Asked to explain this in lay terms, the analyst testified: "that indicates that [his] DNA or [his] alleles are present within that mixture profile." The analyst estimated that "the proportion of individuals that would be included as a possible donor to the major mixture component is at least one in 760 billion in the U.S. population[,]" or greater than the world's entire population.

Following his conviction, Mr. Mobley timely appealed. We include additional detail as necessary in the following discussion.

DISCUSSION

I. MR. MOBLEY WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL.

Mr. Mobley first contends he was denied his constitutional right to a trial by jury because: (1) the circuit court did not adequately convey sufficient information to ensure he understood this right; and (2) failed to determine whether the waiver was voluntary. Relying on a Committee Note accompanying Maryland Rule 4-246, Mr. Mobley specifically argues that the court's alleged error amounted to a violation of Rule 4-246, as well as a constitutional violation, because he was not apprised that a jury would need to reach a unanimous verdict, of the State's burden of proof, or of the differences between a bench trial and a jury trial.

The State responds that Mr. Mobley's arguments in his brief are "something of a mix-and-match" of the alleged constitutional violation and the alleged Maryland Rule

violation. The State's brief considers these as separate claims, asserting that the alleged Rule violation was not preserved, but that even if it were, the Committee Note relied upon "is hortatory, not mandatory." The State maintains that the circuit court properly advised Mr. Mobley of his constitutional right to a jury trial.

On the morning of trial, Mr. Mobley indicated that he wanted a bench trial. Defense Counsel engaged in the following colloquy with Mr. Mobley:

> [DEFENSE COUNSEL]: Mr. Mobley, you have a right to a jury trial, and you and I would pick twelve citizens, and we would -- they would be the trier of facts in your case.
>
> You have the right to a bench trial, where Your Honor would be the trier of facts, and decide the facts of the case.
>
> Would you like to go forward with a bench trial today?
>
> [MR. MOBLEY]: Yes.
>
> [DEFENSE COUNSEL]: Speak up, please.
>
> [MR. MOBLEY]: A bench trial.
>
> [DEFENSE COUNSEL]: And you're waiving your trial by jury?
>
> [MR. MOBLEY]: Yes.

The court then inquired further:

> THE COURT: All right.
>
> So, Mr. Mobley, I want you to understand -- at this juncture, because this is an important juncture -- a decision that you have to make.
>
> And it is your right and your sole decision of whether you are tried by a court, or a jury. And if you waive your right to a jury trial right now, there's no turning back from that.
>
> Do you understand that?
>
> [MR. MOBLEY]: Yes.
>
> THE COURT: Okay. And you understand that if you go through with a court trial, I will be the decision-maker in that;

> I will take the testimony and evidence just like a jury would hear it, okay? But it would be me, myself, who determines whether the State has met [its] burden of proof beyond a reasonable doubt, with the evidence that they've presented.
>
> Do you understand that?
>
> [MR. MOBLEY]: Yes, ma'am.
>
> THE COURT: And do you need any time to discuss that -- any more time; I'm assuming you've discussed that with [Defense Counsel, but do you need any further time to discuss that with [Defense Counsel]?
>
> [MR. MOBLEY]: No, ma'am.

After confirming there was nothing else from the State, the court stated, "I accept the waiver of the jury trial at this time." No further objection or discussion was held after the court accepted Mr. Mobley's waiver.

A. Mr. Mobley's Rule 4-246 claim is not preserved.

With respect to Mr. Mobley's argument that the court failed to make a finding on the record that his waiver was made knowingly and voluntarily, Maryland Rule 4-246 provides, in pertinent part:

> (a) In the circuit court, a defendant having a right to trial by jury shall be tried by a jury unless the right is waived pursuant to section (b) of this Rule. The State does not have the right to elect a trial by jury.
>
> (b) A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the waiver is made knowingly and voluntarily.

This Rule establishes the procedure for acceptance of a knowing and voluntary jury trial waiver. If, however, a defendant does not contemporaneously object to the court's

acceptance of their jury trial waiver, any error under Rule 4-246 is unpreserved. *Hammond v. State*, 257 Md. App. 99, 119 (2023) ("[T]o challenge a failure to comply with Rule 4-246(b) on appeal, [] there must be an objection raised in the trial court." (citing *Nalls v. State*, 437 Md. 674, 693 (2014))). Mr. Mobley did not object to the court's inquiry; thus, his argument based on Maryland Rule 4-246 is not preserved, and we decline to consider it further.

B. Mr. Mobley was sufficiently apprised of his constitutional right to a jury trial before waiving that right and electing a bench trial.

Regardless of whether a defendant objected at trial, he may raise, on appeal, a claim of violation of his constitutional right to a jury trial because the waiver of a constitutional right must appear affirmatively in the record. *See Biddle v. State*, 40 Md. App. 399, 407 (1978) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)). The Sixth Amendment of the United States, as well as Articles 5, 21, and 24 of the Maryland Declaration of Rights, ensure a criminal defendant a right to a jury trial. *Abeokuto v. State*, 391 Md. 289, 316 (2006). A defendant may elect to waive his right to a jury trial and instead be tried by the court. *Id.* To be constitutionally valid, this waiver must be both knowing and voluntary. *Id.* (citing *Smith v. State*, 375 Md. 365, 377-80 (2003)).

"[A] constitutionally valid waiver of the right to a jury trial must be *knowing* and *voluntary*; it must be 'an intentional relinquishment or abandonment of a known right or privilege.'" *Hammond*, 257 Md. App. at 121 (quoting *Aguilera v. State*, 193 Md. App. 426, 431 (2010) (internal citation omitted) (emphases added)). The Supreme Court of Maryland has defined knowingly as synonymous with "intelligently" and "having or

showing awareness or understanding." *Nalls*, 437 Md. at 689 (citations omitted). Although the defendant must have knowledge of the jury trial before waiving this right, full knowledge is not required. *State v. Hall*, 321 Md. 178, 182-83 (1990). As such, a trial court need not recite "any fixed incantation" to ensure that the defendant knowingly waives his jury trial right. *Martinez v. State*, 309 Md. 124, 134 (1987); *Hammond*, 257 Md. App. at 121.

In short, whether an accused has made an intelligent and knowing waiver of the right to a jury trial depends on the facts and totality of the circumstance of each case. *Abeokuto*, 391 Md. at 318; *Hammond*, 257 Md. App. at 121. The court need not conduct an explicit inquiry into the voluntariness of the waiver, absent any triggering facts. *Aguilera*, 193 Md. App. at 442 (recognizing that a voluntariness determination may be made "based on the defendant's demeanor, without asking any specific questions about voluntariness") (citing *Abeokuto*, 391 Md. at 321). Nonetheless, the court must ensure that the defendant's waiver is intentional and is not a product of duress or coercion. *Hall*, 321 Md. at 182-83.

Here, the record affirmatively shows that Mr. Mobley had some knowledge of the right to a jury trial. Mr. Mobley was informed, by both his own counsel and the court, that: the jury would consist of twelve citizens; he and Defense Counsel would be involved in selecting the jury; the jury trial, like a bench trial, would involve testimony and evidence; the jury would be the trier of facts; the State had the burden of proof beyond a reasonable doubt; and, that the choice of whether to waive a jury was entirely up to him.

In addition, there is nothing in the record to suggest that the court should have asked more specific questions when considering the waiver. *See Hammond*, 257 Md. App. at 124 (noting that the trial judge was able to observe appellant's demeanor and there was nothing in the record to prompt additional questions concerning the voluntariness of the waiver). To the contrary, the record supports an inference that Mr. Mobley had discussed this choice with Defense Counsel and Mr. Mobley expressly agreed he did not need additional time to discuss his election with his attorney any further. Based on our review of the record, we presume that counsel "advised of the advantages and disadvantages of having the case evaluated by a judge instead of a jury." *Hammond*, 257 Md. App. at 123 (citation omitted). That presumption is supported in this case where DNA evidence was at issue by the following portion of Defense Counsel's opening statement:

> So, Your Honor, with that said -- certainly defense lawyers don't often select bench trials in cases like this.
>
> Maybe it's from distrust -- having one person decide, versus twelve -- but I think in this case, Your Honor, with the evidence being what it is, the risk of some jurors hearing "DNA" and being confused by the science of it, is -- it outweighs the risk of having someone being fair and impartial, that's read that charge to juries many a time, knows it cold, implicit bias. Only the evidence, what we say is in evidence -- just what comes from the witness stand. Your Honor knows those things.

In sum, we conclude that, based on the totality of the circumstances, Mr. Mobley's waiver of his right to trial by jury was made knowingly and voluntarily, and the trial court properly accepted that waiver.

II. THE CIRCUIT COURT DID NOT ERR IN DENYING MR. MOBLEY'S MOTION FOR A NEW TRIAL.

Mr. Mobley next argues that the case against him was purely circumstantial and that there was insufficient evidence that he possessed the handgun and ammunition that were recovered in the case. Mr. Mobley also asserts the court erred in denying his motion for new trial on this same basis. The State counters by reminding us of the DNA evidence linking Mr. Mobley to the handgun's magazine found in the bedroom he shared with his wife and maintains that the circumstantial evidence was sufficient to establish constructive possession.

Before we begin, we set forth the applicable standards of review. Initially, we note that Mr. Mobley raised this issue in a motion for new trial. Ordinarily, our standard of review of such a motion, such as the one raised here, is whether the trial court abused its discretion. *Williams v. State*, 462 Md. 335, 344 (2019). The new trial motion, however, hearkens back to the fact that this was a bench trial. Maryland Rule 8-131(c) provides the standard for appellate review:

> When an action has been tried without a jury, an 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.

"Maryland appellate courts accordingly adopt a deferential standard when reviewing sufficiency of evidence that asks whether 'any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.'" *State v. McGagh*, 472 Md. 168, 193 (2021) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Furthermore, "we

review findings of fact under the 'clearly erroneous' standard, meaning that '[a] finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion.'" *Scriber v. State*, 236 Md. App. 332, 344-45 (2018) (quotation omitted)). "Issues of law are reviewed *de novo*." *Id*. (citation omitted). The Supreme Court of Maryland has explained that:

> When reviewing the sufficiency of evidence, this Court does not retry the case. It is simply not the province of the appellate court to determine whether . . . it could have drawn other inferences from the evidence. Our concern is only whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt. . . .
>
> Because the circuit court is entrusted with making credibility determinations, resolving conflicting evidence, and drawing inferences from the evidence, the reviewing court gives deference to a trial judge's or a jury's ability to choose among differing inferences that might possibly be made from a factual situation.

Koushall v. State, 479 Md. 124, 148-49 (2022) (cleaned up) (internal citations omitted).

When assessing sufficiency, we do not discriminate between direct and circumstantial evidence. *Williams v. State*, 251 Md. App. 523, 569 (2021). Moreover, "[i]t is well-settled that circumstantial evidence alone is sufficient to support a conviction, provided the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused." *Ware v. State*, 170 Md. App. 1, 29 (2006) (quotation and internal marks omitted). "[I]f two inferences reasonably could be drawn, one consistent with guilt and the other consistent with innocence, the choice of which of these inferences to draw is exclusively that of the

fact-find[er] . . . and not that of a court assessing the legal sufficiency of the evidence." *Ross v. State*, 232 Md. App. 72, 98 (2017).[3]

Here, the court addressed the sufficiency of the evidence when denying the motion for new trial as follows:

> THE COURT: Thank you, Counsel, both for the presentations. You know, as I've said before, this is [] more of a constructive case. And I think that the motion did a great deal to think about when I reviewed it, thus set it in for a hearing. Both parties have had an opportunity to respond at this time.
>
> And when I look at the cases, the cases cited, [Defense Counsel], and the big difference -- and I know your argument is that the DNA could have gotten on the gun from anything. There's millions of ways that that could have gotten on the gun. I don't think there's millions of ways that it could have gotten on the gun. I think that needed to be in closer proximity with contact with [Mr. Mobley] in the DNA is there. I believe that that DNA evidence on the gun takes it out of a different -- takes it to a different dimension than the other cases.
>
> But that DNA, coupled with detective seeing [Mr. Mobley] coming in and out of this location on a couple of occasions, [Mr. Mobley] is present when the search and seizure warrant is effectuated at the home at that time.

[3] We note that Mr. Mobley's sufficiency of the evidence argument relies on the concept found in older cases, *e.g.*, *West v. State*, 312 Md. 197, 211-12 (1988), that "a conviction upon circumstantial evidence *alone* is not to be sustained unless the circumstances are inconsistent with any reasonable hypothesis of innocence." In *Ross*, this Court, after analyzing the case law addressing that "reasonable hypothesis of innocence" concept, confirmed that there is but one test for the sufficiency of the evidence and that the test does not depend upon whether the evidence is circumstantial or direct. *Ross*, 232 Md. App. at 94-102. This Court concluded in *Ross* that the "reasonable hypothesis of innocence" concept "was an unworkable mix and it is no longer with us. R.I.P." *Id*. at 101.

> There is -- there is the Father's Day card. There's a great deal of evidence in regards to that.[4] But this is in the room in -- with the gun, with [Mr. Mobley's] DNA on it.
>
> I do not accept the theory that it could be -- with that DNA, I don't believe that it could be just his wife's -- or just, you know, the other individual sharing the room. And as pointed out, it could be his, and he is prohibited. Or it could be theirs and that includes him, and he is still prohibited.
>
> And for those reasons, and this gun is clearly different than the other guns located in other areas of the home, this one is amongst their belongings in their room and this one has his DNA on it. And that's what the [c]ourt finds differentiates this from the other cases that are out there, and [Mr. Mobley] being here.
>
> You know, I think a car search is completely different than this and being in the [Mr. Mobley's] home where he's seen coming to, from, and there during the execution of the warrant.
>
> So, because of the evidence, I do believe that the evidence was still -- [] find that beyond a reasonable doubt and the Motion for a New Trial is denied.

Possession may be constructive or actual, exclusive or joint. *See Moye v. State*, 369 Md. 2, 14 (2002); *see also State v. Smith*, 374 Md. 527, 549 (2003) (recognizing that the law in possession of narcotics cases is instructive in cases involving firearms). And "to possess something is to exercise actual or constructive dominion or control over it." *Nicholson v. State*, 239 Md. App. 228, 252 (2018) (quotation and internal marks omitted). Furthermore, "[i]t has long been established that the mere fact that the contraband is not found on the defendant's person does not necessarily preclude an inference by the trier of

[4] This reference is unclear. Although there was significant argument about a Father's Day card being found near the bin during argument during the hearing on the motion for new trial, we were unable to locate any evidence about that card in the trial evidence.

fact that the defendant had possession of the contraband." *State v. Suddith*, 379 Md. 425, 432 (2004) (citation omitted). Commonly referred to as the "*Folk* factors," the following factors may be considered in determining joint or constructive possession:

> 1) proximity between the defendant and the contraband, 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant, 3) ownership or some possessory right in the premises or the automobile in which the contraband is found, or 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband.

Cerrato-Molina v. State, 223 Md. App. 329, 335 (2015) (quoting *Folk v. State*, 11 Md. App. 508, 518 (1971)) (emphasis removed); *see also Scott v. State*, 268 Md. App. 29, 51 (2025) ("Although the *Folk* factors are most typically applied in drug cases, we have applied the factors in gun cases.") (citations omitted).

Applying the *Folk* factors, *first*, there is an inference of proximity. The handgun was recovered from a bin in the primary bedroom. There was also evidence that Mr. Mobley shared that bedroom with his wife. This area was distinguished from Mr. Stewart's bedroom, which appears to have been downstairs. Mr. Mobley was also present when the police executed the warrant. The factfinder could make the rational inference that Mr. Mobley was in proximity to the evidence at issue. *See Ross*, 232 Md. App. at 98.

Second, as for knowledge, when the lid to the bin was removed, although there were other items nearby, the handgun was immediately apparent. Moreover, the fact that Mr. Mobley could not be excluded as a source of DNA on the gun's magazine supported

an inference of knowledge. The firearm was loaded, with a round chambered and eight additional rounds in the magazine. These circumstances permitted the factfinder to infer Mr. Mobley's knowledge of the firearm's presence and his ability to exercise dominion and control over it.

Third, there is evidence that Mr. Mobley had a possessory right in the residence. He was present when the police executed the warrant and had been seen entering and exiting the residence a few months earlier. There was evidence that he shared the bedroom with his wife and that his stepson, Mr. Stewart, lived downstairs. Mr. Mobley's DNA could not be excluded from the DNA on the magazine of the gun located in the bin in the bedroom. Thus, we are persuaded that the *Folk* factors permit a rational inference that Mr. Mobley possessed the gun and the magazine at issue.[5]

Both parties direct our attention to *Moseley v. State*, 245 Md. App. 491 (2020). Although the appellant in *Moseley* was present at the residence when officers first arrived to investigate and told police that he lived at the residence, he was not present when the search warrant was executed and had been in police custody for approximately 36 hours before the ammunition was discovered, creating a dispositive "temporal disconnect." *Id.* at 506-08. The residence was also subject to extensive third-party access, with as many

[5] It is unnecessary to address the fourth *Folk* factor on mutual use and enjoyment. *See Moseley v. State*, 245 Md. App. 491, 518 (2020) ("[U]nlike narcotics cases where it is frequently a significant factor, 'mutual enjoyment' or 'participation with others' was simply, by the very nature of the crime, a non-factor. It is, to be sure, hard to have fun with a cartridge.").

as 25 individuals associated with the premises, and no forensic evidence tied the appellant to the ammunition. *Id*. at 500-01.

Here, by contrast, Mr. Mobley was present in the residence at the time of the search, had been observed coming and going from the townhouse in the months preceding execution of the warrant, and shared the primary bedroom where the firearm and magazine were recovered. Unlike in *Moseley*, the State presented DNA evidence at trial establishing that Mr. Mobley could not be excluded as a contributor to the major mixture DNA profile on the magazine recovered with the firearm, with statistical weight exceeding the world's population. Thus, the factual ambiguities that undermined the State's proof in *Moseley* are absent in this case.

In sum, viewed in the light most favorable to the State, the evidence established Mr. Mobley's connection to the residence, his shared use of the primary bedroom where the firearm was recovered, his presence in the home at the time the warrant was executed, and DNA evidence linking him to the magazine of the loaded handgun. Taken together, these facts permitted a rational trier of fact to conclude that Mr. Mobley constructively possessed the firearm and ammunition. We hold that there was sufficient evidence of possession to sustain Mr. Mobley's convictions, and, accordingly, that the circuit court did not err in denying the motion for a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.