

15-2035-cr (L)

United States v. Cummings

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4
5 August Term, 2016
6

7 (Argued: December 14, 2016

Decided: June 6, 2017)

8
9 Docket Nos. 15-2035-cr (L), 16-322 (Con)
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12
13 UNITED STATES OF AMERICA,
14

15 *Appellee,*
16

17 v.
18

19 ARMANI CUMMINGS, AKA A1, CHRISTOPHER NWANKO, AKA Big Boi,
20

21 *Defendants-Appellants.*¹
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23

24
25 Before: JACOBS, POOLER, and HALL, *Circuit Judges.*
26

27 Appeal from a judgment of conviction of the United States District Court
28 for the Southern District of New York (Marrero, J.) following a jury verdict
29 convicting Defendant-Appellant Armani Cummings of one count of conspiracy

¹ The clerk of court is respectfully instructed to amend the caption as above.

1 to distribute 280 grams or more of cocaine base in violation of 21 U.S.C.
2 §§ 841(b)(1)(A) and 846; one count of using and carrying a firearm during and in
3 relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c); two counts
4 of killing a person during and in relation to a conspiracy to distribute 280 grams
5 or more of cocaine base in violation of 21 U.S.C. § 848(e)(1)(A); two counts of
6 brandishing and discharging a firearm during and in relation to a crime of
7 violence in violation of 18 U.S.C. § 924(c); and two counts of causing the death of
8 a person through the use of a firearm during and in relation to the crack cocaine
9 conspiracy in violation of 18 U.S.C. § 924(j). Following Cummings's conviction,
10 the district court sentenced Cummings principally to 75 years' imprisonment.

11 Cummings argues, among other things, that the district court erred by
12 admitting hearsay evidence of a death threat he allegedly made against a
13 government witness. We agree and hold that such error was not harmless. The
14 hearsay was especially toxic because it created a grave risk that the jury would
15 use it as evidence of Cummings's murderous propensity. That risk was
16 heightened by the lack of a limiting instruction, the similarity between the death
17 threat and the underlying charges, the government's argument on summation

1 suggesting that the threat was substantive proof of Cummings's guilt, and
2 Cummings's inability to cross-examine the third-party declarant who heard his
3 alleged threat. We therefore vacate Cummings's convictions and remand for a
4 new trial.

5 On January 25, 2016, the United States District Court for the Southern
6 District of New York (Marrero, J.) entered judgment against Defendant-
7 Appellant Christopher Nwanko, convicting him, following a guilty plea, of one
8 count of participation in a conspiracy to distribute 280 grams or more of cocaine
9 base. On appeal, this Court appointed Nwanko new counsel pursuant to the
10 Criminal Justice Act, 18 U.S.C. § 3006A. Nwanko's counsel later filed a motion
11 seeking permission to withdraw as counsel pursuant to *Anders v. California*, 386
12 U.S. 738 (1967). We grant the *Anders* motion and issue an order simultaneously
13 with this Opinion.

14 Vacated and remanded as to Cummings; *Anders* motion granted as to
15 Nwanko.

16 _____

1 MARSHALL ARON MINTZ, Mintz & Oppenheim LLP,
2 New York, NY, *for Defendant-Appellant Armani*
3 *Cummings.*

4
5 MALVINA NATHANSON, New York, NY, *for*
6 *Defendant-Appellant Christopher Nwanko.*

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10 States Attorneys, *on the brief*), *for* Joon H. Kim, Acting
11 United States Attorney for the Southern District of New
12 York, New York, NY, *for Appellee.*

13
14 POOLER, Circuit Judge:

15 **BACKGROUND**

16 Defendant-Appellant Armani Cummings appeals from a judgment of
17 conviction of the United States District Court for the Southern District of New
18 York (Marrero, J.) following a jury verdict. Cummings was convicted of one
19 count of conspiracy to distribute 280 grams or more of cocaine base in violation
20 of 21 U.S.C. §§ 841(b)(1)(A) and 846; one count of using and carrying a firearm
21 during and in relation to a drug trafficking crime in violation of 18 U.S.C.
22 § 924(c); two counts of killing a person during and in relation to a conspiracy to
23 distribute 280 grams or more of cocaine base in violation of 21 U.S.C.
24 § 848(e)(1)(A); two counts of brandishing and discharging a firearm during and

1 in relation to a crime of violence in violation of 18 U.S.C. § 924(c); and two counts
2 of causing the death of a person through the use of a firearm during and in
3 relation to the crack cocaine conspiracy in violation of 18 U.S.C. § 924(j).

4 Following Cummings's conviction, the district court sentenced Cummings
5 principally to 75 years' imprisonment.

6 Cummings argues, among other things, that the district court erred by
7 admitting hearsay evidence of a death threat he allegedly made against a
8 government witness. We agree and hold that such error was not harmless. The
9 hearsay was especially toxic because it created a grave risk that the jury would
10 use it as evidence of Cummings's murderous propensity. That risk was
11 heightened by the lack of a limiting instruction, the similarity between the death
12 threat and the underlying charges, the government's argument on summation
13 suggesting that the threat was substantive proof of Cummings's guilt, and
14 Cummings's inability to cross-examine the third-party declarant who heard his
15 alleged threat. We therefore vacate Cummings's convictions and remand for a
16 new trial.

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2 District of New York (Marrero, J.) entered judgment against Defendant-
3 Appellant Christopher Nwanko, convicting him, following a guilty plea, of one
4 count of participation in a conspiracy to distribute 280 grams or more of cocaine
5 base. On appeal, this Court appointed Nwanko new counsel pursuant to the
6 Criminal Justice Act, 18 U.S.C. § 3006A. Nwanko's counsel later filed a motion
7 seeking permission to withdraw as counsel pursuant to *Anders v. California*, 386
8 U.S. 738 (1967). We grant the *Anders* motion and issue an order simultaneously
9 with this Opinion.

10 **I. The Underlying Conduct**

11 The evidence presented at trial showed that, from 2006 to 2012, Cummings
12 was a leader of a drug trafficking organization that sold crack cocaine in the
13 Bronx. In that role, Cummings provided crack to street-level dealers, collected
14 proceeds from their sales, and sold crack directly to end users on the street.
15 Cummings and other members of his organization carried firearms in order to
16 secure their drugs, proceeds, and territory.

1 By 2009, a building known as the Carter became a lucrative location for
2 selling crack. Although a rival drug trafficking organization dominated the
3 Carter's drug trade, Cummings and his organization competed for greater access
4 to its spoils. In short order, that competition bred violence.

5 In particular, violence erupted between Cummings and Laquan Jones, a
6 former member of Cummings's organization who, after a falling out, joined the
7 rival organization and sold crack in the Carter. After several incidents between
8 the feuding organizations—including one when Cummings chased Jones with a
9 firearm, and another when Jones shot at Cummings while Cummings's mother
10 was present—the competition over the Carter's drug trade turned deadly.

11 On January 14, 2010, Cummings shot and killed Jones. In retaliation,
12 members of the rival organization shot and killed Travis Geathers, Cummings's
13 close friend and a member of Cummings's organization. According to a member
14 of the rival organization, Geathers's death was "a body for a body, nothing
15 personal." Tr. at 477. Nevertheless, the violence persisted. On June 9, 2010,
16 Cummings shot and killed Carl Copeland, a member of the rival organization
17 who was allegedly tied to Geathers's murder.

II. Indictments and Arraignment

On January 12, 2012, Cummings and thirty-four co-defendants were indicted for knowingly conspiring to violate federal narcotics laws and for related federal firearms violations.

On November 7, 2014, a superseding indictment was filed which charged Cummings with the following: one count of conspiracy to distribute 280 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846; one count of using and carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c); two counts of killing a person during and in relation to a conspiracy to distribute 280 grams or more of cocaine base in violation of 21 U.S.C. § 848(e)(1)(A); two counts of brandishing and discharging a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c); and two counts of causing the death of a person through the use of a firearm during and in relation to the crack cocaine conspiracy in violation of 18 U.S.C. § 924(j).

Cummings pled not guilty to all of the counts charged.

III. Motions in Limine

1 On October 27, 2014, prior to Cummings’s trial, the government filed a
2 motion in limine regarding the admissibility of certain testimony from a
3 cooperating witness, Jim Volcy. Volcy was a former crack dealer in the Bronx
4 who claimed to have observed Cummings’s participation in the Copeland
5 shooting. Volcy also claimed to have heard Cummings threaten him while they
6 were housed in the same prison.

7 In its motion, the government stated that it “intends to offer evidence that,
8 while in jail, Cummings . . . threatened [a] cooperating witness[] . . . because of
9 [his] cooperation.” App’x at 55. In particular, the government proffered that
10 “[Volcy] will testify that Cummings said that he would kill [Volcy] if he could
11 because of [Volcy’s] cooperation.” App’x at 55. The government’s motion in
12 limine included no further factual information about this alleged death threat
13 evidence as it pertained to Cummings.

14 The government argued that Volcy’s death threat testimony was
15 admissible under Federal Rule of Evidence 404(b)² as evidence demonstrating

² Federal Rule of Evidence 404(b) states that “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on

1 Cummings's consciousness of guilt, and that the probative value of that evidence
2 outweighed any unfair prejudice under Federal Rule of Evidence 403.³ Although
3 the government acknowledged that the prejudice of this death threat testimony
4 was "potentially significant," the government argued that any such prejudicial
5 effect would be mitigated because the testimony involved only a verbal threat
6 and did not involve conduct more sensational than the crimes charged. App'x at
7 56. The government added that any prejudicial effect associated with the death
8 threat testimony "will be further eliminated by a limiting instruction." App'x at
9 56.

10 On November 3, 2014, Cummings's defense counsel opposed the
11 government's motion in limine, arguing that the death threat testimony should
12 be excluded under Rule 403, as the probative value of that evidence was far
13 outweighed by the risk of unfair prejudice to Cummings. Defense counsel
14 argued further that "if the Court permits such [death threat] evidence, Mr.

a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1).

³ Federal Rule of Evidence 403 states that the district court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403.

Cummings request[s] a limiting instruction, both at the time the testimony is admitted at trial and again during the Court's instructions to the jury at the end of trial." App'x at 65.

Several days later, the district court granted the government's motion and ruled that Volcy could testify about Cummings's alleged death threat. *See United States v. Cummings*, 60 F. Supp. 3d 434, 440 (S.D.N.Y. 2014). Specifically, the district court held:

A defendant's threats toward a witness are admissible under Rule 404(b) as evidence of consciousness of guilt. . . . [T]he potential for unfair prejudice by presenting the threats at issue here is mitigated by the severity of the crimes alleged in the indictment. Certainly an allegation of a verbal death threat is no more inflammatory than an accusation of 'two premeditated, assassination-style murders.' The potential for prejudice could be further mitigated by a limiting instruction advising the jury that these threats are admissible only to show consciousness of guilt. The Court therefore grants the [g]overnment's motion with regard to evidence that Cummings . . . threatened [a] cooperating witness[, *subject to an appropriate limiting instruction.*

Id. (emphasis added) (internal citations omitted). The district court further stated that the government's motion was granted "subject to a limiting instruction directing the jury to consider the threats only to show consciousness of guilt." *Id.* at 441.

Cummings's defense counsel subsequently included a request in its proposed jury instructions relating to the admission of "similar acts" evidence. Proposed Jury Instructions on Behalf of Defendant Armani Cummings at 33, United States v. Cummings, No. 12-cr-00031, (S.D.N.Y. Oct. 17, 2014), ECF No. 927 [hereinafter "Proposed Jury Instructions"]. In particular, defense counsel asked the district court to instruct the jury as follows:

The government has offered evidence tending to show that on different occasions the defendant engaged in criminal conduct which is not charged in this case.

...

[Y]ou may not consider this evidence as a substitute for proof that the defendant has committed the crime charged. Nor may you consider this evidence as proof that the defendant has a criminal propensity or bad character. The evidence of the uncharged act was admitted for a much more limited purpose, and you may consider it only for that limited purpose.

Id.

In its proposed instructions, the government omitted this request.

IV. Trial

At trial, the government introduced testimony from a number of witnesses, including several former members of Cummings's drug trafficking organization, several former members of the rival drug trafficking organization,

1 and one of Cummings's former prison inmates. These witnesses testified that
2 they observed Cummings sell crack, commit violence against members of the
3 rival drug trafficking organization, and confess to murdering Jones and
4 Copeland. The government also introduced 911 calls, as well as crime scene,
5 ballistic, and medical evidence.

6 Volcy testified at trial. His testimony about Cummings's alleged death
7 threat, however, deviated from the government's proffer in its motion in limine.
8 Specifically, when presented at trial, Volcy's testimony posed potential hearsay
9 issues that the government had not presented in its motion in limine.

10 After stating that he and Cummings were housed together at the
11 Metropolitan Detention Center in Brooklyn ("MDC"), Volcy testified as follows:

12 AUSA: Now, at the MDC, did you see [Cummings]?

13 VOLCY: Yes.

14 AUSA: *Did he say anything to you?*

15 VOLCY: *Not directly.*

16 AUSA: *Did he say anything to you indirectly?*

17 DEFENSE: Objection.

18 THE COURT: Overruled.

19 VOLCY: *He said stuff to people around me.*

20 AUSA: But you were present?

21 DEFENSE: Objection. Leading.

22 THE COURT: Overruled.

23 AUSA: What did he say?

1 VOLCY: He just called me rat bastard and just called me
2 names -- things like that.
3 AUSA: After he called you names, what if anything did
4 he say to you or do to you?
5 VOLCY: He didn't do anything to me. *He couldn't reach me,*
6 *but you know, he made threats, things like that.*
7 AUSA: What were the threats that he made?
8 VOLCY: *He would shoot me in the face.*

9 Tr. 933-34 (emphasis added). Although he made a pre-trial request for a limiting
10 instruction upon admission of such death threat testimony, Cummings's defense
11 counsel did not renew the request. The district court did not provide a limiting
12 instruction at that time. It may be that the hearsay problem took the government
13 itself by surprise. But it is nevertheless the case that neither the defendant nor the
14 court was alerted to the problem in advance.

15 At the end of trial, during the charge conference, the government
16 commented on a proposed jury instruction about evidence admitted under
17 Rule 404(b). In particular, the government said, "I think, ultimately, in this case, I
18 don't think that the government offered any 404(b) evidence. If I am wrong, the
19 defense will correct me." Tr. 1728. Cummings's defense counsel responded that
20 only a gun stipulation "might fall under this instruction." Tr. 1729. The

1 government disagreed, and therefore asked that the Rule 404(b) instruction be
2 removed.

3 The next day, the government clarified its prior statement that there was
4 no Rule 404(b) evidence offered in this case. The government stated:

5 Yesterday during the charge conference, there was a question
6 that came about whether there was any -- I think it was 404(b)
7 evidence. And I wanted to correct that in one regard. . . . There was
8 evidence that was offered with regard to consciousness of guilt; that
9 is, certain threats that were made. And that's not a direct evidence,
10 that's only consciousness of guilt evidence. I don't know if defense
11 counsel wants an instruction with regard to that evidence or not, but
12 I just wanted to flag that for the Court.

13 Tr. 1782-83. Cummings's defense counsel did not respond. On the other hand,
14 the defense had already proposed a charge (set out *supra* at 12) that would
15 alleviate the risk of propensity prejudice, and counsel might well have elected to
16 avoid a more specific charge that would emphasize a vivid threat to kill a
17 witness by gruesome means.

18 In delivering its jury instructions at the close of trial, however, the district
19 court did not include the instruction regarding evidence admitted pursuant to
20 Rule 404(b). Cummings's defense counsel did not raise an objection during the

1 charge conference or after the charge relating to the absence of a Rule 404(b)
2 instruction.

3 Finally, in its summation, the government repeated Volcy's death threat
4 testimony. The government stated, near the conclusion of its summation, "[n]ow,
5 the importance of the cooperator testimony was not lost on Cummings[.] . . . You
6 heard evidence that Cummings called . . . Jim Volcy, a 'rat bastard' and
7 threatened to shoot [him] in the face for cooperating." Tr. 2161. After referring to
8 this threat, the government added:

9 You know why Cummings . . . made th[at] threat[.]. You know
10 why Cummings . . . did not want [Volcy] to testify. Cummings . . .
11 knew that the testimony would be very, very damaging to [hi]m at
12 trial.

13 *And that testimony, ladies and gentlemen, was in fact completely*
14 *devastating proof of [Cummings's] crimes, proof that was corroborated*
15 *again and again by the other witnesses and the other evidence in the*
16 *case.*

17 Tr. at 2162 (emphasis added).

18 On December 11, 2014, after a three-week trial, the jury convicted
19 Cummings on all eight counts.

20 On January 16, 2015, Cummings filed a letter motion requesting a new trial
21 pursuant to Federal Rule of Criminal Procedure 33 and renewed his prior

1 motions for a judgment of acquittal pursuant to Federal Rule of Criminal

2 Procedure 29. Fed. R. Crim. P. 29, 33.

3 The district court denied those motions.

4 On June 19, 2015, the district court sentenced Cummings to 75 years'
5 imprisonment. Cummings timely filed his appeal.

6 DISCUSSION

7 I. Standard of Review

8 This Court reviews evidentiary rulings for abuse of discretion. *United*
9 *States v. Natal*, 849 F.3d 530, 534 (2d Cir. 2017). "A district court has abused its
10 discretion if it based its ruling on an erroneous view of the law or on a clearly
11 erroneous assessment of the evidence or rendered a decision that cannot be
12 located within the range of permissible decisions." *Id.*

13 Even if a district court abuses its discretion by making an erroneous
14 evidentiary ruling, that error is ordinarily subject to harmless error analysis.
15 *United States v. Mercado*, 573 F.3d 138, 141 (2d Cir. 2009). "An erroneous ruling on
16 the admissibility of evidence is harmless if the appellate court can conclude with
17 fair assurance that the evidence did not substantially influence the jury." *Id.*

1 Where, however, “the appellant fails to preserve an evidentiary challenge by
2 lodging a timely objection, we review for plain error.” *United States v. Certified*
3 *Envntl. Servs., Inc.*, 753 F.3d 72, 96 (2d Cir. 2014).

4 **II. Did Cummings Forfeit His Claim of Error?**

5 Cummings argues that Volcy’s death threat testimony constitutes
6 inadmissible hearsay and the district court erred by admitting such testimony.
7 As a threshold matter, the government contends that Cummings forfeited this
8 argument because he raised it for the first time on appeal. We disagree with the
9 government.

10 Under Federal Rule of Evidence 103, a party must make a timely and
11 specific objection to an evidentiary ruling in order to preserve a claim for appeal.
12 Fed. R. Evid. 103. In particular, Rule 103 states that “[a] party may claim error in
13 a ruling to admit or exclude evidence only if the error affects a substantial right
14 of the party and . . . if the ruling admits evidence, a party, on the record:

15 (A) timely objects . . . and (B) *states the specific ground, unless it was apparent from*
16 *the context.*” Fed. R. Evid. 103(a)(1) (emphasis added); see *Robinson v. Shapiro*, 646
17 F.2d 734, 742 (2d Cir. 1981) (“The purpose of requiring a timely objection is to

1 identify the disputed issue and give the trial judge a chance to correct errors
2 which might otherwise necessitate a new trial.”).

3 Here, defense counsel timely objected to the relevant portion of Volcy’s
4 testimony. When the government asked Volcy whether Cummings said
5 anything to him while they were at MDC, Volcy responded “not directly.” Tr.
6 934. When the government asked a follow up question to clarify, “Did he say
7 anything to you indirectly?”, defense counsel objected. Tr. 934. The district court
8 overruled the objection.

9 It is apparent from the context that defense counsel objected to the hearsay
10 nature of Volcy’s testimony, or at least the possibility that Volcy was testifying
11 without personal knowledge of Cummings’s threat. *See* Fed. R. Evid. 602 (stating
12 that a lay witness “may testify to a matter only if evidence is introduced
13 sufficient to support a finding that the witness has personal knowledge of the
14 matter”); *United States v. Garcia*, 291 F.3d 127, 140 (2d Cir. 2002). Given the
15 context, defense counsel’s timely objection was sufficient to identify the hearsay
16 issue and give the district court the opportunity to correct any error that would
17 result from admitting such testimony.

1 Therefore, we hold that Cummings preserved his objection to the
2 admission of Volcy's hearsay testimony. Accordingly, as discussed above, we
3 review Cummings's preserved evidentiary challenge to determine whether the
4 court abused its discretion by admitting hearsay evidence, and if so, whether that
5 error was harmless. *See Mercado*, 573 F.3d at 141.

6 **III. Admissibility of Hearsay Evidence**

7 Cummings argues that Volcy's death threat testimony involved
8 inadmissible hearsay and that the district court's failure to exclude such
9 testimony was erroneous. We agree.

10 Hearsay is a statement that "(1) the declarant does not make while
11 testifying at the current trial or hearing; and (2) a party offers in evidence to
12 prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c).
13 "Hearsay is admissible only if it falls within an enumerated exception." *United*
14 *States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013); *see* Fed R. Evid. 802.

15 Cummings and the government dispute whether Volcy heard Cummings
16 make the alleged death threat. According to Cummings, Volcy's testimony
17 clearly indicates that Volcy did not hear Cummings's threat. *See* Appellant's Br.

1 at 28 (“[T]he entire exchange in question is prefaced by the admission that
2 Cummings *never said anything to Volcy*, and Volcy never stated he was present
3 when the ‘threats’ were made.”). If Volcy did not hear Cummings make this
4 threat, then Volcy must have heard about it from a third party. This proposition
5 raises hearsay concerns.

6 According to the government, Volcy personally heard Cummings make
7 the death threat and therefore Volcy could testify based on his first-hand
8 knowledge. Specifically, the government claims that, in its appropriate context,
9 Volcy’s statement that Cummings “said stuff to people around me,” Tr. 934, is
10 “clearly understood to mean that Cummings made the statements to people *in*
11 *Volcy’s presence*.” Appellee’s Br. at 24 (emphasis added). Because the government
12 asserts that Cummings’s death threat was not offered for its truth—that
13 Cummings actually would shoot Volcy in the face—but as evidence of
14 Cummings’s consciousness of guilt, the government concludes that Volcy’s
15 testimony does not raise hearsay concerns.

16 When reviewing evidentiary challenges in criminal cases, we view the
17 evidence in the light most favorable to the government. *See United States v.*

1 *Curley*, 639 F.3d 50, 54 n.1 (2d Cir. 2011). Nevertheless, we only draw inferences
2 that are supported by the evidence in the record.

3 Here, we cannot draw the government’s preferred inference—that Volcy
4 heard the death threat directly from Cummings—because it is not supported by
5 the evidence in the record.

6 The plain language of Volcy’s testimony belies the government’s
7 argument. When asked point blank whether Cummings said anything to him,
8 Volcy said, “[n]ot directly.” Tr. 934. When asked whether Cummings said
9 anything to him indirectly, Volcy said that “[h]e said stuff to people around me.”
10 Tr. 934. The question is whether Volcy was present when the statement was
11 made, and Volcy’s statement that Cummings “couldn’t reach [me]” suggests that
12 Volcy and Cummings did not share a physical space, reducing the likelihood that
13 Volcy heard Cummings make the death threat. Moreover, the government
14 continued its testimony without allowing Volcy to answer the question, “But
15 were you present?,” once the court overruled defense counsel’s objection to the
16 question as leading. Tr. 934. Lastly, Volcy’s choice of language—a statement
17 made “to people around me” rather than “directly”—bespeaks second-hand

1 communication. Taken together, the only inference supported by the evidence in
2 the record is that Volcy did not hear the death threat directly from Cummings.
3 Rather, the evidence supports an inference that Volcy heard about Cummings's
4 threat from a third-party declarant.

5 As a result, Volcy's trial testimony presented a potential double hearsay
6 problem, or hearsay within hearsay.

7 Under Federal Rule of Evidence 805, "[h]earsay within hearsay is not
8 excluded by the rule against hearsay if each part of the combined statements
9 conforms with an exception to the rule." Fed. R. Evid. 805.

10 Because Volcy did not hear Cummings's threat directly, Volcy's testimony
11 involves two out-of-court statements, either or both of which poses hearsay
12 concerns. The first statement is made by Cummings to a third-party declarant: "I
13 am going to shoot Volcy in the face." The second statement is made by that
14 unknown third-party declarant to Volcy: "I heard Cummings say 'I am going to
15 shoot Volcy in the face.'" We review each statement to determine whether it is
16 admissible, either because it is not hearsay or because it is hearsay subject to an
17 enumerated exception, or whether it is inadmissible hearsay.

1 With respect to the first statement—made by Cummings to a third-party
2 declarant, “I am going to shoot Volcy in the face”—it could be admitted as not
3 hearsay on either of the following two possible bases. First, under Rule 801(c), a
4 statement is not hearsay unless it is offered to prove the truth of the matter
5 asserted in the statement. Fed. R. Evid. 801(c). The first statement would have
6 been admissible if offered not for the truth of the matter asserted—that
7 Cummings actually would shoot Volcy in the face—but rather as evidence of
8 Cummings’s consciousness of guilt. Second, under Rule 801(d), a statement is not
9 hearsay if it is “offered against an opposing party and . . . was made by the party
10 in an individual . . . capacity.” Fed. R. Evid. 801(d)(2)(A); *see also Green v. City of*
11 *N. Y.*, 465 F.3d 65, 77 (2d Cir. 2006). Thus, the district court could have also
12 admitted Cummings’s death threat as an opposing party’s statement under Rule
13 801(d)(2) if the government sought to introduce the threat against Cummings,
14 the opposing party in the prosecution, and if the third-party declarant that heard
15 Cummings make the threat testified under oath.

16 Here, however, even though the first statement on its own could be
17 admissible because it was not hearsay, we have to address the admissibility of

1 the second statement. In this case, the government did not call the third-party
2 declarant to testify. As a result, the district court could only admit the death
3 threat relayed in the first statement if the second statement in this double hearsay
4 problem were admissible, either because it was not hearsay or because it was
5 hearsay subject to an exception.

6 We hold, however, that the second statement—the third-party declarant’s
7 statement to Volcy that, “I heard Cummings say ‘I am going to shoot Volcy in the
8 face’”—was hearsay not subject to an exception. This statement is only probative
9 if admitted for the truth of the matter asserted, i.e., that the third-party declarant
10 *actually heard* Cummings make this threat. If it was not admitted for its truth,
11 then it would not be probative of Cummings’s consciousness of guilt. Because
12 this second statement is offered for its truth and does not satisfy any of the
13 enumerated hearsay exceptions, the second statement is inadmissible hearsay.

14 Accordingly, because the second statement is inadmissible hearsay not
15 subject to an exception, Rule 805’s requirement that “each part of the combined
16 statement” be admissible is not met. The district court therefore abused its

1 discretion in admitting Volcy's hearsay testimony regarding Cummings's death
2 threat.

3 **IV. Harmless Error Analysis**

4 Having established that Cummings preserved his claim of error and that
5 the district court abused its discretion in admitting hearsay testimony, we review
6 that erroneous evidentiary ruling under a harmless error standard. *See* Fed. R.
7 Crim. P. 52(a).

8 "An erroneous ruling on the admissibility of evidence is harmless if the
9 appellate court can conclude with fair assurance that the evidence did not
10 substantially influence the jury." *Mercado*, 573 F.3d at 141. In order

11 [t]o say that the erroneously admitted testimony did not
12 substantially influence the jury[,] we are not required to conclude
13 that it could not have had any effect whatsoever; the error is
14 harmless if we can conclude that that testimony was unimportant in
15 relation to everything else the jury considered on the issue in
16 question, as revealed in the record.

17 *United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992) (internal quotation marks
18 omitted). "The principal factors for such an inquiry are the importance of the
19 witness's wrongly admitted testimony and the overall strength of the

1 prosecution's case." *United States v. Dukagjini*, 326 F.3d 45, 62 (2d Cir. 2003)

2 (internal quotation marks omitted).

3 Cummings does not allege that the government presented insufficient
4 evidence to support his conviction. Nor do we dispute the significant amount of
5 evidence presented over the course of Cummings's three-week trial. The jury
6 heard considerable evidence regarding Cummings's guilt of the charged crimes,
7 including eyewitness testimony and confessions regarding the Jones and
8 Copeland murders.

9 The test of whether an error is harmless, however, is not whether,
10 "disregarding the erroneously introduced evidence, there was other evidence
11 which was independently sufficient to establish [Cummings's] guilt." *United*
12 *States v. Check*, 582 F.2d 668, 684 (2d Cir. 1978) (internal quotation marks
13 omitted). Rather, we must evaluate the "manner in which, in the total setting of
14 the case, the error influenced the jury." *Id.* (internal quotation marks omitted).
15 Then, "[o]nly if our conviction is sure that the error did not influence the jury or
16 had but very slight effect," will we affirm Cummings's conviction. *Id.* (internal
17 quotation marks omitted). Because of the severely prejudicial nature of Volcy's

1 death threat testimony, the distinct possibility that the jury would use such
2 testimony as impermissible propensity evidence in the absence of a limiting
3 instruction, and the serious risk that such evidence “lure[d] the [jury] into
4 declaring guilt on a ground different from proof specific to the offense charged,”
5 *United States v. Massino*, 546 F.3d 123, 132 (2d Cir. 2008) (quoting *Old Chief v.*
6 *United States*, 519 U.S. 172, 180 (1997)), we are unable to conclude that the
7 admission of such testimony was unimportant in relation to the other evidence
8 considered by the jury. Therefore, we hold that—to the extent that we are not
9 sure that the improper admission of Volcy’s hearsay death threat testimony did
10 not influence the jury or that it had very slight effect—the error was not
11 harmless.

12 Although we neither affirm nor disturb the district court’s balancing
13 analysis pursuant to Rule 403, we draw upon similar considerations—probative
14 value, danger of unfair prejudice—in determining the importance of Volcy’s
15 wrongly admitted, death threat testimony and whether it substantially
16 influenced the jury. *See* Fed. R. Evid. 403.

1 “It is hard to deem harmless the erroneous admission of death threat
2 evidence” because death threat evidence may be “toxic.” *United States v. Morgan*,
3 786 F.3d 227, 234 (2d Cir. 2015). “As our past decisions indicate, the potential
4 prejudice for death threats may be great.” *United States v. Qamar*, 671 F.2d 732,
5 736 (2d Cir. 1982). “Ordinarily, unrelated death[] threat testimony is kept from a
6 jury because its potential for causing unfair prejudice outweighs its probative
7 value with respect to a defendant’s guilt.” *United States v. Panebianco*, 543 F.2d
8 447, 455 (2d Cir. 1976).

9 In this case, the admission of Volcy’s death threat evidence was toxic for
10 several reasons.

11 First, the admission of Volcy’s death threat testimony created an undue
12 risk that the jury construed the threat as evidence of Cummings’s murderous
13 propensity. Propensity evidence, like other evidence that poses a risk of causing
14 unfair prejudice,

15 tends to distract the jury from the issues in the case and permits the
16 trier of fact to reward the good man and to punish the bad man
17 because of their respective characters[,] despite what the evidence in
18 the case shows actually happened. The effect in such a case might be
19 to arouse the jury’s passions to a point where they would act
20 irrationally in reaching a verdict.

1 *United States v. Robinson*, 560 F.2d 507, 514 (2d Cir. 1977) (internal quotation
2 marks and citation omitted).

3 Here, there was an undue “likelihood that the jury would substitute the
4 death threat evidence for consideration of the elements of the charged crimes.”
5 *Morgan*, 786 F.3d at 233. The similarity of the threat evidence to the charged
6 crimes may have misled the jury and substantially heightened the potential of
7 the threat evidence to influence the jury. Cummings was on trial for, among
8 other crimes, the shooting and killing of both Jones and Copeland. The similarity
9 between Volcy’s death threat testimony and the crimes charged risked
10 suggesting to the jury that it should convict Cummings of the prior murders
11 because he was willing to murder for expedience. Therefore, the death threat
12 evidence had a substantial “capacity . . . to lure the [jury] into declaring guilt on a
13 ground different from proof specific to the offense charged.” *Massino*, 546 F.3d at
14 132. Its erroneous admission raises serious doubts that such evidence was
15 unimportant to the jury in light of the other evidence presented.

16 Second, the district court did not provide a limiting instruction to the jury
17 about the limited permissible purpose of Volcy’s death threat testimony. In the

1 absence of a limiting instruction, there was an undue risk that the jury
2 considered the death threat evidence as evidence of Cummings's murderous
3 propensity rather than as evidence of Cummings's consciousness of guilt.

4 "Where evidence is admissible for one purpose but is inadmissible for
5 another, the trial judge should, when requested, instruct the jury as to the limited
6 purpose for which the evidence may be considered." *United States v. Washington*,
7 592 F.2d 680, 681 (2d Cir. 1979); *see* Fed. R. Evid. 105. "[L]imiting instructions are
8 an accepted part of our present trial system." *United States v. Ebner*, 782 F.2d 1120,
9 1126 (2d Cir. 1986) (internal quotation marks omitted). Limiting instructions
10 serve an important purpose of reducing the danger that a jury, after hearing
11 about a defendant's other crimes or bad acts, "will impermissibly infer that he is
12 a bad man likely to have committed the crime for which he is being tried." *United*
13 *States v. Benedetto*, 571 F.2d 1246, 1249 (2d Cir. 1978).

14 As a general matter, a defendant must request such a limiting instruction;
15 if he does not, he waives any objection to the admissibility of the disputed
16 evidence, *see United States v. Smith*, 283 F.2d 760, 764 (2d Cir. 1960), and the
17 district court will typically not be found in error by failing to provide an

1 unrequested instruction, *see Benedetto*, 571 F.2d at 1250 n.9 (finding no plain error
2 in the district court's failure to provide a limiting instruction where no such
3 charge was requested by the defendant).

4 Although we do not ascribe plain error to the district court for not
5 providing a limiting instruction here where Cummings's defense counsel failed
6 to renew any request for an instruction at the charge conference, *see United States*
7 *v. Tracy*, 12 F.3d 1186, 1195 (2d Cir. 1993), the absence of such an instruction
8 nevertheless looms large in considering the potential unfair prejudice Cummings
9 suffered as a result of the erroneous admission of Volcy's death threat testimony
10 and the importance of the error to Cummings's trial. For example, in several of
11 our prior cases holding that the admission of death threat testimony was
12 harmless, we pointed to the district court's effective use of limiting instructions
13 to reduce the potential prejudice from the threat evidence. *See, e.g., Qamar*, 671
14 F.2d at 737 (explaining that the district court "limited the potential prejudice" of
15 death threat testimony "by admonishing the jury" about its few permitted uses);
16 *United States v. DeLillo*, 620 F.2d 939, 946 (2d Cir. 1980) ("[T]he prejudice is likely

1 to be small because the jury will be instructed not to consider the threat on the
2 question of the defendant's overall guilt").

3 Recognizing that Volcy's death threat testimony had the potential to cause
4 severe prejudice to Cummings, both parties and the district court acknowledged
5 the value of a limiting instruction in relation to the admission of such evidence.

6 See App'x at 56 (government's motion in limine) (noting that the prejudice from
7 death threat testimony was "potentially significant" but stating that such
8 prejudice "will be further eliminated by a limiting instruction"); App'x at 65
9 (Cummings's opposition to motion in limine) (requesting a limiting instruction if
10 the court decided to admit Volcy's death threat testimony); *Cummings*, 60 F.

11 Supp. 3d at 440 (discussing, in granting the motion in limine, the power of a
12 limiting instruction to reduce the prejudicial effect of Volcy's testimony and
13 stating that such testimony would be admitted "subject to an appropriate
14 limiting instruction"); Proposed Jury Instructions at 33 (requesting an instruction
15 on the permissible use of Rule 404(b) evidence and including an admonishment
16 that the jury may not "consider this [other act] evidence as proof that
17 [Cummings] has a criminal propensity or bad character"). Because the death

1 threat testimony, nevertheless, was admitted without a limiting instruction, the
2 jury may have considered it for any purpose—including an impermissible
3 purpose, such as evidence of Cummings’s murderous propensity.

4 Third, the government’s description of Volcy’s death threat testimony in
5 its summation went beyond the alleged purpose for its admission (to prove
6 Cummings’s consciousness of guilt). In its summation, “the government argued
7 to the jury that the death threats were evidence of [Cummings’s] guilt.” *Morgan*,
8 786 F.3d at 235. Specifically, the government stated that such death threat
9 testimony “was in fact completely devastating proof of [Cummings’s] crimes.”
10 Tr. 2162. The government’s statements in summation exacerbated the injurious
11 effect of Volcy’s death threat testimony by inviting the jury to consider such
12 testimony for impermissible purposes. In light of this improper description of
13 Volcy’s death threat testimony to the jury, “[e]ven if it would otherwise have
14 been proper for the government to argue in its summation that the death threats
15 evinced *consciousness* of guilt, we cannot conclude that the government placed no
16 undue emphasis on the threats.” *Morgan*, 786 F.3d at 235 (internal quotation
17 marks omitted).

1 Finally, the hearsay nature of Volcy's death threat testimony unfairly
2 prejudiced Cummings and may have affected the jury's understanding of this
3 testimony. "The hearsay rule is generally said to exclude out-of-court statements
4 offered for the truth of the matter asserted because there are four classes of risk
5 peculiar to this kind of evidence: those of (1) insincerity, (2) faulty perception, (3)
6 faulty memory[,] and (4) faulty narration, each of which decreases the reliability
7 of the inference from the statement made to the conclusion for which it is
8 offered." *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 232 (2d Cir. 1999). The rule
9 "ordinarily prohibits the admission of out-of-court statements by declarants on
10 the theory that cross-examination can help test for these four classes of error,
11 thus allowing the [jury] to weigh the evidence properly and to discount any that
12 is too unreliable." *Id.*

13 In this case, Volcy's death threat testimony presented all of those dangers.
14 For example, did the unknown third-party declarant have an incentive to
15 fabricate Cummings's alleged death threat (insincerity)? Did that third-party
16 declarant actually hear Cummings, as opposed to someone else, make this threat
17 (faulty perception)? Even if the third-party declarant heard Cummings make a

1 threat, was it actually directed to Volcy as opposed to another inmate (faulty
2 memory)? Did the third-party declarant relay the proper message from
3 Cummings's alleged threat (faulty narration)?

4 Typically, hearsay dangers may be mitigated by cross-examination. *See*
5 *United States v. Reyes*, 18 F.3d 65, 69 (2d Cir. 1994) ("The principal vice of hearsay
6 evidence is that it offers the opponent no opportunity to cross examine the
7 declarant on the statement that establishes the declared fact."). But because the
8 government neither identified the unknown third-party declarant nor called that
9 person to testify, Cummings was unable to cross-examine that person and
10 challenge the veracity of the death threat evidence. Cummings was therefore
11 denied the opportunity to undermine the trustworthiness of the third-party
12 declarant and to minimize the injurious effect of the death threat evidence.

13 Because of the toxic nature of death threat testimony, "we have carefully
14 limited [its] use to situations where there was a clear need for the prosecution to
15 use such evidence." *Check*, 582 F.2d at 685. Here, there was no such need. Volcy's
16 death threat testimony "bore no relation to the offenses for which [Cummings]
17 was being tried." *Morgan*, 786 F.3d at 232, nor was it "inextricably intertwined

1 with the evidence regarding the charged offense,” *United States v. Quinones*, 511
2 F.3d 289, 309 (2d Cir. 2007). It was not evidence of Cummings’s participation in
3 the narcotics conspiracy, murders, or firearms violations. *See Tracy*, 12 F.3d at
4 1195 (finding no abuse of discretion in admitting death threat testimony where
5 the testimony showed that defendant “was a member of the conspiracy and
6 played a role that gave him . . . familiarity with [its] operation”). Nor was such
7 testimony offered as evidence regarding a witness’s credibility. *See Qamar*, 671
8 F.2d at 736 (finding no abuse of discretion in the admission of threat evidence
9 when such evidence was useful to explain a witness’s demeanor, whose
10 credibility “was central to the jury’s determination of guilt or innocence”);
11 *Panebianco*, 543 F.2d at 455. Because Volcy’s death threat testimony was
12 unconnected to the charged crimes, it is dubious that there was a “clear need” for
13 Volcy’s death threat testimony and that it “serve[d] an important purpose.” *See*
14 *Morgan*, 786 F.3d at 229.

15 Moreover, the government presented other, far more damning, evidence of
16 Cummings’s consciousness of guilt: his confessions. In light of the extensive

1 testimony regarding these confessions, Volcy's death threat testimony was little
2 more than gratuitous.

3 In opposition to Cummings's claim, the government argues that Volcy's
4 death threat testimony was not unfairly prejudicial because Cummings's verbal
5 threat "paled in comparison to the crimes which Cummings was charged,
6 including two premeditated, assassination-style murders." Appellee's Br. at 23.
7 While we acknowledge that the prejudicial effect of evidence is mitigated where
8 the evidence is no "more sensational or disturbing than the crimes with which
9 [the defendant] [i]s charged," *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d
10 Cir. 1990), we are not persuaded that this rule trumps the other sources of unfair
11 prejudice present in the instant case that made Volcy's death threat toxic.

12 Additionally, the government claims that Volcy's death threat testimony
13 was not prejudicial and was therefore harmless because such testimony "was
14 several lines in a trial transcript that is approximately 2,000 pages." Appellee's
15 Br. at 25. We are not persuaded.

16 Unquestionably, when determining whether the erroneous admission of
17 evidence was harmless, we consider the centrality of that evidence at trial and

1 the number and frequency of references to the wrongly admitted evidence. *See*
2 *e.g., Morgan*, 786 F.3d at 234 (“Here, the death threat evidence was the
3 government’s most dramatic evidence at trial, a circumstance that weighs in
4 favor of ruling that the error affected Morgan’s substantial rights.” (internal
5 quotation marks and brackets omitted)); *United States v. McDermott*, 277 F.3d 240,
6 243 (2d Cir. 2002) (holding that references to disputed evidence was harmless in
7 light of the limited number of references and the substantial evidence against the
8 defendant). But these considerations are not dispositive in this case. Although
9 the references to Volcy’s death threat testimony were few and the testimony was
10 not a central piece of evidence in the case, Volcy’s death threat testimony still
11 carried significant risk of substantially influencing the jury because it had the
12 tendency to “distract the jury from the issues in the case,” *Morgan*, 786 F.3d at
13 233, and to “permit[] the trier of fact to . . . punish the bad man because of [his] []
14 character[],” *Robinson*, 560 F.2d at 514. We have acknowledged the toxic effects of
15 improperly admitting death threat testimony, *see, e.g., Morgan*, 786 F.3d at 234;
16 *Qamar*, 671 F.2d at 736-37; *Panebianco*, 543 F.2d at 455; *Check*, 582 F.2d at 685-86,
17 and we are not persuaded that it was unimportant to the jury despite by the

1 limited number of references to Volcy's death threat testimony and the volume
2 of other evidence in this case.

3 It is not the province of this Court to "speculate upon probable
4 reconviction and decide according to how the speculation comes out." *Kotteakos*
5 *v. United States*, 328 U.S. 750, 763 (1946). *United States v. Tussa*, 816 F.2d 58, 67 (2d
6 Cir. 1987) ("Even if an appellate court is without doubt that a defendant is guilty,
7 there must be a reversal if the error is sufficiently serious."). "But this does not
8 mean that the appellate court can escape altogether taking account of the
9 outcome." *Kotteakos*, 328 U.S. at 764. Rather, we must "take account of what the
10 error meant to [the jury], not singled out and standing alone, but in relation to all
11 else that happened." *Id.*

12 Accordingly, after an examination of the record, we are unable to conclude
13 with fair assurance that the evidence did not substantially influence the jury.
14 Therefore, we hold that, in light of the facts of this case, the erroneous admission
15 of the death threat evidence was not harmless.

CONCLUSION

Despite the seriousness of the crimes charged against Cummings, in light of the erroneous admission of hearsay death threat testimony, and the harmfulness of that error, we vacate Cummings's conviction and remand for a new trial.