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RENDERED: SEPTEMBER 26, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000488-MR

JOHN LESLIE MELTON — APPELLANT

V.

ON APPEAL FROM HART CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, JUDGE
NO. 10-CR-00027

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, IN PART, AND
REVERSING AND REMANDING, IN PART

A circuit court jury convicted John Leslie Melton of first-degree rape (victim under twelve) on a charge that he had raped eleven year-old "Sally"[1] at the home of Kenny and Patricia Buster. The trial court sentenced Melton to forty-five years' imprisonment, and he appeals from the resulting judgment as a matter of right.[2]

He contends the trial court erred (1) in limiting his ability to cross-examine the Commonwealth's witness, Patricia Buster; (2) by failing to provide him with Patricia Buster's mental health records or order a continuance to allow him to obtain such records; (3) by admitting inadmissible hearsay evidence; and (4) by attempting to retain jurisdiction over this case in order to

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[1] The minor victim's identity is protected. As a result, this Court will be using a pseudonym in order to maintain the secrecy of the victim's identity.

[2] Ky. Const. § 110(2)(b).

impose court costs and a partial public defender fee upon his release from imprisonment.

Finding no error, we affirm the conviction and sentence; but we reverse the trial court's decision to retain jurisdiction over this case to consider imposing court costs and fees in the future. Accordingly, we remand for further proceedings regarding costs and fees.

I. FACTUAL AND PROCEDURAL HISTORY.

Over a period of years, Kenny and Patricia Buster babysat Sally and her sister on the weekends during the summer.[3] During this time, the Busters' residence was a veritable cesspool of child sexual abuse, leading to sexual abuse related charges against Kenny and Patricia Buster, as well as Kenny's brother, Harold Buster.[4]

Although Sally and her sister both claimed to have been raped or sexually abused numerous times during the weekends the Busters babysat them, only one alleged rape is the subject of this appeal.

One summer evening, when Sally was eleven years old, Melton, the Busters, Mark Puckett, and his girlfriend, Jessica, were all in the Buster kitchen engaged in activity. Meanwhile, Sally went into the living room to watch television and sat on the couch, which was not visible from where the

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[3] Although the relationship between Sally and the Busters is somewhat unclear, Sally's mother testified that Kenny Buster is her cousin.

[4] *See Buster v. Commonwealth*, ___ S.W.3d ___, 2013 WL 4607605 (August 29, 2013); *Buster v. Commonwealth*, 381 S.W.3d 294 (Ky. 2012); *Buster v. Commonwealth*, 364 S.W.3d 157 (Ky. 2012).

adults were sitting in the kitchen. On this evening, Sally was wearing an oversized t-shirt and panties, her normal bedtime attire.

Melton soon joined Sally on the couch. Sally testified that Melton began touching her vagina with his fingers. Eventually, he removed her panties and inserted his penis into her vagina. Sally cried and asked Melton to stop while trying to push him away, but Melton covered her mouth to muffle her cries and told her that everything would be okay.

Sally was unable to state how long the rape lasted but testified that she was able to squirm off the couch and against the wall until Melton stopped assaulting her and left the room. Sally also testified that Jessica Puckett, who was living at the Buster residence at the time of the rape, must have seen Melton's actions because she began "screaming and hollering" and telling all the adults that they were "nasty." As a result of Jessica's outburst, she and Mark Puckett left the Buster residence, followed shortly by Melton. After they left, Patricia told Sally "not to say anything" and that "no one would believe [her]."

The jury convicted Melton of first-degree rape (victim under twelve) and recommended a sentence of forty-five years' imprisonment. At sentencing, the trial court accepted the jury's recommendation, sentenced him accordingly, and ordered that Melton's ability to pay court costs and a partial public defender fee would be deferred until Melton's release from incarceration. This appeal followed.

II. ANALYSIS.

A. Melton Waived his Right to Claim that the Trial Court Improperly Limited his Cross-Examination of Patricia Buster.

Melton first argues that the trial court impermissibly limited the scope of his cross-examination of Patricia Buster by not allowing him to question her regarding related sexual charges that had been brought against her. More specifically, Melton contends that the trial court impermissibly limited his ability to cross-examine Buster regarding any bias that she may have had against Melton or in favor of the Commonwealth as the result of any benefit or leniency she received in her conditional plea agreement, an appeal of which was pending at the time of this trial.

In support of this argument, Melton cites the following conversation as the basis for the court's limitation of his right to cross-examine Buster:

Defense Counsel [to Judge]:	So [Patricia Buster's] case is on appeal, but yet she's going to testify without an attorney here?
Judge:	I assume so. I assume we're not asking her questions about, remember, you wanted to keep out all of what happened. This is just about this case, not about her case.
Commonwealth:	And I'm certainly not going to ask her any questions about [her case].

At no point during this exchange did Melton's counsel challenge the trial court's stated assumption. Melton is also unable to point to anywhere in the record where he is anything but in full accord with the alleged limitation of the questions that could be asked of Buster.

Melton misquotes the trial court by arguing that the trial court's statement, "I assume we are not asking her questions about her case," preserved this issue for appeal.[5] We find that this issue is unpreserved for appeal as a result of Melton's failure to raise any objection at trial in order to alert the trial court of a need to make an informed determination of the issue.[6] Further, we find that Melton invited any error that may have arisen by affirmatively causing the trial court to believe that he wished to sanitize the proceeding by avoiding reference to Buster's previous or pending charges or any bias stemming from them.

"Generally, a party is estopped from asserting an invited error on appeal."[7] Unlike forfeited errors, which are subject to palpable error review, this Court has recognized that "invited errors that amount to a waiver, *i.e.*, invitations that reflect the party's knowing relinquishment of a right, are not subject to appellate review."[8]

Although we are not convinced the trial court did actually limit Melton's ability to cross-examine Buster, Melton nonetheless waived his ability to raise this issue on appeal by his explicit and implicit representations to the trial court that he did not wish to question Buster regarding her pending criminal

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[5] Melton acknowledged his initial misquote in his reply brief, agreeing that the trial court actually stated: "I assume we're not asking her questions about, remember, you wanted to keep out all of what happened. This is just about this case, not about her case." Notwithstanding the initial misquote, Melton still champions his original argument in the reply brief.

[6] *Hilsmeier v. Chapman*, 192 S.W.3d 340, 345 (Ky. 2006).

[7] *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011) (citing *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006)).

[8] *Id.* at 38 (citing *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997)).

charges.[9] We will not allow defendants to take one position before the trial court and, thus, invite an error only to argue the opposite position on appeal.[10] Because we find that Melton knowingly and affirmatively relinquished his right to cross-examine Buster about her related criminal prosecution, this issue is not subject to appellate review. Accordingly, we decline to examine the merits of Melton's claim.

B. The Commonwealth's Failure to Provide Melton with Patricia Buster's KCPC Report did not Violate *Brady*, and the Trial Court did not Commit Palpable Error by not Ordering a Continuance on its Own Motion.

Although Melton's second argument is not clearly articulated, it appears to us that the heart of his argument is that the Commonwealth violated *Brady* in failing to disclose Patricia Buster's KCPC report[11] before trial. Secondarily, it appears, Melton also argues that the trial court erred in failing to order a continuance on its own motion when it became known that Melton could not obtain the KCPC report before Buster testified.

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[9] *Id.*; *see also Graves v. Commonwealth*, 384 S.W.3d 144, 152 (Ky. 2012) (holding that appellant invited error in defective jury instructions by affirmatively agreeing with proposed instruction); *Mullins v. Commonwealth*, 350 S.W.3d 434, 439 (Ky. 2011) (holding that appellant's representations to the trial court that he did not want an instruction regarding lesser-included offenses was an invitation of error).

[10] *See Grundy v. Commonwealth*, 25 S.W.3d 76, 84 (Ky. 2000) (quoting *Kennedy v. Commonwealth*, 54 S.W.2d 219, 222 (Ky. 1976)) ("This Court simply does not review alleged procedural errors when the appellant did not present the issue before the trial court, and we will not allow appellants . . . 'to feed one can of worms to the trial judge and another to the appellate court.'").

[11] During her prosecution, Patricia Buster was apparently subjected to a competency evaluation at the Kentucky Correctional Psychiatric Center (KCPC).

Under *Brady v. Maryland*[12] and cases following its rule, it is a violation of a defendant's due process rights when the prosecution fails to disclose material exculpatory evidence to the defense, regardless of the prosecution's good or bad faith.[13] Impeachment evidence is included within the scope of exculpatory evidence that is subject to *Brady*.[14] But this requirement only applies to "those cases in which the government possesses information that the defense does not."[15] "Moreover, *Brady* applies only to 'the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense.'"[16]

While case law provides support for a finding that mental health records of a testifying witness can be relevant and exculpatory impeachment evidence,[17] we do not express any opinion about the exculpatory nature of KCPC reports of testifying witnesses for purposes of *Brady*. Instead, we assume for purposes of this argument that the KCPC report was exculpatory within the *Brady* rule. Similarly, we also do not express an opinion regarding whether the KCPC report at issue was, in fact, in the possession of the Commonwealth for purposes of *Brady*. Although we note that government

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[12] *Brady v. Maryland*, 373 U.S. 83 (1963).

[13] *Id.* at 87; *United States v. Agurs*, 427 U.S. 97, 107 (1976).

[14] *United States v. Bagley*, 473 U.S. 667, 676 (1985).

[15] *Bowling v. Commonwealth*, 80 S.W.3d 405, 410 (Ky. 2002).

[16] *Id.* (quoting *Agurs*, 427 U.S. at 103).

[17] *See Commonwealth v. Barroso*, 122 S.W.3d 554, 562 (Ky. 2003).

possession is broadly defined under *Brady*,[18] we find the record here unclear regarding the Commonwealth's actual possession of the KCPC report; and, further, we do not express an opinion on whether records in possession of KCPC are in government possession for purposes of *Brady*. Again, we assume for purposes of this argument that the KCPC report was in the government's possession and, thus, within the scope of *Brady*.

On the eve of trial, Melton moved the trial court to unseal the record containing Buster's KCPC report. The trial court granted Melton's motion but was unable to provide him with the report because Buster's case had been appealed to this Court. As a result, the trial court's record in Buster's case, including the KCPC report, was in Frankfort and not readily accessible on site.

Upon this revelation, Melton admits he did not request any further relief from the trial court, nor did he offer the trial court any suggestions to rectify the situation. Despite Melton's inability to obtain Buster's KCPC report before she testified at trial, he was nonetheless able to cross-examine her about, among other things, her: (1) memory and history of memory problems; (2) competency; (3) history of mental problems; (4) KCPC evaluation; and (5) the diagnoses and medications prescribed during her evaluation.

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[18] *See Nunley v. Commonwealth*, 393 S.W.3d 9, 13 (Ky. 2013) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)) ("[G]overnment possession is broadly defined."); *Ballard v. Commonwealth*, 743 S.W.2d 21, 22-23 (Ky. 1988) (applying *Brady* to records in the possession of the Department of Human Resources).

This Court recently faced a similar issue in *Nunley v. Commonwealth.*[19] In *Nunley*, the trial testimony of a sexual crime victim first revealed that she was seeing a counselor near in time to the alleged sexual assaults.[20] Defense counsel then argued that information pertaining to the victim's counseling was exculpatory under *Brady* and that the defendant was entitled to a mistrial as a result of the evidence's suppression.[21] In holding that there was no *Brady* violation, we explained that "the defense not only knew about the proof during trial, it actively cross-examined the witness about it," therefore, removing the evidence from the scope of *Brady* even though the defendant did not have intimate knowledge of the counseling's details.[22]

Here, Melton clearly knew about the allegedly exculpatory KCPC examination and extensively cross-examined Buster regarding her mental history, mental health diagnoses, and the medication prescribed to her as a result of the KCPC evaluation. Even though Melton was not familiar with the exact content of Buster's KCPC evaluation during cross-examination, "*Brady* does not give a defendant a second chance after trial once he becomes dissatisfied with the outcome if he had a chance at trial to address the evidence complained of."[23] Melton clearly had his opportunity to address the evidence

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[19] *Nunley*, 393 S.W.3d 9.

[20] *Id.* at 12.

[21] *Id.*

[22] *Id.* at 13.

[23] *Id.*

pertaining to Buster's mental health and KCPC evaluation; and, therefore, *Brady* provides him no relief in this instance.

Further, information that is readily available to a defendant, and not secreted by the Commonwealth, is also outside the scope of *Brady*.[24] This includes information that is part of a public record.[25] Although Buster's KCPC report is not itself a public record because of its confidential nature, it was nonetheless accessible by Melton from sources outside of the Commonwealth's Attorney's files.

In *Bowling v. Commonwealth*, we held that there was no *Brady* violation when the defendant "could have—without the Commonwealth's assistance or permission—obtained" the exculpatory evidence upon which the defendant's claim was premised.[26] In this case, it is clear that Melton could have obtained the KCPC report without the assistance of the Commonwealth considering his only attempt to obtain the report bypassed the Commonwealth completely. As discussed above, Melton's sole attempt at procuring the KCPC report consisted of a motion to unseal the report contained in Patricia Buster's court file, which was summarily granted by the trial court, conclusively showing his ability to obtain access to the KCPC report without the Commonwealth's assistance. Although the unavailability of the report on the day of trial was, for Melton, an

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[24] *Bowling*, 80 S.W.3d at 410.

[25] *Sanborn v. Commonwealth*, 892 S.W.2d 542, 556 (Ky. 1994).

[26] *Bowling*, 80 S.W.3d at 410. The requirement that a criminal defendant acquire known and accessible evidence is often referred to as "defense diligence." *See* 6 LAFAVE, ET AL., CRIMINAL PROCEDURE § 24.3(b) (3d ed. 2012).

unfortunate happenstance, we must echo the trial judge's sentiment that Melton's motion "[p]robably should have been . . . taken up before trial."

Moreover, Melton also could have accessed the video recording of Buster's competency hearing—which would contain all the relevant information contained in the KCPC report—without the assistance or permission of the Commonwealth. Not only was it possible for him to obtain this video, his counsel was aware that a competency hearing had taken place, informing the trial judge of such. Because we find that Melton could have obtained the information sought via avenues outside the Commonwealth's control, *Brady* could not have been violated. In finding no *Brady* violation, we will not allow a defendant to wait until the eve of trial to seek allegedly exculpatory evidence, the existence of which was within defendant's knowledge, and then claim a constitutional violation if unable to obtain such evidence in the expedited manner necessitated by the defendant's own delay.

In a similar vein, Melton also argues that the trial court erred in failing to order a continuance of the trial on its own motion so that he could obtain the KCPC report before Buster testified. Because Melton concedes that this issue is unpreserved, we review for palpable error.[27] "An error is palpable only if it is 'shocking or jurisprudentially intolerable'"[28] and Melton can show a

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[27] RCr 10.26.

[28] *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

"probability of a different result or [an] error so fundamental as to threaten [his] entitlement to due process of law."[29] We find no such error.

While the revelation that the KCPC report was unavailable may have warranted a brief continuance had one been requested,[30] Melton cites no authority that would mandate a court to order a continuance on its own initiative. Because the ordering of a continuance "lies within the sound discretion of the trial court,"[31] we find no "shocking or jurisprudentially intolerable" error in the trial court failing to order a continuance on its own, especially in light of the numerous avenues and opportunities which Melton could have used to obtain the KCPC report before trial.[32]

C. The Trial Court Properly Admitted the Alleged Hearsay Statements of Patricia Buster and Jessica Puckett.

Melton next argues that the trial court impermissibly allowed Sally to introduce hearsay evidence during her testimony. Melton concedes that this issue is unpreserved; and, thus, we review for palpable error.[33] We find that the alleged hearsay statements were not offered to "prove the truth of the matter asserted" and, therefore, find no error, palpable or otherwise, in the admission of the statements.[34]

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[29] *Martin*, 207 S.W.3d at 3.

[30] *See Nunley*, 393 S.W.3d at 13.

[31] *Shegog v. Commonwealth*, 142 S.W.3d 101, 109 (Ky. 2004).

[32] *Martin*, 207 S.W.3d at 4.

[33] RCr 10.26.

[34] KRE 801(c).

Although Melton does not provide any analysis of the hearsay nature of the statements with which he takes issue, nor does he explicitly cite to the alleged improper statements in the record, it appears as though Melton's hearsay argument revolves around two statements elicited during the Commonwealth's direct examination of Sally. The first statement that Melton contends is inadmissible hearsay is Sally's testimony that Buster told her not to say anything about the rape because no one would believe her. The other statement with which Melton takes issue is Sally's testimony that Jessica Puckett must have seen the rape because she began yelling and called all the adults in the Buster household "nasty."

Hearsay is defined as an out of court statement "offered in evidence to prove the truth of the matter asserted."[35] As a general rule, hearsay statements are inadmissible as evidence but may be admissible if an appropriate exception is provided for by the Kentucky Rules of Evidence (KRE), or by rule of this Court.[36]

Upon review of the record, it is clear that Sally's testimony regarding Patricia Buster's statement does not fall within the definition of hearsay because it was not offered as proof of the matter asserted.[37] As the Commonwealth argues, Sally's testimony that Buster had told her not to say anything about the rape was offered to show the impact that Buster's

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[35] *Id.*

[36] KRE 802.

[37] *See* KRE 801(c).

statement had on Sally and to explain why she had not reported the crime to police for nearly a decade. This purpose is made even clearer when the original line of questioning by the Commonwealth is viewed as a whole:

Commonwealth:	Did you tell anybody about this?
Sally:	No.
Commonwealth:	Why didn't you tell anybody?
Sally:	I was scared to.
Commonwealth:	Why would you have been scared to?
Sally:	Because Kay[38] had told me not to say anything, no one would believe me. I just, I was scared to tell. I was little. I was just a little girl; I didn't want anyone to know.

Further, there does not appear to be any evidence in the record, nor does Melton point us to any, to support a finding that Buster's statement was entered into evidence to prove that no one would have believed Sally if she were to report the rape. The relevance of the statement would be tenuous at best if used for such a purpose.[39] With no evidence to the contrary, we find that Buster's statements do not fall within the definition of hearsay and were properly admitted.[40]

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[38] Sally's testimony at trial established the she and her sister referred to Patricia Buster as "Kay."

[39] *See* KRE 401.

[40] We note that Buster's statement is only admissible for a limited purpose; and, therefore, under the Kentucky Rules of Evidence, Melton was entitled to a limiting instruction or admonition upon request. KRE 105(a). However, Melton did not request such a limitation; and, therefore, the trial court was not required to provide one. *Id.*

Jessica Puckett's statement that the adults in the Buster home were "nasty" also does not fall within the definition of hearsay. Sally's testimony regarding Jessica's statement and behavior was used to explain her belief that Jessica had witnessed the rape even though Sally admitted that she never saw Jessica witness the rape. Such a purpose was most clearly elicited from Sally upon cross-examination by Melton. When asked about the inconsistency between her testimony that no one else was in the room during the time of the rape and her testimony that Jessica must have witnessed the rape, Sally responded, "Because she did see, and she did start screaming. I didn't see her see, but why would she be telling 'em they were nasty and she didn't want to stay there anymore?"

In the face of Sally's clear explanation of the purpose and relevance of Jessica's statement, Melton does not even undertake an argument that Jessica's statement was proffered by the Commonwealth to prove that anyone at the Buster household is, or was, "nasty." As a result, we find that the statement does not fall within the definition of hearsay.

Even assuming, however, that Sally's testimony regarding Jessica's statement was within the definition of hearsay, it is nonetheless admissible under exceptions to the hearsay rule.[41] First, Jessica's statement falls squarely within the present sense impression exception.[42] Based on Sally's testimony, Jessica's statement was a reaction to having witnessed Sally being raped and

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[41] *See* KRE 803.

[42] KRE 803(1).

was made while she "was perceiving the event or condition, or immediately thereafter."[43] Similarly, the excited utterance exception is also easily applicable to Jessica's statement.[44] Sally's testimony establishes that Jessica was upset at the time she made the statement at issue and that her labeling everyone as "nasty" was done as an immediate reaction to witnessing an exceptionally startling event—the rape of a young child.[45]

We find no error in the trial court's admission of the statements at issue because they were not offered to "prove the truth of the matter asserted" and were, therefore, outside the definition of hearsay.[46]

D. The Trial Court Erred in Attempting to Retain Jurisdiction Until Melton was Released from Incarceration in Order to Determine Whether Court Costs and Partial Public Defender Fees Should be Imposed.

Melton lastly argues that the trial court erred in ordering that his ability to pay court costs and the partial public defender fee of $200 be determined upon his release from incarceration. We agree.

We recently addressed the same issue in *Buster v. Commonwealth.*[47] In *Buster*, we held that there is no statutory basis for a court to exercise jurisdiction beyond the end of proceedings in order to determine the appropriateness of imposing court costs and a partial public defender fee.[48]

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[43] *Id.*

[44] KRE 803(2).

[45] *Id.*

[46] KRE 801(c).

[47] *Buster*, 381 S.W.3d 294.

[48] *Id.* at 305.

We also held that remand was necessary in order for the trial court to determine the imposition of costs because court costs are mandatory absent specific statutory findings.[49] And while the partial public defender fee is not mandatory, the determination of whether the indigent defendant is capable of paying such a partial fee is mandatory.[50]

Relying on our precedent in *Buster*, we find the trial court's attempt at granting itself "continuing" or "returning jurisdiction" over Melton's case until costs could be determined at some future date was error. Accordingly, we reverse the portion of the trial court's judgment regarding court costs and the partial public defender fees.[51]

III. CONCLUSION.

For the foregoing reasons, we affirm Melton's conviction in full; but we reverse the portion of the trial court's judgment pertaining to court costs and the partial public defender fee and remand for further proceedings consistent with this opinion.

All sitting. All concur.

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[49] KRS 23A.205 mandates the imposition of court costs upon a defendant's conviction "unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs in the foreseeable future."

[50] *Buster*, 381 S.W.3d at 306 (citing KRS 31.211(1)).

[51] We also note that Melton appears to make an argument that his status as an indigent both entitles him to the assistance of a public defender and frees him from the mandatory imposition of court costs. Our holding in *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012), however, holds to the contrary. In *Maynes*, we held that a criminal defendant may be entitled to the assistance of a public defender under KRS 31.110, yet, may still be required to pay court costs by KRS 23A.205, absent a finding that he is a "poor person" within the definition contained in KRS 453.190(3).

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