IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LARRY EUGENE WRIGHT, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	))))))))	Not for Publication Case No. F-2005-557

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Larry Eugene Wright was tried by jury and convicted of Robbery with Firearm, under 21 O.S.2001, § 801 (Count II); Possession of Firearm After Former Conviction of a Felony, under 21 O.S.Supp.2004, § 1283 (Count IV); Possession of Firearm with Altered Serial Number While in Commission of a Felony, under 21 O.S.2001, § 1550(A) (Count V), and Obstructing an Officer, under 21 O.S.2001, § 540 (Count VI), in the District Court of Tulsa County, Case No. CF-2004-2898.[1] In accordance with the jury's recommendation, the Honorable Caroline Wall sentenced Wright to imprisonment for twenty-five (25) years and a fine of $5,000 on Count II, imprisonment for ten (10) years and a fine of $5,000 on Count IV, imprisonment for five (5) years and a fine of $1,000 on Count V, and imprisonment for one (1) year in the county jail and a fine of

[1] The jury acquitted Wright on Count I, first-degree burglary, and on Count III, kidnapping. (Although the original information filed in the case had a second page, listing five prior felony convictions, with conviction dates ranging from 1979 to 1988 and sentences ranging from 4 to 40 years, the amended information did not have a second page.)

$500 on Count VI.[2] The Honorable Caroline Wall ordered that all four counts be served concurrently.

Wright raises seven propositions of error in support of his appeal:

I. UNDER THE FACTS OF THIS CASE, APPELLANT'S CONVICTION FOR POSSESSION OF A FIREARM WITH AN ALTERED SERIAL NUMBER WHILE IN COMMISSION OF A FELONY VIOLATES CONSTITUTIONAL AND STATUTORY PROHIBITIONS AGAINST DOUBLE PUNISHMENT. APPELLANT'S CONVICTION IN COUNT V MUST BE REVERSED WITH INSTRUCTIONS TO DISMISS.

II. APPELLANT'S CONVICTIONS IN COUNT II, ROBBERY WITH FIREARM, AND COUNT IV, POSSESSION OF A FIREARM AFTER FORMER CONVICTION OF A FELONY, VIOLATE 21 O.S.2001, § 11.

III. IT WAS REVERSIBLE ERROR TO PRESENT THE PRIOR FELONY CONVICTION FOR FELONIOUSLY CARRYING A FIREARM (POSSESSION OF A FIREARM AFCF) IN SUPPORT OF THE CHARGE OF POSSESSION OF A FIREARM AFTER FORMER CONVICTION OF A FELONY IN COUNT IV OF THE INFORMATION DURING THE FIRST STAGE OF APPELLANT'S TRIAL.

IV. VARIOUS INSTANCES OF PROSECUTORIAL MISCONDUCT OCCURRED THROUGHOUT TRIAL, WHICH ULTIMATELY SERVED TO DENY APPELLANT HIS RIGHT TO A FAIR TRIAL GUARANTEED BY THE OKLAHOMA AND UNITED STATES CONSTITUTIONS, INCLUDING VOIR DIRE MISCONDUCT, MISCONDUCT DURING WITNESS TESTIMONY, AND CLOSING ARGUMENT MISCONDUCT.

V. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VI. IT WAS ERROR TO DENY APPELLANT'S REQUEST TO INSTRUCT THE JURY AS TO THE PAROLE RESTRICTIONS IMPOSED BY 21 O.S.2001, §§ 12.1, 13.1.

VII. THE ACCUMULATION OF ERROR IN THIS CASE DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND A RELIABLE SENTENCING PROCEEDING, THEREFORE NECESSITATING REVERSAL PURSUANT TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Proposition I, Wright asserts that his Count V conviction for Possession of Firearm with Altered Serial Number While in Commission of a Felony violates 21 O.S.2001, § 11, because it involves the "same act" as his

[2] The Judgment and Sentence document for Count V references "21 OS 1272-1289," though the record in this case clearly reflects that in Count V Wright was charged and convicted under 21 O.S.2001, § 1550(A). Hence the Judgment and Sentence document for Count V should be corrected, via an order *nunc pro tunc*, to correctly reflect the provision under which Wright was convicted. This Court also notes that under § 1550, the trial court is obligated to order the destruction of the altered firearm, unless the defendant files a timely motion to preserve it

Count II conviction for Robbery with Firearm and his Count IV conviction for Possession of Firearm AFCF, since they all involve possession of the same gun.[3]

Wright's jury was instructed that in order to convict him on Count V, it had to find that he possessed the firearm with an altered serial number "while committing or attempting to commit a felony, to wit: Count 1, 2, 3 and/or Count 4." Although the jury's verdict on Count V did not state which underlying felony or felonies its Count V conviction was based upon, the fact that the jury acquitted Wright on Counts I and III makes those felonies ineligible as the basis for the conviction on Count V. Yet since the jury did not articulate whether Count II or Count IV was the underlying felony for Wright's conviction on Count V, this Court can only uphold Wright's Count V conviction if we can conclude that *both* of these other counts (II and IV) can be combined with Count V, without violating Section 11.

In *Davis v. State*,[4] this Court articulated the following standard for addressing Section 11 claims such as Wright's: "If the crimes truly arise out of one act . . . , then Section 11 prohibits prosecution for more than one crime. One act that violates two criminal provisions cannot be punished twice, *absent specific legislative intent.*"[5] Almost all of this Court's Section 11 jurisprudence

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pending appeal. *See* 21 O.S.2001, § 1550(C)(2). The record does not reflect whether or not that occurred in the current case.

[3] *See* 21 O.S.2001, § 11(A) ("[A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, . . . but in no case can a criminal act or omission be punished under more than one section of law . . . .").

[4] 1999 OK CR 48, 993 P.2d 124. This Court's *Davis* opinion modified the approach, though not the result, taken in our prior Section 11 decision in *Hale v. State*, 1995 OK CR 7, 888 P.2d 1027.

[5] *Id.* at ¶ 13; 993 P.2d at 126-27 (emphasis added); *cf. Ellis v. State*, 1992 OK CR 35, ¶ 30, 834 P.2d 985, 991(noting that in constitutional double punishment context, "where the legislature

has dealt with the question of whether two convictions are both punishing the "same act."[6] In the current case, however, the State asserts that the legislature *intended* that a conviction under § 1550(A) be an additional punishment for the same act, when at the time the defendant committed the original felonious act, he also possessed a firearm with an altered or obliterated serial number.

We begin by looking at the language of § 1550(A), which states:

> Any person who, *while in the commission or attempted commission of a felony,* has in his possession or under his control a firearm, the factory serial number or identification number of which has been removed, defaced, altered, obliterated or mutilated in any manner, upon conviction, shall be guilty of a felony punishable by imprisonment in the State Penitentiary for a period of not less than two (2) years nor more than five (5) years, or by a fine of not less than One Thousand Dollars ($1,000) nor more than Ten Thousand Dollars ($10,000), or by both such fine and imprisonment.[7]

The language of § 1550(A) and § 1550 as a whole reveals a legislative recognition of the fact that the alteration, removal, obliteration, mutilation, *etc.* of the serial numbers and identification numbers on firearms poses a serious problem for law enforcement, because it makes the tracing and identifying of firearms substantially more difficult, if not impossible. The clear legislative intent of § 1550(A), in particular, is to punish persons who possess or use such weapons, *i.e.*, "nontraceable firearms," while committing or attempting to

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has explicitly authorized multiple punishment the judicial inquiry is at an end, multiple punishment is authorized and proper, and the *Blockburger* test is irrelevant" (citing *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983))). Hence if Wright's § 11 double punishment claim fails based on legislative intent, his constitutional double punishment claim fails as well.

[6] *See, e.g., Peacock v. State*, 2002 OK CR 21, ¶¶ 4-5, 46 P.3d 713, 714; *Davis*, 1999 OK CR 48, ¶ 13, 993 P.2d at 126-27; *Hammon v. State*, 1995 OK CR 33, ¶ 71, 898 P.2d 1287, 1303; *Hale*, 1995 OK CR 7, ¶¶ 5-6, 888 P.2d at 1030; *Ocampo v. State*, 1989 OK CR 38, ¶ 14, 778 P.2d 920, 924; *see also Smith v. State*, 1971 OK CR 245, ¶ 2 486 P.2d 770, 770-71 ("same event").

[7] 21 O.S.2001, § 1550(A) (emphasis added).

commit a felony, more severely than those who possess or use firearms with intact serial numbers while committing a felony.[8] In other words, the clear legislative intent of § 1550(A) is to subject persons who are already accountable for one felony (the "underlying felony") to an *additional* felony conviction, with a separate punishment, whenever that individual contemporaneously possessed or had in his "control" a nontraceable firearm.

Hence § 1550(A) serves as a sort of enhancement statute, which both enhances the penalty and adds an additional felony conviction when a defendant chooses to possess a nontraceable firearm while committing a separate felony. The structure and language of § 1550(A) appear to clearly anticipate that an individual will be convicted of both the underlying felony, as well as the § 1550(A) felony for possessing the nontraceable firearm at the same time. Furthermore, § 1550 was adopted and went into effect in 1988, significantly after the statutory prohibition of § 11 itself.[9] To hold that § 11 prohibits convicting a defendant of both a § 1550(A) felony and the separate, underlying felony would be to violate the clear legislative intent of § 1550(A), which is both more recent than § 11 and more specific, since it deals only with this particular situation.[10]

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[8] Since an attempt to commit a felony is itself a crime, so long as it includes some "act toward the commission of such crime," and such an attempt is often a felony itself, *see* 21 O.S.2001, § 42, for the sake of brevity, the opinion will hereafter refer simply to "committing a felony."

[9] The majority opinion in *Hale* notes that "Section 11 was promulgated in 1970." 1995 OK CR 7, ¶ 3, 888 P.2d at 1028. Judge Lumpkin further asserts, in his separate opinion, that some version of the statute's prohibition on multiple punishments "has been on the books of this state and preceding territory since before the turn of the century." 1995 OK CR 7, Opinion of Lumpkin, J., concurring in result, ¶ 4, 888 P.2d at 1031 (all citations omitted).

[10] The majority opinion in *Davis* noted that it would be permissible, under Section 11, to prosecute a defendant for both traditional assault and violating a protective order, based upon

Thus the question of whether Wright's Count V § 1550(A) conviction is based upon the "same act" as either his Count II conviction or his Count IV conviction does not answer the question of whether § 11 is violated in the current case. If, as seems likely, Wright's jury convicted him of Count V based upon its finding that Wright possessed a nontraceable firearm during the commission of the armed robbery (Count II), the possession and the armed robbery are based upon the "same act," namely, Wright's act of using the (nontraceable) gun to rob Donald Nigh.[11] The analysis is the same even if the Count V conviction was based only upon the jury's finding that while Wright was committing the offense of being a convicted felon in possession of a firearm (Count IV), he also possessed a firearm with an altered serial number, namely, the very same gun. Even though here the act underlying the two counts is even more clearly the "same act," *i.e.*, the act of possessing a gun, the legislature is presumed to know the other statutes in force at the time it adopted § 1550, and the penalty scheme in § 1550(A) is reasonably construed as a supplement to, rather than a substitute for, the penalty scheme in provisions such as § 1283.[12]

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the same act, "because the legislative enactment concerning protective order violations was enacted after Section 11 and is controlling, . . . and is further the more specific provision." 1999 OK CR 48, ¶ 13 n.5, 993 P.2d at 127 n.5 (all citations omitted).

[11] Although the evidence in this case would support a finding that Wright continued to possess the nontraceable gun even after he completed the robbery, this subsequent (and separate) possession, standing alone, could not support a conviction under § 1550(A), because that section requires that the possession of the nontraceable firearm occur "while in the commission or attempted commission of a felony." Thus the § 1550(A) offense is limited to the exact time period during which the defendant is also committing (or attempting) some other felony.

[12] The sentencing range for a violation of § 1283 (possession of a firearm by a felon), both at the time when § 1550 was adopted and now, is imprisonment for 1 to 10 years. *See* 21 O.S.1991, § 1284; 21 O.S.2001, § 1284. The sentencing range for a violation of § 1550(A),

Thus this Court concludes that § 11 is not violated by either the combination of Count II and Count V or the combination of Count IV and Count V. The language and structure of § 1550(A) reveal that the legislature intended to provide for additional punishment and an additional conviction for the "act" of committing the underlying felony, when at the time the defendant committed the underlying felony (or felonies), he contemporaneously possessed a nontraceable firearm. Section 11 does not prohibit either this goal or this approach. Hence Proposition I is rejected.

Regarding Proposition II, the evidence presented at trial established that Wright continued to possess the gun even after completing the robbery, since he was seen by police running through the Nigh home, was seen dropping something when he jumped off the back porch (and lost his hat), and later the gun was found near the hat below the back porch. This evidence supports the logical inference that Wright possessed the gun separate and apart from the robbery, as he attempted to flee the scene.[13] The State presented evidence of possession of the gun by Wright, who was a convicted felon, that was separate and apart from Wright's act of robbing Donald Nigh. Hence this proposition is rejected as well.

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which has not changed since its adoption in 1988, is imprisonment for 2 to 5 years and/or a fine of $1,000 to $10,000. Hence it is reasonable to conclude that the legislature intended for § 1550(A) to provide a further penalty, in *addition* to the penalty of § 1283, when the firearm possessed by a felon was nontraceable. If the legislature intended for the § 1550(A) penalty to be only an alternative to the § 1283 penalty, the felon would be subject to a lower maximum penalty, rather than a higher one, if he was charged with possessing a nontraceable firearm, rather than a traceable one.

[13] The State's evidence also established that the gun did not belong to anyone in the Nigh home; hence it is reasonable to infer that Wright possessed it as he brought it to the home.

In Proposition III, Wright argues that even if his testimony was subject to impeachment by the fact that he had five former convictions, he was still entitled to a bifurcated trial under *Chapple v. State*,[14] and also that the State should not have been allowed to introduce evidence that he had previously been convicted of "feloniously carrying firearm," since the nature of this weapon-carrying conviction was unduly prejudicial to the jury's consideration of the charges in the current case.[15] Wright failed to object to the trial court's decision allowing the State to "reopen" its case and present evidence on Count IV in the first stage. Hence this claim is waived absent plain error, which we do not find.

Furthermore, in *Dodd v. State*,[16] a post-*Chapple* decision, this Court described as "settled law" the rule that "a defendant who takes the stand is subject to impeachment by prior convictions just like any other witness."[17] We also noted our prior holdings that "any defendant who admits prior convictions on the witness stand has waived the necessity for a second stage to determine the validity of any prior convictions."[18] Hence we do not find that the trial court abused its discretion in allowing the State to present the judgment and sentence document, showing Wright's prior conviction for feloniously carrying a

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[14] 1993 OK CR 38, 866 P.2d 1213.

[15] In Proposition V, Wright separately argues that his counsel ineffectively conceded that all five of these prior convictions were available to impeach his testimony, when four of the five prior felony convictions were actually too remote under § 2609(B).

[16] 1999 OK CR 20, 982 P.2d 1086.

[17] *Id.* at ¶ 4, 982 P.2d at 1087.

[18] *Id.* at ¶ 4 n.4, 982 P.2d at 1087 n.4 (citing cases, including *Ray v. State*, 1990 OK CR 15, 788 P.2d 1384); *see also Ray*, 1990 OK CR 15, ¶ 7, 788 P.2d at 1386 ("It is well established in this jurisdiction that a defendant who confesses the former convictions under oath is not

firearm, during the first stage of his trial.[19] Proposition III is rejected accordingly.

Regarding Proposition IV, this Court must determine whether the challenged prosecutorial actions were indeed improper and, if so, whether they so infected Wright's trial that it was rendered fundamentally unfair, such that the jury's verdicts—or some portion of those verdicts—cannot be relied upon.[20] This Court finds nothing improper in the challenged comment made during *voir dire*.[21] And regarding the State's cross examination of Wright, this Court notes that the trial court was consistent, and even generous, in sustaining defense counsel's objections to the prosecutor's questions. This Court finds no lingering prejudice from the challenged remarks.

Regarding the State's closing arguments, however, we reach a different conclusion. Two prosecutors participated in Wright's trial. During the State's initial closing argument, the less-experienced prosecutor listed the elements for Wright's Count IV charge of possession of a firearm AFCF, noting Wright's 1987 conviction in Creek County, and then argued as follows: "What was that?

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entitled to a bifurcated trial. . . . and is subject to the same rules of cross-examination and impeachment as other witnesses.").

[19] The State's use of this evidence, however, will be discussed *infra* in Proposition IV.

[20] *See Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974) (consider whether challenged conduct made trial "so fundamentally unfair as to deny [defendant] due process"); *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986).

[21] During voir dire the prosecutor made the remark, "I don't want innocent people getting convicted any more than you do, do you understand that?". Wright argues that while this statement "may seem relatively innocuous," "given a little thought," it constitutes an improper implication by the prosecutor that he personally knows Wright is guilty—otherwise he would not be pursuing the case. Wright has given this isolated remark too much thought and too much significance. It occurred immediately after the prosecutor reminded the jury that if the State did not meet its burden, the jury was required to find the defendant not guilty. A juror,

Feloniously Carrying a Firearm. Exact same thing. He told you himself he's a convicted felon numerous times. What's he doing? Same thing. Hasn't changed. He's still walking around with pistols--." At this point defense counsel objected and asked for a side bar.

During the extensive side bar that followed, the trial court agreed with defense counsel that the prosecutor's argument was "totally inappropriate," "highly prejudicial," and that the matter was "very serious." The trial court explained to the more-experienced prosecutor, who attempted to defend the challenged remarks, that the prior conviction was admitted only for the limited purpose of establishing the fact of a prior conviction, and that the challenged propensity argument, *i.e.*, "because he did it before, he's guilty," was "highly inappropriate." After considering Wright's motion for mistrial, the trial court chose instead to admonish the jury that the State's preceding argument regarding Count IV was "completely contradictory and not consistent to the law as stated by the Court." The court instructed jurors to completely disregard this portion of the State's argument.

The more-experienced prosecutor presented the State's final closing argument. During this closing the prosecutor repeatedly suggested that in order to acquit the defendant, the jury had to believe everything he said—in effect distorting the State's burden of proof by suggesting that Wright could

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hearing the remark in context and in the midst of voir dire, is unlikely to have given the challenged comment a second thought, let alone the interpretation suggested by Wright.

only be acquitted if the defense could establish that Wright was being completely truthful.[22]

While the State acknowledges in its brief that the challenged closing argument statements were "improper," the State maintains that in light of the trial court's admonitions to the jury, Wright was not prejudiced by the improper comments. This Court has recognized that although a trial court admonishment regarding an improper argument generally cures any error, "[s]ome misconduct is so flagrant than an admonition cannot cure the error."[23]

The evidence supporting Wright's convictions in this case was certainly substantial. Nevertheless, the jury apparently did find portions of the State's case lacking, since it acquitted Wright on the charges of first-degree burglary and kidnapping. This Court finds that the State's prosecutorial misconduct during closing arguments merits the reversal of Wright's Count IV conviction for possession of a firearm AFCF. The State's propensity argument regarding Count IV—that Wright has already been convicted of this "exact same thing," that he "hasn't changed," and that he is "still walking around with pistols"—is particularly troubling, since there had been substantial prior discussion in this case of the *limited* purpose for which the prior conviction was being admitted

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[22] The prosecutor first argued, "To exonerate the defendant you have to believe everything he says." Although defense counsel failed to object to this remark the first time, counsel did object when the prosecutor later referred back to this argument, saying: "[A]s I said, to exonerate the defendant you've got to say everything you say to me, Larry Wright, is the gospel truth. Poor Larry Wright, everybody's picking on him." The trial court sustained the objection and admonished the jury. Yet the prosecutor soon made the argument again, a third time, asserting to the jury: "Do you really believe this guy? Because if you don't believe him, you can't find him not guilty." Defense counsel again objected, noting that the argument was "shifting the burden," and the trial court again sustained the objection and admonished the jury to disregard the prosecutor's statement.

and of the possible prejudice arising from the similarity of this prior conviction with the charged offenses.

Although this Court is also very troubled by the State's improper arguments regarding the burden of proof, we note that the jury in this case was admonished to disregard the improper remarks and was clearly and properly instructed regarding the burden of proof. Furthermore, we note that Wright's jurors apparently *did* understand that they could find him not guilty, even if they did not believe all of his testimony, *i.e.*, the jury did not accept the State's argument about having to believe everything he said in order to acquit. Looking at the jury's verdicts in the context of the entire trial, it is clear that the jury did not believe *everything* that Wright said; otherwise the jury would have acquitted him on all counts. Nonetheless, the jury's verdicts suggest that the jury did hold the State to its burden of proof, and that it found the State's case to be inadequate regarding Counts I and III. We find that the improper prosecutorial arguments in the current case merit the reversal of Wright's conviction on Count IV, but that no other relief is necessary.[24]

In Proposition V, Wright asserts that he received ineffective assistance of counsel because four of the five prior convictions, about which his own counsel elicited his testimony, were not actually admissible as impeachment evidence,

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[23] *See Gooden v. State*, 1980 OK CR 76, ¶ 3, 617 P.2d 248, 249.

[24] Although the trial court did not explain its sentencing decision to run all four of the counts upon which Wright was convicted concurrently, the overall record in the case suggests that this decision may have been affected by the trial court's concern regarding the State's misconduct.

since they were "stale" under § 2609(B).[25] To establish ineffective assistance of counsel, Wright must show that his counsel's performance was deficient and that he suffered prejudice as a result.[26]

The record in this case leaves no doubt that defense counsel elicited Wright's testimony regarding his five prior convictions only because he believed that the State would be able to impeach Wright's testimony with all five of these convictions; and counsel was attempting to remove some of the "sting" of this impeachment, by addressing it first.[27] Unfortunately, Wright's counsel failed to recognize that (as both parties now agree) four of these convictions were not even available as impeaching evidence, under § 2609(B), since even if Wright had served his complete sentence on those convictions, more than ten years would have passed from the date of his release until the date of his testimony. Consequently, defense counsel's performance in this regard was unreasonable, and we cannot find that this choice was strategic.[28]

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[25] *See* 12 O.S.Supp.2004, § 2609(B).

[26] *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). To show inadequate performance, Wright must demonstrate that his counsel's representation was unreasonable, under prevailing professional norms, and that the challenged action or inaction could not be considered sound trial strategy. *Id.* at 687, 689, 104 S.Ct. at 2064, 2065. To show prejudice, Wright must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068.

[27] Before eliciting this testimony, defense counsel vigorously sought to prevent the State from getting into any of Wright's priors during the first stage, arguing that this evidence would be unduly prejudicial in the current case. And defense counsel successfully argued that the information regarding the five "impeachment offenses" should be limited to the date of conviction, the case number, and the county of conviction.

[28] The record suggests that defense counsel was totally unaware of, or at least never considered, § 2609(B)'s time-based limitation on impeachment by prior offenses. In the context of the current case, in which counsel repeatedly attempted to shield Wright's jury from information about his prior convictions, we simply cannot conclude that his decision to reveal this information was strategic, rather than a mistake, or that it was otherwise reasonable.

Nevertheless, Wright fails to establish prejudice from his counsel's error. Although defense counsel unnecessarily elicited testimony about four of Wright's five previous felony convictions—due to his failure to consider the time-based limitations of § 2609(B)—he successfully persuaded the trial court to shield the jury from learning anything about the facts or nature of these prior convictions.[29] In particular, defense counsel effectively shielded the jury from learning about Wright's first-degree *robbery* conviction in 1988, for which he received a sentence of forty (40) years, which was the one felony conviction that was *not* stale under § 2609(B). We further note that based upon pretrial proceedings, Wright's case was tried without a second page, despite the fact that he had numerous prior convictions. And his jury was specifically instructed that the fact of his prior convictions could be considered only as impeachment evidence—not as evidence of guilt and not in regard to sentencing.

Reviewing Wright's trial as a whole, it is obvious that his counsel was highly effective and that he subjected the State's case to a very meaningful "adversarial testing." Evaluating counsel's isolated mistake in the context of Wright's entire trial and assessing the limited potential impact of this error, we simply cannot conclude that Wright was prejudiced regarding either his convictions or his sentences. This proposition is rejected accordingly.

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[29] Wright's jury did learn the nature of his 1987 conviction for "feloniously carrying firearm," in connection with his Count IV possession of Firearm AFCF charge. We have already granted relief regarding this conviction, however, which fully resolves any prejudice that could have been caused by the jury earlier learning that he had some unnamed felony conviction in 1987.

Regarding Proposition VI, this Court recently held, in *Anderson v. State*,[30] that juries should be instructed, in cases under 21 O.S.2001, §§ 12.1 and 13.1, that a defendant would be required, by statute, to serve 85% of any sentence imposed, before becoming eligible to be considered for parole.[31] Wright's appeal was pending in this Court when *Anderson* was decided; hence he is entitled to the benefit of that decision.[32] However, under the specific facts and circumstances of this case, we find that Wright was not prejudiced by the trial court's failure to instruct regarding the "85% Rule."[33] This Court concludes that there is not a reasonable probability that Wright's robbery sentence would have been less if his jury had been instructed regarding the 85% Rule. Consequently, Wright is not entitled to any relief regarding his sentence.

Regarding Proposition VII, this Court has fully evaluated Wright's claims and reversed his Count IV conviction based on prosecutorial misconduct, after concluding that this conviction was otherwise valid and did not violate Section 11. Although Wright's trial was not perfect, it was, on the whole, quite fair. Defense counsel's representation of Wright was admirable, and with the limited exceptions discussed in Proposition IV, the State's prosecution of Wright was fair and reasonable. Thus we conclude that even considering the "combined effect" of the particular misconduct and errors committed during his trial, Wright is not entitled to either a new trial or a modification of his sentence.

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[30] 2006 OK CR 6, 130 P.3d 273.
[31] *Id.* at ¶ 24, 130 P.3d at 282. Wright's counsel requested such an instruction at trial.
[32] *Griffin v. Kentucky*, 479 U.S. 314, 327, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987).
[33] Wright's jury was correctly instructed that the sentencing range for robbery with firearm was imprisonment for a term of 5 years to life. *See* 21 O.S.2001, § 801.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Wright's Count IV conviction for possession of firearm after former conviction of a felony must be reversed, but that his other convictions and sentences should be affirmed.

Decision

Wright's **CONVICTIONS** and **SENTENCES** for Robbery with Firearm (Count II), Possession of Firearm with Altered Serial Number While in Commission of a Felony (Count V), and Obstructing an Officer (Count VI) are hereby **AFFIRMED**. Wright's conviction for Possession of Firearm After Former Conviction of a Felony (Count IV), however, is **REVERSED AND REMANDED**. This case is also **REMANDED** to the district court for correction of the Judgment and Sentence document, through an order *nunc pro tunc*, to reflect that in Count V Wright was charged and convicted under 21 O.S.2001, § 1550(A). Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the decision to affirm the convictions and sentences for Counts II, V, and VI. However, I dissent to the decision to reverse and remand Appellant's conviction on Count IV.

In so doing, I agree improper arguments made by the State amounted to prosecutorial misconduct and require some form of relief. However, I submit the proper remedy here is sentence modification only since the issue raised concerns improper argument and there was more than sufficient evidence to sustain the verdict otherwise, as the summary opinion itself acknowledges.

Accordingly, I would modify Appellant's sentence on Count IV to five (5) years imprisonment, to run concurrently with the other counts.