No. 31820-6-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JASON LEE DUTCHER,

Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John D. Knodell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the jury's verdict that Mr. Dutcher committed third degree child molestation.

2. The trial court violated Mr. Dutcher's right to a unanimous verdict when it failed to instruct the jury on unanimity.

3. The trial court erred by ordering Mr. Dutcher not to purchase, possess, or view any pornographic material in any form as a sentencing condition.

4. The trial court erred by ordering Mr. Dutcher to submit to plethysmograph examinations as directed by his community corrections officer as a sentencing condition.

Issues Pertaining to Assignments of Error

1. Were Mr. Dutcher's state and federal constitutional due process rights violated where the State failed to prove third degree child molestation because it did not show Mr. Dutcher acted with the purpose of sexual gratification?

2. Was Mr. Dutcher denied his constitutional right to a unanimous jury verdict where the State relied on multiple criminal acts as a basis for conviction on a single count of third degree child molestation and the court did not instruct the jury to be unanimous?

3. Is the sentencing condition prohibiting the purchase, possession or viewing of "any pornographic material in any form" unconstitutionally vague?

4. Does the sentencing condition requiring Mr. Dutcher to submit to plethysmograph examinations as directed by his community corrections officer violate his right to be free from bodily intrusion?

B. STATEMENT OF THE CASE

The State charged Jason Lee Dutcher with one count of third degree child molestation and one count of indecent liberties. Clerk's Papers (CP) 29-30. The child molestation charge alleged that 20-year-old Mr. Dutcher had sexual contact with 14-year-old H.N.D. on January 3, 2012:

> On or about the 3rd day of January, 2012, in the County of Grant, State of Washington, the above-named Defendant, being at least forty-eight (48) months older than the victim, had sexual contact with another person who was at least fourteen (14) years old but less than sixteen (16) years old and not married to the Defendant, to-wit: HND, 02/10/1997; contrary to Revised code of Washington 9A.44.089.

CP 29. The case proceeded to jury trial. 1RP[1] 2.

[1] "1RP" refers to Volume I of III of the verbatim report of proceedings dated June 12, 2013. Volume II of III dated June 13, 2013, will be cited as "2RP," Volume III of III dated June 14, 2013, will be cited as "3RP."

At trial, the State presented testimony from H.N.D., her mother (Judy Diamond), their housemate (Stephanie Long), and Deputy Darrik Gregg. 2RP 49-236.

H.N.D., born February 10, 1997, testified that, on January 3, 2012, Mr. Dutcher, a family friend, touched her. 2RP 49, 51, 63, 68. H.N.D., Mr. Dutcher, and H.N.D.'s friend, Shana, had been watching a movie on H.N.D.'s bed around midnight. 2RP 52-53. H.N.D. fell asleep between her two friends before the movie was over. 2RP 54-56, 59. She woke up when she felt Mr. Dutcher touch her for a few seconds on her left side between her rib cage and her hip and then removed his hand. 2RP 60, 92. One minute later, Mr. Dutcher reached under her panties and touched her clitoris for a few seconds. 2RP 61, 63, 92-93, 97. On direct examination, H.N.D. said Mr. Dutcher next pulled his penis out of his pants and rubbed it on her. 2RP 64-65. But, during cross-examination, she testified she was not sure he pulled his penis out and did not feel his penis. 2RP 64, 102. She believed he thrust his hips into her back for a couple seconds a few minutes after touching her clitoris. 2RP 98, 102-05. Mr. Dutcher then tried to reach up her shirt, but she pulled her knees to her chest, crossed her arms, and told him to keep his hands to himself. 2RP 63, 66. Mr.

Dutcher never said a word. 2RP 109. He did not threaten her. 2RP 112. He rolled over and appeared to be sleeping. 2RP 66.

Thirty minutes to an hour later, H.N.D. got out of bed. 2RP 67. Mr. Dutcher did not try to stop her from leaving the bed or the room. 2RP 112. Across the hall from H.N.D.'s room was the room of Stephanie Long, a woman who lived in the same home as H.N.D. and her family. 2RP 67. H.N.D. went into Ms. Long's room and asked her to make Mr. Dutcher leave. 2RP 67. Ms. Long woke Mr. Dutcher and confronted him with H.N.D.'s allegations. 2RP 180. Mr. Dutcher told Ms. Long that he had been sleeping and did not know what she was talking about. 2RP 181. Ms. Long told Mr. Dutcher to leave the house, so he did. 2RP 181.

Deputy Gregg testified that he met with Mr. Dutcher at the Airway Deli later on January 3. 2RP 223. The deputy disclosed H.N.D.'s allegations to Mr. Dutcher. 2RP 223. Mr. Dutcher was advised of and waived his *Miranda*[2] rights. 2RP 227. He told Deputy Gregg that he was born on September 21, 1991, and confirmed he had watched a movie in H.N.D.'s bedroom. 2RP 224-25. He said Ms. Long had awakened him, accusing him of grabbing H.N.D. 2RP 226. Mr. Dutcher said he sometimes pulls people close to him when he sleeps. 2RP 226. But he

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

denied touching H.N.D. 2RP 231. Deputy Gregg arrested Mr. Dutcher after their conversation. 2RP 229.

James Kindred, a private investigator hired by the defense, testified he interviewed H.N.D. on July 26, 2012. 3RP 269. During the interview, H.N.D. denied that Mr. Dutcher penetrated her with his fingers. 3RP 281. She had told him only that Mr. Dutcher "reached down there." 3RP 281. On recall, Deputy Gregg also confirmed H.N.D. never told him that Mr. Dutcher touched her clitoris. 3RP 300.

Counsel and the court reviewed the court's proposed jury instructions after the close of evidence. 3RP 315. Neither attorney objected to any of the instructions. 3RP 315. The instructions given to the jury contained no unanimity instruction for the charge of child molestation in the third degree. CP 34-44. The State also did not elect one act from among the several acts it presented as the basis for the single child molestation charge. 3RP 328-43, 370-79. The State relied on several of the alleged acts. 3RP 333, 336, 340, 374.

The jury found Mr. Dutcher guilty of third degree child molestation and not guilty of indecent liberties. CP 45-46. A jury poll confirmed that each general verdict was unanimous. 3RP 386-89, 389-91.

The court sentenced Mr. Dutcher to nine months of confinement and 12 months of community custody. CP 64-65. It also required Mr. Dutcher to "submit to plethysmograph[s] as directed by supervising Community Corrections Officers." CP 81. And it prohibited him from "purchas[ing], possess[ing] or view[ing] any pornographic material in any form. This includes but is not limited to cell phones, videos, books, magazines, internet, or chat rooms." CP 80.

Mr. Dutcher appealed. CP 82–83.

C. ARGUMENT

1. Mr. Dutcher's state and federal constitutional due process rights were violated because the State produced insufficient evidence of third degree child molestation by failing to show Mr. Dutcher acted with the purpose of sexual gratification.

The State produced insufficient evidence of sexual contact because it did not show Mr. Dutcher was awake during the alleged contact. A challenge to the sufficiency of the evidence implicates the State's burden of production. *State v. Henjum,* 136 Wn. App. 807, 810, 150 P.3d 1170 (2007). The question is whether the State produced enough evidence to support the sexual contact element of third degree child molestation. *Id.* The State's evidence and all reasonable inferences from that evidence are

considered to be true. *State v. Jensen*, 125 Wn. App. 319, 325, 104 P.3d 717 (2005). And the jury is entitled to deference on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Longuskie*, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990).

Third degree child molestation requires proof of "sexual contact":

> A person is guilty of child molestation in the third degree when the person has . . . *sexual contact* with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

RCW 9A.44.089(1) (emphasis added); CP 41.

"Sexual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party." RCW 9A.44.010(2); *see also* CP 43 (jury instruction defining "sexual contact"). Part of the State's burden of proving sexual contact is its burden to show the defendant acted with a purpose of sexual gratification. *State v. Stevens*, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006). While sexual gratification is not an explicit element of third degree child molestation, the State must prove a defendant acted for *the purpose* of sexual gratification. *See id*. at 309-10. "'Purpose' and 'intent' are synonymous for criminal culpability under RCW 9A.08.010(1)(a): 'A person acts with intent or intentionally when he [or she] acts with the

objective or purpose to accomplish a result which constitutes a crime.'" *State v. Woolworth*, 30 Wn. App. 901, 905-06, 639 P.2d 216 (1981). Thus, intent is relevant to the crime of third degree child molestation because it is necessary to prove the element of sexual contact. *See Stevens*, 158 Wn.2d at 309-10.

Here, there was insufficient evidence Mr. Dutcher acted *for the purpose of sexual gratification*. The State's evidence showed Mr. Dutcher was asleep during the alleged touching. H.N.D. testified Mr. Dutcher never said anything and appeared to be sleeping while the touching occurred. Likewise, Ms. Long and Deputy Gregg testified Mr. Dutcher told them he had been asleep during the alleged touching.

Mr. Dutcher could not have acted with the purpose of sexual gratification due to his unconscious state just as a sleeping victim in an indecent liberties action is "physically helpless" to communicate a willingness to engage in sexual contact due to her unconscious state. *State v. Puapuaga*, 54 Wn. App. 857, 860, 776 P.2d 170 (1989). The state of sleep affects a victim and a perpetrator the same way – both are unconscious and incapable of volitional action. *See State v. Deer*, 175 Wn.2d 725, 287 P.3d 593 (2012) (Wiggins, J., dissenting). Because Mr. Dutcher was asleep during the alleged touching, he was unconscious and

could not have formed the necessary intent or purpose to commit child molestation. Mr. Dutcher's conviction for third degree child molestation should be reversed because the evidence does not support a finding of sexual contact.

2. Mr. Dutcher was denied his constitutional right to a unanimous jury verdict where the State relied on multiple criminal acts as a basis for conviction on a single count of third degree child molestation and the court did not instruct the jury to be unanimous.

The trial court erred by omitting a unanimity instruction on the third degree child molestation charge. This issue may be raised for the first time on appeal even though Mr. Dutcher did not request a unanimity instruction at trial. The lack of instruction violates Mr. Dutcher's constitutional rights to trial by jury and to a unanimous verdict. *State v. Coleman*, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007); *State v. Jones*, 71 Wn. App. 798, 821, 863 P.2d 85 (1993). The issue is reviewed de novo. *State v. Cross*, 156 Wn.2d 580, 615, 132 P.3d 80 (2006).

A unanimity instruction (or an election) is required in a multiple acts case. *State v. Furseth*, 156 Wn. App. 516, 520, 233 P.3d 902 (2010). A multiple acts case arises "[w]here the evidence indicates that more than one distinct criminal act has been committed but the defendant is charged

with only one count of criminal conduct." *Furseth*, 156 Wn. App. at 520 (quoting *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)). Whether a prosecution constitutes a multiple acts case depends also on the proper unit of prosecution of the crime charged. *See Furseth*, 156 Wn. App. at 520-21. As noted by this Court, "a defining characteristic of a multiple acts case is not only that a single count could be proved by evidence of any of the acts but also that each individual act could support a single specific count." *Id*. at 522.

The child molestation prosecution of Mr. Dutcher is a multiple acts case. *State v. Soonalole*, 99 Wn. App. 207, 992 P.2d 541 (2000). The *Soonalole* Court analyzed the proper unit of prosecution for third degree child molestation under RCW 9A.44.089(1). 99 Wn. App. at 211-12. The court construed the statute as prohibiting each separate act of sexual contact. *Id*. at 212. It reasoned that sexual assault victims, especially children, are best protected by separately punishing each separate invasion of a protected area to ensure consequences for additional sexual assaults on the same victim. *Id*. at 212-13. For example, the Court agreed that two sexual assaults involving the same victim and location within 25 minutes are multiple acts, not one continuous act. *Id*. at 214.

Here, the State presented evidence of multiple acts, each of which could support a single count. Although the State charged Mr. Dutcher with only one count of third degree child molestation, H.N.D. testified that Mr. Dutcher touched her clitoris, breasts, and side with his hand and thrust his penis or hips into her back. These five touches constitute five separate invasions of a potentially protected area. Assuming without conceding that Mr. Dutcher acted with the purpose of sexual gratification, the jury could have relied on any one of these touches to prove the crime of third degree child molestation. Under *Soonalole*, each of these acts could have supported separate, individual counts of third degree child molestation. The third degree child molestation prosecution is, therefore, a multiple acts case that required a unanimity instruction.

When the State presents evidence of several acts of like misconduct, any one of which could form the basis of one count charged, either the State must tell the jury which act to rely on in deliberations or the court must instruct the jury to agree on a specific criminal act. *Coleman*, 159 Wn.2d at 511. If the State fails to elect an act and the trial court fails to instruct the jury to be unanimous, constitutional error results from the possibility that some jurors may have relied upon one act while other jurors may have relied on another act, resulting in lack of unanimity

on all of the elements necessary for a valid conviction. *Coleman*, 159 Wn.2d at 512. Such an error is presumed prejudicial and is harmless only if no fact finder could have entertained a reasonable doubt that each act established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 405-06.

Here, the State presented evidence that Mr. Dutcher touched H.N.D. five times. H.N.D. testified that Mr. Dutcher rubbed his penis against her back, thrust his hips into her back, and used his hand to touch her clitoris, breasts, and side between her hip and rib cage. The State did not tell the jury which of these acts to rely upon in its deliberations. Instead, in closing, the State relied on each of these touches to argue that Mr. Dutcher molested H.N.D. Because the State failed to elect an act upon which to base its charge, the court was required to instruct the jury to be unanimous. But the court did not instruct the jury to agree on a single, specific criminal act. The lack of unanimity instruction is presumed to be prejudicial error. *Id.*

The presumption of prejudice is not rebutted here because this Court cannot be sure that all jurors agreed that one of the several acts in evidence constituted the sexual contact establishing the child molestation charge. A reasonable juror could have entertained a reasonable doubt that

some of the touches established child molestation beyond a reasonable doubt.

H.N.D. described each touch in detail. Yet some evidence weakened her story. H.N.D. offered contradictory testimony. Defense counsel introduced previous contradictory statements by the victim. And Mr. Dutcher denied the allegations.

A reasonable juror could have entertained a reasonable doubt about whether Mr. Dutcher rubbed his penis on H.N.D.'s back. While H.N.D. testified during direct examination that she thought Mr. Dutcher pulled out his penis and rubbed it on her, she contradicted herself on cross-examination, testifying that she was not certain Mr. Dutcher pulled out his penis and rubbed it on her. She said she neither felt nor saw his penis.

Any one of the jurors also could have reasonably doubted that Mr. Dutcher molested Ms. Dutcher by touching her side between her rib cage and hip or by touching the small of her back. The trial court acknowledged that whether a person's side is an intimate body part is a question for the jury, citing *In re the Welfare of Adams*, 24 Wn. App. 517, 520, 601 P.2d 995 (1979), for support. 2RP 263-64. In *Adams*, the primary question was whether evidence that the defendant touched the victim's hips constituted sexual contact of "other intimate parts" in an

indecent liberties case. *Id*. at 518-19. The Court there concluded that "[t]he determination of which anatomical areas apart from the genitalia and breasts are intimate is a question to be resolved by the trier of the facts." *Id*. at 520. The definition of "sexual contact" that applies to indecent liberties also applies to third degree child molestation. *See* RCW 9A.44.010(2). Thus, some jurors could have doubted that H.N.D.'s side and back constituted "other intimate parts" of her body for the purposes of establishing third degree child molestation's sexual contact element.

A juror could have reasonably doubted that Mr. Dutcher actually touched H.N.D.'s breasts. H.N.D. testified that Mr. Dutcher *tried* to reach up her shirt and touch her breasts. 2RP 64, 108-09. She said she pulled her knees to her chest and crossed her arms across her chest so Mr. Dutcher could not reach up her shirt. 2RP at 65. Based on her testimony, a reasonable juror could have concluded that Mr. Dutcher did not touch H.N.D.'s breasts.

Finally, a reasonable juror could have entertained a reasonable doubt as to whether Mr. Dutcher touched H.N.D.'s clitoris. Trial was the first time H.N.D. claimed Mr. Dutcher touched her clitoris. When interviewed by Mr. Kindred in July 2012, H.N.D. denied that Mr. Dutcher penetrated her vagina with his fingers. 3RP 281. She told Mr. Kindred

only that Mr. Dutcher "reached down there." 3RP 281. Deputy Gregg also confirmed H.N.D. never told him that Mr. Dutcher touched her clitoris. 3RP 300. A juror could have reasonably doubted that Mr. Dutcher touched H.N.D.'s clitoris based on her prior statements.

Any one of the five acts alleged by H.N.D. could have satisfied the sexual contact element of third degree child molestation (assuming without conceding that Mr. Dutcher was conscious and acting with the purpose of sexual gratification when each touching occurred). But a reasonable juror could have entertained a reasonable doubt that each act occurred. It is, therefore, possible that one or more jurors might have relied on an act that others did not. Accordingly, the court's failure to provide the jury with a unanimity instruction is not harmless. Mr. Dutcher's conviction for child molestation in the third degree should be reversed.

3. The sentencing condition prohibiting purchasing, possessing or viewing "any pornographic materials in any form" is unconstitutionally vague.

The court erred by imposing an unconstitutionally vague sentencing condition prohibiting Mr. Dutcher from purchasing, possessing or viewing "any pornographic materials in any form." Ripe pre-

enforcement "[v]agueness challenges to conditions of community custody may be raised for the first time on appeal." *State v. Bahl*, 164 Wn.2d 739, 745, 751, 193 P.3d 678 (2008).

A challenge is ripe if it raises a primarily legal issue, it does not require further factual development, and the challenged action is final. *Id*. at 751. The court also considers whether withholding consideration would cause the parties hardship. *Id*. at 751.

The *Bahl* Court held a pre-enforcement vagueness challenge to a pornography sentencing condition like the pornography condition imposed here was sufficiently ripe for review because (1) although a defendant is in prison, the challenged condition will immediately restrict him upon his release; (2) the challenge is purely legal, i.e., whether the condition violates due process vagueness standards; (3) nothing will change between the present time and the defendant's release that would affect the vagueness analysis; and (4) the risk of hardship – the risk that the defendant will be arrested and jailed for violating the challenged condition – is significant. *Id*. at 751-52. The bases underlying the ripeness holding in *Bahl* are present here. Mr. Dutcher's vagueness challenge should, therefore, be considered ripe for review.

Federal and state due process clauses require that citizens have fair warning of illegal conduct. *Id*. at 752. To be constitutional, a sentencing condition must be sufficiently definite that ordinary people understand what conduct is illegal and must provide ascertainable standards to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 753. Additionally, when a sentencing condition prohibits access to material protected by the First Amendment, a heightened level of clarity and precision is required of the condition to protect against a chilling effect on the exercise of First Amendment rights. *Id*. at 753.

A court has discretion to impose conditions of community custody, which will be reversed if manifestly unreasonable. *Id*. at 753. Imposing an unconstitutional condition is manifestly unreasonable. *Id*.

Here, the trial court imposed a sentencing condition prohibiting Mr. Dutcher from "purchas[ing], possess[ing] or view[ing] any pornographic material in any form. This includes but is not limited to cell phones, videos, books, magazines, internet, or chat rooms." CP 80.

Adult pornography is constitutionally protected speech. *Bahl*, 164 Wn.2d at 757. Neither the trial court nor Washington law defines the term "pornography." *Id*. The undefined term "pornography," then, is unconstitutionally vague. *Id.* at 757-58. The condition prohibiting Mr.

Dutcher from purchasing, possessing, or viewing pornography in any form is manifestly unreasonable and must be stricken.

4. The sentencing condition requiring Mr. Dutcher to submit to plethysmograph examinations as directed by his community corrections officer violates his right to be free from bodily intrusion.

The trial court erred by ordering Mr. Dutcher to submit to penile plethysmograph testing as directed by supervising community corrections officers (CCO). Given the invasive nature of the test, the requirement of plethysmograph testing at the discretion of a CCO rather than a qualified treatment provider violates Mr. Dutcher's constitutional right to be free from bodily intrusions.

Again, court-imposed sentencing conditions may be raised for the first time on appeal and are reviewed for abuse of discretion. *Bahl*, 164 Wn.2d at 744-45, 753. Unconstitutional conditions will be stricken as manifestly unreasonable. *Id*. at 753.

The federal constitution's Fourth and Fourteenth Amendments protect a citizen from bodily invasion. *In re Marriage of Parker*, 91 Wn. App. 219, 224, 957 P.3d 256 (1998).

No infringement upon fundamental liberty interests is permitted unless the infringement is narrowly tailored to serve a compelling state

interest. *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Penile plethysmograph testing implicates this liberty interest. *In re Marriage of Ricketts*, 111 Wn. App. 168, 43 P.3d 1258 (2002) (recognizing liberty interest); *Parker*, 91 Wn. App. at 226 (concluding test violated father's constitutional right to be free from bodily restraint, noting no absence of less intrusive measures); *Coleman v. Dretke*, 395 F.3d 216, 222-23 (5th Cir. 2004) (concluding the "highly invasive nature" of the test implicates significant liberty interests), *cert. denied*, 546 U.S. 938 (2005); *Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1992) (stating there has been "no showing" that other less intrusive means are not available for obtaining the information).

In Washington, a trial court may not require a sex offender to submit to plethysmograph testing as a sentencing condition unless it also orders crime-related treatment that would reasonably rely upon such testing as a physiological assessment measure. *State v. Riles*, 135 Wn.2d 326, 344-46, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010).

Here, the court required Mr. Dutcher to submit to such testing "as directed by supervising Community Corrections Officers," not at the direction of a sex offender treatment provider. CP 81. Under a separate

condition, the court ordered Mr. Dutcher to "[a]ttend and participate in a crime-related treatment counseling program, if ordered to do so by the supervising Community Corrections Officer." CP 80. In essence, Mr. Dutcher is not required to engage in crime-related treatment or therapy unless his CCO orders it. It is possible the CCO will not order treatment or therapy. If the CCO does not order treatment, plethysmograph testing will not serve its proper purpose in this case. "Plesthysmograph testing serves no purpose in monitoring compliance with ordinary community placement conditions." *Riles*, 135 Wn.2d at 345.

The problem is Mr. Dutcher's sentencing condition requiring plethysmographs is not connected to the sentencing condition for crime-related treatment or therapy. Instead, the CCO can order a plethysmograph for any reason, including monitoring Mr. Dutcher's compliance with other community custody conditions, whether or not it orders Mr. Dutcher to attend and participate in crime-related treatment or therapy. In addition, the trial court ordered Mr. Dutcher to submit to invasive plethysmograph testing without any individual determination that such testing would be valuable in his case. Under these circumstances, the plethysmograph condition violates Mr. Dutcher's constitutional right to be free from bodily

intrusions. This Court should strike the requirement that he submit to plethysmograph testing as directed by his CCO.

D. CONCLUSION

For the reasons stated above, Mr. Dutcher's third degree child molestation conviction must be reversed and dismissed. Alternatively, the pornography and plethysmograph sentencing conditions must be stricken.

Respectfully submitted on January 17, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

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