No. 58416-6-II



COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON

v.

LORENZO ARMENTA

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# PETITION FOR REVIEW

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A. Identity of Petitioner

Lorenzo Armenta asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

On July 29, 2024, the Court of Appeals filed its opinion affirming Mr. Armenta's judgment and sentence. A copy of the decision is in the Appendix.

C. Issues Presented for Review

4. Should this Court grant review to reconcile its conflicting decisions regarding the competency of extremely young children in delayed reporting sexual assault cases?

5. A seven-year-old child disclosed sexual abuse that allegedly occurred when she was between two-and-a-half and five years old. The trial court allowed her to testify for the jury and admitted child hearsay without

hearing from the child and determining her capacity at the time of the alleged abuse. Was this error?

6. Having improperly presumed the child competent, did the trial court compound the error admitting child hearsay statements without requiring corroboration?

D. Statement of Facts

Lorenzo Armenta was charged by Second Amended Information with one count of First Degree Rape of a Child and one count of First Degree Child Molestation. CP, 185; RP, 735. Both charges allege a date range of January 1, 2015 through March 1, 2018. RP, 735. The victim of both offenses was A.Z., whose birthday is June 11, 2012. RP, 654.

A.Z. is the daughter of Diana Garcia.[1] RP, 571. Ana Karen Garcia is Diana Garcia's sister and A.Z.'s aunt. RP, 515. Eloisa Dominguez-Cira is the mother of both Diana and Ana Karen and A.Z.'s grandmother. RP, 410. Ana Karen described

[1] For clarity, Diana Garcia and Ana Karen Garcia are referred to by their first names. No disrespect intended.

her relationship with A.Z. as "very close," "like a daughter." RP, 517, 515. Although the record is somewhat ambiguous, Mr. Armenta and Diana had a romantic relationship for a period of time that roughly coincides with the charging period, breaking up in February of 2018. RP, 584. After the breakup, A.Z. had no further contact with Mr. Armenta. RP, 588. She was, therefore, a part of Mr. Armenta's life from the ages of 2-1/2 through 5-1/2.

The trial court admitted a substantial amount of child hearsay pursuant to RCW 9A.44.120. A child hearsay hearing was conducted and the trial court heard from forensic interviewer Keri Arnold (RP, 160), Diana Garcia (RP, 257), Ana Karen Garcia (RP, 234), and Ms. Dominguez-Cira (RP, 203). Each of these witnesses testified at the child hearsay hearing about the child hearsay they overheard – hearsay that was later repeated for the jury. All of the child hearsay statements were made when A.Z. was seven years old about events that occurred

between the ages of two-and-a-half and five years old. RP, 778. She was ten years old at the time of trial.

In addition to the hearsay, the Court heard the following facts about A.Z. during the child hearsay hearing. Diana had taught A.Z. the importance of being honest and not telling lies. RP, 272. A.Z. understands the difference between the truth and a lie, but she nevertheless does lie on occasion. RP, 277, 284. A.Z. is a talkative, friendly, empathetic child. RP, 273. In her younger years, she had an active imagination and liked making up stories. RP, 273. By the time of the trial, she was growing out of that phase. RP, 284.

Significant to this appeal, the State did not call A.Z. at the child hearsay hearing, although she did testify for the jury. When the State announced they would not call A.Z. at the child hearsay hearing, Mr. Armenta promptly objected. RP, 288. Mr. Armenta argued that the Court could not assess the competency of the victim without hearing from her. RP, 288. Mr. Armenta conceded that A.Z. presently has the capacity to express in

words her memory and to understand simple questions about it, but argued that there was no basis to conclude she understands the obligation to tell the truth. RP, 292. More importantly, he argued there was no evidence A.Z. had the mental capacity at the time of the occurrence to receive an accurate impression and a memory sufficient to retain an independent recollection. RP, 292. The Court overruled the objection and concluded that A.Z. is presumed competent and the burden was on the defense to overcome the presumption. RP, 294.

For the most part, the child hearsay witnesses testified to the same underlying facts at the child hearsay hearing and for the jury. Rather than repeat the same facts, the following recitation of facts comes from the trial testimony.

On an unspecified date in October of 2019, when A.Z. was seven years old, A.Z. was being babysat by her aunt and grandmother. RP, 520-21. A.Z. was in her grandmother's bedroom jumping on the bed when she volunteered to Ana Karen that she had a secret with Mr. Armenta. RP, 523. She

stated when her mom would go to work, Mr. Armenta would blindfold her and have her touch something. RP, 523. Using hand motions and a pillow, she demonstrated cupping her hands together around the object and moving her hands up and down. RP, 523. She also said he put something in her mouth. RP, 523. Ana Karen asked where this happened and A.Z. said at the "blue house." RP, 525.

Ana Karen got Ms. Dominguez-Cira's attention and asked A.Z. to repeat what she had said. RP, 421. A.Z. said she played a game with Mr. Armenta where he would blindfold her and have her grab onto something with both hands, after which she demonstrated an up and down motion. RP, 422. Ms. Dominguez-Cira asked her to repeat what she said again and A.Z. repeated the same thing. RP, 423. She asked her to repeat it a third time (actually a fourth time, if her statements to Ana Karen are considered) and she repeated it but added that one time she was able to see outside the blindfold and she saw that she was holding his "private part." RP, 424. Ms. Dominguez-

Cira asked if it happened once or more than once and A.Z. said it happened many times. RP, 425. Ms. Dominguez-Cira asked where it happened and A.Z. said it happened at the last place they lived. RP, 425.

Ana Karen and Ms. Dominguez-Cira decided to call Diana and have her come over. RP, 526. When Diana arrived, she went directly to her daughter and asked what was wrong. A.Z. said she and "Lorenzo had a secret she wasn't supposed to talk about." RP, 600. She said Mr. Armenta would blindfold her and have her grab something with both hands and make an up and down motion. RP, 601. On one occasion, she could see what the object was underneath the blindfold. RP, 601. She also said he put something in her mouth and she could spit it out if she wanted. RP, 602. Diana asked when this happened and she said it happened in the house with the big yard and trampoline. RP, 602. Diana decided to call law enforcement. RP, 604.

A couple weeks later, Diana, Ana Karen, and Ms. Dominguez-Cira took A.Z. to the Child Advocacy Center

(CAC) for a forensic interview. RP, 605. Keri Arnold, a child interviewer employed by the Pierce County Prosecutor's Office, conducted the interview. RP, 762. In the recording, A.Z. described various sexual acts committed by Mr. Armenta.

A.Z. was asked where this happened. She answered, "At my house." "I don't know what kind of house, but like, our really, really old house when we used to live with Lorenzo. But – yeah. Now we don't anymore." Exhibit 2; Pg. 34. The house had a "backyard" and a "gate and – something and like – ." Exhibit 2; Pg. 34. The house was "kind of, like, big, and then the outside, I think, a little blue and white." Exhibit 2; Pg. 35. Asked when the first time it happened, A.Z. answered, "I don't remember." Exhibit 2; Pg. 36.

A.Z. did not say anything to Ms. Arnold about a trampoline. RP, 831. Ms. Arnold never asked A.Z. how old she was when this happened. RP, 833. When questioned about this omission, Ms. Arnold explained in her experience, when

children are asked how old there were, they are "likely to guess." RP, 833.

A.Z. testified in front of the jury. RP, 654. She remembered two residences during this period. She described living in an apartment in Puyallup with her mom. RP, 662. She also described living in a blue house with a big backyard and trampoline. RP, 663. Mr. Armenta lived with them in the blue house. RP, 665. A.Z. described Mr. Armenta blindfolding her with a scarf and putting her hands on something. RP, 670. One time she looked under the blindfold and saw Mr. Armenta lying on the bed with his hands behind his head. RP, 671. When specifically asked whether she saw his "private parts," she said she could not remember. RP, 703. She described moving her hands up and down on a "something." RP, 673. When asked to describe the "something," she said it was like a "circle" and "wet." She did not know how many times this occurred, but more than once. RP, 675-76. There were also times he put her mouth on it. RP, 676. When that happened, a "drink" went into

her mouth. RP, 677. The drink had the consistency of water and warm like a bath temperature. RP, 678. This happened in the blue house. RP, 682. A.Z. believed she was four or five years old at the time of the incidents. RP, 708.

Mr. Armenta, Diana and A.Z. lived in five separate residences together. When they first got together, Diana was living in an apartment in Puyallup and Mr. Armenta moved in for a short time. RP, 578. They then moved into her family's house with Diana's mother, two sisters, and brother. RP, 578-79. This house was a large five-bedroom house in Puyallup. RP, 580. This house was painted blue with white trim. RP, 485; RP, 759; Exhibit 16. They lived there for a year. RP, 584. They then moved into a house with Mr. Armenta's family for three months. RP, 583. The fourth residence was a brown condo in Puyallup. RP, 581. They lived there for one year. RP, 584. The fifth residence was a two-bedroom house in Tacoma with a big yard, a trampoline, and a swimming pool in the summer. RP, 581-82. The Tacoma house is not blue, but white with brown

trim. RP, 626; RP, 759; Exhibit 15. Diana and Mr. Armenta were close to the end of their one-year lease in February of 2018 when they broke up. RP, 585. Diana and A.Z. moved out of the Tacoma house, leaving Mr. Armenta to finish the last few weeks of the lease. RP, 616.

E. Argument Why Review Should Be Accepted

Few issues confound criminal practitioners – prosecutors, defense attorneys, and trial judges alike – more than the issue of how to address allegations of physical and sexual assault committed against our state's most vulnerable and youngest children while simultaneously protecting the accused from false or mistaken allegations. Nor are the Justices of this Court immune from this challenge, as reflected by the conflicting decisions to come out of this Court. Compare *In re Dependency of A.E.P.,* 135 Wn.2d 208, 956 P.2d 297 (1998) and *State v. Woods*, 154 Wn.2d 613, 114 P.3d 1174 (2005) with *State v. Brousseau*, 172 Wn.2d 331, 259 P.3d 209 (2011) and *State v. S.J.W.,* 170 Wn.2d 92, 239 P.3d 568 (2010). Compare, also,

*State v. C.J.,* 148 Wn.2d 672, 63 P.3d 765 (2003) with *State v. Karpenski*, 94 Wn. App. 80, 971 P.2d 553 (1999).

Children are different. *State v. Houston Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). For the past decade, this Court has expended enormous resources examining the adolescent brain, concluding based upon psychological studies that the brain is not fully developed until roughly the age of twenty-five. See *State v. O'Dell*, 183 Wn.2d 680, fn.5, 358 P.3d 359 (2015). Meanwhile, this Court has ignored the equally well documented fact that extremely young children have grossly underdeveloped brains and are susceptible to a variety of outside influences. See *State of New Jersey v. Michaels*, 642 A.2d 1372 (N.J. 1994) and psychological studies cited therein. Instead, this Court has rested its conclusions on the artificial and counterfactual legal fiction that all people are competent, even a child as young as two-and-a-half, as in Mr. Armenta's case. How many innocent men and women sit in prison based upon the faulty memories of a preschool child? Unfortunately,

outside of a Phillip K. Dick novel, there is no way to reduce that number to zero. There are no magic beans or DNA-type technology that will affirmatively tell us when a child is relating a real-life experience or a false memory. But we owe it to the citizens of this state to try. And ignoring the uncontroverted physiological and psychological studies of the toddler brain is irresponsible.

This Court announced the basic framework for evaluating a witness' competency in *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967) by creating a five-factor test, a test that has remained essentially unchanged for over half a century. But since then, this Court has been inconsistent in its application of that test. Application of the *Allen* factors has proved particularly difficult in cases involving delayed disclosures. While everyone understands that infants are incompetent and children over ten are almost always competent, there is considerable gray area in between. And it is in this field of uncertainty that Mr. Armenta's case falls. This Court should grant review to resolve these

conflicting cases and determine an issue of substantial public interest. RAP 13.4(b).

The legislature has decided that hearsay statements by a child under ten may be admissible as substantive evidence if the statements are deemed reliable and trustworthy by the court. RCW 9A.44.120. Whether statements are reliable are judged by the *Ryan* factors. *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984). Regardless of reliability, child hearsay is inadmissible unless either: (1) the victim testifies; or (2) the statements are corroborated. The trial court understood this and, at least implicitly, found there was no corroborative evidence. RP, 297. The trial court found that corroboration was unnecessary, however, because the A.Z. was available to testify. The trial court reached this conclusion without ever hearing from A.Z. or making any findings as to her competency to formulate memories at the time of the alleged incidents. CP, 95; RP, 294, citing *State v. Brousseau*, 172 Wn.2d 331, 259 P.3d 209 (2011). This was error.

A witness is competent to testify if the witness has (1) an understanding of the obligation to speak the truth on the witness stand, (2) the mental capacity at the time of the occurrence to receive an accurate impression of the matter about which the witness is to testify, (3) a memory sufficient to retain an independent recollection of the occurrence, (4) the capacity to express in words the witness' memory of the occurrence, and (5) the capacity to understand simple questions about it. *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967). Addressing the competency of young children, this Court said a "child must not only be able to relate facts truly (which refers to the time of trial), but must have been capable of receiving just impressions of the facts (which obviously refers to the time of the event)." *Allen* at 691.

This Court clarified the *Allen* factors in 1998 when it held that it is an abuse of discretion in a delayed disclosure case for a trial court to decline to make findings of the child's competency both at the time of the trial and at the time of the

event. *In re Dependency of A.E.P.,* 135 Wn.2d 208, 956 P.2d 297 (1998). In *A.E.P.,* the trial court failed to find when the abuse occurred or whether the child was capable of receiving accurate impressions of the event at that time. This Court determined that the abuse could have occurred as much as two years prior to the five-year-old child's initial disclosure. This Court said:

> To be competent to testify, A.E.P. must have had the mental capacity at the time of the alleged abuse to receive an accurate impression of it. Having reviewed the entire record, we find nothing establishing the date or time period of the alleged sexual abuse. None of the hearsay statements made by A.E.P. indicate when the alleged touching by her father happened. The record contains no indication of A.E.P. ever being asked by any of her interviewers to state, even in the most general of time periods, when the events happened. In fact, it appears from the record that A.E.P. was asked just one time when the alleged events happened – this occurred during the cross-examination of A.E.P.

*A.E.P.* at 223-24. This Court then concluded:

> [T]he court should have determined whether the child has the capacity *at the time of the event* to receive an accurate impression of the event. This would have required the trial court to fix a time period of the

> alleged abuse. Absent this critical information, and despite the high level of deference accorded to the trial court's competency findings, we are compelled to hold the trial court abused its discretion in finding A.E.P. competent to testify.

*A.E.P.* at 225-26 (emphasis in original).

This Court next addressed this issue in *State v. Woods*, 154 Wn.2d 613, 114 P.3d 1174 (2005), a 5-4 decision. In *Woods*, the trial court held a three-day pretrial hearing to address competency and child hearsay issues. The children were very young, four and six-years old at the time of their trial testimony, but they were able to provide accurate recollections of events, places, and people from the very narrow time period in which they were in the defendant's care. A majority of this Court distinguished *A.E.P.*, saying, "We explained that if A.E.P had been able to relate impressions of events which occurred contemporaneously with the alleged abuse, the court could have inferred A.E.P.'s competency to testify about the abuse incidents as well." *Woods* at 620, citing *A.E.P.* at 225.

Regarding the second *Allen* factor, the majority said the following:

> The purpose of the second *Allen* factor is to ensure that the child has the mental capacity to perceive accurately the events to which the child is testifying. In this case, the trial court observed both PW's and HW's overall demeanor and manner of answering. The trial court found that the facts elicited at the competency hearing narrowed the time of the abuse to a period of approximately nine months. The trial court heard the girls describe events and places contemporaneous with this nine month period.

*Woods* at 622.

*Woods* was decided over a vigorous dissent. The dissent disagreed that the second *Allen* factor was proven by the evidence, emphasizing that there was no evidence establishing when the alleged sexual abuse occurred, so there was no way to determine whether the very young children had the mental capacity at the time of the occurrence to receive an accurate impression of it. *Woods* at 625-26 (Justice Sanders, dissenting). The dissent would have concluded the child in *Woods* was incompetent for the same reasons the Court concluded the child was incompetent in *A.E.P.* Thus, although the majority and

dissent disagreed on its application in that case, this Court was unanimous that the second *Allen* factor must be considered by the trial court prior to finding the child competent and this will almost always require hearing from the child prior to trial.

The logic of *A.E.P.* and *Woods* are inescapable: a child who is old enough and mature enough at the time of trial to have the capacity to form memories and answer simple questions about those memories should nevertheless not be permitted to testify if they did not have that capacity at the time of the event as shown at a pretrial hearing. This Court started to retreat from the logic of *A.E.P.* and *Woods*, however, in *S.J.W.* and *Brousseau*. In *S.J.W.,* the defendant was convicted of raping a fourteen-year-old developmentally delayed boy. In *Brousseau*, the defendant was convicted of a raping a seven-year-old child who disclosed the sexual abuse to a trusted adult the next day after the abuse when the events were fresh in her memory. In those two cases, this Court declared that all people,

including children, are competent to testify, and the burden is on the defense to prove otherwise. *Brousseau* at 341. Referencing A.E.P.'s holding that a "child is not competent if one of the *Allen* factors is shown to be absent," this Court stated with little explanation that *A.E.P.* does not offer "any guidance." *S.J.W.* at 98. "Rather, we hold that courts should presume all witnesses are competent to testify regardless of their age." *S.J.W.* at 100.

In *Brousseau*, a majority of this Court concluded the defendant's "bare assertion" at the child hearsay hearing that the victim is incompetent is insufficient to require the trial court to hear from the victim. *Brousseau* at 345. Instead, the trial court relied on the testimony of the victim's psychologist. The majority concluded the trial court heard credible evidence from the psychologist that the victim had the capacity to understand the obligation to tell the truth and had the capacity at the time of the occurrence to receive an accurate impression of the matter about which the witness is to testify. As to whether she had a

memory sufficient to retain an independent recollection of the occurrence, she was able to provide a detailed physical description of the bedroom where it happened. Given this testimony from the psychologist, the trial court did not need to hear from the victim herself. Curiously, the majority then analyzes whether any error was harmless. The majority noted the victim testified at trial without difficulty and found any error harmless. *Brousseau* at 350.

Four Justices vehemently dissented. The dissenting Justices believed that finding a child competent without hearing from the child constitutes a due process violation. *Brousseau* at 363 (Justice Owens, dissenting). The dissenting Justices also disagreed that the error was harmless, finding that it was impossible to conclude what the court would have found had a proper competency hearing been conducted. *Brousseau* at 366 (Justice Owens, dissenting).

While Mr. Armenta respectfully concurs with the dissent in *Brousseau*, the outcome of the majority can be justified for

two reasons. First, *Brousseau* is not a delayed reporting case. The child in *Brousseau* promptly disclosed the abuse the day after it occurred when the abuse was fresh in her memory. The immediacy of the first disclosure gives it indicia of reliability in the same way that excited utterances and present sense impressions are considered reliable. Second, the trial court heard detailed testimony from the child's psychologist, who testified as the child's ability to form and relate memories contemporaneous with the alleged abuse.

Conversely, the trial court heard none of this in Mr. Armenta's case. A.Z.'s delayed disclosure means that there was at least two years, and possibly as much as five years, between the alleged abuse and the first disclosure. Assuming arguendo the truth of the allegations, she was between two-and-a-half and five years old when she was receiving impressions of the facts about which she was being asked to relate. Further, there was little to no evidence admitted of A.Z.'s maturity and ability to formulate memories at the time of the incidents. Under these

circumstances, it was error to place the burden on the defense to prove her lack of competency.

The Court of Appeals in Mr. Armenta's case concluded that although the *Allen* factors "continue to be a guide when competency is challenged," *A.E.P.* is no longer good law, pointing out that it was decided prior to *S.J.W.* and *Brousseau.* Opinion at 6. The Court of Appeals' analysis is understandable in light of this Court's mixed signals on the applicability of the *Allen* factors in delayed disclosure cases. Did this Court really mean what it said when it declared in *S.J.W.* that "all witnesses are competent to testify regardless of their age?" Would this Court really find a witness competent in, say, a case like *State v. Jennings*, 106 Wn.App. 532, 24 P.3d 430 (2001) (defendant convicted of torturing and raping a 13-day-old child). It is imperative that this Court clarify that *A.E.P.* and the *Allen* factors have not been overruled and children must be competent both at the time of the trial and at the time of the incident if their out-of-

court statements are to be admitted pursuant to RCW 9A.44.120.

Mr. Armenta's case provides an excellent vehicle to address these issues. The testimony in this case was that A.Z. was possibly as young as two-and-a-half and no older than five years old at the time of the alleged abuse. Children of this age are rarely found competent. See *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984) (two victims, four-and-a-half and five years old, both incompetent). The testimony in *Karpenski*, where a six-year-old described vivid memories of vacationing in Hawaii and being present for his brother's birth – neither of which occurred – is not unusual for small children.

In the few cases where children under six years old have been found competent, it was only after a pretrial hearing where the child testified and the trial court was able to assess their maturity and memory. See *State v. Woods*, 154 Wn.2d 613, 114 P.3d 1174 (2005). In Mr. Armenta's

case, the trial court did not hear from the child prior to trial and heard almost no evidence of A.Z.'s memory, maturity, or character during this period. The scintilla of evidence the trial court did hear about her during this period indicates she was unable to form reliable memories or relate them truthfully. According to her mother, during this period, she had an active imagination and liked making up stories. RP, 273. She was known to tell lies. RP, 294.

There was also a significant discrepancy in where and when the abuse occurred. The evidence was that Mr. Armenta, Diana and A.Z. lived in five separate residences together. Although the record is not a model of clarity on this point, it appears the following chronology is accurate. When Mr. Armenta and Diana broke up in February of 2018, they were at the tail end of a one-year lease at the white house with brown trim in Tacoma with a large backyard and trampoline. A.Z. was born on June 11, 2012, making her five years, eight months at

the time of the breakup. Working backward reveals the following chronology:

| Residence | Length of stay | A.Z.'s age at the time |
|---|---|---|
| Diana's apartment | Short time | Under 2 yrs. & 5 mos. |
| Blue-and-white house in Puyallup | One year | 2 years & 5 months – 3 years & 5 months |
| Mr. Armenta's family | Three months | 3 years & 5 months – 3 years & 8 months |
| Brown Puyallup condo | One year | 3 years & 8 months – 4 years & 8 months |
| White/brown house in Tacoma w/trampoline | One year | 4 years & 8 months – 5 years & 8 months |

A.Z. told her mother the abuse happened at the house with the trampoline. RP, 602. She repeated that to the jury. RP, 663. The only house with a trampoline was the white house with brown trim in Tacoma. If true, that would have made her between four-and-a-half and five-and-a-half years old. She did not tell the forensic interviewer, however, that it occurred at the house with the trampoline. RP, 831. Rather she told Ms. Arnold it happened in a blue and white house. Exhibit 2, page 35. She

also told Ana Karen it occurred at the blue house. RP, 525. If true, she would have been between two-and-a half to three-and-a-half years old. During the trial, she testified it occurred in a blue house with a big backyard and trampoline. RP, 663. No such house exists. Ms. Arnold made no attempt to learn how old A.Z. was at the time of the offense, explaining in her experience, when children are asked how old there were, they are "likely to guess." RP, 833. A.Z. told the jury she thought she was either four or five years old. RP, 708.

As was the case in *A.E.P.*, it was incumbent on the trial court to determine "whether the child has the capacity *at the time of the event* to receive an accurate impression of the event." The trial court made no attempt to do so, either at the child hearsay hearing or at trial. If *A.E.P.* has been overruled, this Court needs to so declare. But the better course of action is to clarify that the *Allen* factors remain good law and in cases involving delayed disclosures by young children, the trial court is required to determine at a pretrial hearing that the child is

both presently competent and competent at the time of the alleged abuse. The stakes could not be more dire. Paraphrasing the dissent in *Woods*, "A.Z.'s competency to testify to events that occurred prior to February, 2018 was never established. An innocent man may be imprisoned as a result." *Woods* at 625 (Justice Sanders, dissenting).

Assuming the trial court erred by finding A.Z. competent without a hearing, the trial court also erred by admitting child hearsay without corroboration. RCW 9A.44.120. Reversal is required.

F. Conclusion

This Court should reverse and remand for a new trial.

This Petition for Review is in 14-point font and contains 4918 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 16th day of August, 2023.

*Thomas E. Weaver*

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Attorney for Appellant

FILED
7/29/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br>Respondent,<br>v.<br>LORENZO REYES ARMENTA,<br>Appellant. | No. 86624-9-I<br>DIVISION ONE<br>UNPUBLISHED OPINION |

CHUNG, J. — When she was seven years old, A.Z. described sexual abuse by her mother's former boyfriend, Lorenzo Armenta, that had taken place before she turned six years old. The State charged Armenta with rape of a child in the first degree and child molestation in the first degree. The trial court found A.Z. competent to testify at trial and admitted child hearsay testimony from her mother, grandmother, and aunt, as well as the forensic interviewer. On appeal, Armenta claims the trial court erred in finding A.Z. competent and allowing the hearsay testimony. We conclude the trial court did not abuse its discretion and affirm.

## FACTS

Lorenzo Armenta and Diana Garcia dated for approximately three years. They lived together, along with Garcia's daughter A.Z. and other family members.

Armenta and Diana ended their relationship when A.Z was almost six years old.[1] A.Z. had no further contact with Armenta.

Around two years later, when A.Z. was seven years old, she was having a sleepover with her aunt, Ana Karen Garcia, and grandmother, Eloisa Dominguez-Cira, when she told them that she and Armenta had "a secret." A.Z. explained that when Diana was not home, she and Armenta played "a game" in which he would blindfold her, place her hands on something, and have her make an up and down motion. He also would "put stuff in her mouth." A.Z. said that one time, when her eyes had not been completely covered, she could see that she was touching Armenta's "private part." She told Ana Karen and Dominguez-Cira that this happened when they lived in the "blue house." Ana Karen and Dominguez-Cira had A.Z. repeat the story three times. When asked why she had not told them before, A.Z. said that Armenta told her it was a secret and she could not tell anyone.

Dominguez-Cira called Diana and told her to come to the house quickly. When she arrived, Diana asked A.Z. what had happened. A.Z. repeated the information she had told her aunt and grandmother. A.Z. said the activities took place when they lived in the house with the trampoline and the big yard. Diana called the police and subsequently took A.Z. to the Children's Advocacy Center for a forensic interview with Keri Arnold. In a recorded interview, A.Z. told Arnold

[1] A.Z. was born June 11, 2012. Diana and Armenta ended their relationship in February 2018.

that Armenta asked her to keep a "secret." She again described being blindfolded, being made to touch his "privates" and "put [her] mouth on it," and provided additional details. Asked where these incidents happened, she said at the "blue and white" house where they used to live with Armenta.

The State charged Armenta with rape of a child in the first degree and child molestation in the first degree. The State sought to introduce testimony about A.Z.'s statements to Diana, Ana Karen, Dominguez-Cira, and Arnold. The court held a child hearsay hearing in which the four women testified. After the testimony, Armenta inquired, "There's an issue of competency for the child, so I'm assuming they need to call her still; is that correct? Or are they not going to call her?" The prosecutor stated the State did not intend to call A.Z. to testify at the child hearsay hearing, but she would testify at trial. The State explained that a child is presumed competent and the defendant is not entitled to a competency hearing. Armenta replied, "We have indicated from the beginning . . . that there was a challenge to the competency of the child to testify. If the State is going to rely solely upon the testimony of their [sic] mother, that's their call, but I don't think that's sufficient for the Court to make that determination." The court reminded Armenta that he bore the burden of overcoming the presumption that the child was competent. Armenta had not subpoenaed A.Z. but stated that he could "challenge her competency based upon what the mother has testified to." Armenta argued that A.Z. was not competent because "[t]here's been no indication that she understands the obligation to speak the truth on the witness

stand," and "[t]here has been absolutely no testimony by the State to indicate that she has the mental capacity at the time of the occurrence to receive an accurate impression."

After hearing the parties' arguments on competency, the trial court found A.Z. competent to testify based on descriptions by her mother and the video and transcript of the forensic interview. The court reiterated that children are presumed competent and Armenta had not produced sufficient evidence for it to find A.Z. not competent. The court also admitted the child hearsay testimony from Diana, Ana Karen, Dominguez-Cira, and Arnold.

The child hearsay witnesses testified at trial. A.Z. also testified and faced cross-examination. A jury convicted Armenta as charged. The court sentenced him to a standard range indeterminate sentence of 160 months to life.

Armenta appeals.

## DISCUSSION

### I. Competency to Testify

Armenta contends "[t]he trial court erred by presuming a small child competent to testify without hearing from the child or determining her capacity at the time of the alleged abuse to receive an accurate impression of the abuse and testify truthfully about it later." We disagree.

A child's competency to testify at trial is determined within the framework of the general competency statute, RCW 5.60.050. State v. C.J., 148 Wn.2d 672, 682, 63 P.3d 765 (2003). The bar for competency is low. State v. Brousseau, 172

Wn.2d 331, 347, 259 P.3d 209 (2011). Children are presumed competent until proven otherwise by a preponderance of the evidence. Id. at 341. The burden of proving incompetency is on the party challenging the child witness. State v. S.J.W., 170 Wn.2d 92, 102, 239 P.3d 568 (2010). The challenging party must make a threshold showing of incompetency to require a pretrial hearing. Brousseau, 172 Wn.2d at 344-45. A bare assertion that a child witness is incompetent does not establish a basis for a competency hearing. Id. at 345.

In assessing whether a child is competent to testify, the court considers five factors, known as the Allen[2] factors:

> (1) an understanding of the obligation to speak the truth on the witness stand, (2) the mental capacity at the time of the occurrence to receive an accurate impression of the matter about which the witness is to testify, (3) a memory sufficient to retain an independent recollection of the occurrence, (4) the capacity to express in words the witness' memory of the occurrence, and (5) the capacity to understand simple questions about it.

C.J., 148 Wn.2d at 682. We review the trial court's determination of competency for abuse of discretion. State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005).

Armenta claims "[i]t is an abuse of discretion in a delayed disclosure case for a trial court to decline to make findings of a child's competency both at the time of the trial and at the time of the event," citing In re Dependency of A.E.P., 135 Wn.2d 208, 956 P.2d 297 (1998). The court in A.E.P. stated that the Allen factors must be found before a child can be declared competent. 135 Wn.2d at

[2] State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

223. However, A.E.P was decided before the court clarified in S.J.W. that children are presumed competent to testify, and "[a] party challenging the competency of a child witness has the burden of rebutting that presumption with evidence indicating that the child is of unsound mind, intoxicated at the time of his production for examination, incapable of receiving just impressions of the facts, or incapable of relating facts truly." S.J.W., 170 Wn.2d at 102. The Allen factors "continue to be a guide when competency is challenged." Id.

Brousseau further underscored the presumption of competency by approving of the federal requirement "that a court find 'compelling reasons' before requiring a witness to testify at a pretrial competency hearing." 172 Wn.2d at 343. The court noted, "it makes little sense to require the court to examine a witness—at the expense of the witness and the court—where the party challenging competency lacks a demonstrated ability to prevail in this challenge." Id. Mere recitation of the Allen factors or "bare assertions" do not constitute a sufficient offer of proof of incompetency. Brousseau, 172 Wn.2d at 344-45.

Armenta contends that Brousseau is inapposite because that case did not involve delayed disclosure. Additionally, A.Z. was "possibly as young as two-and-a-half and no older than five years old" at the time of the alleged abuse, and according to Armenta, "[c]hildren of this age are rarely, if ever, found competent." But the case law is clear that children of any age are presumed competent, and it is the challenging party who bears the burden of making a threshold showing of incompetency in order to obtain a competency hearing. Id. at 343.

Moreover, as competency may be challenged at any time, "a party challenging competency on the ground that the witness was not subject to examination at a pretrial hearing has ample opportunity during trial to correct a preliminary error." Id. at 348. A child found competent at one point in time may become incompetent at trial, at which point a litigant may object, or the court may conduct a competency determination sua sponte. Id. Here, A.Z. testified at trial and was subject to cross-examination. Armenta could have renewed his challenge to her competency, or the trial court could have raised the issue sua sponte at any point during the trial, but neither did so.

With respect to A.Z.'s competence, Armenta argued below that the State had not provided evidence that A.Z. could satisfy the Allen factors:

> There's been no indication that she understands the obligation to speak the truth on the witness stand. There's an indication that she understands the difference between a truth and a lie, but there's no indication she has an understanding of her obligation to tell the truth when she's testifying in this courtroom, the mental capacity at the time of the occurrence to receive an accurate impression of the matter about which the witness is to testify. There has been absolutely no testimony by the State to indicate that she has the mental capacity at the time of the occurrence to receive an accurate impression.
>
> There's also been indication that when she was younger, about the time these alleged incidents occurred, she had an active imagination.
>
> There's also an indication from the mother that she didn't fully understand what she was talking about or what had happened. And that goes to the issue number three, a memory sufficient to retain an independent recollection of the occurrence. There's absolutely no evidence to indicate that she has a memory sufficient to retain an independent recollection, for the capacity to express with words, the witness's memory -- to express in words the witness's memory.

Thus, though Armenta argued the State failed to establish the Allen factors as needed for competency, it was *his* burden to make a showing of *incompetency* sufficient to require a hearing. Instead, his argument attempted to improperly shift the burden to the State to establish competence. Therefore, the trial court did not abuse its discretion by determining, without conducting a hearing, that Armenta had not overcome the presumption of competency and that A.Z. was competent.

II. Child Hearsay

Armenta also assigns error to the admission of the child hearsay statements. He argues the trial court "based its opinion on A.Z.'s maturity and demeanor at the time of the statements without giving any consideration of her maturity and demeanor at the time of the alleged incidents." We disagree that the trial court erred by admitting the statements.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801. Generally, hearsay evidence is not admissible unless subject to an exception under rule or statute. ER 802. RCW 9A.44.120(1)(a)(i) allows for admission of hearsay evidence "made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another."

When deciding whether to admit hearsay evidence, the court must conduct a hearing outside the presence of the jury and find "that the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120(1)(b). Admissibility of child hearsay statements does

not require a showing of testimonial competency at the time of the out-of-court statements, including the ability to distinguish between truthful and false statements and an understanding of the obligation to tell the truth. C.J., 148 Wn.2d at 682-83. Rather, the inquiry focuses on whether the comments and circumstances surrounding the out-of-court statement indicate reliability. State v. Borboa, 157 Wn.2d 108, 120, 135 P.3d 469 (2006).

The Supreme Court has identified nine factors that courts should consider when assessing admissibility of child hearsay statements pursuant to RCW 9A.44.120, known as the Ryan[3] factors. Courts must consider

> (1) whether the child had an apparent motive to lie, (2) the child's general character, (3) whether more than one person heard the statements, (4) the spontaneity of the statements, (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness, (6) whether the statements contained express assertions of past fact, (7) whether the child's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the child's recollection being faulty, and (9) whether the surrounding circumstances suggested the child misrepresented the defendant's involvement.

Woods, 154 Wn.2d at 623. These factors must be "substantially met," and not every factor must be satisfied. Id. at 623-24. We review a trial court's decision on admissibility of child hearsay statements for abuse of discretion. Id. at 623.

[3] State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

After hearing testimony from Diana, Ana Karen, Dominguez-Cira, and Arnold, the trial court considered the Ryan factors and entered the following findings:

> 1. There is no evidence of a motive for A.Z. to lie;
> 2. The evidence shows that A.Z. is of good character which suggests trustworthiness. A.Z. had a lively imagination like most kids which is only encouraged;
> 3. A.Z. made statements to four people: Ana Karen, Eloisa Dominguez Cira, Diana Dominquez [sic], and Keri Arnold.
> 4. A.Z.'s statements were spontaneous as defined by the case law. Keri Arnold asked open ended questions that encouraged narrative responses. The only closed questions asked were clarifying questions;
> 5. The timing of A.Z.'s statements and her relationship with the witnesses suggest that her statements are trustworthy. All three relatives to whom A.Z. disclosed are close to [ ] her, but it is not surprising that a child is going to disclose to people to which she is closest;
> 6. The court did not consider factors 6 and 7.
> 7. The possibility of faulty recollection is remote. Despite inconsistencies between Ana Karen and Eloisa about where the incident occurred, there is no evidence that A.Z.'s recollection was faulty.
> 8. Based on the totality of the circumstances surrounding the making of A.Z.'s statements, there is no reason to believe A.Z. misrepresented the defendant's involvement.

As a result, the court admitted A.Z.'s hearsay statements.

Rather than challenge any of the court's findings, Armenta contends, "A person's competency at the time of the incident is an integral part of the Ryan analysis." Armenta bases this claim on the statement in State v. Karpenski, 94 Wn. App. 80, 119, 971 P.2d 553 (1999), abrogated by C.J., 148 Wn.2d 672, that "a hearsay statement cannot be reliable enough for admission unless the declarant possessed the qualifications of a witness at the time the statement was

made." But Karpenski does not support Armenta's contention, as it discussed witness competency at the time the statements were made rather than at the time of the incident. 94 Wn. App. at 119.[4] Armenta has not provided decisional authority that considers a child's competency at the time of the alleged incident when determining the admissibility of child hearsay. The trial court properly considered the hearsay testimony in light of the Ryan factors. Armenta has failed to demonstrate any error as to the court's findings and analysis related to the Ryan factors.

As an alternative argument, Armenta asserts that even if the hearsay statements satisfy the Ryan requirements, the statements were inadmissible because they were not corroborated as required under RCW 9A.44.120(1)(c)(iii) when the child is unavailable as a witness at trial. Although A.Z. testified at the trial, Armenta claims she was unavailable because she was incompetent to testify. As discussed above, the trial court did not abuse its discretion in finding A.Z. competent to testify. Corroboration was not needed.

Affirmed.

[4] Moreover, the Washington Supreme Court has since determined the prerequisites in the child hearsay statute "do not include any requirement that a declarant must be shown to have possessed testimonial competency at the time of the out of court statement." C.J., 148 Wn.2d at 683.

Chung, J.

WE CONCUR:

Feldman, J.

Bowman, J.

# THE LAW OFFICE OF THOMAS E. WEAVER

## August 16, 2024 - 3:37 PM

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| **Appellate Court Case Number:** | 58416-6 |
| **Appellate Court Case Title:** | State of Washington, Respondent v. Lorenzo Reyes Armenta, Appellant |
| **Superior Court Case Number:** | 19-1-03940-1 |

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