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STATE OF WASHINGTON

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No. 78888-0
(COA Nos. 54793-3-I and
54897-3-I consolidated)

**IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent,

v.

ANTHONY SANDERSON, Petitioner

and

LAWRENCE FOXHOVEN, Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether photos of the defendants' writing or drawing of their tags – monikers – on buildings and trains and photos of defendants' with their tags was admissible under ER 404(b) as evidence of modus operandi or identity where a person's tag is their identity within the graffiti subculture.
2. Whether defendants' use and drawings of their tags and graffiti connection with one another was admissible under ER 404(b) as evidence of identity, separate from modus operandi, where such evidence was relevant to establish identity and their relationship with one another.
3. Whether drawings of the defendants' tags found in defendants' residences constitutes prior bad acts thereby implicating ER 404(b) where the drawings were not illegal and were not character evidence.

B. FACTS

1. Procedural Facts

Petitioners Michael Foxhoven and Anthony Sanderson were charged in 2002 for graffiti vandalism they committed on October 26, 2001. SCP 174-76, FCP 91-95.¹ Foxhoven was charged with seven counts of first degree malicious mischief, eight counts of second degree malicious mischief and four counts of third degree malicious mischief. FCP 91-95. Sanderson was charged with four counts of first degree malicious mischief and five counts of second degree malicious mischief. SCP 174-76. The jury found Foxhoven and Sanderson guilty as charged

¹ "SCP denotes clerk's papers in Sanderson's case and "FCP" those in Foxhoven's.

in amended informations that had been amended by the State to conform to the proof. RP 859-61,² SCP 61-66, FCP 23-31.

At sentencing Foxhoven and Sanderson challenged the amendments, resulting in one of Foxhoven's counts being dismissed³ and some other counts being reduced to reflect the charges in the original information. RP 1028, 1034-35. The judge imposed a standard range sentence of 50 months for Foxhoven and a standard range sentence of 18 months for Sanderson. RP 1038, SCP 41-52, FCP 3-15.

2. Substantive Facts

Over twenty-five businesses or organizations were vandalized on October 26, 2001 by persons who had painted graffiti with an acid etching compound across the windows, causing around \$10,000 dollars in damage.⁴ RP 317-21, 353-389, 432, 655-60. Three tags⁵ appeared on the windows, HYMN, GRAVE, SERIES, individually or in a combination thereof. RP 433, 655-58, Supp. CP Ex. 114. The tag SERIES appeared primarily as SeRIeS, but as SERIES as well. RP 665-68, Supp. CP Ex. 114. The tag HYMN appeared with a stylized Y and sometimes with a

² The verbatim report of proceedings is referred to as RP as the proceedings for the trial are sequentially numbered. The report of proceedings for the testimony of Officer Bonafacio is referred to as "3/18/04 RP."

³ The prosecutor conceded that the count should be dismissed as the victim had not been alleged in the original information. RP 1027.

⁴ The dollar amount is based on the restitution amounts in the judgment and sentence. The officer estimated the amount of damage at \$20,000 – 40,000. RP 4.

⁵ A "tag" is a person's moniker, or name, within the graffiti subculture.

circle over or near the M and sometimes it appeared as HYMN2. RP 458-59, 663-68, Supp. CP Ex. 114. The tag GRAVE or GRAVER had a stylized G and a V that looked like a U. RP 506.

Two officers, Det. Hardin of the Seattle Police Department and Officer Don Almer of the Bellingham Police Department, provided background information about graffiti vandals. They explained the graffiti subculture has its own language, norms and means of operating. RP 283, 402. Graffiti vandals don't use their own name but a moniker, a "tag," which is their identity within the graffiti subculture.⁶ RP 408-09. They choose their tag very carefully to make sure that no one else is using that tag and to ensure that they will enjoy writing that tag for years. RP 410. If a tagger paints or draws an elaborate tag that is difficult to read, the tagger will often sign the tag more legibly near the tag. RP 460. The point of tagger graffiti is to gain fame or notoriety within the graffiti subculture. RP 812.

Over time, a graffiti vandal cultivates his style and technique for writing his tag. RP 410. Thousands of styles are used and reading graffiti can be difficult. RP 412. Examples of style include bubble letters as well

⁶ Officer Bonafacio, a graffiti expert from California described a tag as "a moniker that an individual takes -- that he makes up or someone gives to him and that's his distinguishing moniker that he will use to place on public or private property using spray paint markers, other etching tools and that identifies him alone as that person." 3/18/04
RP 14

as straight tags. RP 286-87. The tagger's goal is to personify his style, e.g., by the manner in which he connects the letters or the color scheme he uses. RP 906. While a tagger strives for a particular style, it is not uncommon for taggers to use variations on spelling their tag. RP 449. They practice their tag in books called "piece books."⁷ RP 303. These books are often passed around with other taggers who may sign them, like a yearbook. RP 453, 789. It is necessary for a tagger to practice his tag numerous times so that when they do it in public, they can do so quickly. RP 453.

Taggers do not take on another person's identity or stylized tag. Copying another person's style or tag, called "biting," is a bad thing in the graffiti subculture. RP 286-87, 595, 780, 904. Sometimes taggers will do "hook-ups" by putting up another person's tag, along with their own. RP 287, 306-07, 780. If a tagger wants to show association with a particular group of other taggers, he will put up the group's, or "crew's," tag, usually consisting of three letters, e.g. "HPC" for the High Priest Crew. RP 284, 450. Sometimes taggers will do a "roll call" of the members of their crew, along with the crew's tag, in which case the writing of the tags will not be as stylistic, or in the same style as they would be if the tagger were just

⁷ Officer Bonafacio referred to a piece book as a "tag book" and described it as a book that the "graffiti tagger keeps to practice his moniker and it usually has several pages of his moniker written in different styles and colors." 3/18/04 RP 17.

putting up his own tag. RP 285-86, 298, 780, 790-91. Taggers can belong to more than one crew. RP 446-47, 690.

In the course of his investigation, Officer Don Almer of the Bellingham police department, assigned to graffiti crimes, determined that GRAVE was Desmond Hansen.⁸ RP 435. At Hansen's house were a lot of materials for doing graffiti. RP 443, 468-71, 474. Among the items found at Hansen's residence was a King County bus stop sign with HYMN, GRAVE and HPC⁹ on it. Hansen's piece book showed that HYMN, GRAVE and SERIES were associated with one another in 2001, and included a roll call for HYMN, SERIES and GRAVE. RP 453-57.

Almer's investigation led him to two other persons, Luke Meighan and Reid Morris. RP 486-498. At their residence in Bellingham, Almer saw the tags for REFER, SPIRE, HYMN and GRAVE, which led him to conclude that the taggers HYMN and GRAVE had an association with Bellingham. RP 486-99. In one of the piece books were drawings of the tag SERIES, some in the variation "SeRIeS," some not. RP 504-09. The tag GRAVE sometimes appeared as "GRAVER." Numerous photos were found: one of Sanderson with Meighan, photos of the tags REFER, SPIRE, HYMN and GRAVE, as well as photos of Sanderson putting up

⁸ Hansen pled guilty. RP 128, 170.

⁹ Det. Hardin had seen the tags HYMN, GRAVE and SERIES associated with either the HPC or UPS crews in Seattle. RP 288

his tag, drawing the H with the stylized Y, on a train. RP 514-534, Supp. CP Ex. 69, 70.

Almer conducted a search of Sanderson's house in Seattle on May 31, 2002, pursuant to a search warrant. RP 538. On Sanderson's computer were photos or digital images of pages of a piece book, along with other photos. All the photos of the piece book tags were of the tag HYMN. RP 545-46. There was other evidence of the tag HYMN and the crew UPSK at the house. RP 547. There was a book and other materials that contained HYMN, with the stylized Y and circle, and GRAVE in it. RP 558-71. Some of the papers had HYMN TWO and TONY in a similar style on them. RP 562-71. The predominant tag found there was HYMN. RP 293.

During the course of the search, Officer Almer spoke with Sanderson who confessed to being involved, said that he had been in Bellingham, that Hansen had said he wanted to etch and that they had done it with acid. RP 331, 592-96, 738.¹⁰ He said a lot of people had been downtown that night as well as a number of police officers. RP 593. Sanderson admitted to tagging four maybe seven businesses, but that he primarily acted as a lookout. RP 592-96. He said he put HYMN up in

¹⁰ The trial court held a 3.5 hearing and determined the statements were admissible. RP 138.

bubble letters as well as slashed letters, and admitted that HYMN had been his tag for two years and was not aware of anyone else using that tag within the last two years. RP 592-96, 739, 742-43, 797. When Almer asked if anyone else used that tag, Sanderson responded, “No, no. You don’t do that. People will throw down with you if that happens...” Id. Sanderson told Almer that in the graffiti culture that’s your name and that you don’t go and write someone else’s name because the person will get angry because that’s their source of pride. RP 595.

Months later, based on some information from the San Francisco BART authorities, Almer conducted a search of Foxhoven’s residence in Seattle. RP 598-99. Outside Foxhoven’s residence was the tag SERIES on a garbage can and in his bedroom were piece books, papers, photos and spray paint can caps. RP 600-10. In the piece books, the tag SERIES appeared in the same style as that on the Bellingham businesses (SeRIeS), along with the tags GRAVE/R and HYMN and HPK, dated 2001. Id., Supp. CP Ex. 80, 81. There were different styles within the book and the books had both the tags GRAVE and HYMN, but mostly the tag SERIES. RP 292, 609-12. One piece book, dated 2000-2002, had numerous “SeRIeS” in it, and other materials or photos that had the tag written as “SeRIeS” or “SERIES” in it. RP 612-39. One photo showed the tags SERIES, GRAVE and HYMN TWO, along with HPC. RP 640-41. There

were a number of digital images of the tag SERIES on Foxhoven's computer. There was also a postcard addressed to "Michael SERIES Foxhoven" in the apartment. RP 646-47, 651. Foxhoven told Almer that he used to do graffiti, but that he didn't do it anymore. He admitted he had been arrested in California and had used the tag SERIES there. RP 649. He claimed that he kept the books, etc. because of his current work. RP 649. He admitted knowing Hansen and Sanderson, but not necessarily as the taggers GRAVE and HYMN. RP 652-53.

At trial, Almer acknowledged that some of the SERIES writings in Foxhoven's piece book looked different and explained that they were done by someone else, for example as part of a roll call. RP 782-85. He also explained that the tags on the Bellingham businesses were not done in a roll call format. RP 791-92.

Pretrial, Foxhoven and Sanderson moved in limine to exclude photos and testimony of other graffiti and of Sanderson's "graffiti-like artwork." FCP 75, SCP 119-27, 135-38, RP 160-66. The State sought to admit the evidence based on modus operandi, common scheme or plan, identity, intent and motive. RP 428-29. The court ruled the evidence admissible to show identity under modus operandi and as evidence to common scheme or plan, and gave a limiting instruction to that extent. FCP 97-98, SCP 55-56, RP 452.

C. ARGUMENT

Foxhoven and Sanderson challenge the trial court's evidentiary ruling regarding the admission of photographs and drawings taken from their residences as well as evidence of other criminal conduct. Specifically, Foxhoven contests the admission of photographs of his tag SERIES taken from his residence and the admission of testimony regarding prior graffiti he committed in California. *See* Foxhoven's Opening Brief at 6; Foxhoven's Petition at 7. Sanderson specifically contests the admission of evidence of his prior graffiti-related arrests, the graffiti-like artwork seized from his house, and photographs of Sanderson painting graffiti. Sanderson's Opening Brief at 17, Sanderson's Petition at 6.¹¹ They assert that the trial court erred in admitting the evidence because it was not "so unique" as to create a high probability that the same person committed both. The trial court did not abuse its discretion as the evidence of other graffiti incidents was admissible as evidence of *modus operandi* or identity and the drawings found in Sanderson's house were not "other bad acts" or impermissible character evidence under ER 404(b) evidence but were simply relevant to prove the identity of who committed the graffiti in Bellingham.

¹¹ They do not otherwise challenge the evidence seized from co-defendant Hansen's house or from the residence of Meighan and Morris. Foxhoven does not challenge the admissibility of the piece books found at his house.

- 1. Evidence of other graffiti incidents was admissible as evidence of modus operandi because the defendants' use of their distinctive tags created a high probability that they committed the charged graffiti as well.**

Foxhoven and Sanderson challenge the admissibility of their other graffiti and drawings under ER 404(b), specifically that the trial court erred because the evidence was insufficient to establish modus operandi. The correct interpretation of an evidentiary rule is reviewed de novo, while a trial court's decision to admit or exclude the evidence in accord with the correct interpretation is reviewed for abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Evidence of other bad acts or crimes is not generally admissible to prove character and action in conformity with that character. 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.

In order to admit evidence of other crimes or misconduct under ER 404(b), the court applies a four factor test:

the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A challenge to the uniqueness of the evidence for purposes of modus operandi is a challenge to the third factor, relevance. *Id.*¹² Petitioners' challenge to the sufficiency of the distinctiveness of the evidence for purposes of modus operandi is a challenge only as to relevance.

The primary purpose of modus operandi evidence is to corroborate identity. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984). When evidence of modus operandi is sought to be admitted, the evidence is relevant if the method employed 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 (*citing* State v. Russell, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994)). “The greater the distinctiveness the higher the probability that the defendant committed the crime, and thus the greater the relevance.” *Id.* The distinctiveness must be signature-like, but does not have to constitute a signature. *Id.*; *see also*, State v. Russell, 125 Wn.2d 24, 67-68, 882 P.2d

¹² If a court fails to conduct the balancing process on the record, the error is harmless if the record is sufficient to allow effective appellate review. State v. Bradford, 56 Wn. App. 464, 468, 783 P.2d 1133 (1989); *see also*, State v. Herzog, 73 Wn. App. 34, 867 P.2d 648, *rev. den.*, 124 Wn.2d 1022 (1994) (failure to weigh prejudice on the record harmless if reviewing court can determine from the record that the trial court would have admitted the evidence if it had conducted the balancing).

747 (1994), *cert. den.*, 514 U.S. 1129 (1995 (similarities need not be identical, but must show that the incidences are more than coincidental).

One means of demonstrating this “signature-like” similarity is by demonstrating that both crimes share the same or similar distinctive features. Thang, 145 Wn.2d at 643. Another means is by showing that the shared similarities between the two crimes, even if not distinctive in and of themselves, when combined with one another and with the lack of dissimilarities, create a “sufficient inference that they are not coincidental.” *Id.* at 644. The purpose is to determine if there is “such a high degree of similarity as to mark it as the handiwork of the accused.” State v. Jenkins, 53 Wn. App. 228, 236, 766 P.2d 499, *rev. den.*, 112 Wn.2d 216 (1989). Russell, 125 Wn.2d at 67-68. As long as the two crimes are sufficiently similar and distinctive, differences between the crimes go to the weight and not admissibility of the evidence. *See, People v. Tipton*, 207 Ill. App. 3d 688, 695, 566 N.E.2d 352 (1991) (differences between crimes went to weight and not admissibility under ER 404(b) where defendant threatened to decapitate both victims with a meat cleaver).

Examples of Washington cases that have held that feature(s) of the crimes were sufficiently distinctive as to be admissible modus operandi evidence include: (1) State v. Russell, *supra* (homicides were cross

admissible where the victims were killed by violent means after being sexually assaulted and their bodies posed with the aid of props; (2) State v. Lynch, 58 Wn. App. 83, 792 P.2d 167, *rev. den.*, 115 Wn.2d 1020 (1990) (prior robberies admissible where perpetrator wore brown wig, approached safety deposit box prior to robbery, used a red ten speed bike and displayed a gun tucked into his waistband); and (3) State v. Battle, 16 Wn. App. 66, 553 P.2d 1367 (1976) (other worthless checks drawn on the same fictitious account and signed by “Eugene Franklin” admissible to show modus operandi in cashback scheme). *See also*, State v. Talbot, 416 So.2d 97, 100 (La. 1982) (defendant’s identifying himself as “Doc” in both rapes was so distinctive as to conclude that both incidents were the handiwork of the same person); State v. Walton, 311 Or. 223, 809 P.2d 81, 88-89 (1991) (shotgun was so distinctive that it immediately, in and of itself, earmarked the robberies as the handiwork of the same person).

In ruling on defendants’ motions here the trial court referenced and applied the correct legal standard regarding modus operandi as set forth in Thang. RP 200. The court further explained that relevance would not be established “unless the shared features of the crimes are individually unique or the appearance of the shared features combined with a lack of dissimilarities can create a sufficient inference that they are not coincidental.” RP 202. In applying this legal standard, the court reasoned:

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

RP 202. The trial court ultimately ruled the evidence admissible as evidence of modus operandi and common scheme or plan. The court limited some evidence that could be presented and gave a limiting instruction, limiting the jury's consideration of the evidence to modus operandi or common scheme or plan. RP 171, 205-08, 452.

Here, defendants' prior graffiti was relevant to establish identity as to who committed the Bellingham graffiti through the distinctive tags the defendants chose for themselves and admitted were theirs. As the expert testimony explained, their choice of tag was individual to them within the graffiti subculture, it was their identity. Their placing their tags on buildings in an unlawful and ostentatious manner was their means of seeking notoriety for themselves. The purpose of their graffiti was to draw attention to the act of vandalism and to identify it as *their* act of vandalism, by the use of their tag. As the prosecutor argued: "Similarity of style and consistent use of the same pseudonym is evidence of identity, and that's unique to the vandal who identifies himself as the author of the graffiti." RP 198.

The specific variations of the tags done in Bellingham, “SeRIeS” and “H-‘with the distinctive Y’-MN, were also found in Foxhoven’s and Sanderson’s apartments. Piece books dated 2001-2002 found in Foxhoven’s apartment contained the “SeRIeS” tag, and images and materials found at Sanderson’s had the “distinctive Y” in the tag HYMN. This particular variation of SERIES is also found in some of the photos found at Foxhoven’s apartment. *See* Ex. 95, 101, 104.

The distinctive feature in this case common to both the charged crime and the prior graffiti is the defendants’ use of their tag. Depictions of the tag in a style and/or variation nearly identical to some of those found in defendants’ other graffiti and piece books only increases the relevance of that particular evidence. While some of Foxhoven’s prior graffiti depict his tag in a style and/or font that differ from one another, there is no question that all of that graffiti, found at Foxhoven’s house, were *his* acts of graffiti and those of SERIES. Foxhoven admitted that the photos and piece books were his and that he did the graffiti in the California incident. Likewise, Sanderson admitted to graffiti that varied in format and style.

The fact that a tagger uses different styles in painting his graffiti does not mean that it is not the same tagger doing the graffiti. In fact, in order to ensure that persons know that it is the specific tagger’s work, if

the tagger has done an elaborate piece which may not be legible as his tag, he will “sign” the piece of work in legible letters near or on the other painted letters. E.g., Ex. 95, 96, 97, 98, 99, 100, 101, 102, 103 104, 105, 109.¹³ The depictions of the tags need not be identical, the similarities between the prior graffiti and the charged graffiti must be enough to show that the incidences are more than coincidental.

The trial court here applied the correct legal standard and did not abuse its discretion in admitting evidence, through exhibits and testimony, of the defendants’ prior acts of graffiti. The defendants’ tags were their means of identifying themselves. The distinctive, identifying, feature common to both the prior graffiti and the charged crimes is the particular tag and its use in a context so as to draw attention to the tag. Defendants intended to identify themselves by using their tags HYMN and SERIES. Their use of those tags on the windows in Bellingham was sufficiently similar to the prior graffiti so as to establish that they were the handiwork of the same person. The specific tags chosen by the defendants are so unique as to create a high probability, in and of themselves, that the same person did them. The trial court did not abuse its discretion in admitting the evidence of the prior graffiti.

¹³ Given the location they targeted, downtown Bellingham, and the number of persons and police around, the taggers would not have had the time to do an elaborate tag.

2. Evidence of defendants' use and drawings of their tags and their graffiti connection with one another was admissible simply as relevant identity evidence.

Modus operandi is not the only means of admitting other bad act evidence under ER 404(b). Other bad act evidence is otherwise admissible under 404(b) if it is relevant to show identity. State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989). "Proper evidence will not be excluded because it may also tend to show that the accused has committed another crime, unrelated to the one with which he is charged. The test is whether the questioned evidence tends to establish motive, intent ... *identity or presence*." State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990) (*quoting State v. Boggs*, 80 Wn.2d 427, 433, 495 P.2d 321 (1972).) Evidence of other misconduct is admissible if it tends to establish identity through proof of a relationship or commonality of interest between co-defendants. State v. Suttle, 61 Wn. App. 703, 712-13, 812 P.2d 119 (1991).

In State v. Suttle, the court held that evidence of the defendant's escape status was admissible to establish his relationship and commonality of interest with the co-defendant in order to prove the identity of one of the robbers. Suttle, 61 Wn. App. at 712-13. In that case, two persons

committed the robbery, the charged crime, although a third person was present. The court held that the evidence that the defendant had escaped with the other robber/co-defendant “was relevant to show the existence and nature of their relationship which, in turn, was probative of the robber’s identity.” Id. at 713. The defendant contended that the evidence was not a signature crime and therefore was inadmissible. The court disagreed:

... a “signature crime” analysis is neither relevant nor appropriate here. However, as our discussion of Pam indicates, prior “bad acts” evidence may be admitted under ER 404(b) when that evidence is probative of identity for other reasons, and its admissibility is not limited to “signature crimes.”

Id. at 713 n.10 (*citing* State v. Pam, 98 Wn.2d 748, 659 454 (1983)).

In State v. Dennison, the court admitted a photograph in which there was a pink pillowcase found at defendant’s home in a case where the defendant was charged with homicide and had used a pink pillowcase during the crime and left it at the scene of the crime. The court held that the trial court did not abuse its discretion in admitting evidence that the police had investigated the defendant a month earlier regarding a different crime because the “similarities between the pillowcases were relevant evidence to link Dennison to the alleged murder.” 115 Wn.2d at 628.

In State v. Newton, 42 Wn. App. 718, 714 P.2d 684 (1986), the court admitted evidence of prior misconduct in which the defendant had

called the witness and pretended to be “Eugene Kellenbenz.” The witness eventually recognized that the voice was the defendant’s. Id. at 724. The court held that the witness’s testimony was “relevant for the purpose of proving identity – that [the defendant] had assumed the identity of or pretended to be Kellenbenz.” Id. at 725.

Here, some of the evidence admitted and challenged on appeal was simply proper evidence of identity and was not required to meet the stringent test of *modus operandi*. This Court can affirm on an alternative ground supported by the record. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). For example, the photo of Foxhoven sitting on an object with “SERIES” written on it and the photo of Sanderson writing the letters “HY” are both admissible simply to show identity. Ex. 108, Supp. CP Ex. 70. Evidence of their prior use and drawings of their tags was relevant to show identity.

Moreover, given the circumstantial nature of the case and Sanderson’s challenge to his confession the prosecutor needed to establish a connection amongst the three:

We don’t have an eyewitness that puts Mr. Foxhoven in Bellingham on that night. We know that Foxhoven knows Sanderson and Hansen. We know that all this graffiti that’s in Bellingham matches up with the graffiti that’s in his house. We know those guys – we’re going to put a circumstantial case that has him here in Bellingham.

RP 169. The court permitted evidence of Foxhoven's association with Hansen and Sanderson's association with Hansen for that purpose, although it limited the details of those incidents. RP 171, 204-208. Photos of the co-defendants with one another and testimony regarding Sanderson's arrest with Hansen at a train yard in Seattle are admissible to show the relationship amongst the three and their commonality of interest. The piece books also show the relationship amongst the three as the tags of each appear in each other's piece books. This evidence was admissible not as modus operandi evidence, but simply as evidence that tended to establish identity and therefore was relevant and presumed admissible.

3. Some of the evidence did not fall within the scope of ER 404(b) because it was not evidence of other bad acts.

Some of the evidence that was objected to based on ER 404(b) does not even fall within the scope of ER 404(b). ER 404(b) only applies to evidence of other bad acts, or evidence of "acts used to show the character of a person to prove the person acted in conformity with it on a particular occasion." State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). In Everybodytalksabout the court held that the evidence of the defendant's character trait for being a leader was impermissible under ER 404(b), even though it was not misconduct evidence, because it was evidence of the defendant's character and was

being used to prove that he acted in conformity with that character trait at the time of the murder. *Id.* at 468. Prior to Everybodytalksabout, the caselaw arguably limited impermissible ER 404(b) evidence to evidence of other crimes or misconduct. *See, State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997) (evidence of defendant's contacts with two other women did not fall within purview of ER 404(b) because it did not involve a crime or misconduct); *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995) ("purpose of ER 404(b) is to prohibit admission of evidence designed simply to prove bad character"). If the evidence is not other crime or misconduct evidence, and is not evidence of character, then it does not fall within the scope of ER 404(b). Its admissibility is then determined by its relevance.

Here, Sanderson's drawings of HYMN and photos of the tags SERIES and HYMN on items that are not public or private buildings or trains do not constitute graffiti¹⁴ and are not "other bad acts" under ER 404(b). RP 416. The drawings found in Sanderson's home are not illegal and do not, in and of themselves, suggest anything about Sanderson's character. E.g., Supp. CP Ex. 71, 75F. Sanderson's counsel himself brought out on cross-examination that practicing a tag on paper is not

¹⁴ Officer Almer defined "graffiti" as the "defacing of public or private property by painting, drawing, writing, etching or carving without the property owner's permission." RP 416

illegal. RP 723. Foxhoven's counsel also brought out that a number of the photos were not depictions of illegal activity and argued that the piece books aren't illegal. RP 785-86, 996-97. As non-character, non-misconduct evidence, ER 404(b) is not a basis to exclude them, and they were relevant to establish identity.

4. Even if the trial court erred in admitting some evidence, any error was harmless.

Even if this Court concludes that the trial court abused its discretion in admitting some of the challenged evidence, any error was harmless. Erroneous admission of ER 404(b) evidence requires reversal "only if the error, within reasonable probability, materially affected the outcome." Everybodytalksabout, 145 Wn.2d at 469-70; State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Even if some of the prior acts of graffiti or other evidence had been excluded, it would not have materially affected the outcome in either Sanderson's or Foxhoven's case. Sanderson confessed to having done at least four to seven of the graffiti tags. Although Sanderson challenged his confession at trial, it was a detailed confession and one overheard by another officer. RP 331, 581-83, 592-95. Sanderson admitted he was "HYMN" and wasn't aware of anyone else using that tag. RP 594-95.

In Foxhoven's case, Foxhoven admitted to Officer Almer that he had used the tag SERIES previously and that the piece books containing the variation "SeRIes" in 2001 were his. The tags that appeared on the windows in Bellingham were GRAVE, HYMN and SERIES also appeared in the piece books of Foxhoven and Hansen and some were dated 2001. RP 453-54, 456-57, 459-61, 600-15, Supp. CP Ex. 80, 81, 114. Although Foxhoven claimed that he had stopped doing graffiti in California, when Officer Almer conducted the search of Foxhoven's apartment in November 2002, he found Foxhoven's tag SERIES on a garbage dumpster outside the apartment. RP 600-01, 649-50. The State presented a strong circumstantial evidence of Foxhoven's connection with the tag SERIES and his connection with the other two defendants.

D. CONCLUSION

Petitioners request this Court to reach the alternative basis for admitting evidence of their prior graffiti, common scheme or plan. It is not necessary for this Court to reach the common scheme or plan issue because the evidence was clearly admissible as evidence of modus operandi. This case is a classic illustration of the type of relevant evidence that should come in as modus operandi in order to prove the element of identity. The trial court did not abuse its discretion in admitting the evidence. The State respectfully requests that this Court affirm the Court

of Appeals decision and uphold the convictions of Foxhoven and Sanderson for graffiti-related malicious mischief.

Respectfully submitted this 11 day of May, 2007.

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CERTIFICATE

I certify that on this date I electronically filed this document with this Court and placed in the mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to petitioners' counsel, addressed as follows:

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