The Circuit Court for Harford County
Case No.: 12-K-15-000058 and
Case No.: 12-K-15-001448

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos.2597 & 2632

September Term, 2015

DAVID DORSEY

v.

STATE OF MARYLAND

Meredith,
Leahy,
Beachley,

JJ.

Opinion by Meredith, J.

Filed: June 18, 2018

At the conclusion of a jury trial in the Circuit Court for Harford County, David Dorsey, appellant, was convicted of first-degree assault, attempted robbery with a deadly weapon, attempted robbery, and first-degree burglary. The court sentenced appellant to a term of 25 years' incarceration for first-degree assault, a consecutive term of 20 years' incarceration for first-degree burglary, and a consecutive term of 20 years' incarceration for attempted robbery with a deadly weapon.

In this direct appeal, appellant presents two questions for our review, which we have rephrased: (1) Did the trial court err when it permitted the victim to testify that she heard a bystander say to the fleeing assailant: "Dave, why did you do that to her?"; and (2) Should the conviction for first-degree assault have merged with the conviction for attempted robbery with a deadly weapon for purposes of sentencing.[1]

For the following reasons we answer both of those questions "no," and affirm the judgments entered by the Circuit Court for Harford County.

BACKGROUND

Victoria Merritt, the victim in this case, was attacked in her apartment on December 4, 2014, by a person who struck her first with her vacuum cleaner, and then repeatedly with a hammer, and asked her for money.

[1] Appellant phrased the two questions he raised as follows:

1. Did the trial court err when it permitted Ms. Merritt to testify to a statement [Mr. Dave] Quick made, when the statement was hearsay?

2. Must Mr. Dorsey's sentences for first-degree assault and attempted robbery with a dangerous weapon be merged?

Earlier in the evening, the victim's friend Amber had been with her in the apartment while the two hung curtains. Amber left the apartment around 11:30 p.m. After the victim had fallen asleep, she was awakened by noises within her apartment. As she investigated the noise she was struck in the head, first with a vacuum cleaner and then with a hammer. Her assailant said "Amber, that was real cruddy of you," and "Amber, do you have any money?" The blows to her head sent the victim in and out of consciousness before she awoke to see her assailant leaving her bathroom.[2]

The assailant then ran from the apartment. The victim followed the man out the door, screaming: "Somebody help me. Somebody catch him." She also recalled shouting: "Look at what he's done to me." "Somebody get him. Somebody get him, please." The victim testified, over objection, that, as she was begging for help, a man known to her by the nickname "Quick" was standing nearby in the street, and said to the fleeing man: "Dave, why did you do that to her?"

The victim testified that she then "ran back in the house to call 9-1-1 because the blood was just gushing everywhere, and I was more worried about, you know, me at the time." At that point, she recalled, "all of a sudden, Quick came rushing through the door and grabbed the phone out of my hand and was telling 9-1-1" that she needed help quickly because her bleeding was getting worse: "He said, he says, 'Please, get here quicker then. . . . [Y]ou need to get here quicker because she is bleeding faster and faster, and it's not

[2] Several days after the attack, the victim realized that forty dollars was missing from her wallet, which had been on a table in her apartment.

only dripping down, but now it's squirting out straight,'. . . ." But Quick left the scene before emergency personnel arrived, and he did not testify at trial.

About 45 minutes after the police responded to the scene of the attack, they located a man nearby who appeared dressed as the victim had described. The man was Mr. Dorsey, the appellant. After the police officer who was interviewing Mr. Dorsey saw what he suspected to be blood on Mr. Dorsey's hands and clothing, Mr. Dorsey was photographed and transported to the police station. When asked about the origin of the blood, Mr. Dorsey had no explanation.

At trial, Katherine Busch was accepted as an expert in forensic serology and DNA analysis. She testified that genetic material recovered from the blood on Mr. Dorsey's clothing matched the victim's genetic profile at all 15 locations tested, and therefore, it was her opinion that the victim was the source of a DNA profile from the blood stains that were found on Mr. Dorsey's jacket and pants.

DISCUSSION

I.

Prior to trial, appellant moved *in limine* to preclude the victim from testifying that she heard Quick say "Dave, why did you do that to her?". The parties agreed to postpone addressing appellant's motion until the matter came up during testimony at trial and also agreed not to mention Quick's statement during the parties' opening statements.

The victim was the first witness to testify for the State. At the appropriate time during her testimony, the jury was excused so that the court could hear the victim's

testimony regarding Quick's statement, as well as the parties' arguments regarding admissibility of the proffered testimony. The victim testified as follows:

> Q. We were at the point where you saw the man that attacked you run out the door.
>
> A. Uh-huh. Yes.
>
> Q. Describe what you did next.
>
> A. I ran after him screaming "Somebody, somebody please catch him. Somebody please get him. Look what he did to me."
>
> Q. Okay. And did you see anybody out there?
>
> A. Yes.
>
> Q. Who did you see?
>
> A. A guy that calls himself Quick.
>
> Q. And did you – What, if anything, did you hear Quick say?
>
> A. Quick said "Dave, why did you do that to her?" I could not hear what the guy said to Quick because I was too far away because I was running back to call 9-1-1. And then Quick came back to the phone and took the phone out of my hand and was telling 9-1-1 that they needed to get here quicker because blood was squirting everywhere and we couldn't get it to stop.

Thereafter, the State argued that it had laid a proper foundation to establish that Quick's statement met the requirements for the "present sense impression" exception to the ban on the use of hearsay. The State argued that the statement met the definition of a present sense impression pursuant to Md. Rule 5-803(b) because it was spontaneous, contemporaneous, and based on personal knowledge.

In response to the State's argument that the statement should come in as an exception to the rule against hearsay, defense counsel stated: "Your Honor, I would ask the

Court not to allow that statement to come in." Counsel also added an argument based upon the Confrontation Clause, but has not raised any argument in that regard on appeal.

The court provided a detailed oral opinion explaining why the court was ruling that the statement qualified for admission as a present sense impression. The court explained:

> THE COURT: . . . In preparation for this case, counsel provided me with several of the cases which are on point. *Booth v. State* found [at] 306 Md. 313, (1986). Also *State v. Jones* found at 311 Md. 23, (1987). And I believe in my further research, I located *Washington v. State* at 191 Md. App. 48, (2010). And *Washington v. State* basically confirms that at least as recently as 2010 *Booth* and *Jones* were still considered to be good law, and in fact, *Booth* was identified by the Court, by the Court of Special Appeals in *Washington* as continuing to be the leading case with regard to this exception to the hearsay rule. So despite the fact the *Booth* case is a 1986 case, it is still the leading case with regard to this area of the law.
>
> My reading of that case shows that the factors that are of significance in analyzing this evidence are the following: First, there must be requisite spontaneity. The *Booth* case discussed the fact that precise contemporaneity C-O-N-T-E-M-P-O-R-A-N-E-I-T-Y, not a word we use all the time, is not always possible. There may be a slight delay in converting the observation to speech. But the interval must be [] very short between the observation and utterance. And the issue is whether or not considering all of the surrounding circumstances there would have been sufficient time to permit reflective thought. And quoting Professor John Waltz, W-A-L-T-Z, the Court stated that there should be no delay beyond an acceptable hiatus between perception and the cerebellum's construction of an uncalculated verbal description.
>
> Well, in this case, I certainly think that that is what we have based on the testimony of Ms. Merritt. She testified that as her assailant was leaving her apartment[, she] was able to struggle to her feet to pursue him, that she was, in fact, screaming as he left her apartment, words to the effect of: ["]Stop him. Look what he did to me.["] Calling attention not only to herself, but from the fact, as she testified, [she] was obviously bleeding profusely at this point, the fact that she was in distress. So that was made clear by both her calling out and also by her physical appearance. She testified to the fact she had motion sensor lights which were activated as well as the fact that this is a well-lit area due to street lights. She testified that the person referred to as Quick was down by the road[,] by the street, and that her assailant ran out ahead of her. She is screaming, running behind him and that she herself

observed Quick and the assailant to be in close proximity as the assailant ran toward the street. So clearly she is able to testify that there was the opportunity for Quick to observe her assailant, and she was able to hear Quick's statement, "Dave, why did you do that to her?"

So, the Court feels that absolutely the requirement that the utterance be made in a contemporaneous way to the observation that that requirement is met in this case. There certainly was not an opportunity for reflective thought here. There was not any opportunity for there to be some type of constructing of a narrative. It is clear to the Court that what Quick said was an immediate, contemporaneous response, summary, exclamation, if you will, about what he was observing. And what he was observing was the assailant running in the street with Ms. Merritt injured and screaming hard on the heels of the assailant. And at that point made the statement, according to Ms. Merritt, who is on the witness stand and is subject to cross-examination, "Dave, why did you do that to her?"

Now, the second requirement is that the individual speak from personal knowledge. This must be – the utterance must be the product of the declarant's own sensory perceptions, not a situation where the declarant is repeating something that is being described by someone else and is being reported to the declarant by someone else and the declarant is actually just repeating something that happened in the past. Well that certainly is not the case here. Ms. Merritt did not know this individual who came into her apartment and who assaulted her in the way she described. She had no idea what name would identify this individual, but yet her memory, her perception of what was said is that Quick said, "Dave, why did you do that to her?"

Now, the content of that statement is a compressed statement of multiple observations. And the Court has followed carefully the analysis in the *Booth* case, the *Jones* case, and in the *Washington* case which talks about the fact that it is permissible for the utterance to basically be a shorthand fact description of what the declarant is observing.

So, in this case from the perspective of Quick and the Court's analysis of the statement, Quick is observing this person he knows to be Dave. He is observing that something has happened to the woman who is pursuing Dave, and he is both – he is summarizing those observations: This person running toward me is Dave and this woman running toward me has had something happen to her all in the same statement.

The Court feels that this is certainly a shorthand fact description which both in terms of its timing and the fact that these circumstances indicate that

> this was certainly an observation made with personal knowledge. In other words, Quick is the individual who observed the person and the interaction which he is describing, and also the fact that Quick had the opportunity to personally observe the assailant and personally observe Ms. Merritt as she was running behind the assailant. That opportunity to observe and the fact that Quick made his comment upon observing this state of affairs actually is corroborated by Ms. Merritt who also was an observer of this event.
>
> So, based on the Court's reading of the cases and the evidence I have heard today out of the presence of the jury, the Court finds that this statement made by Quick, which was described by Ms. Merritt, does qualify under the hearsay exception for present sense impression.
>
> Now, with regard to [defense counsel's] argument that there is a violation of the defendant's confrontation rights in this case, and I assume he is referring to the *Crawford* case and all of its progeny in this case, the Court does not see by any stretch of the imagination that Quick's statement can be considered to be testimonial. It is not made to anyone in authority. It's not made as a result of interview questions. It's not made for the purpose of attempting to bring anyone into Court or further any investigation or intervention to charge anyone by any governmental authority. It is a spontaneous comment, a spontaneous utterance contemporaneously made with the [s]tate of affairs that Quick was observing. So the Court does not see that that this evidence in any way implicates the *Crawford* case or the confrontation rights of the defendant.
>
> * * *
>
> So, the Court is going to permit this statement as a present sense impression.

After the court determined that the statement was admissible, the jury returned to the courtroom and the victim testified, over the defense's continuing objection, to the substance of what she had testified to during the hearing on the motion *in limine*.

Appellant contends on appeal to this Court that the trial court erred by admitting Quick's statement "Dave, why did you do that to her?" through the victim as a present sense impression because Quick lacked personal knowledge of what occurred inside the

victim's apartment. Therefore, according to appellant, Quick's statement was not a "shorthand description of fact," but rather, it was an opinion that Dave had injured the victim. Appellant argues that, "[i]n light of [the victim's] inability to identify her assailant in a photo array, Quick's statement formed a critical part of the State's case against Mr. Dorsey."

The State responds that appellant (1) failed to preserve the issue for appeal by arguing a different theory of inadmissibility at trial, (2) in the alternative, if preserved, the trial court did not err in ruling that the hearsay statement was admissible as a present sense impression, and (3) also in the alternative, that any error in admitting the evidence was harmless beyond a reasonable doubt in light of the fact that appellant was found nearby shortly after the attack wearing clothes matching the description provided by the victim and with the victim's blood on his clothes.

Preservation

Pursuant to Maryland Rule 8-131(a), our scope of appellate review is "ordinarily" limited to an issue that was "raised in or decided by the trial court." Because the trial court clearly ruled upon the question of whether Quick's hearsay statement — otherwise inadmissible, *see Bernadyn v. State*, 390 Md. 1, 8 (2005) ("a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility") — could be admitted pursuant to the exception for a present sense impression, the issue Mr. Dorsey argues on appeal was adequately preserved for appeal.

Merits

The standard for review of a trial court's admissibility determination regarding hearsay is two-tiered, providing deference to a trial court's factual conclusions, but no deference to its legal conclusions:

> [T]he trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed de novo, but the trial court's factual findings will not be disturbed absent clear error.

Gordon v. State, 431 Md. 527, 538 (2013) (internal citations omitted). With respect to the sort of factual determinations that a court makes when determining whether a statement falls under a hearsay exception, the Court of Appeals has explained:

> For instance, in determining whether evidence is admissible under the excited utterance exception to the hearsay rule, codified in Rule 5–803(b)(2), the trial court looks into "the declarant's subjective state of mind" to determine whether "under all the circumstances, [he is] still excited or upset to that degree." 6A Lynn McLain, *Maryland Practice: Maryland Evidence State & Federal* § 803(2):1(c) (2d ed.2001). It considers such factors, as, for example, how much time has passed since the event, whether the statement was spontaneous or prompted, and the nature of the statement, such as whether it was self-serving. *Id.* Such factual determinations require deference from appellate courts.

Gordon, 431 Md. at 536–37.

Although hearsay is generally inadmissible, Md. Rule 5-802, "[a] hearsay statement may be admissible, however, under certain recognized exceptions to the rule 'if circumstances provide the "requisite indicia of trustworthiness concerning the truthfulness of the statement."'" *Parker v. State*, 156 Md. App. 252, 259 (2004) (quoting *State v. Harrell*, 348 Md. 69, 76 (1997).

Maryland law recognizes numerous exceptions to the hearsay rule, one of which is the "present sense impression" exception as set forth in Md. Rule 5-803(b)(1). The Rule defines a present sense impression as a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." As the Court of Appeals explained in *Booth v. State*, 306 Md. 313, 324 (1986), the rationale of the present sense impression exception to the hearsay rule is that it recognizes "the benefit of spontaneity in the narrow span of time before a declarant has an opportunity to reflect and fabricate" and "rests upon a firm foundation of trustworthiness[.]" Regarding that "narrow span of time," our Courts have recognized that the time interval between the observed event and the utterance must be very short:

> [B]ecause the presumed reliability of a statement of present sense impression flows from the fact of spontaneity, the time interval between observation and utterance must be very short. **The appropriate inquiry is whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought.** *See McCormick on Evidence* § 298, at 862 (3d ed. E. Cleary 1984). In the words of Professor Jon Waltz, "absent some special corroborative circumstance, there should be no delay beyond an acceptable hiatus between perception and the cerebellum's construction of an uncalculated verbal description." Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 Iowa L.Rev. 869, 880 (1981).

Washington v. State, 191 Md. App. 48, 92–93 (2010) (quoting *Booth*, 306 Md. at 324) (emphasis added). In addition to being both spontaneous and contemporaneous with an event or condition, for a statement to be admitted as a present sense impression, the statement must come from the personal knowledge of the out-of-court declarant. *Booth*, 306 Md. at 325. Finally, an otherwise valid present sense impression is not excludable simply because it appears to come in the form of an opinion rather than a fact; "[a]

statement that at first blush appears to represent the opinion of the speaker may prove upon more careful analysis to be non-judgmental in character, or it may represent a shorthand rendition of facts." *Id.*

We agree with the trial court that the Quick's statement to the fleeing man was a spontaneous reaction to seeing a man being chased by a screaming and bleeding woman. Clearly, the statement was contemporaneously made, as it was made while Quick tried to comprehend what was transpiring before his eyes. We likewise agree with the trial court's conclusion that Quick was speaking from personal knowledge and that his statement was a "shorthand fact description" of his dual observations that a person running toward him was someone he knew as Dave, and the woman he saw running had had something done to her which Quick inferred to have been done to her by Dave. We are not persuaded that the fact that Quick did not observe what transpired in the apartment barred the admission of Quick's present sense impression as to what he observed outside the apartment. In summary, we discern neither error nor abuse of discretion on the part of the circuit court in admitting the statement into evidence.

II.

Relying on *Morris v. State*, 192 Md. App. 1 (2010), appellant next contends that his conviction for first-degree assault must be merged into his conviction for attempted robbery with a dangerous weapon for purposes of sentencing because the two convictions

arose out of the same act or transaction, and, under the required evidence test, the two convictions were for the same offense.[3]

The State concedes that the two convictions arose from the same act or transaction, but contends that merger is not warranted because the two convictions are not for the same offense under the required evidence test.[4]

Ordinarily, we undertake a two-part analysis to determine whether two offenses should merge for sentencing. "To evaluate the legality of the imposition of separate sentences for the same act, we look first to whether the charges 'arose out of the same act or transaction,' then to whether 'the crimes charged are the same offense.'" *Morris*, 192 Md. App. at 39, quoting *Jones v. State*, 357 Md. 141, 157 (1999). In the instant case, the State concedes that the two offenses arose out of the same transaction. We agree, and

[3] During the sentencing hearing, appellant also argued that his sentences should merge under the concepts of lenity and fundamental fairness. By not including those arguments in his Brief before this Court, he has abandoned them on appeal. But, even if those arguments were before this Court, we would reject them. The offenses do not merge under the concept of lenity because that form of merger only applies to statutory offenses and assault and robbery are both common law offenses, even though they have statutory penalties. *Pair v. State*, 202 Md. App. 617, 641–43 (2011). Moreover, there is nothing fundamentally unfair about the imposition of separate sentences under the circumstances of this case. The first degree assault in this case was no mere incident to the robbery of the victim; she was repeatedly struck in the head, first with a vacuum cleaner, and then with a hammer, until she was beaten unconscious.

[4] The State further contends that the two offenses do not merge under principles of lenity or fundamental fairness. And the State notes that, were the sentences to merge under either lenity or fundamental fairness, the offense with the lesser penalty (robbery) would merge into the offense with the greater penalty (first-degree assault). As noted in the previous footnote, appellant has not pressed either of these arguments for merger in this appeal.

therefore turn to the question of whether the first-degree assault and attempted robbery with a dangerous weapon are the "same" offense.

To determine whether two offenses are the "same," we employ the required evidence test, which analyzes the required elements of each offense to determine whether each offense has an element that the other does not.

> The required evidence is that which is minimally necessary to secure a conviction for each . . . offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, the offenses are not the same for double jeopardy purposes, even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes. And of course if both [offenses] have exactly the same elements, the offenses are also the same within the meaning of the prohibition against double jeopardy.

Monoker v. State, 321 Md. 214, 220 (1990), quoting *State v. Holmes*, 310 Md. 260, 267-68 (1987).

In *Pair, supra,* 202 Md. App. at 625, Judge Charles E. Moylan, Jr., observed: "Assault is a protean crime." First-degree assault can be viewed as an aggravated form of second-degree assault. Second-degree assault can be carried out in three distinct ways: (1) by intentionally frightening the victim, (2) by actually battering the victim, and/or (3) by attempting to batter the victim. *Jones v. State*, 440 Md. 450, 455 (2014). There are two alternative modes by which a second-degree assault may rise to a first-degree assault: (1) by causing, or attempting to cause serious physical injury, and/or (2) by using a firearm. Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("C.L.") § 3–202, *see also Dickerson v. State*, 204 Md. App. 378, 383 (2012). The jury in the instant case was

instructed on the "actual battery" theory of second degree assault and on the "serious physical injury" theory of aggravation, as follows:

> The defendant is charged with the crime of first-degree assault. In order to convict the defendant of first-degree assault, the State must prove: **One**, that the defendant caused offensive, physical contact with [the victim]; **two**, that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and **three**, that the defendant intended to cause serious, physical injury in the commission of the assault.
>
> … Serious physical injury means injury that one, creates a substantial risk of death; or two, causes serious and permanent, or serious and protracted disfigurement.

(Emphasis added).

"Robbery is the 'felonious taking and carrying away of the personal property of another from his person by the use of violence or by putting in fear.'" *Fetrow v. State*, 156 Md. App. 675, 687 (2004), quoting *Metheny v. State*, 359 Md. 576, 605 (2000). "Robbery with a dangerous or deadly weapon is the offense of common law robbery, aggravated by the use of a 'dangerous or deadly weapon.'" *Fetrow*, 156 Md. App. at 687, (quoting *Couplin v. State*, 37 Md. App. 567, 582 (1977)). Attempt consists of intent to commit a particular offense coupled with some overt act in furtherance of the intent which goes beyond mere preparation. *Cox v. State*, 311 Md. 326, 330 (1988).

Consistent with those principles, the jury in the instant case was instructed on the offense of attempted robbery with a dangerous weapon, as follows:

> The defendant is charged with the crime of robbery. Robbery is the taking and carrying away of property from someone's presence and control by force or threat of force with the intent to deprive the victim of the property. In order to convict the defendant of robbery, the State must prove: **One**, that the defendant took the property from [the victim's] presence and control;

> **two**, that the defendant took the property by force or threat of force; and **three**, that the defendant intended to deprive [the victim] of the property.
>
> ***
>
> The defendant is also charged with the crime of robbery with a dangerous weapon. In order to convict the defendant of robbery with a dangerous weapon, the State must prove all of the elements of robbery **and** also must prove that the defendant committed the robbery by using a dangerous weapon. A dangerous weapon is an object that is capable of causing death or serious bodily harm.
>
> The defendant is charged with the crime of attempted robbery with a dangerous weapon. Attempt … is a substantial step beyond mere preparation toward the commission of a crime. In order to convict the defendant of attempted robbery with a dangerous weapon, the State must prove: **One**, that the defendant took a substantial step beyond mere preparation toward the commission of the crime of robbery with a dangerous weapon and **two**, that the defendant intended to commit the crime of robbery with a dangerous weapon. The elements of the crime of robbery with a dangerous weapon have been given above.

(Emphasis added).

When the required evidence test is applied to the elements of first-degree assault and attempted robbery with a dangerous weapon, it is clear that, in the present case, these two crimes are not the "same" offense because each offense has at least one element that the other does not. First-degree assault requires the infliction, or attempted infliction, of serious physical injury; and attempted robbery with a dangerous weapon requires the use of a dangerous weapon. Accordingly, no merger occurs under the required evidence test because, even though the two offenses arose from the same transaction, the jury was required to find at least one additional element to support a conviction of each offense.

Appellant's reliance on a seemingly contrary statement in *Morris* is misplaced. Appellant asserts that, in *Morris*, we stated that "this Court has previously held [that] first-

degree assault is a lesser included offense of robbery with a dangerous and deadly weapon." *Morris*, 192 Md. App. at 39–40 (quotation marks and citation omitted). In support of that statement in *Morris*, we cited *Williams v. State*, 187 Md. App. 470, 476 (2009), and *Gerald v. State*, 137 Md. App. 295, 312 (2001), as cases that had held that the two offenses merged. But, unlike this case, all three of those cases addressed first-degree assaults committed with firearms. When first-degree assault is predicated on the firearm aggravator, merger of that offense with robbery with a deadly weapon under the required evidence test may be warranted because that modality of first-degree assault does not require proof of an intent to commit serious bodily injury, and therefore, does not require proof an element other than those required for proof of robbery with a dangerous weapon. In that respect, *Morris*, *Williams*, and *Gerald* concerned different offenses than the offenses of which Mr. Dorsey was convicted, and do not dictate merger in his case.

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