No. 48059-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHAWN BRANDENBURG,

Appellant.

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

The Honorable Mary Sue Wilson, Judge
Cause No. 13-1-01606-4

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

On June 24, 2012, Sergeant Brian Cassidy of the Thurston County Sheriff's Office took a report from L.B. that Brandenburg had committed a sex offense against her. RP 211-12.[1] At that time her friend, E.W., also reported that a few years before she had also had a sexual experience with Brandenburg. RP 220-21.

L.B., whose date of birth is January 25, 2000, testified at trial. RP 116. She said that over the Mother's Day weekend in

1 All references to the Verbatim Report of Proceedings, unless otherwise noted, are to the two-volume trial transcript dated August 3-7, 2015.

2012, she spent Saturday with E.W. and her family at the beach and at E.W.'s family home. RP 117-18. Also present was another friend of L.B.'s, A.H. L.B. and A.H. spent the night at E.W.'s house. They all slept in the living room. RP 119. L.B. was on the couch and the other two girls slept on the floor. RP 121. When L.B. went to sleep, she was wearing shorts, a bathing suit top and a button-up shirt. The bathing suit top tied around the neck and behind the back, but had no snaps. RP 123-24. L.B. woke to the feeling of being touched on her left breast in a circular motion. The TV was on and from its light she could see Brandenburg. RP 122-23. When she awoke, the bathing suit top was on the TV and her shirt was unbuttoned. Her arms were still in the sleeves but her chest was uncovered. RP 123-24. L.B screamed and pulled a blanket over her head. RP 123-24. Although she thought she screamed loudly, the others did not wake up. RP 124.

L.B. stayed under the blanket for a time, then woke E.W. L.B. was crying and upset. RP 124-24. E.W. testified that L.B. was crying hard and couldn't stop. L.B. did not at that time tell E.W. why she was crying. RP 39-40. E.W. went upstairs and got her mother, Gina Brandenburg, who came downstairs and watched TV with the girls for awhile. RP 125-26. By the time Gina arrived in the living

room, L. B. had put her clothes back on. After a short time, and after L.B. had fallen asleep, Gina returned upstairs. RP 41, 126.

E.W. testified that L.B. told her some person had taken her bikini top off and touched her while she was asleep. At first L.B. said it was a big man but it was too dark to identify him. Then she said it was Brandeburg. RP 40, 126. E.W. thought she remembered L.B. removing her bikini top herself before they all went to sleep. RP 40. L.B. was certain someone had touched her breasts, but E.W. had been asleep and did not see anything. RP 40-41. The following morning L.B. also told Gina Brandenburg. Gina told L.B. that she did not believe her, and to forget about it. RP 127.

A.H. testified that when she woke, E.W. and L.B. were talking on the couch. L.B. told them that she woke up to find someone standing above her. She was uncertain whether it was a person or a shadow and went back to sleep. RP 286-87. L.B. was dressed in a bathing suit, shorts and a button-up flannel shirt. RP 287. L.B. suggested that Brandenburg had been touching her, but she was uncomfortable and wanted to forget about it. RP 287. A.H. said the three girls all went upstairs to a room that was normally occupied by one of E.W.'s brothers, but they did not see

Gina Brandenburg during that time. RP 287. A.H. also testified that there was no discussion of the incident at breakfast the following morning, but after they left E.W.'s house, A.H. told L.B. that she should tell her mother. RP 288. According to A.H., L.B. never said anything about the person touching her. RP 289.

L.B. testified that she did not tell A.H. anything until a few years later because she is a blabbermouth who "tells everybody everything." RP 131, 149. L.B. found the incident embarrassing and did not want people to know about it. RP 150.

Some weeks after this incident, E.W. attended a birthday party for one of L.B.'s siblings at Skateland. At the invitation of L.B.'s mother, E.W. stayed the night with L.B. RP 42. L.B.'s mother confronted E.W. about the incident and then called law enforcement. RP 42. At that time, E.W. said that Brandenburg had also done things to her that she did not like. RP 42.

At trial, E.W. testified that when she was seven years old and in the third grade, the family lived in an apartment and she shared a bedroom with her sister. E.W. slept on the floor. RP 43. The first time something happened she was asleep. She was wakened when she heard someone come into her room; the person removed her pajama pants. RP 44. E.W. pretended to be still

asleep. By squinting, she could see that the person was Brandenburg. E.W. testified that this happened a few times, but she did not remember how many. RP 43-44. On separate occasions, Brandenburg touched her vaginal area and her breasts with his hands. RP 45, 47-48, 51-52, 57-58. On still a different occasion, E.W. felt something go into her mouth but she did not know what it was. RP 49. It felt weird. RP 50-52.

E.W. testified that she told her mother after the first incident and after the next few, but her mother did not report them to the police or to Child Protective Services. She believed her mother spoke to Brandenburg because the touching stopped. RP 53, 77, 106-07. Gina Brandenburg denied that E.W. had told her about these events until the party at Skateland. RP 267. E.W. reported minimal information to the Thurston County officer who took the report from L.B., but the officer did not feel he had probable cause to believe that a crime had occurred. RP 220-21.

Shortly after this, E.W. left to spend the summer with her father in Louisiana. RP 54, 250. By the time she returned to Washington the family had moved to Silverdale. RP 250. In June of 2013, Detective Ivanovich interviewed E.W. at her school in Silverdale. RP 55, 167, 252. E.W. testified that she did not want to

speak to the detective and tried to minimize what had happened to her because she was afraid Brandenburg would go to jail. He was the sole wage earner in the family and she "didn't know where my mom was going to be." RP 55-56, 108.

The State charged Brandenburg with one count each of first degree child molestation, second degree child molestation, and first degree rape of a child. The jury found him guilty of both counts of child molestation but not guilty of the rape of a child charge. RP 365-68. The court imposed a sentence of 80 months to life on the first degree child molestation conviction, to be followed by community custody for life, and 41 months for second degree child molestation, with 36 months of community custody to follow. CP56-57. The court also reserved restitution, and imposed legal financial obligations (LFOs) of a $500 victim assessment, $200 in court costs, and a $100 DNA fee, for a total of $800. CP 54-55.

C. ARGUMENT.

1. There was no prosecutorial misconduct during closing argument.

Brandenburg claims that during closing argument the prosecutor committed misconduct in two different ways and that he was prejudiced by it. He made two objections during the State's

closing argument, neither of them to the PowerPoint[2] slides and neither of them on the grounds he now claims on appeal. RP 331, 343.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d

2 PowerPoint is a registered trademark of Microsoft Corp.

153 (1960). The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

A reviewing court examines allegedly improper arguments in the context of the total argument, the issues in the case, the instructions given the jury, and the evidence addressed in the argument. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). The standard of review is abuse of discretion. State v. Osman, 192 Wn. App. 355, 366, 366 P.3d 956 (2016).

a. Characterization of the burden of proof.

Brandenburg argues that the prosecutor mischaracterized the State's burden of proof "by telling the jurors to convict if they 'believe[d] the little girls who sat in that chair.'" Appellant's Opening Brief at 7-8. That is not exactly what the prosecutor said, nor did Brandenburg object to it.

Alleged improper statements are considered in context. State v. Larios-Lopez, 156 Wn. App. 257, 261, 233 P.3d 899 (2010). Early in her closing argument, the prosecutor discussed the testimony of the two victims, as well as reasonable doubt and abiding belief. RP 330-32. She said, "If you walk into that jury

room and say I believe that these things happened to these little girls, I submit to you that you have an abiding belief, and you have a duty to return verdicts of guilty." RP 332. After reminding the jury that the State has the burden of proof, RP 333, the prosecutor made the statement to which Brandenburg assigns error; "He's presumed innocent, unless and until you believe the little girls who sat in the chair, [E.W.] and [L.B.], and if you believe them, you're satisfied beyond a reasonable doubt." RP 333.

Contrary to Brandenburg's argument, the prosecutor did not tell the jury to convict if it believed the girls. She told the jury that if it believed the girls, it would have an abiding belief, that is, be satisfied beyond a reasonable doubt. While Brandenburg argues that the jury could believe the girls and still have a reasonable doubt, Appellant's Opening Brief at 8, it is difficult to see how that could be. Nor did the argument even hint that the jury must disbelieve the two girls before it could acquit. The prosecutor's statement that believing the girls equated to finding that the State had proved its case beyond a reasonable doubt was not error.

Even if this argument were error, there was no objection. Brandenburg waived a challenge unless it were so flagrant and ill-intentioned that a curative instruction would have been useless.

However, it seems plain that had Brandenburg objected, and the court had sustained that objection, a simple instruction to the jury to disregard that statement and rely on the instructions would have erased any potential prejudice. Because of that, Brandenburg cannot now claim prosecutorial misconduct.

b. Claimed expression of personal opinion.

A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999).

> It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence.

State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983).

Brandenburg asserts that two of the slides used in the prosecutor's closing argument constituted a statement of personal

opinion that he was guilty. Those two slides are numbers 11 and 15 of Exhibit 15. The first asks, "Did sexual contact between defendant and [E.W.] occur?" and answers, "YES." Exhibit 15, slide no. 11. The second asks, "Did sexual contact between defendant and [L.B.] occur?" and answers, "YES." Brandenburg further argues that the slides did not contain any reference to the testimony or other evidence. Appellant's Opening Brief at 9.

The PowerPoint presentation was not shown to the jury in silence without reference to the oral argument. By reading the transcript of the prosecutor's argument, it is apparent when each of the slides was presented to the jury. For example, one of the first remarks the prosecutor made to the jury was that "the lawyers' statements are not evidence." RP 329. The first slide in Exhibit 15 is titled "Lawyers' Statements" and contains this text:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence.

Exhibit 15, Slide No. 1.

The prosecutor then went on to remind the jury that it was the sole judge of credibility. The second slide in the presentation contained this sentence: "You are the sole judges of the credibility

of each witness." Exhibit 15, Slide No. 2. The prosecutor was obviously referring to the jury instructions. CP 17-38.

By the time the prosecutor reached the 11th slide in the presentation, the one referencing E.W., she had discussed E.W.'s testimony. RP 330-31, 338-40. She showed a slide listing the disclosures made by E.W. Exhibit 15, Slide No. 8. She talked about the elements for first degree child molestation. Exhibit 15, Slide No. 9; RP 339. She discussed the definition of sexual contact. Exhibit 15, Slide No. 10; RP 339-40. When the prosecutor asked the question, "Did sexual contact occur between the defendant and [E.W.]?" and answers "YES", it is obvious that she is referring to the evidence that she was arguing led to that conclusion. A statement is not the personal opinion of the prosecutor when it is tied to the evidence presented at trial.

Similarly, the challenged 15th slide referring to L.B. followed the prosecutor's discussion of the elements of the crime as they pertained to L.B. Exhibit 15, Slide No. 13; RP 340-41. Sexual contact was again defined. Exhibit 15, Slide No. 14; RP 341. And finally, the question and answer in Exhibit 15, Slide No. 15, accompanied the oral argument. RP 341. It was a culmination of the evidence, not the personal opinion of the prosecutor.

Brandenburg seems to argue that any statement put into writing and displayed on a PowerPoint slide becomes a statement of personal opinion. He does not claim that the oral statement made by the prosecutor was a personal opinion. He cites to In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012), and State v. Hecht, 179 Wn. App. 497, 319 P.3d 836 (2014), to support that argument.

In the closing argument in Glasmann, the prosecutor used a PowerPoint slide presentation in which he incorporated various forms of media: video from security cameras, audio recordings, photographs of the victim's injuries, and Glasmann's booking photograph, which had been admitted into evidence. Glasmann, 175 Wn.2d at 701. The photograph showed "extensive facial bruising." Id. at 700. It was "digitally altered to look more like a wanted poster than properly admitted evidence." Id. at 715, J. Chambers concurring. Five slides used during the prosecutor's closing showed the booking photograph; one included the caption "DO YOU BELIEVE HIM?"; one was captioned "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" Id. at 701-02, 706. One of the slides showed a photograph, presumably taken from the security video, of Glasmann holding the

victim in a choke hold while crouched behind the counter of a minimart, with the captions "YOU JUST BROKE OUR LOVE". Id. at 701. Another showed the victim's injuries with two captions: "What was happening right before the defendant drove over Angel . . . ", and ". . . you were beating the crap out of me!" Id. Finally, three slides during closing arguments successively superimposed the word "GUILTY" over Glasmann's photograph, forming a "GUILTY GUILTY GUILTY" over his bruised and bloodied face at the end. Id. at 712. Glasmann did not object to any of these slides. Id. at 702. In closing the prosecutor told the jury that to reach a verdict it must decide "Did the defendant tell the truth when he testified?" and that the jury had a duty to compare the testimony of the State's witnesses to that of the defendant. Id. at 701.

The Glasmann court found that by making "repeated assertions of the defendant's guilt" visually through slides, the prosecutor had used his position as representative of the State to express his opinion regarding Glasmann's guilt:

> A prosecutor could never shout in closing argument that "Glasmann is guilty, guilty, guilty!" and it would be highly prejudicial to do so. Doing this visually through use of slides... is even more prejudicial.

Id. at 710, 708. It did not say that any statement on a PowerPoint slide expressed a personal opinion. And, notably, the slides in Brandenburg's trial did not say he was guilty. They said that sexual contact, one of the elements of the crime of child molestation, had been proven. Nor did they shout. They only tied a conclusion to the evidence presented.

In Hecht, as in Glasmann, the court took issue with the word "GUILTY" in red over a photograph of the defendant. Hecht, 179 Wn. App. at 504. The court remarked on the capital letters, the color, and the diagonal placement of the word, all designed to "[draw] the eye, implying urgency of action, and evoking emotion." Id. at 506. There is no similarity between this presentation and that in Brandenburg's case, where the prosecutor did not use the word "guilty," did not use a photograph of the defendant, and clearly linked the conclusion that sexual contact had occurred to the evidence presented at trial.

c. There was no prejudice.

Brandenburg claims he was prejudiced because there was conflicting evidence and the prosecutor's printed statements somehow "tipped the balance" and caused the jury to find him guilty. He overlooks the fact that the prosecutor used a similar

argument, and a similar slide, in reference to the charge of first degree rape of a child. RP 341-42; Exhibit 15, Slides No. 17-18. The prosecutor discussed the elements of the offense and the definition of sexual intercourse, and the testimony of E.W. RP 341-42. She followed with a slide that asked, "Did Sexual Intercourse Between the Defendant and [E.W.] Occur?" "YES." Exhibit 15, Slide No. 19. Yet the jury found Brandenburg not guilty of that crime. RP 368; CP 42. Were these slides so prejudicial and the jury so impressionable, one would expect that it would have also convicted Brandenburg of the first degree rape of a child charge.

There was no prejudice to the defendant. Not every PowerPoint presentation which accompanies a prosecutor's closing argument is an improper expression of personal opinion. This one certainly was not.

2. Defense counsel had no reason to object to the testimony of the two officers or to the closing argument of the prosecutor. Failing to do so was not ineffective assistance of counsel.

Brandenburg faults his attorney for failing to object to testimony of Sgt. Cassidy and Detective Ivanovich, as well as to the closing argument of the prosecutor, discussed in the previous section.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984) (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first]." Strickland, 466 U.S. at 697.

a. Testimony of Sgt. Cassidy.

Sgt. Cassidy took the initial report from L.B. and E.W. on June 24, 2012. RP 211-12. When asked if L.B. had disclosed a sex offense, he replied, "Yes." RP 212. He did not repeat any of the allegations made by L.B.

During E.W.'s testimony, and particularly during cross-examination, she gave conflicting answers concerning what she told Sgt. Cassidy. RP 42, 68, 70-71, 96-97, 109-10. The questioning often concerned answers she had given when she was interviewed by the detective and by the defense investigator. Id.

The prosecutor wanted to ask questions of Sgt. Cassidy for the purpose of "addressing the inconsistent statements that Mr. Jefferson elicited from [E.W.] yesterday. . . [E]ssentially the State is seeking to rehabilitate its witness through this witness." RP 216.

The State elicited from Sgt. Cassidy that E.W. had told him about an incident where her shirt had been removed while she slept and that she believed Brandenburg had removed it. RP 220-21. Cassidy then testified that he did not have enough information to conclude that a crime had occurred. RP 221. On cross-examination, defense counsel elicited the information that E.W. had not told Cassidy about any touching of her "lady parts" in any "way, shape or form." RP 222.

First, any actual hearsay contained in Cassidy's testimony is so minimal as to be nearly non-existent. It is not at all clear that it was even hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Here the evidence sought by both parties was the subject matter of statements made by the two girls, not the substance of it.

Second, as to the testimony about E.W.'s statements, the State sought to clarify exactly the scope of what E.W. had told

Cassidy and no specific statements were repeated. This testimony, which does not squarely fall within ER 801(d)(1), would not even be hearsay if it were offered for the purpose of rebutting an express or implied charge of recent fabrication. E.W.'s testimony about what she told Cassidy was conflicting and confusing, and defense counsel clearly was seeking to show she was untruthful. *E.g.*, RP 109-10. The State sought to mitigate that impression by Cassidy's testimony as to which subjects she spoke to him about. The result was not particularly helpful to either party.

It is obvious, however, that Brandenburg cannot have been prejudiced by it. Cassidy's statement that L.B. disclosed a sex offense came long after L.B. had testified at length about Brandenburg removing her clothing and rubbing her breasts. That statement alone cannot conceivably have had any negative effect on Brandenburg. Likewise, the testimony that E.W. had talked only about having her shirt removed would have likely been helpful to Brandenburg, since E.W. told the detective, and testified at trial, about many more serious acts.

The decision whether or not to object is "a classic example of trial tactics. Only in egregious circumstances . . . will the failure to object constitute incompetence of counsel justifying reversal."

State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). It appears that defense counsel did not object here because he expected the testimony to be beneficial to him, and mostly it was.

b. Detective Ivanovich's testimony regarding delayed reporting.

Brandenburg claims that his attorney should have objected to testimony from Detective Ivanovich about the behavior of children in general who disclose sexual abuse. Appellant's Opening Brief at 13-14. However, counsel did object. Twice. RP 159-160. The objections, based upon speculation and lack of foundation, were sustained. RP 159-60.

Ivanovich testified that he has undergone thousands of hours of training during his twenty years in law enforcement. Eighty percent of his caseload consists of cases of sexual assaults against children. RP 155. He has conducted approximately 500 interviews of children, more than one hundred of them formal forensic interviews of children under ten years of age. RP 156. He testified that, based upon his forensic interviews, not every child who has been abused discloses all of the abuse. RP 156. Defense counsel objected on the grounds of speculation and the court required the State to lay additional foundation. RP 159. Ivanovich then testified

that in his investigations, children did not always disclose all of the abuse at once, and they were more likely to disclose when they were away from the person who abused them. RP 159. When asked if a child would make additional disclosures over time, defense counsel again objected on the grounds of speculation and lack of foundation. The court sustained the objection, and the State abandoned that line of questioning. RP 159-60.

Any "expert testimony" that actually came out of the detective's mouth was so minimal as to make no difference to either party. Further, Ivanovich was not asked about children in general, but about the children he had interviewed. RP 158-159. Nor was he asked to express an opinion. Rather, the State was seeking to establish that among the children he had interviewed, and based upon his training, children tended to make successive disclosures over time as they felt more comfortable doing so. This is hardly the kind of "scientific, technical, or other specialized knowledge" that requires an expert to explain. ER 702. It is a common sense observation that would be readily understandable by the jury. It would explain why E.W. had not told Sgt. Cassidy about all of the events to which she testified at trial, but Ivanovich

was not asked to express an opinion about the reasons E.W. made additional disclosures over time.

Ivanovich's testimony does not even fall squarely under ER 701:

> OPINION TESTIMONY BY LAY WITNESSES
>
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

In short, the evidence the State sought to elicit from Ivanovich was not an expert opinion, but rather the observation he had made of many children over a long period of time. He testified about his qualifications to make that observation. Even so, defense counsel objected and the objections were sustained. Brandenburg's claims as to this evidence are without merit.

c. State's closing argument.

Brandenburg also claims ineffective assistance of counsel for his failure to object during the prosecutor's closing argument. As discussed extensively in the first section of this brief, an argument that will not be repeated here, there was no objectionable

argument. Counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974). "Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct." United States v. Necoechea, 986 F.2d 1273, 1281 (1993), citing to Strickland, 466 U.S. at 689.

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). Brandenburg has not overcome that presumption.

d. There was no prejudice

Brandenburg maintains that he was prejudiced by his attorney's failings, but he cannot point to anything except that he was convicted. There was no ineffective assistance of counsel, but even if there had been, there was no apparent prejudice. Brandenburg was acquitted of the most serious charge, which indicates the jury carefully considered the evidence and was not

swept away by the "bolstered testimony" of the victims, "expert testimony" from the detective, or prejudicial argument by the prosecutor.

3. The Court of Appeals has previously rejected the claim made here by Brandenburg that the jury instruction on reasonable doubt violated his due process rights.

The jury in this case was instructed regarding reasonable doubt as follows:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Instruction No. 2, final paragraph; CP 21. This instruction is taken verbatim from WPIC 4.01. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (3d ed. 2008).

Brandenburg argues for the first time on appeal that "an abiding belief in the truth of the charge" encourages the jury to determine what the truth is, equating proof beyond a reasonable doubt with "the truth." Appellant's Opening Brief at 17.

In general, appellate courts will not consider issues raised for the first time on appeal. It may be so raised if it is a "manifest error affecting a constitutional right." RAP 2.5(a). Constitutional errors are treated differently because they can and often do result in injustice to the accused and may affect the integrity of our system of justice. "On the other hand, 'permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials, and is wasteful of the limited resources of prosecutors, public defenders and courts.'" McFarland, 127 Wn.2d at 333 (cite omitted, emphasis in original).

WPIC 4.01 has a status that is unusual and possibly unique. Ordinarily, trial courts have discretion to decide how instructions are worded. State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988). WPIC 4.01, however, must be used without change. The Supreme Court has warned against any attempts to improve this instruction:

> We understand the temptation to expand upon the definition of reasonable doubt, particularly where very creative defenses are raised. But every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms and shifts, perhaps ever so slightly, the emphasis of the instruction.

State v. Bennett, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007). Brandenburg argues that the Bennett court did not analyze the flaws in WPIC 4.01, but rather disapproved a different instruction. But that court instructed trial courts to use WPIC 4.01 "until a better instruction is approved." Id. at 318. No better instruction has been approved, nor has Brandenburg proposed one. To change that instruction would require overruling Bennett. This court is required to follow controlling precedent from the Supreme Court. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006). Only the Supreme Court can overrule Bennett.

As Brandenburg observes, the Court of Appeals has already rejected the identical claim in State v. Federov, 181 Wn. App. 187, 199-200, 324 P.3d 784, *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014), and State v. Kinzle, 181 Wn. App. 774, 784, 326 P.3d 870, *review denied*, 818 Wn.2d 1019, 337 P.3d 325 (2014). As both of those cases held, an "abiding belief in the truth of the charge" is another way of saying "satisfied beyond a reasonable doubt."

Brandenburg is correct that the job of the jury is not to determine the truth of what happened, but rather to determine whether the State proved the charges beyond a reasonable doubt.

State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). It is a stretch, however, to equate "an abiding belief in the truth of the charge" with a determination of the objective truth of the matter. Obviously, truth does have some place in a courtroom. Otherwise there would be no point in placing witnesses under oath or instructing the jury that it is the sole judge of the credibility of the witnesses. Instruction No. 1, CP 19. Brandenburg asks this court to reject Federov and Kinzle, in part because they affirmed the use of WPIC 4.01 "without analysis." Appellant's Opening Brief at 17. But sometimes there is not much to analyze, and this is one of those times. Bennett requires that trial courts give WPIC 4.01 and the claim that the language of the instruction tells the jury that it must find the truth is without merit.

4. The bill which elevated first degree child molestation from a B felony to an A felony was properly enacted and did not violate art. II, § 19, of the Washington Constitution.

Brandenburg claims that the legislation which amended RCW 9A.44.083 to elevate first degree child molestation from an A felony to a B felony was enacted in violation of art. II, § 19 of the Washington Constitution. He further argues that legislation in 1994,

which again amended RCW 9A.44.083 was also constitutionally deficient. The State disagrees.

Constitutional claims are reviewed de novo. State v. Vance, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010). Statutes are presumed to be constitutional and the party challenging the constitutionality of a statute bears the burden of proving it unconstitutional beyond a reasonable doubt. State v. Hunley, 175 Wn.2d 901, 908, 287 P.3d 584 (2012); State v. Alexander, 184 Wn. App. 892, 896, 340 P.3d 247 (2014), *review denied*, 182 Wn.2d 1024 (2015).

a. Single-subject rule.

Art. II, § 19 states, "No bill shall embrace more than one subject, and that shall be expressed in the title." This provision establishes two specific rules; (1) the single-subject rule, and (2) the subject-in-title rule. Alexander, 184 Wn. App. at 896. "The single-subject rule aims to prevent the grouping of incompatible measures and to prevent 'logrolling,' which occurs when a measure is drafted such that a legislator or voter may be required to vote for something of which he or she disapproves in order to secure approval of an unrelated law." Wash. Ass'n for Substance Abuse and Violence Prevention v. State, 174 Wn.2d 642, 655, 278 P.3d

632 (2012) (citing Amalgamated Transit Union Local 587 v. State, 152 Wn.2d 183, 212, 11 P.3d 762 (2000), 27 P.3d 608 (2001); Wash Fed'n of State Emps. v. State, 127 Wn.2d 544, 552, 901 P.2d 1028 (1995)). This provision is construed liberally in favor of the legislation. Amalgamated Transit, 142 Wn.2d at 206.

When analyzing a claim that the legislature violated the single-subject rule, the court engages in a two-step analysis. The first step is to determine whether the title of the bill is general or restrictive. Alexander, 184 Wn. App. at 897.

> "'A general title is broad, comprehensive, and generic[,] as opposed to a restrictive title that is specific and narrow,'" and that "selects a particular part of a subject as the subject of the legislation" or subsets of an overarching subject.

Alexander, 184 Wn. App. at 897, quoting Pierce County v. State, 144 Wn. App. 783, 820, 185 P.3d 594 (2008). A general title "may constitutionally include all matters that are reasonably connected with it and all measures that may facilitate the accomplishment of the purpose stated." Pierce County, 144 Wn. App. at 821. "'Where a general title is used, all that is required is rational unity between the general subject and the incidental subject." State v. Haviland, 186 Wn. App. 214, 219, 345 P.3d 831, *review denied*, 183 Wn.2d 1012, 352, P.3d 188 (2015), quoting Amalgamated Transit, 142

Wn.2d at 209. General titles will be reviewed liberally to find any "reasonably germane" subject to be properly included in the legislation. Alexander, 184 Wn. App. at 898.

The second step in the analysis is to determine whether "a rational unity exists among the subjects addressed in the bill." Id. Rational unity exists when matters within the bill are germane to the title and the provisions are germane to each other. Wash. Ass'n, 174 Wn.2d at 656.

RCW 9A.44.083 was amended to elevate first degree child molestation to a class A felony by Laws of 1990, ch. 3, § 902. The bill is headed "Community Protection Act," and the title begins "An Act Relating to criminal offenders."[3] Brandenburg argues that this bill violates the single-subject rule because the bill added provisions to statutes dealing with mental illness, certification for sex offender treatment providers, the civil commitment of sexually violent predators, and treatment and supervision of parents who have abused children. Appellant's Opening Brief at 21-22. However, there is a connection between those subjects and criminal offenders.

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3 The complete title is lengthy; it is set forth in its entirety in the Appellant's Opening Brief at 21, fn. 7.

The sections concerning mental illness address those who have been found not guilty of a crime by reason of insanity, Laws of 1990, ch. 3, § 109, and sexual psychopaths, § 120. Sections addressing the certification of sex offender treatment providers, §§ 801-811, clearly are germane to criminal offenders. Sections 1001-13, deal with the civil commitment of sexually violent predators. In Laws of 1990, ch. 3, § 1002, "sexually violent predator" is defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." Persons charged or convicted of crimes usually are considered criminal offenders, and thus these sections are germane to the title of the bill. Brandenburg also identifies section 1301, concerning treatment for abusive parents, but physically or sexually abusing a child violates several criminal laws in RCW 9A.44 and RCW 9A.36. It is not a stretch to find this subject germane to the title of the bill.

All of the subjects which are addressed in this bill are all related in some manner to criminal offenders or the management or treatment of them. Rational unity exists. Alexander, 184 Wn. App. at 899.

That said, however, the 1990 legislation does not determine the question. "[W]hen a statute is challenged on the basis that its title violates article II, section 19, a later amendment to or reenactment of the statute supersedes and therefore 'cure[s] any defect' in the earlier legislation." Morin v. Harrell, 161 Wn.2d 226, 231, 164 P.3d 495 (2007) (quoting Pierce County v. State, 159 Wn.2d 16, 39-41, 148 P.3d 1002 (2006). Because the legislature amended RCW 9A.44.083 again in 1994, this court need not address the 1990 bill.

In Laws of 1994, ch. 271, § 303, the legislature again amended RCW 9A.44.083 to add the element of knowingly causing another person under the age of eighteen to have sexual contact with a person less than twelve years old. The heading of that bill is "Crimes—Clarification and Technical Corrections," and the title begins "An Act Relating to crimes . . .[4] Brandenburg argues that this bill is also constitutionally defective because two subjects addressed in the bill are not rationally related to "an act relating to

4 The complete title is AN ACT Relating to crimes; amending RCW 9A.28.020, 9A.72.090, 9A.72.100, 9A.72.110, 9A.72.120, 9A.44.010, 9A.44.083, 9A.44.086, 9A.44.089, 9A.44.093, 9A.44.096, 43.43.754, 43.43.680, 9.94A.140, 9.94A.142, 9A.46.110, 13.40.020, and 9.94A.220; reenacting and amending RCW 9A.46.060; adding a new section to chapter 72.65 RCW; creating new sections; repealing RCW 10.19.130; prescribing penalties; and providing an effective date.

crimes." Appellant's Opening Brief at 25-26. He identifies section 1001, which concerns procedures for locating work release facilities, a subject which is more than tangentially related to crimes.

Brandenburg also points to sections 401 and 402 of the bill, which require juvenile violent and sexual offenders to provide biological samples for DNA identification purposes. Brandenburg argues that since a juvenile is not technically convicted of a crime, RCW 13.04.240, these sections cannot be rationally related to the title. Appellant's Opening Brief at 26. However, RCW 9.94A.030(11) defines "criminal history" as prior convictions and juvenile adjudications. While different terminology is used in juvenile court, the fact remains that the acts committed by juveniles are the same acts called crimes when committed by adults. The nature of the acts do not change, nor does the impact on the community. As noted above, statutes are presumed constitutional and are liberally construed to preserve constitutionality. Even under a more stringent standard, this bill would pass constitutional muster.

Even if Brandenburg were correct and three of the sections of the 1994 legislation went beyond the title of the bill, the

remaining portions could be severed and remain in effect. State v. Thomas, 103 Wn. App. 800, 813-14, 14 P.3d 854 (2000), *petition for review withdrawn,* 143 Wn.2d 1022, 29 P.3d 719 (2001).

> [W]here the proposed legislation with a single subject title contains multiple subjects, those provisions not encompassed within the title are invalid but the remainder is constitutional if: (1) the objectionable portions may be severed such that a court can presume the enacting body would have enacted the valid portion without the invalid portion; and (2) elimination of the invalid part would not render the remainder of the act incapable of accomplishing the legislative purpose. [*State v. Broadway*, 133 Wn.2d 118, 128, 942 P.2d 363 (1997).] In short, when an act contains provisions not fairly within the single subject of its title, such provisions are void.]*Power, Inc. v. Huntley*, 39 Wn.2d 191, 200, 235 P.2d 173 (1951).]

Thomas, 103 Wn. App. at 813-14 (footnote and additional cite omitted).

Brandenburg does not argue that the portion of the bill which amended RCW 9A.44.083 went beyond the title of the 1994 bill, nor does he claim more than three sections are suspect. Therefore, even if those sections did exceed the scope of the title, they would be void and the remainder of the bill would comply with art. II, § 19.

b. Subject-in-title rule.

Brandenburg maintains that the subject matter of these two bills bore no rational unity with the title. Appellant's Opening Brief at 23-24.

The subject-in-title rule "is satisfied if the title of the act gives notice that would lead to an inquiry into the body of the act or indicates the scope and purpose of the law to an inquiring mind." Pierce County, 144 Wn. App. at 822. The title need not include details or "an exhaustive index." Haviland, 186 Wn. App. at 221. "Any objections to a title must be grave, and the conflict between it and the constitution palpable, before we will hold an act unconstitutional for violating the subject-in-title requirement." Pierce County, 144 Wn. App. at 822.

In the legislation at issue in this case, the titles addressed subjects dealing with criminal offenders and crimes. Each title listed the statutes being amended and plainly indicated that new sections were being added. There was no violation of the subject-in-title rule. Brandenburg has failed to carry his heavy burden of showing, beyond a reasonable doubt, the unconstitutionality of either bill.

5. This court should reserve a decision about award appellate costs until such time as the State substantially prevails. Brandenburg has not provided any basis for finding him indigent for purposes of imposing appellate costs.

In his Supplemental Brief, Brandenburg argues that this court should not impose appellate costs in the event the State substantially prevails on appeal.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976[5], the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. Id., .160(2). In State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. Id., at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In State v. Blank, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997), the Supreme Court

5 Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

held this statute constitutional, affirming the Court of Appeals' holding in State v. Blank, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996). State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000), noted that in State v. Keeney, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. Keeney, 112 Wn.2d at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in State v. Edgley, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. Nolan, 141 Wn.2d at 624-625, 628.

In Nolan, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. Id., at 622. As suggested by the Supreme Court in Blank, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in State v.Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d

612 (2016), prematurely raises an issue that is not before the Court. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See* Blank, 131 Wn.2d at 242; State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing State v. Baldwin, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. Baldwin, 63 Wn. App. at 311; *see also* State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. Id. Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." Blank, 131 Wn.2d at 241–242. *See also* State v. Wright, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. *See* State v. Lundy, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty

in general terms in seeking remission or modification of LFOs. *See* State v. Woodward, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. *See* Blank at 236-237, quoting Fuller v. Oregon, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); Woodward, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id., at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. Id., at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. Id., at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

Even though Brandenburg has been found indigent in the trial court, that is not a finding of indigency in the constitutional

sense. Constitutional indigence is more than poverty. State v. Johnson, 179 Wn.2d 534, 553-54, 315 P.3d 1090, *cert. denied*, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014). Only the constitutionally indigent are protected from the requirement to pay. Id. at 555. Indigency, moreover, is a "relative term" that "must be considered and measured in each case by reference to the need or service to be furnished." State v. Rutherford, 63 Wn.2d 949, 953-54, 389 P.2d 895 (1964); Johnson, 179 Wn.2d at 555.

As Blazina instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as Sinclair points out at 389, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

Certainly, in fairness, appellate courts should also take into account the defendant's financial circumstances before exercising its discretion. It is to be hoped, pursuant to Blazina, that trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. Until such time as more and more trial courts make such a record, the appellate courts may

base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

In this case, the State has yet to "substantially prevail." It has not submitted a cost bill. Brandenburg offers no evidence of his future ability to pay other than that he was found indigent in the trial court and "this status is unlikely to change." Appellant's Supplemental Brief at 4. Brandenburg was born on September 21, 1979. CP 52. At the time of sentencing, he was four days short of his 36th birthday. Id. His standard range sentence was 41 months, CP 56, or three years and five months. The statutory maximum for first degree child molestation is life, CP 57, but unless the Department of Corrections finds reason to hold him beyond the 41 months, he will be released before he turns forty. He has a history of employment. E.W. testified she did not want him to go to jail because he supported the family. RP 56. Gina Brandenburg testified that he was the primary breadwinner for the family. RP 270. After serving ten years in the military, Brandenburg worked for a lawn maintenance company when the family first moved to Washington. RP 234. After they moved to Silverdale, he worked for Watson Furniture. RP 251. There is nothing in the record that

indicates Brandenburg has any health problems that would prevent him from obtaining employment.

This Court should wait until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm both of Brandenburg's convictions and to defer a decision on awarding appellate costs until such time as the State substantially prevails and submits a cost bill.

Respectfully submitted this 13th day of May, 2016.

Carol La Verne

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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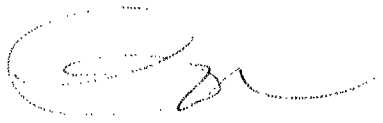
I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 17 day of May, 2016, at Olympia, Washington.



Caroline M. Jones

THURSTON COUNTY PROSECUTOR

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