B. CONDITIONAL RELEVANCE

Focus on FRE 104(b)

Problem 1.7
Threat to Disclose

Consider the following news account:

Fitzhugh Case: Judge Allows Paternity Motive

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Jurors will be permitted to hear evidence concerning Kenneth Fitzhugh's possible motive for murdering his wife, Kristine, in their Palo Alto home last year, according to a Wednesday ruling issued by Santa Clara County Superior Court Judge Franklin Elia.

In a motion filed last week, prosecutor Michael Fletcher stated he will argue Fitzhugh killed Kristine because she planned to tell her oldest son, Justin, that Fitzhugh was not his father.

Fletcher wrote that family friend Robert Brown "had a long-term, intimate relationship with the victim" in the 1970s, around the time Justin Fitzhugh was conceived. He also noted that a DNA test has established that Brown, who will be a witness in the case, is Justin Fitzhugh's father.

Brown, according to the district attorney, is planning to testify that in January 2000, Kristine told him over the phone that she was planning to tell Justin about his real father after her son graduated from college.

Kristine Fitzhugh, 53, was murdered in her home on May 5, 2000, approximately two weeks before Justin graduated from the University of the Pacific in Stockton. . . .

Defense attorney Thomas Nolan wrote in his own motion that "unless the district attorney can show that Mr. Fitzhugh knew of the facts that constituted a possible motive, it cannot be a motive."

In his response, Fletcher gave no proof that Fitzhugh was told of Kristine's alleged plans to tell her son. Instead, he wrote that "It is a fair and reasonable inference that the victim would not tell her son this critical information without first telling her husband, especially since she did tell Mr. Brown. In this circumstance, it is reasonable to infer that the victim did, in fact, tell the [defendant] her plan." . . .

Fletcher wrote that the issue of Justin Fitzhugh's paternity came up accidentally while Kenneth Fitzhugh was being interviewed the day of the murder. Palo Alto Police Detective Michael Denson was questioning Fitzhugh, who referred to Justin as "her older son" rather than "our older son."

"Her older son graduates from college in a couple of weeks," Fitzhugh said, according to the prosecution's motion . . . .

When Denson asked, "You said 'her older son.' Is he not your son?" Fitzhugh responded, "No. He's our son."

Assume this case is governed by the Federal Rules of Evidence. Was the trial judge right to admit the prosecutor's evidence of motive? What are the best arguments for both sides?

COX v. STATE

Supreme Court of Indiana.
696 N.E.2d 853 (Ind. 1998).

■ BOEHM, JUSTICE. In this direct appeal from a conviction for murder, Patrick E. Cox contends that . . . the trial court erred by admitting certain testimony, the relevance of which depended upon Cox's knowledge of the content of the testimony . . . .

FACTUAL BACKGROUND

In the early morning hours of September 22, 1995, James and Patricia Leonard were asleep in the ground floor bedroom of their home. At about 3:00 a.m. Patricia . . . was awakened by a single "loud pop sound," and quickly realized that James had been shot in the eye. James was rushed to the hospital but died three days later.

Bullet holes were found in the bedroom window and its screen, and a bullet casing was outside beneath the window. An officer who was called to the scene that night had a clear view of the inside of the bedroom from immediately outside the window. A firearms expert testified that the pattern of discoloration on the screen could have been produced only by a shot fired within six inches of the screen.

Police questioned Cox on the morning of the shooting. Cox denied any involvement in the crime and said he returned home from a nearby friend's house at about 1:00 a.m. However, later that morning one of Cox's friends told police that Cox had said that he had looked into the Leonards' window, fired a shot, and fled. Cox also told him that "Leonards probably ain't gonna have a dad after last night." . . . In addition, Angela Bowling, a friend of Cox's, testified that she bought bullets for Cox at his request the night of the shooting and that she and a few other friends were with him at the home of Helen Johnson until Cox left between 3:30 and 4:00 a.m.

Johnson was the mother of Cox's close friend, Jamie Hammer. . . . The State contended that Cox killed Leonard as an act of retaliation because Hammer was in prison pending the resolution of charges filed against him by the Leonards for molesting their young daughter. The jury convicted Cox of murder. . . .

III. RELEVANCE OF EVIDENCE CONDITIONED ON A FACT

At trial, Cox objected to testimony by David Puckett, a deputy prosecutor in Madison County. Puckett testified that four days before the murder he had represented the State of Indiana at a bond reduction hearing for Cox's close friend Jamie Hammer. He testified that: (1) he had informed the court at the hearing that three class B felony charges were to be filed against Hammer, in addition to a single pending charge, for alleged acts of child molestation of Leonard's daughter; (2) Helen Johnson, Hammer's mother, testified at the hearing; and (3) Hammer's bond was not reduced as a result of the hearing. Cox contends that this testimony was inadmissible because it could be relevant only if Cox knew what happened at the hearing and the State was unable to prove conclusively that Cox had that knowledge. The trial court admitted the evidence, concluding that because Hammer's mother knew about the denial of Hammer's bond reduction and the additional charges to be filed, ''other persons in [Hammer's] circle reasonably are likely to know about it.''

The admissibility of Puckett's testimony is governed by Indiana Evidence Rule 104(b), ''Relevancy Conditioned on Fact,'' although neither party cites this rule. The Indiana Rule is identical to [unrestyled] Federal Rule of Evidence 104(b). It provides: ''When the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.'' Here, the relevance of Puckett's testimony depends upon a condition of fact—whether Cox knew about what happened at the bond reduction hearing. If Cox knew of the latest developments in Hammer's case, then the information was relevant and extremely probative of the State's theory that Cox killed Leonard—the father of Hammer's victim—because of Hammer's plight. If Cox was ignorant of these developments, then Puckett's testimony would be irrelevant and unfairly prejudicial.

We have not yet had occasion to set out the standard for questions under Rule 104(b). Under its terms, the court may admit the evidence only after it makes a preliminary determination that there is sufficient evidence to support a finding that the conditional fact exists. As Weinstein commented, ''these issues are, for the most part, simple factual questions to be decided on the basis of common sense, and the Rules [of Evidence] assume that the jury is as competent to decide them as the judge.'' We adopt the prevailing federal standard that ''the judge must determine only that a reasonable jury could make the requisite factual

determination based on the evidence before it.'' *See, e.g.,* United States v. Beechum, 582 F.2d 898, 913 (5th Cir. 1978) (en banc) (''the preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist''). The trial court is not required to weigh the credibility of the evidence or to make a finding. *See* Huddleston v. United States, 485 U.S. 681, 690 (1988).

Here, the State introduced evidence that Cox spent almost every day at the Hammer house where Hammer's mother lived both before and after the bond reduction hearing and up to the time of the shooting. Hammer and Cox were close friends and Hammer's mother attended the hearing. This evidence is sufficient to support the inference that Cox had learned what transpired at the hearing. Accordingly, the trial court did not abuse its discretion by admitting the evidence. . . .

COX V. STATE: *Afterthoughts*

The Problem of Conditional Relevance

Both *Fitzhugh* (Problem 1.7, page 35) and *Cox* seem to present problems of conditional relevance. In each case there is evidence that *might* be relevant, but only if some other condition is met. Kristine Fitzhugh's apparent intention to tell her son that Kenneth Fitzhugh was not his father *might* have given Kenneth Fitzhugh a motive to kill her, but only if he had heard of her intention. And the new charges lodged against Patrick Cox's friend, Jamie Hammer, in the case involving the Leonard daughter *might* have given Cox a motive to kill James Leonard, but only if Cox had heard of the new charges.

In each case Rule 104(b) tells us that the contested evidence—Kristine Fitzhugh's apparent intention to disclose her son's paternity or the new charges lodged against Jamie Hammer—is admissible only if ''proof [is] introduced sufficient to support a finding that the [conditional] fact does exist.'' The theory behind the rule is that the chain of inferences leading from the contested fact to the conclusion of the defendant's guilt is simply *severed* if the conditional fact—that Fitzhugh had learned of his wife's intentions or that Cox had learned of the new charges—is not established. The rule therefore requires that there be sufficient evidence to support a jury finding of the conditional fact.

One can imagine similar problems of conditional relevance. The advisory committee suggests that ''if a letter purporting to be from Y is relied upon to establish an admission [of fault] by him, it has no probative value unless Y wrote or authorized it.'' (RB 14.) By the same reasoning, a ballistics expert's opinion that a particular bullet was shot from the defendant's gun would have no relevance unless the bullet the expert examined is the one that struck the victim (or is otherwise connected with

the crime). And a chemist's opinion that a particular bag of white powder contains cocaine would have no relevance without evidence that the defendant at some point possessed or was otherwise connected with the bag.

Such problems—or apparent problems—of conditional relevance seem obvious enough. In fact it is fairly easy to imagine chains of inference that depend on conditional facts. It is far harder, however, to imagine a chain of inferences *free* of any problem of conditional relevance. That is our next challenge.

Conditional Relevance: Is There a There There?

How will we know that a piece of evidence presents *no* problem of conditional relevance? The Advisory Committee's Note to Rule 104(b) gives some guidance. It suggests that there is no problem of conditional relevance with ''evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing.'' The note adds that such evidence is ''treated in Rule 401.'' (RB 14.)

Is there really no problem of conditional relevance buried within evidence that the defendant bought a weapon of the sort used on the day before the killing? In an article titled, ''The Myth of Conditional Relevancy,'' Professor Vaughn Ball writes: ''It seems to me safe to say that instead of some, virtually all offers of evidence can raise problems of conditional relevancy . . . .'' Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435, 456 (1980). And Professor Dale Nance adds: ''Indeed, the only limit on the number of conditioning facts pertaining to each proffer is one's imagination.'' Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447, 452 (1990). Take Ball's and Nance's claims as a challenge: Can you identify ''conditioning facts'' that must be proved before we can feel confident that ''evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing'' is relevant? More than likely you can.

Here is another example. Several pages back, Problem 1.3 presented a scenario in which the defendant agreed to undergo a polygraph examination. The judge excluded the results of the test. The defendant then sought to offer evidence that he had agreed to be tested even after he was warned that the technique accurately detected deceit. The relevance of the defendant's consent to the examination was that it tended to prove his *consciousness of innocence*. The chain of inferences had four links: (1) the defendant consented to the test despite the expert's warning; (2) therefore he must have been prepared to tell the truth; (3) therefore he must have been confident the truth could not hurt him; (4) therefore he must be innocent.

But was there no possible missing link in this chain of inferences? One could imagine at least a couple. For example, the reasoning assumes

the defendant truly *believed* the polygraph test would detect any attempt to lie. What if the defendant felt certain he could beat the test and lie without detection? In that event his consent to the examination would have had no relevance in proving his innocent state of mind. Likewise, the chain of inferences depends on the defendant's belief that the results of the test could somehow end up in the hands of authorities. What if the defendant in fact believed that if the test came out badly, he could keep the whole thing to himself and his lawyer? In that event the defendant's confidence in undergoing the test might be evidence not of his consciousness of innocence, but of his certainty that the results, if unfavorable, would never become evidence against him. In either event the defendant's consent to the polygraph would cease to be relevant evidence of innocence.

Most experts agree with Professors Ball and Nance that there is no *separate* problem of conditional relevance. ''[A]ll cases of relevancy are cases of conditional relevancy.'' Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871, 879 (1992); *accord* Craig R. Callen, *Rationality and Relevancy: Conditional Relevancy and Constrained Resources*, 2003 MICH. ST. L. REV. 1243, 1256 (''[T]he relevancy of an item of evidence is always dependent on the other information we have.''). That is, within *any* logical chain of inferences, a clever lawyer could spot a missing link without which the chain breaks apart. Those lawyers sharp enough to spy the missing link and articulate a conditional relevance objection may force the judge to analyze the problem under Rule 104(b). Less resourceful lawyers will not. And where no conditional relevance objection is made, the judge likely will admit the proffered evidence if it surmounts the bare relevance standard of Rule 401.

The difference in this circumstance between having a sharp lawyer and having a slacker amounts to this: In the one case, the judge will test the opponent's evidence against Rule 104(b)'s conditional relevance standard. In the other, she will apply only Rule 401's bare relevance standard. But is this a difference that makes a difference?

And if There's No There There . . .

The answer depends on how much harder it is to surmount the 104(b) standard than the 401 standard. Consider again the facts of *Cox*. How much easier would it have been to admit Prosecutor Puckett's proposed testimony under a bare relevance standard than under the conditional relevance standard imposed by the court? Under a bare relevance standard, the trial judge would have asked simply whether the outcome of Jamie Hammer's bond reduction hearing had any tendency to make it more probable that Cox had a motive to kill (and therefore did kill) James Leonard. The answer, presumably, would have been yes, as long as there was *any* non-negligible chance that Cox had heard about the outcome of the hearing. Under the 104(b) standard, evidence of the bond-

reduction hearing could come in only if the prosecutor introduced ''sufficient [evidence] to support a finding'' that Cox had heard about the hearing.

But now we've raised another question: sufficient to support *what kind* of finding? There are several possibilities—a finding beyond a reasonable doubt, a finding by clear and convincing evidence, or a finding by a mere preponderance of the evidence. The rule writers did not specify the standard. The Supreme Court, however, has resolved this question by choosing the most lenient option: Rule 104(b) requires that the proponent introduce sufficient evidence that ''the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.'' *See Huddleston v. United States*, 485 U.S. 681 (1988) (excerpted below at page 201).

This is not the last we will see of Rule 104(b)—or of its sibling rule, 104(a), which we take up in Chapter 7. I will look at the distinction between these two rules in some detail at pages 427 to 429. For now, you should mull this muddled state of affairs: In erecting a distinct standard to govern questions of conditional relevance, the rule writers almost surely made a logical error. *Every* chain of inferences has potential missing links. The consequence of this error is that when the missing link is obvious enough—or the opposing lawyer is canny enough to spot it—the judge will admit the challenged evidence only if the proponent introduces sufficient evidence of the conditional fact (the missing link) that the jury could reasonably find by a preponderance of the evidence that the link is established. But when the missing link is less apparent—or the opposing lawyer less resourceful—the judge will test the proffered evidence against only the bare relevance standard.

This state of affairs is surely somewhat troubling. But in practice it seems to prompt little concern or confusion. In part that is because lawyers simply do not make many conditional relevance objections. And in part it is because the conditional relevance standard, though higher than the bare relevance standard, is not *much* higher. The difference between *Huddleston*'s standard of conditional relevance (sufficient evidence that ''the jury could reasonably find the conditional fact . . . by a preponderance of the evidence'') and Rule 401's bare relevance standard (evidence having ''any tendency to make a fact more less probable'') amounts to little in the rough-and-tumble of real-world fact-finding.

On Condition of Later Proof

Rule 104(b) says that the trial judge ''may admit the proposed evidence on the condition that the proof be introduced later.'' Consider the *Cox* case again. Assume prosecutor Puckett has taken the stand, ready to testify about the new charges lodged against Jamie Hammer. If there already is enough evidence in the record to support an inference that Patrick Cox had heard of the new charges at the time of Leonard's

murder, Puckett's testimony may be admitted without further ado. If such evidence is not already in the record, the judge may permit Puckett to testify ''on the condition'' of connection. The prosecution still must introduce evidence that connects the new charges against Hammer with Cox's alleged motive to kill. If the prosecution fails to do so, the judge will instruct the jury to disregard Puckett's testimony about the bail reduction hearing.

The advisory committee's explanation of this mechanism is hardly a model of clarity. To make matters worse, there is a small but significant error in the committee's note to Rule 104(b). Here are the note's concluding sentences:

> If after all the evidence on the issue is in [i.e., all evidence about whether Cox had heard of the new charges] . . . , the jury could reasonably conclude that fulfillment of the condition is **not** established, the issue [i.e., the import of Puckett's testimony about the new charges] is for them [the jury]. If the evidence is not such as to allow a finding [that Cox had heard of those charges], the judge withdraws the matter from their consideration.

(RB 15.) That boldfaced ''not'' is a mistake. These two sentences make (somewhat) more sense without it.

C. PROBATIVENESS VERSUS THE RISK OF UNFAIR PREJUDICE

Focus on FRE 403

RULE 403, PHRASE BY PHRASE

Rule 403 is short, but its simplicity is deceptive. Almost every phrase of the rule deserves scrutiny:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

It is worth taking a moment to master the mechanics of Rule 403. Virtually every piece of evidence admitted at trial must survive this rule's probativeness-versus-risk-of-unfair-prejudice weighing test. Some evidence must survive a stricter screening. But only the narrow class of