SUPREME COURT OF ILLINOIS

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September 26, 2018

In re: People State of Illinois, respondent, v. Russell Frey, petitioner.
Leave to appeal, Appellate Court, Second District.
123623

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 10/31/2018.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

2018 IL App (2d) 150868-U
No. 2-15-0868
Order filed February 15, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Lee County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12-CF-44
	)	
RUSSELL FREY,	)	Honorable
	)	Ronald M. Jacobson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Hudson and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in admitting other-crimes evidence, and any error in admitting a letter written by the defendant was harmless.

¶ 2 A jury found the defendant, Russell Frey, guilty of three counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2010)), and he was sentenced to consecutive prison terms totaling 50 years. He appeals, arguing that the trial court erred in admitting certain evidence and that the errors denied him a fair trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In March 2012, the defendant was charged with committing three acts of penetration on his daughter, S.T., in January (count I) and February (counts II and III) of 2012. The defendant was 35 years old and S.T. was 12 years old when the alleged acts occurred.

¶ 5 Prior to trial, the State moved for leave to present evidence of certain uncharged crimes committed by the defendant, pursuant to section 115-7.3 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-7.3 (West 2014)). The only such evidence at issue in this appeal was the testimony of C.P., the defendant's stepson, that the defendant touched his genitals on one occasion. Specifically, the State indicated that C.P. would testify that, in 2008 or 2009 when he was 11 or 12 years old, the defendant came into C.P.'s bedroom where C.P. was playing a video game and offered to make a "bet" on the outcome of the game: if C.P. won, the defendant would give him a "blowjob," and if the defendant won, C.P. would give the defendant one. After C.P. won the game, the defendant touched C.P.'s penis with his hands (under the clothing). C.P. told the defendant that it made him uncomfortable and the defendant stopped.

¶ 6 The State argued that this testimony should be admitted because it was similar to the charged offenses, in that C.P. was the same age as S.T. was when the charged offenses occurred; the defendant had a family relationship with both of them; and both children were in the defendant's care when the abuse occurred. The defendant argued that the C.P. incident was not similar: C.P. and S.T. were of different sexes and the nature of the alleged abuse was different as there was no penetration with C.P. The trial court ruled that the C.P. incident was sufficiently similar and was more probative than prejudicial, and was admissible. The defendant moved to reconsider, and the trial court denied the motion.

¶ 7 The jury trial commenced on March 16, 2015, and lasted for five days. The facts below summarize the evidence given at trial.

¶ 8 The defendant and S.T.'s mother, Brandi T., never married. They split up before S.T. was born on May 29, 1999. In 2002, the defendant's paternity was established and he began seeing S.T. for regular visits. At the time of the alleged offenses, the visitation schedule provided for overnight weekend visits every two weeks.

¶ 9 In January 2012, the visits occurred at 1613 West Chicago Street in Lee County (the Woodland Shores house). The Woodland Shores house was owned and occupied by Jarod Harshman, Brandi T.'s husband. Jarod and Brandi T. had separated the previous summer. The house had three bedrooms on the main level and a basement bedroom and living area. Jarod, his new girlfriend (and eventual wife) Jessica, and her two sons lived in the house, on the first floor. Jarod allowed the defendant to live in the basement and the defendant's daughter from his first marriage, Jessie, to use the remaining first floor bedroom. At trial, Jarod explained that he allowed the defendant to live there in large part so that he could also see S.T. during her visits with the defendant—during his marriage with Brandi T., S.T. had been like a daughter to him and he missed her. During her visits, S.T. would sleep in the same room as Jessie, with whom S.T. was very close.

¶ 10 Brandi T., who was angry at Jarod, expressed opposition to the visits taking place at the Woodland Shores house. In February 2012 the defendant began visiting with S.T. at his parents' home at 518 West 9th Street in Dixon (the grandparents' house). That house had an attic bedroom where S.T. and Jessie (who would also visit when S.T. was there) would sleep. The defendant continued living at the Woodland Shores house. At that point, he did not have a driver's license. During the weekends of S.T.'s visits, his father would pick him up on Saturdays and Sundays about noon each day and return him to the Woodland Shores house each evening.

¶ 11 On March 7, 2012, S.T. told her mother that the defendant had raped her. Brandi T. immediately took S.T. to the hospital. On the way there, S.T. said that during her last visit with the defendant in February (at the grandparents' house), he pushed her against a washing machine in the bathroom, took off his pants, told her to take off her pants, and sexually assaulted her. S.T. also said that on an earlier visit the defendant had sexually assaulted her in his basement bedroom at the Woodland Shores house. At the hospital, S.T. complained of pain in her pelvic region and when urinating. A nurse spoke with Brandi T. separately, who disclosed S.T.'s report of abuse. The emergency room physician did not perform a pelvic exam, as he did not want to traumatize S.T. further. Also, the emergency room did not have the appropriate equipment. However, the hospital contacted the Department of Children and Family Services (DCFS), which arranged with Brandi T. for S.T. to be interviewed at the Shining Star Children's Advocacy Center and for a subsequent physical examination.

¶ 12 Two days later, on March 9, 2012, S.T. met with Traci Mueller, a forensic child interviewer at Shining Star. The interview lasted about two and a half hours and was audiovisually recorded. At trial, after Mueller explained the interview procedures and summarized S.T.'s testimony, the recording was played for the jury.

¶ 13 In the interview, S.T. described three incidents of sexual assault by the defendant in January and February 2012. The first incident occurred at the Woodland Shores house in January. S.T. said that she and the defendant were watching a movie in the living room. When they got up to go into the defendant's bedroom, the defendant told her to take off her pajamas. He then undressed and put his "bad spot" into her "bad spot." (S.T. explained that the penis was the "male bad spot" and the vagina was the "female bad spot.") S.T. said that, when this happened, there was a Sons of Anarchy blanket on the defendant's bed.

¶ 14 The second and third incidents occurred at the grandparents' house in February. One assault took place after S.T. had been cleaning the attic bedroom she shared with Jessie. The defendant came in and had her take off her clothes. He applied "lotion" to his "bad spot" and put it into her "bad spot." The other assault occurred in the first floor bathroom, about two weeks before the interview. As she was leaving the bathroom, the defendant grabbed her arm and pulled her back into the bathroom. He pushed her against the washing machine in the bathroom. He then told her to take off her clothes, lie down on the floor, and put her legs over his shoulders. The defendant put his bad spot into her bad spot. She told him that it hurt, and he said they needed to stop before they were caught.

¶ 15 In the interview, S.T. told Mueller that the defendant had also assaulted her a few years earlier during a week-long road trip. The defendant was a long-haul truck driver at the time. She did not remember how old she was. She and the defendant were playing a spider solitaire game on a laptop in the cab of his semi truck. The winner of each game had to remove a piece of clothing. Eventually, they were both undressed. The defendant told S.T. to lie down on the bed in the private portion of the truck's cab. The defendant made S.T. put her mouth and hand on his bad spot and white stuff came out. Then he made her get on her hands and knees on the bed, he put lotion on both of their bad spots, and he put his bad spot into her butt and into her bad spot. S.T. told him that it hurt, but the defendant told her it would be okay.

¶ 16 S.T. said that, during several of the assaults, the defendant told her to say things such as "daddy F-word me." S.T. told Mueller that she did not talk about the incidents before because the defendant told her not to. Also, she loved the defendant and Jessie and did not want to lose them.

¶ 17 At trial, after the recording of the interview was played for the jury, Mueller answered further questions about the interview and the anatomical drawings used by Mueller and S.T. during the interview.

¶ 18 On March 13, 2012, Dr. Merry Demko performed a full physical exam of S.T. At trial, Dr. Demko described her training to become familiar with normal and abnormal examination results of children. She regularly performed specialized physical examinations for children interviewed at Shining Star. When examining S.T., Dr. Demko saw no indication of bleeding, trauma, injury, or bruising to the genital areas, and tests for urinary tract infection and venereal disease were negative. Dr. Demko testified that this was not unexpected. It was very uncommon for children to show physical signs of abuse, because injuries tended to heal quickly and typically did not leave scars. Dr. Demko testified that, even in children where abuse was known to have occurred, over 95% of examinations were normal. Although the use of force or repeated abuse could be more likely to leave signs of injury, that was difficult to predict, and trauma was less likely when lubrication was used. Dr. Demko testified that, based on her physical examination of S.T., she could not either corroborate or rule out the occurrence of sexual abuse.

¶ 19 On March 9, 2012, a group of officers including Illinois State Police forensic investigator Clinton Smith, an officer with the Lee County sheriff's department, and two Dixon police officers including Matt Richards, searched the Woodland Shores house and the grandparents' house pursuant to a warrant. Smith testified that at the grandparents' house he searched the attic bedroom and the first floor bathroom. In the attic bedroom, he collected the fitted bed sheet and a lotion bottle, and he collected a lotion bottle from the bathroom. He searched for stains that might contain bodily fluid, found one such stain on a carpet near the attic bed, and collected the stain by transferring it to a cotton swab. At the Woodland Shores house, he searched S.T.'s

bedroom, the defendant's bedroom, and the basement living area. He collected stains from the bed sheets, "personal lubricant" and "male enhancement" pills from the defendant's nightstand, and lotion and a tube of petroleum jelly from the dresser. He searched the two scenes by hand and with a special light, and he believed that he would have uncovered any physical evidence that existed. At both houses, Smith took pictures of various rooms; he identified these at trial, and they were admitted into evidence.

¶ 20 The sheets and rug stain were sent to the State Police lab for testing. An Illinois State Police forensic scientist tested them and compared the DNA she found with DNA samples from S.T. and the defendant. She determined that the stains collected from the defendant's basement bedroom at the Woodland Shores house contained the DNA of "at least three people" and that the defendant and S.T. could not be excluded as sources of that DNA, but the amount of DNA in the sample was insufficient to form any opinion as to whether the defendant or S.T. in fact contributed to the DNA. The rug stain contained male DNA that did not match the defendant. No semen was found on the sheet collected from the attic bed in the grandparents' house. Dixon police detective Richards later testified that the defendant's mother, Sandra (Sandy) Frey, had told him that she washed those sheets after S.T.'s most recent visit. Sandy's testimony at trial contradicted this: she said she had not washed the sheet and that she had told Richards so. S.T. testified that the sheets shown in the picture of the attic bedroom taken on March 9, 2012, were not the same ones that were on the bed when the defendant assaulted her on that bed.

¶ 21 S.T.'s testimony at trial largely echoed her recorded interview three years earlier, although she often used less childlike terms for genitalia, terms that she said she had become more comfortable using after undergoing counseling. She described the January 2012 assault in the basement bedroom of the Woodland Shores house, the February 2012 assaults at her

grandparents' house, and the earlier assault in the semi truck. Her trial testimony differed somewhat from the recorded interview in the following respects: She said that she had been cleaning her sister's room before the January assault in the Woodland Shores house (rather than watching a movie with the defendant as she said earlier). Also, rather than one incident in the bathroom of her grandparents' house, she described two. One incident occurred as she was getting out of the shower and found the defendant was in the bathroom. He grabbed her and had her lie on the floor, where he sexually assaulted her. The other incident occurred when she was in the bathroom doing laundry. The defendant came in and closed the door, took their pants off, set her on the washing machine, and sexually assaulted her. S.T. did not immediately disclose the assaults because she was afraid that the defendant would start to abuse her sister Jessie, who was 10 or 11 years old in 2012.

¶ 22 At trial, the State presented Anna Salter, Ph.D., a clinical psychologist who was an expert in the disclosure of sexual abuse by children. Dr. Salter testified that children were often reluctant to disclose sexual abuse and might do so gradually, "testing the waters" by revealing a few facts at first and then adding more details later on as they gained confidence that such disclosure was safe. Children's reluctance to disclose could arise from several factors. First, despite the abuse, many children still loved their abusers and wanted to maintain ties with them, even when they wanted the abuse to stop. Children might also be ashamed of the sexual acts that occurred. Children also might believe that if they accepted the abuse, they could protect someone else they cared about, such as a sibling, from abuse. As a result of this reluctance, only about one-third of children told anyone about sexual abuse while they were still children, and less than 20% of sexual abuse got "to the ears of" the police. Further, it was not unusual for children who had experienced repeated abuse to mix pieces of different incidents. When asked

about an incident, they might remember what usually happened, not necessarily what happened on that specific occasion. On cross-examination, Dr. Salter agreed that children could be suggestible. However, that effect was strongest in very young (3- or 4-year old) children; by age 10 to 12, children's resistance to suggestion was the same as for adults.

¶ 23 In its case in chief, the State also presented the testimony of C.P. that had been the subject of its pretrial motion. C.P. testified that for several years the defendant was married to C.P.'s mother, Jennifer A. (then known as Jennifer P.). The family included Jennifer; her two children from a previous marriage, C.P. and C.P.'s sister Sadie P.; the defendant; and Jessie, the daughter of the defendant and Jennifer. Between October 2008 and July 2009, the family was living in Amboy. At some point during that time, the defendant entered C.P.'s room while he was playing a computer game. No one else was present. The defendant "bet" C.P. that if C.P. won the game, the defendant would give him a blowjob, and if C.P. lost, C.P. would give the defendant one. After C.P. won, the defendant began touching C.P.'s genitals inside his clothing. C.P. said he was uncomfortable and the defendant stopped. C.P. acknowledged that he was now 20 years old and living in Kentucky, and that the State had paid for his travel to Illinois to testify.

¶ 24 On cross-examination, C.P. said he knew S.T. "pretty well" and still thought of her as his sister, and "she always knows I'm there for her." Although C.P. told his mother about the incident about a week after it happened, he did not speak to police or counselors about it until July 2012. The first time he did so was after the defendant was arrested in this case. C.P. denied that he had known what the defendant was accused of when the police and counselors spoke to him. He did not recall when he first learned of the accusations. He remembered being interviewed at Shining Star in July 2012, but he did not recall telling the interviewer that he was aware that the defendant was accused of abusing S.T. He did not recall talking to DCFS in 2012

and saying that the defendant was in jail for inappropriately touching S.T. The jury later heard a stipulation that, if called to testify, C.P.'s interviewer at Shining Star would testify that during his July 2012 interview, C.P. said he was aware that the defendant had abused S.T.

¶ 25 C.P. also knew Melissa Frey, who had been his aunt. C.P. denied telling her that he made up his accusation that the defendant abused him and denied having a conversation with her on Facebook about it. He agreed that he had not wanted to testify in the case, because he "just wanted it to be over and forgotten about." It was not easy for him to talk about. Later in the trial, the defense called Melissa Frey as a witness. She testified that, sometime in 2009 near the end of the summer or the beginning of fall, C.P. and his mother Jennifer told her about C.P.'s accusations toward the defendant. However, about two days later, in the presence of Jennifer and C.P.'s sister Sadie, C.P. said that he had lied about the accusations. He said he made up the accusations because he was mad that the defendant "left" and did not take C.P. with him. (Jennifer and the defendant split up in July 2009.) On cross-examination, Melissa agreed that she was not familiar with research on why children might be reluctant to acknowledge abuse.

¶ 26 In addition to Melissa Frey, the defense put on the testimony of the defendant's parents, Richard (Rick) and Sandy Frey; the defendant's sister, Roxanne Shaffer; the defendant's daughter Jessie; and the defendant himself.

¶ 27 Rick and Sandy testified that the defendant was never alone with S.T. during her visits at their house in January and February 2012. Rick was generally in his garage workshop or outside working, while Sandy was often in the kitchen. The kitchen was where people would come in and out of the house through the back door, and it was close to the entrance to the bathroom. However, Sandy also went to other rooms in the house and was not able to say where in the house she was any particular point during the day. Sandy testified that if she needed to run an

errand she would take S.T. and Jessie with her. She had not washed the attic bedroom sheets between the time that S.T. visited in February 2012 and when the police came to the house in March 2012, and she denied telling Detective Richards otherwise. Sandy could not remember the defendant ever taking S.T. with him on a trucking trip. Sandy also testified that, when the defendant was a young boy, the toilet lid fell on him during urination and he had a "round circle" that "sort of looked like a bruise" on his penis as a result. When she last saw the defendant's penis (when he was 13 or 14 years old), the bruise was still there. (Earlier, S.T. had testified that she did not recall the defendant's penis having any marks or discoloration, but she did not really look at it because she did not want to.)

¶ 28 Roxanne, the defendant's sister, testified that she knew Brandi T. On February 11, 2012, she ran into Brandi T. at Wal-Mart. Brandi T. said that if the defendant took S.T. to his house (*i.e.*, the Woodland Shores house) that weekend, Brandi would make sure that he would never see S.T. again, adding that she "had DCFS on her side." Roxanne thought that the defendant had in fact taken S.T. to his home in Woodland Shores that weekend, but she was not there and had no personal knowledge. Roxanne agreed that S.T. really loved the defendant and wanted to be around him and Jessie.

¶ 29 Jessie, the defendant's daughter, was 13 years old at the time of trial and lived with Roxanne and her husband. She remembered her father driving a truck when she was younger, and she and S.T. would sometimes go with him on trips. S.T. never took a trip like that alone with the defendant. In January and February 2012, she was living with her father at the Woodland Shores house. At her grandparents' house, she was never left alone with her father, and she did not recall any time when S.T. was left alone with him. On cross-examination, Jessie said that when she was visiting at her grandparents' house she would sometimes go over to play

with her next-door neighbor. While they were playing, S.T. or she might go back to the grandparents' house for things sometimes. Her grandmother Sandy might be in any of the rooms in the house, not just the kitchen. Jessie agreed that she and S.T., whom she last saw in 2012, had been very close.

¶ 30 The defendant testified in his own defense. He denied ever taking S.T. or any of the children with him alone on trucking trips, saying that he would not have wanted to take any of the girls alone because they would have had to enter the restrooms at truck stops alone. He denied ever abusing S.T. in his semi truck. The defendant described his living situation, work hours, and weekend schedule in January and February 2012. He was living in the basement of the Woodland Shores house and never spent the night at his parents' house during S.T.'s visits there. He denied ever being alone with S.T., either at the Woodland Shores house or his parents' house. He never sexually abused her at either house. He used "personal lubricant" on his nightstand in the Woodland Shores house when he had sex with Jessica, Jarod's girlfriend. The Sons of Anarchy blanket had never been on his bed in the Woodland Shores house. He had last washed the sheets on that bed in December 2011. He also denied ever sexually abusing C.P.

¶ 31 On cross-examination, the State began asking the defendant about a letter he had written to State's Attorney Anna Sacco-Miller. The defense attorney immediately objected. The letter had been the subject of a motion *in limine* by the defense to bar its use at trial, for the following reasons.

¶ 32 Sacco-Miller was originally one of the defendant's attorneys for about seven months soon after his arrest. In November 2012, Sacco-Miller withdrew from representing the defendant because she had been elected State's Attorney of Lee County. The defendant obtained other counsel and the prosecution was taken over by the Attorney General's office. At some point

after that, while he was in jail awaiting trial, the defendant wrote Sacco-Miller a letter. In it, he suggested the creation of a "sex offender court" for first- and second-time sex offenders in which such offenders would be required to attend counseling twice a week and report to court once a week. The sex offenders also would be sent to jail for 6-12 months. After completing this program, the offenders would be on "probation and [a] 10 year registry," but then could have their criminal record expunged. If they "messed up" again, sex offenders would be sent to prison and put on the sex offender registry for life. The defendant sent the letter to Sacco-Miller at the State's Attorney's office, which then gave it to the prosecution.

¶ 33 In its motion *in limine*, the defense argued that the letter had low probative value as it did not relate to the charged offenses, but it would be highly prejudicial. The State argued that, although the defendant never indicated in the letter that he viewed himself as one of the sex offenders who might be helped by his proposed program, the letter demonstrated a consciousness of guilt and could even be seen as a "veiled" admission of guilt. The trial court denied the motion *in limine*, finding that the letter was not unduly prejudicial and its probative value outweighed any such prejudice.

¶ 34 At trial, when the State sought to question the defendant about the letter, the defense reiterated its objection. The trial court overruled the objection and allowed the questioning, during which the defendant admitted that he wrote the letter but was adamant that the proposed program was not directly relevant to him because he had never sexually abused anyone and was not a sex offender. On re-direct, the defendant explained that he had written the letter because when he was in jail he had talked to numerous sex offenders who had told him that there were no programs for them except for counseling, which did not help. The letter was admitted into

evidence and was published to the jury. After the defendant finished testifying, the defense rested its case.

¶ 35 The State then introduced the testimony of various rebuttal witnesses. Jarod, Brandi T.'s ex-husband, testified about the living arrangements at the Woodland Shores house. He testified that the defendant could be alone with S.T. during visits, and that S.T. would go down to the basement where the defendant had his bedroom. S.T. and Jessie were close and spent a fair amount of time playing together. Jessica Fargher, who was Jarod's second ex-wife, testified that she and her boys were living with Jarod in the Woodland Shores house in January and February 2012. The defendant was living in the basement. She did see S.T. go down to the basement in January 2012; all the kids played down there, so it was not uncommon for S.T. to be down there. She received a Sons of Anarchy blanket for Christmas, the same one shown in one of the pictures taken at the Woodland Shores house on March 9, 2012. (S.T. had identified the blanket in this picture during her testimony as well.) In late January 2012, she could not find the blanket and then found it downstairs on the defendant's bed.

¶ 36 Sadie P. testified that the defendant was married to her mother, Jennifer A., for about 11 years, including during 2008 and 2009. The defendant would sometimes take the children, including Sadie, alone with him on trucking trips. Sadie went alone with him "several times" on trips of more than one day. One summer when Sadie did not want to go on a trip with him, the defendant took S.T. She thought they were gone about a week. She saw them pull out of the driveway in his truck.

¶ 37 Jennifer A. testified that she was married to the defendant for ten years, from 2000 through 2010 when the divorce became final. She had one child with him, Jessie. She also had two older children from her first marriage, Sadie and C.P. During their marriage, the defendant

drove semi trucks and would take the kids on trips with him. Jennifer, S.T., and Jessie took a couple of trips together with him. Jennifer recalled the defendant taking Sadie alone on trips. She was "positive" that the defendant took S.T. alone with him on one trip. It was during the summer when S.T. was not in school, and Jennifer thought it was a three-day trip to Tennessee. In 2008, the family moved to Amboy. When C.P. was about 11 years old, he told her that the defendant touched him inappropriately. At the time, she was working from 9 a.m. to around 3 p.m. and the defendant would sometimes be alone with C.P. and Sadie in the house. Jennifer asked the defendant to leave the house. She later told him that he would "be in trouble" and she would call the police if he ever touched her kids again. They split up in July 2009.

¶ 38 The parties then gave their closing arguments. The State focused on the credibility of S.T.'s account, noting details that she had provided that had been corroborated, such as the Sons of Anarchy blanket being on the defendant's bed. It attacked the credibility of the defense witnesses, noting that they included only the defendant and his family members, all of whom were biased in his favor and had a motive to lie. The State pointed out ways in which the defense witnesses had been impeached on the issue of whether the defendant had ever been alone with S.T. during her visits and whether he had taken S.T. on a trucking trip with him. The State also played key portions of S.T.'s recorded interview again, and noted Dr. Salter's testimony about why disclosure of abuse might be delayed or gradual.

¶ 39 The State also mentioned C.P.'s testimony in its closing, saying that the "bet" on a computer game C.P. described was similar to S.T.'s testimony that the defendant used a computer solitaire game to persuade her to take her clothes off. The State also attacked Melissa Frey's testimony that C.P. said he made up his accusation and argued that even if C.P. knew that the defendant had been accused of sexual abuse of S.T. before he was interviewed, C.P. would

not have known details like the defendant's use of the laptop solitaire game. Near the end of its initial closing, the State mentioned C.P. again:

> "Here's a comparison of [C.P.]'s and [S.T.]'s situation. Neither knew of the other's situation about a game being used to molest a child. Neither one. And look at the similarity here. [C.P.]'s eleven or twelve. [S.T.] is about eight or nine. He uses spider solitaire game with her to get her to take her clothes off and he used a video game contest to get him to get involved and he fondled him."

The State did not mention the letter from the defendant to Sacco-Miller in its initial closing.

¶ 40 The defense closing argument reminded the jury that it should consider the evidence only, not arguments, and that the State bore the burden of proving the defendant guilty beyond a reasonable doubt—the defense witnesses did not need to establish that a reasonable doubt existed. Instead, the jury must focus on whether the witnesses were telling the truth. Brandi T. was fighting with the defendant and had threatened to prevent the defendant from seeing S.T., and that threat had come true. As for C.P., he said he told his mother one week later, but he did not tell the police until after he had heard S.T.'s accusations, and he had lied by saying that he had not known about the accusations. C.P. also had a motive to lie, because he cared for S.T. and wanted to make sure that the accusations would "stick." The defense also highlighted various inconsistencies in S.T.'s account, including the number of times the defendant assaulted her and where the first incident of abuse occurred. The defense then turned to the heart of its argument: the lack of physical or "objective" evidence corroborating S.T.'s account. After going through the lack of corroboration from various potential sources of physical evidence, the defense then returned to C.P., arguing that his testimony did not provide any corroboration either because it was unreliable, as C.P. had lied and recanted.

¶ 41 The defense then raised the issue of the letter to Sacco-Miller. The defense noted that the defendant never conceded guilt in the letter or referred to himself as being within the group of people (sex offenders) who would be helped by the proposed program. Although sending the letter might not have been wise, it was not any evidence of guilt. Rather the only real evidence was S.T.'s accusation, which was not supported by any other evidence, because the defendant was innocent of the charges against him.

¶ 42 In its rebuttal closing, the State argued that it had shown that the defendant had lied, as key parts of his testimony had been contradicted by other witnesses. The suggestion that Brandi T. had "cooked this up" was not believable, given that S.T. had had difficulty speaking about the abuse and Brandi T. took S.T. directly to the hospital upon hearing her report of abuse. As for the Sacco-Miller letter, the State thought the defendant was "one pronoun away from saying give [him] a break," but the jurors could read it and "take from it what you want." After being instructed, the jury retired to deliberate.

¶ 43 The record reflects that, about two hours after starting deliberations, the jury sent out a note with the following question: "Does the burden of proof [*sic*] have to have physical evidence?" With the consent of both attorneys, the trial court responded: "You are to decide this case based on the evidence you have seen and heard together with the instructions I have given you."

¶ 44 About six hours after starting deliberations, the jury reached its verdict, finding the defendant guilty on all three counts. The jurors were polled individually as to whether the verdict represented their own verdict, and all of them confirmed the verdict.

¶ 45 The defendant's motion for a new trial was denied. After a sentencing hearing, the trial court sentenced the defendant to 10 years of imprisonment on count I, 15 years on count II, and

25 years on count III, all sentences to run consecutively, for a total of 50 years. The trial court denied the defendant's motion to reconsider his sentence. This appeal followed.

¶ 46 II. ANALYSIS

¶ 47 On appeal, the defendant argues that the trial court erred in admitting (1) the testimony of C.P., and (2) the Sacco-Miller letter. The defendant also argues that, even if neither error was cause for reversal standing alone, their cumulative effect was sufficiently prejudicial to deny him a fair trial.

¶ 48 The determination of whether evidence is admissible is within the sound discretion of the trial court, and we will not reverse its determination unless there has been a clear abuse of that discretion. *People v. Montano*, 2017 IL App (2d) 140326, ¶ 74. An abuse of discretion exists where the trial court's ruling is arbitrary, fanciful, or unreasonable, or no reasonable person would take the view adopted by the trial court. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003).

¶ 49 This same standard applies to the admission of other-crimes evidence such as C.P.'s testimony. See *id.* Under section 115-7.3 of the Code, when a defendant is charged with certain sex offenses, evidence of other sex offenses committed by the defendant may be admitted at trial to show the defendant's propensity to commit sex offenses, so long as the evidence "is otherwise admissible under the rules of evidence." 725 ILCS 5/115-7.3(b) (West 2014). Our supreme court has explained that the requirement that the evidence be "otherwise admissible" means that its prejudicial effect must not substantially outweigh its probative value. *Donoho*, 204 Ill. 2d at 183.

¶ 50 In determining whether other-crimes evidence is admissible under section 115-7.3, a court must consider the length of time between the charged offense and the other offense, the degree of similarity between the offenses, and any other relevant factors. 725 ILCS 5/115-7.3(c)

(West 2014). Even if the evidence is admissible under these factors, however, a trial court must still weigh its probative value against its prejudicial effect, and exclude the evidence if the latter substantially outweighs the former. *Donoho*, 204 Ill. 2d at 183. The risk of undue prejudice is a function of how likely the other-crimes evidence is to "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

¶ 51 On appeal, the defendant's argument focuses on whether the two offenses—the uncharged fondling of C.P.'s genitals and the sexual penetration of S.T. with which the defendant was charged—were sufficiently similar. The supreme court has held that other-crimes evidence is admissible so long as it has "some threshold similarity to the crime charged." *Id.* at 184 (*quoting People v. Bartall*, 98 Ill. 2d 194, 310 (1983)). This means that "mere general areas of similarity will suffice." *Id.* (*quoting People v. Illgen*, 145 Ill. 2d 353, 372-73 (1991)). As the trial court noted when making its ruling, the offenses share the similarities that the defendant was a member of the victim's immediate family at the time of the offense, the victim was in the defendant's care at the time of the offense, and the victims were about the same ages (11 or 12 years old) when the abuse occurred. In addition, the use of a computer game to facilitate the defendant's initiation of sexual contact was similar.[1] The State also argues on appeal that the

[1] The defendant points out that this similarity is not between the charged offenses and an uncharged offense, but between two uncharged offenses (the abuse of C.P. and the assault on S.T. in the semi truck). However, given that S.T.'s testimony about the uncharged offense in the semi truck was admitted into evidence and the defendant has not attacked that ruling on appeal, the trucking incident may properly be considered as part of the trial evidence.

locations where the abuse occurred (inside a home) were similar. Taken together, these similarities meet the general-similarity threshold for admissibility under *Donoho*.

¶ 52 The defendant argues that there were many differences between the other-crimes evidence and the charged offenses: the victims were of different sexes, and the abuse involved different acts (fondling versus penetration) and different details (the abuse of C.P. did not involve the use of lotion or sexual language and did not include nudity, and the defendant stopped when the victim protested). However, once the requirement of general similarity is met, the differences between the other crime and the charged offenses do not necessarily render the other-crimes evidence inadmissible. Rather, such differences lessen the probative value of the other-crimes evidence. *Id.* (the greater the factual similarity, the greater the probative value). Thus, the degree of similarity or difference affects the trial court's weighing of the probative value of the other-crimes evidence as compared to its likely prejudicial effect.

¶ 53 The defendant argues that the differences between the C.P. incident and the charged offenses were so substantial that the other-crimes evidence should have been excluded, comparing his case to *People v. Smith*, 406 Ill. App. 3d 747 (2010), and *People v. Johnson*, 406 Ill. App. 3d 805 (2010), in which other-crimes evidence was ruled inadmissible. However, these cases are inapposite.

¶ 54 In *Smith*, trial court had excluded the other-crimes evidence, and the deferential standard of review thus favored affirming that ruling. Further, the reviewing court found that the evidence was properly excluded based on (1) the extreme length of time between the earlier offenses and the charged offense (the excluded sex offenses against the defendant's sisters and daughters were all committed between 25 and 42 years earlier) and (2) the substantial prejudice likely to be caused by the admission of five witnesses' testimony to repeated abuse that was

more serious in nature than the charged offense. Neither of these factors is present here. The defendant's abuse of C.P. took place in 2008 or 2009, about when his assault on S.T. in the semi truck appears to have taken place, and within a few years of the charged offenses in early 2012. And the potential prejudice flowing from the other-crimes evidence here was far less, in that it was an isolated incident, the level of abuse was less serious than the charged offenses (fondling versus penetration), and C.P. testified that the defendant stopped as soon as C.P. voiced discomfort. As the *Smith* decision rests on factors not present in this case, it is inapposite.

¶ 55 Nor is *Johnson* an apt guide for this case. In *Johnson*, the defendant was accused of raping a young woman by penetrating her vaginally after dragging her into an alley. The reviewing court found that the trial court had abused its discretion in admitting evidence of a prior sexual assault by the defendant because there were too many differences between the charged offense and the other-crimes evidence: the prior assault had been carried out by two men, who used a car to block the victim's escape, used alcohol and drugs to subdue her, and penetrated her orally and anally as well as vaginally. *Johnson*, 406 Ill. App. 3d at 811. In addition, the trial court made an error of law by failing to engage in any assessment of the prejudice likely to arise from admitting the other-crimes evidence. *Id.* at 812. Here, by contrast, the defendant was the only alleged perpetrator both in C.P.'s account and the charged offenses, and rather than using a different instrument such as a car, his *modus operandi* was similar in that he initiated sexual contact with both victims through the use of a computer game. Further, the prior offense in *Johnson* was even more heinous than the charged offense, and thus ran a higher risk of causing the jury to convict the defendant for conduct not associated with the charges against him. Here, by contrast, the prior offense was less serious than the charged offenses, and

thus presented a lower risk of undue prejudice. See *Old Chief*, 519 U.S. at 180. For all of these reasons, this case is distinguishable from both *Smith* and *Johnson*.

¶ 56 In this case, the trial court determined that, despite the differences in the victims' sexes, the seriousness of the abuse, and other details of the abuse, the defendant's prior sexual abuse of his 11- or 12-year old stepson, initiated through engagement in a computer game, had probative value. The potential prejudice flowing from the admission of that evidence was less than in *Smith* or *Johnson*, in that the prior offense was an isolated incident that was less serious in nature than the charged offenses. Moreover, the prejudice caused by the admission of C.P.'s testimony was blunted by the defense's capable use of cross-examination, other witnesses, and a stipulation, all of which impeached C.P.'s truthfulness.

¶ 57 As was noted in *Donoho*, the fact that reasonable minds could differ about the admissibility of evidence does not demonstrate an abuse of discretion, and "[t]he reviewing court owes some deference to the trial court's ability to evaluate the impact of the evidence on the jury." *Id.* at 186. We cannot say that the trial court erred in determining that the probative value of the evidence was not substantially outweighed by its prejudicial effect. Accordingly, the trial court did not abuse its discretion by admitting C.P.'s testimony as other-crimes evidence.

¶ 58 We turn to the defendant's attack on the admission of the Sacco-Miller letter. To be admissible, evidence must be relevant: that is, it must make some disputed matter either more or less probable. Ill. R. Evid. 401, 402 (eff. Jan. 1, 2011); *In re A.W.*, 231 Ill. 2d 241, 256 (2008). Even relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice." Ill. R. Evid. 403 (eff. Jan. 1, 2011). As with the other-crimes evidence, we review the trial court's decision to admit the Sacco-Miller letter into evidence under the abuse-of-discretion standard. *Montano*, 2017 IL App (2d) 140326, ¶ 74.

Under that standard, we will reverse only if the ruling was arbitrary or no reasonable person would take the view adopted by the trial court. *Donoho*, 204 Ill. 2d at 182.

¶ 59 The defendant argues that the letter should not have been admitted because it was irrelevant to the central issue of whether he committed the alleged offenses, as it did not contain any admissions of guilt. Further, he argues that any probative value it might have had was "vastly" outweighed by the prejudice it created in the minds of the jurors, especially as the State implied, when questioning the defendant about the letter, that the letter suggested that sex offenders' criminal records should be expunged "so they can be around kids again." (The letter did not in fact state that sex offenders should be free to "be around kids again." Immediately after the State's question, the defendant vehemently denied that this suggestion was either contained in the letter or a reasonable inference from it.)

¶ 60 The State responds that the letter was relevant because it reflected the defendant's consciousness of his own guilt, and it was admissible because it posed little danger of unfair prejudice. In connection with the latter argument, the State notes that it made minimal use of the letter, addressing it only after the defendant had raised the letter in his own case, and mentioning it only briefly in its closing argument, telling the jurors that they could read the letter for themselves and determine what weight to give it.

¶ 61 We agree with the State that the letter did not have to contain admissions to the charged offenses in order to be relevant. The letter had probative value as tending to show a consciousness of guilt, given that it was written after the defendant had been charged with sex offenses and was in jail as a result of those charges. As to the prejudicial effect of the letter, the defendant argues that by suggesting that the letter actually contained the language, "so they can be around children again," the State was attempting to add facts not in evidence. We disagree—

that expungement of sex offenders' records could result in their being able to "be around kids again" is a logical inference from facts that were in evidence, *i.e.*, the contents of the letter. We condemn the State's phrasing of its questions, which falsely indicated that the letter itself contained the phrase "be around kids again." However, the defendant's immediate and vehement denial of this insinuation, and the jury's opportunity to read the letter and view its contents for itself, mitigated the prejudice from the State's implication.

¶ 62 In this case, even if we were inclined to view the prejudice arising from the letter as substantially outweighing its probative value (so that admitting it into evidence was error), any such error was harmless. See *People v. Nevitt*, 135 Ill. 2d 423, 447 (1990) (evidentiary error is harmless "where there is no reasonable probability that the jury would have acquitted the defendant absent the" error). Relatively little attention was paid to the letter during the trial. The State did not mention it at all during its case in chief (which occupied two and a half days). The letter was first raised during the defendant's cross-examination, after he chose to testify. The focus of the trial was the relative credibility of the two competing accounts: S.T.'s accusations and the defendant's denials. The letter contained no admissions or lies and it was not relevant to the issue of whether the defendant or S.T. was telling the truth. At worst, it simply portrayed the defendant as sympathetic to sex offenders—a fair portrayal, based on its contents.

¶ 63 In arguing that the error was not harmless because it was a close case, the defendant highlights the lack of physical evidence in the case, a point that apparently concerned the jury, which sent out a note asking about whether such physical evidence was "part of the burden of proof."[2] But the letter did not relate in any way to the issue of the physical evidence in the case,

[2] The defendant also points out that the record contains a second note apparently written by the jury, which reads, "Please advise—We have 10 guilty (all 3 counts) 2 not guilty all 3

nor did it bear on the primary issue in the case, the defendant's truthfulness. We have no difficulty concluding that, even if the admission of the letter was error, there is no reasonable probability that it affected the jury's verdict. *Id.*

¶ 64 Lastly, the defendant argues that, even if neither of the trial court's rulings merited reversal on its own, their cumulative effect denied him a fair trial, thereby denying him due process. The defendant argues that the case was essentially a credibility contest and thus the evidentiary rulings, which allowed in evidence that portrayed him as a repeat sex offender (C.P.'s testimony) and someone who was either sympathetic to sex offenders or possibly aware

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counts. The 2 not guilty are firm that the State did not prove guilt on all the counts." However, there is absolutely no indication in the record as to the source of this note. The trial transcript reflects that the jury retired to deliberate about 4 p.m. About 6 p.m., it sent out the note regarding physical evidence, and the trial court called the attorneys back to discuss the appropriate response, which it then delivered to the jury. The bailiff notified the court that the jury had reached a verdict shortly before 10 p.m. There is no mention whatsoever of the second note regarding the 10-2 split in the jury, and no explanation for its presence in the common law record. Accordingly, we have difficulty in determining what weight, if any, should be placed on the second note. Ordinarily, when the record is silent on a point, we must presume that the trial court acted in conformity with the law. *In re Estate of Cargola*, 2017 IL App (1st) 151823, ¶ 17. A trial court generally must address on the record any notes it receives from the jury. See *People v. Childs*, 159 Ill. 2d 217, 228-29 (1994). We presume that the trial court's failure to address the second note on the record indicates that the jury ultimately chose not to send out the second note. This presumption is buttressed by the fact that the trial court took great pains to properly address the note it received about physical evidence.

that he might be found to be a sex offender (the Sacco-Miller letter), damaged his ability to receive impartial consideration by the jury. However, we have found that the trial court did not err in admitting C.P.'s testimony and that even if the admission of the letter constituted error, any such error was harmless. Where at most one error is found, a defendant cannot argue cumulative error. *People v. Caffey*, 205 Ill. 2d 52, 118 (2001).

¶ 65 III. CONCLUSION

¶ 66 For the reasons stated, the judgment of the circuit court of Lee County is affirmed.

¶ 67 Affirmed.