

NO. 47036-5-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WARREN C. MABRY,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY COURT
The Honorable Robert Lewis, Judge
Cause No. 14-1-00818-0

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Mabry of his constitutional due process right to a fair trial.
02. The trial court erred in imposing discretionary legal and financial obligations on Mabry.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Mabry was denied his constitutional due process right to a fair trial where during closing argument the prosecutor engaged in prejudicial misconduct by minimizing the State's burden of proof and by appealing to passion? [Assignment of Error No. 1].
02. Whether the trial court improperly imposed discretionary legal and financial obligations on Mabry without first determining whether he had the ability or likely future ability to pay them? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Warren C. Mabry was charged by second amended information filed in Clark County Superior Court June 18, 2014, with six counts of rape of a child in the first degree, with counts IV-VI alleging the alternative of child molestation in the first degree, contrary to RCWs 9A.44.073 and 9A.44.083. Each count further alleged the aggravating circumstances of ongoing pattern of sexual abuse and violation of position

of trust, contrary to RCWs 9.94A.533(3)(n), and 9.94A.533(3)(g). [CP 3-7].

Trial to a jury commenced October 27, the Honorable Robert Lewis presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 810]. Mabry was found guilty of all six counts of rape of a child in the first degree, including all aggravating factors, was given an exceptional sentence of 480 months, and timely notice of this appeal followed. [CP 41-47, 49-50, 52-53, 55, 57-73, 79].

02. RCW 9A.44 Hearing

Dr. Kimberly Copeland, a child abuse pediatrician, saw A.E.G. July 10, 2013, and performed a medical examination. [RP 7, 8-9, 15-16]. She wanted to see “whether or not there was any potential that she (A.E.G.) could have infections related to that contact or potential injuries related to that contact.” [RP 10]. A.E.G. made disclosures of physical contact with Mabry that happened in the living room, bedroom, bathroom, and kitchen. [RP 15]. She referenced places in her mom’s house but didn’t provide any specific details “except for the bathroom.” [RP 17].

[S]he had verbalized to me that it happened in the bathroom, that he grabbed her. That he took her to the bathroom, closed the door. She couldn’t recall if he locked the door or not. She said that, He got me naked, and then

she wrote, And he got himself naked and he put me on the floor and then he got on top of me.¹

[RP 18-19].

On Friday, June 14, 2013, after learning from his fiancé Valeria Jacobson that A.E.G. had indicated that Mabry had inappropriately touched her, Cesar Gorgonio Lopez,² A.E.G.'s father, took his daughter to the hospital, where she told him "that (Mabry) was touching her." [RP 21-24]. "[W]hen I asked (A.E.G.) if (Mabry) was touching her she says, Yes." [RP 26]. When Gorgonio and Jacobson asked where Mabry was touching her, "she said, In my private parts." [RP 27]. "She said it in English." [RP 27]. The following Sunday, A.E.G. told Gorgonio and Jacobson that Mabry "was penetrating her." [RP 28].

[S]he had said that not only was he touching her, but he was putting his fingers into her private parts and that he had pulled down his pants and put his private part inside her vagina.

[RP 29].

Days after I started to ask again questions and that's when she said that was he - - not only was he penetrating her in the vagina, but was also penetrating her in the anus. She told Valeria first and then she told me about it.

[RP 30]. When asked if A.E.G. was just saying these things on her own or

if someone had asked her questions about it, Gorgonio responded:

¹ Quoted passages herein are represented as set forth in the verbatim report of proceedings, with no changes to either grammar or punctuation.

² A.E.G.'s father's last name is Gorgonio. [RP 21].

No, because I told her that she can feel comfortable talking to me about it because I was curious, needed to know more about it. And little by little she started to open up. Slower with me than Valeria.

[RP 31].

Valeria Jacobson recounted how A.E.G. first told her that Mabry had touched her after she had picked her up at her mom's (A.E.G.'s) apartment Friday, June 14, 2013. [RP 35, 48]. "I was opening the door to get her in the car and then she just say, (Mabry) touches me." [RP 49].

I didn't move and then I went, like, okay, like you can tell me now. And then she said, Well, (Mabry) touches me. And I said, Where? And she said, My private areas. And I asked her to show me where, you know, with her hands, you know, and she said, Here and there.

....

Like down there, like woman private area.

....

Vagina, uh-huh.

....

The boobs.

[RP 49].

When asked when, A.E.G. "said before it was just sometimes, but now it's all the time." [RP 49]. When asked how long it had been going on, she said, "A very long time." [RP 51]. Jacobson repeated what A.E.G. had told her and Gorgonio the following Sunday and the days thereafter about the extent of Mabry's sexual abuse. [RP 51-52, 61, 63].

Now 7-year-old A.E.G. (DOB 01/18/07) testified that Mabry touched her “where nobody’s supposed to touch me and I didn’t like it.” [RP 113]. She related how this occurred sometimes in the living room, sometimes in the kitchen, and sometimes in the bedroom. [RP 113]. “He did it like 20 or 30 times.” [RP 124]. She remembered first telling Jacobson and then her father. [RP 114-15]. She easily distinguished between what is true and what is a lie and remembered taking to the police about the improper touching. [RP 116]. She referred to her biological mother as “Amber,” and when asked why, responded, “[S]he brings me really bad memories and I don’t feel like she’s my real mom.” [RP 118]. She said Amber had seen what Mabry was doing to her. [RP 25].

Amber Mabry, A.E.G.’s mother and former wife of Cesar Gorgonio and now Mabry’s wife, said that on a couple of occasions, probably April or May 2013, A.E.G. had complained that her butt was bleeding and that she had vaginal pain, the latter of which was diagnosed as a bladder infection and treated with antibiotics. [RP 144-45]. She never talked to A.E.G. about her allegations of sexual abuse. [RP 143].

On June 28, 2013, Detective Jennifer Hubenthal conducted a forensic interview with A.E.G., which was admitted as State's Pretrial Exhibit 6.³ [RP 150].

Reviewing the factors set forth in State v. Ryan, 107 Wn.2d 165, 691 P.2d 197 (1984), the court ruled that statements made by A.E.G. to Jacobson, her father and Detective Hubenthal between June 14-28, 2013, would be admissible under RCW 9A.44.120. [RP 161-65]. A.E.G.'s statements to Dr. Copeland would be admissible "for purposes of diagnosis and treatment." [RP 163].

03. Trial

At trial, A.E.G. alleged that Mabry had sexually abused her by putting his private part inside her mouth and vagina. [RP 180]. It all started in 2011, when she was 4, and happened in different places in various rooms: bedroom, living room, kitchen, and bathroom. [RP 180, 186-89, 211-12]. She described numerous instances [RP 181-86, 188-190], and said that Mabry told her "to never ever tell anyone." [RP 183]. "He told me every single time he did those stuff to me." [RP 200]. She also claimed that her mother saw a "lot of" what was going on [RP 203] and "would do nothing" when she asked her for help. [RP 191]. She admitted

³ The exhibit was later played to the jury and is set forth in the verbatim report of proceeding at RP 654-730.

telling Detective Hubenthal that her mother didn't know anything [RP 203], explaining, "I was scared I was going to get in trouble." [RP 204]. When asked from whom, she said her mother [RP 204], later adding she was no longer afraid because once she told about it, "I started feeling more brave." [RP 207]. When questioned if she was making up a story so she wouldn't have to go back and live with her mother, she responded, "No, this is the truth." [RP 229].

After making her disclosures to Jacobson and her dad, A.E.G. was taken to the hospital and examined by Dr. Thao Nguyen, a pediatric emergency medicine physician, who found no evidence of sexual abuse, nothing unusual, though she did note a mild redness to the vaginal mucosa, which is not specific for child abuse. [RP 432, 437-38, 442].

Cesar Gorgonio Lopez related that he divorced A.E.G.'s mother as a result of her having him arrested for domestic violence in 2008, for which he was never charged [RP 279-280, 289], and that he was currently in the process of seeking permanent custody of A.E.G. [RP 284].

Valeria Jacobson testified consistent with her pretrial testimony [RP 255, 260-61, 300, 304-08], further observing that several months before June 14, 2013, she noticed discharge stains on A.E.G's underwear. [RP 257-59]. "It started out just a little bit and got worse and it got to a point where she would smell bad too." [RP 257].

Amber Mabry learned about A.E.G.'s accusations from CPS on Saturday, June 15, which was almost a week after her marriage to Mabry, from whom she separated at that point [RP 455, 460, 470]. Sometime earlier that year between April and mid-May, A.E.G. had complained to her about vaginal pain and bleeding from her butt, which was diagnosed as a yeast infection, which she was told to treat with an over-the-counter cream. [RP 456-58, 484-85, 487-88]. Earlier, A.E.G had been given "antibiotics for a UTI." [RP 485]. In all, A.E.G complained about four times that she was bleeding. [RP 489]. Prior to June 2013, Amber Mabry had no dispute with A.E.G.'s father regarding child support [RP 453], explaining that they continued on good terms and had no serious problems. "I mean, we had our tiffs here and there because, you know, we are exes, but nothing really serious." [RP 459].

He had asked me a few times if we could change the custody for him to have her during the week and me during the weekend because I was working so much, and I told him, no, that I wanted my daughter home with me - -

[RP 459].

Dr. Kimberly Copeland testified that her physical examination of A.E.G did not yield any physical evidence other than a normal examination of a child A.E.G's age. [RP 549]. She found nothing abnormal in her examination. [RP 554]. A.E.G told her "there was no

bleeding [RP 551](,)” and she did not have any bruising. [RP 554]. All medical tests were negative for evidence of sexually transmitted disease. [RP 554]. “I would say my findings, she had anatomic variants that were not suggestive to me of child abuse.” [RP 558].

A redacted version of Dr. Copeland’s interview with A.E.G. was played to the jury. During the interview, A.E.G. claimed that something happened with Mabry “a lot of times.” [RP 770]. In the living room, the bathroom, the kitchen, and once in the bedroom. [RP 770]. He put his front private stuff in her front private stuff and her bottom and her mouth. [RP 773-74, 776-77]. When he put his front stuff inside her bottom, she “felt like something was squirting out.” [RP 774]. Sometime he put his fingers in my private stuff. [RP 774]. She described one incident where Mabry took her into the bathroom, they both got naked, and he got on top of her, but didn’t want to say anything further. [RP 779, 789, 793].

Using reference samples from Mabry and A.E.G., Brad Dixon, a DNA analyst for the Washington State Patrol Crime Laboratory, obtained a DNA profile for each that he tested for amylase. [RP 577, 603]. An anal swab taken from A.E.G. and from her underwear tested positive for amylase [RP 603, 606], “an enzyme that’s a constituent of saliva.” [RP 589]. Male DNA was present on a crotch swab taken from A.E.G. [RP 609]. “It was a very, very low amount.” [RP 609]. Amylase activity

usually associated with salvia was detected on her underwear [RP 629], an analysis of which Dixon testified produced the following:

So I obtained a mixed DNA profile of at least two individuals. It's consistent with the combined know profiles of (A.E.G.) and Warren Mabry

[RP 612]. The source for this can be feces, urine, sweat or breast milk, but Dixon could not say from which it had been deposited. [RP 629, 634]. No male DNA was detected on the anal swabs [RP 629], and Dixon didn't know if the male DNA detected on the underwear was consistent with touch DNA, though he admitted it was possible. [RP 632-33, 637].

During an interview with Detective Jennifer Hubenthal June 28, 2013, A.E.G. claimed that Mabry put his private stuff in her private stuff and her back bottom, in addition to putting his fingers in her front private stuff. [RP 680-81]. She said incidents occurred in the kitchen, living room, bedroom, and bathroom. [RP 683-88, 695]. She described an incident in the bathroom where Mabry got her naked, got on top of her and put his front private "[i]n my front private stuff." [691]. It happened one time in the bathroom in the daytime when she was in kindergarten. [RP 711]. "Probably five." [RP 694]. In the kitchen, while they were both dressed, their front privates would touch while Mabry continued to move back and fourth, pushing against her. [RP 696-98, 712-13]. In the bedroom he put her on the bed and then put "his front private stuff in my bottom." [RP

702]. It happened more than once in the bedroom. [RP 704]. “[A] lot more.” [RP 713]. In the bedroom he put his private stuff in her bottom and in her mouth on different occasions. [RP 704, 707]. Sometime he would put her on the bed and lick “my private part.” [RP 721]. “[H]is tongue goes in all the way.” [RP 722]. Sometimes this happened in the living room. [RP 724]. “It happens a lot of times.” [RP 706]. This always happened at her mother’s house where Mabry resided. [RP 709]. “But she’s not there.” [RP 709]. “It happens a lot of times when she’s not there. Every day when she’s not there.” [RP 716]. “It doesn’t happen when she’s there.” [RP 724].

Mabry rested without presenting evidence. [RP 799].

D. ARGUMENT

01. MABRY WAS DENIED A FAIR TRIAL WHERE DURING CLOSING ARGUMENT THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT BY MINIMIZING THE STATE’S BURDEN OF PROOF AND BY APPEALING TO PASSION.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty

can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Where, as here, a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). “The State’s burden to prove harmless error is heavier the more egregious the conduct is.” State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

A prosecutor’s obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the

defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

01.1 Burden of Proof

Although a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury, State v. Hoffman, 116 Wn.2d at 94-95, it is misconduct of the most flagrant degree to minimize the burden of proof and thereby encourage the jury to convict based on something short of proof beyond a reasonable doubt, which occurred in this case. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997); State v. Davenport, 100 Wn.2d at 763.

During rebuttal argument, in addressing the merits of the respective cases, the prosecutor argued to the jury:

There's a principle used in logical problem solving known as "Occam's Razor", which states, "That among competing hypotheses, the one that make said the fewest assumptions is the one that you should select." So in other words, the simplest answer is going to be the right one. That's exactly what we have going on here.

[RP 871]. premise

It was misconduct for the prosecutor to argue to the jury that when deciding between competing arguments, the simpler one is the better, which is the problem-solving principle of Occam's Razor, where the

appeal to simplicity seems more about shifting the burden of proof, and less about adhering to the legal standard of beyond a reasonable doubt. The prosecutor's argument minimized the State's burden of proof to the level of asking the jury to render a verdict based on the simplest explanation with no regard for the required standard of proof.

In State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 10902 (2010), even though the jury, as here, was correctly instructed on the State's burden of proof and that lawyers' statements are not evidence, this court, while affirming since the misconduct was not sufficiently prejudicial, held that the State committed misconduct by comparing its beyond a reasonable doubt burden of proof to everyday common decisions in which one might choose to act or refrain from acting, reasoning this was improper because it minimized the importance of the reasonable doubt standard and the jury's role in determining whether the State had met its burden. Anderson, 153 Wn. App. at 431. Similarly, in State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011), where the prosecutor trivialized the State's burden of proof by arguing that an abiding belief was like knowing what a scene depicted in a puzzle looked like prior to putting in the last pieces, this court reversed, reasoning in part

that the State had impermissibly quantified the level of certainty required to satisfy its burden of proof. Johnson, 158 Wn. App. at 685-86.

Given that the presumption of innocence is the bedrock upon which the criminal justice stands, and because this presumption is defined by the reasonable doubt instruction, “it can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve(,)” State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007), which is what happened here. The State’s case was not without serious gaps. Dr. Nguyen, the pediatric emergency physician who first examined A.E.G., found no evidence of sexual abuse. [RP 432, 437-38, 442]. Similarly, Dr. Copeland’s physical examination of A.E.G. found nothing suggestive of sexual abuse. [RP 558]. And S.E.G., as acknowledged by the prosecutor in closing, did “not remember a lot of details.” [RP 873]. Mabry exercised his right not to testify, leaving the State with the burden to prove his guilt beyond a reasonable doubt. The State’s minimization of that burden affected the outcome of this case.

Based on this record, reversal is required, for there is a substantial likelihood that the prosecutor’s flagrant and ill-intentioned mischaracterization of the State’s burden of proof affected the jury’s verdict and in the process ensured that Mabry did not receive a fair trial.

Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. Dhaliwal, 150 Wn.2d at 578. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient....

In re Glassman, 175 Wn.2d 696, 711, 286 P.3d 673 (2012).

01.2 Appeal to Passion

The prosecutor completed his argument with a flagrant appeal to passion:

We don't have the technology to go back in time and stop bad things from happening. We don't have the technology to take the bad memories out of someone's head. (A.E.G.) had to deal with the ongoing sexual abuse. She had to live with it. We are still seeing what she's been left to deal with. And now the time has come for him to live with it.

[RP 880].

A prosecutor commits misconduct when he or she asks a jury to "decide guilt on something other than the evidence," such as sympathy for the victim. Moore v. Morton, 255 F.3d 95, 117 (3d Cir. 2001). As set forth above, the prosecutor's argument implied that the jury could convict Mabry for reasons other than the strength of the evidence, either sympathy or revenge, which was improper, flagrant and ill-intentioned to the degree that an instruction could not have cured the resulting prejudice. State v. Stenson, 132 Wn.2d at 719. As illustrated in the preceding section, there

were weaknesses in the State's case, with the result that the prosecutor's misconduct requires reversal of Mabry's convictions.

01.3 Cumulative Effect of Misconduct

Based on this record, reversal is required, for not only is there a substantial likelihood that the prosecutor's comments affected the jury's verdict, the comments were nothing short of a flagrant attempt to encourage the jury to decide the case on improper grounds, for they were "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). In deciding whether the conduct warrants reversal, this court considers its prejudicial nature and its cumulative effect. State v. Boehning, 127 Wn. App. at 518.

Not only did the prosecutor minimize the burden of proof, he also asked the jury to decide the case on something other than the evidence with his appeal to passion. The cumulative effect requires reversal and remand.

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02. THE TRIAL COURT IMPROPERLY IMPOSED DISCRETIONARY LEGAL AND FINANCIAL OBLIGATIONS ON MABRY WITHOUT FIRST DETERMINING WHETHER HE HAD THE ABILITY OR LIKELY FUTURE ABILITY TO PAY THEM.

Before imposing discretionary legal financial obligations (LFOs) the sentencing court must consider a defendant's current and future ability to pay:

RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future to pay before the court imposes LFOs....

State v. Blazina, 182 Wn.2d 827, 839, 344 P.2d 680 (2015). And more than a cursory inquiry is required:

[T]he court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors ... such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d at 838.

Here, the court imposed \$6,185.38 in discretionary legal financial obligations: \$250 (jury demand fee), \$2,250 (court appointed attorney), \$2,250 (court appointed defense expert), \$500 (fine), \$100 (crime lab fee). [CP 63]. The court made no inquiry into any factors that would have been

relevant to its decision, and the boilerplate language in the judgment and sentence that it “is anticipated” that Mabry will be able “to pay financial obligations in the future” does solve this deficiency. [CP 60].

While Mabry did not object to the imposition of the costs below, RAP 2.5(a), as recognized by our Supreme Court in Blazina, 182 Wn.2d at 833, grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. State v. Russell, 171 Wn.2d 118, 122, 249 P.3d 844 (2011). The Blazina court, while noting that each appellate court must make its own decision in this regard, further opined that “(n)ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” Blazina, 182 Wn.2d at 834.

There is no evidence in the record that the sentencing court made the individualized and detailed inquiry now required under Blazina. Concomitantly, there is nothing in the record to support a finding that Mabry has the ability or likely future ability to pay the discretionary LFOs. He is 43 and incarcerated for 40 years.

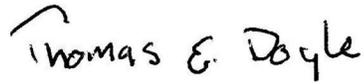
This court should exercise its discretion and reach the merits of Mabry’s claim and remand for resentencing with instructions for the trial court to conduct an on-the-record inquiry consistent with Blazina.

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E. CONCLUSION

Based on the above, Mabry respectfully requests
this court to reverse his convictions and/or remand for resentencing

DATED this 30th day of June 2015.

Handwritten signature of Thomas E. Doyle in black ink.

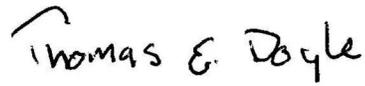
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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Thomas E Doyle - Email: ted9@me.com

A copy of this document has been emailed to the following addresses:

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