[Cite as *State v. Looman*, 2010-Ohio-2567.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

RODNEY A. LOOMAN

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09 CA 105

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case no. 07 CR 896H
JUDGMENT:	Affirmed in part; Reversed in Part and Remanded
DATE OF JUDGMENT ENTRY:	June 3, 2010

APPEARANCES:

For Plaintiff-Appellee

JAMES J. MAYER, JR.
PROSECUTING ATTORNEY
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Wise, J.

{¶1} Defendant-appellant Rodney A. Looman appeals his conviction on one count of failure to provide periodic verification of address entered in the Richland County Court of Common Pleas following a jury trial.

{¶2} Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On May 17, 2000, Rodney Allen Looman (hereafter "Appellant") was pled guilty to rape in Richland County Court of Common Pleas case number 99-CR-627H. He was sentenced to three years in prison. During that time, Megan's Law went into effect. Appellant was classified as a sexual predator and was required to register his address with the sheriff's office every ninety days for life, or anytime he moved to a new address.

{¶4} Appellant initially registered with the Morrow County Sheriff's Office on May 23, 2003, after he was released from prison. Thereafter, he registered with the Richland County Sheriff's Office in 2004, providing an address on Mill Street in Lexington. Appellant remained in compliance until 2005, when he was indicted for failure to provide a change of address in Richland County Court of Common Pleas case number 05-CR-160H. He was convicted of that offense and served one year in prison.

{¶5} After serving his second prison sentence, Appellant registered with the Richland County Sheriff's Office on April 27, 2007, providing an address of 237 Hillside Circle, Apartment 5, in Mansfield, Ohio. He remained in compliance by periodically verifying his address on August 1, 2006, and April 27, 2007, respectively. When he

reported on April 27, 2007, he signed a notice acknowledging that his next reporting date was August 5, 2007.

{¶6} Appellant failed to report for his ninety-day periodic verification on August 5, 2007. Pursuant to Ohio law, a warning letter was mailed to his last known address on August 7, 2007. That letter advised Appellant that he had failed to report as required by law and gave him until August 14, 2007, to report to the Sheriff's Office in order to avoid sanctions. The warning letter was returned to the Richland County Sheriff's Office on September 3, 2007. It was marked “return to sender, attempted, not known, unable to forward”, indicating that Appellant no longer resided at that address.

{¶7} Appellant never reported to the Richland County Sheriff's Office to register a change of address; however, after being homeless for a period of time, he turned himself in before he could be arrested.

{¶8} Appellant was indicted by the Richland County Grand Jury for one count of failure to provide periodic verification of address, a third degree felony in violation of R.C. §2950.06(F). He pled not guilty to the charge at arraignment, and his case was set for trial.

{¶9} Prior to trial, Appellant filed a motion to dismiss, arguing that the Richland County Sheriff’s Office failed to comply with the mandatory provisions of R.C. §2950.06(G)(1)(d), which requires that the warning letter conspicuously state that failure to timely verify the offender's address is a felony offense, and with R.C. §2950.06(G)(2)(b), which requires that upon the failure to verify an address, a deputy of the appropriate Sheriff shall locate the offender and promptly seek a warrant for his or her arrest. After an oral hearing, the trial court denied the motion to dismiss.

{¶10} On August 3, 2009, Appellant's case proceeded to jury trial. The State presented testimony from two witness, Connie Walls, the Electronic Sex Offender Notification ("ESORN") Officer with the Richland County Sheriff's Office and Betty Hoffman, Appellant's landlord.

{¶11} Ms. Walls provided an overview of Ohio's sex offender registration requirements, including the frequency of reporting for the different tiers of sex offenders. (T. at 99). She also explained her duties as the ESORN Officer, which included obtaining offender information and submitting it to the Ohio Bureau of Criminal Investigation and Identification for posting on the public website, and sending warning letters to offenders who are out of compliance with their reporting requirements. (T. at 100, 106-107). Ms. Walls explained that even homeless offenders are required to report to the Sheriff's Office in person to register their residence status. (T. at 110).

{¶12} Specifically addressing the charge against the Appellant, Ms. Walls identified State's Exhibits 1 and 2, an Admission of Guilt/Judgment Entry and a Sentencing Entry from case number 99-CR-679H in which Appellant was convicted of rape. (T. at 101-102). She also identified Appellant, whom she had had personal contact with when he reported for his registration. (T. at 101). Ms. Walls indicated that he was required to register every ninety days as a sexual predator/tier three offender under Ohio law. (T. at 101). She further testified that Appellant began reporting on May 28, 2003, and remained in compliance until August 5, 2007. (T. at 101, 106).

{¶13} Finally, Ms. Walls identified State's Exhibits 3 and 4. State's Exhibit 3 is a document generated and maintained by the Richland County Sheriff's Office ESORN computer system identifying Appellant as a sexual predator, advising him of his

registration requirements, and providing him with his next reporting date of August 5, 2007. (T. at 105-106). State's Exhibit 4 is a warning letter generated by the ESORN system which advised Appellant that he was out of compliance with his reporting requirements and had seven days to report to avoid sanctions. (T. at 107). She indicated that the warning letter was returned to the Sheriff's Office on September 3, 2007, and that Appellant did not report to verify his current address. (T. at 107-109).

{¶14} The State also presented testimony from Betty Hoffman, Appellant's landlord at 237 Hillside Circle in Mansfield. Ms. Hoffman testified that Appellant had resided in Apartment 5 at that address since April of 2006. He initially paid his first month's rent, and security deposit; however, he did not pay rent starting in May of 2006. (T. at 120-121). Ms. Hoffman testified that she had difficulty contacting Appellant regarding his non-payment of rent. She stated that she eventually made contact with him in the spring of 2007, as he was taking groceries into his apartment. Mrs. Hoffman testified that she asked him at that time to vacate the premises due to non-payment of rent. (T. at 121-123).

{¶15} After the State rested, Appellant raised a Crim.R. 29 motion for acquittal, arguing that the State failed to prove that Appellant was a sexual predator/tier three offender subject to registration requirements because the prosecution did not submit any paperwork signed by a judge to that effect. (T. at 128-129). The trial court overruled the motion on the basis that Appellant had been registering as a sexual predator with Ms. Walls. (T. at 129).

{¶16} Thereafter, Appellant took the stand in his own defense. He testified that he moved into Apartment 5 at 237 Hillside Circle on April 27, 2006, and that he

registered that address with the Richland County Sheriff's Office. (T. at 130). However, he was unable to pay rent because he was only employed intermittently, and he moved out after living there for a little over a year. (T. at 130-131). After he moved out of the apartment, he stayed with various people for short periods of time, but had no permanent address. (T. at 131-134). He described himself as living "off of other people." (T. at 132). Appellant admitted that he did not report his address during this time period, and he was aware that he was out of compliance with his registration requirements. Id. He explained that he did not report at any point after August 5, 2007, because he was "already late and [he] got scared and stupid." (T. at 132). He eventually turned himself in because he was "tired of looking over [his] back all the time." (T. at 132).

{¶17} On cross-examination, Appellant admitted that he was convicted of a felony sex offense in case number 99-CR-679H. (T. at 133). He also admitted that he was a sexual predator/tier three sex offender who was required to register with the Sheriff's Office. Id. Appellant indicated that he had complied with those registration requirements until he moved out of the Hillside Circle apartment.

{¶18} At the conclusion of trial, after deliberations, the jury found Appellant guilty as charged in the indictment. At his sentencing, the trial court imposed a mandatory three-year sentence which it believed was required under the Adam Walsh Act, which went into effect on January 1, 2008.

{¶19} Appellant now appeals his conviction and sentence to this Court, raising the following assignments of error:

ASSIGNMENTS OF ERROR

{¶20} "I. THE SENTENCE HEREIN IS UNLAWFUL, IN THAT THE MANDATORY PROVISION OF R.C. 2950.99 UNDER WHICH THE TRIAL COURT DETERMINED APPELLANT'S SENTENCE WAS NOT IN EFFECT AT THE TIME OF THE OFFENSE, THEREFORE VIOLATING §28, ARTICLE II OF THE OHIO CONSTITUTION PROHIBITING RETROACTIVE LAWS.

{¶21} "II. DUE TO THE INADMISSIBLE HEARSAY EVIDENCE PRESENTED OF APPELLANT'S STATUS AS A PERSON REQUIRED TO VERIFY A CURRENT ADDRESS, APPELLANT'S CONVICTION PURSUANT TO R.C. 2950.06 IS CONTRARY TO THE MANIFEST WEIGHT AND SUFFICIENCY OF EVIDENCE PRESENTED AT TRIAL, THUS DENYING APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND UNDER ARTICLE 1, SECTION 16 OF THE OHIO CONSTITUTION.

{¶22} "III. APPELLANT WAS DEPRIVED OF DUE PROCESS AS GUARANTEED BY THE OHIO AND U.S. CONSTITUTIONS, AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL, OR IN THE ALTERNATIVE, PLAIN ERROR.

{¶23} "IV. EVEN IF THE 2008 VERSION OF R.C. 2950.99 APPLIES, THE SENTENCE HEREIN IS INVALID DUE TO PROCEDURAL ERRORS, RESULTING IN A VIOLATION OF DUE PROCESS UNDER THE U.S. AND OHIO CONSTITUTIONS."

I., IV.

{¶24} In Appellant's first and fourth assignment of error, he argues that the trial court erred when it retroactively applied the mandatory three-year sentence set forth in R.C. §2950.99(A)(2)(b). We agree.

{¶25} In the case sub judice, the trial court sentenced Appellant to a three-year mandatory sentence pursuant to a provision in R.C. §2950.99(A)(2)(b) which went in to effect on January 1, 2008, and provides as follows:

{¶26} "(b) In addition to any penalty or sanction imposed under division (A)(1)(b)(i), (ii), or (iii) of this section or any other provision of law for a violation of a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code, if the offender previously has been convicted of or pleaded guilty to, or previously has been adjudicated a delinquent child for committing, a violation of a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code when the most serious sexually oriented offense or child-victim oriented offense that was the basis of the requirement that was violated under the prohibition is a felony if committed by an adult or a comparable category of offense committed in another jurisdiction, the court imposing a sentence upon the offender shall impose a definite prison term of no less than three years. The definite prison term imposed under this section is not restricted by division (B) of section 2929.14 of the Revised Code and shall not be reduced to less than three years pursuant to Chapter 2967 or any other provision of the Revised Code."

{¶27} Upon review, we find, and the State of Ohio concedes, that in this case it was error to impose the mandatory three-year sentence because Appellant committed

his offense on or about August 15, 2007, approximately six months prior to the effective date of such provision.

{¶28} Accordingly, we find Appellant's first and fourth assignments of error well-taken and hereby sustain same.

II.

{¶29} In his second assignment of error, Appellant argues that the trial court erred in allowing inadmissible hearsay evidence and that his conviction was against the manifest weight and sufficiency of the evidence.

{¶30} Appellant argues that the statements made by Connie Walls of the Sheriff's Department were inadmissible hearsay. He further argues that the records submitted were not of sufficient weight to establish that he was a sexual predator or tier three sex offender subject to the registration requirements contained in R.C. §2950.06(F).

{¶31} Initially, we will address Appellant's sufficiency of the evidence argument.

{¶32} When an appellate court reviews a record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Monroe,* 105 Ohio St.3d 384, 392, 827 N.E.2d 285, 2005-Ohio-2282, citing *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, superseded by state constitutional amendment on other grounds as stated in *State v. Smith,* 80 Ohio St.3d 89, 684 N.E.2d 668, 1997-Ohio-355. Sufficiency is a test of adequacy, *State v. Thompkins,* 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 1997-Ohio-52, and the question of whether evidence is sufficient to sustain a verdict is one of

law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148, superseded by state constitutional amendment on other grounds as stated in *Smith,* supra.

{¶33} In the case sub judice, the jury convicted Appellant of failing to provide periodic verification of address, in violation of R.C. §2950.06(F), which provides:

{¶34} "(F) No person who is required to verify a current residence, school, institution of higher education, or place of employment address, as applicable, pursuant to divisions (A) to (C) of this section shall fail to verify a current residence, school, institution of higher education, or place of employment address, as applicable, in accordance with those divisions by the date required for the verification as set forth in division (B) of this section, provided that no person shall be prosecuted or subjected to a delinquent child proceeding for a violation of this division, and that no parent, guardian, or custodian of a delinquent child shall be prosecuted for a violation of section 2919.24 of the Revised Code based on the delinquent child's violation of this division, prior to the expiration of the period of time specified in division (G) of this section."

{¶35} Appellant argues that his status as someone who was required to report his address is an element of the offense and that the State failed to prove same.

{¶36} Upon review, we find that certified copies of Appellant's Admission of Guilt/Judgment Entry and Sentencing Entry were identified at trial and admitted as exhibits, evidencing Appellant's conviction of rape in case number 99-CR-679H. (T. at 101-102).

{¶37} Connie Walls testified that she was employed by the Richland County Sheriff's Department as the ESORN Officer and that she had been employed in that position for approximately 12 years. (T. at 98-99). She further testified that based on

his offense, Appellant was a Tier three offender and that as such he was required under Ohio law to register every ninety-days for life. (T. at 99).

{¶38} Ms. Walls testified that Appellant was initially required to register as a sex offender in Morrow County in May, 2003 (T. at 101, 104); that, in 2004, Appellant moved from the Morrow County to Richland County and that he registered with the Richland Sheriff's Office at that time and provided an address on Mill Street in Lexington. (T. at 103); that following that second registration, Appellant registered changes of address to Fourth Street, Newman Street, Bailey Drive and South Mill Street and Hillside Circle, respectively. (T. at 104). The last change of address, on Hillside Circle, was made in April, 2006. Id. Thereafter, Appellant reported for his ninety-day registrations in August, 2006 and April, 2007. (T. at 105). Evidence was also presented in the form of a document signed by Appellant acknowledging that his next scheduled reporting date was August 5, 2007. (T. at 105-106).

{¶39} In support of her testimony, computerized sex offender registration information compiled and maintained by the Richland County Sheriff's Department and identified as State's Exhibit 2 was admitted as evidence. Appellant contends that such documents were hearsay.

{¶40} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶41} Upon review of the record, we find that Appellant failed to object to the admission of such evidence. This Court must therefore review such under a plain error analysis.

{¶42} Crim.R. 52(B) states "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The Ohio Supreme Court in *State v. Barnes,* 94 Ohio St.3d 21, 759 N.E.2d 1240, 2002-Ohio-68, explained the plain error rule. "By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, *i.e.,* a deviation from a legal rule. *State v. Hill* (2001), 92 Ohio St.3d 191, 200, 749 N.E.2d 274, 283 (observing that the "first condition to be met in noticing plain error is that there must be error"), citing *United States v.. Olano* (1993), 507 U.S. 725, 732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508, 518 (interpreting Crim.R. 52(B)'s identical federal counterpart, Fed.R.Crim.P. 52(b)). Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. *State v. Sanders* (2001), 92 Ohio St.3d 245, 257, 750 N.E.2d 90, 111, citing *State v. Keith* (1997), 79 Ohio St.3d 514, 518, 684 N.E.2d 47, 54; see, also, *Olano,* 507 U.S. at 734, 113 S.Ct. at 1777, 123 L.Ed.2d at 519 (a plain error under Fed.R.Crim.P. 52 [b] is " 'clear' or, equivalently, 'obvious' " under current law). Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial. See, *e.g., Hill,* 92 Ohio St.3d at 205, 749 N.E.2d at 286; *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894, 899; *State v.*

Long (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus." Id. at 27.

{¶43} The Ohio Supreme Court admonished that plain error "is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Barnes* at 27, quoting *State v. Long* (1978), 53 Ohio St.32d 91, 372 N.E.2d 804; See also, *State v. Landrum* (1990), 53 Ohio St.3d 107, 559 N.E.2d 710.

{¶44} Upon review, we find that the evidence presented was not inadmissible hearsay as same falls under the business records exception as set forth in Evid.R. 803(b), which provides:

{¶45} "A *memorandum, report, record, or data compilation* * * * if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business to make the memorandum, report, record, or data compilation * * * * " is an exception to the hearsay exclusion. (Emphasis added).

{¶46} As stated above, Ms. Walls is the ESORN Officer for the Richland County Sheriff's Department and as such is the custodian of the subject records. The compilation of the information is conducted in the regular course of the business of the Sheriff's Department and is done in accordance with the State of Ohio's sex offender registration laws.

{¶47} In light of the above, we conclude that a rational trier of fact could have found that the essential elements of failure to provide periodic verification of address were proven beyond a reasonable doubt.

{¶48} We must now continue to Appellant's manifest weight of the evidence argument.

{¶49} When an appellate court analyzes a conviction under the manifest weight standard, it must review the entire record, weigh all of the evidence and all of the reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins,* 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Only in exceptional cases, where the evidence "weighs heavily against the conviction," should an appellate court overturn the trial court's judgment. Id.

{¶50} Appellant herein argues that the evidence in support of his status as a sexual predator or tier three sex offender was "weak and unpersuasive". (Appellant's Brief at 8). We disagree.

{¶51} As set forth above, evidence was presented by Ms. Walls that Appellant failed to report for his ninety-day periodic verification on August 5, 2007, and that a warning letter was mailed to his last known address on August 7, 2007, advising him that he had failed to report as required by law, giving him until August 14, 2007, to report to the Sheriff's Office in order to avoid sanctions. That warning letter was returned to the Richland County Sheriff's Office on September 3, 2007, marked "return to sender, attempted, not known, unable to forward", indicating that Appellant no longer resided at that address.

{¶52} Appellant himself took the stand and admitted that he was a sexual offender subject to the ninety-day registration requirement. (T. at 133). He further admitted that he failed to report as required. (T. at 132).

{¶53} Because the record supports the jury's conclusion, we cannot say that the jury clearly lost its way. Accordingly, we find that Appellant's conviction was not against the manifest weight of the evidence.

{¶54} Upon review, because the record supports the jury's conclusion, we cannot say that its decision finding Appellant guilty was against the manifest weight or sufficiency of the evidence.

{¶55} Accordingly, Appellant's second assignment of error is overruled.

III.

{¶56} In his third assignment of error, Appellant argues that he was denied the effective assistance of counsel. We disagree.

{¶57} Specifically, Appellant argues that his trial counsel was ineffective for failing to object to the improper sentence and failing to object to hearsay.

{¶58} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶59} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St.3d at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. Id.

{¶60} The United States Supreme Court and the Ohio Supreme Court have held that a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley*, 42 Ohio St.3d at 143, 538 N.E.2d 373, quoting *Strickland,* 466 U.S. at 697, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶61} "When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense 'is meritorious,' and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued." *In re Adrian R*., 5th Dist. No. 08-CA-17, 2008-Ohio-6581, 2008 WL 5207301, at ¶ 23, citing *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305.

{¶62} Here, under the first prong of the *Strickland* test, we find counsel's performance at the sentencing hearing deficient. Counsel failed to object the trial court's application of the mandatory sentence pursuant to R.C. §2950.99(A)(2)(b). Indeed,

counsel appears to have stated to the Court that Appellant's case was one in which a mandatory application was obligatory. (T. at 152).

{¶63} We therefore sustain Appellant's third assignment of error insofar as he contends that he was denied effective assistance of counsel for failure to object to the imposition of a mandatory sentence.

{¶64} Based on the foregoing, we affirm in part, vacate the sentence herein and remand this matter to the trial court for resentencing.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 519

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RODNEY A. LOOMAN	:	
Defendant-Appellant	:	Case No. 09 CA 105

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

Costs assessed to Appellee.

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JUDGES