IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD F. KARPE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50865

FILED

NOV 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of six counts of sexual assault on a child under the age of fourteen years. First Judicial District Court, Carson City; James Todd Russell, Judge. The district court sentenced appellant Gerald F. Karpe to five consecutive terms of life in prison with the possibility of parole after 20 years and to one concurrent term of life in prison with the possibility of parole after 20 years.

Karpe argues that he is entitled to a new trial or, at the very least, to a new sentencing hearing. In support of his argument for a new trial, he raises several issues on appeal: (1) the State improperly withheld evidence in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963); (2) the prosecutor committed several acts of misconduct; (3) the district court erred in allowing a sheriff's detective to testify that, in his opinion, Karpe was dishonest during a taped police interview; (4) the district court judge was not neutral and assumed the role of prosecutor; and (5) even if the above errors do not individually warrant a new trial, their cumulative effect is such that he is entitled to the new trial. Karpe also argues that even if he is not entitled to a new

sentencing hearing because his sentence was impermissibly increased as a result of his exercise of his constitutional right to proceed to trial. For the reasons stated below, we affirm the judgment of conviction and sentence.

Brady violation

Karpe argues that the State improperly withheld police reports and the results of a CARES sexual assault examination in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963). As the analysis for a Brady claim presents mixed questions of fact and law, we review Karpe's claims de novo. Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). A defendant's due process rights are violated when a prosecutor fails to disclose material evidence favorable to the defense. Brady, 373 U.S. at 87. This court has identified three elements to a Brady violation: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." Mazzan, 116 Nev. at 67, 993 P.2d at 37. Where the information was specifically requested, a defendant establishes prejudice by showing a "reasonable possibility that the omitted evidence would have affected the outcome." Id. at 66, 993 P.2d. at 36.

Karpe argues that the State failed to disclose favorable, material evidence in violation of Brady. In particular, despite a subpoena duces tecum served on the Carson City Sheriff's Office to disclose "[a]ny notes, video or reports done concerning allegations" that Karpe sexually assaulted the victim's twin sister (M.), the State failed to disclose the results of a CARES sexual assault examination performed on M. The State also failed to disclose a supplemental report ("Lacy Report") by the sheriff's office containing M.'s allegations that Karpe sexually assaulted her. The Lacy Report was disclosed mid-trial, but the CARES report was

discovered only after trial when the defense subpoenaed it from the nurse who performed the examination. For the reasons stated below, we hold that the State improperly withheld favorable evidence but that Karpe was not prejudiced by the omission.

The evidence was favorable

Evidence is favorable to a defendant not only when it is exculpatory, but also when it impeaches the credibility of a prosecutor's witness, when it attacks a police investigation, or when it bolsters the defendant's case. Id. at 67, 993 P.2d at 37.

The withheld evidence tends to bolster Karpe's theory of the case that the victim and M. both fabricated allegations of sexual assault in order to secure the attention of their parents and possibly to obtain Karpe's video game collection if he went to jail. The Lacy Report contains M.'s statement detailing alleged assaults against her and that her friend had witnessed one of them. However, when the defense interviewed the friend after the trial, it learned that although the friend had spent a considerable amount of time at Karpe's residence, she had never witnessed any inappropriate touching between Karpe and either the victim or M. Also, M.'s CARES report revealed no physical findings of sexual assault. While not dispositive, the lack of findings in the CARES report tends to bolster Karpe's theory of the case. The evidence was therefore favorable to the defense.[1]

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[1]The withheld evidence also provided impeachment material as it contradicted the mother's testimony that she never believed M. because M. never gave a detailed description of the alleged assaults against her as the victim had done regarding those against him. In particular, the supplemental report reveals that M. did give a detailed description of the

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The evidence was withheld by the State

Because the sheriff's office was in possession of both the Lacy Report and CARES report, the prosecutor is charged with constructive knowledge and possession of those documents and therefore improperly withheld them.[2] See Jimenez v. State, 112 Nev. 610, 620, 918 P.2d 687, 693 (1996) (charging the state attorney "'with constructive knowledge and possession of evidence withheld by . . . law enforcement officers.'") (quoting Gorham v. State, 597 So. 2d 782, 784 (Fla. 1992)).

Karpe was not prejudiced by the withholding

Karpe elicited some testimony at trial regarding M.'s allegations such that he was able to argue his theory of the case during closing arguments. He now argues on appeal that he was nevertheless prejudiced by the State's improper withholding of the additional evidence because, had he known of it prior to trial, he could have more fully developed his theory at trial such that there is a reasonable possibility that the jury would have reached a different verdict.[3] In undertaking a

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alleged assaults and that the mother made statements indicating that she did at some point believe M. As Karpe does not make this argument on appeal, it does not factor into our analysis.

[2]We note that the district court's order denying Karpe's motion for new trial and release of evidence discussed whether the withholding was inadvertent. However, the State's intent to withhold information is irrelevant to a Brady analysis. Jimenez, 112 Nev. at 620, 918 P.2d at 693.

[3]The State contends that the appropriate standard is "reasonable probability" because the information was not specifically requested of the prosecutor. While the information was not specifically included in the

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Brady analysis, we look at the evidence in the context of the entire case rather than at each piece of evidence in isolation. Mazzan, 116 Nev. at 71, 72-73 n.6, 993 P.2d at 39, 40 n.6. Although the denial of a defendant's ability to fully develop a theory may be prejudicial, see id. at 68, 993 P.2d 37, there is generally no prejudice where a defendant has the opportunity to cross-examine witnesses in regard to the withheld information. Wade v. State, 115 Nev. 290, 296, 986 P.2d 438, 441 (1999). Further, where a defendant receives evidence at trial before his case begins and he neither makes an attempt to use the evidence nor requests a continuance, he is not prejudiced by the disclosure of the evidence. United States v. Palmer, 536 F.2d 1278, 1280-81 (9th Cir. 1976).

The Lacy Report was disclosed at trial before Karpe finished cross-examining the State's first witness, well before Karpe began his case-in-chief. The report, prepared by Detective Lacy, included M.'s detailed and specific allegations against Karpe, that it happened in the victim's presence, and that M. observed Karpe sexually assaulting the victim and their older sister. Despite having the Lacy Report early in trial, Karpe did not use any of the information to question the mother,

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Brady order issued by the district court, the subsequent subpoena duces tecum served on the sheriff's office and faxed to the prosecutor requested information on the victim as well as "[a]ny notes, video or reports done concerning allegations involving Gerald Karpe and [M.]." As previously stated, the prosecutor is deemed to have the same knowledge as the sheriff's office, and the prosecutor admits to having received a copy of the subpoena. This was therefore at least the "functional equivalent" of a specific request. See Mazzan, 116 Nev. at 74; 993 P.2d at 41.

Detective Lacy, Detective Bopko, or even the victim, all of whom testified after the report was received. In addition, Karpe did not request a continuance to investigate the information in the Lacy Report.

While the Lacy Report was disclosed early in the trial, two pieces of evidence were not discovered until after trial: (1) evidence refuting at least one of M.'s statements contained in the Lacy Report, and (2) the results of M.'s CARES examination. Although the value and extent of the evidence was not known until after trial, Karpe was made aware at trial that the evidence likely existed. The Lacy Report stated that M.'s friend witnessed Karpe sexually assault M. and gave the name of the friend, yet Karpe did not ask questions of any trial witnesses about the friend or request a continuance to investigate this allegation. The Lacy Report also referenced the need for M. to undergo a CARES examination, yet again Karpe did not question any witnesses regarding the results, move to compel production of any other evidence—such as the CARES report—that would have been responsive to the subpoena, or move to continue the trial in order to investigate this withheld information. Because Karpe did not seek to continue the trial in order to complete an investigation of this new information or take the available opportunity to cross-examine witnesses as to the information that he did possess at trial, we cannot conclude that Karpe was prejudiced by this untimely discovery of evidence. We therefore conclude that relief is not warranted on this basis.

Prosecutorial misconduct

Karpe argues that the prosecutor committed misconduct by vouching for the credibility of the victim and by urging the jury to consider factors other than the law and relevant facts. In reviewing claims of

prosecutorial misconduct, we first address whether the prosecutor's conduct was improper and, if so, whether it warrants reversal. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 476 (2008). When a defendant has not objected below to a prosecutor's comment, we review the comment for plain error. Id. at ___, 196 P.3d at 477. When a defendant has objected below, we instead determine whether reversal is warranted based on harmless error review. Id. at ___, 196 P.3d at 476. Under either standard, we view the comments in context and will not lightly overturn a conviction based on a prosecutor's comments alone. Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004).

Vouching

Karpe argues that the prosecutor vouched for the credibility of the child victim when, during rebuttal argument, he quoted Oliver Wendell Holmes, stating, "Pretty much all the honest truth-telling . . . in the world is done by children." As Karpe did not object to the statement at trial, we review it for plain error.

"A prosecutor may not vouch for the credibility of a witness." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). When viewed in context, the challenged statement was not improper vouching. The prosecutor followed the quotation by pointing out that this case "comes down to believing [the victim]," and he went on to describe the various pieces of evidence that supported the victim's veracity. In doing so, the prosecutor was not inserting his personal opinion as to the victim's credibility but rather asking the jurors to believe the victim in a case that rested nearly entirely on credibility. Such arguments are proper. See People v. Wallace, 97 P.3d 262, 270 (Colo. App. 2004). In addition, the prosecutor was merely responding to defense counsel's closing arguments

that the victim fabricated the allegations to gain attention. The prosecutor's rebuttal argument was a fair response to Karpe's closing arguments, see Bridges v. State, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000) (holding no error where prosecutor's remarks are fair response to defense arguments), and was not error plain from the record.

Urging jurors to consider improper factors

It is improper for a prosecutor to "urge[ ] the jury to convict on a basis other than the evidence." Pantano v. State, 122 Nev. 782, 793, 138 P.3d 477, 484 (2006). For example, a prosecutor should not engage in conduct designed only to inflame the jury's emotions or urge the jury to convict to prove their own or society's morality. See Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985), modified on other grounds by Howard v. State, 106 Nev. 713, 719, 800 P.2d 175, 178 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000). Karpe points to three of the prosecutor's statements as instances of such improper argument.

The first challenged statement was made at the beginning of the prosecutor's opening remarks when he quoted an unnamed source as saying, "The test of the morality of a society is how it treats its children." He then stated that this case was about how Karpe treated the victim, "one of society's children," followed by the facts he intended to elicit during trial. Karpe did not challenge the statement at trial, so we review for plain error. The quote does not urge the jurors to prove their or society's morality by convicting Karpe. Rather, it is a rhetorical device to call into question Karpe's morality when he treated the victim in the manner that the prosecutor went on to describe. Such "unflattering characterizations" of a defendant are not improper when supported by the evidence. Miller v.

State, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005). Here, an argument regarding Karpe's immorality was supported by the evidence as the victim testified to several immoral acts that Karpe either performed on the victim or forced the victim to perform on Karpe. The statement is therefore not error plain from the record.

The next challenged statement was made at the beginning of the prosecutor's closing argument when he again quoted an unnamed source and said, "We know the truth not only by reason, but from the heart." Again, Karpe did not challenge the statement at trial, so we review it for plain error. This statement appears to encourage jurors to base their decision at least in part on their hearts or emotions. Such an argument is improper. Collier, 101 Nev. at 479, 705 P.2d at 1130. However, Karpe has merely identified an error without demonstrating that he was actually prejudiced or that the comment resulted in a miscarriage of justice. See Valdez, 124 Nev. at ___, 196 P.3d at 477 (explaining that a defendant must demonstrate "'actual prejudice or a miscarriage of justice'") (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). The evidence in this case was certainly not overwhelming, but at the same time, the prosecutor's improper remark was not egregious. Rather, it was a brief, isolated comment at the beginning of closing argument. As such, we will not reverse based on this comment.

The final challenged statement was made during the prosecutor's rebuttal argument when he rhetorically asked the jurors,

> Does a . . . boy put himself through the discomfort and the embarrassment of having to report these things to complete strangers, to sit here and tell you this?

> Is there anyone here who wants to get up and talk about your greatest sexual experience? Anyone here want to talk about your most humiliating experience?

Karpe objected to this passage at trial, arguing that it impermissibly placed the jurors in the victim's position. We therefore review the comment under the harmless error standard.

A prosecutor generally may not ask the jurors to place themselves in the victim's position. McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984). However, it is not improper for the prosecutor to place the jurors in the victim's position during some other time than during the commission of the crime. See Leslie v. Warden, 118 Nev. 773, 777, 59 P.3d 440, 443 (2002). Further, even an improper, inflammatory comment may not warrant reversal where the district court sustains an objection. Leonard v. State, 114 Nev. 1196, 1212, 969 P.2d 288, 298 (1998).

Here, the challenged statement by the prosecutor did not urge the jurors to place themselves in the victim's place during the commission of the crimes and was therefore not an improper comment. Moreover, although the district court did not expressly rule on Karpe's objection, it admonished the jury not to consider the comment. Under the circumstances presented here, there was no error, and we therefore conclude that relief is not warranted on this basis.

Detective Bopko's opinion

Karpe argues that the district court improperly allowed Detective Keith Bopko to testify as to his opinion about whether Karpe was telling the truth during a video-taped police interview in which Karpe denied sexually assaulting the victim. We review claims regarding the

admission of evidence for abuse of discretion. See Lucas v. State, 96 Nev. 428, 431-432, 610 P.2d 727, 730 (1980); Mulder v. State, 116 Nev. 1, 13-14, 992 P.2d 845, 852-53 (2000). It is unclear whether Detective Bopko's testimony was given as an expert witness or as a lay witness.[4] However, while the law differs depending on whether the witness is offering lay or expert testimony, the result in the case at bar is the same under either line of analysis: The district court abused its discretion when it allowed Detective Bopko to give his opinion as to Karpe's veracity.

During Detective Bopko's testimony, the prosecutor played for the jury a video of Detective Bopko's interview with Karpe, then asked Detective Bopko whether there was anything happening during the interview that was not apparent in the video. Detective Bopko responded with his observations that Karpe's eyes were moving, he was fidgeting, his breath turned sour, and he began to sweat. Detective Bopko then explained in some detail why and how the shifting eyes and body movement indicated that Karpe was being deceptive and had "integrity issues" during the interview. These explanations went beyond his mere

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[4]On the one hand, it appears the witness was testifying as an expert because his voir dire included testimony as to his training in the area of reading body language for signs of deception, and, during a later hearing outside the presence of the jury when Karpe moved for a mistrial, the prosecutor referred to Detective Bopko's "expertise" in the area. On the other hand, Detective Bopko himself explicitly stated that he was not an expert in this area, and the district court did not determine whether Detective Bopko was in fact qualified as an expert, a prerequisite to any expert testimony. See Crowe v. State, 84 Nev. 358, 362, 441 P.2d 90, 92 (1968), modified on other grounds by Tellis v. State, 84 Nev. 587, 590, 445 P.2d 938, 940 (1968); Mulder v. State, 116 Nev. 1, 13, 992 P.2d 845, 852 (2000).

perceptions and into the prohibited realm of opining as to Karpe's veracity. Karpe properly objected to this opinion testimony, but the district court erroneously overruled it.

Neither a lay witness nor an expert witness may opine on another witness's veracity or the defendant's guilt or innocence as such testimony invades the province of the jury to weigh evidence and decide the credibility of witnesses. DeChant v. State, 116 Nev. 918, 924-25, 10 P.3d 108, 112 (2000); Marvelle v. State, 114 Nev. 921, 931, 966 P.2d 151, 157 (1998), abrogated on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000), modified on other grounds by State v. Dist. Ct (Romano), 120 Nev. 613, 623, 97 P.3d 594, 600 (2004), overruled on other grounds by Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006). Because Karpe objected to inappropriate opinion testimony, we consider whether its admission was harmless. Townsend v. State, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987).

In this instance, defense counsel offered a timely solution to the improper testimony: The defense offered its own witness to impeach Detective Bopko's credibility on his so-called expertise.[5] The defense witness thoroughly impeached Detective Bopko, explaining not only why Detective Bopko was wrong but also the limitations of the significance of the evidence even if his interpretations of body language were accurate. In addition, the prosecutor did not refer to Detective Bopko's improper

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[5]Although the district court allowed the defense witness to give expert testimony without properly qualifying the witness as an expert, any error in this regard favored Karpe and was therefore harmless. See Mulder, 116 Nev. at 14, 992 P.2d at 853.

testimony during closing arguments. Accordingly, we conclude that the error was harmless. Relief is therefore not warranted on this basis.

Judicial misconduct

Karpe argues that the trial judge was not neutral but instead advocated for the prosecution. We disagree.

Prior to the beginning of testimony, the district court held an admissibility hearing pursuant to NRS 51.385 to determine whether the mother would be allowed to testify to hearsay statements made by the victim. In determining that the hearsay evidence could be admitted, the district court found the victim's description of "white stuff" coming out of Karpe's penis to be especially important to its finding of sufficient circumstantial guarantees of trustworthiness, noting that a child of the victim's age would not normally be expected to have such knowledge. When, during direct examination of the mother, it appeared that the State was not going to elicit that piece of information, the trial judge interrupted the examination and called counsel to a bench conference, where he proceeded to ask the prosecutor to pose the question about the "white stuff." The prosecutor resumed the interrupted line of questioning and, when he was finished, asked the question directed by the court. Karpe did not object.

The trial judge could have posed questions directly to the witness, NRS 50.145,[6] but he chose instead to discretely discuss the

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[6]NRS 50.145(2) reads as follows:

> The judge may interrogate witnesses, whether called by himself or by a party. The parties may object to questions so asked and to evidence thus

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matter at a bench conference, thereby properly ensuring that the jury would not know of the great weight the judge placed on this piece of evidence and reducing any prejudicial effect from his actions. See State v. Fitch, 65 Nev. 668, 685, 200 P.2d 991, 1000 (1948), overruled on other grounds by Graves v. State, 82 Nev. 137, 413 P.2d 503 (1966). Karpe alleges no other instances where the district court advocated for either side, see Azbill v. State, 88 Nev. 240, 249, 495 P.2d 1064, 1070 (1972), and our review of the record reveals none. There also is no evidence in the record that the district court abandoned its appearance of impartiality or that it otherwise engaged in misadventures so pervasive as to be unfair. See McNair v. State, 108 Nev. 53, 62, 825 P.2d 571, 577 (1992). We therefore conclude no relief is warranted on this basis.

Cumulative error

Karpe argues that even if the above errors individually do not warrant reversal, he is nevertheless entitled to a new trial because, cumulatively, the errors denied him a fair trial. In determining whether a defendant was denied due process due to cumulative errors at trial, we consider "whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998) (quoting Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1289 (1996)).

In the instant case, the issue of innocence or guilt is very close, turning almost entirely on the credibility of the complaining witness. At

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> adduced at any time prior to the submission of the cause.

the same time, the crimes charged—sexual assault of a child under 14 years old—are grave. The analysis rests then on the quantity and character of the errors.

We discerned only three errors at trial. First, the State improperly withheld Brady evidence. However, the evidence was ultimately disclosed such that any prejudice was minimal. Second, the prosecutor urged the jurors to convict Karpe based not just on the evidence but also on their "heart." While improper, this fell short of an invitation to ignore the evidence. Finally, the district court erred in admitting Detective Bopko's opinions as to Karpe's veracity. However, the evidence was spontaneously offered by the witness rather than intentionally elicited by the prosecutor and was thoroughly rebutted. When viewed as a whole, the errors made during trial were not so pervasive or egregious as to render Karpe's trial unfair.

Unlawful sentence

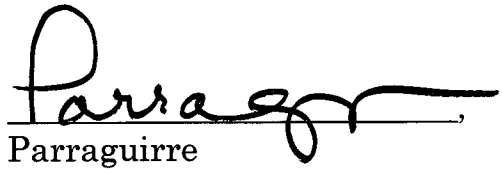
Karpe argues that the district court impermissibly increased his sentence because he exercised his constitutional right to proceed to trial. Karpe highlights two facts in support of his argument: (1) a sentence in the presentence investigation (PSI) report's conclusion states, "It is unfortunate that this child had to go through a trial where he had to repeatedly retell his victimization," and (2) the sentence imposed exceeded that requested by the State.

Although it would be an abuse of discretion to impose a harsher sentence because a defendant has exercised his right to a trial, Bushnell v. State, 97 Nev. 591, 593, 637 P.2d 529, 531 (1981), a review of the entire record does not reveal that the district court based Karpe's sentence on such impermissible grounds. Rather, the district court stated

that it found the victim's testimony "convincing" and in fact imposed a sentence less harsh than the six consecutive life terms recommended in the PSI report. Because Karpe has failed to show that the district court abused its discretion, we hold that he is not entitled to a new sentencing hearing. Castillo v. State, 110 Nev. 535, 544, 874 P.2d 1252, 1258 (1994).

Having held that Karpe is not entitled to either a new trial or a new sentencing hearing, we therefore

ORDER the judgment of conviction AFFIRMED.



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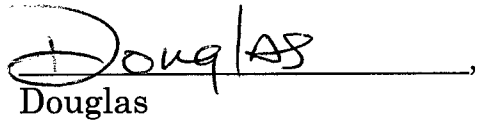

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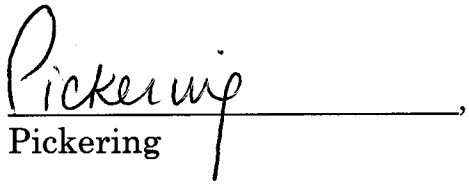

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cc: Hon. James Todd Russell, District Judge
State Public Defender/Carson City
Attorney General Catherine Cortez Masto/Carson City
Carson City District Attorney
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