

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 SUMMARY ORDER
5

6 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL
7 REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO
8 THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION
9 OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS
10 CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF
11 COLLATERAL ESTOPPEL OR RES JUDICATA.
12

13 At a stated term of the United States Court of Appeals
14 for the Second Circuit, held at the Thurgood Marshall United
15 States Courthouse, at Foley Square, in the City of New York,
16 on the 13th day of September, two thousand and four.
17

18
19 PRESENT: HON. RALPH K. WINTER,
20 HON. DENNIS JACOBS,
21 Circuit Judges, *
22

23 - - - - -X
24 UNITED STATES OF AMERICA,
25

26 Appellee,
27

28 -v.-

03-1682, 03-1711

29
30 AVINOAM DAMTI and OFER YOSEF,
31

32 Defendants-Appellants
33

34 - - - - -X
35
36

* The Honorable Milton Pollack, Judge, United States District Court for the Southern District of New York, who sat by designation as a member of the panel, died following argument. The appeal is being decided by the remaining two members of the panel, who are in agreement. See 2d Cir. R. § 0.14(b).

1 **APPEARING FOR DEFENDANTS-**
2 **APPELLANTS:**

NATHAN Z. DERSHOWITZ,
Dershowitz, Eiger & Adelson, New
York, NY (Amy Adelson on the
brief), Attorney for Avinoam
Damti.

AVRAHAM C. MOSKOWITZ, Moskowitz
& Book, LLP, New York, NY,
Attorney for Ofer Yosef.

11
12 **APPEARING FOR APPELLEE:**

ERIC R. KOMITEE and JOHN D.
BURETTA, Assistant United States
Attorney, Brooklyn, NY (Roslynn
R. Mauskopf, United States
Attorney, on the brief, and
Susan Corkery, Assistant United
States Attorney, of counsel)

20
21 Appeal from the United States District Court for the
22 Eastern District of New York (Garaufis, J.) .

23
24 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
25 **AND DECREED** that the judgment of the district court be
26 **AFFIRMED.**

27
28 Defendants-Appellants Avinoam Damti ("Damti") and Ofer
29 Yosef ("Yosef") appeal from sentences entered in the Eastern
30 District of New York (Garaufis, J.) following convictions by
31 a jury on charges stemming from alleged schemes to defraud
32 and extort money from customers of their various moving
33 businesses. Both defendants were convicted of one count of
34 conspiracy to commit wire fraud in violation of 18 U.S.C. §
35 371 and four counts of wire fraud in violation of 18 U.S.C.
36 § 1343. Damti was separately convicted of one count of
37 receiving the proceeds of extortion in violation of 18
38 U.S.C. § 880. Yosef was separately convicted of two counts
39 of extortion via interstate communication in violation of 18
40 U.S.C. § 875(d) and two counts of making false statements in
41 an application submitted to the United States government in
42 violation of 18 U.S.C. § 1001.
43

1 Damti and Yosef chiefly argue: (i) that the district
2 court erred in excluding evidence of non-fraudulent moves
3 performed by the defendants for allegedly satisfied
4 customers; and (ii) that the district court erred either in
5 admitting a redacted confession by a co-defendant against
6 Damti or in allowing the Government to link the redacted
7 confession to Damti during summation. Subsequent to oral
8 argument in this case, Damti and Yosef also have raised
9 arguments under Blakely v. Washington, 542 U.S. ____, (June
10 24, 2004).

11
12 Familiarity with the facts and procedural history of
13 this appeal is presumed.

14
15 Exclusion of Alleged "Good Moves"

16 The defendants argue that the district court abused its
17 discretion in preventing them from introducing evidence of
18 moves in which customers were satisfied and no fraud or
19 extortion occurred. The exclusion of these so-called "good
20 moves" was considered at a pre-trial hearing. The trial
21 court preliminarily ascertained whether the prosecution's
22 theory assumed that the defendants (i) defrauded all of
23 their customers, (ii) operated a business that was
24 "permeated with fraud," or (iii) defrauded only the ten
25 specific customers whose moves were being described during
26 the trial.

27
28 The court concluded that the Government's case presumed
29 that the defendants operated a business that was "permeated
30 with fraud" but expressed concern that the jury might
31 construe that allegation as one where "all customers were
32 defrauded." It therefore instructed the Government not to
33 use the phrase "permeated with fraud" (or any similar term)
34 in front of the jury. The Government evidently abided by
35 this instruction.

36
37 A district court "has wide discretion in controlling
38 the admissibility of testimony and other evidence, and,
39 absent a demonstration of abuse of discretion, its rulings
40 will not be disturbed." Zahra v. Town of Southold, 48 F.3d
41 674, 686 (2d Cir. 1995) (citations omitted). Evidence of
42 past "good acts" by a defendant is generally not probative
43 unless a defendant is alleged to have "always" or
44 "continuously" committed "bad acts," United States v.

1 Scarpa, 913 F.2d 993, 1010 (2d Cir. 1990) (observing that
2 "good acts" evidence "would only be relevant if the
3 indictment charged [defendants] with ceaseless criminal
4 conduct") (emphasis added), or where the evidence of "good
5 acts" would undermine the underlying theory of a criminal
6 prosecution, United States v. Santos, 201 F.3d 953, 962 (7th
7 Cir. 2000) (conceding that "good acts" evidence is relevant
8 when the prosecution contends "that every transaction . . .
9 was corrupt" or when the "good acts" evidence "cast[s] doubt
10 on the government's theory" of how or why certain
11 transactions occurred).
12

13 The Government did not allege to the jury that the
14 defendants engaged in "ceaseless" criminal conduct, that
15 "all" of the defendants' customers were defrauded, or that
16 the defendants' business was "permeated with fraud."
17 Instead, it argued to the jury that ten specific moves were
18 fraudulent and therefore were representative of a
19 substantial portion of the more than four-thousand moves
20 performed by the defendants during the period relevant at
21 trial. Even if many or most of these moves were fraudulent,
22 it follows that a substantial portion also presumably were
23 legitimate. Evidence of "good moves," therefore, would not
24 have been probative of the key issue during trial. The
25 district court did not abuse its discretion in excluding
26 this evidence.
27

28 Admission of the Redacted Confession of a Co-Conspirator

29 During a search of defendants' offices, conducted
30 pursuant to a search warrant on February 20, 2002, co-
31 defendant, Shlomo Hababa cooperated with officers and placed
32 principal responsibility for the alleged criminal conspiracy
33 on Damti as the primary owner of the different moving
34 businesses. Many material elements of Hababa's confession
35 were recapitulated in the testimony of a federal agent to
36 the jury, with Damti's name redacted and replaced with vague
37 references to an unnamed "individual" who owned the moving
38 businesses. To the extent this expedient obscured Damti's
39 identity as that "individual," doubt was dispelled by the
40 prosecution, who made clear during summation that the
41 "individual" described in Hababa's confession was Damti.
42

43 The Supreme Court has blessed the use of redacted co-
44 defendant confessions when combined with other trial

1 protections. See Richardson v. Marsh, 481 U.S. 200 (1987);
2 Bruton v. United States, 391 U.S. 123 (1968). On appeal,
3 the defendants invite us to reconstrue Bruton and Richardson
4 in light of the Supreme Court's recent holding in Crawford
5 v. Washington, 124 S. Ct. 1354, 1374 (2004) that "[w]here
6 testimonial evidence is at issue, however, the Sixth
7 Amendment demands . . . unavailability and a prior
8 opportunity for cross-examination" of the declarant. We
9 decline to do so. The prosecutor's summation should not
10 have linked Damti to Hababa's redacted confession, but by
11 the time this lapse occurred there was an abundance of
12 evidence before the jury that Damti was, in fact, the de
13 facto owner of the allegedly fraudulent moving businesses.
14 The prosecutor's linkage was therefore harmless.

15
16 Blakely v. Washington

17 As to Blakely v. Washington, 542 U.S. ____, (June 24,
18 2004), the mandate in this case will be held pending the
19 Supreme Court's decision in United States v. Booker, No. 04-
20 104, and United States v. Fanfan, No. 04-105 (to be argued
21 October 4, 2004). Should any party believe there is a need
22 for the district court to exercise jurisdiction prior to the
23 Supreme Court's decision, it may file a motion seeking
24 issuance of the mandate in whole or in part. Although any
25 petition for rehearing should be filed in the normal course
26 pursuant to Rule 40 of the Federal Rules of Appellate
27 Procedure, we will not address Damti's and Yosef's Sixth
28 Amendment appeal of their sentences until after the Supreme
29 Court's decision of Booker/Fanfan. The parties will have
30 until 14 days following the Supreme Court's decision to file
31 supplemental petitions for rehearing in light of
32 Booker/Fanfan.

33
34 The defendants also contend that the district court
35 erred in (i) admitting various pieces of alleged hearsay
36 evidence into the trial record, (ii) limiting the defense's
37 cross-examination of certain witnesses; (iii) giving an
38 allegedly misleading missing-witness charge to the jury;
39 (iv) applying sentencing enhancements for the amount of the
40 losses, the number of victims, the use of sophisticated
41 means, and the violation of an administrative order; and (v)
42 calculating appropriate restitution. In addition, Damti
43 challenges the district court's calculation of a \$1 million
44 fine against him and Yosef challenges the enhancement of his

1 sentence for obstruction of justice. We have examined all
2 of these claims and find them to be without merit.

3
4 For the foregoing reasons, the judgment of the district
5 court is hereby **AFFIRMED**.

6
7 FOR THE COURT:
8 ROSEANN B. MACKECHNIE, CLERK
9 By:

10
11 _____
12 Richard Alcantara, Deputy Clerk
13