No. 03-10515

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ELDON FLYN SIMMONS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, LUBBOCK DIVISION
(HONORABLE SAM R. CUMMINGS)

BRIEF FOR THE APPELLEE UNITED STATES OF AMERICA

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 15 U.S.C. § 1 and 18 U.S.C. § 3231. It entered final judgment and sentence on May 23, 2003. R3-639, RE-9.[1] The Appellant filed a timely notice of appeal on May 23, 2003. R3-645. This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the court abused its discretion by denying the Appellant's motion to sever.
2. Whether the jury instructions provided a basis for the Appellant's theory of defense and, as a whole, accurately reflected the law.
3. Whether the court abused its discretion by admitting the out-of-court recorded statements of the Appellant and the out-of-court statements contained in the testimony of three government witnesses.

STATEMENT OF THE CASE

On November 14, 2001, a federal grand jury sitting in Lubbock, Texas, returned a two-count indictment against Appellant Eldon Flyn Simmons ("Simmons") and James Douglas Kuhn ("Kuhn"). R1-1. Count One of the

[1] In this brief, R refers to the record followed by the volume and page number, RE to the Appellant's record excerpts, Br. to Appellant's brief, GX to government exhibits, and KX to co-defendant Kuhn's exhibits.

Indictment charged them with conspiring to fix the price of automotive replacement glass in the central North Texas area from January 1998 until at least May 1998, and Count Two charged them with conspiring to fix its price in Lubbock, Texas, from March 1998 until at least May 1998, both in violation of Section One of the Sherman Act, 15 U.S.C. § 1. R1-1-8.

On December 16, 2002, after six days of trial and two days of deliberations, the jury returned a verdict of not guilty as to Simmons on Count Two, the Lubbock conspiracy. R9-1521; R2-454, RE-4. On the remaining counts, the jury could not reach a verdict and the district court declared a mistrial. R9-1522.

On February 7, 2003, Simmons filed a motion to sever pursuant to Federal Rule of Criminal Procedure 14 asking the court to try him and Kuhn separately. R3-524, RE 5. The district court denied the motion, and the second trial began on February 10, 2003. R3-540; R10-4. Simmons was tried on only the central North Texas charge, Count One, while Kuhn was tried on both counts, *i.e.*, the central North Texas price-fixing conspiracy and the Lubbock price-fixing conspiracy.

On February 21, 2003, the jury found Simmons guilty as to Count One and Kuhn guilty as to Count One and Count Two. R17-1955; R3-600, RE-8. On May 23, 2003, the court sentenced Simmons to a ten month term of imprisonment, a $75,000 fine, and a one year term of supervised release. R3-639-43, RE-9. That

same day, Simmons filed his notice of appeal.[2] R3-645. RE-10. Simmons reported to prison on July 18, 2003.

STATEMENT OF THE FACTS

I. BACKGROUND

The automotive replacement glass industry includes the manufacture, wholesale distribution, and retail sale and installation of replacement windshields and side windows for automobiles. R10-134. This case is about the retail part of the industry, *i.e.* the sale and installation of replacement automotive glass ("auto glass"). R10-149. There are three categories of auto glass customers: 1) commercial accounts such as commercial fleets, car dealerships, and body shops; 2) insurance companies; and 3) cash customers, "[j]ust the guy who walks in off the street and says, 'I need a windshield and I am paying cash for it.'" R10-257-60; R11-450. The price of auto glass is usually determined by discounting off of NAGS, or the National Auto Glass Specifications, a publication used in the industry that establishes part numbers and the suggested list prices. R10-155. These suggested list prices are inflated to the point where a retailer might purchase glass from a wholesaler at 90% off of the NAGS price and resell it for 80% off NAGS. R10-155.

[2] Kuhn did not appeal.

Auto Glass Center ("AGC") operated auto glass stores throughout Texas. R10-137-38; R15-1343. It was originally owned by six shareholders, Richard "Rick" Akin, Larry Vance, Jim Lupton, David Lupton, and the two defendants, Simmons and Kuhn. R10-139. Simmons oversaw all of the AGC stores; he "was basically everybody's boss." R11-380; R10-139. Simmons also ran American Glass Distributors, a wholesale distributor of automotive glass owned by the Jack Riedinger family. R10-135-36; R11-364. AGC bought its glass almost exclusively from American Glass Distributors because Simmons controlled AGC. R10-141; R11-384.

By the end of 1997, AGC had twelve stores in central North Texas, roughly the Dallas-Fort Worth metropolitan area, all of which were supervised by Larry Vance, who reported to Simmons. R10-138-140. At that time, the auto glass market in that area was a "very competitive market . . . very cutthroat" meaning that competitors would offer customers prices "cheaper than what you're getting" in order "to try to get business away from another competitor." R11-387-88; R10-151; R11-580. Vance, in particular, was known for aggressively cutting prices, which "had created a lot of enemies." R10-158, 235; R11-585; R15-1394-95. AGC's primary competitor in this market was A-1 Auto Glass ("A-1"). R10-151-52; R11-391-92; R12-739. Roger McDonald, the owner and operator of A-1,

considered AGC his main competitive threat. R11-582; R12-739. Both companies' primary customers were commercial accounts. R10-152; R11-580. As a result, AGC and A-1 were often in "head to head competition." R11-584.

In the Lubbock area, AGC had one store operating under the name Avenue H, whose manager was Angela Cuevas, Akin's sister. R10-140, 190; R12-814, 816. Like the market in the Dallas-Fort Worth area, prior to 1998 the Lubbock auto glass market was "very competitive." R12-848. Avenue H's principle competitor was Crafton's Glass. R12-815. Dale Crafton, the owner and operator of Crafton's Glass, considered Avenue H its primary competitor. R13-992, 997.

At the end of 1997, there were major changes at AGC. In December of that year, the Jack Riedinger family bought the Luptons' shares of AGC and became one third owner of AGC. R10-139. At the same time, Vance, the aggressive price cutter, was fired. R11-585. James Lukacs replaced Vance as the supervisor of the Fort Worth, Cleburne, and Arlington stores and Kuhn took over the Dallas stores. R10-145, 168; R11-366, 368. On January 1, 1998, Akin became CEO of AGC and "had the retail stores reporting directly to [him] at that time;" in this role, he "supervised the supervisors." R10-144, 146. Akin, however, reported to Simmons. R10-145.

II. AGC AND A-1 AGREE ON PRICE IN CENTRAL NORTH TEXAS

At the beginning of 1998, Simmons initiated a series of meetings among himself, some other AGC managers, and Roger McDonald of A-1. R10-164; R11-393; R11-588. Simmons, Kuhn, Akin, Lukacs, and McDonald attended the first meeting in Simmons' office in Fort Worth. R10-165; R11-398; R11-588. This meeting's purpose was to let McDonald "know that we had replaced his problem, which was Larry Vance" and "that our goal was to work with Roger and be friendly competition, that we wanted to work on getting the price of glass up, and trying to reestablish a relationship with Roger." R10-159-60, 169-70; R11-400. Simmons led the meeting and told McDonald that with Vance gone "this was a great time to do some thing to get our prices up," and that AGC was no longer going to take McDonald's employees nor "chop his prices with his customers." R10-170-71; R11-397, 400-01, 590-91. They discussed the "need to help each other keep the pricing up." R11-589. McDonald was cautious, but indicated that he would not take AGC's employees. R10-171-72. They agreed that the market was "too cheap" and to meet again. R10-174.

After this first meeting, McDonald called Lukacs and told him that he was going to send him a price survey[3] and wanted Lukacs to make sure he was by the

[3] In the auto glass industry, retailers like AGC and A-1 would conduct price surveys by calling their competitors as "a mystery shopper" and getting a price

fax machine to receive it. R11-402; R11-592; GX4. McDonald faxed the price survey listing auto glass part numbers, the NAGS list price, the price discounted off that list price, and the competitor providing the quote. R11-403-08; R12-600-01; GX4. McDonald sent it "because of the meeting" and the discussion of "repairing relationships between American Glass and Auto Glass Center and A-1 Glass" in an effort "to build a relationship" and to let Lukacs know he was "going along with them and trying to get along with them." R11-410; R12-602. Lukacs then conducted his own price survey and sent it to McDonald "to help build this rapport with Mr. McDonald because of the meeting." R11-411.

Simmons arranged a second meeting. R10-175. Since McDonald was concerned with being seen meeting at Simmons' office, Simmons selected a Jack-in-the-Box restaurant. R11-416; R12-604-05. On the morning of February 3, 1998, Simmons, Kuhn, Akin, Lukacs, and McDonald met there. R10-175-76; R11-413-14, 416; GX9, 9A; R12-604-05. Simmons was "a very active participant" in this meeting. R11-421; R12-610. Kuhn "let [McDonald] know that, if he would provide us with his pricing, that we would make a commitment to him to go and not cut those prices." R10-176. In other words, AGC offered that "we would not go below his prices, that we would raise our prices to that

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quote for a part, for example a windshield for a particular vehicle, to help them set their own pricing. R11-592; R12-599.

minimum level, and that we would not go around cutting prices." R10-177; R11-419. McDonald told them in general what his prices were and what discount off of NAGS he was using. R10-177-78. Kuhn told McDonald that he would make sure the AGC stores managers "knew not to go below those prices." R10-178, 181. Simmons "reiterated that we were going to do these things" and made sure that Lukacs and Akin knew that this is what he wanted. R10-179-80.

At the meeting, everyone agreed not go below the agreed-upon pricing, specifically "not to go below 81 percent off" of NAGS prices and not to undercut one another's prices. R12-606, 611; R11-361, 419, 424; R10-181. They also agreed to check with each other on accounts so that they did not undercut each other's prices. R12-611-12. Specifically, Lukacs was "instructed to deal with Mr. McDonald if there were any problems that had arisen between us and the agreements we had made." R11-428. In other words, "things were pointed out to James Lukacs especially, you know, you check with Roger [McDonald] and if your sales rep comes in and says you have – A-1 is offering his price too low, you check with Roger and make sure." R12-611-12. They also agreed to continue the meetings. R10-181.

After the meeting both AGC and A-1 took steps to implement the agreement. Kuhn and Lukacs told AGC's sales representative, Amanda Brewer,

"not to go up against A-1 Auto Glass, that there was a deal made with Roger McDonald, and his sales rep . . . was not supposed to go up against [her] and [her] customers and [her] business; and vice versa, [she] wasn't supposed to go up against [A-1's sales representative]." R12-742; R11-429. She was also instructed not to go below a certain floor price. R12-742-45. Kuhn went to an AGC store and met with the manager there to make sure the pricing was where they had agreed it would be. R10-181. Likewise, McDonald sent a memorandum to all of his employees and each of A-1's stores. R12-612-13; GX6. He also faxed a copy to Simmons. R12-612-13. The memorandum states "ALL DEALER, BODY SHOP AND FLEET ACCOUNTS HAVE A FLOOR PRICING OF" of 81 percent off of NAGS for windshields. GX6; R12-614-15. As McDonald put it, "This was what we agreed on at the meeting." R12-615.

In addition, as agreed at the Jack-in-the-Box meeting, Lukacs and McDonald began checking with each other on specific accounts. R10-189; R11-431-32; R12-622. On several occasions, McDonald called Lukacs to complain that AGC sales staff went into one of A-1's customers and quoted less than A-1 and to request that Lukacs "correct that and see that it doesn't happen anymore." R11-459-60; R11-431-32. He "was calling to let [Lukacs] know that [the AGC conspirators] were not upholding [their] end of the bargain." R11-431-32. Lukacs

would then eventually tell Brewer that "we had agreement with A-1, and she needed to make sure, above and beyond any other company, she had to make sure she did not cut their price when she went into a place to make a sales call." R11-432, 460. Likewise, when A-1 undercut AGC's prices with a particular customer, Lukacs would call McDonald and ask him to correct it. R11-460; R10-189.

On one occasion, Lukacs and McDonald met face to face in a convenience store parking lot to check on a particular account. R11-455-56; R12-623. McDonald had called "in regards to an account [Forrest Chevrolet] that he had down in Cleburne and that [AGC] had gone in there and done some business for by actually cutting his price, quoting cheaper and doing the work for less than what he had been doing it for." R11-455. McDonald was concerned because "[t]hat's what we agreed not to do." *Id*. The AGC store manager said A-1 was the one actually cutting the price by doing the work up front on a work order charging the agreed-on price but at the end of the month rebating a discount to Forrest Chevrolet. R12-622-23. At the meeting, McDonald gave Lukacs some documents–a statement, a list of invoices that all matched the invoice numbers that were on the statement, and a cancelled check–to show Lukacs that A-1 was indeed charging Forrest Chevrolet a considerably higher price than what AGC quoted. R11-456-57; R12-624. Afterward, Lukacs called the AGC store manager in

Cleburne and told him that A-1 was getting a higher price than AGC quoted and that AGC should be charging that higher price, not cutting the price. R11-457-58.

A second Jack-in-the-Box meeting took place several weeks after the first. R11-435. Although Simmons, Kuhn, Akin, and Lukacs expected to meet McDonald, they instead met Maurane Edwards, a supervisor at A-1 who was "Roger's right-hand person," because McDonald was ill. R10-186; R11-436; R12-624-25. Edwards "wanted to talk to us about truck – fast movers of truck windshields." R11-437. Kuhn "wanted to know what [A-1] would be charging on fast moving truck windshields because of a [NAGS] price increase . . . [that] was fixing to go into effect." R12-625; R11-437. Edwards pulled out a handwritten list of the part numbers for fast moving windshields, the list prices, and the prices A-1 was going to charge once the NAGS price change came into effect in March. R11-437, 440-41; R12-625. When she passed it around, Kuhn "asked her if he could keep a copy of that note, and she told him she would prefer that he didn't but he could copy it if he liked." R11-437; R12-625. He made two copies, one which he kept and the other he gave to Lukacs. R11-438; GX7; R12-625 Simmons was an "active participant" in this meeting. R11-442-43.

After the meeting, Lukacs made a copy of the list and distributed it to his customer service representatives and told them "they needed to use that as a

guideline for pricing those fast moving windshields." R11-443. He also gave a copy to AGC employees Bill Cook and Amanda Brewer and to the AGC stores in Cleburne and Arlington. R11-443. As a result of the meetings, Lukacs changed his prices for those windshields. R11-444. Kuhn stopped by to make sure Lukacs changed his pricing pursuant to the agreement that McDonald, Simmons, Kuhn, Akin, and Lukacs had made, *i.e.*, the "agreement not to cut their prices and to match those truck prices and the agreement in general." R11-445-46. To implement these prices, McDonald taped a copy of the price list to each of A-1's computer monitors. R12-626; GX7.

In late February 1998, Simmons fired Akin. Akin was fired after Crafton "lost a pretty good sized account, which was Shamrock Chevrolet, to Avenue H," the AGC store in Lubbock. R13-998. Cuevas, Avenue H's manager, knew that this dealership had hired a new body shop manager, for whom Avenue H had previously done a lot of work, so she quoted him a price which he accepted. R12-823; R10-195. Crafton felt that Cuevas had cut the price "so low that there was no profit left in it whatsoever," and called Cuevas, American Glass Distributors' salesman Joe LaRoe, Simmons, and Kuhn about it. R13-999-1000.

Simmons and LaRoe called Cuevas and told her that "Dale Crafton had called them and was complaining that [she] was in Lubbock just cutting prices and

. . . that [she] was just selling [her] glass way too cheap." R12-821. Cuevas responded that Crafton "was full of crap, because he was much cheaper than [she] was on a lot of products." R12-821. Simmons and LaRoe also talked with Akin about the complaint. R10-202. Akin explained that Cuevas "had done it correctly, that the customer had come to us, that we did not cut the price, the price was a good price." R10-202. A "very irate" LaRoe said that they had made Crafton very mad and that Akin "was to go to Lubbock, get with Angie, back out of this customer's business, not service this customer, and get with Dale Crafton on a price that we could 'all live with.'" R10-202-03. Akin responded that it was not his responsibility to go to Lubbock and get with Crafton: "'That's not my customer. It is your customer, and I shouldn't have to go get with him and set prices.'" R10-203. During this conversation, Simmons did not say anything, but he was "pretty upset." R10-203.

Afterwards, Simmons told Akin "that we should have gotten on the phone and called Dale Crafton and asked his permission to sell this account." R10-204. Simmons instructed Akin "to go to Dale Crafton and get with him and get those managers in line and get the pricing up and get with Dale Crafton on this." R10-205.

The next morning, February 26, 1998, Simmons came to Akin's office,

stated that he was not happy with Akin's performance, and fired him claiming later that he was "doing a very poor job." R10-207; R15-1344-47. Simmons had never previously told Akin that his performance was not satisfactory, R10-208, R15-1345-46, 1425-26. As Akin explained, "eventually it got to where I was asked for come to Lubbock, Texas, get with a competitor, go up on some pricing, withdraw, divide up some territories. And when I told him it was wrong and this isn't correct, you know, it is not right to be doing that, I was terminated the next day." R10-161.[4]

After Akin's termination, the conspiracy continued in central North Texas. On April 8, 1998, AGC sales representative Brewer called on Freeman Pontiac Body Shop, which used Hudson's Auto Glass rather than AGC. R12-746-47, GX12. While Brewer was giving her usual sales pitch, essentially claiming she could give the shop a cheaper price than Hudson, she noticed that the manager and assistant manager were a "little uneasy." R12-747-48. Tim Hudson, the owner of Hudson's Glass, one of AGC's competitors, appeared and "chew[ed her] out there in the body shop, something along the line of how dare [she] come into one of his

[4] In January 2000, Akin and Cuevas, his sister and a government witness whose testimony described in detail the Lubbock conspiracy, filed a wrongful termination lawsuit against American Glass Distributors and AGC's umbrella corporation, Windshield Sales and Services, Inc. R10-210-11, 216; R13-903-04; GX107. After settling the case, they each received $258,330. GX107; R10-213; R13-906-7.

accounts and cut his price when he had a deal with Doug [Kuhn] and Flyn [Simmons]." R12-748. Brewer then told him that she "wasn't aware of any deal he had with Doug or Flyn; said the only deal I was aware of was A-1." *Id.*; R11-462. Hudson said he was going to call Simmons. *Id*. Simmons later told Lukacs to contact Hudson and correct the problem and to control his sales force. R11-463. Lukacs then contacted Hudson and essentially told him that AGC would not compete against him based on price. R11-466.

Around the first of May at a Whataburger fast food restaurant, Simmons, Kuhn, and Lukacs met a final time with McDonald. R11-446-47, 449; R12-627-28. McDonald had "called Flyn and told him that the price fixing wasn't working" and the "[p]ricing wasn't holding up." R12-627-28. At the meeting, they "discussed one reason that the pricing wasn't holding up is State Farm had put out a new price sheet." R12-629; R11-447-48. McDonald believed that State Farm Insurance's changing of prices would force them to lower their prices on other accounts. R11-450-51. McDonald indicated that he "wanted out," but Simmons told him "not to be quite so hasty that, you know, things could still work out." R12-628. Simmons and Kuhn told McDonald that he was overreacting and that they "just needed to leave things as they were." R11-453; R12-629. They continued to abide by their agreements. R11-454; R12-629. Shortly thereafter, on

May 12, 1998, A-1 received a federal grand jury subpoena. R12-630.

SUMMARY OF ARGUMENT

Most of Simmons' arguments are variations of a central theme: his prior acquittal on Count Two renders unfair the joint retrial because his Count One co-defendant was also charged with Count Two. The district court did not abuse its discretion in denying Simmons' motion to sever. The evidence was neither confusing nor complicated, allowing the jury to sort out the two counts and differentiate between the two defendants. Simmons failed to demonstrate substantial prejudice due to the joinder. And, in any event, the court's jury instructions adequately protected Simmons from any possible prejudice.

Simmons' argument that the district court failed to give an instruction on his defense theory because it did not give the same instruction on similar business practices to the second jury that it gave the first is also meritless. The court's modified instruction eliminated the confusing and misleading aspects of the instruction it gave the first jury, while providing a clear and correct instruction to the second jury on similar business practices. The jury instructions provided an instruction on Simmons' theory of defense and, as a whole, accurately reflected the law.

Returning to the central theme, Simmons contends that the government

could not establish that he was a member of the Lubbock conspiracy for purposes of admitting various out-of-court statements as coconspirator statements because of the prior acquittal. This contention is legally and factually wrong. The acquittal did not collaterally estop, or otherwise preclude, the government from establishing by a preponderance of the evidence Simmons' participation in the Lubbock conspiracy. Based on the evidence adduced at both trials, the government met its burden of establishing his participation. Furthermore, the statements were admissible for other reasons. Their probative value was not substantially outweighed by the danger of unfair prejudice. And the court's jury instructions again provided adequate protection against the danger of unfair prejudice. Lastly, even if statements were erroneously admitted, any error was harmless given the overwhelming and direct evidence of Simmons' participation in and leadership of the conspiracy charged in Count One.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING SIMMONS' MOTION TO SEVER

A. Standard of Review

In ruling on a motion to sever, the district court must balance the potential prejudice to the defendant "against the interests of judicial economy, a consideration involving substantial discretion." *United States v. McGuire*, 608

F.2d 1028, 1031 (5th Cir. 1979); *United States v. Kane*, 887 F.2d 568, 571 (5th Cir. 1989). As a general rule, persons indicted together should be tried together, particularly when the offense charged is conspiracy. *McGuire*, 608 F.2d at 1031.

A denial of a motion to sever is reviewed for an abuse of discretion. *Kane*, 887 F.2d at 571. "Even in cases where the initial joinder of defendants was not proper, to demonstrate reversible error from the denial of a motion for severance a defendant must still show 'clear, specific and compelling prejudice that resulted in an unfair trial.'" *United States v. Posada-Rios*, 158 F.3d 832, 863 (5th Cir. 1998) (quoting *United States v. Bullock*, 71 F.3d 171, 174 (5th Cir. 1995)). The prejudice must be of a type "'against which the trial court was unable to afford protection,'" *United States v. Mann*, 161 F.3d 840, 863 (5th Cir. 1998) (quoting *United States v. Arzola-Amaya*, 867 F.2d 1504, 1516 (5th Cir. 1989)), and the "possibility of prejudice must also be balanced against the interest of judicial economy," *Posada-Rios*, 158 F.3d at 863. Appellants "must 'isolate events occurring in the course of a joint trial and then . . . demonstrate that such events caused substantial prejudice.'" *Id.* (quoting *United States v. Ellender*, 947 F.2d 748, 755 (5th Cir. 1991)). The defendant's burden "has aptly been characterized as 'heavy.'" *McGuire*, 608 F2d. at 1032 (quoting *United States v. Lane*, 465 F.2d 408, 413 (5th Cir. 1972)).

B. In Denying Simmons' Motion to Sever, the Court Properly Balanced the Potential Prejudice to Simmons Against the Interests of Judicial Economy

Simmons argues that the district court abused its discretion in denying his motion to sever. He primarily argues that the "forcing of Appellant in a joint trial with Co-Defendant Kuhn at the second trial had the spillover effect of allowing the Government to re-litigate the issue of Appellant knowingly becoming a member of the conspiracy that was alleged in count two of the Indictment." Br. 31-32. Simmons claims that the testimony of witnesses Akin, Cuevas, and Crafton "inexerably [sic] tied" him to the activities of Kuhn and the Lubbock conspiracy. Br. 32. This argument fails, however, because Simmons did not suffer "clear, specific, and compelling prejudice" due to the joinder.

"The test for severance under Rule 14 is whether the jury could sort out the evidence reasonably and view each defendant and the evidence relating to that defendant separately." *United States v. Merida*, 765 F.2d 1205, 1219 (5th Cir. 1985). In other words, a district court should deny a motion to sever where the evidence is "not so complicated . . . as to prevent the jury from separating the evidence and properly applying it only to those against whom it was offered." *United States v. Manzella*, 782 F.2d 533, 540 (5th Cir. 1986). The district court here was especially well situated to apply this test because the first trial concluded

a mere eight weeks earlier, and the court was, therefore, familiar with the evidence that would be offered. It correctly denied the severance motion because the evidence was not confusing or complicated, and the jury could reasonably sort it out.

Although both counts involved the fixing of the price of auto glass, they each involved different witnesses, different locations, different competitors, and a different time-frame. Four government witnesses, Akin, Lukacs, McDonald, and Brewer, provided firsthand accounts of the formation and implementation of the price-fixing agreement charged in Count One. This conspiracy involved AGC stores and A-1 in central North Texas. The meetings took place in Fort Worth, either in Simmons' office or at fast food restaurants, specifically Jack-in-the-Box and Whataburger. The price-fixing agreement was reached the first week of February 1998 at the critical first Jack-in-the-Box meeting. Simmons attended the meetings.

Different government witnesses, Cuevas and Crafton, and surreptitiously recorded conversations detailed the formation and implementation of the price-fixing agreement in Lubbock. The Lubbock conspiracy involved an AGC store operating under a different name–Avenue H–and Crafton's Glass. The meetings took place the first week of March 1998 in Lubbock at either Cuevas' Avenue H

office or the 50 Yard Line restaurant. R12-838-46, 853-64; R13-1000-07. With the exception of Kuhn, none of those attending the Lubbock-conspiracy meetings attended the central-North-Texas-conspiracy meetings. *Id.* Simmons did not attend the Lubbock meetings.

Given these differences, the jury could easily distinguish between the Count One conspiracy that charged both defendants in central North Texas and the Count Two conspiracy that charged only Kuhn in Lubbock. In other words, "[t]he evidence was not so complicated as to prevent the jury from separating the evidence and properly applying it only to those against whom it was offered." *United States v. Rocha*, 916 F.2d 219, 229 (5th Cir. 1990); *see United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980) ("Although there were seven defendants on trial, the evidence was generally focused on no more than two or three defendants at a time. We cannot say the evidence was so complex or confusing that the jury was unable to make individualized guilt determinations, and merely cumulated the evidence against all the defendants."). As a result, the potential prejudice to Simmons attributable to the joint trial was negligible. Thus, in applying this test and balancing the interests in judicial economy against the potential prejudice, the district court did not abuse its discretion in denying the motion to sever.

C. The Jury Instructions Provided Adequate Protection Against Prejudice

The district court's jury instructions provided adequate protection against possible prejudice. The court explained that Count One charged both Kuhn and Simmons with price-fixing in the central North Texas area while Count Two charged Kuhn alone with price-fixing in Lubbock, a point also made more than once by the government. R17-1867-68; *see, e.g.,* R10-104-06; R17-1881. In addition, the district court used the same instruction repeatedly approved by this Court as adequate protection against prejudice in a joint trial. *See United States v. Bieganowski*, 313 F.3d 264, 288 (5th Cir. 2002); *United States v. Pofahl*, 990 F.2d 1456, 1483 & n.36 (5th Cir. 1993); *Posada-Rios*, 158 F.3d at 863-64.

Specifically, the district court instructed:

> A separate crime is charged against one or more of the defendants in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. Also, the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant. You must give separate consideration to the evidence as to each defendant.

R17-1876-77; *see Bieganowski*, 313 F.3d at 288 ("[B]ecause a jury is presumed to follow the court's instructions, instructions such as those given here are generally sufficient to cure the possibility of prejudice."); *Pofahl*, 990 F.2d at 1483 ("[T]he district court properly instructed the jury to limit evidence to the appropriate

defendant. . . . Consequently, the jury was able to separate the evidence and properly apply it only to those against whom it was offered."); *Posada-Rios*, 158 F.3d at 864 ("Similar instructions have been held to be sufficient to cure the possibility of prejudice because the court presumes that the jury followed the court's instructions."). This instruction told the jury to treat each count and the evidence related to each count separately. It also told the jury to treat each defendant and the evidence related to each defendant separately. That protected Simmons from the "spillover" evidence and prevented the jury from convicting Simmons on Count One based on the evidence related to Count Two.

Simmons argues that this instruction was insufficient because of "the unique circumstances of this case, where Appellant is prohibited from showing that a jury had previously resolved those issues in Appellant's favor." Br. 34. There is nothing particularly unique about this circumstance. The jury was never informed of the previous trial or Simmons' acquittal on Count Two because these facts have no evidentiary value and might unfairly affect the jury. R2-464-65; R3-547. The only effect of Simmons' prior acquittal on Count Two is a preclusive one. Specifically, it precludes the government from relitigating the issue of whether there was proof beyond a reasonable doubt of Simmons' guilt on that count. *See United States v. Bracket*, 113 F.3d 1396, 1400-01 (5th Cir. 1997); *United States v.*

One Assortment of 89 Firearms, 465 U.S. 354, 361-62 (1984) ("[A]n acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt."). Thus, Simmons' "prior acquittal [did] not preclude the government from relitigating a question of fact when the issue [was] governed by a lower standard of proof in [the] subsequent proceeding." *Bracket*, 113 F.3d at 1400-01; *Dowling v. United States*, 493 U.S. 342, 348-50 (1990). Similarly, the prior acquittal did not preclude the introduction of evidence related to both Simmons and Lubbock against Simmons if the evidence is proof of an issue related to the Dallas-Fort Worth area conspiracy. *Bracket*, 113 F.3d at 1400-01.

Moreover, Simmons did not challenge this instruction or request additions or modifications to it. In fact, despite the government's indication at a bench conference that it would not object to an instruction telling the jury "not to consider evidence about Mr. Simmons in the Lubbock area," R10-199, Simmons never requested such an instruction or any other instruction more specific than the one given. In any event, the general instruction at the close of trial provided adequate protection, even in the absence of a more specific limiting instruction at the time the evidence was offered. *See United States v. Peterson*, 244 F.3d 385, 394-395 (5th Cir. 2001).

To the extent, if at all, Simmons now challenges the adequacy of these instructions or the absence of more specific limiting instructions, the issue should be reviewed for plain error because he made no objection to the instructions nor requested a limiting instruction. *See United States v. Parziale*, 947 F.2d 123, 129 (5th Cir. 1991). There was no plain error because the instructions provided sufficient protection. *See id.* ("[F]ailure to give limiting instructions is generally held not to be plain error.") (internal quotation marks and citation omitted).

D. Simmons Fails to Show Clear, Specific, and Compelling Prejudice Due to Joinder Resulting in an Unfair Trial

In an effort to show "clear, specific, and compelling prejudice," Simmons makes three arguments: 1) the spillover of evidence prejudiced him; 2) the joinder presented him with a Hobson's choice regarding cross-examining the Lubbock witnesses; and 3) the closing arguments prejudiced him. None of these arguments meets his heavy burden because the circumstances complained of either do not result from joinder or are not prejudicial.

1. The "Spillover" Evidence Did Not Prejudice Him

Simmons cites four examples of spillover evidence: 1) Akin's testimony concerning Simmons' request that he go to Lubbock and talk to Dale Crafton concerning the pricing issue and his subsequent termination; 2) Cuevas' testimony "concerning the recorded conversation with [Simmons] and her opinion that

[Simmons'] failure to stop the implementation of the price changes caused Cuevas to resign;" 3) Crafton's testimony concerning conversations he had with Simmons; and 4) evidence of implementation in Lubbock. Br. 32-33. As an initial matter "the mere presence of a spillover effect does not ordinarily warrant severance." *Pofahl*, 990 F.2d at 1483; *Rocha*, 916 F.2d at 228. In this case, the overwhelming direct evidence of Simmons' guilt on Count One, including testimony from Akin, Lukacs, McDonald, and Brewer detailing the formation and implementation of the price-fixing agreement, makes the spillover effect especially negligible. As explained below, the evidence Simmons complains "spilled over" is tangential to and dwarfed by the direct evidence related to Count One.

Akin's testimony concerning the Shamrock Chevrolet incident and his subsequent termination is not spillover evidence resulting from the joinder because it was relevant to Count One. This testimony provided critical evidence related to Akin's credibility and rebutted Simmons' argument that Akin fabricated the central North Texas price-fixing conspiracy as a disgruntled, do-nothing employee to get back at Simmons, AGC, and American Glass Distributors for his termination. As a central theme of his defense, Simmons attempted to discredit Akin, the lead government witness on the central North Texas conspiracy. For instance, in his closing argument, Simmons' defense counsel argued that Simmons

fired Akin because Akin "wanted to retire on company time and on the company paycheck . . . Rick Akin is disinterested, he's disengaged." R17-1904. Defense counsel then argued that after being "fired for not working" by Simmons, Akin is "upset," "disgruntled," and "vindictive" and "wants to get back at this man, that man, and these companies." R17-1904. Therefore, the argument continued, Akin allied himself with the government and falsely accused Simmons to help his civil lawsuit and to "get him his $250,000" settlement. R17-1904-05. Simmons' defense also developed this theme during the cross-examination of Akin and direct-examination of Simmons. R10-215-223; R11-295-97; R15-1344-47.

Akin's testimony about the facts and circumstances leading to his termination and the termination itself was necessary to rebut Simmons' attack on his credibility. Specifically, Akin explained that Simmons fired him because he would not comply with Simmons' request to go and talk with Dale Crafton in Lubbock about the Shamrock Chevrolet account. He also explained that Crafton's complaint that Avenue H had cut the price to Shamrock Chevrolet "so low that there was no profit left in it whatsoever" prompted Simmons' request. R13-999-1000. This explanatory testimony was relevant and would have been admitted even if Kuhn had been tried separately. Thus, Simmons has failed to show any prejudice due to joinder resulting from this testimony.

Cuevas' testimony "concerning the recorded conversation with Appellant and her opinion that Appellant's failure to stop the implementation of the price changes caused Cuevas to resign" was not prejudicial. Br. 32 (citing R13-894-96, 961-63, 982-83). After Cuevas, Kuhn, and Crafton had met and agreed on the prices Avenue H and Crafton's Glass were going to begin charging March 9, 1998, for auto glass in Lubbock, R12-844-48, 854-64, 882; R13-1001-06, 1008; GX34C; GX36B, Cuevas called Simmons on March 6, 1998, to see if she could persuade him to stop the Kuhn-ordered implementation of these prices, R13-894-95. Cuevas recorded the conversation:

Angela:	And I feel like this is price-fixing and if I – you know, he don't want me to be competitive he wants me to match him dollar for dollar
Flyn:	Right.
Angela:	And, uhm, I just feel like, you know, that's not right.
Flyn:	Uh uh.
Angela:	So if I don't follow what Dale says, I mean Doug [Kuhn] says then he's going to fire me anyhow.
Flyn:	Right.
Angela:	So before he fires me and all that, I'll just resign my position as manager.
Flyn:	Well, okay, well you know, I'll, I'll accept your resignation. I think you misunderstood Doug, I think what Doug was telling you, you need to get your prices up because all the Auto Glass Centers, we're sitting here, we're losing money.
. . . .	
Angela:	And, and Doug had those guidelines and he wants me to match it dollar for dollar. No wavering. And like I said he.
Flyn:	I think, I think you totally misunderstood him.
Angela:	Well maybe I did.

Flyn:	Right.
. . . .	
Angela:	and I feel like if, you know, I do match these prices then we're price-fixing.
Flyn:	Right.
Angela:	Because I really can't negotiate.
Flyn:	We both, we both know that's illegal and that's not what he said.

KX64B (transcript); KX64A (audiotape); R13-963-70. Cuevas understood Simmons' affirmative responses "Right" or "Uh uh" to mean he was listening, not that he was agreeing with her statements. R13-965. She resigned because Simmons indicated that she must have misunderstood Kuhn when she thought he was instructing her to fix prices, not because Simmons was endorsing price-fixing. R13-895.

This testimony did not implicate Simmons in the Lubbock conspiracy. In fact, as suggested by the fact that his co-defendant chose to offer the recording in evidence, it tends to exculpate Simmons.[5] *See* R13-963. On the recording, Simmons repeatedly told Cuevas she must have misunderstood Kuhn if she thought Kuhn wanted her to fix prices. KX64A, 64B. He also told her that he knows that price-fixing is illegal and that it is not what Kuhn told her to do. *Id.*

[5] Simmons insinuates that this choice was "questionable" as a "defensive strategy." Br. at 46. In the first trial, however, Simmons' own defense counsel emphasized the recording and argued that it was especially "compelling" evidence that nobody was fixing prices in Lubbock "because there's no agenda around it, other than Angie Cuevas' agenda." R9-1472-73.

Cuevas did not testify that Simmons participated in, or even knew of, a price-fixing conspiracy in Lubbock or in central North Texas. In contrast, she described in detail how she, Kuhn, and Crafton had agreed to fix the price of auto glass in Lubbock. *See* R12-836-883, R13-891-94. This testimony and the recording did not prejudice Simmons.

The two calls between Simmons and Crafton that Crafton testified about at the retrial also did not implicate Simmons in the Lubbock conspiracy or otherwise prejudice Simmons.[6] The first was Crafton's complaint to Simmons, as well as to Cuevas, American Glass Distributors salesman LaRoe, and Kuhn, that Avenue H had cut the price to Shamrock Chevrolet "so low that there was no profit left in it whatsoever." R13-999-1000. As explained above, testimony such as this about the facts and circumstances leading to Akin's termination was relevant and admissible whether or not there was a joint trial. In addition, this testimony did not implicate Simmons in the Lubbock conspiracy.

The second call occurred when Crafton told Simmons that Cuevas had

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[6] At Simmons' first trial, Crafton testified about additional contact between him and Simmons that directly implicated Simmons in the Lubbock conspiracy. Specifically, after the initial meeting between Crafton, Kuhn, and Cuevas at the 50 Yard Line restaurant, Crafton called Simmons and told Simmons he had arranged a meeting with Cuevas. R6-705; R6-750 ("The conversations I had with Flyn is what I discussed with him, that Doug and I and Angie had come to an agreement on pricing."). The government did not elicit this testimony after the first jury acquitted Simmons on Count Two.

called him after she resigned. R13-1009. Simmons responded, "if I was you, I wouldn't talk to her any more because more than likely all she wants is money and I have been down this road before." R13-1010. Crafton's report and Simmons' response did not implicate him in the Lubbock conspiracy. In fact, this testimony was exculpatory because Simmons' contemporaneous response provided support for his theme at trial that the government witnesses were disgruntled employees just after money.

Simmons also argues that he was especially prejudiced because there was evidence of implementation of the Lubbock agreement but no implementation of the agreement in the central North Texas area. Br. 33. This argument ignores the overwhelming evidence of the formation *and implementation* of the central North Texas agreement. Government witnesses Akin, Lukacs, and McDonald all testified that at the first Jack-in-the-Box meeting the AGC managers, including Simmons, agreed with A-1's McDonald to fix the price of auto glass. R10-181; R11-361; R12-606, 611; *see also supra* pp. 7-8. They also described the agreement's implementation, including AGC's managers instructing store managers and sales representatives to charge the agreed upon prices, McDonald's memorandum to A-1's employees instituting the agreed upon floor pricing, the checking back and forth regarding specific accounts between Lukacs and

McDonald, and the Forrest Chevrolet incident. *See supra* pp. 8-12. There is simply no basis for this argument. And in any event, a "spillover effect, by itself, is an insufficient predicate for a motion to sever." *Bieganowski*, 313 F.3d at 287.

2. The Alleged "Hobson's Choice" Does Not Demonstrate Clear and Compelling Prejudice

Simmons contends that he was faced with a Hobson's choice on how to treat these witnesses' testimony concerning Lubbock: he could either attempt to "assail" these witness on this point and risk emphasizing this testimony to the jury or leave it unchallenged. Br. 33. In fact, Simmons faced no such choice. As explained in the preceding section, Cuevas' and Crafton's testimony did not implicate Simmons in the Lubbock conspiracy. Their tangential and brief references to Simmons stood in contrast to their detailed description of how Kuhn formed the agreement with them on what Avenue H and Crafton's Glass would charge for auto glass. *See* R12-836-883, R13-891-94, 1000-08, 1010-20 (detailing the formation and implementation of Lubbock conspiracy). Simmons' decisions not to cross-examine these witnesses and not to ask for a specific limiting instructions for their testimony reflect the fact that the testimony did not inculpate Simmons. This tactical choice does not demonstrate clear and compelling prejudice; rather, it demonstrates "no more prejudice 'than that which necessarily inheres whenever multiple defendants or multiple charges are jointly

tried.'" *Rocha*, 916 F.2d at 229 (quoting *United States v. Tashjian*, 660 F.2d 829, 834 (1st Cir. 1981)).

3. The Closing Arguments Do Not Demonstrate Unfair Prejudice Related to Joinder

Lastly, Simmons argues that the closing arguments of the government and his co-defendant somehow demonstrate prejudice or an inability "to provide such protection" from prejudice. Br. 34. Simmons emphasizes that the government in its closing argument used the plural "competitors" when arguing that Simmons and Kuhn "broke the law by making illegal agreements with their **competitors** to fix the price of windshields and auto glass by making illegal agreements with their **competitors** to protect each other's loyal customers and not compete for their business." Br. 34 (quoting R17-1879) (emphasis provided by Simmons). Presumably, Simmons believes that by the use of the plural the government was unfairly implying that Simmons had agreements with more than one competitor, *i.e.*, with A-1 in central North Texas and Crafton's Glass in Lubbock. This strained semantic argument does not hold up; if Simmons and Kuhn were accused of "making agreements with their wives," no one would think that Simmons was a bigamist.

Moreover, the difference between the two conspiracies and the fact that Kuhn alone was charged in Count Two were emphasized in both the government's

closing, R17-1881 ("[L]et me remind you that the indictment charges two counts. Count 1 is the D/FW areas and involves both defendants, Defendant Simmons and Defendant Kuhn. Count 2 involves the Lubbock area, and it involves Mr. Kuhn") and its opening, R10-104-06 ("Count 2 involves Lubbock. Doug Kuhn alone is charged in Count 2. . . . Remember, please, two counts, two conspiracies. Count 1, conspiracy to raise prices in the D/FW area, Central North Texas. Mr. Kuhn and Mr. Simmons entered into that conspiracy with their primary competitor, A-1. The second count, Doug Kuhn entered into a conspiracy with Avenue H's primary competitor here in Lubbock, Crafton's Glass.").

Simmons also argues that Kuhn's closing argument prejudiced him when Kuhn argued that KX64A and 64B, showed that Simmons told Cuevas she misunderstood what Kuhn was asking her to do and, therefore, Cuevas' accusations against Kuhn were baseless. Br. 34-35. As explained above, *supra* pp. 28-30, this evidence tends to exculpate both defendants. Thus, Kuhn's emphasizing this evidence could not have prejudiced Simmons. In fact, the recording is more favorable to Simmons than Kuhn because it can mean either that Cuevas indeed misunderstood Kuhn, in which case Simmons and Kuhn were not involved in a price-fixing conspiracy, or that Cuevas correctly understood Kuhn but Simmons was unaware of what Kuhn was actually asking her to do, in which

case Kuhn is not exculpated but neither is Simmons inculpated.

In sum, Simmons fails to show clear, specific, and compelling prejudice against which the district court was unable to afford protection. Accordingly, the district court's denial of his motion to sever is not an abuse of discretion.

II. THE JURY WAS PROPERLY INSTRUCTED

A. Standard of Review

The district court retains "broad discretion" in formulating jury instructions. *United States v. Harrelson*, 705 F.2d 733, 736 (5th Cir. 1983). While a defendant is entitled to an instruction on his theory of defense, he "has no right to particular wording, or to a charge which is incorrect, confusing, or misleading." *Id*. at 737. "Calling a proposed instruction a 'theory of defense' . . . does not automatically require that it be given in those words. If the instruction does not concern factual issues properly before the jury or if it is otherwise confusing, it need not be given at all." *United States v. Malatesta*, 583 F.2d 748, 759 (5th Cir. 1978).

When considering a jury instruction challenge on appeal where a defendant's requested instruction on a theory of defense was not given, this Court reviews "the district court's instruction as a whole to determine whether it accurately reflects the law." *United States v. All Star Industries*, 962 F.2d 465, 473-474 (5th Cir. 1992); *United States v. Davis*, 226 F.3d 346, 357-58 (5th Cir.

2000).

"When a defendant fails to object to an instruction, or if he urges a different ground for the objection on appeal than before the district court," this Court reviews for plain error. *United States v. Jimenez*, 256 F.3d 330, 340 (5th Cir. 2001). "Plain error occurs only when the instruction, considered as a whole, was so clearly erroneous as to result in the likelihood of a grave miscarriage of justice." *United States v. Martin,* 332 F.3d 827, 834 (5th Cir. 2003).

B. The Court Properly Instructed the Jury

Complaining that the court did not give the same jury instructions at both trials, Simmons argues that those given at the second trial "incorrectly emphasized" the issues and "precluded Appellant from being able to present and argue his defensive theory to the jury." Br. 38. Simmons objected below to the district court's decision not to give the instruction he requested on the grounds that it was used in the prior trial and that it "more completely and accurately lays out the status of the law relative to similar pricing, association, et cetera" than the government-proposed instruction. R17-1851. He did not, however, argue that the court's decision precluded his theory of defense or otherwise failed to provide a basis for that theory. *Id*. Thus, to the extent he now makes this argument, review is only for plain error. *Jimenez*, 256 F.3d at 340.

The court properly instructed the jury. Simmons' defensive theory was that he and "competitors in the DFW market did have similarity of competitive practices and had identical prices for the same goods and services, but **not** as a result of an unlawful agreement or understanding." Br. 39 (emphasis in original). The jury instructions correctly and repeatedly emphasized that an agreement, not any particular business practice or similarity of business practices, is what the government must prove and the jury must find to convict the defendants. R17-1870 ("The existence of a conspiracy is an essential element of the offenses charged in the indictment and must be proved by the government beyond a reasonable doubt. A conspiracy is an agreement between two or more persons to join together to accomplish some unlawful purpose."); R17-1871 ("[T]he essence of a conspiracy to fix prices is the making of the agreement itself."); R17-1873 ("A price-fixing conspiracy, such as charged in Count 1 and Count 2 of the indictment, may consist of any mutual agreement or arrangement or understanding between two or more competitors or others, knowingly made, to sell at a uniform price, or to raise, or lower, or stabilize prices or discounts."); R17-1874 ("The gist of the crime charged in each count of the indictment is knowingly making or arriving at an agreement, or arrangement, or understanding, in unreasonable restraint of interstate trade and commerce."); *see All Star Industries*, 962 F.2d at

474 n.18. These instructions informed the jury that proof of an agreement to fix prices was required to convict, without suggesting that similar business practices were somehow sufficient to convict. Thus, these instructions alone provided a sufficient basis for Simmons' theory of defense.

The district court, however, went beyond that and gave a specific instruction on similar business practices. Simmons' contention that the court "gave no instruction on similarity of competitive business practices" is wrong. Br. 39. The court instructed:

> The fact that competitors may have charged identical prices, copied each other's price lists, conformed exactly to another's price policies, discussed prices, obtained information about each other's prices, or exchanged information about prices does not establish a violation of the Sherman Act unless they did any of these things because of an agreement or arrangement or understanding such as is alleged in the indictment.
>
> Therefore, similarity or identity of prices charged does not alone establish the existence of a conspiracy. You may, however, consider these facts and circumstances along with all the other evidence in determining whether there was an agreement, arrangement, or understanding between such competitors as alleged in the indictment.

R17-1875-76. This instruction is a correct and clear statement of the law. It correctly instructed the jurors that an agreement is required and that the "similarity or identity of prices charged does not alone establish the existence of a conspiracy." *Id.* It provided a legal basis for Simmons' theory of defense that the similar business practices and identical prices for the same goods and services

among the competitors in the central North Texas market were the result of ordinary competitive behavior and not because of an agreement to fix prices. In his closing argument, Simmons' defense counsel used it to argue his theory of the case:

> But what's important and what's important for you as jurors is to understand that Judge Cummings is telling you, regardless of what you thought when you walked in here two weeks ago, it is not illegal to charge identical prices, copy each other's prices, conform exactly to another's price policies, discuss prices, obtain information about other prices or exchange information about prices, unless it's pursuant to agreement.

R17-1901.

The instruction was a simplification and clarification of the confusing and misleading similar business practices instruction, which the court gave at the first trial and which Simmons requested at the second. Nothing precludes the court from modifying, condensing, or omitting parts of jury instructions after a mistrial for purposes of the retrial. *United States v. Williams*, 728 F.2d 1402, 1406 (11th Cir. 1984). The requested and previously given instruction stated in part:

> Similarity of competitive business practices or the mere fact that identical prices for the same goods and services may have been charged does not establish a conspiracy, since these practices of business concerns may be consistent with ordinary competitive behavior in a free and open market.

R2-439; Br. 37, 39. This statement is misleading in two respects. First, it assumes that the similar business practices are, in fact, "competitive." Second, its

instruction that similar business practices or identical prices do not establish a conspiracy is misleading because the jury should be permitted to determine whether evidence of similar business practices or identical prices is probative of a price-fixing agreement or competition. *Cf. Southway Theatres, Inc. v. Georgia Theatre Company*, 672 F.2d 485, 501 (5th Cir. 1982) ("Parallel behavior among competitors is especially probative of price fixing because it is the sine qua non of a price fixing conspiracy."). To avoid confusing or misleading the jury, the court reworded the instruction by including the word alone–"Therefore, similarity or identity of prices charged does not alone establish the existence of a conspiracy"–while also informing the jury that it could consider "these facts and circumstances along with all the other evidence" in reaching its verdict. R17-1876. The court properly permitted the jury to determine how to interpret or what to infer from the evidence.

Despite this instruction, Simmons complains that the court "did not tell the jury that similarity of business practices or he [sic] charging of identical prices for the same goods and services may be consistent with ordinary competitive behavior in a free and open market." Br. 39. The court's instructions, however, did inform the jury that "[t]he fact that competitors may have charged identical prices, copied each other's price lists, conformed exactly to another's price policies, discussed

prices, obtained information about each other's prices, or exchanged information about prices" does not violate the Sherman Act unless "they did any of these things because of an agreement or arrangement or understanding." R17-1875-76. In other words, such similar business actions, absent an agreement, are lawful and permissible competitive business behavior.

In sum, Simmons has failed to show that the district court abused its discretion. Rather, the district court's instructions, taken as whole, or the similar business practice instruction, taken in particular, fairly reflected the law and the theory of defense. They certainly were not "so clearly erroneous as to result in the likelihood of a grave miscarriage of justice." *Martin,* 332 F.3d at 834.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE OUT-OF-COURT STATEMENTS

A. Standard of Review

Simmons' claim that various out-of-court statements were improperly admitted as coconspirator statements under Rule 801(d)(2)(E) of the Federal Rules of Evidence. He also argues that some of these statements should have been excluded under Rule 403. The district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Lowery*, 135 F.3d 957, 959 (5th Cir. 1998). "The exclusion of evidence under Rule 403 should occur only sparingly." *United States v. Pace*, 10 F.3d 1106, 1115 (5th Cir. 1993). Where Simmons' "objection

during trial is different from the theory he now raises on appeal, 'plain error' is the standard of review." *United States v. Green*, 324 F.3d 375, 381 (5th Cir. 2003), *petition for cert. filed*, 71 U.S.L.W. 3791 (U.S. June 6, 2003) (No. 02-1811). In order to reverse a conviction on the basis of an evidentiary error, this Court must find a "significant possibility that the testimony had a substantial impact on the jury." *United States v. Sanchez-Sotelo*, 8 F.3d 202, 210 (5th Cir. 1993) (internal quotation marks and citation omitted).

B. The Out-of-Court Statements Were Not Erroneously Admitted Against Simmons as Coconspirator Statements

Simmons argues that out-of-court statements concerning him and Lubbock were erroneously admitted because the government could not establish that they were coconspirator statements under Rule 801(d)(2)(E). Specifically, he objected below and now argues that the government could not establish that he was a member of the Lubbock conspiracy due to his prior acquittal and that prevents the admission of his own out-of-court statements. Br. 44-45, 49-51; R3-522 (Simmons' motion in limine) ("The Movant's acquittal of Count 2 excludes him from any alleged conspiracy. As a result, Richard Akin, Angela Cuevas, Dale Crafton, Co-Defendant Kuhn or any other witnesses are prohibited from testifying to hearsay statements made by ELDON FLYN SIMMONS as they relate to Count 2 because they no longer fall within the 801(d)2 exception."); R10-198 ("I wanted

to reurge my motions in limine.").

This argument is flawed in several respects and, ultimately, unavailing. Simmons' prior acquittal does not preclude the government from showing by a preponderance of the evidence that he participated in that conspiracy for purposes of admitting a coconspirator statement. *See Bracket*, 113 F.3d at 1400-01; *One Assortment of 89 Firearms*, 465 U.S. at 361-62 ("[T]he jury verdict in the criminal action did not negate the possibility that a preponderance of the evidence could show that Mulcahey was engaged in an unlicensed firearms business."); *supra* pp. 23-24. And while little evidence concerning Simmons' participation in the Lubbock conspiracy was introduced at the retrial, the district court could find by a preponderance of the evidence that Simmons was a member of that conspiracy based on the evidence adduced at the first trial. *See, e.g.,* R6-705; R6-750 ("The conversation I [Crafton] had with [Simmons] is what I discussed with him, that Doug and I and Angie had come to an agreement on pricing."); *see United States v. Ricks*, 639 F.2d 1305, 1309-10 (5th Cir. 1981) (explaining the great flexibility a district court has in manner of hearing evidence on preliminary facts for admission of coconspirator statement).

Furthermore, the out-of-court statements Simmons complains about are his own made in the course of conversations with government witnesses. As a result,

they are admissible against him under Rule 801(d)(2)(A), not Rule 801(d)(2)(E), and the witnesses' portion of the conversation is admissible as necessary context. *See United States v. Flores*, 63 F.3d 1342, 1358-59 (5th Cir. 1995) ("Garza . . . argues that both his and Bordayo's statements were inadmissible hearsay because they were not made in furtherance of the conspiracy. This argument is entirely meritless, because Garza's statements were admissible not as co-conspirator statements but as the admissions of a party-opponent. Bordayo's statements were reciprocal and integrated utterances and were admissible to put Garza's own statements in context.") (citations omitted).

1. The Recording of the Conversation between Simmons and Cuevas

Simmons argues that KX64A and 64B, the recording of the conversation between Simmons and Cuevas, in which Cuevas resigns, should not have been admitted against him as a coconspirator statement under Rule 801(d)(2)(E) because the government could not show he was a member of the conspiracy. Br. 44-45. The government did not offer these exhibits against Simmons. Rather, his co-defendant Kuhn offered them to raise doubts about Kuhn's own participation in the Lubbock conspiracy. R13-963. Simmons did not request a specific limiting instruction to this effect; however, the court did admonish the jury to treat the evidence related to each count separately and the evidence related to each

defendant separately. R17-1876-77; *see supra* pp. 22-25. To the extent, if at all, the statements were admitted against Simmons, they were properly admitted not as coconspirator statements under Federal Rule of Evidence 801(d)(2)(E), but as his own statements under Federal Rule of Evidence 801(d)(2)(A). *Flores*, 63 F.3d at 1358-59. And Cuevas' portion of the recorded conversation was admissible as necessary context to the conversation. *Id.*; *United States v. Gutierrez-Chavez*, 842 F.2d 77, 81 (5th Cir. 1988).

Simmons' argument that the admission of KX64A and 64B "had a significant impact on the jury's decision to convict Appellant on count one of the Indictment" is meritless. Br. 46. As we have already noted, in this conversation, Simmons responded to Cuevas' allegations that Kuhn was asking her to break the law by price-fixing. He stated that Cuevas had misunderstood what Kuhn was telling her, that price-fixing was illegal, and "that's not what [Kuhn had] said" she should do. KX64B. This conversation did not implicate Simmons in either the central North Texas conspiracy or the Lubbock conspiracy. Kuhn's defense counsel offered it in evidence not to shift blame to Simmons, but to show that Cuevas misunderstood what Kuhn was asking her to do and that in fact there was no price-fixing conspiracy in Lubbock. This recording tends to exculpate Simmons from the Lubbock conspiracy and says nothing about the Dallas-Fort

Worth conspiracy. The jury was instructed to treat the conspiracies separately. R17-1876-77; *see supra* pp. 22-25. Thus, there is no "significant possibility that the testimony had a substantial impact" on the jury's verdict of guilty as to Count One. *Sanchez-Sotelo*, 8 F.3d at 210. Accordingly, any error in the exhibits' admission is harmless.

2. The Out-of-Court Statements in Akin's Testimony

Simmons asserts that Akin's testimony contained hearsay that should not have been admitted against him as a coconspirator statement under Rule 801(d)(2)(E) because there was no showing he participated in the Lubbock conspiracy and because the statements were unduly prejudicial under Rule 403. Br. 46-47. He fails to identify the specific statements that were improperly admitted but is presumably complaining about the testimony related to the Shamrock Chevrolet incident and Akin's termination. *See supra* pp. 12-14. This testimony explained the facts and circumstances leading to Akin's termination. It was therefore highly probative evidence of Akin's credibility because it explained his motivations and refuted the implications of bias. At the same time, this testimony did not implicate Simmons in the Lubbock conspiracy. Thus, its probative value was not "substantially outweighed by the danger of unfair prejudice." Fed.R.Evid. 403. Moreover, the court's instructions provided

Simmons with adequate protection against any unfair prejudice. R17-1876-77; *see supra* pp. 22-25.

This testimony was also not inadmissible hearsay. The evidence adduced at the first trial established Simmons' participation in the Lubbock conspiracy by a preponderance. *See supra* pp. 43 & n.6. More importantly, Simmons' own statements were properly admitted under Rule 801(d)(2)(A). *See Flores*, 63 F.3d at 1358-59. The other statements, for instance Crafton's complaints, were not offered for the truth of the matter asserted, *i.e.,* that Avenue H had indeed cut the price to Shamrock Chevrolet, but rather to show what began the series of events leading to Akin's termination, *i.e.*, Crafton's complaints reaching Simmons and the other AGC managers. *See United States v. Webster*, 750 F.2d 307, 330 (5th Cir. 1984) ("It is axiomatic that verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted is excluded from the federal definition of hearsay.") (internal quotations marks and citation omitted).

In any event, government witnesses Akin, Lukacs, McDonald, and Brewer along with the corroborating, contemporaneously-made documents, GX6, GX7, GX9, provided overwhelming direct and circumstantial evidence of Simmons' participation in and leadership of the central North Texas conspiracy. Given the court's jury instructions and the overwhelming evidence on Count One, the

admission of any of these statements did not create "significant possibility that the testimony had a substantial impact on the jury." *Sanchez-Sotelo*, 8 F.3d at 210. As a result, any evidentiary error was harmless.

3. The Out-of-Court Statements in Cuevas' Testimony

Simmons asserts that Cuevas' testimony contained hearsay that should not have been admitted against him as a coconspirator statement under Rule 801(d)(2)(E) because there was no showing he participated in the Lubbock conspiracy and because Cuevas' testimony was unduly prejudicial under Rule 403. Br. 46-47. At trial, Simmons requested a "running" objection to Cuevas' testimony without specifically objecting to particular statements, and on appeal he fails to identify precisely which statements were improperly admitted. R12-820-21. Presumably, he complains about the testimony related to Crafton's Shamrock Chevrolet complaint that led to Akin's termination, the recorded conversation, KX 64A and 64B, and Cuevas' tender of her resignation. The out-of-court statements of Simmons and Cuevas were admissible as party-opponent admissions and necessary context. *See Flores*, 63 F.3d at 1358-59. They were necessary to explain the circumstances leading to Akin's termination, Cuevas' termination, and their potential bias. To the extent they were relevant only to Count Two and defendant Kuhn, the court instructed the jury to treat the evidence related to that

count and that defendant separately. R17-1876-77; *see supra* pp. 22-25. Simmons did not request a more specific instruction. Moreover, as explained above, *supra* pp. 28-30, the Simmons-Cuevas call did not implicate Simmons, but rather tended to exculpate him. In short, the probative value of this evidence was not substantially outweighed by the danger of any unfair prejudice. And the court's instructions adequately protected against this danger. R17-1876-77; *see supra* pp. 22-25.

For the first time on appeal, Simmons also argues that the statements in Cuevas' testimony could not have been coconspirator statements because they were "idle chatter or conversation." Br. 51. Simmons never articulated this basis for excluding the statements to the district court. Accordingly, this Court reviews only for plain error. *Green*, 324 F.3d at 381. Simmons cannot show plain error because these statements were otherwise admissible. *See Flores*, 63 F.3d at 1358-59.

Lastly, there was overwhelming direct and circumstantial evidence of Simmons' participation in and leadership of the central North Texas conspiracy. Thus, given the overwhelming evidence and the court's instructions, these out-of-court statements could not have "had a substantial impact on the jury." *Sanchez-Sotelo*, 8 F.3d at 210. Accordingly, any error in their admission was harmless.

4. The Out-of-Court Statements in Crafton's Testimony

Simmons asserts that Crafton's testimony contained hearsay that should not have been admitted against him as a coconspirator statement under Rule 801(d)(2)(E) and that should have been excluded under Rule 403. Br. 49-51. He again fails to identify precisely which statements he believes were improperly admitted. Presumably, he challenges the same two Simmons-Crafton telephone calls that he relies on to argue that he was prejudiced by the denial of his severance motion. *See supra* pp. 30-31. Simmons' own statements were admissible under Rule 801(d)(2)(A) and Crafton's statements as necessary context. *See Flores*, 63 F.3d at 1358-59. In the first call, Crafton complained to Simmons and others that Avenue H had cut the price to Shamrock Chevrolet so low that it took the profit out of it.[7] This conversation did not implicate Simmons in the Lubbock conspiracy. The fact that Crafton complained to Simmons was not offered for the truth, *i.e.*, that Avenue H was indeed cutting prices, but to show the facts and circumstances ultimately leading to Akin's termination, *i.e.*, that Simmons received a complaint from Crafton about Avenue H. As such, its probative value is not substantially outweighed by the danger of unfair prejudice.

In the second call, Crafton told Simmons that Cuevas had told him she had

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[7] Simmons failed to object to the testimony concerning this first call. R13-999. Therefore, review is for plain error. *Green*, 324 F.3d at 381.

resigned. R13-1010. Simmons responded, "if I was you, I wouldn't talk to her any more because more than likely all she wants is money and I have been down this road before." R13-1010. Like the recording exhibits, KX64A and 64B, these statements do not implicate Simmons in the Lubbock conspiracy and tend to exculpate Simmons because Simmons' contemporaneous response is that Cuevas was wrong and was really only after money, the same motivation Simmons attributes to Akin, Cuevas' brother. The district court did not abuse its discretion in admitting this testimony. And in any event, given the jury instructions and the overwhelming direct and circumstantial evidence of Simmons' participation in and leadership of the central North Texas conspiracy, these statements could not have "had a substantial impact on the jury." *Sanchez-Sotelo*, 8 F.3d at 210.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted.

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I, James J. Fredricks, hereby certify that I caused to a copy of the accompanying BRIEF OF THE UNITED STATES and an electronic copy, USASimmonsAppelleeBrief03-10515.pdf, on a 3.5 inch disk to be sent via Federal Express on the 29th of September, 2003, to the following:

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