

No. 62899-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DEREK QUENTIN LEWIS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mary I. Yu

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Derek Lewis is the biological father of D.L., who alleged Mr. Lewis committed several sexual acts against her. Mr. Lewis was convicted of two counts of child rape in the first degree and one count of child molestation in the first degree. The jury acquitted Mr. Lewis of one count of rape of a child in the first degree. The court ruled that Mr. Lewis had voluntarily waived his right to be present during trial when he failed to appear at the conclusion of the trial.

On appeal, Mr. Lewis contends the court erred in failing to declare a mistrial for an improper opinion of credibility by a witness, erred in ruling he voluntarily absented himself from trial, and erred in failing to find the three convictions to be the same criminal conduct.

B. ASSIGNMENTS OF ERROR

1. Mr. Lewis's Sixth and Fourteenth Amendment and article I, sections 21 and 34 rights to a jury trial were violated by a witness's improper opinion testimony.

2. The trial court violated Mr. Lewis's Fifth, Sixth, and Fourteenth Amendment and article I, section 22 rights to be present at trial.

3. The trial court erred in failing to find the three convictions to be the same criminal conduct.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has a Sixth Amendment and Article I, section 21 right to a jury trial which is violated when the trial court admits witness opinion testimony regarding another witness's credibility. Here the trial court, over repeated defense objections and a motion for a mistrial, allowed testimony from D.L.'s mother, Wendy Frost, regarding D.L.'s credibility. Did this improper testimony infringe on Mr. Lewis' right to a jury trial entitling him to reversal of his convictions?

2. Under the Sixth Amendment and article I, section 22, a defendant has a right to be personally present during trial. A defendant may waive that right but only by way of a knowing, voluntary, and intelligent waiver. An implied waiver may result where the defendant voluntarily absents himself. A court ruling on whether a defendant has voluntarily absented himself must indulge the presumption against waiver. Here, Mr. Lewis did not appear at the conclusion of his trial and the court ruled he had voluntarily absented himself, but did not indulge a presumption against waiver, instead presuming from the beginning that Mr. Lewis had waived

his presence. Is Mr. Lewis entitled to reversal of his convictions based upon the court's presumption of a waiver?

3. Multiple concurrent offenses must be counted as a single offense in the defendant's offender score where the offenses constitute the same criminal conduct. Offenses are the same criminal conduct where they are committed against the same victim, occurred at the same time, and shared the same intent. Where the offenses involved the same victim, D.L., involved the same intent, and the State failed to prove the acts occurred at different times, did the trial court abuse its discretion in refusing to find the offenses were the same criminal conduct?

D. STATEMENT OF THE CASE

Derek Lewis is the biological father of seven year old D.L. 11/12/08RP 5. At the time of the events in question, Mr. Lewis was married to D.L.'s mother, Wendy Frost. 11/12/08RP 5. In 2007, D.L. made disclosures to her mother that Mr. Lewis had engaged in sexual acts with her. 11/12/08RP 8. As a consequence, Mr. Lewis was charged with three counts of rape of a child in the first degree and one count of child molestation in the first degree. CP 37-38. Following a jury trial, Mr. Lewis was acquitted of one count of child rape but convicted on the remaining three counts. CP 78-81.

E. ARGUMENT

1. MR. LEWIS'S CONSTITUTIONALLY PROTECTED RIGHT TO A JURY TRIAL WAS VIOLATED BY A WITNESS'S IMPROPER OPINION THAT ANOTHER WITNESS WAS TRUTHFUL

During the testimony of D.L.'s mother, Wendy Frost, and over Mr. Lewis's repeated objections, the State elicited the following responses:

Q: Now, you have talked with [D.L.] about telling the truth and telling lies?

A: Yes.

...

Q: What have you talked with her about relating to that?

A: Just she knows it's better to be honest than lie, and that she –

...

Q: Did you ever tell [D.L.] – or tell Deborah Smith that [D.L.] was lying about what had happened?

A: No.

...

Q: You had taken her to visit a couple of times even while this was all going on?

A: Yeah, twice. Once before the school clothes. I mean, she missed her grandparents but they thought – I mean, obviously they don't believe her so I just –

11/12/08RP 39, 43-44.

Mr. Lewis objected to the questions regarding whether D.L.'s ability to know the truth and a lie were an improper opinion regarding the credibility of D.L. 11/12/08RP 48. On that basis, Mr. Lewis moved for a mistrial.

Your honor, I objected to questions regarding – I don't know the exact – I don't remember the exact answers, but these questions regarding [D.L.'s] ability to know the truth and a lie. There was conversation about that and I did object to it. The reason I'm objecting is because this suggests an improper opinion regarding the credibility of a child abuse victim.

And based on those reasons, Your Honor, I'm actually asking this Court to declare a mistrial at this point. I think we've violated – I think the Rules of Evidence have been violated, but I think the bigger issue here is my client's right to cross-examination has been violated at this point.

11/12/08RP 49-50.

The court disagreed with the defense characterization of Ms. Frost's testimony, found it was not a comment on D.L.'s credibility, and denied the mistrial motion. 11/12/08RP 51.

a. A witness cannot render an opinion whether another witness is truthful. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 21 and 34 of the Washington Constitution guarantee a defendant the right to an

impartial jury. Moreover, Article I, § 22 of the Washington Constitution requires a unanimous verdict in criminal cases.

"[N]o witness may give an opinion on another witness' credibility." *State v. Carlson*, 80 Wn.App. 116, 123, 906 P.2d 999 (1995). Improper opinion testimony violates the defendant's right to a jury trial and invades the jury's fact-finding province. *State v. Dolan*, 118 Wn.App. 323, 329, 73 P.3d 1011 (2003). Comments on the credibility of a key witness may also be improper because issues of credibility are reserved for the trier of fact. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); *City of Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993). Admission of improper opinion testimony is a constitutional error requiring reversal. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *State v. Saunders*, 120 Wn.App. 800, 813, 86 P.3d 232 (2004).

b. Ms. Frost's testimony constituted an improper opinion on the veracity of D. L. Mr. Lewis contended at trial, and similarly contends here, that Ms. Frost's testimony regarding the veracity of D.L. was an improper opinion and his convictions must be reversed.

A mother's opinion testimony about her child's credibility in a rape case is inadmissible. *State v. Jerrels*, 83 Wn.App. 503, 508, 925 P.2d 209 (1996). In *Jerrels*, the State charged the defendant with raping his daughter and two stepchildren. *Jerrels*, 83 Wn.App. at 504. During the trial, the prosecutor repeatedly asked Jerrels' wife, and the mother of the three children, if she believed the children were telling the truth about the defendant's actions. *Id.* The questioning focused on the mother's belief in the truth of the specific sexual abuse incidents about which the children had testified. *Id.* The court found that the mother's opinion as to her children's veracity could not easily be disregarded, and that the repeated questioning had a cumulative effect. *Id.*

Admittedly not as egregious as the misconduct by mother in *Jerrels*, Ms. Frost's testimony was nonetheless as damaging to Mr. Lewis. *Jerrels* and *Saunders* are less about *what* was said and more about *who* said it. *Saunders*, 120 Wn.App. at 813 (police officer offering opinion about credibility of victim); *Jerrels*, 83 Wn.App. at 508 (mother of child victim offering opinion about child's credibility). In both of these cases, the testimony was improper but the prejudice to the defendant was substantial because of the special aura of reliability of the person giving it. As the *Jerrels'*

court so clearly stated: “A mother’s opinion as to her children’s credibility could not be easily disregarded.” 83 Wn.App. at 508. Ms. Frost’s testimony provided an opinion about D.L.’s credibility, something the jury could not easily disregard. The trial court erred in admitting this improper opinion testimony.

c. Mr. Lewis is entitled to reversal of his convictions where his right to a jury trial was violated by the admission of an improper opinion. To find an error affecting a constitutional right harmless, the State must prove beyond a reasonable doubt the error harmless. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

Here the State cannot meet its burden of proof. The central issue in light of the lack of any physical evidence substantiating D.L.’s claims was D.L.’s credibility. Absent D.L.’s testimony there was simply no other evidence presented to support the convictions. Mr. Lewis is entitled to reversal of his convictions.

2. MR. LEWIS'S CONSTITUTIONALLY PROTECTED RIGHT TO BE PRESENT AT TRIAL WAS VIOLATED WHEN THE COURT FOUND HE HAD VOLUNTARILY ABSENTED HIMSELF

Near the conclusion of the defense case, Mr. Lewis sought additional time from the trial court to consider whether he should testify. 11/12/08RP 141-44. Mr. Lewis sought an additional day, to which the court reluctantly agreed. 11/12/08RP 143-44.

The next morning, Mr. Lewis did not appear. 11/13/08RP 2-4. Later during the same day, defense counsel introduced Iris Neidoff, defense investigator, to the court. 11/13/08RP 9. Ms. Niedoff related a conversation she had with Mr. Lewis' mother approximately one-half hour before the hearing:

[Mr. Lewis'] mother said, and this is semi-verbatim that he said that they would not lose their house, they would lose him and that he mentioned suicide.

...

Because last night they were talking about the trial and [Mr. Lewis] said that – that – he was very distraught. That they wouldn't lose their house – apparently that's how he bailed out – and that they would lose him. The conversation – I think they said what are you talking about and he mentioned something about killing himself. I don't know if he used the word suicide or not, but that's the word the mother, Deborah Smith, used.

...

He apparently has one or more – girlfriend or a friend that he went to sleep at, and he was supposed to come home so his mother would bring him here this morning. He didn't show up and they can't locate him wherever it was he was. So the

whole family is now looking for him, going to all his – anyone, any associates, contacts that might know where he is or where he might have been.

I've called all the emergency rooms and the hospitals in the area, and I also checked all the local jails in King County and Pierce County and I can't find him.

11/13/08RP 9-11.

The trial court agreed to give Mr. Lewis additional time to appear, but also issued a warrant for his arrest. 11/13/08RP 13. At the conclusion of the day without an appearance by Mr. Lewis, the court indicated it was going to find Mr. Lewis had voluntarily absented himself and resume the trial:

Here we have an individual who's been here every single day religiously. Early, in fact. And now that we have additional information about conversations he had with his parents, it seems to me that we either can speculate that he took his life and he's gone or he took off with someone and is gone because that seems to be what his parents might be suggesting that those were the choices that he felt were in front of him.

At this point I don't know how we can come to any other conclusion that he has made that conscious choice to waive his right to be here for the remainder of the trial. We've had no contact from him, counsel has had no contact from him. Today was the day that I was going to be asking him whether he wanted to testify or not. He's heard the entire case of the State and even your rebuttal. So unless I have some other indication I can't help but almost come to the conclusion that he's waived his presence to be here in the final stages and that is to hear closing remarks,

because he was also aware of the fact there was no evidence left for him to present other than for him to make a choice.

So I want to make it clear I'm not doing this just because it would be a convenience to the jury or inconvenience to the jury. I just think this case is finished. I'm not quite sure what evidence anybody could provide to me that would merit waiting until Monday.

11/13/08RP 19-20.

At the beginning of trial on Monday morning, Mr. Lewis did not appear and the court ruled he had voluntarily absented himself:

So at this point this court has no other information and therefore I do believe and will make a finding that Mr. Lewis has voluntarily absented himself from this trial and this court's intending to go ahead and proceed at this point.

11/17/08RP 5. The trial then continued.

Mr. Lewis appeared at sentencing and offered an explanation for his absence:

MR. LEWIS: When I left that Wednesday I had got dropped off at the bus stop. There was a black truck that rolled up on me and said if I showed up I court my family would be in danger. I called [defense counsel] but when I called him I didn't tell him what it was because I didn't know how it would turn out since when I was in court it wasn't going in my favor anyways.

...
THE COURT: There were certain representations made about your parents as well and so I'm just

wondering why during that whole period of time you never communicated with anyone.

MR. LEWIS: That being said, at the time it felt like the only thing that I was worried about was the house. So instead of making someone feel stressed out about it I took stress, tried to take the stress out of my home at that point.

THE COURT: Where is it you went?

MR. LEWIS: My wife's house. My fiancée.

1/16/09RP 4-5. The court reentered its finding Mr. Lewis voluntarily absented himself from the proceedings:

I have to tell you, Mr. Lewis, that I do not believe you. I find what you are telling me today is not credible –

...

-- at all. And so I will make a finding that, again, you made yourself voluntarily absent from trial once we had started it. That under the law is an implied waiver. So at this point we'll go ahead and continue on to the hearing that we're here for today and that is to proceed to sentencing.

1/16/09RP 7.

a. A criminal defendant has a constitutionally protected right to be present during trial. The United States Constitution provides the accused the right to be present at trial. U.S. Const. amends. V, VI, XIV; *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985)

(*per curiam*). The right to be present at trial has been held to be a fundamental right. *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983). In addition, the Washington Constitution provides the accused enjoys the right to appear and defend in person. Const. art. 1, sec. 22 (amend. 10); *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003). In order to implement this fundamental constitutionally protected right, the Washington rules of criminal procedure provide that the accused has the right to be present at every stage of trial. See CrR 3.4(a)(b).

The right to be present may be waived, but the waiver must be voluntary and knowing. *Garza*, 150 Wn.2d 367; *State v. Thomson*, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). A defendant may impliedly waive the right to be present when the court makes a finding he personally voluntarily absented himself from the trial. *Id.* Following such a finding, the trial continues without the defendant. *Id.*

An absence is determined to be voluntary based upon the “totality of the circumstances.” *Garza*, 150 Wn.2d at 367; *Thomson*, 123 Wn.2d at 881. In order to make a finding of voluntary absence, the trial court must:

(1) [make] sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary,

(2) [make] a preliminary finding of voluntariness (when justified), and

(3) [afford] the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed.

Garza, 150 Wn.2d at 367, *quoting Thomson*, 123 Wn.2d at 881

(internal quotation marks omitted). The court must indulge every presumption against a waiver and the State bears the burden of proving the waiver was voluntary. *Garza*, 150 Wn.2d at 367-69.

This presumption against waiver “must be the overarching principle throughout the inquiry. Otherwise the right to be present is not safeguarded as the *Thomson* court intended.” *Id.* at 369.

b. The trial court did not make the presumption against waiver the “overarching principle” as required. While the court seemingly complied with the three part test adopted in *Thomson*, the court failed to indulge the presumption against waiver in the first step of the test. The court’s initial comments when Mr. Lewis failed to appear on November 13, 2008, although noting that it wished to give Mr. Lewis every benefit of the doubt, also implied that it was ready to make a ruling that Mr. Lewis voluntarily absented himself. 11/13/08RP 6-7. In addition, when

Ms. Niedoff came forward with the information that Mr. Lewis may have committed suicide, the court again tipped its hand that it was ready to find Mr. Lewis had voluntarily absented himself. See 11/13/08RP 13 (“I’m not ready to draw the conclusion that Mr. Lewis has taken his life so much as taken flight.”). Following the lunch break, the court made its preliminary ruling of a waiver of Mr. Lewis’ right to be present. 11/13/08RP 18-19.

Contrary to the Supreme Court’s mandate that the presumption against waiver be the “overarching principle throughout the inquiry,” the court here presumed Mr. Lewis had taken flight. Thus, the court’s subsequent inquiry of the additional two steps required in the *Thomson* test was necessarily colored by this contrary presumption. As a consequence, the court’s conclusion that Mr. Lewis had voluntarily absented himself must fail as the court failed to comply with the requirements of *Garza* and *Thomson*.

3. THE COURT ABUSED ITS DISCRETION IN FAILING TO FIND THE OFFENSES CONSTITUTED THE SAME CRIMINAL CONDUCT

At sentencing, Mr. Lewis moved the court to find the three counts were the same criminal conduct. 1/16/09RP 11-22. The trial court denied the motion and counted each conviction separately:

I cannot, despite the fact that there's every effort by this court to truly give the defendant every benefit of the doubt in every single way in terms of sentencing as well as in trial, I cannot find any facts that would allow this court to support a finding that it was the same criminal conduct. I believe that the testimony is clearly contrary to that in terms of place and time. There were a number of events. And, again, the sequence is not always clear but there were specific instances that were separated by time. And, again, I cannot make a finding that it was the same criminal conduct.

1/16/09RP 23.

a. Where multiple current offenses constitute the same criminal conduct the trial court must count them as a single offense. A person's offender score may be reduced if the court finds two or more of the criminal offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same

victim.” *Id.* The State has the burden to prove the crimes did not occur as part of a single incident. *State v. Dolen*, 83 Wn.App. 361, 365, 921 P.2d 590 (1996) (“If the time an offense was committed affects the seriousness of the sentence, the State must prove the relevant time.”). The trial court’s “same criminal conduct” determination is reviewed for an abuse of discretion or misapplication of the law. *Id.* at 364.

The “same criminal intent” element is determined by looking at whether the defendant’s objective intent changed from one act to the next. *Dolen*, 83 Wn.App. at 364-65. The mere fact that distinct methods are used to accomplish sequential crimes does not prove a different criminal intent. *State v. Grantham*, 84 Wn.App. 854, 859, 932 P.2d 657 (1997). The “same time” element does not require that the crimes occur simultaneously. *State v. Porter*, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); *Dolen*, 83 Wn.App. at 365. Individual crimes may be considered same criminal conduct if they occur during an uninterrupted incident. *Porter*, 133 Wn.2d at 185-86; *Dolen*, 83 Wn.App. at 365, *citing State v. Walden*, 69 Wn.App. 183, 188, 847 P.2d 956 (1983) (court found a defendant’s convictions for second degree rape and attempted second degree rape, committed by forcing the victim to submit to oral and

attempted anal intercourse during one continuous incident, to be same criminal conduct).

The *Dolen* court looked at the evidence presented (six different incidents in which Mr. Dolen engaged in sexual intercourse and/or sexual contact with a child) and determined it was unclear from the record whether the jury convicted him of the two offenses in a single incident or in separate incidents. *Dolen*, 83 Wn.App. at 365. The Court reasoned that if Mr. Dolen had been convicted of two offenses from a single incident, then they would have encompassed the same criminal conduct. *Id.* The court held: “the State failed to prove that [Mr.] Dolen committed the crimes in separate incidents[,] [c]onsequently, the trial court’s finding that the two convictions did not constitute the same criminal conduct is unsupported.” *Id.*

b. The two offenses shared the same intent, were committed at the same time, and involved the same victim. The three acts of which Mr. Lewis was convicted involved the same intent, his sexual gratification, and involved the same victim, D.L. Thus they all constituted the same criminal conduct. *See State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999) (multiple offenses against the same victim constitute the “same criminal conduct.”).

Mr. Lewis's case is similar to *Dolen*. Although the testimony shows different means of committing rape and molestation and different dates, it is unclear whether the jury convicted Mr. Lewis for committing three offenses in a single incident or in separate incidents. D.L. testified Mr. Lewis inappropriately touched her and made her touch him inappropriately but was unable to specify the time and place. The State's closing argument does not help. The State conceded the dates were unclear, "But the State doesn't have to prove to you the exact date, just that it occurred during that timeframe and that all of these elements were met." 11/17/08RP 12. It did not argue the different means of committing rape occurred on different days. The evidence does not eliminate the circumstance of a vaginal, anal, and an oral penetration occurring during a single incident. *Dolen*, 83 Wn.App. at 365. Further, the jury's note seeking clarification of which acts constituted which counts evidences further the lack of evidence that these offenses occurred at different times. CP 76-77. Without a special verdict setting out the specific times and places, it is impossible to find the State had proven the acts all occurred at different times.

To avoid the same criminal conduct issue, the State needed to show the incidents occurred at different times. *Id.* The fact the

Court gave the unanimity instruction does not provide assurance that the offenses occurred at separate times. CP 65; *State v. Petrich*, 101 Wn.2d 566, 572-73, 683 P.2d 173 (1984).

In sum, “the record [here] does not tell us whether the jury convicted [Mr. Lewis] of committing the two offenses in a single incident or in separate incidents.” *Dolen*, 83 Wn.App. at 365. “[T]he State [then] failed to prove that [Mr. Lewis] committed the crimes in separate incidents.” *Id.* Thus, the trial court erred in failing to count Mr. Lewis’ three convictions as the same criminal conduct.

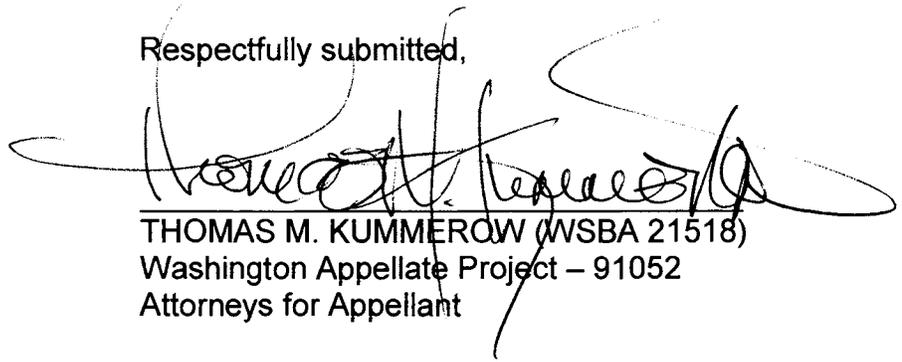
c. Mr. Lewis is entitled to reversal of his sentence and remand for resentencing with the convictions being counted as same criminal conduct. Where the trial court’s conclusion the three offenses were committed in separate incidents is unsupported, the resulting sentence must be reversed and remanded for resentencing. *Dolen*, 83 Wn.App. at 365. Mr. Lewis is entitled to reversal of his sentence and remand for resentencing.

F. CONCLUSION

For the reasons stated, Mr. Lewis submits this Court must reverse his convictions and remand for a new trial, and/or reverse his sentence and remand for resentencing.

DATED this 11th day of February 2010.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.) NO. 62899-2-I
)
 DEREK LEWIS,)
)
 Appellant.)

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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