UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1386

September Term, 2014

JOHN BURKS

v.

STATE OF MARYLAND

Wright,
Reed,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: January 15, 2016

On June 11, 2014, a jury in the Circuit Court for Baltimore City convicted John Burks, appellant, of first-degree assault and wearing or carrying a weapon openly with intent to injure. Two months later, appellant was sentenced to 11 years imprisonment for the assault charge and a consecutive two years for the weapon charge. Appellant timely appealed, and presents three questions for our review:

> 1. Did the trial court err in giving a "mere presence" instruction to the jury?
>
> 2. Is the evidence sufficient to sustain the conviction for carrying a weapon openly with intent to injure?
>
> 3. Assuming, *arguendo*, that the evidence is sufficient to sustain the conviction for carrying openly a weapon with intent to injure, are separate sentences for first[-]degree assault and carrying a weapon openly with intent to injure improper?

We answer the first question in the negative, and, because the State concedes the second question, we decline to answer the second and third. Accordingly, we affirm in part and vacate in part the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Michael Stark, the victim, testified that on Sunday, June 30, 2013, as he was driving home from church on West Pratt Street, he stopped at a red light on the corner of West Pratt Street and South Pulaski Street in West Baltimore City. While waiting for the light, Mr. Stark considered stopping at the fried chicken take-out next to him when he saw appellant "across the street on the corner," walking back and forth. Mr. Stark was familiar with appellant because he had "seen him in the neighborhood" and "had a conversation [with him] before," and because he was fairly certain he attended either elementary or middle school with appellant's younger brother. He knew of appellant for "two, three years

maybe," and knew that he lived in the area, "not far from the corners of Pratt and Pulaski." Mr. Stark testified that he never had any problems with appellant, and that their relationship was "cool" and "fine."

Mr. Stark decided not to stop for food, and instead turned right onto Pulaski to head home. As Mr. Stark was turning, he noticed appellant yelling, "Yo, big man," trying to get Mr. Stark's attention. In response, Mr. Stark slowed in the middle of the block and replied, "Yo, what's going on?" Appellant replied, "Come here. Come holler at me." Mr. Starks twice "circled the block to come back," but did not see appellant. After circling a third time and finally seeing appellant, Mr. Stark "stopped and pulled forward to talk to him."

As the two were exchanging pleasantries through the driver-side window, Mr. Stark testified: "I just kind of looked over to the right of me and I saw a gentleman coming between two cars, and he came up towards my car and he went to take his hand to lift the handle of my door, and when I looked and he noticed that I saw him he stopped." The "gentleman," a "heavyset, dark-skinned" man whom Mr. Stark did not recognize, was unable to get in the car because the passenger-side door was locked. After that, Mr. Stark said that he "looked over at the [appellant] . . . and something was just like, this is not right." Mr. Stark described what then happened as follows:

> So I went to hit my gas and move my car and it made a little noise, and when I was gonna do that, I felt [appellant]'s hand reach through the window. And I felt like—I thought he was just banging me in my chest.
>
> And I went real quick to get my car—because I didn't know that the car—I guess I had put it in park. I went to move it out of park to pull off, and I was doing that going down to turn and go home, I felt my shirt started sticking to me and that's when I noticed—I thought I was just hot and

sweating, nervous, but I noticed that I was bleeding, that I had been cut and I had been stabbed.

Mr. Stark then further illustrated the incident during the following questioning by the State:

Q: Okay. So, at what point did—so you mentioned that the [appellant] was banging your chest. At what point did that happen?

A: I guess once they heard me pressing the gas on my car to get my car to move. At that point I realized that he had his hand in my window, and he was banging me in my chest.

Q: Do you recall whether or not you saw anything in the [appellant]'s hand that day?

A: I don't recall seeing anything, no, ma'am.

Q: When he first approached your car, did you notice that he had anything in his hand?

A: I don't.

Q: Do you recall whether or not you saw anything in his waistband area that he could have been carrying?

A: I don't.

Q: And how long was the conversation that you had with the [appellant] before you saw the other individual approach your car?

A: Maybe about one or two minutes.

Mr. Stark testified that he was "panicked and scared . . . [b]ecause I didn't know what was going on or why it was happening." He thought about going to the hospital and calling the police, but decided against both because he "was trying to get home as soon as I could 'cause I was bleeding and I had to go to the bathroom." Two or three minutes later he arrived home and was greeted by his wife who "started screaming and crying and she

jumped up and she got the phone." The police and medics arrived a few minutes later, and Mr. Stark was transported to Shock Trauma in downtown Baltimore where he was treated for "a few hours" and received stitches in his chest and arm.

Mr. Stark further testified that he was visited by Detective Jeffrey Converse of the Baltimore Police Department while he was at the hospital. Mr. Stark was unable to provide a name for his assailant, but he did provide Det. Converse with a description of "what he had on," "where he'd be at a lot," and where he resided—"a house that's about two or three doors down on Pulaski Street from the corner. It's a white door. It had a motorcycle and then a lot of trash and things out in front of the house."

Additionally, Det. Converse showed Mr. Stark two photo arrays that day. When shown the first one, Mr. Stark told Det. Converse that "the person that did this to me was not in this group of pictures," but was able to point out that "a relative to the [appellant]" was in one of the pictures. Later that evening, Det. Converse showed Mr. Stark another photo array, and Mr. Stark was able to point out a picture of appellant and identified him as the man who had stabbed him.

Officer Jeffrey Siddall of the Baltimore Police Department was the next witness to testify. Off. Siddall testified that he was the first responding officer to Mr. Stark's house after he received a call about a cutting around 12:30 p.m. Upon arrival, he found a "substantial amount of blood" both in Mr. Stark's vehicle and on a "visibly agitated" Mr. Stark who "still appeared to be in shock from his injuries." Off. Siddall said that Mr. Stark told him that his assailant was "a stranger" who weighed about 130 pounds, wearing blue jean shorts and no shirt, and had some tattoos on his chest. Off. Stark testified that Mr.

Stark never mentioned a second suspect. In his report, he wrote that Mr. Stark's story was "extremely vague and inconsistent" and that "he could not provide any further information to the incident."

Det. Converse next testified that he reported to Shock Trauma at around 3:00 p.m. after receiving a call "that there was a confirmed stabbing and the victim received stab wounds as a result of a sharp cutting instrument." Det. Converse testified that Mr. Stark was calm and alert, but that he "was obviously in pain" and "kind of in shock." Det. Converse testified that Mr. Stark gave him a "limited" description of the suspect: "a black male, had some hair on his chin, facial hair on his chin and had some type of like, short twists or braids in his hair." Mr. Stark also gave him a "descriptive and distinct description" of the assailant's house and that he "had seen the suspect before and he went to high school with the assailant's brother." Based on that information, Det. Converse was able to identify "two potential persons of interest" and used those people in the photo arrays that Mr. Stark used to identify appellant and his brother.

Det. Converse further testified that the blood swabs taken from the car were not tested, that he did not know if the car was tested for fingerprints, and that he did not check the footage from the CitiWatch cameras around the location of the incident. On cross-examination, Det. Converse was also pressed about perceived inconsistencies with Mr. Stark's initial descriptions of his assailant and his testimony at trial.

On June 11, 2014, the final day of trial, the defense presented their only witness to testify: Michael Magee, a private investigator and former Baltimore City police officer. He described the intersection of Pratt and Pulaski streets as a "heavily populated area" with

"very heavy foot traffic." Through him, the defense introduced a map of the area, where Mr. Magee indicated the locations of police cameras at various intersections throughout the area.

Following Mr. Magee's testimony, the parties discussed jury instructions at a bench conference. After the trial court listed its proposed instructions, appellant's counsel objected to the "mere presence" instruction, and the following exchange took place:

> [Defense Counsel]: Your Honor, I would object to the presence of the [d]efendant instruction being given. There's been no evidence that the [d]efendant was at or near the scene of this incident whatsoever.
>
> THE COURT: I think it is appropriate under the circumstances and I will give it over your objections. . . .

Accordingly, the trial court then gave the members of the jury their instructions, which included the "presence of defendant" instruction, also known as the "mere presence" instruction, almost entirely based on Maryland Criminal Jury Pattern Instruction (2nd Ed., 2013 Supp.) ("MPJI-Cr") 3:25.[1] The instruction, as read to the jury, tracked the language of the pattern instruction, with minor deviations:

[1] MPJI-Cr 3:25, as written by the Maryland State Bar Standing Committee on Pattern Jury Instructions, provides:

> A person's presence at the time and place of a crime, without more, is not enough to prove that the person committed the crime. The fact that a person witnessed a crime, made no objection or did not notify the police does not make that person guilty of the crime. However, a person's presence at the time and place of the crime is a fact in determining whether the defendant is guilty or not guilty.

MPJI-Cr 3:25 (2nd Ed., 2013 Supp.).

THE COURT: A person's presence at the scene of a crime without more is not enough to prove that the person committed a crime. The fact that the person witnessed a crime, made no objection, did not notify the police, does not make that person guilty of a crime. However, a person's presence at the time and place of a crime is a fact in determining whether the [d]efendant is guilty or not guilty.

After the trial court finished given its instructions, appellant's counsel renewed her objection to the "mere presence" instruction, and the trial court responded as follows:

THE COURT: Very well. So noted, but I think that the truth of the matter being, based upon this evidence, that was a pro-[d]efense instruction because there is testimony independent of the act that he was seen by the victim in the area. Seeing him in the area is not proof of the crime, it is contending that he is a person standing at a window during the stabbing. I think it was appropriate under the circumstances. . . .

That same day, the jury rendered their verdict, acquitting appellant of attempted first-degree murder, and convicting him of first-degree assault and openly carrying a deadly weapon with intent to injure.

On August 13, 2014, appellant was sentenced to 11 years for the assault charge and two consecutive years for the weapon charge. Appellant noted timely appeal on August 22, 2014.

DISCUSSION

I. "MERE PRESENCE" JURY INSTRUCTION

A. Parties' Contentions

Appellant concedes that the instruction as given, with "minor deviations," "tracked the language of MPJI-Cr 3:25 . . . and is a correct statement of the law." Nonetheless, appellant argues that giving the instruction was in error "because it was not supported by the evidence and was not applicable under the facts of the case." Relying principally on *Brogden v. State*, 384 Md. 574 (2001) and *Fleming v. State*, 373 Md. 426 (2003), appellant sums up his argument as follows:

> A defendant has the right to choose his own defense. While the trial judge may have believed that the mere presence instruction was "pro-[d]efense," the defense injected into the case by that instruction was inconsistent with the defense's position that Stark was stabbed by someone else and, as a result, not only risked juror confusion as to the nature of the defense but also undermined the defense's chosen strategy. In short, the mere presence instruction was not applicable to this case and should not have been given.

The State first argues that because appellant "did not raise below the point to which he devotes the bulk of his appellate argument," appellant failed to preserve the claim for review. The State goes on to argue that even if it were preserved, the evidence adduced at trial was sufficient to "generate" the instruction. The State believes that because "some evidence" that appellant was at the scene was given by Mr. Stark, "[t]he jury may have believed Stark's testimony that he saw and heard [appellant] when he first drove down Pulaski Street, but disbelieved (or not believed beyond a reasonable doubt) Stark's testimony that [appellant] had approached Stark's car just before the stabbing." The State

disagrees with appellant and says that the instruction was not inconsistent with his defense because (1) there was no evidence appellant "was *not* at the crime scene," and (2) "the instruction here did not impose an affirmative burden upon [appellant] to prove a defense he did not raise." The State's penultimate argument is that appellant incorrectly concluded that the instruction presumed his presence at the scene because the entire set of jury instructions, when read as a whole, suggests that the jury first must have decided that Mr. Stark correctly identified appellant, and only then were they to consider what weight, if any, appellant's supposed presence at the scene deserved. The State concludes by arguing that even if the instruction was given in error, it was harmless because "it still required that the jury find more evidence to convict him."

Appellant, in his reply brief, first argues that the issue was sufficiently preserved because the "objection advanced at trial is simply a shorthand version of the argument made . . . on appeal." Appellant then advances the argument that the "mere presence" instruction "is appropriately given in cases where the State proceeds on a theory of accomplice liability and the defendant concedes his or her presence at the time and place of a crime but contends that he or she did not aid or abet the crime," citing *Fleming*, 373 Md. at 433-38. Appellant then turns to the merits and argues that "there was no evidence—none whatsoever—that would have supported a finding by the jury that [appellant] was present at the time and place of the stabbing but that someone else committed the stabbing." Appellant concludes by arguing that the error was not harmless because the State's argument "ignores the weakness of the State's case"; namely, that the case relied on Mr.

Stark's testimony and it is "questionable" whether the jury would have credited his testimony without the instruction.

B. Standard of Review

The Court of Appeals has very recently described the standard of review of a trial court's decision regarding jury instructions:

> Maryland Rule 4–325 governs jury instructions in criminal cases:
>
> > The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.
>
> Maryland Rule 4–325(c). As the Court of Special Appeals in this case recognized rightly, this Rule has been interpreted to require trial courts to give jury instructions requested by a party when a three-part test is met. The instruction must state correctly the law, the instruction must apply to the facts of the case (e.g., be generated by some evidence), and the content of the jury instruction must not be covered fairly in a given instruction. *See Derr v. State,* 434 Md. 88, 133, 73 A.3d 254, 281 (2013), *cert. denied,* —— U.S. —— –, 134 S.Ct. 2723, 189 L.Ed.2d 762 (2014); *Cost v. State,* 417 Md. 360, 368–69, 10 A.3d 184, 189 (2010); *Dickey v. State,* 404 Md. 187, 197–98, 946 A.2d 444, 450 (2008); *Roach v. State,* 358 Md. 418, 428–29, 749 A.2d 787, 792–93 (2000). Nonetheless, the decision whether to give a jury instruction "is addressed to the sound discretion of the trial judge," *Gunning v. State,* 347 Md. 332, 348, 701 A.2d 374, 382 (1997), unless the refusal amounts to a clear error of law. *See Derr,* 434 Md. at 133, 73 A.3d at 281; *Cost,* 417 Md. at 369, 10 A.3d at 189.
>
> The general purposes of jury instructions include: aiding the jury in understanding clearly the case, providing guidance for the jury's deliberations, and helping the jury to arrive at a correct verdict. *See General v. State,* 367 Md. 475, 485, 789 A.2d 102, 108 (2002). "Jury instructions direct the jury's attention to the legal principles that apply to the facts of the case." *Id.*

Preston v. State, 444 Md. 67, 81-82 (2015) (footnote omitted). In short,

> On review, jury instructions [m]ust be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate. Reversal is not required where the jury instructions, taken as a whole, sufficiently protected the defendant's rights and adequately covered the theory of the defense.

Derr, 434 Md. at 133 (citing *Cost*, 417 Md. at 368-69).

C. Analysis

As an initial matter, we are not persuaded by the State's attempted non-preservation argument. Rule 4-325(e) provides, in pertinent part: "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." The rule's "salutary function" is to provide the trial court with an opportunity to correct the instructions as given to the jury before they retire and deliberate. *See Johnson v. State*, 223 Md. App. 128, 151 (2015). That is exactly what happened here.

The record reflects that appellant's trial counsel was clearly diligent in offering her objections both before and after the instructions were given to the jury. After the first objection, the trial court noted the objection and explained, "I think it is appropriate under the circumstances and I will give it over your objections." After the second objection, the court again noted the objection and explained its reasoning. As we have held before, so long as the objection is clear to us and to the trial court, an objection to a jury instruction will be preserved for appellate review. *See, e.g.*, *Kissinger v. State*, 117 Md. App. 372, 375-76 (1997) ("It is clear to us, as indeed it appears that it was clear to the court, that appellant's

counsel was referring to the no adverse inference instruction about which appellant complains on appeal, and the court, by saying, 'Okay. You have your exception.' succeeded in making the objection distinct and in compliance with the rule.").

Turning to the merits, however, we are unable to hold that the trial judge committed an abuse of discretion in giving the "mere presence" instruction. As pointed out *supra*, a requested jury instruction is required to be given when: (1) the instruction is a correct statement of the law, (2) the instruction is applicable to the facts of the case, and (3) the content of the instruction was not fairly covered elsewhere in the instructions. *See Preston*, 444 Md. at 81-82. Accordingly, this case hinges on the second element; namely, whether the instruction was supported by the facts of this case. We believe it was, for four reasons.

First, we disagree with appellant's assertion that the instruction was inapplicable to this case. To support that premise, appellant points to the language in *Fleming* where the Court of Appeals explained the "mere presence" instruction is "not limited merely to accomplice liability," and thereby extended it to the circumstances in that case, *i.e.*, Fleming's proximity to drugs. *Fleming*, 373 Md. at 435. In doing so, however, the Court attached the following pertinent footnote:

> The language in *Hopewell v. State*, 122 Md.App. 207, 712 A.2d 88 (1998), to the contrary is hereby disapproved. In Hopewell, the Court of Special Appeals stated that "Maryland case law has continued to maintain the principle that the mere presence doctrine applies only to situations in which multiple persons are alleged to have committed an offense." *Id*. at 218, 712 A.2d at 94. *To the extent that this language implies that the mere presence doctrine is limited to those situations where another person has been charged, or only to the aider and abettor situation, it is overruled*.

Fleming, 373 Md. at 435 n.4 (emphasis added). We do not read that to mean that the instruction is *only* applicable to drug and accomplice cases; rather, that the Court was pointing out that the instruction is not simply limited to accomplice cases alone.

Second, as Judge Moylan has pointed out:

> All that is necessary to generate a requested instruction that is a correct statement of the applicable law and that has not been covered by other instructions is "some evidence." *See, e.g.*, *Arthur v. State*, 420 Md. 512, 525–26, 24 A.3d 667, 675 (2011) (emphasis supplied). This is a "fairly low hurdle." *Id*. (citing *State v. Martin*, 329 Md. 351, 359–61, 619 A.2d 992, 996–97 (1993)).

Choate v. State, 214 Md. App. 118, 131 (2013). This "low hurdle," as the Court of Appeals has explained, is indeed low:

> Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says—"some," as that word is understood in common, everyday usage. It need not rise to the level of "beyond reasonable doubt" or "clear and convincing" or "preponderance." The source of the evidence is immaterial; it may emanate solely from the defendant. . . .

Arthur, 420 Md. at 526 (citation omitted). Here, in basic terms, Mr. Stark testified that (1) he saw appellant, an acquaintance, beckon him to "come holler" at him; (2) after he circled the block to find appellant, appellant approached his car and spoke to him at his driver-side window; and (3) after seeing the other man approach the passenger-side door, he felt a banging on his chest as he was trying to flee, but never saw anything in appellant's hand or even knew what was happening. Thus, the jury was presented with "some" evidence—within any definition of the word—that appellant was "merely" in the area at the time of the incident and not necessarily the assailant. The jury was free to give any weight it wanted to the victim's identification of appellant in the area immediately before the attack.

Third, the "mere presence" instruction was not at all, as appellant would have us believe, inconsistent with his defense at trial. According to appellant:

> As *Brogden* makes clear, however, it is error for a judge to instruct a jury concerning a principle of law that has "absolutely nothing to do with the case as presented to the jury" 384 Md. at 644 (emphasis in original). The theory of the defense was that "Stark has concocted a fairy tale," that Stark was not stabbed in his car, that the stabbing may have occurred in his home, and that Stark does not want to implicate "the real culprit" and "is covering up what really happened." At no time during the trial did defense counsel ever suggest that Burks was present at the scene of the crime but was not the individual who stabbed Stark while he was sitting in his car. Because such a defense was never raised by the defense, "there was absolutely no reason for the trial judge, over objection, to instruct the jury as to [mere presence at the scene of a crime]." *Brogden*, 384 Md. at 644.

Accepting that as true, we fail to see how appellant's "theory" at trial is even remotely at-odds with the language of the instruction. While we agree with appellant that the middle sentence of the instruction is inapplicable and thus, could have been "excised,"[2] the applicable language of the instruction, as read at trial, reads:

> A person's presence at the scene of a crime without more is not enough to prove that the person committed a crime. . . . However, a person's presence at the time and place of a crime is a fact in determining whether the [d]efendant is guilty or not guilty.

If the jury believed appellant's "theory" at trial, there is no reason why they could not have concluded that Mr. Stark was actually stabbed before or after speaking with appellant at his car and later "concocted" the "fairy tale." The uncontradicted testimony at trial made it

[2] *See Fleming*, 373 Md. at 437 n.8 ("One sentence of the requested instruction was not applicable to petitioner's situation. The sentence reads: 'The fact that a person witnessed a crime, made no objection or did not notify the police does not make that person guilty of a crime.' The trial court, however, could have excised this portion of the otherwise applicable charge.").

clear that appellant—at the very least—lived very nearby the scene of the crime. The jury was free to believe that he was near the scene and not involved, or even nowhere near the scene at all. There is nothing in the instruction that presupposes a defendant's involvement (let alone guilt) in the act. As a neutral, evidentiary-based instruction, nothing in it tells the jury to disregard or presume anything about his alleged presence at the scene, toward either the State or the defense.

Finally, we agree with the State that, when reading the instructions as a whole, the trial court's placement of the "mere presence" instruction immediately following MPJI-Cr 3:30,[3] the "extrajudicial identification" instruction, vitiates any possible concerns over

[3] MPJI-Cr 3:30, as written by the Maryland State Bar Standing Committee on Pattern Jury Instructions, provides:

> The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. You have heard evidence about the identification of the defendant as the person who committed the crime. You should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind, and any other circumstance surrounding the event. You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's credibility or lack of credibility, as well as any other factor surrounding the identification.
>
> [You have heard evidence that prior to this trial, a witness identified the defendant by _____.]
>
> [The identification of the defendant by a single eyewitness, as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification of the defendant with great care.]
>
> It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

MPJI-Cr 3:30 (2nd Ed., 2013 Supp.).

perceived prejudice toward appellant. That instruction, as read by the court, reads as follows:

> You have heard evidence that prior to trial, the witness, Mr. Stark, identified the [d]efendant by way of selecting his photograph from a group or array of photographs. The identification of the [d]efendant by a single eye witness as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the [d]efendant. However, you should examine the identification of the [d]efendant with great care. *It is for you to determine the reliability of any identification and give it the weight you believe it deserves.*

(emphasis added). The jury heard testimony that Mr. Stark knew it was appellant that was yelling to him because he "knew of" appellant and knew he lived nearby, and later that he identified him in a photo array. Reading those two instructions in conjunction, it is clear that the jury was instructed to first decide if Mr. Stark's identification of appellant as the man who called to him was worth any weight at all, and only then were they to consider what effect, if any, his presence in the area had on their decision. The trial court did not abuse its discretion in giving the instruction to the jury.

II. THE WEAPON CONVICTION

Appellant contends that the evidence was insufficient to sustain a conviction for carrying a dangerous weapon openly with intent to injure pursuant to Md. Code (2002, 2012 Supp.) §4-101(c)(2) of the Criminal Law Article. Because the State agrees that (1) there was no direct evidence that appellant was openly carrying the weapon, and (2) "under these circumstances, any 'open carrying' of the weapon would have been incidental to the first-degree assault," we need not examine this allegation. Accordingly, we will vacate the

conviction for wearing or carrying a weapon openly with intent to injure, and need not reach the third question presented by appellant.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY MODIFIED BY VACATING THE SENTENCE ON COUNT 4 AND, AS MODIFIED, AFFIRMED. COSTS TO BE SPLIT 50% BY APPELLANT AND 50% BY MAYOR AND CITY COUNCIL OF BALTIMORE.