Circuit Court for Montgomery County
Case No. 134494C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1409

September Term, 2019

MERVIN RIVAS-CHANG

v.

STATE OF MARYLAND

Berger,
Friedman,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: April 7, 2021

INTRODUCTION

Mervin Rivas-Chang was charged with one count of sexual abuse of a minor, one count of second-degree sexual offense, and three counts each of third-degree and fourth-degree sexual offense. Before the case was submitted to the jury, the State nol prossed each of the lesser-included fourth-degree charges, which stemmed from the same sexual contacts as the greater third-degree charges. Rivas-Chang was convicted of sexual abuse of a minor and one count of third-degree sexual offense.[1]

Rivas-Chang's appeal concerns two issues. *First*, he argues that the evidence was insufficient for the jury to convict him of sexual abuse of a minor because he did not accept responsibility for the supervision of K.N. We hold that there was sufficient evidence and affirm that conviction. *Second*, he argues that the nol pros of the fourth degree charge, coupled with the trial court's refusal to instruct the jury on the now-nol prossed fourth degree charge, deprived him of a fair trial. We hold that the nol pros of the fourth degree charges and the trial court's refusal to instruct the jury on the nol prossed charges was error. We therefore reverse the third degree sexual offense conviction and remand for a new trial.

[1] Rivas-Chang was also convicted of second-degree sexual offense, but the trial court granted Rivas-Chang's motion for a new trial on that charge because of an Instagram post by K.N. where she directly contradicted her testimony and claimed that Rivas-Chang, "did not penetrate me, but he did touch." At sentencing, the State placed the count charging second-degree sexual offense on the stet docket. As such, it is not before us.

BACKGROUND

K.N., a 17 year-old young woman, had her wisdom teeth removed by Dr. Akbar A. Dawood at Maryland Oral Surgery Associates ("MOSA") in Silver Spring. Dr. Dawood was assisted by two surgical assistants: Patty Herrera, a woman, and Rivas-Chang, a man. Staff placed EKG leads on K.N.'s chest and side, a blood pressure cuff on her arm, a nasal cannula under her nose to deliver supplemental oxygen, and a pulse-oximeter on her finger to monitor oxygen levels. Dr. Dawood administered general anesthesia to K.N. at timed intervals throughout the procedure, which lasted between 25 and 35 minutes.

After the procedure—while K.N. was left to recover from the effects of the anesthesia in the operating room—Dr. Dawood, again assisted by Herrera and Rivas-Chang, performed a half-hour procedure on another patient in another operating room. When the second procedure was complete, Herrera and Rivas-Chang returned to K.N.'s room to check on her and prepare the room for the next surgery. Rivas-Chang asked K.N. if she was cold, she indicated that she was, and he placed a blanket over her. At some point during K.N.'s recovery, there was a problem with the pulse-oximeter, and Dr. Dawood instructed Rivas-Chang to place it on her other hand. After Dr. Dawood cleared K.N. to leave the operating room, Herrera removed the EKG leads, and Rivas-Chang escorted K.N. to the discharge room where her mother was waiting. They left the MOSA office. K.N. then told her mother that the male assistant had inappropriately touched her.

The police were called, and K.N. told them that Rivas-Chang touched her breasts, put her hand over the crotch of his pants, and touched her vagina. K.N. was taken to the

hospital for a forensic examination, which revealed traces of Rivas-Chang's DNA on K.N.'s vagina.

Rivas-Chang was charged in an eight-count indictment.

- **Count One:** Sexual Abuse of a Minor
- **Count Two:** Sex Offense Second-Degree
- **Count Three:** Sex Offense Third-Degree (touching of the vagina)
- **Count Four:** Sex Offense Fourth-Degree (touching of the vagina)
- **Count Five:** Sex Offense Third-Degree (touching of the breasts)
- **Count Six:** Sex Offense Fourth-Degree (touching of the breasts)
- **Count Seven:** Sex Offense Third-Degree (causing K.N. to touch his penis)
- **Count Eight:** Sex Offense Fourth-Degree (causing K.N. to touch his penis)

At the close of the evidence, the State nol prossed Counts Four, Six, and Eight—the lesser-included fourth-degree charges—leaving only the greater third-degree charges for the jury's consideration. Rivas-Chang objected to the State's nol pros of the lesser-included charges. After considering whether these nol prosses were permissible under the governing case law, the trial court allowed the State to nol pros the fourth-degree charges. Rivas-Chang then requested that the trial court instruct the jury on Counts Four, Six and Eight, the nol prossed, lesser-included fourth-degree charges, but the trial court declined. The jury found Rivas-Chang guilty of sexual abuse of a minor (Count One), and third-degree sexual offense for touching K.N.'s vagina (Count Three). Rivas-Chang timely noted this appeal, which only concerns Counts One and Three, and the nol pros of Count Four.

DISCUSSION

We affirm Rivas-Chang's conviction of sexual abuse of a minor and reverse the third-degree sexual offense conviction. In Section I, we explain why the evidence was sufficient to support Rivas-Chang's conviction for sexual abuse of a minor. In Section II, we evaluate the closely related *Hook* and *Hagans* doctrines, and explain why the trial court erred by allowing the nol pros and denying Rivas-Chang's request for a jury instruction. In Section III, we clarify why Rivas-Chang's sexual abuse of a minor conviction can stand even though we reverse the underlying sexual offense conviction.

I. THE EVIDENCE PRODUCED AT TRIAL WAS SUFFICIENT TO CONVICT RIVAS-CHANG OF SEXUAL ABUSE OF A MINOR

Rivas-Chang argues that the evidence was insufficient for the jury to convict him of sexual abuse of a minor, because he did not have the responsibility for the supervision of K.N. when he sexually abused her. We disagree.

To be convicted of sexual abuse of a minor, a jury must find beyond a reasonable doubt that the defendant was, "[a] parent, or other person who [had] permanent or temporary care or custody *or responsibility for the supervision of a minor*," and, "[caused] sexual abuse to the minor." MD. CODE, CRIMINAL LAW ("CR") §3-602(b)(1) (emphasis added). Under governing case law, a person may only obtain the necessary responsibility upon mutual consent, either express or implied, between the person legally charged with the care of the child and the person assuming responsibility. *Pope v. State*, 284 Md. 309, 323 (1979). "Responsibility," as used here generally means accountability, and the term "supervision" is intended to emphasize the broad authority to oversee with the powers of

direction and decision. *Id*. Whether a defendant has responsibility for the supervision of a minor is a question of fact for the jury. *Anderson v. State*, 372 Md. 285, 292 (2002); *Harrison v. State*, 198 Md. App. 236, 242-43 (2011).

Where the sufficiency of the evidence is challenged, we "examine the record solely to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt [and] view the State's evidence, including all reasonable inferences to be drawn therefrom, in the light most favorable to the State." *Fuentes v. State*, 454 Md. 296, 307 (2017). We will, "defer to any possible reasonable inference the jury could have drawn from the admitted evidence[.]" *Spell v. State*, 239 Md. App. 495, 511 (2018) (citing *State v. Smith*, 274 Md. 527, 557 (2003)). The question we must answer, then, is whether a rational jury could have concluded, upon the evidence presented, that Rivas-Chang had "responsibility for the supervision" of K.N. when he sexually abused her.

We consider *first*, whether there was sufficient evidence for the jury to conclude that Rivas-Chang consented to accept responsibility for the supervision of K.N. and *second*, whether there was sufficient evidence from which the jury could find that Rivas-Chang was, in fact, responsible for the supervision of K.N.

A. <u>There Was Sufficient Evidence for the Jury to Conclude that Rivas-Chang Consented to Accept Responsibility for the Supervision of K.N.</u>

K.N.'s mother signed a form conspicuously labeled: CONSENT FOR ORAL AND MAXILLOFACIAL SURGERY AND ANESTHESIA. That document clearly indicated K.N.'s mother's consent to transfer responsibility for K.N.'s supervision to Dr. Dawood

and the MOSA staff. Rivas-Chang was part of the three-person team led by Dr. Dawood that cared for K.N. during and after the procedure. Therefore, K.N.'s mother expressly consented to Dr. Dawood, Rivas-Chang, and the other MOSA staff obtaining responsibility for the supervision of K.N. The question then becomes whether Rivas-Chang and the other MOSA staff consented to accept this responsibility.

All of the MOSA staff who tended to K.N. impliedly consented to accept the responsibility for her supervision, including Rivas-Chang, Herrera, and the front desk staff who kept an eye on K.N. for a brief period.[2] While Dr. Dawood expressly consented to accept responsibility for the supervision of K.N. by countersigning the consent form, Rivas-Chang impliedly consented by assisting Dr. Dawood during the procedure, and monitoring K.N. after the procedure. *See Pope*, 284 Md. at 323 (noting that consent may be express or implied). Moreover, supervising patients while they recover after a procedure was an integral element of Rivas-Chang's job. It was reasonable for the jury to find that, by doing his job, Rivas-Chang impliedly accepted responsibility for the supervision of

[2] We note that if a member of the front desk staff sexually abused K.N. during this time, we would not be forced to conclude that the staff member could not have had responsibility for the supervision of K.N. simply because they lacked medical training or the ability to lawfully provide medical care. *See infra*, n. 4. This underscores why Rivas-Chang's lack of responsibility for K.N.'s medical treatment did not render him unable to accept responsibility for her supervision. In his brief, Rivas-Chang explains that he could legally leave the office in the middle of a surgery, whereas Dr. Dawood could not. Again, this explains who was responsible for delivering medical care to K.N. but does not limit the number of persons who were generally responsible for her supervision.

K.N.[3] This was not incompatible with the fact that Dr. Dawood also consented to accept the same responsibility.

Express mutual consent between Dr. Dawood and K.N.'s mother does not preclude implied consent between K.N.'s mother and Rivas-Chang. The governing cases are not so limiting. *See, e.g.*, *Ellis v. State*, 185 Md. App. 522, 547 (2009) (explaining that in the school setting, there is implied mutual consent between the parent and school authorities, and by extension all of the teachers). There is not a finite number of persons who can assume responsibility for the supervision of a minor at a given time, and it is not only the most senior person who takes on such responsibility. The ability to accept responsibility for the supervision of a minor does not depend on one's official duties, or on the presence of others who have also accepted the same responsibility. Rather, it is a functional analysis of the factual circumstances, and a single factor is not likely to be dispositive. Here, we hold that there was sufficient evidence for the jury to conclude that Rivas-Chang consented to accept responsibility for K.N.'s supervision.[4]

[3] Rivas-Chang contends that his employment at MOSA does not imply his consent to accept "supervision and responsibility" for K.N., but we do not agree with his conclusion. Rivas-Chang testified that one aspect of his job was to monitor patients recovering from anesthesia. It is difficult to imagine a time where it is more necessary to have a responsible adult keeping a watchful eye, ready to act if something should go wrong. This was Rivas-Chang's job. By showing up to work and discharging his duties, he impliedly consented to be responsible for the supervision of K.N.

[4] Rivas-Chang also argues that as a dental surgical assistant, he has so little responsibility for a patient's medical treatment that he is effectively ineligible, as a matter of law, to receive responsibility for the supervision of a patient. This argument confuses two different things. Responsibility for the treatment aspect of a medical procedure is not the same as responsibility for the supervision of a patient at a medical facility before, during, or after that procedure. These are two separate concepts. Only Dr. Dawood was

B. There Was Sufficient Evidence for the Jury to Conclude that Rivas-Chang Was, In Fact, Responsible for the Supervision of K.N.

Rivas-Chang argues that there was insufficient evidence for the jury to conclude that he was, in fact, responsible for K.N.'s supervision because, he argues, he was not

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responsible for K.N.'s medical treatment. That is clear. But Dr. Dawood and Rivas-Chang, among others, jointly had responsibility for K.N.'s supervision.

It is true that a dental surgical assistant, like Rivas-Chang, can only perform "procedures that do not require the professional skills of a licensed dentist; and … intraoral tasks only under the direct supervision of a licensed dentist who personally is present in the office area." MD. CODE, HEALTH OCC. ("HO") §4-301(b)(5). As Rivas-Chang explained, his only responsibility was, "hold[ing] the patient[']s head during a surgical procedure[,] and other non-surgical duties like cleaning a room, printing prescriptions, monitoring patients during recovery, and escorting patients to and from offices." As such, a dental surgical assistant has very little responsibility for the patient's treatment. The limitations on a dental surgical assistant's responsibilities for medical treatment, however, do not signal a limitation on a dental surgical assistant's ability to be responsible for the supervision of a minor patient.

The cases that Rivas-Chang relies on do not hold to the contrary. While the defendants in those cases had different sorts of responsibilities to manage than Rivas-Chang, there is nothing in those cases that suggests that people with limited responsibilities cannot be responsible for supervision of a minor. *See Ellis v. State*, 185 Md. App. 533 (2009) (evidence sufficient to find that teacher had responsibility for the supervision of a minor student); *Tapscott v. State*, 106 Md. App. 109 (1995) (evidence sufficient to find that half-uncle had responsibility for the supervision of a minor); *Newman v. State*, 65 Md. App. 85 (1985) (evidence sufficient to find that the defendant had supervision for the responsibility of a minor where he paid her to babysit children at his home). Rivas-Chang's responsibility for the supervision of K.N. was different than the responsibility for the supervision of minors in the cases cited, but the difference is one without distinction. The particulars of a person's responsibility for the supervision of a minor will vary depending on the situation. We cannot say that an adult surgical assistant cannot accept responsibility for the supervision of a minor in K.N.'s position as a matter of law. It would create an anomalous situation indeed, if we were to hold to the contrary, that only the person holding the most senior, most responsible job could commit the crime. We conclude, therefore, that even where there is a legal bar to a dental surgical assistant having responsibility for a medical treatment, there is no legal bar to a dental surgical assistant accepting responsibility for supervision of a minor patient.

actually responsible for K.N.'s supervision.[5] On this point, we also disagree. Careful review of the record makes clear that there was sufficient evidence to support the jury's finding that Rivas-Chang was responsible for K.N.'s supervision.

Rivas-Chang allegedly assaulted K.N. while she was recovering after her wisdom teeth were removed. The jury heard from Dr. Dawood, Herrera, and Rivas-Chang that a surgical assistant is responsible for monitoring a patient after surgery while the anesthesia wears off. Whether Rivas-Chang had responsibility for the supervision of K.N. was a question of fact for the jury to determine. *Anderson*, 372 Md. at 292. There is nothing in the record that supports Rivas-Chang's argument that the jury's conclusion here was unreasonable.[6] Again, Rivas-Chang relies on the fact that he had no medical authority and asserts that he was a "mere conduit" to Dr. Dawood. This may accurately describe his role.

[5] Rivas-Chang also argues that he could not have had responsibility for K.N. because he had no power to override Dr. Dawood's rules, and one of these rules was that no male staff could be alone with a female patient at any time. The fact that a rule exists, however, does not prevent that rule from being broken, and breaking the rule does not imply that Rivas-Chang overrode Dr. Dawood's policy. The jury was not precluded from finding that Rivas-Chang broke this rule and was, in fact, alone with and supervising K.N.

[6] It is useful to consider who would have called for help if K.N. stopped breathing while she recovered from the anesthesia. Presumably, it would have been Rivas-Chang or Herrera, because they were monitoring her. In other words, they were responsible for her supervision. If something went wrong while Rivas-Chang and Herrera were helping Dr. Dawood with the second operation, the front desk staff keeping a watchful eye were responsible for K.N.'s supervision and would have called for help. If a student stops breathing, the teacher calls for help, thus the teacher is responsible for the supervision of the minor. If a baby stops breathing, the babysitter calls for help. If a camper stops breathing, the counselor calls for help. While, an oversimplification, this demonstrates how fluid the concept of responsibility for the supervision of a minor can be.

It does not, however, persuade us that no rational jury could find that Rivas-Chang was, in fact, responsible for the supervision of K.N. at the time when he assaulted her.

For these reasons, we hold that the evidence was sufficient to support the jury's finding that Rivas-Chang had the responsibility for the supervision of K.N., and thus affirm Rivas-Chang's conviction on Count One.

II. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO NOL PROS THE LESSER-INCLUDED FOURTH-DEGREE CHARGES AND DENYING RIVAS-CHANG'S REQUEST FOR A JURY INSTRUCTION

Rivas-Chang was charged with third-degree and fourth-degree sexual offense for groping K.N.'s vagina. To convict Rivas-Chang of the third-degree charge, the jury had to find that he "engage[d] in sexual contact with another, [and] the victim [was] substantially mentally incapacitated … or physically helpless …, and [that Rivas-Chang knew or reasonably should have known] the victim [was incapacitated or helpless]." CR §3-307(a)(2). To convict Rivas-Chang of the lesser-included fourth-degree charge, the jury would have had to find only that Rivas-Chang, "engage[d] in sexual contact with another without the consent of the other[.]" CR §3-308(b)(1). Thus, the only difference between the third-degree sexual offense and fourth-degree sexual offense, as charged, turned on K.N.'s mental incapacitation or physical helplessness, and Rivas-Chang's awareness of it.

At the conclusion of the evidence, the State nol prossed the fourth-degree charge, leaving only the third-degree charge for the jury's consideration. Rivas-Chang objected, but over that objection, the trial court allowed the State to nol pros. Minutes later, Rivas-Chang asked the trial court to instruct the jury on the recently-nol prossed fourth-degree charges. The trial court declined.

On appeal, Rivas-Chang challenges the trial court's decision to allow the State to nol pros the lesser-included fourth-degree charge and the refusal to instruct the jury on the nol prossed fourth-degree charge. The answer turns on the application of two closely related doctrines of Maryland criminal law: the *Hook* doctrine and the *Hagans* doctrine.

Generally, the State may "terminate a prosecution on a charge and dismiss the charge by entering a [nol pros] on the record in open court." MD. RULE 4-247(a). The *Hook* doctrine precludes the State from nol prossing a lesser-included charge if there exists a rational, factual basis for convicting a defendant of the lesser and not of the greater charge. *Hook v. State*, 315 Md. 25, 37 (1989); *see also Fairbanks v. State*, 318 Md. 22 (1989); *Taylor v State*, 83 Md. App. 399, 403-404 (1990).[7] Here, the jury had facts from which it could rationally conclude that K.N. was not substantially incapacitated or helpless, (that is, the anesthesia had worn off) thus it could have convicted Rivas-Chang of the lesser-included fourth-degree sexual offense, and acquitted him of the greater third-degree sexual offense.

The jury heard how K.N. responded to inquiries about whether the room was too cold,[8] how K.N. physically repelled Rivas-Chang's hand,[9] and that the sexual assault

[7] The *Hook* doctrine does not apply if there are no facts from which a jury might rationally conclude that a defendant is guilty of the lesser-included but not the greater offense. *Burrell v. State*, 340 Md. 426, 439 (1995); *Jackson v. State*, 322 Md. 117, 127-28 (1991).

[8] Rivas-Chang testified that when he asked K.N. if she was cold while recovering from the anesthetic, "she nodded her head yeah. So [he] gave her a blanket."

[9] According to K.N.'s testimony, "[she] tried moving [her] hand again when they tried to go in my pants again. That's when [she] could move a lot more. [She] tried to push

happened mere minutes before Dr. Dawood determined that K.N. could be discharged because the anesthesia had sufficiently worn off. Based on that evidence, the jury could have concluded that the anesthesia had, either partially or completely, worn off and that K.N. was no longer substantially mentally incapacitated or physically helpless when Rivas-Chang sexually assaulted her. It was therefore factually possible to conclude that Rivas-Chang was guilty of the fourth-degree charge, but not the third-degree charge. Under the circumstances, we hold that it was error under *Hook* to allow the State to nol pros the lesser-included fourth-degree charge.

The *Hagans* doctrine is closely related to the *Hook* doctrine. *Hagans* applies where there is no pending lesser-included charge, but the evidence could be interpreted to permit conviction of a lesser-included charge and acquittal of the greater charge, and the defendant or State requests an instruction on the uncharged, lesser-included offense. *Hagans v. State*, 316 Md. 429 (1989).[10]

Here, because the State nol prossed the lesser-included fourth-degree sexual offense, but there were facts that would rationally support Rivas-Chang's conviction of the nol prossed lesser-included fourth-degree offense and acquittal of the third-degree offense, Rivas-Chang was entitled to the fourth-degree offense instruction that he requested.

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the hand away and they stopped. [She thought] they tried to do it again, and [she] could move [her] hand, and they stopped."

[10] In *Hagans*, the parties did not request the instruction on the lesser-included offense, but it was suggested by the trial judge. The Court of Appeals held that the instruction must be requested—the trial court should not act on its own initiative. 316 Md. at 454-55.

Specifically, there were facts in the record from which the jury could have concluded that the anesthesia had worn off and K.N. was no longer substantially mentally incapacitated or physically helpless when Rivas-Chang sexually assaulted her.[11] Under these circumstances, we hold that it was error for the trial court to refuse to instruct the jury on the lesser-included fourth-degree sexual offense.

It does not matter whether we characterize the error as a *Hook* doctrine error caused by allowing the State to nol pros the lesser-included fourth-degree offense, or as a *Hagans* doctrine error caused by the trial court refusing to give an instruction on the lesser-included (now uncharged) fourth-degree offense. Both errors are present here, and the result under either analysis yields the same result. "[T]he analysis under both *Hook* and *Hagans* is the same …. We see no reason why the rule or its rationale should turn on whether it was the prosecutor or the trial judge who placed defendants in the 'all or nothing' predicament." *Johnson v. State*, 90 Md. App. 638, 645 (1992).

Having concluded that the trial court erred, we must next determine whether the error was harmless. *Flores v. Bell*, 398 Md. 27, 33 (2007). "[U]nless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless'." *Dionas v. State*, 436 Md. 97, 108 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). A "reviewing court must thus be satisfied that there is no

[11] *See supra* at n.8 and n.9 and accompanying text.

reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *Id*.

The error committed here was to limit the verdicts the jury could consider. *Hook* and *Hagans* are clear on this matter. Limiting the verdicts that the jury could consider in this situation is a reversible error because Rivas-Chang was entitled, as a matter of law, to have the jury consider the greater and lesser-included charge. As a result, we hold that the error necessarily influenced the verdict because it limited the verdicts the jury could consider, in violation of *Hook* and *Hagans*. For that reason, the error was not harmless.

III. RIVAS-CHANG'S CONVICTION FOR SEXUAL ABUSE OF A MINOR CAN STAND ON ITS OWN

Because the result we have reached—affirming the conviction for sexual abuse of a minor, but reversing the conviction for third-degree sexual offense and remanding for a new trial—was not sought by either Rivas-Chang or the State, we have received no briefing on the compatibility of these results. We hold, however, that these are not legally inconsistent results and that the sexual abuse of a minor conviction can stand on its own accord. *See, e.g.*, *Caldwell v. State*, 164 Md. App. 612, 631 (2005) ("Generally, each count in an indictment is regarded as if it were a separate indictment, and the jury is required to determine whether to make a finding of guilt on each count without regard to the disposition of other counts."). Although the third-degree sexual offense conviction is reversed here, that does not mean that the illegal conduct did not occur. Rather, it only means that the jury should have had the opportunity to consider whether K.N. was mentally incapacitated or physically helpless when it occurred. While a sexual offense in any degree

is sufficient to support a conviction for sexual abuse of a minor, it is not necessary. *Tribbit v. State*, 403 Md. 638, 648 (2008); *Tate v. State*, 182 Md. App. 114 (2008). As such, the reversal of that count does not undermine the validity of the sexual abuse of a minor conviction.

CONCLUSION

We affirm Rivas-Chang's conviction on Count One. We reverse Rivas-Chang's conviction on Count Three, and remand for a new trial on Count Three and Count Four.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR NEW TRIAL CONSISTENT WITH THIS OPINION. COSTS TO BE EQUALLY DIVIDED BETWEEN APPELLANT AND MONTGOMERY COUNTY.