NO. 31847-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

ANATOLIY MELNIK, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 13-1-00108-3

BRIEF OF RESPONDENT

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II. STATEMENT OF FACTS

On January 13, 2013, Tiffany Glassick, her husband, and their three young children returned from church around 1:30 p.m. and found their Kennewick home burglarized. (RP at 81-82, 84). Mrs. Glassick immediately called the police and noted multiple items were stolen, including electronics, several perfume bottles, and a large amount of jewelry that included her engagement ring, her wedding ring, rings that held her children's birth stones, necklaces, a watch, and her mother's ring with initials engraved in it. (RP at 89-92).

Barely twenty-four hours after Mrs. Glassick's home was burglarized, on January 14, 2013 at 1:48 p.m., the defendant sold multiple pieces of Mrs. Glassick's jewelry stolen in the burglary to Money Tree in Kennewick as scrap gold. (RP at 171-72). Money Tree is a payday loan business that also cashes checks and buys scrap gold. (RP at 166-167).

Money Tree does not purchase any property other than gold and then sells that gold to a refinery. (RP at 167, 172.) Gemstones were in some of the jewelry the defendant presented for sale at Money Tree, including a sizable diamond in Mrs. Glassick's engagement ring. (RP at 172-73). A Money Tree representative advised the defendant she could not pay him for any of the gemstones, so he took Mrs. Glassick's engagement ring outside Money Tree and removed the diamond before selling the band and her other jewelry to Money Tree. (RP at 172, 184-93). The defendant was unable to remove some of the smaller gemstones from the jewelry but sold them to Money Tree anyway without being additionally compensated for them. (RP at 172-73). The defendant sold a total of sixteen pieces of Mrs. Glassick's jewelry to Money Tree and was paid $460.76 based on their weight in gold. (RP at 177, 180). In selling the items to Money Tree, the defendant signed a form indicating that under penalty of law he was the legal owner of the property and to the best of his knowledge it was not stolen. (RP at 178-79). He also provided photo identification. (RP 178). At trial, a Money Tree employee identified the defendant as the person whom she conducted the gold transaction with on January 14, 2013, and she recalled that he appeared nervous during the transaction. (RP at 167, 173).

After he sold Mrs. Glassick's jewelry to Money Tree, the defendant took the loose diamond from her engagement ring to Ace Jewelry and Loan where he tried to sell it. (RP at 143). Ace Jewelry and Loan is a pawn shop that either holds items in exchange for short-term loans or buys items, including jewelry and gemstones, outright to resell. (RP at 134-35). An employee from Ace identified the defendant as the person who came into the store on January 16, 2013, at approximately 5 o'clock in the evening and attempted to sell a loose diamond. (RP at 142-43). Employees at Ace were immediately suspicious the diamond was not real based on its large size. (RP at 143). The defendant stated that "he knew exactly where the ring had come from" and that is how he knew it was real. (RP at 145). The employees examined the diamond and determined it was real. (RP at 143). One of the employees assisting the defendant felt that the defendant was giving off some red flags that the diamond might be stolen because the defendant was continuously fidgeting, constantly moving around in front of the employees, and claiming he knew the diamond was real without actually revealing where it came from. (RP at 145). The employee asked the owner of the shop to assist with the transaction and they eventually elected to call the police because they were concerned the diamond was stolen. (RP at 145-46).

After the police were called, the defendant got "real[ly] fidgety and . . . nervous." (RP at 148).

The address listed on the defendant's driver's license, which he also listed on documentation he filled out at Money Tree on January 14, 2013, is 510 N. Mayfield, Kennewick, Washington. (RP at 178, 243). On January 18, 2013, the police executed a search warrant at the defendant's listed residence. (RP at 234). During the execution of the search warrant, the police found two bottles of perfume, Be Delicious and Coco Chanel, that Ms. Glassick identified at trial as being stolen from her residence. (RP at 92, 236-38).

At trial, Mrs. Glassick also identified all of the jewelry the defendant sold to Money Tree as jewelry that belonged to her and that was stolen during the burglary of her home. (RP at 97-102). Mrs. Glassick was able to tell the jury detailed stories about where many of the pieces of jewelry had come from and what they meant to her. *Id.* One of the pieces of jewelry Mrs. Glassick identified was her engagement ring, which was now missing the diamond. (RP at 97-98). Mrs. Glassick also identified the same diamond the defendant attempted to sell to Ace Jewelry and Loan as the diamond that was missing from her engagement ring. (RP at 105). Mrs. Glassick provided a lengthy explanation of how she was able

to recognize her diamond, placed it into the prongs of her engagement ring, and showed it to the jury. (RP 103-08).

Kennewick Police Detective Jon Davis told the jury that as part of the investigation in this case, he listened to recorded jail phone calls the defendant made on January 16, 2013, and January 20, 2013. (RP at 249-50). The defendant spoke to his girlfriend multiple times on January 16, 2013, and repeatedly directed her to clean the house, emphasizing the word clean. (RP at 250). It appeared the two were at times talking in code. (RP at 265). He also asked her to clean the car and remove any receipts and cell phone wires. *Id.* The defendant directed his girlfriend to do this immediately, while they were still on the phone. (RP at 251). He ordered her to do this in an authoritative manner. (RP at 252). When talking with his girlfriend about the residence that he was directing her to clean, the defendant became upset and repeatedly yelled at her, "I'm not a resident there." (RP at 263).

In talking to his girlfriend in the jail phone calls, the defendant also stated that just because he found some jewelry in the park doesn't make him a suspect. (RP at 251.) In recounting the defendant's statements in the jail phone call about the jewelry, Detective Davis testified:

> And then, um, they have some more talk, and a little bit later he says, "Seriously, I find the shit in the park down by that, you know, white bridge," and then he's describing ---

> he said he found a whole bag of this stuff, and he's describing to Brooke [the girlfriend] --- the way I'm hearing it, it's like she's never heard this before. He's trying to describe where he found this stuff.

(RP 251).

Det. Davis also described a phone call from January 20, 2013 to the jury where the defendant was speaking with an unidentified person. (RP at 254). The defendant asked that person about whether police had searched the house and what items they had seized. (RP at 254-55).

At the conclusion of testimony, the State proposed what was adopted by the court without objection as Jury Instruction 14. (CP 54; RP at 269, 279-80). The instruction read as follows:

> (1) Any person who finds property that is not unlawful to possess, the owner of which is unknown, and who wishes to claim the property, shall:
> (a) Within seven days of the finding acquire a signed statement setting forth an appraisal of the current market value of the property prepared by a qualified person engaged in buying or selling like items or by a district court judge, unless the found property is cash; and
> (b) Within seven days report the find of property and surrender, if requested, the property and a copy of the evidence of the value of the property to the chief law enforcement officer, or his or her designated representative, of the governmental entity where the property was found, and serve written notice upon the officer of the finder's intent to claim the property if the owner does not make out his or her right to it under the appropriate RCW.[1]
> (2) Within thirty days of the report the governmental entity shall cause notice of the finding to be published at

[1] Judge Bruce A. Spanner crossed out "this chapter" (original language from RCW 63.21.010) and hand-wrote "the appropriate RCW," initialing his amendment. (CP 54).

> least once a week for two successive weeks in a newspaper of general circulation in the county where the property was found, unless the appraised value of the property is less than the cost of publishing notice. If the value is less than the cost of publishing notice, the governmental entity may cause notice to be posted or published in other media or formats that do not incur expense to the governmental entity.

(CP 54).

During closing arguments, the deputy prosecutor's argument included the following:

> . . . [I]f the Defendant wants to argue, "Well, I didn't know that I couldn't sell property that was lost the next day after I found it," that's not a defense to trafficking in stolen property. What knowingly is about in this about in this case is knowingly is that you knew of a fact or circumstance when you were committing an act. . . .

(RP at 287).

> . . . [T]heft means something very specific, and in this case it means either to wrongfully obtain property with the intent to keep it away from the real owner, but also to appropriate lost property or misdelivered property with the intent to keep it away from the true owner, and that is one scenario that you could believe happened in this case. . . .

(RP at 292).

> So, if you believe his jail phone calls and just thought it was lost property, he knew by his very actions he had stolen property when he went to sell it at Money Tree and at Ace Pawn. That's the state of the law. . . .

(RP at 301).

> It's about the fact that the State has proven that the defendant knew that property was stolen within the 24 hours after it was taken and he still chose to sell some of it to Money Tree and then try to pass off that loose diamond to Ace Jewelry and Loan. . . .

(RP at 285).

> If you believe statements the defendant made on the jail phone call that, "Oh, I just, you know, found this lost property down by the bridge and sold it," that is a theft of property. You don't get to pick up and grab other people's property that doesn't belong to you. . . .

(RP at 292).

> Now, why would someone want to dump property super quickly at a discounted rate? It's because they know it's stolen, and they want to get rid of it as fast as possible because the longer you possess stolen property the more likely it is that someone's gonna find out you have it and you're gonna get in trouble, and that's what his actions demonstrate.
>
> If you don't know property's stolen, why would you make up a story about where you found it if you didn't really find it? Why would you just be making something up about being innocent? Why would you be asking about what was taken from my house? You know, did they get a search warrant? What did they find? Those aren't the kind of comments of a person who hasn't done anything wrong, who doesn't know that property was stolen from someone. . . .

(RP at 303-04).

> I think with the time line, the testimony that you heard and with the distinct jewelry that's in evidence, it's very clear the defendant knew this property was stolen. You're not allowed to just go sell other people's property no matter, you know, if you found it or if you know it's stolen.

> You cannot do that, and that makes him guilty of two counts of trafficking in the first degree, both for the Money Tree incident on the 14th of January and for the Ace incident on the 16th. . . .

(RP at 305).

III. ARGUMENT

Trafficking in stolen property in the first degree is defined by statute as, "[a] person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, *or who knowingly traffics in stolen property* . . . ." RCW 9A.82.050. (emphasis added). Stolen property is defined as "property that has been obtained by theft, robbery, or extortion". RCW 9A.82.010(16). Theft is defined by statute and means "to appropriate lost . . . property . . . of another . . . with intent to deprive him or her of such property . . . ." RCW 9A.56.020. Lastly, appropriating lost property has been defined under the theft statute as "obtaining or exerting control over the property or services of another which the actor knows to have been *lost or mislaid* . . . ." RCW 9A.56.010 (emphasis added).

According to the statute, if the defendant immediately sold another's property that had been lost or mislaid, then the defendant would have appropriated lost property of another. When the defendant attempted to sell that appropriated property at Money Tree and Ace Jewelry and

Loan, the defendant was acting with intent to deprive the owner of such property. Because the defendant was acting with intent to deprive Mrs. Glassick of her property, the property falls under the definition of theft. And finally, because the property was appropriated by theft, the property was stolen, and when the defendant tried to sell the stolen property, he trafficked in stolen property in the first degree.

1. The evidence was sufficient to prove beyond a reasonable doubt that when the defendant sold property to Money Tree and attempted to sell property to Ace Jewelry and Loan, he knew it was stolen.

On review for an insufficiency of evidence claim, the Court should view the evidence in the light most favorable to the State, and then determine whether any rational trier of fact could have found each essential element beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "An insufficiency claim admits the truth of the State's evidence *and all inferences* that reasonably can be drawn therefrom." *Id.* (emphasis added). The standard for examining an insufficiency of evidence claim "is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury." *In re Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). A reviewing court should only reverse a conviction where no rational trier of fact could find all the elements of a crime present beyond a reasonable

doubt. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). A sufficiency of evidence claim treats circumstantial evidence and direct evidence as having equal weight. *State v. Hermann*, 138 Wn.App. 596, 602, 158 P.3d 96 (2007). Should the Court find that there was insufficient evidence to convict a defendant, the only appropriate remedy is reversal. *Id.* at 604.

A jury is free to infer that a defendant knew property was stolen based on all the evidence. In *State v. Killingsworth*, a resident noticed that the dome light was on in their family vehicle. *State v. Killingsworth,* 166 Wn.App. 283, 269 P.3d 1064 (2012). Upon further inspection, the resident noticed two people flee from his location, and did not initially notice anything missing from the vehicle. *Id.* at 285. Between midnight and 5:30 a.m. the following morning, a Jetta was stolen from the same residence. *Id.* The key to the Jetta was missing from the family vehicle's center console that the resident did not notice during his initial inspection. *Id.* The Jetta was found in a field with extensive damage. *Id.* An iPod and a GPS were missing from it. *Id.*

Inside the car, the police found a receipt from a grocery store. *Id.* The store's surveillance footage showed the defendant purchasing the items listed on the receipt. *Id.* After the police identified the defendant in the surveillance footage, the police ran the defendant's name through a

local pawn shop database and found that the defendant had pawned an iPod and a GPS unit at a local pawn shop. *Id.* The victim identified the iPod and the GPS unit as hers. *Id.* The defendant was convicted of trafficking in stolen property in the first degree, but contended that there was insufficient evidence to show that he knew the property was stolen. *Id.* The Court found that there was sufficient evidence to convict the defendant because the State had submitted substantial circumstantial evidence to support a conviction. *Id.* at 287. The evidence was sufficient because the two people spotted the night of the incident fled in the direction of the defendant's home, the receipt and the video put the defendant at the store and in the car after the car was stolen, and the abandoned car was found near the defendant's home. *Id.*

In the instant case, the defendant claimed he found the jewelry. (RP at 285). The jury could have reached their guilty verdict by concluding that the defendant knew that the property was lost, which logically stems from the type of property involved in this case. The jury could reasonably infer that an individual would not abandon an engagement ring with a large diamond, a wedding ring, several gold necklaces, bottles of perfume, a heart-shaped gold ring, a ring with initials engraved in it, and rings with birthstones in them. (RP at 89-98). Furthermore, within twenty-four hours after the victim reported the

burglary, the defendant sold some of the stolen property and attempted to sell her diamond. (RP at 171). The timeframe of the sale, taken in conjunction with the type of property the defendant was trying to sell and his willingness to sell the property at a discounted rate to a pawn shop and a cash advance store, could allow a reasonable juror to find that the defendant knew beyond a reasonable doubt the property was lost.

Jury Instruction Eight reads that "if a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she has acted with knowledge of that fact." (CP 48). Taking the jury instruction in conjunction with the meaning of the statutorily defined term 'appropriate lost property,' which again means "obtaining or exerting control over the property or services of another which the actor knows to have been lost or mislaid," the jury could have found that a reasonable person in the same or similar situation would have known that the property was lost, if in fact the defendant here found the property. RCW 9A.56.010.

Alternatively, like in *Killingsworth*, there is sufficient circumstantial evidence to infer that the defendant knowingly trafficked in stolen property if the jury was not convinced that the defendant found the property. Not unlike the car in *Killingworth*, not only was the defendant in possession of stolen jewelry from the Glassick residential burglary,

there was also additional stolen property from the burglary inside the address listed on the defendant's driver's license. (RP at 236-40). Upon executing a search warrant of the defendant's listed residence, Detective Monteblanco found two perfume bottles that were later identified as the same perfume bottles that belonged to the victim. *Id.*

Additionally, the timeframe between the reported burglary and the sale and attempted sale of the stolen property was only twenty-four hours. (RP at 171). That short amount of time could reasonably allow a jury to infer that, taken in conjunction with other evidence, the defendant here knew the property was stolen. Testimony about the sale of the property could also weigh against the defendant. Ace Jewelry and Loan employee Drew Essery testified that the defendant stated he knew exactly where the diamond came from. (RP at 143, 154). The jury could have given Mr. Essery's statement a great amount of weight and inferred that the defendant actually knew where the diamond had come from, which was from Mrs. Glassick's residence. (RP at 143). Furthermore, Mr. Essery testified that the defendant was acting strange and nervous throughout the transaction, especially after the police were notified. (RP at 148). When the defendant was at Money Tree attempting to sell the stolen property, employee Mary Dawson testified that the defendant was acting nervous there as well. (RP at 173). When Detective Davis testified, he indicated

that while the defendant was in jail, he repeatedly told his girlfriend to clean the house. (RP at 252). While ordinarily telling someone to clean a house would not be indicative of a crime, taken in context of the defendant's situation, the conversation Detective Davis describes could lead the jury to infer that the defendant was telling his girlfriend to dispose of stolen property that was in their possession.

Considering public policy, an owner of property should retain constructive possession of their lost property when a reasonable finder would determine that the property is lost, not abandoned. A finder should know that property is lost and not abandoned by the nature of the property and the circumstances around which the property is found. Mrs. Glassick's emotional testimony and reaction when she saw her jewelry exemplifies that she certainly would have attempted to regain control of the property, had the opportunity presented itself. Additionally, the defendant's state of mind should be considered. The defendant did not obtain control over the property with the intent to return the property; rather, the defendant's actions prove that he took control of the property with the intent to deprive the rightful owner, Mrs. Glassick, of her ownership interest in the property before giving her a chance to recover it.

2. The State did not shift the burden of proof to the defendant by proposing a jury instruction, which was not objected to by the defendant, regarding how one may legally claim found property as their own.

On review, jury instructions are reviewed de novo for errors of law. *State v. O'Donnell*, 142 Wn.App. 314, 321, 174 P.3d 1205 (2007). "A criminal defendant may not raise an objection to a jury instruction for the first time on appeal unless the appeal relates to a 'manifest error affecting a constitutional right.'" *Id.* at 321-22 (citing RAP 2.5(a)(3)). On appeal of a first time objection to a jury instruction, the court should determine whether the "'error is truly of constitutional magnitude.'" *Id.* at 321-22. If the Court finds that the asserted claim is of constitutional magnitude, then the Court should examine the effect of the error under the harmless error standard. *Id.* at 322. An error that infringes on a defendant's constitutional rights is presumed prejudicial, but the Court may rule that an error is harmless if it appears beyond a reasonable doubt that the error did not constitute the ultimate verdict. *State v. Seipp*, 142 Wn.App. 1017, 1021 (2007).

If a jury instruction omits an essential element of the crime, then the jury instruction is unconstitutional. *O'Donnell,* 142 Wn.App. at 322. An "omission of an element from that instruction is of sufficient constitutional magnitude to warrant review when raised for the first time

on appeal." *Id.,* quoting *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Alternatively, the jury should not have to guess as to the meaning of each essential element of the crime. *Id.*

To help determine whether the jury instruction at issue here was harmless, the Court may consider the following factors: the importance of the witness' testimony in the prosecution's case; whether the testimony was cumulative; the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; the extent of the cross-examination otherwise permitted; and the overall strength of the prosecutor's case. *Id.* The Court should evaluate each instruction in the context of the instruction as a whole. *Id.* When the Court reviews the adequacy of a jury instruction, the Court should read the instruction as an ordinary, reasonable juror would. *Killingsworth*, 166 Wn.App. at 288. Jury instructions are sufficient if they allow the parties to argue their theories of the case and do not mislead the jury. *O'Donnell,* 142 Wn.App. at 321. The jury instructions do not mislead the jury if the jury instructions, taken as a whole, properly inform the jury as to the law that should be applied. *Id.* Additionally, an alleged improper closing argument should be reviewed in the context of the entire argument. *State v. Gregory*, 158 Wn.2d. 759, 810, 147 P.3d 1201 (2006). A prosecutor has wide latitude to argue reasonable inferences from the evidence during

closing arguments. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011).

A jury instruction shifts the burden of proof to the defendant when the language of the jury instruction creates a mandatory presumption that shifts the burden to a defendant and relieves the State of its duty to prove the crime beyond a reasonable doubt. *State v. Schloredt*, 97 Wn.App. 789, 796, 987 P.2d 647 (1999). In *Schloredt*, a defendant was convicted by a jury of burglary in the second degree and possession of stolen property in the second degree. *Id.* at 792. The defendant was convicted because he broke into a grocery store, stole cigarettes, and was found with credit cards that belonged to other individuals on his person. *Id.* at 791. The jury instruction on burglary during trial read:

> A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent. This inference is not binding upon you and it is not for you to determine what weight, if any, such inference is to be given.

Id. at 796. The Court found that the jury instruction relieved the State of its duty to prove all elements of the crime beyond a reasonable doubt. *Id.* The Court next looked at the instruction to determine whether the instruction was harmless. *Id.* The Court ultimately decided that the

instruction was harmless because of the defendant's admission to the crime while in custody. *Id.* The Court found that the instruction as a whole identified the elements of the crime, what exactly the jury needed to find in order to find the defendant guilty, and although the instruction shifted the burden to the defendant, the instruction was harmless. *Id.* The instruction was harmless because the verdict was not attributable to the error. *Id.* at 801.

In the instant case, the jury instruction does not rise to constitutional magnitude because the jury instruction was a correct statement of the law, the jury instructions included each essential element of the crime, and each essential element of the crime was defined so that the jury would not have to guess as to the essential elements' meanings. Because the essential elements were defined in the instructions and all of the essential elements of the crime were present in the jury instructions, this Court should find that the defendant's contention does not rise to the level of constitutional magnitude; therefore, there is no need to go through a harmless error analysis.

Even if the Court finds that there was an error of constitutional magnitude, the instruction was a harmless error. The State did not shift the burden of proof to the defendant. Jury Instruction 14, taken nearly verbatim from RCW 63.21.010, explains what a person who wishes to

retain lost property must do to lawfully possess it. (CP 54; RP at 269, 279-80). Jury Instructions six, seven, eight, nine, ten, eleven and twelve informed jurors of the definition and essential elements of trafficking in stolen property in the first degree. (CP 46-52). Taking Jury Instruction 14 in the context of all the jury instructions, the jury was informed of what the defendant must have done to rightfully claim the property as his own. The jury instruction correctly stated the law and did not mislead the jury.

In response to defense counsel's argument that there was no evidence presented that would allow the jury to find that the defendant attempted to assert control over the property, the defendant sold and attempted to sell property that was not rightfully his for cash. The defendant signed a Money Tree document under penalty of law that he was the legal owner of the jewelry he was selling. The defendant's actions also speak to the defendant's wrongful claim of property. By selling property for cash, an individual should be recognized as claiming ownership of that property.

Taken in context, the prosecutor's statement that ". . . [w]ell, I didn't know I couldn't sell property that was lost . . . " is an accurate statement of the law as it stands, because knowing the property was lost and then trying to immediately sell the property with such knowledge would constitute a sufficient basis for a trafficking in stolen property in the

first degree conviction. (RP at 287). This comment allowed the prosecutor to argue her theory of the case without misleading the jury. The jury was fully informed of the crime and the elements that accompanied the crime through the jury instructions. Lastly, the standard of proof to convict the defendant and the burden of proof were both orally communicated to the jury and were sent with the jury to the jury room during their deliberation.

Even if the statement about being able to sell lost property made by the deputy prosecutor during closing arguments is not a correct statement of law, the jury instruction was harmless because as a whole, the jury instruction informed the jury of what was necessary to convict the defendant of trafficking in stolen property in the first degree.

IV. CONCLUSION

The State presented sufficient evidence for the trier of fact to find the defendant guilty of two counts of trafficking in stolen property in the first degree. Jury Instruction 14 was a correct statement of the law and did not shift the burden of proof to the defendant.

RESPECTFULLY SUBMITTED this 20th day of June, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on June 20, 2014.

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