

Excerpt from:

No. 933SC676

THREE-A DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

v.

ROBERT FULTON KELLY, JR.

)
)
)

From Pitt County

DEFENDANT-APPELLANT'S BRIEF

A recently discovered portion of an interview by Brenda Toppin is a good example of exculpatory material collected on a non-indictment child. "Child No. 5" was interviewed by Brenda Toppin. The interview was audio-taped. Ms. Toppin then apparently taped over this interview with an interview of Betsy Kelly. After the state cross-examined Ms. Kelly about a comment she made during the interview, the defense played the entire interview for the jury. The tape was introduced into evidence as Defendant's Exhibit No. 256, which has since been transmitted to this Court.

At the end of the tape recording is the last few minutes of Ms. Toppin's interview of "Child No. 5." The transcript of this portion of the interview is attached to this Brief with the name of the child obscured. Ms. Toppin did not bring any record of her interviews to court, defendants subpoena *duces tecum* having been quashed. She testified, however, that she used appropriate interview techniques, did not lead the children, and used the anatomical dolls in a professional and non-suggestive manner. (Tpp. 12,458, 12,461, 12,467-69, 12,473) The transcript reveals that, contrary to Ms. Toppin's testimony at trial, at least some of her interviews were recorded and then intentionally destroyed. It also reveals that Ms. Toppin's interviews were not only suggestive, but coercive to the point of brutality. The child's crying and pleas to stop are met only by Ms. Toppin's promise to stop when the child said what she wanted to hear. The tape also makes it clear that it was Ms. Toppin, not "Child No. 5," who manipulated and touched the dolls. See App. 8.

DEFENDANT-APPELLANT'S APPENDIX

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BT - BRENDA TOPPIN

C - CHILD

M - MOTHER

BT Inaudible . . . feel like heat . . .

M Say we're used to this . . . we have [inaudible] every night when we go to bed.

BT You do?

M Say yes ma'am, here you go . . .

C It still hurts . . .

M Well, give it a few minutes. It will take a few minutes.

C I'm thirsty.

M Ok. I'll tell you what, I'll get you some . . . what you want? You want 7UP?

C Uh huh.

M Ok, ask Ms. Brenda if she wants something to drink.

C No - Pepsi.

BT Can I have a little bit too?

C I want Pepsi, mamma.

M Ok, I'll get you-all some Pepsi.

BT Water.

M All right, finish talking, I'll get it, Ok?

BT Oh, my nose itches . . . My nose is itching there, alright, Ok. Now we were taking and you've been, and you're my helper and we were talking about sometimes people do things that are not right, don't we? And sometimes those people are big people. And if big people do things that are not right sometimes we have to punish them too. They have to . . . They don't get spankings 'cause they're big. But sometimes they have to go to a doctor, or sometimes the police have to . . . talk to them or something you know?

C Yea, and you know what?

BT What?

C If they're bad people they, they get arrested and go into jail.

BT Sometimes they do. Sometimes they do . . . it depends.

C The ones, the ones that have a ugly house go in jail.

BT They do? - Well tell me . . . you told me that sometimes Mr. Bob is a bad person and I need to know about that. Can we talk about that a minute?

C Inaudible . . .

BT Can we talk about that a minute?

C Nope.

BT Why not?

C 'cause I want to talk about it after I eat . . .

M . . . after you drink.

BT Well, how about Ms. Betsy - is she a good person all the time or is she a bad person sometimes?

C She's a bad person all the time . . .

BT Now you told . . . she's a bad person all the time? . . . is that 'cause she makes you take a nap?

C (Walking away) . . . Uh huh

BT Say yea, mommy, I'm doing fine.

Inaudible

BT Say we just like to fantasize a little bit . . .

M Inaudible

BT He's doing fine, he's normal . . . Oh that's good RH, Thank you very much.

C Inaudible

BT That's water.

C I'll give it to you.

BT Huh?

- C I'll give it to you.
- BT You want to give in to me?
- C What [inaudible] knife.
- BT I can smell your Ben Gay.
- C It don't smell good.
- BT It smells pretty good, it's not bad.
- C Hey, I want, I want, I want to talk now.
- BT Well, we have to talk about Mr. Bob first before we can talk. You have to tell me why you think he's a bad person sometimes. Sometimes is he a good person?
- C (No response)
- BT Yea? - Is he a good person all the time?
- C (No response)
- BT No?
- C I thought he was bad.
- BT What does he do when he's bad?
- C Inaudible
- BT Hum?
- C Inaudible
- BT You know I can't understand a word you're saying with that in your mouth.
- C I said he spans us.
- BT He spans you?
- C He spans us!
- BT Why does he spank you? What do you . . . What do kids do when they get a spanking?
- C They spank him right in the holster.
- BT Right where the holster is? They spank you here? Or here? Or here? Or here? Or Here? Where do they spank you?
- C Or here?

- BT Or here? Where do they spank you?
- C Or here?
- BT Yea. Where . . . where does Mr. Bob spank when he spans?
- C Um . . . He slaps us.
- BT He slap you? Where does he slap you?
- C Oh he just throws around . . .
- BT Hum?
- C And he throws us and he slaps us and he steps on us.
- BT He steps . . . Tell me something . . . And this is real important what you're telling me is this make pretend or is this the truth?
- ...
-
- BT It's Ok if you tell me make pretend as long as I know its make pretend.
- C If its the truth, I'm not going to tell.
- BT Why?
- C 'cause.
- BT 'cause why?
- C I'm not.
- BT Well you . . Well did Mr. Bob ever ask you not to say anything?
- C He said not to . . . [inaudible]
- BT He said what? Come here and talk to me a minute.
- C Can I tell you a story?
- M You tell her the truth.
- BT Yea, you can tell me a story and then we can talk about the truth. Ok?
- M I'll be there in a minute . . .
- C Mommy, I don't want to talk!
- M Why don't you want to talk? Huh? Don't you want to tell her the truth?
- C I want to tell her all the truth.

M Inaudible

BT Well, come tell me. I'm right here.

C I'm not going to tell her anything.

M Why not?

C Inaudible . . .

Starts crying . . . throws temper tantrum.

M Inaudible . . . Anderson will call up when it's time to eat, Ok?

C No! Inaudible

BT I'll tell you what . . . I can leave just as soon as you talk to me.

C No.

BT And then I can go . . .

M Sit down.

BT Do you want mamma to stay with you?

C [Whines] . . . No . . .

BT You can have mommy in here if you feel better that way.

M Are you tired?

BT Probably a little bit . . .

C Uh . . . Uh huh.

BT Well tell me something . . . Tell me what Mr. Bob does when you think he's bad.

C Kicks us.

BT Now is this the truth or is this just make believe?

C Its make believe.

BT Ok, now I don't care if you tell me make believe, but you have to tell me its make believe too, Ok?

C Mamma, I can see [inaudible] right there . . .

BT Yea. Well tell me something . . . You told me that Mr. Bob spansks. Is that the truth or is that make believe?

- C Its, its the truth.
- BT Ok. Can you tell me who Mr. Bob spans?
- C Oh Mommy . . . [whines] . . .
- M Its alright, go ahead and talk and then you'll be all finished then we can go bye bye and you can play with Luke. Ok?
- C Luke has a spaceship.
- M Yea, but you've got to finish talking to Ms. Brenda before I call Ms. Anne, Ok?
- C Ok.
- M Go ahead and talk to Ms. Brenda.
- BT Tell me who Mr. Bob spans.
- M (Whispers) RH who does he spank?
-
- C Oooooo . . .
- M Do you remember? Who does he spank?
- C Mommy, [inaudible] . . . go to sleep.
- BT Your neck still hurt'n? . . . Yes? Well tell me who Mr. Bob spans and then Ms. Brenda will be almost through.
- [Phone rings - RH gets it]
- C Hello. Uh huh. Fine. Uh huh.
- M Say a few more minutes.
- C Ok, Ok, Bye.
- M Was that Ms. Anne?
- C Uh huh.
- BT Ok. Well come talk to me so [inaudible].
- M Real quick, gotta finish talking.
- BT So we can . . .
- C [Whines] . . .
-
- M Well honey, what did you do to it?

C I was . . . I was running in the street . . .

M Is that how you hurt your neck?

C Uh huh.

M It hurt before you hit the bed?

C Uh hum.

M Well, I told you not to go outside, didn't I? . . . Alright, look, you're almost finished . . .

C Uh ugh, uh ugh . . . while you were on the telephone I went outside.

Pause

M When you were on the telephone you went outside . . . Uh. You did not go outside when I was on the telephone.

C Um hum.

M No you didn't. You told me that Mr. Bob spans. Is that the truth or is that make pretend?

C Its the truth.

BT Ok. Can you tell me who Mr. Bob spans? . . . Its Ok to tell.

C Ummmm . . . Annie Baker.

BT Does he spank Annie Baker, does he spank anyone else?

C Uh Uh.

BT Just Annie? . . . Ok when you told me that you got a spanking was that the truth, or was that make believe?

C It was make believe.

BT That was make believe. Ok. When Annie Baker got a spanking was that the truth or make believe?

C The truth.

BT The truth. Ok. Um. Can you tell me if um . . . any kids in that class are unhappy kid because anything that Mr. Bob does?

C Know what mommy? What is the right here?

M Inaudible

- BT Answer me real quick, so you can go play.
- C Uh huh.
- M Isn't it fun to talk?
- C Uh uh [No].
- M No . . .
- C I want to go . . .
- BT Ok. Well tell me real quick who's unhappy if Mr. Bob does things they don't like. Is anybody unhappy?
- C I want you to come tomorrow.
- BT You want me to come tomorrow? Why do you want me . . . Will you talk to me tomorrow if I come?
- C [No response]
- BT Ok. Would you tell me . . . does Mr. Bob ever tell you not to tell anything?
- C [No response]
- BT Can you tell me what that is? . . . You know its ok. Ms. Betsy and Mr. Bob want everybody to tell everything so so that everybody will know what goes on at the daycare . . . Can you tell me what Mr. Bob told you not to say?
- C He said not to say do do and pee pee.
- BT Ok. Were they words that you aren't supposed to use?
- C Use?
- BT Um. Are they words you're not supposed to say?
- C Foo foo?
- BT What's foo foo? . . . That's a dog!
- C Uh uh.
- BT What is it?
- C A cat.
- BT A cat?
- C [Whines] . . .

BT You hurt your neck . . .

M Yea, he did.

BT Mommy give it love and kisses and it'll be all better. Alright. Let me ask you one more thing and then I'll be all through RH and you can go play. Ok? . . . You see my little dolls here you were looking at?

C Uh huh.

BT Ok. What I need to know. I want to know if Ms. Shelly or Ms. Betsy or Mr. Bob anybody in your class has any touched any of the kids here, here, or here? . . . Has anybody ever touched the kids there?

C Ummm . . . There.

BT Where there? Show me where. You can hold him.

C Right on the stomach.

BT Ok. Right here?

C Uh huh.

BT Ok. Have they ever touched them anywhere else?

C Uh uh [No]

BT Ok.

C But get the other baby dolls out.

BT I got a little girl dolly too see.

C Um hum.

BT Has Mr. Bob ever touched any of the little girls or Ms. Shelly touched any of the little girls anywhere?

C Why does she have these shoes on?

BT She has patten shoes on.

C What?

BT She has to wear shoes too. Don't take her pretty shoes off, her feet will be cold.

C Uh huh. And she'll cry.

BT That's right she will.

[Inaudible]

BT Look at her hair sticking straight up already.

M Her hair looks like Meredith's does.

C Get the other baby doll out.

BT No. We can't play dollys. You got to go bye bye and I got hurry up and leave so we need to finish up. Is there any thing that you think I should know about daycare that that people are not happy there . . .

C Nooo mommy! . . .

M RH, go ahead and finish talking and then we can go on.

BT Is there anyone unhappy at day care?

C Uh uh [No].

BT No? . . . Did you really get a spanking or was that make believe?

C It was make believe.

BT Ok. How about Anna . . . Was it Anna?

M Annie.

BT Annie. Did she get a spanking, or was that make believe?

C It was . . . she got a spanking.

BT She did. And who spanked her?

C Mr. Bob.

BT Ok. Well listen, I want to thank you . . .

TAPE ENDS