

- IV. Appellant was denied a fundamentally fair trial when deputies brought him into the courtroom in handcuffs;
- V. Appellant received constitutionally ineffective counsel when trial counsel failed to request jury instructions on lesser included degrees of robbery;
- VI. Prosecutorial misconduct during closing arguments resulted in a fundamentally unfair trial;
- VII. The sentence imposed is excessive and must be modified; and
- VIII. The accumulation of errors resulted in a fundamentally unfair trial.

After thoroughly considering these propositions and the entire record before us, we find modification is required.

With respect to proposition one, we find Appellant's claim has merit. The State sufficiently proved the first seven elements necessary for a conviction under 21 O.S.2001, § 801, i.e., (1) wrongful; (2) taking; (3) carrying away; (4) personal property; (5) of another; (6) from the person of another; and (7) by force or fear. However, the State failed to meet its burden of proof on the eighth element, i.e., "through use of a imitation firearm capable of raising in the mind of the person threatened with such device a fear that it is a real firearm."

Unquestionably, the imitation firearm was capable of convincing someone that it was a real firearm. However, the victim was never "threatened with such device." The record reflects the victim never saw the imitation weapon, even though it was smashed against her head and knocked her unconscious. She was never made aware of the weapon in any way until after the crime was completed. This is insufficient under the statutory language. Therefore relief in

the form of modification is required. *See McArthur v. State*, 1993 OK CR 48, ¶ 10, 862 P.2d 482, 484-85; 22 O.S.2001, § 1066.

Reviewing the information filed in this case and the elements of robbery, which necessarily include the use of force or fear, we find it appropriate under these specific facts to modify Appellant's conviction to First Degree Robbery, in violation of 21 O.S.2001, § 797, subsections (1) and (3). Appellant caused "serious bodily injury" to the victim by breaking her finger and striking her in the head with a weapon so hard as to render her unconscious. His actions also intentionally put the victim in fear of serious bodily injury, as she attempted to flee in vain. Modification of Appellant's sentence is also warranted for reasons set forth below.

With respect to proposition two, we find this Court has condemned the practice of having third parties testify about extra-judicial identifications made by others in several cases, including *Brownfield v. State*, 1983 OK CR 125, 668 P.2d 1165. Some cases support a harmless error analysis regarding this issue. *See, e.g., Trim v. State*, 1991 OK CR 37, ¶ 8, 808 P.2d 697, 699 (finding such testimony may be, but is not necessarily reversible error). Here, we find any such error was harmless, if error at all, as the defense strategy was clearly to attack the identification procedures, which resulted in one misidentification and one with conflicts. Indeed, defense counsel himself cross-examined the police officer vigorously concerning the lineup and procedures used.

With respect to proposition three, we find defense counsel's performance in this case, including the issue of the admissibility of Appellant's statement,

did not rise to the level of constitutionally-ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984) or violate Appellant's Fifth and Sixth Amendment rights. *Michigan v. Jackson*, 475 U.S. 625, 632, 106 S.Ct. 1404, 1408, 89 L.Ed.2d 631 (1986); *Miller v. State*, 2001 OK CR 17, ¶ 12-13, 29 P.3d 1077, 1081; and *Patterson v. Illinois*, 487 U.S. 285, 291, 108 S.Ct. 2389, 2394, 101 L.Ed.2d 261 (1988). The motion to supplement the record and application for evidentiary hearing are hereby **DENIED**. 12 O.S.Supp.2002, § 2606.

With respect to proposition four, we find error occurred when Appellant was brought into court and escorted out of court in handcuffs in the presence of jurors. *Deck v. Missouri*, 487 U.S. 285, 125 S.Ct 2007, 161 L.Ed2d 953 (2005). Even though this was not a capital case and the incidents occurred only during sentencing, these events may have impacted the sentence by affecting negatively the jury's perception of Appellant. We take this in consideration with respect to the modification of Appellant's sentence.

With respect to proposition five, we find lesser-included offense instructions were not warranted as Appellant's defense was innocence/alibi. See *Hooker v. State*, 1994 OK CR 75, ¶ 31, 887 P.2d 1351, 1361. With respect to proposition six, we find no prosecutorial misconduct warranting relief. *Garrison v. State*, 2004 OK CR 35, ¶ 122, n. 35, 103 P.3d 590, 611, n.35; *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693.

With respect to proposition seven, we find, consistent with contemporaneous cases before this Court, that the jury should have been

instructed on the applicability of the 85% rule, i.e., 21 O.S.2001, § 13.1. *Anderson v. State*, 2006 OK CR 6, __ P.3d __. We take this into account with respect to the modification of Appellant's sentence.² And finally, we find proposition eight, cumulative error, to be moot, considering the relief granted.

DECISION

Appellant's conviction is hereby **REVERSED** and **MODIFIED** to the crime of First-Degree Robbery, in violation of 21 O.S.2001, § 797 (1) and (3), and to correct each of the errors discussed, Appellant's sentence is hereby **MODIFIED** to twenty (20) years imprisonment. The case is **REMANDED** to the District Court of Cleveland County with instructions to enter a corrected Judgment and Sentence in conformity with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE TOM A. LUCAS, DISTRICT JUDGE

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² Based upon the principle of *stare decisis*, I accede to the application of *Anderson* to cases pending on appeal at the time of that decision. However, I believe the Court should apply the plain language of *Anderson*, which states:

While this decision gives effect to the legislative intent to provide juries with pertinent information about sentencing options, it does not amount to a substantive change in the law. A trial court's failure to instruct on the 85% Rule in cases before this decision will not be grounds for reversal.

2006 OK CR 6, ¶25, __ P.3d at __ (emphasis added). The plain reading of the decision reveals it is not a substantive change in the law, only a procedural change, and it should only be applied in a prospective manner.

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