

COURT OF APPEALS
DIVISION II

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

State of Washington
Respondent

v.

WILLIAM C. SELLS
Appellant

413817

On Appeal from Grays Harbor County Superior Court
Cause number 10-1-00279-3

The Honorable Gordon Godfrey

REPLY BRIEF

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III. SUMMARY OF THE CASE

Please refer to the Statements of Facts in Appellant's opening brief and the State's responding brief.

On July, 15, 2010, the morning after a burglary at the North Beach School District, a Visa credit card was presented at three local businesses. RP 34-35. The State alleged both the School District and Superintendent Stanley Pinnick were named card holders. RP 48, 96.

Three days later, the police searched the truck of Appellant William C. Sells and found two other district charge cards, along with a receipt from July 15 involving the Visa card. RP 112. Sells was convicted of possessing these two cards in violation of RCW 9A.56.160. CP 5-6. The defense did not dispute the possession charge. RP 173.¹

The State also charged Sells with identity theft, RCW 9.35.020(3), based on the use of the Visa card. CP 5. The State alleged Pinnick's name on the card was a "means of identification." RP 136-37, 161-62.

A store security video showed Sells and another man presenting the Visa card at an AM/PM mini-mart. RP 68-69. Witnesses also testified that Sells used the Visa at a gas station and a restaurant. RP 79; 89. The State neither alleged nor offered evidence that Sells or the accomplice claimed at any time or in any manner to be Stanley Pinnick. Rather, Sells

¹ Sells was not accused of the burglary. CP 5-6.

claimed his companion was a School District employee. No identification was either requested or offered. RP 71, 73. When Sells returned to the AM/PM later by himself, he signed the Visa receipts not in the name of Pinnick, but as a person called Bryce Bitar. RP 80, 91. Sells was not charged with stealing the identity of Bitar.

The Visa card was not in evidence. The owner of the AM/PM told the police that the only named card-holder was the School District. RP 76. He also testified to this at trial. RP 72. Accordingly, Sells challenged the sufficiency of the evidence that Pinnick's name was on the card. RP 174-77. The defense also moved to dismiss for lack of evidence on the essential elements of identity theft, even if Pinnick's name was on the Visa card. RP 136-37.

During closing argument, the prosecutor commented that Sells had offered no evidence that Pinnick's name was not on the Visa card:

Is there some evidence here that [Pinnick's] name wasn't on the card? I wish we had the card, but the card was thrown away, lost, going who knows where in those three days. But the answer is, is there a reasonable doubt that his name was on the card? And the answer is no.

9/16 RP 183. The court ruled this was not burden-shifting and denied a motion for mistrial. 10/11 RP 1-3.

The defense did not object to the proposed jury instructions. RP 158. The jury convicted Sells on both counts. CP 28, 29.

Sentencing: Sells did not stipulate to the court's calculated offender score of 11. RP 183. The standard ranges on a score of 9+ were 43-57 months on Count 1 and 22-29 on Count 2. RP 192. The court imposed top-of-the range sentences of 57 months on Count 1 and 29 months on Count 2 and ran the sentences consecutively under the "free crime" doctrine of RCW 9.94A.535. CP 68; RP 202-03. The consecutive sentences totalled 86 months. RP 203. The court was expressed regret that it could not sentence Sells to life as a habitual offender as provided in the law of Nevada where Sells had incurred some priors. RP 201-02, 203.

The court accepted the prosecutor's unsupported assertion that Sells was not entitled to credit for time served because he was held pretrial on a Nevada hold for a parole violation. RP 206. Defense counsel produced documentation showing that Sells was granted bail on these offenses. RP 207. Order Setting Conditions of Release, Supp. CP. The court nevertheless denied credit for time served. RP 207.

III. ARGUMENTS IN REPLY

1. THE STATE FAILED TO PROVE INTENT TO USE PINNICK'S NAME TO COMMIT A CRIME.

The State claims that Pinnick's name on the Visa card was a means of identification for the purposes of identity theft. Brief of Respondent (BR) 6. But the State failed to prove either that Pinnick's name was a

means of identification or that Sells possessed it with the intent to commit a crime. As with the other two cards in Sells's possession, Pinnick's name was entirely superfluous to Sells's alleged criminal purpose.

First, the State did not establish that Pinnick's name on the School District credit card constituted a means of identification in the context of the identity theft statute.

A name on the Visa card is "financial information." That is, information identifiable to an individual that describes finances or credit for the purpose of "account access or transaction initiation." RCW 9.35.005(1). A "means of identification," by contrast, is information that does not describe finances or credit. Laws of 1999, ch. 368, § 1; *State v. Berry*, 129 Wn. App. 59, 67, 117 P.3d 1162 (2005). RCW 9.35.005(3); Instr. 6, CP 23. Thus, a person's name may constitute a means of identification. RCW 9.35.005(3). But, by these definitions, a single manifestation of a single name on a single item cannot be both a means of identification and financial information.

The facts of Sells's case are like those of *Berry*. *Berry* did not commit identity theft against the owner of an account simply by using the account number where *Berry* did not use the account owner's name for the purposes of identification. *Berry*, 129 Wn. App. at 67. The account number and the District's name on on the Visa card gained access to the

funds in the account. The fact that the School District was a named card holder removed any interest in claiming to be Pinnick. Simply claiming to be an anonymous district employee was sufficient.

Moreover, the State is also wrong in claiming that using the Visa card with the intent of obtaining goods or services without paying for them that is the same as using Pinnick's name for that purpose. BR at 7. Even if Pinnick's name on the card were a means of identification, the crime of identity theft has two essential elements, not one. The State also had to prove that Sells's purpose in possessing the name was to use it to commit a crime. *State v. Baldwin*, 150 Wn.2d 448, 455, 78 P.3d 1005 (2003).

This means the intent to commit a crime had to be the reason Sells acquired the name on the card. It is not enough to show merely coincidence in time; the intent to commit a crime had to be Sells's purpose in acquiring Pinnick's name independent of his purpose in possessing the card — a purpose that could not be achieved if Pinnick's name were not on there. RCW 9.35.020(1).

The State did not prove this. Rather, Sells somehow came into possession of three School District credit cards in the name of the North Bend School District. Assuming one card also happened to have the superintendent's name on it, the State did not suggest how that could have independently facilitated the commission of a crime or how Sells could

have intended for it to do so. Sells's acquisition of Pinnick's name was purely incidental to his possession of three District cards.

In fact, the evidence affirmatively showed that Sells did not use Pinnick's name. Neither Sells nor his companion attempted to claim Pinnick's identity. They first said one of them worked for the school district. Later, Sells did not claim to be Pinnick, but signed the slip "Bryson Bitar."

Thus the State neither alleged nor proved the requisite nexus between Pinnick's name on the card and Sells's intent to commit an offense with that card. Sells had no intent to possess Pinnick's name on the card that was independent of his intent to possessing the cards without Pinnick's name on them.

Because there is no evidence that Sells used Pinnick's name as identification or ever intended to do so, the State failed to prove an essential intent element of identity theft.

"Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). The Court should reverse the conviction and dismiss the prosecution.

2. THE EVIDENCE SUPPORTS AN
INSTRUCTION FOR SIMPLE THEFT.

The court would have given a simple theft instruction on Count 1 had it been asked to do so. This would have permitted the jury to convict of a misdemeanor instead of the Class C felony of identity theft. No possible benefit could be achieved by not requesting it.

It is theft in the third degree to commit theft of property valued less than \$750. RCW 9A.56.050(1).² The statutory definition of “theft,” includes to wrongfully “exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). Third degree theft is a gross misdemeanor. RCW 9A.56.050(2). Second degree identity theft, by contrast is a class C felony. RCW 9.35.020(3).

Sells essentially conceded that he exerted control over what was obviously a School District Visa card to buy gas and food with the School District’s funds. Accordingly, it is inconceivable that, if defense counsel had requested a third degree theft instruction, the court would not have given it.

² The definition of “theft,” includes to “wrongfully exert unauthorized control over the property or services of another...with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). Also to “appropriate lost or misdelivered property ... with intent to deprive [the owner]of such property or services.” RCW 9A.56.020(1)(c).

Moreover, no legitimate strategy justified withholding from Sells's jury the option of convicting him of simple third degree theft — a gross misdemeanor — rather than identity theft, a Class C, seriousness level II felony offense. It was a win-win situation.

The evidence that Sells committed an offense by means of using a card to obtain goods or services with the School Districts funds was overwhelming, while the evidence for identity theft was weak. Moreover, the jury would not know that simple theft is a less serious crime, only that it is a better fit on these facts. At best, they would have acquitted on Count 1 — or at worst they would have opted for simple theft on that Count. Assuming they convicted Sells on Count 2, this would have resulted in no more than a 90-day maximum misdemeanor sentence added to the maximum of 29 months on Count 2.

If Count 1 had been the only charge, then conceivably it could be argued that counsel acted reasonably in risking an all-or-nothing roll of the dice. But given Count 2, the 'all' if convicted on Count 1 without the lesser offense option was 86 months and 'nothing' was 29 months. But with the theft option, 'nothing' was still 29 months, but the 'all' was only 32 months, not 86. It is simply not conceivable that reasonable counsel would substitute 86 versus 29 months for a possible 32 versus 29 months.

It did not benefit Sells in the slightest to withhold from the jury the ability to convict on the lesser charge.

3. COUNSEL WAS INEFFECTIVE FOR NOT REQUESTING THE THEFT INSTRUCTION.

Effective counsel would have requested an instruction for simple theft to account for the facts alleged in Count 1.

Failure by defense counsel to discover the applicable law falls below an objective standard of reasonableness and is deficient per se. *State v. Kylo*, 166 Wn.2d 856, 865-69, 215 P.3d 177 (2009). “[D]efense counsel has a duty to investigate all reasonable lines of defense,” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 744, 101 P.3d 1 (2004). To prevail on a claim of ineffective assistance, an appellant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

When an ineffectiveness claim rests on counsel’s failure to request an instruction that would allow the jury to convict on a lesser offense, the appellant must persuade the Court that no legitimate strategy can be conceived for omitting the instruction. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011) (counsel reasonably could have believed that an all or nothing strategy was the best approach.) But counsel is ineffective in failing to request a jury instruction that would mitigate a guilty verdict if it

is not possible to conceive of a legitimate reason for not doing so. An “all-or-nothing” strategy may be, but is not necessarily, reasonable. The *Strickland* performance and prejudice prongs both are established by showing that no reason exists for counsel not to have offered an instruction that was both necessary to further the defense theory of the case and supported by the evidence. *Grier*, 171 Wn.2d at 34-35.

The State does not claim that Sells’s counsel made a strategic decision to pursue an “all-or-nothing” strategy instead of seeking a lesser offense instruction. BR at 8-9. Rather, the State claims the evidence could not support a conviction for simple theft. But

To establish prejudice, an appellant must show that it is reasonably probable the outcome of the trial would have been different if counsel had done what he was supposed to do. *Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is sufficient to undermine confidence in the outcome. *Cienfuegos*, 144 Wn.2d at 222, 229, 25 P.3d 1011 (2001) citing *Strickland*, 466 U.S. at 694.

It is highly likely that a properly instructed jury would have convicted Sells of simple third degree theft which carried a maximum penalty of 90 days rather than 57 months.

The Court should reverse and dismiss the conviction for Count 1.

4. THE JURY INSTRUCTIONS FOR COUNT 1
ARE INSUFFICIENT AND DEFECTIVE.

Jury instructions that relieve the State of its burden of proof constitute a manifest constitutional error that this Court will review even if trial counsel did not object. *State v. Goble*, 131 Wn. App. 194, 202-03, 126 P.3d 821 (2005). And a jury unanimity error can be raised for the first time on appeal. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

In support of Count 1, the State argued that a school district is a “person” for purposes of the identity theft statute because it is a corporation. CP 13. The State now concedes that the School District is not a human “person” and cannot therefore be a victim of identity theft. BR 10, citing RCW 9A.04.110(17); RCW 9.35.020. (See Appellant’s Brief (AB) at 21-22. The plain language of the identity theft statute limits potential victims to “another person living or dead.” RCW 9.35.020. A corporation may be a fictional person for some purposes, but it cannot, even fictionally, be either living or dead.)

The State now claims it did not invite the jury to regard the School District as a possible victim of the identity theft. BR 10. But the jury instructions show otherwise. Instruction 11 invites the jury to convict Sells on Count 1 if it finds he used an access device in the name of Pinnick

and the School District. CP 24. This would suggest to the jury that it could find that the school district was a victim of Count 1.

At best, Instr. 11 is fatally ambiguous. Identity of the actual victim is an essential element of the crime of identity theft. *Berry*, 129 Wn. App. at 68. Therefore, because one or more of Sells's jurors may erroneously have thought it was immaterial whether Pinnick's name was on the School District's Visa card, the instructions cannot support a unanimous conviction for identity theft. The to-convict instruction for Count 1 limiting potential victims solely to Pinnick. is contradicted by Instr. 11. Instr. 4, CP 22; Instr.11, CP 24.

Instruction 11 also conflates the elements of Counts 1 and 2 by substituting the term "access device for "means of identification." The instruction defining identity theft for Count 1 defines the offense solely in terms of a means of identification. Instr. 2, CP21. The term "access device" is used to describe the essential elements of a different offense in Count 2. Instr. 5, CP 23. But the unanimity instruction says the jury can convict on Count 1 if they unanimously find Sells used an "access device." Instruction 11, CP 24.

Erroneous instructions given on behalf of the prevailing party are presumed prejudicial unless it affirmatively appears that the error was harmless. *State v. Bray*, 52 Wn. App. 30, 34-35, 756 P.2d 1332 (1988).

These instructions deprived Sells of his right to a properly instructed jury and left the jurors to try to figure out for themselves what constituted which crime and which if any crime the State had proved. These errors cannot be harmless.

The remedy is to reverse the conviction on Count 1.

5. THE STATE SHIFTED THE BURDEN TO SELLS TO PROVE PINNICK'S NAME WAS NOT ON THE VISA CARD.

During closing argument, the prosecutor called the jury's attention to the fact that Sells had failed to prove that Pinnick's name was not on the card. RP 183. Defense counsel moved for a mistrial on this ground. CP 50; 10/11 RP 1. The court summarily denied the motion. 10/11 RP 3.

The State cites *State v. Ashby*, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969), for the proposition that commenting on the lack of evidence refuting the the State's evidence is not objectionable unless the prosecutor comments that the defendant himself failed to refute it, and that any prejudice is cured by instructing the jury not to infer guilt from the defendant's decision not to testify. CP 52. The State also cites *Brett*, 126 Wn.2d 136, and *State v. Morris*, 150 Wn. App. 927, 932, 210 P.3d 1025 (2009), both of which reiterate the holding of *Ashby*. BR 14-16.

The sole issue in *Ashby, Brett, and Morris*, however was whether the prosecutors commented on the defendants' failure to take the stand and testify in their own defense. *Id.* The Court held they did not, because witnesses other than the defendants could conceivably have been called to testify on the point at issue. *Ashby, Brett, and Morris* hark back to *State v. Litzenberger*, 140 Wash. 308, 311, 248 P. 799 (1926), also cited by the State here (BR 15), where the Court asked rhetorically:

Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it, and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his.

Ashby at 38, citing *Litzenberger*, 140 Wash. at 311.

But the prosecutor's comment here violated Sells's right to the presumption of innocence by drawing the jury's attention to his exercise of his right not to present any evidence. It is *In re Winship*,³ not *Doyle v. Ohio*,⁴ that has rendered *Ashby, Brett, and Morris* no longer viable. *Winship*, 397 U.S. 358, 361-62.

The issue is not Sells's right not to testify. A criminal defendant has no duty to present any evidence or any witnesses, and it is reversible misconduct for the State to comment on the lack of defense evidence.

³ 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

⁴ 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990). A defendant “has no duty to present any evidence. The State bears the entire burden of proving each element of its case beyond a reasonable doubt.” *State v. Traweck*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986). The prosecutor may not imply guilt from a defendant’s failure to call witnesses to prove his innocence. *Traweck*, 43 Wn. App. at 107. It is misconduct to invite the jury to infer a duty to present favorable evidence if it existed. *Cleveland*, 58 Wn. App. at 648 (discussing *Traweck*).

Here, the State claims the prosecutor’s comment addressed the total lack of evidence, not the lack of defense evidence. BR 14. But again, the record refutes this. Mr. Singh, the AM/PM manager, testified that only the School District was named on the card. RP 76. So the State’s comment simply drew attention to the fact that Sells himself did not present any evidence disproving the State’s allegations.

Counsel’s Failure to Object Was Deficient Performance: The defense waives misconduct by not objecting at trial unless the misconduct was “so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Edvalds*, 157 Wn. App. 517, 522, 237 P.3d 368 (2010). Here, the misconduct arguably could have been cured by a timely objection and a curative instruction reminding the jury of the *Winship*

doctrine. Therefore, the failure to object and preserve the issue for appeal was ineffective assistance of counsel.

The deficiency prong of ineffective assistance test is met. The prosecutor's comment was clearly improper. An objection and instruction could have corrected any misunderstanding in the jury box and avoided any resulting prejudice. Counsel had no tactical reason for not objecting.

The prejudice prong is also satisfied because confidence in the verdict is compromised. A reviewing court cannot determine what may have influenced the jury's decision. *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946); Dennis J. Sweeney, AN ANALYSIS OF HARMLESS ERROR IN WASHINGTON, 31 Gonz. L. Rev. 277 (1995-96).

Here, we cannot know what factors led the jury to its verdict or what the impact of any particular constitutional violation might have had on deliberations. The remedy is to reverse the conviction.

6. COUNTS 1 AND 2 WERE SAME CRIMINAL CONDUCT.

The State claims the credit card offenses here were not the same criminal conduct for sentencing purposes because they were committed in different places and at different times. BR 17. This is wrong.

Same criminal conduct comprises "two or more crimes that require the same criminal intent, are committed at the same time and place, and

involve the same victim.” RCW 9.94A.589(1)(a). All three elements must be present. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). But offenses need not occur simultaneously in order to constitute the same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). The “same time” and “same intent” elements are established by individual acts that are part of a continuing, uninterrupted sequence of conduct. *Porter*, 133 Wn.2d at 186. In determining whether two crimes share the same criminal intent, the court considers (1) whether the defendant’s intent, viewed objectively, changed from one crime to the next, and (2) whether commission of one crime furthered the other. *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

RCW 9.94A.589(1)(a) is construed narrowly, and most multiple crimes do not constitute the same criminal conduct. *State v. Stockmyer*, 136 Wn. App. 212, 218, 148 P.3d 1077 (2006). This Court defers to the trial court’s determination of same criminal conduct unless the court clearly abused its discretion or misapplied the law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990). Here, the sentencing court did both.

The focus of a same criminal conduct inquiry is the timing of the unlawful acts, not the discovery of the evidence. The fact that additional cards were discovered three days after the Visa card was used does alter the fact that the offenses involved three stolen cards as part of a single,

ongoing course of criminal conduct. The State did not allege and presented no evidence to suggest that Sells did not come into possession of all the cards at the same time or that his possession of the cards in his truck was part of a separate unlawful course of conduct from that involving the Visa card.

It is well-settled in the context of a double jeopardy analysis that the unit of prosecution for credit card offenses is not the number of transactions but the number of victims. *See, e.g., State v. Fisher*, 139 Wn. App. 578, 582, 161 P.3d 1054 (2007). The sole victim here was the School District. Therefore, Counts 1 and 2 are the same criminal conduct for sentencing. The sentencing judge appeared to blame Sells for the perceived shortcomings of the SRA, which led the court to reject the same criminal conduct idea without a meaningful analysis. RP 200-04. This was an abuse of discretion.

This Court should remand so that a different judge can determine whether Sells was guilty of a single course of criminal conduct.

7. THE COURT ERRED IN DENYING CREDIT
FOR TIME SERVED.

Motion to Strike: Sells asks the Court to strike page 20 of the Respondent's Brief, which alleges a series of facts regarding a supposed Nevada hold without a single citation to the record.

Appellants' counsel routinely explain to their clients that an appeal is not a new trial, and that review is based solely on the trial court record. This record contains not a jot of evidence that Sells was on parole in Nevada; was being supervised by the Washington DOC; or that Nevada placed a detainer against him. The State refers to some sort of administrative hearing but does not identify the agency, the question presented; the examiner's findings of fact or conclusions of law, or the source of the agency's authority to issue orders to the state of Nevada. The prosecutor did not produce a bench warrant from Nevada or a certification from the Grays Harbor County Sheriff. See BR 21.

Merits: The sentencing court did not have discretion to withhold credit for the time Sells served while confined during these proceedings. The Sentencing Reform Act, RCW 9.94A (SRA), requires that the court shall give credit for time served before sentencing "if that confinement was solely in regard to the offense for which the offender is being sentenced." RCW 9.94A.505(6). This is not optional. It may be that the State could have held Sells on a Nevada hold, but the prosecutor presented no evidence that it did so. Sells was held solely on these charges.

The State claims the superior court both granted bail and ordered Sells detained. BR 21. But, a court cannot simultaneously grant conditional release and unconditionally detain. The order setting

conditions of release is in the record. Order Setting Conditions of Release, Supp. CP. The Nevada detainer, by contrast, is merely a rumor. The State contends a Nevada hold would go into effect after Sells served his Washington sentence. BR 21. That being so, the hold was not in effect before he served it. Therefore, Sells was in custody pretrial solely on the current charges.

The State's claim that Nevada would credit Sells for time served in Washington is unsupported by authority as fact or law. BR 21. And the argument that credit here would result in a windfall there is an argument for the Nevada prosecutor to offer at the appropriate time.

This Court should remand for resentencing with credit for time served.

VI. **CONCLUSION**

The Court should reverse and remand for a new trial. Alternatively, the Court should reverse Count 1 and dismiss with prejudice. At minimum, the Court should remand for resentencing before a different judge.

Respectfully submitted this May 3, 2011.



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NOTAR PUBLIC
11 MAY -4 PM 10:40
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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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