

FILED  
Court of Appeals  
Division III  
State of Washington  
10/29/2018 3:20 PM

Nº. 36116-1-III

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

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STATE OF WASHINGTON  
Respondent,

v.

TIMOTHY MILLER,  
Appellant.

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OPENING BRIEF OF APPELLANT

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Appeal from the Superior Court of Benton County,  
Cause No. 15-1-00559-0  
The Honorable Cameron Mitchell,  
Presiding Judge

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A. ASSIGNMENT OF ERROR

The State presented insufficient evidence to convict Mr. Miller of communication with a minor for an immoral purpose.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the State present sufficient evidence to convict Mr. Miller of communication with a minor for an immoral purpose where the State presented no evidence to support the inference that Mr. Miller's statements to T.H. were done for an immoral purpose?

C. STATEMENT OF THE CASE

**Factual and Procedural Background**

On May 12, 2015, Mr. Timothy Miller was charged in Benton County Superior Court cause number 15-1-00559-0 with one count of communication with a minor for immoral purposes in violation of RCW 9.68A.090(2).<sup>1</sup>

On July 30, 2015, Timothy Miller entered a plea of guilty in Benton County Superior Court cause number 15-1-00559-0 to one count of communicating with a minor.<sup>2</sup> On the same date, Mr. Miller pled guilty in 15-1-00519-1 to one count felony failure to register as a sex offender and one count unlawful possession of a firearm.<sup>3</sup> Both pleas were *Alford*

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<sup>1</sup> CP 1.

<sup>2</sup> CP 139.

<sup>3</sup> CP 140.

pleas.<sup>4</sup>

On May 17, 2018, an order was entered allowing Mr. Miller to withdraw those guilty pleas on the basis that he was misinformed as to the standard range and maximum punishment and because his sentence exceeded the maximum sentence that could be imposed.<sup>5</sup>

The retrial in cause number 15-1-00559-0 began on May 22, 2018.<sup>6</sup>

Mr. Marshall Almarode testified that in 2015 Mr. Miller had been living lived in a motor home on Mr. Almarode's property for about a year-and-a-half and would help Mr. Almarode with work on the property.<sup>7</sup> Mr. Miller lived with Mr. Almarode's friend, Mr. Jerami Wilson.<sup>8</sup> The Jessops were a family that lived next door to Mr. Almarode's property and who had previously lived on Mr. Almarode's property.<sup>9</sup>

In April of 2015, the oldest Jessop son came to Mr. Almarode's house and gave Mr. Almarode a ten-dollar bill that was "kind of folded funny."<sup>10</sup> Mr. Almarode had a conversation with the Jessop boy then decided to investigate whether the information he had been told was

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<sup>4</sup> RP 5; 7-30-2015. The volumes of the Report of Proceedings are not numbered continuously. Reference to the RPs will be made by giving the page number followed by the date of the proceeding being referenced.

<sup>5</sup> CP 143-146.

<sup>6</sup> RP 53; 5-22-2018.

<sup>7</sup> RP 53-55; 5-22-2018.

<sup>8</sup> RP 55; 5-22-2018.

<sup>9</sup> RP 55-57; 5-22-2018.

<sup>10</sup> RP 59-61; 5-22-2018.

accurate.<sup>11</sup>

Mr. Almarode and Mr. Miller had purchased the rights to salvage copper from a building that was being torn down, so there was a place on Mr. Almarode's property where he was storing the materials from which the copper was being stripped.<sup>12</sup> Mr. Miller was stripping the plastic coating off copper wires by cutting it off with a razor blade.<sup>13</sup> Mr. Almarode went to this area with the Jessop boy and spoke with Mr. Miller.<sup>14</sup>

Mr. Almarode asked Mr. Miller if the ten-dollar bill was his and Mr. Miller took it and said it was.<sup>15</sup> Mr. Miller "denied the issue," so Mr. Almarode went to speak with the Hunter family, a family that lived nearby.<sup>16</sup> T.H. and her mother, Tara, were home and they said they had called Jamie Larson, T.H.'s father.<sup>17</sup> T.H. was upset and not making complete sentences when she called Mr. Larson.<sup>18</sup> T.H. was crying when she came in the house so her mother spoke with her and then called the police.<sup>19</sup>

Mr. Almarode spoke with T.H.'s mother and T.H. did not have a

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<sup>11</sup> RP 61; 5-22-2018.

<sup>12</sup> RP 61-62; 5-22-2018.

<sup>13</sup> RP 62; 5-22-2018.

<sup>14</sup> RP 64; 5-22-2018.

<sup>15</sup> RP 64-65; 5-22-2018.

<sup>16</sup> RP 57-59, 65; 5-22-2018.

<sup>17</sup> RP 65-66, 73-74; 5-22-2018.

<sup>18</sup> RP 74; 5-22-2018.

<sup>19</sup> RP 120; 5-23-2018.

reaction to the conversation.<sup>20</sup> Mr. Larson arrived and Mr. Almarode spoke with him.<sup>21</sup> This time, while Mr. Almarode spoke to Ms. Hunter and Mr. Larson, T.H. started shaking and yelled, “that’s not what he said.”<sup>22</sup>

After speaking with Ms. Hunter and Mr. Larson, Mr. Almarode went back and spoke with Mr. Miller.<sup>23</sup> Police eventually arrived.<sup>24</sup>

Mr. Larson spoke with T.H. but could not get an answer from her about what was going on, so he went to Mr. Almarode’s property to speak to Mr. Miller.<sup>25</sup> Mr. Larson also spoke to police.<sup>26</sup>

D.J., the oldest Jessop boy, testified that Mr. Miller was his friend in 2014 and that D.J. hang out with Mr. Miller and help him strip the copper wire.<sup>27</sup> T.H. was a friend of D.J.’s little sister.<sup>28</sup> D.J. claimed that Mr. Miller had once told D.J. that T.H. “was hot and he would like to fuck her.”<sup>29</sup>

D.J. testified that in April of 2015 he had been helping Mr. Miller

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<sup>20</sup> RP 66; 5-22-2018.

<sup>21</sup> RP 66; 5-22-2018.

<sup>22</sup> RP 66; 5-22-2018.

<sup>23</sup> RP 71; 5-22-2018.

<sup>24</sup> RP 71; 5-22-2018.

<sup>25</sup> RP 74-75; 5-22-2018.

<sup>26</sup> RP 76; 5-22-2018.

<sup>27</sup> RP 80-81; 5-22-2018.

<sup>28</sup> RP 81; 5-22-2018.

<sup>29</sup> RP 82; 5-22-2018.

strip wire and saw Mr. Miller speaking to T.H.<sup>30</sup> D.J. went back home but T.H. came to his house, shaking, crying, and scared, told D.J. what had happened, and gave D.J. a ten-dollar bill.<sup>31</sup> D.J. couldn't remember what T.H. said, but thought T.H. might have said something about Mr. Miller wanting to take her clothes off or "wanting to be nasty to her or with her or something."<sup>32</sup> D.J. gave the ten-dollar bill to Mr. Almarode.<sup>33</sup> D.J. did not personally hear the conversation between T.H. and Mr. Miller.<sup>34</sup>

T.H. testified she and her friend were playing near her friend's house when Mr. Miller asked T.H. and her friend if they wanted to make money helping him and D.J. strip wire.<sup>35</sup> T.H. said "no" and her friend went inside.<sup>36</sup> T.H. testified that Mr. Miller then asked her if she played "truth or dare" and when she said she did, he asked her "how dirty would you get?"<sup>37</sup> T.H. testified that Mr. Miller asked her to come over to his house the next day after school and knock on his door.<sup>38</sup> T.H. testified that Mr. Miller was rubbing her back and that he gave her five dollars and made her promise not to tell anybody.<sup>39</sup> T.H. testified that Mr. Miller

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<sup>30</sup> RP 83; 5-22-2018.

<sup>31</sup> RP 83-84; 5-22-2018.

<sup>32</sup> RP 84; 5-22-2018.

<sup>33</sup> RP 86; 5-22-2018.

<sup>34</sup> RP 87; 5-22-2018.

<sup>35</sup> RP 126-127; 5-23-2018.

<sup>36</sup> RP 127; 5-23-2018.

<sup>37</sup> RP 127; 5-23-2018.

<sup>38</sup> RP 127; 5-23-2018.

<sup>39</sup> RP 127; 5-23-2018.

repeatedly asked her how nasty she would get with him and each time he asked it his voice got lower.<sup>40</sup> T.H. ran away from Mr. Miller, gave the money to D.J., then went home and spoke to her mother.<sup>41</sup>

Mr. Miller testified in his defense.<sup>42</sup> Mr. Miller testified that on April 30, 2015, he was stripping wire when T.H. ran up to him and asked him if there was anything she could do to make money.<sup>43</sup> Mr. Miller testified that he went to the camper to retrieve some X-Acto blades so T.H. could help strip copper and he reached into a “blade bucket” where he kept extra blades and cut his hand.<sup>44</sup> Mr. Miller testified that he pulled his hand out of the bucket and exclaimed, “man, that’s nasty” because there was something “nasty” in the bucket that had cut him and there was something “nasty” on his fingers when he put them in his mouth.<sup>45</sup> Mr. Miller testified that he cut his hand T.H. looked at him weird and then ran off.<sup>46</sup>

Mr. Miller denied giving T.H. money,<sup>47</sup> denied ever touching T.H., and denied saying T.H. was “hot” or that he wanted to fuck her.<sup>48</sup> When police contacted Mr. Miller he denied the allegations that T.H. had made

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<sup>40</sup> RP 127-128; 5-23-2018.

<sup>41</sup> RP 127-128; 5-23-2018.

<sup>42</sup> RP 141-164; 5-23-2018.

<sup>43</sup> RP 143-145, 150-151; 5-23-2018.

<sup>44</sup> RP 151-152; 5-23-2018.

<sup>45</sup> RP 152; 5-23-2018.

<sup>46</sup> RP 153; 5-23-2018.

<sup>47</sup> RP 153; 5-23-2018.

<sup>48</sup> RP 156; 5-23-2018.

against him.<sup>49</sup>

The jury found Mr. Miller guilty of the crime of communication with a minor for immoral purposes.<sup>50</sup>

Mr. Miller's notice of appeal was filed on June 8, 2018.<sup>51</sup>

#### **D. ARGUMENT**

**1. The State presented insufficient evidence to convict Mr. Miller of communication with a minor for an immoral purpose where the State presented insufficient evidence to establish that Mr. Miller's communication with T.H. on April 30, 2015 was done for an immoral purpose.**

In a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn from them.<sup>52</sup> Evidence is reviewed in the light most favorable to the State.<sup>53</sup> Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.<sup>54</sup>

Circumstantial evidence and direct evidence are equally reliable.<sup>55</sup>

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a

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<sup>49</sup> RP 163; 5-23-2018.

<sup>50</sup> RP 215; 5-23-2018; CP 168.

<sup>51</sup> CP 191.

<sup>52</sup> *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

<sup>53</sup> *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

<sup>54</sup> *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

<sup>55</sup> *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

reasonable doubt, but only that substantial evidence supports the State's case.<sup>56</sup> Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed."<sup>57</sup> The existence of a fact cannot rest upon guess, speculation or conjecture.<sup>58</sup>

When reviewing the sufficiency of evidence in support of a conviction following a bench trial, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court's conclusions of law.<sup>59</sup> Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the findings are true.<sup>60</sup> A defendant challenging a trial court's finding of fact bears the burden of demonstrating that the finding is not supported by substantial evidence.<sup>61</sup>

"A person being tried on a criminal charge can be convicted only by evidence, not by innuendo."<sup>62</sup> The findings of fact must support the elements of the crime beyond a reasonable doubt.<sup>63</sup> If there is insufficient

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<sup>56</sup> *State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000).

<sup>57</sup> *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

<sup>58</sup> *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972), *cited in Hutton*, 7 Wn.App. at 728, 502 P.2d 1037.

<sup>59</sup> *State v. Alvarez*, 105 Wn.App. 215, 220, 19 P.3d 485 (2001).

<sup>60</sup> *State v. Stevenson*, 128 Wn.App. 179, 193, 114 P.3d 699 (2005).

<sup>61</sup> *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

<sup>62</sup> *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950).

<sup>63</sup> *State v. Tadeo-Mares*, 86 Wn.App. 813, 815-16, 939 P.2d 220 (1997).

evidence to prove an element, reversal is required, and retrial is ‘unequivocally prohibited.’<sup>64</sup>

A. The State’s burden in this case.

The State charged Mr. Miller with communication with a minor for immoral purposes in violation of RCW 9.68A.090(2).<sup>65</sup> RCW 9.68A.090(2) provides, in pertinent part,

A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state.

For purposes of RCW 9.68A.090, “immoral purpose” refers to sexual misconduct.<sup>66</sup> Thus, the State had the burden of presenting sufficient evidence to support an inference that the purpose for his communications with T.H. on April 30, 2015 was related to sexual misconduct.

B. The State had no evidence that suggested that Mr. Miller’s communication with T.H. on April 15, 2015 was done for an immoral purpose.

From the moment he was initially confronted with T.H.’s claims that he had made inappropriate comments to T.H., Mr. Miller denied any improper contact with her. The only evidence that could be interpreted as

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<sup>64</sup> *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

<sup>65</sup> CP 1-2.

<sup>66</sup> *State v. Pietrzak*, 100 Wn. App. 291, 295, 997 P.2d 947 (2000).

suggesting Mr. Miller communicated with T.H. for the purpose of sexual misconduct was D.J.'s testimony that Mr. Miller had once told D.J. that T.H. "was hot and he would like to fuck her"<sup>67</sup> and T.H.'s testimony that Mr. Miller asked her if she played truth or dare, how "dirty" she got when she played it, and how "nasty" she would get with him if she came over to his house.<sup>68</sup>

D.J. did not personally hear the conversation between T.H. and Mr. Miller<sup>69</sup> so could not testify as to what, exactly was said or the tone of voice used to say it. Further, no evidence was offered regarding the context in which Mr. Miller's alleged statement about T.H. being attractive was made. The State did not indicate when it was made, the conversation in which it came up, or the purpose for Mr. Miller stating it. Further, the State presented no evidence linking this alleged statement to any statement made by Mr. Miller to T.H. on April 30, 2015. Even if one were to believe that Mr. Miller found T.H. physically attractive, it does not mean that every communication he might make to T.H. would be made for purposes of sexual misconduct.

T.H.'s testimony described statements that were, at most, ambiguous regarding their meaning. Asking an eleven-year-old child how

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<sup>67</sup> RP 82; 5-22-2018.

<sup>68</sup> RP 127-128; 5-23-2018.

<sup>69</sup> RP 87; 5-22-2018.

“dirty” they got when playing truth or dare does not suggest the question was asked for improper sexual purposes. No testimony or evidence was offered to explain what Mr. Miller meant by the term “dirty.” “Dirty” in the context of eleven-year-olds playing truth or dare could refer to being physically dirty, such as performing dares that required the participant to get physically dirty. “Dirty” could also mean swearing, or picking one’s nose, or flatulating, or any one of a number of bodily functions that an eleven-year-old might describe as “dirty.” Nothing in the testimony presented to the jury suggested that Mr. Miller intended the word “dirty” to mean anything to do with sexual activity.

Similarly, nothing in the record establishes that Mr. Miller’s use of the word “nasty” was done with a sexual connotation. Again, “nasty” could be used interchangeably with “dirty” to describe the same truth or dare activities discussed above.

The State presented no evidence about Mr. Miller’s motive behind any statement he might have made to T.H. on April 20, 2015. Any inference that the statements were made for purposes of sexual misconduct would be based on innuendo, speculation, and conjecture, not on evidence. There was not substantial evidence in the record to support the finding that any comments made by Mr. Miller to T.H. were made for purposes of sexual misconduct. The State presented insufficient evidence to convict

Mr. Miller of communication with a minor for an immoral purpose.

**2. If the state substantially prevails, the Court of Appeals should decline to award any appellate costs requested.**

Mr. Miller was found to be indigent by the trial court.<sup>70</sup> Once an appellant is found indigent, the presumption of indigence continues throughout review.<sup>71</sup>

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail.<sup>72</sup> Pursuant to the General Court Order dated June 10, 2016 and Title 17 of the Rules on Appeal, Mr. Miller respectfully requests that, due to his continued indigency, the court should decline to impose appellate costs in the event he does not prevail. His report as to continued indigency will be filed shortly after this brief.

In *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015), the Washington Supreme Court responded to growing national attention to the societal burdens associated with imposing unpayable legal financial

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<sup>70</sup> CP 195.

<sup>71</sup> RAP 15.2(f).

<sup>72</sup> *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied*, 185 Wn.2d 1034 (2016).

obligations on indigent defendants, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." Under Washington's system, unpaid obligations accrue interest at 12% per annum and can be subject to collection fees, creating the perverse outcome that impoverished defendants who pay only \$25 per month toward their obligations will, on average, owe more after ten years than at the time of the initial assessment.<sup>73</sup> As a result, unpaid financial obligations can become a burden on gaining (and keeping) employment, housing, and credit rating, and increase the chances of recidivism.<sup>74</sup>

Appellate costs are "indisputably" discretionary in nature.<sup>75</sup> The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. Furthermore, "[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals'] obligation to exercise discretion when properly requested to do so."<sup>76</sup>

The Court of Appeals has recognized that in the absence of information from the State showing a change in the appellant's financial circumstances, an award of appellate costs on an indigent appellant may

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<sup>73</sup> *Blazina*, 182 Wn.2d at 836.

<sup>74</sup> *Blazina*, 182 Wn.2d at 837.

<sup>75</sup> *Sinclair*, 192 Wn.App. at 388.

<sup>76</sup> *Sinclair*, 192 Wn.App. at 388.

not be appropriate.<sup>77</sup> The Supreme Court has additionally recognized that application of RAP 14.2 should "allocate appellate costs in a fair and equitable manner depending on the realities of the case."<sup>78</sup>

Lastly, the Washington Supreme Court recently amended RAP 14.2 to provide that costs should not be imposed if the commissioner determines the offender does not have the current or likely future ability to pay such costs. When the offender has been found indigent for appeal, that presumption continues unless the commissioner determines that the offender's financial circumstances have significantly improved since the last determination of indigency. Because Mr. Miller has been found indigent for this appeal, it is presumed he is unable to pay an appellate cost award unless the State presents evidence of a significant improvement in his financial condition.

Mr. Miller has been convicted of a felony and sentenced to prison. The trial court determined that he is indigent for purposes of this appeal.<sup>79</sup> There is no reason to believe that status will change. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal

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<sup>77</sup> *Sinclair*, 192 Wn. App. at 393.

<sup>78</sup> *State v. Stump*, 185 Wn.2d 454, 461, 374 P.3d 89 (2016).

<sup>79</sup> CP 195.

financial obligations.<sup>80</sup>

Under these circumstances, if the state substantially prevails on this appeal, this court should exercise its discretion under RAP 14.2 to decline to impose appellate costs. Mr. Miller has been found indigent and has complied with this court's General Order. Under the *Sinclair* standard as well as revised RAP 14.2, an appellate cost award is inappropriate in this case.

**E. CONCLUSION**

For the reasons stated above, this court should vacate Mr. Miller's conviction and remand for dismissal with prejudice.

DATED this 29<sup>th</sup> day of October, 2018.

Respectfully submitted,



Reed Speir, WSBA No. 36270  
Attorney for Appellant

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<sup>80</sup> *Blazina*, 182 Wn.2d at 839, 344 P.3d 680.

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 29<sup>th</sup> day of October, 2018, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Andrew Kelvin Miller  
Benton County Prosecutors Office  
7122 W. Okanogan Place, Building A  
Kennewick, WA 99336-2359

And to:

Timothy Charles Miller, DOC No. 245431  
Coyote Ridge Correctional Center  
PO Box 769  
Connell, WA 99326

Signed at Tacoma, Washington this 29<sup>th</sup> day of October, 2018.



Reed Speir, WSBA No. 36270

**LAW OFFICE OF REED SPEIR**

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**Transmittal Information**

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