

NO. 42167-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

SPENSER PLUEARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00331-1

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED December 27, 2011, Port Orchard, WA _____

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in determining that Plueard had the capacity to commit the crime of child molestation when he was eleven years old?

2. Whether the trial court properly determined that evidence of lustful disposition is properly admissible under ER 404(b), even if the defendant lacked capacity due to age at the time the prior acts were committed?

II. STATEMENT OF THE CASE

Spenser Plueard was charged by first amended information filed in Kitsap County Superior Court with second-degree rape of a child, first-degree child molestation, and conspiracy to commit witness intimidation (domestic violence). The rape charge involved his half-sister MKM, and was alleged to have occurred between January 1, 2006, and December 31, 2007, when Plueard would have been between 17 and 18 years old, and MKM would have been between 12 and 13 years old. The child molestation charge involved his half-sister CLM, and was alleged to have occurred between May 21, 2000 and May 21, 2002, when Plueard would have been between 11 and 13 years old and CLM would have been eight to 10 years old. CP 15.

The facts underlying the offenses are set forth in the documentation filed with the stipulated facts verdict. In 2001, Janet Mulka had reported her

son Plueard to CPS for touching her daughter, MKM, in her privates. The case was dismissed by CPS as a “you show me yours, I’ll show you mine” type issue. Mulka placed Plueard into counseling. At the time, Plueard was 13 and MKM was 11. CP 54.

In February 2010, Mulka took then-16-year-old MKM to the doctor for a yeast infection. When the male physician went to examine her, MKM became upset and did not want him to touch her. When Mulka asked her why she was so upset, MKM responded that the abuse by Plueard had continued. It started in 2001 and went through 2007, when she was half way through seventh grade. It included him touching her vagina and him making her touch his penis, as well as full sexual intercourse. CP 54.

MKM was subsequently interviewed at the prosecutor’s office. MKM reported that her brother put his penis inside her crotch on numerous occasions. The incidents began when she was in the fifth grade and occurred weekly. The last incident occurred in the middle of her seventh grade year. CP 52.

MKM described Plueard pulling down her pants and underwear, picking her up and telling her to wrap her legs around him. He would then put his penis inside her crotch. He did not use a condom. It hurt when her brother put his penis in her and she cried and threatened to tell her mom. Plueard responded that if she told on him, CPS would take her away or no

one would believe her. CP 52.

Plueard touched MKM's bare chest and crotch on multiple occasions before she was in fifth grade. He would come into her room at night, touch her and tell her it was normal. He would try to get her to touch his penis. She did touch his penis but could not remember the details. She also could not remember whether the touching was on the inside of her crotch or outside. All of the incidents occurred in her room except for several incidents of touching several years ago while the family was visiting relatives in Oregon. CP 53. MKM was about eight or nine at that time, and he came into her bed and touched her crotch and chest. CP 55.

The last time the abuse occurred, MKM was in the seventh grade. She was in bed and Plueard came into her bedroom. She pretended to be asleep, but he woke her up and began touching her chest and crotch. He told her to rub his penis, and when she refused he, pulled her pants and underwear down and penetrated her with his penis. She was crying and told him she was scared. After the last incident, Plueard told MKM that it was the last time, and was not going to happen again if she did not tell their mother. CP 54-55.

MKM finally told her mother of the abuse because she realized that CPS wasn't going to take her away. Her mother confronted Plueard but he denied the incident. After she reported him, Plueard asked MKM why she

was telling her mother about the incidents. CP 53. He told her it was all in her mind, and that she was just saying it to get attention. CP 53, 55.

MKM also told her friend, P, when she was in the 8th grade. CP 53.

After the interview, the police arrested Plueard. After being advised of his rights, Plueard waived them and agreed to speak with the police. CP 55.

Plueard stated that he was ten years old when he began living with his mother and half-sisters. CP 55. He also stated that he thought that “all of this” had been dealt with a long time ago. The detective asked what he meant, and Plueard responded that there had been an incident when he was younger where he and MKM had had “some sort of sexual attraction for each other.” He stated that he was ten at the time and she was 5. He said it was just touching and fondling, and was a one-time incident. Plueard asserted that he went to counseling and although the court wanted to charge him, nothing happened. He “knows” it was wrong but wanted to put it behind him. He clarified that he fondled her genitals, and she fondled his. He asserted that “unless he was sleepwalking” nothing else had happened between them. CP 56.

The detective confronted Plueard with the allegations that MKM had made. Plueard then said the only explanation he had was that he had never lived with them until he was 10 and had never had a “birds and the bees”

talk, and he developed a sexual attraction for MKM. He added that he thought she had for him too. CP 56.

Plueard denied that he ever had sexual intercourse with MKM. The detective responded that she had described it in detail and asked him why she would make it up. Plueard stated that he did not know. When the detective told him he did not believe him, Plueard admitted that there might have been more than one incident of fondling. He also said he was not at the house after he turned 18. He became angry and said he was done talking. CP 56.

Plueard nevertheless continued to talk. He told the detective that it would not have continued after he was 11. He was very afraid of his stepfather after the first incident came out. CP 56.

The detective asked Plueard to describe the incident he did remember. Plueard said it happened in MKM's bedroom in the basement. It was late evening and he went downstairs into her room. They talked a bit and that led to fondling. They were not completely naked. MKM pulled down her pants and he unzipped and pulled out his penis. They started fondling each other. He touched the outside of her vagina with his hand. He denied penetrating it with his finger. He said he stopped because he remembered thinking it was wrong. He said it was like the song, "this is so wrong, but it feels so right."

Plueard did not recall telling MKM not to tell their parents. Although he did not recall that, he stated that it would not surprise him if he had. Then

he stated that it was “don’t tell Mom or Dad because they will get mad,” not “don’t tell them or I’m going to hurt you.” He denied telling her that CPS would take her away. He did not know anything about CPS at the time. CP 56.

Plueard denied the Oregon incident. He also denied ever touching his half-sister CLM or his step-sister EWM. CP 56.

Plueard again asserted that it would not have continued after he was 11. CP 56. When the detective again suggested he did not believe him, Plueard became angry and terminated the interview. As the detective was leaving, Plueard called him back and stated that he wished to keep speaking. CP 57.

Plueard went on about how afraid he was of his stepfather at the time, and how frustrated he was at being called a liar. The detective responded that there were two different stories, so someone was clearly lying. CP 57.

Plueard then stated that he and MKM had hit it off when he first came to live with them. He would go into her room and they would talk. The subject of sex came up. Plueard acknowledged that yes, he was talking to a five-year-old about sex. He said he brought it up but she had a lot of questions about it. She would ask a question and then he would show her. He maintained that he never penetrated her. He thought it was “a mental block” that stopped him and told him that was too far. CP 57.

He also admitted that he showed her some “sexual positions.” They were both fully clothed at the time. He also admitted that the molestation went on for about six months. He admitted doing it to her about once a week on average. CP 57.

Plueard kept suggesting that MKM had him confused with someone else. He denied recollection of ever digitally penetrating MKM, but conceded that it was possible. He also admitted to rubbing his penis on the outside of her vagina, but again denied ever penetrating it. He thought that MKM asked him not to put his finger in her because she was scared. CP 57.

A few weeks after his arrest, Plueard’s cellmate, Goodloe, approached a corrections officer and reported that Plueard had confessed to him. Plueard told Goodloe that he had been having sexual relations with his sister since about 2000. CP 60.

Plueard further told Goodloe that his father was in the security business and Plueard could get him some guns if Goodloe could make his sister change her testimony. Goodloe showed the officer a business card from Plueard’s lawyer that had an address written on it. CP 60.

Goodloe was then interviewed by a Sheriff’s detective. CP 61. Goodloe and Plueard were cellmates for 12 days. Plueard initially declined to tell Goodloe what he had been arrested for. Later, Goodloe came back from a meeting with his attorney and told Plueard that he hoped to be

released soon. Plueard then told Goodloe that he was charged with rape of a child. Plueard at first said the victim was “some ‘bitch’ living at his house.”

A few days later, Plueard told Goodloe that the victim was his sister, who Plueard identified as MKM. Plueard said he had only had intercourse with her three times. He also said he had been in juvenile detention for touching her and that when he had gotten out, his father had hired guards to watch him when the parents were not there. CP 62.

Plueard said that between 2003 and 2004, he been touching or penetrating MKM. He called it “touching her monkey.” Goodloe asked Plueard why he would do that to his own sister. Plueard went into a story about how his mother had killed his father and been sent to prison. Plueard lived with his grandparents until she got out. MKM was already there by the time he returned to live with his mother. Plueard believed his mother had given him MKM for his pleasure to make up for having his father killed. He was doing it to get back at his mother and stepfather, who he did not like. CP 62.

He said that early on, he touched her vagina in a “‘You show my yours and I’ll show you mine’ kind of thing.” CP 63. Later on, MKM would “suck him off” and he would masturbate in front of her downstairs in her room. CP 64. Plueard claimed that after the first time when they had oral sex, MKM wanted full penetration. He said it was very difficult because she

was very “tight.” Afterward, he used a lot of lubricant. CP 62.

Plueard also said MKM would sit on his lap often and their mother would see this and tell him that it was inappropriate. One time she was on his lap, and Plueard pulled her shorts aside and put his finger in his vagina. He also fondled her breasts, but said she was “fat” and did not have “titties.” Plueard nevertheless described himself as a “chubby chaser,” meaning he liked fat girls. CP 62. Goodloe asked Plueard why he had never had a sexual relationship with CLM. Plueard informed him that he did. CP 63.

Plueard said a “lot of stuff” stopped with MKM once he got a girlfriend. Sometimes MKM would come and sit on his lap because she was jealous. CP 63. Plueard said that he and his fiancée had a good sex life, but that since she had the baby, she had gained a lot of weight and smelled funny. He said that he had the best of both worlds by having sex with his sister and his fiancée. CP 64.

Believing that Goodloe would be released soon, Plueard asked him if he liked guns. He told him that if he did him a favor, he could get him some guns. He explained that his parents had a security company and that his stepfather had multiple guns. CP 62. Plueard told Goodloe that once the charges against him were dropped, he would break in and disarm his parents alarm and steal a shotgun and handgun for him. CP 63.

Plueard wanted Goodloe to “scare the shit out of his sister and

mother” so they would not testify. He wanted him to drive up to MKM when she was walking to school, get out and yell at her. “you better not testify against Spenser!” He also wanted Goodloe to flatten his mother’s tire and then to approach her and offer to help her change it when she discovered it. Goodloe was then to tell his mother that “Spenser said it could be worse if she was to testify against him, because the next time it might be the brake line.” CP 63.

Plueard told Goodloe that there were two pit bulls named Maggie and Tanner. He would be all right if he called them by name. Goodloe said Plueard described the house as brown and tan with old security cars in the fenced yard. The business card had the address of the Mulka home on it, and the names of Plueard’s mother and fiancée. CP 63.

A detective went to the Mulka home and spoke with the parents. The residence matched Goodloe’s description of it, as did Mulka’s Jeep. The detective also confirmed the names of the dogs, and that they had guns in the house. CP 64.

Subsequently, MKM’s sister CLM was interviewed at the prosecutor’s office. CLM reported that Plueard had molested her for about a year when she was eight or nine and Plueard was twelve or thirteen years old. It ended when she was around nine or 10. Most of the incidents occurred when she was sleeping: Plueard would not say anything and would

only do it when she thought he was asleep. CP 49. Plueard also touched her vagina twice while they were riding in a car. CP 50.

Plueard moved under RCW 9A.04.050 to exclude the charges against him that occurred before he turned 12 years old on the grounds of incapacity. CP 22. He also moved to exclude his March 2010 confession on two grounds: that admissions to acts before he turned 13 were irrelevant because he did not have capacity to commit a crime at the time, and because the admissions to acts after he turned 13 were irrelevant because the acts were outside the charged offense dates. CP 24. The trial court, in a written opinion, found that the State had established capacity and that the “lustful disposition” evidence was admissible. CP 33.

After the trial court’s decision, the State amended the information, to allege one count of first-degree child molestation as to each of Plueard’s sisters. The charging period in Count I (re CLM) alleged acts occurring when Plueard was between 11 and 13 and a half. Count II (involving MKM) alleged acts occurring when Plueard was between 11 and 17 years old. The witness intimidation charge was unchanged. CP 39. The case proceeded to trial on stipulated facts, and Plueard was convicted as charged. CP 44.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT PLUEARD HAD THE CAPACITY TO COMMIT THE CRIME OF CHILD MOLESTATION WHEN HE WAS ELEVEN YEARS OLD.

Plueard argues that the trial court abused its discretion in finding that Plueard had the capacity . This claim is without merit because the evidence, including that of Plueard's sexual maturity, his appreciation of the wrongfulness of the acts, his desire to conceal the acts, and his appreciation that consequences could flow from discovery, supported the trial court's conclusions.

1. *Legal standards*

Pursuant to RCW 9A.04.050, children between the ages of 8 and 12 years old are presumed to be incapable of committing a crime. RCW 9A.04.050 provides:

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.

The statute codifies "the infancy defense." The purpose of the infancy defense is "to protect from the criminal justice system those individuals of tender years who are less capable than adults of appreciating the wrongfulness of their behavior." *State v. Ramer*, 151 Wn.2d 106, 114, 86

P.3d 132 (2004) (quoting *State v. Q.D.*, 102 Wn.2d 19, 23, 685 P.2d 557 (1984)).

The presumption of incapacity can be overcome with clear and convincing evidence that the child had sufficient capacity to understand the act charged and to know that it was wrong. *Ramer*, 151 Wn.2d at 114 (citing *State v. J.P.S.*, 135 Wn.2d 34, 37, 954 P.2d 894 (1998), and *Q.D.*, 102 Wn.2d at 26). The burden of proof rests upon the State to prove capacity. *State v. T.E.H.*, 91 Wn. App. 908, 913, 960 P.2d 441 (1998). Capacity hearings are not “adjudicatory” hearings: rather, they are preliminary determinations, and, therefore, rules of evidence and other exclusionary rules do not apply. ER 1101; *State v. Linares*, 75 Wn. App. 404, 408-09, 880 P.2d 550 (1994). On appeal, a finding of capacity will be upheld provided there is evidence from which rational finder of fact could find capacity by clear and convincing evidence. *T.E.H.*, 91 Wn. App. At 914..

J.P.S. sets forth several factors that may assist the court in determining whether a child knew the offending action was wrong, though no one factor is required or determinative:

- (1) The nature of the crime;
- (2) The child's age and maturity;
- (3) Whether the child showed a desire for secrecy;
- (4) Whether the child admonished the victim not to tell;
- (5) Prior conduct similar to that charged;

- (6) Any consequences that attached to the conduct; and
- (7) Acknowledgment that the behavior was wrong and could lead to detention.

J.P.S., 135 Wn.2d at 38-39.

In the present case there was sufficient evidence from which the court could find Plueard understood and appreciated the gravity of his acts. The State will discuss each of the *J.P.S.* factors.

2. *The nature of the crime*

Capacity determinations are to be made in light of the specific act charged. *Q.D.*, 102 Wn.2d at 26. The nature of the behavior charged is an important factor in determining capacity. *J.P.S.*, 135 Wn.2d at 38. In order to prove capacity, it is not necessary to establish that the child knew the offending action was illegal or would be punished as a crime. *J.P.S.*, 135 Wn.2d at 38. All that is required is an appreciation of the wrongful quality of the act at the time it was committed. *J.P.S.*, 135 Wn.2d at 38. The more intuitively wrong the conduct is, the more likely the child will be aware that the conduct is inappropriate and will result in consequences. *State v. J.F.*, 87 Wn. App. 787, 790, 943 P.2d 303 (1997) (*quoting Linares*, 75 Wn. App. at 415 n.12).

Here, the record shows that Plueard was aware *at the time* that his actions were wrong. He admitted in his statement to the police that he knew at the time that his conduct was wrong, or at the very least that he “had a very

strong feeling that it was wrong, and that as a result on “many, many nights” he would resist the “urge” to enter his sister’s room. Exh. 1, at 14:02.¹ He compared his state of mind to that of the song, “so wrong, but feels so right.” *Id.*, at 13:02-13:03.

3. *Plueard’s age and maturity;*

While Plueard stated he was only 10 (and she 5) when the fondling of MKM began, he also reported that at that age he had a sexual maturity beyond that of a typical 10-year-old. He was able to instruct her on sexual positions because he “learned a lot about sex” by looking at pornography on the internet since he was eight years old. *Id.*, at 13:59.

4. *Whether Plueard showed a desire for secrecy;*

Plueard admitted he went downstairs to his sister’s room in the basement in the evening or at night, when his parents were away. *Id.*, at 12:59-13:00.

5. *Whether Plueard admonished the victim not to tell*

MKM reported that Plueard told her not tell. Plueard himself admitted that he told her not to tell. He explained that this was because their parents “always freaked out about sex.” *Id.*, at 13:05.

¹ Plueard’s confession was not transcribed. References are to the time-stamp appearing on the video.

6. *Prior conduct similar to that charged*

If such evidence is available, the court may consider prior conduct by the child that was similar to the offense in question. *J.P.S.*, 135 Wn.2d at 39. Although Plueard had prior juvenile offenses, they did not involve sexual misconduct.

7. *Any consequences that attached to the conduct*

Again as noted, Plueard was aware at the time that his parents would respond unfavorably to his actions.

8. *Acknowledgment that the behavior was wrong and could lead to detention*

Admission of wrongfulness is a factor to consider, however, an admission of wrongfulness after the act alone will not be sufficient unless the defendant admits knowing it was wrong at the time they committed the act:

[T]he relevant inquiry is whether the child appreciated “the quality of his or her acts at the time the act” was committed.

Linares, 75 Wn. App. at 416 n. 15. As previously noted, and contrary to the suggestion made by Plueard, he specifically admitted to knowing that the conduct was wrong *at the time*.

When considering all the foregoing, it cannot be said that the trial court abused its discretion in concluding that Plueard had the capacity to commit the crime of child molestation at the time he was 11 years old. His convictions should be affirmed.

9. *Remedy*

If this Court finds that the trial court abused its discretion in finding that Plueard had capacity before he turned 12, the next question to be considered is the scope of the remand. Plueard argues only that his convictions should be reversed. Plueard does not suggest what should then occur. If his case had been tried to a jury, the State might agree that a new trial would be required.² This case, however, was tried to the court on stipulated facts. The State submits that the proper course if reversal is required would be remand to the trial court for a determination of whether the court still find guilt based on conduct after Plueard's 12th birthday.

Remand is generally proper where a trial court enters a conclusion of law finding a defendant guilty of a crime but omits a finding as to an essential element necessary to support that conclusion. *State v. Alvarez*, 128 Wn.2d 1, 19–22, 904 P.2d 754 (1995); *State v. Avila*, 102 Wn. App. 882, 886–87, 896–97, 10 P.3d 486 (2000), *review denied*, 143 Wn.2d 1009 (2001).

Here the case for remand is more compelling. The trial court found Plueard guilty of all the elements of each offense. Moreover, there was no basis to distinguish between the evidence before and after Plueard's 12th birthday.

² Plueard does not suggest that his claim involves one of sufficiency of the evidence, which would bar retrial. Nor would such a suggestion be well-taken. Capacity would not be presented to a jury as an element to be found, and need not be found beyond a reasonable doubt. It is clearly not an element of the offense.

Both counts charged conduct beginning when Plueard was 11 and continuing for a period well beyond his 12th birthday. The statements of both girls supported the charging periods. Plueard denied any contact with CLM. Although he insisted that his contact with MKM ended when he was about 11, that claim is inconsistent with his oft-repeated claim that he stopped when CPS became involved because he feared his father and criminal charges. Exh. 1, at 12:37, 12:53, 12:56, 13:16, 13:47, 14:18, 14:19. The evidence showed, however, that Plueard was already 12 when the molestation was reported to CPS. *Cf. State v. Camarillo*, 115 Wn.2d 60, 65, 794 P.2d 850 (1990) (when considering harmlessness of failure to give a unanimity instruction in a multiple acts case, “the jury may consider the totality of the evidence of several incidents to ascertain whether there is proof beyond a reasonable doubt to substantiate guilt because of the acts constituting one incident and also to believe that if one happened, then all must have happened.”).

In the event that the Court finds error, the case should be remanded for the trial judge to determine whether it would still find guilt based only on the evidence of the acts that occurred after Plueard turned twelve.

B. THE TRIAL COURT PROPERLY DETERMINED THAT EVIDENCE OF LUSTFUL DISPOSITION IS PROPERLY ADMISSIBLE UNDER ER 404(B), EVEN IF THE DEFENDANT LACKED CAPACITY DUE TO AGE AT THE TIME THE PRIOR ACTS WERE COMMITTED.

Plueard next claims that the trial court erred in admitted his statements to the police as evidence of lustful disposition under ER 404(b). Plueard does not dispute the legal theory or factual basis for the trial court's ruling, other than his claim that he lacked the capacity to commit the offenses he described in his statement to the police. However, the entire concept underlying the admissibility of "lustful disposition" evidence is that it shows a defendant's desire toward the particular victim. This probative value remains regardless of whether the defendant may be charged with a crime for the conduct or not.

The trial court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Carleton*, 82 Wn. App. 680, 684, 919 P.2d 128 (1996). ER 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before a court admits evidence under this rule, it must (1) identify the purpose for introducing the evidence, (2) determine relevancy to an element

of the crime charged, (3) weigh the probative value against its prejudicial effect. *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982). As noted, Plueard does not challenge the propriety of the trial court's determinations in this regard.

The 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 victim. *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). The critical factor is that the other misconduct is directly connected to the victim, and thus does not just reveal the defendant's general sexual proclivities:

Such evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged.

... The important thing is whether it can be said that it evidences a sexual desire for the particular female.

The kind of conduct receivable to prove this desire at such ... subsequent time is whatever would naturally be interpretable as the expression of sexual desire.

Ray, 116 Wn.2d at 547 (*quoting State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983) (alterations the Court's)).

Nothing in any of the cases cited by Plueard holds that misconduct must be chargeable to be relevant and admissible. Incapacity is based on a Legislative policy decision not to hold certain young offenders accountable for their actions. The rules of evidence, on the other hand, are founded on

relevance. If the evidence satisfies the narrow constraints of the lustful disposition doctrine, and the slightly broader limits of ER 404(b), there is no justifiable reason for excluding it. Plueard does not challenge the trial court's compliance with these rules.

Instead he argues, somewhat disingenuously, that because his acts may not be prosecuted due to his relative youth at the time, his molestation of his 5-year-old sister cannot be deemed "sexual misconduct." Indeed, here, Plueard himself described his feelings toward his sister as one of "sexual attraction" and "urges" toward her. Exh. 1, at 12:44, 14:01-14:02. As noted previously, Plueard acknowledged the wrongfulness of the conduct.

Even if that evidence were insufficient to establish his legal capacity clearly and convincingly, they do not render the acts not "sexual misconduct." Incapacity is not unlike a statute of limitations, which puts otherwise illegal conduct beyond the power of the State to punish. In such cases, however, the time elapsing since the conduct does not necessarily preclude its admission as evidence of lustful disposition. *Ray*, 116 Wn.2d at 547-48 (holding incidents of incest occurring ten years before charged offense properly admitted); *State v. Guzman*, 119 Wn. App. 176, 79 P.3d 990 (2003), *review denied*, 151 Wn.2d 1036 (2004) (six years).

This evidence was relevant and probative. The trial court did not abuse its discretion in refusing to exclude it.

Plueard also claims that his confession was inadmissible as to CLM because evidence of lustful disposition may only be used with regard to crimes involving the same victim as was the subject of the prior acts. The State agrees with this contention. It notes however, that Plueard's confession was offered, pursuant to the stipulated facts agreement, only with regard to Count II, which pertained to the molestation of MKM. CP 40, 44. At the stipulated facts trial the State only argued that the confession was relevant to Count II. RP (4/25) 6. As such, any reference in the trial court's evidentiary ruling to the "girls" would be harmless.

This concession is based on Plueard's denial of any contact with CLM. Any statements by CLM of Plueard's past acts against her would be admissible as to Count I for the same reason that his prior acts with MKM are admissible as to Count II, as previously discussed.

IV. CONCLUSION

For the foregoing reasons, Plueard's conviction and sentence should be affirmed.

DATED December 27, 2011.

Respectfully submitted,

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KITSAP COUNTY PROSECUTOR

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