68604-6

68604-6

No. 68604-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ALLEN BRANDICH, JR.,

Appellant.

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

The Honorable Michael Trickey

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct in cross-examination of the defense expert, denying Mr. Brandich a fair trial and his rights to counsel and to a defense.

2. The trial court erred in denying the defense motion for a mistrial.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A prosecutor commits misconduct when she casts aspersions upon or impugns the integrity of defense counsel. During her cross-examination of the defense expert, the prosecutor elicited evidence that the expert had provided favorable testimony on identical defenses on behalf of the same defense attorney in at least two other cases, and intimated that the expert and defense counsel were in collusion with one another for mutual advantage. In actuality, the expert was one of the few experts willing to offer testimony on mental defenses at the rates of pay offered by the King County Office of Public Defense. Where there was no way to rebut the prosecutor's unsavory insinuations short of defense counsel becoming a witness in the case, and

a curative instruction was inadequate to dispel the taint from the improper suggestions, did the misconduct deny Mr. Brandich a fair trial? Should a mistrial have been granted?

C. STATEMENT OF THE CASE

Richard Brandich developed an addiction to opiates after he was laid off from his job as a general manager at Qwest, in Colorado. 5RP 156, 158.[1] His opiate dependence commenced with prescription medications such as Vicodin and Percocet, but he soon moved on to Oxycontin, consuming as many as four 80-milligram pills per day, at a street value of $1 per milligram, or $360 per day. 5RP 158; 6RP 35. Eventually, Mr. Brandich started using heroin, because the street drug was cheaper than the prescription pills. 6RP 36.

In April 2011, Mr. Brandich decided he wanted to try to stop using. Because he had probation warrants in Colorado, he took the identification card of an acquaintance,

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[1] The verbatim report of proceedings is cited herein as follows:

January 9, 2012	-	2RP
February 1, 2012	-	3RP
February 2, 2012	-	4RP
February 7, 2012	-	5RP
February 8 and 9, 2012	-	6RP

According to RCKC records, upon his admittance, Mr. Brandich was administered the following drugs: Phenobarbital, a sedative hypnotic with a long half-life, Methocarbamol, also known as Robaxin, another sedative, and Dicyclomine, a drug prescribed for gastrointestinal upsets, but which has an amnesiac effect. 5RP 31. He was discharged from the clinic at 10:35 a.m. for allegedly refusing to cooperate, and then returned at 11:30 a.m. that same day. 5RP 32. The records reflected that sometime after that, he was transported to Harborview Medical Center. Id. Mr. Brandich had no memory of any of these events. Id.

Later that afternoon Mr. Brandich went to the Walgreen's Pharmacy on Broadway and Pine Street. He approached the pharmacy counter and told the pharmacy technician, Daniel Lammers, that he was collecting a prescription for "Melissa Williams." 4RP 28. Mr. Lammers was unable to find a person by that name on file and asked what the prescription was for. Id. Mr. Brandich said he did not know. Id. He asked Mr. Lammers for a pen, and Mr. Lammers handed him a pen and transfer pad. He then

asked Mr. Lammers to look into another prescription. 4RP 29-30.

Mr. Brandich then moved closer to the register and asked for "oxys."[2] 4RP 30. Mr. Lammers "froze in place" and replied that Oxycontin was kept in a locked case and he would not be able to access them. 4RP 31. Mr. Brandich seemed confused by this answer. 4RP 32. He repeated his request, and flashed what appeared to Mr. Lammers to be the butt of a gun. Id. He then asked if Mr. Lammers had any other opiates he could give him. 4RP 33.

The pharmacist came over to defuse the situation, and Mr. Brandich demanded "oxys" from him and again flashed what appeared to be the butt of a gun. 4RP 36-38. The pharmacist yelled, "He has a gun, he's trying to rob us," and Mr. Brandich turned and walked quickly out of the Walgreen's. 4RP 54.

Mr. Brandich was arrested near the campus of Seattle Central Community College. 4RP 117-18. He did not immediately comply with law enforcement efforts to detain

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[2] Mr. Lammers understood Mr. Brandich to mean Oxycontin. 4RP 30.

him, or commands to show his hands, even when a military-style rifle was pointed at him. 4RP 117-18, 154, 156. The officer who was aiming the rifle at Mr. Brandich had to tell him "many times" to show his hands. 4RP 158. According to the officer who ultimately took Mr. Brandich into custody, Lorie Aagard, Mr. Brandich was "acting weird." 3RP 52. During the effort to apprehend him, Mr. Brandich started to reach into his coat, as if to draw a weapon even though weapons were drawn upon him, and was passively resistant to attempts to physically take him into custody. 3RP 52-53. Several officers were needed to subdue him. 3RP 53.

Mr. Brandich was brought to Seattle police department robbery headquarters at approximately 7:00 p.m., where he was questioned by two detectives. 4RP 77. Detective Frank Clark described Mr. Brandich's demeanor during this interview as "serious" and "slightly agitated." 4RP 81. Occasionally Mr. Brandich bent over and grabbed his stomach, stating that he did not feel well. Id.

Mr. Brandich was left alone in the interview room for about 20 minutes while Detective Clark completed some

paperwork. 4RP 83-84. As Detective Clark was walking back to the room, he heard a crash. 4RP 84. When he looked into the room, he saw that the table had been moved to the center of the room, and Mr. Brandich was standing on it. Id. The ceiling vent had been pulled down and the vent housing pushed out of place. 4RP 86.

Mr. Brandich was handcuffed behind his back and moved to a different interview room. 4RP 91. When Detective Clark checked on him again, the handcuffs were at the front of Mr. Brandich's body, and the face plate for the light socket had been removed. 4RP 92.

Mr. Brandich did not remember any of these events. 5RP 168-76; 6RP 17.

The King County Prosecuting Attorney charged Mr. Brandich with one count of attempted first degree robbery and one count of escape in the second degree. CP 24-25. At a jury trial, Mr. Brandich called as a witness psycho-pharmacologist Dr. Robert Julien. Dr. Julien testified that based upon his review of the records from RCKC and Mr. Brandich's self report regarding his use of heroin and

alcohol, he believed Mr. Brandich was in a drug-demented state. 4RP 22. Specifically, Dr. Julien believed that the substances Mr. Brandich had ingested were of sufficient quantity to render him incapable of forming memory. 1RP 22, 34. He explained that a person in opioid withdrawal, like Mr. Brandich, would feel intense cravings, which could explain Mr. Brandich's behavior in attempting to rob the pharmacy. 4RP 35. At the same time, the alcohol would function as a disinhibitor. 4RP 71. Dr. Julien testified that a person in a state of drug-induced dementia, such as Mr. Brandich, might not exhibit classic signs of intoxication, and could even appear "totally normal." 4RP 36.

The prosecutor, Samantha Kanner, cross-examined Dr. Julien aggressively. Ms. Kanner first questioned Dr. Julien about a talk he had given to the National Psychological Association, in Washington. 4RP 44. She intimated that Dr. Julien had recommended forensic testimony as a potentially lucrative pursuit for pharmacologists, and asked whether he had said at the conference, "[i]n fact, it can be as simple as calling a local

public defenders office and saying, quote, if you need help in a case involving drugs, give me a call." Id. Dr. Julien had no specific recollection of this statement and explained, "I have not seen a transcript of that lecture." Id.

Ms. Kanner pressed,

> Okay. Is that fair to say, though? If somebody wants to get involved in this type of work, the type of work you do, testifying about blackouts and amnesia and this connection to intent, all they have to do is give a local public defender's office a call and say ... if you have a case involving drugs, give me a call?

4RP 45.

Mr. Brandich's defense counsel objected to this question based upon the court's *in limine* ruling excluding evidence that Dr. Julien had been retained by a public defender's office and was being paid public defender rates. Id. The court overruled the objection. Id.

Later during her questioning, the following exchange transpired:

> Question (by Ms. Kanner): Now doctor, in your – by your testimony, blackouts are pretty common among defendants caught on video committing crimes.

Answer (by Dr. Julien): I believe so. I have seen no statistics on that comment.

Q: And you've had at least three cases in the past year where defendants who have been caught on tape committing robberies, like of a bank or a pharmacy, have claimed amnesia?

A: Yes, ma'am. I remember two. I don't know if there were three or not.

Q: And Mr. Wolfe was defense counsel in all those cases?

A: In at least one, maybe two others. I can't – I don't keep those records.

Q: And in all of those cases, you testified that drugs and/or alcohol, either together or not together, put those three men –

Mr. Wolfe: Objection, your Honor. And defense has a motion outside of the presence of the jury.

Ms. Kanner: Your Honor, I believe it goes directly to the bias of this witness.

The Court: Why don't we do this. I'm going to reserve ruling. Let's move on and finish your cross-examination, and then I'll take up that objection outside of the presence of the jury.

Ms. Kanner: Sure.

Q: And you've testified on numerous times and in cases where alleged crimes have been caught on video that those people are in blackouts, based entirely on their self-reports of what they've consumed, either alcohol or drugs or a combination, correct?

> A: That's correct. I've never argued whether they did what they did or not. The question was solely whether they had the legal capacity to meet the legal definition of intent – intentional behaviors.
>
> Q: Did Mr. Wolfe take your seminar, "Understanding Drugs of Abuse and Legal Defense"?
>
> Mr. Wolfe: Objection, calls for speculation.
>
> The Court: Sustained. Not relevant.
>
> Mr. Wolfe: Move to strike.
>
> The Court: There's no answer to strike. The objection is sustained.

4RP 90-92.

Outside of the presence of the jury, Mr. Wolfe moved for a mistrial. 4RP 109-114. He noted Ms. Kanner's questions regarding Dr. Julien contacting public defender's offices, and her questions regarding Dr. Julien's testimony in other similar cases. 4RP 109. He noted, as well, that Ms. Kanner had elicited testimony from Dr. Julien that Mr. Wolfe was counsel in those other cases, and that she had also asked whether Mr. Wolfe had attended Dr. Julien's seminars. 4RP 110.

Mr. Wolfe argued that the implication of Ms. Kanner's questions was one of collusion between defense counsel and the expert, where Mr. Wolfe attended Dr. Julien's conference, gave him referrals, and fed him money. 4RP 111. He argued that no curative instruction could cure the taint from these questions and resulting improper inference. Id. He made an offer of proof that he had never attended one of Dr. Julien's seminars, and that Dr. Julien was one of the few experts willing to offer testimony at the rates paid by the King County Office of Public Defense ("OPD"). Id. He contended that as a consequence of Ms. Kanner's cross-examination, the defense would have to force the issue of Mr. Brandich's status as an indigent defendant and establish the legitimate process of securing defense experts through OPD, making defense counsel a witness. 4RP 112.

In response, Ms. Kanner claimed that while she did not intend to cast aspersions on Mr. Wolfe, it was her belief that Dr. Julien was "pandering his services" to defense attorneys and would "say anything to get hired." 4RP 116. She noted that she was aware of two other cases involving

similar circumstances and Mr. Wolfe as defense counsel. 4RP 116.

The court was sympathetic to Mr. Wolfe's arguments, and noted,

> If you're a public defender or appointed counsel, the number of witnesses who will take your appointments can be fairly small. And so sometimes your universe of witnesses is small and then again, it is ineffective assistance of counsel if you don't have a witness. So I think it puts appointed counsel in a tough situation.

4RP 119.

The court commented that the situation was "very close." 4RP 121. The court noted that it had been Ms. Kanner who initially moved to exclude any reference to the fact that Dr. Julien had been retained by a public defender agency. Id.

The court ultimately denied Mr. Wolfe's motion for a mistrial because the court believed that the jury could be instructed to disregard any testimony about the relationship between Mr. Wolfe and Dr. Julien. 4RP 122. Mr. Wolfe renewed his motion for a mistrial, stating that he had "very

real concerns" about whether a limiting instruction could dispel the taint from Ms. Kanner's improper questions. Id.

Pursuant to its ruling, when trial proceedings resumed, the court gave the following limiting instruction to the jury:

> During the cross-examination this morning, there were several references made to an alleged relationship or cooperation between the defense counsel and the witness. I'm now going to sustain the objections to that. I'm going to strike all of that question and testimony, and you are instructed to disregard any allegations or inferences of any kind of relationship between defense counsel and the witness.

4RP 124.

Mr. Brandich was convicted of both counts as charged, and now appeals. CP 51-52, 75-91.

D. ARGUMENT

The prosecutor's cross-examination which impugned defense counsel by suggesting that he had colluded with the appointed expert to fabricate a bogus defense was misconduct that prevented Mr. Brandich from receiving a fair trial.

1. A prosecutor has the ethical duty to ensure that criminal trials are fair.

A prosecutor serves two equally important functions. She enforces the law by prosecuting those who have violated the peace and dignity of the state by breaking it, and she functions as the representative of the people in a quasijudicial search for justice. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Defendants are among the people the prosecutor represents. Id. (citation omitted). Thus, the prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." Id.; see also Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935) (prosecutor has the obligation to ensure that the accused receives a fair trial); U.S. Const. amend. XIV; Const. art. I, § 3.

2. A prosecutor commits misconduct which violates an accused person's Sixth Amendment right to counsel when she disparages defense counsel's role or impugns defense counsel's integrity.

It is misconduct for a prosecutor to cast aspersions upon defense counsel's role or to impugn the defense lawyer's integrity. State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011); State v. Gonzales, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002); see also United States v. Young, 470 U.S. 1, 9, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (an attorney "must not be permitted to make unfounded and inflammatory attacks on the opposing advocate"). Such misconduct undermines the accused's Sixth Amendment right to counsel and the right to a defense. Bates v. Bell, 402 F.3d 635, 647 (6th Cir. 2005).

In Thorgerson, the prosecutor impugned defense counsel's integrity by characterizing the presentation of his case as "bogus" and involving "sleight of hand." 172 Wn.2d at 451-52. The Supreme Court emphasized that "[i]n particular, 'sleight of hand' implies wrongful deception or even dishonesty in the context of a court proceeding." Id. at

452. The Court held that these comments "went beyond the bounds of acceptable behavior." Id.

In Bates, the prosecutor made personal attacks on defense counsel when he attempted to object to the State's cross-examination and claimed that defense counsel's objections were a diversionary tactic. 402 F.3d at 646-47. In holding that the misconduct warranted reversal of Bates' death sentence, the Court noted that the misconduct was "plainly deliberate," and observed that "the intentionality of the prosecutor's improper remarks can be inferred from their strategic use." Id. at 648.

3. This prosecutor's comments critically undermined defense counsel's integrity before the jury by implying he regularly colluded with the defense expert to manufacture bogus defenses, where in fact the expert was one of the few expert witnesses available to indigent defendants.

Similar to Bates, the prosecutor's remarks in this case were likely deliberate, and appeared designed to suggest that Mr. Wolfe repeatedly colluded with Dr. Julien to present bogus defenses to the jury. The prosecutor's comments thus presented the error identified by the Court in Thorgerson,

where the prosecutor's remarks directly called into question defense counsel's honesty and integrity.

Even after the trial court sustained Mr. Wolfe's objection to the prosecutor's questions about Mr. Wolfe being counsel on previous cases where a similar defense was presented, Ms. Kanner persisted with cross-examination about whether Mr. Wolfe had taken Dr. Julien's seminar, "Understanding Drugs of Abuse and Legal Defense." 4RP 90-92.

As Mr. Wolfe noted, and as the trial court found, contrary to Ms. Kanner's insinuation about a grubby partnership between Mr. Wolfe and Dr. Julien for mutual profit, Dr. Julien was one of a very limited number of potential experts willing to take cases at the low compensation rates paid by OPD. 4RP 109, 111, 119. The trial court specifically remarked that appointed counsel in such circumstances is in a "tough situation" because of the small number of available expert witnesses. 4RP 119. Far from a relationship of mutual advantage, Mr. Wolfe's

relationship with Dr. Julien was born out of necessity: there simply were few other experts available. 4RP 111.

The prosecutor's remarks were plainly misconduct. There was no conceivable good faith basis for the prosecutor to elicit evidence that Dr. Julien had offered similar testimony in previous cases on behalf of Mr. Wolfe's clients. Nor, given Mr. Wolfe's offer of proof that he had never attended one of Dr. Julien's seminars, did Ms. Kanner have any good faith reason for posing this question either. As the trial court observed in sustaining Mr. Wolfe's objection, the answer to this latter question was not relevant. By placing the suggestion before the jury, however, Ms. Kanner managed to make it seem both pertinent and significant.

Mr. Wolfe had no way to effectively rebut the prosecutor's unsavory insinuations or dispel the taint from her questions short of (a) presenting evidence regarding OPD's system for approval and appointment of expert witnesses, and (b) testifying himself that he retained Dr. Julien because he was one of a limited number of available witnesses, not because he had attended Dr. Julien's

seminar. The prosecutor in essence thus placed irrelevant and prejudicial "facts" before the jury in a manner that left defense counsel with no effective means of rebuttal.

In its recent decision in In re the Personal Restraint of Glasmann, __ Wn.2d __, __ P.3d __, 2012 WL 4944546 (No. 84475-5, October 18, 2012), the Washington Supreme Court decried a prosecutor's efforts to attempt to influence the verdict by the introduction of extrinsic evidence. Id. at ¶ 17.[3] "The 'long-standing rule' is that 'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.'" Id. (quoting State v. Pete, 152 Wn.2d 546, 555 n. 4, 98 P.3d 803 (2004) (internal citation omitted)). In Pete, the Court defined such evidence as "'information that is *outside all the evidence* admitted at trial, either orally or by document.'" Pete, 152 Wn.2d at 552 (citation omitted, emphasis in original). The Court observed that this type of evidence is "improper

[3] At the time of this writing, no pin citations were available for Glasmann on Westlaw.

because it is not subject to objection, cross examination, explanation or rebuttal." Id.

In Pete, the jury inadvertently was presented in the deliberation room with the written and signed statement that Pete gave following his arrest. Id. at 554. The Court held, "[t]he jury's receipt of this extrinsic evidence ... presented a 'no win' situation for Pete because he was not able to object to or explain the extrinsic evidence." Id. at 555.

This case presents a similar situation. Mr. Brandich was able to object to the prosecutor's improper cross-examination, but short of his lawyer testifying, there was no way to explain the extrinsic "evidence" presented by the prosecutor's questions.

4. No curative instruction could have dispelled the taint from the prosecutor's improper remarks.

In Pete, a curative instruction was given to the jury by the bailiff, who "instructed the jurors to disregard the unadmitted documents during their deliberations." Id. at 551. The Supreme Court held that this did not "mitigate the harmfulness of the error," and further commented, "[e]ven if

the trial court had given the instruction, which would be the appropriate practice, the same can be said." Id. At 555.

Here, likewise, this Court should hold that the curative instruction given by the trial court could not have dispelled the taint from the prosecutor's misconduct. The Supreme Court recognizes that in some instances, a curative instruction is incapable of dispelling the taint from improper remarks and evidence. Glasmann, 2012 WL 4944546 at ¶ 24.

> While it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.

State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

As the Fifth Circuit colorfully analogized, "one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it'." United States v. Dunn, 307 F.3d 883, 886 (5th Cir. 1962) (citations omitted).

In this case, the distasteful suggestion of an improper alliance between defense counsel and the expert, possibly forged at a seminar given by the expert and inuring to the advantage and profit of both, could not be dispelled by a curative instruction. For the same reason, the remedy sought by Mr. Wolfe of a mistrial was the only appropriate remedy. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (trial court should grant a mistrial "when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly").

The trial court ruled that the issue was "very close" but elected to deny the motion for mistrial and instead issue a curative instruction. Unfortunately, the instruction given by the trial court likely served only to underscore the impermissible inference from Ms. Kanner's questions. The trial court told the jury that during the prosecutor's cross-examination "there were several references made to an alleged relationship or cooperation between the defense counsel and the witness." 4RP 124. These words accurately characterized the tenor of Ms. Kanner's remarks, neatly tying

together her several improper questions – which did not reference the words, "cooperation" or "relationship" – to make this point explicit for her. The judge's instruction did not cure the error by telling the jury that no inappropriate relationship existed, but instead simply told the jury to disregard the possible relationship. Even if it were possible to dispel the stink of this particular skunk, the court's curative instruction failed to do so.

5. The remedy is reversal of Mr. Brandich's convictions.

In determining whether prosecutorial misconduct requires reversal of a defendant's convictions, the only question before the Court is whether "there is a substantial likelihood that the instances of misconduct affected the jury's verdict." Glasmann, ¶ 32. Whether sufficient evidence supported the convictions is irrelevant: "[t]he focus must be on the misconduct and its impact, not on the evidence that was properly admitted." Id. at ¶ 31.

Here, Mr. Brandich presented a mental defense to the charged crimes which found its support in the expert testimony of Dr. Julian. Through her misconduct, the

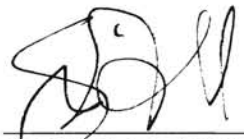
prosecutor both eviscerated the defense and discredited defense counsel. She portrayed defense counsel and the retained expert as little more than charlatans, assuring that the jury would give no credence to Dr. Julian's testimony or Mr. Wolfe's advocacy. This Court should conclude that there is a substantial likelihood the misconduct affected the verdict, and reverse Mr. Brandich's convictions.

F. CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Brandich's convictions.

DATED this 23rd day of October, 2012.

Respectfully submitted:



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68604-6-I
v.	)	
	)	
RICHARD BRANDICH,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF OCTOBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] RICHARD BRANDICH ID #2012108909 DENVER COUNTY JAIL 10500 E SMITH RD DENVER, CO 80239	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF OCTOBER, 2012.

X_____

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