

IN THE SUPREME COURT OF IOWA

IOWA SUPREME COURT NO. 19-0911

**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**ANTHONY ALEXANDER MONG,
Defendant-Appellant.**

**APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE WILLIAM P. KELLY
JUDGE, FIFTH JUDICIAL DISTRICT
Polk County No. FECR317295**

RESISTANCE TO APPLICATION FOR FURTHER REVIEW
(Iowa Court of Appeals Decision: February 16, 2022)

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PROOF OF SERVICE

On the 18th day of March, 2022, the undersigned hereby certifies that she electronically served the within Resistance to Application for Further Review on the Iowa Attorney General Criminal Appeals Division via EDMS. The undersigned further certifies that she will serve the Defendant/Appellant by mailing a copy thereof to him at the following address: Anthony Alexander Mong, #6703464, Clarinda Correctional Facility, 2000 North 16th Street, Clarinda, Iowa 51632.

Respectfully Submitted:

/s/ Cathleen J. Siebrecht

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CERTIFICATE OF FILING

I hereby certify that I did file the within Appellant's Resistance to Application for Further Review with the Clerk of the Iowa Supreme Court via electronic filing system (EDMS) on the 18th day of March, 2022.

Respectfully Submitted:

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TABLE OF CONTENTS

PROOF OF SERVICE2
CERTIFICATE OF FILING3
TABLE OF CONTENTS.....4
STATEMENT SUPPORTING RESISTANCE5
STATEMENT OF THE CASE6
NATURE OF THE CASE6
COURSE OF THE PROCEEDINGS7
STATEMENT OF THE FACTS.....9
ARGUMENT16
CONCLUSION22
CONDITIONAL REQUEST FOR ORAL ARGUMENT23
COST CERTIFICATE.....24
CERTIFICATE OF COMPLIANCE25

STATEMENT SUPPORTING RESISTANCE

The State requests this Court to grant further review to clarify the manner in which the doctrine of transferred intent should be submitted to a jury and to determine whether the evidence was sufficient to support Mong's convictions for Attempted Murder, Intimidation with a Dangerous Weapon with Intent, and Willful Injury Causing Bodily Injury.

The Court of Appeals already answered the State's question regarding the manner in which the doctrine of transferred intent should be submitted to a jury. Had the jury instructions stated the intended target of the offenses was Ricco Martin or "Shane Woods or another" the jury would then have had the opportunity to deliberate a transferred intent to Shane Woods.

As Mong has argued to both the trial court and the Court of Appeals, the law of this case are the jury instructions. The instructions required the jury to find that Mong specifically intended to commit the alleged crimes against Shane Woods. The instructions did not require the jury to find that Mong specifically intended to commit the alleged crimes against Ricco Martin or any other person. The instructions limited the victim to Shane Woods.

Because there was no evidence even presented by the State to cause a rational trier of fact to believe that Mong intended to inflict harm on Shane

Woods. With no intent to inflict harm on Shane Woods, the doctrine of transferred intent did not apply because there was no intent to be transferred.

STATEMENT OF THE CASE

Nature of the Case:

This matter stems from Anthony Alexander Mong's appeal from the judgment, conviction, and sentence following a jury trial for Attempt to Commit Murder, in violation of Iowa Code 707.11(1), a Class B Forcible Felony; Intimidation with a Dangerous Weapon with Intent, in violation of Iowa Code 708.6, a Class C Forcible Felony; Willful Injury Causing Bodily Injury, in violation of Iowa Code 708.4(2), a Class D Non-Forcible Felony; and Going Armed with Intent, in violation of Iowa Code 708.8, a Class D Non-Forcible Felony. (04/08/2019 Forms of Verdict). (05/23/2019 Sentencing Order). (05/30/2019 Notice of Appeal). (App. 62-69,84-88, 89)

Mong argued that the jury pool and panel violated his State and Federal Constitutional rights to a fair cross-section of his community; insufficiency of the evidence; and other errors.

Course of the Proceedings:

Mong was charged on September 25, 2018 by trial information in the Iowa District Court for Polk County in Case No. FECR317295 with the following crimes:

Count I: Attempted Murder, in violation of Iowa Code § 707.11(1), a Class B Felony;

Count II: Intimidation with a Dangerous Weapon with Intent Injure / Provoke Fear, in violation of Iowa Code § 708.6, a Class C Felony;

Count III: Felon in Possession of a Firearm, in violation of Iowa Code § 724.26, a Class D Felony;

Count IV: Willful Injury, in violation of Iowa Code § 708.4(1), a Class C Felony; and,

Count V: Going Armed with Intent, in violation of Iowa Code §708.8, a Class D Felony.

(09/25/2018 Trial Information). (App.6-8).

The State also filed a Notice of Intent to seek the dangerous weapon enhancement pursuant to Iowa Code § 902.7. (03/19/2019 Notice of Enhancement). (App. 9).

On the morning of trial, the Court ruled on the pretrial motions; the State orally moved to dismiss the Felon in Possession of a Firearm charge; and the Court renumbered the counts. (04/02/2019 Count III Dismissal Order). (Jury Instructions). (Trans. Trial Vol.2, p.22). (App. 26-27, 28-61).

Prior to jury selection, the Defense challenged the jury pool as a violation of Mong's right to a fair cross-section of the community. (Trans. Trial Vol.1, p.63). The Court overruled Mong's challenge to the jury pool. (Trans. Trial Vol.1, p.71). The Jury was selected and seated. Trial commenced; evidence was presented; the Court denied Mong's motions for directed verdict and judgment of acquittal; and the jury found Mong guilty on all four remaining charges, with one being a lesser included offense. (Forms of Verdict). (Trans. Vol.3, p.175-185). (App. 62-69).

The Defense timely filed a Motion for New trial, which was denied. (05/07/2019 Defense Motion for New Trial). (05/23/2019 Order Denying Motion for New Trial) (App. 70-81, 84-88). Mong's sentences were run concurrent to each other for a total period not to exceed 25 years with a mandatory minimum of 17 ½ years prior to eligibility for parole. (05/23/2019 Sentencing Order). (Sent. Trans. 5/23/20 p.21-40). (App. 84-88). Mong then appealed. (05/30/2019 Notice of Appeal). (App. 89).

The appeal was submitted to the Court of Appeals. On February 16, 2022, the Court of Appeals held that Mong is entitled to access to the information needed to enforce his constitutional right to a jury trial and was not given access to that information. It further held there was insufficient evidence of a specific intent to harm or kill Shane Woods and therefore

insufficient evidence to support the charges of attempted murder, intimidation with a dangerous weapon and willful injury causing bodily injury. The conviction for going armed with intent was conditionally affirmed with instructions that the district court develop the record on the challenge to the composition of the jury. The Court of Appeals therefore reversed in part, affirmed on condition in part, and remanded.

The State now seeks further review.

Statement of the Facts:

The facts pertinent to the issues raised for further review are as follows:

Anthony Alexander Mong and Madison Cobb dated for a period of time prior to the incident at issue. (Trial Trans. Vol. 2 p.45, 49; 161; Vol. 4 p. 15-16). Madison lived with her parents, Todd and Heather Hines. Madison's uncle, Shane Woods, and cousin, David Woods, also stayed at the Hines' residence. (Trial Trans. Vol. 2 p.46, 240). Anthony and Madison's relationship could be described as "on and off". (Trial Trans. Vol.4 p.16). While they were dating, Anthony was also in a relationship with Rachel Janousek, and Madison was in a relationship with Ricco Martin. (Trial Trans. Vol. 2 p.48-49, 90, 94, 223-224; Vol. 4 p. 16, 18).

Anthony's vehicle, a red Cadillac, was stored at the Hines' residence for Todd to repair. (Trial Trans. Vol. 2 p.56-57, 224; Vol. 4 p.20-21). At some point the relationship between Madison and Anthony ended. (Trial Trans. Vol. 4 p. 23-24). On May 31, 2018, Anthony went to the Hines' residence to retrieve his Cadillac but Todd told him to come back later that weekend to retrieve the vehicle, keys and title. (Trial Trans. Vol. 2 p.224-225; Vol. 4 p.23-24). The conversation was cordial, and Anthony agreed. (Trial Trans. Vol. 2 p.224-225).

The next day, Anthony drove Rachel to work in Rachel's 2012 Hyundai Sonata and also picked up his friend, Brandon Henlon. (Trial Trans. Vol. 2 p.78-79, 87-88; Vol. 4 p.25-27). After dropping Rachel, Anthony and Brandon went to pick up the Cadillac from the Hines' residence. (Trial Trans. Vol. 4 p.28-29). With loud music playing, Anthony drove to the Hines' residence, did a U-turn and parked on the street. (Trial Trans. Vol. 4 p.32-33, 55-56). Todd, David, Shane and Ricco were standing outside the residence. (Trial Trans. Vol. 2 p.55-56, 58, 98-99, 174-175, 240; Vol. 4 p.49-51). Todd ran inside to get his gun. (Trial Trans. Vol. 2 p.214, 219.) When Todd came back outside, he had his gun in his waistband. Todd claimed he could hear Anthony "racking" a gun in the vehicle as he was driving by. Todd tried to draw the gun but it dropped and Rico took it from

him. Ricco ran around the corner of the house. (Trial Trans. Vol. 2 p.217, 219-220, 228-229, 233).

Anthony exited the vehicle and started to approach the residence while texting on a black cell phone. (Trial Trans. Vol. 4 p.33, 36, 43). When he looked up, Anthony saw Todd fidgeting with a gun and Ricco grabbing it. (Trial Trans. Vol. 4 p.36, 91). Anthony felt he was going to be shot and lunged behind a large tree for cover. (Trial Trans. Vol. 2 p.104-105, 105, 114, 141-142; Vol. 4. 36-37). Anthony heard a shot go off from the direction of where Todd, Ricco and the others were; and then he heard a second shot from behind him. (Trial Trans. Vol. 4 p.37-38, 63-64, 82). He then made his way back to the car and drove off. (Trial Trans. Vol. 4 p.38). Anthony and Brandon dropped the vehicle at the house where Brandon and Rachel had been staying. Anthony then noticed that Brandon had a gun in his hand. Anthony stayed at a motel because he was afraid of being shot or someone coming after him and left the next day to stay with his mother in Las Vegas. (Trial Trans. Vol. 4 p.39-40). He did not tell anyone that Brandon had a firearm in the vehicle that night because he felt that Brandon had saved his life. (Trial Trans. Vol. 4 p.81, 87-88).

Shane testified that he wasn't "too worried" about Anthony as he "had no beef with him." (Trial Trans. Vol. 2 p.244, Vol. 3 p.21-22, 27-28).

Shane “turned around to walk back up towards the house and heard a shot”. Shane then realized he was hit on the left side of his back. (Trial Trans. Vol. 2 p.244-245). Shane received medical treatment and was released from the hospital the following day. (Trial Trans. Vol. 2 p.235)

David testified that he was in the garage grabbing a baseball bat when he then heard a gunshot and Todd say “He’s got a gun”. He then heard his dad, Shane, yell “I’m hit. I’m hit.” (Trial Trans. Vol. 2 p.177, 182). David came out of the garage with the bat and chased after Anthony. (Trial Trans. Vol. 2 p.177-178). David never saw Anthony exit the vehicle when he arrived, but he saw him get back into the vehicle as he chased after him. (Trial Trans. Vol. 2 p.182-183).

A neighbor heard someone say, “No, you’re doing it the wrong way.” (Trial Trans. Vol. 2 p.145). She then heard two gunshots and noticed a Caucasian male with a baseball bat chasing another man around a tree. (Trial Trans. Vol. 2 p.144-145).

Todd was standing in his house when he heard two gunshots. He did not see Anthony fire any shots and he did not see Shane get hit. (Trial Trans. Vol. 2 p.220, 228-229, 234). Todd told Shane “Get the fuck in here. They’re shooting at you”. Shane responded, “Well, you got me in the back. I’m hit. Help me. Help me.” (Trial Trans. Vol. 2 p.230). Todd called 911

and reported that Anthony shot Shane. He did not report that he a gun in his possession during the incident until a later interview at the police station. He also did not report they had all smoked marijuana that day. (Trial Trans. Vol. 2 p.162, 221, 231).

Only Ricco claimed to have been a witness to the shooting. (Trial Trans. Vol. 2 p.101, 181, 183, 221, 228; Vol. 2 p.22). He instructed Heather to put Todd's gun upstairs in their bedroom. (Trial Trans. Vol. 2 p.167, 170-171).

Heather hid the gun under a mattress. (Trial Trans. Vol. 2 p.167, 170-171, 227). Although she did not witness any of the events, Heather also called 911 to report that Anthony shot Shane. She did not disclose that she hid Todd's gun under a mattress. (Trial Trans. Vol. 2 p. 162, 171, 221).

Law enforcement found a shell casing in the street and a live round in the vehicle Anthony had been driving. (Trial Trans. Vol. 3 p.37-38, 44, 54, 65, 79, 166). Todd's gun was finally seized three days later. (Trial Trans. Vol. 2 p.232). No gunpowder analysis was completed and no DNA evidence was taken. (Trial Trans. Vol. 3 p.68, 69, 81, 85-86, 88, 101, 166-168).

A warrant was issued for Anthony and he was charged in the Polk County District Court by Trial Information with:

Count I: Attempted Murder, in violation of Iowa Code § 707.11(1), a Class B Felony;

Count II: Intimidation with a Dangerous Weapon with Intent Injure / Provoke Fear, in violation of Iowa Code § 708.6, a Class C Felony;

Count III: Felon in Possession of a Firearm, in violation of Iowa Code § 724.26, a Class D Felony;

Count IV: Willful Injury, in violation of Iowa Code § 708.4(1), a Class C Felony; and,

Count V: Going Armed with Intent, in violation of Iowa Code §708.8, a Class D Felony.

(09/25/2018 Trial Information). (App. 6-8).

It was the State's theory that Anthony intended to shoot Ricco, but missed and shot Shane instead. (Trial Trans. Vol. 5 p.7-34, 71-82).

The Defense theory was that Shane was either shot with Todd's gun by Todd or Ricco, or by Brandon. (Trial Trans. Vol. 5 p.35-70). Todd admitted to having a firearm at the scene. Ricco had control of Todd's firearm at the scene. Brandon was known to possess firearms and was at the scene but was deceased at the time of trial. (Trial Trans. Vol. 2 p.89; Vol. 4 p.55, 89).

The jury was selected and trial proceeded. At the close of the State's evidence the Defense moved for a directed verdict and judgment of acquittal. The motion was denied. (Trial Trans. Vol. 3 p.172-185). After

the close of the Defense case, the Defense renewed its motion for directed verdict and judgment of acquittal. The Court again denied the Defense motion. (Trial Trans. Vol. 4 p.101-104).

The case was submitted to the jury and the jury returned a verdict of guilty on Count I: Attempt to Commit Murder; Count II: Intimidation with a Dangerous Weapon with Intent; Count III: Willful Injury Causing Bodily Injury (a lesser included offense); and Count IV: Going Armed with Intent. (Forms of Verdict). (App.62-69).

The Defense filed a Motion for New Trial arguing again that the evidence was insufficient for conviction and that the jury could not have convicted the Defendant without improperly applying “transferred intent”. (Motion for New Trial). (Sentencing Trans. p. 2-9) (App. 70-81). The Court denied the Motion for New Trial and sentenced Anthony to a concurrent to each other for a total period not to exceed 25 years with a mandatory minimum of 17½ years prior to becoming eligible for parole. (Sentencing Trans. p. 19) (Order Denying Motion for New Trial). (Sentencing Order). (App.82-83, 84-88). The Defense then filed a Notice of Appeal. (Notice of Appeal) (App.89).

Additional facts are discussed as necessary in the following arguments.

ARGUMENT

THE COURT OF APPEALS PROPERLY FOUND THERE WAS NO EVIDENCE OF A SPECIFIC INTENT TO HARM OR KILL SHANE WOODS AND, THUS, THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CHARGES OF ATTEMPTED MURDER, INTIMIDATION WITH A DANGEROUS WEAPON, AND WILLFUL INJURY CAUSING BODILY INJURY.

“Sufficiency of the evidence claims are reviewed for correction of errors at law. The jury’s verdict is binding upon a reviewing court unless there is an absence of substantial evidence in the record to sustain it. Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record.” *State v. Hennings*, 791 N.W.2d 828, 832-33 (Iowa 2010). See also *Albright*, 925 N.W.2d at 150.

“Where, as here, the jury was instructed without objection, the jury instruction becomes the law of the case for the purposes of reviewing the sufficiency of the evidence.” *State v. Banes*, 910 N.W.2d 634, 639 (Iowa Ct. App. 2018). See also *State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009).

The jury instructions, and therefore the law in Mong's case, specifically required that the jury find that Mong specifically intended to do certain acts to Shane Woods as opposed to a general person in order for the jury to find Mong guilty of the crimes alleged, except for the lesser included offenses of Assault in Instruction No. 24 and Assault Causing Bodily Injury in Instruction No. 31.

ATTEMPT TO COMMIT MURDER:

“A person commits the offense of attempt to commit murder when, *with the intent to cause the death of another person* and not under circumstances which would justify the person's actions, the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of the other person.”
Iowa Code 707.11(1). (Emphasis added).

However, Jury Instruction No. 18, and therefore the law in this case, provided:

In Count I, the State must prove all the following elements of Attempt to Commit Murder:

1. On or about June 1, 2018, the Defendant, Anthony Alexander Mong shot Shane Woods with a firearm.
2. By his acts, the defendant, Anthony Alexander Mong expected to set in motion a force or chain of events which could have caused or resulted in the death of Shane Woods.
3. When the defendant acted, *he specifically intended to cause the death of Shane Woods.*

If the State has proved all of these elements, the defendant is guilty of attempt to commit murder.

If the State has failed to prove any one of the elements, the defendant is not guilty of attempt to commit murder and you will then consider

the offense of assault with intent to inflict serious injury as explained in Instruction No. 19.

(Jury Instructions) (App. 28-61). (Emphasis added.)

There was absolutely no evidence presented to the jury that Mong intended to cause the death of Shane Woods. None. That was not even the theory of the State's case against Mong. The State does not dispute this lack of evidence. The State's theory at trial and on appeal is Mong intended to shoot Ricco Martin. There was no evidence to support Mong's conviction of Attempt to Commit Murder.

INTIMIDATION WITH A DANGEROUS WEAPON:

“A person commits a class “C” felony when the person, with the intent to injure provoke fear or anger *in another*, shoots, throws, launches, or discharges a dangerous weapon at, into, or in a building, vehicle, airplane, railroad engine, railroad car, or boat, occupied by another person, or within an assembly of people, and thereby places the occupants or people in reasonable apprehension of serious injury or threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out.”

Iowa Code 708.6. (Emphasis added.)

Again, there is a major difference in the jury instructions.

Instruction No. 23 provides:

In Count II, the State must prove all of the following elements of Intimidation with a Dangerous Weapon with Intent:

- 1) On or about June 1, 2018, the defendant, Anthony Alexander Mong, intentionally shot a dangerous weapon within an assembly of people;
- 2) *Shane Woods* actually experienced fear of serious injury and his fear was reasonable under the existing circumstances;
- 3) The defendant shot the dangerous weapon *with the specific intent to injure or cause fear or anger in Shane Woods*.

If the State has proved all three of these elements, the defendant is guilty of intimidation with a dangerous weapon with intent. If the State has proved elements 1 and 2, but not element 3, the defendant is guilty of the offense of intimidation with a dangerous weapon without intent. If the State has failed to prove any one of these elements, you will then consider the offenses of assault as explained in Instruction No. 24.
(Jury Instructions) (App.28-61).

There is no evidence in this record that Shane Woods experienced fear of a serious injury. To the contrary, Shane testified that when Mong arrived he wasn't "too worried" as he "had no beef with him." There was no conflict between the two of them and he was not aware of any issues between Mong and the others. (Trial Trans. Vol. 2 p.244, Vol. 3 p.21-22, 27-28). Shane "turned around to walk back up towards the house and heard a shot" and he was hit on the left side of his back. (Trial Trans. Vol. 2 p.244-245). There is no evidence that he experienced fear of serious injury. Further, as argued above, there was no evidence that Mong intended to injure or

cause fear in Shane. They had no issues with one another. The State did not even theorize that Mong had such intent.

WILLFUL INJURY CAUSING BODILY INJURY

Any person who does an act which is not justified and which is intended to cause serious injury to another commits willful injury, which is punishable as follows . . . a class “D” felony, if the person causes bodily injury to another. Iowa Code 708.4 (Emphasis added).

Jury Instruction No. 17 provides:

In Count III, the State must prove all of the following elements of willful injury causing bodily injury:

1. On or about June 1, 2018, the defendant, Anthony Alexander Mong shot a firearm at Shane Woods.
2. The defendant *specifically intended to cause a serious injury to Shane Woods*.
3. Shane Woods sustained a bodily injury as a result of the defendant’s actions.

If you find the State has proved all of the elements, the defendant is guilty of willful injury causing bodily injury. If the State has failed to prove any one of the elements, you should go on to consider the offense of assault causing serious injury as set out in Instruction No. 29.

Once again, there was no evidence even presented by the State to cause a rational trier of fact to believe that Mong specifically intended to cause a serious injury to Shane Woods.

When viewing the

The State continues to argue its reliance on the transferred-intent instruction:

INSTRUCTION NO. 16

Under the doctrine of transferred intent, once the intent to inflict harm on one victim is established, the criminal intent transfers to any other victim who is actually assaulted. A party is liable for a wrongful act, where there exists a criminal intent, although the act done is not that which was intended. The wrongful intent to do one act, is transposed to the other, and constitutes the same offense.

(App. P. 39).

Because the instructions regarding the elements of each crime required the specific intent to be directed toward Shane Woods, not Ricco Martin and not some other person, no intent to inflict harm could be established. There is no “intent” to be transferred to any other person. Thus, Instruction No. 16 and the doctrine of transferred intent became irrelevant under the law of this case.

There is no need for this Court to grant further review to provide any additional clarification to the manner in which the issue of transferred intent should be instructed and submitted to the jury. The Court of Appeals explained had each of the jury instructions stated the intended target of the offenses was Ricco Martin; or had the

instructions provided the intended target was Shane Woods or another; the jury might have found a transferred intent to Shane Woods. The instructions did not do this. There was no wrongful intent toward Shane Woods that could be transposed to Ricco Martin or someone else. The State did not object to the wording of the instructions and did not offer an alternative. Therefore, it is the law of the case. For these reasons, the State's request for further review should be denied.

CONCLUSION

For the reasons set forth herein, the Appellant, Anthony Alexander Mong, respectfully requests that this Court deny the State's request for further review.

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CONDITIONAL REQUEST FOR ORAL ARGUMENT

Counsel for Appellant hereby requests to be heard should oral argument be granted.

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COST CERTIFICATE

I, Cathleen J. Siebrecht, hereby state that the actual cost of printing the foregoing Appellant's Resistance to Further Review was the sum of \$0.00 as it is electronically submitted.

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Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g) because this brief contains 3,912 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared this brief has been prepared in a proportionally spaced typeface using Microsoft Word 14 point Times New Roman.

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03/18/2022
Date