

No. 40837-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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BY: [Signature]
JUL 10 2010
COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Freya Marconnette,

Appellant.

Lewis County Superior Court Cause No. 10-1-00094-6

The Honorable Judge Nelson Hunt

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Ms. Marconnette's conviction was entered in violation of her Fourteenth Amendment right to due process.
2. The trial court erred by refusing to give Ms. Marconnette's proposed instructions on the lawful use of force.
3. Ms. Marconnette was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel.
4. If the court's failure to instruct on the lawful use of force is not preserved for review, then Ms. Marconnette was denied the effective assistance of counsel.
5. The trial judge commented on the evidence.
6. The trial court erred by overruling Ms. Marconnette's objection to prosecutorial misconduct.
7. The prosecutor committed misconduct in closing arguments.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the court to instruct the jury on all essential elements of an offense. Where a person accused of assault presents some evidence establishing a lawful use of force, the absence of this defense becomes an element that the state must prove beyond a reasonable doubt. Did the trial court's failure to instruct the jury on Ms. Marconnette's lawful use of force violate her Fourteenth Amendment right to due process?
2. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, Ms. Marconnette's defense was that her use of force was lawful because the arresting officers used excessive force to effectuate an unlawful arrest; however, the record is unclear as to whether or not defense counsel actually submitted written instructions on the lawful use of force. If the court's failure to

properly instruct the jury is not preserved for review, was Ms. Marconnette denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel?

3. A prosecutor may not commit misconduct during closing arguments. Here, the prosecutor successfully argued that the jury should not be informed that police acted illegally (when they entered a residence without authority of law and arrested Ms. Marconnette without probable cause), but then implied to the jury in closing that the judge had decided that the officers acted properly. Did the prosecutor commit misconduct requiring reversal?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Eighteen-year-old Freya Marconnette was in an apartment with her friend Connie Durga. Ms. Durga's three children were home, as was her boyfriend Matt Reisman. RP (5/24/10) 95. At some point, Ms. Durga wanted Mr. Reisman to leave and he would not, so she asked Ms. Marconnette to call the police. Ms. Marconnette made the call, telling the dispatcher that there was a dispute between a man and a woman. RP (5/24/10) 24, 63, 95-96. Mr. Reisman left. RP (5/24/10) 96.

As he drove up to the apartment building, Officer Thompson saw Reisman, wearing pajamas and no shoes. Reisman ran away when he saw the officer. RP (5/24/10) 36. Knowing that the dispute was no longer occurring, he went up to the second-floor apartment and knocked on the door. Ms. Marconnette answered. RP (5/12/10) 24, 36. She opened the door and stepped outside. She said she was the person who had called 911. He asked her if she was the other part of the dispute, and she said that she was not. RP (5/12/10) 24-25, 38.

Ms. Marconnette told the officer that the other party was inside the apartment. Officer Thompson instructed Ms. Marconnette to tell the other party that he needed to speak with her, and Ms. Marconnette went back into the apartment to pass on the message. She came out and said that

Durga did not want to talk with him. RP (5/24/10) 25. Ms. Marconnette told the officer that Durga knew that if the police came, her boyfriend would leave and that was all she wanted. RP (5/24/10) 26. Officer Thompson said again that he needed to talk with Durga, and Ms. Marconnette again went inside to tell Durga what he had said. RP (5/24/10) 26. Once again, she came back out and said that Durga did not want to talk. RP (5/24/10) 26.

At this point, other officers had talked with Reisman and he had told them that Durga slapped him. RP (5/24/10) 26-27. So once again, Officer Thompson went up to the apartment to try to talk with Durga, this time with Officer Henderson. Ms. Marconnette came out, and both officers urged her to tell Durga to come out and talk with them. RP (5/24/10) 27, 43, 65. Again, Ms. Marconnette went in to tell Durga, and again came out to speak with the police. She told them that Durga told her she would not come out. RP (5/24/10) 28, 67. Both officers viewed Ms. Marconnette as a go-between for them. RP (5/24/10) 41, 78.

One of the officers told her that they did not necessarily want to have to enter the apartment to speak to Durga. RP (5/24/10) 28, 44, 66. Ms. Marconnette went in with the message, and came back out saying again that Durga did not want to talk with them. RP (5/24/10) 44. Ms. Marconnette said that they could not go into the apartment without a

warrant. RP (5/24/10) 28. They told her that she was obstructing them. According to Officer Henderson, he told her at that point that she was under arrest. RP (5/24/10) 67-68.

According to Ms. Marconnette, she was told that if she did not get Durga to come out, she would be put under arrest. RP (5/24/10) 45, 67-68. She responded by cursing and saying "fine," and turned to go back in, to make Durga come out. RP (5/24/10) 45, 103.

Officer Henderson blocked the door with his foot and reached in and grabbed Ms. Marconnette's arm. Both Ms. Marconnette and the officers pushed against the door. Officer Henderson grabbed Ms. Henderson by her hair with both hands and pulled her out of the apartment onto the small second-floor landing. The officers told her that she was under arrest for "obstructing". RP (5/24/10) 29, 67-68, 75, 79. At one point, both officers held her off the ground with her head and part of her body over the stairs. RP (5/24/10) 59-60, 108. Ms. Marconnette flailed and kicked and twisted, but the officers took her to the ground. RP (5/24/10) 29-30, 68-71. As they were handcuffing her, Officer Henderson felt a bite on his leg, although he did not see it and was not injured. RP (5/24/10) 71, 85.

The state charged Ms. Marconnette with Assault in the Third Degree.¹ CP 1. Ms. Marconnette sought dismissal, arguing that the officers entered the home unlawfully, and that the officers were committing an unlawful arrest, and thus were not pursuing their lawful duties. RP (3/19/10) 3, 6; RP (4/14/10) 2. The court declined to make a ruling on the lawfulness of the arrest. RP (4/14/10) 5. The court also prohibited defense counsel from raising in front of the jury the lawfulness of the officers' warrantless entry into the home or of the arrest. RP (5/24/10) 16.

Ms. Marconnette testified. She told the jury that she did not remember biting the officer though she did not dispute that it happened. RP (5/24/10) 113-114. She said that she was flailing because she was afraid she could fall down the stairs and that she did not have any intent to assault anyone. RP (5/24/10) 109-110, 113. She described the injuries she sustained, and introduced photographs documenting them. RP (5/24/10) 109-113; Exhibits 1-5, Supp. CP.

¹ The state also filed a charge of Resisting Arrest, which they later dismissed. CP 2; RP (5/12/10) 3-4.

The trial judge refused to instruct the jury on the lawful use of force, as set forth in WPIC 17.02.01. Defense counsel objected.² RP (5/24/10) 125.

The prosecutor started off his closing argument to the jury by saying, “We have certain systems in this county for dispensing justice and different people play different roles. The judge rules on the law, he makes rulings whether officers do the right thing...” Defense counsel objected to the argument, and the court overruled the objection. RP (5/24/10) 126.

The jury convicted Ms. Marconnette of Assault in the Third Degree, and she appealed. CP 4-12, 13-22.

ARGUMENT

I. THE TRIAL COURT VIOLATED MS. MARCONNETTE’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY REFUSING TO INSTRUCT THE JURY ON HER “LAWFUL USE OF FORCE” DEFENSE.

A. Standard of Review

A trial court’s rejection of a proposed instruction is reviewed *de novo* if the refusal is based on an issue of law. *City of Tacoma v. Belasco*, 114 Wash.App. 211, 214, 56 P.3d 618 (2002). If the refusal is

² It is not clear from the record whether or not defense counsel proposed written instructions.

based on a factual dispute, the evidence is taken in a light most favorable to the defendant, and review is for an abuse of discretion. *Id*; *see also State v. Smith*, 154 Wash.App. 272, 278, 223 P.3d 1262 (2009) (citing *State v. Fernandez-Medina*, 141 Wash.2d 448, 461, 6 P.3d 1150 (2000)).

B. Due process requires the court to instruct the jury on the lawful use of force when there is some evidence supporting the defense.

An accused person is entitled to instructions on the defense theory of the case if there is evidence to support that theory; failure to so instruct is reversible error. *State v. Harvill*, 169 Wash.2d 254, 259, 234 P.3d 1166 (2010). The evidence is evaluated in the light most favorable to the proponent of the instruction. *In re Crace*, 157 Wash.App. 81, 107, 236 P.3d 914 (2010) (citing *Fernandez-Medina*, *supra*).

In particular, instructions on the lawful use of force are required whenever there is some evidence to support the defense. *State v. Jordan*, ___ Wash.App. ___, ___ n. 6, 241 P.3d 464 (2010); *State v. Walden*, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997). When the lawful use of force is properly raised at trial, the absence of the defense is an element which the prosecution must disprove beyond a reasonable doubt.³ *State v. Kyлло*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009).

³ Accordingly, failure to instruct on the lawful use of force relieves the state of its burden to prove every element beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash.

A person who is being arrested has a right to use reasonable and proportional force to resist an attempt to inflict injury. *State v. Valentine*, 132 Wash.2d 1, 21, 935 P.2d 1294 (1997). The correct standard for evaluating an accused person's lawful-use-of-force defense is set forth in WPIC 17.02.01:

It is a defense to a charge of [Assault in the Third Degree] that force used was lawful as defined in this instruction.

A person may use force to resist an arrest only if the person being arrested is in actual and imminent danger of serious injury from an officer's use of excessive force. The person may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 17.02.01 (certain bracketed material omitted).

C. The trial judge should have instructed the jury on the lawful use of force because there was some evidence supporting the defense.⁴

Taking the evidence in a light most favorable to Ms. Marconnette, the record contained at least some evidence suggesting that she was in

Const. Article I, Section 3; *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004).

⁴ Because the reasons for the court's ruling are not included in the record, it is unclear which standard of review applies. However, whether review is *de novo* or for an abuse of discretion, the trial judge committed prejudicial error requiring reversal.

actual and imminent danger of serious injury from the officers' use of excessive force. First, it is undisputed that two large police officers breached the threshold of Ms. Marconnette's home, grabbed her by the hair using a two-hand hair hold, and brought her face-down to the floor of the landing. RP (5/24/10) 19-92. Second, the landing was on the second floor, and the layout was such that she might have fallen down the stairway. RP (5/24/10) 23, 57-60. Third, Ms. Marconnette actually sustained some injury from the officers' actions. RP (5/24/10) 109-113; Exhibits 1-5, Supp. CP.

Given the evidence, the trial court should have instructed the jury on the lawful use of force using WPIC 17.02.01.⁵ *Jordan, supra; Walden, supra*. The failure to do so relieved the state of its burden to prove the absence of the defense beyond a reasonable doubt. *Kyllo, supra*. This violated Ms. Marconnette's Fourteenth Amendment right to due process. Accordingly, the conviction must be reversed and the case remanded to the trial court, with directions to instruct the jury on the lawful use of force, using WPIC 17.02.01. *Walden, supra*.

⁵ It is unclear whether or not defense counsel proposed written instructions on the lawful use of force. Defense counsel did object to the trial court's failure to give WPIC 17.02.01. RP (5/24/10) 125. Furthermore, in light of clear evidence raising the lawful use of force, the trial judge should have given the instruction even absent proposed written instructions from the defense. In addition, if the issue is not properly preserved, the Court of Appeals should review it as a manifest error affecting a constitutional right (pursuant to RAP 2.5(a)(3)) or as an ineffective assistance of counsel claim, as argued elsewhere in this brief.

II. MS. MARCONNETTE WAS DEPRIVED OF HER SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); see also *State v. Pittman*, 134 Wash.App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance, though it is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." *State v. Kylo*, at 862. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

- C. If Ms. Marconnette’s self-defense claim is not preserved for review, defense counsel provided ineffective assistance by failing to propose instructions on self-defense.

The reasonable competence standard requires defense counsel to be familiar with the instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). A failure to propose proper instructions on the justifiable use of force constitutes ineffective assistance of counsel. *State v. Woods*, 138 Wash. App. 191, 156 P.3d 309 (2007); *see also State v. Rodriguez*, 121 Wash. App. 180, 87 P.3d 1201 (2004).

Ms. Marconnette’s trial strategy rested on evidence that she used lawful force in resisting police violence, which created “actual and imminent danger of serious injury.” WPIC 17.02.01. Defense counsel objected to the trial court’s failure to give WPIC 17.02.01; however, the record does not clearly establish that counsel proposed written instructions. If written instructions were not proposed, Ms. Marconnette was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel.

There is “no conceivable legitimate tactic” explaining counsel’s failure to propose proper written instructions. *Reichenbach*, at 130. Nor is there any indication in the record suggesting that counsel was actually

pursuing a strategy that required him not to propose such instructions, especially in light of his objection to the court's failure to give WPIC 17.02.01. *See Hendrickson, supra*. Under these circumstances, trial counsel should have proposed written instructions based on WPIC 17.02.01, and the failure to do so constituted deficient performance. *Woods, supra*. The error prejudiced Ms. Marconnette, because without such instructions, the jury was unable to evaluate her defense, and could not acquit Ms. Marconnette even if it believed she used lawful force in resisting police violence.

If Ms. Marconnette's self-defense claim is not preserved for review, defense counsel was ineffective for failing to propose written instructions on self-defense. *Woods, supra*. Her conviction must be reversed and the case remanded for a new trial. *Id.*

III. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE IN VIOLATION OF WASH. CONST. ARTICLE IV, SECTION 16.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). A comment on the evidence "invades a fundamental right" and thus may be challenged for the first time on review as a manifest error. RAP 2.5(a)(3); *State v. Kirwin*, 165

Wash.2d 818, 823, 203 P.3d 1044 (2009); *State v. Becker*, 132 Wash.2d 54, 64, 935 P.2d 1321 (1997).

Review is required when the appellant identifies a constitutional error and shows how, “in the context of the trial, the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *State v. McFarland*, 127 Wash.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wash. App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).⁶

B. The trial judge improperly commented on the facts of the case by implicitly endorsing the prosecutor’s argument that the judge had ruled that the officers did “the right thing.”

Under Article IV, Section 16 of the Washington Constitution, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const. Article IV, Section 16. In this case, the trial judge improperly commented on the facts by overruling Ms. Marconnette’s objection to prosecutorial

⁶ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

misconduct, implicitly endorsing the prosecuting attorney's argument that "the judge rules on the law, he makes rulings whether officers do the right thing." RP (5/24/10) 126.

By overruling Ms. Marconnette's objection, the court "lent an aura of legitimacy to what was otherwise improper argument." *State v. Davenport*, 100 Wash.2d 757, 764, 675 P.2d 1213 (1984). A comment of this sort is "structural error [which] infects the entire trial process," and is not subject to harmless error analysis. *State v. Jackman*, 125 Wash. App. 552, 560, 104 P.3d 686 (2004). Accordingly, Ms. Marconnette's conviction must be reversed and the case remanded for a new trial. *Id.*

IV. THE PROSECUTOR COMMITTED MISCONDUCT REQUIRING REVERSAL.

A. Standard of Review

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. *State v. Ish*, ___ Wash.2d ___, ___, 241 P.3d 389 (2010). Prosecutorial misconduct requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wash.App. 794, 800, 998 P.2d 907 (2000).

B. A guilty verdict may not be based on facts not introduced into evidence or legal arguments unsupported by the court's instructions.

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). The due process clause affords a similar protection. U.S. Const. XIV; *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). It is misconduct for a prosecutor to suggest that information not presented at trial supports conviction. *State v. Jones*, 144 Wash.App. 284, 293-94, 183 P.3d 307 (2008); *State v. Perez-Mejia*, 134 Wash.App. 907, 916, 143 P.3d 838 (2006).

In addition, a prosecutor's statements to the jury upon the law must be confined to the law set forth in the instructions. *Davenport*, at 760; *State v. Huckins*, 66 Wash.App. 213, 218-219, 836 P.2d 230 (1992). Any statement of law not contained in the instructions is improper, even if it is correct. *Davenport*, at 760. Such misconduct is a "serious irregularity having the grave potential to mislead the jury." *Id.*, at 764. Reversal is required whenever there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.*, at 762.

- C. The prosecutor committed misconduct by referring to matters not in evidence and by making arguments that were not supported by the court's instructions.

In this case, the prosecutor referred to matters not in evidence and made legal arguments not supported by the instructions when he told the

jury that “the judge rules on the law, he makes rulings whether officers do the right thing...” RP (5/24/10) 126. This implied to the jury that the trial judge had found the officers’ conduct lawful. Neither the evidence nor the court’s instructions supported this remark. RP (3/19/10) 2-9; RP (4/14/10) 2-5; RP (5/12/10) 11-125; Court’s Instructions, Supp. CP.

This misconduct was especially egregious because the prosecutor successfully argued that the lawfulness of police action was irrelevant to the trial, and obtained an order prohibiting defense counsel from raising the issue in front of the jury.⁷ RP (5/24/10) 16. The trial judge should have sustained defense counsel’s objection; by overruling it, the trial judge gave implicit support to the prosecutor’s argument. *See Davenport, at* 764.

The prosecutor’s remark suggested to the jury that the judge had reviewed the officers’ actions and found them appropriate. Some jurors may well have concluded that the judge’s sanction of the officers’ conduct was inconsistent with an acquittal.

The prosecutor’s comments violated Ms. Marconnette’s right to a verdict based solely on the evidence and the court’s instructions. This

⁷ The prosecutor even dismissed Count II (Resisting Arrest) prior to trial, at least in part (one assumes) because that charge hinged on whether or not the arrest was lawful. RP (5/24/10) 3-4.

misconduct violated Ms. Marconnette's Sixth and Fourteenth Amendment rights to due process and to a jury trial.⁸ Accordingly, her convictions must be reversed and the case remanded for a new trial.

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on December 6, 2010.

BACKLUND AND MISTRY



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⁸ In the alternative, defense counsel's failure to object deprived Ms. Marconnette of his right to the effective assistance of counsel, as argued elsewhere in this brief.

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Freya Marconette
231 SW 11th St., #9
Chehalis, WA 98532

and to:

Lewis County Prosecutor
360 NW North St.
Chehalis, WA 98532

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 6, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 6, 2010.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BY: 
DATE: _____
TIME: _____
PLACE: _____