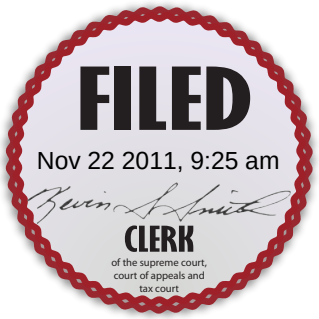

ATTORNEY FOR APPELLANT:

MICHAEL B. TROEMEL
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

STEVEN R. FARRELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 04A03-1101-CR-21
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BENTON CIRCUIT COURT
The Honorable Rex W. Kepner, Judge
Cause No. 04C01-0911-MR-238

November 22, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Steven Farrell appeals his conviction for murder and his sentence for murder and Class B felony unlawful possession of a firearm by a serious violent felon. We affirm.

Issues[1]

Farrell raises four issues, which we restate as:

I. whether fundamental error occurred as a result of the admission of evidence of an uncharged rape of the murder victim's daughter;

II. whether the evidence is sufficient to sustain Farrell's murder conviction;

III. whether Farrell's convictions for both murder and unlawful possession of a firearm by a serious violent felon violated the prohibition against double jeopardy; and,

IV. whether the eighty-five-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

Facts

Farrell and Christine Craig had an off-and-on relationship beginning around 2002. Craig had four children from a previous relationship, including sixteen-year-old J.T., and they lived in Lafayette.

[1] We note that Indiana Appellate Rule 28(A)(2) requires that the transcript "be numbered consecutively regardless of the number of volumes the Transcript requires." Further, Indiana Appellate Rule 28(A)(8) requires that the table of contents be contained in a "separately bound volume." Indiana Appellate Rule 29 also requires the exhibits to be separately bound and an index of the exhibits to be prepared. The transcript here contained five volumes, but the pages were not numbered consecutively as required by Appellate Rule 28. Further, the table of contents was found in Volume IV at page 146, the index of the exhibits was found in Volume IV at page 139, and the exhibits were found in Volume IV after page 152.

On November 27, 2009, Farrell and Craig apparently decided to get married that day even though Farrell was already married to Toni Farrell.[2] Farrell and J.T. allegedly went to pick up a grill from a friend with Farrell's truck. Instead, Farrell took J.T. out on gravel and dirt roads to a remote and secluded area near a river in Tippecanoe County. When Farrell stopped the truck, he got out, looked around, and then opened up the passenger door. Farrell unbuckled J.T.'s seatbelt and took her phone, and J.T. got out of the truck. Farrell then reached behind his back and pulled out handcuffs, which he forced on J.T. Farrell put a sleeping bag on the ground, put J.T. on it, removed J.T.'s clothing, and had sexual intercourse with her. Farrell then removed the handcuffs, J.T. got dressed, and they got back into the truck.

Farrell showed J.T. a gun while they were in the truck. Farrell told J.T. that he was going to kill himself after he killed Craig. Farrell drove back toward U.S. 52, and he called Craig on his cell phone. Farrell told Craig to meet him on U.S. 52. When Craig pulled up behind Farrell's truck in her car, Farrell turned off of U.S. 52 onto a gravel county road in Benton County. Approximately one-half mile later, Farrell stopped his truck, and Craig stopped her car behind the truck.

Farrell and Craig got out of their vehicles and argued. J.T. got out of Farrell's truck and into the passenger seat of Craig's vehicle. She started Craig's vehicle, called 911, and locked the doors of the car. Eventually, J.T. climbed into the driver's seat of Craig's vehicle and started to turn the car around. J.T. then heard Craig yell, "Don't leave me," and saw that Farrell was restraining Craig. Tr. Vol. I p. 214. Craig escaped

[2] Their divorce was not final until 2010.

from Farrell and ran toward the passenger side of her car with Farrell chasing her. J.T. opened the passenger door for Craig, and once Craig was in the passenger seat, J.T. heard a gunshot and drove away. The passenger door shut as J.T. drove away. J.T., who was still talking to the 911 operator at that time, eventually found her way back to U.S. 52 and stopped at a business, where police officers dispatched by the 911 operator found them. Craig died as a result of a close contact gunshot wound to her upper right arm. The bullet passed through her arm, chest, both lungs, and her heart.

J.T. was examined by a sexual assault nurse examiner. J.T. had injuries to both wrists, her lower spine, a tear in her posterior fourchette area, and a vaginal tear. The nurse collected DNA from her examination of J.T., and the DNA from the sperm cell fractions of the samples matched Farrell's DNA "in the absence of an identical twin and to a reasonable degree of scientific certainty." Tr. Vol. III p. 50.

Farrell left the area and drove to Danville, Illinois, where he changed his appearance and purchased jeans, a sweatshirt, and a cap. On November 29, 2009, investigators received information that Farrell's vehicle was at the Indianapolis International Airport's parking garage, and they recovered his truck there.

On December 9, 2009, the Mesquite Police Department in Nevada received a request to check on a man, later identified as Farrell, at a hotel. The hotel manager gave the officer items, including a prescription bottle, which Farrell had left in the room. The officer located Farrell near the hotel, learned that Farrell was wanted in Indiana, and arrested him. When officers searched Farrell's hotel room, they also discovered a letter addressed to his wife, Toni. The letter stated, in part:

> Toni,
>
> By now you know what kind of sick man that I turned into, but there is a lot of things that I need to say so you can understand everything that have been going on in my head.
>
> * * * * *
>
> Kevin given me a lot of ideas of how to do away with Chris, everything from drugs, to blowing up her car. From the time I first met Kevin he told me how he set his house on fire, and set Rogers barn on fire, and said Roger had nothing to do with it. Kevin needed money so he put a lot of junk tools in Roger's barn and set it on fire so he had a way to collect insurance on the He said that he set fire to his house so he could get even with the bank for taking it from him since he had no way to make the payments. I think that if I never met Kevin all of this would have never happen.
>
> * * * * *
>
> Kevin even got me a 22 rifle that he cut down in his garage so I could used it on Chris, but never did. [J.T.] was with me the day that I picked it up and was driving when I shot it a few times. Kevin hid it in some woods and told me where it was. [J.T.] even drove me over to Kevin's house one night so I could talk to him.

State's Exhibit 44 pp. 1, 5-6 (errors in original). A forensic document examiner opined that "it is highly probable that Steven Farrell was the writer" of the letter. Tr. Vol. III p. 4.

On December 9, 2009, the Mesquite Police Department also received a report of a gun found on the grounds of an apartment complex approximately three-fourths of a mile from Farrell's hotel. An officer recovered a single-shot handgun loaded with a .410 shotgun slug. A forensic firearms examiner determined that the projectile removed from Craig's body was fired by the gun recovered by the Mesquite Police Department.

The State charged Farrell with murder and Class B felony unlawful possession of a firearm by a serious violent felon in Benton County.[3] At the jury trial, Farrell claimed that he accidentally shot Craig. A forensic firearms examiner testified that the gun's hammer had a half-cocked position, but it had to be fully cocked to fire. The examiner performed tests to determine if the gun would go off accidentally without pulling the trigger, and the gun did not discharge during the tests. The examiner also tested to see how much weight was required to depress the trigger and found that 8.5 to 9 pounds were required. An average single shot or single action pistol required between four and seven pounds on the trigger. The examiner also determined that the gun was fired "at or near contact" with Craig. Id. at 98.

Farrell testified and admitted that he had sexual intercourse with J.T. He claimed that he told Craig about the sexual intercourse with J.T., that Craig still wanted to marry him, and that the gun went off accidentally when J.T. drove away in the car and he fell down. Farrell admitted that he was aware Craig had been shot, but he drove to Danville, Illinois, where he purchased clothing and changed his appearance. Farrell then drove to the Indianapolis International Airport, left his truck in the parking garage, and took a bus to Nevada.

The jury found Farrell guilty of murder. Farrell then pled guilty to unlawful possession of a firearm by a serious violent felon as a Class B felony. The trial court sentenced him to sixty-five years in the Department of Correction for the murder

[3] Because the alleged rape of J.T. occurred in Tippecanoe County, jurisdiction over that offense rested in Tippecanoe County. At the time of the trial in this matter, no charges had been filed against Farrell related to the alleged rape.

conviction and twenty years with two years suspended to probation for the unlawful possession of a firearm conviction. The trial court ordered that the sentences be served consecutively. Farrell now appeals.

Analysis

I. Admission of Uncharged Rape Evidence

The first issue is whether fundamental error occurred as a result of the admission of evidence regarding the uncharged rape of J.T. It is undisputed that Farrell did not object to the admission of evidence regarding the uncharged rape of J.T. In general, the failure to object to the admission of evidence at trial normally results in waiver and precludes appellate review unless its admission constitutes fundamental error. Konopasek v. State, 946 N.E.2d 23, 27 (Ind. 2011). "Fundamental error is an error 'so prejudicial to the rights of the defendant as to make a fair trial impossible.'" Id. at 27 n.1 (quoting Willey v. State, 712 N.E.2d 434, 444-45 (Ind. 1999)).

Farrell argues that fundamental error occurred because the admission of the evidence violated Indiana Evidence Rule 404(b), which 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, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 404(b) was designed to assure that "the State, relying upon evidence of uncharged misconduct, may not punish a person for his character." Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997). "Although evidence of prior uncharged misconduct may not be admitted for the purpose of proving a defendant's bad character, it may be admissible for other purposes, such as 'proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" Id. (quoting Ind. Evid. R. 404(b)).

Rule 404(b) does not bar, however, evidence of uncharged criminal acts that are "intrinsic" to the charged offense. Lee, 689 N.E.2d at 439. "Other acts are 'intrinsic' if they occur at the same time and under the same circumstances as the crimes charged." Wages v. State, 863 N.E.2d 408, 411 (Ind. Ct. App. 2007), trans. denied. "Evidence of happenings near in time and place that complete the story of the crime is admissible even if it tends to establish the commission of other crimes not included among those being prosecuted." Id.

Farrell argues that the uncharged rape evidence "was not introduced for any relevant reason other than to provide the 'forbidden inference' regarding the defendant's bad character which was specifically what Rule 404(b) was designed to prevent." Appellant's Br. p. 17. The State contends that the uncharged rape evidence "completed the story" of Craig's murder, was relevant to prove Farrell's motive for killing Craig, and rebutted his claim of an accidental shooting. Appellee's Br. p. 17.

We note that, although Farrell never objected to the evidence in question, after J.T.'s testimony and while the jury was out of the courtroom, the trial court raised the issue of the uncharged rape evidence. After a discussion about the issue, the trial court

stated that the uncharged rape evidence was necessary to present a complete story to the jury and that it would be "difficult if not impossible" to require the State to "peel that portion of those facts out of this case." Tr. Vol. II pp. 78-79. Further, the trial court stated that, even under Rule 404(b), the evidence was admissible to show motive. Our review of the record reveals that the trial court's analysis was correct.

The evidence of the uncharged rape was admissible because it was intrinsic to the murder charge. The State presented evidence that Farrell took Craig's sixteen-year-old daughter, J.T., with him to allegedly find a grill. Instead, Farrell took J.T. to a remote and secluded location in Tippecanoe County where he handcuffed her and raped her. When they were back in Farrell's truck, Farrell claimed that he was going to kill himself after he killed Craig, and J.T. saw a gun in Farrell's truck.

Farrell then called Craig and lured her to another location in Benton County. Farrell admitted in his testimony that he told Craig of the sexual intercourse with J.T. J.T. saw them arguing and saw Farrell restraining Craig as she tried to turn Craig's car around. Craig escaped and got into the passenger seat of her car, but Farrell was chasing her and shot her. Evidence of the uncharged rape explained the argument between Farrell and Craig. It would have been impossible to present a complete the story of the murder without presenting evidence of the uncharged rape. The jury would have been left with an incomplete and confusing sequence of events.

Moreover, we alternatively conclude that the evidence of the uncharged rape was admissible under Rule 404(b) as evidence of motive and evidence of the absence of accident. In assessing the admissibility of 404(b) evidence, the trial court must "(1)

determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403." Turner v. State, 953 N.E.2d 1039, 1057 (Ind. 2011).

Farrell claimed in his testimony that he accidentally shot Craig when J.T. started driving away and he fell. Evidence of the uncharged rape and the resulting argument between Farrell and Craig called Farrell's claim of an accidental shooting into question and was also evidence of motive. See Scalissi v. State, 759 N.E.2d 618, 623 (Ind. 2001) (holding that evidence of the defendant's rape of his roommate was admissible under Rule 404(b) to show the defendant's motive, intent, or absence of accident or mistake in shooting another roommate, who threatened to report the rape to the police). Further, while the rape evidence is prejudicial, its probative value clearly exceeds the prejudicial effect of its admission. See Ind. Evidence Rule 403. We also note that the trial court instructed the jury that it should consider evidence of Farrell's other crimes or bad acts "only for the limited purpose of deciding if it tends to show motive, intent, plan, malice, or absence of mistake or accident." Appellant's App. p. 55. For these reasons, we find no error in the admission of the evidence of the uncharged rape, much less fundamental error.

II. Sufficiency of the Evidence

Farrell next claims that the evidence is insufficient to sustain his conviction for murder. When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. Bailey v. State,

907 N.E.2d 1003, 1005 (Ind. 2009). "We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence." Id. We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. Id.

Farrell argues that "there were no witnesses that saw Farrell shoot Craig nor was the murder weapon found in Farrell's possession" and that the State presented no evidence of motive. Appellant's Br. p. 21. Farrell's argument that no one saw him shoot Craig is inconsistent with his own testimony. Farrell testified at the trial and admitted to shooting Craig. As for motive, "[i]t is not necessary for the prosecution to offer evidence of motive, although it may do so." Moore v. State, 653 N.E.2d 1010, 1016 (Ind. Ct. App. 1995), trans. denied. Moreover, as noted in the discussion of Rule 404(b), the State did present evidence of motive.

Farrell also argues that he did not intend to kill Craig and that it was "possible for the weapon to go off accidentally." Appellant's Br. p. 21. The State was required to present evidence that Farrell knowingly or intentionally killed Craig. Ind. Code § 35-42-1-1. The State presented evidence that Farrell raped J.T., threatened to kill Craig and himself, and then lured Craig to a gravel road in Benton County, where he told Craig about the sexual intercourse with J.T. and they argued. While J.T. was on the phone with a 911 operator and trying to turn Craig's car around, Craig escaped from Farrell, who had been restraining her, and got into the passenger seat of her car. Farrell chased her to the car and shot her before she was able to close the passenger door. Although Farrell claimed that the gun discharged accidentally as he fell, the forensic firearms examiner

found no evidence that the gun would go off accidentally without pulling the trigger, significant weight was required to depress the trigger, and the gun was fired at or near contact with Craig's arm. Although he was aware that Craig had been shot, Farrell changed his appearance and left the area. While in Nevada, he wrote a letter to his wife blaming his friend Kevin, who had given Farrell "a lot of ideas of how to do away with" Craig. State's Exhibit 44 p. 5.

We conclude that the jury was presented with evidence from which it could have found that Farrell knowingly or intentionally killed Craig. Farrell's argument to the contrary is merely a request that we weigh the evidence and judge the credibility of the witnesses, which we cannot do. The evidence is sufficient to sustain his conviction for murder.

III. Double Jeopardy

Farrell also argues that convictions for both murder and unlawful possession of a firearm by a serious violent felon violated the prohibition against double jeopardy. The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Ind. Const. art. 1, § 14. Our supreme court has held that "two or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). Farrell argues that his convictions violate the actual evidence test, not the statutory elements test.

"An offense is the same as another under the actual evidence test when there is a reasonable possibility that the evidence used by the fact-finder to establish the essential elements of one offense may have been used to establish the essential elements of a second challenged offense." Richardson, 717 N.E.2d at 53. However, the our supreme court clarified this test in Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002), where it held that the test is not whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish one of the essential elements of a second challenged offense; rather, the test is whether the evidentiary facts establishing the essential elements of one offense also establish all of the elements of a second offense. If the evidentiary facts establishing one offense establish only one or several, but not all, of the essential elements of the second offense, there is no double jeopardy violation. Spivey, 761 N.E.2d at 833.

Farrell pled guilty to unlawful possession of a firearm by a serious violent felon. The factual basis, as admitted by Farrell, established that, on November 27, 2009, he knowingly possessed a firearm in Benton County even though he was a serious violent felon. The jury found Farrell guilty of knowingly or intentionally killing Craig, and the evidentiary facts showed that Farrell knowingly or intentionally shot Craig with the same weapon.

In support of his double jeopardy argument, Farrell relies on a line of cases holding that convictions for unlawful possession of a firearm by a serious violent felon and carrying a handgun without a license violate the prohibition against double jeopardy. See, e.g., Calvert v. State, 930 N.E.2d 633, 642 (Ind. Ct. App. 2010) (holding that the

defendant's conviction for possessing a sawed-off shotgun was based on the very same act—his having the sawed-off shotgun in his vehicle—which formed an essential element of possession of a firearm by a serious violent felon); Alexander v. State, 772 N.E.2d 476, 479 (Ind. Ct. App. 2002) (holding, on rehearing, that the defendant's convictions for unlawful possession of a firearm by a serious violent felon and carrying a handgun without a license violated the actual evidence test of the Indiana double jeopardy analysis), trans. denied.

We do not find that line of cases relevant here. Rather, we conclude that the convictions here are more similar to those in Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002). There, the defendant was convicted of both murder and carrying a handgun without a license. Our supreme court found no double jeopardy violation because "'[c]arrying the gun along the street was one crime and using it was another.'" Guyton, 771 N.E.2d at 1143 (quoting Mickens v. State, 742 N.E.2d 927, 931 (Ind. 2001)). Similarly, here, possession of the gun as a serious violent felon was one crime and using it to kill Craig was another. There is no double jeopardy violation here.

IV. Inappropriate Sentence

Farrell argues that his maximum, consecutive sentences are inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B) provides that we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. When considering whether a sentence is inappropriate, we need not be "extremely" deferential to a trial

court's sentencing decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Still, we must give due consideration to that decision. Id. We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The principal role of Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We "should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." Id.

The nature of the offense is that, after raping her sixteen-year-old daughter, J.T., Farrell lured Craig to a gravel road in Benton County where he told her about his sexual intercourse with J.T. They argued and, at one point, Farrell restrained Craig. When Craig escaped, she ran to her vehicle and got in on the passenger side as J.T. tried to drive away. Before Craig could shut the passenger door, Farrell shot and killed her in front of her daughter. Clearly, the nature of the offense is horrific.

Our review of the character of the offender reveals that Farrell has an extensive criminal history. In 1972, he was convicted of contributing to the delinquency of a minor. In 1979, he was convicted of raping a seventeen-year-old girl and was sentenced to ten years in the Department of Correction. Also in 1979, he pled guilty to raping a nineteen-year-old girl and was sentenced to ten years, consecutive to his other ten-year

sentence. In 1979, he was also charged with attempted rape, but that charge was dismissed as part of the plea agreement for his other rape charge. In 1993, Farrell pled guilty to lewdness in Utah.[4]

The trial court also properly considered uncharged misconduct in determining Farrell's sentence. Roney v. State, 872 N.E.2d 192, 200 (Ind. Ct. App. 2007) (holding that a trial court is permitted to consider uncharged misconduct when enhancing a sentence), trans. denied. Evidence was presented at the sentencing hearing regarding videos found during the search of Farrell's vehicle. The videos showed Farrell engaging in sexual conduct with J.T. while J.T. was unconscious. Additionally, evidence was presented that Farrell told the probation officer preparing his presentence investigation report that he had given a substantial amount of money to his Toni after their divorce to avoid compensating Craig's family. The uncharged misconduct is clearly indicative of Farrell's character.

Given the nature of the offense and Farrell's character, as evidenced by his criminal history and the uncharged misconduct, we cannot say that his maximum sentence of eighty-five years with two years suspended to probation is inappropriate.

Conclusion

Fundamental error did not occur as a result of the admission of Farrell's uncharged rape of J.T., and the evidence is sufficient to sustain his conviction for murder. Further, his sentence is not inappropriate in light of the nature of the offense and the character of

[4] Additionally, the presentence investigation report indicates that, in 1973, Farrell was charged with rape, but the charges were later dismissed. In 1991, he was charged with rape, criminal deviate conduct, and confinement, but the charges were later dismissed.

the offender, and no double jeopardy violation occurred as a result of his conviction of both murder and unlawful possession of a firearm by a serious violent felon. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.