

NO. 45496-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY DEAN ROBINSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-00458-3

BRIEF OF RESPONDENT

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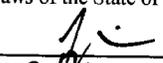
SERVICE	John A. Hays 1402 Broadway Longview, WA 98632 Email: jahays@3equitycourt.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 7, 2014, Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left.
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its broad discretion when it considered all of the available remedies for the discovery violation in the present case and carefully crafted two authorized remedies (suppression of the evidence or a mistrial) for that discovery violation?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jeffrey Dean Robinson was charged by information filed in Kitsap County Superior Court with one count of possession of a stolen vehicle. CP 1-2. An amended information was later filed that added a charge of theft of a motor vehicle. CP 53-54. The matter proceeded to trial on August 20, 2013. RP (8/20) 1. The trial, however, resulted in a mistrial. RP (8/21) 152-53. A second trial began on September 30th. At the beginning of the second trial the State moved to dismiss the theft of a motor vehicle count, and the trial court granted that motion. RP (9/30) 10; CP 84. A jury then found the Defendant guilty of possession of a stolen vehicle, and the trial court imposed a standard range sentence. CP 135, 146. This appeal followed.

B. FACTS

Introduction.

Shortly after midnight on February 25, 2013 the Defendant was pulled over by a Washington State Patrol Trooper for a minor traffic infraction. The Defendant was driving a stolen truck, but the owners of the truck had not yet discovered or reported the theft, so the Defendant was released. The case proceeded to trial, but shortly after opening statements the trial court found that there had been a discovery violation and declared a mistrial. At issue was the presence and actions of second truck (with an unidentified driver) that pulled over nearby while the trooper contacted the Defendant on the night in question. The existence of this second vehicle was disclosed to the defense, but the trial court found that several details regarding the actions of this second truck had not been disclosed, and thus there had been a discovery violation. The trial court then gave the Defendant a choice of either a mistrial or suppression of any evidence regarding the second truck, and the Defendant choose a mistrial. On appeal, the Defendant contends that the trial court abused its discretion by not dismissing all the charges outright.

Facts from the Record Below

The record below shows that the Defendant was charged via an information filed on May 7, 2013 with one count of possession of a stolen

vehicle. CP 1-2. The probable cause statement explained the on February 25 Jacqui and Billie Stevenson contacted the police to report that sometime during the previous night someone had stolen their blue Toyota pickup truck. CP 4. When law enforcement went to enter the stolen vehicle information it was discovered that a Washington State Patrol officer had pulled the truck over shortly after midnight the previous night (after it had been stolen from the Stevenson's), but the trooper did not know that the truck was stolen at that time since the Stevenson's had not yet discovered the theft. CP 4. The probable cause statement further explained that the driver of the truck had been the Defendant, and that the next day Trooper O'Connor reviewed a DOL photograph of the Defendant to confirm that he had been the driver of the truck the previous night. CP 4. Law enforcement later contacted the Defendant, and the Defendant denied being stopped by the trooper and claimed he had not been driving the blue Toyota pickup. CP 4-5.

The Defendant was arraigned in the Kitsap County Superior Court on May 15, 2013. CP 6. Prior to trial the State provided the defense with discovery including the report by Office Sabado, and defense counsel also later interviewed Trooper O'Connor. RP (8/20) 53, 58. Defense counsel was, therefore, aware that there was a second truck that pulled over up the road when the Defendant was pulled over by the trooper. RP (8/20) 53, 58.

Specifically, Officer Sabado's report indicated that after taking the stolen vehicle report he contacted Trooper O'Connor about the traffic stop. CP 37. Trooper O'Connor told him that "there was another vehicle in the area that appeared to be waiting around while he had Robinson stopped." CP 37. After Trooper O'Connor released Robinson he then contacted the other vehicle to see if that driver needed help, and the driver of the other pickup told trooper O'Connor that he had stopped to use his phone. CP 37. Officer Sabado's report also stated that the other vehicle was a brown Toyota Pickup, and the report also listed the license plate number of that second vehicle and also listed the registered owner and her address. CP 37.

Defense counsel interviewed Trooper O'Connor prior to trial, and asked him if he had contact with another vehicle after stopping the Defendant. RP (8/20) 53. Trooper O'Connor explained that there was a pickup truck that had pulled over to the shoulder with his flashers on. RP (8/20) 53. The trooper explained that he contacted this second truck and asked if everything was ok, and the driver said that he was just making a phone call. RP (8/20) 53-54. Trooper O'Connor then explained that this was the "extent of that contact" with the driver of the second truck. RP (8/20) 54.

Trial began on August 20, 2013. RP (8/20) 1.¹ In his opening statement the prosecutor stated that Trooper O'Connor would testify that when he pulled the Defendant over he saw that there was a second truck behind the Defendant. RP (8/20) 35. As the trooper pulled the Defendant over this second truck drove by the traffic stop very slowly and that the trooper found that this was "odd." RP (8/20) 35. The second truck continued on up the road approximately a quarter of a mile and then pulled over and turned on its flashers. RP (8/20) 35. After the trooper completed his traffic stop with the Defendant, the trooper next contacted the second truck that had pulled over up the road. RP (8/20) 36. The trooper saw that there was a cell phone on the bench seat of the truck next to the driver, and the driver told the trooper that he had pulled over to make a phone call. RP (8/20) 36-37. The prosecutor further stated that the actions of the second truck would be something that the jury could consider with respect to the theft of a motor vehicle count. RP (8/20) 40.

Shortly after opening statements were completed defense counsel informed the court that she believed there had been a discovery violation. RP (8/20) 52. Defense counsel stated that she was aware of the second truck, but that she had not been advised that the second truck had slowly driven by the traffic stop involving the Defendant and was not aware that

¹ This trial began well within the time for trial rules, as the 90 day time for trial was not

the State believed (or was intending to argue) that this second truck was involved in the theft of the Stevenson's truck. RP (8/20) 52-55. Defense counsel acknowledged that Officer Sabado's report indicated that the second truck was a "suspicious vehicle," but defense counsel stated that she had not received any discovery indicating that the second truck had slowly rolled past the traffic stop or that it had apparently been driving behind the Defendant prior to the traffic stop. RP (8/20) 58-59.

The State argued that there had been no discovery violation, as Officer Sabado's report indicated that the second truck appeared to be associated with the Defendant's vehicle, and defense counsel was aware of this. RP (8/20) 60. As this argument came up near the end of the day, the trial court recessed for the day and stated it would hear further argument on this issue the following day. RP (8/20) 71-72.

The next day the trial court heard further argument and conducted a brief examination of Trooper O'Connor regarding the facts of the case and his defense interview. RP (8/21) 73-140. At the conclusion of this process the trial court made a number of findings of fact. RP (8/21) 110. Specifically, the trial court found that in the defense interview with Trooper O'Connor the trooper did not go into his suspicions regarding the second truck, and thus defense counsel came out of the interview with the

set to expire until September 18, 2013. CP 51.

impression that the second truck was not relevant to the case at hand. RP (8/21) 110-11. The trial court also specifically stated that it did not find that the trooper was intentionally trying to manipulate or withhold information from the defense. RP (8/21) 111.

The court also found that after the defense interview with Trooper O'Connor was completed, the prosecutor and the trooper discussed the case further and during this discussion the prosecutor asked the trooper more questions about the second truck and ultimately both the prosecutor and the trooper concluded that the second truck was suspicious and there was a reason to conclude that it had been connected with the Defendant's truck. RP (8/21) 111, 144. The trial court found that this information was material and should have been disclosed to the defense. RP (8/21) 111-12, 152. The trial court, however, also clarified that "I do not find that it was a willful violation." RP (8/21) 152.

With respect to the potential remedy for the discovery violation, the trial court explained as follows

THE COURT: This court has several remedies available to it, from suppression of the evidence to dismissal of the case. In between there is a mistrial, which can be declared. I do not find this is a willful violation on the part of the prosecution or the State Patrol officer.

...

Having said that, I will not dismiss this case as a sanction. That's a harsh sanction, and it should be, and I

will reserve it only for deliberate violations of the discovery rules.

The question then remains between the two choices of a mistrial or suppression of the evidence with an admonishment to the jury. The case law that I have reviewed runs both gamuts.

The information that was given to the jury does ring the bell with respect to the second driver. And Mr. Davy did spend some time discussing the second driver and how they would hear, at the end of the case, how that second driver comes into play with the theft of the motor vehicle.

And so, Ms. Robinson, I guess I will leave this up to you. Do you want the Court to grant a mistrial, or do you want the Court to suppress the evidence of the second driver with an admonishment to the jury, a cautionary instruction?

MS. ROBINSON: Your Honor, I would request a mistrial.

THE COURT: All right. And so I will order a mistrial be declared at this point.

RP (8/21) 152-53. The trial court later entered written findings of fact and conclusions of law regarding the discovery violation. CP 159.

After the trial court declared the mistrial and excused the jury, the parties discussed a potential date for a new trial. RP (8/21) 156. When the first trial commenced on August 20, the trial had begun well within the time for trial rules, as the 90 day time for trial was not set to expire until September 18, 2013. CP 51. The trial court explained, however, the once the mistrial was declared, the 90 day time for trial period started over. RP (8/21) 158. Defense counsel further stated that the time for trial period

would be “90 days from today.” RP (8/21) 159. The trial court thus explained that the new time for trial period would extend until November 20. RP (8/21) 159.

The trial court also asked the parties about their preferences for a new trial date. The prosecutor stated that he preferred a date “as soon as possible,” and that a trial the following week would be fine. RP (8/21) 156. Defense counsel, however, requested a trial date out at least a couple of weeks, and the court then suggested September 3rd and September 9th. RP (8/21) 157.² Due to an illness in her family, however, defense counsel asked for a date at the end of September, and the State explained that it had no objection based upon the reasons defense counsel had stated. RP (8/21) 157-58. The trial court then set the new trial date for September 30th and noted that the time for trial extended until November 20th. RP (8/21) 158. Neither party expressed any objection to this new trial date.

The second trial began on September 30th. RP (9/30) 1. At the beginning of the trial the State moved to dismiss Count II – the charge of theft of a motor vehicle. RP (9/30) 10. The trial court granted the motion. RP (9/30) 10; CP 84.

² Both of these dates would have been within the original time for trial period, which as previously mentioned was not set to expire until September 18th. CP 51.

At the conclusion of the trial, the jury found the Defendant guilty of possession of a stolen vehicle as charged in Count I. CP 135. The trial court then imposed a standard range sentence. CP 146.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION WHEN IT CONSIDERED ALL OF THE AVAILABLE REMEDIES FOR THE DISCOVERY VIOLATION IN THE PRESENT CASE AND CAREFULLY CRAFTED TWO AUTHORIZED REMEDIES (SUPPRESSION OF THE EVIDENCE OR A MISTRIAL) FOR THAT DISCOVERY VIOLATION.

Using an amalgam of theories, the Defendant argues that the court erred by failing to dismiss the charges after the late discovery of the potential role of the second vehicle. The Defendant, however, has not shown any entitlement to that remedy.

Specifically, the Defendant argues that the trial court should have dismissed the charge below because the prosecutor violated his discovery obligations pursuant to CrR 4.7 and this violation constituted prosecutorial misconduct that violated the Defendant's right to a speedy trial. App.'s Br. at 13. Because of the various components of the Defendant's argument, there are several issues and standards of review that must be examined.

First, under Washington law discovery in a criminal case is governed by CrR 4.7, and the rule grants a trial court broad discretion to fashion an appropriate remedy for discovery violations, including the granting of a continuance or dismissal of an action. CrR 4.7(h)(7)(i). Another remedy available under CrR 4.7 is the ordering of a mistrial. *See, State v. Greiff*, 141 Wn.2d 910, 923 n5, 10 P.3d 390 (2000), *citing State v. Faulk*, 17 Wn.App. 905, 908, 567 P.2d 235 (1977) (recognizing mistrial as a sanction available under CrR 4.7(h)(7)(i)).

“Dismissal of a case for discovery abuse is an extraordinary remedy that is generally available only when the defendant has been prejudiced by the prosecution's actions.” *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). Similarly, a trial court's power to dismiss is discretionary and is reviewable only for manifest abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). “A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.” *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012).

Furthermore, the determination of whether dismissal is an appropriate remedy for discovery violations is a fact-specific one that must be resolved on a case-by-case basis. *State v. Ramos*, 83 Wn.App. 622, 637, 922 P.2d 193 (1996). Even if government misconduct is present, dismissal

is not required absent a showing of prejudice to the defense. *State v. Blackwell*, 120 Wn.2d 822, 832, 845 P.2d 1017 (1993). Furthermore, a discovery violation that is discovered at trial may not even warrant a mistrial, let alone an outright dismissal. *See, e.g., Greiff*, 141 Wn.2d at 923 (holding that although there was a clear discovery violation, trial court did not err in refusing to grant a mistrial).

Next, CrR 8.3(b) empowers a court to dismiss an action when “due to arbitrary action or governmental misconduct” that prejudices the rights of the defendant, there has been a material effect on the “right to a fair trial.” The court's power to dismiss under CrR 8.3(b) is discretionary and reviewable only for a manifest abuse of that discretion *State v. Laureano*, 101 Wn.2d 745, 762, 682 P.2d 889 (1984); *State v. Cochran*, 51 Wn.App. 116, 123, 751 P.2d 1194, *review denied*, 110 Wn.2d 1017 (1988). However, dismissal remains an extraordinary remedy and is appropriate only if the prejudice to the defendant cannot be remedied by granting a new trial. *State v. Garza*, 99 Wn.App. 291, 295, 994 P.2d 868 (2000); *State v. Baker*, 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970); *State v. Cochran*, 51 Wn.App. 116, 123, 751 P.2d 1194, *review denied*, 110 Wn.2d 1017 (1988).

As outlined above, a trial court is given broad discretion under both CrR 4.7 and CrR 8.3 to fashion a remedy for a discovery violation or

government misconduct. Neither rule requires dismissal of all charges any time there has been a violation. In the present appeal, however, the Defendant's argument would, in essence, require this Court to find that the only available remedy under these rules is outright dismissal of all charges. No Washington court, however, has ever held that to be the case. To the contrary, Washington law is clear that a trial court has broad discretion to fashion whatever remedy it feels is appropriate. This Court should decline the Defendant's invitation to create new law by holding that dismissal is the only available remedy.³

In the present case the trial court carefully considered the available remedies and held that the extraordinary remedy of a dismissal was not warranted. The court did, however, carefully craft two potential remedies (suppression and a mistrial) and allowed the defense to choose the remedy

³ The Defendant also briefly cites *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). App.'s Br. at 14, 16. It is not immediately clear why the Defendant believes *Brady* applies to the present case, as the Defendant's right to a fair trial was honored by the fact that his actual trial did not occur until after he was apprised of the evidence regarding the second truck. Stated another way, the Defendant has not established a *Brady* violation because he cannot show that the result of his trial would have been different absent the violation. See, e.g., *In re Stenson*, 174 Wn.2d 474, 487, 276 P.3d 286 (2012) (In order to show "materiality" under the *Brady* test, a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."), quoting *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

In the present case the Defendant was aware of the evidence regarding the second truck by the time of his actual trial on September 30th. Thus there simply was no *Brady* violation. In addition, it is important to note that even in cases where the court has found a *Brady* violation the remedy is often a new trial, not an outright dismissal of all charges. See, e.g., *Stenson*, 174 Wn.2d at 494 (a death penalty case where the Washington Supreme Court found the State had violated *Brady* by failing to disclose photographs and an FBI file to the defense, yet the Supreme Court remanded the case for a new trial).

it most preferred. The Defendant has failed to show that this careful and deliberate actions by the trial court constituted a manifest abuse of discretion. The Defendant's claim, therefore, must fail.

The Defendant also cites *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 and argues that the present case is exactly like *Michielli* and that the trial court essentially "forced the defendant to either accept a mistrial and the continuance of the trial date, or proceed to trial unprepared." App.'s Br. at 22. The Defendant's argument, however, misconstrues the holding of *Michielli* and inaccurately portrays the trial court's ruling in the present case.

In *Michielli* the Supreme Court ultimately upheld a trial court's decision to dismiss four additional charges that were added on the eve of trial. *Michielli*, 132 Wn.2d at 246. There are, however, several critical facts that must be remembered. First, the Supreme Court in *Michielli* upheld the dismissal of the additional counts under CrR 8.3, which (as outlined above) gives a trial court broad discretion to fashion an appropriate remedy. The Court in *Michielli*, however, in no way held that dismissal was the *only* appropriate remedy. Rather, the Court merely held that the trial court did not abuse its discretion in applying that remedy. *Id* at 240.

Secondly, the trial court in *Michielli* did not dismiss every count against the Defendant. Rather, the court only dismissed those counts that were added at the last minute with no notice to the defense. *Id.* at 233-34. Thus, the trial court's remedy was tailored to meet the actual nature of the violation. Namely, the State was prohibited from trying the Defendant on those counts for which the Defendant had not been given the appropriate notice. The Defendant in the present case claims that he was "forced" to choose between a mistrial and going to trial unprepared, but this is inaccurate. In the present case the trial court carefully tailored two potential remedies to fit the violation and gave the Defendant the choice of either a mistrial or going forward with trial with the suppression of all of the evidence that was not timely disclosed. RP (8/21) 152-53. The remedy of suppression, therefore, essentially mirrored the remedy in *Michielli* because it would have prevented the State from benefiting from the late disclosure. Rather than somehow running afoul of *Michielli*, the trial court's offer to suppress the State's late disclosed evidence was actually entirely consistent with *Michielli*. The *Michielli* court did not give the Defendant a windfall and dismiss all charges against the Defendant. Rather, the court only dismissed those counts that caused undue surprise. The trial court's offer to suppress the evidence that was not timely disclosed in the present case followed this same logic and was not an

abuse of discretion and did not (contrary to the Defendant's assertion) force the Defendant to go to trial unprepared. To the contrary, the trial court offered to suppress the newly disclosed evidence, and this offer would have properly eliminated any prejudice resulting from the State's late disclosure.

Thirdly, the declaration of a mistrial in the present case did not force the Defendant to waive his right to a speedy trial. Nor did the mistrial result in a functional waiver of the Defendant's right to a speedy trial. Rather, even after the mistrial there were still approximately 30 days remaining under the previously existing time for trial period, which would not have expired until September 18, 2013. CP 51. The State expressed that it would be ready to begin the second trial as soon as possible (as early as the following week) and the trial court then offered the Defendant two trial dates that would have been inside the original time for trial period. RP (8/21) 157. For reasons unrelated to the present case, however, the Defense sought to set the trial date slightly outside that original time for trial period. RP (8/21) 157-58. Furthermore, the defense raised no time for trial objection below, and the defense specifically acknowledged that the mistrial resulted in a new 90 day time for trial period. RP (8/21) 159. Given all of these facts it is simply inaccurate to

claim that the trial court's ruling somehow forced the defendant to waive his right to a speedy trial.

In conclusion, *Michielli* simply does not require a dismissal in the present case for several reasons. Rather, *Michielli*, (a CrR 8.3 case) is consistent with the well-established rule in Washington that a trial court has broad discretion to fashion an appropriate remedy to governmental misconduct. While dismissal is a potential remedy, it is certainly not the only remedy. Furthermore, the Court in *Michielli* simply upheld the dismissal of those counts which were not timely filed, but did not dismiss those counts which had been timely filed. The trial court's ruling in the present case was entirely consistent with the spirit of *Michielli*, as the trial court offered to completely suppress the evidence which had not been timely disclosed. The Defendant, however, freely choose the alternative remedy of a mistrial and declined the trial court's offer to set the new trial for a date that would have been within the original time for trial period. In short, *Michielli* in no way demonstrates that the trial court abused its discretion in the present case.

With respect to the time for trial rules, it is also worth noting that it is undisputed that pursuant to CrR. 3.3(c)(2)(iii) the declaration of a mistrial results in a resetting of the 90 time for trial clock. The defense acknowledged this fact below and raised no objection to the new trial date.

RP (8/21) 159. On appeal, the Defendant appears to suggest that the fact that the first trial ended in a mistrial by necessity caused a speedy trial violation. Such a holding, however, would mean that the *only* possible remedy would be an outright dismissal of the case anytime the State could be said to have caused a mistrial. No Washington court, however, has ever reached this conclusion. Although not discussed by the Defendant, there are a number of cases that have held that in some limited situations a retrial may be prohibited when the State has caused a mistrial. Those cases, however, hold that a retrial is prohibited only if it is shown that the “governmental conduct in question is intended to ‘goad’ the defendant into moving for a mistrial.” *See, State v. Lewis*, 78 Wn.App. 739, 742, 898 P.2d 874 (1995), *quoting Oregon v. Kennedy*, 456 U.S. 667, 102, S.Ct. 2083, 72 L.Ed.2d 416 (1982); *see also State v. Aleshire*, 89 Wn.2d 67, 70, 568 P.2d 799 (1977); *State v. Cochran*, 51 Wn.App. 116, 119, 751 P.2d 1194 (1988) (same). The Court of appeals has explained that under this test the “critical factor is the trial court’s perception that the State’s case was going badly and the prosecutor was looking for an excuse to start over.” *Lewis*, 78 Wn.App. at 743.

In the present case, of course, the trial court made no finding that prosecutor intentionally attempted to goad the defense into seeking a mistrial, nor would the record have supported such a finding. Rather, the

record shows that the discovery violation came to light during opening statements and there was certainly nothing that would have supported a finding that the State's case was going badly or that the State somehow intentionally goaded the defense into moving for a mistrial because the State wanted to start the trial over. The present case, therefore, simply does not fall within that narrow spectrum of cases where a retrial is prohibited after a mistrial caused by the actions of the State. Thus, despite the Defendant's arguments to the contrary, this Court should follow the holding of the cases mentioned above and decline to hold that dismissal was the *only* available remedy. In addition, this Court should decline to set out a new rule that would bar retrial (under a speedy trial argument or any other similar claim) in every case where a mistrial was attributable to the actions of the State.

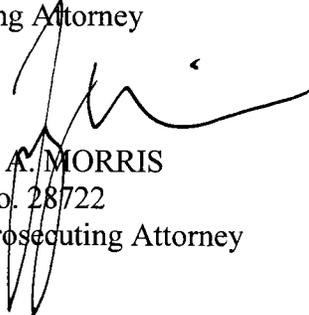
In conclusion, under both CrR 4.7 and 8.3 a trial court has broad discretion to fashion an appropriate remedy for a discovery violation or governmental misconduct. Under both rules a trial court's exercise of its broad discretion is reviewed for a manifest abuse of discretion, and the Defendant in the present case has failed to demonstrate a manifest abuse of discretion. Rather, the record shows that the trial court acted well within its broad discretion when it considered the available remedies and carefully tailored two remedies to fit the discovery violation at issue.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED July 7, 2014.

Respectfully submitted,
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