

NO. 42167-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

SPENSER PLUEARD,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jay B. Roof, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed present clear and convincing evidence to overcome the presumption that appellant lacked the capacity to commit a sexual offense before he was 12 years old.

2. The court erred in admitting evidence of conduct appellant engaged in before he had capacity to commit a crime on the theory that it showed lustful disposition.

Issues pertaining to assignments of error

1. A child under the age of 12 is presumed incapable of committing a crime, and the State bears the burden of overcoming that presumption with clear and convincing evidence. The State's burden is harder to meet when a sex offense is charged. Appellant was charged with child molestation committed before he turned 12. Where the evidence failed to show he understood the nature of the charged conduct or understood it was wrong at the time the conduct occurred, must the court's determination that he had capacity to commit the charged offense be reversed?

2. The court ruled that even if appellant lacked capacity to commit a sexual offense, evidence of conduct that occurred before he turned 12 was admissible to show his lustful disposition toward the alleged victim. Where the State failed to prove the prior conduct

constituted a crime or sexual misconduct, was the trial court's reliance the lustful disposition theory improper?

B. STATEMENT OF THE CASE

Appellant Spenser Plueard was born on November 14, 1988. CP 44. In March 2010, when he was 21 years old, his younger half sisters MM (born December 6, 1993) and CLM (born May 21, 1992) alleged that he had sexual contact with them numerous times after coming to live with them when he was 10 years old. CP 44-45, 49, 52.

Plueard was initially charged with one count of rape of a child in the second degree, committed against MM between January 1, 2006, and December 31, 2007, when Plueard was 17 to 19 years old. CP 1. The charge was based on MM's statement that Plueard put his penis in her vagina multiple times when she was in the fifth through seventh grades. CP 52. She said that Plueard would have her wrap her legs around him and he would penetrate her vagina. CP 52. MM said that when this happened, she threatened to tell their mother, but Plueard told her CPS would take her away if she told, and no one would believe her. CP 52. MM also said in her statement to a child interviewer that there were other incidents of Plueard touching her chest and crotch before she was in fifth grade. She said Plueard would come into her room at night, touch her, and tell her it was normal. He also tried to get her to touch his penis. CP 52.

In addition, CLM told a child interviewer that on several occasions when she was 8 or 9 and Plueard was 12 or 13, Plueard touched her vagina while she was sleeping. She threatened to tell on him if he continued, and he stopped. CP 20-21. The State added a charge of first degree child molestation against CLM, committed between May 21, 2000, and May 21, 2002. CP 16.

Plueard's mother told police that in 2001, when Plueard was 13 years old, she reported that Plueard had touched MM "in her privates," but CPS had dismissed the allegation. CP 54. In 2010, MM told her mother that the abuse started in 2001 and continued through 2007. CP 54. MM finally reported the sexual contact because she no longer believed CPS would take her away. CP 55.

Plueard was arrested on March 19, 2010. In an interview with police, he denied having sexual intercourse with MM, although he admitted several incidents of fondling. CP 7-8. Plueard first described a fondling incident when he was 10 and MM was 5. He said it happened one time, he went to a counselor for it, and he was never charged. He knew it was wrong, and he put it behind him. CP 56.

When asked why the fondling happened, Plueard said he had never had a "birds and bees" talk, and when he came to live with his mother and MM, he developed a sexual attraction for MM, which he believed was

mutual. CP 56. He said it did not go on past him being 11 years old. CP 56. In describing the first fondling incident, Plueard said he stopped before penetrating MM's vagina. When asked what made him stop, Plueard said that all he could remember was that he thought it was wrong. CP 56. When asked if he told MM not to tell anyone, Plueard said he did not remember doing so but he would not be surprised if he did, although he never threatened her. CP 56. He did not remember saying anything about CPS and explained that he did not know about CPS at the time. CP 56.

Plueard said that when he was 10 and MM was 5, they would talk about sex. She would ask him questions, and he would show her. He never penetrated her, and he thought there must have been a mental block which told him that was too far. CP 57. Plueard said he showed MM some sexual positions, but they were fully clothed. CP 57. Plueard said he touched MM's vagina about once a week for six months, when he was 10 years old. CP 57. He remembered that he stopped before it went as far as penetration. CP 57.

Plueard moved to suppress his statement to the police and to exclude any charges for acts committed prior to November 14, 2000, when he turned 12 years old. CP 22. Defense counsel pointed out that, under RCW 9A.04.050, Plueard was presumed incapable of committing a crime

before the age of 12. Counsel argued that the State could not overcome that presumption, because Plueard's statement to the police was too remote from the described acts to establish that he had capacity at the time the acts were committed. CP 22-24; 1RP<sup>1</sup> 3-7. Since Plueard's statement to police referred only to acts that occurred before he turned 12, the statement was not relevant and should be suppressed. CP 23-24; 1RP 10.

The State responded that Plueard's statement was sufficient to establish that, at the time of the acts he described, he knew they were wrong. 1RP 11-12. The State also argued that, even if the court found Plueard did not have capacity to commit the charged crimes, his statement was admissible to show his lustful disposition toward MM. RP 13.

Kitsap County Superior Court Judge Jay B. Roof issued a memorandum opinion accepting the State's arguments. CP 33-38. First, the court found that Plueard's statements demonstrated "a level of understanding of sexual urges and behavior that transcended what a typical 10 or 11-year-old child may possess." CP 36. The court noted that Plueard admitted to sexual contact with MM when he was 11 to 11.5 years old, he had sexual urges toward MM and believed there was a mutual sexual attraction, and he showed her sexual positions and talked about sex when he was 10 or 11 years old. CP 36.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—3/28/11; 2RP—4/25/11; 3RP—5/27/11.

The court also believed Plueard's statements established that he knew, when he was 10 years old, that his conduct with MM was wrong. The court said Plueard admitted a pattern of conduct and said he would not be surprised if he told MM not to tell her parents about it. It found that Plueard specifically told the detective that he knew the contact with MM was wrong at the time it was occurring and that he stopped because he knew it was improper. CP 36. Based on these findings, the court concluded that Plueard had capacity prior to age 12 to commit the crimes charged. CP 36.

The court also concluded that, even if there were not sufficient evidence to make a finding of capacity, Plueard's statements would be admissible to show his lustful disposition toward MM and CLM. CP 37. The court found that the probative value of the statements as to this issue outweighed the prejudicial effect, and any prejudice could be mitigated with a limiting instruction. CP 37.

After the court entered its memorandum decision, the State filed an amended information, dropping the rape of a child charge and adding a charge of first degree child molestation committed against MM between December 6, 1999, and December 5, 2005. CP 30. Plueard then stipulated to the facts as set forth in his interview, the child interview summaries relating to MM and CLM, and police reports. CP 44-69. The

court accepted the stipulation and found Plueard guilty of both counts of child molestation, as well as a charge of intimidating a witness. CP 46-47. The court imposed a standard range sentence, and Plueard filed this appeal. CP 71, 81.

C. ARGUMENT

1. THE STATE FAILED TO OVERCOME THE PRESUMPTION THAT PLUEARD LACKED CAPACITY TO COMMIT THE CHARGED OFFENSES.

Plueard was charged with and convicted of first degree child molestation committed within a charging period that began before he was 12 years old. By statute, a child under 12 years of age is presumed incapable of committing any crime. State v. Ramer, 151 Wn.2d 106, 114, 86 P.3d 132 (2004); RCW 9A.04.050. The statute provides in relevant part:

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

RCW 9A.04.050. The State has the burden of overcoming the presumption of incapacity by clear and convincing evidence that the child understood the charged act and knew it was wrong. Ramer, 151 Wn.2d at 114; State v. J.P.S., 135 Wn.2d 34, 37, 954 P.2d 894 (1998); State v. Q.D.,

102 Wn.2d 19, 24-25, 685 P.2d 557 (1984). “The focus is on ‘whether the child appreciated the quality of his or her acts at the time the act was committed,’ rather than whether the child understood the legal consequences of the act.” Ramer, 151 Wn.2d at 114 (quoting State v. T.E.H., 91 Wn. App. 908, 913, 960 P.2d 441 (1998)).

The Supreme Court has identified seven factors for courts to consider in determining capacity:

(1) the nature of the crime, (2) the child’s age and maturity, (3) whether the child evidenced a desire for secrecy, (4) whether the child told the victim (if any) not to tell, (5) prior conduct similar to that charged, (6) any consequences that attached to that prior conduct, and (7) whether the child had made an acknowledgment that the behavior is wrong and could lead to detention.

Ramer, 151 Wn.2d at 114-15; J.P.S., 135 Wn.2d at 38-39. Testimony from experts or others acquainted with the child are relevant to this determination. Id.

First and foremost, a capacity determination must be made in reference to the specific act charged. J.P.S., 135 Wn.2d at 37; Q.D., 102 Wn.2d at 26. It can be more difficult to prove that a child had capacity to commit a sexual offense than other crimes, such as theft or arson. Most children are taught from a young age that stealing, setting fires, or injuring other people is wrong. J.P.S., 135 Wn.2d at 43. But with sexual crimes, it is very difficult to tell if a child understands that sexual contact with other

children is wrong. J.P.S., 135 Wn.2d at 38. Thus, when a child is charged with a sex crime, the State's burden in proving capacity is greater and it must present a higher degree of proof that the child understood the illegality of the act. Ramer, 151 Wn.2d at 115; J.P.S., 135 Wn.2d at 38, ("When a child is accused of a crime which involves sexual misconduct, it is more difficult for the State to prove the child understood the conduct was wrong."); State v. Erika D.W., 85 Wn. App. 601, 607, 934 P.2d 704 (1997).

It is also crucial that the child understood the wrongfulness of the act at the time it was committed, not that he realized it was wrong after the fact. J.P.S., 135 Wn.2d at 38. "A child's after-the-fact acknowledgment that he or she understood the conduct was wrong is insufficient, standing alone, to overcome the presumption of incapacity by clear and convincing evidence." J.P.S., 135 Wn.2d at 44 (child's acknowledgment that his conduct was bad and he felt guilty, made after he was interrogated by police and shunned by neighbors and classmates, not probative of whether he understood conduct was wrong at time it occurred).

When the trial court finds capacity, the appellate court reviews the record to determine if there is substantial evidence establishing that the State overcame the presumption that a child under 12 is incapable of committing crime by clear and convincing evidence. Ramer, 151 Wn.2d

at 112-13; J.P.S., 135 Wn.2d at 37. Thus, the question on appeal in this case is whether the State introduced clear and convincing evidence that Plueard understood the act of child molestation and knew that it was wrong at the time the conduct occurred.

The only evidence before the court for the capacity determination were statements made by Plueard and MM describing events that occurred about ten years earlier when they were both young children. No experts testified, and no adults who knew Plueard provided any insight into what he knew and understood at the relevant time. No Washington case has addressed whether such scanty and remote evidence is sufficient to overcome the statutory presumption that a child under the age of 12 lacks capacity to commit crime. Even under existing case law, however, it is clear that the capacity determination must be reversed. See, e.g. State v. Linares, 75 Wn. App. 404, 416, 880 P.2d 550 (1994) (finding of capacity reversed where the only evidence before the court was child's custodial statement acknowledging conduct was wrong).

The court below relied on Plueard's statements that he talked to MM about sex, he felt there was a mutual sexual attraction, and he demonstrated sexual positions. The court said these statements showed Plueard knew more about sex than the typical ten year old. CP 36. There was no evidence, however, as to what Plueard told MM, whether that

information was accurate, or how he acquired whatever information he had.

A similar issue was addressed in Erika D.W. In that case, an 11 year old child was charged with child molestation against her 6 year old neighbor. The neighbor reported that Erika had touched her private area and told her not to tell anyone about the touching. Erika D.W., 85 Wn. App. at 603. Erika was interviewed at the police station, and when she was told there was a machine that could tell if she was lying, she said she had accidentally touched the neighbor's private part outside her clothing while helping her get dressed, and she felt bad about that. Erika D.W., 85 Wn. App. at 604.

The trial court found that Erika was above average intellectually and had appropriate parental supervision and training in social mores. The court found that her denial of sexual contact and her explanations for other accidental touching showed her awareness that touching with sexual intent was wrong. It concluded she had capacity to commit the charged offense. Erika D.W., 85 Wn. App. at 604-05.

The Court of Appeals reversed. Although there was evidence Erika had learned about human sexuality in her 5<sup>th</sup> grade class, there was no testimony that she learned anything about sexual desire or that one could touch a younger child to gratify such desire. Erika D.W., 85 Wn.

App. at 606. Nor did the evidence show that she knew her conduct was wrong. The Court noted that the State carries a greater burden to prove a child understands the nature of sexual conduct and that it is wrong, and the evidence was insufficient in that case. Erika D.W., 85 Wn. App. at 606-07.

Similarly, in this case, while Plueard said he talked to MM about sex when he was 10 years old and he felt there was a mutual attraction, there was no evidence as to what that meant to him as a 10 year old child. The evidence does not show that he understood it was possible to touch someone to gratify sexual desire.

More importantly, although Plueard admitted fondling MM, there was no evidence he knew that such contact was wrong. There was no evidence he had ever been told that it was wrong to act on sexual urges with other children when there were mutual feelings. J.P.S., 135 Wn.2d at 37 (children may lack understanding of sexual conduct without instruction); State v. J.F., 87 Wn. App. 787, 790-91, 943 P.2d 303 (1997) (capacity found on evidence that child charged with arson was instructed on fire safety and taught wrongfulness of setting fires from early age), review denied, 135 Wn.2d 1009 (1998). Plueard said in his statement that he had never been given a “birds and bees” talk, and there was no evidence to dispute that. CP 56.

The court relied heavily on its finding that Plueard admitted to police that he knew his conduct with MM was wrong at the time it occurred. CP 36. At the start of his interview with police, Plueard said there had been one incident of fondling, his mother found out about it and called CPS, he went to counseling, and he put it behind him because he knew it was wrong. CP 56. The legal test is whether Plueard knew his conduct was wrong at the time it was committed, not whether he realized it was wrong after being chastised by his mother, dealing with authorities, and attending counseling because of it. See J.P.S., 135 Wn.2d at 37-38, 44 (child's acknowledgment that his conduct was bad, made after he was interrogated by police and shunned by neighbors and classmates, did not prove he understood conduct was wrong at time it occurred); J.F., 87 Wn. App. at 793 (after punishment by parent or interrogation by police, wrongfulness of conduct is obvious, and child's acknowledgement of wrongfulness does not indicate awareness at time of conduct). "[A] child's after-the-fact acknowledgment that he or she understood that the conduct was wrong is insufficient, standing alone, to overcome the presumption of incapacity by clear and convincing evidence." Linares, 75 Wn. App. at 417. Plueard's statement that he put the fondling incident behind him after counseling does not establish that he knew the conduct was wrong when it occurred.

Plueard later admitted that there was more than one incident of fondling, and that the conduct occurred once a week for about six months before he turned 11 years old. While Plueard admitted fondling MM, he repeatedly denied that there was any penetration of MM's vagina. When asked why these incidents did not progress to penetration, Plueard said because he knew that would be wrong. He felt there was a mental block that kept him from going as far as penetration, because he knew that was wrong. CP 56. These statements by Plueard clearly demonstrate that he knew penetration was wrong. There were no allegations of penetration during the time Plueard was describing, however. Contrary to the court's findings, Plueard's statements do not demonstrate that he knew the fondling he admitted to was wrong.

Other relevant factors further demonstrate that the State failed to overcome the presumption of incapacity. First, Plueard described acts which occurred before he turned 11 years old. CP 56-57. His age was in the middle of the range to which the presumption of incapacity applies and provides no basis for overcoming the presumption. See J.F., 87 Wn. App. at 792.

Next, as to whether Plueard indicated a desire for secrecy, he said it was possible he told MM not to tell her parents what they were doing, although he did not remember doing so. CP 56. The State argued below

that Plueard's threats to MM that CPS would take her away if she told weighed in favor of a finding of capacity. 1RP 12. When confronted with MM's allegation, Plueard said he did not even know what CPS was when he was 10 or 11 years old, and his mother confirmed that CPS did not become involved until Plueard was 13. CP 54, 56. In any event, MM only described these CPS threats in connection with the intercourse she said occurred when Plueard was 17 to 19 years old. CP 54-55. This evidence sheds no light on Plueard's capacity to commit child molestation before the age of 12.

Finally, there was no evidence of any prior sexual conduct and thus no evidence Plueard had been punished for such conduct. See J.P.S., 135 Wn.2d at 43. Nonetheless, the State argued that the court should consider that Plueard had pleaded guilty to four counts of assault prior to the age of 12 to establish his capacity to commit crime. 1RP 12-13. Case law is very clear that capacity is a fact specific question, however. Linares, 75 Wn. App. at 415. A capacity determination must be made in reference to the specific act charged. J.P.S., 135 Wn.2d at 37. Evidence that shows no more than a general understanding of the criminal justice system is not sufficient to establish capacity to commit a specific crime. Q.D., 102 Wn.2d at 26. Nor does evidence that the child knew the wrongfulness of one crime establish capacity as to another offense. Q.D., 102 Wn.2d at 26.

Children may know it is wrong to injure someone, even when they do not know sexual contact with other children is wrong. See J.P.S., 135 Wn.2d at 43. Thus, Plueard's guilty pleas to assault do not show he had capacity to commit a sexual offense.

Because Plueard was charged with a sex crime committed before the age of 12, the State has to present a higher degree of proof that he understood the illegality of the act. See Ramer, 151 Wn.2d at 115. No rational trier of fact could find, based on the evidence presented, that Plueard had capacity to commit the crime of child molestation before he was 12 years old. Because the charging periods for both counts of child molestation include times when Plueard lacked capacity to commit that offense, the convictions must be reversed.

2. THE COURT ERRONEOUSLY RULED THAT CONDUCT WHICH OCCURRED BEFORE PLUEARD HAD THE CAPACITY TO COMMIT A SEXUAL OFFENSE WAS ADMISSIBLE TO SHOW LUSTFUL DISPOSITION.

The court below ruled that even if the State failed to prove Plueard had capacity to commit child molestation before he turned 12 years old, his statements were admissible under a theory of lustful disposition. CP 37. Again, the trial court's ruling presents an issue of first impression in Washington.

Our Supreme Court “has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female.” State v. Ray, 116 Wn.2d 531, 547 806 P.2d 1220 (1991); see also State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); State v. Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983). A defendant’s conduct is admissible under this theory only if it would naturally be interpreted as an expression of sexual desire, such as intercourse or other conduct which is indecent or otherwise improper. State v. Thorne, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953).

Evidence of prior sexual misconduct is admissible if it shows a lustful disposition toward a specific victim, on the theory that such evidence makes it more probable the defendant committed the charged offense. Ferguson, 100 Wn.2d at 134. Before such evidence may be admitted, however, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is offered, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. State v. Pirtle, 127 Wn.2d 628, 649, 904 P.2d 245 (1995).

No Washington case has held that conduct engaged in by the defendant at a time when he lacked the capacity to commit a sexual offense was relevant to show a lustful disposition for a specific person. This Court should reject such a holding in this case.

First, by long-standing rule, evidence admitted under the lustful disposition theory should be actual sexual misconduct or a crime. State v. Golladay, 78 Wn.2d 121, 141-42, 470 P.2d 191 (1970), overruled on other grounds by State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976). See e.g., Ray, 116 Wn.2d at 546-47 (father's prior sexual contact with daughter properly admitted to show lustful disposition toward her); Camarillo, 115 Wn.2d at 69 (evidence of repeated sexual contact with boy victim); Ferguson, 100 Wn.2d at 133 (evidence that defendant forced stepdaughter to have sexual contact numerous times); Thorne, 43 Wn.2d at 60 (evidence of prior sexual contact between defendant and his daughter); State v. Guzman, 119 Wn. App. 176, 182-83, 79 P.3d 990 (2003) (defendant's sexual contact with wife's sister when she was 10 years old), review denied, 151 Wn.2d 1036 (2004). If the defendant lacked capacity to commit a sexual offense at the time of the prior conduct, that conduct cannot be construed as a crime or sexual misconduct.

As discussed above, capacity to commit a crime requires an understanding of the specific act charged as well as an understanding that

the conduct was wrong. Ramer, 151 Wn.2d at 114. Where that understanding is missing, the child cannot be held legally accountable for his conduct. Cases applying the lustful disposition theory have done so only when there is evidence of prior sexual misconduct which is illegal, indecent, or improper. This Court should not extend the theory by applying it to conduct which does not fit that definition.

Moreover, conduct is relevant under this theory only if it would naturally be interpreted as an expression of sexual desire for a specific person. Thorne, 43 Wn.2d at 60-61. Sexual desire is a sophisticated concept for a pre-adolescent, which a child who lacks capacity to commit a sexual offense would not understand. See Erika D.W., 85 Wn. App. at 606. While fondling of genitals by an adult would be interpreted as an expression of sexual desire, the same actions by a child may not. Where the child lacks capacity to commit a sexual offense, the court cannot be sure whether his conduct evidenced sexual desire for a particular person or was merely childish exploration with an available partner.

Finally, the court below also found that Plueard's statements were relevant to prove Plueard engaged in a pattern of touching both MM and CLM for sexual purposes. CP 37. To be admissible for this purpose, however, the misconduct must directly connect to the offended person, not merely reveal the defendant's general sexual proclivities. Ray, 116 Wn.2d

at 547. Because Plueard's statements made no reference to CLM, they cannot be used to prove the count of child molestation involving her.

The trial court's ruling that Plueard's statements to the police regarding his actions with MM when he was 10 years old were admissible under a lustful disposition theory is not supported by existing case law. It should be rejected by this Court.

D. CONCLUSION

The State failed to provide clear and convincing evidence to overcome the presumption that Plueard lacked capacity to commit the charged offenses before he was 12 years old. In addition, evidence of conduct which occurred before Plueard had the capacity to commit a sexual offense was not relevant to show a lustful disposition toward the alleged victim. The two convictions of child molestation must be reversed.

DATED this 12<sup>th</sup> day of September, 2011.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of the Brief of Appellant in *State v. Spenser J. Plueard*, Cause No. 42167-4-II, directed to:

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Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Port Orchard, WA  
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