FILED
COURT OF APPEALS
DIVISION II
09 JAN 21 PM 4:08
STATE OF WASHINGTON
BY
DEPUTY

NO. 36960-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY LANGFORD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 07-1-02110-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State properly argue the credibility of the witnesses where defense put that at issue and where the State did not present the jury with a false choice between the credibility of the witnesses and acquittal of the defendant?

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4. Did the trial court properly admit Erin Finney's statement that she did not allow guns in the house because of safety concerns for her children where that statement was relevant to whether the gun came from Langford or from within the house?

5. Was any error harmless where the defendant showed no prejudice?

6. Where there was no prejudicial error, did the appellant fail to establish cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

Based upon an incident that occurred on April 16, 2007 Timothy Langford was charged with assault in the first degree(with a firearm sentence enhancement); assault in the second degree (with a firearm sentence enhancement); unlawful possession of a firearm in the first degree; and burglary in the first degree (with a firearm sentence enhancement). CP 9-10; 17-19. Apparently, the charge of assault in the second degree was dropped during trial. *See* CP 84-115; 119-121. RP 311, ln. 5-6.

The jury convicted the defendant as to all three counts, (but was unable to find a firearm enhancement as to either count) on October 3, 2007. CP 119-123. The court sentenced the defendant on November 2, 2007. CP 131-142. This appeal was timely filed on November 6, 2007. CP 143-169.

2. Facts

On April 16, 2007 Erin Finney resided with Derrick Cleary and her children at an address in the Parkland area. RP 124; 170. At approximately 8:30 to 9:00 a.m. she was home with Derrick and they were lying down in bed. RP 124-125; 170. Ms. Finney heard knocking and the doorbell ringing repeatedly, so she put on a robe, went downstairs and answered the door. RP 127. She did not recognize the man at the door

who mumbled a query, "Is D there?" RP 127-28. After having him repeat the query, she understood him to be referring to Derrick who went by the first letter of his name. RP 128. The man at the door was a black male, young and thin, of medium build. RP 128. She shut and locked the door and went upstairs to get Derrick. RP 129; 172. He then threw on some clothes and went downstairs. RP 129; 172.

Mr. Cleary opened the door and recognized someone known to him as ATL. RP 173. Mr. Cleary identified ATL in court as the defendant, Timothy Langoford. RP 173-74. Mr. Cleary invited Langford in. RP 177. Langford stepped about a foot in the door and threw something in Mr. Cleary's eyes that was grainy and burned Mr. Cleary's eyes. RP 177. Langford then pushed Mr. Cleary onto the couch at which point Cleary heard a series of clicks. RP 177. Mr. Cleary got some of his vision back and saw Langford with a gun standing above him. RP 178. Langford was trying to fix the gun, so Mr. Cleary tried to grab it. RP 179. Mr. Cleary grabbed the gun and they started wrestling when Mr. Cleary got the gun away from Langford and they started fighting. RP 179. Mr. Cleary yelled for Ms. Finney. RP 180.

Ms. Finney heard the door open and slam, heard Mr. Cleary make an exclamation, and then heard a commotion like wrestling. RP 131. She then put her robe back on and ran downstairs. RP 131. She saw Derrick and the person at the door wrestling. RP 132. She identified the person in court as Langford. RP 133. The fight was very violent. RP 134. Mr.

Cleary advised Ms. Finney that Langford had tried to kill him and that Langford brought a gun. RP 135. After Cleary told her to, she picked up the gun which was about a foot away from where they were wrestling on the floor. RP 135. Cleary then told Ms. Finney to open the door so he could clear Langford out of the house. RP 136; 180. Ms. Finney then called 911 and asked for police assistance. RP 138; 181.

Langford and Mr. Cleary continued to fight. RP 138-39. Langford got away from Mr. Cleary and ran back into the house toward Ms. Finney and attempt to take the gun from her. RP 138-39; 181. Ms. Finney screamed for Mr. Cleary to come and help her. RP 139; 181. Mr. Cleary came back in and got Langford out of the house again. RP 140. The 911 operator then told Ms. Finney to lock the door. RP 140.

Mr. Cleary continued fighting with Langford when Langford asked Mr. Cleary to please let him go. RP 182. Mr. Cleary then returns to the house. RP 140. Langford then ran away. RP 182.

Ms. Finney lets him back in. RP 140. Mr. Cleary retrieves the gun from where Ms. Finney placed it down, and then he went back outside. RP 141. Mr. Cleary attempted to locate Langford to keep him there for police. RP 184. Police arrived and Mr. Cleary made contact with them. RP 141; 184.

C. ARGUMENT.

1. THE STATE'S REBUTTAL ARGUMENT REGARDING THE CREDIBILITY OF THE WITNESSES WAS PROPER WHERE THE DEFENSE CLOSING RAISED THAT AS AN ISSUE, AND WHERE THE STATE'S ARGUMENT DID NOT PRESENT THE JURORS WITH A FALSE CHOICE BETWEEN BELIEVING THE STATE'S WITNESSES AND ACQUITTING THE DEFENDANT.

The appellant gives a generally correct statement of the law when he argues that it is error for the State to tell the jury it must determine who is telling the truth and who is lying in order to decide the case. Br. App. 11 (citing ***State v. Wright***, 76 Wn. App. 811, 824-26, 888 P.2d 1214, *review denied*, 127 Wn.2d 1010 (1995). However, that is not what happened here.

In ***Wright***, the case relied upon by the appellant, the court stated that it is improper to tell the jury that to acquit the defendant it would be necessary to conclude the State's witnesses were lying. ***Wright***, 76 Wn. App. at 824 (citing ***State v. Riley***, 69 Wn. App. 349, 848 P.2d 1288 (1993)). However, the court in Wright affirmed an argument that:

> To *believe* (as opposed to acquit) Wright [the defendant] the jury would need to believe that the State's witnesses were *mistaken* (as opposed to lying). [Italics in original.] [***Wright***, 76 Wn. App. at 824.]

Error exists in those situations where the prosecutor presents the jurors with the false choice between believing the State's witnesses or acquitting the defendant. ***Wright***, 76 Wn. App. at 825.

> Where [...] the parties present the jury with conflicting version of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other. [Footnote omitted.] [***Wright***, 76 Wn. App. at 825.]

Here, the State's rebuttal statements that are challenged by the appellant are consistent with those affirmed in ***Wright***. This is a case of the State arguing the evidence and the credibility of the witnesses, where the witnesses gave an account which was mutually contradictory with Langford's. In its own closing, the defense argued that the State's arguments regarding the evidence, and that the accounts of the State's witnesses did not make sense. Br. App. 307, ln. 23 to p. 309, ln. 17; RP 310, ln. 24 to p. 313, ln. 1; RP 314, ln. 19-21; RP 315, ln. 16-18. It was therefore proper for the State to argue the credibility of those witness accounts. It is evident the prosecutor did this when the prosecutor's statements are viewed in their complete context.

> MR. OISHI:
> [....]
> Now what you need to ask yourself in this case, I would ask you to just apply your common sense. I think you all have common sense. When you sit back there, ask yourself a simple question. Is this a case of Mr. Langford committing a number of very serious crimes and then subsequently being caught? Or is this a situation of Derrick

> Cleary and Erin Finney somehow having a bone to pick with Mr. Langford and trying to set him up? Is this some kind of conspiracy? Well, let's think about the lengths that Derrick and Erin would have to go to try to set Mr. Langford up.
>
> MR. SHAW: Your Honor, I object. I didn't argue conspiracy. This is not proper rebuttal.
>
> MR. OISHI: Your Honor, this is argument.
>
> THE COURT: I'll give you a little more leeway.
>
> MR. OISHI: Thank you, Your Honor. Think about the 911 tape. Is Derrick going to go to the lengths of huffing and puffing and saying stuff on the tape like he had a gun and so on and so forth? Is Erin going to be able to conjure up so much emotion on that 911 tape that she's screaming, that she's out of breath. That is not stuff that can be made up, and it sure is not stuff that can be made up on the spur of the moment. This is not a situation of two people trying to set up someone else. This is a situation of Mr. Langford committing a number of serious crimes and getting caught and trying to run from the police.
>
> Ladies and gentlemen, when you use your common sense and you apply beyond a reasonable doubt standard [sic], the State is confident that you will return verdicts of guilty, again, on assault in the first degree, yes to the firearm enhancement; number two, guilty on unlawful possession of a firearm first degree; and number three, guilty on burglary in the first degree, also answering yes to the firearm form. Thank you. [RP 318, ln. 9 to p. 319, ln. 23.]

In its primary closing the State had already correctly informed the jury that the State was required to prove each element of each crime beyond a reasonable doubt. RP 290, ln. 7-13. The State also made specific arguments as to each crime, and made those arguments in terms of

the "to convict" instruction and each element the State was required to prove. *See* RP 291, ln. 23 to p. 292, ln. 5; RP 295, ln. 12 to p. 296, ln. 15; RP 296, ln. 16 to p. 298, ln. 23.

Moreover, in the absence of a proper objection, issues of prosecutorial misconduct cannot ordinarily be raised for the first time on appeal. ***State v. Wright***, 76 Wn. App. 811, 822-23, 888 P.2d 1214 (1995) (citing ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987)). Here the only objection by defense counsel was that where defense counsel did not argue conspiracy in closing, it was not proper rebuttal argument for the State to argue that it was not credible to believe that witnesses Derrick Cleary and Erin Finney somehow conspired to set up Langford. RP 318, ln. 11-13. The court denied the objection and permitted the State to continue. RP 318, ln. 25 to p. 319, ln. 1.

2. THE PROSECUTOR PROPERLY ARGUED TO THE JURY THAT LANGFORD'S FLIGHT FROM THE SCENE SUPPORTED AN INFERENCE OF HIS GUILT.

The appellant claims that in rebuttal the State improperly commented on the defendant's right to remain silent where the State argued an inference of guilt because the defendant fled the scene. The State may properly argue that the evidence of flight following the commission of a crime is evidence of consciousness of guilt. ***State v. Porter***, 58 Wn. App. 57, 62, 791 P.2d 905 (1990); ***State v. Blanchey***, 75

Wn.2d 926, 936-37, 454 P.2d 841 (1969) (*quoting* ***State v. Bruton***, 66 Wn.2d 111, 112, 401 p.2d 340 (1965); ***State v. Baxter***, 68 Wn.2d 416, 421-22, 413 P.2d 638 (1966)).

The defendant's argument is flawed at its inception because it assumes that the defendant's flight before officers arrived was an exercise of his right to remain silent. The appellant cites no authority in support of that position and the court should therefore refuse to consider the argument pursuant to RAP 10.3(a)(6). The appellant cannot cite to any such authority because there is none. The right to remain silent does not attach until the defendant is subject to custodial interrogation. *See* ***State v. Unga***, Slip. Op. 80020-1, p. 6, 2008 Wash. LEXIS 1056 (2008); ***State v. Ray***, 130 Wn.2d 673, 683, 926 P.2d 904 (1996).

Here Langford's flight could not be an exercise of his right to remain silent because he was not in custody at the time he fled. He fled before police arrived. Moreover, after he was arrested the defendant voluntarily waived his right to remain silent and spoke with police. RP 15-43.

The State also did not act improperly by comparing Langford's conduct with that of the opposing witnesses who remained at the scene and contacted the officers when they arrived. One of the issues in the case was the credibility of the witnesses as opposed to Langford and their

conflicting accounts that they gave to police of the underlying incident that led to police being called.

As the appellant argues in his brief, it is not enough for the State to argue that the defendant was not credible. Br. App. 10-11. The State must also argue that the evidence put forth in support of the defendant's guilt was credible and established the defendant's guilt as to each element beyond a reasonable doubt. Here, where there were two conflicting stories, one by Langford, and one by the witnesses against him, it was reasonable for the State to argue in closing that the witnesses were credible based upon their own conduct while Langford's conduct, in contrast, was consistent with his own consciousness of guilt.

3. THE DEFENDANT'S COUNSEL WAS NOT INEFFECTIVE.

The appellant argues that the defendant's trial counsel was ineffective because he failed to object to the prosecutor's statements regarding the defendant's right to remain silent, and because defense counsel did not request a limiting instruction after the statements were made. As explained in section 2 above, the prosecutor's closing statements regarding the defendant's flight from the scene in no way implicated the defendant's right to remain silent. Accordingly, defense counsel was not ineffective when he failed to object to or ask for a limiting

instruction regarding the State's closing statements which were in fact proper.

4. ERIN FINNEY'S STATEMENTS ABOUT NOT ALLOWING GUNS IN THE HOUSE WAS NOT CHARACTER EVIDENCE.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. ***City of Kennewick v. Day***, 142 Wn.2d 1, 5, 11 P.3d 304 (2000).

Here, Erin Finney testified that she didn't like guns and did not allow guns in her home because she had two small children and didn't consider it safe. RP 156, ln. 3-4. She clarified that it is not the gun itself, but what can happen with guns in the house. RP 156, ln. 4-5.

Defense counsel had objected to this testimony, initially based on relevance grounds. RP 130, ln. 14. Upon further argument outside the presence of the jury defense counsel argued that it was no more relevant, "than asking somebody so, did you rob the bank, and they said no, I was raised in a good Catholic home." RP 151, ln. 10-13. He went on to argue that the testimony attempted to trump up the good character of the witness. RP 151, ln. 23-24.

Here, the evidence was offered under ER 401 as relevant to the factual question of whether the gun was already at the house. RP 150, ln. 12 to p. 151, ln. 9. Upon further consideration the court admitted the

testimony because it related to a fact of consequence in the trial. RP 152, ln. 7-12.

ER 404(a)(3) indicates that evidence of a witness's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except as provided in ER 608 (ERs 607 and 609 not being relevant under the facts here). ER 608 provides that character evidence regarding reputation may only refer to character for truthfulness or untruthfulness and that evidence of truthfulness is only admissible after the character of the witness for truthfulness has been attacked. ER 608(a).

However, defendant's argument is misplaced because none of that applies here. The evidence wasn't offered to bolster the character of the witness. It was offered as relevance to the fact that the gun did not originate from within the house. Moreover, ER 404 does not act to deprive the state of relevant evidence that is admissible for some other purpose. *See* ***State v. Foxhoven***, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)(considering other bad acts evidence under 404(b)).

The defendant's claim that Finney's statements about not allowing guns in the house constituted the improper admission of character evidence is without merit.

5. IF ANY ERRORS OCCURRED THEY WERE HARMLESS.

Two different standards for harmless error have been applied to Washington cases. In ***State v. Whelchel***, the Washington Supreme Court held that a constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. ***State v. Whelchel***, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)(holding the error was harmless were statements were admitted in violation of the defendant's rights under the confrontation clause). The court in ***Whelchel*** held that independent of the improperly admitted statements, there was overwhelming evidence to support the defendant's conviction so that the erroneous admission was harmless beyond a reasonable doubt. ***Whelchel***, 115 Wn.2d at 730.

However, when the same case went before the Ninth Circuit Court of Appeals on an appeal to a *habeas corpus* motion, the Ninth Circuit held that the standard for harmless error was whether a given error had a substantial and injurious effect or influence in determining the jury's verdict. ***Whelchel v. Washington***, 232 F.3d 1197, 1205-06 (9th Cir. 2000). In ***Whelchel***, the Ninth Circuit affirmed the Federal District Court's grant of *habeas corpus* relief to the defendant, holding that the statements were not cumulative of other evidence, and were inherently suspect. ***Whelchel***,

232 F.3d at 1208. The court also noted that the other evidence did not point overwhelmingly to Whelchel's guilt. ***Whelchel***, 232 F.3d at 1208. The court did find harmless error as to other improperly admitted statements where they were merely cumulative. ***Whelchel***, 232 F.3d at 1211.

Additionally, the court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. ***State v. Costich***, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, the defendant has shown no prejudice from any of the alleged errors. He has not shown that the State was relieved of its burden to prove each element of the crime beyond a reasonable doubt. Nor has he shown that the State's comments about witness credibility presented the jury with the false choice between believing the State's witnesses and acquittal.

Langford has also failed to show that he was prejudiced by the closing arguments regarding his flight. Where those comments did not implicate his right to remain silent, he did not suffer any prejudice even if they were otherwise improperly admitted.

Langford has also failed to show prejudice from Finney's statements that she did not allow guns in the house out of safety concerns for her children. Even if that statement was improperly admitted character

evidence, Langford suffered no prejudice from it, because it added little to her other statements that she did not allow guns in the house.

6. THERE WAS NO CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ***Neder v. United States***, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999)(internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232 (1973)(internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose***, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also* ***State v. Kitchen***, 110 Wn.2d 403, 409,

756 P.2d 105 (1988)("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also* ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994) *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See Id.* Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See e.g.*,

Johnson, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See e.g.*, ***State v. Stevens***, 58 Wn. App. 478, 498, 795 P.2d 38, *rev. denied,* 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.")(emphasis added).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. *Compare* ***State v. Whalon***, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with ***State v. Wall***, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did not amount to cumulative error) and ***State v. Kinard***, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g.*, ***State v. Badda***, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the state was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated

witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see e.g.*, ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four error relating to defendant's credibility combined with two errors relating to credibility of state witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g.*, ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See* ***Stevens***, 58 Wn. App. at 498.

Here, where the errors alleged by the appellant were in fact not errors, there is no cumulative effect. Moreover, Finney's statement that she did not permit guns in the house out of safety concerns for her children was not an error of the magnitude that could accumulate. If error at all, it was *de minimis*.

D. CONCLUSION

The State did not present the jurors with the false dichotomy of believing the State's witnesses, or acquitting the defendant. Rather, the State properly argued the credibility of the witnesses against the defendant where the defense counsel put that credibility at issue in his closing. The State also properly argued that Langford's flight from the scene provided evidence of his consciousness of guilt. Where that flight occurred before police were present and he was not in custody, Langford's right to remain silent was not violated. Nor was defense counsel ineffective because he failed to argue this position that was without merit. It was not erroneous and improper character evidence when the court admitted Erin Finney's statement that she did not allow guns in the house because she had children and it wasn't safe to have guns present. Her statement was properly admitted as relevant evidence to show that Langford brought the gun with him and did not acquire it from within the house. Finally, where there were no errors, and especially no errors that prejudiced the

defendant, neither was there any cumulative error. The court should deny the defendant's appeal as without merit.

DATED: January 21, 2008

GERALD A. HORNE
Pierce County
Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/21/09 Johnson
Date Signature

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