

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0348

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NATHANIEL J. LAKE,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Karen S. Townsend, Presiding

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STATEMENT OF THE ISSUES

Whether the district court abused its discretion when it excluded evidence about semen that did not belong to the defendant in the victim's underwear based on the rape shield law and Mont. R. Evid. 403?

STATEMENT OF THE CASE

In November 2015, the State charged Appellant Nathaniel John Lake (Lake) with attempted sexual intercourse without consent, a felony. (D.C. Docs. 1, 3; *see also* D.C. Docs. 28, 35 (dismissing separate charge of violation of an order of protection).) Prior to trial, the State moved to exclude evidence that semen that did not belong to Lake had been found on the victim's underwear. (D.C. Doc. 20 at 5-6.) After receiving briefing and holding a hearing to address the issue, the court granted the motion to exclude evidence about semen from another person on the victim's underwear. (D.C. Doc. 66, available at Appellant's App. A.) After a six-day trial, a jury convicted Lake of attempted sexual intercourse without consent. (D.C. Doc. 80.) On appeal, he argues that the court erred in excluding the semen evidence.

STATEMENT OF THE FACTS

I. The offense

The victim, Barb, met Lake in 2012, when she was volunteering at the Union Gospel Mission (Mission) in Missoula. (9/1/16 Tr. at 45.) Barb was

inspired by her faith to help Lake and the other clients at the Mission. (*Id.* at 49, 61.) Barb regularly visited the people at the Mission, including Lake, on her lunch break. (*Id.* at 58-60.) She also spent a large amount of time there on the weekends. (*Id.* at 61.) Barb enjoyed giving out hugs to all of the people there because she believed that “people need to know they matter.” (*Id.* at 59.)

Lake had been chronically homeless for a decade and lived near the river in McCormick Park. (9/2/16 at 341, 344.) Barb observed that he did not interact with others when he came to the Mission and had alienated himself. (9/1/16 Tr. at 47, 49.) Barb eventually began trying to engage Lake in conversation. (*Id.* at 50.) Although progress was slow, he gradually began to open up. (*Id.* at 51-52.) Barb and other volunteers worked on getting Lake to obtain social services so that he might be able to obtain a home. (*Id.* at 55-56.) After several months, Barb started taking Lake to appointments to obtain housing and mental health services. (*Id.* at 56-57.)

By 2014, Barb saw that Lake was engaging with other clients at the Mission and had improved his hygiene. (*Id.* at 69.) She was pleased to see him “flourishing.” (*Id.*) Barb regularly took Lake to appointments with a case manager at the Western Montana Mental Health Center, who worked very well with him. (*Id.* at 70.) And Barb worked on improving Lake’s hygiene. She bought him additional clothes and washed his clothes and bedding. She also convinced him to

take showers. (*Id.* at 71-72.) She later testified that Lake was not the only homeless person she “went the extra mile for, but I really cared for him. I wanted to see him succeed. I felt like he had potential and I wanted him to see that in himself.” (*Id.* at 72.)

While spending time with Lake, Barb would hug him, like she did other people. (*Id.* at 59, 74.) He sometimes put his hand on her knee while they were in the car, and she picked it up, put it back, and asked him not to do that. (*Id.* at 75.) Barb told him repeatedly that he was her friend, and that she had a family. (*Id.* at 76.)

Although Lake had made a lot of progress by early 2014, that was a difficult period because of a long cold spell. (*Id.* at 76-77, 79.) Twice in one day, Barb found Lake outside with ice in his hair and beard, without a coat or gloves, frantically digging in the snow with his bare hands. (*Id.* at 80, 86.) After the second time, Barb convinced him to go to a hotel room, which she paid for that night. (*Id.* at 88.) He stayed there for weeks while it was cold, and Barb’s friend paid for the remainder of his stay. (*Id.* at 89.)

In the spring of 2014, Lake’s mother died. Barb had previously come in contact with Lake’s brother, with whom Lake was not in contact. When Lake’s mother died, Lake’s brother contacted Barb, and she took him to Lake so that he

could inform Lake their mother had passed. (*Id.* at 92-93.) Barb and her family attended Lake's mother's funeral with Lake. (*Id.* at 92-94.)

Later than spring, Lake exhibited sexual behavior toward Barb for the first time. (*Id.* at 98-99.) Barb had gone down to the river where Lake was camped to visit with him. (*Id.* at 99.) He pinned her up against the bushes and proceeded to grind into her with his pelvis, exposed his penis, and touched her breasts. (*Id.*) Barb's reaction was to freeze, but she later confronted him and told him he could not do that. (*Id.* at 99-100.) Lake repeatedly apologized. (*Id.* at 100.) Barb was "really angry," but she continued to try to help him because she felt like she had invested too much time to give up on him and that the incident might have reflected what he was going through with the death of his mother. (*Id.* at 99-100.) She also felt like she could not walk away because he did not have a support system. (*Id.* at 101-02.) Although Barb continued to have contact with Lake, she tried to not be alone with him. (*Id.* at 102.) There were other times when Lake verbally attacked Barb. (*Id.* at 105.) She continued to have contact with him because he normally was very appreciative and kind to her. (*Id.* at 106.)

Barb helped Lake obtain an apartment, which he moved into in June 2014. (*Id.* at 106.) Barb and her friends from her church helped Lake furnish his apartment and, along with Barb's family, helped him move into the apartment.

(*Id.* at 108-09.) He also started receiving Social Security benefits, which she had helped him obtain. (*Id.* at 107.)

By that time, Barb had forgiven Lake for the sexual encounter at the park. She went over to his apartment alone once or twice a week to bring him lunch or see how he was doing. (*Id.* at 109-10.) In November 2014, a new incident caused Barb concern. As she was getting ready to leave his apartment, he shut and locked the door, backed her up against the door, ground himself into her, and exposed himself. (*Id.* at 111-12.) She repeatedly asked him to quit, but he did not quit until he was finished. (*Id.* at 112.)

When he stopped, Barb left. She was confused about why he had done that and how to handle him. (*Id.* at 113-14.) Barb still did not want to stop helping Lake because she “had come too far with him to just be able to walk away from him,” and there was “a big part of me that desperately wanted to believe that that wasn’t really my friend that did that.” (*Id.* at 114.) Although he had an apartment, she still worried about him because he did not have a support system. (*Id.* at 115.) And Lake did not get out of his apartment regularly or keep it clean. (*Id.* at 115-16.)

Barb changed her meetings with Lake so that she generally did not go to his apartment alone and, if she did, she left the door open. (*Id.* at 121.) She still tried to encourage him because she cared about him and wanted him to succeed. (*Id.* at

122-23.) Barb was torn between her determination to help Lake and her concern about being hurt by him. (*Id.* at 123-24.) At times he was verbally mean to her and she considered discontinuing the relationship, but she did not do so. (*Id.* at 124-25.)

Barb did not immediately tell her husband about either of the incidents because she was worried about how he would handle it, and she felt responsible. (*Id.* at 101, 118, 120, 130-31.) She became depressed after the November 2014 incident and entered into counseling. (*Id.* at 120, 129-30.) In February 2015, Barb told her husband, who was upset and wanted Barb to stop all contact with Lake. (*Id.* at 121, 134-35, 137.) Barb started trying to help Lake more through her phone than in person. (*Id.* at 136.) But she still went to his apartment and checked in with him. (*Id.* at 140.)

When Barb went to Lake's apartment in July 2015, she noticed that he had stopped bathing, and both he and the apartment smelled bad. (*Id.* at 141.) During that visit, Lake pulled on her arm and tried to put her in a closet. (*Id.*) Barb resisted and was able to get away. (*Id.* at 142.) After that, she stopped communicating with him. (*Id.*)

In August, Lake called Barb's office twice and was verbally abusive and accused her of bizarre behavior involving sex and drugs. (*Id.* at 144.) He then repeatedly called her cell phone. (*Id.* at 145.) She told him then that she was done

communicating with him and she obtained an order of protection. (*Id.* at 146-47.)

After that, she did not hear from him or have any contact with him for months.

(*Id.* at 150.) Barb stopped volunteering at the Mission to avoid encountering Lake.

(*Id.*)

Barb continued to go to McCormick Park to eat her lunch or to walk on the trail, which she had done before she met Lake. (*Id.* at 151-52.) She did not know that by October he had resumed living in McCormick Park. (*Id.* at 153, 156.) She ran into him unexpectedly in October along the riverbank. (*Id.* at 152.) She talked to him for a while and was surprised by how well he looked. (*Id.*) Barb asked Lake whether anyone was helping him get housing, and he indicated that nobody was. (*Id.* at 154.) Barb was not willing to work with him herself, but she asked him if he would like help from Barb's friend, which he said he would. (*Id.*)

Barb felt better after their meeting because it was a normal, nonthreatening interaction. (*Id.* at 155.) She told her husband, and he was upset that she had talked to Lake. (*Id.*) The next day, she walked through McCormick Park again on her lunch break. (*Id.* at 156.) She heard heavy stomping and was surprised when she turned around to see Lake running up behind her. (*Id.* at 157.) He asked her to sit and talk to him, which she reluctantly agreed to do at a nearby picnic table. (*Id.* at 157-58.) They talked for five to ten minutes, and during that time he apologized

for leaving her the voice messages he had left. (*Id.* at 158.) He also asked if there was still an order of protection in place, and she told him there was. (*Id.*)

When Barb told her husband afterwards, he was upset that she had not reported the contact because Lake had violated the order of protection. (*Id.* at 159.) Barb decided that Lake had probably been looking for her. (*Id.* at 159-60.) She decided that she would go down and confront him to let him know that she would not go back there, and he would not see her again. (*Id.* at 160.)

The offense charged in this case occurred on October 12, 2015, when Barb went down to talk to Lake in the park. (*Id.* at 161.) She used crutches to get down there because she had injured her foot. (*Id.* at 163.) Barb sat down on his blanket and told him that she would not be coming back, and he should not look for her. (*Id.* at 163-64.) While she was sitting down, he told her she was pretty, talked about her body, touched her sore foot, took her glasses off and set them on the ground, covered her eyes with his hand, and pulled her head into his armpit. (*Id.* at 165-66.) Lake swung his leg over her to hold her down and attempted to get her shirt off. (*Id.* at 168-69.) Barb struggled with him, and he finally got off of her. (*Id.* at 170.) She was able to get her shoes back on and stand up with her crutches. (*Id.*)

Lake then pushed her back with his body and pinned her against a log. (*Id.* at 171-72.) He made a statement about having her trapped and stated that she

was “crippled,” which likely referred to her injured foot. (9/7/16 Tr. at 116.) Lake pulled Barb’s pants open and pulled them below her pubic area. (9/1/16 Tr. at 173-75.) Lake pulled Barb’s underwear to the side, placed his penis in her underwear, and thrust forcefully. (*Id.* at 175.) His penis was touching her vagina, inside the labia, and she believed he was trying to penetrate her. (*Id.* at 175-76, 179.) Barb felt frozen and was shaking. (*Id.* at 176.) She begged him to stop, but did not fight back. (*Id.* at 177; 9/2/16 Tr. at 460.) She believed that he ejaculated on her and her underwear because she felt wetness. (9/1/16 Tr. at 179; 9/2/16 Tr. at 459.) Barb determined that Lake knew what he was doing and acted intentionally because he was watching her the entire time. (9/1/16 Tr. at 193-94.)

Eventually, Lake stopped and just stared at her. (*Id.* at 180.) She yelled at him and left. (*Id.* at 180-81.)

II. Barb’s response and the investigation

When Barb got home, she showered because she “felt disgusting” and washed her clothes. (*Id.* at 182-83.) She also cried a lot. (*Id.* at 183.) Barb’s husband was out-of-state for his work. Her children came home from school, but then left for activities that evening. (*Id.* at 186.) While they were gone, Barb went back down to McCormick Park and yelled at Lake. (*Id.* at 187-88.) He responded,

saying “I don’t know why you are so mad. We didn’t have sex.” (*Id.* at 188.) His response made her incredibly angry. (*Id.* at 189.)

Barb debated whether to report the assault and did not immediately do so. The next day, she struggled at work. (9/2/16 Tr. at 282.) She went to a previously scheduled lunch with friends, but she did not communicate and had difficulty not breaking down. (*Id.* at 284-85.) Three of her friends noticed that she was much quieter than normal, was not mentally present, and appeared sad. (9/7/16 Tr. at 67-69; 9/8/16 Tr. at 375-76, 382-83.) Barb left the lunch early and returned to work, but she found that she could not work. (9/2/16 Tr. at 285.)

Barb decided to report the assault. (*Id.* at 283, 286.) She went to the crime victim advocacy office and made the report to Officer Crystal Crocker (Officer Crocker). (*Id.* at 286-88.) Barb then went to the First Step Resource Center. (*Id.* at 289.) Barb spoke to a nurse practitioner, Mary Pat Hansen (Hansen). Barb obtained antibiotics to ensure she did not get a sexually transmitted disease, but she chose not to have an examination. (*Id.* at 220, 292-93.)

Barb also called her husband and told him what had happened. (*Id.* at 289-90.) On the evening of October 14, 2015, Barb and her husband, who had returned that day, met with Detective Bob Franke (Detective Franke) for a more detailed interview. (*Id.* at 294-301.)

Days after the assault, Barb noticed that she felt pain when she would urinate and wipe herself. (*Id.* at 305.) She returned to First Step on October 18, 2015, and had a genital examination performed by Sarah Slater (Slater). (*Id.* at 245, 248, 307.) Slater observed that Barb had tenderness in one genital area and, in another area, Barb had increased redness and tenderness, which Slater determined was a “possible healing abrasion.” (*Id.* at 249, 252.)

Detective Franke spoke with Lake two times on October 14, 2015, including a conversation in the park in the morning and an interview at the police station later that day. (9/7/18 Tr. at 155-61, 167-84.) Lake stated that he had last seen Barb two and half months ago. (*Id.* at 170.) But he later acknowledged that he saw her twice on October 12, 2015 when she came down to the river. (*Id.* at 172.) Lake said when Barb came to see him by the river, he complimented her appearance. (*Id.* at 174.) He said she touched him on the forearm, and he stroked her head and gave her a squeeze. (*Id.*) When asked whether the contact was sexual, Lake said it was “more like a church thing.” (*Id.* at 175.) He denied that his penis or pelvis came into contact with Barb or that he sexually assaulted her. (*Id.* at 175-76, 178.) He said when she was ready to leave, she put her shoes back on and “crutched up the hill.” (*Id.* at 177.)

Lake suggested that Barb may have made the allegation because of an incident that had occurred previously when he claimed he had rejected Barb’s

advances and embarrassed her. (*Id.* at 158, 178.) He varied in his timeframe for the prior incident, sometimes saying it occurred six months before and other times saying two years before. (*Id.* at 178.) When discussing that alleged prior incident, he would go off on tangents that made it difficult to understand him. (*Id.* at 179.) During one conversation, Lake made unsolicited remarks claiming that Barb had sex with 30 other men; had been flirting with other men in church in front of her husband; and sent him things on the internet saying she had sexual relations with other men. (*Id.* at 159.) Lake's answers were often nonlinear and meandering. (*Id.* at 160.)

Lake later told a friend during a recorded call that he had made a statement to Barb similar to, "I've got you now, you crippled little girl," and then followed it with a laugh. (9/7/16 Tr. at 184.)

III. The DNA evidence

When Barb spoke to law enforcement, an officer asked her for the clothes she had been wearing during the assault. Barb explained that she had already washed the clothes, but an officer told her that DNA may still be recoverable on her clothing. (9/7/16 Tr. at 113, 118, 211-12.) Barb gave the clothes to Detective Franke when she met him on October 14, 2015. (9/2/16 Tr. at 295-96.)

Serological testing of Barb's underwear revealed a stain from sperm cells that contained a mixture of at least two individuals. (D.C. Doc. 59, Ex. 1.) Testing revealed that Lake could be excluded as the contributor of the major profile. (*Id.*) No conclusions could be drawn about the contributor of that profile. (*Id.*) The crime lab was unable to draw any conclusions about the minor profile and indicated it could even have come from Barb's epithelial cells. (8/25/16 Tr. at 16.) A DNA profile was also obtained from epithelial cells on the underwear. The DNA from the epithelial cells contained a mixture of at least two individuals, and the major profile matched the DNA profile of Barb. (D.C. Doc. 59, Ex. 1.)

The State filed motions in limine in which the State moved to exclude any evidence of the victim's sexual conduct under the rape shield law. (D.C. Doc. 20.) The State explained that the absence of Lake's DNA on the victim's underwear was admissible, but testimony "that someone else's DNA was found potentially implicates the victim's sexual conduct and should be barred." (*Id.* at 5-6.)

Although Lake did not initially object to the State's motion to exclude evidence about an unidentified person's DNA, (D.C. Doc. 25 at 7), he argued at the hearing that he should be able to present testimony that male DNA that did not belong to Lake was found on sperm cells in the victim's underwear. (4/6/16 Tr. at 7-8.) The court held that testimony about another person's DNA was barred by the rape shield law. (*Id.* at 8-10.)

Four months later, Lake filed a motion and brief arguing that the evidence that another person's DNA was found on Barb's underwear and Lake's DNA was not found should be admitted. (D.C. Docs. 50, 51.) Lake explained that the rape shield law has to be balanced with the defendant's right to present a defense. (D.C. Doc. 51 at 5.) Lake argued that the DNA evidence was essential to his defense that the sexual act did not occur because Barb alleged that Lake had ejaculated on her but that it was unlikely his DNA would be found because she washed the underwear. Lake argued the jury was entitled to know that sperm cells that did not belong to Lake were found in her underwear. (*Id.*) Lake also argued that the evidence was not speculative nor unsupported and would not be an attack on her character. (*Id.*) Lake stated that "[t]he purpose of this evidence is to simply demonstrate that semen, other than Mr. Lake's, was still able to be located on the pair of underwear she wore during the alleged assault despite her washing them." (*Id.*)

In response, the State argued that the evidence should be excluded because it was speculative and unsupported. The State argued that Lake's claim that the evidence supported his defense was based on the assumption that the presence of other DNA meant that Lake's DNA was never present, and that assumption was not supported by an expert opinion or any other evidence. (D.C. Doc. 56 at 4-5.) The State also argued that the proffered evidence should be excluded under

Mont. R. Evid. 403 because the danger of confusing or misleading the jury substantially outweighed the prejudicial value of the evidence. (*Id.* at 5-7.) The State noted Lake would still have the ability to argue that Lake's DNA was not present and that its absence supported his claim that the sexual encounter never occurred. (*Id.* at 7.)

At a hearing on August 16, 2016, before the briefing on the DNA evidence was completed, the parties discussed whether Barb's husband would be required to submit to DNA testing to determine whether he was the contributor of the sperm cells in her underwear. (8/16/16 Tr.) The State explained that Barb's husband did not believe it was appropriate for him to have to provide a DNA sample. (8/16/16 Tr. at 9.) Lake's counsel stated that they had asked him if he would like to provide a DNA sample, but the defense did not intend to move for a court order that would require him to do so. (*Id.* at 10.)

Lake's counsel then explained that they wanted to be able to inform the jury that DNA was found in Barb's underwear, and it did not belong to Lake. (*Id.*) The court expressed concern that that evidence would violate the rape shield law. (*Id.* at 11.) The State stated that, based on its conversation with the crime lab, the State did not believe the conclusions Lake was drawing should be drawn from the evidence. (*Id.*) The State thus "ask[ed] that the defense be required to make an

offer of proof first to see if it is sufficient enough to overcome the victim's protections on the Rape Shield." (*Id.*)

The court issued an order setting a hearing on Lake's motion to admit the DNA evidence. (D.C. Doc. 58.) The order stated that "[t]he record as it presently exists is insufficient for the Court to determine whether or not the proposed evidence is admissible." (*Id.*) The court therefore ordered the defense to appear "and make an offer of proof of the evidence sought to be introduced at trial." (*Id.*)

Lake filed a reply in which he argued that the evidence was not speculative because the presence of DNA was an undisputed fact. (D.C. Doc. 59 at 2.) Lake stated that Joseph Pasternak (Pasternak), a forensic scientist at the Montana State Crime Lab, would testify that DNA is capable of surviving repeated washings. (*Id.*) Lake argued that the DNA in Barb's underwear likely went through the same wash cycle and previously went through additional wash cycles. (*Id.* at 3.) Lake also argued that the evidence was crucial because it supported his account that he did not attempt to have sexual intercourse with Barb. (*Id.*) Lake attached the DNA report from the crime lab and two articles stating that sperm cells can be located in clothing after clothing is washed. (D.C. Doc. 59, Exs. 1-3.)

At the hearing, the court asked for "a specific offer or proof of what it is that you seek to bring before the jury." (8/25/16 Tr. at 14.) Lake's counsel explained that they sought to admit testimony through Pasternak that sperm cells from

somebody other than Lake were located on Barb's underwear. (*Id.* at 15.)

Additionally, they intended to admit testimony that sperm cells are hardy and can survive going through the washing machine. (*Id.*) Lake's counsel argued the evidence should be admitted because the jury would presume the DNA was removed in the wash, but the presence of other DNA demonstrated that DNA can survive washing and would support the defense's position that Lake's ejaculate was not present because he did not commit the offense. (*Id.* at 21.)

In response, the State explained that it was possible that Lake's DNA was washed away when another person's was not, so the presence of the other person's DNA did not support Lake's defense. (*Id.* at 23-24.) And testimony from Pasternak would not assist the jury because he would simply say that he does not know whether Lake's DNA was washed away. (*Id.* at 24.) The most that Pasternak would be able to testify to is that some studies have shown that DNA can survive washings. (*Id.*)

Lake's counsel wanted to argue that it was unlikely that Lake's sperm cells were washed away if another person's DNA remained. (*Id.* at 30.) But the State argued that Lake could not say that because the expert, Pasternak, would state that he cannot draw that conclusion. (*Id.*)

The court expressed frustration at the hearing that the defense had not made an official offer of proof by demonstrating precisely what testimony Pasternak

would give. (*Id.* at 31.) In response, Lake filed an additional pleading after the hearing entitled Defendant's Continuing Offer of Proof of DNA in Support of Admitting DNA Result. (D.C. Doc. 62.) Lake stated that Pasternak was expected to testify that: 1) sperm cells were present in the crotch of the underwear; 2) DNA was extracted from those sperm cells, a major profile of an unknown male was obtained, and Lake was excluded as a contributor; 3) sperm cells are "hardy"; 4) sperm cells can survive washing; 5) DNA is more likely to be recovered from cotton material than polyester; and 6) Barb's underwear was cotton. (*Id.* at 2.)

The district court issued an order excluding evidence of unidentified DNA in Barb's underwear. (D.C. Doc. 66 at 7, available at Appellant's App. A.) The court ruled that if Lake laid the proper foundation, he would be able to offer testimony that his DNA was not found in Barb's underwear; that sperm cells are "hardy" and can survive washing; that there is support for the finding that DNA is more likely recovered after washing from cotton than from polyester; and that Barb's underwear was cotton. (*Id.* at 6-7.) The court explained that it had to balance the defendant's right to present a defense with the victim's rights under the rape shield law. (*Id.* at 4.) The court noted that evidence covered by the rape shield law should not be admitted if it is speculative or unsupported. The court rejected Lake's claim that his DNA evidence was not speculative or unsupported. The court explained,

the proffered evidence appears to go beyond what is contained in the crime lab report and consists of additional testimony related to the survival of sperm cells after laundering; the greater possibility of recovery of sperm cells from cotton and the identification of Jane Doe's underwear as made of cotton.

(*Id.* at 5.)

The court noted that Lake "has proffered no expert testimony that would enable a jury to understand the significance of unidentified DNA evidence which persisted after laundering or how to relate the presence of unidentified DNA to evidence that Defendant was not a contributor." (*Id.*)

The court then concluded that the introduction of the evidence would violate Mont. R. Evid. 403 because the evidence is more prejudicial than probative. (*Id.* at 5.) The court stated that "the effect of introducing such evidence immediately invites consideration of Jane Doe's sexual conduct contrary to the purpose and intent of the Montana Rape Shield Law." (*Id.* at 6.) The court explained that Lake's offer of proof did not support his assertion that the evidence would refute the victim's claim that Lake's DNA was not present because she washed her underwear. (*Id.*)

At trial, Pasternak testified that he tested the crotch region of Barb's underwear for the presence of DNA. (9/8/16 Tr. at 391.) Lake's DNA profile was not found on Barb's underwear, and no DNA profile matching Barb was found on the swim trunks Lake had been wearing at the time of the assault. (*Id.* at 394.)

Epithelial cells matching Barb's DNA profile were located on her underwear. (*Id.* at 393.)

Pasternak explained that although Barb stated that she had washed her underwear, the testing was still done because DNA cells can survive washing and provide evidence for the case. (*Id.* at 391-92.) He explained that there are many factors that can impact whether DNA would survive being washed, so he could not make a statement about the ability of DNA to remain after washing. (*Id.* at 396.) He explained that he did not know what made DNA more likely to remain in clothing, but he acknowledged that one factor might be the length of time that sperm had set in on the clothing. (*Id.* at 398.) Pasternak testified that sperm cells are hardier than epithelial cells and that cotton fabric holds DNA better than some other fabrics. (*Id.* at 392-93.)

Lake's counsel attempted to establish that Barb's epithelial cells that were located on her underwear must have survived the wash because they were located in the interior crotch region. (*Id.* at 399.) But Pasternak testified that he could only say that the cells were there, and they matched Barb. He could not say whether they survived the wash or whether they were put on the underwear after it was washed by Barb handling the underwear. (*Id.* at 399-400.)

During Lake's closing argument, his counsel reminded the jury that Pasternak had testified that DNA can survive washing, that Pasternak had no way

of knowing whether the underwear was actually washed, that epithelial cells break down easier, that cotton retains DNA better, and that Barb's DNA was "on the interior crotch region of Barb's underwear, not the exterior when you're folding their clothes, the interior crotch." (9/9/16 Tr. at 118.) Lake's counsel argued "What's significant is that he was able to find DNA on her—a pair of underwear where she says they were washed. This epithelial was found, but not one sperm cell or one piece of Nathan's DNA was found anywhere on those underwear. Underwear in which Barb said he ejaculated inside. Not one sperm cell survived. All right. That does not make sense." (*Id.* at 118-19.) In reply, the State noted that Pasternak testified that he had no way of knowing whether Barb's epithelial cells were placed on the underwear before or after it was washed. (*Id.* at 123-24.)

SUMMARY OF THE ARGUMENT

The district court properly balanced the rape shield law and the defendant's rights when the court excluded evidence that there was semen from an unidentified person on the victim's underwear. In this case, where the identity of the assailant was not in question, the probative value was not sufficient to override the rule excluding evidence of the victim's prior sexual conduct. Lake's claim that the evidence was highly probative is based on the unsupported assumption that Lake's sperm would not have been washed away if another person's remained. But

Lake's DNA expert was not willing or able to draw that conclusion. Without expert testimony to support Lake's theory about the sperm evidence, the district court's exclusion of the evidence was not an abuse of discretion.

Additionally, the court did not abuse its discretion when it excluded the evidence under Mont. R. Evid. 403 because the probative value was slight and was significantly outweighed by the danger of prejudice, misleading the jury, and confusing the issues.

Finally, even if the court erred in excluding the evidence, the error was harmless.

ARGUMENT

I. Standard of review

A district court has broad discretion when determining the relevance and admissibility of evidence. Accordingly, this Court generally reviews evidentiary rulings for abuse of discretion. *State v. Lotter*, 2013 MT 336, ¶ 13, 372 Mont. 445, 313 P.3d 459. Specifically, when a district court has excluded evidence under the rape shield law after balancing the victim's rights and the defendant's rights, this Court has reviewed the district court's exclusion of the evidence for an abuse of discretion. *State v. Aguado*, 2017 MT 54, ¶ 34, 387 Mont. 1, 390 P.3d 628. A district court abuses its discretion when it acts arbitrarily, without conscientious

judgment, or exceeds the bounds of reason. *State v. Franks*, 2014 MT 273, ¶ 11, 376 Mont. 431, 335 P.3d 725.

Citing *State v. Patterson*, 2012 MT 282, ¶ 10, 367 Mont. 186, 291 P.3d 556, Lake argues that the court's exclusion of the evidence should be reviewed de novo. In *Patterson* and other cases, this Court has stated that "to the extent that the court's ruling is based on an interpretation of an evidentiary ruling or statute, our review is de novo." *Patterson*, ¶ 10. This Court further stated in *Patterson* that "where the court's conclusions of law involve the Constitution or the rules of evidence, our review is, likewise, de novo." *Id.*

In this case, the district court balanced the victim's rights and the defendant's rights, as this Court has directed, and excluded evidence concerning the presence of semen that did not belong to the defendant in the victim's underwear. The issue on appeal is not whether the district court correctly interpreted the constitution or reached a correct conclusion of law; it is whether the court erred when, after balancing the defendant's and victim's rights, the court concluded that the rape shield law barred admission of the evidence. The court's ruling on admissibility made after balancing those interests should be reviewed for an abuse of discretion, which is the standard this Court applied in *Aguado*. *Aguado*, ¶ 34.

II. The district court did not abuse its discretion when it excluded evidence that sperm cells from a person other than Lake were found in Barb's underwear.

A. The court did not abuse its discretion when it excluded the evidence under the rape shield law.

Montana's rape shield law provides that "[e]vidence concerning the sexual conduct of the victim is inadmissible in" the prosecution of sexual crimes "except evidence of the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution." Mont. Code Ann. § 45-5-511(2). Evidence about the presence of sperm is covered by the rape shield law because it is evidence concerning the sexual conduct of the victim. *See State v. Bauer*, 2002 MT 7, ¶ 31, 308 Mont. 99, 39 P.3d 689 (relying on the rape shield law to hold the district court did not abuse its discretion when it excluded evidence about the presence of sperm on a blanket that did not match the defendant's DNA profile).

The rape shield law is intended to "protect victims from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior." *State v. Awbery*, 2016 MT 48, ¶ 17, 382 Mont. 334, 367 P.3d 346. It "reflects a compelling state interest in keeping a rape trial from becoming a trial of the victim" and demonstrates "society's recognition that a rape victim's prior sexual

history is irrelevant to issues of consent or the victim's propensity for truthfulness." *Awbery*, ¶ 17.

This Court has recognized that the rape shield law can conflict with a defendant's right to confront his accuser under the Sixth Amendment and the defendant's right to present a defense under the Sixth and Fourteenth Amendments. *State v. Colburn*, 2016 MT 41, ¶¶ 24, 39, 382 Mont. 223, 366 P.3d 258. "Neither the Rape Shield Law nor the defendant's right to confront and to present evidence are absolute." *Awbery*, ¶ 20. "The Rape Shield Law therefore cannot be applied to exclude evidence arbitrarily or mechanistically." *Colburn*, ¶ 25. It is the trial court's responsibility to strike a balance between the victim's rights under the rape shield law and the defendant's rights. *Id.* A court balancing those interests "should require that the defendant's proffered evidence is not merely speculative or unsupported." *Id.* "The court should consider whether the evidence is relevant and probative (Rules 401 and 402, M. R. Evid.); whether the evidence is merely cumulative of other admissible evidence; and whether the probative value of the evidence is outweighed by its prejudicial effect (Rule 403, M. R. Evid.)." *Awbery*, ¶ 20 (citation omitted).

In *Colburn*, this Court held that a district court erred when it mechanistically applied the rape shield law to exclude evidence of a victim's prior sexual abuse. *Colburn*, ¶ 29. Colburn was charged with sexually abusing his daughter and an

11-year-old neighbor, R.W. *Colburn*, ¶ 9. At trial, the State presented evidence from a forensic interviewer who testified that R.W. “provided details that were sexual knowledge that a child may not have *unless they’ve had the experience of sexual abuse.*” *Colburn*, ¶ 11. Colburn sought to admit evidence that several weeks after R.W. made allegations against Colburn, she disclosed that she was sexually abused by her father, and she stated that she finally felt comfortable disclosing the information because her mother had believed her when she made allegations against Colburn. *Colburn*, ¶ 35 (McKinnon, J., concurring). By the time of Colburn’s trial, R.W.’s father had pleaded guilty to sexually assaulting her. *Colburn*, ¶ 37 (McKinnon, J., concurring). Colburn argued that evidence of R.W.’s abuse by her father was admissible for two reasons: first, because she had a motive to fabricate allegations against Colburn in order to “test the waters” to learn whether her mother would believe her allegations; and second, because evidence she had been sexually abused by her father would provide an alternative source for her sexual knowledge. *Id.* This Court reversed because the district court excluded evidence of R.W.’s sexual abuse by her father without balancing the victim’s rights with Colburn’s right to present a defense. *Colburn*, ¶ 29.

In contrast, this Court held in *Awbery* that a district court properly excluded evidence and argument about prior sexual abuse suffered by three of Awbery’s victims. *Awbery*, ¶ 21. This Court noted that Awbery’s theory that the prior abuse

led the victims to suffer PTSD, which led them to make erroneous reports against Awbery, was unsupported speculation. *Id.* Additionally, the evidence “presented a considerable risk of turning the trial into a second case involving incidents unrelated to Awbery’s offenses,” creating “a high risk of jury confusion.” *Awbery*, ¶ 22. Because Awbery’s theory was speculative and unsupported and the evidence was likely to confuse the jury, this Court concluded that the court properly balanced the interests involved and excluded the evidence.

Similarly, this Court held in *Aguado* that a district court did not abuse its discretion when it excluded evidence of the victim’s sexual orientation because the evidence was intended to prejudice the victim in the eyes of the jury and the defendant’s theory to support admission of the evidence was speculative and unsupported by the evidence. *State v. Aguado*, 2017 MT 54, ¶ 34, 387 Mont. 1, 390 P.3d 628.

Unlike *Colburn*, the district court in this case discussed the defendant’s rights to present a defense and confront witnesses, and the court balanced those interests with the victim’s rights under the rape shield law. (Appellant’s App. A at 3-4.) The district court did not abuse its discretion when it balanced those interests and excluded evidence of the presence of another person’s sperm on Barb’s underwear.

Lake wanted to admit the DNA evidence so he could argue that if another person's sperm was on Barb's underwear after it was washed, it was unlikely Lake's sperm had all been washed away, and his sperm must have never been there. That conclusion is unsupported by any evidence presented in Lake's offer of proof and is speculative. As the court noted, "the proffered evidence appears to go beyond what is contained in the crime lab report." (Appellant's App. A at 5.) Although Pasternak was qualified to testify about the ability of sperm cells to survive washing, the court noted that Lake had "not offered any scientific or expert testimony regarding how to interpret the presence of the unidentified DNA in a laundered garment when other DNA (Defendant's) was not found." (*Id.*)

Before the hearing on the admissibility of the DNA evidence, the court directed the defense to provide an offer of proof demonstrating what testimony it sought to admit. (D.C. Doc. 58.) Despite that request, the defense failed to offer any testimony at the hearing or clearly demonstrate what testimony Pasternak could offer. (Appellant's App. A at 3; 8/25/16 Tr.) The State explained at the hearing that Pasternak would not testify that the presence of sperm on the underwear meant anything about whether Lake's DNA had been washed away from the underwear. (8/25/16 Tr. at 24, 29-30.) Lake argues that it is a "common sense" inference that Lake's sperm would not have been washed away if another person's remained. (Appellant's Br. at 13.) But the court correctly stated that

“[i]nterpreting DNA evidence is decidedly not a common sense endeavor—it is highly technical and requires expert testimony from a qualified witness. Defendant has proffered no expert testimony that would enable a jury to understand the significance of unidentified DNA evidence which persisted after laundering or how to relate the presence of unidentified DNA to evidence that Defendant was not a contributor.” (Appellant’s App. A at 5.)

Lake argues “the continued presence of other sperm cells on the underwear was highly probative that the particular washing to which [Barb] subjected the underwear did not remove sperm cells and, thus, that there was reason to doubt the State’s theory that the washing completely removed all of Nathan’s sperm cells.” (Appellant’s Br. at 17-18.) Lake’s argument presumes that both Lake’s sperm and the unknown person’s sperm would be equally likely to have been washed away, but he does not have any expert testimony to support that. Indeed, Pasternak’s testimony indicated that it is unknown what causes sperm cells to sometimes survive washing and to sometimes be washed away. Unknown factors could cause one person’s sperm to be washed away when another person’s remains. For example, Pasternak testified that the amount of time that sperm has set on the underwear could impact whether the sperm is washed away because sperm might be more resistant to washing after it has been on clothing longer. (9/8/16 Tr. at

398.)¹ Barb washed her clothing, including her underwear, as soon as she got home after being assaulted because she “felt disgusting.” (9/1/16 Tr. at 182-83.) The lack of time between the placement of Lake’s sperm on the underwear and the washing is one of many factors that may have affected whether Lake’s sperm would have remained. But Pasternak, Lake’s expert, would not have been able to tell the jury what factors make sperm less likely to remain, except for stating sperm is more likely to remain in cotton, because it is not known what factors those are. (9/8/16 Tr. at 397-98.)

Significantly, Pasternak would not have been able or willing to testify that the presence of another person’s sperm provided any information about whether Lake’s sperm had ever been present. (*See* 8/25/16 Tr. at 24, 29-30.) If the DNA expert cannot draw that conclusion, Lake’s counsel should not be able to argue that the evidence establishes that conclusion. That is all the more true where Lake was given an opportunity to make an offer of proof with testimony from an expert demonstrating that the presence of another person’s DNA was relevant to

¹In one of the articles Lake attached to his motion as his offer of proof, the authors speculate that the eight-month lag time between depositing semen and washing the clothing in their study may “have made the stains more resistant to the washing process,” explaining why a study with a lag time of only 24 hours located lower quantities of DNA. H. Brayley-Morris et al., *Persistence of DNA from Laundered Semen Stains: Implications for Child Sex Trafficking Cases*, Forensic Science International: Genetics at 169, available at D.C. Doc. 59, Ex. 2.

determining whether Lake's DNA was on the underwear, and he failed to provide expert testimony to support that conclusion.

Lake argues that the excluded evidence was critical to his defense. But he was allowed to present evidence that Lake's DNA was not present, and DNA can remain after clothes are washed. (9/8/16 Tr. at 391-94.) Indeed, the State presented testimony that evidence can be found after clothes are washed. (9/7/16 Tr. at 113.) From that, Lake was able to argue the absence of the DNA indicated that it was never there, which was the argument that was supported by the evidence. The excluded evidence did not establish what Lake alleged it established—that Lake's sperm was never present—because Lake's expert would not have testified that the presence of another person's sperm was in any way determinative about whether Lake's sperm was ever present. The court correctly determined that evidence of another person's sperm did not have the probative value that Lake asserted it had.

The court also correctly determined that the prejudicial value outweighed the probative value of the evidence. Evidence about sperm in Barb's underwear is prejudicial to Barb because it makes her sexual practices an issue at the trial, which the rape shield law is designed to avoid. Lake points out that Barb is married, and there is no reason to believe the sperm cells do not belong to her husband. But Lake never requested that the court order Barb's husband to provide a DNA

sample, so the contributor of the sperm cells has not been established. Admitting evidence that there were sperm cells in Barb's underwear from an unknown contributor would raise questions about the contributor of the sperm cells when that issue is irrelevant to this case. This is not a case where the victim could have been mistaken about the identity of the assailant. Instead, the issue was whether Lake committed the acts Barb alleged he committed. Evidence about unidentified sperm cells in Barb's underwear would have prejudiced the victim and distracted the jury with an irrelevant issue.

Additionally, the DNA evidence had a significant potential of confusing the jury. Lake argues that he is making a "common-sense" inference about the DNA evidence but his DNA expert would not support his inference. Jurors may mistakenly make conclusions the jurors believe are "common-sense" when those conclusions are not actually supported by scientific evidence. Inviting jurors to make conclusions about DNA evidence that cannot be drawn by DNA experts creates a significant potential for misleading the jury.

Lake argues that it was unfair for the State to be able to admit evidence that the underwear was washed when he was not able to present evidence that other sperm remained. But evidence of the washing was relevant and admissible. It explained the actions Barb took after the assault and was a possible reason that Lake's DNA was not located on her underwear. The admission of that evidence

did not open the door to evidence about the sperm that remained on the underwear because, as explained above, the presence of another person's sperm on the underwear does not demonstrate that Lake's sperm was not washed away.

Lake also argues that the State was able to defeat the logic of his skin-cell argument because he was not allowed to present evidence about another person's sperm cells. But the two pieces of evidence were not related. The court properly excluded evidence of the other person's sperm cells because that evidence did not demonstrate what he alleged it demonstrated and, therefore, when the rape shield interests were balanced, it was not admissible. The skin cell evidence never demonstrated what Lake attempted to argue it demonstrated, and the State properly pointed that out. Lake attempted to argue that Lake's sperm cells, which are hardier than skin cells, would not have been washed away if Barb's skin cells remained. To make that argument, Lake suggested that the skin cells must have been on the underwear before they were washed because they were on the interior of the crotch region. But that assertion is baseless. When removing her underwear from the wash machine or dryer, handling the underwear, and then bringing it to law enforcement, Barb could have touched any portion of it—inside or out. The State merely elicited testimony from Lake's expert indicating what was obvious—there was no way to know whether Barb's skin cells were placed on the underwear before or after it was washed. The failure of Lake's argument about

skin cells did not provide a reason for the court to admit evidence about another person's sperm cells because, as explained above, that evidence was properly excluded under the rape shield law.

In sum, the district court properly balanced the victim's rights under the rape shield law and Lake's right to present a defense. The district court did not abuse its discretion when it excluded evidence about an unidentified person's sperm cells because the evidence did not have the probative value Lake claimed, Lake was relying on a speculative theory that was unsupported by his expert witness, and the evidence was likely to prejudice the victim and confuse the jury.

B. The district court also did not abuse its discretion when it excluded the sperm evidence under Mont. R. Evid. 403.

The district court relied on both the rape shield law and Mont. R. Evid. 403 in its ruling excluding evidence about semen. Although Rule 403 is incorporated in the rape shield analysis, *see Awbery*, ¶ 20, it appears the district court separately held that the semen evidence was barred by Rule 403. The court stated, "This Court concludes that the introduction into evidence that there were sperm cells found in Jane Doe's underwear from an unknown male violates Rule 403 Mont. R. Evid. Such evidence is more prejudicial than probative." (Appellant's App. A at 5.)

Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Although the district court omitted the word “substantially,” the district court’s analysis demonstrates that the court properly excluded the evidence under Rule 403 because the probative value of the semen evidence was substantially outweighed by unfair prejudice, confusion of the issues, and misleading the jury. As explained above, the semen had little probative value because an expert witness would not be able to testify that the presence of another person’s semen on the underwear made it more likely that Lake’s semen was never present. And there was a danger of misleading the jury because Lake wanted to use the evidence to argue that it was unlikely that Lake’s DNA was completely washed away (8/25/16 Tr. at 30), and that was not a conclusion the DNA expert would be willing to make. Finally, the evidence is unfairly prejudicial to the victim and had the potential to confuse the issues because it raises questions about the victim’s sexual practices that are irrelevant to the determination of whether Lake committed attempted sexual intercourse without consent. Therefore, the district court did not abuse its discretion when it excluded the semen evidence under Rule 403.

Further, exclusion of the evidence under Rule 403 did not violate Lake’s right to present a defense. The right to present a defense “is subject to reasonable restrictions.” *United States v. Scheffer*, 523 U.S. 303, 308 (1998). “[S]tate and

federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308. The Supreme Court has also explained that "[t]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). Rule 403 is a "standard rule of evidence" with a counterpart in the federal rules of evidence. Indeed, the Supreme Court has listed Fed. R. Evid. 403 and Mont. R. Evid. 403 as examples of "familiar and unquestionably constitutional evidentiary rules." *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). The exclusion of semen evidence in this case did not violate Lake's right to present a defense because the evidence was excluded under a well-established rule of evidence that permissibly excludes evidence where the probative value is substantially outweighed by prejudice and other risks.

C. Even if the district court erred in excluding evidence of the prior sexual assaults, that error was harmless.

If the court erred in excluding evidence that sperm was located in Barb's underwear, that error was harmless. A federal constitutional error is harmless if the court can declare a belief that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). The evidence presented at

trial demonstrated that Barb worked with Lake for about three years and grew to care a great deal about him. She spent a large amount of time and spent her own money to try to bring Lake into society and help him obtain shelter. There is no indication that, after spending years trying to help Lake, Barb had any motive to fabricate this offense.

And, although there were no witnesses to the offense, Barb's account is corroborated by other evidence. Barb testified about several previous incidents where Lake sexually assaulted her or engaged in behavior that was threatening. Barb's friend and Barb's husband testified that she had told them about two of those incidents. (9/6/16 Tr. at 540-41, 545; 9/8/16 Tr. at 281, 293-94.) Although Barb continued to have contact with Lake after those incidents, she discussed ceasing contact with him, reduced the amount of time she spent alone with him, and entered into counseling. (9/1/16 Tr. at 102, 121, 129, 136; 9/6/16 Tr. at 545, 551-52; 9/8/16 Tr. at 286-87.) Barb eventually got an order of protection to stop Lake from having any contact with her, which was a difficult decision after all of the work she had done with him. (9/1/16 Tr. at 146-47; 9/7/16 Tr. at 86.)

After Lake committed the attempted sexual intercourse without consent in October 2015, Barb's friends immediately saw a significant change in her. (9/2/16 Tr. at 555-57, 560-61; 9/7/16 Tr. at 68-69, 72-74, 76, 82.) And approximately a week later, a nurse conducting an examination observed that Barb

had a possible healing abrasion. All of these details corroborate Barb's credible testimony about being assaulted by Lake.

Additionally, Lake agreed that he spoke to Barb twice on the day of the offense in the park where he was living. (9/7/16 Tr. at 172.) He acknowledged that he petted her head and gave her a squeeze, accurately described what she was wearing, and stated that she was using crutches. (*Id.* at 174-77.) Lake denied that he committed any sexual act, (*id.* at 176, 183), but he acknowledged that she returned later that night and was upset with him. (*Id.* at 177-78.) He was unable to provide any logical reason that she was angry at him, but stated she came back to yell at him and say he was not her husband. (*Id.* at 177-79.) That only makes sense if Barb's accusations are true. And Lake told a person later that he had told her when she was down there the first time, "I've got you" and referred to her as crippled, followed by a laugh. (*Id.* at 184.) That is consistent with Barb's report to law enforcement. (*Id.* at 116.)

Further, the evidence that another person's sperm was on Barb's underwear would have had little probative value. Although Lake would have used the evidence to argue that his sperm would not have been washed away and, therefore, must have never been on the underwear, the DNA expert would not have supported that conclusion. Even if the jury had doubts about whether Lake's sperm was ever on the underwear, that would not create significant doubt about Lake's guilt in

light of the evidence corroborating Barb's testimony. Lake could have committed the act Barb described, and she may have simply been mistaken about whether he ejaculated.

Given the strength of the evidence against Lake and the lack of probative value of the excluded evidence, the alleged error is harmless beyond a reasonable doubt.

CONCLUSION

The district court's exclusion of semen evidence was not an abuse of discretion and, if it was error, it was harmless. Accordingly, Lake's conviction for attempted sexual intercourse without consent should be affirmed.

Respectfully submitted this 22nd day of October, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,636 words, excluding certificate of service and certificate of compliance.

/s/ *Mardell Ployhar*
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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-22-2018:

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