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Supreme Court No. _____
COA No. 54857-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
ANTHONY SANDERSON,
Petitioner.

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3

PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY

Petitioner Anthony Sanderson, 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

Sanderson seeks review of the Court of Appeals unpublished opinion in State v. Sanderson, No. 54857-3-1 (Slip Op. filed May 8, 2006). A copy of the opinion is attached as an Appendix.

C. ISSUES PRESENTED FOR REVIEW

Petitioner Sanderson 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-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

1. The Charged Incident. On October 26, 2001, the owners of several businesses in downtown Bellingham discovered that, during the night, acid-etched graffiti had been placed on their shop

windows. 3RP 354-55, 357, 359-61, 363, 365-67, 370, 376-78, 379-84; 4RP 387, 390-91.¹ Bellingham police officer Don Almer, who was assigned to the investigation as part of his graffiti emphasis detail, observed three “tags”² on the windows: HYMN, GRAVE and SERIES. 4RP 399, 433.

After contacting Seattle Police Detective Rod Hardin, Almer investigated Desmond Hansen as a possible suspect regarding the GRAVE tags. 3RP 284, 289; 4RP 434-35. Almer obtained a search warrant for Hansen’s residence and during the search discovered multiple graffiti-related items, including numerous tags of GRAVE and HYMN, as well as a “roll call”³ associating SERIES with HYMN and GRAVE. 4RP 445-46, 453-56, 466-70.

Almer next searched the residence of Ben Amador, whom he suspected might be associated with the tag HYMN. 3RP 294-95, 299, 476-77, 478-79; 5RP 694-96, 716. Almer located numerous instances of the “HYMN” tag but the predominant tag was ANIK. 4RP 479-83; 5RP 700. Following this search, Almer

¹ Transcripts of proceedings, which include a CrR 3.5/3.6 hearing, trial and sentencing, are contained in seven consecutively-paginated volumes referenced herein as follows: September 2 and 29, 2003 – 1RP; June 14 and 15, 2004 – 2RP; June 16 and 17, 2004 – 3RP; June 21, 2004 – 4RP; June 22, 2004 – 5RP; June 23, 2004 – 6RP; June 24, 25 and August 19, 2004 – 7RP.

² A “tag” is the moniker used by a graffiti artist. 1RP 47; 4RP 409.

³ In a “roll call”, taggers will list the tags of other members of their graffiti “crew,” or persons they habitually associate with to do graffiti. 3RP 298; 4RP 447.

decided Amador was more likely to be ANIK than HYMN and conducted no further investigation of Amador. 5RP 711.

Almer then searched the Bellingham residences of Luke Meighan and Reid Morris. 4RP 486. Inside, he found evidence of the tags REFER, SPIRE and HYMN, as well as photographs of appellant Anthony Sanderson painting a train with the tag HYMN and the “crew tag” UPSK. 4RP 489, 493, 530-33. Based on this evidence, Almer began investigating Sanderson and ultimately obtained a search warrant for Sanderson’s residence in Seattle. 1RP 5; 4RP 536, 538.

2. The Police Search of Sanderson’s Home, Interrogation, and Sanderson’s Alleged Confession. On the morning of June 5, 2002 Almer and other police officers arrived at Sanderson’s residence to search. 1RP 32. At the door, they were greeted by Sanderson’s mother and her friend Delcee Golding. 1RP 6; 6RP 855-56, 889. Sanderson was sleeping in his bedroom in the basement. 1RP 7-8; 6RP 891. Police officers woke Sanderson, brought him upstairs and instructed him to remain in the living room while they searched. 1RP 63-64; 6RP 867, 891.

After concluding his search of the basement, Almer returned to the living room and began questioning Sanderson. 1RP 9, 66.

Sanderson denied knowledge of the Bellingham graffiti incident and told Almer that although he had friends involved in the graffiti culture, he did not engage in graffiti vandalism. 1RP 10-11, 66. When Almer's questions failed to yield an admission of involvement in the Bellingham crimes, Almer proceeded to search the computer in Sanderson's living room. 1RP 11, 31, 36, 66-67.

Almer found folders in the computer's hard drive titled "HYMN", links to internet sites about graffiti, and digital photographs of HYMN tags. 1RP 13, 31-32, 66-67. Almer claimed that when he confronted Sanderson with this evidence, Sanderson requested to speak with Almer privately and gave a lengthy confession which implicated both Desmond Hansen and Sanderson's co-defendant, Lawrence Michael Foxhoven. 1RP 15, 30.⁴

Sanderson challenged the admission of his statements and the computer search under CrR 3.5 and 3.6. CP 110-18; 128-34.

⁴ Sanderson, his mother and Delcee Golding disputed Almer's account, stating Sanderson never requested a private conversation or acknowledged involvement in the Bellingham incidents, and that Almer became progressively more angered as Sanderson continued to deny he was involved. 1RP 67-68; 6RP 870, 874-76, 895-96. Other law enforcement witnesses offered inconsistent testimony regarding whether they heard Sanderson confess and the substance of the confession. See e.g. 1RP 106-07; 3RP 329, 335 (Bellingham police sergeant Flo Simon testified at CrR 3.5 hearing that she was not "in hearing vicinity" during confession; at trial the same witness claimed that although she did not prepare her own report, reading Almer's police report refreshed her recollection that she did hear the confession); 3RP 289-93 (Seattle Police Detective Rod Hardin testified he did not recall Sanderson's confession).

Although the search warrant neither authorized a search of the computer nor incorporated the search warrant affidavit, the court found the warrant was “very, very clear” and contemplated a search of the computer. CP 136; 2RP 228. The court alternately found Sanderson consented to the search because he helped Almer when Almer had difficulty navigating the computer. 2RP 229; CP 53-54.

Based on these events, a Whatcom County jury convicted Sanderson and Foxhoven of six counts of malicious mischief in the second degree and one count of malicious mischief in the first degree. CP 61-63. 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. 7RP 1038; CP 47.

3. Proceedings on Appeal. On appeal, Sanderson challenged the admission of Sanderson’s prior graffiti-related arrests, the graffiti-like artwork seized from Sanderson’s house during the search warrant’s execution, and photographs of Sanderson allegedly painting graffiti “tags.” Br. App. 17-28. The trial court had admitted this evidence under ER 404(b) to prove both common scheme or plan and *modus operandi*. 2RP 204-07;

4RP 430-31, 452. Sanderson also contended the search warrant violated the Fourth Amendment's particularity requirement because it did not specify Sanderson's computer as a place to be searched, and a heightened degree of particularity was required because the computer was a place protected by the First Amendment.

The court misapplied the test for admissibility under the *modus operandi* exception to ER 404(b), and so found that because police discovered photographs of Sanderson and Foxhoven using "SERIES" and "HYMN" tags, this was probative of their identity as the Bellingham taggers. Slip Op. 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. Slip Op. at 7.

The court failed to understand Sanderson's overbreadth challenge to the warrant, and so held that because the warrant permitted officers to search for graffiti images "recorded in any form and/or on any medium," it permitted a search of the computer. 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 Division One 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 Sanderson 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 Division One failed to answer correctly, was whether there 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. Division One 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 HYMN tags offered at trial were done by the same person. 4RP 420-25.

Curiously, however, the court did not mention this in its opinion. 4RP 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. 3RP 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”); 3RP 398 (Detective Hardin described the practice of a “roll call”, in which a tagger will list the other members of his graffiti “crew”); 4RP 476, 479-80; 6RP 774 (Almer testified that Ben Amador apparently practiced the tag “HYMN”); 5RP 689-90 (Almer acknowledged that Sanderson was previously affiliated with the tags SUPS and UPROCK); 6RP 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.” Slip Op. 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 Sanderson’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 Sanderson's "common plan" was to place graffiti in many prominent locations to obtain notoriety. 2RP 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 Sanderson 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.

3. DIVISION ONE'S APPROVAL OF THE
UNCONSTITUTIONAL GENERAL WARRANT
PRESENTS AN IMPORTANT CONSTITUTIONAL
QUESTION THAT SHOULD BE REVIEWED BY
THIS COURT.

Because of the privacy interests at state, governmental intrusion into an individual's home must be predicated on the authority of a warrant or valid exception. Const. art. I, § 7; U.S. Const. amend. 4. In the context of a warrant, the Fourth Amendment's particularity requirement prevents general searches and "the issuance of warrants on loose, vague, or doubtful bases of fact." State v. Nordlund, 113 Wn. App. 171, 179-80, 53 P.3d 520 (2002) (quoting State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992)). "The problem [posed by the general warrant] is not that of intrusion *per se*, but of a general, exploratory rummaging in

a person's belongings...." Perrone, 119 Wn.2d at 545 (internal citation omitted). Warrants which infringe upon materials protected by the First Amendment merit the highest degree of particularity and must be scrutinized with "scrupulous exactitude." Stanford v. Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965).

The general warrant here permitted a search for "images of graffiti or graffiti-related malicious mischief in progress recorded in any format and/or on any medium." CP 134. Division One opined a "commonsense reading" of the warrant "permitted a search for images recorded in a digital format." Slip Op. at 10-11. This was incorrect. Under the heightened scrutiny demanded for materials protected by the First Amendment, the warrant violated the Fourth Amendment's particularity requirement. Perrone, 119 Wn.2d at 545; Nordlund, 113 Wn. App. at 179-80, 182-83.

In Nordlund, Division Two found search warrant affidavits did not demonstrate a nexus between the crime under investigation and a search of the defendant's personal computer even though the affidavits claimed the computer contained data that would establish Nordlund's "location at critical times relevant to the alleged crimes." 113 Wn. App. at 182-83. The court remarked,

Nor is there a nexus between the alleged crimes and Nordlund's use of the computer to access pornography and send E-mails. Rather, it appears that the State was fishing for some incriminating document, which is precisely what the first and fourth amendments prohibit.

Nordlund, 113 Wn. App. at 183; see also State v. Griffith, 129 Wn. App. 482, 489, 120 P.3d 610 (2005) (finding requisite nexus shown to computer only because child victim observed defendant hook up his digital camera to a computer).

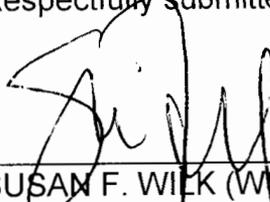
Division One's so-called "commonsense" approach fails to differentiate the "things to be seized" from the "places to be searched." However, the Fourth Amendment requires both be specified with particularity. See Perrone, 199 Wn.2d at 545; Nordlund, 113 Wn. App. at 183; Griffith, 129 Wn. App. at 489. Because the correct application of the Fourth Amendment's particularity requirement is an important constitutional question which lower courts must frequently decide, this Court should grant review. RAP 13.4(b)(3); RAP 13.4(b)(4).

F. CONCLUSION

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

DATED this 7th of June, 2006.

Respectfully submitted:



SUSAN F. WICK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Petitioner

To ~~my~~ I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

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



JUN - 7 2006

Name

Date

Done in Seattle, Washington

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State v. Sanderson, COA No. 54857-3-1

APPENDIX

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Washington Appellate Project

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, C.J.

Cox, J.