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COURT OF APPEALS, DIVISION  
CORTNY RAE SCOTT,  
APPELLANT,  
v.  
STATE OF WASHINGTON,  
RESPONDENT.

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Appeal from the Superior Court of Thurston County, Washington  
The Honorable Chris Lanese, Judge, Cause No. 17-1-01790-34

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REPLY BRIEF OF APPELLANT

By

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A. LAW AND ARGUMENT

1. DEFENDANT DOES NOT HAVE THE BURDEN TO SUBPOENA AN ITEM OF EVIDENCE THAT THE STATE HAS FAILED TO PRESERVE UNDER CrR 4.7(d)(2); RATHER, THE STATE HAD THE DUTY TO, UNDER THAT RULE, TO ATTEMPT TO OBTAIN THE ITEMS, AND IF UNSUCCESSFUL, TO OBTAIN THE ASSISTANCE OF THE TRIAL COURT TO ACCOMPLISH THAT.

Defendant moved the court to suppress photographs of alleged text messages from victim SNM's cell phone. RP 1/7/19 5.

Defendant argued that because the cell phone had not been taken into evidence, the State could not establish the authenticity of the photographs. *Id.* Further, the police officer alleged that there were "several" such text messages but he only provided two photographs. *Id.* Defendant moved the court to suppress testimony about the number of such text messages because there was no way for defendant to challenge the police officer's credibility because he admittedly had not photographed all of the text messages or seized the cell phone. *Id.* Defendant could not "test" the evidence given the State's selective evidence collection.

Defendant denied sending any such text messages. RP 1/7/19 6. Defendant asked the court to order the State to produce the cell phone so that defendant could have it examined by an independent expert. *Id.*

The State responded that it had satisfied its discovery obligations by providing the photographs and that the State had no duty to preserve the cell phone for defense examination. RP 1/7/19 8-9. The State argued that the defendant could have issued a subpoena for the cell phone from the victim. RP 1/7/19 9.

In addition, the State argued that the victim had rights under RCW 7.90 and intimated that there were special rights to privacy in a child victim's cell phone. *Id.* RCW 7.90 is Sexual Assault Protection Order Act and is irrelevant to the issue raised by Defendant. [On appeal, the State cites to RCW 7.69.030, a provision of 7.69, the statute pertaining to the rights of child victims and witnesses at trials and juvenile court proceedings. That statute also is irrelevant to defendant's argument.

The State asserts without authority that victims have privacy rights in their cell phones.

However, the State totally ignores CrR 4.7(a)(1)(ii) which requires the prosecutor to disclose to the defendant the following information within the prosecuting attorney's possession or control no later than the omnibus hearing ". . . any written or recorded statements and the substance of any oral statements made by the defendant."

Thus, when the State elects to use evidence from a victim's cell phone cell to deprive a citizen of his liberty, the State has a duty to secure the evidence to ensure that defendant has access to it to prepare his case for trial and to permit the evidence to be fairly tested at trial. The Constitution demands nothing less.

In this case, defendant made his argument prior to trial. After hearing the argument with no objection from the State, the trial court held that it was not properly before the court. RP 1/7/19 12-13. The court nevertheless ruled on the motion, finding that the argument was merely was one of authentication. RP 1/7/19 13-14. The court had not heard any evidence regarding what the State intended to offer as evidence, however, the deputy prosecutor informed the court that she would not be asked any questions regarding "several photographs" or "several messages." RP 1/7/9 15. The deputy prosecutor stated that she would be offering only two photographs. *Id.*

Defendant wanted to have the phone examined by an expert to determine the actual dates and times that the messages were placed on the phone. RP 1/7/19. An expert could examine the meta data on the phone to determine whether the messages had been placed on the phone at other times on other dates. *Id.* This evidence would have been exculpatory and obviously was hugely significant to defendant.

The defendant's failure to seize the phone and the State's failure to ensure that this had been accomplished timely deprived defendant of his right to a fair trial.

The State argues that without citation to authority that defendant should have made a motion to the court to subpoena SNM's cell phone under CrR 4.2(d). The State has misinterpreted that rule. CrR 4.2(d) provides:

Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant. (Emphasis added).

Contrary to the State's argument, the clear language of the CrR 4.2(d) places the burden on the State to attempt to cause such material to be made available to the defendant. In this case, the State, through the detective, had earlier obtained the cell phone for examination. Further, the State had a victim advocate who contacted the alleged victim's mother and through her set up interviews with the complaining witnesses. The State had the duty to contact the witnesses to arrange to have the cell phone made available to defense.

Of course, the State's failure to not take the cell phone into evidence when it was first examined and/or photographing all of the text messages on it at that time meant that the cell phone may not no longer have been in the same condition. SMN could have deleted the cell phone messages. Evidence could have been lost and/or altered. The detective had noted that when he examined the cell phone, he "was able to go through the string of text messages that came from the defendant to her." RP 922. He reviewed all of the text messages in the string. *Id.* He did not photograph all of the text messages. *Id.* He explained, "I took pictures of the text messages that she had, just the dot, dot, dot that was described to me." *Id.* He further testified that she had explained that "those were the times that the defendant sent to the victim, or alleged victim, to come out to where she was then sexually assaulted." *Id.*

These photos were State's Exhibits 25, a text dated 9/8/17, and 26, a text dated 9/30/17. RP 922, 923, 924.

Interestingly, these nights were both weekday nights when defendant spent the night with Jennifer Junge, with whom he had an infant son. RP 972-73. They were together every Monday night through Friday night. RP 980. She believed he was home on September 8<sup>th</sup>.<sup>1,2</sup> (2) ATTACHMENT A. Junge was not sure if defendant was home on during the day on Saturday September 30<sup>th</sup> because she thought he was probably with his mom or friends. RP 980. However, Junge testified that he would have spent Friday night September 29<sup>th</sup> at home with her and the family and so he would have been with them during the early morning hours of September 30<sup>th</sup>, so the deputy prosecutor's question was disingenuous. RP 980.

They were not together much on the weekends as he said he had other family obligations or was going out with friends on Saturday when then he returned to her after work on Monday. RP 977.

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<sup>1</sup> The deputy prosecutor erroneously referred to the date on State's Exhibit 25 as September 9 whereas Detective Boling had testified that the date on the Exhibit was September 8<sup>th</sup>. RP 924.

<sup>2</sup> Calendars for September and October 2017

In its' response brief, the State notes that "though he had returned to the courtroom, Scot (sic) elected not to testify at the trial." (Response Brief, p.16). A criminal defendant is not required to testify at trial. The State's suggestions that this court should draw an unfavorable inference from his failure to do so is prosecutorial misconduct. *State v. Lindsey*, 180 Wn 2d 423, 433-34, 326 P.2d 124 (2014).

1. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE.

(a) Trial counsel's theory of the case was abandoned after opening statement.

Defense counsels' closing arguments were misstatements of the law, misstatements of the testimony, and, in the case of the portion presented by co-counsel Chapman, an attempt to do damage control.

In opening statement, defense counsel Chapman set forth the theory that the alleged victims confabulated the story that defendant had sexually assaulted them after their mother fell apart emotionally in their presence and told them that defendant had cheated on her and had a baby with another women. RP 5/23/19 31-32. The alleged victim's mother affirmed this in her testimony as did the alleged victims. RP5/28/19 725: RP 5/23/19 66, 68-69, 74-76, 78, 80-82, 126-128, 130-132, 142 .

And yet there was not one word about it in the defense closing argument. *Passim*.

Rather, defense counsel misargued the law and suggested to the jury that it had to find a reasonable doubt. RP 5/30/19 1091-92, 1121. Defense counsel attempted to argue testimony that the court had ruled inadmissible<sup>3</sup>. Defense counsel argued “logic” and “critical thinking”, enumerating a number of factors telling the jury that “if you find one or more of them probable or reasonably possible”, the jury was required to enter not guilty verdicts. RP 1092. Of course, that is not the law. The law, plain and simple, is that the defendant is entitled to not guilty verdicts if the State fails to prove the case beyond a reasonable doubt.

After attorney Chapman took over the closing after the several serious legal errors of co-counsel Hetter, he committed misstatements of the law. RP 5/30/19 1121 *et. seq.* After telling the jurors to keep the presumption of innocence “first and foremost”, he moved to the concept of “reasonable doubt”, telling, “the foundation for a reasonable doubt has been laid . . . But your job here is reasonable doubt.” RP 5/30/19 1121.

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<sup>3</sup> The trial court had denied Hetter’s attempt to introduce as substantive evidence under the guise of “personal knowledge” of a police officer Hetter’s statements to him about a person’s ability to create fictitious messages on a cell phone. RP 5/30/19 1103-04.

Counsel thus argued contrary to instruction no. 4 when he argued that the jury's job was to find a reasonable doubt. The State had the burden to prove the case *beyond* a reasonable doubt. *Id.*

The defense argument in closing was that "there's reasonable doubt written all over the testimony, all over the evidence." RP 5/30/19 1130. Defense counsel implored, "We pray that your good sense and sense of the testimony will follow the reasonable doubt that has been laid out for you and that the ending is now yours to take." RP 5/30/19 1130.

Admittedly Chapman had a difficult job after Hetter made so many egregious errors in his portion of the closing argument and also received verbal admonitions from the trial court in the presence of the jury which plainly reflected the trial court's opinion of the defense counsel.

However, he should have and could have returned to the theme of his opening statement and reiterated what the evidence arguably supported, that is, that these allegations were a retaliatory reaction to the girls' learning that defendant had betrayed their mother. This was what he promised to prove in opening statement and which evidence supported. He just abandoned it.

There is substantial difference between the theory that the victims were motivated to fabricate the allegations after they saw the emotional devastation he caused their mother when he had a child with another woman versus the State's failure to adduce evidence beyond a reasonable doubt.

(b) Trial counsel failed to conduct an adequate pretrial investigation.

As the State agrees, defense counsel who fails to conduct an adequate interview of a particular witness can be found ineffective.

Response brief, page 21, citing *State v. Jones*, 183 Wn.2d 327, 340, 352 P.3d 776 (2015).

That being said, the issue in this case is whether trial counsel was constitutionally ineffective for failing to interview the complaining witnesses<sup>4</sup> prior to trial.

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<sup>4</sup> The State notes that appellant has designated a portion of the transcript from the Wendy Scott interview as clerk's papers in this case. *Id.* That is the only portion of that document that is actually in the record in this case and was relied upon by trial counsel in its motion for a new interview of the alleged victims after trial counsel had informed the deputy prosecutors that they did not want to interview the alleged victims when they previously were made available. *Id.* Under the Rule of Appellate Procedure, counsel cannot put materials in the record on appeal that are not in the trial record. E.g., *Pruitt v. Savage*, 128 WnApp 327, 330, 1115 P.3d 1000 (2005).

Defense counsel should have interviewed the alleged victims because their testimony was critical to convicting defendant. Although TRM was the older of the alleged victims, she had issues with mental competency that were troubling. Even based on the record adduced at trial, it clear that TRM lacked a good enough memory to retain an independent recollection of prior occurrences as well as to understand simple questions about prior occurrences.

TRM had significant disabilities. She had been in special education classes throughout her school days. She had an IEP (Individualized Education Program<sup>5</sup>).

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<sup>5</sup> WA - Washington Administrative Code WAC § 392-172A-03090:TITLE 392. PUBLIC INSTRUCTION, SUPERINTENDENT OF PUBLIC INSTRUCTION:CHAPTER 172A. RULES FOR THE PROVISION OF SPECIAL EDUCATION > CHAPTER 172A. INDIVIDUALIZED EDUCATION PROGRAMS CHAPTER 172A. WAC 392-172A-03090. Definition of individualized education program.(1) The term IEP means a written statement for each student eligible for special education that is developed, reviewed, and revised in a meeting in accordance with WAC 392-172A-03095 through 392-172A-03100 , and that must include and provides in pertinent part: (a) A statement of the student's present levels of academic achievement and functional performance, including: (i) How the student's disability affects the student's involvement and progress in the general education curriculum (the same curriculum as for nondisabled students); . . (b)(i) A statement of measurable annual goals, including academic and functional goals designed to:(A) Meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and (B) Meet each of the student's other educational needs that result from the student's disability; and (ii) For students who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;(c) A description of:(i) How the district will measure the student's progress toward meeting the annual goals described in (b) of this subsection; and(ii) When the district will provide periodic reports on the progress the student is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards); (d) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student, or on behalf of the student, and a statement of the program modifications or supports for school personnel that will be provided to enable the student: (i) To

Had trial counsel obtained her school records and her IEP, trial counsel would have gained critical information regarding the extent of her disability, which appeared to be significant.

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advance appropriately toward attaining the annual goals;(ii) To be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other students including nondisabled students in the activities described in this section;(e) An explanation of the extent, if any, to which the student will not participate with nondisabled students in the general education classroom and extracurricular and nonacademic activities;(f)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the student on state and district-wide assessments; and (ii) If the IEP team determines that the student must take an alternate assessment instead of a particular regular state or district-wide assessment of student achievement, a statement of why: (A) The student cannot participate in the regular assessment; and (B) The particular alternate assessment selected is appropriate for the student; (g) Extended school year services, if determined necessary by the IEP team for the student to receive FAPE. (h) Behavioral intervention plan, if determined necessary by the IEP team for the student to receive FAPE.(i) Emergency response protocols, if determined necessary by the IEP team for the student to receive FAPE, and the parent provides consent, as defined in WAC [392-172A-01040](#). (j) The projected date for the beginning of the services and modifications described in (d) of this subsection, and the anticipated frequency, location, and duration of those services and modifications.(k) Beginning not later than the first IEP to be in effect when the student turns sixteen, or younger if determined appropriate by the IEP team, and updated annually, thereafter, the IEP must include: (i) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (ii) The transition services including courses of study needed to assist the student in reaching those goals.(l) Transfer of rights at age of majority. Beginning not later than one year before the student reaches the age of eighteen, the IEP must include a statement that the student has been informed of the student's rights under the act, if any, that will transfer to the student on reaching the age of majority.

Consider the following:

- When asked when the deputy prosecutor had shown her photos of one of the residences that she had lived in, TRM replied “yesterday.” RP 5/23/19 123-24. In fact, it had been earlier. *Id.*
- TRM could not recall simple facts such as where she went to school, where exactly she had lived with defendant except “in a house”. RP 5/23/19 120, 122.
- TRM could not accurately recall the last time she was sexually assaulted, testifying that he assaulted her in the kitchen “a month after he got caught by what happened, after we left the house.” RP 5/23/19 127. This answer plainly states that defendant sexually assaulted after he was already caught for committing these offenses. She also contradicted herself, stating variously that it had happened “a month ago”, a month before or else a month *after* she and her sister “came out with the truth” and also she was “pretty sure” that it started in the new school year. RP 5/23/19 127, 133, 138, 139.
- On the other hand, TRM had specific recollection regarding what her *biological father* had done to her and so testified on direct examination. TRM described them as “me playing with his penis, then sucking on his nipple, or he would make me suck his nipple, or I would have to – he could put his penis in my vaginal hole.” RP 5/23/19 127. Asked to describe what describing what defendant did, TRM clarified, “This is what my dad used to do.” RP 5/23/19 130.

- TRM lacked the capacity to understand simple questions about the events. For example, when the prosecutor asked her if defendant had instructed her how to touch him, she testified, “Uh, no, I don’t think so, but I could be wrong.” RP 5/23/19 133. The prosecutor needed to ask leading questions to adduce any substantive answers. The prosecutor’s necessary use of leading questions is argued in appellant’s opening brief, pages 23, 24, 25.
- TRM candidly testified that she was “really slow” in school in reading and math. RP 5/23/19 119. She was in special needs classes in school. *Id.* She said that it takes her “longer to think about things.” RP 5/23/19 121.

Had trial counsel conducted even a short interview of TM, trial counsel would have ascertained the aforementioned that TM was not a competent witness.

Further, using this information, trial counsel would then have been able to make motions for her school records, which would have documented her learning disabilities from her IEP as well as her receipt of Social Security Disability Income<sup>6</sup>. That TMN qualified for SSI was significant given that only 1.7 per cent of disabled school children qualify for it. See footnote 5 below.

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<sup>6</sup> “SSI provides critical support for 1.2 million children with disabilities across the nation, making up 15 percent of SSI recipients, and 1.7 percent of all children. Children must meet stringent criteria to receive SSI benefits. A child’s impairments must match or equal in severity a list of disabilities compiled by the Social Security Administration (SSA). Qualified medical professionals — physicians, licensed or certified psychologists, or certain other experts — must submit evidence of the disability; the opinions of the child’s parents or teachers do not suffice.” K. Romig, “SSI – A Lifeline for Children on Disabilities”, Center for Budget and Policy Priorities (2017).

Her intellectual disabilities appear to be significant and her testimony was the product of leading questions to which trial counsel failed to object. Defendant failed to receive a fair trial, the reliability of the result in which this court can have confidence.

(c) Defense counsel should not have been found in contempt of court for referring to TM's answer to a question to which the deputy prosecutor failed to object at trial in the presence of the jury.

Defense counsel did not violate the order on the ruling in limine. To the contrary, when TM interjected the inadmissible evidence into the record before the jury, the deputy prosecutor had the duty, at a minimum, to ask for an immediate recess to take the matter up before the trial court and to ask the trial court to order the jury to disregard the last part of TM's answer. When the deputy prosecutor failed to do so, TM's answer remained in the record as competent evidence that the jury was entitled to consider and that counsel was entitled to use in argument. The deputy prosecutor's objection was improper and the trial court's intemperate response likewise was wholly improper.

(d) The trial court's instruction to the jury in closing argument to disregard evidence that was not objected to during trial was improper. The giving of the instruction showed a bias to the prosecution and also deprived the defendant of any opportunity to re-litigate the issue, that is, *the admissibility of evidence that already was before the jury without objection from the State.*

ER 103(a)(1) requires a party to interpose timely objections, stating the specific ground if not apparent from the context, as well as and motions to strike. If a motion to strike is granted, an instruction to disregard is available as a matter of right. *Magana v. Hyundai Motor America*, 123 Wn.App. 306, 94 P.3d 987 (Div. 2, 2004) as amended (9/21/2004). In the absence of a motion to strike and instruction to disregard, the objectionable testimony is in evidence, and the issue of admissibility is normally waived for purposes of appeal.

Thus, in *State v. Stackhouse*, 90 Wn.App. 344, 957 P.2d 218 (Div. 3, 1998), a witness answered some questions before the defendant objected to the prosecutor's entire line of questioning. The court sustained defendant's objection, but defendant did not move to strike the testimony already given. As a result, the witness's answers remained in evidence and could be properly commented on by the prosecutor in closing argument.

In the instant case, the deputy prosecutor failed to object to TM's blurted out answer about her father's conduct. The deputy prosecutor, having failed to object, also failed to move to strike. Defense counsel properly referred to it in closing argument. The trial court erred when it held that defense counsel had erred by mentioned evidence that was in the record and further erred by giving the deputy prosecutor a "re-do" in terms of a *nunc pro tunc* objection, motion to strike.

This ruling is reversible error and highly prejudicial to defendant, especially given the court's unwarranted brow-beating of defense counsel and the gratuitous comments that the lawyers arguments needed to be supported by the evidence immediately following its instruction to the jury to disregard "prior comments with regards to testimony by a witness about references to someone's father what may or may not have occurred." RP 1120. The clear and only conclusion a reasonable juror could make from that comment by the trial court is that the trial court believed defense counsel had been untruthful about TM's clear, un rebutted, and unobjected-to testimony about her father's abuse of her.

(e) The trial court's oral instruction to disregard evidence already in the record without objection and/or motion to strike was an unconstitutional comment on the evidence.

This court should reject the State's response that the trial court did not comment on the evidence but rather "was limiting an improper argument." Response brief, page 46. The State fails to acknowledge that TM's blurted out response was in the record as competent evidence and that defense counsel therefore was entitled to incorporate that comment in closing argument. Sec. 3 Opening Brief. The trial court's comment went directly to the evidence,

"First, the jury will disregard prior comments with regard to testimony by a witness with regard to someone's father and what may or may not have occurred. Additionally, I will just remind you that statements by lawyers, both legal argument and facts, need to be supported by the evidence and my instructions. . . ." RP 1120

The clear import of this trial comment suggested to the jury that the counsel's comment was not supported by the evidence, when in fact it was. The trial court's comment was an unconstitutional comment on the evidence, telling the jury to disregard a piece of evidence properly in the evidence and also disparaging trial counsel who had referred to that competent evidence.

The credibility of the alleged victims was a central issue in the case. By instructing the jury to “disregard” a statement that substantially impeached TM, the trial court de facto endorsed her credibility.

This was reversible error.

3. DEFENDANT IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Scott was prejudiced by prosecutorial misconduct for discovery violations in failing to provide the cell phone text messages which were his own statements that the State admitted at trial and which he denied making, the trial court erroneously instructed the jury to disregard TRM’s answer about what her biological father had done to her when the deputy prosecutor failed to object to that evidence and it was properly in the record before the jury. The trial court improperly told the jury to disregard it and also informed in not subtle language that defense counsel had made a mistake [second after slapping \$2,000 sanctions on counsel].

The other trial errors are summarized in appellant's opening brief and this reply brief. Scott's trial was infected with these errors and he has demonstrated the requisite prejudice. He is therefore entitled to a new trial.

DATED this 12<sup>th</sup> day of October, 2020

/s/ Barbara Corey  
Barbara Corey, WSB #11778  
Attorney for Appellate

**I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via filing portal a copy of this Document to: Appellate Division Thurston County Prosecutor's Office,**

**10/12/20  
Date**

**/s/ William Dummitt  
Signature**

# **ATTACHMENT A**

<b>September 2017</b>						
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<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>	<b>8</b>	<b>9</b>
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<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>
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**BARBARA COREY, ATTORNEY AT LAW**

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