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- APPELLANT'S NAME: Eric Charles Nenno
- OFFENSE: Capital Murder - Death Sentence
- COUNTY: Harris
- CRIM. APPEALS No. 72,313
- DATE OF OPINION: June 24, 1998
- JUDGE: Keller, J.
- DISPOSITION: Conviction and Sentence Affirmed

Case Note: Besides the points discussed below, Appellant raised other issues which have been raised and rejected in other cases, or which the Court found error had not been preserved. Because they offer no insight into existing law and aren't new law, they aren't discussed here.

536.011 Sufficiency of the Evidence / Special Issues (Future Dangerousness): In his second point of error, Appellant claimed the evidence to sustain the affirmative finding that he would constitute a danger to society was insufficient. According to the opinion, the evidence showed that the defendant "raped and choked to death a seven year old girl."

Holding: The facts of the offense, alone, can be sufficient to support an affirmative answer to the special issue . . . [and] . . . The facts of the present offense were egregious. However, we need not determine whether such facts, by themselves, would support an affirmative answer to the future dangerousness issue. The State also presented expert testimony from a Supervisory Special Agent in the Behavioral Science unit of the FBI who specialized in studying the sexual victimization of children who, from information given about Appellant, concluded that Appellant was a pedophile. He also testified that such a person was difficult to rehabilitate. After being given a lengthy hypothetical matching the facts shown by the evidence, he testified that an individual matching the hypothetical "would be an extreme threat to society and especially children within his age preference." This evidence, along with the circumstances of the crime, is sufficient for a rational jury to conclude that appellant poses a future danger to society.

Comment: (David A. Schulman) This summary is not included because the sufficiency review or the holding is important, but rather to point out the inconsistency in the logic used to justify the State's actions in obtaining death sentences. This Court has consistently held that a capital jury is not entitled to know (i.e., the defendant is not entitled to tell them) the minimum period a defendant must serve, if given a life rather than death sentence, before becoming eligible for parole. The Court's rationale has been that "parole is not an issue applicable to a capital murder case" . . . [because] . . . in deciding whether a defendant poses a continuing threat to society, a jury considers not only free society, but also prison society." See, e.g., Collier v. State, No. 74,206; December 17, 1997)(see Greenwood & Schulman, Vol. 5, No. 50; December 22, 1997). Given that the State's expert on future dangerousness in this case testified that Appellant was a pedophile and concentrated on the danger Appellant would pose to young children . . . and, by the way, there

are no young children in the penitentiary, shouldn't the jury be informed that this man will have to serve 40 calendar years before he is eligible for parole? Shouldn't this jury know that the likelihood that his defendant would ever see the streets again was/is absolutely nil and the only society they had to be concerned with was "prison" society, where pedophiles are much more likely to be in danger than to be dangerous? In my opinion, this case, more than most others, demonstrates why a Simmons instruction is appropriate in Texas.

G/S 44 Confessions / Voluntariness: Appellant was a suspect in the disappearance, from his neighborhood, of a seven year old girl. One of the neighbors gave his name to the police because, a few months previous to this incident, he had (allegedly) tried to lure a young girl into his home. He cooperated with the police and eventually came to the "command post" (trailer) that had been set up in the neighborhood. After several hours of being interviewed, he agreed to take a DPS polygraph test. The examiner "conducted a two-and-one-half hour pre-test interview" then Appellant signed a standard DPS "Polygraph Release Form," which stated that Appellant was agreeing to take the test "for the mutual benefit of myself and the Harris County Sheriff's Department." The test was finally given at 1:00 a.m., lasted thirty minutes and, at its conclusion, Appellant said to the examiner, "I failed it, didn't I?" The examiner that told Appellant, "Yes, you had some difficulty on it" and that "he was going to have to tell the police where the body was." The examiner then told Appellant that the examination "indicated deception" when Appellant had been asked if he knew the complainant was missing before he had been told about it Friday morning." The examiner told Appellant that "he needed to tell where the complainant is because he knows." Appellant then stated, "I think she's still in the attic." When asked further, the defendant stated: "They're going to kill me for this, aren't they?," and asked whether there was anything, "anything you can give me, that I can take my life with?" Appellant subsequently gave a written statement regarding the crime. On appeal, Appellant contended that his statements were given involuntarily, because (a) the polygraph examiner told him (and the release form stated) that the tests results "could be used for his benefit as well as for the benefit of the [police] . . .;" and (b) the polygraph operator coerced his confession by commanding him to tell the police what happened.

Holding: (Polygraph Examiner's Warnings) A statement is inadmissible if the statutorily required warning that "any statement he makes may be used against him" is altered into a warning that says that the statement may be used "for or against" him. But, when the correct statutory warning is given, and a "for or against" type comment is made at a different time during the course of interrogation, no statutory violation is present. Such a remark may be a circumstance bearing upon the voluntariness of a defendant's statement, but does not necessarily render the statement inadmissible. In the present case, the proper warning was given a number of times, both before and after the complained-of comment by the polygraph operator. The correct warning is set out in the written warnings contained in appellant's written statement. While the polygraph operator's comment is a factor to take into account in a voluntariness analysis, it does not in itself require an involuntariness finding. (Police Coercion / "You're going to have to tell the police where the body is") We do not interpret the polygraph operator's comment that Appellant would "have to tell" the police what happened as meaning that he was legally obligated to do so. Instead, the polygraph operator's statement conveys that appellant was morally obligated to give the information. Such moral urging does not in itself render an accused's statement involuntary but is another circumstance to consider.

G/S 301.04 Witnesses / Expert Witnesses / Admissibility - Relevance - Permissible Scope: In point of error one, Appellant contended that the trial court erred in admitting expert testimony from Kenneth Lanning, a Supervisory Special Agent in the Behavioral Science unit of the FBI who specialized in studying the sexual victimization of children. He contended that the State failed to show the validity of the scientific theories underlying Lanning's testimony or the validity of the method used for applying the theories, arguing that the State failed to produce any evidence (1) that the theories underlying Lanning's testimony are accepted as valid by the relevant scientific

community, (2) that the alleged literature on the theories supports his theories, (3) that there are specific data or published articles regarding the area of future dangerousness of prison inmates, (4) that his theories have been empirically tested, (5) that he has conducted any studies or independent research in the area of future dangerousness, or (6) that anyone else had tested or evaluated the theories upon which his testimony was based. Note: In Kelly v. State, 824 S.W.2d 568 (Tex.Cr.App. 1992), the Court held that Rule 702 required the satisfaction of a three-part reliability test before novel scientific evidence would be admissible: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. In Jordan v. State, 928 S.W.2d 550 (Tex.Cr.App. 1996)(see Greenwood & Schulman, Vol. 4, No. 22; June 12, 1996), it subsequently held that this inquiry is substantively identical to the inquiry mandated by the Supreme Court in the federal system in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. __, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) concerning the admissibility of scientific evidence under Rule 702. Although Kelly involved novel scientific evidence, the Court later concluded that the standard established in that case applied to all scientific evidence, whether or not it was novel. Hartman v. State, 946 S.W.2d 60 (Tex.Cr.App. 1997)(see Greenwood & Schulman, (see ⁂, Vol. 5, No. 16; May 1, 1997).

Holding: The question we confront today is whether Kelly is applicable to nonscientific expert testimony (i.e. that involving technical or other specialized knowledge). The answer to that question is a qualified "yes." The general principles announced in Kelly (and Daubert) apply, but the specific factors outlined in those cases may or may not apply depending upon the context. When addressing fields of study aside from the hard sciences, such as the social sciences or fields that are based primarily upon experience and training as opposed to the scientific method, Kelly's requirement of reliability applies but with less rigor than to the hard sciences. To speak of the validity of a "theory" or "technique" in these fields may be roughly accurate but somewhat misleading. The appropriate questions are: (1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. These questions are merely an appropriately tailored translation of the Kelly test to areas outside of hard science. And, hard science methods of validation, such as assessing the potential rate of error or subjecting a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences.

Comment: Judge Baird concurred, but dissented as to "the decision to publish," arguing that "decision to publish an opinion of the Court should rest on whether the opinion would contribute to the jurisprudence of this State." I totally disagree. That theory works in discretionary review cases, but not (at least for me) in capital cases. In fact, all three of the cases he cites in support of his argument are non-capital cases. I personally think that, if we're going to kill somebody, the opinion affirming their conviction should be recorded for posterity in the annals of the Southwest Reporter, so that their is at least some record of the case that is not locked away in the Zavala Archives in Austin. Additionally, this last point is very important. Ths is the first case which held the Kelly test is not totally applicable to the so-called "soft" sciences. Relying on Hartman, the Waco Court of Appeal ruled that soft science testimony is not treated any different under Kelly than "hard" sciences. Fowler v. State, 958 S.W.2d 853 (Tex.App. - Waco 1997)(see Greenwood & Schulman, Vol. 5, No. 48; December 8, 1997)("We can find no reason why evidence regarding the "soft sciences" is not susceptible to Kelly. Rule 702 applies to all testimony given by experts.") Only the Austin Court has held that the Kelly rule should not be applied rigidly to the "soft" sciences. See Nations v. State, 944 S.W.2d 795 (Tex.App. - Austin 1997)(see Greenwood & Schulman, Vol. 5, No. 12; May 12, 1997)("a rigid application of the Kelly criteria might exclude relevant and reliable expert testimony"). This is an important case and needed to be published. Even if one believes that the Court has said this before, it has never been said with such clarity and force.