



- V. The trial court erred by not instructing on the 85% rule in response to questions submitted by the jury; and
- VI. Accumulated error deprived Appellant of a fundamentally fair trial.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find modification is required.

Regarding proposition one, Appellant's failure to object to all but one of the prosecutor's questions that seemingly violated his right to remain silent waived all but plain error review for those questions. *Simpson v. State*, 1994 OK CR 40, ¶ 34, 876 P.2d 690, 701. Nevertheless, we find error occurred with respect to one question upon which error was preserved and that plain error occurred with the others. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976); *Wood v. State*, 1987 OK CR 281, 748 P.2d 523. Violation of the statutory notice requirement in 22 O.S.2001, § 585 by a defendant with a weak alibi does not mean he suddenly forgoes important constitutional rights. But, he should not get a free pass when his actions invite the inquiry. In light of the overwhelming evidence presented, however, we find the error was harmless beyond a reasonable doubt.

Regarding proposition two, no objection was lodged to the officer's testimony concerning extra-judicial identifications; thus Appellant waived all but plain error. Here the testimony came after the witnesses

testified. Appellant was not denied a fundamentally fair trial. *Kamees v. State*, 1991 OK CR 91, ¶ 16, 815 P.2d 1204, 1208.

With respect to proposition three, we find Appellant's convictions for both Robbery With a Firearm and Felony Possession of a Firearm do not violate 21 O.S. 2001 § 11. These were separate and distinct acts, as there was direct and circumstantial evidence that Appellant possessed the prohibited gun both before and after the robbery. *Davis v. State*, 1999 OK CR 48, 993 P.2d 124. With respect to proposition four, we find the instructions on circumstantial evidence, taken as a whole, fairly and accurately state the applicable law. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556. Regarding proposition five, we find the trial court's failure to instruct on the 85% rule requires relief by modification, as set forth below. *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273.<sup>1</sup> As to Proposition six, we find this case does not present a situation where the trial irregularities, taken together, were so great as to have denied Appellant a fair trial, beyond the relief granted on proposition five.

### **DECISION**

The judgments and sentence on Count I are hereby **AFFIRMED**. The sentence on Count 2 is **MODIFIED** to five years. The sentences shall run consecutively. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of*

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<sup>1</sup> I concur in the relief granted by modification as a matter of stare decisis only. In spite of the jury's concern about early release, the sentences assessed were reasonable and do not reflect inflation due to any arbitrary factor. I continue to interpret the plain language of *Anderson, supra*, as having prospective effect only but recognize the majority of the Court has not followed that limiting language.

*Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY  
THE HONORABLE TAMMY BASS-JONES, DISTRICT JUDGE

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**OPINION BY: LUMPKIN, V.P.J.**  
CHAPEL, P.J.: CONCUR IN PART/DISSENT IN PART  
C. JOHNSON, J.: CONCUR  
A. JOHNSON, J.: CONCUR  
LEWIS, J.: CONCUR IN RESULT

RB

**CHAPEL, PRESIDING JUDGE, CONCURS IN PART/DISSENTS IN PART:**

I concur in affirming the convictions in this case and in modifying the sentence in Count II to five years. However, I would also modify the sentence in Count I to twenty (20) years.

**LEWIS, JUDGE, CONCURS IN RESULTS:**

I agree with the outcome reached in this opinion. I write to address a concern that I see in Proposition I. The State in this case violated Appellant's right of post-arrest silence. The opinion finds that this was harmless error. Furthermore, the opinion states that counsel fails to preserve the error. I disagree with this analysis.

The State improperly impeached Appellant's right of post-arrest silence in violation of the Fifth Amendment.