

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>UNITED STATES OF AMERICA</b>	)	<b>Criminal No. 3-95CR-294-R</b>
	)	
<b>v.</b>	)	<b>Filed: 3/11/96</b>
	)	
<b>MRS. BAIRD'S BAKERIES, INC. and FLOYD CARROLL BAIRD,</b>	)	<b>Violation: 15 U.S.C. § 1</b>
	)	
<b>Defendants.</b>	)	

**Government's Response to Motion of Defendant  
Mrs. Baird's Bakeries, Inc. for a New Trial on Count One and Memorandum in Support**

Defendant Mrs. Baird's Bakeries, Inc. has filed a motion requesting that the Court grant it a new trial pursuant to Rule 33, Fed. R. Crim. P. The defendant claims (1) that the jury's guilty verdict on Count One was against the clear weight of the evidence, (2) the government failed to show that the charged price fixing conspiracy continued into the five-year statute of limitations and, (3) that various errors were committed during trial that caused it substantial prejudice. The defendant's arguments are based almost exclusively on a mischaracterization, or misunderstanding, of the evidence presented at trial. Essentially, defendant constructs a fictional account of the testimony presented by Stanley Oler and, then, attacks this incomplete and misleading version of events in order to create an argument that the jury's verdict was unsupported by the evidence presented at trial. The defendant vigorously argued this alternate version of events to the jury. However, the jury chose to believe the more complete picture of events presented by the government and concluded that a full and complete review of the evidence supported a verdict of guilty beyond a reasonable doubt. Therefore, because

defendants arguments are based on an incorrect and incomplete interpretation of the evidence presented at trial, its motion for a new trial should be denied.

### **The Legal Standard**

Pursuant to Rule 33, Fed. R. Crim. P., a trial court may grant a new trial to a defendant if required in the interest of justice. Motions for a new trial may be based either on the ground that the verdict was against the weight of the evidence or that some error occurred at trial which substantially affected the rights of the accused. United States v. Simms, 508 F. Supp. 1188, 1202 (W.D. La. 1980). The decision to grant or deny a motion for a new trial based on allegations that the verdict was against the weight of the evidence is within the sound discretion of the trial court. United States v. Martinez, 763 F.2d. 1297, 1312 (11th Cir. 1985). While the court's discretion is broad, a new trial should be granted on this ground only in exceptional cases. Simms, 508 F. Supp. at 1202. Indeed, the Court may not reweigh the evidence and set aside a jury verdict simply because the judge may feel that some other result is more reasonable. Martinez, 763 F.2d at 1312; Simms, 508 F. Supp. at 1202. Also, while the court is allowed to weigh the evidence and consider the credibility of witnesses in assessing a defendant's motion for a new trial based on the weight of the evidence, absent exceptional circumstances, issues of witness credibility should not provide sufficient grounds for granting a new trial except where the testimony contradicts indisputable physical laws or facts. United States v. Kuzniar, 881 F.2d 466, 470-471 (7th Cir. 1989). In any event, motions for new trials based on the weight of the evidence are not favored and should be granted only where the evidence preponderates heavily

against the verdict, such that it would be a miscarriage of justice to let the verdict stand.

Martinez, 763 F.2d at 1313.

In cases where a new trial motion is premised on allegations of error committed during the course of the trial, the convicted defendant has the burden of showing not only that some error was in fact committed but also that the error was prejudicial to it. Simms, 508 F. Supp. at 1203. However, even if an error is found to exist, a new trial should not be granted unless the error affected the defendant's substantial rights and the fairness of the trial. Id. The test to be applied by the Court is whether the verdict was substantially swayed by the error. Id.

### **Weight of the Evidence**

As in its motion for a judgment of acquittal, the defendant argues that the evidence presented by the government was insufficient to support the jury's verdict of guilty on Count One. In support of its argument, the defendant makes several factual assertions which are either incomplete, mischaracterizations, or nonsensical. For example, the defendant appears to argue that it should be granted a new trial because the government did not present a typical price fixing case, which it defines as a case involving a multitude of witnesses and a plethora of pricing documents. Clearly, the government could have burdened the Court and the jury with a parade of cumulative testimony and documentary evidence. However, there is no legal requirement that the government present every last shred of evidence in order to prove a "hard core" price fixing violation. Indeed, as this case demonstrates, a lengthy price fixing conspiracy can be proved beyond a reasonable doubt with the testimony of a long term executive of the corporate defendant who confesses to participating in a lengthy price-fixing conspiracy on behalf of his

employer. Clearly, the jury found that the testimony of Stanley Oler, in conjunction with the exhibits admitted into evidence during his testimony, was sufficient to support a finding beyond a reasonable doubt that the defendant had participated in the price fixing conspiracy charged in Count One. The fact that additional evidence of guilt may have been available in no way supports defendant's argument for a new trial.

After arguing that it deserves a new trial because in a typical price fixing case the government ordinarily presents more witnesses and more documentary evidence, the defendant asserts that the evidence presented proved nothing more than an innocent and legal exchange of price information. In essence, the defendant argues that the evidence presented at trial proved only lawful conduct. This argument is disingenuous because it ignores crucial aspects of Stanley Oler's testimony.

Mrs. Baird's argues that the prosecution did not make any attempt to demonstrate that Mrs. Baird's entered into an express price fixing agreement with Flowers prior to announcing price increases. See Defendant's Motion at page 6. Mrs. Baird's asserts that the government attempted to prove a per se violation by showing only the advance announcement of price increases and the exchange of publicly announced price information. Defendant's assertions are not true. As demonstrated in the government's response to Defendant's Motion for Judgment of Acquittal, the government proved, beyond a reasonable doubt, that Stanley Oler and an executive of Flowers exchanged proposed prices for bread products in east Texas prior to the date those prices were scheduled to take effect. If Mrs. Baird's, or on rare occasions Flowers, would not agree to the proposed bread prices, the new prices would not take affect. On the other hand, if Mrs. Baird's agreed to match a price increase proposed by Flowers, or vice versa on at least one

occasion, then Mrs. Baird's would increase its price to match the Flowers' proposal and Flowers would allow its proposed price increases to take effect. Therefore, the prices for bread products in east Texas depended on Mrs. Baird's response to proposed increases. If Mrs. Baird's agreed to increase, the price increased. If Mrs. Baird's would not agree to an increase, the price remained stable. The jury did not ignore this crucial evidence, and neither should the Court.

The defendant's legal argument, and cases cited in support are premised on the assumption that the government merely proved an innocent exchange of prices. That is not the case, and therefore, the case law and supporting argument presented by the defendant is irrelevant and inapplicable to the issues in this case. Besides addressing a factual situation not presented in this case, defendant's legal argument ignores the fact that both Mrs. Baird's and Flowers had a clear understanding of the consequence, and anticipated actions which would result from their exchange of prospective pricing information. Therefore, even if the government had not proved an explicit agreement, the coordinated actions of Flowers and Mrs. Baird's following the exchange of prospective price information provided the jury with substantial circumstantial evidence proving the existence of a tacit price-fixing agreement. See United States v. Champion Int'l Corp., 557 F.2d 1270, 1273 (9th Cir. 1977), cert. denied, 434 U.S. 938 (1977).

In sum, defendant's factual and legal arguments are incomplete and, therefore, mischaracterize the quantity and quality of evidence presented to the jury. The defendant's misguided interpretation of Mr. Oler's testimony and their theory that the evidence proved merely that the defendant had engaged in a legal price exchange with Flowers, was forcefully argued to the jury by able defense counsel. The jury weighed defense arguments against the

evidence presented by the government and determined beyond a reasonable doubt that defendant had committed the violation charged in Count One of the Indictment. The jury's verdict is both reasonable and fully supported by the evidence. Therefore, there has been no miscarriage of justice which could justify nullifying the jury's verdict.

### **Statute of Limitations**

The defendant reasserts its argument, more fully set out in its motion for a judgment of acquittal, that the government failed to prove that the price-fixing conspiracy charged in Count One of the Indictment continued into the five-year statute of limitations period. As detailed in the Government's Response to Defendant's Motion for a Judgment of Acquittal, defendant's argument ignores crucial evidence showing that the charged conspiracy continued at least until November 1992, and therefore, its motion for a new trial based on the same allegations should be denied.

### **Alleged Trial Errors**

The defendant, Mrs. Baird's Bakeries, Inc., assert four errors which occurred at trial which caused prejudice to its substantial rights. First, the defendant claims that the government's proof created a constructive amendment of the Indictment, or induced a material variance, which caused the Court's instructions to the jury to be clearly erroneous. The defendant's assertion is based on their theory that the government proved a case based only on advance price announcement and information exchanges rather than a "hard core" price fixing case. The defendant asserts that by failing to prove an express price fixing agreement, the government's

proof either amended the Indictment or caused a material variance to occur. As shown above, and in the Government's Response to Defendant's Motion for a Judgment of Acquittal, the defendant's version of the evidence is wrong. The government proved a price-fixing agreement, both explicit and tacit, and therefore, the defendant's conduct was as "hard core" as it gets. As a result, the Court's instructions were correct and no new trial is necessary.

Next, the defendant contends that the Court's instructions to the jury were deficient in three respects. First, defendant complains that the Court only gave a portion of its requested instruction number 18. Defendant's requested instruction number 18 contained a laundry list of activities which, unless done pursuant to an agreement to fix prices, would not constitute a violation of the Sherman Act. The Court included some, but not all, of the listed activities which would, by themselves, not constitute a price fixing violation. In essence, the instruction merely attempted to highlight the fact that in order to convict the defendant, the jury must find beyond a reasonable a doubt that the defendant entered into a price fixing agreement with a competitor. This basic requirement was repeated many times in the Court's charge and therefore, the defendant's theory was adequately covered, not only in the portion of defendant's requested instruction read by the Court, but certainly in the charge as a whole. See United States v. Natel, 812 F.2d 937, 942 (5th Cir. 1987); United States v. Tarantino, 846 F.2d 1384, 1400-1401 (D.C. Cir. 1988) cert. denied, 488 U.S. 840 (1988). Because defendant's theory is adequately covered in the charge as a whole, no new trial is necessary.

Second, defendant complains that the Court did not give its requested instruction number 17 which stated that the mere solicitation of an agreement to fix prices does not constitute a Sherman Act violation. Again, because the charge as a whole clearly required the jury to find

beyond a reasonable doubt that the defendant entered into an agreement to fix prices with a competitor, failure to give another variation on that theme is not reversible error and, therefore, no new trial is required.

Lastly, defendant objects to the Court's instruction that no actual effect on prices need be established to find the defendant guilty of a price fixing conspiracy in violation of Section One. Because, as defendant recognizes, these instructions are appropriate for a case involving a per se violation the antitrust laws, the defendant's objection is frivolous.

As its third alleged trial error, defendant claims that the admission of the tape recorded conversation between Stanley Oler and Steve Green constitutes reversible error. Despite the fact that defendant failed to object at the time the tape recording was admitted into evidence, (Tr. I-428) the defendant now objects to its introduction claiming that the government failed to lay a proper foundation.

Even though the defendant never objected to the accuracy or authenticity of the tape recording prior to its admission into evidence, and despite the fact that it was defense counsel himself who disclosed the contents of the recording, defendant now objects to the admission of the tape recording for lack of a proper foundation. It is well recognized that there are no strict particularized standards governing the admissibility of tape recordings and that the purpose of the foundational inquiry is simply to establish and ensure the accuracy of the recording. United States v. Hughes, 658 F.2d 317, 322, (5th Cir. Oct. 1981), cert. denied, 455 U.S. 92 (1982); see also, United States v. Stone, 960 F.2d 426, 436 (5th Cir. 1992) (The Biggins factors are not meant to require "formalistic adherence" at the expense of the trial judge's discretion). The trial judge has broad discretion to determine whether this burden has been satisfied, and his

determination will not be disturbed absent extraordinary circumstances. Hughes, 658 F.2d at 323; United States v. Biggins, 551 F.2d 64, 66-67 (5th Cir. 1977).

In this case, Oler, a participant in the conversation, was able to identify the conversation with sufficient clarity to give interpretive testimony concerning the conversation and was able to accurately identify his own voice as well as Steve Green's. Neither Oler, nor the defendant, have challenged the accuracy or authenticity of the taped conversation. Because Oler was available for cross-examination concerning his identification of the voices and the accuracy of the recording, his testimony concerning the tape recorded conversation provides a sufficient foundation for its admission. See United States v. Albert, 595 F.2d 283, 290 (5th Cir. 1979), cert. denied, 444 U.S. 963 (1979). In any event, because defense counsel have never suggested that the tape recording was changed, altered, or falsified in any way, there is no abuse of discretion in allowing the admission of this tape recording into evidence. See U.S. v. Stone, 960 F.2d 426, 436 (5th Cir. 1992).

Therefore, because defendants failed to properly object to the admission of the tape recording between Stanley Oler and Steve Green prior to its admission into evidence, and because the testimony of Stanley Oler provided a sufficient basis to find that the tape recording accurately reproduced the telephone conversation between Oler and Green, the Court did not abuse its discretion in admitting the tape recording. Accordingly, the defendant's request for a new trial should be denied.

Finally, the defendant reasserts its contention that it suffered prejudice at trial because of the Court's failure to sever the trial of Count Two from the trial of Count One. For all the reasons contained in the Government's Response to Defendant's Joint Motion for Severance of

Counts, filed December 4, 1995, the joinder of offenses charged in Count One and Count Two was proper and, did not result in actual and substantial prejudice to the defendant. For all the reasons the Court denied of the Defendant's Joint Motion for Severance of Counts, the defendant's request for a new trial based on the Court's denial of the Defendant's Joint Motion for Severance of Counts should be denied.

### **Conclusion**

The defendant's motion for a new trial is based almost exclusively on its incomplete and inaccurate interpretation of the evidence offered by the government at the trial to support the allegations contained in Count One of the Indictment. Contrary to defendant's assertions, that evidence clearly showed that the defendant engaged in a price fixing conspiracy with Flowers-Sunbeam, which affected, and dictated, the price of bread and bread products in east Texas between 1977 and 1993. Because the evidence presented to the jury fully supports its guilty verdict on Count One, the interests of justice require that Defendant's Motion for a New Trial be denied.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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<b>FLOYD CARROLL BAIRD,</b>	)	
	)	
<b>Defendants.</b>	)	

**ORDER**

The Court, having considered the Government's Response to Motion of Defendant Mrs. Baird's Bakeries, Inc. for a New Trial on Count One and Memorandum In Support hereby finds that the motion should be denied in its entirety.

IT IS SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 1996.

\_\_\_\_\_  
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 Motion of Defendant Mrs. Baird's Bakeries, Inc. for a New Trial on Count One and Memorandum In Support were mailed via Federal Express on the 11th day of March 1996, to

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