UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	)	**Criminal No. 3-95CR-294-R**
	)	
v.	)	**Filed: 12/4/95**
	)	
MRS. BAIRD'S BAKERIES, INC. and FLOYD CARROLL BAIRD,	)	**Violation: 15 U.S.C. § 1**
	)	
	)	
Defendants.	)	

GOVERNMENT'S RESPONSE TO DEFENDANTS' JOINT MOTION FOR SEVERANCE OF COUNTS

The United States of America, through its attorneys, hereby responds to Defendants' Joint Motion for Severance of Counts.

The government disputes the defendants' initial contention that Counts 1 and 2 of the indictment are improperly joined under Fed R. Crim. P. 8(a). That rule, as set forth in defendants' motion, specifies those instances in which the government may separately charge multiple offenses in the same indictment. Here, the government followed the requirements of Rule 8 and elected to charge both defendants with Counts 1 and 2 because the offenses are of the same or similar character.

Joint trials promote judicial economy and efficiency. Bruton v. United States, 391 U.S. 123, 131 n.6 (1968); thus, Rule 8 must be broadly interpreted in favor of initial joinder. Haggard v. United States, 369 F.2d 968, 973 (8th Cir. 1966), cert. denied, 386 U.S. 1022 (1967). However, even if joinder was improper, reversal is not required unless the misjoinder resulted in actual and substantial prejudice that influenced the determination of the jury verdict. U.S. v. Lane, 474 U.S. 438, 449 (1986). Accordingly, "...a denial of severance will not be reversed

unless real prejudice and an abuse of discretion are shown." U.S. v. Adkins, 842 F.2d 210, 212 (8th Cir. 1988). In those instances where prejudice is shown, the tailoring of relief is within the discretion of the trial court. U.S. v. Zafiro, 113 S. Ct. 933, 938 (1993).

Defendants' motion continues at length setting forth how the two alleged violations of §1 of the Sherman Act differ with respect to co-conspirators, objectives, market areas and time periods. All of these differences, they contend, result in a situation that warrants a severance of the counts and separate trials.

It is true, as the defendants allege, that the counts differ in many particulars. The same evidence will not be offered at trial to prove both offenses. That is precisely why two separate conspiracies were charged as opposed to a single conspiracy. However, Rule 8(a) does not require that the offenses be identical, as is implied by the defendants' argument. All that is required is that the offenses be of the same or similar character. Here, the defendants are charged with similar conspiracies accomplished through similar collusive activities, each designed to fix the wholesale price of bread in a distinct geographical area. Both alleged conspiracies violate the identical statute, occurred during substantially the same time period, were implemented in a similar manner, involved the active participation of the defendant Floyd Carroll Baird on behalf of his co-defendant employer, and ultimately caused harm to similarly situated victims. To say that these offenses are not of the same or similar character because they are not factually identical is to severely distort the plain meaning of the words used in Rule 8(a).

Offenses that have been held to be "of the same or similar character" for joinder purposes include multiple counts of bank robbery, U.S. v. McQuiston, 998 F.2d 627 (8th Cir. 1993), and

bank fraud, misapplication of bank funds and false statements to a bank officer U.S. v. Furman, 31 F.3d 1034 (10th Cir. 1994).

Differences in co-conspirators and time periods do not mandate a severance of counts against a criminal defendant, but may even support a joinder. In U.S. v. Bermea, 30 F.3d 1539, 1574 (5th Cir. 1994), cert. denied, 115 U.S. 1113 (1994), a defendant (Garza) was charged with two counts of conspiracy to possess marijuana with intent to distribute. His argument on appeal that the two counts against him should have been severed because they were so similar and would probably confuse the jury was rejected. The Court found that although the conspiracies were similar, they were distinct in time and involved different participants. The Court reasoned that no error occurred since the two conspiracies were factually separable and the jury was given cautionary instructions.

The defendant Floyd Carroll Baird offers another reason for a severance of counts on page 8 of the joint motion:

> "...it is *possible* that the developments and evidence at trial *could* result in a situation in which Defendant Carroll Baird desires to testify on his own behalf as to one of the offenses charged in one count, but elects not to so testify as to the other count." (emphasis added)

Defendant's tentative language in his motion is precisely why a severance based on this ground should be denied. A defendant seeking a severance for this reason has the burden of showing the importance of his testimony as to one count and a strong reason for not testifying as to the other. U.S. v. Ballis, 28 F.3d 1399, 1408 (5th Cir. 1994), U.S. v. Hollis, 971 F.2d 1441, 1457 (10th Cir. 1992), cert. denied, 113 S.Ct. 1580 (1994). Sufficient information about the nature of the expected testimony must be provided to the Court to support a claim of prejudice.

Ballis, *supra*, at 1408; Hollis, *supra*, at 1457. A bare allegation of possible prejudice if the defendant possibly testifies as a result of developments and evidence at trial that may occur clearly does not approach the standard set forth above.

Lastly, the defendants seem to be arguing that a severance should be granted because the two offenses constitute Fed. R. Evid. 404(b) evidence with respect to each other and should be severed pursuant to Fed. R. Crim. P. 14. They contend that proof of each conspiracy only proves their propensity to commit crimes when offered at the trial of the other conspiracy and is thereby unduly prejudicial. They believe that none of the exceptions to the rule are applicable in this case.

The flaw in this argument lies in the defendants' assumption that, if each offense were tried separately before a jury, Rule 404(b) would prohibit the admission at trial of evidence of one conspiracy at the trial of the other conspiracy. Virtually no substantive factual or legal arguments are set forth by the defendants to support their assumption.

Various types of offenses and bad acts are routinely admitted in trials to prove one or more of the exceptions under Rule 404(b). On the issue of a defendant's intent, evidence admitted under Rule 404(b) has included prior incidents of bid rigging, U.S. v. Bi-Co. Pavers, Inc., 741 F.2d 730, 736-737 (5th Cir. 1984) and U.S. v. Dunham Concrete Products, Inc., 475 F.2d 1241, 1250 (5th Cir. 1973), cert. denied, 414 U.S. 832 (1973); prior involvement in manufacture of methamphetamines in trial for conspiracy to manufacture methamphetamines, U.S. v. Stephenson, 887 F.2d 57, 60 (5th Cir. 1989), cert. denied, 476 U.S. 1086 (1990); evidence of prior bribery schemes in trial for conspiracy to commit fraud and bribery, U.S. v. Bruno, 809 F.2d 1097, 1106 (5th Cir. 1987), cert. denied, 481 U.S. 1057 (1987); fire damage to

other properties owned by the insured both prior and subsequent to the fire damage at issue in the lawsuit, Dial v. Travelers Indemnity Co., 780 F.2d 520 (5th Cir. 1986); and evidence of attempt to buy heroin in a trial for distribution of heroin, U.S. v. Witt, 618 F.2d 283 (5th Cir. 1980), cert. denied, 449 U.S. 882 (1980). Proof of such similar crimes is relevant and admissible because if "...the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense." U.S. v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979).

Following the reasoning in the Fifth Circuit case law above, the evidence that supports each of these offenses would clearly be admissible at a trial of the other offense pursuant to Rule 404(b). Evidence that the defendant Floyd Carroll Baird directed his subordinates to meet with competitors to reach pricing agreements in distinct geographical marketing areas during overlapping time periods is compelling proof of what was intended, why it was done, how it was done, and when it was done. A jury will be easily able to distinguish one offense from the other since the geographical areas and co-conspirators are completely different. Assisted by the Court's cautionary instructions, there will be no danger that a jury will use the evidence of each conspiracy in an impermissible manner.

While some degree of prejudice is always present when cumulative evidence of criminal conduct is presented to a trial jury, a court is not required to sever offenses for that reason alone. Hollis, *supra*, at 1457. That a defendant would have a better chance of acquittal were the offenses tried separately cannot support a severance. Zafiro, *supra*, at 938. A defendant cannot claim prejudice where a severance would not result in a limitation of evidence presented at trial. Ballis, *supra*, at 1409.

CONCLUSION

The defendants have offered no legal reason that would entitle them to a severance of the counts in the indictment. While the defendants may be prejudiced to some degree by a joinder of offenses and the cumulation of evidence of criminal conduct, such minimal prejudice is far outweighed by the probative value of the evidence of both offenses.

WHEREFORE, the government respectfully requests that the defendants' Joint Motion for Severance of Counts be denied in its entirety.

Respectfully submitted,

_____/s/_____
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ORDER

The Court, having considered the Defendants' Joint Motion for Severance of Counts and Brief in Support Thereof and the Government's Response hereby finds that the motion should be denied in its entirety.

IT IS SO ORDERED this ____ day of _____, 1995.

_____
JERRY BUCHMEYER, CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Government's Response to Defendants' Joint Motion for Severance of Counts and proposed Order were mailed via Federal Express on the ____ day of December 1995, to

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