

ORIGINAL

original

No. 35605-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

cmh

STATE OF WASHINGTON,

Respondent,

v.

JEAN L. ROBBINS,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer, II Judge
Cause No. 05-1-00333-2

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES

1. ROBBINS COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BY ARGUING FOR CONVICTION ON THE LESSER OFFENSE OF ASSAULT OF A CHILD IN THE THIRD DEGREE WHERE THERE WAS SUBSTANTIAL EVIDENCE OF ROBBINS' GUILT AS TO THE LESSER OFFENSE AND A SUBSTANTIAL RISK OF GREATER PENALTY WITH RESPECT TO THE GREATER OFFENSE OF ASSAULT OF A CHILD IN THE SECOND DEGREE.
2. THERE IS SUFFICIENT EVIDENCE TO CONVICT ROBBINS OF ASSAULT OF A CHILD IN THE THIRD DEGREE WHERE TWO DOCTORS AGREED THAT THE VICTIM SUSTAINED PERMANENT SCARRING ON HIS PENIS AS A RESULT OF AN UNPROFESSIONAL, "BOTCHED" CIRCUMCISION BY A LAY PERSON LACKING THE PROPER MEDICAL OR RELIGIOUS TRAINING TO CONDUCT THE SURGICAL PROCEDURE.
3. THE COURT PROPERLY EXCLUDED EVIDENCE OF CONSENT, PARENTAL RIGHT, OR RELIGIOUS MOTIVE FOR THE UNPROFESSIONAL CIRCUMCISION GIVEN THAT NEITHER CONSENT, PARENTAL RIGHT, OR RELIGIOUS MOTIVE ARE VALID DEFENSES TO CRIMINAL LIABILITY FOR ASSAULT.

A. STATEMENT OF THE CASE

1. & 2. PROCEDURAL FACTS AND SENTENCING.

Pursuant to RAP 10.3(b), the State accepts Robbins' recitation of the procedural history of the case.

3. SUBSTANTIVE FACTS

On or about the last week of December 2003, Joseph J. Curry, performed an at-home circumcision on seven-year-old J.R., in the bathroom of Curry's home in Tahuya, Washington. CP 164; 2RP 277-278. The circumcision was done with the permission of J.R.'s biological mother, Robbins, who assisted Curry by sterilizing the instruments, laying out sterile towels, and peeking in and out of the bathroom to help if needed while the circumcision was being done. CP 166, State's Exhibit 7. Although Curry had some training in the military as a medic, he had no medical or religious training to perform a circumcision. State's Exhibit 7, Excerpt 11. At the time of the circumcision, Curry, Robbins, J.R. and his older brother lived with Curry at the Tahuya address. 2 RP 279.

Detective Luther Pittman of the Mason County Sheriff's Office interviewed J.R., whose date of birth is October 7, 1996, on June 3, 2005. CP 164, 2RP 290. J.R. told Detective Pittman that Curry circumcised him in the bathroom of Curry's residence in Tahuya, and that his mother (Robbins) told him that it was okay. CP 164, 2RP 277. Curry used "[a] model knife and some scissors" to perform the circumcision. 2RP 278. J.R. had seen the model knife before because he had seen Curry use it to work on models at the house. 2RP 278. Robbins was present and knew what Curry was doing. 2RP 278, State's Exhibit 7. J.R. told Detective

Pittman that he didn't want to have the circumcision done to him, but Curry circumcised him anyway. CP 164.

Detective Pittman then interviewed Curry and in a post-Miranda statement, Curry admitted to circumcising J.R. in the bathroom of his residence in Tahuya, Washington. CP 164-165. Curry said that Robbins was present and made sure that everything was clean when the circumcision took place. CP 164. Curry and Robbins maintained that they had purchased a "scalpel-type set" and sterilized the utensils by washing them in disinfectant and then boiling them. State's Exhibit 7, Excerpt 14.

Robbins and Curry took J.R. to see his doctor, Dr. Brad Andersen, J.R.'s family physician, on March 6, 2003, when J.R. was seven years old. 2 RP at 222, 226. During the course of J.R.'s well-child examination, they asked Dr. Andersen about a possible circumcision for J.R. 2 RP 222. Dr. Andersen explained

[A]s I do with every inquiry about circumcision, that it is a cosmetic procedure, that at this point there is no real medical necessities (sic) for it. And as I documented in the note, explained the possible side effects of the circumcision, inquired whether they would still like to be referred for that, which would have to go to a urologist. And they said yes, and so I went ahead and submitted the referral to Dr. Owen Davies, a urologist that was practicing locally in Bremerton.

2 RP 222.

Dr. Andersen testified that he further explained to Curry and Robbins that there is no medical necessity for circumcision and that appropriate hygiene generally removes any medical need for circumcision. 2RP 224. He also explained different techniques that are used with circumcisions and that those become more complicated the older the child becomes. 2 RP 225. If, after this explanation, the parents still want to go through with the circumcision, they are referred to a urologist for a surgical procedure, either with local anesthesia or with general anesthesia. 2RP 225.

Dr. Andersen testified that the urologist, Dr. Davies, recommended deferring the circumcision until a later time, but if they (Robbins and Curry) wanted to go ahead with a circumcision, Dr. Davies would perform the procedure. 2RP 227.

Dr. Andersen saw J.R. again on May 24, 2005, after J.R.'s uncle took him to the doctor's office after learning that J.R. had been circumcised at home. The uncle wanted an evaluation of J.R.'s penis to see if there was any damage and if, in fact, a circumcision had taken place. 2RP 228.

Dr. Andersen found "scarring noted and [that] it was consistent with a (sic) amateur circumcision done outside of a medical office . . ." 2RP 228. He observed "over-removal of foreskin" and an "overaggressive

circumcision”. 2RP 229. He characterized the scarring as significant. 2RP 247.

“[I]f you are too aggressive on your circumcision, you can actually start to cut into the tissue on the shaft of the penis and the risk is scarring as a body tries to reconnect with those parts of the tissues, and that’s what I saw with [J.R.]” 2RP 229.

Dr. Andersen testified that J.R.’s injuries indicated that the circumcision was too low, “essentially de-gloving the penis”, and the scar tissue reflected the body’s attempts to heal itself. 2RP 231. Dr. Andersen also testified that by circumcising below the foreskin, “you’re on to the shaft of the penis and you’re essentially separating, you know, an area that needs to be kept intact during an erection.” 2RP 239. If, as in J.R.’s case, the circumcision was over-aggressive, the skin will not remain intact when an erection occurs. 2RP 243.

Dr. Andersen said that J.R. may have “a lot of potential complications” from the scarring, but that he “can’t look into the future” and say whether any of those complications would actually occur. 2RP 250.

J.R. was examined by a urologist, Dr. Michael Ellen, in April 2006. 3RP 319. During the course of the examination, Dr. Ellen observed scar tissue and adhesions where the skin of the penis had adhered to the

underlying erectile body. 3RP 320. He also observed swelling and noted that the scarring appeared to be permanent. 3RP 320, 324. In Dr. Ellen's opinion, it appeared that J.R. had had a not-professionally performed circumcision. 3RP 320.

Dr. Ellen testified that if a circumcision needs to be done on a seven-year-old, he likes to make sure that it is medically necessary. 3RP 321. Dr. Ellen further testified that whether or not the circumcision is medically necessary or if it is being performed for other reasons, he would like to do it in the hospital under a general anesthetic. 3RP 321. As a general rule, Dr. Ellen testified, "most seven-year-olds aren't going to be able to – they're going to have a high level of fear and anxiety and probably aren't going to be able to hold still for the procedure." 3RP 321.

A circumcision is a relatively simple procedure for a urologist, but there are many steps that have to be taken in order to be sure that everything turns out correctly. 3RP 322. The doctor needs to make sure that enough, but not too much, tissue is taken to ensure that scarring doesn't occur. Furthermore, the doctor also has to make sure that the shaft of the penis or the urethra is not damaged. 3RP 322, 324. Dr. Ellen further opined that "there's a lot of potential problems that can happen. It's – so, it's, you know, probably best done by a urologist." 3RP 322.

According to Dr. Ellen, J.R. may have sustained physical damage that requires surgery to fix. 3RP 322.

B. ARGUMENT

1. ROBBINS COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BY ARGUING FOR CONVICTION ON THE LESSER OFFENSE OF ASSAULT OF A CHILD IN THE THIRD DEGREE WHERE THERE WAS SUBSTANTIAL EVIDENCE OF ROBBINS' GUILT AS TO THE LESSER OFFENSE AND A SUBSTANTIAL RISK OF GREATER PENALTY WITH RESPECT TO THE GREATER OFFENSE OF ASSAULT OF A CHILD IN THE SECOND DEGREE.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Shaver*, 116 Wash.App. 375, 382, 65 P.3d 688 (2003). The reviewing court begins with a strong presumption that defense counsel's performance was effective. *Id.* A defendant bears the burden of overcoming that presumption and showing that defense counsel's representation was deficient. *State v. McFarland*, 127 Wash.2d 322, 334-35, 337. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance was so deficient that the attorney was not functioning as "counsel" for Sixth Amendment purposes, and that there is a reasonable probability that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wash.2d 222-26, 743 P.2d 816 (1987). A defendant

must also show some probability that the result would have been different but for defense counsel's deficiencies. *State v. McFarland, supra*. Additionally, the defendant must show that there were no legitimate tactical or strategic reasons for counsel's conduct. *Id.*, at 336.

A defendant has the right to have lesser included offenses presented to the jury. RCW 10.61.006, *State v. O'Connell*, 137 Wash.App. 81, 152 P.3d 349 (2007), citing *State v. Stevens*, 158 Wash.2d 304, 310, 143 P.3d 817 (2006). In fact, defense counsel's failure to argue a lesser included offense can be deemed ineffective assistance of counsel. *See, e.g., State v. Pittman*, 134 Wash.2d 376, 166 P.3d 720 (2006) (in attempted residential burglary case, defense counsel's failure to request a lesser included offense instruction on first degree attempted criminal trespass constituted ineffective assistance of counsel); *State v. Ward*, 125 Wash.App. 243, 104 P.3d 670 (2004) (an "all or nothing defense" is not a legitimate trial strategy and is unreasonable when it exposes the defendant to an unreasonable risk that the jury will convict on the only option presented).

Similarly, defense counsel's concession of guilt during closing argument can properly be considered a tactical decision to secure acquittal on a more serious charge. *State v. Silva*, 106 Wash.App. 586, 596, 24 P.3d 477 (2001.)

Acknowledgement that there is overwhelming guilt as to the evidence on a particular count “. . . can be a sound tactic when the evidence is indeed overwhelming (and there is no reason to suppose that any juror doubts this) and when the count in question is a lesser count, so that there is an advantage to be gained by winning the confidence of the jury.” *Id.*, citing *Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir 1991).¹ If the concession is a matter of trial strategy or tactics, it does not constitute deficient performance. *State v. Hermann*, 138 Wash.App. 596, 605, 158 P.3d 96 (2007), citing *State v. Cienfuegos*, 144 Wash.2d 222, 227, 25 P.3d 1011 (2001).

In this case, there was overwhelming evidence supporting guilt on the charge of assault of a child in the third degree. There is no dispute that J.R. was circumcised in the bathroom of the family home by Curry, who did not have the proper medical or religious credentials, and that Robbins was fully aware that Curry lacked the proper medical and religious credentials, and fully supported and aided Curry in performing the at-

¹ See also *U.S. v. Tabares*, 951 F.2d 405, 409 (1st Cir. 1991) (defense counsel’s admission to the jury that his client was guilty of gun possession charges “was a tactical decision, designed to lead the jury toward leniency on the other charges . . .”); *U.S. v. Gomes*, 177 F.3d 76 (1st Cir. 1999), *cert. denied*, 528 U.S. 911, 941, 120 S.Ct. 260, 352, 145 L.Ed. 218, 275 (1999) (counsel’s concession of guilt on one of several counts was “a reasonable strategy”, to preserve “some credibility with the jury for use where it might help.”); *McClain v. D.R. Hill*, 52 F.Supp.2d 1133, 1143 (1999) (admission of guilt on burglary charges was not ineffective assistance, but rather “a tactical decision to challenge only the most serious charges against petitioner, thereby supporting petitioner’s credibility.”).

home circumcision. Furthermore, there is no dispute as to the evidence that J.R. has scarring on his penis as a result of this amateur circumcision.

Defense counsel's concession as to guilt on the lesser crime of assault of a child in the third degree was a sound trial tactic to secure a conviction on the lesser charge instead of exposing Robbins to the risk of being convicted of the far more serious crime of assault of a child in the second degree. CP106-107.

Robbins has failed to show that defense counsel's performance was deficient, let alone showing that the performance was prejudicial to her case or that it deprived her of her right to counsel.

2. THERE IS SUFFICIENT EVIDENCE TO CONVICT ROBBINS OF ASSAULT OF A CHILD IN THE THIRD DEGREE WHERE TWO DOCTORS AGREED THAT THE VICTIM SUSTAINED PERMANENT SCARRING ON HIS PENIS AS A RESULT OF AN UNPROFESSIONAL, "BOTCHED" CIRCUMCISION BY A LAY PERSON LACKING THE PROPER MEDICAL OR RELIGIOUS TRAINING TO CONDUCT THE SURGICAL PROCEDURE.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the

defendant. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, courts give deference to the trier of fact, who resolves conflicting testimony, evaluates witness' credibility, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992) *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992).

Robbins was convicted of the crime of assault of a child in the third degree. RCW 9A.36.140. Robbins contends that while there may be sufficient evidence of bodily harm, there is insufficient evidence to support that she acted with criminal negligence.

A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

RCW 9A.08.010(1)(d)

In this case, the evidence clearly supports a finding that Robbins acted with criminal negligence.

Robbins' assertion that a circumcision is tantamount to having your ears pierced is belied by the testimony of Dr. Ellen. Dr. Ellen

testified that a circumcision is a fairly simple procedure for a urologist and described the standard of practice relating to the circumcision of a seven year old child as a surgical procedure under general anesthetic. 3RP 321. He further described a number of risks involved in a circumcision, such as being sure that just enough skin is removed and ensuring that damage is not done to the urethra or the shaft of the penis itself. 3RP 322.

Robbins aided and assisted Curry in an amateur, at-home circumcision that resulted in the permanent scarring of her seven-year-old child, in a gross deviation of the standard of care that a reasonable person would exercise in the same situation.

3. THE COURT PROPERLY EXCLUDED EVIDENCE OF CONSENT, PARENTAL RIGHT, OR RELIGIOUS MOTIVE FOR THE UNPROFESSIONAL CIRCUMCISION GIVEN THAT NEITHER CONSENT, PARENTAL RIGHT, OR RELIGIOUS MOTIVE ARE VALID DEFENSES TO CRIMINAL LIABILITY FOR ASSAULT.

When considering whether consent is a defense to a criminal act, courts consider the particular act, the surrounding circumstances, and society's interest in the activity. *State v. Baxter*, 134 Wash.App. 587, 598, 141 P.3d 92 (2006).² Additionally, courts consider a child's capacity to

² Citing to "See, e.g. *State v. Dejarlais*, 136 Wash.2d 939, 943-44, 969 P.2d 90 (1998) (consent not a defense to violation of domestic violence protection order because the public has an interest in preventing domestic violence); *State v. Hiott*, 97 Wash.App. 825, 827-8, 987 P.2d 135 (1999), (consent not a defense to a game of shooting BB guns at each other because the game was not a generally accepted athletic contest and was against public policy); *State v. Shelley*, 84 Wash.App. 24, 33, 929 P.2d 489 (1997)

understand and appreciate the consequences of the conduct consented to.

Id. A court will consider all of these factors when determining whether or not a child can legally consent to an assault.

“[T]he great weight of authority disfavors the defense of consent in assault cases.” *Id.*, at 599.

In *State v. Baxter, supra*, this Court noted the distinction between ritual circumcisions that have been performed for thousands of years and Baxter’s amateur, in-home circumcision of his son.

In the Hebrew faith, for example, ritual circumcisions are performed by mohels who are trained medical professionals or have at least been trained in the craft through apprenticeship. See SARAH E. WALDECK, USING MALE CIRCUMCISION TO UNDERSTAND SOCIAL NORMS AS MULTIPLIERS, 72 U. Cin. L. Rev. 455, 520 (2003). Mohels must be qualified to perform the procedure and in some places are certified by hospitals. See *Oliner v. Lenox Hill Hosp.*, 106 Misc.2d 107, 109, 431 N.Y.S.2d 271 (N.Y. Co. 1980); *Zlotowitz v. Jewish Hosp.*, 193 Misc. 124, 124-25, 84 N.Y.S.2d 61 (N.Y. Co. 1948), *aff’d*, 277 A.D. 974, 100 N.Y.S.2d 226 (1950). The law holds the mohel to “the professional standards of skill and care prevailing among those who perform circumcisions.” *Zakhartchenko v. Weinberger*, 159 Misc.2d 411, 413, 605 N.Y.S.2d 205 (Kings Co. 1993). The mohel uses special equipment, including a “finely honed blade of surgical steel” and a “non-restricting guard.” *Ritual Circumcision*, [http:// www.circumcision.net/Painless.htm](http://www.circumcision.net/Painless.htm) (last visited July 26, 2006). And the ritual circumcision is performed at infancy, where the procedure is simpler.

(consent not a defense to punching another player during a basketball game where the contact was not foreseeable behavior in the play of the game).”

By contrast, Baxter attempted to circumcise his eight-year-old son in a dirty bathtub, with no medical training, using a hunting knife and animal wound cauterizing powder as his tools. Even when performed by trained professionals, circumcision has been criticized by some for the pain it causes and its inherent risk of complications. *See, e.g.,* WALDECK, 72 U.Cin.L.Rev. at 477-80. Given these risks, performing a circumcision as Baxter did here violates public policy.

Baxter, at 599-600.

This Court also determined that Baxter's religious motive and parental right were not proper defenses to his conduct. While a parent's right to control their child's upbringing is cardinal, the State may act as *parens patriae* and may limit this right in the general interest of the youth's well-being. *Id.*, at 601.³ "The State may interfere with the parents' rights to raise their children only where it "seeks to prevent harm or a risk of harm to the child." *Id.*, at 602, citing *In re Custody of Smith*, 137 Wash.2d 1, 18, 969 P.2d 21 (1998).

There are instances where criminal liability may attach when a parent voluntarily causes physical harm to their child for religious purposes. *Id.*, at 602, citing *State v. Norman*, 61 Wash.App. 16, 24, 808 P.2d 1150 (1991).

This Court also found that Baxter's at-home circumcision of his son violated public policy:

State law prohibits cutting children as corporal punishment. *See* RCW 9A.16.100(1). Both corporal punishment and religious practice are grounded in the parents' beliefs as to the best interests of the child, and as parental control over the child's upbringing does not justify cutting the child as punishment, it does not justify cutting the child as a religious exercise. Cutting a child's genitalia is also disfavored in public policy. Congress and several states have passed legislation outlawing female circumcision, also known as female genital mutilation. *See* 18 U.S.C. § 116 (1996); Cal.Penal Code § 273.4 (2006); Del.Code Ann. Tit. 11 § 780 (2006); 720 ILCS 5/12-34 (2006); Md.Code Ann., Health General § 20-601(2006); Minn.Stat. § 609.2245 (2005); N.Y. Penal Law § 130.85 (2006); R.I. Gen. Laws § 11-5-2(c)(3) (2006); Tenn.Code Ann. § 39-13-110 (2005); Wis. Stat. Ann. § 146.35 (2006). Commentators have analogized this procedure to male circumcision. *See* WALDERICK, 72 U.Cin.L.Rev. at 503-04; SHEA LITA BOND, COMMENT: *STATE LAWS CRIMINALIZING FEMALE CIRCUMCISION: A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT?*, 32 J. Marshall L.Rev. 353, 380 (1999). While this point of view is certainly outside the mainstream of popular thought, the performance of a circumcision on an eight-year-old boy, by a layman using improper tools in an unsanitary environment, raises many of the dangers contemplated by Congress and other legislatures in their prohibitions of the female procedure. Thus, while Baxter had the right to control his son's care and upbringing, that right did not extend to the type of harm he inflicted on his son, and his religious motive was not a valid defense to the corresponding criminal liability. Accordingly, the trial court did not err in excluding evidence of that motive.

Baxter, at 602-603.

³ *citing Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

Baxter is squarely on point in this case. Robbins argues that because the circumcision in this case was not performed in patently unsanitary conditions and because she and Curry researched the procedure on the Internet, this Court's ruling in *Baxter* does not apply. This argument misapprehends the Court's ruling in *Baxter*. Furthermore, Robbins erroneously equates the characterization of the circumcision as "cosmetic" with being less serious and less of a surgical procedure than if it were a medically necessary procedure. This argument is clearly refuted by the testimony of Dr. Ellen who described the standard of practice relating to the circumcision of a seven-year-old child, which indicated a surgical procedure under general anesthetic.

The trial court properly excluded Robbins' evidence of consent, parental right and/or religious motive based upon the facts of this case.

C. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm the conviction.

DATED December 7, 2007, at Shelton, Washington.

Respectfully submitted,


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Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	
)	No. 35605-8-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
JEAN ROBBINS,)	
)	
Appellant,)	
_____)	

2007
DEC 10 10:00 AM
Shelton, WA
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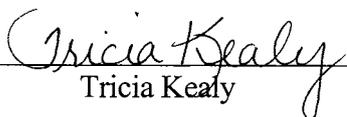
I, TRICIA KEALY, declare and state as follows:

On December 7, 2007, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Peter B. Tiller
The Tiller Law Firm
P.O. Box 58
Centralia, WA 98531-0058

I, Tricia Kealy, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 7th day of December, 2007, at Shelton, Washington.


Tricia Kealy

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