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Supreme Court of Kentucky

2010-SC-000452-MR

BROCK RILEY RAMEY

APPELLANT

V. ON APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS FOUST, JUDGE
NO. 09-CR-00028

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Brock Ramey appeals as of right from a Judgment of the Calloway Circuit Court convicting him of murder, in violation of Kentucky Revised Statute (KRS) 507.020, and sentencing him to life in prison. Ramey was also convicted of first-degree burglary (KRS 511.020), first-degree assault (KRS 508.010), second-degree assault (KRS 508.020), first-degree wanton endangerment (KRS 508.060), and tampering with physical evidence (KRS 524.100). For these additional offenses he received concurrent sentences the maximum term of which is twenty years. Ramey was found guilty of the October 2008 slaying of Jerry Eldridge at Eldridge's home outside Alma, Kentucky. Ramey was also found, in the course of the attack upon Eldridge and in its aftermath, to have assaulted Eldridge's son, Ed Eldridge; to have assaulted Ed Eldridge's girlfriend, Melisa Price; to have wantonly endangered Price's six-year-old son, Johnny Nicolas; and to have destroyed potential

evidence. Ramey contends that his trial was rendered unfair by the admission of insufficiently authenticated evidence, by the mention at several points during the trial of an uncharged prior bad act, and by the prosecutor's reference during closing argument to a supposed fact not in evidence. Finding no reversible error, we affirm.

RELEVANT FACTS

The Commonwealth's proof included testimony by Ed Eldridge and Melisa Price, both of whom described a terrifying confrontation with an intruder during the late night of October 21, 2008, while they were staying as guests at Jerry Eldridge's home on Elm Grove Road in Calloway County. Price testified that she was awakened by gunshots and that Ed immediately got up and hurried from the bedroom. As soon as Ed reached the hallway, Price heard another shot, and Ed, cursing and exclaiming that he had been shot, fell to the floor. The shot seemed to have come from the home's front room, where Jerry Eldridge had gone to bed on a couch and Price's son on a pallet on the floor. Worried about her son, Price followed Ed into the hallway, where she, too, was shot, the bullet piercing her side above the hip and exiting through her back. The shot knocked her to her knees, she testified, from where she called to her son to come to her. As she watched, the intruder grabbed her son, placed the gun to his head, and pulled the trigger. Thankfully no shot fired, and a moment later, when the boy got free and came to her, she covered him with a bag of clothes and lay on top of him.

In the meantime, according to Ed's testimony, he had gotten up after having been shot in the lower jaw and had retrieved a shotgun from the room in which he had been sleeping. He aimed the gun at the intruder, but when he pulled the trigger this gun, too, only clicked. Ed then retrieved another gun from another room, but by then the intruder had fled. Ed testified that he briefly looked outside for the intruder, went back inside, and found his father lying dead in the front room where he had been sleeping. Having checked on Price and her son, Ed then called 911. Soon thereafter, he and Price were taken from the scene by EMS workers to a local hospital. Price was treated there and was released the following afternoon. Ed was flown to the Vanderbilt Hospital, where he underwent several surgeries to reconstruct bones in his face.

Although the details of their descriptions varied somewhat, Price and Ed both told investigators that the intruder was somewhat stocky, was masked, and was wearing a coat. Otherwise they could not identify him, although initially Ed suspected Price's ex-husband, Johnny Nicolas (the father of six-year-old Johnny) and later believed that the attacker could have been his sister's boyfriend, Marty Story. The lead detective, Barry Rice, testified that neither of those leads proved promising. Nicolas was in jail the night of the murder, and Story, likewise, had a convincing alibi. Story informed the investigators that Ramey and his girlfriend, Jackie Phillips, had lived with the elder Eldridge not long before the attack. Ramey, however, and Tony Kirks, another person whose name had been given to investigators, both claimed to

know nothing about the incident, and so for a time that is where the investigation stood.

In early January 2009, however, David Phillips, Jackie Phillips's estranged husband, was caught shoplifting at a Wal Mart and while awaiting the disposition of that charge revealed that he had information about the Eldridge murder. He told investigators, and testified at trial, that although estranged he and his wife had frequent contact and that she had access to his house, where she kept pets and some of her belongings. He often saw her in the company of Ramey. In October 2008, he had purchased a handgun from Ramey—"a Smith and Wesson 38"—and four rounds of ammunition. He kept the gun on his dresser with two of the rounds and kept the other two rounds in the bathroom. A couple of weeks later, during the evening of October 21, Jackie had come into his bedroom and picked up the gun and the two rounds that were with it. A short time later she returned and asked him for the other two rounds, and he told her where they were. Later that night he was awakened when Jackie again came into his room. She told him that someone had been hurt, and she put the gun back on his dresser. Ramey then came in carrying two rifles, which he offered to sell to Phillips. When Phillips declined the offer and wondered what was going on, Ramey said that he was sorry, that he "had to do it; Jerry Eldridge drewed on me first."

When Phillips got home from work the next day, Jackie and Ramey were there, and according to Phillips, Ramey confessed to him that he had beaten Eldridge, holding up his hands to show Phillips his abraded knuckles; had shot

him twice; had shot two other persons, one in the neck and the other in the butt; and had tried to shoot a little boy, but the gun had not fired. After this Phillips looked more closely at the gun on his dresser and saw what appeared to be blood on the barrel and a crack in the grip. He became afraid that Ramey and Jackie may have been trying to "set him up," so he threw the gun from his car into the Clark River in Almo, and he also threw out a knife and two prescription bottles bearing Eldridge's name, which he found on a shelf in his home.

Phillips agreed to assist the investigation by trying to induce Jackie to make inculpatory statements, and for that purpose allowed officers to "wire" him and his car with a recording device. Thus equipped, Phillips met with Jackie in the parking lot outside her place of employment and attempted to talk to her about covering up the murder. The resulting tape was played at trial, and although static and background noise makes much of what was said difficult to hear, Ramey concedes that Jackie can be heard twice answering in the affirmative when asked, "Did you get rid of everything?" And when Phillips said, "They found some clothes or something," Jackie responded, "They're f---ing with you."

The remainder of the Commonwealth's case consisted largely of evidence tending to corroborate Phillips's account of Ramey's confession. Jackie testified, for example, and although she denied having had anything to do with a gun or with covering up the crime, she admitted that on the night of the murder she and Ramey had been in the vicinity. She claimed that they had

been on their way to go night fishing when Ramey had her stop about a mile from the Eldridge house so he could check on marijuana plants he had planted near the house when they lived there. He told her that he would call her when he wanted to be picked up, and she admitted, as phone records showed, that he had called her three times: at 11:47, 11:48, and 11:53. Ed Eldridge's 911 call was received at 11:49.

The medical examiner testified that sixty-year-old Jerry Eldridge died from a combination of a gunshot wound to the shoulder and blunt force trauma to his face and head. The gunshot entered the back side of the right shoulder and exited through the left collar bone, having struck the neck bone and the esophagus in between. The blunt force was severe enough to fracture the bones around the nose and eyes and was likely inflicted by a hard object, consistent, the examiner testified, with Eldridge's having been "pistol whipped."

A firefighter with the Calloway County Fire and Rescue Service testified that at about 9:00 a.m. on October 22, 2008, the morning after the murder, he helped put out a brush fire behind David Phillips's house and that the fire appeared to have spread from what had been a trash fire in Phillips's back yard. Phillips testified that he knew nothing about the fire until he received a notice from the Fire and Rescue Service about a week later. Jackie testified, however, that after she picked Ramey up on the night of the murder they had abandoned their plan to go fishing and had instead gone to Phillips's house so she could feed her animals. While there, she testified, she had seen Ramey

and Phillips standing beside a trash fire in which was burning a pair of white shoes.

Eldridge's brother-in-law, William Ramsey, testified that he and his wife, Eldridge's sister Virgie, lived in a house on the Eldridge property only about fifty yards from Eldridge's house. In late August 2008, he, his wife, and Eldridge had gone out to dinner, and right before they left he had spoken to Ramey, who, along with Jackie, was then living with Eldridge. Ramsey told Ramey that the three of them were going out for dinner. When Ramsey returned home, he found that his house had been broken into and that certain items had been stolen. He reported the break-in to the police, and he also told Eldridge about it. Eldridge suspected Ramey, and a few days later, in early September 2008, he evicted Ramey and Jackie from his home.

Most damningly, perhaps, the Commonwealth introduced into evidence what apparently was a pair of camouflage gloves. Investigators testified, and confirmed with photographs, that they found the right-hand glove on the floor in the front room of Eldridge's house near Eldridge's body. State Crime Lab analysts obtained a DNA sample from the inside of that glove, and the sample proved to be a mixture of DNA from two individuals. The sample was inconsistent with the DNA profiles of Jerry Eldridge, Ed Eldridge, and Marty Story, none of whom, therefore, could have contributed to the mixture. Ramey's profile, however, matched the sample at twelve of the fifteen tested loci and could have matched at the other three, although results at those loci were inconclusive. According to the analyst, a potentially contributing profile, as

was Ramey's, would occur in the relevant United States population with a frequency of about one in 16 million people.

The left-hand glove came into the Commonwealth's possession more haphazardly. Melisa Price testified that when she was released from the hospital early in the afternoon of October 22, the day after the murder, a friend, Tanya Barbeau, picked her up and offered to take her back to the Eldridge residence so that she could collect her belongings. On Elm Grove Road, as they neared the turn onto the Eldridge property, Barbeau noticed a camouflage glove lying in the road and, believing that it might be evidence, stopped and, using a hair brush, picked it up. Moments later, when they reached the turn to the Eldridge property, they were stopped by an officer, Trooper Brad Smith, who was guarding the scene. Barbeau, again using her hair brush, gave the glove to him, who used a pencil to take it. Barbeau also testified, and though she was not able to say as exactly as Price where she found the glove, her testimony otherwise confirmed Price's. This glove proved to be an apparent mate of the glove the investigators found near the body, and a DNA sample obtained from a blood stain on the outside of this glove matched the DNA standard obtained from Jerry Eldridge. The analyst testified that in the relevant United States population that profile would be expected to occur once in about 18 quintillion individuals.

Not surprisingly, Ramey strenuously opposed the introduction of the gloves and the forensic evidence derived from them. He argued at trial and

argues here that the gloves were not properly authenticated, and it is with this contention that our analysis begins.

ANALYSIS

I. The Commonwealth Adequately Authenticated the Camouflage Gloves.

As Ramey correctly notes, Kentucky Rule of Evidence (KRE) 901(a) requires, as a condition precedent to the admission into evidence of physical items, that there be “evidence sufficient to support a finding that the matter in question is what its proponent claims.” Under this rule, the proponent of tangible evidence must provide a reasonable assurance that the proffered evidence was actually involved in the event in question and that it has remained materially unchanged. As we explained in *Thomas v. Commonwealth*, 153 S.W.3d 772 (Ky. 2004), the foundation thus required

depends upon the nature of the evidence. Evidence readily identifiable and impervious to change may be admitted based solely on testimony that it appears to be the actual object in an unchanged condition. . . . However, the more fungible the evidence, the more significant its condition, or the higher its susceptibility to change, the more elaborate the foundation must be.

153 S.W.3d at 779 (citations omitted). Here, the gloves themselves are readily identifiable and impervious to change and so, were they relevant merely as gloves, they could have been admitted by the person who collected them testifying that they appeared to be the gloves actually collected.

Because the gloves were relevant, however, not so much for themselves but because of the DNA present on them, the Commonwealth undertook to establish a more elaborate foundation and to provide the necessary assurance that the gloves had not been altered or contaminated subsequent to the

murder. For each glove, the Commonwealth offered testimony by the person who found the glove, and that person provided a description. In the case of the glove found in Eldridge's home, Detective Sims also provided a photograph of the glove as and where it was found. Three people described the glove that was found on Elm Grove Road: the two women who found it and Trooper Smith to whom they gave it. An appropriate officer explained the protocol whereby evidence collected at a scene is packaged and the package marked with the collecting officer's badge number, a brief description of the item, and a number indicating whether this was the first item the particular officer had collected, the second, the third, and so on. Although Detective Sims's partner, Sergeant Steger, was the officer who actually collected the glove found in the house, Detective Sims testified that he and Sergeant Steger worked in close collaboration and that he, Sims, knew that the glove had been packaged and marked pursuant to the protocol. Trooper Smith likewise testified that he had duly turned the glove which Tanya Barbeau had given him over to the officer in charge of packaging and labeling.

The Kentucky State Police Crime Lab analyst who took samples from the gloves provided a description of them consistent with the officers' descriptions, and she referred to them in accord with their package labels. Finally, Sergeant Bill Lockwood, the evidence custodian for State Police Post 1, testified that he had received and cataloged the packaged items of evidence and had secured them at the Post. He testified that he personally carried the items to be tested to the crime lab, and that he personally picked them up from the lab and

resecured them. He identified two packages as among those that had come into his custody in this case, one with Sergeant Steger's badge number and the description, "19: camoflauge glove recovered near corner of couch," and the other with Trooper Smith's badge number and the description, "1: camoflauge glove." He then opened the packages and confirmed that they contained gloves that appeared to match each other as well as the package descriptions. At that point, over Ramey's objection, the trial court admitted the gloves into evidence.

Despite the very nearly complete chain of custody, Ramey contends that because the Commonwealth did not also employ the less exacting method of authenticating the gloves by means of a witness who had seen them, the authentication fell short. We disagree. The Commonwealth was required, as noted above, to present evidence for which there was reasonable assurance of both identity and integrity—that the gloves introduced into evidence were the gloves that were found at the scene and that were tested, and that the condition of the gloves had not materially changed subsequent to the crime. The chain of custody evidence here satisfied both requirements.

Ramey's objection notwithstanding, there was very little question in this case about the identity of the gloves. Unlike *Gerlaugh v. Commonwealth*, 156 S.W.3d 747 (Ky. 2005), on which Ramey relies, this case did not involve an attempt to introduce evidence no witness could more than tentatively relate to the crime. On the contrary, the gloves' connection to the scene was patent, since one of the apparent pair was found within a few feet of the victim's body. That the gloves found were the same ones later tested and introduced into

evidence was more than reasonably assured by the Commonwealth's chain-of-custody proof, to which a witness's testimony that the introduced gloves "looked like" the glove he or she found would have added little.

That same proof also provided reasonable assurance that the condition of the gloves had not been materially altered. The testimony was that both gloves, even the one Barbeau and Price found in the road, were handled with care and soon after being found were packaged separately and secured. There was virtually no chance, therefore, that the gloves had been contaminated after the fact by either Ramey's DNA or Eldridge's blood, and there was little chance that they had been altered in any other material way. Because the Commonwealth's chain-of-custody proof thus reasonably established the identity and the integrity of the gloves, the trial court did not abuse its discretion by admitting them into evidence.

II. Although Erroneous, Admission of the Ramsey Burglary Evidence Does Not Entitle Ramey to Relief.

A. Ramsey's Testimony About the Burglary and the Prosecutor's References to it Were Harmless.

Ramey next contends that his trial was rendered unfair by insinuations that he committed a prior bad act, insinuations particularly prejudicial, he maintains, because the prior act was also a burglary. As noted above, William Ramsey, Jerry Eldridge's brother-in-law, testified that in late August 2008 his home, which is very close to what was then Eldridge's home, was burglarized. A few days later, he testified, Jerry Eldridge evicted Ramey and Jackie Phillips, who for some months had been living with him. The Commonwealth

maintained, both in its opening statement and in its closing argument, that the eviction was prompted by Eldridge's belief that Ramey was involved in the burglary of his sister and brother-in-law's home. It was the Commonwealth's theory that the eviction created hard feelings between the two men and likely contributed to Ramey's motive for the murder. Although in its opening statement the Commonwealth was careful to explain that it was not accusing Ramey of the prior burglary but was only trying to account for the eviction, and although following William Ramsey's testimony the trial court admonished the jury that the Ramsey burglary was not to be attributed to Ramey, Ramey nevertheless contends that the insinuation was clear. He maintains that the jury was apt to regard the Ramsey burglary as proof of his bad character and in particular of his propensity to commit burglary.

This improper inference was made even more likely, Ramey insists, when, during Melisa Price's testimony, the Commonwealth asked if she heard Jerry Eldridge say something to Ramey and Jackie Phillips "about their living arrangements," and she replied that Eldridge had given them ten minutes "to get their stuff and get out, for them breaking in his sister's house." Ramey moved for a mistrial at that point, and the trial court, although it denied the motion, again admonished the jury to disregard the remark about the burglary. Ramey contends that all of these references to the William Ramsey burglary—the Commonwealth's opening and closing remarks, Ramsey's testimony, and Price's accusation—ought not to have been allowed and that they combined to render his trial unfair.

KRE 404(b), of course, makes inadmissible evidence of a person's prior crimes or bad acts when offered as proof of bad character or criminal propensity. The Commonwealth maintains that because it was offering the Ramsey burglary evidence not as proof of Ramey's character but only to provide a context for Eldridge's eviction of Ramey and Phillips, KRE 404(b) is not implicated. We disagree. Whatever use the Commonwealth intended to make of it, the proof that Ramey had a glaringly obvious opportunity to commit the Ramsey burglary and that Jerry Eldridge believed he had done so was evidence tending to implicate Ramey in the burglary, and thus KRE 404(b) clearly applies.

KRE 404(b) does recognize two exceptions, one when the prior bad act evidence is "offered for some other purpose, such as proof of motive . . . ," and the other if the prior bad act evidence is "so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." Neither exception, however, rescues this evidence for the Commonwealth. To be sure, the Commonwealth could prove the eviction to show that Ramey and Eldridge were on bad terms and that Ramey may thus have had a motive for attacking Eldridge. The ostensible reason for the eviction, however, the alleged burglary, was not evidence of Ramey's motive for shooting Eldridge, but rather evidence of what prompted Jerry Eldridge to order Ramey and Phillips out of his home. This evidence plainly was not admissible under the first exception as evidence of Ramey's motive for the attack. Nor was the evidence essential to the

Commonwealth's case under the second exception. It would not have been difficult to limit the testimony to the fact that in early September 2008 differences arose between Jerry Eldridge and Ramey, and as a result Eldridge evicted Ramey and Phillips from his home. In *Metcalf v. Commonwealth*, 158 S.W.3d 740 (Ky. 2005), a case, like this one, in which evidence of a collateral crime was admitted to show the context in which other acts had occurred, we cautioned against the sort of broad contextual relevance the Commonwealth advocates here:

“In practice, . . . this expanded idea of contextual relevance often paves the way to prove acts that are anything but inseparable [from] the charged crime, and this label can easily become a catchall for admitting other acts that are far more prejudicial to the defendant than useful in determining guilt of the charged offense.”

158 S.W.3d at 744 (quoting from Lawson, *The Kentucky Evidence Law Handbook*, § 2.25(4)(c), at 139 (2nd ed. 1984)). So here, the implication that Ramey may have been involved in a prior burglary on the Eldridge property was detrimental to Ramsey's case without significantly advancing the Commonwealth's case. We agree with Ramey that evidence of the William Ramsey burglary ought not to have been admitted.

The error does not entitle Ramey to relief, however, because it was harmless. Kentucky Rule of Criminal Procedure (RCr) 9.24, of course, precludes relief for harmless errors. A non-constitutional evidentiary error may be deemed harmless, we have explained, “if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.” *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009). The question is

not simply whether the evidence was otherwise sufficient to support the conviction, as clearly it was here, but rather whether “the error itself had substantial influence.” *Id.* (quoting from *Kotteakos v. United States*, 328 U.S. 750 (1946)). Although the Ramsey burglary evidence should not have been admitted, we are more than fairly assured that the judgment was not substantially swayed thereby. This is so, largely because the evidence of Ramey’s confession to David Phillips, Jackie Phillips’s testimony tending to corroborate that confession in important respects, and the DNA evidence linking Ramey both to the scene and to the murder victim are much more apt to have swayed the jury than the evidence of the Ramsey burglary. It is also important that the trial court took such pains to impress upon the jury that it should not be swayed by evidence of a burglary in which Ramey may well have had no part. With its significance limited in these ways, the burglary evidence, although it should not have been admitted, was harmless.

B. Price’s Unsolicited Reference to the Burglary Did Not Necessitate a Mistrial.

For the same reason, essentially, the trial court did not abuse its discretion when, after Melisa Price referred to Ramey as the perpetrator of the Ramsey burglary, it denied Ramey’s motion for a mistrial. As we have many times noted, a mistrial is an extreme remedy to be resorted to only in the face of errors “of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.” *Combs v. Commonwealth*, 198 S.W.3d 574, 581 (Ky. 2006) (quoting from *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005)). Because the trial court

will usually be able to remove the prejudicial effect of an evidentiary error by suitably admonishing the jury, rarely will such errors necessitate a mistrial. Here, immediately following Price's remark, the trial court admonished the jury to disregard it. That admonition was sufficient, we believe, to ensure that the jury was not lead astray by the collateral burglary evidence. This is particularly so given the prior admonition that the jury was not to attribute the Ramsey burglary to Ramey. In sum, while the Ramsey burglary evidence should not have been admitted, the references to the burglary were all so circumscribed that they cannot be deemed to have borne substantially on the jury's decision.

III. The Prosecutor's Alleged Misstatement of the Evidence Was Harmless.

Finally, Ramey contends that during his closing argument the prosecutor misrepresented what can be heard on the surveillance tape made while Jackie Phillips was talking to David Phillips in his car. As previously noted, investigators "wired" David Phillips and his car with a recording device and Phillips attempted to induce statements from Jackie Phillips about the murder or its cover up. Reviewing the evidence during his closing argument, the prosecutor asserted that on the tape Jackie could be heard responding affirmatively when David asked, "Are you sure you got rid of that bloody stuff?" Ramey promptly objected on the ground that there was no mention on the tape of anything "bloody." The prosecutor responded that he had listened to the tape numerous times and that the word "bloody" could be discerned. Noting that the jurors could listen to the tape and decide for themselves what was on

it, the trial court overruled the objection. Ramey now contends that the prosecutor's reference to "bloody stuff" is not supported by the evidence, but was calculated to mislead and inflame the jury.

We need not delve deeply into this contention, for even if the prosecutor misheard the tape, his error was miniscule in the context of this four-day trial and was clearly harmless. *See Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010) (noting that prosecutorial misconduct, even if objected to and not cured by an appropriate admonition, is grounds for relief only if "proof of the defendant's guilt was not such as to render the misconduct harmless"). As photos of the scene and of Jerry Eldridge's body made clear, this was indeed a bloody crime, and as summarized above, there was ample if not overwhelming evidence that the perpetrator had come into direct contact with Eldridge and Eldridge's blood. The jury did not need the static-ridden surveillance tape to tell it that the perpetrator was likely to have gotten blood on his clothes. Also, the prosecutor attributed the "bloody" comment to David Phillips, the person who was cooperating with police and questioning Jackie Phillips, not to Jackie Phillips herself. That and the fact, as the trial court noted, that the jurors could listen to the tape themselves, gives more than adequate assurance that the alleged error, if any, in the Commonwealth's interpretation of the tape did not have a substantial bearing on the outcome.

CONCLUSION

In sum, despite minor errors, Ramey received a fundamentally fair trial. Both the identity and the integrity of the two camouflage gloves found at and

near the crime scene were adequately accounted for to permit the introduction into evidence of the gloves themselves as well as the DNA evidence derived from them. Evidence tending to associate Ramey with the Ramsey burglary, while improper, did not loom large given the other compelling evidence of Ramey's guilt, and it was rendered even more innocuous by the trial court's admonitions against attributing the collateral burglary to Ramey. Finally, the prosecutor's characterization during closing of the Phillips surveillance tape, even if inaccurate in the way Ramey alleges, was not an error at all likely to have affected the outcome of the trial and so does not provide grounds for relief. Accordingly, we affirm the June 15, 2010 Judgment and Sentence of the Calloway Circuit Court.

Minton, C.J.; Abramson, Noble, Schroder, and Venters, JJ., concur.

Cunningham and Scott, JJ., concur in result only.

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