Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-19-00226-CR

José Trinidad **GONZALEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 226th Judicial District Court, Bexar County, Texas
Trial Court No. 2018-CR-0458
Honorable Velia J. Meza, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: July 29, 2020

AFFIRMED

José Trinidad Gonzalez appeals his convictions for sex offenses against a minor and failure to register a new address as a convicted sex offender. He raises three issues: (1) whether police obtained video evidence in violation of article 38.23 and the Fourth Amendment; (2) whether police elicited a tainted admission from Gonzalez by confronting him with the video evidence; and (3) whether the case detective's testimony caused incurable prejudice, thereby necessitating a new trial. We affirm the trial court's judgment.

BACKGROUND

Gonzalez is married to the victim's mother and was living with her at the time of the investigation in this case. The victim, D, was six years old. She did not live with Gonzalez and her mother, but she frequently visited them. When D visited, Gonzalez allowed her to play games on his iPad if she asked.

Although the iPad was passcode-protected, Gonzalez shared the passcode with his wife (D's mother), who believed she had authority or permission to use the iPad. Gonzalez's wife admitted, however, that she had only used the device a couple of times while Gonzalez was present.

One night, after Gonzalez went to bed and left the iPad with D to play games, Gonzalez's wife looked through the device for signs of Gonzalez's infidelity. In the trash folder, she found pornographic videos of Gonzalez with D. She immediately took the iPad to a police substation.

At the substation, an officer spoke with Gonzalez's wife, who described the situation. Gonzalez's wife showed the officer the videos on the iPad, and the officer's supervisor also watched the videos. Based on their observations, the officers decided to arrest Gonzalez.

At the scene of Gonzalez's arrest, a night detective, who handled the investigation before the case detective was assigned to it, also viewed the iPad videos with Gonzalez's wife nearby. The night detective recalled the videos being open without needing to enter the passcode.

After the arrest, the night detective interviewed Gonzalez at the police station and confronted him with the video evidence. Gonzalez stated that he made the videos to get back at his wife for cheating. He also stated he was not surprised that the videos had been discovered since he allowed his wife and D to use the iPad.

The next day, the assigned case detective received Gonzalez's case. Upon review, he applied for a warrant to search Gonzalez's iPad because he learned that the iPad had multiple users and that ownership and control of the iPad were in question. As a result, the case detective decided

it was more procedurally prudent to rely on a warrant rather than consent. In the affidavit, the case detective only included information from the wife's report and did not refer to the results discovered by the officers viewing the iPad videos. After a judge issued a warrant, the case detective had a technician forensically download the contents of the iPad.

Before trial, Gonzalez moved to suppress the evidence against him; however, his motion was denied. Gonzalez also moved to prohibit the State from presenting extraneous offense evidence intended to prove conduct in conformity with character. The State agreed to exclude character-conformity evidence; however, the State objected to prohibiting all extraneous offense evidence. The judge hearing the pretrial motions instructed the parties to seek the trial judge's permission before eliciting any testimony regarding extraneous offenses.

During the case detective's trial testimony, Gonzalez renewed his motion to suppress, and the trial court declined to revisit the pretrial ruling. At the same time, the State mentioned that the night detective would present a video of Gonzalez's interview, in which Gonzalez admitted to possessing pornography involving other children between the ages of ten and twelve. Gonzalez argued the jury should not be allowed to hear the extraneous offense evidence because it would be unduly prejudicial. The State argued that the evidence was relevant to intent. The trial judge indicated she would rule on the motion before the night detective testified, and trial resumed.

During the ensuing examination, the case detective mentioned the iPad contained videos of naked children. Gonzalez objected to the testimony because of his pending motion and asked for a jury instruction to disregard. The trial court sustained the objection and directed the jury to disregard. The trial court denied a motion for mistrial.

During the night detective's testimony, he referred to the iPad containing images of naked children between the ages of 10 and 12. Gonzalez did not object to this testimony. In addition,

the record contains no indication that the trial court ever ruled on Gonzalez's motion to exclude the extraneous offense evidence.

PARTIES' ARGUMENTS

Gonzalez argues his wife had no authority to inspect his iPad files or to deliver his iPad to law enforcement officers. Accordingly, Gonzalez contends that officers had no authority to view the videos on the iPad without a warrant. Because officers viewed the videos without a warrant, Gonzalez asserts the evidence should have been suppressed. Furthermore, because the night detective confronted Gonzalez with the iPad videos during his interview, Gonzalez also contends his admission during the interview should have been suppressed. Although police obtained a warrant before downloading the contents of the iPad, Gonzalez argues the warrant was tainted because the case detective did not disclose in the warrant application that officers viewed the iPad videos. Finally, Gonzalez argues that the trial court should have granted his motion for mistrial after the case detective testified that the iPad contained videos of naked children, which he contends the trial court excluded.

The State argues Gonzalez's wife acted as a private citizen when she discovered illicit videos on Gonzalez's iPad and that her discovery did not result in a violation of Gonzalez's Fourth Amendment rights. The State also argues that the officers' viewing of the videos was either not a search, or officers conducted a reasonable search based on Gonzalez's wife's apparent authority. The State further argues that *Miranda* warnings given at the time of Gonzalez's interview and the warrant obtained by the case detective before the forensic download of the iPad attenuated any potentially illegal police action. Regarding the motion for mistrial, the State argues that Gonzalez waived his argument when he failed to object to other testimony regarding child pornography on his iPad.

OFFICERS' VIEWING OF GONZALEZ'S IPAD

We first address Gonzalez's contention that the trial court erred in denying his motion to suppress.

A. Standard of Review

Suppression issues often raise mixed questions of law and fact. *See Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). We review de novo issues of pure law and the application of the law to the facts of the case, while deferring to the trial court's factual determinations. *Id*.; *see also State v. Ruiz*, 577 S.W.3d 543, 545 (Tex. Crim. App. 2019).

B. Applicable Law

1. Fourth Amendment Protection of Tablet Devices

The Fourth Amendment protects individuals against unreasonable searches and seizures by governmental agents. U.S. CONST. amend. IV; *State v. Rodriguez*, 529 S.W.3d 81, 87 (Tex. App.—Eastland), *aff'd*, 521 S.W.3d 1 (Tex. Crim. App. 2017). Generally, officers must obtain a warrant before they can examine an individual's private property. *See Rodriguez*, 529 S.W.3d at 87; *see also Katz v. United States*, 389 U.S. 347, 357 (1967). In the past, a violation of the right against unreasonable search and seizure was a matter of trespass, but *Katz* established that individuals may be protected if they demonstrate an expectation of privacy. *United States v. Jones*, 565 U.S. 400, 407–08 (2012); *Katz*, 389 U.S. at 353; *Sims v. State*, 569 S.W.3d 634, 643 (Tex. Crim. App. 2019)). This expectation must be something that society is willing to recognize as reasonable. *Sims*, 569 S.W.3d at 643; *Rodriguez*, 529 S.W.3d at 87.

Tablet devices are included in those items that society now expects to be private, especially when they are passcode-protected. *See Thomas v. State*, 586 S.W.3d 413, 419 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (smart phones); *Morales v. State*, No. 06-15-00125-CR,

2016 WL 350622, at *4 (Tex. App.—Texarkana Jan. 29, 2016, no pet.) (mem. op., not designated for publication) (citing *Riley v. California*, 573 U.S. 373, 394–95 (2014)) (iPad). Passcodes effectively exclude others from access and demonstrate a clear expectation of privacy. *See Grant v. State*, 531 S.W.3d 898, 901 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd); *see also Oseguera-Viera v. State*, 592 S.W.3d 960, 965 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd). But when an individual shares access, he may inadvertently confer authority to consent on someone besides himself. *See Thomas*, 586 S.W.3d at 422; *see also Baird v. State*, 398 S.W.3d 220, 230 (Tex. Crim. App. 2013). He may also unwittingly vitiate his expectation of privacy. *See United States v. Barth*, 26 F. Supp. 2d 929, 937 (W.D. Tex. 1998); *State v. Rodriguez*, 521 S.W.3d 1, 11 (Tex. Crim. App. 2017); *Brackens v. State*, 312 S.W.3d 831, 837 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

2. Private Party Doctrine

When a private party discovers contraband in another individual's private effects and turns it over to the police, the Fourth Amendment is not implicated because the police have not entered any protected area or violated the individual's expectation of privacy. *Rodriguez*, 521 S.W.3d at 11 (citing *Cobb v. State*, 85 S.W.3d 258, 270–71 (Tex. Crim. App. 2002)). If the private party reports another individual's contraband and submits it to police inside the owner's locked container, then a warrant is required to break the lock and retrieve the contraband, unless an exception applies. *See id*. (citing *United States v. Jacobsen*, 466 U.S. 109, 121 (1984)). However, if a private party delivers another individual's contraband in an open container to the police, then officers may examine the contraband to the same extent as the private party, because the private party has already frustrated the owner's expectation of privacy. *Jacobsen*, 466 U.S. at 113–14 (citing *Walter v. United States*, 447 U.S. 649 (1980)) (removing and testing drugs from an opened

postal package was not a new search, though viewing contraband films stored in an open box was potentially a new search)).

Similarly, when a private party discovers digital contraband files in another individual's computer and shows those files to police, the Fourth Amendment is not implicated. *See Brackens*, 312 S.W.3d at 837 (citing *Barth*, 26 F. Supp. 2d at 936); *Rogers v. State*, 113 S.W.3d 452, 458 (Tex. App.—San Antonio 2003, no pet.). Police are only required to obtain a search warrant, or justify their search by an exception to the warrant requirement, when they conduct a new search into the computer. *Brackens*, 312 S.W.3d at 838 (citing *Barth*, 26 F. Supp. 2d at 937); *see also Rodriguez*, 521 S.W.3d at 10–11.

If a private party has unlawfully accessed contraband files, the Texas Exclusionary Rule may apply. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23; *Thomas*, 586 S.W.3d at 419; *Brackens*, 312 S.W.3d at 839. But if the private party has lawfully accessed the files, then article 38.23 does not apply to the private-party search. *Ruiz*, 577 S.W.3d at 546; *Thomas*, 586 S.W.3d at 419; *Brackens*, 312 S.W.3d at 839.

3. Authority to Consent to Search

To conduct a new search or exceed the scope of what a private party has uncovered, police must obtain a warrant, or some exception to the warrant requirement must apply. *Brackens*, 312 S.W.3d at 838; *see also Rodriguez*, 521 S.W.3d at 10–11. For example, police may obtain consent for a search from a suspect or from a third party if that person has actual or apparent authority to grant a search. *Rodriguez*, 521 S.W.3d at 19 (citing *Hubert v. State*, 312 S.W.3d 554, 560 (Tex. Crim. App. 2010)).

A third party has *actual* authority to consent to a search if that person shares mutual access, control, or use of an item or place to be searched. *Welch v. State*, 93 S.W.3d 50, 53 (Tex. Crim. App. 2002); *see also Rodriguez*, 521 S.W.3d at 20. A third party has *apparent* authority to consent

to a search if, based on objective appearance and reasonable assumption, that person appears to exercise control and authority over a thing or place to be searched. *Limon v. State*, 340 S.W.3d 753, 756 (Tex. Crim. App. 2011); *see also Rodriguez*, 521 S.W.3d at 19.

The reasonableness of apparent authority depends on "widely shared social expectations," such as the expectation that family members share access, control, and use of their home and the items in it. *See Limon*, 340 S.W.3d at 756–57 (citing *Georgia v. Randolph*, 547 U.S. 103 (2006)); *see also Sheeds v. State*, Nos. 04-12-00153-CR, 04-12-00154-CR, 2013 WL 4829054, at *3 (Tex. App.—San Antonio Sept. 11, 2013, no pet.) (mem. op., not designated for publication). Common authority to consent does not, however, depend on property rights. *Welch*, 93 S.W.3d at 53; *Riordan v. State*, 905 S.W.2d 765, 772 (Tex. App.—Austin 1995, no pet.).

4. Search Warrant Application

Texas law requires officers to present sufficient facts to establish probable cause for a magistrate to approve a search warrant application. *See* TEX. CODE CRIM. PROC. ANN. art. 18.01; *State v. Elrod*, 538 S.W.3d 551, 556 (Tex. Crim. App. 2017); *Hughes v. State*, 334 S.W.3d 379, 386 (Tex. App.—Amarillo 2011, no pet.). The magistrate should have a clear basis on which to grant a specific search or seizure related to a suspected crime. *See State v. Cuong Phu Le*, 463 S.W.3d 872, 877 (Tex. Crim. App. 2015); *Hogan v. State*, 329 S.W.3d 90, 94 (Tex. App.—Fort Worth 2010, no pet.). Officers providing the information are presumed reliable. *Pair v. State*, 184 S.W.3d 329, 337 (Tex. App.—Fort Worth 2006, no pet.) (citing *Davis v. State*, 165 S.W.3d 393, 405 n.3 (Tex. App.—Fort Worth 2005), *rev'd on other grounds*, 202 S.W.3d 149, 158 (Tex. Crim. App. 2006)). If an officer omits material facts from an affidavit, then the warrant can be reviewed under a modified *Franks* analysis. *Gonzales v. State*, 481 S.W.3d 300, 312 (Tex. App.—San Antonio 2015, no pet.); *State v. Verde*, 432 S.W.3d 475, 483–84 (Tex. App.—Texarkana 2014, pet. ref'd). But including tainted information related to an illegal search distracts from the main

inquiry of whether sufficient untainted probable cause exists. *See Cuong Phu Le*, 463 S.W.3d at 877 (citing *McClintock v. State*, 444 S.W.3d 15, 19 (Tex. Crim. App. 2014)); *Brackens*, 312 S.W.3d at 838 (citing *State v. Bridges*, 977 S.W.2d 628, 632 (Tex. App.—Houston [14th Dist.] 1998, no pet.)). Ultimately, a search warrant is valid and can attenuate unconstitutional police actions if there is sufficient untainted probable cause to support it. *See Cuong Phu Le*, 463 S.W.3d at 877; *Wehrenberg v. State*, 416 S.W.3d 458, 468 (Tex. Crim. App. 2013); *Brackens*, 312 S.W.3d at 838 (citing *Bridges*, 977 S.W.2d at 632).

C. Analysis

The Fourth Amendment was not initially implicated in this case. *See Rodriguez*, 521 S.W.3d at 11. Gonzalez's wife acted as a private party when she accessed Gonzalez's iPad and discovered contraband videos on it. *See Brackens*, 312 S.W.3d at 837; *Rogers*, 113 S.W.3d at 458. Gonzalez complains his wife violated his trust in doing so; however, absent a violation of article 38.23, Gonzalez's complaint fails. *See Ruiz*, 577 S.W.3d at 546; *Thomas*, 586 S.W.3d at 419; *Brackens*, 312 S.W.3d at 839.

When Gonzalez's wife showed Gonzalez's iPad videos to police, this was a search, but not an unreasonable one. *See Rodriguez*, 521 S.W.3d at 11; *Brackens*, 312 S.W.3d at 837–38. At that time, Gonzalez's expectation of privacy in his iPad had already been frustrated by a private party, and there is no evidence that officers exceeded the scope of Gonzalez's wife's discovery before obtaining a warrant. *See Rodriguez*, 521 S.W.3d at 11; *Brackens*, 312 S.W.3d at 837–38.

Even if we assume the Fourth Amendment was implicated when Gonzalez's wife showed the iPad videos to the police, Gonzalez's wife had apparent authority to permit police to view the iPad videos because she brought the iPad from her family's home and entered the iPad's passcode to present Gonzalez's videos to the police. *See Limon*, 340 S.W.3d at 756. It was objectively

reasonable for the officers to believe Gonzalez's wife had the authority to disclose the contents of the iPad to the police. *See id*.

Furthermore, police obtained a warrant to forensically download Gonzalez's iPad based solely on information provided by Gonzalez's wife. The warrant effectively attenuated any possible taint from the investigation due to its reliance solely on the information provided by Gonzalez's wife. *See Cuong Phu Le*, 463 S.W.3d at 877; *Brackens*, 312 S.W.3d at 838. Gonzalez complains that the search warrant affidavit improperly omitted police actions that may have been considered improper by the issuing magistrate, but there is no evidence that the case detective omitted facts in bad faith or that those facts were material to the search warrant. *Cf. McKissick v. State*, 209 S.W.3d 205, 213 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) ("[A]ppellant's contentions are without merit because the inclusion of the omissions he cites would not render the affidavit, read as a whole, insufficient to show probable cause."). Rather, the case detective practiced proper procedure by including only the facts that could have been considered if there had been any unlawful police search. *See Cuong Phu Le*, 463 S.W.3d at 877; *Brackens*, 312 S.W.3d at 838.

We overrule Gonzalez's first issue.

GONZALEZ'S ADMISSION

We next consider Gonzalez's challenge to whether his admission during his interview was tainted by the iPad video evidence.

A. Applicable Law

When the exclusionary rule applies, it "extends to statements that are the fruits of an illegal search as well as to the items seized." *Pitts v. State*, 614 S.W.2d 142, 143 (Tex. Crim. App. [Panel Op.] 1981) (citing *Smith v. State*, 542 S.W.2d 420, 422 (Tex. Crim. App. 1976) ("It requires not only that the tangible evidence obtained from the search not be used in court, but that it shall not

be used [a]t all.")). But in the absence of an illegal search, there must be some other theory to exclude an admission, or the challenge necessarily fails. *See Oursbourn v. State*, 259 S.W.3d 159, 169 (Tex. Crim. App. 2008) (quoting TEX. CODE CRIM. PROC. ANN. art. 38.21[1]).

B. Analysis

Gonzalez argues that the police viewing his iPad videos was the first domino in a cascade of constitutional violations that should result in a judgment of acquittal. However, as previously noted, Gonzalez's wife exercised apparent authority over Gonzalez's iPad when she permitted officers to view the videos on it. *See Limon*, 340 S.W.3d at 756–57. In addition, Gonzalez never challenged the legality of his arrest or the voluntariness of his statement. Instead, he focuses his argument on his contention that police tainted the probable cause that led to his arrest and to the issuance of a search warrant for his iPad by viewing the iPad videos prior to obtaining a search warrant. Because we conclude that officers' viewing of Gonzalez's iPad prior to obtaining a warrant was reasonable, we also conclude that Gonzalez's subsequent admission was not tainted by police actions. *Cf. Pitts*, 614 S.W.2d at 143 (subjecting related statements to suppression when the exclusionary rule applies). Therefore, the trial court did not abuse its discretion by denying Gonzalez's motion to suppress his statements. *See* TEX. CODE CRIM. PROC. ANN. art. 38.21 (allowing the statement of an accused to be used in evidence against him if it is voluntary).

We overrule Gonzalez's second issue.

MOTION FOR MISTRIAL

We finally consider whether the case detective's testimony regarding videos of naked children on Gonzalez's iPad caused incurable prejudice, thereby necessitating a new trial.

[1] Article 38.21 of the Texas Code of Criminal Procedure states in relevant part as follows: "A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion . . . ."

A. Standard of Review

In reviewing a trial court's denial of a motion for mistrial, we "view[] the evidence in the light most favorable to the trial court's ruling, considering only those arguments before the court at the time of the ruling." *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009) (citing *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004)). We uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Id*.

B. Applicable Law

1. Mistrial

A mistrial is appropriate in extreme cases of highly prejudicial error when spending any further time or effort on trial "would be wasteful and futile." *Ocon*, 284 S.W.3d at 884 (citing *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000); *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999)). Generally, less drastic measures, such as an instruction to disregard, are preferred. *Id*. at 884–85 (citing *Barnett v. State*, 161 S.W.3d 128, 134 (Tex. Crim. App. 2005); *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000)).

2. Instruction to Disregard

An instruction to disregard can "cure error when evidence of an extraneous offense is placed before the jury in violation of a motion in limine." *Lusk v. State*, 82 S.W.3d 57, 60–61 (Tex. App.—Amarillo 2002, pet. ref'd) (citing *Barney v. State*, 698 S.W.2d 114, 125 (Tex. Crim. App. 1985)). Even when the subject matter is inherently sensitive, extraneous offense evidence will not automatically lead to unfair prejudice. *See Pawlak v. State*, 420 S.W.3d 807, 809 (Tex. Crim. App. 2013); *see also Ovalle*, 13 S.W.3d at 783. If there is no indication of bad faith, and the objectionable testimony does not appear calculated to incurably inflame the jury, then an instruction to disregard will likely suffice. *Lusk*, 82 S.W.3d at 60–61 (citing *Kemp v. State*, 846

S.W.2d 289, 308 (Tex. Crim. App. 1992); *Huffman v. State*, 746 S.W.2d 212, 218 (Tex. Crim. App. 1988)). The outcome will depend on the facts of the case. *Wood*, 18 S.W.3d at 648 (quoting *Ladd*, 3 S.W.3d at 567). Furthermore, if there is an error in the admission of evidence, it "is cured where the same evidence comes in elsewhere without objection." *Lane v. State*, 151 S.W.3d 188, 192–93 (Tex. Crim. App. 2004) (quoting *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003)); *see also* TEX. R. APP. P. 33.1 (error preservation).

C. Analysis

Gonzalez argues that the case detective's statement at trial regarding videos of naked children was inherently inflammatory and unduly prejudicial to such a degree that the trial court should have granted his motion for a mistrial. We disagree.

First, Gonzalez has not preserved his complaint for our review. *See* TEX. R. APP. P. 33.1. When the case detective testified that he saw videos of naked children on the iPad, the trial court was contemplating whether the night detective's interview with Gonzalez should be redacted to exclude Gonzalez's statements about images of naked children between the ages of ten and twelve. The night detective later testified about images of naked children between the ages of ten and twelve on Gonzalez's iPad, and Gonzalez did not object to that testimony. Gonzalez has therefore not preserved his prejudice argument on this point. *See Lane*, 151 S.W.3d at 193.

Second, the only motion in limine regarding extraneous offense evidence that was granted was Gonzalez's pretrial motion to preclude extraneous offense evidence for the purpose of proving conduct in conformity with character. The pretrial hearing judge declined to rule on specific testimony that might arise at trial and instead instructed the parties to seek the trial judge's ruling before introducing extraneous offense testimony. And, given that the night detective was permitted to testify about images of naked children between the ages of ten and twelve on

Gonzalez's iPad without objection, we cannot say the trial court abused its discretion in denying Gonzalez's motion for mistrial. *See Lane*, 151 S.W.3d at 192–93.

We overrule Gonzalez's third issue.

CONCLUSION

Gonzalez's wife was acting as a private party when she discovered pornographic videos of her daughter on Gonzalez's iPad, and because the record does not suggest that police exceeded Gonzalez's wife's initial search, there is no basis to conclude that Gonzalez's Fourth Amendment rights were violated. Furthermore, Gonzalez's wife had apparent authority to allow officers to view the iPad videos. Therefore, Gonzalez's subsequent admission was not tainted by the officers' viewing of the videos on Gonzalez's iPad. Finally, Gonzalez did not object to all instances of testimony regarding images of other naked children on his iPad and did not preserve his claim of error.

The trial court's judgment is affirmed.

Patricia O. Alvarez, Justice

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