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No. 54793-3-1 and  
No. 54857-3-1

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

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STATE OF WASHINGTON, Respondent,

v.

MICHAEL FOXHOVEN, Appellant.

And

STATE OF WASHINGTON, Respondent,

v.

ANTHONY SANDERSON, Appellant.

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**CONSOLIDATED BRIEF OF RESPONDENT**

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## INTRODUCTION

This appeal involves criminal convictions for using acid-etching materials to write graffiti tags on shop windows. In the graffiti subculture, a tag is like a brand name – the more ubiquitous the tag, the more famous the writer. As Officer Don Almer, a specialist in graffiti crimes testified, a tag is as important as a name or signature.

I will in the graffiti culture identify with that; that will be me. And generally vandals, from the materials I read and talking with them..., they want to chose that name very carefully; because what they want to make sure is , A, nobody else has it in this area...and, B, it's something that they are going to enjoy writing or dealing with for many years, because that's their identity.

(VRP 410).

A Whatcom County jury convicted defendant Anthony Sanderson with using the HYMN tag to deface windows in Bellingham, Washington. The jury also convicted defendant Michael Foxhoven with using the SERIES tag in the same acts of graffiti vandalism. Both defendants appeal their convictions, arguing that the trial court abused its discretion by admitting evidence of Sanderson's and Foxhoven's past use of the HYMN and SERIES tags. Sanderson also argues that the search of his

computer, which contained 50 to 60 photographs of the HYMN tags, was illegal.

Because the search was valid, and defendants' past use of the HYMN and SERIES tags is admissible evidence of *modus operandi*, the State respectfully requests this Court to affirm defendants' convictions and dismiss this appeal.

**I. RESTATEMENT OF ISSUES PRESENTED**

Sanderson's and Foxhoven's appeals present three issues:

A. "To comply with the mandate of the Fourth Amendment particularity clause, a search warrant must be sufficiently definite so that the officer executing the warrant can identify the property sought with reasonable certainty." State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997). The search warrant for defendant Sanderson's home allowed investigators to collect "images of graffiti or graffiti-related malicious mischief in progress recorded in any format and/or on any medium." (CP 134). Was this language sufficiently specific to identify pictures of Sanderson's HYMN tags kept on his computer in a file titled "HYMN"?

B. Whether Sanderson consented to the search of his computer "depends upon the totality of the circumstances, including

(1) whether *Miranda* warnings were given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person was advised of his right not to consent." State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). Sanderson helped Officer Almer navigate Sanderson's home computer, telling Almer he will not find any graffiti-related information stored there. Did Sanderson consent to the search of his computer by helping Officer Almer look through its stored files?

C. Evidence of past acts of writing graffiti is admissible to prove *modus operandi* "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). At the 3.6 hearing and at trial, the State presented substantial evidence that a tag is like a graffiti writer's signature, unique to that area. Did the trial court abuse its discretion by admitting evidence of Sanderson's and Foxhoven's past graffiti writings at trial?

## II. STATEMENT OF FACTS

On the morning of October 26, 2001, business owners in downtown Bellingham arrived to discover graffiti painted across their windows. Martin Knapp, director of the Inn University Ministry, Christian Fellowship, testified at trial about what he found.

[It] looked like someone had painted with some white paint on a number of our windows. So I went and got some cleaning solution, went to try to take it off. [I] quickly discovered that it wasn't on the surface, that it was something that had actually eaten into it.

(VRP 354). Vandals had defaced the windows of 29 businesses or organizations within Bellingham's central business district. (VRP 432).

Three tags appeared on the windows. "[O]ne of the tags was GRAVE, G-R-A-V-E, one of the tags was HYMN, H-Y-M-N; and the last tag was SERIES, S-E-R-I-E-S." (VRP 433). Don Almer, Bellingham Police Department's officer in charge of graffiti crimes, began the investigation immediately.

Q: Were you familiar with the identity of the graffiti vandals associated with those tags at the time when you saw them?

A: No, sir.

Q: ...How do you go about investigating who those identities might belong to?

A: ...I started contacting other agencies as to potential leads of suspects; and the first person I started with was Detective Ron Hardin with the Seattle Police Department.

(VRP 434).

Working with Detective Hardin, Officer Almer followed a series of leads that led to three suspects, Anthony Sanderson (HYMN), Michael Foxhoven (SERIES) and Desmond Gabriel Hansen (GRAVE). (VRP 456-57). Hansen later pled guilty to multiple counts of malicious mischief. (VRP 128). In their opening briefs, defendant Sanderson and defendant Foxhoven both describe how the investigation led to warrants to search Sanderson's and Foxhoven's homes. (Sanderson Brief at 5-7) (Foxhoven Brief at 3-6). On appeal, defendant Foxhoven does not challenge the legality of the search. (Foxhoven Brief at 1) (assigning error only to admission of past bad acts).

A. Discovery of Computer Images With Sanderson's Help.

Defendant Sanderson, on the other hand, does challenge the search of his home. Four facts are relevant to evaluating defendant's criticism of the warrant. First, investigators seized what the warrant allowed. The search warrant permitted officers to seize "images of graffiti or graffiti-related malicious mischief in progress

*recorded in any format and/or on any medium.*" (Search Warrant; CP 134) (emphasis added). As he testified at the 3.6 hearing, Officer Almer discovered a cache of digital photographs on Sanderson's computer.

I looked on the computer for computer files and things like that. Mr. Sanderson, the defendant, and his mother both asked me..."What are you looking for?" I explained to them that it wasn't uncommon for images and the like of graffiti items to be placed on a computer...They said, "Oh, okay," basically.

And then I found a whole bunch of graffiti-related items on the computer right after that...I mean, literally probably 50 to 60 or so images and files and things like that directly related to the specific graffiti tag we were looking for.

(VRP 13). Sanderson kept these images under the filename "HYMN". (VRP 546).

Officer Almer drafted the search warrant and intended the phrase "images...recorded in any format and/or medium" to include digital images.

Q: In your search warrant you indicated that you wanted to look for digital images. Where was it that you expected to find digital images?

MR. BRODSKY: Objection. Relevance.

THE COURT: Overruled. You can answer the question.

THE WITNESS: I can answer, sir?

THE COURT: Yes.

THE WITNESS: A computer type thing or digital camera, something that holds digital images.

(VRP 145).

Second, Officer Almer stated more than once during the search that Sanderson did not have to answer any questions.

After we had executed the search warrant in the downstairs portion of the residence, came back upstairs, we had already located items, numerous items linking Mr. Sanderson to what we were there for. So I came upstairs.

And basically I said, "Hey, you're not under arrest. I don't have plans to arrest you, anything like that; but I would like to ask you questions concerning what happened in Bellingham in late October of 2001." And I told him he didn't have to talk to me if he didn't want to.

(VRP 10). Officer Almer would repeat this warning when Sanderson wanted to talk after Almer found the computer images.

(VRP 14) ("I reminded him again that he didn't have to talk to me if he didn't want to").

Third, Sanderson helped Officer Almer search the home computer by directing Almer to look at different locations. It began with Almer asking to look at the computer.

I asked [Sanderson] if he had anything on his computer. He said no. I basically said something to the effect, "Mind if I look?" There was no problem with that...

(VRP 142). As Almer looked on the computer's internet browser, Sanderson started suggesting other places to look.

And he said you could look at my – like, I think it's called a favorites button. You won't see anything there. Check this or check that, there wouldn't be anything there.

(VRP 142).

Sanderson's tone changed when Officer Almer looked at the computer's internal storage device – the C drive.

[Sanderson] said, "Look, there's no sites there," and, "Look, when you type you don't see this. You don't see this. See, I told you."

I said, "What about your C drive?" which from my limited computer knowledge is like the main storage place for a lot of computers. So he said no. I clicked on the C drive. On the C drive there were separate folders. Based on the name of some of those folders, I had a strong suspicion that's where some graffiti-related stuff was. Those folders were opened, and that's when I found a whole bunch of graffiti-type things.

(VRP 143-144). Sanderson then instructed Almer on how to email the images to Almer's departmental computer. (VRP 144).

Fourth, Sanderson confessed to the graffiti vandalism after Almer found the computer images. Sanderson was looking over

Almer's shoulder when the monitor displayed the incriminating images. (VRP 578). Seeing them, Sanderson asked to go to a private place to talk. (VRP 13; 579). He then confessed to writing the HYMN tags.

Mr. Sanderson told me he recalled it was a very busy night. A lot of people were downtown. There were a lot of police officers downtown as well. Mr. Sanderson told me that he recalled maybe putting tags up on maybe four businesses. His primary role was to be a lookout, make sure that they weren't discovered.

At this point I interjected. I said, "Would seven businesses be a possibility?" He told me it could be; he couldn't remember the exact number. He was asked what graffiti tag? He told me, "HYMN". I asked him how he put it on. He said he slashed or he wrote a couple of bubbles. And I asked him how he put the tag on. He said acid that had that had either been brought to Bellingham by Mr. Hansen or was already in Bellingham; he didn't bring it; he didn't know.

(VRP 593).

Before trial, Sanderson moved to suppress his statements to Officer Almer. (CP 151). The trial court in a 3.5 hearing denied the motion to suppress and admitted Almer's testimony at trial. (CP 143). Defendant Sanderson has not assigned error to this ruling in his opening brief.

B. The Trial Court's Admission of ER 404(b) Evidence

During the searches of Sanderson's and Foxhoven's homes and computers, investigators gathered boxes of photographs, piece books, and other examples of defendants' past graffiti work. (VRP 555-575, 604-646). Both defendants moved to suppress evidence of past acts of graffiti, arguing it is inadmissible under ER 404(b). The court provisionally denied the motion before trial, subject to the State proving that each defendant's tag was a unique identifier.

In determining whether to admit evidence of other crimes, relevance is not established unless the shared features of crimes are individually unique or the appearance of shared features combined with a lack of dissimilarities can create sufficient inference that they are not coincidental.

Basically it would seem to me that, if one does it, he does it one time, another time, the third time acid etching, you'd have to compare the signature or tag to see how similar they are. If they appear to be the same, they're going to come in.

(VRP 202). At trial, Officer Almer explained that the tags were unique, and that he found large volumes of HYMN examples in Sanderson's house, and SERIES examples in Foxhoven's. (VRP 668).

The court admitted the past examples of graffiti as evidence of *modus operandi* and a common scheme or plan. The court also gave the jury this cautionary instruction.

Ladies and gentlemen of the jury, evidence has been introduced in this case previously and is being introduced at this time on the subject of the defendant's 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 purpose of either *modus operandi* or common scheme, plan or design. You are not to consider the evidence for any other purpose.

(VRP 452).

At trial, counsel for defendants argued that the evidence of past graffiti was irrelevant and did not prove who vandalized the Bellingham shops. (VRP 689, 772). The jury weighed the evidence and counsel's argument before convicting defendant Sanderson of one count of first degree malicious mischief in the first degree and six counts of second degree malicious mischief. (CP 61-63). The jury convicted defendant Foxhoven of four counts of first degree malicious mischief and 11 counts of second degree malicious mischief. (CP 23-27). Both defendants now appeal.

## ARGUMENT

### III. STANDARD OF REVIEW

“Whether a warrant meets the particularity requirement of the Fourth Amendment is reviewed *de novo*. State v. Stenson, 132 Wn.2d 668, 691, 940 P.2d 1239 (1997). General challenges to warrants are reviewed for an abuse of discretion. State v. Nordlund, 113 Wn. App. 171, 180, 53 P.3d 520 (2002) (“we review a challenge to a search warrant for an abuse of discretion”).

The court reviews the trial court’s admission of 404(b) evidence for an abuse of discretion.

This Court reviews decisions to admit evidence under ER 404(b) for abuse of discretion. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. Alternatively, the Court considers whether any reasonable judge would rule as the trial judge did.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citations omitted).

### IV. THE STATE’S WARRANT WAS CLEAR AND SPECIFIC.

Defendant Sanderson challenges the warrant to search his house on two grounds: (1) the warrant intruded on his first amendment rights, and (2) the language of the warrant was too broad. Neither argument is persuasive.

A. Personal Photographs of Graffiti Are Not First Amendment Protected Activity

In State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992), the Washington Supreme Court scrutinized more carefully search warrants that seek materials protected under the First Amendment.

[T]he constitutional requirement that warrants must particularly describe the things to be seized is to be accorded the most scrupulous exactitude when the things are books, and the basis for their seizure is the ideas which they contain.

Perrone, 119 Wn.2d at 547-48 (quoting Stanford v. Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 12 L.Ed.2d 431 (1965)). The Court noted, however, that this heightened scrutiny applies only to First Amendment materials. “Where items [are] without First Amendment protection, there need not be an extremely stringent test of specificity.” Perrone, 119 Wn.2d at 548 (summarizing United States v. Truglio, 731 F.2d 1123, 1127 (4<sup>th</sup> Cir. 1984), overruled on other grounds, U.S. v. Burgos, 94 F.3d 849 (4<sup>th</sup> Cir. 1996)).

The First Amendment does not protect Sanderson’s acts of graffiti or his pictures of it.

[A] community has the right to decide that its interests in protecting property from damaging trespasses and in securing beautiful surroundings outweigh the countervailing interest in uninhibited expression by means of words and pictures in public places. If the First Amendment categorically protected the

marketplace of ideas from any quantitative restraint, a municipality could not outlaw graffiti.

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (Stevens, J., dissenting in part); Reily v. Reno, 860 F.Supp. 693, 702 (D.Ariz. 1994) (“it is an untenable position that conduct such as vandalism is protected by the First Amendment merely because those engaged in such conduct intend[ ] thereby to express an idea”).

Furthermore, photographing the vandalism does not transform it into protected activity. In State v. Griffith, \_\_\_ Wn. App. \_\_\_, 115 P.3d 357 (July 7, 2005), the Court of Appeals upheld a warrant for pictures the defendant took of a 16-year old girl. Although the warrant also authorized seizure of materials protected under the First Amendment – magazines and websites -- the court upheld admission of the digital pictures defendant made and stored on his computer.

The computer and storage media were specifically named in the warrant and, arguably, are connected to the crime because Mr. Griffith was seen placing the pictures on the computer. This was the only evidence seized used to convict Mr. Griffith. Thus, even though the remainder of the warrant should be suppressed, the evidence that supports his conviction was validly seized. This is not a basis to reverse the convictions.

Griffith, 115 P.3d at 361.

Finally, even under the “scrupulous exactitude” standard, the warrant language was sufficiently clear. Officers were to search for “images of graffiti or graffiti-related malicious mischief”. (CP 134). Unlike the warrant language held overbroad in Perrone and Griffith, the warrant for Sanderson did not allow investigators to search through materials normally protected by the First Amendment. The warrant describes exactly what investigators should look for, and what they found: “images of graffiti and graffiti-related malicious mischief”. (CP 134).

B. The Warrant Was Sufficiently Specific

The warrant to search Sanderson’s house satisfied the requirements for particularity.

To satisfy the particularity requirement, the warrant must be sufficiently definite to allow the searching officer to identify the objects sought with reasonable certainty. The degree of required specificity turns on the circumstances and the type of items involved. A description is valid if it is as specific as the circumstances and the nature of the activity, or crime, under investigation permits. We review de novo whether a search warrant meets the particularity requirement but we interpret warrants in a commonsense, practical manner, rather than in a hypertechnical sense.

State v. Nordlund, 113 Wn. App. 171, 180, 53 P.3d 520 (2002).

As described above, the warrant allowed investigators to search for digital images of graffiti on Sanderson's computer. Defendant Sanderson alleges that the warrant was too vague and general, lacking a sufficient nexus between the criminal charges and the search of his computer. Yet Nordlund, the case defendant cites in support, illustrates why the warrant in this case is valid. In Nordlund, defendant was accused of indecent liberties and attempted rape. No evidence existed that defendant Nordlund used his computer to document his crimes. Nordlund, 113 Wn. App. at 183.

Here, investigators had good reason to believe that Sanderson, Foxhoven and Hansen kept digital images of their exploits, and the subsequent searches confirmed this. (VRP 145). The warrants did not authorize Officer Almer to conduct wholesale rummaging through the computers. Instead, it allowed Almer to look through the computers' files to search for images of graffiti or graffiti-related malicious mischief. The warrant was specific and gave investigators proper guidance on what to look for and where to look.

Finally, defendant Sanderson consented to the search by challenging Officer Almer to look through the computer. Rather

than remaining silent, or opposing the search, Sanderson wanted Almer to look at his internet browser to show a lack of history visiting graffiti sites. What Sanderson did not anticipate is that Almer would search the C-drive. Because he knew that he could stay quiet, but chose not to, Sanderson consented to the search. State v. Reichenbach, 153 Wn.2d 126,132-133 101 p.3d 80 (2004) (defendant "was at no point under pressure to consent to search").

**V. GRAFFITI VANDALISM IS A CLASSIC SIGNATURE CRIME.**

Defendants Sanderson's and Foxhoven's consistent use of the tags HYMN and SERIES represent signature crimes. As Officer Almer testified, graffiti vandals take pride in the skill and prevalence of their tags. They do not steal (or "bite") another tagger's identity. (VRP 286).

[Sanderson] said that in the graffiti culture, that's your name. You don't go out and write somebody else's name. The person's name or tag it is is basically going to get pissed, because it's their identity, their source of pride...

(VRP 595). The State offered evidence of past acts of graffiti to prove identity. Sanderson's use of the tag HYMN and Foxhoven's use of SERIES in the past is evidence they wrote the tags HYMN and SERIES on the Bellingham windows.

Defendants' consistent use of unique graffiti tags is admissible evidence of *modus operandi*.

When evidence of other bad acts is introduced to show 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.

This Court has held that the device used must be so unusual and distinctive as to be like a signature.

State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). The trial court quoted Thang and then found the past graffiti to be admissible evidence of identity. (VRP 202).

In their opening briefs, both defendants argue that the State's evidence of signature tags was insufficient to prove identity. (Sanderson's Brief at 21; Foxhoven's Brief at 17). Defendants then list reasons why the past uses of the tags were dissimilar and how graffiti vandals will, at times, copy other tags. Defendants' arguments blur an important distinction between the admissibility of the evidence and its weight.

"To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought

to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charges, and (4) weigh the probative value against the prejudicial effect.” Thang, 145 Wn.2d at 642. Although defendant Foxhoven complains that the trial court did not give his case sufficient separate consideration, the court carefully analyzed these elements both orally and in writing. (VRP 165-66; 199-208; 231) (CP 57-58; 97-98).

The State met its burden to admit the evidence. But the jury was not required to give the evidence weight if it chose not to. Defendants’ arguments why past graffiti does not prove identity all go to the weight of the evidence. By finding defendants guilty, the jury found the arguments unpersuasive. Defendants do not assign error to the verdict nor do they argue that it is not based on substantial evidence.

The court also admitted the past acts as evidence of a common scheme or plan.

The State alleges that each vandal had adopted a distinctive tag (pseudonym) and vandalized property with that unique tag again and again for years until it became their vandalism identity. The State alleges that part of the overarching scheme or plan of such vandals is to gain notoriety in the graffiti subculture by placing their adopted vandal names on the property of others.

(CP 97). Admission of this evidence was not an abuse of discretion.

Defendants argue that this evidence was not conclusive, but once again these arguments go to the weight of the evidence. (Sanderson's Brief at 25) ("there was substantial evidence to contradict the claim that only one graffiti tagger would have exclusive use of a particular tag"). To reach its verdict, the jury found defendants' arguments unpersuasive. The State provided sufficient proof to admit the evidence at trial, and after evaluating all the evidence, the jury accepted it. Defendants received a fair trial, and no grounds exist to vacate their convictions.

### **CONCLUSION**

The warrant for searching defendant Anthony Sanderson's home gave investigators specific authority to search his computer. Because compelling evidence proves Sanderson's and defendant Michael Foxhoven's involvement in the October 2001 vandalism, the State of Washington respectfully requests this Court to affirm their convictions and dismiss this appeal.

DATED this 8 day of September, 2005.

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