

66163-9

66163-9

NO. 66163-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

A.K.
(D.O.B. 3/3/1993),

Appellant.

2011 APR 27 PM 4:03
FILED
CLERK OF COURT

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. The court untenably relied on an impermissibly suggestive show-up identification as the central evidence against A.K.

2. The court erred by entering Finding of Fact 12 in denying the motion to suppress the tainted identification procedure. CP 12.¹

3. The court erred by entering Finding of Fact 15 in denying the motion to suppress the tainted identification procedure. CP 12.

4. The court misstated the evidence in Findings of Fact 3 and 4 regarding the description of the perpetrator. CP 11-12.

5. The court erroneously concluded the show-up identification and in-court identification were admissible at trial, in violation of A.K.'s right to due process of law and without substantial evidence.

6. To the extent Conclusions of Law 4, 5, 6, and 7 are considered findings of fact relating to the circumstances of the identification, they are not supported by substantial evidence. CP 13.

¹ The findings of fact and conclusions of law from the CrR 3.6 hearing are attached as Appendix A.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

When police officers use impermissibly suggestive tactics to obtain a positive identification of a suspect, the subsequent identification carries a great risk of being inaccurate and should not be admitted at trial. The State's case against A.K. rested on an identification obtained after police officers told the complainant that they had arrested the suspect and this person was likely to have been involved in the crime based on evidence seized from him. When a show-up identification was tainted by improper police tactics and the complainant had little opportunity to view the suspect during the crime, should the court have suppressed the out-of-court identification?

C. STATEMENT OF THE CASE.

As they entered their home one evening, Amanda Schmidt and Lance Stevens heard a noise. RP 68, 101-02.² They saw a person running away. RP 68, 104, 107. Schmidt had a better view of the person fleeing, but did not see his face. RP 73, 107. They called the police and realized that someone had been inside their home. RP 70.

² The verbatim report of proceedings (RP) is contained in a single volume of consecutively paginated transcripts.

About 20 minutes later, police officers contacted Schmidt. 109-110, 117. They told her they had a suspect who matched her description. RP 109. They said that the suspect was with another person who had property in his pocket that they thought may have come from her home. RP 109-110. They described a medallion found in the second person's pocket which looked like an award for a teacher. RP 116. Schmidt immediately recognized this medallion as an award she recently received and kept in her home. RP 110, 117.

Next, a police officer drove Schmidt about five minutes away and stopped the car. RP 110. Other officers stood next to the suspect and held his arms while illuminating him with lights from the police car. RP 113. Schmidt asked the police to have the suspect turn around, so she could see his back. RP 113. She identified this person, A.K., as the person she saw in her house. RP 115. The police did not ask her to look at the second suspect who had the property in his pocket and did not ask her husband to view any potential perpetrators. RP 72, 113-14.

Schmidt felt certain the suspect was the same person she saw run from her home. She described the person as wearing a teal colored basketball jersey and A.K. wore a shirt that looked the

same, although it was described to police as royal blue. RP 57, 115. She thought the numbers on the jersey were 1 and 2, and A.K.'s jersey had the numbers 1 and 5. RP 137. A.K. was also the same build. RP 115. His hair was shorter than the hair she described, and the second suspect had hair more like that which Schmidt described. RP 135, 162.

After a juvenile bench trial, the court concluded that the show-up identification was impermissibly suggestive. CP 13 (Conclusion of Law 4). But it concluded that the identification procedure was nonetheless reliable and, based on the identification, the State had proven A.K. was the person who entered Schmidt's home. RP 138, 162, 165. The court adjudicated A.K. guilty of one count of residential burglary. RP 165.

D. ARGUMENT.

THE COURT ERRED BY FAILING TO SUPPRESS
THE IMPERMISSIBLY SUGGESTIVE AND
UNRELIABLE IDENTIFICATION PROCEDURE

1. The show-up identification procedure must be suppressed when there is a substantial likelihood of misidentification. Courts have long recognized that eyewitness identifications are often unreliable. United States v. Wade, 388

U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). As the Wade Court stated, "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." Id. at 228.

Suggestive procedures are disapproved of because they increase the likelihood of misidentification. Id.; Neil v. Biggers, 409 U.S. 188, 199, 193 S.Ct. 357, 34 L.Ed.2d 401 (1975). A witness's recollection of a total stranger, viewed under circumstances of emergency or emotional distress, can be easily distorted by the circumstances or by the actions of the police. Mason v. Brathwaite, 432 U.S. 98, 112, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). "[T]he dangers for the suspect are particularly grave when the witness's opportunity for observation was insubstantial and thus his susceptibility to suggestion is the greatest." Wade, 388 U.S. at 229.

Current empirical evidence casts new light upon the Supreme Court's stated concern about misidentification in Wade, Biggers, and Brathwaite. "Indeed, studies conducted by psychologists and legal researchers since Brathwaite have confirmed that eyewitness testimony is often hopelessly unreliable." Comm. v. Johnson, 650 N.E.2d 1257, 1262 (Mass. 1995).

“Eyewitness misidentification is the leading cause of wrongful convictions, a factor in 75 percent of post-conviction DNA exoneration cases.” Jason Cantone, *Do You Hear What I Hear?: Empirical Research on Earwitness Testimony*, 17 TxWLR 123, 129 (Winter 2011); see Veronica Valdivieso, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 Geo. L.J. 1009, 118 n.83 (2002) (“Eyewitness testimony, for example, is widely accepted in the courtroom, yet it has been demonstrated to be ‘notoriously unreliable--in some circumstances more often wrong than right.’” (citation omitted)).

Pretrial identification procedures violate due process when an impermissibly suggestive encounter creates an irreparable probability of misidentification. State v. Ramirez, 109 Wn.App. 749, 761, 37 P.3d 343, rev. denied, 146 Wn.2d 1022 (2002); see Brathwaite, 432 U.S. at 114; Biggers, 409 U.S. at 199.

A show-up process is inherently suggestive because the eyewitness views only one individual “and, generally, that person is in police custody,” as the New Jersey Supreme Court explained in State v. Herrera, 902 A.2d 177, 183 (N.J. 2006); see also Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* 27-40

(Charles C. Thomas 1965) (explaining that courts and experts are in agreement that show-ups are “grossly suggestive”).

The U.S. Department of Justice (DOJ) has recognized the inherent suggestiveness of a show-up. U.S. Dept. of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* at 27 (1999) (instructing law enforcement to employ procedures that avoid prejudicing the witness). Among other procedural safeguards, DOJ instructs law enforcement that when multiple witnesses are involved and a positive identification is obtained from one witness, other identification procedures (e.g., lineup, photo array) should be considered for remaining witnesses. *Id.*

Show-ups are inferior to lineups because of the increased chances for mistaken identification. Note, *No Exigency, No Consent, Protecting Innocent Suspects from the Consequences of Non-exigent Show-Ups*, 36 Colum. Human Rights L. Rev. 755, 759 (2005) (citing Gary L. Wells, *Police Lineups: Data, Theory, and Policy*, 7 Psychol. Pub. Pol'y & L. 791 (2001) (discussing current eyewitness identification research and the ways in which research can impact practice); R.C.L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Show-ups: Eyewitness Identification Decisions of Adults and Children*, Law & Hum. Behav. 391, 393-

402 (1997) (finding that the show-up is a “dangerous procedure” that increased rates of false identifications). The increased chances for mistaken identification are due to a lack of procedural safeguards in the show-up process:

Show-up misidentifications are likely more prevalent than misidentifications made pursuant to lineups or photographic arrays because many safeguards that exist with other methods of identification, such as lineups and photographic arrays, do not exist for show-ups. *The most important safeguard that exists with lineups and photographic arrays, but that does not exist for show-ups, is the presentation of more than one person from whom to choose.*

Amy Luria, *Show-up Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes*, 86 Neb. L. Rev. 515, 551 (2008) (internal citations omitted) (emphasis added).

In Brathwaite, the United States Supreme Court held that due process permits the admission of confrontation evidence such as a show-up identification if, “despite the suggestive aspect, the out-of-court identification possesses certain features of reliability.” Brathwaite, 432 U.S. at 110. Thus, a court must examine the totality of the circumstances such that “if the challenged identification is reliable [regardless of whether the procedures used were unnecessarily suggestive], then testimony as to it and any identification in its wake is admissible.” Id. at 110 n.10. The

Brathwaite test is twofold: first, a court must determine whether the identification procedure was unnecessarily suggestive. If so, the court must then determine whether, despite the use of unnecessarily suggestive procedures, the identification was nevertheless reliable. To determine reliability the Brathwaite Court set out the following factors:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [the witness's] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Id. at 114; State v. Linares, 98 Wn.App. 397, 401, 989 P.2d 591 (1999) (adopting same test).

2. The show-up was impermissibly suggestive. The trial court found the procedure the police used to obtain an identification of A.K. as the perpetrator was "somewhat suggestive" but not impermissibly suggestive. RP 137-38. Its written conclusions of law state that the show-up was "impermissibly suggestive." CP 13 (Conclusion of Law 4). In reaching this decision, the court focused on the mechanism of the show-up and how the police illuminated A.K., without giving necessary weight to the suggestive

circumstances of the identification procedures employed by the police. In its written findings of fact, it ignored the suggestive process created by the police. CP 12-14.

A court abuses its discretion when its decision is based on a misapprehension of the law or an untenable view of the facts.

State v. Quismondo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

The court's failure to consider and weigh the circumstances of the show-up constitute an abuse of discretion undermining its determination that the identification was admissible against A.K.

a. Before the show-up, the police told the complainant that they had a suspect who matched the description and this suspect had evidence showing his involvement in the crime. Eyewitnesses are influenced by conduct of the police both before and after the identification procedure, and the eyewitness is likely unaware of the effect of these influences. Curt R. Bartol & Anne M. Bartol, Psychology and Law: Theory, Research and Applications, 229 (3d ed. 2004) (police officers do not recognize that a person's memory can be contaminated by "careless interviewing and misleading commentary"); see also Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing*

Experience, 83 J. Applied Psychol. 360, 374 (1998) (“[A] casual comment from a lineup administrator following eyewitnesses' identification can have dramatic effects on their reconstructions of the witnessing and identification experience.”).

Complainant Schmidt testified that before the police drove her to the location of the show-up identification, the police told her “we have a suspect” and “we think he meets the description that you gave.” RP 109. The police also told her, before the show-up, that the suspect was with another person who had distinctive property in his pocket that they suspected came from her house. RP 109-10, 129. She recalled hearing this information while standing on the street next to her house. RP 109.

Before the show-up, the police officer “described the property” found on the second suspect and, “I knew it was mine.” RP 110. This property was a medallion she had recently won as a teaching award and it had been kept in her house. RP 116-17. Schmidt clearly recalled that she learned this information from the police before the show-up. RP 109-110, 125, 129. The prosecution pressed her on whether the police may have given her this information after the show-up, rather than before, but the complainant remained “pretty certain” that the police told her they

thought they had the person who matched her description and who was found with another person in possession of her property prior to the show-up. RP 130.

The police officer's comments to Schmidt before she viewed the show-up undoubtedly affected how she perceived the show-up. It also bolstered her confidence and shaped her memory of the event. Richard A. Wise, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 Conn. Law Rev. 435, 458-59 (2009) (explaining increase in eyewitness's confidence of identification, particularly after police confirm correct person identified). However, this confidence does not increase accuracy. Id. Here, the officers told Schmidt before the show-up that they has the person who matched her description and was caught with incriminating goods, thereby encouraging her to identify A.K., helping to create a memory that A.K. is the perpetrator, and informing her that the police were showing her someone who was proven to be the perpetrator. The court's written findings do not even mention these suggestive practices, notwithstanding the court's conclusion that the procedure was impermissibility suggestive. CP 12-13.

b. There was a second suspect but the police did not ask the complainant to view this person; and the police did not ask the second eyewitness to view any suspects. During the show-up, police officers stood next to the suspect and held him by his arms. RP 137-38. He was handcuffed before the show-up. RP 60. They illuminated A.K. with a spotlight. Id. The trial court found there was “some likelihood of misidentification” based on these procedures. RP 138.

The police did not ask the complainant to view the second suspect, even though they found her property in his pocket and his physical appearance was similar to how she described the perpetrator. RP 109, 137, 162. The court agreed that the second suspect had hair “more consistent with the original description from Ms. Schmidt” than A.K.’s hair. RP 162. The officers’ failure to ask the complainant to view the second suspect must weigh against the accuracy and reliability of the complainant’s identification. In fact, it demonstrates police efforts to prevent the complainant from equivocating or feeling less than assured about her identification.

c. The court did not consider the State's failure to call witnesses who could have explained the suggestiveness of the show-up procedures. The missing witness inference arises in cases where the evidence is "within the control of the party whose interest it would naturally be to produce it, and without satisfactory explanation, he fails to do so." State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968). Where independent evidence exists explaining the constitutionality of police action, "it must either be presented or the State must explain on the record why the evidence is not being presented." State v. Haack, 88 Wn.App. 423, 433, 958 P.2d 1001 (1997).

The prosecution called no police witnesses to testify about who said what to Schmidt before and after the show-up. Instead, the prosecution had four police officers testify about the circumstances of stopping and detaining A.K. while he waited for the show-up. These officers did not go to the scene of the break-in. RP 28-29, 43, 82, 92-93. The officers presented in-car video, showing A.K.'s detention. RP 31, 52, 83, 95. Yet the prosecution did not offer in-car video showing the identification procedure or police testimony about the circumstances of the show-up, including anyone who could explain what they told Schmidt before and after

the show-up. The State did not explain why it was not calling the witnesses who could speak to what was conveyed to Schmidt at the time of the identification procedure.

Where a witness is under the control of the party presenting evidence and is not called and no explanation is given for that failure, the trier of fact may entertain an inference that the testimony of the missing witness would have been adverse. Haack, 88 Wn.App. at 433-34. In a bench trial, the judge is presumed to properly apply the law concerning the admissibility of evidence and to rely only on evidence that is properly before the court. State v. Wolfer, 39 Wn.App. 287, 291-92, 693 P.2d 154 (1984), rev'd on other grounds, State v. Heritage, 152 Wn.2d 210, 95 P.3d 345 (2004). The court did not apply the missing witness doctrine or ask the State to explain why it did not offer testimony of officers who could explain the identification procedures employed. Even without a request from A.K., the trial court should have weighed the officers' testimony and assessed the suggestiveness of the identification by applying the missing witness doctrine. The State's failure to call necessary witnesses should be presumed to favor the suggestive nature of their actions influencing the identification of A.K. as the perpetrator.

3. The court erred by finding that despite the show-up's suggestiveness, the identification was admissible at trial**Error!**
Bookmark not defined.

The court's treatment of the improper tactics employed by the police in its written findings of fact demonstrate the untenable nature of the court's refusal to find the show-up was tainted by police suggestion. Finding of Fact 12 summarily states that Schmidt and Stevens learned about the officers' belief they had the suspect when they "overheard police confirm that two suspects had been detained." CP 12. Yet no one testified about overhearing anything the officers said. Schmidt's testimony was unequivocal: she recalled an officer asking her to go with him "to identify the suspect because we were told they had found him." RP 108. She remembered standing on the street corner below her porch when the officer told her this information. RP 108. No one testified that Schmidt inadvertently overheard this information, as the finding of fact states. CP 12.

The court's findings of fact also claim Schmidt "could not recall whether she was asked about the coin before or after the show-up identification." CP 12 (Finding of Fact 15). This finding is similarly nonsensical. Schmidt testified that before she went to the

show-up, an officer told her they found a distinctive medallion in the pocket of a suspect and Schmidt “immediately” knew it was an award she had recently received. RP 110. The prosecutor asked, “And this is before you go to the showup?” RP 110. Schmidt responded, “Yes.” RP 110. Schmidt never said she could not recall when she received this information. The court’s findings also state that Schmidt described the perpetrator as wearing a Denver Nuggets jersey, but Schmidt never claimed to know the identity of the team whose the jersey the perpetrator wore, she only described its colors. CP 11-12 (Findings of Fact 3 and 4). The court’s written findings are not supported by the evidence presented to the court.

Once the court finds the identification procedure was impermissibly suggestive, there is a presumption that it is inadmissible. Linares, 98 Wn.App. at 401 (discussing Brathwaite, 432 U.S. at 114). Here, after determining the procedures used in the identification were unnecessarily suggestive, the court permitted the prosecution to introduce, and rely upon, this out-of-court identification on the grounds it was reliable. CP 13, RP 138.

However, the factors used in measuring reliability do not permit the introduction of the identification in the case at bar. See Linares, 98 Wn.App. at 401. Schmidt had a very limited

opportunity to view the perpetrator, who was a stranger to her. RP 103-04. She only saw his back and the entire encounter was over very quickly, in a matter of 10 to 15 seconds. RP 104.

The likelihood of misidentification is substantial. The police had told her before the show-up that they thought he was the perpetrator and he was with someone who had distinctive property from her house. RP 108-10. She did not get a chance to look at the second person at the show-up. RP 110.

A.K. did not have the gloves in his possession that she noticed on the hands of the perpetrator, or any other corroborating evidence beyond his physical appearance. RP 96-97, 104. As the court recognized, the second suspect matched the physical description of the perpetrator, other than his clothes, more closely than A.K. RP 162. The court erred by concluding the identification was reliable in the face of the numerous factors weighing against such a finding, and the presumptive inadmissibility of the identification. Linares, 98 Wn.App. at 401. Therefore, the suggestive identification should have been suppressed. See Brathwaite, 32 U.S. at 114; State v. Hillard, 89 Wn.2d 430, 439, 573 P.2d 22 (1977).

4. In light of the critical role of the identification, reversal is required. Without the identification, A.K. would not have been convicted. There was no other evidence that he was the perpetrator. RP 164-65. The use of impermissibly suggestive identification procedures to obtain evidence against A.K. led to his conviction and should not be countenanced. The violation of A.K.'s due process right to a fair trial requires reversal of his adjudication. Linares, 98 Wn.App. at 401.

E. CONCLUSION.

For the reasons stated above, A.K. respectfully asks this Court to reverse his adjudication for residential burglary.

DATED this 28th day of April 2011.

Respectfully submitted,



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APPENDIX A

FILED
KING COUNTY, WASHINGTON

DEC 03 2010

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DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON,

Plaintiff,

vs.

ABDIKADIR KHALIF
DOB: 03/03/93

Respondent.

No. 10-8-01804-4 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL
EVIDENCE

A hearing on the admissibility of physical evidence was held on September 9, 2010 before the Honorable Timothy Bradshaw. After considering the evidence submitted by the parties, including the testimony of Seattle Police Department Officers Sabay, Renner, and Sperry, in-car videos, and hearing argument, the Court makes the following findings of fact and conclusions of law as required by CrR 3.6:

A. FINDINGS OF FACT

1. On May 17, 2010 at approximately 9:50pm, Lance Stevens, Amanda Schmidt, and their 10 month-old baby arrived at their home, which is located at 6702 40th Ave SW in Seattle, Washington. They immediately heard noises coming from upstairs and the roof top.
2. Schmidt immediately turned around and went outside to the front porch. Lance grabbed the phone and called 911 while also heading towards the porch.
3. While standing on the porch, Schmidt observed a black male wearing a blue Denver Nuggets basketball jersey jump from her roof onto her front lawn and flee on foot. She did not see the front of his face.

ORIGINAL

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58

- 1 4. At approximately 9:55pm, Seattle Police Officers Sabay, Renner, and Sperry were
2 dispatched to the reported residential burglary. The suspect was described as a thin
3 black male wearing a Carmello Anthony Denver Nuggets basketball jersey and blue
4 jeans.
- 5 5. A couple of minutes later, Officer Sabay observed two black males walking together on
6 the corner of 35th and SW Graham St, which is a few blocks from the burglarized home.
7 One of the males was wearing a Denver Nuggets basketball jersey and blue jeans.
- 8 6. Officer Sabay contacted and detained the two males. Officer Sabay's in-car video was
9 activated at the time.
- 10 7. The male matching the description was identified as the respondent.
- 11 8. Within minutes, Officer Renner, Levens, and Sperry arrived as back up. Their in-car
12 videos were activated at the time.
- 13 9. Officer Sperry searched the second male and found a distinct coin in his pant pocket.
- 14 10. The respondent was placed in the back of Officer Renner's patrol car. Officer Renner
15 advised the respondent of his Miranda rights.
- 16 11. While officers detained the two suspects, other officers went to Schmidts and Stevens'
17 home to interview them.
- 18 12. While officers were at their home, Schmidt and Stevens overheard police confirm that
19 two suspects had been detained.
- 20 13. About 20 minutes after the respondent was detained, Schmidt was brought to the corner
21 of 35th and SW Graham St for a show-up identification.
- 22 14. Schmidt positively identified the respondent as the one who she saw jumping off her
23 rooftop.
15. While Schmidt recalled being asked about a coin that was retrieved from the other
suspect, she could not recall whether she was asked about the coin before or after the
show-up identification.
16. The Court finds Schmidt's testimony credible.

21 B. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE
22 SOUGHT TO BE SUPPRESSED

- 23 1. The respondent's motion to suppress the in-car videos is denied in part and
granted in part. Exhibits 1a and 1b are admissible. Exhibit 1c is suppressed.
However, any derivative or independently derived information that can be

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66163-9-I
v.)	
)	
A.K. (D.O.B. 3/3/1993),)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 27th DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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Seattle, WA 98126	()	_____

SIGNED IN SEATTLE, WASHINGTON THIS 27th DAY OF MARCH, 2011.

x _____ *JA*

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