

Judge lambastes Colorado Springs prosecutor after third courtroom error in 6 months

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While a woman experiencing a panic attack sobbed outside a courtroom, the case against a man suspected of sexually assaulting and kidnapping her was falling apart.

A defense attorney for Daniel Christian August said an argument by prosecutor Jennifer Darby during her closing statements the previous day was part of a strategic move to gain an advantage and the latest example of "a pattern and a history of prosecutorial misconduct" and "mistrusting cases."

Fourth Judicial District Court Judge Barney Iuppa, a former district attorney, agreed, saying he wished she "would rein in her overzealous prosecution" style.

"Ms. Darby has a goal of winning, of winning at any and all costs, throwing fair blows as well as foul blows," he said. "To paraphrase Vince Lombardi - winning isn't everything. Winning is the only thing."

Iuppa dismissed the case against August with prejudice, meaning he was free to go and could not be retried unless a higher court intervened.

Court records show what Iuppa called an inclusion of "impermissible evidence for impermissible purposes" derailed prosecutors' attempts to convict August for the second time.

They also show that the misstep was not the first for Darby in front of Iuppa. In a six-month span, the judge had ruled that she committed two other errors in prosecuting cases, a rare occurrence in that time frame, according to experts.

In July, Iuppa ruled that Darby committed prosecutorial misconduct in a suspected child abuse case after she admitted she had introduced false information about the defendant during a sentencing hearing, according to court records.

In November, Iuppa declared a mistrial after he ruled that Darby tainted jurors with her questioning during jury selection in a sex offense case, court records show. Darby was removed from the case, which later was retried. The defendant was found guilty in February of child abuse and sexual assault, court records show.

The August case was dismissed by Iuppa in December.

"In over 30 years of being a defense attorney I can't think of another instance where a prosecutor in essence committed three separate acts of prosecutorial misconduct over this short period of time that rose to the level of mistrials or the finding of prosecutorial misconduct," said Dan Recht, a Denver-based defense attorney not connected to the cases. "Prosecutors often go a whole career without three such strikes against them."

Darby, who was hired by the 4th Judicial District Attorney's Office in 2011, did not respond to requests for comment. She does not have a public disciplinary history on file, according to records from the Colorado Supreme Court.

The District Attorney's Office did not release other information about Darby, including where she got her law degree,

experience and age. Her salary is \$81,375.

District Attorney Dan May declined to comment through his spokeswoman Lee Richards.

The District Attorney's Office tracks mistrials, which average about 15 per year, Richards wrote in an email. They can happen for multiple reasons, she wrote, including a hung jury or not having enough people for a jury. She declined to answer if the District Attorney's Office tracks prosecutorial misconduct.

The District Attorney's Office appealed Iuppa's ruling in the August case, and it is pending in the state's court of appeals, said Jon Sarché a spokesman for the Colorado Judicial Department. A hearing is likely this year, he said.

August declined to comment, citing the pending appeal. Public defender Julian Rosielle did not return a request for comment.

Transcripts from August's case show how Darby's most recent error, in Iuppa's eyes, played out in court.

Since he was accused of the crimes in July 2009, the 35-year-old August had spent about 475 days in jail, Rosielle said in court. August's first trial, also in front of Iuppa, ended after the judge declared a mistrial because of prosecutorial misconduct, an attorney familiar with the case said. Sharon Flaherty was the prosecutor.

During Darby's closing arguments in the second trial, on Dec. 15, the prosecutor referenced an earlier incident in which the same woman had accused August of sexually assaulting her in March 2008. No charges were filed, though it's unclear why. The Gazette typically does not identify victims of sexual assault.

While Iuppa had allowed the information to be introduced in court, he had done so with conditions, directing that the prior incident could not be used as evidence to suggest August was guilty of the new accusations based on a character trait.

"We don't want a jury saying, well, he did it before, so he must have done it again," Iuppa said before dismissing the charges Dec. 16.

Darby had included the words: "History repeats itself" on the 53rd of 55 slides of a PowerPoint presentation in her closing argument, the day before. In doing so, Iuppa believed she had violated "rules of evidence and rules of closing argument" and told Darby the inclusion of the phrase was "inappropriate" and "inadmissible." He called the prosecution's case against August "problematic" at best.

"You don't hear that kind of strong language from a judge when a prosecutor has committed misconduct only once," Recht said.

Before dismissing the case, Iuppa said he came to the conclusion that Darby was "trying to pull victory from the jaws of defeat" by using the evidence to her advantage. And when that failed, he said, she tried to goad the defense to ask for a mistrial.

"Ms. Darby is talented," Iuppa said. "She could have handled this trial easily without going over the bounds of what is permitted and chose not to."

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