UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1483

September Term, 2014

LARRY ALONGI, JR.

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Woodward, J.

Filed: October 20, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a waiver of his right to a trial by jury, appellant Larry Alongi, Jr. was convicted in the Circuit Court for Caroline County by Judge Karen A. Murphy Jensen of first-degree burglary, third-degree burglary, fourth-degree burglary (dwelling), fourth-degree burglary (theft), theft of property with a value less than $1000, eluding police, and traffic offenses. The trial court sentenced appellant to a total of 10 years in prison, suspending all but five years, after which appellant timely noted this appeal.

Appellant presents the following questions for our consideration, which we have slightly rephrased:

1. Was appellant's conviction of first-degree burglary inconsistent with his acquittal of wanton trespass on private property?

2. Was the evidence sufficient to sustain the convictions of first-degree burglary and theft?

3. Did the trial court err in accepting the waiver of jury trial, where the court failed to tell appellant that he was charged with "first degree burglary" or to tell him the maximum penalty for that count?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

In early December 2013, appellant voluntarily vacated the Federalsburg, Maryland rental property he shared with his wife, Cherie Alongi, to reside in a "half-way house" in Cambridge, in order to "deal with his drug and alcohol addictions problem." He took nothing with him when he left, and he relinquished his key to the property, at his wife's request. Ms. Alongi also explained to appellant that he would not be permitted to be in the

house in her absence, although the couple had no formal separation agreement or protective order in place.[1]

When appellant moved out of the home, appellant asked Ms. Alongi if he could use the 1999 Honda Accord to run errands and attend job interviews. The Honda was registered to Ms. Alongi. Ms. Alongi stated that she allowed appellant to use the car for one week. A few days before Christmas, which was after that one week period, Ms. Alongi asked appellant to return the Honda, but appellant refused. On Christmas Day, when appellant drove the Honda to the Federalsburg house for a family visit, Ms. Alongi asked appellant to leave the vehicle at the house, and her parents would drive appellant back to Cambridge. Appellant refused.

On the afternoon of December 26, 2013, Ms. Alongi went to her parents' house in Dorchester County, returning home at approximately 9:30 that evening. During her drive home, appellant called her on her cell phone, but she did not answer.

Upon arriving home with her children, Ms. Alongi noticed that the motion activated security light was not illuminated in the back of the house, as it should have been. When she entered the house through the side door, she realized that her laptop computer was not on the dining room table where she had left it.[2] Inspection of the front and rear exterior

[1] Ms. Alongi agreed, however, that if appellant were able to get his drug and alcohol addictions under control, it was the couple's intention to resume family relations.

[2] Although Ms. Alongi stated that she and appellant were married and living together as husband and wife in March 2013 when she purchased the laptop for approximately $1000, he did not use the laptop and identified it as belonging to her.

doors revealed that the lock on the back porch door had been broken with the door broken open, and the back house door had a buckled frame.

Ms. Alongi called the police, who responded to her home. Approximately 25 minutes after leaving the Alongi residence, Federalsburg Police Department Captain Donald Nagel observed Ms. Alongi's Honda on Sullivan Mill Road, an area known for drug dealing. Captain Nagel identified appellant, with whom he was familiar, as the driver of the Honda. Captain Nagel radioed Corporal Brian McNeil to assist in apprehending appellant.

When Corporal McNeil activated his emergency lights and siren to initiate a traffic stop, appellant did not stop, instead accelerating to 74 miles per hour in a 25 miles per hour speed zone, driving erratically, sometimes on the wrong side of the road, narrowly avoiding parked vehicles, and failing to stop at a stop sign. In addition, he attempted to hit Captain Nagel's vehicle, instead of slowing down to avoid it. As appellant approached the Maryland/Delaware line, Captain Nagel and Corporal McNeil ended the chase. Appellant was not apprehended that evening.

On December 27, 2013, appellant called Ms. Alongi and told her that he had her car and her laptop. He apologized for what he had done and told her she could pick up the computer and the car at the half-way house in Cambridge. Ms. Alongi called the Federalsburg Police Department to alert them to the location of her Honda, but she was advised to inform the Cambridge Police Department.

When she arrived at appellant's home, he exited the house, apologizing and appearing sober and alert, and handed her the laptop and the keys to the Honda. She regained possession of the Honda and the laptop, and appellant was arrested.

At the close of the State's case, appellant moved for judgment of acquittal. The court granted the motion on the charge of wanton trespass upon private property, reserved on the burglary charges, and denied the motion on the traffic charges. Appellant did not put on any evidence, and at the close of the entire case, he renewed his motion for judgment of acquittal. The court found appellant guilty of all counts but for second-degree assault, on which it entered a not guilty verdict.

DISCUSSION

I.

Appellant first contends that the trial court erred when it inconsistently granted his motion for judgment of acquittal on the charge of wanton trespass upon private property while convicting him of first-degree burglary of the same property. In other words, he argues, if there was no trespass because of his possessory interest in the house, there could not have been a burglary, which requires the intent to commit theft of items from the property of another.

The State first offers a non-preservation argument, an argument with which we concur. During appellant's bench trial, when the court found him guilty of the burglary and theft charges, after having granted his motion for judgment of acquittal on the charge of wanton trespass upon private property, appellant did not object or otherwise seek clarification of the alleged inconsistent verdict.

This Court, in *Travis v. State*, 218 Md. App. 410, 452 (2014), discussed the "iron-clad preservation requirement" with regard to claims of inconsistent verdicts. Although the discussion about the necessity of preservation centered on objections required when a jury renders inconsistent verdicts of conviction and acquittal, *Travis* itself involved an alleged inconsistent verdict in a bench trial, and we concluded that "[t]he easy answer [ ] is that no objection was made and the point is not preserved for appellate review." *Id*. at 471. In this matter, because appellant made no objection based on any alleged inconsistency of the trial court's verdict, appellant has failed to preserve this issue for our review.

Even had he preserved the issue, appellant would not prevail. The misdemeanor of wanton trespass upon private property is prohibited by Maryland Code (2012 Repl. Vol., 2013 Supp.), §6-403(a) of the Criminal Law Article ("CL"), which states: "A person may not enter or cross over private property . . . of another, after having been notified by the owner or the owner's agent not to do so, unless entering or crossing under a good faith claim of right or ownership." The felony of first-degree burglary is the "break[ing] and enter[ing] the dwelling of another with the intent to commit theft or a crime of violence." CL § 6-202(a). "Trespass" in §6-403(a) proscribes "the intrusion upon the property of another with the general intent to break and enter but without the specific intent to commit a crime therein." *Warfield v. State*, 315 Md. 474, 498 (1989). It is the lack of the requirement of a specific intent that distinguishes the crime of trespass from burglary. *Id*.

At first blush, then, it would appear that a defendant may not be guilty of burglary, that is, the breaking and entering the dwelling of another, without also trespassing upon the

dwelling of that person, and a verdict acquitting the defendant of trespass and convicting him of first-degree burglary would be inconsistent. It is also true, however, that a court may impose seemingly inconsistent verdicts if it gives a satisfactory explanation for the apparent inconsistency on the record. *Hickman v. State*, 193 Md. App. 238, 254 (2010). *See also Smith v. State,* 412 Md. 150, 164 (2009) (holding that "seemingly inconsistent verdicts by a trial judge in a non-jury trial were, and still are, only acceptable if the trial judge explains the apparent inconsistency on the record").

In the instant case, the trial court took great pains to explain its verdict. During its grant of appellant's motion for judgment of acquittal on the trespass charge, the court acknowledged that the acquittal was appropriate because appellant remained a lessee of the Federalsburg residence that he had shared with his wife, and "trespass deals with the ownership interest." However, the court continued, "[t]he thefts and the burglaries deals [sic] with possessory interest." With regard to the burglary, which resulted in the theft of Ms. Alongi's laptop, the court added, "[Y]ou have the problem of relinquishing the key and it's not the ownership it's the possession."

In rendering its verdict on the burglary charge, the court further explained that this Court, in *Parham v. State*, 79 Md. App. 152 (1989),[3] had determined that the burglary laws were

[3] In *Parham*, discussed in more detail in section II, below, this Court held that the "law of burglary was designed for the purpose of protecting the habitation, and thus, occupancy or possession, rather than ownership, is the test." 79 Md. App. at 161 (internal citation omitted). Thus we concluded that "the mere existence of the marriage relationship does not put a spouse's separate property beyond the protection of the law and subject to the depredation of the other spouse." *Id*. at 163.

> designed for the purpose of protecting habitation and this occupancy of possession, rather then [sic] ownership is the test. And it goes on to talk about some other out of state cases. And on the last page common thread running through the cases at the mere existence of the marriage relationship does not put a spouses [sic] separate property beyond a protection of the law, in subject to the (unintelligible. .) of the other spouse. As in any. . . in any case everything is fact specific. And the last thing I want to do is have a run on the District Court Commissioner every time people are separated and somebody is going into the house and stealing, taking somebody's property, I mean we could have an absolute nightmare on our hands. But that's really not what happened here Mr. Alongi**. I think the key is you voluntarily left the house and voluntarily relinquished even temporary possession of your right to go in and out by giving your wife the key. And that is. . . that is really the issue to me. . .**
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> * * *
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> **Occupancy or possession rather than ownership is the test.** This is not a divorce case, and as I told you the marital . . . the laptop[,] the car[,] it's all marital property, but that's in a totally different context. That's in the civil . . . civil matter on who owns what, who's going to get what. . . . But we're not in divorce court[,] we're in criminal court. And as I said when you gave the key up, you give up temporarily the right to go in and out of that house. **Now, if you had never given the key up and going in and out of the house, I mean the State wouldn't have really quite frankly a leg to stand on, because I would agree that you had [a] possessory interest in the house.** You could come and go as you want, if you elected, if you had lost your key and elected to throw a brick through the window and climbed in again, you wouldn't be held accountable. But that is not, it's the key . . . it's the key. You understand that **when you went in, basically when you abandoned temporarily the right to go in and out of the house, you abandon your right to claim any possessions in the house including the laptop. So, that is why the Court is finding you guilty of the burglaries and the theft of the laptop.**

(Emphasis added).

The trial court adequately explained its seemingly inconsistent verdict on the record. The court found that appellant, by virtue of his continued leasehold interest in the residence, was not guilty of wanton trespass on the property, but nonetheless impermissibly

entered the residence, in which he had relinquished any possessory interest, with the intention of stealing personal property, in which he had also relinquished any possessory interest. The court thus permissibly acquitted appellant of wanton trespass upon private property while convicting him of first-degree burglary and related charges.

II.

Appellant argues that the evidence adduced at trial was insufficient to sustain the conviction of first-degree burglary[4] because the State failed to prove that he had no occupancy or possessory interest in the Federalsburg rental property he shared with his wife, given his continued leasehold interest in the house. The State counters that appellant, who had voluntarily vacated the house, relinquished his key, and had been told by his wife that he had no permission to be in the house in her absence, had no occupancy or possessory interest in the house at the time he broke into the house and took the laptop, and, therefore, the evidence sufficiently supported the conviction of first-degree burglary.

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[4] Appellant, in his second question presented, also disputes the sufficiency of the evidence to support the theft conviction. His argument in support of that position, however, references only the evidence as it relates to the burglary charge. In *Oak Crest Village, Inc. v. Murphy*, 379 Md. 229, 241 (2004), the Court of Appeals pointed out that, pursuant to Md. Rule 8-504(a)(5), "[a]n appellant is required to articulate and adequately argue all issues the appellant desires the appellate court to consider in the appellant's initial brief." And, as we stated in *von Lusch v. State*, 31 Md. App. 271 (1976), "'[s]urely it is not incumbent upon this Court, merely because a point is mentioned as being objectionable at some point in a party's brief, to scan the entire record and ascertain if there be any ground, or grounds, to sustain the objectionable feature suggested.'" *Id.* at 282 (quoting *State Roads Comm. v. Halle*, 228 Md. 24, 32 (1962)), *rev'd on other grounds*, 274 Md. 255 (1977).

Accordingly, we decline to address the sufficiency of the evidence to sustain the theft conviction. Had we done so, however, we would have determined that the evidence was sufficient to sustain the theft conviction.

We will conclude that the evidence is sufficient if, "viewing the evidence in the light most favorable to the State, '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Riggins v. State*, 223 Md. App. 40, 60 (2015) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)) (emphasis in original).

When *Parham* was decided in 1988, burglary was defined as "the breaking and entering of a dwelling house of another in the nighttime with an intent to commit a felony."[5] 79 Md. App. at 160. As appellant does here, Parham argued that the State failed to establish one element of the crime of burglary, that is, that his breaking and entering was into the "dwelling house of another." *Id*. Although separated, Parham and his wife remained legally married; he argued that their dwelling was still marital property and that he therefore had "an absolute right to be there." *Id*. Accordingly, Parham said, he could not be convicted of burglary because his breaking and entering was not of the dwelling place of another, but rather his own. *Id*.

We disagreed, explaining that "the law of burglary was designed for the purpose of protecting the habitation, and thus, occupancy or possession, rather than ownership is the test." *Id*. at 161 (internal citations omitted). Referencing out-of-state cases that specifically held an estranged spouse can be convicted of burglary if the dwelling broken into was once shared with his or her spouse, we held that a rational trier of fact could have found that Parham, an estranged spouse, had neither a possessory interest in his wife's house, nor a

[5] CL §6-202(a) now codifies the crime of first-degree burglary and states that "[a] person may not break and enter the dwelling of another with the intent to commit theft or a crime of violence."

right to be in the residence when he entered it. Consequently, the evidence was sufficient to sustain Parham's conviction for burglary. *Id*. at 163.

We hold similarly here. Despite appellant's arguments that (1) he and his wife were not legally separated; (2) he and his wife were both still listed as lessees of the property; (3) he had left all his belongings in the house with an expectation of moving back in once he had resolved his drug and alcohol addictions; and (4) his wife had permitted him to visit the house on Christmas Day, the test remains whether he had a right to occupancy or possession of the property at the time he entered it. In our view, he did not.

Ms. Alongi's undisputed testimony showed that appellant had voluntarily vacated the home, relinquished his key, and accepted her prohibition on his presence in the house in her absence. The very fact that he broke two back doors to gain entrance to the house when he was presumably aware that his wife was away visiting her parents belies his claim of a right to enter to the house. *See Parham*, 79 Md. App. at 161 n.3 (stating that the method Parham employed to gain entry, throwing a brick through a window, was "inconsistent with any kind of permissive entry").

Given the evidence, a rational trier of fact, here the court, could have found beyond a reasonable doubt that appellant had neither a possessory interest in his wife's residence, nor a right to be in the residence at the time that he entered it. We hold that the evidence is sufficient to sustain appellant's conviction for first-degree burglary.

III.

Finally, appellant asserts that the trial court erred in accepting his waiver of his right to trial by jury because the court failed specifically to advise him that he was charged with

first-degree burglary or what is the maximum penalty for that crime. Thus, he concludes, his jury trial waiver was not knowing or voluntary.

On July 9, 2014, appellant appeared, with counsel, at a pre-trial hearing for two pending cases, wherein his attorney advised the trial court that appellant wished to reject the State's plea offer and waive his right to trial by jury in both matters.[6] The court then permitted defense counsel to question appellant regarding his waiver of his right to a jury trial to determine whether he was "doing it freely and voluntarily with understanding." Appellant stated that he was 42 years old, had attended school through the eighth grade but had received his GED, and could read and write.

Then his attorney queried:

> [DEFENSE COUNSEL]: Do you understand in the one case you're charged with several counts, including second degree burglary. Okay, and that carries a maximum penalty of fifteen years incarceration. In the other case [, the one at issue in the instant appeal,] you are also charged with some burglary, and some theft related offenses. And you understand what the maximum penalties of those charges are as well?
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> [APPELLANT]: Yes sir.
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> [DEFENSE COUNSEL]: Okay. You and I have talked about that?
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> [APPELLANT]: Mmm-hum.

Following the remainder of the colloquy with counsel, which included an explanation of the general nature of a jury trial and a determination that appellant had not

[6] The cases involved "separate incidents" and appeared to be unrelated.

been threatened, cajoled, or coerced into giving up his right to a jury trial, the court declared itself "satisfied that in both case [sic] 10151 and 10150 that you are freely and voluntarily with understanding waiving your right to trial by jury in both of those cases."

Although not raised by the State in its brief, we conclude that appellant has not preserved for appellate review the issue he now raises on appeal--that his jury trial waiver was not made knowing and voluntary because he had not been specifically informed of the most serious charge or its maximum penalty--by failing to object at any time during the trial court's acceptance of his jury trial waiver. Pursuant to Md. Rule 8-131(a), if a party fails to raise an issue in the trial court or fails to issue a contemporaneous objection, "the general rule is that he or she waives that issue on appeal." *Nalls v. State*, 437 Md. 674, 691 (2014).

A criminal defendant's right to a jury trial is fundamental. It is guaranteed by the Sixth Amendment to the U.S. Constitution[7], applicable to the states through the Fourteenth Amendment–*see Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)–and by the Maryland Declaration of Rights, Articles 5, 21, and 24.[8] As with most constitutional rights, however, the right to a jury trial may be waived by a criminal defendant. *Smith v. State*, 375 Md.

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[7] The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed …." *Jenkins v. State*, 375 Md. 284, 299 (2003).

[8] The relevant portions of Articles 5, 21, and 24 state, respectively: "That the Inhabitants of Maryland are entitled to … trial by jury;" "That in all criminal prosecutions, every man hath a right to … a speedy trial by an impartial jury;" and "That no man ought to be … imprisoned … but by the judgment of his peers." *Smith v. State*, 375 Md. 365, 377 n.9 (2003).

365, 377 (2003). In Maryland, the option of trial by jury belongs entirely to the defendant. *Carter v. State*, 374 Md. 693, 714 (2003).

Md. Rule 4-246, which governs a defendant's waiver of a jury trial, states, in pertinent part:

> (a) **Generally**. 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.
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> (b) **Procedure for acceptance of waiver**. 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.[9]

As Maryland courts have recognized, for the waiver of the constitutionally protected right to a jury trial to be valid, the "'trial judge must be satisfied that there has been an intentional relinquishment or abandonment of a known right or privilege.'" *Kang v. State*, 393 Md. 97, 105 (2006) (quoting *Smith*, 375 Md. at 379). Pursuant to Rule 4-246, if a defendant chooses to waive his or her right to a jury trial, a waiver inquiry must be conducted on the record in open court. The waiver must be made "knowingly and

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[9] Prior to an amendment to the Rule that took effect on January 1, 2008, there was no requirement that the trial court announce on the record that the defendant's waiver was knowing and voluntary. That change in the Rule was in response to *Powell v. State*, 394 Md. 632 (2006), *cert.* denied, 549 U.S. 1222 (2007) in which the Court of Appeals upheld the defendant's jury trial waiver although the trial judge neglected to state on the record that he found the jury trial waiver to be knowing and voluntary. *Walker v. State*, 406 Md. 369, 377, n.1 (2008).

voluntarily," and the trial court must announce on the record its determination that the waiver was made knowingly and voluntarily. Md. Rule 4-246(b).

If a defendant's waiver is knowing and voluntary, then the waiver meets the test set forth in the Rule, and the trial court may properly accept the waiver. *Smith*, 375 Md. at 380. On the other hand, if the trial court does not comply fully with Rule 4-246(b), the failure to comply constitutes reversible error. *Valonis v. State*, 431 Md. 551, 570 (2013).

Appellant argues that the trial court failed to make an adequate finding of knowledge and voluntariness in his waiver of his right to a jury trial because it did not ensure that he was aware of the most serious charge against him or its maximum penalty. Appellant, however, interposed no objection to the court's alleged failure to conform to Rule 4-246 or to any alleged lack of knowledge or voluntariness of the waiver.

The Court of Appeals recently addressed the preservation issue with regard to Rule 4-246. In *Nalls*, 437 Md. at 693, the Court exercised its discretion to consider the issue, "based on the continued confusion surrounding this issue in the trial courts," notwithstanding the defendants' failure to object to the jury trial waiver procedure at the trial court level. Going forward, however, the Court explained that

> the appellate courts will continue to review the issue of a trial judge's compliance with Rule 4-246(b) *provided a contemporaneous objection is raised in the trial court to preserve the issue for appellate review*. Accordingly, to the extent that *Valonis* could be read to hold that a trial judge's alleged noncompliance with Rule 4-246(b) is reviewable by the appellate courts despite the failure to object at trial, that interpretation is disavowed.

Id. at 693-94 (emphasis added).

Shortly thereafter, this Court, in *Meredith v. State*, 217 Md. App. 669, 674-5*, cert. denied*, 440 Md. 226 (2014), heeded the Court of Appeals' admonition, succinctly holding that in the absence of an objection to the jury "waiver procedure, to its content, or to the trial court's announcement" or lack thereof, a defendant's "challenge to the effectiveness of his waiver is not preserved for our review and is not properly before this Court. We shall not exercise our discretion under Rule 8-131 to consider the issue." And, in *Clark v. State*, 218 Md. App. 230, 246 (2014), we reiterated that, under *Nalls* and *Meredith*, the absence of an objection to the trial court's failure to determine and announce a jury trial waiver rendered the defendant's claim of error unpreserved for appellate review.

We hold similarly here. Appellant did not contemporaneously object to any aspect of the jury waiver process. He thus failed to preserve the issue for our review.

Appellant's argument, even had he preserved it for our review, is unavailing. A trial court '"need not recite any fixed incantation'" in determining whether a defendant's waiver of a jury trial is knowing and voluntary. *Winters v. State*, 434 Md. 527, 537 (2013) (quoting *Walker v. State,* 406 Md. 369, 378 (2008)). So long as the court ensures that the defendant has "some knowledge of the jury trial right before being allowed to waive it," the waiver will be knowing and voluntary. *Abeokuto v. State*, 391 Md. 289, 317-18 (2006). Whether a defendant's waiver of his jury trial right is valid '"depends upon the facts and circumstances of each case.'" *Winters*, 434 Md. 527 at 537 (quoting *State v. Hall*, 321 Md. 178, 182 (1990)). Therefore, on review, we consider the "totality of the circumstances." *Walker v. State,* 406 Md. at 379.

Here, the colloquy at appellant's waiver hearing reveals that the trial court adequately examined appellant regarding his waiver of his right to a trial by jury. No facts from the record demonstrate that the court had reason to advise appellant about the specific charges against him or their maximum penalties, particularly given appellant's assertion that he and his attorney had "talked about" the burglary and theft charges and their maximum penalties. Therefore, an examination directed to those areas was not required in this case, and the circumstances support the court's finding of a knowing and voluntary jury trial waiver.

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