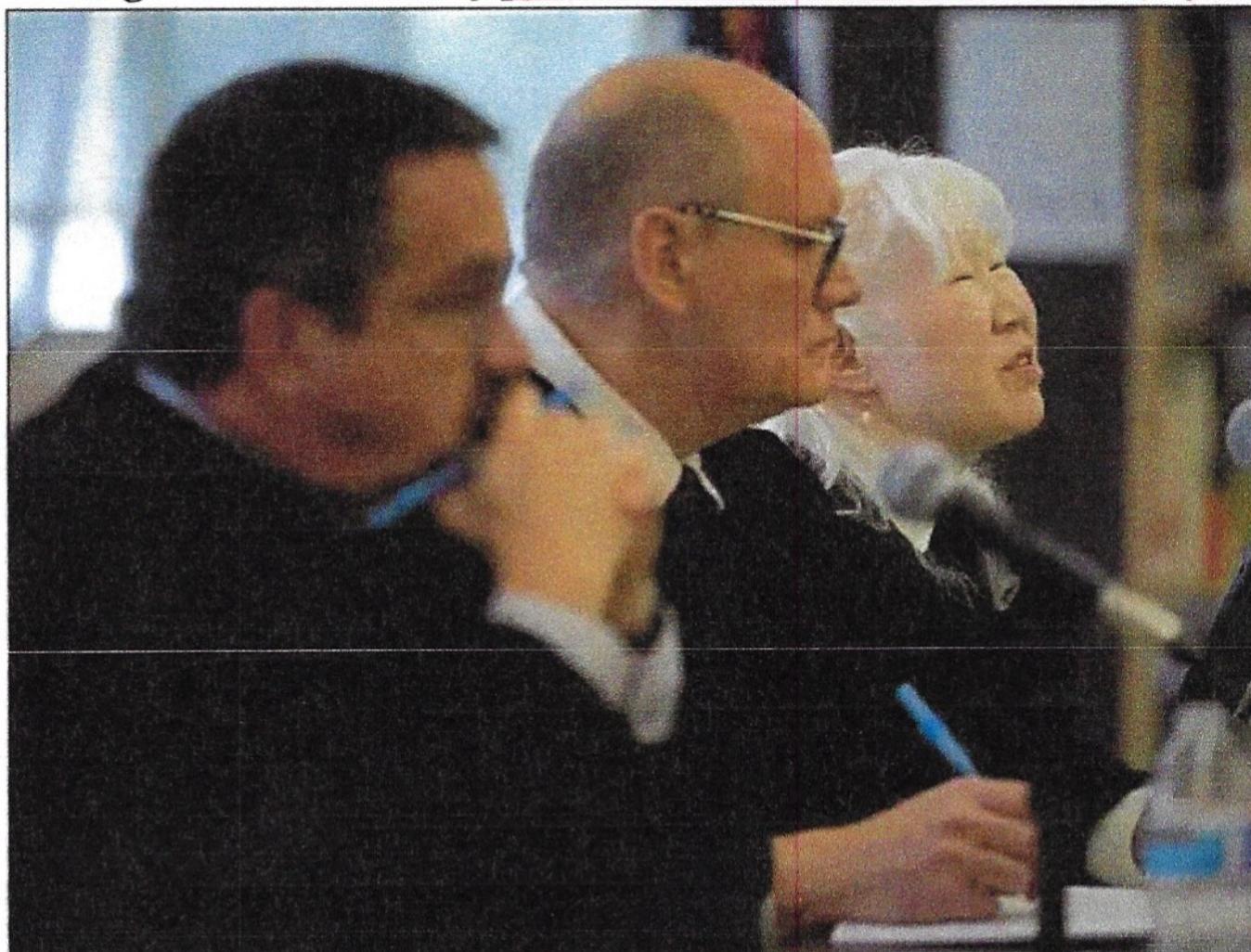


Court overturns sex offense convictions due to prosecutor's misconduct

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Colorado's second-highest court reversed multiple child sex assault convictions on Thursday after concluding an Adams County prosecutor committed misconduct while cross-examining the defendant.



Note

A three-judge Court of Appeals panel observed the charges against Daniel Michael Boerner depended on the jury either believing the child witnesses' original accusations or believing their trial testimony, which cast doubt on any wrongdoing by Boerner. With no physical evidence, jurors had to decide who was credible. *Note*

Repeatedly asking Boerner about the truthfulness of the child witnesses "placed him in the 'no-win situation,'" wrote Judge Sueanna P. Johnson in the Jan. 22 opinion. "Boerner had to choose between calling two young girls liars or testifying that they were not lying, implying that he was lying." *Note*

In 2006, the state Supreme Court held that it is improper to ask a witness to opine on the truthfulness of another witness. The court elaborated that there may be differences in perception or lapses in memory that do not amount to "lying." Further, such questions pit witnesses directly against each other and encroach upon the jury's role in deciding credibility.

"There are other ways to emphasize conflicts in the evidence and raise questions as to a witness's credibility that do not involve asking 'were they lying' types of questions," wrote then-Justice Alex J. Martinez.

Boerner is serving a sentence of 10 years to life after jurors convicted him of sexual assault-related offenses against two children. The allegations centered on Boerner's inappropriate touching of both

girls.

At trial, the two child witnesses' testimony differed meaningfully from their previous statements. Their accounts also differed from a third child's recollection. *Note*

Boerner testified in his defense and denied any inappropriate touching.

The unidentified prosecutor asked Boerner nearly two dozen times to comment on the truthfulness of the children, including:

- Whether one witness “decided ... that ‘I’m going to make up a sexual assault allegation?’”
- “Do you believe the information ... to the forensic interviewer was false?”
- “What parts do you believe were false?”
- “So, (one witness’s) statement in court was untruthful?”

Boerner's attorney did not object, and then-District Court Judge Roberto Ramírez did not intervene.

On appeal, the Colorado Attorney General's Office argued that none of the questions was “glaringly inappropriate, and the prosecutor never used the word “lie.”

“This was not a solitary slip of the tongue or a single poorly worded question,” countered public defender Jason C. Middleton. “This was a cross-examination centered, in part, on improperly questioning Mr. Boerner regarding the truth and veracity of other witnesses’ testimony.” *Note*

The appellate panel agreed with Boerner. Given the Supreme Court’s precedent on “were-they-lying” questions, Johnson wrote that the prosecutor’s inappropriate line of inquiry was so obvious that the trial judge should have intervened even without an objection.

“The questions need not specifically refer to ‘lying’; the crucial point is whether the question seeks to elicit an opinion from the witness that another witness is or is not telling the truth,” she wrote.

Johnson added that the key changes in two of the witnesses’ recollections meant Boerner was being asked to testify about which version of the children’s accounts the jury should believe.

The panel reversed his convictions. Because the Court of Appeals found the evidence sufficient to support a guilty verdict, it permitted the prosecution to retry Boerner.

The trial court’s docket and a press release issued at the time of Boerner’s sentencing indicated that Deputy District Attorney Brian McGarry prosecuted the case. A spokesperson for 17th Judicial District Attorney Brian Mason did not have a comment about the panel’s finding of prosecutorial misconduct.