

FILED

SEP 27 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

28738-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

JOSE REYES RAMIREZ,

Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT

RESPONDENT'S BRIEF

Respectfully submitted:
D. Angus Lee, WSBA #36473
Grant County Prosecuting Attorney



EREK R. PUCCIO – WSBA #40137
Deputy Prosecuting Attorney

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecuting Attorney Office, is the Respondent herein.

II. RELIEF REQUESTED

Reversal is not warranted and Appellant's conviction must be affirmed.

III. ISSUES

1. Whether the trial court erred in failing to give a jury instruction on "great personal injury."
2. Whether the deputy prosecutor committed prosecutorial misconduct during his direct examination of witnesses at trial.
3. Whether the State failed to disprove self-defense beyond a reasonable doubt.

IV. STATEMENT OF THE CASE

The Appellant, Jose Reyes Ramirez, was charged by second amended Information with Assault in the Second Degree with a deadly weapon enhancement and Malicious Mischief in the Third Degree. On November 17, 2009, a jury found Ramirez guilty of the assault, but not while armed with a deadly weapon. (11/17/09 RP 2, 3). The jury acquitted Ramirez of the malicious mischief charge. (11/17/09 RP 3).

At trial, the evidence and testimony established that, on May 20, 2009, Ramirez was employed at the Wahluke Wine Company in Mattawa, Washington. (11/13/09 RP 54, 56). On that date, Ramirez was involved in an incident with another employee, Humberto Ruvalcaba. (11/13/09 RP 55, 56). The incident began outside the barrel room where Ramirez was playing around with a box cutter. (11/13/09 RP 57, 58). He was showing it off to Mr. Ruvalcaba. (11/13/09 RP 58). Mr. Ruvalcaba told him to stop and Ramirez immediately cut Mr. Ruvalcaba's shirt. (11/13/09 RP 59, 62). Ramirez appeared angry and was taunting Mr. Ruvalcaba. (11/13/09 RP 62, 63). Ramirez was calling Mr. Ruvalcaba a "fatty," but in Spanish. (11/13/09 RP 107). Mr. Ruvalcaba then reached out and grabbed the box cutter, breaking the blade. (11/13/09 RP 63). Mr. Ramirez then tried to cut Mr. Ruvalcaba with the broken blade. (11/13/09 RP 63, 64). In response, Mr. Ruvalcaba pushed Ramirez away because he felt he was in a dangerous situation. (11/13/09 RP 64). Mr. Ruvalcaba stated, "I had to get him away." (11/13/09 RP 64).

Following the push, Ramirez fell backwards but caught himself on a tank. (11/13/09 RP 64). Ramirez stood up and took a second box cutter out of his pocket. (11/13/09 RP 64, 65). Ramirez took the wrapper off the second box cutter and came at Mr. Ruvalcaba. (11/13/09 RP 65). Ramirez appeared angry and slashed at Mr. Ruvalcaba fifteen times with

the box cutter. (11/13/09 RP 64, 65). Mr. Ruvalcaba told Ramirez to stop, but Ramirez kept slashing at his stomach and neck area. (11/13/09 RP 66). Mr. Ruvalcaba tried to block the slashes but got cut on his left arm and chest. (11/13/09 RP 66). The laceration on his left arm was three inches in length and required stitches. (11/13/09 RP 37, 39). Mr. Ruvalcaba testified he is right-handed. (11/13/09 RP 66, 67). Mr. Ruvalcaba also testified he took no swings at Ramirez. (11/13/09 RP 79).

One witness, Juan Barragan, testified that he witnessed the incident and saw Ramirez rip Mr. Ruvalcaba's shirt with the box cutter. (11/13/09 RP 99, 101). Mr. Barragan saw Mr. Ruvalcaba push Ramirez away. (11/13/09 RP 102). He saw Ramirez hit the tank, but not hard. (11/13/09 RP 103). Ramirez appeared angry and got up and started swinging at Mr. Ruvalcaba's neck with the box cutter. (11/13/09 RP 103, 104). According to Mr. Barragan, Mr. Ruvalcaba did not try to attack Ramirez and made no steps or gestures toward Ramirez. (11/13/09 RP 104).

Another witness, Sergio Larios, saw Ramirez slice Mr. Ruvalcaba's shirt with the box cutter. (11/16/09 RP 39). He heard Mr. Ruvalcaba tell Ramirez not to play with knives. (11/16/09 RP 39). There was a forklift in the area, but Mr. Larios saw Ramirez catch himself after being pushed. (11/16/09 RP 39, 40). Ramirez stood up within two

seconds. (11/16/09 RP 40). Ramirez then ran at Mr. Ruvalcaba and began slashing at him with the box cutter. (11/16/09 RP 41, 42).

After the State rested, the defense made a motion to dismiss and a motion for mistrial based upon the deputy prosecutor's use of the word "assault" during direct examination of the State's witnesses. (11/13/09 RP 114, 115). The motion was denied. (11/13/09 RP 115, 116). The court found the term was not unduly prejudicial and that both attorneys were compliant and cooperative with the court. (11/13/09 RP 115, 116).

Ramirez then testified on his own behalf that he and Mr. Ruvalcaba were playing around when he cut Mr. Ruvalcaba's shirt. (11/16/09 RP 19). Ramirez agreed to pay for the shirt and went back to working. (11/16/09 RP 19). Ramirez testified he then felt somebody punch him and "throw [him] on the chest." (11/16/09 RP 20). Ramirez was on the floor and saw "this big old man coming into me." (11/16/09 RP 20). At the time, Ramirez was 35 years old. (11/16/09 RP 25). Mr. Ruvalcaba was 23 years old. (11/13/09 RP 54). Ramirez had the box cutter in his hand, but did not remember cutting Mr. Ruvalcaba. (11/16/09 RP 21, 22). Afterward, Deputy Keith Edie of the Grant County Sheriff's Office contacted Ramirez at his residence. (11/12/09 RP 53; 11/13/09 RP 10). Ramirez told Deputy Edie he wondered why it took [the deputy] so long to get there. (11/13/09 RP 10).

Raymundo Lucio testified for the defense that he was present and saw Ramirez and Mr. Ruvalcaba “yelling at each other playfully, just clowning around.” (11/13/09 RP 124). Then, he saw Mr. Ruvalcaba shove Ramirez and saw Ramirez hit a tank. (11/13/09 RP 124, 125). Lucio testified he saw Mr. Ruvalcaba swinging, but thought it was “horseplay amongst youngsters.” (11/13/09 RP 126, 136). However, other witnesses testified Lucio was not present at the time of the incident. (11/13/09 68, 105; 11/16/09 RP 45). Lucio admitted to having been fired from the company after the incident for stealing. (11/13/09 RP 137).

Miguel Rodriguez testified Ramirez had a good reputation in Mattawa for the trait of peacefulness. (11/13/09 RP 156). Julia Cardozo testified her brother, Ramirez, had a reputation for being a law-abiding citizen. (11/16/09 RP 13). Officer Jose Chiprez of the Mattawa Police Department testified in rebuttal that Mr. Ruvalcaba had a great reputation in Mattawa for the trait of peacefulness. (11/16/09 RP 51).

Ramirez now claims the trial court erred by refusing to give an instruction on “great personal injury” and that the instructions that were given did not permit him to adequately present his claim of self-defense. (Br. of Appellant at 6). Ramirez also claims the deputy prosecutor committed prejudicial misconduct by consistently using the word “assault” during direct examination of witnesses. (Br. of Appellant at 11). Finally,

Ramirez makes a sufficiency claim that the State failed to disprove self-defense beyond a reasonable doubt. (Br. of Appellant at 14).

V. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DECLINING RAMIREZ'S PROPOSED INSTRUCTION BECAUSE THE OTHER INSTRUCTIONS, AS A WHOLE, ALLOWED HIM TO ADEQUATELY PRESENT HIS SELF-DEFENSE CLAIM.

Ramirez first claims the trial court erred by refusing to give a jury instruction on "great personal injury" and that the instructions that were given did not permit him to adequately present his claim of self-defense.¹ However, he has failed to show he was unable to present his claim through the instructions given. Further, the authorities primarily relied upon by Ramirez – *Rodriguez*² and *Walden*³ – are distinguishable. His claim must be denied.

On appeal, challenges to jury instructions are reviewed de novo for errors of law. *State v. O'Donnell*, 142 Wn.App. 314, 321, 174 P.3d 1205 (2007). The wording of instructions is within the trial court's discretion. *Id.* at 324. Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case,

¹ Ramirez also subtly contends the definitions given for "deadly weapon" were inconsistent and clear misstatements of the law. Separate definitions for "deadly weapon" were given because the term is defined differently for purposes of second degree assault and the sentence enhancement. (CP 110, 117); See WPIC 2.06.01 and 2.07. During closing argument, the prosecutor compared the two for the jury. (11/16/09 RP 65, 66). Nevertheless, Ramirez did not object or raise this issue below.

² *State v. Rodriguez*, 121 Wn.App. 180, 87 P.3d 1201 (2004).

³ *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997).

and inform the jury of the applicable law when read as a whole. *State v. Marquez*, 131 Wn.App. 566, 575, 127 P.3d 786 (2006). The instructions, as a whole, must make the relevant legal standard manifestly apparent to the average juror. *Rodriguez*, 121 Wn.App. at 185. Instructions on self-defense must more than adequately convey the law. *Id.* (citing *Walden*, 131 Wn.2d at 473).

In self-defense cases, once the defendant sets forth evidence he was defending himself, the burden shifts to the State to disprove it beyond a reasonable doubt. *Walden*, 131 Wn.2d at 473-74. Self-defense requires only a subjective, reasonable belief of imminent harm from the victim. *Rodriguez*, 121 Wn.App. at 185 (citing *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996)). The jury need not find actual imminent harm, but must put themselves in the defendant's shoes and consider all the facts and circumstances known to the defendant. *Id.* See also *Walden*, 131 Wn.2d at 474.

Several Washington courts have addressed similar instructional issues as the one presented here. In *Rodriguez*, *supra*, this Court addressed an "act on appearances" instruction that conflicted with other instructions involving "great bodily harm." *Rodriguez*, 121 Wn.App. at 185-86. There, "great bodily harm" was defined only in the context of first degree assault, but not in the context of self-defense. *Id.* at 186. As a

result, the jury was required to find that, in order to act in self-defense, the defendant had to believe he was in “actual danger of probable death, or serious permanent disfigurement, or loss of a body part or function.” *Id.* The effect of this essentially prohibited the defendant from being able to act in self-defense against an ordinary battery. *Id.* This lessened the burden on the State to disprove self-defense. *Id.* at 188.

Similarly, in *Marquez, supra*, Division Two of the Washington Court of Appeals addressed conflicting instructions involving “great bodily harm.” *Marquez*, 131 Wn.App. at 576. As in *Rodriguez*, “great bodily harm” was defined in the context of first degree assault, but not in the context of self-defense. *Id.* As a result, the State faced an impermissibly lower burden that increased Marquez’s likelihood of conviction. *Id.* The *Marquez* Court acknowledged a correct statement of the law would have allowed the defendant to use such force as a reasonably prudent person would find necessary under the circumstances as they appeared to the defendant. *Id.* at 577.

In *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009), the Supreme Court of Washington addressed an “act on appearances” instruction that told the jury, in part, that the defendant was “entitled to act in self-defense only if he believed ... that he was in actual danger of great bodily harm.” As non-deadly force was involved, the instruction should

have described apprehension of “injury.” *Id.* at 864. The jurors were not given a definition for “great bodily harm,” but were instructed on “substantial bodily harm” in connection with the second degree assault charge. *Id.* As a result, the jury could have been confused as to the kind of harm the defendant had to fear before he could act in self-defense. *Id.* at 864-65.

In *Walden, supra*, the Supreme Court of Washington dealt with two internally inconsistent instructions regarding self-defense and “great bodily injury.” *Walden*, 131 Wn.2d at 478. There, “great bodily injury” was again defined in a way that excluded all ordinary batteries and prevented the jury from considering the defendant’s subjective perception of the battery. *Id.* at 475. The *Walden* Court held that definition was a misstatement of the law and was presumed prejudicial to the defendant. *Id.* at 478.

Unlike the instructions given in *Rodriguez, Marquez, Kyllo* and *Walden*, there were no inconsistent interpretations of the precise level of harm or injury Ramirez had to face to be entitled to act in self-defense – just that he be faced with actual danger of injury. The jury in Ramirez’s trial was given an “act on appearances” instruction⁴ that stated, in part, that “[Ramirez] is entitled to act on appearances in defending himself, if

⁴ This instruction is reflected in WPIC 17.04.

he believes in good faith and on reasonable grounds that he is in actual danger of *injury....*” (CP 115) (emphasis added). The court also gave an instruction⁵ stating that:

“It is a defense to a charge of assault in the second degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who *reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person*, and when the force is not more than is necessary.

The person using the force *may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person*, taking into consideration *all of the facts and circumstances* known to the person at the time of the incident.

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 as to this charge.” (CP 112) (emphasis added).

When read as a whole, the instructions given clearly allowed Ramirez to argue his theory of the case. Instead of being prejudiced, Ramirez actually benefitted from the trial court declining his “great

⁵ This instruction is reflected in WPIC 17.02.

personal injury” instruction. The practical effect of declining the instruction actually heightened the State’s burden of disproving self-defense.⁶ As noted above, Ramirez only had to believe he was in actual danger of injury. His counsel was able to freely argue a broad range of scenarios. His counsel argued without objection that Mr. Ruvalcaba was “going in for the kill” despite Mr. Ruvalcaba’s alleged assault on Ramirez being with hands and fists. (11/16/09 RP 82, 83). He argued on more than one occasion that the jury had to stand in Ramirez’s shoes. (11/16/09 RP 73, 76, 83). Unlike *Walden*, the jury was properly allowed to consider Ramirez’s subjective perceptions of the alleged battery.

Had the trial court accepted his “great personal injury” instruction, it would have had to offer either WPIC 16.07 or a modified version of WPIC 17.04 with the words “great personal injury” inserted in place of “injury.” The court pondered the instructions and agreed that, as a whole, they allowed Ramirez to argue he could use reasonable force under the circumstances. (11/16/09 RP 6, 56). The court believed further instructions were unnecessary. (11/16/09 RP 56). As illustrated by the record, the court was cognizant of and concerned about the problems

⁶ Because Ramirez benefitted and the State’s burden was heightened, any error in the rejection of the instruction was harmless. See *State v. Kidd*, 57 Wn.App. 95, 101, n. 5, 786 P.2d 847 (1990) (an instructional error is harmless when the appellate court determines beyond a reasonable doubt from an examination of the record that the error had no effect on the final outcome of the case).

presented in *Walden*. (11/16/09 RP 6, 7). Given the outcome of *Rodriguez, Marquez, Kyлло* and *Walden*, had the trial court accepted the instruction, this Court could have been asked to decide whether Ramirez's counsel was ineffective in proposing the instruction or whether Ramirez invited the error.

Moreover, the Supreme Court of Washington has previously held it is not mandatory upon the trial court to give an instruction of this nature. *State v. Bezemer*, 169 Wash. 559, 577, 14 P.2d 460 (1932). In *Bezemer*, the trial court rejected the defendant's proposed instruction on "great bodily harm." *Id.* at 575. That instruction would have essentially advised the jury that an assault with the naked hands and fists is sufficient to justify the use of deadly force if the defendant reasonably believed he was in imminent danger of death or great bodily harm. *Id.* The *Bezemer* Court held the trial court did not err in refusing the instruction in light of the evidence and the other instructions given. *Id.* at 577-78.

As in *Bezemer*, the alleged assault on Ramirez involved an ordinary battery with the use of hands and fists. In declining the instruction for "great personal injury," the trial court here did not exclude ordinary batteries from the equation. This is precisely what separates the instant case and *Bezemer* from *Rodriguez, Marquez, Kyлло* and *Walden*. For the reasons outlined above, Ramirez's claim must fail.

B. RAMIREZ HAS FAILED TO SHOW THE PROSECUTOR'S USE OF THE WORD "ASSAULT" DURING DIRECT EXAMINATION CONSTITUTES REVERSIBLE AND PREJUDICIAL MISCONDUCT.

Ramirez next claims the trial court erred in refusing to declare a mistrial when the deputy prosecutor consistently used the word "assault" during direct examination of the State's witnesses. Ramirez contends this amounted to prejudicial prosecutorial misconduct. This claim must fail because Ramirez has failed to show the prosecutor's use of the word "assault" constitutes reversible and prejudicial misconduct.

The Sixth Amendment to the United States Constitution guarantees a defendant a fair trial but not a trial free from error. *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009). To establish prosecutorial misconduct, the defendant bears the burden of showing the prosecutor's conduct was both improper and prejudicial. *State v. Borboa*, 157 Wn.2d 108, 122, 135 P.3d 469 (2006). If the conduct is shown to be improper, the defendant must show a substantial likelihood the misconduct affected the jury's verdict. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). Allegedly improper remarks are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The trial court is in the best position to

effectively determine whether the alleged misconduct prejudiced a defendant's right to a fair trial. *Stenson*, 132 Wn.2d at 719. Deference is given to the trial court's ruling. *Id.* Trial court rulings on alleged misconduct are reviewed for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999).

As stated above, Ramirez claims the trial court erred in refusing to declare a mistrial when the deputy prosecutor consistently used the word "assault" during direct examination of the State's witnesses. (Br. of Appellant at 11). He claims the deputy prosecutor insisted on using the word "assault" to characterize the incident. (Br. of Appellant at 13).

However, Ramirez grossly mischaracterizes the nature of the trial record when he says the deputy prosecutor "consistently used" and "insisted on using" the word "assault." He cites to only two occasions where the prosecutor used the word "assault" during questioning of witnesses. On numerous other occasions, the prosecutor used the word "incident" during direct examination. (11/12/09 RP 30, 54, 55; 11/13/09 RP 57, 68; 11/16/09 RP 37). On one occasion, the prosecutor even corrected himself, apologized, and then rephrased the question using the word "incident." (11/13/09 RP 57). In denying the motion for mistrial, the court acknowledged both attorneys were "cooperative" and "we don't have that kind of flavor [of misconduct] in this court if the transcript

doesn't show that already.” (11/13/09 RP 116). The court also found the term “assault” was not unduly prejudicial. (11/13/09 RP 116).

In *State v. Edvalds*,⁷ ____ Wn.App. ____, ____ P.3d ____ (2010), Division One of the Washington Court of Appeals was faced with a similar issue involving the prosecutor’s use of the word “surveillance” during direct examination of witnesses in a burglary trial. The prosecutor’s mere use of the word “surveillance” violated the trial court’s order in limine and was sustained several times on defense objections. *Id.* The *Edvalds* Court acknowledged the use of the word “surveillance” in the trial record was infrequent, inadvertent, and was not relied upon in subsequent argument. *Id.* Even if mentioning it constituted misconduct, it did not alone warrant a new trial. *Id.*

Likewise, the trial record in this case shows the deputy prosecutor’s use of the word “assault” was infrequent. It was inadvertent as evidenced by his voluntary rephrasing of one of the questions. And it was not relied upon by him in subsequent argument. No orders in limine were violated. Under an *Edvalds*-like analysis, assuming the use of the word “assault” was even improper, that alone does not warrant a new trial.

⁷ Although *Edvalds* is not currently published in the Washington or Pacific Reporters, the Washington State Courts website indicates *Edvalds* will be a published opinion. *Edvalds* can be found on the Washington State Courts website at www.courts.wa.gov/opinions under August 16, 2010 Division I published opinions. *Edvalds* can also be found on LexisNexis at 2010 Wash.App. LEXIS 1862.

Additionally, Ramirez has failed to show the prosecutor's minimal use of the word "assault" was prejudicial. At trial, he claimed self-defense, which by its very nature, means he admitted an assault occurred. This is much different from an assault case where the defense is general denial and the jury is charged with deciding whether an "assault" occurred. Here, it simply cannot be said that the deputy prosecutor's use of the word "assault" on two occasions during direct examination negatively impacted the jury, especially in light of the overwhelming evidence against Ramirez that was presented at trial. The use of the word "assault" in this context was harmless⁸ and Ramirez's claim must be denied.

C. RAMIREZ'S SUFFICIENCY CLAIM MUST BE DENIED BECAUSE ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THAT RAMIREZ DID NOT ACT IN SELF-DEFENSE.

Ramirez's final claim is that the State failed to disprove self-defense beyond a reasonable doubt. He specifically alleges he was scared of an angry man who outweighed him by 100 pounds and shoved him into a tank. (Br. of Appellant at 14). He claims he defended himself. (Br. of Appellant at 14). However, his claim must fail because any rational trier of fact could have found that he did not act in self-defense.

⁸ See *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947) (an error is harmless if it is trivial, formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome or verdict in the case).

Challenges to the sufficiency of the evidence are reviewed to determine whether, after reviewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The inquiry is not whether the appellate court believes the evidence at trial established guilt beyond a reasonable doubt. *Id.* A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences therefrom. *State v. Walton*, 64 Wn.App. 410, 415, 824 P.2d 533 (1992). Deference is given to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Id.* at 415-16. As stated above, in self-defense cases, once the defendant sets forth evidence he was defending himself, the burden shifts to the State to disprove it beyond a reasonable doubt. *Walden*, 131 Wn.2d at 473-74.

Ramirez claims the State failed to disprove self-defense beyond a reasonable doubt. However, there was sufficient testimony and evidence admitted at trial for the jury to reject Ramirez's self-defense claim and to support his conviction. Witnesses testified it was Ramirez who was the first aggressor and that he provoked Mr. Ruvalcaba. The evidence also supports a finding that Ramirez used excessive force. Mr. Ruvalcaba testified that Ramirez, after being pushed, quickly unwrapped a second

box cutter, came at him, and slashed fifteen times at his stomach and neck. Photographs and testimony from Dr. Dinglasan confirmed a large cut to the underside of his left arm. (11/13/09 RP 37, 38). Mr. Ruvalcaba testified he is right-handed. (11/13/09 RP 66, 67). Other witnesses, including Ramirez himself, testified for the defense and gave a somewhat different version of events. One of those witnesses, Mr. Lucio, had been fired from the winery for stealing. The jury was free to decide issues of witness credibility and conflicting testimony. The jury did so and found Ramirez guilty. His challenge to the sufficiency of the evidence must fail.

VI. CONCLUSION

Based upon the foregoing, the State respectfully requests this Court deny Ramirez's appeal and affirm his conviction.

DATED: September 23, 2010.

Respectfully submitted:

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