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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. STEVEN LAWRENCE WRIGHT et al., Defendants and Appellants.	B281115 (Super. Ct. No. GA082955) (Los Angeles County)

Steven Lawrence Wright and Hildon James Jones, III, appeal from judgments of conviction. They were charged together in a two-count information. In count 1 Wright alone was charged with murder.[1] (Pen. Code, § 187, subd. (a).)[2] In count 2 Wright and Jones were jointly charged with willful, deliberate, and

[1] In count 1 Vernon E. Fisher, Jr., was charged as a codefendant. He is not a party to this appeal.

[2] All statutory references are to the Penal Code.

premeditated first degree attempted murder. (§§ 664, 187, subd. (a).) Each count was separately tried before separate juries.

On count 1 Wright was convicted of first degree murder. On count 2 Wright and Jones were convicted of first degree attempted murder. As to each count, the jury found true allegations (1) that a principal had intentionally discharged a firearm causing death or great bodily injury within the meaning of section 12022.53, subdivisions (d) and (e)(1); and (2) that the offense had been committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C). The trial court found true allegations that Wright and Jones had been convicted of a prior serious felony within the meaning of section 667, subdivision (a)(1), and a prior serious or violent felony within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) Wright was sentenced to prison for an aggregate term of 135 years to life. Jones was sentenced to prison for an aggregate term of 60 years to life.

As to the murder conviction, Wright claims that the trial court (1) erroneously instructed the jury and (2) applied the wrong legal standard in ruling on his motion for a new trial. As to the attempted murder conviction, Jones claims, and the People concede, that the trial court erroneously imposed and stayed a 10-year term for the gang enhancement. As to both counts, the parties agree that the matter must be remanded to the trial court so that it may exercise its discretion whether to strike the firearm enhancements pursuant to amended subdivision (h) of section 12022.53. Appellants argue that we should also remand the matter so that the trial court may exercise its discretion whether to strike the five-year enhancements for a prior serious

felony conviction pursuant to amended sections 667, subdivision (a)(1) and 1385, subdivision (b).

We remand the matter with directions that the trial court exercise its discretion whether to strike the firearm and prior serious felony conviction enhancements as to both appellants. We strike Jones's stayed 10-year term for the gang enhancement. In all other respects, we affirm.

Facts

The facts underlying the attempted murder convictions on count 2 are not relevant to the issues on appeal. We therefore omit a summary of these facts. We briefly summarize *some* of the material facts underlying Wright's murder conviction (count 1).[3]

Donnell Taylor, whose nickname was "Touche," was a member of the Pasadena Denver Lane Bloods criminal street gang. At about 8:00 p.m. on January 19, 2011, Taylor was sitting on steps leading to the front porch of a residence on Summit Avenue in Pasadena. A man wearing a black "hoodie jacket with fur around it" approached Taylor. The hood "was on his head." The man asked Taylor, "'What's up, blood.'" Taylor said his name was, "Touche." The man "pulled out [a] gun and just said, 'yeah' and started shooting" at Taylor. After the shooting, the man "walked off." Taylor was shot four times. A gunshot wound to the heart was fatal.

William Fishburn saw the shooter immediately thereafter. In a 911 call, he described the shooter as a black male, approximately 25 to 30 years of age, wearing a black hooded

[3] The facts are voluminous. In both Wright's opening brief and respondent's brief, the statement of facts as to count 1 comprises 34 pages. We limit our factual summary to facts necessary to understand the issues on appeal.

jacket with "fur around the hood." In court Fishburn identified appellant as the shooter. However, in a later court proceeding he identified Wright's codefendant, Vernon E. Fisher, Jr., as the shooter.

Wright is a member of the Altadena Blocc Crips (ABC) criminal street gang. ABC and Taylor's gang, the Pasadena Denver Lane Bloods, are rivals.

Hinal Maganlal had a dating relationship with Wright. At Wright's direction, she drove her vehicle to get the firearm that was apparently used to shoot Taylor. Before the shooting, Maganlal heard codefendant Fisher say to Wright, "'That nigga not even down there. Let's go.'" "'We got to go get him, Cuz.'" Fisher referred to the person they had to get as "that nigga Donnell." Donnell is Taylor's first name. Maganlal said that Wright was wearing "[h]is hoodie jacket."

After the shooting, Wright gave Maganlal the firearm that she had transported to him earlier that day. He told her "to take it back in the morning." Wright said, "'Somebody in the hood died tonight.'" He instructed Maganlal that, if anyone asked about his whereabouts that night, she was to say that he had been with her.

Shortly after the shooting, Maganlal became a paid police informant. She provided information about Wright's actions on the day of the shooting. In March 2011, about two months after the shooting, Maganlal recorded portions of her conversations with Wright. During one conversation, Wright denied participating in the shooting. Maganlal said she needed to know what had happened. Wright replied: "You don't need to know nothing . . . . The less you know, the better." "[Y]ou don't know shit. And that's what you say." Maganlal asked, "Did you make

sure you took everything?" Wright responded, "Man you don't need to - - of course."

Brenden Jackson is an associate of ABC. Jackson told the police that, at about 8:00 p.m. on the night of the shooting, he was with Maganlal when she received a call from Wright saying she should "go check [Woodbury] and see if somebody . . . got shot. [¶] [¶] Go see if the ambulance is down there." The shooting occurred at about 8:00 p.m. at 1797 North Summit Avenue in Pasadena. We take judicial notice that North Summit Avenue and East Woodbury Road intersect, but 1797 North Summit Avenue is approximately two blocks away from the intersection. (Evid. Code, §§ 459, 452, subd. (h).) Maganlal testified that Wright had phoned and told her "to go check out the scene" at "Woodbury and Summit."

Wright's Claim that, as to Count 1 (Murder), the Trial Court Gave an Erroneous Version of CALCRIM No. 301

CALCRIM No. 301 states: "[Unless I instruct you otherwise,] (T/the) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." (Brackets in original.) The Bench Notes to the instruction explain, "Insert the bracketed language if the testimony of an accomplice or other witness requires corroboration." Section 1111 provides that a conviction cannot be based on an accomplice's testimony "unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense."

The trial court gave CALCRIM No. 301 without inserting the bracketed "Unless I instruct you otherwise" language. Wright contends, "This was error in light of the fact that

Maganlal was an accomplice as a matter of law and Brenden Jackson may also have been deemed an accomplice as a factual matter, in which case their testimony incriminating [Wright] required corroboration."

The trial court did not err. In addition to giving CALCRIM No. 301, it gave CALCRIM Nos. 334-335. CALCRIM No. 335 informed the jury that "[i]f the crime of Murder was committed, then Hinal Maganlal was an accomplice to that crime" and Wright cannot be convicted based on her testimony unless it is corroborated. CALCRIM No. 334 instructed, "Before you consider the statement or testimony of Brenden Jackson . . . , you must decide whether [he] was an accomplice." If the jury found Jackson to be an accomplice, the instruction warned that his testimony cannot support a conviction without corroboration. We presume that the jury understood that CALCRIM Nos. 334-335 modified rather than conflicted with CALCRIM No. 301. Together, the instructions made clear that although a witness's testimony can prove any fact, an accomplice's testimony is not sufficient to convict Wright unless it is corroborated. "It is ordinarily presumed that jurors are intelligent persons capable of understanding and correlating all jury instructions that are given. [Citations.]" (*People v. Phillips* (1985) 41 Cal.3d 29, 58.)

That the trial court did not err is supported by *People v. Chavez* (1985) 39 Cal.3d 823, 829-831 (*Chavez*). There, the California Supreme Court concluded that the trial court had not "misled [the jury] as to the need for corroboration" by giving former "CALJIC No. 2.27 which allows the jury to find any fact on the testimony of only one witness" and former CALJIC No. 3.11 "to the effect that the testimony of an accomplice needs

corroboration."[4] (See also *People v. Andrews* (1989) 49 Cal.3d 200, 217 ["nothing in those instructions [former CALJIC Nos. 2.27 and 3.11] suggested to the jury that corroboration of the accomplice's testimony was unnecessary. A reasonable juror would have recognized CALJIC No. 2.27 as setting forth the general rule and the charge on accomplice testimony [CALJIC No. 3.11] as [setting forth] an exception to it"].)

The Trial Court Did Not Apply the Wrong Legal Standard in Ruling on Wright's Motion for a New Trial

As to the murder conviction on count 1, Wright moved for a new trial under section 1181, subdivision (6). He claims that the court's denial of the motion must be reversed because the "record demonstrates the trial court abused its discretion by erroneously applying a Penal Code section 1118.1 standard of review, rather than the proper independent 13th juror standard under section1181, subdivision (6)." "A motion under section 1118.1 seeks a *judgment of acquittal* for insufficient evidence. It may be

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[4] Like the version of CALCRIM No. 301 given in the present case, former CALJIC 2.27 provided: "Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact [required to be established by the prosecution] to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends." (*Chavez*, *supra*, 39 Cal.3d at p. 830, fn. 2, brackets in original.) Present CALJIC No. 2.27 provides: "You should give the [uncorroborated] testimony of a single witness whatever weight you think it deserves. Testimony concerning any fact by one witness, which you believe, [whose testimony about that fact does not require corroboration] is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends." (Brackets in original.)

made at the close of the prosecution's case or at the close of the defense evidence, before the case is presented to a jury. (§ 1118.1.) A motion under section 1181(6) seeks a *new trial* because the verdict is 'contrary to law or evidence.'" (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 132 (*Porter*).)

"In ruling on an 1118.1 motion for judgment of acquittal, the court evaluates the evidence in the light most favorable to the prosecution. If there is any substantial evidence, including all inferences reasonably drawn from the evidence, to support the elements of the offense, the court must deny the motion. . . . This test is the same as that used by appellate courts in deciding whether evidence is legally sufficient to sustain a verdict." (*Porter*, *supra*, 47 Cal.4th at p. 132.)

"A grant under section 1181(6) is different. The court extends no evidentiary deference in ruling on a 1181(6) motion for new trial. Instead, it independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a '13th juror.' [Citations.] If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is 'contrary to [the] . . . evidence.' [Citations.] In doing so, the judge acts as a 13th juror who is a 'holdout' for acquittal." (*Porter*, *supra*, 47 Cal.4th at p. 133.)

In his written motion for a new trial, Wright argued that the People had failed to present sufficient evidence to corroborate Maganlal's testimony. Wright characterized Maganlal as "an uncontrollable li[a]r." He continued, "Mr. Fishburn was the only person to identify Mr. Wright at the location of the shooting," but his identification lacked "stability" and he "suffers from Mental illness, vision problems and chemical dependency issues."

Therefore, "the court should not allow the case to rely on [Maganlal's testimony] and should act as the 13th juror and [grant the motion for a new trial]." At the hearing on the motion, Wright's counsel declared, "[W]ithout her [testimony], I think the court should act as a 13th juror and find there is not sufficient evidence to convict the defendant in this matter."

The prosecutor responded that, "[u]nder the totality of the circumstances, the corroboration is overwhelming." The prosecutor noted, "There was a photograph of Mr. Wright wearing a very distinct jacket with a fur collar. Three separate witnesses identified that jacket as almost identical to the one worn by the shooter." The prosecutor also said that Wright had made recorded admissions to the police and Maganlal.

"'Corroborating evidence may be slight, entirely circumstantial, and entitled to little consideration when standing alone. [Citations.] . . . It is "sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." [Citation.]' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 95.)

In its oral ruling denying the motion for a new trial, the court said: "The jury knew that there had to be corroboration, and so the question is did the jury find corroboration and was that corroboration sufficient?" "They are the finders of fact, and they have to make that determination; and based on their decision, it's clear that somewhere in there they found corroboration of . . . Mr. Wright's involvement in the murder and that there was evidence, however slight; and so the defense is now asking the court to come back and take a look at that evidence; and I find that the testimony of Mr. Fishburn, although it was all over the place, if the jury believed [Fishburn's]

identification of Mr. Wright that is corroboration." The court noted that Fishburn had identified Wright but had later identified codefendant Fisher as the shooter. The court said, "[I]t's not up to the court to tell the jury that they must believe one identification over the other."

The court continued: "[T]he jacket . . . corroborates Mr. Fishburn's original identification of Mr. Wright. So in that sense, yes, there is slight corroboration. As far as Brenden Jackson is concerned, I think there was a question whether or not any of the statements by Brenden Jackson corroborate or are sufficient . . . to support the fact that Mr. Wright was involved in it; and, again, I think that is something that the jury had to decide." As to the recorded conversation between Maganlal and Wright, the court noted, "[A] jury could find that Mr. Wright was discussing the night of the [murder] when he indicated that he had taken care of everything." The court concluded, "So on the issue of corroboration . . . , the court finds that it was proper to find Ms. Maganlal a co-conspirator by law and that there was sufficient evidence, however slight, to corroborate her testimony; and therefore the jury could consider her testimony."

"A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion." (*People v. Davis* (1995) 10 Cal.4th 463, 524 (*Davis*).) Wright argues that the trial court's statements show it "repeatedly deferred to the jury's determination of the facts, rather than exercising its own independent judgment as a 13th juror."

We disagree. "Although [Wright] isolates statements in which the trial court refers to the jury's verdict[], it is clear from the record as a whole that it did not regard itself as bound by any

of the jury's findings." (*Davis*, *supra*, 10 Cal.4th at p. 524.) It is reasonable to infer that the trial court was merely showing a proper regard for the verdict: "In reviewing a motion for a new trial, the trial court . . . is . . . guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. [Citation.] The trial court 'should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' [Citation.]" (*Id.* at pp. 523-524.)

In *Davis* our Supreme Court rejected the defendant's claim that statements similar to those made here "show that the trial court's exclusive focus was on evidence sufficient to support the *jury's* finding, not on independent review of the evidence." (*Davis*, *supra*, 10 Cal.4th at p. 523.) As to the *Davis* defendant's motion for a new trial on kidnapping and sodomy counts, the trial court "concluded: 'there was sufficient evidence to support the verdict on those counts . . . . [t]he jury was instructed that the crime of kidnapping could be committed if the movement was consensual at first and but later turned into something less than consensual. And I think the evidence supports that, and I think the jury finding of that [was] supported by the evidence.'" (*Id.* at p. 524.) As to an issue of premeditation and deliberation, the trial court said, "'The Jury did reach a result and the question is: Is the result that they reached supported by the circumstantial evidence and inferences that could be made . . . .'" (*Id.* at p. 523.) Just as the Supreme Court in *Davis* rejected the defendant's claim that the trial court had applied an "improper standard of review," we reject Wright's claim to the same effect. (*Ibid.*)

The recent case of *People v. Watts* (2018) 22 Cal.App.5th 102, is distinguishable. There, the trial court "employed the incorrect test when reviewing Watts's new trial motion, citing the legal standard used when ruling on a section 1118.1 motion rather than a section 1181, subdivision (6) motion." (*Id*. at p. 113.) The appellate court observed, "A review of the motion hearing transcript reveals that the court repeatedly informed Watts it could not reweigh the evidence and that its only concern was whether the prosecution had presented sufficient evidence to present the matter to the jury." (*Ibid*.)

As to Jones, the Stayed 10-Year Term for the Gang Enhancement Must Be Stricken

As to Jones, the jury found true a gang enhancement pursuant to section 186.22, subdivision (b)(1)(C). In sentencing Jones, the trial court imposed and stayed a 10-year term for the enhancement. "Section 186.22(b)(1)(C) does not apply, however, where [as here] the violent felony is 'punishable by imprisonment in the state prison for life.' [Citation.] Instead, section 186.22, subdivision (b)(5) . . . applies and imposes a minimum term of 15 years before the defendant may be considered for parole." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.) The trial court imposed the 15-year minimum term and doubled it because of the prior strike. The People concede that the stayed 10-year term must be stricken. We agree.

Remand is Necessary so the Trial Court May Exercise Its Discretion Whether to Strike Enhancements

Appellants' sentences include 25-year-to-life terms for firearm enhancements pursuant to section 12022.53. At the time of sentencing, the trial court did not have the power to strike these enhancements. Effective January 1, 2018, the legislature

amended subdivision (h) of section 12022.53 to provide that the court may strike the enhancement "in the interest of justice pursuant to Section 1385." (S.B. 620, 2017-2018 Reg. Sess., Stats. 2017, ch. 682, § 2.)

Appellants' sentences also include five-year enhancements for a prior serious felony conviction pursuant to section 667, subdivision (a)(1). At the time of sentencing, the trial court did not have the power to strike these enhancements. (Former §§ 667, subd. (a)(1), 1385, subd. (b).) Effective January 1, 2019, Senate Bill 1393 (S.B. 1393) amended subdivision (a)(1) of section 667 and subdivision (b) of section 1385 to authorize the striking of these enhancements. (S.B. 1393, 2017-2018 Reg. Sess., Stats. 2018, ch. 1013, §§ 1, 2; see the Legislative Counsel's Digest to S.B. 1393 ["This bill would delete the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of the 5-year enhancement"].)

"[B]ecause there is nothing in the amendment[s] to suggest any legislative intent that the amendment[s] would apply prospectively only, we must presume that the Legislature intended the amendment[s] to apply to every case to which [they] constitutionally could apply, which includes this case." (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1091; see *People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524 ["'Under the *Estrada* rule [*In re Estrada* (1965) 63 Cal.2d 740], an amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date'"]; *People v. Garcia* (Nov. 1, 2018, E068490) __ Cal.App.5th __ [2019 Cal.App. Lexis 993, *18] (*Garcia*) ["under the *Estrada* rule, . . . it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to

all cases to which it could constitutionally be applied, that is, to all cases not yet final when [S.B.] 1393 becomes effective on January 1, 2019"].

Appellants claim, and the People concede, that the matter must be remanded to the trial court so that it may exercise its discretion whether to strike the firearm enhancements. As to Jones, the People note that the trial court said it would strike the firearm enhancement if it had the power to do so. As to Wright, the People observe that "the trial court did not provide any insight into how it would have used its discretion to strike the firearm enhancements had it known it had any."

In supplemental letter briefs, appellants claim that the matter must also be remanded to the trial court so that it may exercise its discretion whether to strike the five-year prior serious felony conviction enhancements. In their responsive supplemental letter brief, the People assert: "First, appellants' claims are not ripe because the statutory amendment authorizing such action will not become effective until January 1, 2019. Second, with respect to appellant Wright, the trial court's statements at sentencing clearly indicate that it would not have dismissed appellant Wright's enhancement even if it had the power to do [so,] making remand unwarranted as to him."

The People's ripeness argument lacks merit because our decision cannot become final until after January 1, 2019, the effective date of the amendment. (See Cal. Rules of Court, rule 8.264(b)(1); *Garcia*, *supra*, 2018 Cal.App. Lexis 993, *18-19.) The People concede, "If Senate Bill 1393 goes into effect before appellants' judgments become final, which it will absent further legislative action, then respondent agrees the new law would apply to each appellant retroactively."

The People contend that remand as to Wright is unwarranted because of the trial court's stated reasons for denying his motion to dismiss the prior strike. Both the strike and the prior serious felony conviction are based on the same offense - a 1998 conviction of assault with a firearm. (§ 245, subd. (a)(2).) The trial court said: "[T]here's an escalation of criminal activity and violence from the 245, he goes to having a gun, and then convicted of attempted murder and murder. [¶] Based on that, the Court is going to deny the defense motion . . . [to dismiss] his single strike prior." The People argue that the trial court's comments "clearly indicate the court would not have dismissed [Wright's] prior serious felony enhancement, based on the violent escalation of his criminal activity." (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 ["if '"the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required"'"].)

Wright claims that remand is appropriate because "the decision whether to strike a prior conviction for purposes of sentencing under the Three Strike law . . . is a different question than the decision as to whether to strike a 5-year serious felony prior conviction enhancement under Penal Code section 667, subdivision (a)(1). A trial court could reasonably conclude a defendant does not fall [within] the spirit of the Three Strikes law and deny his or her . . . motion [to dismiss the strike] on that basis, while at the same time reasonably conclude the interests of justice do not require both the doubling of the defendant's sentence under the Three Strikes law, and imposition of an additional 5-year term on top of that under section 667,

subdivision (a)(1), based on the exact same prior conviction." We agree with Wright.

Corrections to Wright's Abstract of Judgment

The People and Wright concur that Wright's Abstract of Judgment contains several clerical errors. First, as to count 1, the trial court imposed one 25-year-to-life term for the section 12022.53 firearm enhancement, not two consecutive terms for a total of 50 years to life as shown in item 2 of the Abstract of Judgment. Second, item 2 of the Abstract of Judgment fails to show that on count 2 Wright was sentenced to a separate 25-year-to-life term for the section 12022.53 firearm enhancement as to that count. Third, the court imposed a term of 30 years to life (15 years to life doubled because of the prior strike) on count 2, not 60 years to life as shown in item 6.c. Fourth, the Abstract of Judgment does not show that Wright was sentenced as a "second striker" under the Three Strikes law. In item 8, the court should check the first and second boxes to show that he was so sentenced. Fifth, item 6.b of the Abstract of Judgment shows a sentence of 25 years to life on count 1. The actual sentence was 50 years to life (25 years to life doubled because Wright is a second striker). Sixth, item 3 fails to show that Wright received a five-year enhancement for a prior serious felony conviction pursuant to section 667, subdivision (a)(1).

Disposition

As to Jones, the stayed 10-year term for the gang enhancement (§ 186.22, subd. (b)(1)(C)) is stricken. As to both appellants, the matter is remanded to the trial court with directions to exercise its discretion whether to strike in furtherance of justice (§ 1385) the section 12022.53 firearm enhancements and the five-year enhancements for a prior serious

felony conviction (§ 667, subd. (a)(1)). In all other respects, the judgments are affirmed.

The trial court shall conduct a noticed hearing and shall give the parties a reasonable opportunity to file briefs on whether the enhancements should be stricken. If the court strikes an enhancement, it shall prepare an amended Abstract of Judgment showing the new sentence. The trial court shall correct Wright's Abstract of Judgment as set forth in the preceding part of this opinion entitled, "*Corrections to Wright's Abstract of Judgment*." The court shall send a certified copy of each corrected or amended Abstract of Judgment to the Director of the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Michael D. Carter, Judge

Superior Court County of Los Angeles

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