

Court of Appeals No. 41941-6-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

KAREN M. VIELGUTH,

Defendant/Appellant.

OPENING BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 09-1-03783-5
The Honorable Linda Lee, Presiding Judge**

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I. ASSIGNMENT OF ERROR

The State presented insufficient evidence to convict Ms. Vielguth of any crime.

II. ISSUES PRESENTED

1. Did the State present sufficient evidence to convict Ms. Vielguth of being a principal actor in the burglary and theft of items from the Halverson property?
2. Did the State present sufficient evidence to convict Ms. Vielguth of being an accomplice to Mr. Murphy's crimes where the State failed to establish that Ms. Vielguth solicited, commanded, encouraged, or requested Mr. Murphy to commit the crimes or that Ms. Vielguth aided or agreed to aid Mr. Murphy in planning or committing the crimes?

III. STATEMENT OF THE CASE

Factual and Procedural background

Marvin and Shirley Halverson own a piece of property in Graham. RP 123-124, 184-185. On August 17, 2009, the Halversons went to the property to retrieve some firewood and saw a white van backed up to the garage on the property. RP 128-130, 186-188. Mr. Halverson got out of his truck and approached the garage. RP 133. As Mr. Halverson got out of his truck, Ms. Halverson called 911. RP 189.

Mr. Halverson saw a woman pushing a bicycle like she was going to load it into the back of the white van. RP 133. The bicycle was usually stored on the outside of the garage. RP 133. Mr. Halverson didn't see the

woman for very long. RP 134. Mr. Halverson did not get a good look at the woman's face. RP 164. Mr. Halverson did not see the woman put anything into the van. RP 174.

The woman saw Mr. Halverson, leaned the bicycle against the garage, and spoke to a second person. RP 135. Mr. Halverson heard a man's voice. RP 135. Mr. Halverson saw a woman get into the passenger side of the van and a man get into the driver's side. RP 136. Mr. Halverson yelled at the people in the van and told them not to leave because the police were coming. RP 137. Mr. Halverson did not see what the man looked like. RP 138.

Ms. Halverson observed the man getting into the van and noted the first four characters of the license plate on the van. RP 189-190. Ms. Halverson never saw a female on the property. RP 205.

After the van drove off the property, Mr. Halverson looked at the garage and discovered that the door had been kicked in and a steam cleaning machine was missing from inside the garage. RP 139-140. Ms. Halverson noted that some antique wheels, an outdoor bell, and two pair of skis were also missing. RP 192.

Pierce County Sheriff's Deputy Brian Coburn arrived at the Halverson property at 9 a.m., shortly after the van left the property. RP 158, 237-238. The Halversons gave Deputy Coburn a description of the

people and the van the Halversons had seen on their property and Dep. Coburn broadcast that description to other deputies. RP 169, 244-245, 301.

Two and a half hours after Mr. Halverson had seen the people on his property, Pierce County Sheriff's Deputy Tony Filing returned to Mr. Halverson's property and showed him a photomontage. RP 170, 326. Mr. Halverson identified a woman other than Ms. Vielguth as the woman he had seen pushing the bicycle. RP 170. Mr. Halverson did not show any hesitation in picking a photograph of Ms. Marlene Moreland as the woman he had seen on his property. RP 327, 334.

Around noon, Deputy Filing saw a van matching the description of the van given by the Halversons. RP 299-302. Deputy Filing pulled in behind the van and initiated a stop. RP 302-303. The van accelerated, drove around a large truck, pulled into a parking lot, and stopped. RP 303. Deputy Filing observed a man get out of the driver's side of the van and a woman get out of the passenger side of the van. RP 304. The woman stopped running and Deputy Filing was able to contact her. RP 304. Deputy Filing stopped the woman and handcuffed her, despite knowing that she was not the woman identified by Mr. Halverson in the photomontage as the woman who Mr. Halverson had seen on his property. RP 45, 334.

The woman identified herself as Karen Vielguth. RP 305. Deputy Filing questioned Ms. Vielguth about how she came to be in the van and who the driver of the van was. RP 306. Ms. Vielguth initially denied being in the van, but then recanted and admitted she was in the van after Deputy Filing told her he had seen her exit the van. RP 306. Ms. Vielguth identified the driver of the van as "Rob." RP 306.

By the time Ms. Vielguth had admitted to being in the van and identified the driver, other deputies had responded to Deputy Filing's radio broadcast regarding stopping the van. RP 306-307. Pierce County Sheriff's Sergeant Nicholas Hausner heard Deputy Filing's radio broadcast and responded to the location where Deputy Filing had stopped the van. RP 275-277. Sergeant Hausner arrived at the location at around 12:15 PM. RP 277. Deputy Filing had Ms. Vielguth with him. RP 277.

Deputy Filing and the other deputies left the scene to look for the driver of the van and Sergeant Hausner stayed with Ms. Vielguth. RP 279, 307. Ms. Vielguth told Sergeant Hausner that she would cooperate in any way that she could. RP 287. Sergeant Hausner told Ms. Vielguth what he knew about the situation and Ms. Vielguth responded by saying that she had been visiting with her friend Connie at Connie's house earlier in the day when a man named Rob arrived in a van. RP 280. Ms. Vielguth told Sergeant Hausner that she had only met Rob one time

previously, but accepted his offer to give her a ride. RP 280-281. Ms. Vielguth told Sergeant Hausner that Rob was giving her a ride when the van was stopped by Deputy Filing. RP 280-281.

Deputy Coburn responded to the location where Deputy Filing had stopped the van. RP 247-249. The woman from the van was in the back of Deputy Filing's patrol car when Deputy Coburn arrived. RP 249. The woman from the van was identified as Ms. Karen Vielguth. RP 250. Deputy Coburn advised Ms. Vielguth of her constitutional rights but did not talk to her. RP 251.

The deputies were unsuccessful in locating the driver of the van. RP 307. Upon returning the parking lot, Deputy Filing questioned Ms. Vielguth about how she had come to be in the van and what she had been doing earlier in the day. RP 307, 308. Ms. Vielguth told Deputy Filing that she had had an argument with her husband the previous night and had gone to the home of her friend, Richard. RP 308. Richard had driven her to the home of Connie, another of Ms. Vielguth's acquaintances. RP 308. She stayed at Connie's home for two hours until Rob arrived in his van and agreed to give her a ride. RP 308, 309. Rob was at Connie's house for 45 minutes. RP 309. Ms. Vielguth further stated that Deputy Filing had stopped Rob's van after it had left Connie's house. RP 308. She ran from the van because she was scared and did not

know what was going on. RP 309.

Approximately one and a half hours after viewing the photomontage, Mr. Halverson was asked by deputies to look at a suspect and determine whether or not it was the woman he had seen on his property. RP 171, 310. Mr. Halverson was brought to the location where the police were holding Ms. Vielguth. RP 281. After viewing Ms. Vielguth from all angles, Mr. Halverson was not sure if she was the woman he had seen on his property. RP 172, 282, 288, 310. The handcuffs were removed from Ms. Vielguth before Mr. Halverson saw her. RP 287.

Ms. Vielguth told Sergeant Hausner where Connie's house was located and the police responded to that location. RP 283. Ms. Vielguth was transported to Connie's residence in the back of Deputy Filing's patrol vehicle. RP 310. Several other deputies remained at Connie's home to question the occupants, and Deputy Filing drove Ms. Vielguth to the police office. RP 289, 310-311.

Connie was home along with a man named Charles. RP 283-284. Sergeant Hausner questioned Connie and Charles about what they had been doing earlier that day and about any visitors to their property. RP 284. Sergeant Hausner passed the information he learned on to Deputy Filing. RP 284.

At the police office, Ms. Vielguth identified Robert Murphy as the man who was driving the van stopped by Deputy Filing. RP 311. At the police station, Deputy Filing received a phone call from Sergeant Hausner who relayed to Deputy Filing the information Sergeant Hausner had received from Connie and Charles. RP 311-312. Deputy Filing confronted Ms. Vielguth with the information learned from Connie and Charles. Ms. Vielguth denied that she had arrived at Connie's residence with Rob. RP 312.

After identifying Robert Murphy as the driver of the van, Ms. Vielguth told Deputy Filing that she wanted to go back to Richard's house. RP 312. Deputy Filing transported Ms. Vielguth to Richard's house and spoke to Richard briefly while Ms. Vielguth remained in the patrol car. RP 313, 317.

After speaking with Richard, Deputy Filing returned to the patrol car and questioned Ms. Vielguth about how she arrived at Connie's house. RP 317. Ms. Vielguth now said that Rob had picked her up from Richard's house in his van at 5 a.m. that morning and taken her to the Halversons' property. RP 318. Ms. Vielguth told Deputy Filing that the gate to the property was open when she and Rob arrived, and that Rob told her to close the gate after he had driven onto the property. RP 318. Ms. Vielguth told Deputy Filing that Rob went into one of the buildings on the

property and removed a really old wagon wheel and put it in the van. RP 318-319. Ms. Vielguth told Deputy Filing that the Halversons arrived after Rob put the wheel in the van. Rob drove the van away from the property while she fled on foot. RP 319-320.

Ms. Vielguth never said she knew why Rob wanted to go to the Halversons' property. RP 345. Ms. Vielguth also never said that she had gone into any of the buildings on the Halversons' property or that she had picked up anything. RP 345. When Deputy Filing spoke with Rob, Rob also never said that Mr. Vielguth assisted him, or went into any buildings, or picked up anything. RP 345. Rob never contradicted anything Ms. Vielguth told Deputy Filing. RP 345. Ms. Vielguth told Deputy Filing that she had not told him the truth at the beginning because she was afraid of how her husband would react if he found out she had been out with someone else. RP 349.

On August 18, 2009, Ms. Vielguth was charged with one count of second degree burglary and one count of second degree theft. CP 1-2.

On August 19, 2009, Deputy Filing searched the van that was driven by Rob Murphy. RP 320-321. The Halversons were present during the search in order for them to take possession of the items stolen from their property. RP 321. Inside the van, Deputy Filing located a wallet belonging to Robert Murphy, an iron bell, a mail order with Ms.

Vielguth's name and address, old sheet music, an iron cart with two wagon-type wheels, ski poles, two pairs of skis, and an older pressure washer. RP 321. The Halversons identified the bell, the sheet music, the cart, the skis and poles, and the pressure washer as their property and took them. RP 322-323.

On February 9, 2011, the State filed a memorandum in support of the admissibility of Ms. Vielguth's statements to Deputy Filing and Sergeant Hausner. CP 29-36.

Also on February 9, 2011, a CrR 3.5 hearing was held regarding Ms. Vielguth's statements. RP 28-97. Deputy Filing acknowledged handcuffing Ms. Vielguth immediately and bringing her back to his patrol vehicle, but testified that he initially did not ask Ms. Vielguth about the burglary and only asked her about who was driving the van and what she had been doing earlier in the day. RP 45, 48, 51, 66-67. Deputy Filing acknowledged that he questioned Ms. Vielguth while she was in handcuffs and that he never advised her of her constitutional rights. RP 66-67. Deputy Filing testified that Ms. Vielguth was handcuffed for officer safety and that she remained handcuffed until the Halversons arrived for the show up. RP 69, 73, 78.

Sergeant Hausner testified that Ms. Vielguth was handcuffed at the time he arrived and that he did not inform her of her constitutional

rights but, instead, began questioning Ms. Vielguth as to how she had arrived at the location. RP 84-85.

Deputy Coburn testified that he informed Ms. Vielguth of her constitutional rights but that, at that time, nobody was questioning Ms. Vielguth. RP 34-36.

Deputy Filing testified that the handcuffs were removed from Ms. Vielguth for the Halversons' identification show-up, but that Ms. Vielguth remained in the back of a patrol car during the trip to Connie's house and that Ms. Vielguth could not have opened the doors to get out of the police car. RP 54-55, 74. Deputy Filing testified that he transported Ms. Vielguth to the police station where he told her to wait in the reception area for ten minutes while he prepared the photomontage including Robert Murphy's photograph. RP 55-56. Deputy Filing testified that the door was locked from the inside and that Ms. Vielguth could have unlocked the door and left if she had wanted to. RP 55-56. Deputy Filing testified that, at that point, Ms. Vielguth had not been formally arrested and that he thought of her as a witness. Furthermore, he had never told her that she was under arrest. RP 57.

Deputy Filing testified that he confronted Ms. Vielguth with the conflicting information he had learned from Richard. He formally arrested Ms. Vielguth after she admitted to having been at the Halversons'

property. RP 59-62. It was only after Ms. Vielguth had been handcuffed, while in the back of Deputy Filing's vehicle, that Deputy Filing informed Ms. Vielguth of her constitutional rights. RP 59-62.

The trial court held that all of Ms. Vielguth's statements to the officers were admissible. RP 114-120; CP 122-127. The trial court held that Ms. Vielguth's post-*Miranda* statements to Deputy Coburn were admissible since counsel for Ms. Vielguth had not objected to them. RP 114-115. The court held that Ms. Vielguth's statements to Deputy Filing were admissible because Deputy Filing did not ask Ms. Vielguth any questions about the burglary, despite knowing that the van was involved in the burglary. RP 116, 118-119; CP 122-127. Similarly, the trial court held that Ms. Vielguth's statements to Sergeant Hausner were also admissible because Sergeant Hausner did not ask Ms. Vielguth any questions about the burglary. RP 119-120; CP 122-127.

Trial began on February 10, 2011. RP 123.

At trial, Ms. Halverson testified that the wheels found in the van were worth \$50-\$100, one pair of the skis was worth \$25, the other pair of skis was worth \$100, the steam cleaner was worth \$100, and the bell was worth \$5 or \$10. RP 193-194. Counsel for Ms. Vielguth objected to Ms. Halverson's valuation of the items on the basis that the testimony was speculation. RP 193. The trial court overruled the objection. RP 193.

On cross-examination, Ms. Halverson admitted that none of the property taken had been appraised, that she was not a trained appraiser. RP 201-202. Ms. Halverson testified that she had no idea of what the fair market value of the steam cleaner would be and that her idea of the value of the skis was a “ballpark” amount based on looking at prices on eBay. RP 203-204. Ms. Halverson also testified that there was no set price for any of the items. RP 204.

After the State rested its case, Ms. Vielguth moved to dismiss both counts on the basis that the State had failed to establish that Ms. Vielguth was an accomplice to the crimes. RP 366-372. The trial court denied the motion. RP 372. Ms. Vielguth then moved to dismiss the theft charge on the basis that the State failed to establish the value of the stolen property. RP 372-379. The trial court denied the motion. RP 379.

Robert Murphy testified on behalf of Ms. Vielguth. He testified that Ms. Vielguth did not help him load the Halversons’ property into the van in any way, that he did not ask her to help him, and that she never offered to help him. RP 382-384, 387.

The jury found Ms. Vielguth guilty of both second degree burglary and second degree theft. RP 475, CP 117, 119.

Notice of appeal was timely filed on April 1, 2011.

IV. ARGUMENT

The State presented insufficient evidence to convict Ms. Vielguth of any crime.

Where a criminal defendant challenges the sufficiency of the evidence, the court of appeals reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. Circumstantial and direct evidence are of equal weight upon review by an appellate court. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

If there is insufficient evidence to prove an element, reversal is required and retrial is 'unequivocally prohibited.' *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Ms. Vielguth was charged with the crimes of burglary in the second degree in violation of RCW 9A.52.030(1) and theft in the second degree in violation of RCW 9A.56.020(1)(a) and RCW 9A.56.040(1)(a).

CP 1-2. While Ms. Vielguth was not charged as an accomplice, the jury was given accomplice liability instructions and trial counsel for Ms. Vielguth did not object to the instructions. RP 408-414; CP 84-116.¹

a. *The State presented insufficient evidence to convict Ms. Vielguth of being a principal in the burglary and theft of items from the Halverson property.*

“A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.” RCW 9A.52.030(1).

“‘Theft’ means...To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a).

On August 17, 2009, RCW 9A.56.040(1)(a) provided,

A person is guilty of theft in the second degree if he or she commits theft of...Property or services which exceed(s) two hundred fifty dollars in value but does not exceed one thousand five hundred dollars in value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle.

It was undisputed at trial that Ms. Vielguth accompanied Mr.

¹ While no amended information was filed charging Ms. Vielguth as an accomplice, Ms. Vielguth acknowledges that it is not unconstitutional for an individual to be charged as a principal but convicted as an accomplice so long as the trial court gives an accomplice liability instruction. *See State v. Davenport*, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984) (“While it is not unconstitutional to charge a person as a principal and convict him as an accomplice, the court must instruct the jury on accomplice liability.”)

Murphy onto the Halverson property. However, the State presented no evidence from which the jury could draw the inference that Ms. Vielguth entered or remained on the property with the intent to commit a crime or that Ms. Vielguth asserted control over any of the Halversons' property with the intent of depriving the Halversons of that property. Ms. Vielguth was not seen entering any building or loading any property into the back of Mr. Murphy's van. In fact, Ms. Vielguth and Mr. Murphy both told police, and Mr. Murphy testified at trial, that Ms. Vielguth did not know Mr. Murphy was going to take any items and she did not assist in taking the items or entering the garage.

The evidence introduced at trial establishes only that Ms. Vielguth was passively present as Mr. Murphy committed the crimes of burglary and theft. The State's evidence was insufficient to establish the requisite mens rea to convict Ms. Vielguth of either burglary or theft.

b. The State presented insufficient evidence to convict Ms. Vielguth of being an accomplice to Mr. Murphy's crimes where the State failed to establish that Ms. Vielguth solicited, commanded, encouraged, or requested Mr. Murphy to commit the crimes or that Ms. Vielguth aided or agreed to aid Mr. Murphy in planning or committing the crimes.

An accomplice and a principal share the same criminal liability. *State v. Carter*, 154 Wn.2d 71, 78, 109 P.3d 823 (2005) (quoting *State v. Graham*, 68 Wn.App. 878, 881, 846 P.2d 578 (1993)). A person is an

accomplice if, “[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.” RCW 9A.08.020(3)(a). But mere presence at the scene of a crime, even if coupled with knowledge of another's criminal conduct, is not sufficient to prove complicity. *State v. Luna*, 71 Wn.App. 755, 759, 862 P.2d 620 (1993). Rather, the State must prove that the accomplice acted with knowledge that his or her action promoted or facilitated the commission of the charged crime. *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000); RCW 9A.08.020.

“In order to be deemed an accomplice, an individual must have acted with knowledge that he was promoting or facilitating the crime for which the individual was eventually charged, rather than any and all offenses that may have been committed by the principal.” *State v. Carter*, 119 Wn.App. 221, 227, 79 P.3d 1168 (2003), *affirmed* 154 Wn.2d 71, 109 P.3d 823 (2005).

A defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to succeed. *Luna*, 71 Wn. App. at 759, 862 P.2d 620 ; *see also State v. Robinson*, 73 Wn. App. 851, 8972 P.2d 43 (1994). Guilt cannot be inferred by mere presence and knowledge of

activity. *In re Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979).

Washington case law has consistently held that physical presence and assent alone are insufficient to constitute aiding and abetting. *Wilson*, 91 Wn.2d at 491, 588 P.2d 1161. *See also Luma*, 71 Wn.App. at 759, 862 P.2d 620 (“Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime.”), *citing State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). “One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed.” *State v. Amezola*, 49 Wn.App. 78, 89, 741 P.2d 1024 (1987).

Again, it was undisputed that Ms. Vielguth was driven onto the Halversons’ property by Mr. Murphy. It was further undisputed that Ms. Vielguth was present on the property while Mr. Murphy loaded the Halversons’ property into the van and that Ms. Vielguth personally observed Mr. Murphy load at least one of the wagon wheels into the van. However, none of the evidence presented at trial established that Ms. Vielguth personally went inside any of the buildings on the property or loaded any of the property into Ms. Murphy’s van. Further, no evidence was introduced suggesting that Ms. Vielguth solicited, commanded,

encouraged, or requested Mr. Murphy to commit it the crimes or that Ms. Vielguth aided or agreed to aid Mr. Murphy in planning or committing the crimes. As stated above, both Ms. Vielguth and Mr. Murphy told police, and Mr. Murphy testified at trial, that Ms. Vieguth did not participate or encourage the entering of the garage or taking of the Halversons' property in any way. The evidence introduced at trial was that Ms. Vielguth did not know that any property would be stolen when she entered the property with Mr. Murphy.

At most, Ms. Vielguth could be said to have assisted Mr. Murphy by closing the gate to the property when Mr. Murphy told her to. RP 318. However, at worst, closing the gate after entering the Halverson property without permission this establishes only that Ms. Vielguth assisted Mr. Murphy commit the uncharged crimes of second degree trespass, not the crimes of burglary or theft. *See* RCW 9A.52.080(1) (“A person is guilty of criminal trespass in the second degree if he or she knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree.”) As stated above, “[i]n order to be deemed an accomplice, an individual must have acted with knowledge that he was promoting or facilitating the crime for which the individual was eventually charged, rather than any and all offenses that may have been committed by the principal.” *Carter*, 119 Wn.App. at 227,

79 P.3d 1168. Because Ms. Vielguth took no actions which would make her an accomplice to the crimes of second degree burglary and second degree theft, and because Ms. Vielguth was not charged with second degree trespass, she cannot have been found to have been an accomplice of Mr. Murphy to any of his crimes.

At worst, the State's evidence established only that Ms. Vielguth was present while Mr. Murphy was committing crimes and that Mr. Murphy assented to the commission of those crimes. The State introduced no evidence that Ms. Vielguth took any actions indicating that she wished the burglary and theft to occur and succeed.

VI. CONCLUSION

For the reasons stated above, this court should vacate Ms. Vielguth's convictions and remand for dismissal of the charges with prejudice.

DATED this 2nd day of November, 2011.

Respectfully submitted,

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

Certificate of Service:

The undersigned certifies that on November 2, 2011, she delivered by e-mail to the Pierce County Prosecutor's Office, pcpatecfl@pierce.wa.us, and by United States mailed to appellant, Karen M. Vielguth, DOC # 724007, Washington Corrections Center for Women, 9601 Bujacich Road Northwest, Gig Harbor, Washington 98332, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington November 2, 2011

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Statement of Additional Authorities

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