Did Spenser James Plueard When He Was Under Twelve Years Old Know That It Was Wrong to Sexually Molest His Sisters MKM and CLM?

State v. Plueard, *No. 42167-4-II (Wash. Ct. App. Feb. 20, 2013)*

Spenser James Plueard was born in November 1988. He lived with his grandparents and in foster care while his mother was in prison. In approximately 1998 or 1999, when Plueard was around 10 years old, his mother regained custody of him, and he moved in with her, his stepfather, and his two half sisters, MKM and CLM. Shortly after moving in with his half sisters, Plueard developed a "sexual attraction" for MKM, which he thought she also shared. When he was 10 years old and MKM was 5, he started going into her bedroom at night, touching her body, and telling her that it was "normal."

Plueard also touched his other half sister, CLM, beginning in 2000 or 2001 on multiple occasions, when he was around 11 1/2 or 12 1/2 years old and CLM was 8 or 9. Plueard also touched her vagina on two occasions when they were driving in a car. This sexual contact occurred two or three times a week for a year. CLM eventually told Plueard that she would tell on him, and he stopped touching her.

Later that year, in 2001, when Plueard was 13 years old, his mother called Child Protective Services (CPS) and reported that he had touched MKM's "privates." CPS dismissed the charges against Plueard as a "you show me yours, I'll show you mine" situation. Plueard attended counseling after this incident. Despite this counseling, Plueard continued to touch MKM in a sexual manner, which grew more intense over time.

On a weekly basis between 2001 and 2007, when Plueard was 13 to 19 years old, he touched MKM's bare vagina with his hand and with his penis, and he began having sexual intercourse with her when they were alone in her bedroom. Plueard repeatedly threatened MKM not to tell anyone about their sexual contact because "CPS would take her away" and "no one would believe her." He once became so angry at MKM for threatening to tell on him that he hit her in the face. Plueard last had sexual contact with MKM in 2007, when he was around 19 years old.

In 2010, when MKM went to the doctor for a yeast infection, she became very upset and did not want the doctor to examine her vagina. When her mother asked what was wrong, MKM disclosed that Plueard's sexual contact had continued after 2001 and the counseling. When MKM's mother confronted Plueard about the sexual contact, he denied it.

Law enforcement and CPS were again contacted, and MKM and CLM underwent child forensic interviews. After viewing a video recording of MKM's forensic interview, the police determined that they had probable cause to arrest . . . Plueard admitted several incidents of "touching" or "fondling" MKM before he was 12 years old; but he denied having sexual intercourse with her, and he denied touching CLM at all. . . .

Plueard eventually admitted that there may have been "more than one" touching incident. He specifically recalled one incident during which he had gone into MKM's bedroom at night when he had believed no one else was present. According to Plueard, he and MKM had talked for a while; eventually, MKM had pulled down her pants and they had started fondling each other. Plueard had unzipped his zipper, pulled out his penis, and touched the outside of her vagina with his hand; but he denied having stuck his finger or his penis inside her vagina. When the police asked why he had stopped before penetration, Plueard replied that he remembered thinking at the time that their sexual contact was "wrong" but that it was like the song lyrics, "[T]his is so wrong, but it feels so right." Plueard also explained that he had shown MKM "sexual positions" when they were fully clothed and admitted that he might have rubbed his penis against her vagina "once or twice."

Plueard . . . estimated that he had fondled MKM "once a week" for "six months" when he was around 10 years old and she was 5. He was adamant, however, that none of their sexual contact continued after he was 11 years old because he was "very afraid of his stepfather" after the "first incident came to light." . . .

The State charged Plueard with two counts of first degree child molestation committed against CLM and MKM, respectively. Both counts included a charging period when Plueard was under 12 years old: Count I was based on Plueard's sexual contact with CLM between May 21, 2000, and May 20, 2002, when Plueard was between 11 1/2 and 13 1/2 years old. Count II was based on Plueard's sexual contact with MKM between December 6, 1999, and December 5, 2005, when Plueard was between 11 and 17 years old. The trial court found Plueard guilty of both counts.

When the superior court finds capacity under RCW 9A.04.0507 we review the record to determine whether there is substantial evidence establishing that the State met its burden of overcoming the statutory presumption that children under 12 years of age are incapable of committing a crime. In order to overcome the presumption of incapacity, the State must provide clear and convincing evidence that the child had sufficient capacity both to understand the act and to know that it was wrong.