[Cite as *State v. Thompson*, 2009-Ohio-3552.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 08AP-956 (C.P.C. No. 08CR01-0131)
Charles T. Thompson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 21, 2009

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Dennis W. McNamara, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Charles T. Thompson ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict convicting appellant of one count of burglary, a felony of the fourth degree and a violation of R.C. 2911.12(A)(4). At sentencing, the court imposed a period of community control.

{¶2} The procedural history is as follows. On January 7, 2008, appellant was indicted on one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree. After the prosecution presented its evidence during a jury trial, appellant made a Crim.R. 29 motion seeking dismissal of the charge. The trial court granted the motion as to the second degree felony count of burglary finding insufficient evidence that appellant had the purpose to commit a theft offense. However, the trial court permitted the trial to continue as to a fourth degree felony count of burglary. The jury found appellant guilty.

{¶3} Appellant filed a timely notice of appeal and raised the following assignments of error:

> ASSIGNMENT OF ERROR NO. I
>
> THE PROSECUTION ERRED WHEN ITS WITNESS TESTIFIED THAT APPELLANT ELECTED NOT TO MAKE A STATEMENT AFTER BEING ADVISED OF HIS MIRANDA RIGHTS.
>
> ASSIGNMENT OF ERROR NO. II
>
> THE TRIAL COURT ERRED WHEN IT REFUSED TO INSTRUCT THE JURY AS TO THE AFFIRMATIVE DEFENSE OF DURESS.
>
> ASSIGNMENT OF ERROR NO. III
>
> THE INDICTMENT WAS DEFECTIVE BECAUSE IT FAILED TO CONTAIN THE ESSENTIAL ELEMENT OF "RECKLESS."

{¶4} At the trial, the first witness to testify was Kyle Bowman, who resided at 1510 Worthington Street. On December 29, 2007, he and his wife went to a restaurant for dinner, leaving before 7 p.m. and locking the doors of the house. The police called Mr. Bowman's mother-in-law, who owns the residence, to inform her that there was an

incident at the house. The owner then contacted the Bowmans. When Mr. Bowman arrived home, he found the front door had been kicked in, things had been moved in the house, a shotgun case in the basement had been opened and a shotgun moved, and the upstairs bathroom door had been kicked in and the casing broken. He found a bag in the bathroom that did not belong to either his wife or him. Approximately a month later, he found something that looked like a homemade tomahawk in an armoire in a bedroom. Nothing was missing from the home.

{¶5} Columbus Police Officer Quoc Nguyen testified that he was dispatched to the 1500 block of Worthington Street on December 29, 2007, in response to a 911 call which reported that an out-of-state police officer had seen a shooting. Nguyen and his partner were the first to arrive on the scene. Multiple cruisers responded to the dispatch, but when they searched the area and could not find a victim they contacted the dispatcher and found that the call originated from 1510 Worthington Street.

{¶6} The officers went to the front door, heard screaming inside, and discovered the window pane of the door was shattered. They announced that they were the police, they were wearing police uniforms, and had arrived in cruisers with the lights and sirens activated. They kicked in the door and heard a door upstairs slam.

{¶7} The officers kicked in the upstairs bathroom door and found appellant trying to jump out the window. Appellant was talking and acting erratically, saying things that did not make sense, and he would not show the police his hands as requested. Appellant jumped in the bathtub where the officers used a taser on him to control and detain him. They did not find any weapons on appellant. Appellant was the only person found inside the house. It was later determined that appellant had made

the 911 call which had prompted the response from the police and in which appellant had reported himself to be an out-of-state police officer.

{¶8} The police detective assigned to the case, David Bucy, testified he interviewed the Bowmans, toured the house, took photos, and directed the patrol officers to transport appellant to police headquarters. He stated there were two 911 calls made to the Columbus Police by appellant and a third one made by a neighbor, John Lepley. On cross-examination, Bucy was asked whether he talked to appellant at the scene or at the detective bureau. He responded that he had attempted to conduct an in-custody interview, but appellant had not waived his constitutional rights so the interview was not conducted. Bucy did state that appellant made a statement to the officers that someone was chasing him.

{¶9} Mr. Lepley did not testify, but a stipulation was presented to the jury regarding his testimony. The parties stipulated that Lepley would have testified that he encountered a male in the street, just south of the Bowmans' house, who was yelling and screaming, but was difficult to understand. Lepley observed the male go to the porch of 1510 Worthington Street and break the window of the door and enter the home. Lepley returned home and called the police. He did not remember shots being fired in the area.

{¶10} Appellant testified on his own behalf and stated that he had been diagnosed with bipolar disorder, but was not taking medication or receiving care on December 29, 2007. He had been drinking the night before at his friend Ahmed's house, who lived approximately a block and a half from the Bowmans. Appellant testified that when he left Ahmed's house, he saw two cars and that a man with a gun

got out of one of the cars. He believed that the men were going to rob and kill him because they assumed that he had large amounts of drugs on him. He then ran and one of the cars followed him. He heard tires squeal and thought he heard shots fired.

{¶11} Appellant testified that he ran to another friend's house, but when there was no answer at the door he continued to run. Appellant entered a corner store and dialed 911, but panicked. He testified as follows:

> Q. So, where did you go from there?
>
> A. So, then I ran around and I was kind of frantic. I didn't know where to go. There's like a little corner store I remembered. I ran over and crossed the street and I was kind of ducking in and trying to hide and trying to see if I could see where they were and I ran to the corner store and I yelled to the guy, "Call 911."
>
> Q. Yelled to what guy?
>
> A. The attendant in the thing. And he was like – I guess he was an immigrant. He was like, "No, I can't call 911," with an accent. He wouldn't call it.
>
> He handed me the phone. I started dialing 911 and then I was just – I had pictures in mind of them shooting in the place. I asked the guy if there was a back-door and there's no back-door to the place. So, I don't know, I ran out of there.

(Tr. 132-33.)

{¶12} Appellant testified that when he left the corner store, he ran down the street, saw John Lepley, and yelled to him to call the police. He went up to the Bowmans' house, knocked, then broke the window in the door, and entered the house. He testified he entered the house because he was out of breath and thought he would collapse on the ground. Appellant did not testify that the men followed him into the store or were near him or in the vicinity at that time he entered the Bowmans' house.

He admitted some paranoia at the time and believed more people to be involved and believed that those involved could be in the store.

{¶13} Appellant testified that he sincerely believed he would be shot or harmed if he did not leave the street and entered the house to escape injury. Once inside the house, appellant ran around looking for a phone and called 911, telling the police that he was a Florida police officer. He testified he did so because he wanted the police to be looking for a "victim" (i.e., police officer in danger) rather than a burglar. When the police arrived, appellant believed they were the men chasing him. He placed a second 911 call from the home. He denied being in the basement of the home.

{¶14} In his first assignment of error, appellant contends that the prosecution erred when its witness testified that appellant elected not to make a statement after being advised of his *Miranda* rights. Relying on *Doyle v. Ohio* (1976), 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, appellant argues that his due process rights were violated when the officer twice testified that appellant refused to make a statement after being advised of his *Miranda* rights.

{¶15} In *Doyle*, co-defendants remained silent after their arrest and *Miranda* warnings had been given. During their trials, the co-defendants testified regarding an "exculpatory explanation." On cross-examination, they were questioned, over their counsel's objection, as to why they had not given the arresting officer the exculpatory explanations, but, rather, had remained silent. The United States Supreme Court held that it was fundamentally unfair to allow a defendant's silence to be used to impeach an explanation subsequently given at trial. The use, for impeachment purposes, of a

defendant's silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.

{¶16} At issue here are two exchanges between counsel and Bucy. The first exchange occurred on cross-examination. Defense counsel asked the detective whether he talked to appellant either at the scene or at the detective bureau. Bucy replied, as follows:

> A. I attempted to conduct a recorded DVD, an in-custody interview with him at the fifth floor at central police headquarters.
>
> Q. Did you find him to be somewhat incoherent or not understanding clearly the things that you were talking to him about?
>
> A. The Defendant declined to speak to me.
>
> Q. Didn't you in your report say that you did talk with him but he seemed not to understand the rights you were trying to explain?
>
> A. When I advised him of his rights, he simply would not acknowledge his rights.
>
> Q. He didn't speak any words at all?
>
> A. I would have to review that interview to be specific. That was a period of time ago.

(Tr. 94.)

{¶17} Appellant argues that this line of questioning was to further develop appellant's mental instability by asking the detective if appellant was incoherent and the question only required a "yes" or "no" answer. Although there was no objection to this exchange at trial, appellant complains that the detective responded by volunteering that

appellant declined to make a statement and, thus, commented on his post-arrest silence, rather than on appellant's state of mind.

{¶18} Appellant also contends that the following exchange between the prosecution and Bucy on redirect violated his rights:

> Q. And you indicated that he [appellant] never waived his rights so you were never able to complete a full interview, is that correct?
>
> A. That's correct.
>
> Q. Before you get to the portion where you read somebody their rights, do you ask a set of preliminary questions?
>
> A. I try and normally do ask questions about alcohol usage, drug usage, educational levels, hearing, speech and writing.
>
> Q. Are those things normally contained on the waiver, constitutional rights waiver form?
>
> A. They're located on the bottom of the rights waiver form.
>
> Q. Did you go over those questions with Mr. Thompson?
>
> A. I would have to look at that form.

(Tr. 98.)

{¶19} At the conclusion of this exchange, defense counsel requested a bench conference which was not recorded in the record. After the bench conference, the prosecutor pursued a different line of questioning. Therefore, there is no objection by defense counsel on the record, and, in oral argument to this court, defense counsel conceded that a plain error analysis applies to this assignment of error.

{¶20} Although generally a court will not consider alleged errors that were not brought to the attention of the trial court, Crim.R. 52(B) provides that the court may consider errors affecting substantial rights even though they were not brought to the

attention of the trial court. " 'Plain error is an obvious error * * * that affects a substantial right.' " *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶108, quoting *State v. Keith*, 79 Ohio St.3d 514, 518, 1997-Ohio-367. An alleged error constitutes plain error only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different. *Yarbrough* at 244-45. " '[N]otice of plain error is taken with utmost caution only under exceptional circumstances and only when necessary to prevent a manifest miscarriage of justice.' " *State v. Martin*, 10th Dist. No. 02AP-33, 2002-Ohio-4769, ¶28, quoting *State v. Hairston* (Sept. 28, 2001), 10th Dist. No. 01AP-252.

{¶21} The state argues that appellant cannot demonstrate plain error because the defense opened the door to the topic of his post-arrest silence. The United States Supreme Court has held that the Fifth Amendment does not prohibit references to a defendant's invocation of the right against self-incrimination when the references are made in "fair response" to the defense's claims. *State v. Ferguson*, 10th Dist. No. 07AP-999, 2008-Ohio-6677, ¶51, citing *United States v. Robinson* (1988), 485 U.S. 25, 32-34, 108 S.Ct. 864, 869-70. Here, regardless of the purpose of the line of questioning, the detective testified about the silence in response to defense counsel's question which specifically asked the detective whether he had talked to appellant at the scene or at the detective bureau.

{¶22} This court has found that a prosecutor may question a defendant about post-arrest silence without a *Doyle* violation if the defendant has raised the issue on direct examination. See *State v. Reed*, 10th Dist. No. 08AP-20, 2008-Ohio-6082. In *Reed*, the defendant was arguing that his trial counsel was ineffective because he elicited information regarding the defendant's Fifth Amendment privilege in violation of

Doyle. The defense counsel had questioned the police officer regarding questioning the defendant and the officer testified that the defendant refused to answer questions after being read his rights. This court found that there was no *Doyle* violation because the defendant invited the questioning on cross-examination of the police officer. Under such circumstances, Ohio courts have consistently found no *Doyle* violations. See *State v. Exum*, 10th Dist. No. 05AP-894, 2007-Ohio-2648; *State v. Lamb*, 12th Dist. No. CA2002-07-171, 2003-Ohio-3870; *State v. Eason*, 7th Dist. No. 02 BE 41, 2003-Ohio-6279; *State v. Stevenson* (July 21, 2000), 6th Dist. No. E-94-002; *State v. Vaughn* (July 11, 1985), 8th Dist. No. 49272; *State v. Lee* (Dec. 31, 1997), 11th Dist. No. 95-T-5371.

{¶23} Here, the facts are similar to the facts in *Ferguson* where the police officer was answering questions in response to questions from defense counsel. The defense invited the error by first questioning the detective regarding whether he had talked to appellant and whether he found appellant to be coherent when the officer was explaining appellant's rights to him. The officer's answers were responsive to the question asked. On redirect examination, the prosecutor asked follow-up questions to the topic raised by defense counsel on cross-examination.

{¶24} Finally, appellant has not demonstrated that the outcome of the trial would clearly have been different as required for plain error. Under these circumstances, no plain error and no manifest miscarriage of justice occurred. Appellant's first assignment of error is not well-taken.

{¶25} In his second assignment of error, appellant argues that the trial court erred when it refused to instruct the jury as to the affirmative defense of duress.

Appellant testified that he believed he was being chased by armed individuals and he entered the residence to avoid injury or death. Thus, he argues that the trial court should have given the jury the instruction of duress to explain his behavior.

{¶26} The defense of duress is an affirmative defense. *State v. Sappienza* (1911), 84 Ohio St. 63, 73; *State v. Getsy* (1998), 84 Ohio St.3d 180, 198. A trial court should give a requested jury instruction on an affirmative defense when the defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such a defense. *State v. Melchoir* (1978), 56 Ohio St.2d 15, paragraph one of the syllabus. A trial court may only instruct the jury on issues raised by the indictment and evidence. *State v. Denny* (Oct. 12, 1989), 10th Dist. No. 89AP-329.

{¶27} When determining whether a trial court erred in its jury instructions, an appellate court reviews the instruction as a whole. *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410. A trial court has broad discretion in instructing the jury. *State v. Smith*, 10th Dist. No. 01AP-848, 2002-Ohio-1479. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶28} "Duress consists of any conduct which overpowers a person's will and coerces or constrains his performance of an act which he otherwise would not have performed. Consequently, one who, under the pressure of a threat from another person, commits what would otherwise be a crime may, under certain circumstances, be justified in committing the act and not be guilty of the crime." *State v. Grinnell*

(1996), 112 Ohio App.3d 124, 144-45. The defense of duress requires a sense of immediate, imminent death or serious bodily injury if the actor does not commit the act as instructed. *State v. Cross* (1979), 58 Ohio St.2d 482. The force that is used to compel the defendant's conduct must remain constant, controlling the will of the unwilling actor during the entire time he commits the act, and must be of such a nature that the actor cannot safely withdraw. *State v. Good* (1960), 110 Ohio App. 415.

{¶29} In *Tallmadge v. Robinson* (1952), 158 Ohio St. 333, paragraph two of the syllabus, the Supreme Court of Ohio held that:

> In determining whether a course of conduct results in duress, the question is not what effect such conduct would have upon an ordinary man but rather the effect upon the particular person toward whom such conduct is directed, and in determining such effect the age, sex, health and mental condition of the person affected, the relationship of the parties and all the surrounding circumstances may be considered.

{¶30} A defendant's subjective belief that he is in danger of imminent death or grave bodily injury must be objectively reasonable based upon the evidence presented. *State v. Elijah* (July 14, 2000), 2d Dist. No. 18034.

{¶31} The Supreme Court of Ohio has also emphasized that the affirmative defense of duress is available only in rare circumstances by emphasizing, in *Cross* at 488, as follows:

> It must be understood that the defense of necessity or duress is strictly and extremely limited in application and will probably be effective in very rare occasions. It is a defense and not a conjured afterthought. All the conditions must be met, and the court must find as a matter of law that the evidence is sufficient to warrant an instruction on the affirmative defense of necessity or duress. The court may refuse to give an instruction which is not applicable to the evidence governing the case, or which is incorrect.

{¶32} Appellant relies upon *Elijah* as support for the proposition that the facts here establish the defense of duress. In *Elijah*, the defendant testified that when he noticed that police were following him, he flashed back to an incident 15 years earlier when he was severely beaten by the police. Fearing that the police would beat him again, he continued driving in what was a five minute "low speed chase" to find a safe haven from the police at his aunt and uncle's house. There he was apprehended. The appellate court found that the evidence was sufficient to warrant an instruction on the affirmative defense of duress. We find the facts in *Elijah* to be distinguishable from this case. The perceived threat in *Elijah* was imminent and constant. The police were following the defendant during the entire chase and the testimony presented at trial demonstrated that Elijah believed he was being threatened with imminent serious bodily injury unless and until he reached the safe haven.

{¶33} In the case of *State v. Shirk* (Nov. 4, 1997), 10th Dist. No. 97APA03-390, we reached a different result. In *Shirk*, the defendant was charged with the murder of Robert Rotola. Shirk had loaned money to Rotola. The defendant perceived Rotola to be a "tough guy." After Rotola refused to pay back the loan, Shirk had Rotola's car window broken. With advance warning to Shirk, Rotola went to Shirk's home. Believing that Rotola was coming to his home to retaliate for the broken window, Shirk told his sister not to let Rotola in under any circumstances. Rotola's friend, who accompanied him to Shirk's house, testified that Rotola went to the home to repay the debt.

{¶34} After Shirk's sister refused Rotola entrance to the home, and Shirk heard his sister's and Rotola's voices rising, Shirk went to the door and argued with Rotola. Eventually, Shirk stepped outside with a shotgun at his side, which he showed to

Rotola. Rotola got back in his truck, but the argument continued. Rotola backed out of the driveway. Shirk testified that when the truck reached the street he thought the truck began to roll back into the driveway so he fired a shot in order to scare Rotola away. He stated he did not intend to hit Rotola or the truck.

{¶35} On appeal, Shirk argued that he should have received a duress instruction because he was intimidated by Rotola coming to his house, he thought Rotola came to retaliate, and he only went to the door when he heard raised voices. This court determined that the evidence did not warrant an instruction on duress because any immediate threat to Shirk or his sister had passed by the time appellant fired the shotgun. In reaching that conclusion, we noted that Rotola had retreated to his vehicle and was exiting the driveway, so there was no sense of immediate, imminent death or serious bodily injury to Shirk.

{¶36} Here, appellant testified that he has bipolar disorder and was not taking his medication on the day in question. He stated he entered the Bowmans' house to escape injury and to leave the street because he sincerely believed he would be shot or harmed if he remained on the street. However, appellant did not demonstrate that the force or threat used to compel him remained constant or that it continued during the entire time that appellant committed the act as required. *Good*.

{¶37} Appellant testified that when he initially left his friend's house, he saw two cars and that a man with a gun got out of one of them. He then ran and one of the cars followed him and he thought he heard shots fired. Appellant testified that after this point, he did not see anyone get out of the cars. He continued to run to a friend's house

and into a corner store. Rather than staying in the store and completing a 911 call, appellant panicked and ran outside and down the street.

{¶38} In this case, as in *Shirk*, there is no demonstration that the threat was constant. Once appellant was inside the corner store, he called the police and there was no further evidence that the threat was immediate. Appellant's testimony does not establish a constant threat or force which would compel his conduct of committing burglary. Rather, there was a break in the perceived threat once he entered the corner store. Thus, appellant has not met one of the three requirements pursuant to *Good*, and was not entitled to an instruction on duress. Appellant's second assignment of error is not well-taken.

{¶39} In his third assignment of error, appellant contends that the indictment was defective because it failed to contain the essential element of "reckless." Appellant relies upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"). The mental state of a defendant is part of a criminal offense except those that plainly impose strict liability. *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, ¶18. Pursuant to R.C. 2901.21(B), when a section defining an offense does not specify any degree of culpability and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for guilt. However, when the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

{¶40} In *Colon I* at ¶15, the Supreme Court of Ohio held that a criminal defendant's indictment for robbery under R.C. 2911.02(A)(2) was defective because it failed to include the mental element of "recklessness" or because it failed to charge that

"the physical harm was recklessly inflicted." The court found that the defect in the indictment constituted a constitutional, structural error. This court has also extended *Colon I* to reverse convictions based on indictments that charged robbery under R.C. 2911.02(A)(3). See *State v. Palacios*, 10th Dist. No. 08AP-669, 2009-Ohio-1187, ¶13.

{¶41} On reconsideration, the Supreme Court of Ohio clarified that *Colon I* declared a new constitutional rule that "is prospective in nature" and does not apply retroactively. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, ¶5 ("*Colon II*"). Thus, *Colon I* applies only to cases that were pending on the date *Colon I* was announced or April 9, 2008.

{¶42} In this case, appellant was indicted on one count of burglary, a violation of R.C. 2911.12(A)(2), a felony of the second degree. However, appellant made a Crim.R. 29 motion, which was granted, as to the felony of the second degree, and the jury was instructed regarding R.C. 2911.12(A)(4), a felony of the fourth degree.

{¶43} R.C. 2911.12(A) provides as follows:

> (A) No person, by force, stealth, or deception, shall do any of the following:
>
> * * *
>
> (2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;
>
> * * *
>
> (4) Trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.

{¶44} This court has already found that *Colon I* is inapplicable to aggravated burglary and burglary. See *State v. Mills*, 10th Dist. No. 08AP-687, 2008-Ohio-6609; *State v. Moore*, 10th Dist. No. 07AP-914, 2008-Ohio-4546; *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554. Since burglary statutes contain a mental state, purposefully, R.C. 2901.21 does not control or apply. Furthermore, trespassing requires the mental state of knowingly and it is incorporated by reference into the burglary statutes. See *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707. See *State v. Davis*, 8th Dist. No. 90050, 2008-Ohio-3453; *State v. Day*, 2d Dist. No. 07-CA-139, 2009-Ohio-56 (because the burglary statute includes two mental states, "knowingly" as incorporated in the predicate offense of trespass, and "purposefully" as written in the statute, the *Colon* holding does not apply to burglary and aggravated burglary). Thus, the *Colon I* analysis is inapplicable to these facts involving burglary. Appellant's third assignment of error is not well-taken.

{¶45} For the foregoing reasons, appellant's three assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed. However, the trial court's judgment entry reflects that appellant was convicted of burglary in violation of R.C. 2911.12, a felony of the second degree, rather than a felony of the fourth degree. This cause is remanded for the limited purpose of having the judgment entry amended, pursuant to Crim.R. 36, to reflect that appellant was convicted of R.C. 2911.12, a felony of the fourth degree.

Judgment affirmed;
cause remanded with instructions.

FRENCH, P.J., and CONNOR, J., concur.

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