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Court of Appeals
Division I
State of Washington

72799-1

NO. 72799-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

YUSUFF ABDULLE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Theresa B. Doyle, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	3
a. <u>State’s Case</u>	3
b. <u>Facts Pertaining to Assignment of Error 2</u>	12
c. <u>Facts Pertaining to Assignment of Error 1</u>	14
d. <u>Defense Case</u>	16
C. <u>ARGUMENTS</u>	19
1. BANKS’ EXPERT TESTIMONY WAS IRRELEVANT, UNHELPFUL, PREJUDICIAL, AND SHOULD HAVE BEEN EXCLUDED.	19
2. THE STATE FAILED TO SHOW THE UFED RELIABLY AND ACCURATELY EXTRACTED DATA FROM THE CELL PHONES AND THE UFED REPORTS AND WASHINGTON’S TESTIMONY ON THE CONTENTS OF THE REPORTS SHOULD NOT HAVE BEEN ADMITTED.....	23
D. <u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

City of Bellevue v. Lightfoot
75 Wn. App. 214, 877 P.2d 247 (1994).....25

City of Seattle v. Peterson
39 Wn. App. 524, 693 P.2d 757 (1985).....24

Davidson v. Municipality of Metro. Seattle
43 Wn. App. 569, 719 P.2d 569 (1986).....20

In re Det. of Duncan
142 Wn. App. 97, 174 P.3d 136 (2007)
affd., 167 Wn.2d 398, 219 P.3d 666 (2009).....6, 7, 20

State v. Bashaw
169 Wn.2d 133, 234 P.3d 195 (2010).....23

State v. Bradford
175 Wn. App. 912, 308 P.3d 736 (213).....23, 25

State v. Cameron
100 Wn.2d 520, 674 P.2d 650 (1983).....20

State v. Huynh
49 Wn. App. 192, 742 P.2d 160 (1987).....23

State v. Lewis
141 Wn. App. 367, 166 P.3d 786 (2007).....21

State v. Nunez
174 Wn.2d 707, 285 P.3d 21 (2012).....23

State v. Payne
117 Wn. App. 99, 69 P.3d 889 (2003).....24

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Roberts</u>	
73 Wn. App. 141, 867 P.2d 697 (1994).....	24
<u>State v. Thomas</u>	
123 Wn. App. 771, 98 P.3d 1258 (2004).....	8, 19

RULES, STATUTES AND OTHER AUTHORITIES

ER 401	20
ER 403	20, 22
ER 702	19, 20
ER 901	24
RCW 9.68A.101	2

A. ASSIGNMENTS OF ERROR

1. The court erred when it admitted expert testimony on the pimp/prostitute relationship and denied appellant's motion to exclude the testimony.

2. The court erred when it admitted into evidence data extracted from cellular telephones where there was no showing the evidence was reliable or accurate.

Issues Pertaining to Assignments of Error

1. Appellant was charged with Promoting Commercial Sexual Abuse of a Minor on the theory that for a few weeks in early 2013 appellant pimped two young women who were prostitutes before they met the appellant. A Detective was allowed to testify about the pimp/prostitute relationship, including how pimps recruit young girls into prostitution, take all their earnings, and punish them for violating rules. The description of that relationship was unlike what the evidence showed was the relationship between the two prostitutes and the man they identified as appellant. Did the court err in denying appellant's motion to exclude the testimony as irrelevant and prejudicial?

2. Police used a machine or device called Universal Forensics Examination Device to extract data from the cellular telephones (cell phone) belonging to the two prostitutes, and a cell phone found in the car

appellant was driving when he was arrested. The extracted data purported to show the phone numbers of the cell phones and calls and text messages between the cell phones. Did the court err in admitting as evidence reports generated by the device and testimony concerning the contents of those reports where the State failed to lay a foundation to authenticate the evidence and show the device was able to reliably and accurately extract data from the cell phones? Did the admission of the evidence prejudice appellant and deny him the right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

A Third Amended Information charged Yussef Abdulle with two counts of Promoting Commercial Sexual Abuse of a Minor¹(Counts 1 and 2), one count of Unlawful Imprisonment (Count 3), and one count of Second Degree Assault (Count 4). CP 27-28. A.P. was named victim in Counts 1, 3 and 4. Id. B.I. was the named victim in Count 2. Id.

A jury acquitted Abdulle on Counts 3 and 4. CP 139, 140. He was convicted on Counts 1 and 2. CP 137, 138. Abdulle was given a concurrent standard range sentence of 189 months on each conviction based on an offender score of 6. CP 69-81. Abdulle timely appealed his judgment and sentence. CP 82.

¹ RCW 9.68A.101(1).

2. Substantive Facts

a. State's Case

A.P. was born July 25, 1996. RP 440.² A.P.'s parents separated when she was five years old. RP 441. By the time A.P. was 15 years old her relationship with her mother had become difficult and by December 2012 A.P. was spending most of the week at her boyfriend's house, with friends or with her older sister. RP 442, 446-447, 575.

When A.P. and her sister also began having problems A.P. asked her mother if she could come back home to live. A.P.'s mother refused because she believed A.P. and A.P.'s boyfriend had earlier broken into the house and stole some computers. RP 571-72. A.P.'s boyfriend told A.P. she could live with him but she did not want to live at his house. RP 573. She could have stayed with her father but she did not want to live with him either. RP 556. Instead, A.P. began working as a prostitute walking the streets in the Burien and White Center area. RP 450-51, 460.

B.I., who was born September 9, 1996, also had problems with her mother. She too started engaging in prostitution when she was 15 years old. RP 602-606. B.I. walked the streets in the Tukwila area. RP 607.

One day a friend gave B.I. the telephone number of a man named Derrick who B.I. later identified as Abdulle. RP 609-612. B.I. called the

² The Verbatim Report of Proceedings is sequentially numbered.

number and met Abdulle a few days later. RP 613-14. About a week after they met B.I. asked Abdulle if she could live with him and he agreed. RP 616-17. B.I. was uncertain when she lived with Abdulle but believed it was between February and March 2013. RP 695, 697-98.

B.I. continued to engage in prostitution while living with Abdulle, and she told Abdulle she was prostituting herself. RP 619-621. Once Abdulle gave her a man's phone number. B.I. called the number, met the man, had sex with him, and he paid her \$200. RP 621-623. She did not give Abdulle any of the money. RP 628. Although Abdulle took B.I. to meet men a few times he did not know she was meeting the men to engage in prostitution. RP 686, 721.

B.I. gave Abdulle money from a cell phone she sold and about \$100.00 for gas and other expenses. RP 652, 656. But, Abdulle never asked B.I. for any money from her prostitution activities. RP 721.

B.I. met A.P. through a mutual friend. RP 457, 629-30, 691. When A.P. told B.I. she had nowhere to stay following her mother's refusal to let her come back home, B.I. asked Abdulle if A.P. could also stay at his apartment. RP 461, 631. Abdulle initially rejected that idea but B.I. pleaded with him and he finally agreed. RP 631-32. A.P. moved into the apartment sometime at the end of February 2013. RP 573.

A.P. testified that Derrick, who she too later identified as Abdulle, told her he would get her customers who she referred to as “jugs” and take 40% of what she made. RP 463-466. A.P. was fine with the arrangement. RP 466. A.P. continued to meet her regular customers but did not tell Abdulle because she did not want to give him any of the money she made. RP 477-78. A.P. said she once went with Abdulle and B.I. when Abdulle took B.I. to meet a “jug” in Tukwila. RP 468. Abdulle and A.P. then drove to Seattle where she said Abdulle sold some crack. RP 469.

A few days after A.P. began staying with Abdulle and B.I., A.P. said Abdulle set her up with 4 customers. RP 484. In the two weeks A.P. stayed with Abdulle she said he set her up with maybe a total of 6 or 7 customers. Abdulle set the price A.P. charged those customers. After A.P. had sex with the customers Abdulle would pick her up and they would split the money. RP 482-487, 500, 502.

While they stayed with Abdulle, A.P. and B.I. shared the apartment’s one bedroom and Abdulle slept on the couch. RP 475, 632. B.I. testified that about a week after A.P. moved into the apartment, A.P. told B.I. that Abdulle wanted her and B.I. to leave. RP 633, 700. A.P., on the other hand, said B.I. and Abdulle got into an argument and B.I. left with her boyfriend. RP 513-14. A.P. said she asked B.I. if she could go

with her but B.I. told her she could not. RP 514. B.I. said that she found out later that A.P. did not leave but had continued to stay at Abdulle's apartment for about another week. RP 698-99.

After B.I. left, A.P. no longer engaged in prostitution because Abdulle gave her some drugs that impaired her ability to function. RP 515. At some point A.P. asked Abdulle if her boyfriend could come and stay in the apartment with her. When she made the request Abdulle pulled a gun from a dresser, pointed it at her, and told her that he would kill her if she allowed anyone come to the apartment. RP 518-521. The following day, March 13, 2013, Abdulle gave A.P. a purple pill and she became sick. RP 487, 523. A.P. went to a nearby store, called police, and was taken to the hospital. RP 523-24.

A.P. was diagnosed with a pelvic inflammatory disease. RP 1118. The day after she was taken to the hospital A.P. spoke with a pediatric social worker. RP 1106. Although she spoke with the social worker about her living situation, school, substance abuse, mental health issues, and her friends, she did not mention anything about prostitution or Derrick. RP 1108-09, 1116.

A.P. also met with Sheronda Duncan of YouthCare, an organization that helps girls involved in prostitution. RP 1156, 1164. A.P. told Duncan she was involved in prostitution and needed a place to

stay. RP 1167. Duncan referred A.P. to Bridge, which is similar to a charter school but also provides mental health counseling, chemical dependency counseling, housing, food, and clothes. RP 1160-1162.

When A.P. was discharged from the hospital she wanted to pick up some clothes she left at Abdulle's apartment. RP 1169. Duncan agreed to drive A.P. to the apartment, and while Duncan drove A.P. was on her cell phone texting with someone to make arrangements to pick up her clothes. RP 1171. About 10 minute after Duncan and A.P. arrived at the apartment two African men showed up. RP 1174-75. Duncan described one man as stockier than the other, and she noticed that man was cockeyed and walked with a limp similar to the limp she said she noticed when she saw Abdulle walking in the hallway outside the courtroom. RP 1177, 1181, 1196. The stockier man accompanied A.P. into an apartment and A.P. returned to a short time later with her clothes. RP 1178-79. Duncan then took A.P. to Bridge. RP 1184.

A.P.'s mother, Maria Hedger, also testified she had a poor relationship with A.P. RP 274. Hedger knew A.P. was a thief because A.P. stole some computers from her but contrary to A.P.'s testimony Hedger denied she refused to let A.P. live at home. RP 416-17. Sometime in February 2013 Hedger and A.P. got into a fight and A.P. left for two weeks. A.P. told Hedger she was staying with her older sister and

occasionally with friends. RP 429-30. Hedger said that A.P. also stayed at home 3 or 4 days a week, contrary to A.P.'s testimony that during that entire time she was living in Abdulle's apartment. RP 431-432.

In December 2011 police had contacted Hedger because A.P. had been shot in the leg. RP 405, 407, 555. In March 2012 police again contacted Hedger about A.P. RP 406. Because of those contacts Hedger claimed she became concerned about A.P.'s behavior. RP 387. After she decided to go to Bridge, A.P. told Hedger about what she had been doing. RP 283-84. Hedger let A.P. use her cell phone and Hedger saw a text message from a Derrick that said "you better call me back. RP 287-288. Hedger pretended to be A.P. and sent a message back asking what the person wanted, and she called the phone number associated with the message. RP 289. The text reply to Hedger's message read "get your mom off by back." RP 290. Hedger then called police sometime in March 2013. RP 280, 291.

In early April 2013, Detective Maurice Washington contacted Hedger. RP 759-60. On April 11, 2013 he and victim advocate Stephanie Thomas met with A.P. at the YouthCare facility. RP 762-63. A few days later A.P. took him to an apartment complex on Delridge in West Seattle and pointed out apartment 201 as the apartment she stayed in with Abdulle and B.I. She also pointed out a tan Buick and a silver Buick she said

Abdulle drove. RP 767-771. Washington obtained the Vehicle Identification Numbers from the two Buicks and came up with two names associated with the cars. RP 772-776. Washington also put together a photo montage and showed it to A.P. She picked a person from the montage she indicated looked similar to Derrick. The person she picked was not Abdulle. RP 777-782.

A.P. also told Washington about B.I. RP 807-08. There were warrants for B.I.'s arrest and Washington began searching for her. RP 809. On April 23, 2013 Washington found B.I. at a bus stop in Burien and arrested her. RP 811-813. B.I. spoke to Washington about Derrick and she pointed out the same Delridge apartment A.P. identified as Derrick's apartment as well as the same two Buicks. RP 821-22. B.I. was also shown the same photo montage that was shown to A.P. and B.I. picked the same man A.P. picked as looking like Derrick. RP 824-25.

On April 30, 2013, Washington and another detective conducted a surveillance operation at the Delridge apartment complex. RP 844. They saw two black males come out of an apartment, and walk to the one of the Buicks. The taller of the two walked with a limp. The men stood by the car then went back into the complex. RP 847-850.

A few days later, on May 3, 2013, Washington went to see A.P. again because she said she was receiving text messages on her cell phone

from Derrick. RP 909. The phone number the messages were sent from was 206-673-0684. Washington took A.P.'s phone and started communicating with the person sending the messages because he wanted to set up a meeting so he could arrest him. RP 910-912. Washington, pretending he was A.P., arranged a meeting for the following Monday. RP 912.

The following Monday, May 6, 2013, Washington picked A.P. up at about 6:00 p.m. and began texting the 673-0684 number. RP 918-19. Washington arranged to meet the person at a nearby Super 24 store. RP 920. The person on the other end of the text messages indicated he would be driving a white Toyota Camry. RP 925. Washington and A.P. waited near the store and a few minutes later Washington saw a white Toyota drive past driven by a black man. It stopped at the store. RP 926-27. Washington had A.P. text the same number that she was in the store and would be right out. RP 928. Washington then drove A.P. by the store and she identified the man in the car as Derrick. RP 929-30. A swat team was involved in the operation. RP 916-918, 922-23. When A.P. identified the man the team moved in and arrested Abdulle. RP 933.

Before he was handcuffed police had Abdulle get on the ground. When he was lifted off the ground there was a cell phone underneath him. RP 1207-08. Police also found another cell phone in the Camry, along

with a woman's driver's license issued to Sadie Hassan, an insurance policy issued to an Abdulle, and a yellow receipt with the name Derrick on it. RP 955-56, 1030.

Police searched Abdulle's Delridge apartment, which was the same apartment where A.P. and B.I. said they stayed, and the two Buicks. RP 1264. In the apartment police seized a cell phone, laptop computer and a key to a Buick. RP 1096. In the silver Buick police found what appeared to be a Washington State Title application issued to the MHA Corporation. RP 960-963. The MHA company deals with cars that insurance companies determine are total losses. RP 1241. Police also discovered that an Abdulle reported the Buick stolen in November 2013 and it was later recovered and returned. RP 1230-31. The contact phone number on the report was 673-0684 and the address listed was Abdulle's apartment. RP 1263.

When police ran Abdulle's name in a law enforcement computer system it came up as associated with an Artan Omar. RP 1223. Washington discovered that Omar obtained a driver's license by misrepresenting himself as Abdulle. King County Jail records showed that Omar was booked on March 2, 2013 and released on April 29, 2013. RP 1299, 1512. When Omar was arrested he was booked under Abdulle's name but it was later determined he was not Abdulle. RP 1225-26.

b. Facts Pertaining to Assignment of Error 2

Washington used a machine called Universal Forensics Examination Device (UFED) to extract data from the cell phones belonging to A.P. and B.I., and the cell phone found in the Camry driven by Abdulle when he was arrested. Washington explained a cell phone is connected to the machine with cables, the phone's model and serial numbers are entered into the machine, and the machine itself displays a set of instructions for extracting data from the phone. RP 792, 803-04. Washington explained the UFED can perform a physical extraction of data from the phone, which includes calls made, text messages, instant messages, email applications, passwords, and deleted data. RP 798. The UFED can also perform a logical extraction of data stored in the phone's memory. RP 799. The extracted information is transferred to an external drive and printed. RP 800-01. Washington did not know how the UFED extracted data, and he was never trained by the machine's manufacturer on its use. RP 800.

The UFED report on A.P.'s phone showed that on March 17, 2013 there was a missed call from the 673-0684 number. RP 991; Ex. 41. A few minutes later there was a text message from the same the number that read "Yo asian guy and white guy ready tomo. Let me know I am good with BITCH." RP 992-93; Ex. 40. Washington said records showed 400

calls between the phone number the UFED extracted from A.P.'s phone and the 673-0684 number. RP 1027.

Washington attempted to use the UFED to extract data from the phone recovered on the ground (a Samsung) when Abdulle was arrested, however, the machine was unable to perform an extraction. RP 997-98. Washington performed a manual extraction of some of the phone's data by photographing the data as it appeared on the phone's screen. RP 1000-01; Ex. 49. The phone number extracted from A.P.'s phone was listed in the Samsung under the name Emily. RP 1006. In the phone were the text messages A.P. and Washington had on May 6, 2013 with the 673-0684 number. RP 1006-1016.

Washington also performed a UFED extraction on the cell phone (a Nokia) found in the Camry Abdulle was driving when he was arrested. 1035; Ex. 52. The extraction showed the number for that phone was also 673-0684. RP 1040. Washington testified that two phones can have the same number if a person uses the same SIM card in both phones. RP 1040-41. On only one day, March 11, 2013, were any messages between that phone and the phone number (380-2223) extracted from A.P.'s phone. RP 1038; Ex. 52. There were also 8 text messages between February 21 and 22, 2013 to the phone number (294-72117) extracted from B.I.'s phone. RP 1035, 1253-1260; Ex. 52. The UFED extraction on B.I.'s

phone did not show any text messages to the 673-0684 number, however that number was listed in the phone's contact list under "Answer Dont." RP 1021; Ex. 39.

c. Facts Pertaining to Assignment of Error 1

The State moved in limine to allow Detective Joel Banks to testify as an expert on the "underpinnings" of the prostitution world. RP 44. When the court pressed the prosecuting attorney to identify with more specificity the nature of Bank's testimony, the prosecuting attorney responded Bank's would testify about the geographical areas of prostitution activity, how young women are recruited into prostitution and their living circumstances, and how the proceeds from prostitution activity is shared between a prostitute and a pimp. RP 49-50.

Abdulle argued the proffered testimony was irrelevant and unhelpful because there was no nexus to the facts of case so the testimony would not aid the jury determine whether the crimes were committed. RP 52-53. The court granted the State' motion finding that most jurors have limited or no experience with prostitution and the pimp/prostitute relationship. RP 53-54.

Banks testified that prostitution activity occurs on the SeaTac strip, Pacific Highway, and Aurora. RP 160-161. Women engaged in prostitution also advertise on the internet. RP 149-150. Banks related

certain terms used by prostitutes to refer to a customer, like “Jug”, “Juke” or “John”, and that a “bottom bitch” means the prostitute who has been with a pimp the longest. RP 163-67.

Over Abdulle’s relevancy objection Banks was also permitted to testify about how pimps recruit young girls into prostitution, and the structure or hierarchy of the pimp/prostitute relationship. RP 167, 169-70. Banks told the jury that pimps impose rules on the prostitute and those rules included a prohibition on dating black men, making eye contact with another pimp, the requirement they regularly check in with the pimp, and the requirement the prostitute give the pimp all the money she earned. Banks described the punishment for breaking the rules, which includes forcing a prostitute to engage in sex in front of a crowd, public humiliation or beatings. RP 177-179. Banks testified that the “bottom bitch” usually recruits young prostitutes. The “bottom bitch” collects the prostitute’s money for the pimp and administers punishment if she breaks the rules. RP 179. Banks said that pimps recruit young women from schools, bus stops, and juvenile detention centers. RP 167-68.

On cross examination Banks admitted he did not speak to B.I. or A.P. or if what he described occurred in this case. RP 180-81. However, even though B.I. and A.P both testified they were engaged in prostitution

before they met Abdulle, Banks said he never heard of a young girl prostituting herself without being recruited. RP 239.

Abdulle moved to strike the testimony. Abdulle argued the testimony was not helpful to the jury and irrelevant because B.I. and A.P. did not deny they were engaged in prostitution before they met Abdulle, there was no issue of the meaning of the words they used to describe their prostitution activities or that any of the behaviors or structure of a pimp/prostitute relationship Banks described were related to the facts in the case. Abdulle asserted the testimony substantially prejudiced Abdulle's right to a fair trial. RP 265-66. The motion was denied. RP 267.

d. Defense Case

Abdulle, who is a Somali, testified that he drove a taxi owned by Abdirazaq Mohamed. RP 1431-32. Abdulle generally drove the night shift about 4 days a week, and was often gone for 16 hours. RP 1432, 1435.

Abdulle had lived in the Delridge apartment since 2006 with Mohamed Muktar and Artan Omar. RP 1430. He and Omar are cousins but are like brothers because they were both raised together by their grandmother. RP 1412, 1450. During the months of February and March

2013 Omar stayed with Abdulle in the apartment about 3 days a week. RP 1431, 1450.

Abdulle never met B.I. RP 1433, 1447. He did remember meeting A.P. and her mother in late December 2012 or early January 2013 when the two came to his apartment to buy marijuana from Omar. RP 1434. Abdulle had an agreement with Omar that Omar could not bring people to the apartment Abdulle did not know or smoke marijuana in the apartment. RP 1438. When Abdulle came out of his bedroom and saw A.P. and her mother buying drugs from Omar he became angry and he kicked them out. RP 1437-38.

On the day he was arrested Abdulle was at home with Mohamed Muktar and Omar when Abdirazaq Mohamed, the owner of the taxi cab Abdulle drove, called and asked Abdulle to meet him at a restaurant in Seattle. Abdulle asked Omar for a ride Omar agreed and the two left in Omar's Toyota. Omar asked Abdulle to drive. Abdulle told Omar he wanted to stop at the Super 24 store to buy some Indian tea before going to the restaurant. While they were driving to the store Omar was texting someone on his cell phone. RP 139-1441.

Across from the Super 24 store is a Shell gas station and Omar asked Abdulle to drop him off at the station so he could use the bathroom while Abdulle got his tea. Omar told Abdulle he would walk over to the

store and meet Abdulle when he finished. RP 1442-1444, 1461-1470. Omar left his cell phone in the car. The phone police found on the ground when Abdulle was arrested was Omar's cell phone. RP 1444. Abdulle did not know who owned the phone found in the Camry but he believed it might have belonged to Mohamed Muktar. Id.

Abdulle testified he did not own the two Buicks but he believed Omar had something to do with them, and he was not the person who reported the one Buick was stolen. RP 1446. Abdulle denied he sold drugs, as A.P. claimed. Abdulle never gave A.P. any pills, never called her, and he did not know anyone named Derrick. RP 1444, 1434-35. Abdulle denied he pimped A.P or B.I. and he believed they might have misidentified him as Omar because he and Omar look alike. RP 1437.

Guled Kaynan is also from Somalia. RP 1349-1351. He met Abdulle in 1999. They both previously worked together as drivers for Shuttle Express and in the same warehouse. RP 1352. Kaynan had a key to Abdulle's apartment and would frequently visit the apartment unannounced. RP 1352-1354. Kaynan said Omar, who Kaynan described as a trouble maker, lived with Abdulle off and on, and Omar's sister, Hibaq Omar, was often at the apartment but Kaynan never saw any girls living at the apartment. RP 1354-55, 1362. He testified Abdulle has a reputation in the community for honesty. Id.

Mohemed Roble works as a counselor and educator. Roble works with schools to help African students and is a member of the Somali community. RP 1379-1382. Like Kaynan, Roble testified Abdulle has reputation in the community for honesty. RP 1385.

Hibaq Omar is Abdulle's cousin and Artan Omar's brother. RP 1412, 1420. She testified Omar and Abdulle were raised together. RP 1413. She and Omar often lived with Abdulle in his apartment off and on. Id. Hibaq Omar had a key to Abdulle's apartment and would often cook, clean and shop for him. RP 1415. Between February and March, 2013, Artan Omar was staying with Abdulle, sleeping on the couch, and his friends were frequently at the apartment. RP 1415, 1423. Hibaq Omar never saw any girls at Abdulle's apartment. RP 1416, 1426-27.

C. ARGUMENTS

1. BANKS' EXPERT TESTIMONY WAS IRRELEVANT, UNHELPFUL, PREJUDICIAL, AND SHOULD HAVE BEEN EXCLUDED.

An expert witness with scientific, technical, or other specialized knowledge may testify at trial if that knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. ER 702. The knowledge may assist the trier of fact if it is not misleading and concerns matters beyond the common knowledge of the average juror. State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004).

However, expert testimony must be relevant to be admissible under ER 702. In re Det. of Duncan, 142 Wn. App. 97, 109, 174 P.3d 136 (2007), aff'd, 167 Wn.2d 398, 219 P.3d 666 (2009). The testimony is only relevant if it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Irrelevant evidence has no probative value. State v. Cameron, 100 Wn.2d 520, 531, 674 P.2d 650 (1983). Irrelevant expert evidence is unhelpful to the trier of fact. Duncan, 142 Wn. App. at 109. Evidence is relevant if (1) it tends to prove or disprove the existence of a fact and (2) that fact is of consequence to the outcome of the case. Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 573, 719 P.2d 569 (1986). Even relevant evidence may be excluded if its prejudicial effect substantially outweighs its probative value. ER 403.

The pimp/prostitute relationship Banks described was unrelated to A.P. and B.I.’s experience and unrelated to the trial evidence. B.I. and A.P. became prostitutes on their own. They were not recruited into prostitution by Abdulle, or anyone else, but instead sought him out when they needed a place to stay. There was no agreement or understanding that they were required to turn over all their earnings to Abdulle. There was no evidence that Abdulle advertised B.I or A.P.’s prostitution services

on the internet. There was no evidence Abdulle imposed any rules the two prostitutes were required to follow, which if broken they were threatened by Abdulle with violent punishment or humiliation. There was no evidence B.I. and A.P. were part of an organization run by Abdulle that included a “bottom bitch” who recruited women into prostitution, enforced any rules, or collected earnings. Moreover, the jargon Banks’ identified the pimp/prostitute culture uses to refer to a customer (John, Jugs, Juke) was something B.I. and A.P. themselves testified about. The terms were explained for the jury by B.I. and A.P.

Expert testimony should not be admitted where it is not relevant to the issues to be decided by the jury. State v. Lewis, 141 Wn. App. 367, 389, 166 P.3d 786 (2007). The issue at trial was whether Abdulle pimped A.P. and B.I. The pimp/prostitute relationship that Banks testified about was not relevant to that issue, and because it was not the relationship B.I. and A.P. experienced it did not tend to prove or disprove the existence of any fact at issue in the trial. As defense counsel argued below, there was simply no nexus between the evidence and the pimp/prostitute relationship described by Banks. Furthermore, the jargon Banks’ testified pimps and prostitutes used to describe customers was cumulative of A.P.’s and B.I.’s testimony.

On the other hand, the testimony was unduly prejudicial. ER 403. A.P. and B.I. admitted they were prostitutes before meeting Derrick, the man they identified as Abdulle. They claimed, however, that he provided them a place to stay for a few weeks in February and March, occasionally arranged “dates” and accepted money from them. Abdulle denied he was Derrick. The jury had to decide whether they or Abdulle was the more credible. Although A.P. testified Abdulle threatened her with a gun and plied her with pills so she could not function, the jury nonetheless acquitted Abdulle of the two charges based on that testimony---assault and unlawful imprisonment. B.I.’s and A.P.’s testimony that Abdulle introduced them to men, accepted their money, and on occasion took them to meet men, may have led jurors to infer those activities were similar enough to the relationship Banks described that despite the jury’s obvious misgivings about A.P.’s credibility it tipped the credibility scale in favor of A.P.’s and B.I.’s testimony by essentially vouching for their testimony. The irrelevant and unduly prejudicial testimony likely affected the outcome of he trial and its admission was not harmless.

2. THE STATE FAILED TO SHOW THE UFED RELIABLY AND ACCURATELY EXTRACTED DATA FROM THE CELL PHONES AND THE UFED REPORTS AND WASHINGTON'S TESTIMONY ON THE CONTENTS OF THE REPORTS SHOULD NOT HAVE BEEN ADMITTED.

Abdulle objected to the admission of the data reports (Ex.'s 39, 40, 41, 42 and 52) extracted by the UFED from A.P. and B.I.'s cell phones, the cell phone found in the Camry, and Washington's testimony based on the contents of those extractions. Abdulle argued the reports and Washington's testimony should be excluded because the reports were hearsay, unreliable, and unauthenticated. RP 838-841, 887-902. The court ruled the reports and Washington's testimony were admissible under the holding in State v. Bradford, 175 Wn. App. 912, 308 P.3d 736 (213), and that their relevancy outweighed any prejudice. RP 905-906.³

Evidence must be reliable and accurate to be admitted. State v. Huynh, 49 Wn. App. 192, 196, 742 P.2d 160 (1987). "It is fundamental that evidence must be authenticated before it is admitted." State v. Bashaw, 169 Wn.2d 133,140, 234 P.3d 195 (2010) (overruled on other grounds in State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012)). A report

³ The court granted Abdulle a standing objection to the admission of the evidence. RP 988, 1018-10.

of a test process or test results must be authenticated to be admissible. State v. Roberts, 73 Wn. App. 141, 144-46, 867 P.2d 697 (1994).

“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a). Authentication of a process or system is satisfied by evidence “describing a process or system used to produce a result and showing that the process or system produce an accurate result.” ER 901(b)(9). “The party offering the evidence must make a prima facie showing consisting of proof that is sufficient ‘to permit a reasonable juror to find in favor of authenticity or identification.’” Bradshaw, 169 Wn.2d 140-41 (quoting, State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003)).

Washington admitted he did not know how the program used in the UFED extracted data from a cell phone. RP 799-801. He testified there were others in the department who were trained to maintain the UFED, ensured the UFED was working properly, and who knew how the UFED functioned. RP 800, 1044. Washington’s training was limited to hands on experience operating the device. RP 1044-45. On this record, the State failed to show the UFED was reliable and produced accurate results. See, City of Seattle v. Peterson, 39 Wn. App. 524, 527, 693 P.2d 757 (1985) (evidence of a machine's reliability is a prerequisite to admission of the

machine's results); see also, City of Bellevue v. Lightfoot, 75 Wn. App. 214, 221, 877 P.2d 247 (1994) (“police traffic radar results are not admissible unless the particular radar device used is shown to be reliable”).

The trial court’s reliance on the holding in Bradford was misplaced. In Bradford police conducted a “phone dump” of a cell phone that generated a report itemizing each text message the phone sent or received during a several-month period. Bradford, 175 Wn. App. at 919. The issue in Bradford was whether the messages were sufficiently authenticated because the State did not prove that Bradford was responsible for sending these text messages. Bradford, 175 Wn. App. at 928, n.8. The issue here is the reliability and accuracy of the data extracted from the cell phones by the UFED. The reliability and accuracy of the “phone dump” was not at issue in Bradford.

Abdulle had the opportunity to cross-examine Washington, but because Washington lacked any knowledge regarding the UFED other than how to operate it, cross-examination could not shed any light on its reliability or the accuracy of its reports. In addition, Washington did not retain B.I.’s and A.P.’s phones. They were returned and afterwards became inoperable. RP 714, 842, 882. Because A.P.’s and B.I.’s phones were unavailable to Abdulle through not fault of his own, it was

impossible for Abdulle to independently examine the phones to determine whether the UFED's data extraction was accurate. RP 898-99, 902.

The trial court erroneously admitted into evidence the UFED generated reports and Washington's testimony based on those reports because the State failed to meet its burden as the proponent of the evidence to authenticate the evidence and show its reliability and accuracy. The admission of the exhibits and testimony was not harmless. The evidence was used to purport to identify A.P.'s and B.I.'s cell phone numbers, the cell phone number for the phone found in the Camry, and the text messages and calls between those numbers and with the phone number identified with the phone found with Abdulle when he was arrested. The evidence was also used to show purported text messages from the phone found in the Camry to others indicating the person using that phone could provide the receiver of the messages with prostitution services. Ex. 52; RP 1256-1260. That evidence likely led jurors to discredit Abdulle's testimony that he was not B.I.'s and A.P.'s pimp. Thus, there is a reasonable probability that the cell phone evidence materially affected the outcome of the trial. The error was not harmless and requires reversal.

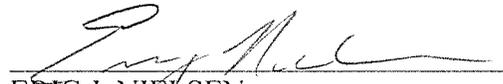
D. CONCLUSION

Abdulle's convictions must be reversed because the court admitted unduly prejudicial expert testimony. Likewise the convictions must be reversed because the court admitted unduly prejudicial cell phone data evidence where the State failed to lay a proper foundation for the admission of that evidence.

DATED this 10 day of September, 2015.

Respectfully submitted,

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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 72799-1-I
)	
YUSSUF ABDULLE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF SEPTEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] YUSSUF ABDULLE
DOC NO. 331649
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF SEPTEMBER, 2015.

x *Patrick Mayovsky*