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Division II
State of Washington
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SUPREME COURT
STATE OF WASHINGTON
3/20/2020
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SUPREME COURT NO. 98293-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CALVIN LUARCA,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 51833-3-II
Clark County No. 17-1-02477-5

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, CALVIN LUARCA, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Luarca seeks review of the February 19, 2020, unpublished decision of Division Two of the Court of Appeals affirming his convictions.

C. ISSUE PRESENTED FOR REVIEW

The trial court granted the defense motion to exclude evidence that Luarca had an outstanding felony probation warrant for which he was arrested before he was booked on the charges in this case. There was evidence that, hours before he was booked on these charges, Luarca gave paramedics a false name as he was being transported to the hospital. Where use of a false name would support an inference that Luarca was trying to avoid arrest on the warrant, but was not connected to the charged offenses, did the court's error in admitting testimony about the false name deny him a fair trial?

D. STATEMENT OF THE CASE

Calvin Luarca and ZM were in a dating relationship in the fall of 2017. RP 277-78. On the morning of November 18, 2017, ZM called 911 and reported that her ex-boyfriend was in her house, he punched her

several times in the face, she thought her life was in danger, and she stabbed him. RP 135, 301. She repeated her story when police responded. RP 119. ZM identified her ex-boyfriend as Calvin Luarca and explained that he had left the house before she called 911. RP 125, 135.

Police found Luarca at a local urgent care center. RP 138. He was being prepared for transport to a hospital when they arrived, because he needed emergency surgery for the abdominal wound ZM inflicted. RP 138-39, 410.

ZM also went to the hospital. The only injury she sustained was a cut to her hand from the knife she was holding. RP 131, 302, 358-60, 571.

Luarca had a federal probation violation warrant, and when he came out of surgery he was placed under arrest on the warrant. RP 86. He invoked his rights and asked for an attorney. RP 87, 93, 97. Once the medical staff cleared him to move, he was transported to the jail medical unit. RP 140, 378. Not until he was there was he informed that he was being charged in connection with the incident at ZM's home that morning. RP 87, 396. Ultimately the charges included first degree burglary (domestic violence), fourth degree assault (domestic violence), interfering with reporting domestic violence, second degree theft (domestic violence), tampering with a witness, and domestic violence court order violation. CP 5-7.

Prior to trial the defense moved to exclude evidence about Luarca's federal probation status and methamphetamine use. RP 74-75. The State made an offer of proof that ZM would testify that two to three days before the incident Luarca became erratic and paranoid. He told her that he had cut off his probation ankle monitor and was using methamphetamine, and that's why she chose to end their relationship. RP 75-78, 208-09. Defense counsel argued that ZM could describe Luarca as erratic without going into his federal probation status or drug use. That information was not relevant and highly prejudicial. RP 79, 211. The court ruled that the offered evidence was more prejudicial than probative, and the State could not offer it in its case in chief. RP 214.

ZM testified that Luarca was becoming jealous and aggressive, so she ended their relationship the night before the incident. RP 280. Luarca responded that he thought she was seeing someone else, who he thought was at her place, so he came to her house to check. RP 283. He called her when he arrived, and she went to the door carrying the knife she had been using in the kitchen. RP 285. When she opened the door, Luarca entered the house and started looking around. RP 286. ZM said they had a confrontation downstairs, and Luarca hit her in the head. She slipped and cut herself with the knife she was carrying. RP 289. She then ran outside and tried to call 911 using an old phone, but Luarca followed her and

knocked the phone out of her hands. RP 291-92, 294. According to ZM, she went back inside to look for her iPhone, and Luarca entered through the back door. They had another confrontation in which he hit her and she stabbed him. RP 296-97. After that Luarca left, and ZM used a neighbor's phone to call 911. RP 298, 301.

At trial the police officer who found Luarca at urgent care testified that as paramedics were preparing Luarca for transport to the hospital, he heard them ask Luarca his name. RP 390-91. Defense counsel objected, and outside the jury's presence he argued that the State should not be permitted to elicit the fact that Luarca gave the paramedics a false name. Luarca had a federal warrant at the time, and use of an alias would indicate he was trying to avoid arrest on that warrant. At the time in question Luarca did not know of any charges from the incident in which he was stabbed, so use of a false name had little to no probative value as to the charged offenses. RP 392-93, 396-98. The court overruled the objection, finding the jury could draw a reasonable inference that Luarca's statement reflected a consciousness of guilt, based on ZM's allegations as to what happened. RP 399.

The police officer then testified that when paramedics asked Luarca his name, he said it was Tim Carter. RP 406. The State relied on

this testimony in closing when arguing that events transpired as ZM described. RP 636.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT OF APPEALS' DECISION CONFLICTS WITH A PRIOR DECISION OF THAT COURT AND PRESENTS A CONSTITUTIONAL QUESTION THIS COURT SHOULD REVIEW. RAP 13.4(b)(2), (3).

Both the state and federal constitutions guarantee criminal defendants a fair trial. U.S. Const. Amend V; U.S. Const. Amend XIV; Wash. Const. art. 1 § 3; *see State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981) (a defendant is entitled to a trial free from prejudicial error). It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, and not convicted because the jury believes he is a bad person who has done wrong in the past. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

In light of this principle of fundamental fairness, ER 404(b) forbids evidence of prior acts which establishes only a defendant's propensity to commit a crime. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The rule does allow for the introduction of other acts evidence if it is relevant for some legitimate purpose, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). But such evidence is admissible only if

the trial court finds the substantial probative value of the evidence outweighs its prejudicial effect. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). This cautious approach recognizes the inherent prejudice of evidence of other bad acts. *State v. Sexsmith*, 138 Wn. App. 497, 505-06, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008).

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible,” and the State must meet a substantial burden when attempting to bring in evidence under one of the exceptions to ER 404(b). *DeVincentis*, 150 Wn.2d at 17. A trial court’s decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). “The abuse of discretion standard is not, of course, unbridled discretion.” *In re Parentage of Jannot*, 110 Wn. App. 16, 22, 37 P.3d 1265 (2002), *affirmed*, 149 Wn.2d 123 (2003). A court abuses its discretion if its decision is contrary to relevant law, based on untenable grounds, or supported by untenable reasons. *Thang*, 145 Wn.2d at 642; *Jannot*, 110 Wn. App. at 22.

Evidence of flight, resisting arrest, use of a false name, and other related conduct may be admissible under ER 404(b) to prove the defendant’s consciousness of guilt. *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001); *see also State v. Bruton*, 66 Wn.2d 111, 112, 401

P.2d 340 (1965) (rationale underlying admissibility of evidence of flight following the commission of a crime is that flight is an instinctive reaction to consciousness of guilt or is an attempt to avoid arrest and prosecution). This evidence tends to be only marginally probative of guilt, however. Thus, to be admissible, “the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful.” *Freeburg*, 105 Wn. App. at 498. Evidence should only be admitted under this exception if it allows “a reasonable inference of consciousness of guilt of the charged crime.” *Freeburg*, 105 Wn. App. at 498.

In *Freeburg*, the trial court admitted evidence that the defendant was in possession of a weapon at the time of his arrest as evidence of flight. *Freeburg*, 105 Wn. App. at 496. But the arrest occurred more than two years after the charged crime, the defendant made no attempt to resist arrest, and the gun in his possession was not the gun used in the shooting with which he was charged. The Court of Appeals held that the State failed to prove the defendant’s possession of the gun at the time of his arrest was evidence of his consciousness of guilt in the charged offense. *Freeburg*, 105 Wn. App. at 500-01.

When determining whether evidence of giving a false name is admissible to show consciousness of guilt, the question is whether the

defendant gave a false name to avoid detection for the crime charged. *Freeburg*, 105 Wn. App. at 497-98. Specifically, there must be a connection between the false name and the crime charged at the time the false name was given. *Id.*

Here, Luarca was charged with burglary, assault, theft, and interfering with reporting domestic violence. Thus, the State had to show that when he gave a false name to paramedics, he did so because of his guilt concerning those charges.¹ The evidence shows Luarca was not even informed of those charges until several hours later, however. RP 87, 396. But at the time he gave the false name, he was aware he had a federal probation violation warrant for which he would want to avoid detection. RP 86, 392-93, 396-98. In fact, he was first arrested on this warrant and not on the offenses charged in this case. RP 86. While a reasonable inference can be drawn that Luarca wanted to avoid arrest on the existing warrant, nothing in the record suggests he used a false name to avoid detection on charges he was not yet even aware of. *See State v. Hagler*, 74 Wn. App. 232, 234, 236, 872 P.2d 85 (1994) (defendant's flight from officer during traffic stop was not consciousness of guilt where State failed to show which of two possible crimes defendant felt guilty about). The necessary link between Luarca's use of a false name and the charged

¹ The other two charges involve events which occurred later. CP 5-7.

offenses does not exist here, and that evidence should have been excluded. *See Freeburg*, 105 Wn. App. at 500-01.

Moreover, any marginal relevance the evidence may have had to the charges in this case was outweighed by the danger of unfair prejudice. The trial court had already ruled that evidence of Luarca's federal probation status was unfairly prejudicial and inadmissible. RP 214. As the court acknowledged, Luarca could not fairly rebut the inference of guilt urged by the State without also informing the jury of this highly prejudicial explanation for the false name. RP 399. The Court of Appeals' conclusion that the trial court did not abuse its discretion in admitting the false name evidence conflicts with *Freeburg*, and this Court should grant review. RAP 13.4(b)(2).

Because, contrary to the Court of Appeals' decision, the trial court erred in admitting the contested evidence, reversal is required if there is a reasonable probability the outcome of the trial would have been materially affected if the error had not occurred. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). There were enough inconsistencies between ZM's testimony and the physical evidence that the State's case against Luarca was not overwhelming. ZM testified that Luarca followed her outside when she tried to call 911, and Luarca knocked the phone out of her hand before re-entering the house without her permission. RP 294,

296, 362-63. But the broken cell phone was found inside the house, and there was no indication it had been moved. RP 364. ZM also testified that Luarca assaulted her repeatedly, hitting her in the head and face and choking her, but the only injury she sustained was a cut on her hand from the knife she was holding. RP 289, 332, 358-59. She said she felt her knife make contact with Luarca, when in fact he required abdominal surgery as a result of the stab wound she inflicted. RP 139, 410.

Because of the trial court's error, the jury heard that Luarca lied about his identity, and the State pointed this out to the jury in closing argument. RP 406, 636. From this evidence the jury could either infer that Luarca was trying to evade detection on the charged offenses, an inference which is contrary to facts of which the jury was unaware, or it could speculate that he is a dishonest person who had something to hide. The latter unfairly shifts the jury's attention to his criminal propensity, just as if Luarca had explained that he gave a false name to avoid the federal warrant. ER 404(a); *Freeburg*, 105 Wn. App. at 502. Given the powerful nature of this evidence, its lack of relevance, and the weakness of the State's case, the court's error cannot be considered harmless. Admission of the statement denied Luarca a fair trial, and this Court should grant review and reverse his convictions.

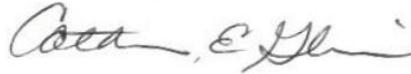
F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Luarca's convictions.

DATED this 20th day of March, 2020.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

CATHERINE E. GLINSKI

WSBA No. 20260

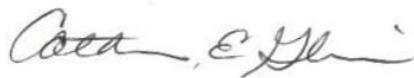
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in
State v. Calvin Luarca, Court of Appeals Cause No. 51833-3-II, as
follows:

Calvin Luarca/DOC#407372
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

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



Catherine E. Glinski
Done in Manchester, WA
March 20, 2020

February 19, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CALVIN PERRY LUARCA,

Appellant.

No. 51833-3-II

UNPUBLISHED OPINION

MELNICK, J. — Calvin Luarca appeals his convictions for burglary in the first degree, assault in the fourth degree, interference with the reporting of domestic violence, theft in the second degree, tampering with a witness, and a domestic violence court order violation. He argues that the court erred in allowing the State to admit evidence that he gave a false name as evidence of consciousness of guilt. He contends that the error was not harmless. He also contends that the inclusion of a filing fee in the judgment and sentence (J&S) is a scrivener’s error and should be corrected. We affirm the conviction but remand to strike the filing fee.

FACTS

Luarca had a dating relationship with ZM. After Luarca began acting erratically, accusing ZM of cheating, and becoming increasingly confrontational, ZM ended the relationship over the phone. That same day, Luarca arrived at ZM’s house to confront her. An altercation occurred.

ZM called 911 and reported that Luarca assaulted her. She reported that she thought her life was in danger, so she stabbed Luarca with a kitchen knife. When the police responded, ZM told the officers that Luarca had left the house after she had stabbed him.

An officer located Luarca at a local urgent care clinic. He needed to be transported to a hospital for surgery. While paramedics prepped Luarca for transport, they asked him his name. Luarca responded, “Tim Carter.” 4 Report of Proceedings (RP) at 406. An officer standing nearby heard the conversation.

After surgery, the police placed Luarca under arrest based on an outstanding federal probation violation warrant. The State subsequently charged Luarca with burglary in the first degree, assault in the fourth degree, interference with the reporting of domestic violence, theft in the second degree, tampering with a witness, and a domestic violence court order violation.

Pretrial, Luarca moved to exclude evidence of his federal probation status and methamphetamine use. The court granted the motions.

At trial, ZM testified to the following. She ended the relationship with Luarca over the phone the morning of the incident because of Luarca’s erratic and confrontational behavior. She did not want him around her son. The morning of the incident, over the phone, Luarca “kept just saying over and over . . . I know someone’s at the house. I know someone’s there. Who is he?” 3 RP at 283.

Luarca told ZM that he was coming over. She replied that it would be better if he did not, because “[he was] acting erratic, and . . . crazy.” 3 RP at 284. Upon his arrival, ZM partially opened the door while carrying the knife she had been using to make breakfast. Luarca barged in and ran around the house “looking around for somebody that wasn’t there.” 3 RP at 287.

Next, Luarca hit ZM on the head, which resulted in her slipping and cutting herself with the knife. She then ran outside and attempted to call emergency services. Luarca followed her, knocked the phone out of her hands, and broke it. ZM ran back inside and locked the door, but Luarca re-entered through the back door. Luarca again hit ZM, and then she stabbed him.

Luarca questioned ZM about the fact that the police found the broken cell phone inside, when she testified that Luarca had knocked it out of her hands outside of the home. ZM responded that she did not know how the phone got back inside. Luarca also questioned ZM why, if she had cut herself, nobody found blood on the broken phone. ZM responded that she did not know. ZM also testified that doctors did not find any injuries on her head from being hit by Luarca.

A neighbor testified that she heard someone yelling for help, so she and another neighbor went outside and called towards the house, asking if anyone needed help. The neighbor saw a person running away from the house. ZM then stuck her head outside of the door and asked the neighbor to call 911.

The State asked the officer who found Luarca at the urgent care if he had heard what name Luarca had given the paramedics. Luarca objected. Outside the presence of the jury, Luarca argued that he had a federal warrant at the time, and the use of an alias indicated he was trying to avoid arrest on the warrant. Luarca argued that because he did not know at that time of any new charges from the incident with ZM, the false name had little to no probative value as to guilty conscience for the charged offenses. The court overruled the objection, stating that a reasonable inference could be made based on the allegations that the false name reflected a consciousness of guilt.

In closing argument, the prosecutor said, “Paramedics asked the defendant what his name was. They need[ed] to identify him. What did he tell them? He told them—he gave them a false name: Tim Carter. Tim Carter. Okay? And we’ll get back to that.” 6 RP at 636-37. However, the prosecutor did not mention the false name again.

Luarca argued in closing that ZM was being untruthful, and the inconsistencies in her testimony indicated that Luarca and ZM were still in a relationship, she invited him over, and when they argued, she got angry and stabbed him.

The jury found Luarca guilty on all counts.

At sentencing, the court found Luarca indigent and waived all non-mandatory legal financial obligations (LFOs). The court struck the filing fee on Luarca’s felony Judgment and Sentence (J&S). It did not strike the filing fee on the misdemeanor J&S, which had a box checked that states, “See companion felony order for financial obligations.” Clerk’s Papers at 364.

Luarca appeals.

ANALYSIS

I. FALSE NAME

Luarca argues that the court erred when it allowed the State to admit evidence that he gave a false name as evidence of consciousness of guilt. He contends that it was inadmissible because he gave the false name to avoid detection for a federal probation violation warrant and not the crime charged. He also argues that it was inadmissible because he could not fairly rebut the inference of guilt from the false name without also informing the jury of his probation violation, which the court had already determined was prejudicial. We disagree with Luarca.

A. Legal Principles

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is manifestly unreasonable, or when it is exercised on untenable grounds or for untenable reasons. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

“When faced with evidence which can be used both properly and improperly, the task of the trial court is to balance probative value against unfair prejudice How this balance should be struck is necessarily a matter addressed to the discretion of the trial court.” *State v. Chase*, 59 Wn. App. 501, 507-08, 799 P.2d 272 (1990).

Evidence of other crimes, wrongs, or acts is inadmissible to prove character and show action in conformity therewith. ER 404(b); *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Such evidence “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

Evidence of flight, resisting arrest, use of a false name, and other related conduct may be admissible under ER 404(b) to prove the defendant's consciousness of guilt. *State v. Freeburg*, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001). Evidence of a false name is admissible if it allows a reasonable inference of consciousness of guilt of the charged crime. *Freeburg*, 105 Wn. App. at 497-98.

B. Analysis

In *State v. Hebert*, a jury convicted the defendant of burglary and theft. 33 Wn. App. 512, 513, 656 P.2d 1106 (1982). Evidence at trial showed that the police apprehended the defendant, but during a pat-down search, he broke free and ran. *Hebert*, 33 Wn. App at 513. The police recaptured him shortly thereafter. *Hebert*, 33 Wn. App at 513.

On appeal, the defendant argued that the court erred by admitting evidence of his flight because the danger of prejudice outweighed its probative value. *Hebert*, 33 Wn. App at 514-15. He argued that he fled because the officer knew of his status as a parolee who possessed marijuana and not because of his involvement in a burglary. *Hebert*, 33 Wn. App at 515. He argued that admission of the flight testimony would require him to admit his parole status or stay silent and allow the jury to draw an inference of guilt from his flight. *Hebert*, 33 Wn. App at 515.

In deciding that the court did not abuse its discretion, we stated that the flight “reasonably could be considered a deliberate effort to evade arrest and prosecution for the burglary and could also reasonably be considered probative of his consciousness of guilt.” *Hebert*, 33 Wn. App at 515.

Here, Luarca claims that he gave a false name, not in an attempt to evade arrest for the crimes charged, but for another reason. Luarca contends that he gave a false name because he wanted to avoid arrest for a probation violation. He argues, as did the defendant in *Hebert*, that he could not “rebut the inference of guilt urged by the State without also informing the jury of th[e] highly prejudicial explanation for the false name.” Br. of Appellant at 9. While the court determined that evidence of the probation violation warrant was inadmissible, it also determined that based on ZM’s allegations, the jury could reasonably infer that he provided a false name as consciousness of guilt for the crimes charged. The record supports this determination.

The trial testimony clearly showed that Luarca had an altercation with ZM that resulted in him fleeing the home after she stabbed him. Luarca also knocked a phone out of ZM's hand as she attempted to call 911. While he may not have known the charges against him when he gave a false name, he likely knew the police were looking for him for the incident at ZM's home. He also knew that the police had positioned themselves near him when he provided the false name.

Like in *Hebert*, we agree that the evidence of Luarca providing a false name, “reasonably could be considered a deliberate effort to evade arrest and . . . [could be] considered probative of his consciousness of guilt.” 33 Wn. App at 515. The balance between the probative and prejudicial nature of the testimony is “necessarily a matter addressed to the discretion of the trial court.” *Chase*, 59 Wn. App. at 508 (determining that the trial court did not abuse its discretion when it admitted evidence of defendant giving a false name despite the fact that it could also have been offered for an improper purpose). We conclude that the trial court did not abuse its discretion in admitting the contested evidence.

III. LFOs

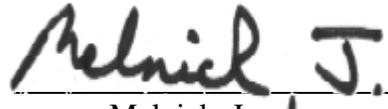
Luarca argues that the court erred by imposing a criminal filing fee on his misdemeanor J&S because at sentencing the court found him indigent, it waived all non-mandatory LFOs, and because his felony J&S did not impose the criminal filing fee. The State concedes that the filing fee should be stricken, and we agree.

Recent legislation prohibits the imposition of certain LFOs, including the criminal filing fee, on a defendant who is indigent under RCW 10.101.010(3)(a)-(c). RCW 36.18.020(2)(h); *State v. Ramirez*, 191 Wn.2d 732, 746, 426 P.3d 714 (2018).

At sentencing, the court found Luarca indigent and waived all non-mandatory LFOs. The court entered two J&S. The court struck the filing fee from Luarca's felony J&S, but failed to strike it from the misdemeanor J&S. We remand to the trial court to strike the criminal filing fee from the misdemeanor J&S.

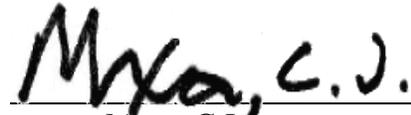
We affirm the conviction but remand to strike the criminal filing fee.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Melnick, J.

We concur:



Maxa, C.J.



Sutton, J.

GLINSKI LAW FIRM PLLC

March 20, 2020 - 11:06 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
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