2016 IL App (2d) 150051-U
No. 2-15-0051
Order filed January 28, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD McCLUNG, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 11-CF-2543 Honorable Joseph G. McGraw, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Schostok and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in allowing the admission of other-crimes evidence: the trial court considered the similarity and differences of the conduct as a threshold to its admissibility, and it balanced the probative value against the prejudicial effect of the other-crimes evidence.

¶ 2 Following a jury trial in the circuit court of Winnebago County, defendant, Richard McClung, appeals his conviction of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2006)). On appeal, defendant argues that the trial court abused its discretion in admitting, pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-

7.3 (West 2014)), other-crimes evidence for the purpose of proving defendant's propensity to commit sex offenses. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We begin by summarizing the pertinent facts adduced at trial and appearing in the record. A.F. was born in October 1998; defendant was born in 1943. At the time of the offense, namely, the summer of 2006, A.F. was under the age of 13, and defendant was over the age of 17. At the time of the offense, A.F., her family, and defendant were members of the same church in Rockford. Defendant was in the leadership structure of that church and, pursuant to his responsibilities, he performed family visits and personal instruction with those families. Through the church, defendant and A.F. and her family became acquainted, and subsequently, became friends. According to A.F.'s mother, defendant was a fun guy to be around, especially for the children. Defendant was a pilot, owned an airplane, and took A.F. and her siblings flying. Defendant and A.F.'s family socialized together.

¶ 5 In June 2006, A.F.'s family planned a trip to Six Flags Great America. Defendant was going along with A.F.'s family. According to A.F., the day before the Six Flags trip, defendant took A.F. flying in his plane. A.F. testified that, after the flight, she and defendant returned to defendant's home, where she planned to spend the night. Defendant's wife was home when she and defendant returned from the flight. They watched movies and defendant's wife left the home to get something to make for dinner. Defendant and A.F. played games, including cards and hide-and-seek.

¶ 6 A.F. testified that, when defendant and A.F. played hide-and-seek, she hid in defendant's bedroom. According to A.F., there were three dressers in defendant's bedroom. After A.F. came out of the bedroom, defendant told her to go back in. In the bedroom, defendant tied A.F.'s

hands together in front of her with a coarse, thin, yellow rope, telling her that they were playing another game. A.F. was seated on the bed and defendant was standing in front of her. A.F.'s hands had been tied at the wrist with the palms facing each other. A.F. testified that defendant took off her pants and her underwear. A.F. testified that defendant "fingered" her, placing his finger on her vagina, both inside and outside of it. A.F. testified that she did not know what was happening, and defendant did not speak during the incident. According to A.F., the incident lasted for about five minutes. When it was over, defendant told A.F. it had been a game and she was not to tell anyone. A.F. put on her underwear and pants by herself, and then returned to the living room, where she and defendant resumed watching movies.

¶ 7 A.F. testified that she was scared and confused. Defendant never spoke to A.F. about the incident. Defendant's wife returned home, made dinner, and they all watched movies until A.F. went to sleep. A.F. did not say anything to defendant's wife regarding the incident. A.F. slept that night in defendant's living room; neither defendant nor his wife slept in that room.

¶ 8 The next day, A.F., her family, and defendant went to Six Flags. A.F. did not tell her parents about the incident. Defendant testified that he and A.F. spent time together in the wave pool and that A.F. did not avoid him during the trip to Six Flags.

¶ 9 A.F. testified that, when she was 12 years old, she told a girl at her school about the incident with defendant. A.F. explained that she had been thinking about the incident and wanted to get it off her chest. The information eventually made its way to A.F.'s parents. A.F. testified that, after the incident and before she told her schoolmate, her parents had asked her if anything had happened to her. Each time she was asked, A.F. denied that anything had happened.

¶ 10 On cross-examination, A.F. testified that defendant took her flying on two occasions; on

each occasion, A.F. was alone in the plane with defendant. A.F. maintained that she flew with defendant the day before the trip. Defendant testified that the flights occurred on June 24, 2006, and July 1, 2006. On the June 24 flight, he took A.F. and her siblings flying, but, because his plane was small, he took each child separately. On the July 1 flight, he flew with A.F. alone to Lake Geneva and back. According to defendant, both flights occurred after the Six Flags trip, and neither occurred the day before the Six Flags trip.

¶ 11 A.F. maintained on cross-examination that defendant and his wife did not visit A.F.'s home for dinner the night before the Six Flags trip; she went flying with defendant the day before the trip. A.F. testified on cross-examination that she continued to interact with defendant after the incident. She did not remember that defendant swam with her in the wave pool at Six Flags. A.F. remembered that, in the gym at her church, she was demonstrating to her father and defendant what she had been learning in gymnastics. She remembered that she got on defendant's shoulders, and defendant also assisted her by holding her legs. A.F. remembered that defendant took her to her sister's August birthday party at the gym where she was participating in gymnastics; A.F. thought that it was the summer before the incident.

¶ 12 A.F. acknowledged on cross-examination that she had been interviewed at the Carrie Lynn Center about the incident. A.F. did not remember telling her interviewer that there were three dressers in the bedroom. She maintained that she had been tied with a coarse yellow rope that defendant retrieved from a dresser; the rope was very painful. A.F.'s mother testified that she had not noticed any markings on A.F.'s wrists on the day of the Six Flags trip. A.F. admitted on cross-examination that she told her interviewer that the contact with defendant continued for 10 to 15 minutes, but she maintained that it was actually a short period of time.

¶ 13 A.F. identified photos of defendant's home on cross-examination. A.F. testified that the

photos depicted the rooms of defendant's home, but the layout of the furniture in the photos was not the same as when she was present in defendant's home the night before the Six Flags trip.

¶ 14 A.F. testified on cross-examination that her parents asked her several months after the Six Flags trip if anyone had touched her inappropriately, and she denied any inappropriate contact. Later that year, when A.F. had returned to school, she became aware that defendant had been arrested. Her parents again asked her whether she had been sexually abused. A.F. still denied the contact. In 2007, A.F. became aware that defendant had been excommunicated from the church, but she still did not tell anyone about defendant's conduct. A.F. learned about defendant's excommunication when her parents came into her room one morning and asked if defendant had ever done anything to her. A.F. again denied that defendant had abused her.

¶ 15 A recording of A.F.'s interview at the Carrie Lynn Center was authenticated by Marisol Tischman, who conducted the interview. While there were inconsistencies between the recorded interview and A.F.'s in-court testimony, as brought out by A.F.'s cross-examination, the salient facts of the interview were consistent with the in-court testimony.

¶ 16 Defendant testified about the incident on his own behalf. Defendant denied that he sexually assaulted A.F. on the night before he accompanied A.F. and her family to Six Flags. According to defendant, the evening before the Six Flags trip, the specific date of which he was unable to remember, he and his wife visited A.F.'s home and had dinner there. As they were leaving, A.F. requested to spend the night at defendant's house so she could watch a particular movie that had recently become very popular with the children in their community. Defendant acquiesced, knowing that A.F. would fall asleep by around 8:30 p.m.

¶ 17 Defendant testified that he, his wife, and A.F. returned to his house by about 7:50 p.m., A.F. watched the movie while he and his wife went about their business, and A.F. had fallen

asleep by 8:30 p.m. The next morning, they awoke between 7 and 7:15 a.m., and arrived, as scheduled, by 8 a.m. at A.F.'s home to go to Six Flags. Defendant specifically denied the particular elements of A.F.'s testimony about the sexual assault. Further, defendant denied that he was alone with A.F. that night, his wife did not leave to get things to make for dinner, and they did not have dinner that night at his home because they had dinner with A.F. and her family at A.F.'s home.

¶ 18 Defendant also identified 10 photos of his home. Defendant testified that they accurately portrayed the arrangement of the furniture in the house on the date of the offense. He acknowledged that he lived in a four-bedroom house, but denied that he ever had three dressers in his bedroom or even in the house. Defendant maintained that he had no dressers in his bedroom, testifying that such storage was contained in the bed frame, which contained several drawers on each side under the mattress.

¶ 19 In September 2006, defendant was accused of a sex crime unrelated to this case, and he stopped seeing the families with whom he had teaching responsibilities through the church. In September 2007, he pleaded guilty to the offense, receiving a four-year sentence of probation. Defendant was fully compliant with the terms of probation and completed his term of probation successfully.

¶ 20 In August 2011, defendant was asked by Detective Vincent Lindberg of the Winnebago County sheriff's department to speak with him at the Winnebago County Criminal Justice Center. According to Lindberg, on August 24, 2011, he and Detective Heath Engelkens met and interviewed defendant at the criminal justice center. Lindberg testified that, when they informed defendant of A.F.'s allegations, he did not deny the allegations, but responded only by saying, "That's interesting."

¶ 21 Lindberg testified that, during the interview, defendant admitted that he had an addiction to sexually abusing children, but that he was working with a counselor on that issue. According to Lindberg, defendant admitted that a trigger for his addiction was being around children: when defendant was "around children, [he had] a desire for children."

¶ 22 Lindberg noted that defendant did not directly deny A.F.'s allegations of abuse. Instead, according to Lindberg, defendant changed the subject or talked about something on a different tangent. Lindberg testified that the only inappropriate contact defendant could possibly remember having with A.F. occurred when defendant and she were playing a "fast-paced card game." Lindberg testified that defendant said a card had slipped from the table and they both tried to get the card. Lindberg related that defendant said A.F., who was about eight years old and was wearing a skirt, fell back onto defendant's open palm, and defendant's hand came to be under A.F.'s butt and crotch. Lindberg testified that defendant told him that A.F. must have enjoyed the contact, because she did not get up immediately; rather, she looked up and smiled at defendant. Defendant denied that his hand or finger touched bare skin. During the conversation, defendant related that he did not touch a child for his own sexual gratification; rather, he touched a child for the child's sexual gratification.

¶ 23 Lindberg testified that he told defendant about the allegations A.F. had made: being tied, her pants and underwear removed, and being digitally penetrated. According to Lindberg, defendant flatly denied the allegations, stating, "That didn't happen." Defendant then again recounted how A.F. had fallen onto his palm.

¶ 24 The interview turned to defendant's flying, and he admitted that he had taken A.F. flying in his plane twice. Lindberg testified that he confronted defendant about A.F. not saying that anything had happened in the plane when she and he had been alone together. Defendant

responded that A.F.'s allegations were part of a ploy to get him out of the church. The interview ended and defendant was allowed to leave.

¶ 25 Lindberg testified that, on September 14, 2011, defendant was arrested. Defendant had gone to meet with his probation officer for the last time when he was met by Lindberg and Engelkens. At about 11:30 a.m., defendant was arrested, and then he was transported to the Criminal Justice Center. Lindberg testified that he read defendant his *Miranda* rights from a printed sheet. After reading each line, he had defendant initial each line of the advisements to evidence that defendant understood what was being read to him. After reading all of the rights, defendant signed the form and inscribed the time as 11:50 a.m. Lindberg and Engelkens also signed the form. Defendant repeated his earlier statement about A.F. falling onto his palm and defendant's palm touching A.F.'s butt and crotch.

¶ 26 Lindberg, on cross-examination, conceded that neither of the interviews had been recorded or formally memorialized. Lindberg explained that, according to his department's policies, only interviews in homicide cases were recorded. Lindberg also conceded that he did not give defendant any *Miranda* warnings before the first interview. Lindberg explained that defendant was not under arrest, so he was not required to provide defendant with the warnings.

¶ 27 Defendant testified about the two interviews with the detectives. Defendant testified that, during the first interview, the word "addiction" came up, but defendant was unsure whether a detective asked him about addiction or how it came up. Defendant testified that he did not say that he had an addiction to abusing children. Defendant agreed that the subject of "triggers" was raised, but only in a general way.

¶ 28 Defendant testified that he did talk with the detectives about the card game with A.F. Defendant told them it occurred early in May, not the night before the Six Flags trip. Defendant

also informed the detectives that the only possible time that anything that could be termed "inappropriate" occurred with A.F. was during the card game. As defendant and A.F. were flipping cards, one fell off of the table. As defendant reached down to get the card, A.F. squatted down on his hand. Defendant testified that the back of his hand contacted A.F.'s butt and his thumb or the back of his hand may have contacted her vagina. Defendant expressly denied that he said that A.F. must have enjoyed the contact because she did not get up and she smiled. Defendant denied that he conversed with the detectives about children needing to learn about sex and personal gratification. Defendant also denied that he stated that he touched children, not for his gratification, but for theirs.

¶ 29 Defendant testified that he did not talk with the detectives about A.F.'s allegations against him; according to defendant, the detectives read him a statement of A.F.'s accusations and defendant said that did not happen. Defendant testified that he could not believe that he was being accused of the conduct.

¶ 30 Defendant testified that he discussed taking A.F. flying and that the detectives highlighted the fact that A.F. did not accuse him of touching her while they were alone together in his plane. Defendant testified that he told the detectives that he did not sexually abuse A.F. in his airplane or in his bedroom. Defendant said the interview ended when the detectives had asked him all of their questions and let him leave.

¶ 31 Defendant testified that, in September 2011, he was arrested by the same detectives. He testified that, at that time, he was surprised and confused, but this later gave way to frustration. Defendant also noted that he was not given any opportunity to make a written statement during either of the interviews. Defendant testified that, when he was arrested, he was not immediately given his *Miranda* rights; instead, he read the sheet himself and signed it.

¶ 32 The State rebutted defendant's testimony about the interviews with the testimony of Engelkens. Engelkens testified that the detectives discussed with defendant what defendant called his "addictions to sexually abusing children." Engelkens testified that defendant noted that the trigger is simply being around children. Engelkens also testified that defendant specifically told them that his hand was palm up when A.F. fell onto it.

¶ 33 Engelkens testified that the first interview also included a discussion about children needing to be instructed about sex and sexual gratification. According to Engelkens, defendant stated that any touching was for the child's gratification and not defendant's.

¶ 34 Engelkens testified that, when defendant was arrested, the second interview began with the reading of defendant's *Miranda* rights. Lindberg read each of the advisements to defendant, and defendant initialed the form after each advisement had been read to him. The interview continued and defendant repeated his statement from the first interview about A.F. falling onto his hand.

¶ 35 On cross-examination, Engelkens testified that the detectives chose not provide defendant with a written statement from either of the interviews. Engelkens also testified that he did not prepare a report about the interviews, but he used Lindberg's report to refresh his recollection.

¶ 36 On October 12, 2011, defendant was indicted for one count of predatory criminal sexual assault of a child (720 ILCS 12-14.1(b)(1.2) (West 2006)) and one count of aggravated criminal sexual abuse.[1] The matter proceeded to a jury trial.

[1] The indictment included two more counts of predatory criminal sexual assault of a child and three more counts of aggravated criminal sexual abuse involving another victim. Before trial, the State elected to proceed only on the counts involving A.F. and acquiesced in severing

¶ 37 On September 8, 2014, immediately before jury selection, the trial court heard the State's amended fourth motion *in limine*, seeking, among other things, to admit the testimony of H.G., pursuant to section 115-7.3 of the Code, for any purpose and specifically denominating propensity, intent, motive, and lack of mistake. The State represented that H.G. was eight or nine years of age at the time of the events about which she would testify, and the event occurred in 2005 or 2006. Defendant met H.G.'s family through the church and developed a friendship even though they did not attend the same location. Defendant had responsibilities to visit, help and instruct H.G.'s family.

¶ 38 One time, at H.G.'s house, defendant and H.G. were watching television. They were seated on a couch and were both under the same blanket. Other members of H.G.'s family were present also watching television. Defendant, who had participated in a tickling game with H.G. and her siblings on a number of occasions, initiated a tickling game while they were seated on the couch. H.G. was clothed and, as defendant was tickling her, his hand contacted her vagina.

¶ 39 The State represented that H.G. would admit that she did not make an outcry at that time. Her family continued to have contact with defendant, but H.G. would avoid defendant. The State further represented that, when defendant was interviewed in the 2006 investigation that culminated in his 2007 plea agreement, he gave a written statement regarding H.G.'s allegations in which he stated that he "might have accidentally tickled her vagina [*sic*] area, but [he] didn't mean to." The State further noted that, although defendant had been questioned and charged regarding the incident with H.G., the charges were dismissed as part of the 2007 plea agreement.

¶ 40 Finally, the State represented that A.F. would testify that, in defendant's bedroom,

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the remaining counts involving the other victim.

defendant tied her hands together in front of her, told her they were playing a game, pulled down her pants and underwear, and touched her vagina and inserted his finger. Defendant then told A.F. that it was a game and she should not tell anyone.

¶ 41 The trial court granted, among other things, the portion of the State's amended fourth motion *in limine* seeking to admit H.G.'s testimony about her encounter with defendant. The trial court held:

> "the case law relied upon by the State and—and the statutory section permitting under certain circumstances the admissibility of other matters which might be relevant, specifically where a defendant is accused of predatory criminal sexual assault of a child or aggravated criminal sexual abuse, the Court may permit the admission of evidence of other sex crimes to show the defendant has a propensity to commit sex offenses. And, as such, that is a correct statement of the law.
>
> And then once the Court has made that initial threshold determination, then that the incidents involving [H.G.] and [D.G.] are of that type of an offense that might or could assist the trier of fact in determining whether or not the defendant has a propensity to commit the offense charged. Then the Court has to weigh the probative value versus the prejudicial effect.
>
> So in—now that I think I understand the context of all of these events and applying that standard, I do find that the incident involving [H.G.] is probative and would permit [H.G.] to testify to attempt to show that the defendant has a propensity to commit the sex offense charged. It's close enough in time. The ages are—of the—all the girls are similar, and it's all through contact with the church regardless of how the church is subdivided. I don't think that's necessarily germane. And although the exact nature of

the up-charged conduct—whether it's the Class 2 aggravated criminal sexual abuse type offense or the predatory criminal sexual assault of a child which is actually the up-charged conduct here, I don't think that that—those distinctions cause the Court to reach a different conclusion.

So I would permit the [H.G.] incident to—to come in. She would be allowed to testify that the defendant touched her vagina or—and whatever other attendant facts or circumstances are relevant.

If [D.G.] was here to testify—if she was—I would permit her to testify. I'm not gonna permit the State to put the conviction in in their case-in-chief because the—the whole—I think that the—in the exercise of my discretion it's important that the jury has the opportunity to hear the girls testify and to have the girls cross-examined about any similarity or dissimilarity between the charged conduct in Counts 1 and 2 of the Bill of Indictment to determine if, uh, this—if it—if it really does show a propensity on the defendant's part. And if they're sufficiently dissimilar, if they're sufficiently, uh—you know, if they're un- —un- —unreliable or incredible, the jury doesn't have to take that testimony; and they can disregard it or accord to it whatever weight they choose. To admit a conviction, though, has, I think, a lot more of a conclusive effect on the jury than the testimony of—of another person making an accusation.

So I'm not gonna permit the State to put in the conviction involving [D.G.]—[D.G.] in—in their case-in-chief."

¶ 42 At trial, D.G. testified consistently with the State's representation. D.G. testified that, at the time of the incident with defendant, she believed that she was seven years old. She met defendant through their church, and their families became friends and would go to each other's

houses for dinner.

¶ 43 H.G. testified that, one time, defendant and his wife visited H.G.'s family at their home. She was sitting on the couch in their living room watching television. Defendant sat down beside her. Both she and defendant were covered by a blanket. There was a game defendant played with H.G. and her siblings in which defendant would tickle the children. H.G. thought the game was fun. That day, however, defendant started to tickle her, and the tickling went down to her vaginal area, and defendant's hands touched H.G.'s vaginal area over her clothes while he was tickling her. The contact was not for very long. No digital penetration of her vagina occurred, it was just light tickling that contacted her vagina. H.G. testified that she became uncomfortable and might have shifted away from defendant. H.G. left the room when her mother asked for help in the kitchen.

¶ 44 H.G. testified that she continued to see defendant and his wife after the incident. Further, nothing like the incident recurred. H.G. testified that she was careful to avoid defendant whenever he came to her home, pretending to be busy. H.G. admitted that she did not tell her mother about the contact. Instead, at that time, H.G. assumed "that it was a game that went too far and it was an accident. Nevertheless, H.G. was uncomfortable and she tried to stay away from defendant.

¶ 45 H.G. testified on cross-examination that, at other times they played the tickling game, defendant did tickle her in appropriate places. At the time of the incident, however, it was different. Defendant tickled H.G. in the vaginal area for a few seconds. H.G. reiterated on cross-examination that she believed it was an accident.

¶ 46 Following the trial, defendant was acquitted of the charge of predatory criminal sexual assault of a child, but was convicted of aggravated criminal sexual abuse. Defendant was

sentenced to a three-year term of imprisonment. Defendant timely appeals.

¶ 47 II. ANALYSIS

¶ 48 On appeal, defendant challenges the trial court's determination to allow H.G. to testify about her encounter with defendant. First, defendant argues that the trial court did not properly consider the similarity of the charged offense with the other-crimes evidence and did not properly consider the other relevant facts and circumstances. Next, defendant argues that the trial court did not engage in any meaningful weighing of the probative value of the evidence against its unduly prejudicial effect. Last, defendant argues that the admission of H.G.'s testimony cannot be deemed harmless error. We consider each point in turn as necessary.

¶ 49 A. Evidence of Propensity to Commit Sexual Offenses

¶ 50 As an initial matter, we note that defendant challenges the trial court's decision to allow H.G. to testify about his improper sexual contact with her when it granted the State's amended fourth motion *in limine*. Generally, a trial court's evidentiary decisions are within its discretion and will be disturbed only if it has abused that discretion. *People v. Burnett*, 2015 IL App (1st) 133610, ¶ 84. More specifically, the trial court's decision to admit other-crimes evidence will not be disturbed absent an abuse of discretion. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). A trial court abuses its discretion if its decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Id.*

¶ 51 As a preliminary matter, evidence of other crimes is generally inadmissible to demonstrate a defendant's propensity to commit the charged crime. *Id.* at 170. This is not because the other-crimes evidence is irrelevant; rather, it is because other-crimes evidence may prove too much and lure the jury into convicting a defendant because he or she is a bad person

deserving punishment. *Id.* Fundamentally, a defendant is entitled to have his or her guilt or innocence determined solely on the basis of the charged crime. *Id.*

¶ 52 Other-crimes evidence is not wholly inadmissible at common law: such evidence is admissible to prove intent, *modus operandi*, identity, motive, absence of mistake, and any material fact other than propensity that is relevant to the case. *Id.* Nevertheless, even if the other-crimes evidence is admissible pursuant to one of these enumerated exceptions, the trial court must consider whether the prejudicial effect of the evidence substantially outweighs its probative value, and if so, the trial court may exclude it. *Id.*

¶ 53 With the adoption of section 115-7.3 of the Code, the common law rules in sex offenses regarding other-crimes evidence were changed. *Id.* at 174. Section 115-7.3 provides, pertinently:

> "(a) This Section applies to criminal cases in which:
>
> (1) the defendant is accused of predatory criminal sexual assault of a child, *** aggravated criminal sexual abuse ***;
>
> ***
>
> (b) If the defendant is accused of an offense set forth in paragraph (1) or (2) of subsection (a) ***, evidence of the defendant's commission of another offense or offenses set forth in paragraph (1), (2), or (3) of subsection (a), or evidence to rebut that proof or an inference from that proof, may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant.
>
> (c) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

(1) the proximity in time to the charged or predicate offense;

(2) the degree of factual similarity to the charged or predicate offense; or

(3) other relevant facts and circumstances.

***"

725 ILCS 5/115-7.3 (West 2014).

¶ 54 Defendant focuses on the factors the court is to consider in weighing the admissibility of other-crimes evidence enumerated in section 115-7.3(c) of the Code. In particular, defendant contends that the trial court erred in considering the degree of factual similarity and the other relevant facts and circumstances of this case. 725 ILCS 5/115-7.3(c)(2), (3) (West 2014). We first consider defendant's contentions regarding the factual similarity of the other-crimes evidence with the charged offenses.

¶ 55 In order to be admissible, other-crimes evidence must have some threshold level of similarity to the charged offense. *Donoho*, 204 Ill. 2d at 184. As the factual similarities between the other-crimes evidence and the charged offense increase, so does the relevance and the probative value of the other-crimes evidence. *Id.* On the other hand, as the factual dissimilarities increase, so does the prejudicial effect of the other-crimes evidence. *People v. Johnson*, 406 Ill. App. 3d 805, 811 (2010). Where the other-crimes evidence is not being offered to prove *modus operandi*, only general areas of similarity will suffice to support its admissibility. *Donoho*, 204 Ill. 2d at 184.

¶ 56 Defendant argues that there is only minimal similarity between the charged conduct and the other-crimes evidence recounted in H.G.'s testimony. Defendant argues that, in fact, the differences between the charged conduct and the uncharged conduct are so great that this alone should have precluded the admissibility of H.G.'s testimony. We disagree.

¶ 57 First, there is a general similarity between the charged and uncharged conduct. Both A.F. and H.G. were around seven or eight years of age at the time the conduct occurred. Defendant touched both girls on their vagina. The touching occurred in the context of a game: with A.F., defendant expressly told her that he and she were playing a game; with H.G., defendant had engaged in a tickling game that he frequently played with H.G. and her siblings. The conduct occurred in such a manner as to hide it from others: in A.F.'s case, defendant and A.F. were alone; in H.G.'s case, defendant and H.G. were physically hidden under a blanket.

¶ 58 In addition, defendant, A.F., and H.G. were members of the same church at the time of the conduct. Defendant met both girls and their families through his role in their common church, and the girls and their families participated with defendant in activities together outside of the church. The conduct complained of arose as a result of the access to A.F. and H.G. that defendant enjoyed as a result of his position with the church. Finally, neither girl reported the conduct at the time out of concern that defendant was a respected elder of the church.

¶ 59 In our view, these similarities are more than sufficient to satisfy the " 'threshold similarity to the crime charged' " (*Donoho*, 204 Ill. 2d at 184 (quoting *People v. Bartall*, 98 Ill. 2d 294, 310 (1983)), and the " 'mere general areas of similarity [that] will suffice' " (*Donoho*, 204 Ill. 2d at 184 (quoting *People v. Illgen*, 145 Ill. 2d 353, 372-73 (1991)) for the admission of other-crimes evidence in instances where it is not being offered to prove the defendant's *modus operandi*. Accordingly, we cannot say that the trial court abused its discretion in determining that the H.G. incident was sufficiently similar to the charged conduct in this case.

¶ 60 Defendant maintains that there are significant dissimilarities that should preclude H.G.'s testimony about the incident. Defendant first points out that the charged offense occurred in defendant's bedroom, while the other-crimes evidence occurred in H.G.'s family room. This

difference, however, is explained by defendant's access to the children. In this case, defendant and A.F. happened to be alone together in defendant's home. Defendant had unfettered choice as to where and how to sexually abuse A.F. In H.G.'s case, defendant and H.G. were not alone; rather, they were only conveniently covered by a blanket and therefore out of the sight of the others in the room. Defendant took advantage of that lack of visibility and committed his act of sexual abuse. In both instances, defendant had a clear opportunity and took advantage of it. While the location is a dissimilarity, we do not believe it is significant in light of defendant's access to the children; defendant took full advantage of the level of access he had with the children.

¶ 61 This analysis is in line with *Donoho*. There, the defendant was charged with abusing his stepchildren over the course of several years. The other-crimes evidence, by contrast, involved two children defendant was driving to church when he was 18 years of age. The court held that the differences between the conduct in the two instances were because of the defendant's access to the children. The other-crimes evidence was different because defendant had significantly restricted access and occurred because the defendant contrived to drive the children to attend church with him; the charged conduct occurred because the defendant was the children's stepfather and had unfettered access and the ability to silence the children through psychological pressure as their stepfather. *Donoho*, 204 Ill. 2d at 185-86.

¶ 62 We believe the differing circumstances here between the charged and uncharged conduct are similarly explained through defendant's access. In both cases, defendant saw an opportunity and took it to abuse his victim; because A.F was staying the night, defendant had better access, opportunity, and ability to perpetrate a more intrusive offense than when he surreptitiously

abused H.G. It boils down to defendant's access to the child, and we do not believe the differences, so understood, are significant in that light.

¶ 63 Defendant next argues that the nature of the offenses is different. Defendant roots this argument in *Donoho*: defendant explains that the *Donoho* court viewed the nature of the offenses as the more compelling component in determining whether the charged offense is sufficiently similar to the other-crimes evidence. See *Donoho*, 204 Ill. 2d at 185-86 (explaining that the court found "more compelling" the nature of the abuse perpetrated by the defendant in the charged offense and the other-crimes evidence). While *Donoho* indisputably states that it finds "more compelling the similarity of the nature of the abuse itself" (*id.* at 186), we disagree with defendant's view that the nature of the offenses thereby becomes the paramount factor for all analyses under section 115-7.3. Defendant overlooks important qualifying language, namely, the nature of the offenses was more compelling because it was the product of the defendant's choices and access to the victims in each case. *Id.*

¶ 64 The defendant's choices in *Donoho* were constrained by his access to the victims. In the other-crimes evidence, the defendant was young and had no relationship to the victims. In the charged offense, the defendant was also the victims' stepfather. Thus, his access explained the differences: namely, in the other-crimes evidence, that because he had no relationship to the victims, he was only able to arrange time alone with the victims under the pretext of driving them to church. This also explains why there was a singular instance of abuse in the other-crimes evidence. In contrast, in the charged offense, the defendant was the victims' stepfather and had unfettered access to the children. *Id.* at 185. In light of these differences, then, the court relied on the nature of the abuse in each case, namely, that the children were all in the same age range, the victims were children of both genders, and the abuse involved the defendant digitally

penetrating the female's vagina and forcing both the male and female to touch the defendant's penis. *Id.* Thus, in our view, *Donoho* does not make the nature of the offense paramount in determining the similarity between the other-crimes evidence and the charged offense; rather, it looked at the circumstances presented in the case, determined that the defendant's access to the victims in each case explained the differences, and noted that the underlying sexual conduct remained the same between the two cases.

¶ 65 Applying this rubric of examining the circumstances of the charged offense and other-crimes evidence results in again noting that the differences are explained by defendant's access to the victims and their families. In A.F.'s case, defendant bound A.F.'s hands, stripped off her pants and underwear, and inserted his finger into her vagina. In H.G.'s case, defendant touched her vagina over H.G.'s clothes. Any differences are explained by access and opportunity. In both instances the child was hidden. In A.F.'s case, it was because she and defendant were alone together; in H.G.'s case, she and defendant were covered by a blanket thereby hiding defendant's activities from sight. In both instances defendant used the pretext of a game to commit his abuse—expressly telling A.F. it was a game; touching H.G. during the course of a "tickling game" he often played with H.G. and her siblings. Finally, the contact reflected what defendant had the reasonable opportunity to get away with: in A.F.'s case, because they were alone, he could touch and penetrate her unclothed vagina; in H.G.'s case, because he was only hidden from sight and in the presence of others, he could only touch H.G.'s vagina over her clothes. Based on defendant's access and opportunity, we do not believe that the differences in the conduct are sufficiently significant to render the two instances dissimilar under section 115-7.3(c)(2) or *Donoho*. Accordingly, we reject defendant's contentions.

¶ 66 Additionally, we observe that, in cases involving the other-crimes evidence being offered for the purpose of demonstrating a defendant's *modus operandi*, there must be a high degree of similarity between the charged conduct and the other-crimes evidence. See *Donoho*, 204 Ill. 2d at 184. The rationale behind this requirement is that "proving identity under a *modus operandi* theory involves reliance on the inference that a distinctive pattern of criminal activity earmarks the crimes as the work of a particular individual or group." *People v. Allen*, 335 Ill. App. 3d 773, 780-81 (2002). In this case, the evidence was not offered for *modus operandi*, but was offered to demonstrate propensity. In *Allen*, where the other-crimes evidence was offered to prove *modus operandi*, the court determined that the differences were significant and precluded admission of the other-crimes evidence. There, the charged offense involved ordering a 14-year-old child into the car at knife point before dropping her off near her house, while the other-crimes evidence involved ordering a 19-year-old woman into a car at knife point and sexually assaulting her in the woods before driving her around in the woods until she was lost and then releasing her. The differences were too significant to allow the admission in order to prove the defendant's *modus operandi*. *Id.* at 781. Here, by contrast, the evidence was not being offered to prove defendant's *modus operandi*, so the differences are not as stringently considered in determining the threshold similarity for admissibility.

¶ 67 Defendant also cites to *Johnson*, 406 Ill. App. 3d 805, as an example of applying the principles we have identified to other-crimes evidence sought to be admitted under section 115-7.3. In *Johnson*, the defendant was charged with dragging the victim into an alley as she walked past. The defendant ordered the victim to follow his instructions, and she would not be hurt. The victim said that the defendant did not have a weapon. The defendant took the victim to an

abandoned building and sexually assaulted her orally and vaginally. After finishing, the defendant fled by hopping over a fence. *Id.* at 806.

¶ 68 In the other-crimes evidence, the other-crimes victim was also walking when a car pulled into an alleyway and blocked her path. The defendant (identified by the other-crimes victim), who was not driving the car, pulled her into the car and threatened to kill her if she screamed. The defendant and the driver pulled the other-crimes victim into an abandoned building. The defendant orally, anally, and vaginally, penetrated the other-crimes victim during the assault; the driver also orally penetrated her as defendant anally penetrated her. The other-crimes victim related that, during the assault, the defendant gave her alcohol and blew cocaine in her face. She passed out from an asthma attack during the course of the assault. When she came to, she was alone in the abandoned building. *Id.* at 808.

¶ 69 The appellate court held that the disparity in the number of attackers from the charged conduct to the uncharged conduct, whether a car was used in the assault, and the use of drugs during the uncharged conduct compared to the charged conduct were all significant differences. *Id.* at 811. However, the court did not decide the case on that basis. Instead, it held that the trial court had not conducted a "meaningful" analysis of the prejudicial effect of the other-crimes evidence and, coupled with the differences, it amounted to error. *Id.* at 812. However, because there was overwhelming evidence of the defendant's guilt outside of the other-crimes evidence, including genetic evidence taken from the victim, the appellate court held that the error in admitting the other-crimes evidence was harmless. *Id.* at 818-19.

¶ 70 Defendant in this case contends that, because of the differences he identifies between the charged conduct and the other-crimes evidence, we should follow *Johnson* and hold that the other crimes evidence here was not sufficiently similar to the charged conduct to warrant

admission. We disagree. While we have noted that there are differences between the conduct described in A.F.'s testimony and H.G.'s testimony, we have determined that the variance was due to defendant's access and opportunity, and that the differences were thus not sufficiently significant. Moreover, *Johnson*'s primary rationale is that the trial court did not engage in a meaningful consideration of the prejudicial effect of the other-crimes evidence. The appellate court indicated that it was the combination of the differences coupled with the lack of consideration of the prejudicial effect that caused the error. *Id.* at 812. Thus, we disagree with defendant that we should follow *Johnson*. (We also note that defendant contends that the trial court did not engage in a meaningful assessment of the prejudicial effect of the other-crimes evidence as well, and we consider this argument below.) Accordingly, we reject defendant's contentions about the dissimilarity of the other-crimes evidence and its effect on our analysis.

¶ 71 Defendant next contends that the trial court did not properly take into account the "other relevant facts and circumstances" from section 115-7.3(c)(3). According to defendant, this case involves only the word of A.F. against his word regarding the commission of the charged offense. In such a circumstance, the court should be especially careful in balancing the section 115-7.3(c) factors.

¶ 72 We do not disagree with defendant's thoughts, but we do not accept his argument. The record shows that the trial court held a full hearing on the parties' motions *in limine* and their arguments for and against the admission of the other-crimes evidence. The trial court further carefully considered the timeframe of the other-crimes evidence, and its similarity to the charged conduct. The trial court did not characterize this case as a credibility contest, but it was aware that there was no physical evidence and that the outcries of A.F. and H.G. came some time after

the conduct. We cannot say that the trial court should have elevated this consideration beyond what is demonstrated in the record. Accordingly, we reject defendant's contention.

¶ 73 We also note that defendant relies on *People v. Lawler*, 142 Ill. 2d 548, 561-62 (1991), for the proposition that, when a defendant's guilt or innocence is completely dependent on the accuser's credibility compared to the defendant's credibility, no error should be allowed to intervene, and any error must be clearly shown to be harmless or else the case must be reversed. We again accept the rule embodied in defendant's citation to *Lawler*, but we do not believe it is entirely apposite here.

¶ 74 First, we believe defendant reads too much into the credibility-contest aspect of *Lawler*: to be sure A.F.'s credibility was important, but we are not so sure that this case is solely a credibility contest between defendant and A.F. Defendant spoke with Lindgren and Engelkens, and his statements to them were not exculpatory and the credibility of his explanations as to why the detectives were incorrect in their recollections of their conversations was for the jury to decide. Defendant's statements to police, then, take this case out of the *Lawler* realm. Second, and importantly, we have not determined that the trial court abused its discretion in its considerations of the admissibility of the other-crimes evidence under section 115-7.3(c), so defendant has not demonstrated that there is error in this case, at least in his initial argument. Accordingly, defendant's reliance on *Lawler* is, as yet, inapposite.

¶ 75 B. Probative Value Versus Prejudicial Effect of the Other-Crimes Evidence

¶ 76 Defendant next contends that the trial court did not engage in a meaningful consideration of the prejudicial effect of the other-crimes evidence. Defendant contends that, based on this failure, the trial court abused its discretion.

¶ 77 Particularly, defendant focuses on a purported abuse of discretion by the trial court in failing to properly analyze the other-crimes evidence encompassed in H.G.'s testimony. Of note, defendant proposes that, "[i]n determining whether the trial court abused its discretion, the primary consideration must be on the potential prejudice to the defendant" from the trial court's action. *People v. Roberts*, 214 Ill. 2d 106, 121 (2005). In claiming that the abuse of discretion analysis should focus on the prejudice accruing to a defendant, defendant ignores settled authority and misinterprets and misapplies the passage relied upon from *Roberts*.

¶ 78 In *Roberts*, the defendant argued that the replacement of a juror with an alternate juror after the matter had been submitted to the jury was prohibited by statute and supreme court rule. *Id.* at 115-16. After determining that neither the statute nor the rule prohibited postsubmission juror replacement, the supreme court determined that it was a matter within the trial court's discretion. *Id.* at 121. The court then stated, that, "[i]n determining whether the trial court abused its discretion, the primary consideration must be the potential prejudice to the defendant *as a result of the postsubmission replacement*." (Emphasis added.) *Id.* Defendant omitted the emphasized language when quoting *Roberts* for his proposition that the abuse-of-discretion inquiry should focus on the potential prejudice to the defendant, even though it is clear that the quote, in its entirety, pertains specifically to issues of juror replacement after the submission of the case to the jury.

¶ 79 Moreover, our research has discovered no cases, other than juror-replacement cases, focusing on the potential prejudice to the defendant when conducting an abuse-of-discretion review. *E.g.*, *People v. Carrilalez*, 2012 IL App (1st) 102687, ¶ 44 (quoting *Roberts*, 214 Ill. 2d at 121) ("In determining whether the trial court abused its discretion in replacing a juror with an alternate juror, 'the primary consideration must be the potential prejudice to the defendant as a

result of the postsubmission replacement.' "). Accordingly, we reject defendant's suggestion that we focus on the potential prejudice to the defendant when reviewing the trial court's decision whether to admit other-crimes evidence because it is unsupported in the case law and derived from a misapprehension of *Roberts*. Instead, we consider whether the trial court abused its discretion, utilizing the longstanding formulation of whether the trial court's decision was arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court. *Donoho*, 204 Ill. 2d at 182.

¶ 80 Defendant next contends that the trial court did not engage in a meaningful weighing of the probative value of the other-crimes evidence against its prejudicial effect. In support, defendant notes that, after the trial court mentioned that it had to weigh the probative value versus the prejudicial effect, it only discussed whether the other-crimes evidence was sufficiently similar to the charged conduct. Defendant then notes that *Johnson* determined that the trial court had not conducted the requisite weighing of whether the risk of unfair prejudice substantially outweighed the probative value of the evidence in determining that the trial court had abused its discretion in admitting the other-crimes evidence in that case. See *Johnson*, 406 Ill. App. 3d at 812. Defendant then concludes that we should follow *Johnson* because the trial court here did not weigh the probative value versus the prejudicial effect of the other-crimes evidence. We disagree.

¶ 81 First, we note that defendant's reliance on *Johnson* is again misplaced. The *Johnson* court recounted the trial court's ruling on the admissibility of the other-crimes evidence in that case. Nowhere in the trial court's ruling did it even mention the need to weigh the probative value against the prejudicial effect of the other-crimes evidence. Instead, the trial court noted that it was not a "big fan" of section 115-7.3, but it would follow the statute and held only that

the facts of the other-crimes evidence were "sufficient enough to show arguably a propensity to commit sex crimes by [the defendant]." *Id.* at 807.

¶ 82 Here, by contrast, the trial court was obviously aware of the requirement that, after meeting the threshold requirements enumerated in section 115-7.3(c), it was required to "weigh the probative value versus the prejudicial effect." The trial court discussed the similarities and then noted that there were differences between the two incidents, but concluded that the differences were not sufficient to cause the court to reach a different conclusion. Accordingly, we determine that the trial court in this case was both aware of the need to balance the probative values versus the prejudicial effect and actually did so.

¶ 83 We note that the trial court's balancing is more on the implicit side. The trial court did not devote much time to discussing the differences between the charged and uncharged conduct and why they were not significant enough to cause the prejudicial effect to substantially outweigh the probative value of the other-crimes evidence. As defendant notes, however, the trial court is not required to discuss each similarity and difference between the two events. See *People v. Smith*, 406 Ill. App. 3d 747, 752 n.1 (2010) (recounting cases in which the trial court's failure to expressly discuss the probative value of other-crimes evidence against its prejudicial value did not amount to an abuse of discretion in rendering its decision to admit it). Thus, even though the trial court here was not as forthcoming in its explanation as might be wished, it demonstrated that it was applying the applicable law properly in rendering its decision, and we cannot say that the lack of a detailed explanation amounts to an abuse of discretion.

¶ 84 Second, and perhaps more importantly, we review the trial court's judgment, not its reasoning. *People v. Cash*, 396 Ill. App. 3d 931, 950 (2009). The reasoning is immaterial, so long as the court reached the correct result. *Id.* Moreover, we may affirm the trial court's

judgment if it is supported by the record. *Smith*, 406 Ill. App. 3d at 752. The burden is on the defendant, as appellant, to demonstrate that no reasonable person would agree with the trial court's determination. See *Donoho*, 204 Ill. 2d at 182.

¶ 85 Defendant argues that the chief problem with the trial court's judgment is that the similarities between the charged conduct and the other-crimes evidence were so insignificant that the trial court's failure to expressly mention prejudice shows that it did not engage in the necessary balancing. Above, we noted that there are sufficient similarities between the two incidents and that the differences were caused more by the access and opportunity presented to defendant than by the nature and performance of the incidents. Accordingly, we cannot say that no reasonable person would agree with the trial court's judgment in this case. Thus, we reject defendant's argument on this point.

¶ 86 C. Harmless Error

¶ 87 Defendant last contends that the errors he identifies cannot be deemed harmless. Because we have held that the trial court did not abuse its discretion in considering the similarity of the charged conduct with the other-crimes evidence or the other relevant factors, that it engaged in the proper balancing of the probative value versus the prejudicial effect of the other-crimes evidence, and, ultimately, that it did not abuse its discretion in deciding to admit the evidence, we need not address defendant's final contention as it does not apply where we have not labeled as error any of the trial court's judgments.

¶ 88 III. CONCLUSION

¶ 89 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 90 Affirmed.