IN THE COURT OF APPEALS

FIRST JUDICIAL DISTRICT

HOUSTON, TEXAS

NO. 01-24-00411-CR and NO. 01-24-00412-CR

KENDRIC L. BESS

V.

THE STATE OF TEXAS

On Appeal from the 178th District Court
Harris County, Texas, Cause Nos. 1752758 and 1752816
Honorable James Anderson, Judge Presiding

BRIEF FOR APPELLANT, KENDRIC L. BESS

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Oral Argument Not Requested

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 38.1(a), the following are parties or counsel to the judgment appealed from:

Presiding Judge:	The Honorable James Anderson Judge, 183rd District Court 1201 Franklin Street Houston, Texas 77002	
Appellant:	Kendric L. Bess	
State of Texas Attorneys:	Michael Haddad Brett Batchelor Jessica A. Caird Harris County District Attorney's Office 1201 Franklin Street, Suite 600 Houston, Texas 77002	(at trial) (at trial) (on appeal)
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STATEMENT REGARDING REFERENCES TO THE RECORD

The clerk's record will be cited as "1 CR", followed by a page number, for the clerk's record in Trial Cause No. 1752758. The clerk's record will be cited as "2 CR", followed by a page number, for the clerk's record in Trial Cause No. 1752816. For example: 1 CR 16 or 2 CR 24.

The reporter's record will be cited as "volume number RR page number." For example: 6 RR 15.

STATEMENT OF THE CASE

On January 26, 2022, Appellant was indicted for the offense of aggravated assault of a family member, enhanced with two prior felony convictions. 2 CR 29. On February 16, 2022, Appellant was indicted for the offense of possession of a controlled substance, enhanced with two prior felony convictions. 1 CR 30. A jury trial commenced on May 28, 2024. 1 CR 267; 2 CR 326. The trial ended in two guilty verdicts (the jury found Appellant guilty of aggravated assault of a family member and possession of a controlled substance). 1 CR 235; 2 CR 293; RR V 36. Appellant was sentenced by the judge to 30 years in prison pursuant to a plea agreement on punishment only. 1 CR 238; 2 CR 296; RR V 37-39. Appellant timely filed notice of appeal on May 30, 2024. 1 CR 243; 2 CR 301.

ISSUE PRESENTED

ISSUE ONE: The Trial Court's statements and questioning of witnesses in the presence of the jury throughout the entire trial deprived Appellant of Due Process. US Const. amends. V and XIV; Tex. Code Crim. P. Article 38.05.

STATEMENT OF THE FACTS

Introductive Summary

On December 28, 2021, Appellant, Kendric Bess, was at the apartment of his former girlfriend, Elisha Hawkins. 3 RR 10, 4 RR 120-121. Appellant was homeless at the time and Ms. Hawkins was allowing him to stay in her home. 4 RR 123. Ms. Hawkins accused Appellant of threatening to kill her with a gun because she refused to have sex with him. 4 RR 126, 131, 135. The police were called to the scene and found a gun and narcotics on Appellant's person and narcotics in Appellant's bag. 3 RR 39. Appellant was arrested and charged with aggravated assault of a family member and possession of a controlled substance. 2CR 29, 1 CR 30. A jury convicted Appellant of both offenses; he was sentenced by the Trial Court to 30 years in prison pursuant to a plea agreement on punishment. 5 RR 36-37.

Trial Court's Voir Dire

During the Trial Court's voir dire of the jury, the judge repeatedly told the jury that the Appellant is "presumed to be not guilty" until proven otherwise. 2 RR 9-10. In particular, the Trial Court stated the following:

> "As he stands here right now, he is presumed to be not guilty." 2 RR 9.

"Right now Mr. Kendric Bess is simply not guilty until proven otherwise." 2 RR 9.

"…you are presumed to be not guilty until proven otherwise in the course of a trial." 2 RR 9.

"…he is presumed to be not guilty." 2 RR 9-10.

"He's presumed to be not guilty." 2 RR 10.

The Trial Court also told the jury that "The indictment is the Court's charging tool." 2 RR 11. "It's just the Court's charging tool to start the trial." 2 RR 12.

Witness Testimony

Officer Lewis, a former Houston Police Department officer, was working the westside patrol on December 28, 2021 when he received a call for a welfare check involving a firearm. 3 RR 10. When the officer arrived at the apartment, a fearful looking woman carrying a young child answered the door. 3 RR 18-19. As the officer was going into the apartment, a man (Appellant Kendric Bess) with a gun on his person was coming out of the apartment. 3 RR 20-22. Appellant told the officers that the gun was not loaded, but it was found to be loaded. 4 RR 85. Appellant told the officer that the complainant, Elisha Hawkins, would not let him leave the apartment. 3 RR 23, 42. He also told the officer that she was getting him an Uber and also that his brother was picking him up. 3 RR 42. Appellant had a bag which was searched and narcotics were found. 3 RR 26. Defense Counsel

objected to an unlawful search and the Trial Court stated that it would hear the motion later in the trial. 3 RR 28.

Officer Lewis further testified that he questioned the complainant at that time; Defense Counsel's objection to hearsay and the confrontation clause were overruled with the Trial Court ruling that it was an excited utterance. 3 RR 32-33. The complainant told the officer that the incident started when she refused to have sex with Appellant; he had been holding her against her will and threatening to force her to have sex with him. She said that he took her phone, snorted "powder" for two days, and kept trying to have sex with her against her will. 3 RR 33-34.

The body-worn camera footage containing Complainant's statements to Officer Lewis was offered into evidence over hearsay and confrontation clause objections by Defense Counsel. 3 RR 37-39. A motion to suppress the pill bottle and the drugs was held outside the presence of the jury and was denied by the Trial Court. 4 RR 6-29.

Houston Police Officer Zachary Roberts testified that his role was to assist Officer Lewis, the primary officer at the scene. 4 RR 37. He observed Officer Lewis find a loaded Taurus 9mm handgun in the outside pants left pocket (Appellant was wearing two pairs of pants) and a pill bottle containing methamphetamine pills in the inside pants pocket. 4 RR 38-42.

Forensic analyst Angelica Noyola testified that she was only asked to test the tablets found inside the pill bottle; she stated that there were 6.92 gm of methamphetamine in the pill bottle. 4 RR 52-68. The methamphetamine was admitted into evidence over the same objections made in the motion to suppress. 4 RR 58.

Officer Lewis continued his testimony, over the same suppression objections from Defense Counsel, from earlier in the trial. He stated that he did a pat-down frisk of the defendant for weapons and felt a cylindrical object that could be a magazine for bullets. 4 RR 74-76. The bottle had a partially removed label with someone else's name and contained methamphetamine pills. 4 RR 76-78. Officer Lewis stated that crack cocaine was found inside a satchel Appellant was wearing. 44 RR 79. The record is void of any information as to why this evidence of crack cocaine was admitted into evidence without a new and separate objection from the suppression issues.

Darshika Hawkins, Complainant's sister, testified that she was speaking to Complainant on the phone and could hear Appellant saying, "Bitch, today is the last day. You're not going to live." 4 RR 107. Then she heard him racking the gun and saying, "Well, let's play Russian roulette." 4 RR 107-108. She could hear her niece crying and the phone disconnected, so she called the police. 4 RR 111.

Elisha Hawkins, the complainant, was the last witness to testify. 4 RR 118. On the day of the incident, she was babysitting her four-year-old granddaughter. 4 RR 120. She said that she and Appellant had been dating for some time and that she was letting him stay at her place because he was homeless. 4 RR 120-123. She further testified that she was not feeling well and took a shower, only to return to the bedroom to find Appellant naked; he tried to get on top of her to have sex and she refused. This upset Appellant and he began demanding that she get him an Uber. 4 RR 126. The tension escalated as he kept trying to have sex with Complainant; the grandchild cried and Appellant stopped. However, Complainant said that he demanded her debit card for an Uber; he grabbed the card from her, pushed, hit and choked her. 4 RR 127-128. He then took her gun and put it to her head, telling her she was going to die. 4 RR 131-135. Finally, Complainant admitted on cross examination that she had a prior conviction for falsely reporting that a boyfriend had assaulted her in the past. 4 RR 139-140.

Both sides rested and closing arguments were had. 4 RR 152-154; 5 RR 1-35. The jury found Appellant guilty of both offenses, and he was sentenced by the judge to 30 years in prison pursuant to a plea bargain on punishment. 5 RR 36-39.

The Trial Court's Comments and Questions

During the State's questioning of Officer Lewis in the presence of the jury about what the Complainant told him, Defense Counsel's hearsay objection was

overruled by the Trial Court, who then questions the State's witness, "So you're talking to Mr. Bess. Does he tell you where he's going to or how he's getting there, if you remember?" 3 RR 23.

Defense Counsel then objects to hearsay when Officer Lewis begins testifying about what Appellant said to him, the Trial Court overrules the objection and then questions the State's witness as follows:

> Trial Court: "If you recall, you got him inside the car. Is he handcuffed, if you know? I'm thinking yes."
>
> Witness: "Oh yeah, yeah. He was cuffed, yes."
>
> Trial Court: "Behind the back, I imagine?"
>
> Witness: "Yes."
>
> Trial Court: "All right. And what, if anything, does he say to you beside the car right there, if you recall?"
>
> Witness: "I believe he was saying that he was waiting for her to call an Uber."

3 RR 29.

The Trial Court overruled another hearsay and confrontation clause objection by Defense Counsel to Complainant's statements to the police, finding it to be an excited utterance. 3 RR 32-33. An exchange commenced as follows:

State: “Judge, we’re going to play the whole body cam pretty soon here which has the complainant’s statement on it. We believe that they come in through excited utterance.”

Defense Counsel: “May we approach?”

Trial Court: “You don’t need to. I’ve got good ears, the objection is overruled. Excited utterance exception. Overruled.”

3 RR 33.

Defense Counsel’s hearsay objection to the officer’s testimony about what the complainant told him was once again overruled due to excited utterance. 3 RR 35. Then an exchange occurred as follows:

Defense Counsel: “Objection, Your Honor. He’s narrating from the offense report.”

Witness: “I’m just trying to paraphrase.”

Trial Court: “He’s paraphrasing, Counsel. It’s overruled. So she’s feeling bad, and he wants some action.”

Witness: “Right. Right. Yes, sir.”

Trial Court: “Right?”

Witness: "Yes, sir.”

3 RR 35.

During the questioning of another State's witness, Officer Roberts, the Trial Court overruled Defense Counsel's objection and stated, "I'll stand by my previous rulings. It is overruled, counsel. So Lewis finds a firearm in the outside pants." 4 RR 38.

During the State's second direct exam of Officer Lewis in the presence of the jury, Defense Counsel objected, re-urging his motion to suppress, and an exchange continued as follows:

> Trial Court: "It's still same questions, same ruling, still overruled counsel. So you detained Mr. Bess?"
>
> Witness: "Yes, sir."
>
> Trial Court: "Do you do a -- is it a pat-down, Counsel?"

4 RR 73-74. During the questioning of Officer Lewis by Defense Counsel, the following occurred:

> Defense Counsel: "Judge, I'm going to have to strike the last part of that as not responsive."
>
> Trial Court: "You ask a broad question, get a broad answer.
>
> Overruled, Counsel. Proceed."

4 RR 89.

During the State's direct exam of Darshika Hawkins, the following exchange occurred:

State: “And when you get a phone call from Elisha, what voices could you hear at the end of the line?”

Witness: “I could Kendric Bess was -- was cussing out my sister. And what the most --"

Defense Counsel: “Objection, not responsive to the question.”

Trial Court: “Well, he asked her what she heard and she said she heard Kendric Bess cussing my sister and your objection is that’s not responsive. Think about it, please. Objection is overruled.”

4 RR 106-107.

The Trial Court was very active in questioning the complaining witness, Elisha Hawkins, beginning when the State passed the witness. The following exchanges occurred:

Trial Court: “Mrs. Hawkins, Mr. Smith over here has some questions he’s going to ask you. We have a system. I call it push and shove. He’s going to push. You’re going to shove. Just try to listen to his questions and answer them directly. Okay?”

Witness: “Yes, sir.”

4 RR 138.

Defense Counsel: “And you -- but do you acknowledge that you have a false report to a police officer conviction?”

Witness: “Yes, sir.”

Defense Counsel: “Okay. That conviction did not involve Kendric, correct?”

State: “Judge, again, I’m going to object to any further questioning on this matter.”

Trial Court: “That’s overruled, Counsel. So that false report case way back in 2013, did that involve Kendric?”

Witness: “No, sir.”

Trial Court: “It did not.”

4 RR 139-140.

Defense Counsel: “Are you, -- because of this incident, have you sought or received any financial government assistance?”

State: “Again, judge, objecting to relevance.”

Trial Court: “I’ll hear it briefly. Ms. Hawkins, you’ve taken a position that you’re a crime victim. Have you received any compensation from the government as a result of being a crime victim?”

Witness: “Yes, sir.”

Trial Court: “She has.”

4 RR 145.

Defense Counsel: “How much? How much compensation have you received?”

State: “Judge, objection to relevance about the amount.”

Trial Court: “I’m going to hear it real briefly, Counsel. Elisha, I don’t know the answer. Is it a couple hundred dollars a month? Is it $50 a week? I have no idea. How much are they giving you as a crime victim compensation thing?”

Witness: “It’s just one check.”

Trial Court: “How much?”

Witness: “It was just one check.”

Trial Court: “Just one check.”

4 RR 145-146.

SUMMARY OF THE ARGUMENT

ISSUE ONE: The trial court's comments and questioning of witnesses in the presence of the jury deprived Appellant of his right to due process by denying him both the presumption of innocence and a fair, impartial trial. This denial of Appellant's right to due process began in voir dire when the trial court stated that Appellant is "presumed to be not guilty" until proven otherwise, and that the indictment is the "Court's charging tool." These preliminary statements set the stage for the jury to perceive the trial court as a partner with the prosecutor and an opponent to Appellant. Following this introduction, the trial court then proceeds to actually question witnesses for the prosecutor, and to go above and beyond making simple rulings on the admissibility of evidence by ridiculing Defense Counsel during such rulings. This questioning and commenting by the trial court in the presence of the jury is pervasive throughout the entire trial before the jury; this resulted in Appellant being denied due process of law in that he was denied both the presumption of innocence and a fair, impartial trial.

ARGUMENT AND AUTHORITY

ISSUE ONE: The Trial Court's statements and questioning of witnesses in the presence of the jury throughout the entire trial deprived Appellant of Due Process. US Const. amends. V and XIV; Tex. Code Crim. P. Article 38.05.

A. Standard of Review

Of the three error-preservation rules set forth in *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), a claim that the trial court made improper comments before the jury is at least a category-two right that must be expressly waived, and thus can be raised for the first time on appeal. *Proenza v. State*, 541 S.W.3d 786 (Tex. Crim. App. 2017). Appellant may raise this claim without having made an objection at trial; the judge has a duty to follow Article 38.05 whether there is an objection or not. *Proenza* at 801.

"Due process requires a neutral and detached judge. A judge should not act as an advocate or adversary for any party." *Johnson v. State*, 452 S.W.3d 398, 405 (Tex. App. – Amarillo 2014, pet. ref'd). Any "indication of prejudice or opinion of guilt on the part of the trial judge requires close scrutiny of his actions." *Bethany v. State*, 814 S.W.2d 455, 456 (Tex. App. – Houston [14th Dist.] 1991, pet. ref'd). "When a judge takes the side of one party, whether expressly or implicitly, the court creates an additional opponent in the courtroom for the other litigant." *Abdygapparova v. State*, 243 S.W.3d 191, 208 (Tex. App. – San Antonio 2007,

pet. ref'd.). When the judge becomes "an advocate for the State, and an opponent for the defense," the defendant has been denied a fair and impartial trial. *Id.* at 209.

Article 38.05 of the Code of Criminal Procedure states as follows:

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

Due process is denied in instances where the judge assists the State at trial in the presence of the jury. *See Kincade v. State*, 552 S.W.2d 832, 835 (Tex. Crim. App. 1977) (judge methodically castigated defense counsel and said counsel was deceiving the jury, then judge himself offered court records of convictions of a witness as an exhibit into evidence and expressed his opinion about them); *Bethany*, 814 S.W.2d at 461 (judge gave defense exhibit, after denying admission by the defense, to the State and then the court admitted the exhibit into evidence with the express purpose that the State use the exhibit to impeach defendant's testimony; at the same time the judge was castigating defense counsel and questioning her honesty); *Abdygapparova*, 243 S.W.3d at 206 (judge castigated

defense counsel throughout the trial and wrote notes to the prosecutors during jury selection providing guidance on how to present their case).

The United States Supreme Court has repeatedly held that a violation of the right to an impartial judge is a structural error that defies harm analysis. *Arizona v. Fulminate*, 499 U.S. 279, 309 (1991); *Chapman v. California*, 386 U.S. 18, 23 (1967); *Tumey v. Ohio*, 273 U.S. 510 (1927). However, should this Court determine that a harm analysis is required, then to "constitute reversible error, in violation of Article 38.05, V.A.C.C.P., the comment must be such that it is reasonably calculated to benefit the State or prejudice the defendant's rights." *Kincade* at 835. If the court determines beyond a reasonable doubt that the trial court's error did not contribute to the conviction or punishment, then the court must hold the error harmless; otherwise, the court must reverse the judgment of conviction. Tex. R. App. P. 44.2(a).

B. Argument

There is no requirement that Appellant object to the comments of the Trial Court before the jury, thus error is properly before this Court. *Proenza*, 541 S.W.3d at 801.

The Trial Court in the present case began making improper comments and assisting the State during voir dire when the judge told the jury panel that Appellant is presumed not guilty until proven otherwise, and that the indictment is

the court's charging tool. 2 RR 9-12. Both of these statements are an incorrect statement of the law, and they lay a foundation for the jury to perceive the trial judge as a partner to the State. Tex. Code Crim. P., Articles 20A.302, 21.01 and 38.03. Instead of instructing the jury that Appellant was presumed innocent unless the State proves his guilt beyond a reasonable doubt, and that the indictment is the State's pleading, the Trial Court improperly instructed the jury that Appellant was less than innocent ("not guilty") and that the Court filed the indictment against Appellant ("the Court's charging tool"). This laid the groundwork for the jury to perceive the Trial Court as a partner with the State throughout the rest of the trial.

The Trial Court proceeded to question the State's witnesses, and at times testify himself for the witnesses, throughout the rest of the trial (e.g., "If you recall, you got him inside the car. Is he handcuffed, if you know? I'm thinking yes." 3 RR 29) (e.g., "So she's feeling bad, and he wants some action." 3 RR 35). At the same time, the Trial Court would make certain comments aimed at Defense Counsel (e.g., denying Defense Counsel the opportunity to approach the bench to object outside the presence of the jury by stating "You don't need to. I've got good ears, the objection is overruled." 3 RR 33) (e.g., overruling an objection by Defense Counsel to not responsive, by stating "Well, he asked her what she heard and she said she heard Kendric Bess cussing my sister and your objection is that's not responsive. Think about it, please. Objection is overruled." 4 RR 106-107) (e.g.,

telling the complaining witness that Defense Counsel was going to "push" and the witness was going to "shove." 4 RR 138).

Beginning with improper comments during voir dire about Appellant's presumption of innocence and the indictment, and adding the fact that the Trial Court made these castigating comments to Defense Counsel while at the same time assisting the State with the questioning of their witnesses, all leads to a trial in which Appellant was denied due process. The judge did not appear neutral and detached when he told the jury that the indictment was "the court's" charging instrument, and the presumption of innocence was damaged with an incorrect definition. The judge was not neutral and detached when he assisted the State with questioning its witnesses, and in addition, the judge actually testified for the State's witnesses on more than one occasion. This is much more behavior to scrutinize than just a judge managing the flow of the trial. *See Jasper v. State*, 61 S.W.3d 413 (Tex. Crim. App. 2001).

The trial court in *Jasper* corrected misstatements of previous testimony and also showed irritation at defense counsel. The Court of Criminal Appeals held that "none of the trial judge's comments rose to such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury." *Jasper* at 421. Appellant does not allege that the Trial Court intended any harm in the present case. However, the Trial Court's behavior in the present case does rise to such a

level as to bear on the presumption of innocence and vitiate the impartiality of the jury. While the Trial Court may have only intended to clear up confusion or to maintain control and flow of the proceedings, the actual effect of his comments did cause him to appear to be an advocate in this case when he questioned the State's witnesses, and even went further to testify for the witnesses on multiple occasions. This behavior at a minimum makes the judge appear to be both a partner with the State, assisting in the prosecution of the case as an attorney, and as a witness for the State, assisting the prosecution with its burden of proof. "It is manifestly clear that the trial court abandoned its neutral status and took up the role of an advocate in this case." *Bethany*, 814 S.W.2d at 461.

"This is an unfortunate case in which the trial judge failed to exercise appropriate caution and failed to maintain an attitude of impartiality throughout the trial. The trial judge's ex parte communications with the prosecutor [*or, as in the present case, the judge's assistance to the prosecutor*] suggest there was, at a minimum, a 'chumminess' between the prosecutor and the trial court from which the jury could interpret that the trial court was 'taking sides'." *Abdygapparova,* 243 S.W.3d at 210 (emphasized language added). The court in *Abdygapparova* quoted a century-old Court of Criminal Appeals opinion, which states as follows:

> "…too much caution cannot be exercised in the effort to avoid impressing the jury with the idea that the court entertains impressions

> of the case which he wishes them to know…To the jury the language and conduct of the trial court have a special and peculiar weight. The law contemplates that the trial judge shall maintain an attitude of impartiality throughout the trial. Jurors are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved. The delicacy of the situation in which he is placed requires that he be alert in his communications with the jury, not only to avoid impressing them with any view that he has, but to avoid in his manner and speech things that they may so interpret."

Lagrone v. State, 209 S.W. 411, 415 (1919).

The present case, as in *Bethany* and *Abdygapporova*, is one in which the absence of an impartial trial judge on the bench "infected the entire trial process," robbing Appellant of his basic protections and "undermining the ability of the criminal trial to reliably serve its function as a vehicle for the determination of guilt or innocence." *Abdygapporova,* 243 S.W.3d at 210.

The violation of Appellant's right to an impartial judge is structural error, therefore a harm analysis is inappropriate. *Arizona v. Fulminate*, 499 U.S. 279, 309 (1991); *Chapman v. California*, 386 U.S. 18, 23 (1967); *Tumey v. Ohio*, 273 U.S.

510 (1927); *Blue v. State*, 41 S.W.3d 129, 139 (Tex. Crim. App. 2000) (Mansfield, J., concurring). It does not matter what evidence exists against Appellant, he has a right to an impartial judge. *Blue* at 138. Appellant's conviction should be reversed and the cause remanded for a new trial.

Should this Court determine that a harm analysis is appropriate, Appellant's conviction should still be reversed and the cause remanded for a new trial. It is reasonable to believe that the Trial Court's error contributed to Appellant's conviction.

CONCLUSION AND PRAYER

THEREFORE, Appellant respectfully prays that his Court sustain Appellant's point of error advanced herein, reverse Appellant's conviction, reverse judgment of the Trial Court below and remand the case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on April 30, 2025, a true and correct copy of the above and foregoing document was served on the State of Texas by serving the District Attorney's Office, Harris County, 1201 Franklin Street, Suite 600, Houston, Texas 77002 through the electronic filing manager.

/s/*Cynthia Rayfield-Aguilar*
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Pursuant to Rule 9.4(i), the undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4.

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/s/*Cynthia Rayfield-Aguilar*
Cynthia Rayfield-Aguilar

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