

Defendant's summary

The defendant appeals a judgment entered on a jury verdict of guilty to multiple counts alleging sexual assault on a child. He received the minimum ten-year sentence and has been incarcerated since the verdict was returned in September 2003.

Defendant lived with his wife (the mother) and the wife's daughter from the wife's prior marriage. When the stepdaughter was in high school, she alleged that when she had been of elementary school age the defendant had periodically "dry humped" her through their clothing and had her massage his penis by placing her hand in his pants. Defendant, who is in his mid-40s, has no prior criminal record and no history of being sexually abusive or abused. There was no physical evidence of abuse. The stepdaughter made no accusation at the time the events allegedly occurred. No third-party witness alleged awareness or suspicion of the allegations before the stepdaughter voiced them while in high school. The case presented a "he said-she said" dispute about whether the alleged child abuse actually occurred years before.

At the time that the stepdaughter made the accusations while in high school, there was tension and disruption in the nuclear family due to a number of simultaneous circumstances: the death of the stepdaughter's grandmother; the stepdaughter's slipping grades in school and resulting intervention by defendant with stepdaughter's teachers; the stepdaughter's difficult relationship with her mother; and a volatile history between defendant and the mother – including physical altercations between the adults when stepdaughter had been present.

Defendant has raised two issues on appeal:

(1) The district court committed constitutionally harmful error in excluding the testimony of a psychologist to whom the stepdaughter spoke about the alleged abuse a few days before it was reported to the police. Based on the content of the psychologist's notes that had been produced before trial, the psychologist's testimony would have materially impeached the stepdaughter's testimony. On appeal the prosecution has conceded that the district court erred in excluding the psychologist from testifying, but argues that the error was harmless. Defendant has replied that the error was harmful because the lack of evidence in the case other than the stepdaughter's uncorroborated story made the stepdaughter's credibility the linchpin of the case.

(2) The prosecution committed constitutional plain error in certain comments that he made to the jury at the end of closing arguments at the trial in the case. Defendant posits that the most egregious comments were several sentences that told the jury that the stepdaughter could not have made up the accusations because to have done so the jury would have to believe that she was demonic and destined to go to hell. These comments had nothing to do with the evidence in the case, and they improperly injected religion into the case in violation of Colorado law. The comments were inflammatory, and prejudicial, because they invited the jury to convict defendant based on the jurors' personal religious beliefs rather than based on the evidence. The comments also

constituted an improper appeal to sympathy for the stepdaughter; specifically that the jury had to convict defendant because to disbelieve the stepdaughter would be to condemn her to damnation.

END