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- (1) whether the trial court erred by modifying the sentence assessed by the jury from fifty years to life in prison; and
- (2) whether prosecutorial misconduct denied him his right to a fair trial.

We affirm the judgment but remand the case to the district court for resentencing consistent with the jury's assessment of punishment.

**1.**

The jury assessed punishment at fifty years imprisonment. The trial court stated at sentencing that this term of years exceeded the maximum punishment allowed by law, which was life imprisonment. Accordingly, the trial court sentenced Struble to life in prison. Struble argues on appeal that the trial court was without authority to modify the sentence assessed by the jury. Struble correctly asserts that in the absence of objection below, this Court reviews only for plain error on appeal. *Barnes v. State*, 2017 OK CR 26, ¶ 22, 408 P.3d 209, 217. To be entitled to relief for plain error, an appellant must show: "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. "This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial

proceedings or otherwise represents a miscarriage of justice.” *Stewart v. State*, 2016 OK CR 9, ¶ 25, 372 P.3d 508, 514.

It is true that when a jury assesses punishment in excess of that allowed by law, the trial court “shall disregard the excess and pronounce sentence and render judgment according to the highest limit prescribed by law.” 22 O.S.2011, § 928.1. However, the jury did not assess punishment in excess of that allowed by law in this case and the trial court’s belief to the contrary was incorrect. Although the trial court did not expound upon the basis for this decision, one can surmise that the court modified the punishment assessed by the jury to life in prison upon the belief that a life sentence is forty-five years imprisonment. This Court has held:

The only time that a life sentence is calculated at 45 years is when the Oklahoma Department of Corrections determines an inmate’s eligibility for parole. If a criminal defendant is not granted parole, he or she will serve the remainder of his or her natural life while serving a life sentence in Oklahoma.

*Runnels v. State*, 2018 OK CR 27, ¶ 30, 426 P.3d 614, 622 (internal citation omitted). Thus, as Struble argues and the State agrees, the fifty-year term of imprisonment assessed by the jury was not more than the maximum sentence allowable and the trial court’s modification

of the sentence assessed was plain error. Accordingly, we remand the case to the district court with instructions to sentence Struble to fifty years imprisonment as assessed by the jury.

## 2.

Struble complains that error occurred when the prosecutor asked questions of the witnesses designed to elicit sympathy for the victim. This, he asserts, denied him a fair trial. Because the questions at issue were not met with objection below, we review for plain error only. *Nolen v. State*, 2021 OK CR 5, ¶ 127, 485 P.3d 829, 859. Under plain error review Struble has the burden to show “that the commission of a plain or obvious error affected the outcome of his trial.” *Nolen*, 2021 OK CR 5, ¶ 128, 485 P.3d at 859. The alleged appeals for sympathy in this case were not plain error. This claim is denied.

## DECISION

Judgment of the district court is **AFFIRMED**. The sentence is **REVERSED** and the case is **REMANDED** to the district court for resentencing consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18,

App. (2023), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF OSAGE COUNTY  
THE HONORABLE STUART L. TATE, DISTRICT JUDGE**

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**OPINION BY: ROWLAND, P.J.**

HUDSON V.P.J.: Concur  
LUMPKIN, J.: Concur  
LEWIS, J.: Concur  
MUSSEMAN, J.: Concur

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