NO. 48717-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRYAN MACKER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 15-1-03028-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State prove beyond a reasonable doubt that the defendant failed to register as a sex offender? (Appellant's Assignment of Error 1-3).

2. Should this Court make a determination as to whether appellate costs are appropriate before the State seeks enforcement of costs if the State is to prevail on appeal?[1]

B. STATEMENT OF THE CASE.

1. Procedure

Bryan Wade Macker, hereinafter "defendant," was charged with knowingly failing to comply with the felony sex offender registration requirements pursuant to RCW 9A.44.130. CP 1. Because the defendant had been previously convicted on two other occasions of failure to register, this violation was charged as a Class B felony pursuant to RCW 9A.44.132(1)(b)[2]. *Id.* The defendant waived his right to a jury trial. CP 3.

[1] Defendant does not provide an assignment of error for appellate costs, however such is challenged in the Conclusion of defendant's brief. *See* Brf. of App. 11.

[2] Defendant is not challenging the sufficiency of the evidence of the defendant's previous convictions for failure to register as a sex offender. The previous Judgments and Sentences were entered on December 14, 2004, July 5, 2007, and February 1, 2010. CP 12-25.

Following a bench trial before the Honorable James Orlando, the defendant was found guilty. CP 4-11, RP 115[3]. Written Findings of Facts and Conclusions of Law were entered on February 19, 2015, the day the defendant was sentenced. The court sentenced the defendant to a period of confinement of 50 months with the Department of Corrections and 36 months of community custody, in addition to legal financial obligations. CP 12-25, RP 124. The defendant timely appealed. CP 26.

2. Facts

On July 8, 2015, Detective Ray Shaviri of the Pierce County Sheriff's Department conducted a verification check to see if the defendant was living at his registered address. CP 4-11 (FoF VIII[4]), RP 88. Detective Shaviri went to 25101 52nd Avenue East in Graham, Washington, the address the defendant had listed as his residence. CP 4-11 (FoF VIII), RP 88-89. No individuals were present at the residence and attempts to reach the defendant by phone were unsuccessful. CP 4-11 (FoF VIII), RP 90. On July 9, 2015 Detective Shaviri again attempted to contact the defendant at his registered address. CP 4-11 (FoF IX), RP 90. Upon arrival at approximately 8:00AM Detective Shaviri made contact with Akeem Tate, who was living at the residence. RP 91. Tate stated that the

[3] The verbatim reports of proceedings are contained in two volumes with consecutive pagination.
[4] Findings of Fact will be abbreviated FoF followed by the specific finding number and Conclusions of Law be abbreviated CoL followed by the specific conclusion number.

defendant was not there, but his mother, Gwendolyn Williams was. *Id.* Because Williams was sleeping, Detective Shaviri left forms with Williams and Tate for them to fill out. CP 4-11 (FoF IX), RP 91. When Detective Shaviri returned to pick up the forms at approximately 10:00AM he spoke with Williams and Tate. RP 92. Detective Shaviri did not learn of the defendant's whereabouts based upon his conversation with Williams and Tate. CP 4-11 (FoF IX), RP 93. Williams informed Detective Shaviri that the defendant had not lived at that address in over two months. CP 4-11 (FoF X-XI), RP 62. Detective Shaviri also conducted a check to see if the defendant was in custody and determined he was not. RP 93-94. At that point Detective Shaviri changed the defendant's verification status to absconded. RP 94.

During trial, the State had Andrea Conger, an office assistant and records keeper with the Pierce County Sheriff's Department responsible for data entry of sex offender paperwork, informing sex offenders of their registration requirements under state law, and maintaining the files in the sex offender unit, testify. RP 9-10. Conger testified that the defendant had previously been convicted for assault of a child in the third degree with sexual motivation, which required the defendant to register as a sex offender in Pierce County. CP 4-11 (FoF III), RP 22. Conger also testified

that the defendant had been previously convicted of failure to register. CP 4-11 (FoF IV), RP 26-32.

Further, Conger identified multiple times when the defendant had entered new registration information, including times when the defendant was transient. CP 4-11 (FoF VII), RP 39. Conger also testified that she personally entered a change of registration for the defendant for the residence at 25101 52nd Avenue East, Graham Washington, on March 18, 2015. CP 4-11 (FoF VII), RP 45. She entered this new address as the defendant had sent a letter stating the change of address. *Id.* Since that time, the defendant did not attempt to register another address with the Sheriff's Department during the charging period. RP 46.

C. ARGUMENT.

1. FAILURE TO REGISTER AS A SEX OFFENDER IS NOT AN ALTERNATIVE MEANS CRIME AND, THROUGH ITS ELECTION OF A SPECIFIC MEANS OF COMMITTING THE CHARGED OFFENSE, THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT FAILED TO REGISTER AS A SEX OFFENDER FOR THE THIRD TIME.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The sufficiency of the evidence is

determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing ***State v. Green***, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* at 201. "All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant" when the sufficiency of the evidence is challenged. *Id.* at 201 (citing ***State v. Partin***, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Criminal intent may be inferred from the conduct where "it is plainly indicated as a matter of logical probability." ***State v. Goodman***, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld. Sufficiency of the evidence is reviewed de novo. ***State v. Berg***, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

When reviewing a trial court's findings of fact and conclusions of law, the court determines whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. ***State v. Hovig***, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). Unchallenged findings of fact are verities of appeal. *Id.* In this case, the only Finding of Fact defendant challenges is Finding of Fact II, all

relevant events occurred at the defendant's residence in Graham, Pierce County, Washington. Brf. of App. at 1. Credibility determinations are for the trier of fact and are not subject to review. ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Conclusions of law are reviewed de novo. ***State v. Homan***, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

a. Failure to register as a sex offender under RCW 9A.44.130 is not an alternative means crime.

An alternative means crime is a crime which provides that the criminal conduct may be proved in a variety of ways. ***State v. Smith***, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). A defendant is not entitled to jury unanimity of an alternative charge where sufficient evidence supports each charged alternative. ***State v. Wright***, 165 Wn.2d 783, 802, 203 P.3d 1027 (2009). Failure to register is not an alternative means crime. Rather, failure to register contemplates *a single act*, which is an offender moves without alerting the proper authorities as required by statute. ***State v. Peterson***, 168 Wn.2d 763, 770, 230 P.3d 588 (2010) (emphasis in original).

In ***Peterson***, the defendant argued failure to register is an alternative means crime because it can be accomplished by either (1) failing to register after becoming homeless; (2) failing to register after moving between fixed residences within a single county; or (3) failing to register after moving from one county to another. *Id.* at 769-770.

However, our Supreme Court rejected this argument and instead found that while different deadlines to register apply depending on the residential status of an offender, this still did not change the nature of the criminal act, moving without registering with the proper authorities. *Id.* at 770. Hence, in order to prove the defendant here was guilty of failure to register, the State only needed to prove that he moved and did not register with the proper authorities.

b. The State elected to proceed under the theory that the defendant failed to register in Pierce County for either a fixed residence or as transient.

An accused is entitled to be informed with reasonable certainty of the nature of the charges against them in order to prepare an adequate defense. ***State v. Royse***, 66 Wn. 2d 552, 557, 403 P.2d 838 (1965). It is sufficient for the State to charge in the language of the statute if it defines the offense with certainty. ***State v. Leach***, 113 Wn.2d 679, 686, 782 P.2d 552 (1989) (citing ***State v. Grant***, 89 Wn.2d 678, 686, 575 P.2d 210 (1978)). A continuing offense may be charged without specifying individual acts as a basis for the criminal conduct. ***State v. Elliot***, 114 Wn.2d 6, 13, 785 P.2d 440 (1990). Failure to register as a sex offender is a continuing offense. RCW 9A.44.140.

The State may elect to proceed under one of potentially many criminal acts.

> When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected.... The State may, in its discretion, elect the act upon which it will rely for conviction. Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured.

State v. Carson, 184 Wn.2d 207, 217, 357 P.3d 1064 (2015) (quoting ***State v. Petrich***, 101 Wn.2d 566, 572, 683 P.2d 173 (1984)).

Here, the State elected to proceed under the theory that the defendant had failed to register pursuant to either RCW 9A.44.130(5) (requirement to register changes in fixed residence address within the same county) or .130(6) (requirement to register for a lack of fixed residence). CP 30-36. Throughout trial, the testimony elicited from the witnesses illustrated that the defendant did not reregister with the Pierce County Sheriff's Department from May 1, 2015 until August 5, 2015 after he had moved out of his mother's home. CP 1, 4-11 (FoF XI, CoL V). All testimony presented specifically addressed the issue of whether or not the defendant was actively living in his mother's home during the charging period. CP 4-11 (FoF VII-XI), RP 46, 62, 88, 90.

While this case was a bench trial, the Washington Pattern Jury Instructions, Criminal (WPIC) are quite informative in illustrating the State's ability to elect under which requirement of RCW 9A.44.130 the defendant failed to meet. The WPIC specifically provides for the State to be able to elect the means of failing to register under which the State wishes to proceed. WPIC 49C.02: Failure to Register as a Sex or Kidnapping Offender states:

> To convict the defendant of the crime of failure to register [as a [sex]...offender], each of the following elements of the crime must be provided beyond a reasonable doubt:
> ...
> (3) That during the time period, the defendant knowingly failed to comply with [a requirement of [sex]...offender] registration] [(*specific registration requirement from RCW 9A.44.130*)]

(emphasis added). Because the State elected to proceed on the theory that the defendant failed to register pursuant to either RCW 9A.44.130(5) or .130(6), the State was only required to prove that the defendant failed to comply with one specific registration requirement. If this was a jury trial, the State would have put the specific registration requirement into the jury instructions, thus showing the State's election and on what specific facts the jury needed to find in order to convict the defendant. Hence, the State was not required to prove each registration requirement was not met, but only the relevant requirement(s) were not met.

Additionally, the State can make an election- and in this case did make an election- during closing argument. In ***Carson***, the Supreme Court noted that because the State had made a clear election in its closing argument on what acts it was focusing on, there was a valid election which could result in jury unanimity. ***State v. Carson***, 184 Wn.2d at 225. Here, during the State's closing argument, counsel continuously discussed the fact that the defendant was not living at his registered address in Graham and had not updated his registration with the Pierce County Sheriff's Department. RP 99-103, 109-110. Hence, the State elected to proceed under the theory that the defendant was not living at his registered address in Graham in Pierce County, Washington, and had failed to register his new residency status with the Sheriff's Department.

c. The State proved beyond a reasonable doubt that the defendant was guilty of a violation of RCW 9A.44.130(5)(a) and RCW 9A.44.130(6)(a).

As previously mentioned, due process requires the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d at 488. The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the

evidence in the light most favorable to the State. ***State v. Salinas***, 119 Wn.2d at 201 (citing ***State v. Green***, 94 Wn.2d at 220-22). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.*

Here, the defendant does not challenge whether or not there was sufficient evidence to show he failed to register after leaving the house in Graham. Brf. of App. 5-10. The only evidence being challenged is there was no proof the defendant moved out of Washington and thus, did not need to provide an updated registration to the Pierce County Sheriff's Department. *Id.* However, substantial evidence showed that the defendant did not complete the necessary steps for moving to a new state nor, as discussed above, was it the theory under which the State elected to proceed.

Conger, the office assistant and records keeper with the Pierce County Sheriff's Department, testified that there were multiple times where the defendant had entered new registration information, including times when the defendant was transient. CP 4-11 (FoF V, VII), RP 34, 40, 44. Conger also testified that she personally entered a change of registration for the defendant for the residence at 25101 52nd Avenue East, Graham, Washington, on March 18, 2015. CP 4-11 (FoF VII), RP 45. At the conclusion of Conger's direct examination, she was specifically asked if between May 1, 2015 and August 5, 2015, the defendant had

attempted to register another address other than his mother's residence. RP 46. Conger responded "No, he did not." *Id.*

Detective Shaviri testified that on two separate dates he attempted to conduct a verification check of the defendant. CP 4-11 (FoF VIII), RP 88. However, on both dates Detective Shaviri was unable to contact the defendant at his registered address. CP 4-11 (FoF VIII, IX), RP 90. During his investigation, Detective Shaviri learned from the defendant's own mother that the defendant had not lived at his registered address in over two months. CP 4-11 (FoF X-XI), RP 62. Detective Shaviri then checked to see if the defendant was in custody and determined he was not. RP 93-94. Based upon his investigation, Detective Shaviri changed the defendant's verification status to absconded. RP 94.

The testimonial evidence clearly illustrates the defendant did not reregister with the Pierce County Sheriff's Department as required. The verification check by Detective Shaviri determined that the defendant was not living at his previously registered address. Detective Shaviri also discovered that the defendant's mother did not believe the defendant had lived at the registered address in over two months. RP 62. Conger's testimony showed she did not have a new address or that the defendant registered as transient. RP 46. As such, the evidence was sufficient to

prove the defendant failed to register his new address and, if he did not have a new address, that he had failed to register as transient.

In ***State v. Peterson***, 168 Wn.2d 763, 230 P.3d 588 (2010), the Supreme Court ruled, among the reasons, that the defendant's conviction was valid because the defendant failed to register within any of the proscribed deadlines. ***State v. Peterson***, 168 Wn.2d at 772. As such, it was unnecessary for the State to show which aspect of residential status was a violation of the statute. *Id.* Here, we have a similar factual scenario. The defendant failed to register for any type of residential status within the statutory deadlines. CP 4-11 (CoL V), RP 46. Thus, because the State proved that the defendant failed to meet the statutory requirements for registering a new address or as transient for over two months after leaving his mother's residence, such was sufficient for a conviction.

The defendant argues the final question asked to Conger meant there was no proof that he did not move to a new state. Brf. of App. at 7. However, this argument, when taken to its logical end, is illogical. Conger's direct examination ended with the following exchange:

> Q. [Mr. Saddatazadeh, DPA]: Between May 1, 2015 and August 5, 2015, based on your review of Mr. Macker's file, did Mr. Macker attempt to register another address other than the 25101 – 52nd Avenue East Address?
>
> A. No, he did not.

RP 46. If the defendant's argument was accurate, it would mean that Conger would have been intentionally misleading the court if she knew the defendant had provided notice regarding a move to a new state. Conger would have known through her experience as the records keeper that the question asked was to show the defendant had absconded his duty to register. If the defendant had in fact moved to another state and provided notice of an out-of-state move, an honest answer would have simply stated such.

2. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT OF THE TRIAL COURT AND SHOULD BE ADDRESSED IF THE STATE WERE TO PREVAIL AND WERE TO SEEK ENFORCEMENT OF COSTS.

a. The defendant's ability to pay appellate costs should only be considered when the State submits a cost bill, if it elects to do so.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); ***State v. Mahone***, 98 Wn. App. 342, 989 P. 2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000).

In ***Nolan*** 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, 389-390, 367 P. 3d 612 (2016), prematurely raises an issue not before the Court. *If* the defendant does not prevail, and *if* the State files a cost bill, the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

b. In the alternative, this Court should rule the defendant must pay for the costs of his appeal.

If appellate costs are imposed, the Legislature has provided a remedy in the same statute which authorizes the imposition of costs. RCW 10.73.160(4) provides that as long as a defendant is not in contumacious default of payments, they may petition the sentencing court for remission of any unpaid costs if such would impose a hardship on the defendant or their immediate family. The sentencing court may then either remit the costs in all or part, or modify such payments under RCW 10.01.170. In ***Blank***, *supra*, at 242, the Supreme Court found this relief provision prevented RCW 10.73.160 from being unconstitutional. Through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In

1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including of prosecuting the defendant and his incarceration. *Id.*, RCW 10.01.160(2). In ***State v. Barklind***, 82 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.

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.

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). 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, ***Blazina*** does not apply to appellate costs. As ***Sinclair*** points out at 389, the Legislature did not include the "individual financial circumstances" 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).

The unfortunate fact is 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. If the Court decided on a policy to excuse every indigent defendant from payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

Parties and the courts can criticize this legislation, its purpose and result, and the debts accumulated by indigent defendants under RCW 10.73.160(3) (and 10.01.160) and the interest that accrues on it under RCW 10.82.090 and RCW 4.56.110 are onerous. The parties may even be in agreement in their criticism. In ***Blazina,*** the Supreme Court was likewise critical of these statutes and their result. *See* 182 Wn.2d at 835-836. Yet, the Court did *not* find the statutes illegal or unconstitutional.

The question for this Court is not whether the Legislative intent or result of these laws is wise or even fair. The question is: are these laws legal

or constitutional? Those questions were settled in the affirmative by the Supreme Court in ***Blank***, and what the Court did *not* do in ***Blazina***. It is for the Legislature to change the statute if it so desires.

c. The defendant may have the ability to pay for appellate costs and, if not, can follow the legislative remedies for relief.

Recently, in ***State v. Caver***, ___ Wn. App. ___, Slip Number 73761-9-I, Westlaw Number 4626243 (September 6, 2016), Division One of this Court directly addressed the situation where a defendant did not have the ability to pay appellate costs at the time of appeal, but was likely to have the ability to pay appellate costs in the future. ***State v. Caver***, Slip Op. at 12-13 (2016). Division One found that there was essentially a two part-test to determine the ability to pay appellate costs: (1) the ability to pay the cost of appeal at the time of appeal; and (2) the future ability to pay for the costs of appeal. ***State v. Caver***, Slip Op. at 12. In ***Caver***, while the defendant was indigent at the time of appeal, because he was only 53 years old and had a relatively short sentence of incarceration, under the second part of the test, the court found there was a "realistic possibility" Caver would be able to pay costs in the future. *Id.* (quoting ***State v. Sinclair***, 192 Wn. App. at 393).

In this case, the defendant is 49 years old. Additionally, the defendant will only be serving a total prison term of 50 months, inclusive of the time that has already been served prior to conviction and while this appeal is pending. As such there is a "realistic possibility" the defendant

here will be able to pay costs in the future when he is released from incarceration at the age of 53, the exact same age as the defendant in ***Caver***.

Even if the court decides to award the State costs, this does not leave the defendant without a recourse if in the future he cannot pay. RCW 10.73.160(4) provides that as long as a defendant is not in contumacious default of payments, they may petition the sentencing court for remission of any unpaid costs if such would impose a hardship on the defendant or their immediate family. The sentencing court may then either remit the costs in all or part or modify such payments under RCW 10.01.170.

If the Court decided to excuse every indigent defendant from payment of costs, such a policy would create a heavy burden on law-abiding taxpayers. Hence, this Court should address the issue of appellate costs only if the State prevails and seeks enforcement.

D. CONCLUSION.

Sufficient evidence was presented for a rational trier of fact to find the defendant guilty of failure to register as a sex offender. The violation is not an alternative means crime and the State, through its election of the specific requirement that the defendant failed to meet, was only required to prove the defendant did not register his new address in Pierce County as

required by statute. Additionally, this Court should address the issue of appellate costs only if the State prevails and seeks enforcement. For the aforementioned reasons, the defendant's conviction should be affirmed.

DATED: October 14, 2016.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/14/16 Theresa Kar
Date Signature

PIERCE COUNTY PROSECUTOR

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