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STATE OF WASHINGTON

SUPREME COURT NO. _____
COURT OF APPEALS NO. 54793-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL FOXHOVEN,

Petitioner.

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

The Honorable Michael Moynihan, Judge

PETITION FOR REVIEW

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.

Whatcom County PROSC-101

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Patrick Myorsky

7-6-2006

Name

Done in Seattle, WA Date

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A. IDENTITY OF MOVING PARTY

Petitioner Michael Foxhoven, the appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Foxhoven seeks review of the Court of Appeals unpublished opinion in State v. Foxhoven, No. 54793-I (Slip Op. filed May 8, 2006).¹ A copy of the opinion is attached as an Appendix A. Foxhoven's motion to reconsider was denied on June 14, 2006. A copy of the Order Denying Motion for Reconsideration is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

Petitioner Foxhoven was prosecuted for multiple acts of graffiti-related vandalism where the identity of the perpetrators was the sole issue at the trial. Division One approved the admission of evidence that petitioner had been associated with one of the graffiti "tags" under the *modus operandi* exception to ER 404(b) because a tag is "like a signature."

1. Because it is solely relevant to prove identity, the narrow *modus operandi* exception requires proof that the means employed in the prior acts and the charged crimes are "so unique" as to create a "signature-

¹ Foxhoven's appeal was consolidated with that of his codefendant Anthony Sanderson. Mr. Sanderson did not file a motion to reconsider, but has filed a petition for review under Court of Appeals No. 54857-3-I.

like similarity." Division One's misapplication of the *modus operandi* rule authorized the State to introduce otherwise-inadmissible propensity evidence. Is clarification of the rule a question of substantial public interest that should be decided by this Court? RAP 13.4(b)(4).

2. Where the State did not allege an overarching criminal enterprise and the existence of the charged acts was not in dispute, should this Court review the trial court's misapplication of the "common scheme or plan" exception to ER 404(b)? RAP 13.4(b)(4).

3. The Fourth Amendment prohibits the issuance of general warrants and requires a warrant specify with particularity the places to be searched and the items to be seized. In supremely circular reasoning, Division One collapsed these two components and so found that because images were found on a computer, a warrant that identified "images . . . recorded in any form and/or on any medium," was not an unconstitutional general warrant. Does correct application of the particularity requirement present an important constitutional question that should be decided by this Court? RAP 13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

On October 26, 2001, the owners of several businesses in downtown Bellingham discovered that, during the night, their shop windows had been

vandalized with graffiti. 5RP² 318, 320-21, 357, 360, 363, 366, 370, 373, 376-77, 380-81, 383; 6RP 387, 390. In investigating these crimes, police found that all the graffiti had been applied using an acid etching compound. 6RP 432. The graffiti consisted of the words GRAVE, HYMN, and SERIES. 6RP 433.

Officer Don Almer, the Bellingham Police Department's graffiti specialist, was assigned to investigate these crimes. 6RP 396, 431. In attempting to identify the vandals responsible for the graffiti, Almer contacted graffiti investigators at other local law enforcement agencies. 6RP 434. He received information that led him to suspect that Desmond Hansen was associated with the graffiti tag³ GRAVE. 6RP 435. Almer obtained a search warrant for Hansen's residence. During the search, he found a large amount of graffiti-related items, including acid etching materials and other evidence relevant to the Bellingham investigation. 6RP 443; 8RP 763.

Next, Almer searched the home of Ben Amador, a high school student in Seattle who had been associated with the HYMN tag. 5RP 476.

² The Verbatim Report of Proceedings is contained in nine volumes, designated as follows: 1RP-7/28/03; 2RP-9/2/03 and 9/29/03; 3RP-3/18/04; 4RP-6/14/04 and 6/15/04; 5RP-6/16/04 and 6/17/04; 6RP-6/21/04; 7RP-6/22/04; 8RP-6/23/04; 9RP-6/24/04, 6/25/05, and 8/19/04.

³ A tag is a moniker used by someone who does graffiti. 6RP 409.

Among the graffiti-related materials located at Amador's residence, Almer found acid etching applicators. 6RP 485. Following the search, however, Almer no longer considered Amador a suspect in the Bellingham case. 6RP 486.

Almer next obtained a warrant to search the residence of Luke Meighan and Reid Morris, two known Bellingham taggers, following up on a possible link between them and Hansen. 6RP 491-92. Police seized a substantial amount of graffiti-related material from that residence, including piece books⁴ which contained the tags GRAVE, HYMN, and SERIES. 6RP 494-98, 504-10.

Some of the evidence obtained from the Meighan and Morris residence led Almer to suspect that Anthony Sanderson was associated with the HYMN tag, and he obtained a search warrant for Sanderson's residence in Seattle. 6RP 536. Almer found examples of the HYMN tag in Sanderson's bedroom and in digital photos on Sanderson's computer. 6RP 546-47. According to Almer, when he confronted Sanderson with this evidence, Sanderson admitted that he and Hansen were responsible for the Bellingham graffiti and that he uses the HYMN tag. 7RP 592-94.

⁴ Piece books are sketch books in which taggers practice their tags. Piece books are also passed around for other taggers to sign, like yearbooks. 6RP 453.

Almer continued his investigation, searching for a suspect who might be associated with the SERIES tag. 7RP 597. Following a lead from someone caught tagging in a Seattle train yard, Almer called the Bay Area Rapid Transit Police Department to learn more about incidents of SERIES graffiti in the San Francisco area. As a result of that conversation, Almer focused his investigation on Michael Foxhoven, and he obtained a search warrant for Foxhoven's Seattle apartment. 7RP 597-99.

Unlike the other residences Almer had searched, Foxhoven's apartment was very neat and organized. 7RP 602; 8RP 780. At Amador's residence, for example, there was graffiti all over the walls, as if the room had been tagged. 5RP 310. By contrast, Foxhoven kept photographs of graffiti filed neatly in storage boxes and photo albums. 5RP 314.

In addition to the photographs, Almer located piece books containing SERIES, GRAVE, and HYMN tags and noted that SERIES was the predominant tag. 7RP 605-06, 612. He found videos and magazines about graffiti. 7RP 616. There was artwork hanging on the wall depicting the HYMN tag with the inscription "By Tony" and another canvas with SERIES 2002 written on the back. 7RP 619, 622. Among Foxhoven's photographs was a group of pictures of the SERIES tag on walls, dumpsters, trains, and a military helicopter. 7RP 633-40. There were also photographs showing

Foxhoven with the SERIES tag. 7RP 643-45. In addition, digital images and a movie depicting the SERIES tag were found on Foxhoven's computer. 7RP 646. Although Almer found spray paint and paint pens, no acid etching materials were found in Foxhoven's apartment. 5RP 311; 7RP 617, 621; 8RP 780.

Foxhoven called Almer following the search to discuss the investigation. When Almer explained that he suspected Foxhoven was involved in the Bellingham graffiti, Foxhoven denied the accusation. Foxhoven explained that he used to do SERIES tagging and was arrested for doing so in California, but he was no longer an active tagger. He had the materials in his apartment because he did graphic design, and the graffiti style was very popular. 7RP 649. Foxhoven said he knew Hansen and Sanderson but did not necessarily know them as the taggers GRAVE and HYMN. 7RP 652-53.

Following Almer's investigation, the state charged Hansen, Sanderson, and Foxhoven with separate counts of malicious mischief for each of the Bellingham businesses damaged by graffiti. CP 91-95. Hansen pled guilty, and Foxhoven and Sanderson proceeded to trial. 2RP 128.

Foxhoven's attorney moved in limine to preclude the state from introducing evidence of prior crimes, wrongs, or acts associated with

Foxhoven. Specifically, counsel sought to suppress photographs of the SERIES tag seized from Foxhoven's apartment and testimony regarding Foxhoven's prior criminal conduct in California. CP 75; 4RP 160-65. The state argued that evidence that Foxhoven had used the SERIES tag in the past was admissible to establish *modus operandi*, asserting these were "signature" crimes. 4RP 160. Counsel argued, however, that the state could not show that Foxhoven's past use of the SERIES tag was unique enough to establish identity in the charged offenses and therefore the highly prejudicial prior crimes evidence should be excluded under ER 404(b). 4RP 164-65.

The court denied the defense motion, ruling that the evidence was admissible because Foxhoven had admitted to Almer that he used the SERIES tag in California. 4RP 165-66, 231. The court did not address any of the ER 404(b) issues raised by the defense when making its ruling. See Id. At the sentencing hearing, the court signed an order indicating that the prior acts of graffiti vandalism were admitted to show a common scheme or plan or to establish *modus operandi*. The order also concludes that the probative value of the evidence was not outweighed by its prejudicial effect. CP 97-98.

Sanderson also moved to exclude evidence of his prior acts, arguing that the evidence of past acts of graffiti did not rise to the level of *modus operandi* or identity evidence. 4RP 196. The court acknowledged the substantial burden the state had to meet to establish identity through evidence of prior acts. It noted that the tags done in the past needed to be compared to the tags in the charged crimes, and if they appeared to be the same, they would come in. 4RP 202. Evidence of Sanderson's prior acts of graffiti was admitted without further ruling by the court. See 4RP 259-66.

In response to Sanderson's request, the court gave the following instruction regarding the ER 404(b) evidence:

[E]vidence . . . is being introduced at this time on the subject of the defendants' association with persons accused of graffiti vandalism or prior acts of graffiti vandalism for which they're not charged here today. This is being offered by the prosecution for the limited purposes of either *modus operandi* or common scheme, plan, or design. You're not to consider the evidence for any other purpose.

6RP 452.

At trial, Almer admitted that he had no facts connecting Foxhoven with the SERIES graffiti in Bellingham. In fact, in all the interviews and discussions he conducted during the course of his investigation, no one had ever told him that Foxhoven participated in the Bellingham graffiti. 8RP

787-88. Instead, the state's case against Foxhoven rested on Foxhoven's use of the SERIES tag in the past. The jury was shown the photographs seized from Foxhoven's apartment to demonstrate his prior acts. 7RP 633-45.

In addition, Officer Henrick Bonafacio of the Bay Area Rapid Transit Police testified that, in 1997, he investigated several instances of the graffiti tag SERIES on airplanes, trains, and other property in the San Francisco area. 3RP 15. Foxhoven was the suspect for that vandalism. In a search of his residence, police found piece books, stickers with the SERIES tag, and a video showing Foxhoven spray-painting the SERIES tag on airplanes and trains. 3RP 17-18. Bonafacio also testified that his partner took a written confession from Foxhoven. 3RP 20-21.

Relying on evidence of Foxhoven's 1997 graffiti, as well as testimony about the "graffiti culture," the state sought to establish that SERIES was Foxhoven's tag and would not have been used by anyone else. See 6RP 402; 9RP 942, 1002.

Although the state's witnesses described a tag as a moniker used to identify a specific tagger, 6RP 409, Foxhoven established through cross examination that there are situations when taggers will write someone else's tag. Seattle Police Detective Rodney Hardin testified that sometimes a

tagger will list a "roll call" of other members of his group. 5RP 286. He also explained that taggers will "hookup," which means writing someone else's tag, giving recognition to a tagger who is not present when the graffiti is done. 5RP 287, 306. On cross examination, Officer Almer identified specific examples where other taggers had written the SERIES tag in piece books. 8RP 781-784. He also identified a photograph which depicted the HYMN, GRAVE and SERIES tags on a wall in Seattle, which were all written by Hansen. 8RP 784-85.

A jury found Foxhoven guilty on all counts. CP 23-27. The court dismissed one count and lowered the degree on three others, to reflect the charges in the state's original information, and imposed standard range sentences. CP 3, 10. Foxhoven filed a timely appeal. CP 16.

On appeal, Foxhoven challenged the admission of his prior alleged graffiti-related activity, arguing that it constituted improper propensity evidence. Brief of Appellant at 10-20; Reply Brief of Appellant at 1-3.

In affirming Foxhoven's convictions, the Court of Appeals misapplied the test for admissibility under the *modus operandi* exception to ER 404(b), and so found that because police discovered photographs of Foxhoven using the "SERIES" tags, this was probative of their identity as the Bellingham taggers. Appendix A. at 5-7. The court determined

differences in "font, style, medium and the objects on which they were painted" went to the weight, not the admissibility of the evidence. Appendix A at 7. For the reasons set forth below, this Court should grant review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. DIVISION ONE'S MISAPPLICATION OF THE MODUS OPERANDI EXCEPTION TO ER 404(b) PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE REVIEWED BY THIS COURT.

The *modus operandi* exception to ER 404(b) is employed to prove not that the crime occurred, but the identity of the crime's perpetrator. State v. DeVincentis, 150 Wn.2d 11, 18, 74 P.3d 119 (2003). When evidence of prior bad acts is introduced as proof of identity by establishing a unique *modus operandi*, the evidence is relevant to the current charge "only if the method employed in the commission of both crimes is 'so unique' that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged." State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002); State v. Bythrow, 114 Wn.2d 713, 720, 790 P.2d 154 (1990). The method used in committing the crimes must be so unusual and distinctive as to be like a signature. Thang, 145 Wn.2d at 643. "*Mere similarity* of crimes will not justify the introduction of other criminal acts under the rule. There

must be something *distinctive or unusual* in the *means employed* in such crimes *and the crime charged.*" State v. Smith, 106 Wn.2d 772, 777, 725 P.2d 951 (1986) (emphasis in original).

Although the Court of Appeals correctly recited the rule, a review of the opinion suggests the court confused the *modus operandi* exception - - which requires a "signature-like similarity" between prior acts and the charged crime -- with the fact that a tag is like a "signature." The court noted Foxhoven was the individual associated with the uncharged "SERIES" tags, and that Almer testified as to "the use of tags as signatures among graffiti artists," and so the court found the evidence admissible. Slip Op. at 6-7. However, the question on appeal, which the Court of Appeals failed to answer correctly, was whether there was something *so unique* in the "means employed" in the prior acts and the charged crimes as to create a *high probability that the same individual committed both.* Smith, 106 Wn.2d at 777.

Had the court correctly applied the rule, the evidence would have been excluded. The Court of Appeals acknowledged the "tags in question do vary in their font, style, medium and the objects on which they were painted." Slip Op. at 7. The court knew the trial court had ruled Almer

was not qualified to render an opinion that the various tags offered at trial were done by the same person. 6RP 420-25.

Curiously, however, the court did not mention this in its opinion. 6RP 420-25. Likewise, the court did not reference the extensive testimony contradicting the claim that only one graffiti tagger would have exclusive use of a particular tag. See, e.g., 5RP 286-87 (Detective Hardin testified that although it is frowned-upon for a tagger to "bite", or copy another tagger's style, taggers will frequently "hook up" a friend's tag -- i.e., put it up -- to give the friend "props"); 5RP 398 (Detective Hardin described the practice of a "roll call", in which a tagger will list the other members of his graffiti "crew"); 6RP 476, 479-80; 9RP 774 (Almer testified that Ben Amador apparently practiced the tag "HYMN"); 8RP 823-25 (Almer admitted that while taggers are developing their styles it is okay to "bite" others' styles, and that a "toy", or beginning tagger, may copy others' tags without fear of recrimination).

The court bundled the problems with the State's proffer into the comment, "these apparent differences go to the weight, rather than the admissibility of this evidence." Appendix A at 7. This fundamentally mistakes the question. The differences are precisely what *prevent* the prior acts from being similar enough to create the requisite "high probability"

that the same person also committed the charged offense. Thang, 145 Wn.2d at 643. Moreover, once the evidence has been admitted, the damage ER 404(b) seeks to prevent has been done. Here, for example, the other acts evidence made a conviction was virtually certain, particularly given the sheer volume of documents and images the State was permitted to introduce at trial.

The court's analysis of the *modus operandi* exception suggests a fundamental misconception about the purport and scope of the exception and how it should properly be applied. This misunderstanding results in a radical expansion of the exception, authorizing the State to introduce all manner of similar, but not unique, prior acts to prove a crime perpetrator's identity. In cases such as Foxhoven's, where the sole issue to be decided by the jury is identity, this misapplication of the rule destroys a defendant's chance to receive a fair trial on the charged offenses. Because clarification of the scope of the exception presents a question of substantial public interest, this Court should grant review.

2. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE SCOPE OF THE "COMMON SCHEME OR PLAN" EXCEPTION TO ER 404(b).

Although the Court of Appeals noted the trial court had found the other acts evidence admissible under the "common scheme or plan"

exception to ER 404(b), the Court did not address this issue in its opinion. Nonetheless, because the trial court failed to properly apply this Court's precedent regarding this exception, this Court should review and clarify the rule.

This Court has identified two circumstances in which evidence may be admissible to prove a common scheme or plan. DeVincentis, 150 Wn.2d at 19. The first type involves multiple crimes that constitute part of a larger, overarching plan in which the prior acts are causally related to the crime charged, as in an ongoing criminal enterprise. Id. (citing State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995)). An example of this type of common scheme or plan would be the theft of a tool or weapon used to commit a subsequent crime, such as a burglary. DeVincentis, 150 Wn.2d at 19. This type of common scheme or plan is clearly not at issue here, as there was no claim of an ongoing criminal enterprise of which the prior acts were a part and no causal relationship shown between the prior acts and the charged crime.

The second type of common scheme or plan requires evidence of a single plan used repeatedly to commit separate, but very similar, crimes. Id. "The evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts

are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." Id. (citing Lough, 125 Wn.2d at 860). Evidence is admissible under this exception when the fact at issue is the *existence* of the criminal act. DeVincentis, 150 Wn.2d at 20.

In DeVincentis, this Court cited with approval Wigmore's treatise on evidence to explain how courts should analyze evidence offered under this exception:

So, on a charge of assault with intent to rape, where the intent alone is disputed, a prior assault on the previous day upon the same woman, or even upon another member of her family, might have probative value; *but if the assault itself is disputed*, and the defendant attempts, for example, to show an alibi, the same facts might be of little or no value, and it might be necessary to go further and to show (for example) that the defendant on the same day, with a confederate guarding the house, assaulted other women in the same family who escaped, leaving the complainant as the only woman accessible to him for his purpose.

DeVincentis, 150 Wn.2d at 20 (citing 2 John H. Wigmore, Evidence § 304, at 249 (James H. Chadbourn rev. ed.1979) (emphasis in DeVincentis)).

Thus, there must be substantial similarity between the prior acts and the crime charged, and sufficient similarity is only reached when "the trial court determines that the 'various acts are naturally to be explained as caused by a general plan....'" DeVincentis, 150 Wn.2d at 21 (citing Lough,

125 Wn.2d at 860)). In DeVincentis, for example, this Court upheld the admission of prior acts evidence under this exception where both acts similarly showed (1) the defendant devised a scheme to get to know young people through a safe channel; (2) the defendant walked around his house clad in g-string underwear; (3) the defendant asked for a massage or gave a massage in a secluded area of the house; (4) in both instances, the girls masturbated the defendant to climax; and (5) in both instances, the defendant asked the girls not to tell. Id. at 22-23.

Similarly, applying DeVincentis, Division Two held evidence of prior sexual misconduct was properly admitted under this exception where the defendant claimed a consent defense to a charged rape and previous rapes contained such common features as: (1) a romantic relationship between the victim and the defendant; (2) the victim attempted to terminate the relationship; (3) the defendant sought to continue the relationship through the pretext of casual contact with the victim; (4) when his advances were rebuffed, the defendant raped the victim using a weapon to facilitate the crime; and (5) the defendant contemplated suicide with the victim. State v. Brundage, 126 Wn. App. 55, 107 P.3d 742 (2005).

The State did not claim there were common features between the charged crimes and the prior acts save for the fact of the tag itself. And,

as noted in argument 1, the state could not establish a single tagger would have use of a particular tag. Instead, the state rested its common scheme or plan theory on the claim that Foxhoven's "common plan" was to place graffiti in many prominent locations to obtain notoriety. 4RP 197-98. Based on this theory, the prior acts evidence was plainly inadmissible under the second prong of the common scheme or plan exception to ER 404(b) as well. There was no evidence that the prior acts bore similarities to the charged crimes as in DeVincentis and Brundage. Rather than relying upon similarities between prior acts and the charged crime to prove the charged crime's existence, the prior acts were solely relevant to prove propensity - - i.e., that because Foxhoven engaged in graffiti in some other form and on some other medium before he engaged in graffiti in Bellingham on October 26, 2001. This is forbidden under ER 404(b). Because the trial court erroneously admitted the evidence under the common scheme or plan exception, this Court should grant review to clarify the exception's scope and proper application.

F. CONCLUSION

Pursuant to RAP 13.4(b)(3) and RAP 13.4(b)(4), Foxhoven respectfully requests this Court grant his petition for review.

DATED this 6th of July, 2006.

Respectfully submitted,

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 LAWRENCE MICHAEL FOXHOVEN,)
)
 Appellant.)

No. 54793-3-I
(consolidated with 54857-3-I)
DIVISION ONE

-----)
)
STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 ANTHONY ESPINOZA SANDERSON,)
)
 Appellant.)
 _____)

UNPUBLISHED OPINION
FILED: May 8, 2006

AGID, J. -- On October 26, 2004, someone vandalized the windows of several Bellingham businesses with acid-etched graffiti. The graffiti featured the words "GRAVE", "HYMN" and "SERIES." Michael Foxhoven (SERIES) and Anthony Sanderson (HYMN) were convicted of multiple counts of first and second degree malicious mischief and ordered to pay restitution. They appeal their convictions on the ground that evidence of prior bad acts was improperly admitted in violation of ER

404(b). In his pro se statement of additional grounds, Sanderson argues the trial court erred by admitting evidence illegally seized from his computer because police searched it without his consent and the warrant was insufficiently particular. Foxhoven argues in his pro se statement of additional grounds that his sentence was disproportionate to his co-defendant's and the court based his restitution order on untenable grounds.

The trial court did not err by admitting the evidence that Foxhoven and Sanderson engaged in prior acts of graffiti under the modus operandi exception to ER 404(b) because the tags were signature-like and both defendants admitted they had used the same tags before. The court properly admitted evidence from Sanderson's computer because the warrant authorized a search for digital images like those found on a computer. Finally, Foxhoven's sentence was not the same as the others involved in the crimes because his offender score was significantly higher than theirs, and the court correctly based its restitution order on the harm his acts caused. We affirm.

FACTS

When police investigated the October 26 graffiti vandalism, it led them to three suspects: Anthony Sanderson (HYMN), Michael Foxhoven (SERIES), and Desmond Gabriel Hansen (GRAVE). Officer Don Almer, the Bellingham Police Department's graffiti specialist, obtained a search warrant for Anthony Sanderson's home when he learned Sanderson was associated with the HYMN tag. The warrant authorized the search and seizure of

items recognized as graffiti and tagging paraphernalia . . . including but not limited to: . . . images of graffiti or graffiti-related malicious mischief in progress recorded in any form and/or on any medium, paperwork, or documents, or objects documenting graffiti tags and any evidence of Anthony E. Sanderson's criminal acts of malicious mischief.

At Sanderson's house, police found examples of the HYMN tag in his bedroom and on his computer. While searching his home, Officer Almer told him he was neither under arrest nor required to speak to police, but asked him questions concerning the October graffiti. During this conversation Sanderson admitted both that he and Hansen were responsible for the graffiti and he used the HYMN tag.

Officer Almer also received information from the Bay Area Rapid Transit Police Department (BART) about Foxhoven, who had moved from the San Francisco area to Bellingham. BART reported that Foxhoven was connected to graffiti incidents in the San Francisco area in which he used the tag SERIES. Based on this information, Officer Almer obtained a search warrant for Foxhoven's apartment. During the search, police found images of the HYMN and SERIES tags in photographs filed in storage boxes, albums, piece books, and on wall canvases. Some of the photographs showed Foxhoven posing next to the SERIES tag. Others were photographs of the SERIES tag on walls, dumpsters, trains, containers, and a military helicopter. Police also found digital images and a movie depicting the SERIES tag on Foxhoven's computer.

When Almer spoke to Foxhoven, he denied being involved in the Bellingham incidents but admitted to a prior California arrest for graffiti using the SERIES tag. Foxhoven said he was no longer an active tagger but used the photographs seized by police in his graphic design work because the style was popular. Foxhoven also said he knew Hansen and Sanderson but did not know them as the taggers GRAVE and HYMN.

The Whatcom County Prosecuting Attorney charged Hansen, Sanderson and Foxhoven with multiple counts of first degree and second degree malicious mischief.

Hansen pled guilty to several counts, but Sanderson and Foxhoven went to trial as co-defendants. Sanderson moved to suppress his statements to Officer Almer because he did not get his Miranda warnings.¹ He also moved to suppress evidence from the search of his computer, arguing the search warrant did not authorize the search. The court denied both motions. It ruled Sanderson's statements to Officer Almer were admissible because they were noncustodial. It also found the warrant was broad enough to authorize the search of the computer, and Sanderson had consented to the search. Sanderson and Foxhoven also moved to suppress photographic and other evidence of their earlier graffiti-related activities.² The court admitted the evidence under the modus operandi and common scheme or plan exceptions to ER 404(b).

Sanderson was convicted of one count of first degree and six counts of second degree malicious mischief. He was sentenced to 18 months and ordered to pay \$6,670.07 in restitution. Foxhoven was convicted of three counts of first degree malicious mischief, nine counts of second degree malicious mischief, and two counts of third degree malicious mischief. He was sentenced to 50 months and ordered to pay \$8,009.66 in restitution.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

² The admitted evidence included: (1) an investigation of Sanderson for train yard vandalism on June 17, 2002, based on incidents also involving Desmond Hansen; (2) numerous HYMN tags found in Hansen's bedroom as well as piece books and roll calls associating SERIES, HYMN and GRAVE; (3) photographs of Sanderson and Hansen on a graffiti website; (4) photographs of a HYMN tag on a train and of Sanderson painting HYMN on a train; (5) numerous loose-leaf sheets of paper with HYMN TWO and TONY written on them found in Sanderson's room; (6) 50-60 images of HYMN graffiti found on Sanderson's computer; and (7) piece books with the tags SERIES and HYMN found in Foxhoven's residence.

DISCUSSION

I. Evidence Rule 404(b)

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

The State offered and the court admitted evidence of Sanderson's and Foxhoven's prior acts of graffiti to prove their identities as HYMN and SERIES. Foxhoven and Sanderson argue the trial court incorrectly analyzed the evidence under the test set forth in State v. Thang³ and should not have relied on their admissions that they had used the HYMN and SERIES tags before.

Evidence that would otherwise be inadmissible may be admitted to show the modus operandi of the crime. That exception applies only if the method used in the earlier crimes is "so unique" that it creates a high probability the defendant committed the crimes charged. The method should be unique and distinctive enough to be like a signature.⁴ Foxhoven and Sanderson argue that there was no signature-like similarity between the tags featured in the photographs seized in their homes and the Bellingham graffiti because the method, style, and location of the tags were different. Foxhoven also argues that his California acts were so long before the Bellingham graffiti that they were no longer probative. The State contends it presented sufficient evidence to show the defendants' consistent use of the SERIES and HYMN tags literally made the tags

³ 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); see also State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001); ER 403.

⁴ Thang, 145 Wn.2d at 643 (quoting State v. Russell, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)).

their unique signatures.⁵ It asserts that graffiti artists like Sanderson and Foxhoven use their tags to communicate their identity to other members of their graffiti subculture.

Trial courts have broad discretion in ruling on evidentiary matters, and their rulings will not be overturned on appeal absent a manifest abuse of discretion.⁶ A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.⁷

Before a court may admit ER 404(b) evidence it must: (1) find by a preponderance of the evidence the misconduct occurred; (2) determine whether the evidence is relevant to a material issue; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice.⁸ Evidence is relevant if it tends to make the existence of any significant fact more or less probable than it would be without the evidence.⁹

Officer Almer testified about the use of tags as signatures among graffiti artists. The purpose behind using a tag within the graffiti culture is to identify the tagger to other graffiti artists. The manner in which the tags are applied and the surface they appear on are secondary to the tag itself. Whether the tags are applied using paint or acid-etching, upon helicopters, bridges, train cars, posters or windows, the signature quality of the tags remains the same. Both Foxhoven and Sanderson admitted to using these tags in other graffiti, and that graffiti varied significantly in style and location. The many

⁵ Thang, 145 Wn.2d at 642.

⁶ State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001) (citing State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997)).

⁷ In re Parentage of J.H., 112 Wn. App. 486, 495, 49 P.3d 154 (2002), review denied, 148 Wn.2d 1024 (2003).

⁸ Thang, 145 Wn.2d at 642; see also Trickler, 106 Wn. App at 732.

⁹ ER 401.

photographs the police found of Foxhoven's and Sanderson's earlier acts of graffiti demonstrate that the "signature" comes not from the surface or medium but rather from the connection between the tag and the artist who draws it. That these were Foxhoven's and Sanderson's signatures is demonstrated by the photographs which included images of them posing with their signature tags. This evidence, coupled with Foxhoven and Sanderson's own admissions to using the tags, was both relevant and highly probative of the identity of the taggers.¹⁰

While the tags in question do vary in their font, style, medium and the objects on which they were painted, these apparent differences go to the weight rather than the admissibility of this evidence. The defendants had every opportunity to argue, and did argue, that the tags were used by someone other than themselves. We hold the trial court did not abuse its discretion when it admitted Foxhoven's and Sanderson's prior acts of graffiti.

II. Search and Seizure

In his pro se brief, Sanderson argues the court should have suppressed all evidence seized on his computer because the warrant did not permit police to search it and he did not give valid consent to the search. He contends the court should have analyzed the warrant with "most scrupulous exactitude" because graffiti is protected

¹⁰ Both Sanderson and Foxhoven's statements to Officer Almer were admissible because they were non-custodial and voluntarily made. Before Sanderson told Officer Almer he was identified with the HYMN tag and had committed the crimes in Bellingham, he was told he was neither arrested nor required to speak to police. After the search of his apartment, Foxhoven called Officer Almer on the telephone and admitted he had previously used the SERIES tag in the San Francisco Bay area.

speech under the First Amendment.¹¹ He also asserts his consent was invalid because the police did not tell him he could refuse or revoke consent, and they failed to limit the scope of the search of his computer as required in State v. Ferrier.¹² Alternatively, he argues he revoked his consent when he refused to give Officer Almer permission to search his C-Drive.

The State contends the warrant authorized police to search for "images of graffiti or graffiti-related malicious mischief," including the digital images found on Sanderson's computer. It asserts the warrant need not be reviewed under the "scrupulous exactitude" standard of State v. Perrone¹³ because the First Amendment does not protect acts of vandalism or photographs of criminal activities. Finally, it argues Sanderson consented to the search when he helped Officer Almer search his computer.

Under the Fourth Amendment, "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."¹⁴ Warrants are tested and interpreted in a common sense, practical manner rather than in a hypertechnical sense.¹⁵ But search warrants must be sufficiently definite to describe the property to be sought with reasonable certainty.¹⁶ This particularity requirement prevents the issuance of "[g]eneral warrants" authorizing unlimited searches and seizures by requiring a

¹¹ Stanford v. Texas, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

¹² 136 Wn.2d 103, 114, 960 P.2d 927 (1998).

¹³ 119 Wn.2d 538, 548, 834 P.2d 611 (1992) ("[W]here items [are] without First Amendment protection, there need not be an extremely stringent test of specificity.").

¹⁴ U.S. CONST. amend. IV.

¹⁵ Perrone, 119 Wn.2d at 549.

¹⁶ State v. Muldowney, 60 N.J. 594, 292 A.2d 26 (1972); 2 Wayne R. LaFare, Search and Seizure § 4.6(a), at 551 (3d ed. 1996).

“particular description” of the things to be seized.¹⁷ We review de novo allegations that a search warrant does not satisfy the particularity requirement.¹⁸

Generally, the degree of specificity required varies according to the circumstances and the kind of items involved.¹⁹ A warrant’s description is valid if it is as specific as the circumstances of the crime under investigation permit.²⁰ Generic classifications are not necessarily impermissibly broad so long as there is probable cause and the precise identity of items sought can be determined when the warrant was issued.²¹ For example, in State v. Stenson the Washington Supreme Court held the general description of business records and documents in a warrant was not impermissibly broad because it limited the search to items indicating a relationship between the defendant and murder victim he was accused of killing.²²

Here, the warrant for Sanderson’s home limited the scope of the search to evidence of crimes Sanderson was suspected of committing by specifying “items . . . including but not limited to: . . . images of graffiti or graffiti-related malicious mischief in progress recorded in any form and/or on any medium . . . documenting graffiti tags and any evidence of Anthony E. Sanderson’s criminal acts of malicious mischief.” A commonsense reading of this language clearly permitted a search for images recorded

¹⁷ Andresen v. Maryland, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)).

¹⁸ State v. Nordlund, 113 Wn. App. 171, 180, 53 P.3d 520 (2002), review denied, 149 Wn.2d 1005 (2003); State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

¹⁹ Perrone, 119 Wn.2d at 546.

²⁰ Id. at 547.

²¹ Id.

²² 132 Wn.2d at 694.

in a digital format, including images found on a computer. The trial court correctly admitted the evidence found on Sanderson's computer.²³

III. Sentencing

Foxhoven argues his sentence was excessive because it is far longer than his co-defendants' sentences. He contends his 50-month sentence was unjust and disproportionate to Desmond Hansen's one-year sentence and Anthony Sanderson's 18-month sentence. But Foxhoven's sentence cannot be compared to either Hansen's or Sanderson's. Hansen entered into a plea agreement in exchange for his sentence. Sanderson and Foxhoven were convicted of a different number of counts, and Foxhoven had a higher offender score.²⁴ Foxhoven does not challenge the accuracy of his offender score, and his sentence was correctly computed.

IV. Restitution Order

The court ordered Foxhoven to pay \$8,009.66 in restitution for damage caused by the defendants' graffiti. Foxhoven challenges the restitution order on the ground the State failed to prove with certainty the amount of damages. The State did not respond to Foxhoven's Statement of Additional Grounds.

²³ Because we resolve this issue based on the warrant, we need not determine whether the consent was valid and/or revoked.

²⁴ Foxhoven was convicted of three counts of first degree malicious mischief, nine counts of second degree malicious mischief, and two counts of third degree malicious mischief. He had an offender score of 12 based on a prior class B felony conviction for theft. On the other hand, Sanderson was found guilty of only one count of first degree malicious mischief and six counts of second degree malicious mischief. His offender score was only five, and he did not have a prior criminal history.

We reject Foxhoven's argument. The trial court has great discretion when imposing restitution, and we will only reverse a restitution order for an abuse of discretion.²⁵ RCW 9.94A.753(3) directs trial courts to impose restitution based on "easily ascertainable damages." Evidence supporting restitution is sufficient if it provides a reasonable basis for estimating loss and is not based on mere speculation or conjecture.²⁶ The amount of harm or loss "need not be established with specific accuracy."²⁷ The trial court may rely on a defendant's acknowledgment to determine the amount of restitution.²⁸ Where a defendant disputes the facts, the State must prove the amount of restitution by a preponderance of the evidence.²⁹ Former RCW 9.94A.030(34) defines restitution as "a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs."³⁰ Here, the evidence presented at the restitution hearing was sufficient to establish the damage the graffiti caused. The trial court's restitution order was based on this evidence and was therefore

²⁵ State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005) (citing State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999)).

²⁶ State v. Fleming, 75 Wn. App. 270, 274-275, 877 P.3d 243 (1994) (quoting State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992)), petition dismissed, 129 Wn.2d 529, 919 P.2d 66 (1996).

²⁷ Hughes, 154 Wn.2d at 154 (quoting Fleming, 75 Wn. App. at 274).

²⁸ State v. Hunsicker, 129 Wn.2d 554, 558-59, 919 P.2d 79 (1996); State v. Ryan, 78 Wn. App. 758, 761, 899 P.2d 825, review denied, 128 Wn.2d 1006 (1995).

²⁹ State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000).

³⁰ Former RCW 9.94A.030(34) (2002), *recodified as* RCW 9.94A.030(37) (Laws of 2005, ch. 436 § 1).

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not manifestly unreasonable or based on untenable grounds.

We affirm.

Azid, J.

WE CONCUR:

Appelwick, CJ

Cox, J.

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 LAWRENCE MICHAEL FOXHOVEN,)
)
 Appellant.)
-----)

No. 54793-3-1
(consolidated with 54857-3-1)

DIVISION ONE

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 ANTHONY ESPINOZA SANDERSON,)
)
 Appellant.)
-----)

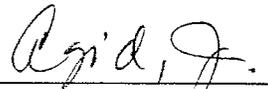
ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant, Lawrence Michael Foxhoven, having filed a motion for reconsideration of the opinion filed May 8, 2006, and the court having determined that said motion should be denied; Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 14th day of June, 2006.

FOR THE COURT:



Judge

FILED
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STATE OF WASHINGTON
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