

54857-3

54857-3

78888-0

NO. 54857-3-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY SANDERSON,

Appellant.

---

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

The Honorable Michael Moynihan

---

BRIEF OF APPELLANT

---

Susan F. Wilk  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
(206) 587-2711

14:14 13:08 2017  
3  
14:14 13:08 2017

## TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE .....	3
1. The Graffiti Incidents and Police Investigation.....	3
2. The Police Search of Sanderson’s Home, Interrogation, and Sanderson’s Alleged Confession .....	5
3. Criminal Charges, Jury Verdict and Sentencing .....	7
D. ARGUMENT .....	8
1. THE SEARCH OF SANDERSON’S COMPUTER VIOLATED THE FOURTH AMENDMENT AND ARTICLE I, § 7, REQUIRING SUPPRESION OF ALL AFTER-ACQUIRED EVIDENCE.....	8
a. The Search Warrant did not Specify Sanderson’s Computer and so Failed to Comply with the Fourth Amendment’s Particularity Requirement.....	8
i. A Search Warrant That Intrudes Upon First Amendment Rights Demands a Stringent Degree of Particularity .....	9
ii. The General Warrant Permitting the Search of Materials Protected by the First Amendment Violated the Fourth Amendment’s Particularity Requirement.....	10
b. Sanderson’s Unknowing Consent was Insufficient to Validate the Search Under Article I, § 7.....	13
c. The Constitutional Violation Requires Suppression of all After-Acquired Evidence.....	16

2. EVIDENCE OF PRIOR MISCONDUCT WAS IMPROPERLY ADMITTED TO PROVE <i>MODUS OPERANDI</i> AND COMMON SCHEME OR PLAN, REQUIRING REVERSAL.....	17
a. The Evidence Was Not Admissible to Prove <i>Modus Operandi</i> .....	19
b. The Evidence Was Not Admissible to Prove Common Scheme or Plan.....	22
c. The Error From the Erroneous Admission of the Prior Acts Evidence Requires Reversal .....	27
E. CONCLUSION.....	28

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>State v. Boland</u> , 115 Wn.2d 571, 800 P.2d 1112 (1990) .....	16
<u>State v. Bythrow</u> , 114 Wn.2d 713, 790 P.2d 154 (1990) .....	21
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003) ..	21, 23-27
<u>State v. Ferrier</u> , 136 Wn.2d 103, 960 P.2d 927 (1999).....	14, 15
<u>State v. Henderson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	13
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995) .....	24, 25
<u>State v. Perrone</u> , 119 Wn.2d 538, 834 P.2d 611 (1992) .....	9-11, 13
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986) .....	21, 23
<u>State v. Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002) .....	20-23
<u>State v. Thompson</u> , 151 Wn.2d 793, 92 P.3d 228 (2004) .....	14
<u>State v. Young</u> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	16

### **Washington Court of Appeals Decisions**

<u>State v. Brundage</u> , 126 Wn. App. 55, 107 P.3d 742 (2005) ....	25, 26
<u>State v. Floreck</u> , 111 Wn. App. 135, 43 P.3d 1264 (2002) .....	27
<u>State v. Nordlund</u> , 113 Wn. App. 171, 53 P.3d 520 (2002) .	9, 11, 12
<u>State v. Trickler</u> , 106 Wn. App. 727, 25 P.3d 445 (2001) .....	19
<u>State v. Wade</u> , 98 Wn. App. 328, 989 P.2d 576 (1999) .....	20

### **Washington Constitutional Provisions**

Article I, § 7 .....	1, 2, 8, 13, 15, 16
----------------------	---------------------

### **U.S. Supreme Court Decisions**

<u>Andresen v. Maryland</u> , 427 U.S. 463, 96 S.Ct. 2737, 2748, 49	
L.Ed.2d 627 (1976).....	9
<u>Nardone v. United States</u> , 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307	
(1939) .....	16
<u>Stanford v. Texas</u> , 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431	
(1965) .....	10, 11
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d	
441 (1963) .....	16

### **U.S. Constitutional Provisions**

U.S. Const. amend. 1 .....	1, 9, 10, 12
----------------------------	--------------

U.S. Const. amend. 4..... 1, 8, 10, 11, 16

**Statutes**

RCW 9A.48.070(1)(a) ..... 7

RCW 9A.48.080(1)(a) ..... 7

RCW 9A.48.090(1)(a) ..... 7

**Rules**

CrR 3.5..... 3, 6

CrR 3.6..... 1, 3, 6

ER 403 ..... 19

ER 404(b)..... 2, 3, 17, 19, 20, 22, 26, 27

**Law Reviews, Journals and Treatises**

2 John H. Wigmore, Evidence, (James H. Chadbourn rev. ed.1979)

..... 24

#### A. ASSIGNMENTS OF ERROR

1. In violation of Article I, § 7 and the Fourth Amendment, the trial court erred in admitting evidence that exceeded the scope of the judicially-authorized search warrant.

2. In violation of Article I, § 7 and the Fourth Amendment, the trial court erred in finding a search of appellant's computer was alternately justified by his consent.

3. The evidence of appellant's prior misconduct did not meet the stringent standard required to establish *modus operandi* or common scheme or plan, and the court erred in admitting it for those purposes.

4. The trial court erred in entering conclusion of law 1 pursuant to CrR 3.6, which states: "The photographs of graffiti found on the computers are admissible, as they were specifically listed in the warrant."<sup>1</sup> CP 54.

#### B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Fourth Amendment, a warrant must particularly describe the place to be searched or it is unconstitutional. Where the search involves matters protected by the First Amendment, the warrant must be scrutinized with scrupulous exactitude. Should

---

<sup>1</sup> A copy of the court's findings of fact and conclusions of law pursuant to CrR 3.6 are attached as Appendix A.

this Court hold that a computer search based on a warrant that simply authorized the seizure of “images of graffiti or graffiti-related malicious mischief in progress recorded in any format and/or on any medium” violated the Fourth Amendment’s particularity requirement? (Assignments of Error 1 and 4)

2. Article I, § 7 of the Washington constitution requires that where the State claims a person consented to a warrantless police search of his or her home for contraband, the police must first advise the person of his or her right to refuse consent, limit the search’s scope, and revoke the consent at any time. Assuming the computer search was not authorized by the warrant, did the trial court err in finding appellant consented to the search merely because he helped police navigate his computer? (Assignments of Error 2 and 4)

3. Evidence of prior acts offered to prove identity under the *modus operandi* exception to ER 404(b) is only admissible if the method employed in the commission of the prior crime is so unique that mere proof that the accused committed that crime creates a high probability he also committed the crime charged. Where prior acts of graffiti bore no similarity to the charged crimes except for the graffiti “tag”, did the trial court err in finding the prior acts were

admissible under the *modus operandi* exception to ER 404(b)?

(Assignment of Error 3)

4. Under ER 404(b), evidence of prior acts is only admissible to prove a common scheme or plan if (1) the evidence is part of a larger, overarching plan and is causally related to the larger plan or enterprise or (2) the existence of the crime is at issue and there are substantial similarities between the prior act and the charged crime. Where proffered evidence met neither of these standards for admission of evidence under the common scheme or plan exception to ER 404(b), did the trial court err in finding the evidence admissible for this purpose? (Assignment of Error 3)

### C. STATEMENT OF THE CASE

1. The Graffiti Incidents and Police Investigation. 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.<sup>2</sup> Bellingham police officer Don Almer, who was assigned to the investigation as

---

<sup>2</sup> 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.

part of his graffiti emphasis detail, observed three "tags"<sup>3</sup> 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"<sup>4</sup> associating SERIES with HYMN and GRAVE. 4RP 445-46, 453-56, 466-70.

Based on information received from Seattle police and Chris Humphries, a school security officer at Evergreen High School in Burien, 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 decided Amador was more likely to be ANIK than HYMN and conducted no further investigation of Amador. 5RP 711.

---

<sup>3</sup> A "tag" is the moniker used by a graffiti artist. 1RP 47; 4RP 409.

<sup>4</sup> 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.

Almer next 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.

After allegedly finding folders in the computer's hard drive titled "HYMN", links to internet sites about graffiti, and digital photographs of HYMN tags, Almer again confronted Sanderson. 1RP 13, 31-32, 66-67. Almer claimed that after Sanderson was confronted with this incriminating evidence, Sanderson requested to speak with Almer privately and gave a lengthy confession of his involvement in the Bellingham incident which implicated both Desmond Hansen and Sanderson's co-defendant, Lawrence Michael Foxhoven. 1RP 15, 30.<sup>5</sup>

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

---

<sup>5</sup> 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.<sup>6</sup> The court alternately found Sanderson consented to the search because he helped Almer when Almer had difficulty navigating the computer. 2RP 229. The court entered written findings of fact and conclusions of law pursuant to CrR 3.6. CP 53-54.

3. Criminal Charges, Jury Verdict and Sentencing. Based on these events, the Whatcom County Prosecuting Attorney charged Sanderson and Foxhoven with four counts of first-degree malicious mischief and five counts of second-degree malicious mischief. CP 174-76; RCW 9A.48.070(1)(a); RCW 9A.48.080(1)(a); RCW 9A.48.090(1)(a).<sup>7</sup>

The court permitted the state to file an amended information after resting its case which charged Sanderson with two counts of first-degree malicious mischief and five counts of second-degree malicious mischief. CP 64-66. The jury convicted Sanderson on all counts save for count VI, in which the jury returned a verdict on the

---

<sup>6</sup> A copy of the search warrant is attached as Appendix B.

<sup>7</sup> The State also charged Desmond Hansen with multiple malicious mischief counts based on this incident; Hansen pleaded guilty and was not involved in the instant proceedings.

lesser-included offense of second-degree malicious mischief. 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. This timely appeal follows. CP 3-40.

D. ARGUMENT

1. THE SEARCH OF SANDERSON'S COMPUTER VIOLATED THE FOURTH AMENDMENT AND ARTICLE I, § 7, REQUIRING SUPPRESSION OF ALL AFTER-ACQUIRED EVIDENCE.

Although the search warrant did not permit a search of Sanderson's computer or the seizure of digital images, the trial court found the search was nonetheless constitutional and justified under the warrant, and alternately that Sanderson consented to the search. On appeal, Sanderson argues the warrant failed to satisfy the Fourth Amendment's particularity requirement and that the State failed to show valid consent under Article I, § 7 of the Washington constitution.

a. The Search Warrant did not Specify Sanderson's Computer and so Failed to Comply with the Fourth Amendment's Particularity Requirement. The Fourth Amendment provides in relevant part, "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.” U.S. Const. amend. 4. 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 (quoting Andresen v. Maryland, 427 U.S. 463, 490, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976) (internal citation omitted)). Whether a search warrant contains a sufficiently particularized description of the place to be searched or the item to be seized is reviewed *de novo*. Perrone, 119 Wn.2d at 545.

i. A Search Warrant That Intrudes Upon First Amendment Rights Demands a Stringent Degree of Particularity.

The degree of particularity required will depend on the nature of the materials sought and the circumstances of each case. Perrone, 119 Wn.2d at 545; Nordlund, 113 Wn. App. at 180. Search warrants listing items protected by the First Amendment require the

highest degree of protection: the “most scrupulous exactitude.”

Stanford v. Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). “No less a standard could be faithful to First Amendment freedoms.” Id.

Applying this standard, the Washington Supreme Court held a search for and seizure of “[c]hild... pornography; photographs, movies, slides, video tapes, magazines ... of children ... engaged in sexual activities....” failed to satisfy the rigorous particularity requirement. Perrone, 119 Wn.2d at 553-55. In so holding, the Court observed that “the particularity requirement is not somehow eliminated because the search is aimed at material falling into a general category, rather than specifically identified...” Id. at 554.

ii. The General Warrant Permitting the Search of Materials Protected by the First Amendment Violated the Fourth Amendment’s Particularity Requirement. Here, the trial court reasoned the search was permissible because the search warrant permitted officers to “search for, seize, secure, tabulate and make return according to law... images of graffiti or graffiti-related malicious mischief in progress recorded in any format and/or on any medium...” 2RP 228; CP 134. Even though the warrant did not specify digital images or identify Sanderson’s computer as a

place to be searched, the court stated, “As far as I’m concerned, [the search warrant] encompasses matters that are contained on computer screens and the like.” 2RP 228.

The court failed to recognize that the very breadth of the warrant’s language transformed the warrant into an unconstitutional general warrant. The warrant’s generality authorized precisely the sort of “wholesale rummaging” through constitutionally protected materials disapproved in Stanford and Perrone. Stanford, 379 U.S. at 485; Perrone, 119 Wn.2d at 559-60. As such, the warrant violated the Fourth Amendment’s particularity requirement.

In Nordlund, Division Two of this Court 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.

It should be noted that in the instant case, the search warrant did not even incorporate Almer's affidavit, so the nexus between the crimes under investigation and the items to be searched was even more attenuated than in Nordlund. CP 134. Further, that Almer's search was a fishing expedition is demonstrated by his clumsy exploration of the computer itself. Almer initially had difficulty navigating the computer. 2RP 229. He testified that with Sanderson's assistance, he checked the web browser "Favorites" and used the auto-fill function on Sanderson's internet search engine to ascertain what websites Sanderson had visited. 2RP 142-43. Almer then explored Sanderson's C-Drive where he allegedly found numerous folders entitled "HYMN" containing 50-60 photographs of HYMN tags. 1RP 92; 2RP 143; 5RP 578. As with the internet search, Almer was only able to recover images because he enlisted Sanderson's help. 2RP 143-45.

Given the vagueness and generality of the search warrant's language, and in light of the scrupulous exactitude with which courts must scrutinize warrants intruding on areas protected by the First Amendment, this Court should not approve the trial court's finding that the computer search was proper. Perrone, 119 Wn.2d

at 545. This Court should reverse and order suppression of the fruits of the unlawful search.

b. Sanderson's Unknowing Consent was Insufficient to Validate the Search Under Article I, § 7. The court alternately found the search was justified by Sanderson's consent, as evidenced by his cooperation and assistance offered Almer during the search. 2RP 229.

Properly established, consent is an exception to the warrant requirement. State v. Henderson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Under article I, § 7, the State must meet three requirements in order to show a valid consensual search: (1) the consent must be voluntary, (2) the person granting consent must have authority to consent, and (3) the search must not exceed the scope of the consent. State v. Thompson, 151 Wn.2d 793, 803, 92 P.3d 228 (2004).

Our Supreme Court has specifically considered application of the "consent" exception to the warrant requirement under Article I, § 7. State v. Ferrier, 136 Wn.2d 103, 114, 960 P.2d 927 (1999). The Ferrier Court concluded that in light of Article I, § 7's explicit protection of private affairs, Washington citizens are entitled to heightened protection from warrantless police searches of their

homes predicated on a claim of consent. Id. Accordingly, the Court held that where police rely on consent to justify a warrantless search for contraband, they must “inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home.” Id. at 118.

Assuming this Court agrees the warrant was too general to permit a search of Sanderson’s computer, under Ferrier, this Court should reject any claim that Sanderson’s consent otherwise rendered the search valid, as the State failed to show Sanderson’s consent was voluntary. 136 Wn.2d at 118. As noted in Ferrier, there are many reasons why an individual might agree to a search which do not signify that consent is voluntary. See id. at 115 (noting “the great majority of home dwellers confronted by police officers on their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the

circumstances to make a reasoned decision about whether or not to consent to a warrantless search.”)

Any other result would fundamentally undermine Article I, § 7’s concern with protecting citizens’ privacy. Permitting the police to conduct a further search for contraband not contemplated by the judicially-authorized search warrant would allow police to unreasonably rely on the inherently coercive effect of the warrant, as well as unduly benefit from the combined elements of surprise, ignorance or fear which could influence consent in the first place. Ferrier, 136 Wn.2d at 115. Here, for example, Sanderson may have cooperated with Almer’s search because he believed he had no choice. He may have assisted so that Almer did not damage the computer’s delicate hardware. Or he may have helped Almer because he thought that his cooperation would enable him to avoid arrest. None of these reasons would establish voluntary consent under Article I, § 7.

Thus, to the extent the court below found Sanderson’s cooperation with Almer’s investigation evinced constitutionally adequate consent, this Court should hold the ruling violated Article I, § 7 and should reject any contention that Sanderson consented to the search.

c. The Constitutional Violation Requires Suppression of all After-Acquired Evidence. Where there has been a violation of the Fourth Amendment, courts must suppress evidence discovered as a direct result of the search as well as evidence which is derivative of the illegality: the “fruits of the poisonous tree.” Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Similarly, the remedy for a violation of the privacy rights secured by Article I, § 7 is suppression of the evidence obtained as a result of the unconstitutionality. State v. Young, 123 Wn.2d 173, 196, 867 P.2d 593 (1994); State v. Boland, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990).

The constitutional violation here requires suppression of both the physical evidence obtained from the computer search and Sanderson’s alleged confession which resulted from that search. See 1RP 13, 67; 2RP 144; 150. This Court should reverse with direction that all evidence obtained as a result of the illegal computer search be suppressed.

2. EVIDENCE OF PRIOR MISCONDUCT WAS IMPROPERLY ADMITTED TO PROVE *MODUS OPERANDI* AND COMMON SCHEME OR PLAN, REQUIRING REVERSAL.

Pretrial, the defense moved *in limine* pursuant to ER 404(b) to prohibit the State from introducing photographic and other evidence connecting Sanderson to other graffiti incidents. CP 119-27; CP 135-38. Specifically, the defense moved to exclude evidence 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." CP 123-25; 135-38. The state claimed the evidence was admissible to prove a common scheme or plan to place graffiti in many prominent locations to gain notoriety. 2RP 198-201. The state claimed the evidence was also admissible to prove *modus operandi*. 2RP 195-98. The defense argued the evidence did not rise to the stringent level of similarity of a signature crime. 2RP 196. The court nonetheless found the evidence admissible to

prove both common scheme or plan and *modus operandi*. 2RP 204-07; 4RP 430-31, 452.<sup>8</sup>

As a result, at trial, the State presented evidence that: (1) Sanderson was investigated for graffiti vandalism in a train yard on June 17, 2002, based on an incident that involved Desmond Hansen and another young man named Kevin Stalker, 2RP 257-70; (2) numerous HYMN tags were recovered from Hansen's bedroom, as well as "piece books"<sup>9</sup> and "roll calls" associating SERIES, HYMN and GRAVE, 4RP 445-456, 469-71; (3) photographs of Sanderson and Hansen were found on a graffiti website, 4RP 469; (4) HYMN tags were found throughout the Meighan/Morris residence as well as photographs of a HYMN tag on a train and of Sanderson painting HYMN and UPSK on a train, 4RP 488, 493, 504, 509-10, 513, 519; (5) numerous pieces of loose-leaf paper with HYMN TWO and TONY written on them were recovered from Sanderson's room, 5RP 562-69; (6) some 50-60 images of HYMN or UPSK graffiti were found on Sanderson's computer; and (7)

---

<sup>8</sup> At one point during the trial, the court read a limiting instruction to the jury that limited their consideration of prior acts evidence to these purposes. 4RP 452.

<sup>9</sup> A "piece book" is a book in which graffiti taggers practice their tags. Almer testified that a graffiti tagger will give a piece book to a brother graffiti tagger to sign. 4RP 453.

SERIES and HYMN tags were found in “piece books” in Foxhoven’s residence, 5RP 604-08.

a. The Evidence Was Not Admissible to Prove *Modus Operandi*. Prior acts evidence is admissible under ER 404(b)<sup>10</sup> only if it is offered for some purpose other than to prove the defendant’s propensity to commit the charged crime and is relevant for that purpose. Therefore, before a trial court may admit evidence of other crimes or misconduct, it must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant to prove an essential ingredient of the crime charged; (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. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001); ER 403. Any doubt regarding admissibility must be resolved in favor of the defendant. State v. Wade, 98 Wn. App.

---

<sup>10</sup> ER 404(b) provides, **Other Crimes, Wrongs, or Acts.** 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.  
ER 404(b).

328, 334, 989 P.2d 576 (1999). An error in the admission of prior acts evidence is reviewed for an abuse of discretion. Thang, 145 Wn.2d at 642.

The *modus operandi* exception to ER 404(b) is not employed to prove the crime occurred but rather 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." Thang, 145 Wn.2d at 643; 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.

In State v. Smith, 106 Wn.2d 772, 725 P.2d 951 (1986), the State sought to prove the defendant committed three Seattle-area rapes by offering evidence of prior burglaries the defendant had committed, contending that because he bore a physical resemblance to the rapist and the rapes, like the burglaries, had

occurred in ground-floor apartments, the *modus operandi* was sufficiently similar for the burglaries to be admissible. 106 Wn.2d at 774-75. Reversing, the Court held the proffered evidence failed to make the existence of the identified fact – i.e., the defendant’s identity – more probable than it would have been without the evidence. *Id.* at 777. The Court stressed, “*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.*” *Id.* (emphasis in original).

The State’s evidence in this case failed to meet this rigorous standard. First, there was no evidence presented to show that Sanderson’s tag was so unique as to be like a signature. *Cf.*, *Thang*, 145 Wn.2d at 643. In fact, the court agreed with the defense that Almer, the State’s graffiti “expert”, was not qualified to render an opinion that the various HYMN tags offered at trial were done by the same person. 4RP 420-25.

Second, there was nothing about the prior acts evidence that established similarity regarding the method employed to commit the crimes. No acid-etching compound was recovered from Sanderson’s home. 6RP 772. Nor were the prior acts themselves

similar to the events in Bellingham. The State presented evidence that Sanderson was arrested in a train yard near freshly-painted graffiti and was photographed painting a train. 2RP 257, 259, 260-65; 4RP 519, 530-33. The State also presented numerous versions of the HYMN tag recovered from various residences. Other than an allegedly “stylized Y” present on some but not all of the HYMN tags, the State did not present any evidence tending to show the various tags were uniquely similar to one another, or even that the “Y” was so unusual as to be perpetrated by the same graffiti tagger. 4RP 470, 504. The State’s prior acts evidence, therefore, did not evince the kind of unique quality or distinctive, signature-like similarity as to be admissible under the *modus operandi* exception to ER 404(b). Thang, 145 Wn.2d at 643; Smith, 106 Wn.2d at 778-79. The evidence should not have been admitted for this purpose.

b. The Evidence Was Not Admissible to Prove Common Scheme or Plan. The Washington Supreme 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.

The DeVincentis 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, the 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 of this Court 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).<sup>11</sup>

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 there was substantial evidence to contradict the State's 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

---

<sup>11</sup> At the time of this writing, pin citations were not available on Westlaw.

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).

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).

Perhaps realizing its theory did not meet either prong of ER 404(b)'s common scheme or plan exception, the State suggested this evidence also could prove Sanderson's motive to commit the charged crimes. 2RP 198. But the court did not agree that the State could prove this was Sanderson's motive to commit the charged crimes, and did not instruct the jury to consider the evidence for this purpose. 4RP 430-31. Thus such an argument is unavailing.

c. The Error From the Erroneous Admission of the Prior Acts Evidence Requires Reversal. Non-constitutional error merits reversal if there is a reasonable probability that the error affected the jury's verdict. State v. Floreck, 111 Wn. App. 135, 140, 43 P.3d 1264 (2002). This standard has been met here. The State's evidence linking Sanderson to the events in Bellingham was largely circumstantial. Without the other acts evidence, the jury would have been required to infer that because Sanderson knew Hansen and Foxhoven, whom the State also suspected of the crime, and had friends in Bellingham who were graffiti taggers,

Sanderson was connected to the crime. Although Almer claimed Sanderson had confessed to the crime, as noted in section C2, supra, Almer was heavily impeached regarding the facts surrounding this alleged "confession" and even law enforcement witnesses failed to corroborate his story.

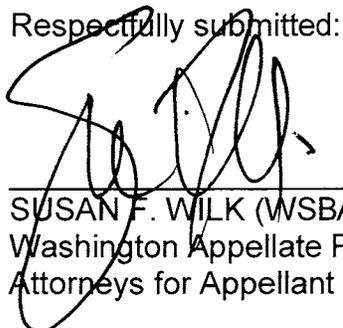
With the assistance of the other acts evidence, however, a conviction was virtually certain, particularly given the sheer volume of documents and images the State was permitted to introduce at trial. This Court cannot be confident in the integrity of the jury's verdict given the wealth of propensity evidence introduced at trial. The trial court's improper admission of this highly prejudicial propensity evidence, therefore, requires reversal.

E. CONCLUSION

For the foregoing reasons, Anthony Sanderson requests this Court reverse his convictions and remand for a new trial.

DATED this 27<sup>th</sup> day of June, 2005.

Respectfully submitted:



---

SUSAN F. WILK (WSBA 28250)  
Washington Appellate Project (91052)  
Attorneys for Appellant

APPENDIX A

FILED IN OPEN COURT  
8-19 20 04  
WHATCOM COUNTY CLERK  
By [Signature]  
Deputy

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

STATE OF WASHINGTON, )  
          plaintiff            )  
v.                                )  
ANTHONY ESPINOSA SANDERSON, )  
          defendant            )

No. 02-1-01343-3

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
RE: CrR 3.6

I.       UNDISPUTED FINDINGS OF FACT

1. In June/Nov. of 2002, officers obtained warrants to search the residences of Anthony Sanderson and Lawrence Michael Foxhoven.
2. The warrants specified that the Officers could search for images of graffiti placed upon any medium, among other things.
3. Officer Almer and other officers served the warrant at Foxhoven's residence on Nov. 7, 2002. Sanderson's residence was searched on June 5, 2002.
4. Officer Almer searched Sanderson's computer, and Anthony Sanderson assisted him in navigating the contents thereof.
5. Images of graffiti in the computer of Anthony Sanderson were viewed by Officer Almer. Officer Almer testified at trial that he viewed these images of graffiti and provided several samples that he had printed.

1 6. Foxhoven's computer was seized, and images of graffiti were later recovered  
2 from the computer's hard drive. Officer Almer testified at trial that he had  
3 viewed these images.

4 II. DISPUTED FINDINGS OF FACT

5 Anthony Sanderson disputes that he provided consent to Officer Almer for the  
6 search of his computer.

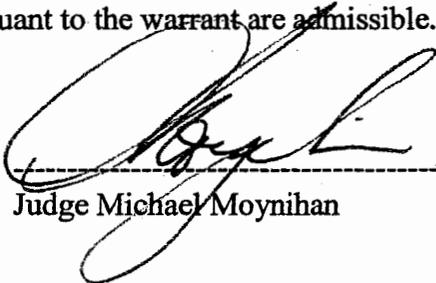
7 III. CONCLUSIONS RE: DISPUTED FINDINGS

8 Officer Almer did not specifically request consent to search Sanderson's  
9 computer. Anthony Sanderson did, however, assist Officer Almer in retrieving  
10 images from the computer.

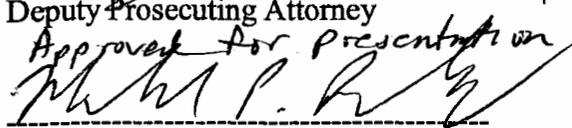
11 IV. CONCLUSIONS OF LAW

- 12 1. The photographs of graffiti found on the computers are admissible, as they  
13 were specifically listed in the warrant.  
14 2. Computer hardware, software and items found on the computer other than  
15 photographs of graffiti are not admissible.  
16 3. Other physical items seized pursuant to the warrant are admissible.

17 Dated this 19 day of August, 2004.

18   
19  
20 Judge Michael Moynihan

21   
22 Royce Buckingham #22503  
23 Deputy Prosecuting Attorney

24 *Approved for presentation*  
  
25 Attorney for the Defendant

## APPENDIX B

EXHIBIT A

02B-19835

SEARCH WARRANT

STATE OF WASHINGTON )

COUNTY OF WHATCOM )

ss.

CASE # 02B19835

TO ANY PEACE OFFICER:

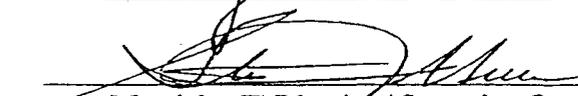
THIS MATTER having come on before me this day, and testimony having been taken and based upon probable cause having been found, in the name of the State of Washington, I command that you enter the following described place(s):

The residence located at 9403 24th Avenue SW, City of Seattle, County of King, State of Washington

therein to search for, seize, secure, tabulate and make return according to law the following property and things: Items recognized as graffiti and tagging paraphernalia consisting in part of and including but not limited to: paint, spray paint cans, spray paint can tips, markers, etching acid, legion shoe polish applicators, objects used to scratch or etch, images of graffiti or graffiti-related malicious mischief in progress recorded in any form or on any medium, paperwork or documents or other

documenting graffiti tags and any evidence of ANTHONY E. SINDERSON'S criminal acts of You are further commanded to execute the Search Warrant within TEN (10) days from the date of issuance. Following execution of this warrant, a return of said warrant shall promptly be made to the undersigned Municipal/District/Superior Court Judge. malicious mischief

ISSUED UNDER MY HAND this 31 day of May, 2002

  
Municipal/District/Superior Court  
Judge/Commissioner for  
City of Bellingham/Whatcom County, Washington.

Telephonic Warrant Certification by: \_\_\_\_\_

Original - Return to Court (via Major Crimes Unit Sergeant)  
Yellow Copy - Premises

76

02B19835

