No. 32168-1-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MAXIMINO CASTILLO-MURCIA,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Carrie L. Runge, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in convicting appellant of the crime of luring.

2. The record does not support Finding of Fact 5.

3. The record does not support Finding of Fact 6 and 9.

4. The record does not support Finding of Fact 10.

5. The court erred in concluding the appellant was unknown to the minor child.

6. The appellant's waiver of his right to a jury trial was not knowingly, intelligently, and voluntarily made.

Issues Pertaining to Assignments of Error

1 The appellant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated by the State's failure to prove the essential element of the crime of luring that the perpetrator was unknown to the victim.

2. The appellant's waiver of his right to a jury trial was not knowingly, intelligently, and voluntarily made and he is entitled to a new trial.

B. STATEMENT OF THE CASE

The Benton County Prosecuting Attorney charged the Appellant, Maximino Castillo-Murcia, by Information with the charges of Luring, Communication with a Minor for Immoral Purposes, and Indecent Exposure – under 14 years.[1] CP 1–2. Mr. Castillo-Murcia was convicted of the three counts following a bench trial. CP 56–57; RP 120[2]. This timely appeal followed. CP 42.

Mr. Castillo-Murcia speaks Spanish as a first language and does not understand English very well. RP 101–02. At the time of trial he had lived in Kennewick, Washington for seven years and previously lived in Los Angeles for 14 to 15 years. RP 78. A Spanish interpreter assisted Mr. Castillo-Murcia at pre-trial proceedings. 8/8/13 RP 2–3; 10/3/13 RP 4; 11/14/13 RP 5–6; 11/21/13 RP 7. At the hearing on August 8, 2013, counsel jointly requested a continuance of the trial date to October 28. 8/8/13 RP 2. On October 3, 2013, defense counsel obtained a continuance of the trial date to December 2 based on the prosecutor's schedule and anticipation of a resolution. 10/3/13 RP 4. At the readiness hearing on November 14, 2013, defense counsel advised the court the defense was

[1] Contrary to RCW 9A.40.090, 9.68A.090 and 9A.88.010, respectively. CP 1–2.
[2] The bench trial and sentencing hearing are contained in one volume and will be cited to as "RP __". The pretrial hearings will be cited to by date, e.g., "8/8/13 RP __".

ready to go forward to trial on December 2 and would make arrangements for an interpreter to be present at trial. 11/14/13 RP 5–6.

One week later, on Thursday, defense counsel asked permission for her firm to withdraw from Mr. Castillo-Murcia's representation because of his non-payment pursuant to a retainer agreement. The court denied the request. 11/21/13 RP 7. Within three business days a Jury Waiver that had been signed by Mr. Castillo-Murcia the previous day was filed in the court file. The written waiver states:

> MAXIMINO CASTILLO MURCIA, herein declares under penalty of perjury that he has been fully advised of his State and Federal constitutional right to be tried by jury in the above-reverenced matter and that any jury verdict would have to be unanimous and having been so advised now knowingly and voluntarily waives said right and elects to have the above-referenced matter tried to a Judge sitting alone who will make any findings of guilt or innocence.

CP 21 (Jury Waiver dated November 25, 2013).

The bench trial commenced on December 2, 2013. When court convened, the following exchange regarding jury waiver took place. No interpreter was present.

> [PROSECUTOR]: We're here, Your Honor, today for a bench trial in the matter of State v. Maximino Castillo-Murcia, 13-1-00450-3. The State is ready for trial. I think that the defendant – Well, I know that the defendant is waiving a jury, and I would like to have colloquy made with the defendant about that.

> [THE COURT]: Good morning, [defense counsel].
>
> [DEFENSE COUNSEL]: Good morning.
>
> [THE COURT]: I have noted in the court file that there is a waiver of jury trial. I will just confirm with you, Mr. Murcia, that you are in agreement to waive your right to a jury trial.
>
> [THE DEFENDANT]: Yes.
>
> [THE COURT]: And it is your desire to have your case tried to the bench or to a Judge?
>
> [THE DEFENDANT]: Yes.
>
> [THE COURT]: And do you understand that I am the one, then, that will be making a decision in your case as opposed to twelve people who would have to be unanimous in their decision?
>
> [THE DEFENDANT]: Yes.
>
> [THE COURT]: Thank you.
>
> (WHEREUPON, opening statement was given by [the prosecutor], reserved by [defense counsel], reported but not requested transcribed, after which the following proceedings [*sic*]:)
>
> [PROSECUTOR]: The State would first call to the stand Chris Oatis.
>
> [THE COURT]: Thank you.
>
> …

RP 5–6.

When Mr. Castillo-Murcia testified during the trial, he spoke through an interpreter. RP 77–104. The testimony at trial established 13-year-old J.M.A.-H. and two friends were at Monopoly Park in Kennewick, Washington. RP 37; CP 54.[3] Mr. Castillo-Murcia, who had run an ice

[3] Finding of Fact 1.

cream truck business for years, arrived as scheduled near the park. He and J.M.A.-H. exchanged greetings as the three girls approached the truck. RP 37, 80–82, 85–86. J.M.A.-H. recognized Mr. Castillo-Murcia at the park because she'd seen him before selling ice cream at this park and also near an apartment complex. She called him the "ice cream man". RP 10, 33–34. She'd met his son once, when he was in the truck with his father. RP 50. She'd also talked to Mr. Castillo-Murcia in the past—once while buying treats for herself and a nephew and another time when she thanked him for giving her and a friend a free ice cream cone because they had no money. RP 34–36.

J.M.A.-H. testified. While they waited for Maggie Solorio to return from going to get money to buy Hot Cheetos, Mr. Castillo-Murcia gave free ice cream to her and 7-year-old H.A.[4] RP 37–38. After H.A. left to get pizza, Mr. Castillo-Murcia told J.M.A.-H. she was pretty, she had a nice body and he wished she was his son's girlfriend. RP 38–40. When H.A. returned, Mr. Castillo-Murcia asked J.M.A.-H. to turn around. RP 39. He

[4] Assignment of Error 2 and 4. Finding of Fact 5 states: "J.M.A.-H. was waiting for her friends to come back. While she was waiting, the defendant gave her a free ice cream." CP 55. The record instead reflects Mr. Castillo-Murcia gave the free cones to J.M.A.-H. and H.A., who together were waiting for their friend Maggie to return. RP 37–38. Finding of Fact 10 states: "[H.A.] returned and [Mr. Castillo-Murcia] gave her a free ice cream to get her to go away". CP 55. The record does not support this finding. Only the one cone was given to H.A. and then J.M.A.-H. told her not to leave. RP 37–40, 52. H.A. did not leave until after the incident.

said she should tell H.A. to leave, but J.M.A.-H. told her not to go. RP 39–40, 52. J.M.A.-H. looked around several times to see if Maggie was coming back and Mr. Castillo-Murcia asked her a second time to turn around. RP 40–41. J.M.A.-H. said no when he asked if she wanted something else or wanted to come inside the truck, and he gave her Hot Cheetos. RP 42, 44–45. He asked her a third[5] time to turn around and when she did J.M.A.-H. saw movement inside the truck as she looked through the clear plexiglass pane beneath the service window. She said his pants were down and he appeared to be masturbating. RP 40–42, 68–71. J.M.A.-H. threw the cone and Hot Cheetos at him, grabbed H.A. and ran to Maggie's house. RP 12–13, 44–45, 54–56. H.A. testified she overheard Mr. Castillo-Murcia and J.M.A.-H. talking during the incident but couldn't understand what he was saying because he spoke in Spanish. RP 56.

Mr. Castillo-Murcia brought the ice cream truck business from California to Kennewick a number of years before. He and family members drove the ten trucks during the summer months with help from other seasonal employees. RP 78–81. He recalled talking with and seeing

[5] Assignment of Error 3. Finding of Fact 6 states: "… [The defendant] asked [J.M.A.-H.] to turn around at least three times … ." CP 55. Finding of Fact 9 states: "The defendant continued to ask J.M.A.-H. to turn around … ." CP 55. The record instead reflects during the incident Mr. Castillo-Murcia asked her a total of three times to turn around. RP 39–40.

J.M.A.-H. often on the Monopoly Park and Amistad routes. He said about eighty percent of the time they'd see the same people. RP 84. He'd given her free ice cream three to four times in the past and gave some to her this time when she asked for it saying she had no money. RP 84–87, 98. Mr. Castillo-Murcia denied asking J.M.A.-H. to turn around or attempting to lure her into the truck. On other occasions she'd asked about his son. This time she asked where his son was and said she wanted to go out with him. RP 87–89. Mr. Castillo-Murcia told her she was very pretty but his son was too old for her. As she talked about his son J.M.A.-H. was turning herself around by moving back and forth in a general flirting way. RP 89–90, 96–97. She handed her new phone to Mr. Castillo-Murcia and asked him to give the phone number to his son. RP 88–89. She became angry when he refused. RP 89. When he gave her the Hot Cheetos she had asked for, she threw them at him and called him "stupid". RP 89.

The following day when police drove J.M.A.-H. around the area to look for the suspect and truck, she immediately recognized Mr. Castillo-Murcia. RP 65.

In closing, defense counsel argued the State failed to prove Mr. Castillo-Murcia as the alleged perpetrator was unknown to the victim, a required element of the crime of luring. RP 112–13. The court

acknowledged there is no case law addressing this particular issue. The court determined the element was proven, because "the victim in this case only knew the defendant, Mr. Murcia, as the ice cream man. So while [J.M.A.-H.] may have recognized Mr. Murcia as the ice cream man, this was not someone that she particularly knew, certainly did not know his name nor [*sic*] where he lived. Only knew him, essentially, as the operator of the ice cream truck." RP 117.

The court found Mr. Castillo-Murcia guilty as charged. RP 120. The court entered written findings of fact and conclusions for bench trial. CP 54–57.

C. ARGUMENT

1. The State produced insufficient evidence of luring by failing to prove that Mr. Castillo-Murcia was unknown to the minor child.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due

process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id*. "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the state, could have found the elements of the crime charged beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d 418, 421–22, 894 P.2d 403 (1995).

The State charged Mr. Castillo-Murcia with luring, contrary to RCW 9A.40.090(1)(a), (b), (c). A person commits the crime of luring if that person

> (1)(a) Orders, lures, or attempts to lure a minor or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public, or away from any area or structure constituting a bus terminal, airport terminal, or other transportation terminal, or into a motor vehicle;
>
> (b) Does not have the consent of the minor's parent or guardian or of the guardian of the person with a developmental disability; and
>
> (c) Is unknown to the child or developmentally disabled person.

RCW 9A.40.090. Thus, to convict Mr. Castillo-Murcia of luring, the State had to prove beyond a reasonable doubt he ordered, lured, or attempted to lure J.M.A.-H. into a motor vehicle, she was under the age of 16, he did not have the consent of her parent, the incident happened in Washington, and Mr. Castillo-Murcia was unknown to J.M.A-H. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 39.41 (3d Ed).

The statute does not define "unknown". Webster's Encyclopedic Unabridged Dictionary of the English Language defines the adjective "unknown" as: "1. not known; not within the range of one's knowledge, experience or understanding; strange; unfamiliar." [6]

No Washington cases address the meaning of "unknown" for purposes of the luring statute. However, a sampling of published cases affirming convictions for luring confirms the person alleged to be luring must be someone who is a stranger to the victim or whom the victim has

not seen before. *See*, e.g., *State v. Dana*, 84 Wn. App. 166, 169, 926 P.2d 344, 345 (1996) ("Dana stopped his car in Edmonds near a McDonald's restaurant and spoke to two girls, A.K. and C.F. They were 12 and 11 years old, respectively. Dana and the girls had never met before."); *State v. Homan*, 330 P.3d 182, ¶ 11, __ P.3d __ (Wash. 2014) ("The parties do not dispute that Homan was a stranger to C.C.N."). Accord, *State v. McSorley*, 128 Wn. App. 598, 600, 605, 116 P.3d 431 (2005) (10-year-old D.J. "did not know the man behind the wheel"; case remanded for retrial where trial court improperly issued instruction on statutory affirmative defense); *State v. McReynolds*, 142 Wn. App. 941, 944, 947–48, 176 P.3d 616, 617 (2008) ("11–year–old L.S. while walking home from volleyball practice at her school first saw Jesse McReynolds, whom she did not know, at a stop sign …"; appellate court affirmed trial court dismissal after state's case-in-chief).

Here, Mr. Castillo-Murcia was known to J.M.A.-H. Based on the State's evidence, she recognized Mr. Castillo-Murcia at the park because she'd seen him before selling ice cream at this park and also near an apartment complex. She called him the "ice cream man". RP 10. She'd met his son once, when he was in the truck with his father. RP 50. She'd

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[6] 2079 (Thunder Bay Press 2001).

also talked to Mr. Castillo-Murcia in the past—once while buying treats for herself and a nephew and another time when she thanked him for giving her and a friend a free ice cream cone because they had no money. RP 34–36. She exchanged greetings with Mr. Castillo-Murcia upon encountering him this time at Monopoly Park. RP 37. J.M.A.-H. immediately recognized Mr. Castillo-Murcia the following day when police drove her .around the area to look for the suspect and truck RP 65.

Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by due process. "Men of common intelligence cannot be required to guess at the meaning of the enactment." *State v. Shipp*, 93 Wn.2d 510, 515-16, 610 P.2d 1322, 1326 (1980), citing *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed.2d 840 (1947); *Seattle v. Pullman*, 82 Wn.2d 794, 797, 514 P.2d 1059 (1973). The word "unknown" has an ordinary and accepted meaning. The trial court reasoned "this was not someone that [J.M.A.-H.] particularly knew, certainly did not know his name nor [*sic*] where he lived. Only knew him, essentially, as the operator of the ice cream truck." RP 117. But the record additionally shows multiple interactions between the two. A statutory redefinition of unknown to mean "someone known

and familiar through interactions in the recent past but not by name or address" would completely contradict the accepted meaning.

The legislature chose the word "unknown". A reviewing court "[does] not read into a statute matters which are not there, nor do we modify a statute by construction or read into the statute things which we may conceive that the Legislature unintentionally left out." *State v. Hursh*, 77 Wn. App. 242, 246, 890 P.2d 1066 (1995) (citing *State v. Enloe*, 47 Wn. App. 165, 170, 734 P.2d 520 (1987)), abrogated by *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005); *Addleman v. Board of Prison Terms and Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986); *State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982). Furthermore, any ambiguity in a statute must be resolved in favor of the defendant. *State ex rel. McDonald v. Whatcom County District Court*, 92 Wn.2d 35, 593 P.2d 546 (1979).

The State produced insufficient evidence of an essential element of the crime of luring by failing to establish the element that the perpetrator was unknown to the minor child. Mr. Castillo-Murcia was known to J.M.A.-H. and his luring conviction should be reversed.

2. Mr. Castillo-Murcia's waiver of his right to a jury trial was not knowingly, intelligently, and voluntarily made and he is entitled to a new trial.

Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial and has consent of the court. CrR 6.1(a). Since the right to a jury trial is constitutional,[7] the waiver of that right must be "knowingly, intelligently and voluntarily made." *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), citing *State v. Bugai*, 30 Wn. App. 156, 157, 632 P.2d 917 (1981). The reason a waiver must be in writing is to ensure that the right was waived knowingly, voluntarily, and intelligently. *State v. Lund*, 63 Wn. App. 553, 558-59, 821 P.2d 508 (1991), quoting *State v. Downs*, 36 Wn. App. 143, 145, 672 P.2d 416 (1983), *review denied*, 100 Wn.2d 1040 (1984). Waiver is also valid if it is done orally on the record. *State v. Wicke*, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979); *State v. Rangel*, 33 Wn. App. 774, 775-76, 657 P.2d 809 (1983).

The presumption should be made against waiver absent an adequate record to the contrary. *Seattle v. Williams*, 101 Wn.2d 445, 451, 680 P.2d 1051 (1984), quoting *Wicke*, 91 Wn.2d at 645. In examining the

[7] U.S. Const. Sixth Amendment; WA Const. art. I, § 21.

record, the appellate court will consider whether the defendant was informed of his or her constitutional right to a jury trial. *Williams*, 101 Wn.2d at 451. The court also examines the facts and circumstances generally, including the experience and capabilities of the accused. *Downs*, 36 Wn. App. at 145, citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 146 A.L.R. 357 (1938) (waiver of right to counsel). An attorney's representation that his client knowingly, intelligently and voluntarily relinquished his jury trial rights is relevant. *Downs*, 36 Wn. App. at 146. While a written jury trial waiver is strong evidence that the defendant validly waived the jury trial right, it is not determinative. *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006).

The prosecution has the burden of proving a valid waiver. *Wicke*, 91 Wn.2d at 645, citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Because it implicates the waiver of an important constitutional right, review is *de novo*. *Vasquez*, 109 Wn. App. at 319. The validity of the waiver of the fundamental and constitutional right to trial by jury may be raised for the first time on appeal. *See Wicke*, 91 Wn.2d at 644-45.

In *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 165 P.3d 391 (2007), the court held that an oral jury waiver made **with** benefit of an interpreter was valid. The trial court accepted defense counsel's representations that he and his client had a number of discussions before the client decided to try his case in front of a judge and they'd further discussed the written jury waiver form which had been translated to the client by an interpreter. Through an interpreter, the trial court additionally engaged in a detailed colloquy with Ramirez-Dominguez about each of the rights on the waiver form, and confirmed that his attorney had also explained the rights to him. 140 Wn. App. at 241–42. The appellate court held that the trial court's acceptance of the oral jury waiver was proper. *Id.* at 242.

In *State v. Woo Won Choi*, 55 Wn. App. 895, 781 P.2d 505 (1989), the appellate court held that a jury waiver made **without** benefit of an interpreter was valid. 55 Wn. App. at 904. The court relied on a number of circumstances in reaching this decision. Defense counsel had assured the court there was no need for an interpreter at this time or for purposes of trial. 55 Wn. App. at 900. The court, Choi and his counsel discussed extensively on the record the nature of a jury trial and the meaning of the word "waiver". *Id.* at 904. The court explained the differences between

bench and jury trials and that Choi had a right to a jury trial. Choi answered "yes, sir" when asked if he understood his rights, if his counsel had explained them to him, and if it was his desire to waive his right to a jury trial. Choi then signed a written jury waiver. *Id.* at 900. Of significance to the reviewing court was that without benefit of an interpreter, the entire record revealed "although Choi's English was not perfect", he was capable of making himself understood, seemed readily to comprehend questions put to him, was able to clearly express his defense, and demonstrated a "certainly adequate" grasp of the English language. 55 Wn. App. at 903–04.

Mr. Castillo-Murcia also waived his constitutional right to a jury trial without the benefit of an interpreter. In contrast to *Choi,* Mr. Castillo's need for an interpreter was documented through defense counsel's procurement of an interpreter for the various pretrial hearings as well as for translation at trial. Unlike in *Choi,* he signed a written waiver outside of the courtroom. The document is in English and there is no indication on it or through defense counsel (unlike in *Ramirez-Dominguez*) that its contents were translated for Mr. Castillo-Murcia before he signed it. This deficit together with the record indicating the jury waiver was signed within two business days after the court rejected defense counsel's

motion to withdraw due to non-payment of a retainer raises some questions whether Mr. Castillo-Murcia was adequately advised about waiver of the right to a jury trial. The court did not inquire of counsel or Mr. Castillo-Murcia about the written waiver or its contents.

Also unlike in *Choi*, the record is barren of any discussion of the nature of a jury trial and the meaning of waiver. In stark contrast to *Ramirez-Dominguez* or *Choi*, Mr. Castillo-Murcia was not asked whether he understood his rights and whether counsel had explained them to him. The court's short colloquy with Mr. Castillo-Murcia—are you in agreement to waive your right to a jury trial? Is it your desire to have your case tried to the bench or to a Judge? Do you understand that I am the one that [*sic*] will be making a decision in your case as opposed to twelve people who would have to be unanimous in their decision?— failed to inform him of the meaning of the right to a jury trial and the consequences of waiving that right, and failed to elicit any meaningful comprehension of the right by Mr. Castillo-Murcia on the record. *See Wicke*, 91 Wn.2d at 642 (with the adoption of CrR 6.1(a), the Supreme Court placed upon trial judges the duty of ensuring there has been a valid waiver of the right to a jury trial). Finally, unlike in *Choi*, because Mr. Castillo-Murcia testified

through an interpreter at trial there is no means in the record to gauge his comprehension or understanding of the English language.

Under the total circumstances, the prosecution cannot meet its burden to show Mr. Castillo-Murcia's jury waiver was knowing, voluntary, and intelligent. Because the record fails to demonstrate a valid waiver of the constitutional right to a jury trial, the proper remedy is to remand this matter for retrial. *See* Wicke, 91 Wn.2d at 645.

D. CONCLUSION

For the reasons stated, Mr. Castillo-Murcia's conviction for luring must be reversed. In the alternative, in the absence of a valid jury waiver the matter must be remanded for a new trial.

Respectfully submitted on August 25, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on August 25, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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