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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of General Sessions

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2019-001593

THE STATE,

Respondent,

v.

JOSE REYES REYES,

Petitioner.

RETURN TO PETITON FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not err in conducting Victim's competency determination in the presence of the jury, and the competency hearing did not result in improper bolstering or vouching. Any conceivable error was harmless in light of the overwhelming evidence of guilt and the trial judge's charge to the jury calling for heightened scrutiny of a child witness' credibility.

STATEMENT OF THE CASE

Petitioner was indicted during the March 2015 term of the Grand Jury for Pickens County for criminal sexual conduct with a minor in the first degree (2013-GS-39-3217). The jury convicted Petitioner as charged following trial on December 12-13, 2016. The Honorable Perry H. Gravely sentenced Petitioner to twenty-eight years imprisonment. Petitioner filed a notice of appeal and following briefing, the Court of Appeals affirmed the conviction and sentence in an unpublished opinion. State v. Jose Reyes Reyes, 2019-UP-214 (S.C. Ct. App. filed June 12, 2019). Petitioner's subsequent petition for rehearing was denied.

STATEMENT OF FACTS

Victim, nine years old at the time of trial, lived with her mother, but occasionally stayed with a relative, Megan.[1] R. p. 14; p. 19. Victim testified Petitioner, known to her as "Fernando," sexually abused her when she was six years old. R. pp. 20-21; p. 25. Petitioner abused her every time she stayed at Megan's house.[2] R. p. 21; p. 23. Victim testified Petitioner touched her "private" with both his hand and penis. R. pp. 20-23. Petitioner also kissed Victim on the mouth during the instances of abuse. R. p. 22. She eventually told her aunt, Aunt Beth, she was abused. R. p. 24.

Mary Couch testified Victim knows her as Aunt Beth. While watching movies at Victim's house, Victim told Couch Petitioner sexually abused her on a couch at Megan's house. Couch got Victim's mother (Mother), and after they listened to Victim, they immediately contacted the police. R. pp. 34-36, 40. Couch testified that Victim, in response to them calling police, told them "she hated us and that she wouldn't never tell us nothing again because somebody was going to be mad at her." R. p. 37, lines 3-5. Mother testified that prior to Victim disclosing the abuse, she recently complained of painful urination. R. p. 40. When Victim complained of painful urination, Mother took her to the emergency room. R. p. 40.

Deputy Billy Trotter of the Pickens County Sheriff's Office responded on August 29, 2013, to Mother's call to report abuse. R. p. 43. Deputy Trotter spoke with Mother and Victim, and Victim disclosed she was sexually abused. R. p. 44. Deputy Trotter testified that Mother did not talk much, she seemed embarrassed and that the event was traumatic for her. R. p. 45.

Captain Marvin Nix of the Pickens County Sheriff's Office investigated Petitioner's case. R. p. 46-47. Captain Nix determined the individual Victim identified as "Fernando" was Jose

[1] Megan is Victim's mother's cousin. R. p. 38.
[2] Petitioner and Megan lived together and had children together. R. p. 114.

Reyes Reyes (Petitioner). R. p. 48. Captain Nix testified Victim was six years old at the time of the abuse and Petitioner was either 25 or 27. R. p. 47. Captain Nix determined the time frame of the abuse ranged from January 2013 to June 2013. R. p. 51.

Victoria Tate provided therapy for Victim since March 2016. She testified Victim disclosed she was sexually abuse at Megan's house. She testified Victim "appears embarrassed." Tate explained, "Victim blames herself for what happened. She's very anxious. She, at times, is aggressive. She also wants to avoid talking about things that have happened to her." R. p. 54.

Dr. Mary Fran Crosswell, a child abuse pediatrician with the Greenville Hospital System, met with Victim at the Julie Valentine Center in Greenville. R. pp. 55-56, 59. As part of her evaluation, Dr. Crosswell reviewed Victim's prior medical records, including a recent lab report indicating Victim suffered from herpes simplex virus- type 1. R. pp. 69-70. Victim was diagnosed as having herpes in her genital area. R. p. 70. Subsequent testing of Petitioner's blood showed he also tested positive for herpes simplex virus-type 1. R. pp. 94-95.

ARGUMENT

The trial judge did not err in conducting Victim's competency determination in the presence of the jury and the competency hearing did not result in improper bolstering or vouching. Any conceivable error was harmless in light of the overwhelming evidence of guilt and the trial judge's charge to the jury calling for heightened scrutiny of a child witness' credibility.

Petitioner complains the trial court should have made Victim's competency determination outside the presence of the jury and that the prosecutor's inquiry vouched for or bolstered Victim's credibility. Similarly, Petitioner complains that the trial court's determination Victim was competent to testify was bolstering. The trial court did not err because the prosecutor did not make an assurance to the jury concerning Victim's credibility and the jury was not reasonably likely to consider the term "competent" synonymous with "credible" or "believable."

Finally, any error was harmless in light of the evidence and minimal potential for prejudice, and any conceivable error was certainly cured when the trial court instructed the jury that it may consider the child's age, the child's ability to observe and remember facts, the child's ability to appreciate the seriousness of criminal proceedings, and whether the child understood the difference between a truth and a lie, in determining the child's credibility; and the trial court warned the jury that a child "may not fully understand what is happening here." R. pp. 169-70.

How the issue arose

Prior to trial, after the solicitor noted the Victim was now nine years old, the trial judge asked, "do we need to go over anything with her before we - - outside the presence of the jury?" R. p. 5. The solicitor responded she would leave it in the trial judge's discretion whether he wanted her to question the witness in the jury's presence or while the jury was outside of the courtroom. R. p. 5. The trial judge replied, "Is she avail - - let's - - let me - - I think - - let's do it

when the jury's here." R. p. 5. Defense Counsel asked for clarification regarding whether the trial judge was going to go through the witness qualification in front of the jury and the trial judge replied he intended to conduct the inquiry in the jury's presence. R. pp. 5-6. Defense Counsel argued, "that's just bolstering just like a forensic interview." R. p. 6. The trial judge found, "Well, I mean, it's a little bit different because it's the difference in the truth and a lie on the stand." R. p. 6.

At the beginning of the solicitor's direct examination of Victim, the solicitor asked, "Do you know that while you're here, we can only talk about things that are the truth." R. p. 14. Victim replied, "Yeah." R. p. 14. Defense Counsel then renewed his objection and the trial judge ruled, "All right. As to the bolstering. Yeah, I think that the person can testify on their own behalf, just not another party." R. p. 14. The solicitor then asked Victim a series of questions about whether she understood the difference between a truth and a lie. R. pp. 15-17. The solicitor then moved Victim as competent to testify, R. p. 17. The trial judge ruled, "I think, under Rule 601, she is competent unless otherwise disqualified." R. p. 17.

Following both parties resting their case and after closing arguments, the trial court instructed the jury during its general charge the following:

> Now this case we've had testimony, uh, of a child, uh, during the, you've heard the testimony from, well from a child and where witness is a child you must determine as with any other witnesses whether that testimony is believable. In deciding believability you may consider not only matters that I have already discussed with you **but you may also consider the age of the child, the child's ability to observe and remember facts and the child's ability understand and answer questions because young children may not fully understand what is happening here, it's up to you to decide whether the child or children understood the seriousness of appearing as a witness at this criminal trial, whether the child, or, uh, understood the questions, whether the child has a good memory and whether child understands the difference between lying and telling the truth**; in addition,

> young children may be influenced by the way questions are asked, is up to you as the jury to decide whether child understood the questions asked.

R. pp. 169-70. This instruction was preceded with instructions that the jury was the sole exclusive judge of the facts, that the judge could not intimate anything about the facts of the case, that if the trial court did anything to make the jury think the trial court had an opinion on the facts, the jury must disregard that because the jury determines the facts of the case. R. p. 166, line 19 – p. 167, line 4. The trial court also instructed the jury that to determine the facts of the case, the jury must determine the credibility of the witnesses. R. p. 168, lines 1-2.

Discussion

Appellant complains that while the Victim's competency determination was presented to the jury, the solicitor improperly bolstered or vouched for Victim's credibility by asking the Victim about the difference between a truth and a lie, and whether she understood she should tell the truth, and further the trial court bolstered Victim's testimony by finding her competent to testify. Petitioner complains the inquiry should not have occurred in front of the jury. However, the trial judge was not obligated to make his determination concerning the competency of Victim outside the presence of the jury, and the competency hearing did not result in improper vouching or bolstering. Victim did not bolster her own testimony and the solicitor's questioning did not indicate she believed Victim or offered the jury the prosecutor's assurance that Victim was credible. Indeed, when the State is required to question a witness about her ability to tell the difference between a truth or a lie, it could just as easily suggest the solicitor does not believe the witness.

Rule 601(a), SCRE, provides the general rule that, "Every person is competent to be a witness except as otherwise provided for by statute or these rules." Rule 601(b), SCRE, states,

"A person is disqualified to be a witness if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth." It is the duty of a trial judge to determine competency of a witness to testify and to make an appropriate examination of the witness upon timely motion of counsel that will reveal to the trial judge's satisfaction the witness's ability to give competent testimony. State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971). The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) ("Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had.").

Petitioner contends the colloquy establishing Victim's competency amounted to improper bolstering or vouching. Fatal to the claim of bolstering is that a witness does not improperly bolster their own testimony. "Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether **another** witness is telling the truth and to maintain 'the assessment of witness credibility . . . within the exclusive province of the jury.'" State v. Taylor, 404 S.C. 506, 514-15, 745 S.E.2d 124, 128 (Ct. App. 2013) (emphasis added) (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). Victim is simply incapable of improperly bolstering her own testimony.

Likewise, it is improper for a solicitor to vouch for a witness's credibility. In Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476-77 (2016), this Court explained:

> Generally, "the assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461,

> 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). Thus, solicitors may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (stating that a solicitor improperly vouches for a witness's credibility "by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony."); Matthews v. State, 350 S.C. 272, 276, 656 S.E.2d 766, 768 (2002).

Appellant's comparisons of the instant case to State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001) rev'd on other grounds, 534 U.S. 246 (2002), are inapposite. In Kelly, the solicitor asked a jailhouse informant various questions based on the prosecutor's apparent prior conversations with the informant. Id. at 368, 540 S.E.2d at 860. Specifically, the solicitor asked the informant, "What did I tell you that I absolutely required regarding your testimony to this jury today?" Id. The solicitor then asked, "Did I tell you to tell the truth to this jury?" The informant replied, "of course." Id. The South Carolina Supreme Court found the solicitor's questions improperly bolstered the informant's testimony, as the jury might have perceived the solicitor held the opinion the informant was telling the truth. Id. at 360, 540 S.E.2d at 860-61.

The present case is immediately distinguishable from Kelly, because the solicitor made no references to prior conversations with Victim, and thus no assurance of Victim's credibility. The harmful aspect of the questioning in Kelly was the solicitor's reference to prior conversations with the informant which suggested the solicitor made a prior threshold determination that the informant was credible. Therefore, in Kelly, the informant's testimony carried the "imprimatur of the government" and such bolstering ran the risk of inducing the jury to trust the State's judgment about the informant without making its own assessment of the informant's testimony. The prosecutor in the present case did not reference any prior

conversations with Victim or otherwise indicate Victim's testimony carried the "imprimatur of the government." The solicitor merely asked basic questions about the Victim's ability to tell the difference between a truth and a lie, without making any assurances of Victim's credibility, to merely establish if the child was competent to testify. The jury was not reasonably likely, based on this basic colloquy, to be induced by any assurance of the Victim's credibility, unlike Kelly.

Also readily distinguishable is Kromah, which found it is improper for an expert witness to testify as to his opinion about the credibility of a child victim in a sexual abuse matter. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). "Even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." Id. at 358, 737 S.E.2d at 499. In that case, a forensic interviewer testified she made a "compelling finding" of abuse following an interview with the child victim. This Court found such testimony was bolstering and then this Court, in strongly phrased dicta, enumerated several examples of statements a forensic interviewer should not make at trial, including that the forensic interviewer should not testify "that the child **was told** [presumably by the forensic interviewer] to be truthful." Id. at 360, 737 S.E.2d at 500 (emphasis added). Therefore, in Kromah, it appears this Court was concerned with the risk that a forensic interviewer's testimony about a child's out-of-court promise to tell the truth during the forensic interview would communicate *her* imprimatur as to the child's credibility and be tantamount to an assurance of the child's credibility to the jury, much like this Court's concerns about a prosecutor's assurance to the jury in Kelly.

Because neither the trial court nor the prosecutor indicated they believed Victim, the prosecutor's inquiry concerning the Victim's understanding of the difference between a lie and the truth was neither bolstering nor vouching. The instant case is distinguishable from Kelly and Kromah because no party offered any commentary through which the jury would infer the

solicitor or trial court believed Victim. Petitioner emphasizes that the prosecutor asked Victim, "So you understand that when we're in here, we're going to talk about the truth?" R. p. 17, lines 11-13. However, the implication in that question does not differ from every witness who is sworn and promises to tell the truth. In reality, the prosecutor merely explained the duty to tell the truth in a manner understandable and consumable for a youthful witness. Rule 603, SCRE ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.").

The prosecutor's questions were entirely neutral and did not provide an assurance from the prosecutor to the jury that the prosecutor found Victim credible. The colloquy merely established that the Victim herself was asserting she would tell the truth **as required** by Rule 603. A witness being questioned as to whether they are being truthful presents no vouching problem, as no other party is indicating they believe the Victim. For a witness to state they are being truthful does not give rise to improper bolstering. See State v. Sanchez-Jacobo, 282 P.3d 880 (Or. Ct. App. 2012) ("A witness's assertion under oath that he or she is being truthful simply is not the type of evidence that a jury might improperly view as a 'guarantee of the witness's veracity.' Stated differently, a witness does not impermissibly 'vouch for' or bolster his or her own testimony by proclaiming truthfulness.") (internal citations omitted).

Further, the prosecutor's inquiry concerning the Victim's understanding of the difference between a lie and the truth, and the importance of telling the truth, became duly warranted in light of the trial court's instructions to the jury calling for heightened scrutiny of a child's credibility. The trial court warned a child may not understand what was happening when they testified, and called upon the jury to consider whether a child witness understands the difference

between lying and telling the truth, and whether the child understood the seriousness of the criminal proceedings. R. pp. 169-70.

The trial court specifically told the jury because young children may not fully understand what is happening here, **it's up to you** to decide whether the child . . . understood the seriousness of appearing as a witness at this criminal trial, . . . and whether [the] child understands the difference between lying and telling the truth; . . . ." R. p. 169, line 23 – p. 170, line 4. Because the State was specifically burdened with the need to prove to the jury that Victim appreciated the seriousness of the proceeding and understood the difference between telling the truth and a lie, the State necessarily needed to elicit testimony from Victim to prove she understood the difference between a truth and a lie, and understood the importance of being truthful. Therefore, no error occurred.

Petitioner also attempts to distinguish State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001), in which this Court found plea agreements in which the agreement requires the cooperating witness is admissible. This Court cited United States v. Romer, 148 F.3d 39 (4th Circuit 1998) *cert. denied*, 525 U.S. 1141 (1999), noting the Fourth Circuit "allows the government to elicit testimony regarding a plea agreement on direct examination only if the prosecutor's questions do not imply the government has special knowledge of the witness's veracity, the trial court gives a cautionary instruction, and the prosecutor's closing argument contains no improper use of the witness' promise of truthful cooperation." Shuler, 344 S.C. at 629, 545 S.E.2d at 818-19.

This Court, in Shuler, also examined Kelly, and observed, "The instant case is distinguishable from Kelly because the Solicitor did not comment he had personal knowledge

Jones was telling the truth. The Solicitor merely asked general questions, not in the first person, about the truthtelling provision in the plea agreement." Id. at 630, 545 S.E.2d at 818.

This Court then held as follows:

> In this case, the Solicitor made no overt statement of his personal belief as to the truth of Jones' testimony, and made no insinuation he knew better than the jury what the truth was. "By calling a witness who testifies pursuant to an agreement requiring him to testify truthfully, the Government does not insinuate possession of information not heard by the jury and the prosecutor cannot be taken as having expressed his personal opinion on a witness' veracity."

Id. at 631, 545 S.E.2d at 819 (quoting United States v. Creamer, 555 F.2d 612, 617-18 (7th Cir. 1977)).

Petitioner attempts to distinguish the present case from Shuler, claiming the prosecutor's questions did imply she believed the witness. However, it is difficult to understand how, since unlike Kelly, the prosecutor was not referencing any prior meeting with Victim, and Victim had not yet testified, so the prosecutor did not reference a prior discussion and was unable to comment as to prospective, unsolicited testimony. The prosecutor simply offered no assurance to the jury about the credibility of Victim. Additionally, as shown above, Petitioner received the benefit of an instruction on child credibility that clarified any misconception about the jury's role to determine credibility. Petitioner also asserts that the trial court's ruling that Victim was competent to testify amounted to the trial court vouching for the witness. However, it is simply not realistic to believe that the jury would consider a finding a child is competent to testify synonymous with the child's credibility or veracity. Note the child's competency was not made an issue at trial. Again, the trial court's instruction on a child witness's credibility surely cures any misunderstanding on this point.

While the trial court certainly may conduct the competency hearing outside the presence of the jury, the trial court was not obligated to do so, because Victim could not improperly bolster her own testimony. Further, the conduct of a trial is within the discretion of the trial judge and the trial court does not abuse its discretion by deciding it was expeditious or proper to conduct the competency inquiry in front of the jury rather than *in camera*. Rule 611(a), SCRE. The judge's finding that Victim was competent was in no way tantamount to a credibility finding, and the jury could not have recognized it as such.[3]

Finally, any alleged error in this case is harmless due to overwhelming evidence of Petitioner's guilt. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). "The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (citations and internal quotations are omitted). In Kelly, the Supreme Court found the informant's testimony harmless, noting trial counsel thoroughly impeached the informant's credibility concerning the motive for the informant to testify. Further, in light of the overwhelming evidence of aggravation, the Supreme Court found it unlikely that the solicitor's bolstering of the informant materially influenced the jury's decision to impose the death penalty. Kelly, 343 S.C. at 370, 540 S.E.2d at 861.

Importantly, Victim's testimony about the abuse she suffered at the hands of Petitioner was directly corroborated by the laboratory test confirming she had herpes simplex virus-type 1 in her genital area, a disease Petitioner also has. The State's theory of the case was the only

[3] Critically, Defense Counsel objected only to Victim's testimony as improper bolstering. Defense Counsel did not allege the trial judge's competency determination in itself improperly bolstered Victim's testimony.

logical chain of events and Petitioner was unable to offer any alternative explanation for how a six-year-old child in his care and custody became afflicted with genital herpes.

Furthermore, the possibility of prejudice by the supposed error evaporated with the trial court's admonition requiring the elevated scrutiny for a jury to analyze the credibility of children. In the charge to the jury, the trial court instructed:

> Now this case we've had testimony, uh, of a child, uh, during the, you've heard the testimony from, well from a child and where witness is a child you must determine as with any other witnesses whether that testimony is believable. In deciding believability you may consider not only matters that I have already discussed with you but you may also consider the age of the child, the child's ability to observe and remember facts and the child's ability understand and answer questions because young children may not fully understand what is happening here, it's up to you to decide whether the child or children understood the seriousness of appearing as a witness at this criminal trial, whether the child, or, uh, understood the questions, whether the child has a good memory and whether child understands the difference between lying and telling the truth; in addition, young children may be influenced by the way questions are asked, is up to you as the jury to decide whether child understood the questions asked.

R. pp. 169-70. This charge suggests juvenile witnesses are less likely to remember things accurately, to know the difference between a truth and a lie, and to appreciate the seriousness of the proceedings. The charge also indicates children are more easily led by counsel.[4] Any

[4] This charge is an impermissible comment on the facts. When considering the no-corobration instruction in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), this Court noted "[b]y addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." Stukes, 416 S.C. at 499, 787 S.E.2d at 483. Similarly, the charge addressed solely to child witnesses specifically undermines their testimony by instead instructing the jury that whenever a child speaks, her words are inherently suspect. The trial court's instruction on how to analyze Victim's testimony "is an improper court-sponsored emphasis of a fact in evidence . . . ." State v. Burdette, 2019 WL 3437783 (S.Ct. filed July 31, 2019) – in this case, the Victim's youth. Accordingly, it is unconstitutional and should be prohibited. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.").

incidental bolstering of Victim's testimony during the competency hearing was eliminated when the trial judge essentially charged the jury that Victim was less credible than other witnesses and they should exercise scrutiny in assessing her testimony. The boon received by the improper instruction on children eliminated any prejudice emanating from the on-the-record competency determination and rendered the error harmless. Petitioner's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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v.

JOSE REYES REYES,

Petitioner.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Return to the Petition for Writ of Certiorari on Petitioner by delivering two copies of the same addressed to his attorney of record, Lara M. Caudy, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 27th day of September, 2019.

Anne Mueller

Anne A. Mueller
Legal Assistant

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