No. 126918

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Illinois Appellate Court, Third District, No. 3-17-0848
Plaintiff-Appellant,	)	There on Appeal from the Circuit Court of the Fourteenth Judicial Circuit,
v.	)	Henry County, Illinois, Nos. 16 CF 411 & 16 CF 412
TRAVIS J. WILLIAMS,	)	The Honorable Jeffrey W. O'Connor,
Defendant-Appellee.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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POINTS AND AUTHORITIES

STATEMENT OF FACTS

The State's Statement of Facts is generally sufficient to present the issues for review. In addition, defendant presents the following additional facts.

The State charged Travis Williams with Predatory Criminal Sexual Assault of a Child and Criminal Sexual Assault. The State alleged Williams abused his biological daughter, K.W., (case 16-CF-411) and his stepdaughter, H.S., (case 16-CF- 412). After a jury trial, Williams was convicted. (R. 504-05).

Prior to trial, the State moved, among other issues, to present other crimes evidence by the two complaining witnesses, K.W., H.S., as well as from A.R. A.R., is K.W.'s younger sister, and also the biological daughter of Williams. (C1. 48).[1] Specifically, A.R. would testify the defendant fondled her vagina in the 7th or 8th grade and that she disclosed this abuse. The motion also noted that Patti, the defendant's ex-wife, would testify to corroborate K.W.'s testimony, particularly about an alleged sexual fetish of Williams. (C1. 50). After the court granted the propensity motion over defense objection, the defense agreed with the State's request that both cases be joined for trial. (R. 71).

[1] Citations to the Common Law Record for 16-CF-411 are (C1), citations to the Common Law record for 16-CF-412 are (C2), citations to the Common Law Record that are in both cases are also cited as (C1.). Citations to the Report or Proceedings are (R.) Citations to the Appendix are (App.). Citations to the State's Appellate Brief are (Br.).

During jury selection, the State listed its potential witnesses to the jury and included K.W., H.S., Patti, and A.R. (R. 98-99). While K.W. and H.S. testified at trial, Patti and A.R. did not.

At trial, K.W. testified that when she was 16 years old, she told the defendant that she was gay and because of this, things were not good between them. (R. 326). When K.W. was 17 or 18, she had a girlfriend (and now wife) and the defendant told her that bringing her girlfriend to his house was like "bringing crack into his house." (R. 326). After that, K.W. and the defendant "kinda just didn't speak after that because he just wasn't -- he was against me being gay." (R. 326). On cross, K.W. stated that she told her wife about the abuse earlier in their relationship but not the details. (R. 332). K.W.'s wife did not testify at trial.

At some point before or around 2009, K.W. told her sister A.R. about the alleged abuse. (R. 306). She did not tell anyone else. (R. 307). In 2009, A.R. told people what K.W. told her about the abuse and the police and Department of Children and Family Services ("DCFS") become involved. (R. 320). DCFS interviewed K.W. and took her to the Child Advocacy Center. (R. 320). K.W., however, denied any abuse occurred. (R. 321). K.W.'s alleged outcry to A.R. happened before she denied it to DCFS. (R. 333).

At trial, the State elicited from K.W. that her sister A.R. was present 25 to 30 times in the bed while Williams was abusing her. (R. 318). K.W. was not sure whether A.R. was awake when the abuse occurred. (R. 286). Around 2012,

Williams and Patti divorced and Patti gained custody of another of their children. (R. 328). The divorce was in 2012 and the outcry to Patti was in 2016. (R. 328, 271-72).

H.S., the defendant's stepdaughter, testified that she was also sexually abused by the defendant when she was twelve and in the seventh grade. (R. 355-56, 372). She denied being abused when she spoke to DCFS in 2009. (R. 373).

The State's expert, Johanna Hager, a Forensic Interviewer, did not meet with or interview K.W. or H.S. (R. 402). She testified that delayed disclosure by a child of abuse is very common. (R. 403). She also agreed that people sometimes do things to gain an advantage in custody and divorce matters. (R. 415).

In closing argument, the defense argued that K.W., H.S., A.R., K.W.'s wife, and Patti came up with the abuse theory to help with a custody issue or because Williams disapproved of K.W.'s lifestyle. (R. 463, 473). The defense also argued the State should have called certain witnesses, specifically A.R., Patti, and K.W.'s wife. (R. 457, 470-74, 479).

In rebuttal, the prosecutor stated: "why didn't [the State] call [A.R] as a witness? Well, first of all, the defense has subpoena powers just like the government." (R. 486). The court overruled an objection and later held that this did not shift the burden of proof. (R. 486-88).

In rebuttal argument, the prosecutor also defined hearsay as "something that's said outside of court." (R. 489). The prosecutor further said that "It's a

rule we can't bring in hearsay, so for the defense to suggest to you that I should call [A.R.] to talk about what [K.W.] told her, he knows I can't do that." (R. 489). Defense counsel did not object.

On appeal, the defendant argued that the prosecutor's comments misstated the law on hearsay, shifted the burden of proof, and that defense counsel was ineffective for failing to object to testimony regarding K.W.'s lack of sexual history, potential pregnancy, and attempts to terminate pregnancy. (Br. 13). The appellate court reversed the conviction holding that the prosecutor "committed a clear error when [she] misstated the law regarding hearsay and then compounded that with the implication that was why the witnesses were not called (the defendant 'knows I can't [offer] that')." *People v. Williams*, 2020 IL App (3d) 170848, ¶ 20.

The appellate court held that the prosecutor did not shift the burden of proof by arguing that the defendant could have subpoenaed A.R. and other witnesses and that the defendant invited the comments by arguing that AR., Patti, and K.W.'s wife should have testified. *See id.* at ¶ 17. The court did not address the ineffective assistance claim as it reversed on other grounds. *See id*. at ¶ 22.

ARGUMENT

The appellate court correctly held that it was reversible error for the prosecutor to provide an incorrect definition of hearsay in closing argument and then to suggest the hearsay rule prevented the State from introducing the

testimony of corroborating witnesses. *See Williams*, 2020 IL App (3d) 170848, ¶ 20.

Preliminarily, it is submitted the appellate court reached an incorrect conclusion that the prosecutor's comments about the defendant being able to subpoena A.R., Patti, and K.W.'s wife did not shift the burden to the defendant. *See Williams*, 2020 IL App (3d) 170848, ¶ 17 (citing to *People v. Kliner*, 185 Ill. 2d 81, 153 (1998)).

It is respectfully submitted that the prosecutor's comments were not invited because A.R., Patti, and K.W.'s wife were not equally accessible to the defendant. A.R. was an alleged victim who the State moved to have testify about other crimes and was also the sister of the complaining witness. Patti was the mother of both complaining witnesses and was also included in the State's pretrial propensity motion and that she would corroborate K.W.'s testimony about a fetish of the defendant. (C1. 50). K.W.'s wife is the wife of a complaining witness. These witnesses were not equally accessible to the defendant.

Kliner should not control where, as here, the missing witnesses are not equally accessible to the defendant. *See e.g. People v. Wheeler*, 5 Ill. 2d 474, 486 (noting that it is error for the State to comment on the failure of the accused to produce witnesses who are *equally accessible* to the prosecution); *see also People v. Jackson*, 399 Ill. App. 3d 314, 319, 926 N.E.2d 786 (1st Dist. 2010) (stating that comments on defense's failure to produce evidence "are not improper after a defendant with *equal access* to that evidence assails the prosecution's failure to

produce it") (emphasis added) (citations omitted); *see also People v. Melton*, 232 Ill. App. 3d 858, 862 (4th Dist. 1992) (holding that the prosecutor could comment on defendant's failure to call mother as witness was proper because she would have testified to a material fact and was not equally accessible to the State).

Nonetheless, the appellate court was correct in reversing the defendant's conviction based on the prosecutor's improper definition of hearsay to the jury and compounding it with the implication that hearsay prevented it from calling these witnesses. *See Williams*, 2020 IL App (3d) 170848, ¶ 20.

In its Brief, the State argues against reversal because: 1) any challenge to the prosecutor's misstatement about hearsay was forfeited because the comments were not clear and obvious error and 2) the evidence was not closely balanced. (Br. 16, 25). The following will address these arguments.

1. The prosecutor's incorrect definition of hearsay and that the hearsay rules prevented the State from presenting evidence was clear and obvious error.

The appellate court correctly held that "the State committed a clear error when it misstated the law regarding hearsay and then compounded that with the implication that was why the witnesses were not called." *Williams*, 2020 IL App (3d) 170848, ¶ 20. Here, the prosecutor defined hearsay as "something that's said outside of court." (R. 489). This is a clear and obvious error.

The State argues, however, that any claim of error is forfeited because "the prosecutor's explanation of hearsay, although incomplete, was not clearly and obviously improper." (Br. 23). The State fails to provide any authority that this

mischaracterization was merely incomplete and not a completely improper definition of hearsay. Nor can it overcome that the prosecutor's definition provided the State's justification for not calling key, corroborating witnesses. Here, the prosecutor not only gave an improper definition of hearsay but then doubled down on this by stating that was why they could not call certain witnesses and the defense lawyer knew this.

The State further argues that the prosecutor was not clearly and obviously wrong because A.R. could not have testified to K.W.'s outcry under the prior consistent statement exception to the hearsay rule. (Br. 19). The appellate court, however, correctly relied on *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005), which noted there is an exception to the hearsay rule for prior out-of-court statements when it is suggested that the witness had recently fabricated the testimony or had a motive to testify falsely, and the prior statement was made before the motive to fabricate arose. *See Williams*, 2020 IL App (3d) 170848, ¶ 19.

Here, A.R. could have testified to show K.W.'s trial testimony was consistent with what K.W. told A.R. before K.W. denied it to DCFS. On direct examination, the State elicited that K.W. told A.R. that the defendant abused her. (R. 306). After K.W.'s alleged outcry to A.R., K.W. denied the abuse to DCFS. (R. 321, 333). A.R.'s testimony about what K.W. told her is a prior consistent statement and not hearsay.

Prior consistent statements are admissible to rebut a charge or an inference that the witness is motivated to testify falsely or that his testimony is of

recent fabrication, and such evidence is admissible to show that he told the same story before the motive came into existence or before the time of the alleged fabrication. *See Cuadrado*, 214 Ill. 2d 79, 90. Here, A.R.'s testimony about K.W.'s alleged outcry would fall under this exception.

The State next unpersuasively argues against error because K.W.'s motive to fabricate the abuse was not clear at the time of the prosecutor's improper closing argument or that the State did not know the defense would argue that K.W. was compromised. (Br. 19-20). Preliminarily, the State offers no authority that the defendant is required to make any such showing to be entitled to review.

The State's argument also ignores that the defense repeatedly argued that K.W.'s more recent allegations were fabricated, possibly because Williams disapproved of her sexuality or to help in a custody battle. (R. 463, 473). In opening statements, the defense talked about H.S. and K.W. originally denying the abuse and that "there are other things going on in the background of what I'll call the family dynamic that is really a true motivation for what's going on here." (R. 255). At trial, defense counsel asked the State's expert about children lying about abuse to help in custody situations. (R. 415). In closing arguments, and prior to State's incorrect hearsay definition, counsel argued "this might be fabricated to gain an advantage in child custody. This might be fabricated because she's angry at her father for not approving of her lifestyle." (R. 473). The defense theory was clear; that K.W. and H.S. initial denials were true and their trial testimony was not.

Additionally, as the appellate court noted, K.W.'s identification of Williams to A.R. and her wife as her abuser could also be admissible as a statement of identification. *See Williams*, 2020 IL App (3d) 170848, ¶ 19. *See also People v. Porrata*, 244 Ill. App. 3d 529, 537 (1st. Dist. 1993) (finding that sexual assault victim's out-of-court statements identifying the defendant as her attacker fell under hearsay exception for identification by declarant who testifies at trial and is subject to cross-examination); 725 ILCS 5/115–12; Ill. R. Evid. 801(d)(1)(B).

In any event, the State cannot overcome that the prosecutor told the jury that the reason the State could not call A.R. and K.W.'s wife was because of the hearsay rule. (R. 489). The appellate court correctly held that this was error citing to *People v. Emerson*, 97 Ill. 2d 487, 497, 455 N.E.2d 41 (1983) and *People v. Shief*, 312 Ill. App. 3d 673, 678, 728 N.E.2d 638 (1st Dist. 2000). *See Williams*, 2020 IL App (3d) 170848, ¶ 20. In *Emerson*, the court noted that a prosecutor may not suggest during closing or rebuttal argument that evidence of the defendant's guilt existed but could not be brought before the jury because of the defendant's objection. *See* 97 Ill. 2d at 497. In *Shief*, the court found reversible error where the prosecutor argued in closing "if I had my way, I would hand you all these police reports … because it suggested the defense intentionally prevented the jury from seeing evidence"). 312 Ill. App. 3d at 678-79.

The State attempts to distinguish *Emerson* and *Shief* arguing "here, the prosecutor did not suggest that K.W.'s wife and A.R., if they could testify to K.W.'s out-of-court statements, would provide additional evidence of

defendant's guilt." (Br. 22). This reasoning overlooks that the prosecutor's improper argument specially implied that A.R. and K.W.'s wife would have provided additional evidence of defendant's guilt but were precluded by the hearsay rule and that defense counsel knew this. A.R.'s outcry was critical to the State's case because if K.W. told A.R. about the abuse prior to the divorce, custody issues, and not being allowed into the defendant's home, then that detracts from her motive to make this up. Further, the State cannot uncouple the prosecutor's mischaracterization of hearsay from its own pretrial motion to have A.R. testify as a propensity witnesses, that it elicited from K.W. that she told A.R. about the abuse, (R. 272, 333), or that A.R. could have testified as a fact witness.

Even if A.R.'s testimony were hearsay, that still does not excuse the prosecutor's claim that the defense was keeping this testimony from the jury by hiding behind the hearsay rules. In its brief, the State never argues that it could not call A.R., Patti, or K.W.'s wife to the stand as its own fact witnesses.

The State also attempts to minimize the prosecutor's error by arguing the incorrect definition of hearsay was made in the course of an 18 page rebuttal argument, citing to *People v. Jackson*, 2020 IL 124112, ¶ 87. (Br. 24). Again, this minimizes the harm of the wrong legal definition of hearsay. This was not a brief and isolated incident and was more than just an incomplete legal definition to the jury. It was an explanation as to why the State failed to call critical witnesses and that it was prevented from doing so by the rules of evidence. A.R. was allegedly in the bed when the abuse occurred. (R. 318). The State moved to have

A.R. testify as a propensity witness. (C1. 48). The State should not be able to hide behind the hearsay rules if it did not want to call her. In *Jackson*, the prosecutor committed two, brief mischaracterizations of evidence between several correct references to evidence. *See id.* at ¶¶ 85, 86. Here, there were no correct references to hearsay in the prosecutor's argument.

2. Evidence was closely balanced

As the appellate court correctly determined, the evidence in this case was closely balanced. *See Williams*, 2020 IL App (3d) 170848, ¶ 21. Both K.W. and H.S. were severely compromised as both credibly denied the abuse to the authorities in 2009. (R. 321, 373). There was no confession, no third-party witnesses, no medical evidence, no corroboration, and a delayed outcry. The only evidence the State presented was the two complaining witnesses and an expert who did not interview the complaining witnesses. (R. 402). As the appellate court noted, "There was no physical evidence, no third party testimony even putting the defendant alone with K.W or H.S., and no evidence suggesting the defendant's consciousness of guilt." *Williams*, 2020 IL App (3d) 170848, ¶ 21.

The State, however, argues the evidence was not closely balanced because K.W. and H.S. "clearly and consistently" testified about the abuse. (Br. 26). Again, this ignores that both K.W. and H.S. originally denied the abuse. Their original denial was credible as no charges were brought. It also does not change that the State offered no corroborating evidence.

The appellate court stated that the trial was a credibility contest between H.S., K.S., and the defendant. *See Williams*, 2020 IL App (3d) 170848, ¶ 21. The State, however, argues the majority erred because there was no "swearing contest" because the defendant did not testify. (Br. 27). The State, however, does not offer any authority that the defendant must testify or put on a case to be entitled to plain error review. Here, the defendant exercised his right not to testify and has no burden to prove his innocence. The State also ignores that the "swearing contest" was between the different accounts by K.W. and H.S. who both denied any abuse when first interviewed. The State does not provide any authority that inconsistent accounts must be from different witnesses for plain error review. As the court stated in *People v. Suggs*, which cited to the appellate court's decision here, "It makes no difference that here the differing accounts came from the same witness." 2021 IL App (2d) 190420, ¶ 10 (citing to *Williams*, 2020 IL App (3d) 170848)).

In reversing the defendant's conviction, the majority states "when the only evidence consists of two differing accounts of the same event, with no corroborating evidence, courts often find the credibility contest to be closely balanced," citing to *People v. Naylor*, 229 Ill. 2d 584, 608 (2008) and *People v. Vesey*, 2011 IL App (3d) 090570. *See Williams*, 2020 IL App (3d) 170848, ¶ 21. The State attempts to distinguish *Naylor* and *Vessey* because the defendant did not present a competing account of events at trial. (Br. 27-28).

This overlooks that the defendant did in fact present a competing account: that K.W. and H.S. told the truth to DCFS and the authorities but were untruthful at trial. (R. 461). This change in their story was potentially based on a custody issue or disapproval of K.W.'s lifestyle. (R. 463, 473). This was a compelling, competing account. Regardless, the State offers no authority that the defense must present motives for why a witness testifies untruthfully or testifies inconsistently with prior statements.

The State's and dissent's reliance on *Naylor* and *Vesey* that a defendant must testify or put in evidence to receive plain error review is unpersuasive. The State offers no authority that a defendant must put on a case to obtain plain error review. Nor does the State explain how this would apply to situations where plain error is the standard because trial counsel failed to preserve an objection or state how such a requirement would not violate due process.

In fact, the State acknowledges that even if the defendant does not present a competing account that this is not "fatal" to plain error review, citing to *People v. Piatkowski*, 225 Ill. 2d 551 (2005). (Br. 28). In *Piatkowksi*, this Court reversed under the plain error standard where the court gave improper jury instructions despite the evidence being uncontested. *See id*. at 567. As this Court stated in *Piatkowski*, "Although defendant has the burden before this court to show that the evidence is closely balanced, he had no burden to present any evidence or to testify himself at trial." *Id*.

Next, the State attempts to minimize its lack of corroboration for the alleged abuse, arguing that, "[i]n criminal sexual assault cases, the victim is typically the only witness (other than the perpetrator) to the crimes." (Br. 30) (citations omitted). While this may be true in some sexual assault cases, the State offers no authority that this means a defendant is not entitled to plain error review, particularly where trial counsel does not preserve error. Also, it does not excuse or explain why the State failed to provide any corroboration in this particular case.

Here, the State provided no corroboration at trial. It elicited that during the alleged abuse A.R. was in K.W.'s bed with her and that the K.S. outcried to A.R. prior to denying it to DCFS. (R. 318, 333). While K.W. was unsure if A.R. was awake (R. 286), A.R. never testified at trial. A.R. was the sister of K.W. and an alleged victim; she was not equally accessible to the defense. Prior to trial, the State filed a motion that Patti would corroborate K.W.'s testimony about a fetish of the defendant. (C1. 50). Patti did not testify at trial. The lack of corroboration was not because there was only one witness to the alleged abuse but because the State chose not to call A.R., Patti, or K.W.'s wife. It could have easily corroborated that defendant was alone with K.W. when Patti was working by putting Patti on the stand. The State clearly knew of these witnesses as they filed a pretrial motion and the complaining witnesses referred to them throughout the trial. The State chose not to have them on the stand.

The mere fact that in some sexual abuse cases the victim is the only witness also does not support that a defendant in a sexual abuse case must present a case or testify in order to preserve a plain error review. Under the State's reasoning, no criminal defendant whose attorney failed to preserve an issue could be entitled to plain error review unless that same counsel puts on a case. Further, the fact that in many criminal sexual assault cases there are only two witnesses to the crime also demonstrates the need to protect individuals from false or incorrect accusations; not to eliminate plain error review where defense counsel fails to preserve error.

The State also argues that the "delay" in K.W.'s outcry was understandable and does not render K.W.'s testimony unreliable. (Br. 29). Again, this overlooks that this case was not merely a delay in outcry but an outright denial by the two complaining witnesses in 2009. Nor is the State's claim that K.W.'s and H.S.'s testimony that they did not speak to each other about the abuse lend additional credibility. (Br. 29). Both K.W. and H.S. were speaking with Patti, the ex-wife of the defendant. (R. 271, 359). The defense argued that that K.W. and H.S., Patt's daughter, may have come up with this with her. (R. 463).

Here, the case hinged on whether the jury believed K.W.'s and H.S.'s earlier denial or their trial testimony. The State was allowed to bolster their trial testimony by eliciting K.W.'s and H.S.'s prior consistent statements through K.W.'s testimony that she told A.R. and Patti about the abuse but then did not

have to put A.R. or Patti on the stand. There was no extrinsic evidence or corroboration. While it may be understandable why a young sexual assault victim may not make a prompt complaint, this does not mean that if two different witnesses initially denied the abuse that this has no impact. Nor does it overcome that the State's lack of corroboration for the alleged abuse. This is not like every other sexual abuse case. This case involved denials to the police and investigators. It also involved a situation where another purported victim was in the bed when the abuse occurred and could have corroborated the complaining witnesses.

Next, the State argues that the defendant's alleged statements to K.W. that he was showing her love and telling her "You're going to protect me, right?" and his alleged statement to H.S. that if she confirmed the abuse in 2009, he and Patti would no longer be together and Patti would be lonely and unhappy, were consciousness of guilt. (Br. 31). Preliminarily, the State does not provide any authority that these, at most ambiguous uncorroborated statements, overcome the closely balanced evidence. Further, the State provides no authority that these uncorroborated statements are admissible as consciousness of guilt. *See e.g. People v. Milka*, 211 Ill. 2d 150, 181 (stating a false exculpatory statement may be probative of a defendant's consciousness of guilt) (citations omitted).

Finally, the State asserts the defendant's closing arguments that the divorce between Patti and the defendant may have provided a motive for K.W. to testify falsely was "speculative at best" because the divorce occurred after the

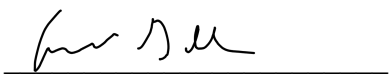
denial and before the testimony at trial. (Br. 32). The defendant's closing argument, however, focused on several reasons to discount K.W.'s trial testimony beyond the divorce. The defense noted that the State's expert testified that people may do things to gain an advantage in custody or visitation. (R. 415). The defense also argued the testimony was compromised because the defendant disapproved of K.W.'s lifestyle and prevented her from bringing her wife to his house. (R. 463). In fact, the defense's closing specifically argued "this might be fabricated to gain an advantage in child custody. This might be fabricated because she's angry at her father for not approving of her lifestyle." (R. 473).

In sum, the State cannot overcome that the evidence was closely balanced. The only evidence was the testimony of K.W. and H.S. which was in direct conflict with their earlier denials to the authorities. The State either could not or chose not to provide any corroborating evidence, including the testimony of A.R., Patti, or K.W.'s wife. The defendant had no burden to prove anything or to testify. The State cannot overcome that plain error review is applicable here.

CONCLUSION

For the foregoing reasons, the Defendant urges this court to affirm the appellate court's judgment.

Respectfully Submitted,



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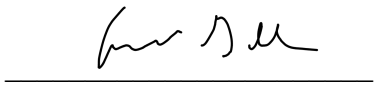
On behalf of Travis Williams
Defendant-Appellee

CERTIFICATE OF COMPLIANCE

I, Andrew S. Gable, certify that this brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the proof of service, is 17 pages.



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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 10, 2021, the foregoing Brief of Respondent-Appellee was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy via email to the e-mail addresses listed below:

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