No. 2—09—0615
Order filed February 9, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 07—CF—1028
TODD LANCE,	)	Honorable John J. Kinsella,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion when it granted the State's motion to admit other-crimes evidence under section 115–7.3 of the Code of Criminal Procedure (725 ILCS 5/115–7.3 (West 2008)) where the probative value was not outweighed by undue prejudice.

Defendant, Todd Lance, appeals from his conviction of aggravated criminal sexual abuse (720 ILCS 5/12–16(b) and (c)(1)(i) (West 2002)) following a bench trial. He argues that the trial court abused its discretion in allowing the State to present other-crimes evidence. For the following reasons, we affirm.

BACKGROUND

On May 10, 2007, a grand jury indicted defendant on two counts of aggravated criminal sexual abuse that allegedly occurred between January 1, 2003 and December 31, 2003. Count 1 alleged that defendant, the stepfather of C.L., knowingly committed an act of sexual conduct with C.L., who was under the age of 18 years when the act was committed, in that defendant placed his hand on the sex organ of C.L., for the purpose of sexual arousal or gratification of defendant or C.L. 720 ILCS 5/12–16(b) (West 2002). Count 2 alleged that defendant, who was 17 years of age or over, knowingly committed an act of sexual conduct with C.L., who was under 13 years of age when the act was committed, in that defendant placed his hand on the sex organ of C.L., for the purpose of sexual arousal or gratification of defendant or C.L. 720 ILCS 5/12–16(c)(1)(i) (West 2002) .

The charges stemmed from an incident that occurred when C.L. was approximately 11 years old. In the middle of the night, C.L. had a nightmare and went to the bedroom of her mother, Evelyn, and defendant. Evelyn directed C.L. to lie down in the queen size bed between Evelyn and defendant. C.L. fell asleep and then was awakened by defendant's hand on her sex organ. The details of the incident are described in the trial testimony below.

On April 2, 2008, the State filed a motion *in limine* to admit evidence of two other crimes in defendant's trial. The first was defendant's 2000 conviction following a guilty plea for criminal sexual assault. Defendant was sentenced to 48 months of probation and 364 days of periodic imprisonment. Defendant's probation conditions included a sex offender evaluation and counseling. The offense involved C.U., one of defendant's former girlfriend's sons, with whom defendant lived at the time. Defendant sexually molested C.U. two to three times per week from the time C.U. was in the fourth grade until he was about 17 years old. The abuse consisted of defendant's entering

C.U.'s bedroom in the middle of the night and fondling C.U.'s penis and putting C.U.'s penis in his mouth. The second offense for which the State sought to admit evidence was criminal sexual abuse against S.U., who was C.U.'s older brother. That involved one instance of defendant's entering S.U.'s bedroom and massaging S.U.'s penis over his clothing until S.U. woke up. S.U. was 19 or 20 years old at the time. After hearing argument on the State's motion *in limine*, the trial court granted it as to the evidence pertaining to C.U. and denied it as to the evidence regarding S.U.

A bench trial commenced on January 29, 2009. C.L. testified that at the time of trial she was 17 years old and in her junior year of high school. She lived with her father, stepmother, and stepsister. She previously had lived with her mother, defendant/stepfather, and sister. When C.L. was in fourth grade, her mother met defendant in the church they attended and dated him for a short time before they married. Her mother told C.L. and C.L.'s older sister that defendant had "touched somebody" in the past. C.L. explained that "[i]n the beginning, me and my sister could not be alone with him, and we had to have locks on the doors." They all lived together in a three-bedroom house where C.L. and her sister each had their own bedroom. C.L. said her relationship with defendant was "okay."

C.L. testified that she sometimes had nightmares and went to her mother's and defendant's bedroom where she would remain for 5 or 10 minutes, sitting on the floor or a chair. Sometimes she sat on the edge of their bed, but never slept there. One night in particular when she was in the fifth grade, and was about 11 or 12 years old, she had a nightmare and entered her mother's and defendant's bedroom where they were sleeping. C.L. woke her mother, who sat up with her and talked about the nightmare. C.L.'s mother then "had [C.L.] get in bed" between her and defendant. C.L. was not afraid; she fell asleep. She awakened to defendant's touching her with his hand; his

fingers were on her vagina. Defendant's hand was rubbing her vagina over her pajamas and over her underwear. Defendant did not make any sounds or say anything to her. His hand was moving, but C.L. did not know how long it was on her. She gasped and defendant stopped. She did not remember if he immediately removed his hand. During the time she was awake, defendant's hand was only on her for a few seconds. C.L. felt "scared and confused." C.L. also "flinched" and "scooted over" toward her mother. She did not leave the room, but went back to sleep. C.L. said nothing to either her mother or defendant.

C.L. testified that defendant never touched her again. He never came into her room in the middle of the night and never said he wanted to do anything sexual with her. C.L. was "[a]t times" afraid to live with defendant following the incident. She continued to live in her mother's home until her mother "kicked [her] out" in May 2007 and she moved in with her father.

C.L. explained that in 2007, when she was a freshman in high school, she told a friend about the incident and felt relieved. After that, she told her psychiatrist. In April 2007, an investigator came to C.L.'s school. At some point, C.L.'s mother found out about the incident, but C.L. never discussed it with her mother or defendant.

Investigator Patrick Dempsey of the Du Page County Child Advocacy Center testified that he interviewed C.L. at her high school on April 10, 2007, regarding the allegation of sexual abuse. As a result of that interview, Dempsey went to defendant's home the next day and arranged to interview defendant at the police department. Defendant went to the Elmhurst police department on April 18, 2007, and was polite and cooperative. Dempsey testified that he and Investigator Mike Campise[1] of the police department, and Investigator Verbose of the children's center conducted the

[1]Within Dempsey's testimony, the investigator's name is spelled "Campese;" however,

interview. Dempsey asked defendant if he remembered the incident of sexual abuse with C.L. Defendant did not deny the allegations. When asked whether C.L. was telling the truth, defendant replied that she probably was and that she would have no reason to lie. Defendant told Dempsey that C.L. had been in his bed and that he thought she was his wife. As soon as he realized it was C.L., defendant immediately removed his hand. Defendant's hand was inside C.L.'s pants, but outside her underwear. Dempsey testified that, later in the interview, defendant said that he actually knew he was touching C.L. rather than his wife, that he put his hand down her pants and fondled her vaginal area for a few seconds. Defendant declined Dempsey's invitation to record the interview and did not provide a written statement. Dempsey testified that, toward the end of the interview, defendant started to cry and apologized for wasting the officers' time and for lying to them. Defendant told Dempsey that he should have taken precautions and kept his bedroom door locked and not let C.L. come in.

C.U. testified next for the State. He was 26 years old at the time of trial. When C.U. was six or seven years old, his mother dated defendant. He, his mother, and his older brother, S.U., moved with defendant into a house in Bloomingdale, Illinois. C.U. and S.U. each had their own bedroom. At first, C.U. got along with defendant because defendant had a lot of "Hot Wheels" cars and tracks. Defendant kept the cars in "the Gacy room," which C.U. described as "a room underneath the stairs, and it was just a creepy place for us when we were kids." Defendant also kept pornography there.

C.U. testified that when he was in third grade, about eight years old, defendant taught him how to masturbate by demonstrating. When C.U. was in fourth grade, defendant began entering

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when Campise later testified in rebuttal for the State, he spelled his name "Campise."

C.U.'s bedroom at night to "do stuff that wasn't right." Defendant touched C.U.'s leg, pulled his pants down, stroked his penis, and performed fellatio on C.U. The incidents occurred at least twice each week. One night C.U. woke up and defendant was "trying to shove [C.U.'s] penis in his behind hole." Beginning when C.U. was in seventh grade, defendant began trying to bribe C.U. with marijuana. When C.U. was in eighth grade, defendant would enter C.U.'s bedroom and say "truth or dare" to initiate contact.

C.U. explained that each instance of abuse lasted from 5 to 20 minutes and always occurred in C.U.'s bedroom in the middle of the night. Both defendant and C.U. were awake for all the instances. Alcohol was always involved; defendant drank everyday. S.U. was never present.

C.U. tried to avoid the contacts by rolling away, but defendant was persistent. He explained that he tried putting his dresser in front of his bedroom door to prevent defendant's entry, but C.U.'s mother told him it was a fire hazard. C.U. then tried wedging different items under his bedroom door, but that did not deter defendant. C.U. started wearing jeans to bed instead of pajamas because he thought they would be harder for defendant to remove. C.U. spent as much time as possible away from home, sleeping at friends' houses or his grandparents' house. The abuse continued until C.U. was 17 years old, when S.U. found out about it and the boys called the police.

Anthony Simpson of the Du Page County Children's Advocacy Center testified that in January 2000, he investigated the allegations of abuse against C.U. When Simpson confronted defendant, defendant admitted he had performed oral sex on C.U. approximately 20-30 times over several years. Defendant said that he was always drinking alcohol when it happened, so he was vague as to specifics. Defendant also admitted to fondling C.U. to the point of ejaculation. Defendant said that he wanted to "pleasure" C.U. Simpson gave defendant an opportunity to write

a letter of apology to C.U., which defendant did. Defendant also provided a written statement to Simpson.

The defense called Evelyn Lance, who testified that she and defendant were married in June 2002. She and defendant lived with her two daughters, C.L. and B.L., in a house in Elmhurst, Illinois. Before they married, defendant told her about his history. She and defendant had a "great" relationship and were very affectionate. Evelyn "quite often" awoke to defendant's touching her vagina. She also frequently touched defendant in the same manner, though sexual intercourse did not always follow. They had no pornography in their home.

Evelyn generally recalled that C.L. sometimes came into her and defendant's bedroom at night when she had nightmares. Evelyn remembered the night in question but had no specific knowledge of what happened because she had been sleeping. Evelyn acknowledged that during the times C.L. came in her room, she (Evelyn) neither had defendant leave the room nor did she and C.L. leave the room, but agreed that she could have done either. She never saw defendant inappropriately touch C.L. Evelyn noticed no change in the relationship between defendant and C.L. or in C.L.'s attitude toward defendant.

Evelyn first heard of the allegation when she talked with Elizabeth Kimble of DCFS on April 5, 2007. Evelyn told Kimble that defendant might have thought that C.L. was she (Evelyn). Evelyn told defendant about the allegations right after she spoke with Kimble. She did not recall telling Kimble that there was nothing to C.U.'s abuse. Evelyn agreed that what happened to C.U. was "horrific."

Evelyn said that on May 17, 2007, C.L.'s father, Paul, took C.L. to live with him. Evelyn did not kick C.L. out of the house. DCFS had called and left a message for Paul about the allegation of abuse. C.L.'s sister continued to live in the Elmhurst residence.

Evelyn testified that in 2003 she was five feet tall and weighed about 110 pounds. Evelyn was a size five then and C.L. was a few sizes smaller. Upon examination by the court, Evelyn said that C.L. had a been a typical 11- or 12-year-old child, not particularly large, overweight, or tall.

Defendant testified in his own behalf. He had been in a ten-year relationship with K.U., who had two sons, S.U. and C.U. During that time, defendant abused alcohol and occasionally smoked marijuana. Defendant testified that when Simpson confronted him with C.U.'s allegations, he confessed because he "did it." Defendant wrote an apology letter to C.U.

Defendant testified that when he married Evelyn, he was a changed person and did not abuse alcohol, smoke marijuana, or keep pornography in the house. He and Evelyn enjoyed a very affectionate relationship and a "very good" sex life. Defendant said that he and his wife often touched each other in bed throughout the night without its leading to sexual arousal or intercourse.

Defendant described his relationship with C.L. as "good," though they sometimes "butted heads." Defendant and C.L. engaged in normal family activities, including collecting and showing bicycles, and going to defendant's mother's cabin. Defendant was aware of C.L.'s coming into his and his wife's bedroom about five times from the time they moved in together until 2004. He would be asleep and then hear Evelyn tell C.L. to go back to her own room. Defendant considered himself a heavy sleeper. C.L. had never before been allowed to sleep in the bed between defendant and his wife and it was not typical for C.L. to come into bed with them.

Defendant described the restrictions in place from April 2000 until April 2004. Defendant could not be alone with either of the girls. If his wife were to leave a room where he and the girls were, either the girls would have to leave or he would. If C.L. were to enter defendant's bedroom, either she or defendant would have to leave because she was forbidden from defendant's bedroom if he were there. The girls were good about following the rules. Their bedroom doors had locks.

Defendant thought the incident in question with C.L. occurred in 2004 or 2005. As he started to awake that night, he was aware that his hand was "on a body." Defendant had no recollection of putting his hand on C.L. because he was asleep and without conscious awareness. He thought his hand was on his wife. Defendant was not sexually aroused. He had no reason to think that C.L. was in bed with him; he had not heard C.L. enter the room or talk with Evelyn. Defendant's hand was between C.L.'s pajamas and underwear. He did not fondle C.L.'s vagina with his fingers. Defendant had to "come to his senses" before he realized it was C.L., and when he did, he removed his hand in a second or two. Defendant explained that there was "a lag of time between the time you are aware of your surroundings and until you actually react to such surroundings." Once his brain registered that it was C.L., he removed his hand "right away" and did not "sit there and linger." Defendant explained that, as he woke up, part of what brought him to his senses was hearing his wife stirring and breathing and immediately telling C.L. to leave the room and go back to her own bed. He did not hear C.L. gasp. When asked what made him aware that he was not touching his wife, defendant replied, "I had a lot of clues. I had sight." He explained that C.L.'s hair was dark and he also saw his wife's hair, so he was "immediately aware that there was more than one person in bed" with him. Defendant described the person next to him as being close to the middle of the bed, which was unusual because his wife always stayed on her own side of the bed. When he wanted to touch

his wife, defendant moved more toward the middle of the bed. Also, the sensation of touching C.L.'s genital area was different than touching his wife's. C.L. left the room and defendant went back to sleep.

Defendant testified that he did not mention the incident to anyone. He said in his mind it was an accident and he did not want to embarrass C.L. by bringing it up and thought she might not even know what had happened. Defendant later felt bad about how it affected C.L. After the incident, C.L. tried to come into defendant's and his wife's bedroom about three different times, but defendant heard his wife tell her to leave the room each time. At no other time did defendant ever touch C.L.'s private parts or make any sexual overture to her.

Defendant testified that he first learned of C.L.'s allegation regarding the incident when his wife received a phone call from DCFS on April 5, 2007. After his wife got off the phone and told him about the allegation, defendant told her that he had obviously mistaken C.L. for her. He said since he had gone to bed that night with his wife, he had no reason to think that anyone else was in bed with him. Defendant was deeply concerned and scared because of his past, but did not believe he had done anything wrong.

Defendant testified that, during the police interview, he told officers that C.L. had no reason to lie. Defendant testified that Campise's tone during the police interview started out very "gentlemanly," but then changed to "[j]ust short of outrage." At that point, defendant began praying about what he should do and remembered a Bible verse that the truth would set him free. He stated, "And at that point, I had a quite a release of emotion. I sobbed. I apologized for wasting their time." He explained that he apologized because he was not being completely forthright. He had been limiting his answers to the time frame suggested by the police even though he knew about the

incident, but thought that it had occurred at a different time. Defendant said that, after he broke down, he told officers that he "did remember a time when [he] woke up and [his] hand was on her, and [he] stopped."

Defendant explained that C.L. was not permitted to stay in his and his wife's bed while he was there. He did remember a time she was there briefly, and noted that, for instance, if he were getting up for work or if he had not yet come to bed, she might be allowed to stay there briefly. Defendant denied telling Dempsey that he did not mistake C.L. for his wife; Dempsey's testimony was incorrect.

The defense offered an agreed stipulation that if Dempsey were called in defendant's case, he would testify that in the April 10, 2007, videotaped interview at the high school, C.L. never said that defendant touched her with his fingers, or that she flinched and scooted toward her mother or, though she was never specifically asked, that she felt scared and confused. The court accepted the stipulation by way of impeaching C.L.'s testimony.

The defense rested. In rebuttal, the State offered an agreed stipulation of its own that if Elizabeth Kimble of DCFS were called to testify, she would say that she had a conversation with defendant's wife, Evelyn, on April 5, 2007. During that conversation, Evelyn commented that there was nothing to the prior investigation involving two boys. The court accepted the stipulation by way of impeaching Evelyn's testimony.

The State then called Detective Michael Campise of the Elmhurst police department, who testified that on April 18, 2007, he participated in interviewing defendant. Campise said that defendant kind of blamed himself for not locking his bedroom door. Defendant told Campise that it was possible that he touched C.L.'s vaginal area with his fingers while he was sleeping, but did

not have a specific recollection of doing so. Campise said that, as the interview progressed, defendant said that he remembered waking up and realizing that he was touching C.L.'s vaginal area with his fingers. Defendant said he thought it was his wife, but when he realized it was C.L., he stopped. Just after that point in the interview, defendant's demeanor changed, and he began to cry. He apologized for lying and wasting the officers' time. Campise testified that defendant then told them a different version of what happened. Defendant told police that he was sleeping in his bed with both his wife and C.L. and that he touched C.L.'s vaginal area with his finger, over her underwear, but under her pants, and that he knew it was C.L. and not his wife. Campise said that he (Campise) never became outraged during the interview. Defendant was very cooperative.

After hearing closing arguments, on January 30, 2009, the trial court found defendant guilty of both counts. The court described C.L.'s testimony and demeanor at length and found it "quite compelling." The court considered C.L.'s testimony along with that of Campise, Dempsey, and defendant. The court stated that it was undisputed that defendant's hand was inside C.L.'s pants on her vaginal area. The court found it "extremely difficult to accept" that defendant had done so unconsciously, despite the testimony about his interactions with his wife. The court stated that it "defie[d] common sense to suggest that a person engaging in that sort of act is not being motivated for sexual gratification." The court also found incredible defendant's testimony that he:

> "could have thought this was his wife who was a fully developed 40-something-year-old woman who's had two children, as opposed to what I believe was a likely 11- to 12-year-old child, who is by her own mother's description, normal child development of that age. And based on what the defendant himself said, where she was located, her size, all of the various factors that would go into his recognition of who was in the bed with him."

The court addressed the other-crime evidence regarding C.U., stating:

> "And I haven't even touched on the evidence offered by the State to show motive and lack of mistake and propensity which has been offered and which it goes, at least, to supporting I think the only reasonable conclusion that can be made that the defendant, on that one occasion, and perhaps contrary to all of his best efforts to resist his demons in his brain, [did] succumb to that propensity at least on that one occasion."

On March 17, 2009, the court found that count 2 merged with count 1 and sentenced defendant to nine years' imprisonment. Following the trial court's denial of his motion to reconsider sentence, defendant timely appealed.

ANALYSIS

Defendant argues that the trial court abused its discretion in admitting the other-crimes evidence regarding C.U. because that offense was "so dissimilar" from the charged offense and "too prejudicial and irrelevant" that it denied him his right to a fair trial.

Evidence of a defendant's other crimes is generally not admissible to demonstrate the defendant's bad character or propensity to commit crime. *People v. Walston*, 386 Ill. App. 3d 598, 609-10 (2008). Exceptions exist to admit such evidence for the limited purposes of showing "intent, *modus operandi*, identity, motive, absence of mistake, and any material fact other than propensity that is relevant to the case." *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). However, effective in 1998, the legislature created a statutory exception to the common-law prohibition on other-crimes evidence when it enacted section 115–7.3 of the Code of Criminal Procedure (Code) (725 ILCS 5/115–7.3 (West 2008)). Section 115–7.3 provides in relevant part:

> "(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 assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, child pornography, aggravated child pornography, or criminal transmission of HIV;

(2) the defendant is accused of battery, aggravated battery, first degree murder, or second degree murder when the commission of the offense involves sexual penetration or sexual conduct as defined in Section 12–12 of the Criminal Code of 1961; or

(3) the defendant is tried or retried for any of the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, or aggravated indecent liberties with a child.

(b) If the defendant is accused of an offense set forth in paragraph (1) or (2) of subsection (a) or the defendant is tried or retried for any of the offenses set forth in paragraph (3) 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(a), (b), (c) (West 2008).

If the statutory requirements are satisfied, section 115–7.3 allows admission of evidence of other crimes for the broad purpose of demonstrating a defendant's propensity to commit sex offenses. *Donoho*, 204 Ill. 2d at 176; *Walston*, 386 Ill. App. 3d at 611. A trial court's decision to admit other-crimes evidence to show a defendant's propensity will not be disturbed absent an abuse of discretion. *People v. Ross*, 395 Ill. App. 3d 660, 674 (2009). A trial court abuses its discretion if its determination is unreasonable, arbitrary, or fanciful, or where no reasonable person would adopt the trial court's view. *Ross*, 395 Ill. App. at 674.

As a threshold matter, though not addressed by the trial court, subsections (a) and (b) of section 115–7.3 are satisfied here because defendant was charged with aggravated criminal sexual abuse and the other-crimes evidence admitted involved his conviction of criminal sexual assault, both of which are set forth in subsection (a).

Subsection (c) of section 115–7.3 provides factors that may be considered by the trial court in weighing the probative value of the evidence against undue prejudice to the defendant–the proximity in time, the degree of factual similarity, and other relevant facts and circumstances. As factual similarities increase, so too does the relevance or probative value. *Donoho*, 204 Ill. 2d at 184. Undue prejudice " 'speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.' " *People v. Boyd*, 366 Ill. App. 3d 84, 94 (2006), quoting *Old Chief v. United States*, 519 U.S. 172, 180 (1997). The trial court must engage in a "meaningful assessment." *Donoho*, 204 Ill. 2d at 186. A trial court abuses its discretion when it fails to address the risk of unfair prejudice. See *Boyd*, 366 Ill. App. 3d at 94 (finding error, though harmless, where there was no indication that the trial court considered the risk of unfair prejudice).

Defendant contends that "the trial court never did engage in any type of weight evaluation and never spoke to the prejudice that the other crimes evidence would have on [his] right to a fair trial." Review of the record here indicates that the trial court conducted a sufficiently meaningful analysis. After hearing arguments on the State's motion *in limine* to introduce evidence of the incidents involving C.U. and S.U., the trial court took the motion, and defendant's written objection, under advisement. When it reconvened two weeks later, the court stated:

> "In viewing the *Donoho* [*sic*] who [*sic*] I think–if I'm pronouncing that correctly–is a leading case on that, obviously it draws some statutory authority. I would deny the State's motion with regards to the older sibling. I think the nature of the incidence, the age, and the circumstances would not justify under *Donoho* the introduction of the evidence relating to that incident. However, in the other incident involving the younger sibling, as I recall occurring close in proximity in time to the incidence charged in this case, one fact I think the State–or the Defendant relied on in arguing against it is the different genders. That was a point that you raised in your response.
>
> In looking at the authority and in *Donoho* I don't think that that is–While it certainly is a factor in evaluating the admissibility of that evidence, I don't think the mere fact that the victim is a male as opposed to a female is dispositive of whether the evidence should be admitted. I think the State's position is the correct one in so far as that victim. And the Court will allow–grant the State's motion in limine seeking to introduce the evidence of that other offense in the trial of this case. So the motion is granted in the one and denied in the other."

The trial court explicitly addressed the factors of section 115–7.3(c)–the proximity in time and factual similarities, as well as the difference in gender.

Although the court did not explicitly address the issue of undue prejudice, it did so implicitly by referring to *Donoho* twice. In *Donoho*, our supreme court concluded that the differences between the charged offense (several incidents of sexual assault of the defendant's stepchildren) and the other-crimes evidence (one incident of indecent liberties with children of no relation to the defendant) were the product of the defendant's access to the victims. *Donoho*, 204 Ill. 2d at 185-86. The supreme court affirmed the trial court's admission of the other-crimes evidence and reversed the appellate court's holding that the " 'obvious prejudicial effect' " was not outweighed by the " 'discernible probative value.' " *Donoho*, 204 Ill. 2d at 168, quoting *People v. Donoho*, 326 Ill. App. 3d 403, 411 (2001). Consequently, by referencing *Donoho*, the trial court in the instant case implicitly concluded that the probative value outweighed any potential undue prejudice.

Moreover, the trial court here denied the motion with respect to the offense against S.U., thereby demonstrating its consideration, and limitation, of any possible undue prejudice. See *People v. Johnson*, No. 1–07–0715, slip op. at 12 (Ill. App. Dec. 20, 2010) (noting that the State's decision to admit other-crimes evidence of only one of three offenses found admissible by the court reduced the possible prejudicial effect). The record also reveals that the court engaged in careful consideration of the parties' arguments and the case law, even taking the State's motion under advisement for a period of time. On this record, the trial court's analysis was sufficient. See *Walston*, 386 Ill. App. 3d at 616-17 (notwithstanding *Donoho*'s pronouncement to trial courts to exercise caution by conducting a meaningful analysis, courts should consider the prejudice inquiry

in such a way to allow section 115–7.3 to operate as the legislature intended–to allow other-crimes evidence to show a defendant's propensity to commit sexual offenses).

We now turn to whether the trial court abused its discretion in admitting the evidence regarding C.U. The first statutory factor to be considered is the proximity in time between the charged offense and the other offense. There is no "bright-line rule about when prior convictions are *per se* too old to be admitted under section 115–7.3. *Donoho*, 204 Ill. 2d at 183-84. Here, although defendant does not raise any argument with respect to time, the difference of three or four years was close enough in time that the trial court did not abuse its discretion. See *Donoho*, 204 Ill. 2d at 184 (holding that the 12-15 year time gap was insufficient to render the admission of the other offense an abuse of discretion).

The next statutory factor is the degree of factual similarity. Defendant argues that any similarities were merely general and common to all offenses of this type and that there were substantial dissimilarities. Unless the other-crimes evidence is being offered to demonstrate *modus operandi*, general areas of similarity are sufficient, even if those similarities are inherent to the offense at issue. *Ross*, 395 Ill. App. 3d at 676, citing *Donoho*, 204 Ill. 2d at 184. That some differences exist "does not defeat admissibility because no two independent crimes are identical." *Donoho*, 204 Ill. 2d at 185.

Here, both the charged offense and the offense against C.U. involved defendant, while in a position of trust and authority in the household, initiating sexual contact with the victims, who were both children of approximately the same age, in the middle of the night when they were in bed sleeping. The offenses were sufficiently similar such that the other-crimes evidence was highly probative. See *Donoho*, 204 Ill. 2d at 184 (general areas of similarity are sufficient).

Defendant points out that the offenses were different in that the offense against C.L. involved one incident of sexual touching, while the offenses against C.U. involved fondling to ejaculation and mouth-to-penis contact and took place a few times a week for a period of several years. *Donoho* is instructive. There, the defendant was convicted of criminal sexual assault and aggravated criminal sexual abuse of his two stepchildren for incidents involving each child separately and occurring over several years, during which time he threatened to punish them if they told. *Donoho*, 204 Ill. 2d at 162, 185. The supreme court held that the trial court did not abuse its discretion by admitting evidence of the defendant's conviction of indecent liberties with a child, involving two unrelated children in a one time incident where he did not threaten them. *Donoho*, 204 Ill. 2d at 185-86. The supreme court noted that, at the time of the earlier offense, the defendant was 18 years old, not married, and childless. He arranged time alone with the children under the pretext of driving them to church. The court stated that the earlier offense "was a single incident with the children together because these were the circumstances under which he could arrange to be alone with them." The court noted that the defendant had no ability to threaten to punish them because he had no authority over them. *Donoho*, 204 Ill. 2d at 185. In contrast, because the defendant was the victims' stepfather in the charged offense, he had "the opportunity and the control to repeatedly abuse them individually and to pressure them into silence." *Donoho*, 204 Ill. 2d at 185-86. The court concluded that the differences were a "product of defendant's access to the victims" and found "more compelling the similarity of the nature of the abuse itself because it was a product of the defendant's choice." *Donoho*, 204 Ill. 2d at 186.

As in *Donoho*, the differences in the number and severity of instances between the charged offense and the offenses against C.U. were a product of defendant's access to the victims. At the

time defendant lived with C.U., he had not been convicted of a sexual offense and had no restrictions on his access to C.U. In contrast, when he lived with C.L., he was restricted from being alone with either C.L. or her sister, both girls had locks on their bedroom doors, and the entire family was aware of defendant's history. Defendant simply did not have the access to C.L. that he had to C.U. However, that defendant took advantage of both C.L. and C.U. by initiating sexual contact with them while he was in a position of trust and authority in their household is a compelling similarity.

Defendant maintains that other significant differences existed: the victims were of a different gender; defendant went to C.U.'s bedroom, but C.L. entered defendant's bedroom; and defendant bribed C.U. with marijuana to prevent his reporting the abuse, but defendant did not even discuss the incident with C.L. Despite these minor differences, the trial court did not abuse its discretion because the probative value is not outweighed by any undue prejudice. See *Ross*, 395 Ill. App. 3d at 675-76 (no abuse of discretion in admitting evidence where both offenses involved oral and penile penetration of 25-year-old, African American women, with whom the defendant was acquainted, in the same area of town, despite the other offense additionally involving a weapon, an injury to the victim, and kidnapping).

Defendant further argues that the other-crimes evidence became the focal point of the trial making it more prejudicial than probative. He contends that the trial court's finding that the State proved the required element that he acted for the purpose of sexual gratification, was improperly based on only the other-crimes evidence. Because the other-crimes evidence was admissible, it was proper for the factfinder to consider it for "its bearing on matter to which it is relevant" (725 ILCS 5/115–7.3(b) (West 2008)), including the element of sexual gratification. A review of the record reveals that the other-crimes evidence was not the focus of the trial and that the trial court was not

lured into finding guilt based solely on the other-crimes evidence. Indeed, the trial court made clear that its finding was also based on the testimony presented by the defense. The court found it "extremely difficult to accept" defendant's testimony that he unconsciously put his hand in C.L.'s pants, stating that it "simply isn't logical." The court did not find defendant's testimony credible, stating,

> "[I]t's somewhat ironic the defense would suggest that it wasn't sexual gratification and, yet, as described by he [*sic*] and his wife, that was part of activities they engaged in that had sexual connotations or overtones because it was described it may or may not have led to more involved sexual activity. So it defies common sense to suggest that a person engaging in that sort of act is not being motivated for sexual gratification."

Based on the record, the trial court's finding that the State proved the element that defendant's conduct was for the purpose of sexual gratification was premised on defendant's testimony, Evelyn's testimony, and the other-crimes evidence. This was not an abuse of discretion. See *Donoho*, 204 Ill. 2d at 170 (noting that the general prohibition against other-crimes evidence, even at common law, was to "protect against the jury convicting a defendant because he or she is a bad person deserving punishment"); *People v. Deenadayalu*, 331 Ill. App. 3d 442, 450 (2002) (holding that the defendant's conviction was not improperly based on other-crimes evidence because, where the defendant was tried in a bench trial, we presume that the trial court considered only properly admitted evidence for its proper purpose).

For the foregoing reasons, the judgment of circuit court of Du Page County is affirmed.

Affirmed.