SUPREME COURT OF THE UNITED STATES

ORIGINAL

In the Matter of:	)	
	)	
GUY RUFUS HUDDLESTON,	)	No. 87-6
	)	
Petitioner,	)	
	)	
v.	)	
	)	
UNITED STATES	)	
	)	

Pages: 1 through 50

Place: Washington, D.C.

Date: Wednesday, March 23, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner,

v. : No. 87-6

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Washington, D.C.

Wednesday, March 23, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

APPEARANCES:

DON FERRIS, ESQ., Ann Arbor, Michigan; on behalf of the petitioner.

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the respondent.

I N D E X

P R O C E E D I N G S

(11:05 A.M.)

CHIEF JUSTICE REHNQUIST: We will hear arguments next in Number 87-6, Guy Rufus Huddleston versus United States.

Mr. Ferris, you may proceed whenever you are ready.

Is your name pronounced "Fearis" or "Fairis?"

MR. FERRIS: "Fairis."

CHIEF JUSTICE REHNQUIST: "Fairis." Okay.

You may proceed whenever you are ready, Mr. Ferris.

ORAL ARGUMENT OF DON FERRIS, ESQUIRE

ON BEHALF OF THE PETITIONER

MR. FERRIS: Thank you, Mr. Chief Justice, and may it please the Court, this case is here on Mr. Huddleston's petition for certiorari to the United States Court of Appeals for the Sixth Circuit. There are two major issues facing this Court in this case.

First, by what standard of proof must the government prove that the defendant engaged in a prior bad act before it may be admitted under Federal Rules of Evidence 404(b). And second, if such evidence is erroneously admitted, which harmless error test should govern on appellate review, the harmless beyond a reasonable doubt

test enunciated by this Court in Chapman or the effect on substantial rights test enunciated by this Court in Kotteakos?

Finally, once this Court decides which standards should be adopted in this case, the Court must apply them to the facts of this case.

Now, petitioner contends that the trial court abused its discretion in admitting petitioner's involvement in the sale of black and white televisions prior to the sale of VHF tapes which he was charged with when the government did not prove they were stolen by at least a preponderance of the evidence.

We also contend that the jury's hearing about these TVs was not harmless error, that it affected his substantial rights and amounted to a miscarriage of justice under the Kotteakos standard.

I will concentrate in my argument on the standard of proof question, contending that both rules 104(a) and (b) of the federal rules require that the government show that the prior bad act was committed and that the defendant committed it by a preponderance of the evidence.

Then I intend to show that the government did not meet this standard in this case, that they did not show by a preponderance of the evidence that these TVs were stolen or that the defendant knew about it.

And finally I will argue that the erroneous introduction of the TVs was not harmless, that it did affect his substantial rights.

Now, this Court is faced in our briefs with deciding between three different standards of proof. First, of all, the clear and convincing standard of proof which was adopted by the Seventh, Eighth, Ninth, and D.C. Circuits. Many federal commentators also support it, as did our position, the federal common law.

The preponderance of evidence test has been supported by six different circuits, using the 104(b) test, and if this case is analyzed also under 104(a) I believe that this would be the required holding of the Court under the recent case of Bourjaily, and if I am not pronouncing that correctly -- I believe the case is Bourjaily, and that was decided by this Court last summer.

The government argues for a different standard. The government argues that a trial court should admit this evidence when there is a basis for finding that the defendant committed the Act. It is our position that there is absolutely no support for that --

QUESTION: Well, there is certainly a great deal of support for it in the traditional common law of evidence. Traditionally your burden of proof is a charge to the jury, but the trial judge admits evidence on the

basis of whether it tends -- whether a reasonable person could find that it tended to prove some element of the case.

MR. FERRIS: I believe -- I would agree with that but there stands as a sentinel to deciding this Rule 104(a) or (b), whichever one applies.

QUESTION: Now, where do we find the text of 104(a) in your brief? In your petition for certiorari you say the rule of evidence involved, but you cite only 104(b).

MR. FERRIS: I cite it --

QUESTION: I mean, you set it out -- you set out only 104(b).

MR. FERRIS: That's correct, and in my brief I cite 104(a) many times.

QUESTION: And is the text in your brief?

MR. FERRIS: Yes, I believe it is.

QUESTION: Again in your brief at the beginning you say the rule of evidence involved, and you set forth only 104(b).

MR. FERRIS: I actually set 404(b).

QUESTION: 404(b).

MR. FERRIS: 404(b). But I argue numerous times in my brief that whichever applies, 104(a) or 104(b), that --

QUESTION: Are these the same -- is 104(a) and 104(b) the same thing as 404(a) and 404(b)?

MR. FERRIS: No, 104(a) provides that preliminary questions on the admissibility of evidence must be decided by the Court.

QUESTION: Why aren't these set forth in your brief if you are going to rely on them?

MR. FERRIS: I believe -- 104(b) is specifically stated in the brief.

QUESTION: Whereabouts?

(Pause.)

QUESTION: Well, continue your argument.

MR. FERRIS: They are set out in Footnote 17 on Page 24 of the brief.

QUESTION: Thank you.

And you are relying both on 104(a) and 104(b)?

MR. FERRIS: 104(a) and 104(b). That's correct. In 104(a),"preliminary questions concerning the admissibility of evidence shall be determined by the courts, subject to the provisions of subdivision (b)," and (b) is relevancy conditioned on fact. "When the relevancy of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

QUESTION: Well, isn't that the traditional trial judge's saying the proponent offers in evidence and says, I will connect it up later? In other words, there is

something that should be in evidence that isn't to make it completely -- to make it admissible, and the trial judge says, yes, but you will have to connect it up later.

MR. FERRIS: No --

QUESTION: That doesn't deal with a standard of proof.

MR. FERRIS: Six Circuit Courts of Appeal have held that it does.

QUESTION: You tell me why you think it does.

MR. FERRIS: I think that it does because similar acts evidence is so fraught with possible prejudice to the defendant that that should be decided by the courts outside of the presence of the jury, and it has no probative value --

QUESTION: But we don't get that surely out of Rule 101(b) or 104(b).

MR. FERRIS: 104(b), I believe that introduction of evidence sufficient to support a finding of the fulfillment of a condition equals a preponderance of the evidence.

QUESTION: I don't think so at all.

QUESTION: I don't see how you can say that.

QUESTION: Sufficient to support a finding is quite different. If it had meant that it would have said, he shall admit it if he finds that the evidence is sufficient. It doesn't say, if he finds. It said sufficient

to support a finding, which is exactly the common law rule the Chief Justice is referring to. Could a reasonable jury find it, whether he thinks so or not. Preponderance is his making the judgment. Sufficient to support a finding is simply a reasonable man could find that.

MR. FERRIS: It is our position that it must be -- that the court must decide that out of the presence of the jury by at least a preponderance of the evidence or it has no probative value, that the jury should not hear about it, that if you then say to the jury, well, just ignore this later, ignore that we have said that this man is a bad man, that that is not effective, that this should be held outside of the presence of the jury, as this Court recognized in deciding the conspiracy issue in Bourjaily under 104(a).

QUESTION: I understand that that is your position. I just don't see how you get it from the language of 104(b), which only requires evidence sufficient to support a finding.

QUESTION: If you want to talk about damaging evidence, suppose there is eyewitness testimony offered. The witness is called. The government calls the witness, and he saw him. He says, yes, I saw this man shoot -- that is rather damaging, isn't it, and yet you don't let the trial judge try out that issue, whether that is reliable testimony or not, before it goes to the jury.

MR. FERRIS: But that is on the substantive offense. Here you are talking about evidence that is disfavored. It has always been disfavored by the courts in the federal common law. This Court in the Boyd case back in 1896 followed the exclusionary rule as to similar acts evidence.

QUESTION: Well, you could certainly -- I suppose the defendant is perfectly entitled to put on other evidence that he didn't commit these acts and let the jury decide it.

MR. FERRIS: He could do that, but it is our position that it doesn't have sufficient probative value to go to the jury unless you prove by at least 51 percent of the evidence that the defendant committed the act, that it is too fraught with prejudice otherwise to be admitted.

QUESTION: But you are saying the judge has to decide that. Suppose there is a dispute over whether or not the prior bad act occurred.

MR. FERRIS: Then that should be held outside of the presence of the jury. From a practical standpoint, it generally does not take that long.

QUESTION: Suppose there is an offer of proof that the prior bad act did occur, and the defense counsel says, we are going to argue that it didn't. Doesn't that go to the jury? The court doesn't hear that.

MR. FERRIS: If the court finds -- it is our position that if the court finds that that had been proven by a preponderance of the evidence, by 51 percent of the evidence, so that it is probative, then yes, then it goes to the jury. Then the defendant can get on the stand and dispute that, and I would state I don't believe --

QUESTION: You say it is the same rule as with a voluntary confession.

MR. FERRIS: Yes.

QUESTION: The court first decides whether it is a voluntary confession, and then the jury decides it again.

MR. FERRIS: Yes, and our position is that it comes out of Rule 104(a).

QUESTION: Can you get that out of the evidence?

MR. FERRIS: Pardon?

QUESTION: But this isn't -- is that just because of the highly dangerous nature of this evidence in your view, because 104(a) doesn't make that distinction.

MR. FERRIS: It is -- questions concerning the admissibility of evidence, and I would agree with Professor Wright, who indicates that if you are talking about whether a prior bad act is a bad act, that that is a preliminary question that should be decided by the judge, that that isn't a preliminary question of fact, that the government is introducing it for the purpose of showing that

the bad act occurred.

QUESTION: And what provision of the rules did Professor Wright rely on to reach his opinion?

MR. FERRIS: 104(a).

QUESTION: 104(a)?

MR. FERRIS: Right.

QUESTION: Which simply doesn't address the point at all, so far as I can tell.

MR. FERRIS: He reads 104(a) and 104(b) as a whole, and because of the possible prejudice and because it is fraught with danger, that he argues and I argue that as do the Seventh, Eighth, Ninth, and D.C. Circuits, and as do every circuit court in this country --

QUESTION: Well, did they have some reasoning that hasn't so far been apparent from your argument? I mean, do they simply rely on the language that we have been talking about, 104(a) and (b)?

MR. FERRIS: Yes, they equate that with preponderance of the evidence. In fact, the most recent case is, the government relied on the First Circuit in developing their any basis test under a case called D'Alora, and since we wrote our initial briefs, the First Circuit came down with a case called Ingraham at 832 Fed 2d. that also follows the Second, Fourth, Fifth, all of the other circuits that have developed a preponderance of evidence

standard, and they all rely on 104(b). They say that that language, introduction of evidence sufficient to support a finding of the fulfillment of a condition, equals a preponderance of the evidence, and that's our position.

QUESTION: I thought you argued for a clear and convincing standard.

MR. FERRIS: I did argue for a --

QUESTION: Your argument is so different than that which I thought we were hearing from the brief.

MR. FERRIS: It is. I argued clear and convincing in my petition, and I was unaware -- in fact, my petition for cert was in the mail when this Court issued its opinion in Bourjaily, and I was not aware of Bourjaily when I wrote my initial brief. But in my reply brief I admit that Bourjaily -- that this Court held in Bourjaily that the 104(a) standard, which had never been ruled on before because it doesn't state -- nowhere in the Federal Rules do they state what the burden of proof should be.

QUESTION: Well, you no longer are asking us to require a clear and convincing standard then?

MR. FERRIS: I am no longer asking that.

QUESTION: All right.

MR. FERRIS: I am no longer asking that, because I don't think that --

QUESTION: And so I thought the Sixth Circuit

applied some preponderance of the evidence there.

MR. FERRIS: They did on their second -- on rehearing they did apply the preponderance of evidence.

QUESTION: So you are saying the judgment should be affirmed, I suppose.

MR. FERRIS: No, I'm saying that the Sixth Circuit also was incorrect in their application of the preponderance of evidence standard. I don't --

QUESTION: That there was not enough evidence that they could have found a preponderance standard?

MR. FERRIS: Yes.

QUESTION: And that's what your argument boils down to now?

MR. FERRIS: Well, it is also -- I'm taking the position for a preponderance of the evidence, because I believe that the government's position of any basis would be disastrous to criminal defendants, that the government could come in with flimsy similar acts evidence and say this evidence should come in, and then only using the 403 -- the government argues for a 403 balancing test.

QUESTION: Well, let's talk about Rule 403. Doesn't Rule 403 require the court to determine whether the prejudicial effect of the evidence outweighs --

MR. FERRIS: The probative value.

QUESTION: -- the probative value.

MR. FERRIS: 403 specifically states that the evidence comes in unless the prejudicial effects substantially outweighs the probative value, which I find very different than a straight probative prejudice balancing.

QUESTION: Right, but was there any objection raised below to the Court's treatment of Rule 403 and that balancing?

MR. FERRIS: There was -- yes, the defense counsel on Joint Appendix 6 did object. There was no balancing below. In fact --

QUESTION: Well, but that is not a question presented on certiorari to us, is it, the 403 balancing?

MR. FERRIS: The 403 only is from a standpoint is if -- the government is arguing that that is what the standard should be, is no standard, just 403.

QUESTION: All right, but you did not raise some improper application of 403 in the petition for certiorari, did you?

MR. FERRIS: That's correct.

QUESTION: Okay.

MR. FERRIS: That's correct. I did discuss 403 because I felt that the government would raise 403.

QUESTION: Well, do you think the strength of the evidence must be considered in the 403 balancing or not?

MR. FERRIS: I think that the first -- I think that it does, but I think that the first step that must be done is that you don't reach the 403 balancing until you decide that there has -- that the similar act has been proven by a preponderance of the evidence.

QUESTION: So you think the trial judge has to make a separate determination of whether the similar acts are established by a preponderance --

MR. FERRIS: Yes, I do.

QUESTION: -- before letting it go to the jury and then make another assessment of the strength of the evidence under 403.

MR. FERRIS: Yes, the steps that I have argued for, and I argue this in my reply brief specifically, is that first the evidence has to be shown to be admitted for a proper purpose, not for propensity, but for one of the proper purposes under Rule 404(b).

Second, that has to be at issue. Now, those two things were argued in this case, that it was being admitted for knowledge and the defendant admitted that the issue in this case was going to be knowledge. Then my position is that in this case, where there is a dispute as to whether the bad act occurred or whether the bad act was a bad act, whether the TVs were stolen, then the court has to show that -- it has to be shown to the court by a

preponderance of the evidence, and once that threshold is met, then he applies the prejudice versus probative value.

QUESTION: Suppose the judge finds that a reasonable trier of fact could find by a preponderance of the evidence that the bad act occurred but he doesn't think it did. Then what?

MR. FERRIS: I think that your standard is the correct one, reasonable. Reasonable. That is the same standard that you would use --

QUESTION: My question is what -- then does it still go to the trier of fact, to the jury?

MR. FERRIS: Yes, it goes to the trier of fact.

QUESTION: So that he doesn't have to make a finding. All he has to find is that there is sufficient evidence from which a jury might make the determination.

MR. FERRIS: And that is 51 percent of the evidence.

QUESTION: May I ask --

QUESTION: But he doesn't have to make a finding.

MR. FERRIS: He has to determine that a trier of fact could make that finding, yes, that a reasonable perso could make a finding of 51 percent of the evidence.

QUESTION: May I ask you a question about the bad act in this case, the sale of the television sets? Is it your view that the bad act that must be proven by a

preponderance of the evidence is that, A, the televisions were sold for a very low price, B, they were stolen, and C, he knew they were stolen? Do they have to prove all three of those elements by a preponderance of the evidence?

MR. FERRIS: My position is, they have to prove, yes, that the televisions were stolen and that the defendant knew that they were stolen.

QUESTION: Knew that they were stolen.

MR. FERRIS: By a preponderance.

QUESTION: And here all they really proved was the first three, isn't it? That's the only --

MR. FERRIS: I think that's all they proved. The only evidence they have about these TVs is that they were sold for $28. I have emphasized in my brief that the government here three years later still can't prove the origin of those TVs. They have had three years to say that these TVs were stolen, prove by a preponderance of the evidence, and they can't do it.

QUESTION: Well, three years after the trial doesn't help very much.

MR. FERRIS: No, it doesn't, but certainly their evidence was from Mr. Toney. Mr. Toney indicated that Guy Huddleston went to him and said, we've got a good deal on TVs. My friend, an attorney with a license to practice law in the State of Michigan, has 770 of these TVs, and he is

selling them right out of his store in Ypsilanti.

QUESTION: Did the government argue that it had proved that the TVs were stolen and that he knew they were stolen?

MR. FERRIS: No, they just argued that it was relevant to show his knowledge. This issue was not very well --

QUESTION: Knowledge of what, knowledge of the tape sale or the TV sale?

MR. FERRIS: They argued -- the transcript is not very -- the hearing was not very long. In fact, there was no testimony taken. They argued that all of these items were stolen, and in fact I think they argued that in their closing argument, that all of these items were stolen, and the government admitted at oral argument in the Sixth Circuit that they did not prove it by clear and convincing evidence, but took the position that they did prove it by a preponderance of the evidence, and that was the government's position in this Sixth Circuit, that the standard should be a preponderance of the evidence, and they have switched their argument before this Court.

QUESTION: So you have each changed.

MR. FERRIS: We have each changed. We have each changed. And I have changed because I believe I have to under the Bourjaily standard. When this Court ruled, I was

not aware of Bourjaily, and when this Court ruled under 104(a) that the standard should be a preponderance of the evidence, I don't think that I can sit here before this Court and argue logically that 104(b) should be a higher standard than that.

QUESTION: Mr. Ferris, I assume that your argument would apply to everything covered by 404(b), and therefore I am a little concerned about using the shorthand "bad evidence."

MR. FERRIS: Right.

QUESTION: It isn't all bad. You say this stuff is so inherently inflammatory there has been a common law bias against it, but it isn't -- if what you are trying to show is that this individual committed burglary ten times before, I suppose you could call that bad evidence, but it wouldn't necessarily be that.

All you would have to show, let's say, in a case where there has been a theft from a store, you might just want to show that in the preceding ten weeks there had been similar items missing from the store, and on the day those items were missing, every one of those days this individual happened to be in the store.

I don't think there's anything inflammatory about the fact that this individual was in the store once a week for the preceding -- what is so inflammatory about that that

we have to erect a special rule for it?

MR. FERRIS: I don't believe in most cases that that is the sort of evidence that comes in, but it is not --

QUESTION: But that -- 404(b) is what would let that in, isn't it?

MR. FERRIS: No question, and in fact the government points that out. 404(b) talks about similar acts. It doesn't talk about bad acts. It talks about similar acts. But in that case I still think that if there is a question, and in that case there is a question as to whether the defendant committed the acts, and then it should be shown to the judge outside of the presence of the jury by a preponderance of evidence standard, using the reasonable --

QUESTION: Why is it -- I mean, why?

MR. FERRIS: Because --

QUESTION: For the other one you could at least justify it by saying it is very inflammatory, and the common law doesn't like people to be, you know, prior criminal acts to be brought in without proving that they actually occurred. But I am not -- all I'm saying is, look, part of what the jury should look at is, this guy did this ten weeks before.

MR. FERRIS: My position is under 104(b), and this is supported by every Circuit Court of Appeals in the

United States that that is what that language means, preponderance of the evidence. This does not come up that often in 404(b) cases, this issue. Most of the time the government can show that the defendant committed the act, or that the act was bad. I would say this might come up in 20, 25 percent of the cases. In major cases, though, where there are serial acts like you bring up, for example, the Wayne Williams case, where -- you know, a classic case --

QUESTION: It seems very strange to me. It could be even that this individual, the person who committed the crime wore a red had, and you want to introduce evidence that this fellow had often been seen wearing a red hat, and you would suddenly invoke this preponderance rule.

MR. FERRIS: No, it -- no, I believe that -- no, because that -- well, if you pigeonhole it under identity. If you pigeonhole it under identity, yes, I believe --

QUESTION: Evidence of other crimes, wrongs, or acts that is not admissible to prove the character. It may, however, be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of --

MR. FERRIS: Right, if it is pigeonholed under the identity, but at some point you are talking about -- you go into part of the res gestae, which is -- the government argued in their brief as a fallback position that this

shouldn't even be analyzed under a similar act evidence, that these TVs should come in because it showed that Mr. Huddleston was -- if these TVs were not stolen, if this Court adopts a standard of the preponderance of the evidence, that if these TVs were not shown to be stolen by a preponderance of the evidence, that they should have come in anyway, because it shows that Mr. Huddleston had a habit, not a habit, but had been selling things throughout the State of Michigan that were of questionable character.

That was their fallback position, and I think at some point you get into a res gestae, and you don't have to analyze it. I don't think that that is before this Court. That argument was first raised before this Court as a fallback position.

The only way to -- I believe that this is a conditional question or a conditional fact that must be decided by the judge, and as a result that 104(b) comes into play, and that stands as a sentinel, in the words of the judge who wrote Ingraham, which reversed the government's argument.

Again I indicate that the First Circuit was the only circuit to follow the government's position, and all the other circuits have indicated that 104 should be the standard, that it has not been shown in this case when all the government can show is that these TVs were being sold

for $28, and in fact if you use all of the evidence there was an attorney licensed to practice in the State of Michigan who said he had a bill of sale for these TVs and sold them right out of his store.

The last issue is that if this Court agrees with my analysis and also agrees that there was not a preponderance of the evidence, then you have to reach the harmless error standard, and I would admit to the Court that this Court has never held that the harmless error standard in nonconstitutional claims, and I am not claiming that this is a nonconstitutional claim, should be by the Chapman rule, should be by harmless beyond a reasonable doubt. The Sixth Circuit applied both standards in their opinions. They first said, in the first opinion, a two-one decision reversing Mr. Huddleston's conviction, they said that it hadn't been proven -- that it hadn't been proven harmless beyond a reasonable doubt, and then they also said, though, that there was some question as to whether there was a sufficient objecion raised here, and they analyzed the case under a plain error standard under Rule 52(b), which I take the position that the plain error standard is the same as the Kotteakos standard.

QUESTION: That was the panel opinion, wasn't it?

MR. FERRIS: That was the panel opinion, two-one, that they indicated that there was plain error.

QUESTION: What about the -- on rehearing?

MR. FERRIS: On rehearing they indicated that there was not?

QUESTION: Not what?

MR. FERRIS: Two of them -- yes, two of them switched their votes. In fact, they indicated that it was not necessary to reach that issue.

QUESTION: Not necessary.

MR. FERRIS: Yes, because --

QUESTION: But they did.

MR. FERRIS: They did.

QUESTION: And what did they say?

MR. FERRIS: They said that it was harmless error under the Kotteakos standard.

QUESTION: Yes.

MR. FERRIS: And this Court can review that under United States versus Hastings, because again that was not cited at the trial court level, that this Court can rule on harmless error, and I would like to point out to the Court that this was a close case. There were two counts here. Mr. Huddleston was convicted of one count. He was acquitted of the other count. The first count he was convicted of was on an April 19th sale. The second count he was convicted of was on an 23rd possession.

The only evidence showing his knowledge before

those tapes were these TVs. The jury was out for two days, and it is our position that this Court cannot say with fair assurance that it did not have a substantial influence on the verdict when it was the only evidence showing Mr. Huddleston's knowledge before he sold these tapes. All thse other things occurred a week later with Agent Nelson, the Amana appliances and the TVs and movies, and for that reason we would ask the Court to reverse the Sixth Circuit.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ferris.

We will hear now from you, Mr. Bryson.

ORAL ARGUMENT OF WILLIAM C. BRYSON, ESQUIRE

ON BEHALF OF THE RESPONDENT

MR. BRYSON: Mr. Chief Justice, and may it please the Court, our position in this case is very simple. It is that Rule 404(b) does one thing and one thing only. It prohibits the use of similar act, what we are calling similar act evidence for the purpose of showing propensity. That is to say, it prevents the government in a criminal case from using similar act evidence to show that a person is a bad man, and then asking the jury to draw the inference from the fact that he is a bad man that he did the bad acts that are charged in the indictment.

As we read the rule, once the judge has performed that act of screening, once the judge has said, this may not be used for propensity, then that evidence is treated just

the same as any other evidence that comes before the Court for admission to the jury under a relevance standard. The question then is under 401 is the evidence relevant, and the question is under 403 is the evidence too prejudicial to be admitted given its probative weight?

QUESTION: Does the strength of the evidence have to be considered in making the 403 balance, Mr. Bryson?

MR. BRYSON: I think it does come in, Your Honor. If the evidence --

QUESTION: I mean, if it is very slender evidence --

MR. BRYSON: If it is extremely slender and it is very, very --

QUESTION: -- and highly prejudicial --

MR. BRYSON: Absolutely.

QUESTION: -- that might be something the Court would consider.

MR. BRYSON: Certainly, Your Honor. I certainly think so. The Court has to look at the evidence as a whole and particularly focusing on the extent to which the evidence bears on the questions presented in the case, and if, for example, the evidence is very weakly proven, and for example if the evidence bears only slightly on the questions that are before the jury, and if the evidence is extremely prejudicial, the Court could conclude that that is a factor, that --

QUESTION: I mean, the court might have had a little on the balancing in this case, I would think, in light of the fact that there isn't much to show knowledge that the televisions were stolen, is there?

MR. BRYSON: Well, Your Honor, I think there is enough to justify a jury in concluding that they are stolen, and we make the point in the brief.

QUESTION: How so? Why don't you run through that with us?

MR. BRYSON: Well, sure. The way we view the question of relevance in this case on the television sets is that, Number One, these were sets that were sold in a barroom, basically. The initial contact was made by somebody walking into a barroom and saying, are you interested in television sets. Number Two, this was a case of someone who had announced that he had a truckload of television sets. Now, this wasn't a case of somebody trying to get rid of the television set that wouldn't work at home and trying to bring the television set into a barroom and see if he could get rid of it.

The televisions were being sold for an extremely low price, $28 for a 12-inch black and white television, and in fact the evidence from the defense, which was the evidence of this lawyer who participated in the sale of other televisions was that the defendants paid a total of, by

his claim, paid a total of about $10,000 to $12,000 for the whole truckload of televisions, which works out to be about $13 to $16 for each set, so the combination of the price, the circumstances of the sale, and the volume are, we think, sufficient evidence just standing by themselves to justify the inference on the part of the jury that these were stolen television sets, and then if you add to that the fact that in other instances Mr. Huddleston was dealing with the same people in part of the same operation with goods that he admitted to the FBI agent were hot, then that makes a very convincing case to go to the jury, we think, on the question of whether they were in fact stolen.

Now, our backup position, of course, is that it isn't necessary to establish that these televisions were stolen in order for that evidence to be admissible, and this was an argument that was made in fact in the closing argument in the rebuttal summation.

QUESTION: But the jury, the jury is going to have to find that they were stolen.

MR. BRYSON: I don't think it would have to make that finding, Your Honor, because suppose the jury concluded, we just don't think they were stolen. The evidence doesn't fall out because of that, because they could still find, well, but what it does show, what this other evidence does show is that Mr. Huddleston was in an

operation that was much larger.

QUESTION: So you don't think in the Court of Appeals then it should even have been open to argue that there was not enough evidence for any reasonable jury to find by a preponderance of the evidence that the televisions were stolen?

MR. BRYSON: Well, we think that would be open to argue that if the Court concluded that the other theory of relevance, our backup theory of relevance was inapplicable, but -- in other words, the Court could --

QUESTION: Well, yes, but you say it is admissible without any prior decision by a judge if it is relevant.

MR. BRYSON: That's right.

QUESTION: Now, if you are right in that regard you have no business argument the sufficiency of the evidence as to whether the goods were stolen on appeal, right?

MR. BRYSON: Well, Your Honor, there are two different issues, I think, if I can sort them out, because I think they get resolved in a slightly different way.

QUESTION: Well, eventually answer my question.

MR. BRYSON: Well, the --

QUESTION: Well, go ahead, but sooner or later answer it.

MR. BRYSON: Well, I am not sure I understand the --

QUESTION: I have forgotten it already.

MR. BRYSON: I'm sorry. You were saying that we had no business aruing sufficiency of the evidence?

QUESTION: Well, assume we take your position on relevance, that if the evidence is relevant, it comes in, without the judge doing anything else but saying it is relevant.

MR. BRYSON: Well, and perhaps this is the answer to the question.

QUESTION: And then does it make any difference on appeal whether or not there is sufficient evidence for a jury to find that the television was stolen?

MR. BRYSON: Well, it may, Your Honor, under this circumstance, and that is why this case presents both parts of the analysis as we see it. It may -- the judge may have to make a finding, a preliminary finding under Rule 104(b) if the question is a question of conditional relevance. That is to say, suppose the only possible theory on which this evidence could be admitted would be if the jury could find that it was stolen. Under those circumstances, the defendant could say, well, I don't want this evidence to come in unless you, judge, find that a jury could find that the evidence was stolen. That's, Your Honor, just --

QUESTION: I don't think that's what the rule means at all, Mr. Bryson. Judges don't traditionally just go through trials and when someone asks them to make a finding of fact like that, they don't go ahead and make findings of fact. That -- 404(b) to me deals with a situation where you are presenting one witness and you want to get him off the stand as soon as you can, but you want to cover everything so you can excuse him. He is going to testify to some things that are not yet tied in, but --

MR. BRYSON: Yes, sir.

QUESTION: -- and another witness is going to come along and tie it in, and so that is what it seems to me that conditional admission is talking about. The judge doesn't make any finding under Rule 404(b).

MR. BRYSON: Under 104(b), Your Honor --

QUESTION: 104(b).

MR. BRYSON: -- of course the judge can admit evidence subject to its being connected up, but this is a basic -- there is nothing special about Rule 104(b). It is simply articulating a basic principle of relevance, and that is that the evidence has to be ultimately tied up. In other words, suppose you have a case in which a witness testifies that someone was seen fleeing from a bank. You have to have some evidence, some basis for concluding that that someone was the defendant before the evidence is

relevant. So it is just a basic --

QUESTION: You handle that on voir dire orindarily, don't you?

MR. BRYSON: Of course.

QUESTION: The defense attorney is entitled to examine this witness to see if he has a sufficient basis for concluding --

MR. BRYSON: Preciseliy.

QUESTION: But your submission to Justice White, I thought, was that at this point you asked the judge to make a finding of fact. I don't see any basis for that.

MR. BRYSON: No, Your Honor, not -- and this is where we differ from petitioner. We are not asking the judge to make a preponderance finding or any other standing. We are asking that the judge do what the judge does in the case of every piece of evidence that is challenged on relevance grounds, which is to ask, could the jury make this finding?

If I said the judge to make a finding of fact, I misspoke. What I mean is, the judge looks at this question and says, could the jury conclude in this case that these televisions were stolen?

Now, if the evidence is relevant without regard to whether the televisions were stolen, then that course of logic that requires the judge to say, could a jury conclude

that they were stolen isn't necessary to do.

QUESTION: Mr. Bryson, before you go into this alternative theory of relevance, let me just be sure I understand your position on the conditional relevance. Is it not correct in your view that whether the standard is measuring probative value versus prejudice or whether it is some kind of a tentative preponderance finding, that the judge might admit it at the time it is offered subject to hearing what else is offered on that same issue, whether it is for tying up, as the Chief Justice says, or for making an appropriate judgment on this balancing business, and that if he determines later on, well, they never did offer anything else, then he would instruct the jury to disregard it. Isn't that correct?

MR. BRYSON: That is correct.

QUESTION: So it is conditional at least to that extent --

MR. BRYSON: That's correct.

QUESTION: -- even if it is just a balancing process.

MR. BRYSON: That's correct, and --

QUESTION: So you agree -- I want to be perfectly clear about it -- you agree that on the theory that they were trying to prove the television sets were stolen, that that 104(b) does apply.

MR. BRYSON: Oh, yes, on that theory, and we

say so in the last footnote in our brief.

QUESTION: All right. Now I am very much interested in your explanation of why it is relevant even if they are not stolen.

MR. BRYSON: Because the testimony -- the way the testimony came in in this case, we had first the witness who testified about the actual sales of the tapes, and she testified that Mr. Huddleston said he had not only these tapes but also had some movies that he was trying to sell in the meantime. The second witness who testified was the witness with respect to the black and white TVs, and he testified that not only did Mr. Huddleston try to sell the black and white TVs but he also tried to sell the blank tapes that -- obviously, the tapes that were at issue in this case.

And then the third witness, who is the one that testified about Mr. Huddleston's dealings a week after the transactions in this case testified that Mr. Huddleston was trying to get rid of not only the Amana refrigerators but also was trying to get rid of the movies and also was trying to get rid of some color TVs.

What the jury could conclude from all of this quite without regard to whether any of this stuff other than the stuff that was at issue in the case was stolen, was that Mr. Huddleston's role in this entire operation was a

much more extensive role than he claimed at trial. His claim at trial was basically -- his defense was, how could I know that this material was stolen, these tapes were stolen, because my role was so limited, all I was doing was, I was making the contact.

QUESTION: In oher words, you are claiming it is impeachment? It is just impeachment? I am talking about just the government's affirmative case.

MR. BRYSON: Your honor, that is not --

QUESTION: You put it in before he testified, didn't you?

MR. BRYSON: You bet, and that is not just impeachment because his whole defense was lack of knowledge on the basis of having so little contact with this material that he had no --

QUESTION: So little contact with the tapes.

MR. BRYSON: Well, that's right, but our point is that if has contact with the same people, the same operation over an extended period of time, he is much more integrally involved in that operation, and therefore much --

QUESTION: Yes, but if three out of the four products, there is no evidence they are stolen, how does that tend to prove that he knew the fourth product was stolen?

MR. BRYSON: Because he knows -- he is much more integrally involved with the operation and therefore

he is much more --

QUESTION: Well, Sears Roebuck sells 400 items and then because it is a big operation and they happen to have one stolen item that makes them know that one stolen item? I don't understand.

MR. BRYSON: Because he is running operation or playing a very major role in the operation, the jury could infer that his defense, which is that he had so little contact he had no reason to inquire, he was just doing a favor for a friend just doesn't wash. In other words, somebody who is in a position of running the operation is going to be likely to know much more about the quality of the goods than somebody who is just doing a favor by making a contact. That's the second theory of relevance, which doesn't depend on whether those TVs were stolen.

Now, we think that the inference of knowledge from the fact that they were stolen, from the conclusion that they were stolen is a powerful inference, and we don't need to rely on the second theory, but I think the second theory would certainly justify the judge in letting the evidence in, and in fact the prosecutor argued to the jury that one reason you can conclude that this evidence is pertinent is because it tends to rebut his claim that he was so busy with his contracting business that he really just relegated to a small part of his attention the business of

selling these tapes, and the prosecutor explained, he was doing this, he was spending a lot of time and effort on this entire operation. This was not something that was just a by the way accommodation by making a couple of phone calls for somebody, and from that we can infer an opportunity to have much more information about the stolen nature of the tapes.

QUESTION: Would you make the same argument if there were evidence that was really very powerful that none of the other items were stolen?

MR. BRYSON: You mean in other words --

QUESTION: Your second theory of relevance would be the same even if he came in later and gave evidence that you would accept as clear and convincing --

MR. BRYSON: Yes, the second theory, yes.

QUESTION: You would still say it is the same.

MR. BRYSON: I would think it would be relevant, Your Honor, and it is so minimally prejudicial that I think the balance could probably be drawn in favor of admitting the evidence.

QUESTION: Mr. Bryson, I gather from what you said earlier concerning your first theory --

MR. BRYSON: Yes.

QUESTION: -- that you don't think that each similar act has to be evaluated on its own, that the criterion

is whether a reasonable jury could find on the basis of all of the similar acts that the goods were stolen.

MR. BRYSON: I think that's right.

QUESTION: By which I mean this. You have in your brief the example of a counterfeiting prosecution --

MR. BRYSON: Yes, the counterfeit. That's right.

QUESTION: -- and you show that the individual went into ten different stores, and each one of those ten stores had a $50 bill in the cash register that was counterfeit afterwards. Now, I am not sure if you just showed one of those that I'd say that that was enough that a reasonable jury could find, but you would not do them one by one, you would take all ten.

MR. BRYSON: I think petitioner would want to do them one by one, but we would not, and I think that you're correct, that when you put them all together it makes a compelling showing with regard to each, and there is no reason that a judge in looking at the question of whether this is something that a jury could conclude established the question which was the basis for the conditional relevance finding. The judge can look at all that evidence, just as the judge could look at other evidence with respect to each incident.

QUESTION: Of course, the difference between that case and this one is that everybody agrees on your

hypothetical they were counterfeit, but here you don't have any agreement on whether these other items were all stolen.

MR. BRYSON: Well, suppose we were --

QUESTION: If you have 50 $10 bills and 49 of them are genuine and one of them is counterfeit and he passed all 50, what does that prove?

MR. BRYSON: Well, suppose in my counterfeit example we were unable for some reason to prove that several of the bills were counterfeit, which would be analogous to this case. Nonetheless, suppose further that the man went into these stores and paid -- he went into five straight stores and paid with a $50 bill for a 15 cent package of gum. That is pretty probative of the fact that something fishy is going on, because he is trying to get rid of fifties, and who gets rid of fifties? People that are carrying bad fifties. That's why --

QUESTION: But then you prove they're good fifties, the whole thing seems kind of silly.

MR. BRYSON: Well, if in fact it is proved they are good fifties, then we have a problem, but --

QUESTION: In fact, this is one of the problems with hypothetical cases. You don't go around peddling good $50 bills. That is your point. But you know they are counterfeit in your hypothetical, and you don't know they are

stolen here.

MR. BRYSON: Well, we don't know they're stolen but certainly the evidence is probative because of the nature of what it describes about the process the defendant is engaged in.

QUESTION: Mr. Bryson, on your first theory of relevance, if we accept that, do we have to reach the argument that there was not sufficient evidence for any reasonable jury to find that these televisions were stolen?

MR. BRYSON: The first theory being the theory that it was admissible without regard to whether they were stolen, you don't have to reach the question.

QUESTION: How about your second?

MR. BRYSON: On the second you would, and the question would be one not of whether either there was clear or convincing evidence or even that the judge believes --

QUESTION: No, no, whether a reasonable jury could find.

MR. BRYSON: -- that there is a preponderance, but rather whether a reasonable jury could draw this inference.

QUESTION: So we do have to reach on --

MR. BRYSON: On the stolen property theory. And, Your Honor, there is no difference in our submission, there is nothing special about that process. It is no different from the process that a judge follows either implicitly or

explicitly.

QUESTION: It seems to me that on your first theory, that that wasn't -- that wasn't the basis on which this evidence was offered.

MR. BRYSON: Well, the evidence, Your Honor, was --

QUESTION: -- and we don't know what a trial judge would have thought about it. We don't even know what the Court of Appeals would have thought about it.

MR. BRYSON: Your Honor, the evidence was offered on a --

QUESTION: Because you have changed your position from the Court of Appeals.

MR. BRYSON: Well, Your Honor, the evidence was offered on the basis that it was relevant to knowledge. It wasn't specified in any great detail as to how. The prosecutor argued in closing argument without objection that one reason that it was relevant was because it showed how much the defendant was involved in this whole operation, which didn't require a conclusion that the property was stolen.

Now, with respect to that point, we have not changed our position. The only change in the position to the extent that there is one, Your Honor, has been in the Court of Appeals when we sought rehearing en banc we argued that the court should not apply the clear and convincing

standard but rather should apply the test it had previously embraced, which is the preponderance test.

Now, we were stuck with what the Court had previously said as our alternative argument. The Sixth Circuit had previously adopted a preponderance test. Obviously it would have been better if we had put in a footnote and said that we believed that even the preponderance test is not correct, but I think we would have had little hope of persuading the Sixth Circuit to abandon its previous position on that.

But the -- even the preponderance test, I think, is a test which has created a lot of confusion because several courts have failed to distinguish between the question of whether a judge makes a finding by a preponderance or whether the judge says, a jury could find, which is to say, a jury could find by a preponderance.

In 104(b), just as in any other case of foundation evidence, the question is, can the judge find or conclude that the jury could find by a preponderance that a particular fact is proven, and that is, we say that is a basic relevance inquiry. That, we think, is the correct view. You can call it a preponderance view of a sort, although I think that is misleading. But it is definitely not the judge making a determination that there is a preponderance and therefore making, for example,

credibility determinations that are properly left for the jury.

Now, I think in order to focus on this distinction between Rules 104(a) and 104(b), which is the crux of petitioner's argument now, it is important to note that 104(a) deals basically with questions of competence, not questions of relevancy. The rule applies, for example to preliminary questions in determining whether hearsay evidence should be admitted, preliminary questions in determining whether a witness is qualified, that sort of inquiry.

It does not apply and specifically excepts that class of cases which deals with relevance, which is 104(b). This question in this case as we see it is a pure question of relevance. I think petitioner is correct that if this were a 104(a) question, a question committed to a judge to make a decision as the judge sitting under a Lego against Twomey type situation, that the preponderance test would apply. That is to say, the judge would have to decide on his own whether the evidence had met whatever factual condition there was by a preponderance.

That does not apply in the case of Rule 104(b) where the rule specifically states that all that is necessary is for the judge to conclude that there is enough evidence to justify the finding, that is to say, to justify

the jury making a finding, and the advisory committee notes to 104(b) specifically lay out that this is a question for juries, this is not a question for judges. That is the question we have in this case, which is one of conditional relevance, if we go solely on the stolen property theory.

Conditional relevance may not apply at all, if we go on the theory that the evidence is admissible without regard to whether the TVs were stolen, so that's the way we view the relationship between Rule 104(a) and 104(b). In any event, the clear and convincing test has nothing to do with any of this. It was invented, we think, by the courts in just sort of expression of antagonism towards evidence of this sort. It is not reflected anywhere in the legislative history or the language of any of the rules. It is simply made up.

Now, as to the assertion that petitioner makes that --

QUESTION: You don't really mind that antagonism really but you say they should vent it through the other provision that requires balancing.

MR. BRYSON: That is exactly what we say.

QUESTION: In some cases you would even allow that that balancing would lead a court to say I won't let it in unless I believe by a preponderance that it was stolen.

MR. BRYSON: Well, I think a judge should not draw

a conclusion like that which would simply be a way of getting around Rule 104(b), but I would think there would be cases --

QUESTION: Conceivably a judge might think it was so prejudicial that that's the standard he'd impose.

MR. BRYSON: Exactly. I think it would be wrong for a judge to say as a matter of course in my courtroom from here on out I am going to read Rule 403 and you are never going to get anything in unless it meets the preponderance test, no matter how minimally prejudicial it is, or like your red hat example, it is not prejudicial at all.

I mean, I have an aversion to red hats, and you had better prove it by a preponderance. That would be crazy, and it would also be wrong, but the test that we suggest and what I think the advisory committee and the various committees that commented on the rules at the time they were being devised wanted to focus the attention of the court on the question of, A, relevance, and B, prejudicial versus probative, and that is the question that is just an inherent part of the whole Article 4 relevancy provision in the rules.

Now, petitioner claims that a number of circuits have adopted his 104(a) analysis here. As we read it, only one circuit has adopted Rule 104(a), and that is the Seventh Circuit, and it has done it in a kind of backwards way. What it has said is because we adhere to the clear and

convincing test, and the Seventh Circuit is one of the courts that adheres to that test, we believe that it would be odd to ask a jury to make a finding like that. Therefore a judge must make such a finding, and therefore because the only rule that requires judges to make findings is Rule 104(a), therefore this must be a Rule 104(a) question.

Well, if you don't start with the assumption that the clear and convincing evidence test is the right test, then you don't end up with Rule 104(a). Every other court that has addressed this question has either ruled that the clear and convincing or preponderance test applies without focusing on the rule at all, simply by applying old common law notions from their own common law developments, or have been courts that have said this is a question of conditional relevance, which is our position.

Now, we think that some courts have incorrectly said it is always a conditional relevance question. It isn't always a conditional relevance question, but there may not be any preliminary fact to be found, but when it is, then it is decided under Rule 104(b), just like any other piece of evidence.

QUESTION: May I ask you a question about your theory?

MR. BRYSON: Yes.

QUESTION: Do you agree that in the first time

the Court of Appeals decided the case, although they weighed the factors different from the way you would, that they followed the procedure that you say was correct? They just did this balancing and said the District Judge had found that probative value outweighed the other?

MR. BRYSON: Your Honor, they invoked the clear and convincing test, which it seems to me is the error.

QUESTION: In the first --

MR. BRYSON: I believe so, in the panel opinion. I believe that they invoked the clear and convincing test, which was why they withdrew their opinion in light of the conflict between that case, that decision, and the Ebens case.

QUESTION: Well, I guess I misread it.

MR. BRYSON: If the Court has no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank youk, Mr. Bryson.

Mr. Ferris, you have two minutes remaining.

ORAL ARGUMENT OF DON FERRIS, ESQUIRE

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. FERRIS: Your Honor, the government does admit 104(b) comes into play in these cases, and they should because the advisory committee notes to 401 recognize the distinction between logical relevancy under 401 and conditional relevancy under 104. And Rule 402 merely states

that relevant evidence is admissible except as otherwise provided for by other rules. 104(a) -- it is our position that 104(a) applies here but if 104(b) applies that, six different circuits have ruled that the preponderance of evidence test is what that rule means.

QUESTION: May I just ask there, when you say preponderance of evidence, do you mean the judge must find by a preponderance, or there must be sufficient evidence that a jury could find?

MR. FERRIS: Yes, I misspoke to Justice White. I believe that the jury -- I mean, that the judge has to find that before it is submitted.

QUESTION: So you and your opponent disagree on the meaning of the preponderance standard.

MR. FERRIS: Yes. The preponderance should be decided by the judge because of the prejudicial nature of the evidence, and Justice Scalia asked about Rule 403. There are some commentators, notably Weinstein, who indicates that 403 should be a sliding scale, that the more prejudicial the evidence, that the higher the standard of proof should be that it occurred.

There is also a very good article on that in the Notre Dame Law Review written by a man named Sharp.

QUESTION: I had thought that the government's in agreement on that. I am not sure you are in --

MR. FERRIS: No, the governments argues that it is a straight 403 balancing, which -- and we disagree. 403 indicates that the probative value -- that the prejudicial effect has to substantially outweigh the probative value, and that is not what the notes -- the advisory committee notes say in Rule 404. They say no mechanical determination is -- we don't suggest any mechanical determination.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ferris. Your time has expired.

The case is submitted.

(Whereupon, at 11:49 a.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

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LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States.

Date: 3/29/88

Margaret Daly

Official Reporter

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