

NO. 44467-4-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN MICHAEL HUBBARD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Chushcoff

No. 11-1-00827-6

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has Defendant failed to show that the trial court abused its discretion in denying his motion to sever his trial from that of Burmeister, when their defenses were not antagonistic and not so manifestly prejudicial as to outweigh the concern for judicial economy?

2. Has Defendant failed to show that the trial court's conclusion of law regarding the admissibility of ER 404(b) evidence should be disregarded where that conclusion is supported by the unchallenged findings of fact?

B. STATEMENT OF THE CASE.

1. Procedure

On February 23, 2011, the Pierce County Prosecuting Attorney (State) charged Justin Hubbard (Defendant) with one count of theft in the first degree, one count of possessing stolen property in the second degree, and one count of unlawful possession of a stolen vehicle. CP 1-2, 14-15, 58-59.

The State also charged co-defendant Ashley Burmeister with one count of possession of stolen property in the second degree, one count of

possession of a stolen vehicle, and two counts of making a false statement or illegal transfer. CP 92, 95-97.

The trial court denied Defendant's pre-trial motion to suppress his statements to law enforcement officers. RP(8/21/12) 390-391.¹ The court ruled that the statements made were voluntary and thus admissible at trial. RP(8/21/12) 391.

Before trial began, Burmeister informed the court that she would argue that Defendant was responsible for the thefts, that he intentionally kept this information from her, and that he deceived her in order to get her to register the vehicles in her name. RP(8/21/12) 328. Burmeister further stated that, although she planned to argue that Defendant was the one who stole the vehicles and not her, she did not intend to produce evidence of Defendant's guilt or take the stand. RP(8/21/12) 329-30. Rather, she intended to argue that the State's case is believable to the extent that Defendant is guilty. RP(8/21/12) 329-30. Burmeister also intended to argue that she had diminished capacity² and that— due to her mental health conditions— would not have drawn inferences of Defendant's guilt from the suspicious circumstances that were present. RP(8/21/12) 331,

¹ The State will refer to the record of proceedings by the date of the proceeding followed by the page number.

² Omnibus Order dated 10/27/11, cause number 11-1-00834-9.

333. Defendant's defense was general denial. RP(8/21/12) 332; CP Supp. 128-130.

Burmeister would also argue that she only registered the vehicles in her name because Defendant's license was suspended and she wanted to help him out, not because she was trying to conceal the stolen vehicles. RP(11/1/12) 24-25.

In order to rebut Burmeister's claim that she did not know the vehicles were stolen, the State sought to introduce evidence of Defendant and Burmeister's contact with police in 2008 regarding their possession of a stolen Mazda truck. RP(8/21/12) 362-64. The court ruled that the State could introduce this evidence if Burmeister opened the door during trial. RP(8/21/12) 400-01. She did, and the evidence was subsequently introduced. RP(11/14/12) 350-51, 370-71; RP(11/19/12) 711. The court also gave a limiting instruction to the jury, informing them that the evidence regarding the stolen Mazda may only be used for the purpose of determining the knowledge of a defendant. CP 79.

Defendant requested his trial be severed from Burmeister's several times before trial, arguing that the two defenses were antagonistic. RP(8/21/12) 354; RP(11/1/12) 28. The court denied Defendant's motion, ruling that the defenses were not antagonistic. RP(8/21/12) 409; RP(11/1/12) 33.

Trial began on November 13, 2012, before the Honorable Bryan E. Chushcoff. RP(11/13/12) 190. On November 21, 2012, the jury found Defendant guilty as charged on all counts. RP(11/21/12) 998-99. The jury found Burmeister not guilty on all counts. RP(11/21/12) 999. The court imposed a standard range sentence of nine months on counts one and three, and five months on count two, for a total of nine months confinement, to be run concurrently. CP 111, 114; RP(01/14/13) 1040. On February 4, 2013, Defendant filed a timely notice of appeal. CP 121.

2. Facts

On February 10, 2008, Ryan Tawes' Mazda pickup truck was stolen. RP(11/19/12) 712. About a month later, Tawes saw his truck advertised for sale on Craigslist. RP(11/19/12) 714. Tawes called the person who placed the ad, claimed he was interested in buying the truck, and arranged to meet. RP(11/19/12) 714-15. When Tawes arrived at the designated location, he encountered Defendant and Burmeister sitting in the truck. RP(11/19/12) 714-15. Tawes approached Defendant and told him that the truck belong to him; Defendant replied that it did not. RP(11/19/12) 716.

Tawes then called the police, who arrived shortly. RP(11/19/12) 717. Burmeister, who was the registered owner of the truck, told police officers that she had bought the truck online. RP(11/19/12) 677.

When Tawes eventually took back possession of his truck, he noticed that the VIN³ — which was originally located on the dash of the truck— had been removed, and a different VIN was attached to the firewall of the truck. RP(11/19/12) 719-20.

In early April of 2009, David Cress' 18-20 foot long car trailer was stolen from a Puyallup Safeway parking lot. RP(11/14/12) 322-24.

On April 23, 2009, Lee Guillot sold a 1949 utility trailer to a man and woman who responded to his ad on Craigslist. RP(11/14/12) 340-43.

On August 15, 2009, Jose Chavez's motorcycle was stolen. RP(11/14/13) 373-74. The motorcycle was manufactured by Independence Motorcycle Company. RP(11/14/12) 375, 378.

On December 20, 2010, Pierce County Sheriff's Deputy Jessica Johnson responded to a call reporting the theft of a motorcycle. RP(11/13/12) 193. Deputy Johnson encountered Defendant and Burmeister at the location when she arrived. RP(11/13/12) 192. Burmeister told Deputy Johnson that she was the registered owner of the

³ Vehicle Identification Number.

motorcycle, and described it as custom-built 1988 Harley Davidson with aftermarket parts. RP(11/13/12) 193. Burmeister reported the license plate of the motorcycle as 8A5727. RP(11/13/12) 194. Burmeister told Deputy Johnson that Defendant had spoken to a man named Scott Schuh earlier that day, and that she believed he had stolen the motorcycle. RP(11/13/12) 194.

On December 28, 2010, Tacoma Police Officer Jeffrey Robillard was on patrol when he observed a motorcycle speeding. RP(11/13/12) 210. Officer Robillard pulled the vehicle over, and upon running the motorcycle's license plate number —8A5727— learned that the motorcycle had been reported stolen. RP(11/13/12) 211. Officer Robillard then detained the driver, Scott Schuh, and attempted to contact Burmeister, as she was the registered owner, but spoke with Defendant instead. RP(11/13/12) 213-14. Defendant informed Robillard that he and Burmeister were on their way to identify and pick up the motorcycle. RP(11/13/12) 214.

While Officer Robillard was waiting for Defendant and Burmeister to arrive, he had a conversation with Scott Schuh regarding the motorcycle. RP(11/13/12) 214. This prompted Officer Robillard to take a closer look at the motorcycle. RP(11/13/12) 215. He noticed that the handgrips on the motorcycle were labeled "Harley Davidson" and that the

motorcycle was registered as a 1988 Harley Davidson motorcycle, but that the engine and other major parts of the motorcycle were labeled "Independence Motorcycle Company." RP(11/13/12) 215-18. He also noticed that the identification number on the engine and transmission were different. RP(11/13/12) 221. Officer Robillard then decided to impound the vehicle and investigate to see if it contained stolen parts. RP(11/13/12) 221.

Burmeister and a male companion arrived on the scene on foot shortly thereafter. RP(11/13/12) 222. Burmeister told Officer Robillard that she had parked her truck at a Safeway parking lot several blocks away because she did not know if there was enough space for her to turn the truck around. RP(11/13/12) 223. This roused Officer Robillard's suspicion as there were plenty of spaces for her to turn her truck around, and it did not make sense to him that she would come to pick up a motorcycle on foot. RP(11/13/12) 224. Burmeister also told Officer Robillard that Defendant had not come with her because he was on electronic home monitoring. RP(11/13/12) 224.

Officer Robillard informed Burmeister that he would be impounding the motorcycle, and Burmeister and her companion walked back toward the Safeway. RP(11/13/12) 224-25. As Officer Robillard was transporting Schuh to the Pierce County Jail, he drove past the Safeway

and observed a truck with an attached trailer pulling out of the lot.

RP(11/13/12) 226-27. Officer Robillard saw Burmeister driving the truck with a male passenger. RP(11/13/12) 227. The male passenger was not the same male that had arrived on the scene with Burmeister earlier.

RP(11/13/12) 227.

Schuh also noticed the truck and trailer, and made a comment to Officer Robillard that prompted him to run the license plate on the trailer. RP(11/13/12) 227-28. The registration information listed the trailer as a red 1949 utility trailer, but the trailer that Officer Robillard saw was a black car-hauling trailer that appeared significantly newer than what was listed. RP(11/13/12) 228-30. Officer Robillard pulled the truck over, contacted Burmeister, and learned the passenger in the vehicle was Defendant. RP(11/13/12) 230. Burmeister told Officer Robillard that she lied about Defendant's whereabouts because she was afraid of Schuh. RP(11/13/12) 231.

Officer Robillard then began to inspect the trailer. RP(11/13/12) 233. He noticed that the trailer appeared to have been painted black at some point, as there were chips in the paint showing red paint underneath. RP(11/13/12) 233. Officer Robillard looked for a VIN but could not locate

one. RP(11/13/12) 234. He eventually released Burmeister and Defendant and left the trailer in their possession while he continued to investigate the incident. RP(11/13/12) 236.

Officer Robillard subsequently discovered David Cress' report regarding his stolen trailer from 2009. RP(11/13/12) 237. He passed that information on to detectives, who later contacted Defendant and Burmeister at their residence. Defendant told detectives that he purchased the trailer some time ago from a person in Olympia who did not have any of the title paperwork. RP(11/13/12) 258. Defendant also told detectives that he could not remember exactly how much he paid for the trailer, but that it was around 2,500 dollars. RP(11/13/12) 258.

Detectives saw that the trailer was originally red but had been painted black, and that the VIN was missing. RP(11/13/12) 257, 260. The registration listed the trailer as 1949 home- built utility trailer, measuring four-feet by six-feet. RP(11/13/12) 260, 270, 271. The trailer Defendant and Burmeister possessed, however, was a much newer, professionally made, eighteen-foot car trailer. RP(11/13/12) 256, 260, 270.

On January 3, 2011, detectives inspected the motorcycle to determine if it contained stolen parts. RP(11/13/12) 272-73. Detectives immediately noticed that the VIN was not in its usual location. RP(11/13/12) 273. Detectives eventually found a welded plate on a

different part of the motorcycle that had a fraudulent VIN number stamped onto it. RP(11/13/12) 273-74. The VIN number found on the motorcycle was not associated with a Harley Davidson like the registration information stated, rather, the VIN number belonged to the Independence Company brand motorcycle reported stolen by Jose Chavez in 2009. RP(11/13/12) 289-91.

On February 21, 2011, police arrested Defendant and Burmeister at their residence. RP(11/15/12) 514. Defendant was advised of his Miranda rights and agreed to speak to detectives. RP(11/15/12) 534-35. Defendant initially gave inconsistent statements to detectives, but later decided he wanted to tell the truth and start with "a clean slate." RP(11/15/12) 529-30. Defendant told detectives that he and Schuh stole the flatbed trailer from a Safeway store parking lot and took it to Schuh's residence, where Defendant repainted it. RP(11/15/12) 530-31. Defendant also admitted to buying a cheap utility trailer and using the paperwork from that trailer to register the stolen one. RP(11/15/12) 531.

Defendant admitted to knowing that the motorcycle was stolen. RP(11/15/12) 532. Defendant told detectives that Schuh was the one who actually stole the motorcycle, but Defendant admitted to purchasing a Harley Davidson frame and falsely registering the motorcycle to conceal the fact that it was stolen. RP(11/15/12) 533.

Burmeister admitted to registering the stolen trailer and motorcycle in her name, but claimed it was only because she had a valid driver's license and Defendant did not. RP(11/15/12) 522-23.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO SEVER HIS TRIAL BECAUSE THE TWO DEFENSES WERE NOT ANTAGONISTIC AND DID NOT UNDULY PREJUDICE DEFENDANT.

"The decision to proceed with joint or separate trials is entrusted to the trial court's sound discretion; [appellate courts] will not disturb the decision absent manifest abuse of discretion." *State v. Johnson*, 147 Wn. App. 276, 284, 194 P.3d 1009 (2008) citing *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). "A defendant must be able to point to specific prejudice to demonstrate that the trial court abused its discretion." *Id.* Washington law does not favor separate trials. *Grisby*, 97 Wn.2d at 506. Because accommodating separate trials in all cases as a matter of course is unduly burdensome, "[s]eparate trials should be required only in those instances in which an out of court statement by a codefendant expressly or by direct inference from the statement incriminates his fellow defendant." *State v. Ferguson*, 3 Wn. App. 898, 906, 479 P.2d 114 (1970).

Trial courts may properly sever trials "only if a defendant demonstrates that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy." *Johnson*, 147 Wn. App. at 284. "Mutually antagonistic defenses are not per se prejudicial as a matter of law." *Grisby*, 97 Wn.2d at 507. "For defenses to be irreconcilable, they must be mutually exclusive to the extent that one defense must be believed if the other defense is disbelieved." *Johnson*, 147 Wn. App. at 285. Our State Supreme Court has held:

The fact that the interests of all the participants in a crime conflict does not require that the court grant each of several participants a separate trial. Such conflicts invariably will be present where two or more persons are tried for the same crime and if such conflicts are regarded as requiring a separate trial, it is at once plain that the statute is rendered nugatory, and joint trials will be the exception and not the rule. But such was not the intent of the legislature.

State v. Davis, 73 Wn.2d 271, 290, 438 P.2d 185 (1968). "The mere existence of antagonism between defenses or the desire of one defendant to exculpate himself by inculpating a codefendant is insufficient to compel separate trials." *Johnson*, 147 Wn. App. at 284-85. Appellate courts "rarely overturn a trial court's denial of a motion to sever on the basis of mutually exclusive defenses, even when one defendant tries to blame another." *Id.* at 285.

In *State v. Grisby*, two co-defendants, Grisby and Frazier, were both convicted of aggravated murder and aggravated assault after one or both men killed five people and wounded two adults. 97 Wn.2d at 496. Both men admitted to going to the residence where the shootings took place. *Id.* Frazier admitted that he opened fire on the apartment's occupants, but that afterwards he dropped the gun and fled. *Id.* Grisby argued he was unarmed and left when the shots were fired. *Id.* Our State Supreme Court held that the defenses were not mutually antagonistic defenses because the two defenses were very similar, agreeing on every fact except for blaming one another for shooting the victims. *Id.* at 508.

In *State v. McKinzy*, the court held that the defendants' defenses to promoting prostitution were not mutually antagonistic. 72 Wn. App. 85, 863 P.2d 594 (1993). In *McKinzy*, both defendants were charged with promoting prostitution for operating a business that provided escort services. *Id.* at 87. McKinzy's defense was that he simply provided escort referrals to clients and had no knowledge or control of any ensuing acts of prostitution. *Id.* at 89. McKinzy's co-defendant, Thomas, argued that she was merely an employee of Thomas and had nothing to do with running the business. *Id.* at 87. The court found that at most, the two defenses were inconsistent but not irreconcilable to the extent that one must be believed if the other is to be disbelieved. *Id.* at 91.

Finally, in *In re Davis*, the court held that "finger pointing" or blame shifting during closing argument did not amount to a manifestly

prejudicial defense, as closing arguments are not evidence and the jury is instructed to only consider evidence in the form of witness testimony and exhibits. 152 Wn.2d 647, 712, 101 P.3d 1 (2004).

In this case, the court did not err in denying defendant's motion to sever his trial from that of Burmeister, because their defenses were not mutually antagonistic to the point where one defense had to be believed if the other was to be disbelieved. If the jury believed Burmeister's defense—that she registered the vehicles in her name because defendant did not have a driver's license and was not aware that the vehicles were stolen—it did not have to disbelieve Defendant's defense that the State did not meet its burden beyond a reasonable doubt to prove he was responsible for the thefts.

Like in *Grisby*, both Defendant and Burmeister agreed on almost every fact except for who was responsible for the thefts. Burmeister alleged that Defendant was responsible and she was unaware the vehicles were stolen; Defendant argued general denial and insufficient evidence to connect him to the thefts. RP(8/21/12) 332; RP(11/20/12) 944, 958. Both defendants told detectives the same thing when asked where they obtained the trailer and motorcycle, and how much they paid for them. RP(11/13/12) 258, 271, 272. The similarities in the statements of Defendant and Burmeister further demonstrate that the two defenses were not irreconcilable or antagonistic to the extent that the joint trial resulted in specific prejudice.

In addition, Burmeister did not testify against Defendant or present any additional evidence to show that Defendant was responsible for the thefts. Her defense consisted solely of arguing that she did not have knowledge that the vehicles were stolen. All of the incriminating evidence against Defendant was presented by the State. Thus, Defendant was not unduly prejudiced by having a joint trial, as no evidence was introduced in this trial that would not have been introduced had Defendant had a separate trial.

Defendant argues that the State was allowed to introduce evidence during trial that was highly prejudicial and would not have been admitted if Defendant had been tried alone. Appellant's brief at 12. Specifically, Defendant argues that the evidence regarding his suspended driver's license, the fact that he was on electronic home monitoring, and information regarding the incident with the stolen Mazda was unduly prejudicial. While evidence of past crimes is inadmissible at trial to prove the character of a person, it is admissible for other purposes, such as to show: proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident. ER 404(b).

In this case, the evidence of prior bad acts was not entered to show Defendant's character; rather, it was introduced to show that Burmeister had knowledge that the vehicles were stolen and show her motive in registering the vehicles in her name. RP(11/1/12) 25, 74-75; RP(11/13/12)

224; RP(8/21/12) 362-64. Furthermore, the court gave the jury a limiting instruction regarding the Mazda incident, stating:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of oral testimony and written exhibits of events of March 22, 2008, regarding a Mazda pickup truck. This evidence may be considered by you *only for the purpose of determining the knowledge of a defendant. You may not consider it for any other purpose.* Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 79 (emphasis added). The court also gave the jury the following two instructions:

A separate crime is charged in each count. You must separately decide each count charged against each defendant. Your verdict on one count as to one defendant should not control your verdict on any other count or as to the other defendant.

CP 74. And

You may consider a statement made out of court by one defendant as evidence against that defendant, but not as evidence against another defendant.

CP 76. As the court noted in *Grisby*:

[W]e must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government is a failure.

Grisby, 97 Wn.2d at 509. The court in this case gave appropriate instructions to the jury cautioning them to properly weigh all the evidence

for its intended purpose only, and to separately decide each count independent of the other. Furthermore, Defendant cannot show that this evidence would not have been admitted even if the trial was severed, as it could still have been admissible for any of the purposes stated under ER 404(b).

Finally, Defendant argues that the statements made by Burmeister's counsel at closing argument attacked Defendant and were unduly prejudicial. Appellant's brief at 14. However, as our State Supreme Court stated in *In re Davis*, blame shifting during closing arguments is not manifestly prejudicial because closing arguments are not evidence and the jury is instructed to disregard any argument not supported by evidence. 152 Wn.2d at 712.

The trial court did not err in denying Defendant's motion for severance, because Defendant and Burmeister's defenses were not antagonistic and did not unduly prejudice Defendant. The evidence at trial regarding the Mazda was properly admitted under ER 404(b) and the jury was given an appropriate limiting instruction to prevent any prejudice or misapplication of the law. Defendant fails to show any manifest prejudice that would outweigh the concern for judicial economy.

2. THE TRIAL COURT'S DECISION TO ADMIT EVIDENCE UNDER ER 404(b) SHOULD BE AFFIRMED BECAUSE ITS CONCLUSIONS DOING SO ARE SUPPORTED BY UNCHALLENGED FINDINGS OF FACT.

Appellate briefs must contain "argument in support of the issues presented for review, together with citations to legal authority and references to the relevant parts of the record." RAP 10.3(a)(6). Assignments of error stated, but not argued, in a brief will not be considered by appellate courts. *State v. Corbett*, 158 Wn. App. 576, 586, 242 P.3d 52 (2010).

"The purpose of written findings and conclusions is to promote efficient and precise appellate review." *State v. Landsiedel*, 165 Wn. App. 886, 893, 269 P.3d 347 (2012).

"Evidentiary rulings will not be disturbed on appeal absent an abuse of discretion." *State v. Wilson*, 144 Wn. App. 166, 183, 181 P.3d 887 (2008). In ruling on the admissibility of prior acts in evidence, Washington courts have employed a four-part test. *State v. Olsen*, 175 Wn. App. 269, 523, 309 P.3d 518 (2013). Before admitting ER 404(b) evidence, a trial court must 1) find by preponderance of the evidence that the misconduct occurred; 2) identify the purpose for which the evidence is sought to be introduced; 3) determine whether the evidence is relevant to

prove an element of the crime charged; and 4) weigh the probative value against the prejudicial effect. *Id.* "This analysis must be conducted on the record." *Id.* Where a defendant does not challenge the trial court's findings, they become verities on appeal. *Id.* The appellate court must then determine whether the findings support the conclusion, and whether the trial court abused its discretion in finding that probative value outweighed the prejudicial effect. *Id.*

Defendant assigns error to the trial court's conclusion of law number four following the ER 404(b) hearing. Appellant's brief at 2. However, Defendant fails to present argument on this issue in his brief. Because Defendant did not argue this issue in his brief in accordance with RAP 10.3(a)(6), this Court should not review this issue on appeal.

Even if the court did address this issue, Defendant's claim would still fail because the court's conclusion was supported by its unchallenged findings of fact. In entering the findings of fact and conclusions of law following the 404(b) hearing regarding the admissibility of the Mazda incident, the court concluded, among other things, "[t]hat the 2008 incident is not tangential to this case and directly goes to the heart of the defenses raised by defendants." CP 19. This conclusion was supported by twenty findings of fact, none of which were challenged by Defendant. CP

16-19. In its findings of fact, the court noted that the VIN on the Mazda had been tampered with, that Defendant and Burmeister both told detectives that they had purchased the Mazda, and that they both denied tampering with the Mazda's VIN. CP 16-19. The court properly conducted an on the record analysis and found that the evidence was permissible to show knowledge of the defendants, and that its probative value warranted its admission. RP(11/14/12) 368-71.

The court correctly entered this conclusion, as the evidence was used to show absence of mistake on behalf of Defendant and knowledge on behalf of Burmeister. RP(8/21/12) 362-64. Hence, its conclusion is supported by unchallenged findings, and its decision to admit the evidence should be affirmed.

D. CONCLUSION.

The trial court did not abuse its discretion in denying Defendant's motion to sever his trial from that of Burmeister. Defendant and Burmeister's defenses were not so antagonistic or manifestly prejudicial as to outweigh the concern for judicial economy. In addition, the trial court's conclusion of law following the ER 404(b) hearing was supported by

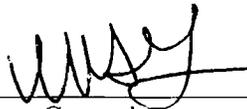
unchallenged findings. For the foregoing reasons, the State respectfully requests this Court to affirm defendant's conviction and sentence.

DATED: January 7, 2013.

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Certificate of Service:

The undersigned certifies that on this day she delivered by e.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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, on the date below.

1-7-14 Sheer Kah
Date Signature

PIERCE COUNTY PROSECUTOR

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