

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR 14 1996
NANCY DOHERTY, CLERK
BY P. J. [Signature]
Deputy

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MRS. BAIRD'S BAKERIES, INC. and
FLOYD CARROLL BAIRD,

Defendants.

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3-95-CR-294-R

COURT'S INSTRUCTIONS TO THE JURY

These instructions contain the law that applies to this case. You must follow them in reaching your verdict.

General Instructions

Consider these instructions as a whole. Do not single out any portion. Do not disregard any instruction.

As jurors, your duty is to determine the facts, without prejudice or sympathy. In doing so, consider only the evidence admitted during trial. Do not speculate about matters that are not in evidence. However, you are permitted to draw reasonable, common sense inferences from the testimony and exhibits.

Statements and arguments of the lawyers are not evidence. Also, you must disregard anything I may have done which might lead you to believe that I have some opinion about the facts of this case, because I do not.

Evidence is either "direct" or "circumstantial." "Direct evidence" is testimony by someone claiming actual knowledge of a fact, such as an eyewitness. "Circumstantial evidence" is proof of a chain of circumstances that points to the guilt or innocence of a defendant. There is no distinction between the weight to be given to either type of evidence; the law requires only that you consider all of the evidence. However, this does not mean that you must accept all of the evidence.

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Credibility, Impeachment,
Weight of the Evidence

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to the testimony. In weighing credibility, consider all of the circumstances surrounding the testimony: Did the witness have any particular reason not to tell the truth? Did he or she have some personal interest in the outcome of the case? What was the witness's relationship to the prosecution or the defense? Did the witness seem to have a good memory? Did he or she appear to understand the questions and answer them directly? Did the witness have the opportunity and ability to observe accurately the things that he or she testified about? Was the witness impeached because the testimony was inconsistent with something that the witness had said or done earlier? Was the witness's testimony supported, or contradicted, by other evidence?

The testimony of (i) an alleged co-conspirator, or (ii) a witness who provides testimony after being granted immunity from prosecution, must always be examined with greater care and caution than the testimony of other witnesses. You should determine whether the testimony of such a witness has been affected by his interest in the outcome of the case -- and, if it has, you are to give that testimony such weight as you may think it deserves. However, you should never convict a defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

The testimony of a witness may be discredited by showing that the witness testified falsely concerning a material matter, or by evidence that some other time the witness said or did something, or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial. If you believe that a witness has been discredited in this manner, it is your exclusive right to give the testimony of that witness whatever weight you think it deserves.

In other words, you may accept all of the testimony of a witness; you may accept only part of it; or you may reject the witness's testimony entirely. But in reaching your verdict, do not make any decision simply because there may have been more witnesses on one side than on the other. Your duty is to decide whether you believe what each witness had to say and how important that testimony was.

Burden of Proof

The indictment in a criminal case is not evidence of guilt. Indeed, the defendant is presumed to be innocent. The defendant is not required to prove his innocence or to offer any evidence. And the fact that the defendant does not testify must not be considered by you in any way or even discussed during deliberations.

The government has the burden of proving each defendant's guilt beyond a reasonable doubt. A "reasonable doubt" is doubt based upon reason and common sense after careful and impartial consideration of all the evidence. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If, based on your consideration of all the evidence, you have a reasonable doubt that a defendant is guilty, then you must find that defendant not guilty. If you view the evidence as reasonably permitting either of two conclusions -- one of innocence, the other of guilt -- then you should, of course, adopt the conclusion of innocence. If you are convinced that the accused has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

Corporations

The defendant Mrs. Baird's Bakeries, Inc. is a corporation. A corporation is in law a person, but it can act only through its agents. The agents of a corporation are the officers, directors, employees, and others who are authorized by the corporation to act for it. A corporation can be held criminally responsible for the unlawful acts of its officers, directors, employees, and other agents, provided that:

First: These acts were done within the scope of authority of the corporation's officers, directors, employees, or other agents; and

Second: These acts were done to benefit the corporation.

It is not necessary that the corporation specifically authorize the employee to undertake a specific act or to make a specific statement. A corporation is legally bound by the acts and statements of its employees done or made within that employee's apparent authority.

Apparent authority is the authority that outsiders could reasonably assume that the employee would have, judging from his position in the corporation, the responsibility previously entrusted to him or his office, and the circumstances surrounding the employee's past conduct. Thus, in order for a corporation to be legally responsible for the acts or statements of its employee, you must find that the employee was acting within his apparent authority.

Authority to act for a corporation in a particular matter, or in a particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case, and need not be established by direct evidence.

Miscellaneous

The indictment charges that the offenses were committed "on or about" a certain date. The government does not have to prove that the crime was committed on that exact date, so long as the proof established beyond a reasonable doubt that the offense was committed reasonably near the alleged date.

THE CHARGES IN THIS CASE

The indictment in this case contains two counts. Both defendants, Mrs. Baird's Bakeries, Inc. and Floyd Carroll Baird, are charged in each count.

A separate crime or offense is charged in each count. Each offense, and the evidence pertaining to it, should be considered separately. You are to determine the guilt or innocence of each defendant from the evidence in this case. The defendants are not on trial for any act or conduct or offense not alleged in the indictment. Nor are you called upon to return a verdict as to the guilt or innocence of any other person not on trial in this case.

Also, the case of each defendant should be considered separately and individually. The fact that you may find one of the defendants guilty or not guilty of one of the crimes charged should not control your verdict as to the other charge or the other defendant.

If you find a defendant guilty, it will then be my job to decide what punishment should be imposed. You should not guess about the possible punishment, and it should not even be discussed during your deliberations.

General Definitions

The following are definitions of terms used in these instructions:

The term "knowingly" means that the act was done voluntarily and intentionally, not because of mistake or accident.

To establish the required intent for each count of the indictment, the government must prove beyond a reasonable doubt that the defendants knowingly did something which the law forbids. In this case, that means that the government must prove beyond a reasonable doubt that the defendants knowingly joined or participated in a combination or conspiracy to fix prices and/or rig bids. Since a combination or conspiracy to fix prices or rig bids is unreasonable and illegal as a matter of law, the government does not have to prove that a defendant specifically intended to unreasonably restrain trade or that such conduct is an unreasonable restraint of trade. Ordinarily, intent may not be proved directly, because there is no way of looking inside the human mind; however, you may infer a defendant's intent from all the facts and surrounding circumstances, including any statements made by a defendant or any other evidence which may indicate a defendant's state of mind.

As used in this case, "East Texas" means the area running from the eastern edge of the Dallas-Fort Worth Metroplex to Shreveport, Louisiana, and from the Red River in the North to Crockett in the South.

As used in this case, "West Texas" means the area west of Fort Worth, east of Lubbock, north of Interstate 10, and south of the Texas-Oklahoma border.

The Dallas-Fort Worth Metroplex is not part of either "East Texas" or "West Texas," as described in the indictment.

Counts One and Two - Conspiracy Instructions

Count One of the indictment charges that, beginning at least as early as 1977 and continuing until at least March 1993, the defendants, Mrs. Baird's Bakeries, Inc. and Floyd Carroll Baird, conspired with others to suppress and restrain competition by agreeing to fix prices of bread and bread products sold to customers in East Texas, in violation of 15 U.S.C. § 1.

Count Two of the indictment charges that, beginning at least as early as 1984 and continuing until at least June 1992, the defendants, Mrs. Baird's Bakeries, Inc. and Floyd Carroll Baird, conspired with others to suppress and restrain competition by agreeing to fix prices of bread and bread products sold to customers in West Texas, and by agreeing to rig bids to governmental entities located in West Texas for contracts to supply bread and bread products, in violation of 15 U.S.C. § 1.

In order to establish the existence of a conspiracy in violation of 15 U.S.C. § 1, commonly known as the "Sherman Antitrust Act," the Government must prove beyond a reasonable doubt:

First: That two or more competitors made an agreement to commit the crime of price-fixing or bid-rigging, as charged in Counts One or Two; and

Second: That the defendants knew the unlawful purpose of the conspiracy and knowingly joined in it, with the intent to further its unlawful purpose.

A "conspiracy" is an agreement by two or more persons to do something illegal. You should first determine whether the evidence established the existence of the single, overall conspiracy alleged in Count One or Count Two. Proof of several different conspiracies does not establish this single, overall conspiracy, unless one of the conspiracies proven is the conspiracy charged in the indictment. If you find that the alleged conspiracy did not exist, then you must acquit the defendants on the charges in Count One or Count Two, even though you may find that some other conspiracy existed.

However, if you conclude that the conspiracy charged in the indictment did exist, you should

next determine whether either defendant knowingly became a member of this conspiracy. In making this determination, you should first consider only the evidence, if any, pertaining to the defendants' own acts and statements. However, if you conclude that a defendant was a member of the alleged conspiracy, then the statements and acts of any other proven member, which were done in furtherance of the conspiracy, may be considered as evidence against that defendant, because, under the law, each member of a conspiracy is the agent or partner of every other member, and is bound by the conduct taken by other members to further their unlawful scheme. Statements of any conspirator, which are not made in furtherance of this conspiracy, or which are made before its existence, or after its termination, may be considered as evidence only against the party making them.

The evidence need not show that there was some express or formal agreement concerning the details of the scheme, what its objectives were, or how it was to be accomplished. Similarly, the evidence need not establish that the conspiracy actually succeeded. Nor must the evidence show that all of the persons alleged in the indictment were members of the conspiracy.

A person may be a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the identities of all the other members. And, if a defendant knowingly joins in an unlawful scheme, that is sufficient to convict him of conspiracy -- even though he was not a member when it began or even though his role may have been a minor one.

However, mere presence at the scene of an alleged transaction or the mere fact that alleged members may have associated with each other or engaged in similar conduct, does not necessarily establish the existence of a conspiracy. Nor is mere presence at the scene of an alleged crime sufficient to establish that a defendant knowingly participated in it. And, a person who has no knowledge of a conspiracy, and who merely happens to act in some way which furthers the conspiracy, does not

thereby become a member of it.

A corporation is not capable in law of conspiring with its own agents or employees, nor are employees of the same corporation capable of conspiring with each other. Through its employees and agents, however, it is capable of conspiring with other persons or other corporations.

Counts One and Two: Antitrust Instructions

Count One and Count Two of the indictment charge two separate violations of the Sherman Antitrust Act, which provides that:

"Every contract, combination . . . or conspiracy, in restraint of trade . . . among the several States . . . is declared to be illegal Every person who shall make any contract or engage in any . . . conspiracy hereby declared to be illegal shall be deemed guilty" of an offense against the laws of the United States.

For you to find a defendant guilty of the crime charged in each count of the indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the conspiracy charged in the indictment was knowingly formed, and was existing at or about the time alleged; and

Second: That the defendant knowingly became a member of the conspiracy.

Instructions

The purpose of the Sherman Antitrust Act is to preserve our free enterprise system and to encourage free and open competition. Any unreasonable interference with ordinary and free competitive pricing or distribution constitutes an unreasonable restraint of trade, and is in itself unlawful; and, if knowingly done, is a criminal offense under the Sherman Antitrust Act. The restraint of trade must have an effect on interstate commerce, but in this case, the government and the defendants have stipulated that the manufacture, sale, and distribution of Mrs. Baird's bread and bread products in East Texas and West Texas did have an effect on interstate commerce.

The government must prove beyond a reasonable doubt that a defendant knowingly formed, joined, or participated in a combination or conspiracy to fix prices or rig bids. Any combination or conspiracy between competitors to fix prices or rig bids is unreasonable and illegal as a matter of law.

and thus, the government does not have to prove that the conspiracy was unreasonable or that a defendant specifically intended to unreasonably restrain trade. Similarly, it does not matter whether the prices paid to the defendants and co-conspirators were reasonable or unreasonable; high or low; fair or unfair. Nor must the government prove that the competitors agreed upon the exact prices to be fixed or the exact prices as bids to be submitted. The Sherman Act makes illegal every conspiracy formed for the purpose of fixing prices or rigging bids.

A price-fixing conspiracy, such as charged in each count of the indictment, may consist in any mutual agreement or arrangement or understanding between two or more competitors, knowingly made, to sell at a uniform price, or to raise, or lower, or stabilize prices. So, a common plan or understanding, knowingly made, or arranged, or entered into, between two or more competitors, to raise, lower, or maintain at fixed levels, prices charged for goods or services would constitute a price-fixing conspiracy in violation of the Sherman Antitrust Act.

A bid-rigging conspiracy, such as charged in part of Count Two of the indictment, is an agreement between two or more competitors to eliminate, reduce, or interfere with competition for a job or contract that is to be awarded on the basis of bids. Bid-rigging may be an agreement among competitors about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding; or any other agreement with respect to bidding that affects, limits, or avoids competition among them. Every conspiracy to rig bids is unlawful, regardless of (i) the motives of the parties, or (ii) any economic or other justification.

The government does not have to prove that a defendant actually took some overt action to further or accomplish the alleged conspiracy or that a defendant actually fixed prices or rigged bids. What the antitrust laws condemn is the agreement or understanding itself. In other words, the mere

agreement or understanding, whether formal or informal, to fix prices or rig bids constitutes the offense -- so it is not necessary for the Government to prove that the alleged conspiracy was ever actually carried out or that its purpose was ever accomplished.

Mere similarity or identity of prices charged does not, without more, establish the existence of a price-fixing or bid-rigging conspiracy such as is charged in Counts One and Two of the indictment. A business may lawfully charge prices identical to those charged by competitors, and still not violate the Sherman Act. A business may even copy the price lists of a competitor, or follow and conform exactly to the price changes of competitors; and that, without more, would not be a violation of the law, unless such acts were done pursuant to an agreement, or arrangement, or understanding between two or more persons, such as is charged in the indictment.

Statute of Limitations

The statute of limitations for the offense charged in the indictment is five years. This means that you cannot find the defendants guilty unless you find, beyond reasonable doubt, that a conspiracy continued or existed within the period beginning September 28, 1990, and ending September 28, 1995, which is the date on which the indictment was filed.

This does not mean, however, that you must exclude from consideration evidence of acts or conduct prior to September 28, 1990. A conspiracy may be a continuing thing which may be proved by a composite of acts. You may, therefore, consider evidence of a defendant's conduct prior to September 28, 1990, insofar as it may tend to prove a design or intent or pattern with respect to that defendant's conduct after September 28, 1990.

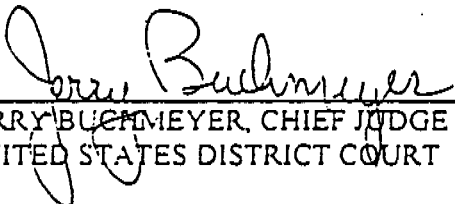
Duty to Deliberate

It is now time for you to deliberate. Begin by selecting one juror to preside over your discussions. If you need to ask me a question, send me a written note signed by the Presiding Juror. After talking to the lawyers, I will answer your question either in writing or here in the courtroom. However, do not tell me where you stand on your verdict -- for instance, if you are split 6-6 or 9-3, do not put that in your note.

Your verdict must be unanimous; that is, all of you must agree to each answer. When you have done this, the Presiding Juror should complete the verdict form and then advise me that you have reached a verdict.

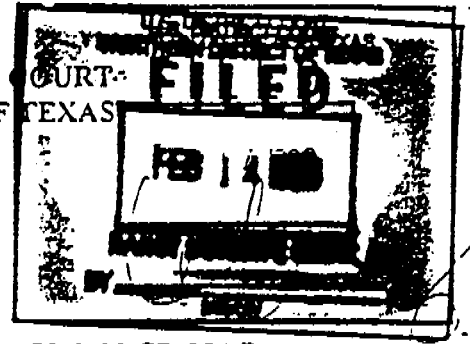
Each of you must decide this case for yourself, but only after discussing the evidence with the other jurors. Do not hesitate to change your mind during deliberations if you are wrong. But do not give up your honest beliefs just because others may think differently, or just to get through with the case.

And remember, at all times, that you are now judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in this case.



JERRY BUCHMEYER, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



CR 3-95-CR-294-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MRS. BAIRD'S BAKERIES, INC. and
FLOYD CARROLL BAIRD,

Defendants.

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VERDICT OF THE JURY

Count 1: Conspiracy to Restrain Trade

We, the Jury, find the defendant

Mrs. Baird's Bakeries, Inc. Guilty of the offense charged.
"Guilty" or "Not Guilty"

Floyd Carroll Baird Not Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 2: Conspiracy to Restrain Trade

We, the Jury, find the defendant

Mrs. Baird's Bakeries, Inc. Not Guilty of the offense charged.
"Guilty" or "Not Guilty"

Floyd Carroll Baird Not Guilty of the offense charged.
"Guilty" or "Not Guilty"

SIGNED THIS _____ DAY OF 2/14, 1996.

James Beaudin
PRESIDING JUROR

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