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No. 54793-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL FOXHOVEN,

Appellant.

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

The Honorable Michael Moynihan, Judge

REPLY BRIEF OF APPELLANT

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

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

*Patrick Mayorsky 10-12-2005*  
Name Done in Seattle, WA Date

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A. ARGUMENT IN REPLY

THE STATE FAILED TO MEET THE STRINGENT STANDARD FOR ADMISSION OF PRIOR MISCONDUCT EVIDENCE.

The state has a substantial burden to meet when it attempts to introduce evidence of prior bad acts under one of the exceptions to ER 404(b). State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court must always begin with the presumption that evidence of prior bad acts is inadmissible, and in doubtful cases the evidence should be excluded. DeVincentis, 150 Wn.2d at 17; State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

In this case, the trial court admitted evidence of Foxhoven's prior acts of graffiti to prove identity. In his opening brief, Foxhoven argued that the evidence failed to establish a unique modus operandi because there was no similarity, other than the use of the SERIES tag, in the method, style, location, or time between Foxhoven's prior acts of graffiti and the charged crimes. See Br. of App. at 16-18.

In its brief, the state contends that appellant's arguments go to the weight of the prior bad acts evidence, not its admissibility. Br. of Resp. at 19. This argument should be rejected. It is well established that factors such as location, method, and temporal proximity are relevant to the admissibility of evidence to establish identity. Thang, 145 Wn.2d at 643-

44; State v. Russell, 125 Wn.2d 24, 68, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Brown, 113 Wn.2d 520, 782 P.2d 1013, 1018 (1989); State v. Laureano, 101 Wn.2d 745, 765, 682 P.2d 889 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988). This is because evidence of other bad acts is relevant to the charged crime only if the method employed in both crimes is so unique that proof that the defendant committed the prior crime creates a high probability that he also committed the charged crime. Thang, 145 Wn.2d at 643. In fact, when identity is at issue, the degree of similarity between the prior crimes and the charged offense must be at its highest level for the evidence to be admissible. DeVincentis, 150 Wn.2d at 21.

Contrary to the state's suggestion, whether Foxhoven's prior acts of graffiti established his identity as the perpetrator was not properly before the jury. Evidence of prior misconduct must satisfy stringent admissibility requirements because it is highly prejudicial and may lead to a verdict based solely on the defendant's criminal propensity. State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). Because the state failed to prove any distinctive and unusual similarities between the prior acts and the charged offenses, it was improper for evidence of the earlier graffiti to be presented.

The state's entire case against Foxhoven rested on evidence of his prior crimes. No one identified Foxhoven as the perpetrator, and there was no physical evidence placing him at the scene. Under these circumstances, there is no question that the outcome of the trial would have been different if the court had properly excluded the evidence of Foxhoven's prior graffiti, and reversal is required.

B. CONCLUSION

For the reasons discussed above and in Appellant's opening brief, this Court should reverse Foxhoven's convictions.

DATED this 15<sup>th</sup> day of October, 2005.

Respectfully submitted,

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