Opinion issued May 12, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00533-CR

RODNEY EARL BURNETT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Case No. 1416217

MEMORANDUM OPINION

Following a bench trial, appellant Rodney Earl Burnett was convicted for aggravated robbery and sentenced to life imprisonment in the Texas Department of Criminal Justice, Institutional Division. On appeal, Burnett contends that the trial court erred in admitting extraneous offense evidence during the guilt and

punishment phases of trial and in admitting two impermissibly suggestive identifications during the punishment phase of trial. We affirm.

Background

On January 23, 2014, Mark Aguilar and his supervisor, Josh Pemberton, were both working at a Radio Shack on F.M. 1960 in Harris County, Texas. Aguilar testified at trial that shortly after 1:00 p.m., while Pemberton was out of the store on break, a customer entered the store appearing to be talking on his cell phone. Aguilar described the customer as a black man, about twenty-eight to thirty-two years old, between six foot three and four, well built at approximately 250 pounds, and wearing jeans and a gray hoodie with white stripes around the waist. Aguilar later identified appellant as the customer in a photo array.

Aguilar testified that appellant asked whether he could purchase an iPhone without getting a cellphone service contract. Aguilar called Pemberton to ask whether that was possible, and Pemberton returned to the store. Assured that they could sell the iPhone as requested, Aguilar began to ring up the sale. Aguilar testified that appellant then pulled a gun from his left hip with his left hand, cocked the gun, told Aguilar to stay calm, and demanded the contents of the register. Aguilar explained that appellant next took him and Pemberton to the back of the store where appellant demanded that Aguilar and Pemberton pack expensive smartphones—particularly iPhones and Samsung phones—into a bag. Then,

Aguilar and Pemberton were told to lie down on the floor of the back room, and appellant fled with the smartphones. Aguilar and Pemberton notified the police and Radio Shack's regional loss prevention manager for the Houston area, Brandon Hudgins.

Hudgins testified that he directed the detective investigating this robbery, Detective R. Tonry, to speak with Montgomery County's Detective B. Mitchell, who had recently investigated a Radio Shack robbery in Conroe. Detective Tonry testified that, after speaking with Detective Mitchell, he developed appellant as a suspect.

At the close of the evidence, the trial judge found appellant guilty of committing the F.M. 1960 Radio Shack robbery. During the punishment phase of trial, the State introduced evidence of other aggravated robberies of area Radio Shacks, including testimony and surveillance videos from Radio Shack robberies that occurred on December 30, 2013, and January 13, 2014.

Cory Partney, then the manager of a Houston-area Radio Shack at Louetta and Stuebner Airline, testified during the punishment phase of trial that around 11:20 a.m. on January 13, 2014, a man matching Aguilar's description of appellant robbed the store. The robbery was recorded via surveillance cameras, and that recording was admitted over objection. The robber wore a gray jacket with stripes at the waist and appeared to be talking on his cell phone as he entered the store.

Partney testified that the robber asked him whether a particular phone was in stock. As Partney went to the register to check the inventory, the robber pulled a gun from his pants with his left hand and demanded the contents of the register. The robber directed Partney to the back of the store, where he demanded that Partney pack iPhones and Samsung phones into a bag. Then, the robber told Partney to lie on the floor and fled with the phones. Partney was shown a photo array after the robbery, but he was unable to identify the robber.

Larry Crawford, then the manager of a Houston-area Radio Shack at F.M. 2920, testified during the punishment phase of trial that his store was robbed around 11:00 a.m. on December 30, 2013. A surveillance camera in the front of the store recorded the robber entering the store, and that video was admitted into evidence. In the video, a man matching Aguilar's description of appellant enters the store wearing a gray jacket with white stripes at the waist and appearing to be talking on his cell phone. The video shows the robber and another employee go to the register, and the employee gives the robber the contents of the register. Then, the two walk off-camera, into the back of the store where Crawford was working. Crawford testified that the robber pointed a gun at him and the other employee and demanded that Crawford pack valuable smartphones into a bag. Once the robber had the smartphones, he directed the employees to lie down on the floor and fled.

Defense counsel objected to admission of Partney's and Crawford's testimony and the surveillance videos, arguing that the State had failed to show that appellant committed either extraneous offense beyond a reasonable doubt. The trial court overruled the objection, noting that Partney's testimony and the video "tracks almost verbatim to our case-in-chief," and that Crawford's testimony and the video also reflected the "signature of the crime" and was "[v]ery, very, very similar to our case-in-chief."

Extraneous Offense Evidence Admitted in Guilt/Innocence Phase

In his first issue, Burnett contends that the trial court erred in admitting evidence of extraneous offenses during the guilt/innocence phase of trial. In particular, appellant complains that Hudgins should not have been permitted to testify about other recent robberies at area Radio Shacks and that Detective Mitchell should not have been permitted to testify about providing appellant's name to Detective Tonry because identity had not been placed in issue.

A. Standard of Review

We review a decision to admit or exclude evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010) (citing *Green v. State*, 934 S.W.2d 92, 104 (Tex. Crim. App. 1996)). A trial court abuses its discretion only if its decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571,

579 (Tex. Crim. App. 2008) (citing *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003)). In contrast, a trial court does not abuse its discretion if any evidence supports its decision. *Osbourn v. State*, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002). We uphold a trial court's evidentiary ruling if it was correct on any theory of law applicable to the case. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

B. Applicable Law

"Rule 404(b) prohibits the introduction of extraneous bad acts to show character conformity but permits the introduction of such acts for other purposes, including proving identity."[1] *Page v. State*, 137 S.W.3d 75, 78 (Tex. Crim. App. 2004). Proving identity is only a valid purpose for which to admit extraneous bad acts when identity is an issue in the case. *Id.* (citing *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996)). Identity can be put at issue by defense cross-examination challenging a material detail of the identification. *Id.* (identity put at issue by defense cross-examination concerning discrepancy between defendant's actual weight and eyewitness estimation of weight); *Siqueiros v. State*, 685 S.W.2d 68, 71 (Tex. Crim. App. 1985) (identity put at issue by defense cross-examination concerning whether defendant had a mustache). In this context, a "material" detail

[1] Rule 404(b)(2) provides that extraneous bad acts "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2).

is simply a detail relevant to the reliability of the identification. *Page*, 137 S.W.3d at 79.

C. Analysis

Appellant complains that testimony concerning extraneous robberies offered by Hudgins and Detective Mitchell was improperly admitted because identity had not been placed at issue. In particular, appellant complains that Hudgins was improperly allowed to offer the following testimony related to other Radio Shack robberies:

> State: You had mentioned that there had been a number of robberies in this area in that time frame. Do you or were you trying to determine whether these robberies were related in any way?
>
> Hudgins: Yes, at the beginning there were—there were a number of robberies. After the third one I had figured out that they were being committed by the same suspect.

Appellant objected to this testimony, and the trial court overruled the objection. Hudgins continued to testify he developed his theory based on descriptions provided by employees and surveillance video available for some of the robberies. Hudgins further testified, without objection, that no other robberies matching the same modus operandi occurred at area Radio Shacks after appellant's arrest:

> State: After Rodney Burnett was arrested shortly after this offense did the Radio Shacks in your district continue to get robbed in the way they had been?
>
> Hudgins: No, nothing matching the same M.O.

Without objection, defense counsel then began cross-examination and elicited testimony explaining that there had been approximately ten other robberies of area Radio Shacks within the eighteen months since appellant's arrest.

Detective Mitchell testified over objection concerning an extraneous Radio Shack robbery he investigated in Montgomery County. Detective Mitchell explained that he had provided information concerning the Montgomery County robbery to Hudgins. Following the charged robbery, Detective Tonry contacted Detective Mitchell, and Mitchell provided him with appellant's name.

Appellant maintains that Hudgins's extraneous offense testimony should not have been admitted because identity had not been put at issue. However, the State responds—and we agree—that defense counsel's cross-examination of Aguilar had already placed identity at issue. *See Page*, 137 S.W.3d at 78 ("Identity can be raised by defense cross-examination, such as when the identifying witness is impeached on a material detail of the identification."). Before Hudgins and Mitchell testified, defense counsel cross-examined Aguilar at length concerning discrepancies in Aguilar's description of the suspect's weight and height, suggesting that both were inconsistent with appellant's actual weight and height:

> Defense: All right. Now, awhile ago when you were describing the person that robbed you, you said he was six three or six four?
>
> Aguilar: Yeah, around six foot.

Defense: How much did you say he weighed?

Aguilar: I say like around 200, maybe a little bit more. I am not sure. Probably right there.

Defense: So, you recognize there is a big difference between 200 pounds and 250 pounds, right?

Aguilar: Yeah.

Defense: So, did you ever tell anybody the person that robbed you weighed 250 pounds?

Aguilar: I don't remember—I don't think so.

. . .

Defense: —You were asked how much the person that robbed you weighed and you told the Court 200 pounds, right?

Aguilar: Yes.

Defense: In preparing you to testify, did you receive information that allegedly—and I wasn't there, so I don't know what happened—you and Mr. Pemberton described the person as weighing 240 to 250 pounds.

Aguilar: What are you asking?

Defense: Yeah, has anybody told you that is what you-all said?

Aguilar: Yes. That's what we went over.

. . .

Defense: Okay. So, after you have come to court today you are now saying the person weighed 200 pounds though?

Aguilar: Yeah.

Defense: Not 240 pounds?

Aguilar: It's been awhile though. So, I don't recollect completely.

. . .

Defense: Could I have my client stand up?

. . .

Defense: This guy that is standing here, do you think he's six three, six four, weighs 250 pounds?

Aguilar: Yes.

Defense: You do?

Aguilar: Yes.

Defense: Okay. But the guy that robbed you only weighed 200 pounds?

Aguilar: No, probably bigger.

. . .

Defense: And it is sounding to me like you thought that the person who robbed you weighed 200 pounds?

Aguilar: Yeah, now that I think about it, it's more though. Probably more.

Defense: Now that you seen him standing up?

Aguilar: Correct.

This cross-examination implied that Aguilar's identification of appellant was flawed. *See Page*, 137 S.W.3d at 78 (defense cross-examination suggesting 265-

pound client was not 200 pounds, as identified by eyewitness, placed identity at issue by challenging trustworthiness of witness's identification through questioning "her capacity to observe (i.e., she was mistaken) or her truthfulness (i.e., she was lying), or both"). Thus, we conclude that by the time of Hudgins's and Mitchell's testimony, defense cross-examination of the identifying witness had already raised identity as an issue. *See id.*; *Dickson v. State*, 246 S.W.3d 733, 744 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) ("Impeachment of a witness's identification testimony raises the issue of identity for which extraneous offense evidence is admissible."); *Burton*, 230 S.W.3d at 849–50 (attempted impeachment of eyewitness identification placed identity at issue).

Accordingly, we overrule appellant's first issue.

Extraneous Offense Evidence Admitted in Punishment Phase

In his second, third, and fourth issues, appellant contends that the trial court erred in admitting extraneous offense evidence at the punishment phase of trial.

A. Standard of Review and Applicable Law

During the punishment phase of trial, evidence as to any matter deemed relevant to sentencing may be admitted, including evidence of an extraneous offense shown beyond a reasonable doubt to have been committed by the defendant.[2] TEX. CODE CRIM. PROC. art. 37.07 § 3(a)(1). Evidence is relevant to

[2] In relevant part, the Texas Code of Criminal Procedure provides:

sentencing if it is "helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case." *Rodriguez v. State*, 203 S.W.3d 837, 842 (Tex. Crim. App. 2006). A trial court "may not admit extraneous offense evidence unless the evidence is such that a jury could rationally find the defendant criminally responsible for the extraneous offense." *Palomo v. State*, 352 S.W.3d 87, 92 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (citing *Davis v. State*, 315 S.W.3d 908, 914 (Tex. App.—Houston [14th Dist.] 2010)), *rev'd on other grounds*, 349 S.W.3d 517 (Tex. Crim. App. 2011). "[T]o prove an extraneous offense at punishment, the State is only required to prove beyond a reasonable doubt a defendant's involvement in the bad act: a finding of guilt for a crime is not required." *Gomez v. State*, 380 S.W.3d 830, 839 (Tex. App.—Houston [14th Dist.]

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. A court may consider as a factor in mitigating punishment the conduct of a defendant while participating in a program under Chapter 17 as a condition of release on bail.

TEX. CODE CRIM. PROC. art. 37.07 § 3(a)(1).

2012, pet. ref'd) (citing *Haley v. State*, 173 S.W.3d 510, 515 (Tex. Crim. App. 2005)).

We review a trial court's decision to admit extraneous offense evidence at the punishment phase of trial under an abuse of discretion standard. *Mitchell v. State*, 931 S.W.2d 950, 953 (Tex. Crim. App. 1996).

B. Partney and Crawford Extraneous Offense Testimony

In his second and third issues, appellant maintains that the trial court erred in admitting testimony and evidence concerning the January 13, 2014 robbery of the Radio Shack at Louetta and Stuebner Airline and the December 30, 2013 robbery of the Radio Shack on F.M. 2920, because the State failed to meet its burden of proving that appellant committed these offenses beyond a reasonable doubt.

We conclude that the trial court reasonably could have determined that the State proved appellant committed the Louetta and F.M. 2920 Radio Shack robberies beyond a reasonable doubt. The testimony and supporting video surveillance for both extraneous offenses are so distinctive and idiosyncratic as to establish a modus operandi unique to appellant. Like the charged robbery, these two extraneous robberies occurred midday at Houston-area Radio Shack stores. In all three robberies, the robber wore a gray jacket with white stripes at the waist and entered the store while appearing to be on his cell phone. In all three robberies, the robber drew his gun while the employee was at the register and demanded the

contents of the register. In all three robberies, the robber directed the employee to the back of the store where he demanded exclusively expensive smartphones be put into a bag before directing the employees to lie on the ground as he fled the scene. Notwithstanding Partney's and Crawford's inability to positively identify a suspect, given the similarities in suspect appearance and clothing as well as the manner and means of executing the robbery, the trial court reasonably could have concluded that the State proved beyond a reasonable doubt that appellant committed the Louetta and F.M. 2920 Radio Shack robberies.

Accordingly, we overrule appellant's second and third issues.

C. Hudgins's Extraneous Offense Testimony

In his fourth issue, appellant contends that the trial court erred in allowing Hudgins to testify as to the amount of losses incurred by Radio Shack as a result of the Louetta and F.M. 2920 Radio Shack robberies. In particular, appellant complains that Hudgins should not have been permitted to testify that the value of cash and merchandise lost in the Louetta robbery totaled approximately $56,560 and the value of cash and merchandise lost in the F.M. 2920 robbery totaled approximately $28,776.

Though appellant argues otherwise, as discussed above, the trial court reasonably exercised discretion in determining that the State proved appellant committed the Louetta and F.M. 2920 Radio Shack robberies beyond a reasonable

doubt. The losses sustained in those related robberies were relevant to appellant's sentencing because they elucidated the circumstances of the offense and of the offender. *See Taylor v. State*, 970 S.W.2d 98, 102 (Tex. App.—Fort Worth 1998, pet. ref'd) (explaining that circumstances of the offense and of the offender are relevant to sentencing). We conclude that the trial court's decision to allow Hudgins to testify as to Radio Shack's losses in related robberies was not an abuse of discretion.

We overrule appellant's fourth issue.

Identification

In his fifth issue, appellant contends that the trial court erred in admitting an unnecessarily suggestive identification at the punishment phase of trial. In particular, Ashby complains that "show-up" identifications of appellant by Abel Garcia and Dulce Hernandez were impermissibly suggestive.

A. Standard of Review and Applicable Law

"[A] pre-trial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law." *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995) (citing *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967 (1967)). The admissibility of an identification is a mixed question of law and fact that we review de novo. *See Gamboa v. State*, 296 S.W.3d 574, 581 (Tex. Crim.

App. 2009); *Brown v. State*, 29 S.W.3d 251, 254 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Appellant must demonstrate that the identification has been irreparably tainted by clear and convincing evidence before we can reverse his conviction. *See Mason v. State*, 416 S.W.3d 720, 738 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

The admissibility of an in-court identification is determined by a two-step analysis: "1) whether the out-of-court identification procedure was impermissible suggestive; and 2) whether that suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification." *Barley*, 906 S.W.2d at 33 (citations omitted); *see also Mendoza v. State*, 443 S.W.3d 360, 363 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Gamboa*, 296 S.W.3d at 581. "An analysis under these steps requires an examination of the 'totality of the circumstances' surrounding the particular case and a determination of the reliability of the identification." *Id.* at 33. Even if impermissibly suggestive, identification testimony may nevertheless be admissible so long as the totality of the circumstances shows no substantial likelihood of misidentification. *Adams v. State*, 397 S.W.3d 760, 764 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citing *Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999)).

B. Analysis

At the punishment phase of trial, the State introduced testimony concerning the July 11, 2014 robbery of a Houston-area Radio Shack from eyewitnesses Abel Garcia and Dulce Hernandez. Using a tracking device placed with smartphones stolen that day, police were able to apprehend two suspects and recover the stolen property within an hour of the robbery. Both suspects were returned to the scene—one in an ambulance and the other in a patrol car. An officer separately showed both suspects to Garcia and Hernandez, and he testified that both Garcia and Hernandez separately identified appellant as the perpetrator. Garcia also identified appellant as the perpetrator of the July 11, 2014 Radio Shack robbery in-court. Hernandez, however, was not asked in the course of her testimony to make an in-court identification.

"On-the-scene" or "show-up" identifications engender some degree of suggestiveness. *Fite v. State*, 60 S.W.3d 314, 318 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Nonetheless, such identification procedures are necessary in cases "where time is of the essence in catching a suspect and an early identification is aided by the fresh memory of the victim." *Id.* (citing *Garza v. State*, 633 S.W.2d 508, 512 (Tex. Crim. App. 1982)); *see also Santiago v. State*, 425 S.W.3d 437, 442 (Tex. App.—Houston [1st Dist.] 2011, no pet) ("The initial show-up procedure at the crime scene was not shown to be impermissibly

suggestive, as such confrontations have been acknowledged as being necessary in many cases."). Benefits to "show-up" identifications include: (1) allowing the witness to test his recollection while his memory is relatively fresh and accurate; (2) expediting the release of innocent suspects; and (3) enabling authorities to release an innocent suspect and to continue their search while the perpetrator is still in the area and before he has an opportunity to change appearance or dispose of evidence. *Garza*, 633 S.W.2d at 512; *Mendoza*, 443 S.W.3d at 363–64; *Louis v. State*, 825 S.W.2d 752, 756 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd). Additionally, any unfair prejudice resulting from the "show-up" identification procedure can be exposed through rigorous cross-examination. *Garza*, 633 S.W.2d at 512; *Mendoza*, 443 S.W.3d at 364; *Louis*, 825 S.W.2d at 756.

All of the above considerations apply to the pretrial identification procedures used here. The pretrial identification occurred within one hour of the robbery, thereby allowing complainants to view the suspects while events surrounding the robbery were still fresh in their minds. Garcia testified that within 12 to 15 minutes of the robbery, officers returned to the store with two suspects and he positively identified the perpetrator. At the time, Hernandez was still so shaken that she was unable to confidently identify the perpetrator. However, Hernandez testified that she did see the perpetrator's face during the robbery, and was later sure that the suspect in the ambulance was the perpetrator. Judging from how

quickly suspects were returned to the scene, we can infer that they were apprehended nearby, thus providing an opportunity for quick confirmation or denial of identification of the suspects by complainants. By keeping the complainants separate during the show-up identification, the officers safeguarded against any influence complainants could have had on one another in the identification process. Doing so prevented complainants from comparing or discussing their recollection of the perpetrator. Neither complainant was able to identify the second suspect; but both were able to identify appellant. This suggests that complainants were able to distinguish the suspect they saw well versus those they did not see at all. Finally, defense counsel cross-examined both complainants and the officers involved in the show-up identifications, thereby affording an opportunity to expose any possible prejudice resulting from the pretrial identification procedure. In sum, we find that the pretrial identification was not impermissibly suggestive. *See Mendoza*, 443 S.W.3d at 364

Even were we to conclude otherwise—that the pretrial identification *was* impermissibly suggestive—the identification procedure did not give rise to a substantial likelihood of irreparable misidentification. In this second part of the analysis, if indicia of reliability outweigh suggestiveness than the identification is admissible. *Barley*, 906 S.W.2d at 34. In order to determine whether a substantial likelihood for reparable misidentification has been created, we consider the non-

exclusive factors enumerated by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972). These factors include: "(1) the opportunity to view, (2) the degree of attention, (3) the accuracy of the description, (4) the witness' level of certainty, [and] (5) the time between the crime and the confrontation." *Garza,* 633 S.W.2d at 513; *see also Neil*, 409 U.S. at 199–201, 93 S. Ct. at 382–83. These factors are weighed against the corrupting effect of any suggestive identification procedures. *Barley*, 906 S.W.2d at 34. We may only reverse upon an appellant's clear and convincing showing that the identification was irreparably tainted. *Id.*

Here, both Garcia and Hernandez testified that they had an opportunity to view appellant before and during the robbery. Testimony from both suggested that they had unobstructed views of appellant while in a lighted retail store at midday. Both witnesses were able to provide detailed descriptions, further suggesting each had an opportunity to view appellant. Both Garcia and Hernandez were more than casual observers, and thus we can infer that both had more reason to be attentive. *See id.* at 35. The descriptions offered by Garcia and Hernandez were detailed, including descriptions of appellant's clothing and accessories, and both witnesses ultimately identified appellant as the perpetrator with confidence. Though Hernandez was uncertain at the time of confrontation, once she had time to calm down after the aggravated robbery, she confidently identified appellant. Garcia

was not troubled by the short amount of time between the crime and the confrontation, and thus his identification of appellant happened very near the time of the crime. Thus, even assuming the pretrial identification procedure was impermissibly suggestive, the reliability of Garcia and Hernandez's statements would lead us to conclude that no substantial risk of irreparable misidentification was created. *See id.*; *Mendoza*, 443 S.W.3d at 364.

Accordingly, we overrule appellant's fifth issue.

Conclusion

We affirm the trial court's judgment.

Rebeca Huddle
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.

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