IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27548-5-III**
Respondent and Cross-Appellant,	)	**Division Three**
v.	)	
ROBERT ALAN BROWN,	)	**UNPUBLISHED OPINION**
Appellant.	)	

Kulik, C.J. — Sebastian Esquibel was held in Robert Brown's trailer and eventually driven out to a field area where he was shot in the back of head. A jury convicted Mr. Brown of first degree kidnapping and felony murder, with the predicate felony of first degree kidnapping. Mr. Brown appeals, asserting two instructional errors, insufficient evidence, ineffective assistance of counsel, and cumulative error. We reverse and remand the first degree kidnapping conviction. We affirm the felony murder conviction.

FACTS

In May 2005, Levoy and Shannon Burnham lived in a fifth wheel trailer owned by and located on Robert Brown's property. Mr. Brown lived in a home near the trailer. Mr. Burnham attempted to arrange a drug deal involving Mr. Esquibel and Carlton Hristco. Mr. Burnham fronted $800 to Mr. Esquibel; however, Mr. Esquibel did not deliver any drugs or return Mr. Burnham's money.

At trial, Ms. Burnham testified that Mr. Burnham brought Mr. Esquibel to the trailer. Mr. Burnham asked Mr. Hristco to bring a gun to the trailer. In the trailer, Mr. Hristco saw Mr. Brown and Mr. Burnham with Mr. Esquibel. Mr. Esquibel looked uninjured. He was wearing only his boxer shorts. Mr. Hristco observed Mr. Brown and Mr. Burnham kicking and punching Mr. Esquibel. Shortly after arriving, Mr. Hristco left.

Theodore Kosewicz came into the trailer and joined in punching and kicking Mr. Esquibel. Mr. Burnham and Mr. Kosewicz repeatedly asked Mr. Esquibel about the money. They held Mr. Esquibel in the trailer overnight.

Mr. Burnham called Amber Johnson and asked for a ride. Ms. Johnson arrived at the trailer around 11:00 a.m. driving a van. Ms. Johnson testified that Mr. Esquibel was wearing only cut-off sweatpants and looked scuffed up. Mr. Burnham put Mr. Esquibel

in the van. Ms. Johnson stated that Mr. Brown knocked on the door of the trailer and talked with Mr. Burnham.

Ms. Johnson drove the van to various places in Spokane and eventually to a field area where Mr. Burnham and Mr. Kosewicz removed Mr. Esquibel from the van. Ms. Johnson testified that about one minute passed when she heard a gunshot. Mr. Burnham and Mr. Kosewicz returned to the van and Ms. Johnson drove away. Mr. Esquibel's body was found under a woodpile in Spokane County in January 2006. His ankles were tied with jumper cables and duct tape bound his wrists. Mr. Esquibel had a gunshot wound to the head.

On March 15, 2006, Mr. Brown agreed to speak with Detectives Douglass Marske and James Dresback about Mr. Esquibel's death. Mr. Brown told the detectives that he saw Mr. Esquibel in the trailer, sitting on the couch, wearing only his underwear. Mr. Brown told the detectives he knew Mr. Burnham and Mr. Hristco were trying to get their money back from Mr. Esquibel. After Mr. Brown returned to his house, he could hear screaming and a roofing nailer going off in the trailer. When Mr. Brown returned to the trailer later, he did not observe any injuries on Mr. Esquibel, so he concluded that Mr. Burnham and Mr. Hristco were using the roofing nailer to scare Mr. Esquibel.

Mr. Burnham asked Mr. Brown to find out if Mr. Esquibel was a member of the

Mexican Mafia. After speaking with Amanda Brown, Mr. Brown determined that Mr. Esquibel did not belong to any Mexican gangs. Later, Mr. Burnham asked Mr. Brown to come out to the trailer, gave him a gun, and asked him to guard Mr. Esquibel. Mr. Brown complied. Mr. Brown also supplied jumper cables to Mr. Burnham.

Mr. Brown was ultimately charged with premeditated murder in the first degree, with aggravating circumstances, or, alternatively, with murder in the first degree, kidnapping in the first degree, and conspiracy to commit first degree kidnapping. The kidnapping charge alleged that Mr. Brown abducted Mr. Esquibel with the intent to inflict bodily injury. The first degree murder charge alleged felony murder, with kidnapping as the underlying felony.

At trial, jury instructions 15 and 16 stated that kidnapping can occur with the intent to inflict bodily injury or the intent to inflict extreme mental distress. The jury acquitted Mr. Brown of premeditated murder in the first degree and conspiracy to commit first degree kidnapping, but found him guilty of kidnapping in the first degree and murder in the first degree based on felony murder, with kidnapping as the underlying charge.

Mr. Brown appeals, asserting that kidnapping instructions 15 and 16 contained an uncharged alternative means, intent to inflict extreme mental distress, to committing kidnapping and, therefore, the kidnapping charge should be reversed. Secondly, Mr.

Brown asserts that because the jury erroneously found him guilty of kidnapping, the felony murder charge no longer has an underlying felony and that the felony murder conviction should be reversed as well. Mr. Brown also asserts insufficient evidence, error on the homicide definitional instruction, ineffective assistance of counsel, and cumulative error. The State cross-appeals, asserting the two deadly weapon enhancements, one for each felony, should be imposed consecutively, not concurrently.

ANALYSIS

Uncharged Alternative Means of Committing Kidnapping. Mr. Brown asserts the trial court erred by instructing the jury on an uncharged alternative means of committing kidnapping. Specifically, the second amended information charged Mr. Brown with kidnapping with the intent to inflict bodily injury. However, the jury instructions regarding kidnapping allowed the jury to convict if it found Mr. Brown acted with the intent to inflict bodily injury *or* the intent to inflict extreme mental distress.

Mr. Brown raises this issue for the first time on appeal. An error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). It is well settled that alleged error regarding jury instructions is of sufficient constitutional magnitude to be raised for the first time on appeal. *State v. Davis*, 141 Wn.2d 798, 866, 10 P.3d 977 (2000).

Kidnapping is an alternative means crime. A person commits kidnapping by abducting another person with the intent to inflict bodily injury or the intent to inflict extreme mental distress. RCW 9A.40.020. The State may charge a defendant with one or all of the alternative means outlined in the statute, so long as the alternatives are not repugnant to one another. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). However, if the information contains only one alternative, it is error to instruct the jury that it may consider any of the other alternative means of committing the crime. *Id.* The defendant has the right to notice of the crimes charged. Allowing the jury to consider uncharged alternative means violates the defendant's right to notice and is reversible error. *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

Here, Mr. Brown was charged only with kidnapping with the intent to inflict bodily injury. However, the trial court instructed the jury that it could find Mr. Brown guilty of kidnapping if he abducted Mr. Esquibel with the intent to inflict bodily injury or with the intent to inflict extreme mental distress. The trial court erred by instructing the jury that it could consider an uncharged alternative means of committing kidnapping.

An erroneous instruction is not automatically reversible error if it can be affirmatively shown that the error was harmless. Instructional error is harmless if there is no possibility that the defendant was convicted on the uncharged alternative. *State v.*

Nicholas, 55 Wn. App. 261, 273, 776 P.2d 1385 (1989). Here, it is impossible to determine which alternative means each individual juror used to find Mr. Brown guilty of kidnapping. Thus, one or more jurors may have found Mr. Brown guilty of kidnapping under the uncharged alternative means. And we cannot affirmatively hold that the error was harmless.

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

Felony Murder as the Underlying Felony. Mr. Brown asserts that because he was erroneously convicted of kidnapping, there is no longer a felony to support felony murder and, therefore, the felony murder conviction should be reversed. The State asserts that the felony murder conviction does not require a separate conviction of the underlying felony to be valid. It asserts the elements of the underlying felony in felony murder are not elements of the crime of felony murder; therefore, it was not error to instruct the jury on uncharged alternative means of committing the underlying felony. As long as the State can prove the elements of the underlying felony and the elements of felony murder beyond a reasonable doubt, the felony murder conviction is valid.

The underlying felony in a felony murder charge is an essential element of felony murder; however, the elements of the underlying crime are not the elements of the crime of felony murder. *State v. Bryant*, 65 Wn. App. 428, 438, 828 P.2d 1121 (1992). Thus,

the elements of the underlying felony do not need to be pleaded. *Id.* And it is not necessary to plead the alternative means of the underlying felony. *State v. Hartz*, 65 Wn. App. 351, 354, 828 P.2d 618 (1992). In *Hartz*, the defendant was charged with felony murder with robbery as the underlying felony. The court held that the State was not required to allege the specific means of the robbery charge. *Id.* However, at trial, the State must prove beyond a reasonable doubt the elements of the underlying crime. *State v. Quillin*, 49 Wn. App. 155, 164, 741 P.2d 589 (1987).

When the court instructs the jury that an offense can be committed in more than one way, the jury must unanimously agree that the defendant is guilty of the charged crime. The jury need not unanimously agree on the means by which the defendant committed the crime if substantial evidence supports each alternative means. *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). Substantial evidence exists if a rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt. *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231 (1994).

Here, the second amended information charged felony murder with kidnapping as the underlying felony. The court instructed the jury that kidnapping can be committed by two alternative means: (1) with the intent to inflict bodily injury, or (2) with the intent to

inflict extreme mental distress. The trial court did not give a unanimity instruction. Thus, we do not know which means the jury used to convict Mr. Brown. We then must determine if substantial evidence supports both alternative means of kidnapping.

The State presented evidence that Ms. Burnham saw Mr. Brown go in and out of the trailer while Mr. Esquibel was being held there. Mr. Hristco stated he saw Mr. Brown hit Mr. Esquibel. Ms. Johnson stated that she knew Mr. Brown came to the trailer and talked with Mr. Burnham when she picked up Mr. Esquibel, Mr. Kosewicz, and Mr. Burnham.

Mr. Brown confessed his participation to Detective Marske. Mr. Brown told Detective Marske he knew Mr. Esquibel was not in the trailer voluntarily. He knew Mr. Esquibel was kept in the trailer all day and night. Mr. Burnham sent Mr. Brown to find out if Mr. Esquibel was part of any Mexican gangs, fearing retaliation. Mr. Brown determined Mr. Esquibel did not belong to any Mexican gangs. Mr. Brown reported hearing a roofing nailer and some screaming from the trailer. He believed the roofing nailer was being used to intimidate Mr. Esquibel. Mr. Brown reported that he was not in the trailer, but he knew that while the men tortured Mr. Esquibel—and to further intimidate him—they talked openly about how they were going to get rid of his body. Mr. Brown confessed to punching Mr. Esquibel in the head and hitting him while others

also hit or kicked him. Mr. Brown told Detective Marske that he was "somewhat confident" the jumper cables used to tie Mr. Esquibel's ankles were his. Report of Proceedings (RP) at 531. Finally, Mr. Burnham asked Mr. Brown to guard Mr. Esquibel while he went out of the trailer. Mr. Burnham left Mr. Brown with a gun. Mr. Brown complied and did not allow Mr. Esquibel to leave the trailer. Mr. Brown told Mr. Esquibel to shut up when Mr. Esquibel pleaded with him.

Based on the evidence, it is clear that a rational trier of fact could find beyond a reasonable doubt that Mr. Brown participated in kidnapping Mr. Esquibel under both alternative means. Mr. Hristco stated he saw Mr. Brown hit Mr. Esquibel, and Mr. Brown confessed to hitting Mr. Esquibel. Mr. Brown acted as an accomplice by checking to see if Mr. Esquibel was in any Mexican gangs. Mr. Brown knew the other men were hitting and kicking Mr. Esquibel while he was in the trailer. This satisfies the intent to inflict bodily injury means.

Mr. Brown knew Mr. Esquibel was being held against his will in the trailer all day and all night wearing only his underwear. Mr. Brown knew the other men were talking about how to dispose of Mr. Esquibel's body while they tortured him. When Mr. Brown was left to guard Mr. Esquibel, he had a gun and he told Mr. Esquibel to shut up when Mr. Esquibel pleaded with him. This satisfies the intent to inflict extreme mental distress

means.

Because there is substantial evidence to support both alternative means, unanimity is not required. The trial court did not err by convicting Mr. Brown of felony murder based on the underlying felony of kidnapping.

Sufficient Evidence. Evidence is sufficient when, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). When considering the sufficiency of the evidence, all reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Mr. Brown asserts that the State presented insufficient evidence to convict him of felony murder. To convict Mr. Brown of felony murder in the first degree, the State must show that Mr. Brown committed or attempted to commit kidnapping in the first degree, "and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, cause[d] the death of a person other than one of the

participants." RCW 9A.32.030(1)(c). To show Mr. Brown committed kidnapping in the first degree, the State must show that Mr. Brown intentionally abducted Mr. Esquibel with intent to either inflict bodily injury on Mr. Esquibel or to inflict extreme mental distress on Mr. Esquibel. RCW 9A.40.020.

The State must show that Mr. Brown was either the principal or an accomplice. Mr. Brown is guilty of a crime as an accomplice if the crime was committed by someone for which Mr. Brown is legally accountable. RCW 9A.08.020(1). Mr. Brown is legally accountable for the conduct of another if

> [w]ith knowledge that it will promote or facilitate the commission of the crime, he
> (i) solicits, commands, encourages, or requests such other person to commit it; or
> (ii) aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020(3)(a).

As noted above, Mr. Brown acted with the intent to inflict bodily injury and to inflict extreme mental distress on Mr. Esquibel. Mr. Burnham intentionally abducted Mr. Esquibel. The question is whether Mr. Brown acted as an accomplice to facilitate the kidnapping and whether Mr. Brown intentionally abducted Mr. Esquibel. Mr. Brown was asked to find out if Mr. Esquibel was a member of any Mexican gangs because of a fear of retaliation. Mr. Brown did so. Mr. Brown also guarded Mr. Esquibel, while armed,

and told Mr. Esquibel to shut up when Mr. Esquibel pleaded with him. Mr. Brown's actions show that he encouraged the kidnapping. He acted of his own free will. A rational trier of fact could conclude he knew his actions would facilitate kidnapping. The State presented sufficient evidence that Mr. Brown acted as an accomplice to first degree kidnapping.

Lastly, there must be sufficient evidence to show Mr. Esquibel died in the course or furtherance of the kidnapping. Mr. Esquibel was abducted and kept in the trailer, then driven to Mr. Hristco's house and Ms. Johnson's house. He was still being held against his will when he was taken out of the van and shot. Sufficient evidence shows that Mr. Esquibel was killed in the course of the kidnapping and to convict Mr. Brown of felony murder.

<u>*Washington Pattern Jury Instruction 25.01.*</u> Mr. Brown asserts that jury instruction 5, which stated "[h]omicide is the killing of a human being by the voluntary act, procurement, or *failure to act* of another," deprived him of a fair trial by misleading the jury into believing Mr. Brown could commit homicide by failing to act. Clerk's Papers (CP) at 347 (emphasis added). Jury instruction 5 was based on the former Washington Pattern Jury Instruction 25.01, which was withdrawn because it was "no longer helpful to the jury." 11 Washington Practice: Washington Pattern Jury

Instructions: Criminal 25.01 at 352, cmt. (3d ed. 2008).

As we noted above, an issue of manifest error involving a constitutional right is an exception to the rule prohibiting raising errors for the first time on appeal. RAP 2.5(a)(3). An error is a manifest constitutional error if the alleged error is a constitutional issue and the error actually prejudiced the defendant. *State v. Barr*, 123 Wn. App. 373, 380, 98 P.3d 518 (2004).

Here, Mr. Brown cannot show that jury instruction 5 was a manifest constitutional error because he cannot show actual prejudice. Only jury instruction 5 contains the language "failure to act." CP at 347. The court correctly instructed the jury in both the definitional instructions, as well as the "to convict" instructions for premeditated first degree murder and felony murder.[1] The trial court also correctly instructed the jury on

---

[1] Jury instruction 6 read as follows:

> A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person unless the killing is excusable or justifiable.

CP at 348.

Jury instruction 7 read as follows:

> As to Count 1:
>
> To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That between the 18th day of May, 2005, and the 13th day of June, 2005, the defendant, as an actor or accomplice, killed SEBASTIAN L. ESQUIBEL;

> (2) That the defendant, as an actor or accomplice, acted with intent to cause the death of SEBASTIAN L. ESQUIBEL;
> (3) That the intent to cause the death was premeditated;
> (4) That SEBASTIAN L. ESQUIBEL died as a result of the defendant's or an accomplice's acts; and
> (5) That the acts occurred in the State of Washington.
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 349.

Jury instruction 13 read as follows:

> A person commits the crime of murder in the first degree when he or she or an accomplice commits or attempts to commit kidnapping and in the course of or in furtherance of such crime or in immediate flight from such crime he or she or another participant causes the death of a person other than one of the participants.

CP at 355.

Jury instruction 14 read as follows:

> As to Count 1 as an alternative:
> To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That between the 18th day of May, 2005, and the 13th day of June, 2005, SEBASTIAN L. ESQUIBEL was killed;
> (2) That the defendant, as an actor and/or accomplice, was committing or attempting to commit first degree kidnapping;
> (3) That the defendant, as an actor and/or accomplice, caused the death of SEBASTIAN L. ESQUIBEL in the course of or in furtherance of such crime or in immediate flight from such crime; and
> (4) That SEBASTIAN L. ESQUIBEL was not a participant in the crime; and
> (5) That the acts occurred in the State of Washington.
> If you find from the evidence that each of these elements has been

accomplice liability.[2] Furthermore, the State did not argue to the jury that Mr. Brown's failure to act caused the death of Mr. Esquibel. Instead, the State argued that Mr. Brown's actions assisted Mr. Kosewicz and Mr. Burnham in the kidnapping and death of Mr. Esquibel. Any error the trial court made did not cause actual prejudice to Mr.

> proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 356.

[2] Jury instruction 10 read as follows:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP at 352.

Brown; thus, we do not address this issue for the first time on appeal.

Ineffective Assistance of Counsel. To prove a claim of ineffective assistance of counsel, the claimant must show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that the defendant was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). There is a strong presumption that trial counsel's performance was reasonable. *State v. Prado*, 144 Wn. App. 227, 248, 181 P.3d 901 (2008). Trial counsel's conduct based on legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel. *Id.*

In his brief, Mr. Brown asserts his trial counsel was ineffective because he failed to object to jury instructions 5, 13, and 14. In his statement of additional grounds, Mr. Brown asserts his trial counsel was ineffective because counsel failed to sufficiently investigate the case and failed to call any defense witnesses.

As stated above, Mr. Brown was not prejudiced by jury instruction 5 and his counsel was not ineffective for failing to object to this instruction. We agree that the trial court committed reversible error by instructing the jury on uncharged alternative means in felony murder instructions 13 and 14.

Next, Mr. Brown contends his trial counsel was ineffective for failing to

sufficiently investigate the case and for failing to call defense witnesses. Mr. Brown asserts there was physical evidence in the form of pictures, to which he directed his attorney, showing the prosecution's claims were incorrect. Mr. Brown contends these pictures would have swayed the jury. An attorney's decision whether or not to introduce evidence to the jury falls squarely within legitimate trial strategy. Similarly, an attorney's decision to call witnesses is trial strategy. We cannot conclude that either support a claim of ineffective assistance of counsel.

Cumulative Error. The cumulative error doctrine allows a defendant a new trial if multiple errors resulted in a trial that was fundamentally unfair. *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004).

Mr. Brown asserts that, under the cumulative error doctrine, the constitutional errors in his trial entitle him to a new trial. However, the only error with merit is the instructional error in kidnapping instructions 15 and 16. The cumulative error doctrine cannot be applied to a case without multiple errors.

STATEMENT OF ADDITIONAL GROUNDS

Conflict of Interest. Mr. Brown asserts two conflict of interest issues. He asserts that attorney James Kirkham was friends with Mr. Esquibel's family and that he agreed he would not work on Mr. Brown's case. Mr. Kirkham later deposed Amanda Brown.

Mr. Brown also asserts the investigator working for his attorney had a conflict of interest because the investigator brought a lawsuit against Mr. Brown prior to the trial for this case.

Both of Mr. Brown's assertions contain facts that are not part of the record in this case. This court cannot review matters outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The proper avenue for review of these issues is a personal restraint petition. *Id.*

Prosecutorial Misconduct. Mr. Brown asserts prosecutorial misconduct based on a statement the prosecutor made in closing argument in which the prosecutor stated, "Who held Mr. Esquibel at gunpoint? Mr. Brown."[3] RP at 755. To constitute prosecutorial misconduct, a prosecutor's remark must be both improper and prejudicial. *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006). Absent an objection at trial, the defendant cannot raise the issue of prosecutorial misconduct unless the prosecutor's statement was so flagrant and ill-intentioned that it created an enduring prejudice throughout the record. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). The prosecutor's comment was not objected to at trial and did not rise to the

[3] Mr. Brown asserts the prosecutor stated: "[Mr.] Brown held the victim at gunpoint;" however, this statement cannot be found in the record. It is assumed that Mr. Brown was referring to the statement quoted.

level of being so flagrant or ill-intentioned that it created an enduring prejudice. Mr. Brown cannot show prosecutorial misconduct based on this comment.

We reverse the first degree kidnapping conviction and remand for a new trial. We affirm the felony murder conviction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

____
Kulik, C.J.

WE CONCUR:

____
Sweeney, J.

____
Brown, J.