IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL JOHN BRAAE, Appellant.	No. 38068-4-II UNPUBLISHED OPINION

Bridgewater, P.J. — Michael John Braae appeals his convictions of first degree felony murder and first degree rape. We affirm.

FACTS

Around 2:00 am on July 7, 2001,[1] a bartender saw Lori Jones leave an Olympia, Washington bar with Michael Braae. On July 8, Jones's apartment manager and a friend found her dead in her apartment. Jones's body was under her bed and a pillowcase had been placed over her face. She had been killed by asphyxiation due to manual strangulation in the early morning hours of July 7. Jones had been raped vaginally, orally, and anally, and she had suffered blows to

[1] The over eight-year delay in this case arose because after Braae's capture, both the state of Idaho and the state of Washington charged and tried him on other charges. After an Idaho jury convicted Braae for crimes surrounding his flight from arrest on this charge, Braae was sent to Yakima County to face attempted murder charges. Braae's Yakima County trial ended in a hung jury and mistrial; the prosecutor elected not to seek another trial. Braae was then sent to Thurston County for trial on the instant offense.

her head that caused bleeding around her brain. In addition, Jones had an injury to her ear consistent with a screwdriver found at the scene. Investigators discovered Braae's fingerprints in Jones's apartment and recovered Braae's semen from her body as well as pubic hairs microscopically consistent with Braae's hair.

Unable to locate Braae, police issued a press release on July 12, identifying Braae as a person of interest in Jones's death. On July 20, officers located Braae in Idaho. When officers tried to arrest Braae at a truck stop, he fled in his vehicle and led police on a lengthy pursuit. Braae dodged spike strips that police had set to deflate his tires and at least three times fired a gun at pursuing officers. When an officer shot out a tire on Braae's vehicle, he stopped his vehicle and jumped into the Snake River. A K-9 police dog later captured him in the river. The State charged Braae with first degree felony murder, a violation of RCW 9A.32.030(1)(c); or in the alternative, second degree murder, a violation of RCW 9A.32.050(1)(b); and first degree rape, a violation of RCW 9A.44.040(1)(c).

At trial, witnesses testified consistently with the facts above, including Braae's flight from police on July 20. Braae testified that he met and began a sexual relationship with Jones in April 2001. He stated that he met Jones at the bar on July 6, and that they left and had consensual sex in her car in the parking lot. He claimed that Jones then left with another man, who drove a "dark-colored SUV." VI VRP at 1071. Braae denied going back to Jones's apartment that night or killing her. Braae also stated that he ran from police because he had a "large quantity of marijuana" on him. VI VRP at 1082. He denied knowing that after July 12, police wanted to talk to him.

The jury found Braae guilty of first degree felony murder and first degree rape. At sentencing, the trial court denied Braae's motion to merge the two counts, finding that Jones suffered separate injuries and that the rape occurred separately from the murder.

ANALYSIS

I. Double Jeopardy

First, Braae argues that his first degree rape conviction merged with his first degree felony murder conviction because the rape was incidental to, a part of, or coexistent with his first degree felony murder conviction. The State argues that Braae's two crimes were separate and distinct from each other because Jones suffered different injuries.

Article I, section 9 of the Washington State Constitution and the Fifth Amendment to the federal constitution prohibit multiple punishments for the same offense. *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). But a trial court's imposition of more than one punishment for a criminal act that violates more than one criminal statute is not necessarily multiple punishments for a single offense. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). The fundamental issue is whether the legislature intended to authorize multiple punishments for criminal conduct that violates more than one statute. *Calle*, 125 Wn.2d at 776. We review de novo whether multiple punishments constitute double jeopardy. *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007), *adhered to on recons.*, 165 Wn.2d 627, 200 P.3d 711, *cert. denied*, 130 S. Ct. 85 (2009).

Washington courts use a multi-prong analysis to determine whether the legislature intended to authorize multiple punishments for criminal conduct that violates more than one

statute. *In re Pers. Restraint of Burchfield*, 111 Wn. App. 892, 895, 46 P.3d 840 (2002). First, we look to the statutory language to determine whether the legislature specifically authorized separate punishments. *In re Burchfield*, 111 Wn. App. at 895-96. Second, if the statute is silent as to whether the legislature intended specific punishments, we apply the "same evidence" rule of construction to determine whether each legislatively-defined offense has an element not contained in the other. *In re Burchfield*, 111 Wn. App. at 896. Third, if each offense contains a separate element, we look for evidence of legislative intent to treat the crimes as one offense for double jeopardy purposes. *In re Burchfield*, 111 Wn. App. at 896. We also apply the merger doctrine to determine whether the legislature intended to treat crimes as one offense for double jeopardy purposes. *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005).

The State does not address legislative language or the same evidence test and, in fact, appears to concede that the same evidence test is met. The State instead argues that an exception exists to the merger doctrine that applies here.

Under the merger doctrine, crimes merge when proof of one is necessary to prove an element or the degree of another crime. *State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983). Thus, merger applies only where the legislature has clearly indicated that in order to prove a particular degree of a crime (e.g., first degree felony murder), the State must prove not only that the defendant committed that crime (e.g., murder) but that the crime was accompanied by an act that is defined as a crime elsewhere in the criminal statutes (e.g., rape). *Vladovic*, 99 Wn.2d at 420-21. Stated another way, if a defendant is convicted of two crimes, the second conviction will stand if that conviction is based on "some injury to the person or property of the

victim or others, which is *separate and distinct from and not merely incidental to the crime of which it forms an element." State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979) (emphasis added), *cert. dismissed*, 446 U.S. 948 (1980), *overruled in part by State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999); *see also Freeman*, 153 Wn.2d at 778. The State cites *State v. Saunders*, 120 Wn. App. 800, 86 P.3d 232 (2004), to argue that Braae committed separate and distinct crimes.

In *Saunders*, the defendant restrained the victim with handcuffs and leg shackles, attempted to force her to perform oral sex on him, anally raped her, and then stabbed or asphyxiated her to death. *Saunders*, 120 Wn. App. at 807. The jury found Saunders guilty of felony murder, first degree robbery, first degree kidnapping, and first degree rape. *Saunders*, 120 Wn. App. at 808. On appeal, Saunders argued in part that his first degree rape and felony murder convictions merged. *Saunders*, 120 Wn. App. at 820.

First, we held that the State had used proof of the predicate crime to prove felony murder. *Saunders*, 120 Wn. App. at 821. Second, we held that while a predicate offense will generally merge into the greater offense, an exception exists. *Saunders*, 120 Wn. App. at 821. To determine if an exception to the merger doctrine applies, we determine whether the predicate and charged crimes are sufficiently intertwined. *Saunders*, 120 Wn. App. at 821 (citing *Johnson*, 92 Wn.2d at 681; *State v. Peyton*, 29 Wn. App. 701, 720, 630 P.2d 1362, *review denied*, 96 Wn.2d 1024 (1981)).

The *Saunders* court then discussed *Peyton*, where convictions for felony murder and robbery did not merge because the robbery occurred separate and distinct from the murder.

Saunders, 120 Wn. App. at 821. In *Peyton*, the defendant shot an officer while fleeing from a bank robbery. *Peyton*, 29 Wn. App. at 704-05. The *Saunders* court then discussed *Johnson*. In *Johnson*, two girls voluntarily went to Johnson's home. *Johnson*, 92 Wn. App. at 672. One at a time, he bound the girls, covered their mouths with adhesive tape, and raped them. *Johnson*, 92 Wn. App. at 672-73. When Johnson was found guilty of rape and kidnapping, the appellate court found the kidnapping incidental to the rape and merged the kidnapping conviction with the rape conviction. *Johnson*, 92 Wn.2d at 681. The *Saunders* court noted three facts central to the *Johnson* court's analysis:

> (1) the rape and kidnapping "occurred almost contemporaneously in time and place";
> (2) the "sole purpose of the kidnapping [sic] and assault was to compel the victims' submission to acts of sexual intercourse"; and
> (3) there was no "injury independent of or greater than the injury of rape."

Saunders, 120 Wn. App. at 822 (quoting *Johnson*, 92 Wn.2d at 681). The *Saunders* court then applied those three factors to its case. *Saunders*, 120 Wn. App. at 822.

The *Saunders* court held that under the first factor, the rape and murder likely occurred close in time, though the record was not clear. *Saunders*, 120 Wn. App. at 823. But the court held that under the third factor, the victim incurred injury exceeding that necessary to commit the murder. *Saunders*, 120 Wn. App. at 824. Specifically, the anal rape caused bleeding that "was distinguishable from the subsequent murder and . . . did not facilitate the murder." *Saunders*, 120 Wn. App. at 823. Based on that factor, the court held that Saunders' felony murder and first degree rape convictions did not merge. *Saunders*, 120 Wn. App. at 824.

Applying the three factors outlined in *Saunders*, Jones's rape and murder were separate

injuries and Braae's convictions do not merge. First, as the trial court noted, we can infer from the facts that at least the oral rape and strangulation occurred separately, even if close in time. As the trial court stated, it is "[p]retty hard to do oral sex and strangle somebody at the same time." VRP (July 24, 2008) at 45. Second, unlike *Johnson*, there is no evidence that the "sole purpose" of the lesser offense, here the rape, was to facilitate the greater offense, the murder. *Johnson*, 92 Wn.2d at 681. Simply, Braae did not need to rape Jones in order to successfully asphyxiate her. Third, like the victim in *Saunders*, Jones suffered injuries separate and distinct from the murder. During the rape, Jones suffered a one-fourth inch rectangular red scraping injury to her labia major. This injury was distinguishable from the strangulation that caused her death and it did not facilitate her death. Braae's rape of Jones therefore caused a separate and distinct injury. The two convictions do not merge.[2]

Braae argues that under *State v. Womac*, 160 Wn.2d 643, 657-58, 160 P.3d 40 (2007), a defendant cannot be convicted of both felony murder and the underlying felony. The *Womac* court addressed the proper remedy for when two offenses merged, not whether the offenses merged. *Womac*, 160 Wn.2d at 647. Because Braae's convictions for first degree murder and first degree rape do not merge, he is not entitled to have his first degree rape conviction dismissed.

We also examine Braae's claim of double jeopardy viewed from the aspect of the charge

[2] The State points to other injuries that it claims arose during the rape, including the injury to Jones's ear and cuts to her hands and face. But nothing in the record indicates if those injuries occurred during Braae's rape of Jones. For instance, the forensic pathologist that examined Jones described the injuries to the back of her hands and arms as defensive wounds, but he did not state if Jones received them while defending against the rape or the murder.

and what event was necessary as the predicate offense. The State charged Braae with first degree felony murder, alleging that "while committing or attempting to commit the crime of Rape in the First or Second Degree, and in the course of and furtherance of said crime or immediate flight from said crime, he caused the death" of Lori Jones. CP at 3. The elements of the predicate crime ranged from rape in the first or second degree. Thus, for example, to prove attempted second degree rape, the State had to show that Braae took a substantial step toward engaging in sexual intercourse, among other ways, by forcible compulsion or when Jones was incapable of consent. RCW 9A.44.050(1)(a); RCW 9A.28.020(1).

In contrast, first degree rape requires sexual intercourse by forcible compulsion, where the perpetrator (1) uses or threatens to use a deadly weapon, (2) kidnaps the victim, (3) inflicts serious physical injury, or (4) feloniously enters the building or vehicle where the victim is situated. RCW 9A.44.040(1). Penetration was not necessary to prove attempted second degree rape, but it was necessary to prove first degree rape. Viewing the two crimes, first degree murder and first degree rape, on a continuum, the predicate offense for felony murder occurred separately from the first degree rape. Braae completed attempted second degree rape satisfying the predicate element of first degree felony murder before he completed first degree rape. Thus, not only was the trial court correct that the oral rape was incidental, as were the anal rape and completed rape in the first or second degree. Braae's convictions do not constitute double jeopardy.

II. Evidence of Flight

A. Witness Testimony

Second, Braae argues that the trial court erred by admitting evidence of his flight as consciousness of guilt because the evidence was unfairly prejudicial. Braae argues that evidence of his flight was inadmissible because the State failed to show that he fled from police officers on July 20, 2001, because of the Jones investigation.

The trial court granted the State's motion to admit evidence of Braae's July 20, 2001 flight from law enforcement. The trial court found the evidence relevant to show consciousness of guilt and that the evidence was more probative than prejudicial because Braae's flight did not include a murder or rape similar to the instant charges.

Assuming, without holding, that the trial court abused its discretion in admitting the flight evidence, that evidentiary holding is subject to harmless error analysis. Nonconstitutional error in admitting ER 404(b) evidence requires reversal only if it is reasonably probable that the error materially affected the trial's outcome. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). An eyewitness saw Braae and Jones leave the bar together and Jones was murdered shortly after she left the bar. Although Braae denied entering Jones's apartment, police found Braae's fingerprints in Jones's apartment and his hair and semen on Jones's body. The forensic pathologist testified that Jones's injuries were consistent with sexual assault and asphyxiation. Overwhelming evidence supports the jury's finding that Braae committed first degree rape and first degree murder. It is not likely, within reasonable probabilities, that admission of evidence concerning Braae's flight materially affected the trial's outcome. Any error was harmless.

B. Videotape of Police Chase

Braae also contends that admission of the police vehicle video recording of his flight was unfairly prejudicial because the police chase was dramatic and lengthy.

Over Braae's objection, the trial court admitted portions of a videotape recording of Braae's flight taken from a police officer's mounted dashboard camera. The trial court found that evidence of Braae's flight was relevant to show consciousness of guilt and that, based on the State's earlier offer of proof regarding Braae's flight, the videotape's relevance outweighed any prejudice. The videotape showed the police chase, that Braae fired a gun at the pursuing police cars, that officers called out shots fired, and that Braae jumped off a bridge into a river. During testimony by an Idaho law enforcement officer, the State showed the jury the videotape excerpts.

Braae contends that this evidence unduly influenced the jury and thus requires reversal. Again, assuming without holding the ruling was error, given the overwhelming evidence listed above, it is not likely, within reasonable probabilities, that admission of the videotape materially affected the trial's outcome. *Everybodytalksabout*, 145 Wn.2d at 468-69. Any error was harmless.

III. Common Scheme or Plan

Third, Braae argues that the trial court erred by admitting testimony by Karen Peterson and her daughter, Veronica Culp, under the common scheme or plan exception to ER 404(b) because the evidence was unfairly prejudicial.

During trial, the State moved to admit Peterson's and Culp's testimony as evidence of a common scheme or plan under ER 404(b). As part of the State's offer of proof, Peterson testified about an attack she suffered between the time of Jones's murder and Braae's capture. Peterson

testified that she met a man later identified as Braae in a Yakima bar, but stated that she went home alone. Her daughter testified that Peterson came home with Braae. Peterson did not remember much of what happened after she returned home but she recalled that as she entered her bedroom, she felt a blow to her head, which knocked her out. She also remembered hands choking her until she blacked out. Peterson awoke the next morning on the floor and noticed that someone had covered her face with a blanket and removed her pants and underwear. Peterson also had bruises to her neck. Culp saw Braae in the apartment that night and identified him the next day after seeing his picture in a local newspaper. Law enforcement had kept secret the fact that someone had placed a covering over Jones's face.

The State then asked the trial court to find that the similarities between Peterson's attack and Jones's attack demonstrated both a common scheme or plan and identity. Braae opposed admission of the testimony because he was not contesting whether someone had murdered Jones. He contended that where only identity is at issue, the State must meet a higher standard of proof for ER 404(b) evidence of prior bad acts. He denied that sufficient similarities existed between Peterson's attack and Jones's murder to support admission of the testimony under ER 404(b).

The trial court held that while Braae conceded that someone had murdered Jones, he did not concede that someone had raped her. Because the State still had to prove rape, as to that crime the State did not have to show unique or uncommon aspects common to the two attacks.

The trial court then found that the State had shown by a preponderance of the evidence that Braae met Peterson at a bar, followed her home, wore western-style clothing, talked about playing a guitar, entered Peterson's apartment, went into Peterson's bedroom, struck her on the

head, and choked her into unconsciousness. The trial court also found that Peterson awoke later with a blanket over her head and no clothes on from the waist down. The trial court found that these events were probative as to common scheme or plan. The trial court stated that it did not need to decide whether these events were so unique as to go to identity because the State offered the evidence to show common scheme or plan with respect to first degree rape. The trial court granted the State's motion to admit Peterson's and Culp's testimony. Peterson and Culp then testified consistently with the State's offer of proof.

Braae asserts that the trial court erred in relying on *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003), to admit Peterson and Culp's testimony because the existence of a crime was not at issue.

Evidence of other crimes, wrongs, or acts is not admissible to prove character or conformity with it, but it may 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). We review admission of ER 404(b) evidence for abuse of discretion. *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001).

To be admissible, the prior acts must be (1) proved by a preponderance of the evidence, (2) admitted here for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. *DeVincentis*, 150 Wn.2d at 17. As used here, common scheme or plan evidence involves prior acts as evidence of a single plan used repeatedly to commit separate, but very similar, crimes. *DeVincentis*, 150 Wn.2d at 19. Admission of evidence of a common scheme or plan requires

substantial similarity between the prior bad acts and the charged crime. *DeVincentis*, 150 Wn.2d at 21. Such evidence is relevant when the existence of the charged crime is at issue. *DeVincentis*, 150 Wn.2d at 21. Sufficient similarity is reached only when the trial court determines that the various acts are naturally to be explained as part of a general plan. *DeVincentis*, 150 Wn.2d at 21. It is not necessary to show uncommon uniqueness between the prior acts and the charged crime. *DeVincentis*, 150 Wn.2d at 18-19.

During the offer of proof about Peterson's and Culp's testimony Braae admitted that someone had murdered Jones, but he did not concede that someone had raped her. Braae asserted that he and Jones engaged in consensual sexual intercourse. The trial court correctly found that because the State had to prove that Braae raped Jones, evidence of prior bad acts was relevant. *DeVincentis*, 150 Wn.2d at 21. The trial court did not abuse its discretion in admitting Peterson's and Culp's testimony just because Braae later conceded during closing arguments that someone else had raped and murdered Jones.

Braae also assigns error to the admission of Peterson's and Culp's testimony because the crimes charged and prior bad act were not so substantially similar that they were naturally to be explained as part of a general plan. Braae contends that the events were dissimilar because (1) Peterson's daughter and boyfriend were home, while Jones was alone; (2) Peterson could not testify that she had been sexually assaulted but someone raped Jones; and (3) Peterson survived her attack, but someone murdered Jones.

Despite the differences between Braae's attack on Jones and his attack on Peterson, the trial court did not abuse its discretion by finding that the prior act was relevant. Both women (1)

met Braae at a bar and he went to their homes after leaving the bar; (2) suffered head injuries, (3) were strangled, (4) had evidence of sexual assault or sexual motivation to the assault, (5) had their faces covered after the attack, and (6) were attacked shortly after meeting Braae. As the trial court found, these events were probative as to common scheme or plan that Braae would meet and befriend a woman in a bar; go home with her after she had consumed alcohol; and have sex with her, by force if necessary; strangle her; and cover her head. The trial court did not abuse its discretion in admitting Peterson's and Culp's testimony.

Braae asserts that the admission of Peterson's and Culp's testimony was unduly prejudicial because the only logical relevancy of the evidence was to show propensity. Braae contends that the evidence implied that Braae "preyed on women and therefore because he had attacked Karen Peterson, . . . he had raped and murdered Lori Jones." Br. of Appellant at 22.

State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001), relied on by Braae, does not support his contention that Peterson's and Culp's testimony was merely propensity evidence. Pogue was charged with unlawful possession of cocaine, which police had found in a vehicle he was driving. *Pogue*, 104 Wn. App. at 982-83. Pogue argued unwitting possession because the car belonged to his sister and claimed that the police planted the drugs in the car. *Pogue*, 104 Wn. App. at 983-84. The trial court admitted evidence of an earlier conviction for delivery of cocaine under ER 404(b) and reasoned that Pogue's assertion of unwitting possession raised the knowledge issue, and therefore the prior conviction was admissible to show that Pogue had knowledge about cocaine. *Pogue*, 104 Wn. App. at 984-85. On appeal, the court reversed because Pogue never argued that he did not know the substance in the bag was an illegal drug.

Pogue, 104 Wn. App. at 985. The court found the only logical relevance was that Pogue's prior cocaine possession made him more likely to knowingly possess cocaine on the day of the charged incident. *Pogue*, 104 Wn. App. at 985.

Pogue is not analogous here because Peterson's and Culp's testimony was not admitted to show mere propensity. As stated above, the trial court properly admitted Peterson's and Culp's testimony to show a common scheme or plan. Unlike *Pogue*, their testimony was relevant for a purpose other than propensity evidence. *Pogue*, 104 Wn. App. at 985.[3] Their testimony was admissible to show a common scheme or plan.

IV. Sufficient Evidence

Fourth, Braae argues that insufficient evidence supports his convictions for first degree felony murder and first degree rape. He contends that the State failed to prove that he was the person who raped and murdered Jones.

We review the sufficiency of the evidence under the familiar test outlined in *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) and *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A person commits first degree felony murder when he or she commits the crime of first degree rape and, in the course of, in the furtherance of, or the immediate flight therefrom, causes the death of a person other than a participant. RCW 9A.32.030(1)(c). A person commits first degree rape if he or she engages in sexual intercourse with another person by forcible

[3] We reject the State's argument that Peterson's and Culp's testimony was also admissible to show signature-like similarity because Braae never argued that police apprehended the wrong person. *State v. Sanford*, 128 Wn. App. 280, 285-86, 115 P.3d 368 (2005) (prior bad acts evidence inadmissible to show identity because defendant did not claim mistaken identity; defendant simply denied committing crime charged).

compulsion and inflicts serious physical injury, including but not limited to physical injury that renders the victim unconscious. RCW 9A.44.040(1)(c).

Braae contends that his denials and explanations at trial disproved any inferences that he raped and murdered Jones. This is a credibility argument, which we do not review. *Thomas*, 150 Wn.2d at 874-75. While Braae denied raping or killing Jones, the jury heard the forensic examiner conclude that Jones was raped and murdered, that she died not long after being seen leaving a bar with Braae, that Braae's semen and hair were on her body, and that Braae's fingerprints were in Jones's apartment. Resolution of these competing claims is a matter of credibility left to the jury. *Thomas*, 150 Wn.2d at 874-75. Sufficient evidence supports Braae's convictions for first degree murder and first degree rape.

V. Statement of Additional Grounds (SAG)

In his SAG, Braae asserts that his appellate counsel failed to contact him before filing his brief or answer his letters after filing the brief and this prevented him from participating in preparing his appeal. This claim relies on matters outside the record. We cannot consider matters outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Braae's claim fails.

Finally, Braae argues that he was not allowed to review the transcript. The record shows otherwise. On April 21, 2009, we sent Braae a copy of the transcripts.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so

ordered.

Bridgewater, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.