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NO. 51740-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY LONG,

Appellant.

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

The Honorable Anne M. Cruser, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Improper judicial comment in violation of Wash. Const. article 4, § 16, deprived Appellant of a fair trial.

Issue Pertaining to Assignment of Error

Did the trial court violate Wash. Const. article 4, § 16 by interrupting defense counsel during closing argument and stating, "Mr. [Defense Counsel], please be cognizant of the time. We're well within the lunch hour[,]" (RP[1] 435), when no similar admonishment was made to the trial prosecutor, thereby implying that what defense counsel had to say in closing was less important than what the prosecutor said?

B. STATEMENT OF THE CASE

1. Procedural Facts

In July 2017, the Cowlitz County Prosecutor charged appellant Anthony Long with second degree assault with a deadly weapon, fourth degree assault – domestic violence and DUI. CP 3-5. The prosecutor alleged that on July 8, 2017, Long assaulted his girlfriend, Breanna Nila by trying to pull her out of his truck by her leg, assaulted Patrick Bailey by threatening and pistol whipping him with a handgun and drove under the

[1] There are three consecutively paginated volumes of verbatim report of proceedings for the dates of March 20-22 & 26, 2018, cited herein as "RP."

influence of an intoxicating liquor or drug for which he refused to submit to a BAC. CP 1-2.

A trial was held March 20-22, 2018, before the Honorable Judge Anne M. Cruser. RP 3-457. A jury found Long guilty of second degree assault with a firearm and the DUI charge, including refusal to submit to a BAC, but acquitted him of the fourth degree assault charge. CP 15-20; RP 445-47.

On March 26, 2018, Long was sentenced to five months for the second degree assault, with an additional 36 months for the use of a firearm, and a concurrent 45 days in jail for the DUI. CP 49-61; RP 473-76. Long appeals. CP 62-79.

2. Substantive Facts

According to Patrick Bailey, at about 5 pm on July 8, 2017, he was on his way to a friend's poker game when he noticed a white pickup truck behind him approaching at a high rate of speed and eventually ended up right behind him. RP 43. When Bailey looked in his rearview mirror he could see what he thought was the male driver screaming at a female passenger. RP 43-44. The truck eventually passed Bailey at an intersection by driving on the grass median at 60 to 70 miles per hour, such that it was out of Bailey's sight almost immediately. RP 44.

Bailey continued on to his poker game until he came upon the same white pickup, now parked in a gravel parking lot. RP 45. It appeared to Bailey that clothes, beer cans and a bong were being tossed out of the passenger side of the pickup, so he stopped in the road and then watched the pickup driver, later identified as Long, appear to try to pull the female passenger out by her foot. RP 45-46, 59.

Bailey got out of his car and approached the pickup and said, "[H]ey, what are you doing, stop. . . . Stop, what are you doing, stop." RP 46, 59. The driver, Long, turned to Bailey and said, "What are you going to do, what are you going to do?" Long then allegedly charged at Bailey. Id.

Bailey, who was a wrestler in high school, claims he "dropped to a double-leg takedown and picked [Long] up and sat him on the ground." RP 41, 47. When Bailey let go of Long and took three to five steps back, Long charged at him again, so Bailey used the same maneuver as before to put Long on the ground, but this time he put him down a bit harder and held Long there and asked him what he was doing before once again letting him up. RP 47-48, 60-61. Bailey denied he ever hit Long in the head, or that Long ever hit him during these initial encounters. RP 61.

When Long got up the second time, Bailey claimed he pulled a black pistol from the front of his waist band and pointed it at Bailey's

head. RP 48-49, 62. Bailey responded by putting up his hands, bowing his head and telling Long, "You win, you win." RP 49. Bailey claimed Long responded by putting him in a headlock and striking him three times with the gun on the back of his head that left Bailey bleeding. RP 50. Bailey clamed he eventually pushed himself away from Long, after which Long kept the gun on him and repeatedly told him, "I can kill you right now; I can shoot you. You want to die?" RP 50-51.

Bailey said he could smell alcohol on Long and believed he was intoxicated, so he asked him how much he had been drinking as he tried to back away towards his car. RP 50-51, 62, 64. Bailey recalled Long pulling out a cell phone and asking him to dial 911, to which Bailey agreed. RP 51. Bailey also recalled someone screaming at him, "You need to get out of here, you're bleeding real bad." RP 51. Bailey said he did not turn to see who it was because his attention was on Long with the gun. Id.

Bailey eventually made it back into his car, albeit with Long standing by with the gun on him, asking if Bailey wanted him to call 911, to which Bailey claimed he replied, "[y]es, call," but Long never did. RP 52. Bailey said he eventually sped off towards his friend's house, which was only about five houses away from the parking lot. RP 52. Bailey asked his friends at the house to try to get the license plate number from

Long's pickup so it could be reported to police. RP 52. Bailey recalled he could see Long from his friend's house in the road adjacent to the parking lot holding up what appeared to be the gun gesturing at Bailey to return. RP 53. As Bailey's friends made there way to the parking lot to get the license number of the pickup, it sped away. RP 53.

According to Matthew Hartley, a friend of Bailey's who was also planning to attend the same poker game testified he drove by the gravel parking lot while the encounter between Bailey and Long was in progress. RP 66-67. Hartley identified Long at trial as the man that appeared to him to have Bailey pinned against a car yelling at him. RP 68. Hartley never saw a gun involved in the incident. RP 72. Hartley continued on to the home where the poker games was to be played to enlist others there to go help Bailey, but Bailey pulled into the home shortly after Hartley arrived and was bleeding from his head from what Hartley believed was about a three to four-inch gash. RP 69-70, 73.

Like his friend Bailey, Hartley claimed they could see Long out in the road by the gravel parking lot with what appeared to Hartley to be a gun in his hands, as if trying to be intimidating. RP 70, 73-74. Only after they could not longer see Long did anyone from the planned poker game go to the parking lot where the Bailey-Long confrontation occurred. RP 71. Hartley said he called 911, and police arrived shortly thereafter. Id.

According to Timothy Bussanich, he saw two men, one larger with a beard (Long) and one shorter and bald (Bailey) fighting on his way to work on July 8, 2017. RP 166-67. Bussanich denied knowing either man. RP 166.

Bussanich claimed the first thing he noticed was Bailey trying to tackle Long. RP 188. He had the impression Long was hitting Bailey as Bailey tried to take Long to the ground. RP 180. Bussanich thought he saw blood, so he stopped his car in the middle of the road, backed up and pulled in to the side of Long's pickup and saw the two men "face-to-face arguing and yelling." RP 167. Bussanich recalled Bailey was pretty bloody and looked like he needed medical attention. RP 168.

According to Bussanich, Long did not pull out the gun until Bussanich had arrived. RP 169. Bussanich claimed he pleaded with Long to put the gun away. Id. Bussanich claimed Long was holding the gun right to Bailey's head, who was trapped against his car. RP 170. Bussanich recalled Bailey kept asking Long, "why are you hitting her, why are you hitting her?" RP 171. Bussanich said he encouraged Bailey to stop talking and just get in his car and leave. Id. Bussanich claimed there was a crowd gathering to watch the confrontation. RP 171-72. Bussanich also claimed Long pulled out his gun three different times during his observation of the incident, and each time he pointed at Bailey,

not the ground. RP 187, 190. Bussanich called 911, the recording of which was played for the jury. RP 172, 174-78.

According to Long's former girlfriend,[2] Breanna Nila, she and Long lived together in July 2017, and that on July 8, 2017 they got into an argument about her new work schedule on the way to the store, which caused them to abandon the store plan and return home. RP 257. Nila could not recall anything usual about Long's driving as they returned home. RP 260.

Nila denied the argument ever turned physical, but admitted they were both yelling and screamed at each other. RP 258, 272. She recalled Long pulling off the road at one point into a gravel parking lot and start throwing garbage out of his pick-up. Nila got out of the pick-up and continued arguing loudly with Long. RP 260-61. Nila denied Long ever put his hands on her when they were stopped in the gravel parking lot, nor did she touch him. RP 261.

Nila recalled that as she sat in the passenger seat and Long was standing outside her door as they talked a white car pulled into the lot and then someone said "hey," to which Long replied, "fuck off," before turning back to Nila. RP 261-62, 273. Shortly thereafter, Nila watched as

[2] According to Nila, she and Long separated because the State entered a protection order prohibiting contact between them. RP 256.

Long got tackled by some guy who ran at Long, pushed him to the ground and then got on top of him and started hitting Long in the neck and shoulder. RP 262-65. Once they got up off the ground, Long pulled out his pistol, pointed it at the ground and told the other guy to back up. RP 265. But instead the other guy walked up to Long and tried to take the gun away, but Long was able to maintain control and eventually struck the guy twice in the head before he finally backed off. RP 265-66.

Nila denied Long ever threatened the man who tackled him, and in particular, never pointed the gun at him. RP 268. She and Long returned home after the incident, Long left the gun in the garage and left in another car. RP 268-69. Nila put the gun in a locked drawer in their spare bedroom, until police arrived and asked for it, so Nila turned it over. RP 269.

According to Long, he and Nila argued so heatedly on the way to the store that they decided to go back home instead. RP 331-32. They had been arguing about Nila's new work schedule, and they continued arguing as they headed home. RP 333-34. Long admitted he may have been speeding on the way home. 334. Long did not recall encountering any cars on the way home but did recall pulling into the gravel parking lot so he could focus on the argument with Nila. RP 334-35. Long denied he ever got physical with Nila during the argument. RP 335.

Once parked in the gravel lot, Long got out and went around to the passenger side of his pickup and demanded that Nila hand him the marijuana bong. Nila complied and Long threw it on the ground and then continued his heated argument with Nila. RP 335.

At some point in their argument Long recalled hearing someone else say, ”hey” from behind him and he turned and told they man, Bailey, to “f off,” and then returned to his argument with Nila. RP 335-36. The next thing Long recalled was Bailey running at him and shoving him hard, so Long shoved back. RP 336. Bailey then dropped to the ground, picked Long up by his lower waist and slammed him to the ground on the right side of his head and immediately started punching Long on the left side of his face. RP 336, 338. Long managed to push Bailey off and regain his feet before Bailey attempted the same maneuver, but Long was ready for it and did not go to the ground. RP 336-37. But as Bailey continued to wrestle with Long, Long could tell he was about to go to the ground again, so he pulled a pistol from the back of his waist band and struck the man three times in the back of the head with the butt of the pistol, each time a little harder until the man finally released his grip and they separated. RP 339-40. Thereafter Long held the gun at “low ready,” meaning he pointed it at the ground with no finger on the trigger. RP 340. Long denied ever

pointing the gun directly at Bailey or anyone else and denied ever threatening to shoot Bailey. RP 343.

Bailey put his hands up but continuing to yell and ask what Long was doing to his female passenger, Nila. RP 341. Long responded by pulling out his cell phone, accusing Bailey of attacking him, and told him he was calling 911 and that Bailey was going to jail. RP 342. After Long dialed 911 and showed it to Bailey and asked if he should call, Bailey said "no, we're fine, we're fine," so Long attempted to hang up, but accidently made the call. Long terminated the call immediately, but the 911 operator called him back. He answered and told the operator everything was okay. RP 341-42.

As Long was on the phone with 911, he saw Bailey making his way to his car holding the back of his head. When Long hung up, he saw another man running up to Bailey and could hear Bailey telling the man that Long had been beating Nila. RP 342. Long said the man tried to deescalate the situation by getting between he and Bailey and telling them to back off from each other and for Bailey to "shut up." RP 343. This worked. Bailey drove off as Long put away his gun and returned to his truck, picked up the stuff that had been thrown out and went home. RP 343-44.

Once at home, Long was still upset, so he left the pistol in the garage, guzzled a beer, then got into his father's Chrysler Pacifica, which he had used earlier that day to take his son and nephew shotgun shooting and still had two unloaded shotguns, some clay pigeons and ammunition in the back, and headed towards a friend's house, which took him past the gravel parking lot on the way. RP 345-46. As he drove by he made eye contact with one of the officers at the scene and was pulled over by police shortly thereafter. RP 346.

Long explained to officers what occurred and thought they understood and believed him. RP 347. Another offer then arrived at the scene and put Long through field sobriety testing, which Long thought he did well on, remarking, "I thought I was going to get off." RP 348. When informed he was under arrest for "domestic violence" and then later for assaulting Bailey, however, Long admitted he "reacted terribly." RP 349-50. Long agreed he may have made comments like "go ahead and just slit my throat." RP 349. Long also admitted he told officers that what they were teaching him by arresting him was that he should have shot Bailey. RP 351.

When asked at trial why he responded to Bailey at the gravel parking lot the way he did, Long explained:

> Honestly, I didn't know why [Bailey] was attacking me. For all I knew, he was just attacking to rob us, to attack us. What would he have done with my girlfriend after I was out, I don't know.

RP 352.

Prior to closing arguments, the court instructed the jury on the law. RP 366-83. They included instructions on how to analyze Long's self-defense claim as to the alleged second degree assault of Bailey. CP 35-38 (Instructions 11-14). They also included a so-called "first aggressor" instruction. CP 36 (Instruction 15).

In closing argument, the prosecution's initial remarks began at 10:54 am and concluded at about 11:35 am (41 minutes total), when defense counsel's closing began. ***CP 90***;[3] RP 383-407 (24 pages of verbatim report of proceedings). Defense counsel's closing remarks took from 11:35 am to 12:16 pm (41 minutes total) and consumed 30 pages of verbatim report of proceedings. ***CP 90***; RP 407-37. Two pages of verbatim report of proceedings before defense counsel concluded his closing remarks, and just when counsel had concluded argument that Long acted in justifiable self-defense against Bailey and was transitioning into a

[3] The bold & Italicized 'CP' citation refers to the anticipated Clerk's Papers index number counsel anticipate will be assigned to the trial minutes (Sub No. 30, Jury Panel & Court Minutes for Trial, filed March 21, 2018), for which a supplemental designation was filed on September 18, 2018.

discussion of the DUI charge, following exchange occurred between the trial court and defense counsel:

> THE COURT: Can I ask you Mr. [Defense Counsel], to please be cognizant of the time. We're well within the lunch hour.
>
> [DEFENSE COUNSEL]: Yes, your honor, I'll try and be brief.

RP 435. Defense counsel concluded his closing two pages of verbatim report of proceedings later. RP 437. Thereafter, the prosecutor presented rebuttal argument, which lasted 10 minutes and consumed six pages of verbatim report of proceedings, concluding at 12:29 pm. ***CP 90***; RP 437-43.

C. <u>ARGUMENTS</u>

1. AN UNCONSTITUTIONAL JUDICIAL COMMENT DEPRIVED LONG OF A FAIR TRIAL.

The trial court made an improper judicial comment to the jury during closing argument. That comment - urging defense counsel to speed up his concluding remarks without ever making the same comment to the trial prosecutor – implicitly told the jury that what defense counsel had to say in closing was less important than what the prosecutor had to say, thereby indicating the trial court believed the prosecution's criminal allegations against Long. This improper judicial comment deprived Long of a fair trial, and therefore reversal is required.

(a) The Relevant Law

Article 4, § 16 of Washington's constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Moreover, this constitutional violation may be raised for the first time on appeal. The failure to object or move for mistrial at the trial level is not a bar to appellate review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

A comment on the evidence in violation of article 4, § 16 is presumed prejudicial, and the prosecution bears the burden to show no prejudice resulted. Levy, 156 Wn.2d at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). In deciding whether a comment on the

evidence is harmless, the Washington Supreme Court has looked to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d at 65 (comment addressed important and disputed issue; reversed); Levy, 156 Wn.2d at 726 (subject of comment "never challenged in any way by defendant"; harmless).

(b) The Trial Court's Improper Comment Deprived Long of a Fair Trial.

The judicial comment set forth above urging defense counsel to conclude his closing remarks at least implicitly informed jurors the trial court did not believe that what defense counsel had to say in the rest of his closing was important enough to delay lunch, and therefore less important than what the prosecutor had to say despite that process taking up even more of the noon hour. This comment implied the trial court found the prosecution had met its burden to prove the underlying crimes. This was a violation of article 4, § 16, because it unfairly influenced the jury's fact-finding duties in a manner prejudicial to Long.

Although Long admitted striking Bailey with the butt of his gun, he denied ever pointing the gun at Bailey or threatening to shoot or kill him. Instead, Long claimed he was acting in self defense and in defense of Nila because he had no idea why Bailey tackled him to begin with, fearing it may have been to rob them or worse. Long also denied driving under the

influence of liquor, claiming he only had a single beer prior to leaving home in the Chrysler Pacifica after the encounter with Bailey. Long never conceded the prosecution had met its burden to prove any of the crimes charged beyond a reasonable doubt. Jurors, therefore, should not have been exposed to any judicial comments that might serve to sway their decisions one way or the other.

The court's improper comment here was similar to comments constituting improper judicial comments on the evidence in several other cases. For example, in Lampshire, following an objection by the prosecutor to the materiality of the defendant's testimony, the judge stated, "Counsel's objection is well taken. We have been from bowel obstruction to sister Betsy, and I don't see the materiality, counsel." Lampshire, 74 Wn.2d at 891. Though recognizing the remark was "inadvertent," the Court nonetheless concluded the judge's comment "implicitly conveyed to the jury his personal opinion concerning the worth of the defendant's testimony." Lampshire, 74 Wn.2d at 892. Because the comment undermined the credibility of the defendant's testimony, the Court concluded it was prejudicial. Id.

Similarly, in State v. James, 63 Wn.2d 71, 385 P.2d 558 (1963), the Court found the defendant was deprived of a fair trial when the trial court commented on the credibility of a witness. Two defendants, William James

and Richard Topper, were charged with three crimes and tried together. During trial, Topper pled guilty and became the State's key witness. The trial court informed the jury that Topper was being discharged from trial to be a witness for the State "providing that he testify fully as to all material matters within his knowledge[.]" James, 63 Wn.2d at 74. The Court found the inferential statement by the trial court was significant to the jury:

> The die was cast when Topper left the courtroom; his counsel took no further part in the trial, and the court, in its final instructions, reiterated that Topper had been discharged. The jury could draw only one conclusion; the court was satisfied that Topper had testified fully as to all material matters within his knowledge. We conclude…that the court's remarks constituted a comment upon the evidence and an approval of the credibility of the witness[.]

James, 63 Wn.2d at 76.

In State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963), defense counsel objected during the prosecution's examination of a police officer regarding the details of the robbery Bogner was alleged to have committed. 62 Wn.2d at 249. The following colloquy between the court and defense counsel occurred after the objection:

> Court: Are you denying that there was a robbery at the housing project at that time on that date?
>
> Counsel: I don't know, you Honor. I think that is what we are here to determine.
>
> Court: We are here to determine, as I understand it, who did it, if anyone.

> Counsel: Of course, we have a twofold purpose. We are trying to determine whether or not there was a robbery and the second point is, who committed the robbery.
>
> Court: Don't you think we are getting a little ridiculous, or aren't we?

Bogner, 62 Wn.2d at 249.

The Court found "the remarks of the trial court clearly violated the constitutional mandate." Bogner, 62 Wn.2d at 252. The Court concluded the trial judge's comments had the effect of telling the jury that the judge believed it could not be denied a robbery had occurred, and that this essential element of the prosecution's case had been so well established that to suggest otherwise was 'getting a little ridiculous.' Bogner, 62 Wn.2d at 250.

Finally, in State v. Vaughn, 167 Wash. 420, 9 P.2d 355 (1932), the court held the defendant was deprived of a fair trial because the trial court commented on the credibility of a witness. William Vaughn and George Miller were each charged with grand larceny and tried jointly. During trial, Miller testified against Vaughn and received a suspended sentence. Vaughn suspected a secret agreement was made between the prosecutor and Miller. Vaughn's counsel called the prosecutor as a witness to prove the alleged secret agreement. The prosecutor, after he was examined by the Vaughn's counsel, stated:

> Prosecutor: "I will ask myself a question on cross examination."
>
> Court: "You needn't ask the question, [prosecutor] Foley."
>
> Vaughn's Counsel: "Just wait a minute. Ask yourself the question first."
>
> Prosecutor: "His Honor said I didn't need to."
>
> Vaughn's Counsel: "Well, he has got to ask his question if he wants to answer it. I want to know what he is going to state."
>
> Court: "It seems to be a senseless procedure, Mitchell [Vaughn's counsel], to ask yourself a question. I dare say [the prosecutor] wouldn't answer anything that he shouldn't."

Vaughn, 167 Wash. at 424.

The Court noted the trial judge had, in effect, vouched for the veracity and rectitude of the prosecutor. The Court concluded the judge's statement "was clearly a comment upon the weight of the testimony and the credibility of the witness," and hence a violation of the right to a fair trial. Vaughn, 167 Wash. at 426.

Here, as in Lampshire, Bogner, James, and Vaughn, the judge improperly commented on the evidence when it implicitly conveyed its opinion to jurors that the defense case was weak and further argument by defense counsel to convince them otherwise was not worth postponing

lunch. RP 435. Jurors could draw but one conclusion from the trial court's comments: the trial court believed Long was guilty.

Lampshire is the most analogous case because it also involved a comment that was prejudicial because of what the comment implied, that the defendant was guilty, and that it was an "inadvertent" judicial comment. Lampshire, 74 Wn.2d at 891-92. Just as the Lampshire Court concluded, this Court should also conclude the comment undermined the credibility of the Long's claim he acted in self defense against Bailey and only consumed one beer prior to driving. 74 Wn.2d at 892.

A comment in violation of article 4, § 16 is presumed prejudicial and the prosecution bears the burden to show no prejudice resulted. Levy, 156 Wn.2d at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). In deciding whether a comment on the evidence is harmless, courts look to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d at 65 (comment addressed important and disputed issue; reversed); Levy, 156 Wn.2d at 726 (error harmless because subject of comment was not challenged).

The trial court's comments here unfairly relieved the prosecution of its burden to prove beyond a reasonable to jurors that Long was not acting

against Bailey in self defense and that he was sufficiently intoxicated to be driving impaired. The improper comments denied Long the right to a fair trial, and the prosecution cannot prove the error was harmless beyond a reasonable doubt. This Court should reverse and remand for a new trial.

D. CONCLUSION

Long denied intentionally assaulting Bailey, claiming instead he was acting in self defense and in defense of Nila. Long also denied being intoxicated when he was driving the Chrysler Pacifica. Unfortunately, the trial court intervened, however inadvertently, in the jury's consideration of whether to accept Long's defenses. The court implicitly revealed it did not believe Long and/or that it was not worth shortening the lunch hour to hear defense counsel's explanation for why Long was not guilty. The prosecution cannot prove this error was harmless beyond a reasonable doubt. Therefore, this Court should reverse Long's judgment and sentence and remand for further proceedings.

DATED this 25th day of September 2018.

Respectfully submitted,

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_____

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