

STATE OF MAINE
AROOSTOOK, SS.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET #: ARO-21-366

STATE OF MAINE
APPELLEE

V.

JOMO WHITE
APPELLANT

ON APPEAL FROM THE UNIFIED CRIMINAL COURT, CARIBOU
AROOSTOOK COUNTY

****BRIEF OF APPELLEE****

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Statement of Facts and of Procedural History

On September 9, 2019, Jon Miller was at his home in the MicMac housing units located at 23 Northern Road, Presque Isle. Transcript, Volume 4, Page 188, Line 11-25 (hereinafter referred to as T1, v-, p.-, l.-). Also at the home was his girlfriend Shelby Richardson who was asleep in main floor bedroom. T1, v.2, p.91, l.3-7. Stenson Gustin was sleeping on the couch in the living room. T1, v.3, p.127, l.20-25. Danny Miller, Jon Miller's brother, was in the basement. Kayla Hanson was in the basement. T1, v.2, p.111, l.2-8. A man known as Val was paying \$35 per day to sleep in the basement. T1, v.4, p.191, l.20-205; T1, v.2, p.192, l.1-15.

At about 5:00 a.m., Brittany Britton and a masked man entered the residence at 23 Northern Road. T1, v.3, p.127, l.5-8; T1, v.3, p.130, l.1-20. The man asked Stenson Gustin if he was calling the police and took Stenson Gustin's phone. T1, v.3, p.132, l.22-25; T1, v.3, p.133, l.1-21. Brittany Britton made her way first down the basement steps followed by the masked man. T1, v.4, p.194, l.2-12; T1, v.4, p.195, l.11-18. The masked man was carrying a firearm at his side. T1, v.4, p.194, l.16-21; T1, v.4, p.195, l.24-25. He proceeded to the bottom of the stairs and into the basement. T1, v.2, p.118, l.7-17. The masked man began to lift the gun. T1, v.2, p.123, l.10-21. "Val" got a gun from a bench in the basement and shots were fired. T1, v.2, p.118, l.17-23; T1, v.2, p.119, l.13-15. Both men proceeded from the basement to the main floor of the residence. T1, v.2, p.120, l.8-9. Gunshots were exchanged by "Val" and the masked man on the main level of the residence. T1, v.4, p.197, l.13-23. "Val" retreated back to

the basement with a gunshot wound. T1, v.4, p.198, 1.1-4. “Val” continued to monitor the stairs and, as he would approach the stairs, “Val” was continuing to get shot by the masked man. T1, v.4, p.198, 1.10-22. “Val” was shot by the masked man three to four times. T1, v.4, p.199, 1.5-17. The masked man ordered Stenson Gustin into the basement to retrieve an item. T1, v.3, p.135, 1.23-25; T1, v.3, p.136, 1.1-23. Shelby Richardson looked through her bedroom window after shots ceased and saw Brittany Britton and a black male leave the scene and proceed in the direction of the community center. T1, v.2, p.94, 1.17-25; T1, v.2, p.95, 1.1-21.

On September 9, 2019, Sgt. Tyler Cote of the Presque Isle Police Department was dispatched to 23 Northern Road to respond to two 911 calls. T1, v.1, p.62, 1.4-5. The second 911 call was made from a male who said he was shot and dying. T1, v.1, p.105, 1.14-16. Sgt. Cote arrived at 23 Northern Road within one minute of the call. T1, v.1, p.61, 1.23-24. The home located at 23 Northern Road is a duplex located a short distance from Northern Maine Community College in a residential neighborhood. T1, v.1, p.63, 1.1-15. Sgt. Cote exited his cruiser and attempted a visual of the inside of the home through a basement window. T1, v.1, p.64, 1.11-19. Sgt. Cote observed a commotion in the home and saw what he believed to be blood on the floor and shell casings. T1, v.1, p.64, 1.20-25. Sgt. Lucas Hafford and Officer Matthew Brown of Presque Isle Police Department arrived on scene approximately 30 seconds after Sgt. Cote arrived at the residence. T1, v.1, p.65, 1.8-15.

Once Sgt. Cote had backup at the scene, he knocked on the front door of 23 Northern Road and backed away for cover at the corner of the garage until someone opened the door. T1, v.1, p.66, l.14-25; T1, v.1, p.67, l.1. Danny Miller opened the door to the residence. T1, v.1, p.67, l.2-11. Sgt. Cote proceeded to the basement. T1, v.1, p.69, l.7-9. There were individuals located in the basement and Sgt. Cote told them to go upstairs to the living room. T1, v.1, p.69, l.13-25. Sgt. Cote identified the individuals in the home as Danny Miller, Jon Miller, Kayla Hanson, Stenson Gustin, and Jon's girlfriend, Shelby. T1, v.1, p.70, l.18-22. Sgt. Hafford and Officer Brown detained the individuals present in the home and placed them in handcuffs. T1, v.1, p.89, l.13-18. Sgt. Cote located an unidentified male slouched against a wall in the basement. T1, v.1, p.71, l.1-13. The unidentified male was unresponsive, and the officer observed the male was wearing a bullet proof vest over his clothing and had a through and through bullet wound to the bicep. T1, v.1, p.71, l.12-23. Sgt. Cote applied a tourniquet to the male's arm and provided additional first aid. T1, v.1, p.72, l.5-11. The officer removed the male's vest and observed two additional gun shot wounds to his chest area. T1, v.1, p.72, l.13-24. While administering first aid, Sgt. Cote observed a large pool of blood on the floor and a magazine to a firearm. T1, v.1, p.73, l.22-25. The officer also observed approximately ten (10) shell casings on the floor of the basement. T1, v.1, p.74, l.10-24. Officer Brown joined Sgt. Cote in the basement and continued compression to one of the male's gunshot wounds. T1, v.1, p.90, l.3-21.

Sgt. Hafford exited the residence to call Maine State Police, Maine State Police Major Crimes Unit, the Presque Isle Police Department Chief of Police, and the Presque Isle Police Department detective. T1, v.1, p.111, l.13-20. While outside, Sgt. Hafford observed a security camera mounted outside a building on the opposite side of the street. T1, v.1, p.112, l.14-19.

Presque Isle Ambulance Service arrived on scene not long after law enforcement arrived at the residence. T1, v.1, p.76, l.6-12. The male was transported to the hospital by ambulance. T1, v.1, p.128, l.9-15. Once at the hospital, the male was assessed in the emergency room and then brought to the operating room. T1, v.2, p.27, l.4-9. The male had a gun shot wound to his upper arm and to the abdomen. T1, v.2, p.33, l.1-15. The abdominal injury included damage to the colon and kidney and a collapsed lung. T1, v.2, p.34, l.8-25; T1, v.2, p.35, l.1; T1, v.2, p.48, l.12-14. A projectile, resembling a bullet, was located in the male's back during surgery. T1, v.2, p.48, l.15-25. Due to the extent of his injuries, he was transported to Eastern Maine Medical Center in Bangor to care for the patient's ongoing trauma. T1, v.2, p.50, l.5-17. The male patient was later identified as Piccolo Martez Robertson. T1, v.5, p.86, l.18-23.

Corporal Nicolas Casavant with Maine State Police was dispatched to Northern Road around 5:50 a.m. on September 9, 2019. T1, v.2, p.56, l.10-20. Corporal Casavant was assigned to obtain any video from the community center security camera located across the street from 23 Northern Road. T1, v.2, p.58, l.12-25.

Corporal Casavant viewed the video and observed that the video captured a male in a black jacket, a female, and a masked male walking behind the community center toward 23 Northern Road. T1, v.2, p.60, 1.9-17. The community center had multiple cameras that captured the three individuals from different angles. T1, v.2, p.60, 1.18-23. From another camera angle, the male in the black jacket and the female go to the front door and the masked male stands off by the side of the steps in front of the garage door. T1, v.2, p.60, 1.21-25; T1, v.2, p.61, 1.1-2. The camera also captured the individuals leaving 23 Northern Road and Corporal Casavant saw on the video that the masked male discarded an object by a red building near the playground. T1, v.2, p.66, 1.1-18. By the movement of the individual, Corporal Casavant believed the male discarded his mask. T1, v.2, p.66, 1.18-20. Lt. Brian Harris of Maine State Police responded to the area and, utilizing the camera system in real time, Corporal Casavant directed Lt. Harris to the object. T1, v.4, p.9, 1.15-25; T1, v.4, p.10, 1.1-10. Lt. Harris discovered a white, full-faced, Halloween style mask. T1, v.4, p.10, 1.13-25.

Approximately two nights prior to this incident, Lt. Harris and Sheriff Shawn Gillen were at Walmart in Presque Isle. T1, v.4, p.11, 1.19-25; T1, v.4, p.12, 1.1. Sheriff Gillen observed a black male pick up a similar mask in Walmart. T1, v.4, p.31, 1.11-14. The male stuck out to Lt. Harris due to his demonstrative nature in the store. T1, v.4, p.13, 1.1-5. Lt. Harris sent a photo of the mask on the ground to Sheriff Gillen. T1, v.4, p.14, 1.8-16. Sheriff Gillen confirmed it was the same mask he saw with the man at Walmart. T1, v.4, p.30, 1.7-25; T1, v.4, p.31, 1.1.

The video footage from the community center was shown to Sgt. Cote and he identified the female as Brittany Britton and the unmasked, white male as Jason Alexander. T1, v.1, p.81, l.3-7. Sgt. Cote did not recognize the other male but observed him to be a huskier, black male putting on a mask. T1, v.1, p.81, l.8-13. Sgt. Hafford was also shown the video and he also identified Brittany Britton and Jason Alexander but he could not identify the third individual. T1, v.1, p.115, l.3-14.

Two individuals ran by the house of Luke Joseph in the early morning hours of September 9, 2019. T1, v.2, p.14, l.10-22. His home is located on MicMac Drive, adjacent to Northern Road. T1, v.2, p.12, l.15-25. He saw the individuals run to the home of Shelby York. T1, v.2, p.15, l.14-24. He then saw a pickup truck leaving that residence. T1, v.2, p.17, l.8-17.

Brittany Britton and a black male arrived at the residence of Aaron Rushing and Thirisha Simon on Mechanic Street, Presque Isle on September 9, 2019. T1, v.3, p.161, l.1-20; T1, v.3, p.162, l.14-24; T1, v.3, p.163, l.2-3. The male had a scruffy beard and a short “afro”. T1, v.3, p.163, l.4-13. He brought a set of clippers to the residence in a Walmart bag. T1, v.3, p.163, l.14-25; T1, v.3, p.164, l.1-2. While at the residence the male cut his hair, shaved his beard, and took a shower. T1, v.3, p.1, l.2-8.

On September 10, 2019, law enforcement received a credible tip that the suspect was staying at a residence at 6 Turner Street in Presque Isle. T1, v.4, p.15, l.9-17; T1, v.4, p.17, l.12-14; T1, v.4, p.39, l.22-25. A PA system was used to call out the

occupants of 6 Turner Street. T1, v.4, p.41, 1.9-12. After approximately 30 minutes on the PA system, three people (two males and one female) exited the front of the house and were detained by law enforcement. T1, v.4, p.42, 1.14-25; T1, v.4, p.43, 1.2-9; T1, v.5, p.46, 1.2-5. Later, a black male subject wearing a red jacket was apprehended by law enforcement leaving the rear of the residence. T1, v.5, p.48, 1.7-19. The male was identified as Jomo White. T1, v.4, p.21, 1.7-25. Jomo White asked about the man he shot and whether he was still alive. T1, v.4, p.21, 1.3-6. Jomo White inquired whether law enforcement found his gun and said a kid will never find it because he took care of it. T1, v.4, p.47, 1.1-8. He told law enforcement that he acted in self-defense and that he shot to kill. T1, v.4, p.47, 1.9-13. Jomo White was transported to Presque Isle Police Department where he was interviewed after waiving Miranda by Detective Chad Lindsay. T1, v.5, p.89, 1.7-25; T1, v.5, p.90, 1.1-3. During the interview, Jomo White indicated he was involved in drug dealing and assisted with setting up drug dealing in the Presque Isle area. T1, v.5, p.106, 1.3-7. He explained that he was part of an organization, and his goal was to remove "Val" from his position and to collect a debt that he owed to either Jomo White or the organization. T1, v.5, p.107, 1.3-14; T1, v.5, p.113, 1.17-25; T1, v.5, p.114, 1.1-4. Jomo White stated he wore a mask so no one would recognize him. T1, v.5, p.110, 1.7-12. He initially stated he found a gun at the residence but eventually confessed that he brought a gun with him that morning. T1, v.5, p.110, 1.13-17.

The appellant was charged with Attempted Murder, Elevated Aggravated Assault, Reckless Conduct with a Dangerous Weapon, Possession of a Firearm by a Prohibited Person, and Robbery.¹ Appendix, p. 1, 49-50. The Appellant filed a Motion to Change Venue on November 2, 2020. Jury selection was held on July 26, 2019. The Court denied Appellant's Motion to Change Venue on July 27, 2021. A jury trial was held at the Aroostook County Superior Court in Caribou on July 27, 28, 29, 30, August 2, 3, 4 and 5. Appendix, p. 10. Appellant made a motion for mistrial on July 27, 2021 after the State's opening statement. The Court denied Appellant's motion for mistrial. Appellant made a motion for mistrial on August 4, 2021 after the State's closing argument. The Court denied Appellant's motion for mistrial. Appendix, pp. 6-7. The appellant did not testify. T1, v.6, p.5, l.12-19.

On August 5, 2021, the jury returned verdicts of guilty to Counts 1, 2, 3 and 5. On Count 4, Justice Stephen Nelson found appellant guilty. On August 11, 2021, Appellant filed a Motion for New Trial alleging that the jury may have given significant consideration to Mr. White's failure to testify in its deliberations. Appendix, p. 51-52. The motion was denied by the court on September 7, 2021. The appellant was sentenced on September 10, 2021. A Notice of Appeal to this Court was filed on September 21, 2021. Appendix, p. 11.

¹ Attempted Murder, 17-A M.R.S. § 152(1)(A), 201, Class A; Elevated Aggravated Assault, 17-A M.R.S. § 208-B(1)(A), Class A; Reckless Conduct with a Dangerous Weapon, 17-A M.R.S. § 211(1), 1252(4), Class C; Possession of a Firearm by a Prohibited Person, 15 M.R.S. § 393(1)(A-1)(3), Class C; Robbery, 17-A M.R.S. § 651(1)(D), Class A

Issues Presented

- 1) Whether the Court abused its discretion in denying Appellant's motions for mistrial based on the allegation of prosecutorial misconduct for: a) Prosecutor using the phrase of holding Appellant "accountable" during his opening statement, and b) Prosecutor's reference to Appellant's audio interview during closing argument.
- 2) Whether the Court abused its discretion by denying to order a change of venue.

Argument

- 1) The State's conduct during trial was proper and any error was harmless.
 - a. The State's opening argument did not contain any error in discussing holding Appellant accountable after detailing the State's high burden of proof beyond a reasonable doubt and meeting the elements of each count alleged.

When determining whether the State has engaged in prosecutorial misconduct, the Court must "first determine whether the misconduct occurred." *State v. Cheney*, 2012 ME 119, P34. If an improper statement in fact occurred then the Court must "review the State's comments as a whole, examining the incidents of misconduct both alone and taken together." *Id.* If the defendant objected at trial, the Court reviews the comments for harmless error and affirm the conviction if it is highly probable that the jury's determination of guilt was unaffected by the prosecutor's comments. *Id.*

In determining whether a prosecutor's statement constitutes misconduct, the central question is whether the prosecutor's comment is fairly based on the facts in evidence." *Id.* at P45.

When the defense objects to prosecution statements at trial, the Court reviews the alleged prosecutorial misconduct for harmless error and do not vacate a judgment if it is highly probable that the jury's determination of guilt was unaffected by the prosecutor's comments. *State v. Clark*, 2008 ME 136, ¶7.

In each instance of alleged misconduct raised in Appellant's brief regarding the opening statement and closing argument, the State made it clear that the jury needed to find that the State had proven the elements of the charged offenses beyond a reasonable doubt and once the facts were so established that the defendant would then be guilty of those crimes and should be held to account for them.

During the opening statements, the State said the following:

"Ladies and gentlemen of the jury, after you have considered all of the evidence in this case, after you have heard from all of the witnesses, after you have seen all of the exhibits, taken into consideration the videos and the testimony of everyone and kept your open mind with the charge from the judge, and keeping the elements of the offense in mind, at the end of the case, the State will have met its burden beyond a reasonable doubt and we will ask you to hold the defendant accountable for his criminal actions and to find him guilty for the attempted murder of Val, of the elevated aggravated assault, of the reckless conduct with a dangerous weapon, and of the robbery to get the drugs and the money, because of his intent, because of his plan, because of his actions and his choices." T1, v.1, p. 30, 1.18-25; p. 31, 1.1-9.

During the closing argument, the State said the following:

"Ladies and gentlemen of the jury, the evidence establishes beyond a reasonable doubt, beyond all doubt, every element of the offenses of the charges brought against the defendant. The evidence shows that the defendant is guilty of Robbery, he is guilty

of Reckless Conduct with a Dangerous Weapon, he is guilty of Aggravated Assault. And, ladies and gentlemen of the jury, the evidence establishes beyond a reasonable doubt that the defendant is guilty of the Attempted Murder of Val.

“You’re going to get a verdict form from the Court. And on the verdict form, you will have the opportunity to find the defendant guilty. And the evidence suggests very strongly that you should, that the defendant should be held- and found guilty of each and every charge. So, I urge you once you’re in the jury room and have had the chance to deliberate to find the defendant guilty on all of the charges.”

T.1, v.6, p. 70, 1.15-25; p.71, 1.1-7.

At no time did the State suggest, directly or otherwise, that the jury had a civic duty to convict the defendant in order to protect themselves, others, or society in general regardless of whether the State failed to meet its evidentiary burden.

In *State v. Nobles*, 210 ME 26, the prosecutor stated during closing and rebuttal arguments, “You are charged with the duty of holding people accountable for misdeeds in our communities, that it’s not just a job that’s confined to the government or to the police. It depends on the participation of citizens...Now, this process, folks, as I said, of holding people accountable, people have different roles to play. And we respect those roles...You’re not here to punish. You’re to decide whether or not Nobles should be her accountable.” *Id.* at ¶ 13. The Law Court found that the language preceding and following the prosecutor’s challenged statements provides important context and the prosecutor predicated the jury’s duty to make that decision on its consideration of the evidence. *Id.* at ¶ 28.

In *State v. Begin*, the Court found that the State’s exhortation that the jury hold Begin accountable improperly suggested to the jury a civic duty to convict. *State v. Begin*, 2015 ME 86, ¶ 27. However, the Court held that any prejudice resulting from

the prosecutor's improper remarks was adequately remedied by the court's response through the use of instructions throughout the trial. *Id.* at ¶ 28.

In this case, the trial court provided full and effective jury instructions including that the attorney's arguments are not evidence, and the jury must decide the case based on the evidence. T1, v.6, p.52, 1.2-7. The Court provided a full explanation of the evidence the jury could consider. T1, v.6, p.52, 1.2-7.

b. The State's Closing was not meant to imply any inference from the Defendant not testifying at trial and the court did not abuse its discretion in denying Appellant's motion for a mistrial.

Appellant contends that the State referenced the Appellant not testifying at trial. The State denies this contention.

The full statement made by the statement during closings is as follows:

“And as we listened to the testimony of Detective Lindsay and we heard the audio recording of the defendant, there's a couple things I want you to keep in mind about that. It's hard to assess the testimony of an audio recording separately from the witnesses who are on the stand and you're able to look at them and make certain assessments. The audio recording makes that a little bit more difficult. But there were some insights that Mr. White gave during the course of his interview, um, that you may find helpful in assessing the credibility of the statement that he gave to Detective Lindsey.

“At the very beginning of the interview when he asked about the charges that were pending against him and he was told Val was still alive so he wasn't facing a murder rap, he asked somewhat rhetorically, maybe even to himself out loud, can I beat those charges? Can I beat those charges? And that tells you the state of mind that the defendant was in as he was talking to Detective Lindsey, as he was recorded.

“He also told the detective that he liked to play poker, that he held his cards close to the vest. Well, part of poker is also bluffing, seeing if you can get more information from the other side. And Mr. White did that. He didn't talk about the mask at first because he was holding those cards close to his vest. His intended statement was to beat those charges.”

T.1, v.6, p.55, l.21-25; p. 56, l.1-23.

The intent of the state was not to call any attention to the Appellant not testifying. The State was commenting on only having an audio recording so the jury did not see the defendant's "visage" during the interview. T1, v.6, p.73, l.1-18. The State indicated that any inference was not intentional and supported a renewed or corrective instruction from the court. T1, v.6, p.73, l.1-25. The statement was a segue by the State of highlighting key statements made by Appellant during his audio recorded interview. The Court, prior to Appellant's closing, again asserted that attorney argument is not evidence. The Court also asserted Appellant has an absolute right not to testify and no weight whatsoever can be given to Appellant not testifying. T1, v.6, p. 80, l.1-14.

In the event that that the Law Court finds misconduct, "any potential prejudice was fully remedied by the court's full and effective instructions, including instructions that the attorney's arguments are not evidence and that the jury's role is to consider the evidence to determine whether the State has proved each crime beyond a reasonable doubt." *Nobles*, ¶29.

Appellant references third party information in its brief reporting that the jury focused on Appellant not testifying and this "proves" that the State's comment made an impact on the jury. There is no information in the record to support or substantiate this claim. Appellant filed a Motion for New Trial with the court which was denied. The Appellant's motion, and Appellant's brief, contains bare assertions and no

specific details. Appellant's right to elect not to testify was referenced many times throughout the trial. Appellant points to no admissible evidence to support juror misconduct, outside influence, or extrajudicial prejudicial information.

Assuming *arguendo* that the comment made was in error, reviewing the record as a whole confirms the trial court's conclusion that it was not plain error, it did not affect the appellant's substantial rights, and it did not taint the proceedings or virtually deprive the appellant of a fair trial. *State v. Clark*, 1999 ME 141, ¶ 24. If there was taint from the statement, instructions such as those given by the Court have been determined to be effective at removing any taint caused by the prosecutor's statement and insuring that the jurors would not consider the appellant's failure to take the stand. *Id.* at ¶27; *State v. Tarbox*, 2017 ME 71, ¶ 15.

The evidence presented at trial against Appellant was strong as detailed in the Statement of Facts including video, audio, and testimonial evidence of corroborating witnesses. There was evidence for the jury to conclude that Appellant committed the crimes alleged by the State.

2) The Court did not abuse its discretion when it denied Appellant's motion for change of venue.

Appellant challenges the court's denial of his motion for change of venue. "We review a motion to change venue for an abuse of discretion." *State v. Holland*, 2009 ME 72, 146, 976 A.2d 227, 241.

The incident that was the basis of this criminal case occurred on September 9, 2019. Defense counsel never provided the court with any documentation, such as newspaper clippings or videos, to support the claim that Appellant could not get a fair trial in Aroostook County. (Or that any allegedly prejudicial publicity was limited to Aroostook County, so that Appellant was likely to get a fairer trial elsewhere.) See *State v. Dyer*, 2007 ME 118 P 11, 930 A.2d 1040: "No documentation or affidavits as to pretrial publicity were filed with the motion, and the record does not reveal any evidence or factual findings on that issue prior to trial."

Again, the incident occurred on September 9, 2019. Jury selection commenced on July 26, 2021, approximately two years later. Jury selection began at 8:00 a.m., and even with a lunch recess and a couple of shorter recesses, concluded voir dire at 4:21 p.m. The court conducted individual voir dire of every juror in the jury pool.

(Appellant does not cite any questions that the court declined to ask that might have resulted in improper selection.) No challenges for cause were denied.

The trial court conducted a thorough analysis of the issues raised by Appellant's brief when it responded to the defendant's Motion for Change of Venue. The State, could not – and will not attempt to – articulate the standard of review, pertinent case law, and substantive analysis better than the trial court did in its oral order. The State, hereby, incorporates the trial Justice's findings of fact and conclusions of law found at *Appendix*, p. 17-21, as being wholly persuasive and they should be adopted by the Law Court.

There was no abuse of discretion in the court's denial of the motion for change of venue.

CONCLUSION

There were no errors affecting the substantial rights of the appellant to a fair trial and the verdict of the jury should be upheld.

Date

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CERTIFICATION OF SERVICE

I hereby certify that 2 copies of the foregoing Brief for Appellee have been forwarded this date to Verne Paradie, Counsel for the Appellant.

Date

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