

NO. 38830-8-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SCOTT MICHAEL HILL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 07-1-04113-5

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the sentencing court act within its discretion when it imposed a sentence within the standard range?
2. Did the State present sufficient evidence to convince a reasonable fact finder that defendant was guilty of second degree assault of Terrance Schlatter?

B. STATEMENT OF THE CASE.

1. Procedure

On August 7, 2007, the State charged Scott Michael Hill (“defendant”), with one count of first degree burglary, one count of attempted first degree murder, two counts of second degree assault, one count of felony harassment, one count of fourth degree assault and one count of violation of a no-contact order in the Pierce County Superior Court Cause No. 07-1-04113-5. CP 1-4.¹ On April 17, 2008, the State amended the charges, to add an additional count of first degree burglary

¹ Citations to Clerk’s Papers will be to “CP” and citations to the verbatim reports of proceedings will be to “RP.” The volume of the report cited will be indicated in Roman numerals after the designation, “RP.”

and one count of first degree malicious mischief, both counts with firearm enhancements. CP 5-9. On December 15, 2008, the State filed a second amended information, which listed all of the same charges. CP 10-14. Ultimately, the nine charges against defendant were: Count I – first degree burglary; Count II – attempted first degree murder (of Jennifer Schlatter); Count III – second degree assault (of Christine Schlatter); Count IV – second degree assault (of Terrance Schlatter); Count V - felony harassment; Count VI – fourth degree assault (of Kimberly Schlatter); Count VII – violation of a no-contact order; Count VIII – burglary in the first degree; and Count IX – malicious mischief. CP 10-14.

On December 16, 2008, defendant pleaded guilty to Count VII, violation of a no-contact order. CP 15-19. At the pre-trial hearings, the court accepted defendant's guilty plea to Count VII (RPII 14-16), and conducted a 3.5 hearing for the remaining counts (RPII 17-48).

Trial commenced December 17, 2008, in front of the Honorable Kitty-Ann van Doorninck. RPIII 58-59. On January 13, 2009, the jury found defendant guilty on all charges. RPX 933-937; CP 76, 77, 78, 79, 80, 81, 82, 83, 84, 85. The jury also returned special verdicts, finding that defendant was armed with a firearm for counts VIII and IX. CP 84, 85.

Sentencing followed on January 30, 2009. RPXI 940-965.

Defendant requested a low-end, standard-range sentence, claiming his only concern was for the victim. RPXI 957. Specifically, defense counsel argued,

[Defendant] wanted to make sure that [Jennifer Schlatter] was – whatever he tried to do, that she was at least recovering, and even more important, that she was safe. He was remorseful from the very, very beginning, and that did not change throughout these proceedings.

RPXI 957.

The State requested the high end of the standard sentencing range. RP XI 944. In making its determination, the court noted that defendant did not appear remorseful in his actions and words throughout the trial, and sentenced defendant to a high-end standard range sentence of 507 months in prison², along with standard fines and conditions. RPXI 963; CP 94-109.

The defendant filed a timely notice of appeal. CP 110.

² The trial court sentenced defendant to 116 months for Count I, 411 months on Count II, 84 months on Count III, 84 months for Count IV, 60 months for Count V, 116 months for Count VIII and 57 months for Count IX, to run concurrently, plus two firearm enhancements of 60 and 36 months on Counts VIII and IX, respectively, to run consecutive to each other and to the other counts, for a total of 507 months.

2. Facts

On Friday, August 3, 2007, Jennifer Schlatter³ went to the Hi-Iu-Hee-Hee Tavern in Gig Harbor with her friend, Trisha. RPV 77-78. Defendant, Jennifer's boyfriend at the time, stopped by the tavern, uninvited, to buy Jennifer a drink. RPV 80. Jennifer told defendant that he should not be there, and he left. RPV 80. After Jennifer and Trisha left the bar, Jennifer called defendant and had him pick her up at Trisha's house. RPV 81. Defendant took Jennifer to his parents' house in Gig Harbor, where they stayed that night. RPV 81, 83-85.

The following morning, Jennifer told defendant she wanted to break up. RPV 86-87. Jennifer took her computer from his house, requested he give her \$5000 to repay a loan she had given him, and had him drop her off at Trisha's house. RPV 86. Defendant tried to change Jennifer's mind by threatening to take his own life, but Jennifer insisted that the relationship was over. RPV 86-87. Jennifer returned to her parents' house after defendant left. *Id.*

Jennifer and defendant continued to have regular phone conversations throughout the weekend in which defendant threatened to commit suicide. RPV 90. On Sunday, during one of many phone calls,

³ Throughout this brief, the Schlatter family will be referred to by their first names. This is done solely for clarification purposes and is not meant to be disrespectful.

Jennifer informed defendant that she had reported him to the police for violating a no-contact order. RPV 95, 99. Defendant asked Jennifer if there was any way that they could make their relationship work, and Jennifer told him “absolutely not.” *Id.* During this conversation, defendant told Jennifer that he was in Eastern Washington or Vancouver, Washington, and again said that he was going to kill himself. *Id.* During their final phone conversation that night, at 10:12 pm, Jennifer told defendant that she had cheated on him with four other men during their relationship. RPV 100, 103-104. Defendant became angry, threatened to kill himself yet again and hung up. RPV 105.

Around 11:30 that evening, Jennifer went to bed. RPV 110. Jennifer’s parents, Christine and Terrence, and sister, Kimberly, were also in the house and had gone to bed. RPV 111.

About an hour after Jennifer went to bed, defendant drove to Jennifer’s parents’ neighborhood and parked approximately an eighth of a mile from the Schlatter residence. RPVII 602-603. Defendant donned a pair of gloves and broke into the house by slicing a hole in the screen over the kitchen window. RPVII 604-608. Defendant climbed in through the kitchen window, stumbling and making a noise once he got into the house. RPVII 609. He then snuck up the stairs toward Jennifer’s bedroom. *Id.*

Jennifer heard the sound of breaking glass from downstairs and her parents' dogs barking. *Id.* Suddenly, her door slammed open and defendant walked into her bedroom. *Id.* Jennifer heard defendant say, "I'm going to fucking kill you, bitch." RPV 115. Defendant stood over Jennifer, placed his hands around her throat and in her mouth and began choking her. *Id.* Jennifer believed she was going to die. RPV 117.

Jennifer's mother, Christine, woke up when she heard the glass break and dogs bark. RPV 210-211. She went to Jennifer's room and saw defendant strangling Jennifer. RPV 211, 212, 213. Christine yelled, "What are you doing?" and jumped on defendant's back. RPV 212-213. As Christine and defendant struggled, Christine yelled for her other daughter, Kimberly, to call the police. RPV 213.

Kimberly woke up when she heard the commotion, came into the room and saw Christine on the ground with defendant standing over her. RPVI 390. Kimberly screamed and defendant attacked her. RPV 392.

During the struggle, Jennifer's father, Terrance, woke up and came into the room. RPV 221. Terrance and defendant began to struggle with each other. RPV 221; RPVI 273, 337, 393. Once Terrance distracted defendant, Kimberly was free to run into her parents' room and call 911. RPVI 394.

Defendant told Terrance that he was going to kill him. RPVI 224; RPVII 273, 304. Defendant threw Terrance three feet, then put his arms around Terrance's neck and attempted to strangle him. RPVI 303-304; RPVII 619, 620. Terrance was unsure of whether or not he lost consciousness, but he remembered ended up on the floor where defendant repeatedly kicked him with his steel-toed boots. RPVI 304-305, 337; RPVII 622; RPVIII 737.

Defendant eventually left Terrance and again attacked Christine. RPVI 306. Defendant grabbed Christine and tried to throw her over the stairs. RPVI 307. Christine called out for Terrance to go get a shotgun. RPVI 396. Terrance ran to the master bedroom to get the gun. RPVI 310-311. While Jennifer's family struggled with defendant, Jennifer ran outside. RPVI 122.

Before Terrance returned with the gun, defendant left Christine and ran downstairs. RPVII 622. He approached Kimberly in the kitchen, but left when she brandished a butcher knife. RPVI 399-400; RPVII 623. Defendant then ran out into the backyard. RPVII 623. On the back patio, defendant ran into Jennifer and grabbed her arm as she tried to get away from him. RPV 125; RPVII 624-625.

Defendant again began beating and kicking Jennifer. RPV 125, 128, 129, 224-225; RPVII 626. As he beat her, he repeatedly told her, "This is for fucking cheating on me." RPV 128; RPVI 397. RPV 129, 224-225; RPVI 401. Defendant finally fled when he heard Terrance attempt to load the shotgun. RPV 226.

The entire Schlatter family went to the hospital to receive treatment for injuries caused by defendant. RPV 232. The hospital personnel x-rayed Terrance's neck and treated him for a floater in his right eye, which he still suffered from at the time of the trial, five months after the assault. RPVI 320. In addition to his eye injury, Terrance had injuries to his arm and to his groin which lasted for a couple of days. RPVI 320-321. Terrance also had noticeable bumps and scratches, which the police photographed when they arrived at the Schlatter residence. RPVI 353.

While Jennifer and her family were at the hospital, defendant returned to the house and broke in again. RPVII 637. He shattered the glass in their sliding door; ransacked the house; and shot bullets into Jennifer's television, computer and bedroom. RPVI 275-278, 286, 324-329; RPVII 637-638. After exchanging numerous phone calls with defendant regarding whether or not he would turn himself in, police located and arrested him in the afternoon on Tuesday, August 7, 2008. RPVI 445-446; RPVII 640.

C. ARGUMENT.

1. THE SENTENCING COURT ACTED WITHIN ITS DISCRETION WHEN IT IMPOSED A SENTENCE WITHIN THE STANDARD RANGE.

“As a general rule, the length of a criminal sentence imposed by a superior court is not subject to appellate review, so long as the punishment falls within the correct standard sentencing range established by the Sentencing Reform Act of 1981.” *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). The Sentencing Reform Act itself states, “A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed.” RCW 9.94A.585. The court may impose any sentence it deems appropriate within the standard range. *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). “This precept arises from the notion that, so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence’s length.” *Williams*, 149 Wn.2d at 146-147. “According wide latitude to the sentencing judge comports with the view that the punishment should fit the offender and not merely the crime.” *State v. Herzog*, 112 Wn.2d 419, 424, 721 P.2d 739 (1989) (internal quotations and citations omitted).

Challenges to a standard-range sentence may be allowed, though, when the error involves a violation of a constitutional right. *Mail*, 121 Wn.2d at 712. The sole constitutional contention defendant presents here is whether or not his right to a jury trial was infringed upon by the judge's comments during sentencing. Ap. Br. 9. "Every criminal defendant has a right under both the State and federal constitutions to a jury trial." *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007). Even a standard-range sentence, if imposed merely to punish a defendant for exercising his right to a jury trial, would violate due process. *State v. Sandefer*, 79 Wn. App. 178, 181, 900 P.2d 1132 (1995).

Yet, due process is not implicated merely because a judge comments on a defendant's choice to exercise his right to trial. See *United States v. Carter*, 804 F.2d 508 (9th Cir. 1986); *Sandefer*, 79 Wn. App. 178. "While a judge may not sentence vindictively or punitively, he may have a legitimate reason for sentencing a defendant more severely. The Court may properly consider the details, flavor and impact upon victims of the offense as presented at trial." *United States v. Carter*, 804 F.2d 508, 514 (9th Cir. 1986). See also *United States v. Hull*, 792 F.2d 941, 943 (9th Cir. 1986) (court could deny probation because defendant did not express

remorse); *United States v. Malquist*, 791 F.2d 1399, 1402-1403 (9th Cir. 1986) (court could include defendant's lack of repentance in sentencing calculus).

In *Sandefer*, the sentencing court admitted that defendant would likely have gotten a lower sentence had he pleaded guilty rather than going to trial:

Mr. Sandefer, if you entered a plea of guilty, I very possibly would have given you a more lenient sentence towards the lower end of the range, because of saving the victim being victimized by going through this court process. You didn't, and I'm not going to give you that break.

Sandefer, 79 Wn. App. at 180. On review, the Court of Appeals did not find that comment improper. Instead, the Court held, "the sentencing court's remarks do not indicate improper consideration of Sandefer's right to stand trial. Instead, we read the court's remarks as nothing more than a fair response to Sandefer's objection to the State's recommendation."

Here, the sentencing court's remarks were also nothing more than a fair response to defendant's request for a low-end sentence. In asking the court to give him the low end of the standard-range⁴, the defendant

⁴ Both the State and the defendant agreed that the standard sentence range was from 404.25 month to 507 months based on the sentence range for attempted murder with an offender score of 18 (308.25 to 411 months) plus two 48-month firearm enhancements.

stated that he had compassion for Jennifer and only cared about her welfare. Defense counsel stated,

Throughout my contacts with [defendant], he expressed an abiding and genuine concern about his girlfriend, Jennifer, throughout, that he wanted to know how she was doing. He wanted to make sure that she was – whatever he tried to do, that she was at least recovering, and even more important, that she was safe. He was remorseful from the very, very beginning, and that did not change throughout these proceedings.

RVXI 957.

In deciding to accept the State's higher recommendation, the sentencing court looked at all of the information provided and considered all of defendant's actions. A review of the court's entire colloquy shows that defendant's exercise of his right to a jury trial was not, in itself, a factor:

THE COURT: I'm a big believer in the jury process, and I have no doubt that they made the right decision, and I have no doubt that if Jenny's mom hadn't come in, you would have killed her. There's no doubt in my mind. And I think the jury saw that correctly.

I think the whole episode was just sheer terror for the entire family, and they will live with that for the rest of their lives. I can't imagine how they would ever feel safe in their home again, no matter how many alarms they put on, because of what you did.

Mr. Ausserer talked about the statement you made about “prison wasn’t that bad,” and I remember being stunned when you said that. Yeah, just stunned. That’s all I can say.

I believe in the jury system, and you absolutely have a right to have a jury trial, and that’s what this was about. Mr. Chin says you always had an abiding concern for Jenny from the first time he met you, and I can’t help thinking, “Then why did you make her go through this trial?” How hard was it for her to come to court and have to relive every single second of that night? Every single second. She had to go over it all more than once. That’s not care and concern for her.

THE DEFENDANT: I didn’t want to go to trial, your Honor.

THE COURT: Well, Mr. Chin is a fine lawyer, and I know I am not privy to any negotiations, and you absolutely have a right to go to trial, but it just doesn’t square when you force her to have to relive the whole night. I don’t want responses from you. This is my turn to talk. So at any rate, I just have a hard time believing any of that.

I am going to impose the high end of the range. If I could guarantee that you would never get out, that would be better for everybody, I think.

RPXI 962-963. The court’s comment on defendant’s choice to go to trial was to refute his claim that his only interest was Jennifer’s well-being. The court specifically focused on the terror that the family must have felt during the ordeal, the fact that defendant said, “prison wasn’t that bad,” the fact that the family was forced to relive the entire ordeal throughout the trial, and that defendant acted selfishly throughout the

proceedings. RPXI 962-963. Because the court's consideration of these factors was proper, due process was not violated.

Defendant relies on *United States v. Medina-Cervantes* to support his assertion that his constitutional right to a jury trial was violated by the judge's remarks. Ap. Br. 9; *United States v. Medina-Cervantes*, 690 F.2d 715 (9th Cir. 1982). This case is distinguishable from *Medina-Cervantes*. In that case, the judge specifically stated that the fine he imposed on Medina-Cervantes was for the purpose of reimbursing the Government for the cost of the jury trial. *Medina-Cervantes*, 690 F.2d at 716. He also stated, "All I can see is he was just thumbing his nose at our judicial system, stands there he could (sic) care less." *Id.* There was no indication in that record that the judge considered any factors other than defendant's choice to go to trial and the cost of that trial in imposing the high-end of the standard range sentence.

Here, the record reflects that defendant's choice to go to trial was not a consideration of the court. The sentencing court expressly affirmed defendant's right to a jury trial. While the court stated that defendant "absolutely ha[d] a right to go to trial, but it just doesn't square when you force her to have to relive that whole night," that statement was in direct response to defendant's assertion that he had "an abiding and genuine

concern for” Jennifer. RPXI 963. As this was a direct response to defendant’s request for leniency, this comment was not improper.

Given the judge’s express statement that she was not punishing defendant for standing trial and given her concern for the seriousness of defendant’s criminal activities, the disputed remarks cannot serve as a basis for invalidating defendant’s sentence. Nothing in the record supports defendant’s assertion that the court improperly imposed a harsher sentence as punishment for him exercising his right to stand trial. Rather, the record shows that the court expressly disavowed any such motivation and based its sentencing decision on the severity of the crime, the lasting impact defendant’s actions will have on the family, and defendant’s attitude toward his actions. As the court properly exercised its discretion when it sentenced defendant to a standard range sentence, the sentence should be affirmed.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF SECOND DEGREE ASSAULT OF TERRANCE SCHLATTER.

Due process requires that the State bear the burden of proving each element of the crime charged beyond a reasonable doubt. *State v. McCullom*, 98 Wn.2d 58, 61, 768 P.2d 1064 (1983). Evidence is sufficient when, viewed in the light most favorable to the prosecution, it

allows a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn. App. 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988). Further, "[w]hen the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial evidence is as reliable as direct evidence. *State v. Lubers*, 91 Wn. App. 614, 619, 915 P.2d 1157 (1996). Where there is conflicting evidence or where reasonable minds may differ in interpreting certain evidence, the jury has the task of weighing the evidence, determining credibility of the witnesses, and deciding disputed questions of fact. *State v. Thereoff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1990). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Great deference should be given to the trial court's factual findings. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

In this case, defendant challenges the sufficiency of the evidence regarding his conviction of second degree assault of Terrance. A person is

guilty of second degree assault if the person intentionally assaults another and recklessly inflicts substantial bodily harm. RCW 9A.36.021(1)(a). One can also commit second degree assault by assaulting another by strangulation. RCW 9A.36.021(1)(g).

The court instructed the jury that the State needed to prove the following two elements to convict defendant for second degree assault:

- (1) That on or about the 6th day of August, 2007, the defendant:
 - (a) intentionally assaulted Terrance Schlatter and thereby recklessly inflicted substantial bodily harm; or
 - (b) assaulted Terrance Schlatter by strangulation; and
- (2) That the acts occurred in the State of Washington.

CP 52, Instruction No, 28.

The jury was also instructed on the definition of substantial bodily harm:

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

CP 47, Instruction No, 24. The court also provided the definition of disfigurement:

Disfigurement means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect or deforms in some manner.

CP 48, Instruction No. 25. Further, the court instructed the jury on the definition of strangulation:

Strangulation means to compress a person's neck, thereby obstructing the person's blood flow or ability to breath, or doing so with the intent to obstruct the person's blood flow or ability to breathe.

CP 49, Instruction No. 26.

Defendant asserts that the State failed to establish that Terrance was in fact substantially harmed in the assault. However, defendant fails to note that there are two alternatives under which defendant can be convicted of second degree assault for Terrance. The jury was instructed that they had to find that either Terrance suffered substantial bodily harm or that defendant assaulted Terrance by strangulation. CP 52, Instruction No. 28. The State presented sufficient evidence to meet both prongs.

First, the State presented sufficient evidence to convict defendant on the basis of the substantial bodily harm Terrance suffered. Defendant threw Terrance about three feet in the air, put his hands around Terrance's neck and forced Terrance onto the floor. RPVI 303. Once he was on the ground, defendant kicked Terrance multiple times in the groin area. RPVI 305. At the hospital later that day, Terrance underwent an x-ray of his

neck and had a spot in one of his eyes. RPVI 320. This spot, called a floater, remained at the time of trial, five months after the date of the assault. RPVI 320. The groin injuries lasted a couple of days. RPVI 320-321.

The floater in Terrance's eye meets the definition of disfigurement, which includes "that which renders unsightly, misshapen, or imperfect or deforms in some manner." CP 48, Instruction No. 25. Causing a spot in one's eye would render that eye imperfect and would impair one's vision. Terrance's groin injury was substantial enough to give lasting pain for several days; it is not unreasonable for the jury to infer that Terrance suffered a temporary but substantial loss or impairment of the function of that body part. CP 47, Instruction No. 24. Determining whether or not these injuries constituted substantial bodily harm or disfigurement was a question for the jury to decide. Taken in the light most favorable to the prosecution, the testimony of the injuries Terrance received and the fact that Terrance still suffered from those injuries at the time of the trial are sufficient for the jury to have reasonably concluded that defendant committed second degree assault against Terrance.

Further, even if the jury was not satisfied that Terrance had suffered substantial bodily harm, sufficient evidence was presented to convince a reasonable fact finder that defendant strangled Terrance,

meeting the second prong. Terrance and Christine both testified that defendant said he was going to kill Terrance and attempted to strangle him. RPVI 224, 254; RPVII 273, 285, 303-304. Defendant put his hands around Terrance's neck and applied pressure. RPVI 304. While Terrance was unsure of whether or not he lost consciousness or had difficulty breathing, the next thing he remembered was ending up on the floor. *Id.* From Terrance's testimony, a jury could reasonably infer that defendant's attempt at strangling Terrance either impaired Terrance's blood flow or oxygen intake enough to make him briefly lose consciousness, causing him not to remember how he ended up on the floor. The neck injuries were severe enough that Terrance had to have x-rays of his neck taken at the hospital. RPVI 320. Viewed in the light most favorable to the prosecution, this evidence is also a sufficient basis for the jury to have reasonably found that defendant committed second degree assault by strangulation against Terrance.

In its entirety, the evidence presented by way of photographs admitted into evidence and Terrance's testimony was sufficient for a reasonable fact finder to find defendant guilty of second degree assault against Terrance. Therefore, this conviction should be affirmed.

D. CONCLUSION.

For the foregoing reasons, the state respectfully requests this Court affirm the convictions and sentence below.

DATED: October 15, 2009.

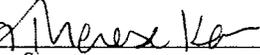
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Certificate of Service:

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.

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