UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1776

September Term, 2015

ANDREW STEPHEN HULL

v.

STATE OF MARYLAND

Meredith,
Leahy,
Friedman,

JJ.

Opinion by Leahy, J.

Filed: July 29, 2016

We have before this Court an appeal from another disturbing college rape case, this time emanating from Maryland's eastern shore. At the conclusion of a two-day trial before a jury in the Circuit Court for Wicomico County, Appellant, Andrew Stephen Hull, was convicted of second-degree rape and second-degree sexual offense in connection with an attack on a college student, whom we shall refer to as "Ms. M."

Appellant challenges the trial court's failure to grant a mistrial after the State, in cross-examining his character witness, asked the witness whether she was aware of charges pending against Appellant for "sexual solicitation" in another county. He also contends that the court erred when it permitted the State to enter the entirety of an 11-page journal kept by Ms. M into evidence. After his sentencing, Appellant noted this timely appeal.

Finding no error or abuse of discretion in the rulings of the trial court, we affirm.

BACKGROUND

On the night of November 1 and into the early morning of November 2, 2014, Ms. M. and her roommate hosted a Halloween party. Appellant was a guest at the party. According to Ms. M.'s testimony at trial, she and another friend from school, Mr. S., decided to go upstairs to Ms. M.'s bedroom to have sex. While Ms. M. and Mr. S. were engaged in intercourse, Ms. M. testified that she "passed out . . . from the alcohol." Ms. M. related, "I was on top of [Mr. S.] and that's the last thing I remember." However, Ms. M. testified that she was later awakened by Appellant sodomizing her. She related the following:

The next thing I remember was waking up from a stabbing pain in my anus.

* * *

> I felt the pain, I screamed in pain, I was very disoriented and confused. I turned to my left to turn on the light that was right next to my bedside. And that's when I realized that it was [Appellant] who was standing naked in front of me. I screamed again --

* * *

> My legs were horizontal, I guess, so parallel to the pillows. So if the bed is facing this way my body was laid across this way, and my legs were over the side of the bed.

* * *

> I had to reach around behind me [to turn the light on], because if you're laying in bed it would be on your right side, but because I was horizontal it was on my left side. So I had to reach around, around [Mr. S.] who was laying next to me, to turn on the light. So to my surprise [Mr. S.] was there, and I was very confused at who was above me.

After Ms. M. managed to turn on the light, she saw Appellant and according to her trial testimony "[Appellant] was naked. . . . He was laughing." Ms. M. continued:

> Well, at first . . . I said "what the f[--]k, [Appellant]." And he said, he was laughing and he said, "oh shit, I thought you were [another girl]." And that's when I grabbed my clothes and I ran downstairs.

According to her testimony, Ms. M. went to her roommate's bedroom and called two close friends.

Ms. M.'s roommate testified that when Ms. M. came to his bedroom, he observed Appellant in the nearby bathroom washing his hands, laughing and taunting Ms. M. about anal penetration. The roommate then insisted that Appellant and his friends leave the residence.

Appellant recounted his own version of the events of November 2, 2014, relating that he entered Ms. M.'s bedroom and, after lying on the bed and talking for a while, he and Ms. M. "started fooling around and that led to [] having a sexual relationship." Appellant testified that he and Ms. M. had consensual oral and vaginal intercourse that was momentarily interrupted when the roommate entered the room to return Ms. M.'s cell phone to her.

Later that morning, Ms. M. sought medical attention for both vaginal and anal injuries. This led to a sexual assault forensic examination and police involvement. On January 5, 2015, Appellant was charged with second-degree rape, second-degree sex offense, third-degree sex offense, fourth-degree sex offense, sodomy, first-degree assault, and second-degree assault.

At a pretrial hearing on May 21, 2015, the parties addressed an 11-page journal entry by Ms. M. detailing her experience of the events of November 2 and giving her opinion of her attacker's character. During the hearing, the State indicated that it did not intend to introduce the journal in its case-in-chief but reserved the right to introduce the journal if defense counsel opened the door and established its relevancy. The circuit court added an entry on the docket reflecting that the State would not use the written statement subject to opening the door.

Appellant was tried before a jury on June 2 and 3, 2015. In addition to the testimony reproduced above, the jury heard from 13 witnesses and saw numerous exhibits including

medical records, cell phone records, DNA analysis, and physical evidence from Ms. M.'s bedroom.

Admission of Ms. M.'s Journal

On June 2, 2015, during cross-examination of Ms. M., defense counsel presented her with three pages from her journal entry for the purpose of demonstrating that, in that writing, Ms. M. had referred to the attacker as "Tim." The State promptly objected, arguing that during the motions hearing it had been agreed that the document was not to be used. Defense counsel argued, however, that there were two separate documents: (1) "three pages [that] dealt with the facts of the incident"; and (2) "an eight page statement." The following colloquy took place:

> [THE STATE]: It comes from this notebook. It was copied in its totality and given to [Defense Counsel]. [Defense Counsel] objected. I agreed not to use any of the statement. And that was on record with [the motions court].
>
> * * *
>
> [DEFENSE COUNSEL]: It was an eight-page statement, not the three-page statement.
>
> [THE STATE]: There is no eight-page and three-page statement. It's the same statement. [Ms. M.] wrote a story.
>
> THE COURT: The State [agreed] not to use it, but I don't see any agreement that the Defendant can't use it in cross-examination.
>
> And [the State] can use it if he opens the door.

Thereafter, Ms. M. twice authenticated the journal as a writing she authored and was questioned regarding its contents.

On redirect, the State sought to move the entire 11-page journal entry into evidence. Appellant objected, prompting the following bench conference:

> [DEFENSE COUNSEL]: [Ms. M.] prepared one three-page statement, which we've gone --
>
> THE COURT: Didn't you question her about the journal?
>
> [DEFENSE COUNSEL]: Your Honor, I'll try to be as clear as I can. I received in discovery a three-page statement which dealt with the facts. Then there was an eight-page statement which vented about how could somebody do this, you know, that someone who is drunk, it's not somebody you meet in an alley. The one statement, the reason I objected to the eight-page statement, it was just venting, venting about, you know, how could he do this. The three page statement dealt with facts.
>
> [THE STATE]: It's all the same --
>
> THE COURT: That's all part of the journal?
>
> [THE STATE]: Yes.
>
> [DEFENSE COUNSEL]: So [the State] had agreed not to introduce the eight-page statement because it's just --
>
> THE COURT: Unless the door was opened. Overrule the objection.
>
> [DEFENSE COUNSEL]: But I didn't open the door as to the eight-page statement.
>
> THE COURT: Overrule the objection. It's all part of the same journal, according to the evidence.

The entire 11-page journal entry was admitted as State's Exhibit 6.

Character Witness and Motion for Mistrial

On June 3, 2015, Appellant called Theresa Lawson, a family friend, as a character witness. Ms. Lawson testified to her opinion of Appellant as honest and "a man of

integrity." When given the opportunity to cross-examine Ms. Lawson, the State asked to approach the bench and the following colloquy occurred:

> [THE STATE]: Your Honor, [Appellant] is currently facing charges in Frederick County for sexual solicitation of a minor, for which he has pled not guilty. This witness testified as to his integrity and honesty saying he's always been willing to admit and say my bad. I believe the case law allows me to ask her if she is aware of those charges and if that would change her underlying opinion.
>
> [DEFENSE COUNSEL]: No, that's . . .
>
> THE COURT: I will allow you to question her if she's aware of the charges in Frederick County but not --
>
> [THE STATE]: Yes.
>
> THE COURT: -- the specificity --
>
> [THE STATE]: Yes, correct.
>
> THE COURT: -- of the charges, what the charges are for.
>
> [THE STATE]: I understand.
>
> [DEFENSE COUNSEL]: That's very prejudicial.
>
> THE COURT: Well, you called somebody to testify as to the good character of your client, and I'm going to permit her --
>
> [DEFENSE COUNSEL]: But he hasn't been found guilty of anything.
>
> THE COURT: I understand that. But it would go to her, if she is considering that in determining his reputation.
>
> [DEFENSE COUNSEL]: All right. Well, then I would respectfully request, are you aware of anything in his life that would affect his reputation, I wouldn't, I don't think she would be able to --
>
> THE COURT: Well, I'm going to ask her, or let her, I'll permit that one question.

[THE STATE]: Okay.

THE COURT: If she's aware of charges against him --

[THE STATE]: Okay.

THE COURT: -- and if that would affect her opinion. Two questions.

[THE STATE]: Okay. Thank you.

The State then resumed cross-examination of Ms. Lawson, and the following exchange took place:

> [THE STATE]: Ma'am, are you aware that [Appellant] is currently facing charges out of Frederick County for sexual solicitation --
>
> THE COURT: Hey.
>
> [DEFENSE COUNSEL]: Object.
>
> THE COURT: I sustain the objection. Counsel, approach the bench.
>
> (Counsel approached the bench and the following occurred. Defendant not present.)
>
> THE COURT: I said you could ask if she's aware of the charges but not the nature of the charges.
>
> [THE STATE]: I apologize. I did not understand -- I didn't understand your ruling.
>
> THE COURT: Okay.
>
> [THE STATE]: Just say charges.
>
> THE COURT: Just charges.
>
> [THE STATE]: I apologize.
>
> THE COURT: Okay.

> [THE STATE]: Do you want to give a curative instruction?
>
> THE COURT: Do you want me to give a curative instruction?
>
> [DEFENSE COUNSEL]: Absolutely.
>
> THE COURT: All right. I will. Go ahead.
>
> (Counsel returned to trial tables and the following occurred in open court.)
>
> THE COURT: All right. Ladies and gentlemen, you are to ignore any references made [b]y counsel in her last question.

Defense counsel did not, at that time, request any further instruction or relief from the court.

> Following the State's case in rebuttal, defense counsel moved for a mistrial.
>
> [DEFENSE COUNSEL]: . . . I want to move for a mistrial. The State bringing up a sexual charge in another case is not something that can be overcome by instructing the jury to disregard. It is just --
>
> THE COURT: You're a little late, aren't you? That happened, what an hour ago?
>
> [DEFENSE COUNSEL]: And I objected at the time.
>
> THE COURT: And I sustained your objection. I gave an advisory instruction. There was no motion for a mistrial.
>
> [DEFENSE COUNSEL]: I'm moving for a mistrial, Judge.
>
> THE COURT: All right. Your motion is denied.

The court later instructed the jury, *inter alia*, that:

> The following things are not evidence and you should not give them any weight or consideration: any testimony that I struck or told you to disregard, any exhibits that I struck or did not admit, questions that the witnesses were not permitted to answer and objections of the lawyers, and the charging document. . . .

* * *

> When I did not permit a witness to answer a question, you must not speculate as to the possible answers. If after an answer was given I ordered the answer to be stricken, you must disregard both question and the answer.

The court granted Appellant's motion for judgment of acquittal as to first-degree assault, and the jury acquitted Appellant of second-degree assault. However, Appellant was found guilty of the remaining offenses: second-degree rape, second-degree sex offense, third-degree sex offense, fourth-degree sex offense, and sodomy.

On September 18, 2015, Appellant was sentenced to 20 years of incarceration for second-degree rape, and 20 years for second-degree sex offense to run concurrently. The remaining charges were merged for sentencing. Appellant noted this appeal on September 29, 2015. He presents the following questions, which we have reordered to reflect the order in which the issues arose at trial:

I. "Did the trial judge err by admitting in evidence for the jury's review an eight-page, unsigned, unsworn, written statement made by the alleged victim, attacking the defendant's character, describing her views on rape victims and recounting her version of the disputed events, even though she had fully testified on direct and cross-examination and in rebuttal regarding those events?"

II. "Did the trial judge err in denying a defense Motion for Mistrial when, despite an agreement between defense counsel and prosecutor not to do so, and despite an instruction by the trial judge not to do so, the prosecutor asked a character witness if that witness knew about a pending sex charge against the defendant involving the solicitation of a minor in Frederick County?"

DISCUSSION

I.

The Journal Entry

Appellant maintains that the 11-page journal entry was actually two separate documents—a three-page factual account and an eight-page statement of opinion.[1] Appellant argues that "[t]he door was clearly not open as to the eight-page statement since defense counsel did not ask a single question of [Ms. M.] about the statement." Appellant asserts that the eight-page statement was "highly prejudicial." Further Appellant argues, for the first time on appeal, that the eight-page statement "was inadmissible hearsay and no exception permitted its admissibility." The State argues (1) that, as the circuit court found, there was only one 11-page document; (2) that Appellant opened the door by seeking to impeach Ms. M. with various questions concerning the context of the writing;

[1] In support of his contention that the 11 pages represent two separate and distinct documents, Appellant argues:

> The three-page statement did not contain any language at the bottom that said "continued" or any other language, such as an incomplete sentence, that would indicate that the statements were one. The first sentence on the 8 page statement did not contain any language that completed any sentence or train of thought from the three-page statement.

Upon inspection of the record, however, we note that the 11 pages as presented by the parties were not in the correct order. When placed in the correct order, the three-page section is the final three pages of the document and the first sentence on page eight is the first sentence of the entire document. Thus, Appellant's reliance on perceived contextual clues to assert the existence of two separate documents is not supported by the record.

and (3) that by application of the rule of completeness the State was permitted to enter the full document into evidence.

The Completeness Doctrine "states that when a party introduces part of a writing, opposing counsel may introduce other parts of the same writing that shed light on the first piece introduced." *Holmes v. State*, 116 Md. App. 546, 557 (1997) (citing *Paschall v. State*, 71 Md. App. 234, 239 (1987)), *aff'd*, 350 Md. 412 (1998). The doctrine finds its expression in the Maryland Rules at 5-106:

> When part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

This Court has explained that to be admissible, "the portion submitted must explain the part already in evidence or correct a misleading impression left by the evidence previously introduced." *Id.* (citing *Paschall*, 71 Md. App. at 240). *See also Bennett v. Wright*, 167 Md. App. 291, 305 (2006) (stating that "'when a defendant introduces in evidence a statement of a plaintiff in order to show favorable items, the items in it which go to prove the plaintiff's claim are also in evidence'" (quoting *J.A. Laporte Corp. v. Pennsylvania-Dixie Cement Corp.*, 164 Md. 642, 649 (1933))).

Here, Appellant sought to impeach Ms. M.'s testimony by introducing a portion of the document (marked as Defendant's Exhibit Number 1) in which she identified the man who raped her by the name "Tim." However, Ms. M. clarified that she had changed the names in her journal entry "so it would be easier for [her] to tell [her] family what happened to her[.]" Thereafter, the State verified with Ms. M. that the pages she was shown by

defense counsel were part of the larger journal and that the entry was written for therapeutic purposes. Then the State moved the entire 11-page document into evidence as State's Exhibit Number 6.

The document itself does not mention Appellant by name or identify Ms. M.'s attacker other than to say that he was someone Ms. M. had known and trusted for seven years. More importantly, the document clarified the point on which the defense tried to impeach her testimony. Ms. M.'s journal entry clearly states that "[t]he names of the people involved in the night of Nov. 1, 2014 & into the morning of Nov. 2nd have been changed." Accordingly, the full journal was presented to correct the misleading impression left by defense counsel's use of only a portion—that Ms. M. had previously identified her attacker as a man named "Tim."

When Appellant sought to introduce the journal, the trial court cautioned him that "in the docket entries of May 21st, it stated, State not to use statement subject to opening of the door." Appellant's persistence in using the journal to impeach Ms. M.'s testimony forfeited his right to object to its introduction into evidence. The trial court determined

that Appellant had opened the door;[2] that the journal was one 11-page document; and that the State was no longer barred from using the document.[3]

"We will not disturb the trial court's evidentiary ruling unless it is a clear abuse of discretion." *Holmes v. State*, 116 Md. App. 546, 555 (1997) (citing *Jeffries v. State*, 113 Md. App. 322, 339 (1997)). We hold that the circuit court did not abuse its discretion in admitting the entire 11-page journal after Appellant used a portion of that writing to impeach a witness.

II.

Impeaching a Character Witness and the Motion for Mistrial

Appellant maintains the trial court erred in not granting his motion for mistrial. He argues that the trial court's curative instruction to the jury was "completely ineffective" because "[t]here was no reference to what the jury should disregard in that question, merely an instruction to ignore 'counsel's last question.'" Appellant contends that the question

[2] In *Clark v. State*, 332 Md. 77, 84-85 (1993), the Court of Appeals explained:

> The "opening the door" doctrine is really a rule of expanded relevancy and authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue, or (2) inadmissible evidence admitted by the court over objection. Generally, "opening the door" is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue.

[3] Appellant failed to object on the bases that the journal in its entirety was unduly prejudicial or contained inadmissible hearsay, and those contentions now raised for the first time on appeal are not preserved. *See* Md. Rule 8-131.

regarding "the charges out of Frederick County for sexual solicitation" was so prejudicial that, despite a curative instruction, he was denied a fair trial.

The State responds that the trial court has broad discretion when considering a motion for mistrial, and that, to reverse a trial court's decision on such a motion requires clear prejudice and not merely "speculative prejudice." Further, the State argues that the court issued a prompt curative instruction and "had [Appellant] wished for a different, or more expansive, jury instruction, counsel had and passed upon the opportunity to seek it." The State adds that, in the context of character evidence offered by a defendant, "[a] prosecutor may cross-examine a character witness with questions probing the depths or the witness's familiarity with the character of the accused, and such questions may relate to the possibility of unproven criminal conduct by the accused[.]" The State asserts that such questions are distinct from an attempt to introduce prior bad acts evidence.

a. Cross-examination of a Character Witness

Pursuant to Md. Rule 5-404(a)(2)(A), "[a]n accused may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it." Generally, Rule 5-404 prohibits the use of evidence of other crimes or wrongs to prove the character of a person in order to show action in conformity therewith. However, where a defendant has offered testimony from a character witness regarding the defendant's good reputation for honesty and integrity, it is permissible to question that witness on whether they had heard any information that caused them to suspect the defendant's reputation. *See, e.g.*, *Winters v. State*, 301 Md. 214, 231-33 (1984).

Indeed, this principle has long been recognized. In *Michelson v. United States*, the Supreme Court of the United States concluded that, where a defendant has called a witness to testify as to his good reputation, that witness may be cross-examined to determine whether that witness is "qualif[ied] to give an opinion by showing such an acquaintance with the defendant . . . as to speak with authority of the terms in which generally [the defendant] is regarded." 335 U.S. 469, 478 (1948). The Court instructed:

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. . . . Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans.

Id. at 479 (footnotes omitted). Specifically regarding whether a character witness may be cross-examined regarding his or her knowledge of the defendant's arrest on charges unrelated to those in the present proceeding, the Court stated:

> The inquiry as to an arrest is permissible also because the prosecution has a right to test the qualifications of the witness to bespeak the community opinion. If one never heard the speculations and rumors in which even one's friends indulge upon his arrest, the jury may doubt whether he is capable of giving any very reliable conclusions as to his reputation.

Id. at 483.

The Maryland Court of Appeals in *Winters v. State*, addressed a similar situation in which the defendant's three character witnesses testified on direct examination that Winters

had a good reputation for honesty and integrity. 301 Md. at 231. On cross-examination, all three witnesses were asked whether they had heard any information that caused them to suspect Winters's reputation. *Id.* Specifically, one of the witnesses was asked on cross-examination "whether, as a result of search warrants executed in 1982, he had received information which made him suspicious about Winters' reputation for honesty and integrity[,]" and that witness answered in the affirmative. *Id.* The Court of Appeals observed:

> Winters bottoms his argument on the principle "that accusations of crime or misconduct, as distinguished from convictions, may not be used to impeach the credibility of a character witness," relying on *State v. Cox,* 298 Md. 173, 468 A.2d 319 (1983), and *Taylor v. State,* 278 Md. 150, 360 A.2d 430 (1976). The state, on the other hand, argues that "the questions posed to the character witnesses were not directed to information concerning prior bad acts of appellant [Winters], but instead, were an effort to probe the veracity of the opinions offered and the witnesses' basis of knowledge in formulating those opinions."
>
> In our view the state's position is correct. The state was seeking to test the witnesses' knowledge; it was not an inquiry specifically directed to a prior bad act. . . .

Id. at 231-32.

Here, the trial court correctly permitted the State to cross-examine Appellant's character witness, Ms. Lawson, regarding the basis for her opinion. As noted above, the State's specific reference to "sexual solicitation" exceeded the scope of the question that the trial court intended to permit. However, as the State notes, the witness did not answer, the court gave a prompt curative instruction, and the issue on appeal is the trial judge's decision to decline a mistrial. Nevertheless, Appellant maintains that the State's reference to "sexual solicitation" was "highly prejudicial" and warranted a mistrial.

b. Prejudice

"A trial judge shall declare a mistrial only under extraordinary circumstances and where there is [] manifest necessity to do so." *Benjamin v. State*, 131 Md. App. 527, 541 (2000) (citation omitted). Further, "the trial court is ordinarily in a uniquely superior position to gauge the potential for prejudice in a particular case." *Simmons v. State*, 208 Md. App. 677, 691 (2012) (citation and internal quotation marks omitted), *aff'd*, 436 Md. 202 (2013). Accordingly, the trial court's ruling on a motion for mistrial generally will not be deemed to be an abuse of discretion unless it is "'well removed from any center mark imagined by the reviewing court and is beyond the fringe of what that court deems minimally acceptable.'" *Id.* (quoting *Moreland v. State*, 207 Md. App. 563, 569 (2012)).

Where a motion for mistrial was denied and the trial judge gave a curative instruction, "we must determine whether the evidence was so prejudicial that it denied the defendant a fair trial; that is, whether the damage in the form of prejudice to the defendant transcended the curative effect of the instruction." *Coffey v. State*, 100 Md. App. 587, 597 (1994) (citations and internal quotation marks omitted). In *Guesfeird v. State*, the Court set forth the following factors that should be considered in determining whether a mistrial is required:

> whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists. . . .

300 Md. 653, 659 (1984).

In the present case, the reference to "sexual solicitation" was a single, isolated reference about the defendant made by the State to a defense character witness. It was not an inadmissible statement made by "the principal witness upon whom the entire prosecution depend[ed]," and a great deal of other evidence was presented, including the testimony of the victim and principal witness, Ms. M. *See id.* Moreover, the trial court promptly gave a curative instruction, telling the jury to "ignore any references made [b]y counsel in her last question." We agree with the State's observation that "had [Appellant] wished for a different, or more expansive, jury instruction, counsel had and passed upon the opportunity to seek it." Indeed, the trial court noted that Appellant accepted the curative instruction without objection at the time it was given and waited another hour before requesting a mistrial based on the alleged ineffectiveness of the instruction.

The reversal of a denial of a motion for mistrial is warranted where "[i]t is highly probable that the inadmissible evidence in th[e] case had such a devastating and pervasive effect that no curative instruction, no matter how quickly and ably given, could salvage a fair trial for the defendant[]," *see Rainville v. State*, 328 Md. 398, 411 (1992), or where the information was "'so prejudicial that it denied the defendant a fair trial' and 'transcended the curative effect of the instruction.'" *See Coffey*, 100 Md. App. at 597 (citing *Rainville*, 328 Md. at 408). We cannot say, under the facts of this case, that the single mention of "sexual solicitation," promptly followed by a curative instruction, had such devastating and

pervasive effect as to deny Appellant his right to a fair trial. Accordingly, we hold that the trial court did not abuse its discretion in denying the motion for mistrial.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.