IN THE COURT OF APPEALS OF IOWA

No. 2-255 / 11-0666
Filed June 27, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES LAWRENCE SALKIL,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick, Judge.

James Salkil appeals from judgment and sentence imposed upon his convictions for first-degree kidnapping and assault causing serious injury. **REVERSED IN PART AND REMANDED.**

David G. Morrison, Rock Island, Illinois, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Michael J. Walton, County Attorney, and Jerald Feuerbach, Assistant County Attorney, for appellee.

Heard by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

POTTERFIELD, J.

James Salkil appeals from judgment and sentence imposed upon his convictions for first-degree kidnapping and assault causing serious injury. Because there was substantial evidence to submit only one of the theories of first-degree kidnapping, the district court erred in instructing the jury and we reverse and remand for a new trial. The district court did not abuse its discretion in its evidentiary rulings.

I. Background Facts and Proceedings.

From the evidence presented at trial, a reasonable jury could find that early in the morning on March 11, 2010, Nate Johnson, Benjamin Border, Anthony McFarland, and James Salkil returned to Salkil's residence after a night of partying. McFarland called Johnson a "bitch" and made crude remarks about Johnson's female relatives. McFarland then said he was going to "slap" Johnson and "lay hands" on Border and Salkil. Salkil grabbed a baseball bat and hit McFarland several times on the head. Salkil then had Border and Johnson help him wrap McFarland in plastic and bedding from Salkil's room and put McFarland in the trunk of Border's Cadillac. The three transported McFarland to a secluded rural road, where Salkil and Border "put him in ditch." The three men then took the sheet and the blanket and McFarland's shirt, got back in the car, and returned to Salkil's residence.

Charles Ray and his girlfriend, Stephanie Wade, had been with the other four men earlier at a strip club where McFarland had "disrespected" Wade. Ray and Wade left the group at about 2 a.m. and returned to their home.

Telephone records indicate a text message was sent from Salkil's phone to Wade at about 5 a.m. At about 7 a.m., Salkil called Ray and Wade saying he needed help. Ray went to Salkil's residence, left, and returned with a change of clothing for Border, whose clothes had blood on them. Johnson changed into some of Salkil's clothing.

Wade arrived at Salkil's residence later with carpet cleaner and shampooed the carpets.

Before Wade arrived at Salkil's residence, Johnson, Border, and Salkil cleaned up the blood that was "all over the living room." They bagged up their bloody clothes and "the other stuff from the living room," including the cleaning materials and the bat, and put them in the trunk of Border's Cadillac. Johnson and Border took the items to a different remote rural location, where they poured gasoline on the pile and set it on fire. The bat did not burn so it was buried in the mud near a creek. Johnson and Border then took the Cadillac to a car wash and used the power sprayer to clean the inside of the trunk. The car wash where Johnson and Border washed the Cadillac had surveillance video that captured the men power washing the inside of the trunk.[1]

Border dropped Johnson off and then asked a friend if he could store the Cadillac for a time in a garage. Border then went to his girlfriend's house where he turned on his cell phone. Border received a text from Salkil that read, "still kicking," which Border took to mean McFarland was still alive.

McFarland was found on the side of the road by morning commuters. At about 7:45 a.m., the first police officer on the scene, Timothy Brandenburg, found

[1] The owner of the car wash thought this behavior odd enough that he remembered it.

McFarland "had shallow respirations and vague pulse," so he asked dispatch to send emergency responders. Firefighter Melaine Mohar-Whitchelo arrived at about 7:50 a.m.

The investigation led police to question Salkil, Johnson, Border, Ray, and Wade. Salkil implicated Johnson and Border. Johnson and Border told police Salkil was the person who had beaten McFarland, told them they had to get rid of him, and chose the place where he would be left in the ditch. Johnson and Border led police to the burn pile in which police found the burnt remnants of a red cell phone, a spare tire belonging to the Cadillac registered to Border, and a "pirate symbol belt buckle."

During the investigation, police learned Salkil, Johnson, Border, and Ray called themselves the Pirate Corp. Salkil had a business called Captain Hook Enterprises. Salkil was the "captain." Ray worked for Salkil and drove a black Dodge truck registered to that business.[2] An ornament (a skull wearing a bandana with a patch across one eye) hung from the rear-view mirror of the truck.

Johnson, Border, and Salkil were all charged with first-degree kidnapping and assault offenses. In addition to kidnapping, Salkil was charged with attempted murder and willful injury with serious injury. Johnson and Border pleaded guilty to lesser charges and testified in the State's case at Salkil's subsequent trial.

At trial, McFarland testified he was hospitalized for three months following the beating, suffered "brain damage, severe trauma," was "missing [the] front half

[2] On the vehicle's proof of insurance, the entity is spelled "Captin Hook Enterprises."

of my skull," and remembered nothing of how he was injured. Salkil entered a written stipulation that "as a result of being struck in the head with a bat, Anthony McFarland suffered serious injury."

Border testified that upon wrapping McFarland in the plastic and sheet, he did not think McFarland was alive. Johnson testified he thought McFarland "was dead" when they left him in the ditch. But Salkil told the police in a recorded statement that when McFarland was put into the car, he was breathing and wheezing. The recorded statement was played for the jury during trial.

The jury found Salkil guilty of first-degree kidnapping, and the lesser included offenses of assault on the attempted murder count, and assault resulting in serious injury on the willful injury resulting in serious injury count.

Salkil now appeals. He contends (1) the court improperly instructed the jury on first-degree kidnapping by including both the serious injury and the torture theories with a general verdict; (2) there is insufficient evidence from which a reasonable jury could find "as a result of the confinement or removal Anthony McFarland suffered a serious injury or intentionally was subjected to torture" to support the kidnapping conviction; (3) the trial court abused its discretion in admitting into evidence exhibits referring to the Pirate Corp; and (4) the court abused its discretion in admitting the automated records of Ben Border's cell phone text messages over the defendant's hearsay objection.

II. Scope and Standard of Review.

We review claims of error in jury instructions for errors of law. *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010).

We also review sufficiency-of-evidence claims for the correction of errors at law. *State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007).

Our review of evidentiary rulings is generally for an abuse of discretion. *See State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). An abuse of discretion occurs when the trial court exercises its discretion on clearly untenable grounds or to an extent clearly unreasonable. *Id.*

III. Discussion.

Salkil's first two issues are interrelated. He argues there was not substantial evidence to support either theory under the marshalling instruction for kidnapping in the first degree. He also contends that because of this lack of evidence, the general verdict returned by the jury requires reversal of his conviction for that crime. *See State v. Lathrop*, 781 N.W.2d 288, 297 (Iowa 2010); *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006). For the reasons that follow, we agree that retrial is required.

A. First-Degree Kidnapping. As relevant here, "[a] person commits kidnapping when the person either confines a person or removes a person from one place to another" without authority or consent "accompanied by . . . [t]he intent to inflict serious injury upon such person" or "[t]he intent to secretly confine such person." Iowa Code § 710.1(3), (4) (2009). Kidnapping is kidnapping in the first degree when the person kidnapped, "as a consequence of" the confinement or removal, "suffers serious injury, or is intentionally subjected to torture or sexual abuse." *Id.* § 710.2.

1. Jury instructions. A court must instruct on all material issues raised by the evidence. *State v. Broughton*, 425 N.W.2d 48, 51 (Iowa 1988); *see also* Iowa

R. Civ. P. 1.924 (stating court is required to "instruct the jury as to the law applicable to all material issues in the case . . . ."); Iowa R. Crim. P. 2.19(5)(f) ("The rules relating to the instruction of juries in civil cases shall apply to the trial of criminal cases."); *State v. Marin*, 788 N.W.2d 833, 837 (Iowa 2010). "In criminal cases, the court is required to instruct the jury on the definition of the crime." *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996).

Here, the jury was instructed (Instruction No. 9) that to establish kidnapping in the first degree, the State must prove all of the following:

> 1. On or about the 11th day of March, 2010, the defendant confined Anthony McFarland or removed Anthony McFarland from the defendant's residence to a ditch along Utah Avenue in Davenport, Iowa.
> 2. The defendant did so *with the specific intent to inflict serious injury upon Anthony McFarland* or to secretly confine Anthony McFarland.
> 3. The defendant knew he did not have the consent or authority of Anthony McFarland to do so.
> 4. *As a result of the confinement or removal*, Anthony McFarland *suffered a serious injury* or *intentionally was subjected to torture*.
> If the State has proved all of the elements, the defendant is guilty of Kidnapping in the First Degree under Count 1. If the State has proved elements 1, 2, and 3, but failed to prove element 4, the defendant is guilty of the included offense of Kidnapping in the Third Degree under Count 1. If the State has failed to prove 1, 2, or 3, you must consider the included offense of False Imprisonment under the following instruction.

(Emphasis added.)

Salkil contends that the highlighted alternatives of element "2" and element "4" were not supported by sufficient evidence and thus their inclusion was improper.[3]

[3] With respect to element "2," Salkil argues there is not substantial evidence to support that the confinement or removal was accompanied by the specific intent to inflict serious

a. Element 2—"specific intent to inflict serious injury."[4] As to the intent to inflict serious injury alternative, Salkil relies on the testimony of Johnson and Border—both of whom testified they believed McFarland was dead—and argues the jury could not conclude he intended to inflict serious injury[5] because they believed McFarland was dead already.

The jury members were free to give the witnesses' testimony such weight as they thought it should receive. *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). They were free to accept or reject any of the witnesses' testimony, *id*., because the very function of the jury is to weigh the evidence and "place credibility where it belongs." *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984). The jury heard Salkil's statement to the police that McFarland was breathing and wheezing when he was put in the vehicle. A rational juror could find that by

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injury. He does *not* contend there was insufficient evidence that the removal was with the specific intent to secretly confine McFarland. With respect to element "4," Salkil argues there was insufficient evidence from which the jury could find either alternative, that is, he argues there is not evidence that *as a result of* the confinement or removal, McFarland either (1) suffered a serious injury, or (2) intentionally was subjected to torture.

[4] With respect to element "2," Salkil argues there is not substantial evidence to support that the confinement or removal was accompanied by the specific intent to inflict serious injury. He does *not* contend, nor on this record could he credibly contend, there was insufficient evidence that the removal was with the specific intent to secretly confine McFarland.

[5] Serious injury was defined in Instruction No. 13:

> A "serious injury" is a (1) condition which cripples, incapacitates, weakens or destroys a person's normal mental functions, or (2) bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or extended loss or impairment of the function of any bodily party or organ. The term "bodily injury" means physical pain, illness or any impairment of physical condition.

The instruction is consistent with Iowa law. *See* Iowa Code § 702.18 (defining "serious injury" as meaning "[d]isabling mental illness" or "[b]odily injury which . . . [c]reates a substantial risk of death," or "[c]auses serious permanent disfigurement," or "[c]auses protracted loss or impairment of the function of any bodily member or organ"); *State v. Taylor*, 689 N.W.2d 116, 135 (Iowa 2004). "'Bodily injury' as used in chapter 708 means physical pain, illness, or any impairment of physical condition." *Taylor*, 689 N.W.2d at 137 (internal quotation marks and citations omitted)).

driving a person who has already suffered a serious head injury (to which the defendant stipulated) and dumping him in a remote ditch on a cold March morning,[6] Salkil intended to inflict bodily injury—as in physical pain or any impairment of physical condition. And, a rational juror could find that dumping a severely injured person in a ditch and thus denying needed medical care "creates a substantial risk of death." *See State v. Anderson*, 308 N.W.2d 42, 47 (Iowa 1981) ("If there is a 'real hazard or danger of death,' serious injury is established."). Thus, there was sufficient evidence of specific intent to inflict serious injury to submit this alternative of element "2" to the jury for consideration. The court did not err in instructing the jury as to both alternatives in the intent element, paragraph 2, of the marshalling instruction.

b. Element "4"—as a consequence of the confinement or removal McFarland suffered a serious injury or was intentionally subjected to torture. Salkil argues there was insufficient evidence from which the jury could find either alternative, that is, he argues there is no evidence that *as a result of* the confinement or removal, McFarland either (1) suffered a serious injury, or (2) intentionally was subjected to torture. We address each argument in turn.

(i) Suffered serious injury. Salkil contends this alternative should not have been included in the jury instructions because there was no medical evidence that "McFarland suffered serious injury as a consequence of being removed from the residence, placed in the trunk of the car or from being

[6] Salkil points to the testimony of the emergency responder that that the cold may have slowed McFarland's bleeding and argues there is therefore no medical evidence that the removal caused serious injury and may have prevented it. The jury was not required to accept this argument, nor are we.

placed in the ditch on Utah Avenue or lying in the ditch." Having carefully reviewed the testimony presented at trial, we agree.

Firefighter Melaine Mohar-Whitchelo testified "initially we weren't even sure [McFarland] was alive." She also testified "I was surprised at how well he was breathing when we got there. Normally with people, if they have head injuries, they start showing some kind of brain damage . . . ." And she answered "no" in response to the prosecutor's question, "the person in this patient's condition, laying outside, patient not being treated, was that doing him any good?" But these statements are not sufficient from which a jury could find McFarland—as a result of the confinement or removal—suffered a serious injury. The State presented no testimony that the confinement or removal—as distinct from the previous beating—resulted in a disabling mental illness, or bodily injury which created a substantial risk of death, or caused serious permanent disfigurement, or caused protracted loss or impairment of the function of any bodily member or organ. *See* Iowa Code § 702.18. The jury might have speculated this was so, but "[e]vidence which merely raises suspicion, speculation, or conjecture is insufficient." *State v. McCullah*, 787 N.W.2d 90, 92 (Iowa 2010). As the State concedes, the requirement of additional consequences resulting from the confinement and removal aspects of first-degree kidnapping are designed to justify the more severe penalties of that crime. *State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994) ("We did not and do not believe the legislature intended to afford prosecutors the option of bootstrapping convictions for kidnapping, carrying life sentences, on to charges for crimes for which the legislature provides much less severe penalties." (citing *State v. Rich*,

305 N.W.2d 739, 745 (Iowa 1981)). Consequently, this alternative was erroneously included in the jury instruction.

(ii) Intentionally was subjected to torture. Salkil also argues there was not sufficient evidence that McFarland was subjected to torture as a consequence of his confinement or removal. This complaint, too, is based upon the defense theory that one cannot torture a dead person and Border's and Johnson's testimony that they thought McFarland was dead. Again, we note that the jury heard Salkil's statement that McFarland was wheezing—and therefore alive—when placed in the trunk of a car wrapped in plastic and bedding.

In *State v. White*, 668 N.W.2d 850, 857 (Iowa 2003), our supreme court explored the meaning of "torture" as it is used in the context of the kidnapping statute, Iowa Code section 710.2. The court concluded:

> It would be contrary to legislative intent and common sense to find "torture" must include an element of physical injury. It is reasonable to assume the legislature was aware of the duality of the term "torture" and would have explicitly limited it to physical torture if that was what the legislature had intended the term to mean. Furthermore, other Iowa Code sections lend support to the conclusion that "torture" encompasses mental anguish unaccompanied by physical injury. Iowa Code section 702.18 defines "serious injury" to include "[d]isabling mental illness," *or* extensive bodily injury. Iowa Code § 702.18(1)(a), (b). We conclude "torture" as it is used in Iowa Code section 710.2 includes mental anguish unaccompanied by physical or sexual assault. *In other words, "torture" is either physical and/or mental anguish.*

White, 668 N.W.2d at 857 (case citations omitted) (emphasis added).

There was sufficient evidence from which a jury could find that as a consequence of the confinement or removal, McFarland intentionally was subjected to torture. He was intentionally wrapped in plastic, placed in the trunk of a vehicle, and dumped on the side of a secluded road injured and bleeding. A

rational jury could find that as a consequence of these acts, Salkil intentionally subjected McFarland to physical and/or mental anguish. As defined in *White*, there was sufficient evidence to instruct the jury on this alternative of element "4."

2. Sufficiency of the evidence. A jury's finding of guilt is binding on appeal if supported by substantial evidence. *See State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). "Substantial evidence is evidence from which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Enderle*, 745 N.W.2d at 443. In reviewing a challenge to the sufficiency of the evidence, "we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record." *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006).

Salkil does not challenge all elements of the first-degree kidnapping offense. He thus concedes that the jury could find he confined or removed Anthony McFarland from his residence to a ditch in Davenport, Iowa, and that he knew he did not have the consent or authority of Anthony McFarland to do so. As to the intent alternatives, Salkil does not dispute there was sufficient evidence to show he removed McFarland with the specific intent to secretly confine McFarland. We have found there is substantial evidence from which a jury could find Salkil specifically intended to inflict additional serious injury on McFarland in moving and confining him. With respect to element 4, the result element, we have also found there is substantial evidence from which the jury could find that as a consequence of the confinement or removal Salkil intentionally subjected McFarland to torture.

However, we have also determined the State failed to present evidence to support the alternative theory that as a consequence of confinement or removal, McFarland suffered serious injury. One theory of first-degree kidnapping was thus not supported by sufficient evidence. But, because the jury returned a general verdict of guilty, we have no way of knowing which theory the jury accepted. *See State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996). We must reverse and remand for a new trial on the first-degree kidnapping charge. *See id*.

We address only those remaining issues that may arise on retrial. *See State v. Heemstra*, 721 N.W.2d 549, 559 (Iowa 2006); *State v. Nance*, 533 N.W.2d 557, 561 (Iowa 1995).

B. Rule 5.403 Balancing. Salkil argues the court abused its discretion in allowing exhibits 16,[7] 35, 36, 49, and 51 and accompanying testimony. Exhibit 35 is a "Pirate Corp" patch, which appears much like a family crest.[8] According to Border and Johnson, Exhibit 36 is a list of the rules[9] for the Pirate Corp. Ray

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[7] We presume this is a typographical error as exhibit 16 is a photograph of the proof of insurance card for a 1994 Dodge registered to "Captin Hook Enterprises, LLC." Later in the brief the defendant identifies Exhibit 13, a photograph of a plastic skull wearing a bandana and an eye patch, which hung on the rear-view mirror of a truck registered to Captain Hook Enterprises and which Ray was driving.

[8] A photocopy of Exhibit 35 is found in the Appendix but the original is not contained in the exhibits sent to this court.

[9] The list reads:

> I. First and foremost the Corp comes first.
> II. Think before you speak.
> III. Pirate business may never be spoken out of the family.
> IV. Always protect your fellow brother.
> V. Any and all disputes between Pirates must be settled by the Cpt. or counsel.
> VI. Ever [sic] Pirate is responsible for any and all that he shall bring to the Corp.
> VII. Every order must be followed.

testified the Pirate Corp consisted of "Me, James, Nate, Ben" and "Bones—Tony [McFarland]" and where "just a couple guys hung around, drank beer, watched football and played cards together." He testified he had never seen Exhibit 36. Exhibit 49 is a photograph taken by law enforcement of a skull and crossbones belt buckle found in the burn pile. Exhibit 51, though not in the record sent to this court is described by the defendant as the belt buckle pictured in Exhibit 49.

Salkil moved in limine before the district court for a ruling that these items be excluded as they invited the jury to speculate about what type of club the Pirate Corp was and allowed the jury to believe it was a criminal enterprise. The State responded that the exhibits were relevant to show that Salkil was the captain or leader of this group, showed motive for what occurred in the case, and showed a connection between all the people involved. The court overruled Salkil's Iowa Rule of Evidence 5-403 objections to the admission of these exhibits.[10]

In this court, Salkil characterizes the exhibits as evidence of gang membership, which he argues is inherently prejudicial and should have been excluded pursuant to rule 5.403. We first observe that the testimony and exhibits do not reveal any instance in which the Pirate Corp was referred to as a gang or a criminal enterprise.

VIII. No civilians especially woman and children.
IX. The Corp name shall never be use without the blessing of the Cpt. or counsel.
X. Once you have become a part of the Corp as low as a Greenhorn it is a commitment for life.

[10] We reject the State's contention on appeal that the defendant did not adequately preserve the issues for our review.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues . . . ." Iowa R. Evid. 5.403. We review the court's balancing of relevance and prejudice under rule 5.403 for abuse of discretion. *See State v. Williams*, 360 N.W.2d 782, 787 (Iowa 1985). "In order to reverse the trial court on this issue we would have to find as a matter of law that the danger of unfair prejudice outweighed the probative value of the evidence." *Id.* We cannot do so in this case.

"In the context of a criminal case, unfair prejudice 'speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.'" *State v. Cromer*, 765 N.W.2d 1, 9 (Iowa 2009) (quoting *Old Chief v. United States*, 519 U.S. 172, 180 (1997)). In *Nance*, 533 N.W.2d at 562, the case upon which Salkil relies, the court found that the evidence of gang membership did nothing to explain the circumstances of the crimes with which he was charged, murder and willful injury. Thus, the evidence only appealed to the jury's instinct to punish gang members. *Nance*, 533 N.W.2d at 562. The *Nance* court cited *State v. Liggins*, 524 N.W.2d 181, 188 (Iowa 1994), where it was found that admitting evidence that the defendant was a supplier of cocaine was not relevant nor was it "an inseparable part of the whole deed," and stating, "[e]vidence of other offenses should never be admitted when the other offense is committed wholly independent of the one for which the defendant is on trial."

Here, group membership was not presented as criminal activity. Nor was it wholly independent of the offenses charged. Salkil, Ray, Johnson, Border, and

McFarland were all members of a group calling themselves the Pirate Corp of which Border and Johnson testified Salkil was the "captain" or "boss." (Ray, too, acknowledged that Salkil was the owner of Captain Hook Enterprises and his employer.) The rules of the group were introduced to provide an explanation as to why Johnson and Border would follow Salkil's directives. The various group-related paraphernalia were relevant to corroborate witness statements and to connect items and relationships. Under these circumstances, where there is probative value, we cannot say as a matter of law that the danger of unfair prejudice outweighed the probative value of the evidence. *See Williams*, 360 N.W.2d at 787.

C. Admission of Exhibit 53. Finally, Salkil contends the district court abused its discretion in admitting Exhibit 53 over his foundation and hearsay objections. The exhibit was introduced during testimony by Jeff Wagenknecht, a Verizon Wireless employee who stated the exhibit was a computer-generated list of text messages sent and received by the cell phone used by Border. The court overruled the objection and admitted the exhibit.

In *State v. Reynolds*, 746 N.W.2d 837, 841–42 (Iowa 2008), the court discussed the hearsay issue raised by admission of some business records. The court acknowledged that records created through a fully automated and reliable process involving no human declarant are "arguably not hearsay at all, as they would not have been made by a human declarant." *Reynolds*, 746 N.W.2d at 843. Salkil does not contend the State failed to prove the records were business records admissible pursuant to rule of evidence 5.803(6), but objects to the admission of the text messages listed as having originated from Salkil's cell

phone, particularly one message ("still kicking"), since the copy of the exhibit cut off the originating phone number.[11] Even assuming the content of the text messages was hearsay, *see State v. Armstead*, 432 So. 2d 837, 839 (La. 1983) ("[C]omputer printouts which reflect computer stored human statements are hearsay when introduced for the truth of the matter asserted in the statements."), the messages themselves were cumulative on the content of the text messages as Border testified that he received a text from Salkil that said "still kicking" and Johnson, too, testified as to the contents of text messages received from Salkil. *See Reynolds*, 746 N.W.2d at 844; *State v. McGuire*, 572 N.W.2d 545, 547–48 (Iowa 1997) (noting the court will not find prejudice in the admission of hearsay evidence if "substantially the same evidence has come into the record without objection"). We find no abuse of discretion.

IV. Disposition.

We reverse and remand for a new trial on the first-degree kidnapping charge.

REVERSED IN PART AND REMANDED.

[11] This is an evidentiary issue we do not anticipate re-occurring in the new trial.