

65308-3

65308-3

NO. 65308-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ERIC COSTON,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

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**BRIEF OF RESPONDENT**

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DIVISION I

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**A. ISSUES PRESENTED**

1. Whether RCW 9.94A.537 should not affect the admissibility of Coston's letters to Burdick because the statute does not establish any new rule of evidence.

2. Whether Coston waived his objection to the letters under ER 404(b). If not, whether Coston's letters to Burdick were admissible under ER 404(b) because they show Coston's intent to force Burdick into prostitution and fall under the *res gestae* exception.

3. Whether Coston has failed to present any relevant argument supporting his claim that the trial court erred in denying his motion for a mistrial.

4. Whether the trial court properly entered a judgment of guilty on the charge of assault in the second degree-domestic violence without a jury finding the existence of a domestic relationship.

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant Eric Coston was charged by amended information with attempted promoting prostitution in the first degree,

assault in the second degree-domestic violence, and three counts of tampering with a witness. CP 6-8. The State further alleged the rapid recidivism aggravator on counts one and two, based on the fact that Coston committed the crimes a few days after his release from Clallam Bay Corrections Center. CP 6-8, 81.

Trial occurred in February and March 2010. The trial court granted Coston's motion to bifurcate the rapid recidivism aggravating circumstance. 2RP 2.<sup>1</sup> The jury found Coston guilty as charged. CP 38-39, 68-70. Coston waived his right to a jury trial on the aggravator and the court found that the State had proven rapid recidivism beyond a reasonable doubt. CP 81-82. The court imposed an exceptional sentence above the standard range. CP 71-80.

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<sup>1</sup> The verbatim report of proceedings will be referred to as follows: 1RP (2/24/2010); 2RP (2/25/2010); 3RP (3/3/2010); 4RP (3/4/2010); and 5RP (3/9/2010).

## 2. SUBSTANTIVE FACTS.<sup>2</sup>

Coston and Jordyn Burdick have known each other for approximately ten years. 3RP 3-4. Their relationship evolved into a dating relationship in early 2009.<sup>3</sup> 3RP 4. For the first half of the year, their relationship was long distance; the pair kept in touch through letters and occasional phone calls. Id. In those letters, Coston wrote about his plans for making money by having Burdick and other women strip and prostitute themselves. 3RP 7-18.

On June 23, 2009, Burdick used Coston's grandmother's car to pick him up and take him to his grandmother's house in Monroe. 3RP 20-21. From there, the couple headed to Kirkland, where they spent the night. 3RP 21-22.

On June 24, 2009, they relocated to the Black Angus motel in Seattle. 3RP 22. Coston was eager to get money and

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<sup>2</sup> Coston provided a partial verbatim report of proceedings, primarily consisting of motions and Jordyn Burdick's testimony. The transcripts of Officer Michael Lewis's and Jean Klum's testimony, which were never requested in the Statement of Arrangements, are unedited and very difficult to read. 4RP 85-132. Other testimony and arguments were not transcribed. Supp. CP \_\_ (Sub 87A, Clerk's Minutes). Although the partial verbatim report of proceedings is sufficient for responding to this appeal, it does not allow for a complete summary of the evidence presented to the jury. The Statement of Facts is based on Burdick's testimony.

<sup>3</sup> Coston was incarcerated at Clallam Bay Corrections Center until June 23, 2009. CP 81. Pursuant to the trial court's pretrial rulings, the jury was never informed of Coston's incarceration or the reasons why his relationship with Burdick was strictly long distance.

eventually told Burdick that he wanted her to be a prostitute.

3RP 24-26. Burdick, who was upset and angered by Coston's expectations, insisted that she did not want to prostitute herself.

3RP 26. Coston repeatedly told Burdick that he expected her to prostitute herself, becoming more persistent as time passed.

3RP 28. Coston told Burdick that she would have to walk the street near the motel and could not return until she had made \$700. 3RP 26-27. Regardless of whether she was having "sex, oral sex, or whatever," she was not supposed to accept less than \$200 for any sex act. 3RP 27.

Coston became frustrated with his lack of money and more upset with Burdick's repeated refusals. 3RP 29. On the evening of June 25, 2009, they got into a heated argument. 3RP 29-30. Coston suddenly punched Burdick on the side of the head, causing her to fall over and black out. 3RP 30-31. When Burdick came to, her eye hurt badly. 3RP 32. Coston was apologetic. 3RP 32.

After the assault, the pair went to Coston's grandmother's house for a few days. 3RP 33. Coston told Burdick to wear sunglasses until her eye looked better. 3RP 33. While there, Burdick did not have access to a phone. 3RP 41. She was able to

email her friend Shanna Roberts, though, who picked her up on Monday, June 29, 2009. 3RP 41-42.

When Roberts arrived, Burdick's eye was black and blue and she was still experiencing headaches and dizziness. 3RP 42-43. Roberts immediately took Burdick to a police station to file a report. 3RP 43.

The State charged Coston in October 2009 and he was subsequently arrested.<sup>4</sup> CP 1-5.

**C. ARGUMENT**

1. THE TRIAL COURT PROPERLY ADMITTED COSTON'S LETTERS TO BURDICK.

The trial court admitted several of Coston's letters to Burdick. Coston challenges the admission of these letters, claiming that handwritten letters have become so rare that a jury must conclude that they were sent from prison. As a result, he argues that the letters are inadmissible under RCW 9.94A.537 and ER 404(b). Coston cannot show that RCW 9.94A.537 governs the admissibility

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<sup>4</sup> The tampering with a witness charges were based on communications between Coston and witnesses while the case was pending. CP 6-8. The underlying facts are not summarized here because they are not germane to the issues on appeal and because the partial verbatim report of proceedings does not provide a sufficient basis for a thorough summary.

of evidence and has waived any objection under ER 404(b).

Therefore, his challenges fail.

a. Relevant Facts.

Burdick saved all of the letters that she received from Coston. 3RP 5. Several of the letters were offered into evidence as one exhibit. Ex. 8. The trial court redacted references to incarceration, and withheld the envelopes, which indicated that they were mailed from Clallam Bay Corrections Center.<sup>5</sup> Ex. 8.

In a letter dated March 12, 2009, Coston wrote about the possibility of one of Burdick's acquaintances "choosing up" with his "family." 3RP 7-8. According to Burdick, Coston referred to his close, trusted friends as his "family." 3RP 9. When he used the phrase "choosing up," Coston was writing about the woman picking him to be her pimp. 3RP 9. In that same letter, Coston instructed Burdick to send him photos of the woman in her "stripping outfit." 3RP 9.

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<sup>5</sup> The partial verbatim report of proceedings does not include the hearing in which the parties discussed potential redactions. The record does indicate that the State was willing to make redactions, with defense counsel's input, and that the court ultimately redacted the letters. 1RP 40; 5RP 1. Coston does not challenge the redactions or the content of the letters.

On March 26, 2009, Coston wrote about another woman who initially had talked about "hoeing" with him, but had "chosen up" with another guy. 3RP 12.

On April 5, 2009, Coston wrote, "You need to know that I'm a hundred and ten percent hustler so getting money by all means is a way of life for me. My understanding for hustling runs deep. Keep your loyalty unbreakable and I will always be here for you." 3RP 16-17. Based on Coston's other letters, Burdick believed "hustle" referred to prostitution and stripping. 3RP 16.

Finally, on April 6, 2009, Coston continued to write about "the hustle," saying, "this is one hustle that truly goes by the quote, "What you put in is what you will get out.'" 3RP 17-18. Coston also told Burdick about a woman who used "every ounce of hustling she could muster up" to earn over \$60,000 in one month. Coston said that he believed Burdick would outshine her with "proper directing and guidance." 3RP 18.

- b. RCW 9.94A.537(4) Is A Procedural Statute And Does Not Govern The Admission Of Evidence.

For the first time on appeal, Coston claims that "nobody writes letters anymore, except prison inmates," and that "a stack of

handwritten letters veritably screams 'prison!' to the jury."<sup>6</sup> App. Br. at 7. Without any authority to support this hyperbolic claim, he reasons that "there is a 100% likelihood that a reasonable person would conclude that [the letters] were written from prison." App. Br. at 14. He further argues that, because it is "inescapable" that the jurors would have concluded that Coston committed his crimes within one or two days of release, the letters were inadmissible under RCW 9.94A.537(4).

Coston appears to be arguing that RCW 9.94A.537(4) precludes the admission of *any* evidence from which a jury could *infer* recent recidivism. Coston offers no authority or argument to support such a broad interpretation of RCW 9.94A.537(4).

Contrary to Coston's argument, RCW 9.94A.537 is not an evidentiary statute. Rather, it is a procedural statute governing the adjudication of aggravating factors. It dictates in part that:

(4) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW

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<sup>6</sup> Although Coston objected to the letters at trial under RCW 9.94A.537, he never articulated his position that "nobody writes letters anymore," and that a jury would therefore conclude that the letters were written from prison.

9.94A.535(3) (e)(iv), (h)(i), (o), or (t).<sup>7</sup> If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

RCW 9.94A.537(4).

The legislature passed RCW 9.94A.537 in 2005, "to conform the sentencing reform act ... to comply with the ruling in Blakely v. Washington<sup>8</sup> ...." Laws of 2005, ch. 68, § 1. The statute was intended "to create a new criminal procedure" for imposing exceptional sentences. Id. It does not create new rules of evidence. Rather, once the trial court determines that an aggravating circumstance should be tried under a separate proceeding, the Rules of Evidence--along with the applicable statutes and jurisprudence--dictate what evidence is admissible at trial. ER 101.

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<sup>7</sup> The rapid recidivism aggravating circumstance is listed under RCW 9.94A.535(3)(t).

<sup>8</sup> 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

In this case, the trial court granted Coston's motion to bifurcate the rapid recidivism aggravating circumstance under RCW 9.94A.537(4). 2RP 2. After the jury convicted him of the underlying charges, Coston waived his right to a jury trial on the aggravating circumstance. CP 81. The trial court concluded that the State had proven rapid recidivism. CP 82.

In concluding that the aggravating circumstance had been proven beyond a reasonable doubt, the trial court relied upon two findings:

1. The defendant was released from incarceration on June 23, 2009 from Clallam Bay Corrections Center.
2. The defendant committed the offenses of Attempted Promoting Prostitution in the First Degree and Assault in the Second Degree between June 24, 2009 and June 26, 2009.

CP 81. Pursuant to the trial court's ruling bifurcating the aggravating circumstance, the jury was never informed that Coston had been incarcerated until June 23, 2009.

As described infra, the letters were admitted to show Coston's intent to force Burdick into prostitution and to show the existence of a dating relationship. They were not considered as facts supporting the aggravating circumstance. CP 81. Therefore, the letters do not implicate RCW 9.94A.537.

c. Coston Waived His Objection Under ER 404(b).

Coston also argues that the letters should have been excluded under ER 404(b). However, at trial, Coston did not object based on ER 404(b). He has therefore waived any objection.

Under RAP 2.5(a)(3), appellate courts may consider an issue raised for the first time on appeal only when it involves a “manifest error affecting a constitutional right.” To raise an issue not previously preserved, an appellant must show that (1) the error is manifest, and (2) the error is truly of constitutional dimensions. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Coston must first identify a constitutional error and then must show how the asserted error actually affected his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). An error is “manifest” where it had “practical and identifiable consequences in the trial of the case.” State v. Kirkpatrick, 160 Wn.2d 873, 880, 161 P.3d 990 (2007). Only after the court determines that the claim does in fact raise a manifest constitutional error does it move on to a harmless error analysis. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

An evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of constitutional magnitude. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Error may not be predicated upon a ruling that admits evidence unless a timely objection is made, stating the *specific ground* of the objection. ER 103(a). Courts will only consider appellate challenges to evidentiary issues if the evidentiary rule was argued at trial. See State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321, 328 (2009).

In addition to his objection based on RCW 9.94A.537(4), Coston objected to the letters under ER 401 and ER 402. CP 14. Coston also argued that the prejudice outweighed the probative value of the letters. CP 14; 1RP 36. This objection simply invokes ER 403.<sup>9</sup> Coston never cited ER 404(b) in written or oral argument.

Coston did not preserve his argument by lodging a specific objection at trial. See ER 103(a); State v. Korum, 157 Wn.2d 614, 648, 141 P.3d 13 (2006). Indeed, an objection based on the argument that evidence is prejudicial does not preserve appellate

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<sup>9</sup> “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

review based on ER 404(b). State v. Fredrick, 45 Wn. App. 916, 922, 729 P.2d 56 (1986). Because the allegedly erroneous admission of ER 404(b) evidence is not of constitutional magnitude, Coston cannot raise the objection for the first time on appeal. Everybodytalksabout, 145 Wn.2d at 468-69.

d. The Letters Were Not Prohibited Under ER 404(b).

But even if Coston had objected at trial, the letters were properly admitted. Under ER 404(b), evidence of other misconduct is not admissible to show a defendant's propensity for criminal behavior. However, crimes or misconduct may be admitted for other reasons, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). In addition to this non-exhaustive list of exceptions identified in the rule itself, courts have recognized a *res gestae* or "same transaction" exception to the rule. Under this exception, evidence of other crimes or misconduct is admissible to complete the story of the crime. See State v. Brown, 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997).

Here, the letters were not offered to prove Coston's character, or even to show that he was incarcerated. Rather, the letters show that Coston began preparing, or grooming, Burdick for prostitution long before June 24, 2009. The letters also demonstrate an ongoing domestic relationship between Coston and Burdick.

A person commits the crime of promoting prostitution in the first degree when he knowingly advances prostitution by compelling a person by threat or force to engage in prostitution. RCW 9A.88.070(1). In order to prove Coston guilty of attempted promoting prostitution in the first degree, the State had to show that he took a substantial step toward the commission of the crime and that the act was done with the intent to commit the crime. CP 55.

Without the letters, the jury would know only that the day after Burdick picked up Coston, he demanded that she prostitute herself and assaulted her after she refused. Coston's demands would have seemed abrupt and out of the blue, and a jury would have had a more difficult time determining whether Coston was actually trying to force Burdick into prostitution when he assaulted her. The letters helped the jury to understand Coston's intent by

showing that he had spent months psychologically grooming Burdick for prostitution.

In admitting the letters, the trial court found that any prejudice was outweighed by the high probative value.<sup>10</sup> 2RP 3. The trial court determined that the letters were relevant to show Coston's intent. 2RP 3. The letters also qualified as *res gestae* evidence because they provided the jury with a more complete picture of events surrounding the crimes committed against Burdick. See Brown, 132 Wn.2d at 573.

The letters consist entirely of statements made by Coston. The statements are relevant to the underlying charges. Any prejudice caused by the appearance of the letters is certainly outweighed by the probative value of the statements themselves.

**2. COSTON OFFERS NO RELEVANT ARGUMENT TO SUPPORT HIS CLAIM THAT THE TRIAL COURT ERRED WHEN IT DENIED HIS MOTION FOR A MISTRIAL.**

Coston contends that the trial court abused its discretion when it denied his motion for a mistrial during Burdick's testimony.

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<sup>10</sup> The trial court did not have the opportunity to consider whether jurors would automatically assume that handwritten letters were from prison because Coston never articulated this argument at trial.

However, on appeal, Coston argues that the trial court should have granted a mistrial based on grounds that were never presented during trial. Therefore, Coston's claim must fail.

Approximately halfway through Burdick's direct testimony, the prosecutor asked Burdick several questions about why Coston was so insistent that she earn money:

Q: Why did you need money right then?

A: Just because we didn't have any. He wanted to get a car so we had a way to get around.

Q: So, this conversation that you're having, it's not something that all just [sic] one little conversation over a short time?

A: No.

Q: How long was this topic of conversation going on?

A: It went on throughout that day and that night and then continued to the next day.

Q: So, then all day long on the 25<sup>th</sup> as well?

A: On and off, yes.

Q: Now, you had spoken earlier about it being kind of joking initially and then escalated, how did that happen?

A: It wasn't joking, it just--he wasn't--he wasn't like super persistent about it. But, the next day he--we didn't have any money at all. And we were trying to find rides around to get where he needed to go, like his probation office and stuff. And he was getting

frustrated because we didn't have a car to get to places that we needed to go.

3RP 28. The court briefly recessed towards the end of Burdick's direct examination. 3RP 48. During the recess, the court explained its ruling on a defense objection, and then addressed Burdick's reference to Coston's probation office. 3RP 48. The court noted that there was no objection and speculated that defense counsel probably did not want to draw attention to the testimony. 3RP 48. Counsel responded, "Correct, Your Honor, I didn't want to interrupt Ms. Miyamasu. But since the jury is not here, Your Honor, I think that statement is grounds for a mistrial and I move for a mistrial as it was disclosed to the jury that my client is on probation." 3RP 48.

The court denied the motion for a mistrial, finding that the statement was clearly inadvertent and that it was not stressed to the jury in any way. 3RP 49. The court also found that the statement was not so prejudicial that it interfered with Coston's right to a fair trial. 3RP 48.

On appeal, Coston does not argue that the trial court should have granted a mistrial based on Burdick's passing reference to a probation office. Rather, Coston reasons that based on the letters and Burdick's testimony about her relationship with Coston, jurors

must have known that Coston was recently incarcerated. He argues that "denial of a mistrial under these circumstances was manifestly unjust and an abuse of discretion." App. Br. at 14.

Coston offers no argument to suggest that the trial court abused its discretion when it denied the motion for a mistrial based on Burdick's inadvertent reference to Coston's probation office.<sup>11</sup> This Court should not consider an assignment of error not supported by argument. Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005).

3. THE TRIAL COURT PROPERLY ENTERED A JUDGMENT OF GUILTY ON ASSAULT IN THE SECOND DEGREE-DOMESTIC VIOLENCE.

Finally, Coston argues that the trial court erred when it entered a judgment of guilty on the charge of assault in the second degree-domestic violence, because the jury did not find the existence of a domestic relationship between Coston and Burdick.<sup>12</sup>

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<sup>11</sup> Coston does not appear to be arguing that the trial court should have granted a mistrial sua sponte on other grounds.

<sup>12</sup> The record does not include the party's objections to the instructions, the court's rulings on those objections, or any objections to the judgment and sentence. It is not clear whether Coston objected to the lack of a definitional instruction or special verdict form. It also is not clear whether Coston objected to the trial court making the domestic violence finding.

Without identifying any prejudice, Coston argues that the remedy for this alleged error is vacation of the judgment and remand for a new trial. Because a domestic violence designation is not an element of the underlying crime, Coston's argument fails.

Relying upon RCW 10.99.020, Coston claims that whenever domestic violence is alleged, the State must prove the existence of a domestic relationship as an element of the crime. Coston's reliance on RCW 10.99.020 is misplaced. RCW 10.99.020 does not require the State to prove the domestic violence relationship as an element of the crime. Rather, it simply defines the terms used in the domestic violence chapter.

Contrary to Coston's claim, a domestic violence designation does not alter the elements of the underlying offense. State v. O.P., 103 Wn. App. 889, 892, 13 P.3d 1111 (2000). Likewise, the designation does not need to be proven to a jury under Blakely. State v. Winston, 135 Wn. App. 400, 406-10, 144 P.3d 363 (2006).

Because the domestic violence designation is not an element, the jury need not be informed of the designation. State v.

Hagler, 150 Wn. App. 196, 202, 208 P.3d 32, review denied, 167 Wn.2d 1007 (2009). In fact, it is generally best not to inform the jury of the designation, so as to avoid any potential prejudice. Id. Therefore, it is proper for a court to enter a domestic violence finding after a jury trial. See Winston, at 405-10.

Coston argues that this situation is analogous to that in State v. Edwards, 3 Wn. App. 638, 477 P.2d 28 (1970). Edwards is inapposite. In Edwards, the trial court failed to enter findings of fact and conclusions of law following a bench trial, as required by court rules. Id. In a per curiam decision, Division Three vacated the judgment and remanded for entry of findings of fact and conclusions of law. Id. at 639. Coston offers no argument to support his contention that Edwards is analogous, particularly in light of Hagler, Winston, and O.P.

Because a domestic violence designation is not an element of the crime, the trial court properly entered the finding of guilt following the jury's verdict.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Coston's convictions.

DATED this 18 day of March, 2011.

Respectfully submitted,

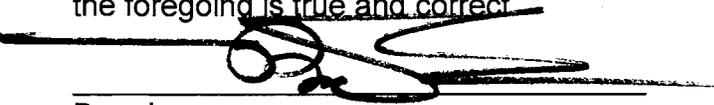
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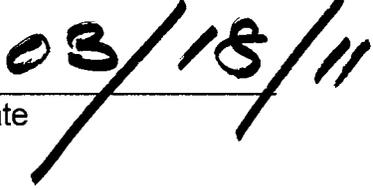
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lee Rousso, the attorney for the appellant, at The Law Office of Lee H. Rousso, 800 Fifth Avenue, Suite 4100, Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. ERIC COSTON, Cause No. 65308-3-I, in the Court of Appeals, Division I, for the State of Washington.

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

  
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Bora Ly  
Done in Seattle, Washington

  
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Date