United States Court of Appeals
for the Second Circuit

August Term 2021

(Argued: August 27, 2021 Decided: May 2, 2022)

No. 20-3594-cr

UNITED STATES OF AMERICA,

Appellee,

— v. —

AKSHAY AIYER,

Defendant-Appellant.

Before: PARKER, BIANCO, and MENASHI, *Circuit Judges*.

Defendant-Appellant Akshay Aiyer appeals from the October 2, 2020 judgment entered in the United States District Court for the Southern District of New York (Koeltl, *J.*), following a jury trial, convicting him of conspiracy to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. More specifically, Aiyer was convicted for his participation in a conspiracy to fix prices and rig bids in connection with his trading activity in the foreign currency exchange market. His primary argument on appeal is that the district court erred by failing to consider his proffered evidence that the alleged illegal trading activity lacked anticompetitive effects and had procompetitive benefits and by refusing to

conduct a pre-trial assessment as to whether the *per se* rule or the rule of reason applies in this case. Aiyer further contends that the district court abused its discretion in largely precluding his competitive effects evidence from admission at trial and in conducting only a limited post-trial inquiry into allegations of juror misconduct. We hold that the district court was not required to make a threshold pre-trial determination as to whether the *per se* rule or the rule of reason applies to the alleged misconduct in this criminal antitrust case. The grand jury indicted Aiyer for a *per se* antitrust violation and the government, which was proceeding only under that theory, was entitled to present its case to the jury. The district court properly assessed the sufficiency of the evidence of the alleged *per se* violation at the time of Aiyer's Rule 29 motion after the government rested its case (which Aiyer renewed after trial), and the sufficiency decision upholding the verdict is not challenged on appeal. In addition, given that the case was being tried under the *per se* rule, the district court acted within its broad discretion in strictly limiting the admission of Aiyer's competitive effects evidence at trial to the issue of intent. Finally, the district court did not abuse its discretion in ending its post-trial investigation into alleged juror misconduct and concluding there was no basis to vacate the jury's verdict where such investigation included interviewing the accused juror and finding his denial of the allegations credible.

Accordingly, we **AFFIRM** the judgment of the district court.

MARY HELEN WIMBERLY (Stratton C. Strand, Kevin B. Hart, Eric Hoffman, Philip Andriole, *on the brief*), United States Department of Justice, Antitrust Division, *for* Richard A. Powers, Acting Assistant Attorney General, Washington, DC, *for Appellee*.

MARTIN B. KLOTZ, Willkie Farr & Gallagher LLP, New York, NY (Joseph T. Baio, Jocelyn M. Sher, Willkie Farr & Gallagher LLP, New York, NY, Mark Stancil, Willkie Farr & Gallagher LLP,

Washington, DC, *on the brief*), *for Defendant-Appellant*.

JOSEPH F. BIANCO, *Circuit Judge*:

Defendant-Appellant Akshay Aiyer appeals from the October 2, 2020 judgment entered in the United States District Court for the Southern District of New York (Koeltl, *J.*), following a jury trial, convicting him of conspiracy to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Specifically, Aiyer was convicted for his participation in a conspiracy to fix prices and rig bids in connection with his trading activity in the foreign currency exchange market. His primary argument on appeal is that the district court erred by failing to consider his proffered evidence that the alleged illegal trading activity lacked anticompetitive effects and had procompetitive benefits and by refusing to conduct a pre-trial assessment as to whether the *per se* rule or the rule of reason applies in this case. Aiyer further contends that the district court abused its discretion in largely precluding his competitive effects evidence from admission at trial and in conducting only a limited post-trial inquiry into allegations of juror misconduct. We hold that the district court was not required to make a threshold pre-trial determination as to whether the *per se* rule or the rule of reason applies to the alleged misconduct in this criminal antitrust case. The grand jury indicted

Aiyer for a *per se* antitrust violation and the government, which was proceeding only under that theory, was entitled to present its case to the jury. The district court properly assessed the sufficiency of the evidence of the alleged *per se* violation at the time of Aiyer's Rule 29 motion after the government rested its case (which Aiyer renewed after trial), and the sufficiency decision upholding the verdict is not challenged on appeal. In addition, given that the case was being tried under the *per se* rule, the district court acted within its broad discretion in strictly limiting the admission of Aiyer's competitive effects evidence at trial to the issue of intent. Finally, the district court did not abuse its discretion in ending its post-trial investigation into alleged juror misconduct and concluding there was no basis to vacate the jury's verdict where such investigation included interviewing the accused juror and finding his denial of the allegations credible.

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BACKGROUND

I. The Relevant Market[1]

This criminal antitrust case arises out of Aiyer's alleged conduct in—and corresponding communications relating to—the foreign currency exchange ("FX")

[1] Given that Aiyer appeals from a judgment of conviction entered after a jury trial, "our statement of the facts views the evidence in the light most favorable to the government,

market. Participants in the FX market buy or sell one national currency in exchange for another. In other words, FX trading takes place in currency pairs, where one individual or entity sells a certain amount of one country's currency to another individual or entity that purchases that currency with a certain amount of another country's currency. *See* Gov't Supp. App'x at 3–4 ("[L]et's take an example . . . you want to buy [U.S.] dollars in exchange for . . . Canadian dollars . . . . That exchange . . . between United States dollar and Canadian dollars, that's called a currency pair. There are always two currencies because you have got to buy one and sell the other.").[2] The mechanism for pricing in the FX market is known as the "exchange rate," "rate," or "price," which essentially represents the amount of one specific currency that a market participant can be paid in exchange for another specific currency. App'x at 33. As of 2013, trillions of dollars in various currencies were traded across this market each day.

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crediting any inferences that the jury might have drawn in its favor." *United States v. Percoco*, 13 F.4th 158, 164 n.3 (2d Cir. 2021) (quoting *United States v. Rosemond*, 841 F.3d 95, 99–100 (2d Cir. 2016)).

[2] There are numerous ways in which FX market participants can trade. However, the "basic trade" in the FX market is known as a "spot trade," where one party simply agrees to buy one currency from a counterparty in exchange for a different currency, with settlement to follow in two business days. Gov't Supp. App'x at 13.

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