IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT HERSHAL PERKIS,	)	
	)	
Petitioner,	)	
v.	)	Case No. C-2003-1247
	)	NOT FOR PUBLICATION
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Robert Hershal Perkis was charged in the District Court of Caddo County, Case No. CF-2002-292A, by Amended Supplemental Felony Information, with Robbery with a Dangerous Weapon, under 21 O.S.2001, § 801 (Count I); Kidnapping, under 21 O.S.2001, § 741 (Count II); and Burglary in the First Degree, under 21 O.S.2001, § 1431 (Count III).[1] On August 15, 2003, Perkis entered a blind plea of *nolo contendere* to all three counts, before the Honorable David E. Powell.

On October 9, 2003, the Honorable David E. Powell sentenced Perkis to imprisonment for twenty-five (25) years and a fine of $1,000 on Count I; imprisonment for ten (10) years and a fine of $1,000 on Count II; and imprisonment for twenty-five (25) years and a fine of $1,000 on Count III, with the imprisonment terms to be served consecutively. In addition, Perkis was ordered to pay actual court costs, a Victim Compensation Assessment of $1,000,

[1] In the original Information filed in the case, Count III was for Burglary in the Second Degree,

and restitution in the amount of $3,436.47.[2] Perkis' prison sentence on Count III was subsequently modified, at the request of the State, to imprisonment for twenty (20) years.[3] Perkis is now properly before this Court on a petition for certiorari, seeking to withdraw his *nolo contendere* pleas or have his sentences modified.

Perkis raises the following propositions of error:

I. BECAUSE MR. PERKIS' *NOLO CONTENDERE* PLEAS WERE NOT SUPPORTED BY A SUFFICIENT FACTUAL BASIS, THE PLEAS CANNOT STAND; THEREFORE PETITIONER SHOULD BE ALLOWED TO WITHDRAW THE PLES AND PROCEED TO TRIAL.

II. BECAUSE THE EVIDENCE DID NOT SUPPORT THE CHARGES, MR. PERKIS' SENTENCES ARE EXCESSIVE.

III. MR. PERKIS' SENTENCES ARE EXCESSIVE IN THAT HE HAS BEEN SUBJECTED TO DOUBLE PUNISHMENT BY IMPOSITION OF A VICTIM COMPENSATION ASSESSMENT ON EACH COUNT, IN ADDITION TO PAYMENT OF RESTITUTION FOR THE ACTUAL EXPENSES OF THE VICTIM ARISING FROM THE CONDUCT OF WHICH PETITIONER WAS CONVICTED.

IV. BECAUSE THE TRIAL COURT FAILED TO FULLY ADVISE PETITIONER OF THE CERTAIN, POSSIBLE, AND/OR LIKELY CONSEQUENCES OF THE PLEAS, MR. PERKIS SHOULD BE ALLOWED TO WITHDRAW HIS *NOLO CONTENDERE* PLEA TO EACH OF THE THREE COUNTS AND PROCEED TO TRIAL OR, IN THE ALTERNATIVE, THE SENTENCES SHOULD BE REDUCED AND/OR ORDERED TO RUN CONCURRENTLY.

V. MR. PERKIS SHOULD BE ALLOWED TO WITHDRAW THE *NOLO CONTENDERE* PLEA TO COUNT III – BURGLARY IN THE FIRST-DEGREE, BECAUSE THERE WAS CONFUSION AS TO THE SENTENCING RANGE, THE ORIGINAL SENTENCE WAS VACATED, AND A DIFFERENT SENTENCE WAS IMPOSED WITHOUT GIVING PETITIONER AN OPPORTUNITY TO WITHDRAW THE PLEA.

VI. MR. PERKIS DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN ENTERING AND/OR ATTEMPTING TO WITHDRAW HIS *NOLO CONTENDERE* PLEAS.

VII. IF MR. PERKIS IS NOT ALLOWED TO WITHDRAW THE *NOLO CONTENDERE* PLEA ON COUNT III – BURGLARY IN THE FIRST-DEGREE, A JUDGMENT AND SENTENCE *NUNC*

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under 21 O.S.2001, § 1435.

[2] The restitution was ordered as a joint and several liability with Perkis' co-defendants, Mark A. Wilkerson and James Leroy McCullough.

[3] At the hearing on Perkis' application to withdraw his pleas, the State noted that although it had requested that Perkis be sentenced to imprisonment for 25 years on Count III, the maximum sentence for First-Degree Burglary, with no prior convictions, is 20 years. *See* 21 O.S.2001, § 1436. Hence the Court modified Perkis' sentence on Count III to imprisonment for 20 years.

PRO TUNC SHOULD BE ORDERED TO REFLECT ACCURATELY THE SENTENCE IMPOSED BY THE DISTRICT COURT.

This Court notes that Perkis' Application to Withdraw Plea, filed on October 15, 2003, asserted only a single reason that Perkis should be allowed to withdraw his pleas: "1. Sentence imposed was excessive." The application contained no further reasons or argument.[4] The specific claims made in Propositions I through VI were not made in Perkis' application to withdraw his pleas, in the evidentiary hearing regarding this application, or in his petition for certiorari. Hence these issues have been waived.[5] And this Court will review these claims only for plain error.[6]

In Proposition I, Perkis claims that the record before the trial court, at the time of his *nolo contendere* pleas, was inadequate to provide a factual basis for each of the three charges upon which he was convicted.[7] He asserts that the record before the court failed to establish one or more of the essential elements of each of these three crimes. Perkis recognizes that the transcript of his preliminary hearing, as well as his confession to Deputy Opitz, was before the court that took his pleas and that these materials can be looked to in establishing the factual basis for his convictions.

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[4] And at the November 7, 2003 hearing on this application, defense counsel's entire argument was that the trial court had not given Perkis proper credit for the fact that he had turned himself in and was sincerely remorseful, and that the Wallis case would probably never have been solved if Perkis had not confessed. This was essentially the same argument that counsel had made at Perkis' sentencing hearing.

[5] *See* Rules 4.2 and 4.3(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2003).

[6] *See Medlock v. State*, 1994 OK CR 65, 887 P.2d 1333, 1342 (issues not raised within application to withdraw plea reviewed for plain error only), *cert. denied*, 516 U.S. 918, 116 S.Ct. 310, 133 L.Ed.2d 213 (1995).

Nevertheless, as this Court noted in *Berget v. State*,[8] a trial court accepting a plea is obligated to ensure that all the elements of the crimes to which the defendant is attempting to plea are factually supported by the record in the case—and that sometimes the record will establish that a particular necessary element is *not* factually supported.

> It is important to recognize that the court's ability to consider the entire record when determining whether to accept a guilty plea is a double edged sword. Just as the record may be used to establish the factual basis, it may also indicate to the trial court that some element of the crime is lacking. In such a situation, the trial court has an obligation not to accept the plea, notwithstanding the claims of the defendant during the actual plea proceedings, and refuse to sentence the defendant on the plea.[9]

Hence this Court must determine whether or not the elements of the crimes to which Perkis pled were indeed factually supported by the record in his case.[10]

A. Robbery with a Dangerous Weapon

In Count I, Perkis was convicted of robbery with a dangerous weapon, under 21 O.S.2001, § 801. The elements of robbery with a dangerous weapon are: (1) wrongful, (2) taking, (3) and carrying away, (4) of personal property, (5) of another, (6) from the person or the immediate presence of the other, (7) by force or fear, (8) through the use of a dangerous weapon.[11] Perkis asserts that the sixth element of this crime was not (and could not have been) supported by the

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[7] *See Wester v. State*, 1988 OK CR 126, 764 P.2d 884, 887 (opinion on rehearing) (holding that "a factual basis is required before a trial court may accept a plea of nolo contendere").

[8] 1991 OK CR 121 824 P.2d 364, *cert. denied*, 506 U.S. 841, 113 S.Ct. 124, 121 L.Ed.2d 79 (1992).

[9] *Id.* at 370.

[10] Even if this Court could avoid this issue under the waiver doctrine, we would be faced with this same question within Perkis' Proposition VI ineffective assistance of counsel claim.

record in this case. He has not raised this claim at any point previously.[12]

Perkis argues that because the property stolen from Wallis' home and shop was not taken from his "person or immediate presence," the crime of robbery with a dangerous weapon is not factually supported by the record in this case. In *Fields v. State*,[13] this Court addressed a parallel challenge. The victim in that case was a convenience store employee. He had already placed the day's receipts from that store (and other stores) in his car, when he went back into the store and was accosted by the defendant, with a gun. The defendant forced the employee to go into a refrigeration vault and to tell him where the money was. The employee was still locked in the vault when the defendant went outside and stole the money out of the car parked outside.

While upholding the defendant's conviction for robbery with firearms, this Court found that the key finding for robbery is that "the property must be so in the possession or under the control of the individual robbed that violence or putting in fear was the means used whereby the robber took it."[14] Our Court relied upon this same analysis in *Lancaster v. State*,[15] where we cited *Fields* for the proposition that "in order for there to be a taking from the immediate presence of a victim it is not necessary that the victim see or hear the taking of the property."[16]

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[11] *See* 21 O.S.2001, §§ 791, 801; OUJI-CR (2d) 4-144 (Supp. 2003).
[12] This is in contrast to the "missing element" claims regarding Perkis' other two convictions.
[13] 1961 OK CR 75, 364 P.2d 723.
[14] *Id.* at 726 (quoting 46 Am.Jur. 142, Robbery § 7).
[15] 1976 OK CR 191, 554 P.2d 32.
[16] *Id.* at 34 (relying on *Fields*). This language appeared in the Court Syllabus in *Fields*. *See*

In *Lancaster*, this Court upheld a robbery with firearms conviction where the defendant forced his way into the victims' home, held them at gunpoint while demanding their money and their car keys, shot at them when they resisted, and then went outside and stole their car, which was parked outside and which had their money inside it, in a purse. This Court recognized that the defendant was given the information about where the money and the car keys were through the use of force and fear, generated by the defendant's gun, and upheld the conviction (and the trial court's refusal to instruct on the offense of unauthorized use of a motor vehicle).[17] This Court's earlier decision, in *Braley v. State*,[18] likewise fits this pattern.[19]

These cases establish that *Perkis'* conviction for robbery with a dangerous weapon was adequately supported by the record in his case. Although Wallis was not present in the same location as the property that was actually taken, Perkis and his co-defendants used force and fear, caused by their violence against Wallis and menacing him with a dangerous weapon (the hammer), in order to accomplish the theft of his personal property. Wallis was in essentially the same situation as were the victims in *Fields*, *Lancaster*, and *Braley*, and this

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Fields, 364 P.2d at 724.

[17] 554 P.2d at 34. The *Lancaster* Court noted the *Fields* analysis and likewise held, "It is sufficient if it is shown that the property was so under the control of the victim that violence or putting in fear was the means used whereby the robber took the property." *Id.*

[18] 54 Okla. Crim. 219, 18 P.2d 281 (1932).

[19] In *Braley*, this Court upheld a robbery with firearms conviction, where a couple was confronted by armed men when they returned home, and where one of these men held them at gunpoint, while the others stole property from their home and their car, which was in the garage. *Id.* at 281-82. The court held, "there was a taking of this automobile from the immediate presence of the [victims], while they were under fear of personal injury to themselves produced by the pointing of the pistol at them in the hands of this defendant, who was guarding them at the

Court should uphold Perkis' robbery conviction based upon these authorities. The cases cited by Perkis are inapposite. Hence the trial court did not err in accepting Perkis' plea to robbery with a dangerous weapon or in refusing to permit the withdrawal of this plea.

B. Kidnapping

In Count II, Perkis was convicted of kidnapping, under 21 O.S.2001, § 741. The elements of kidnapping are: (1) unlawful, (2) forcible seizure and confinement, (3) of another, (4) with the intent to secretly confine or imprison, (5) against the person's will.[20] Perkis asserts that the fourth element of this crime, in particular, the "secretly" aspect of this element, was not (and could not have been) supported by the record in this case. He twice raised this claim at the trial court level.[21]

In *Vandiver v. State*,[22] this Court reviewed the history of Oklahoma's § 741 kidnapping statute, focusing on the intent to "secretly confine or imprison" element.[23] The court emphasized that the intent to "secretly confine" under § 741 is a specific intent requirement and that, as with other specific intent

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time the automobile was taken." *Id.* at 282. *Braley* was cited in *Lancaster*. *See* 554 P.2d at 34.

[20] *See* 21 O.S.2001, § 741; OUJI-CR (2d) 4-110 (Supp. 2003). Other possibilities for the fourth element, which is a specific intent requirement, are with the intent to "send out of the State," "sell as a slave," or "hold to service." *See id.* These alternative specific intent elements were not alleged and are not at issue in this case.

[21] Perkis first raised his "secretly confine" claim at his preliminary hearing, held before the Honorable John E. Herndon, Special Judge, on April 29, 2003. The court rejected the argument, without comment, and bound Perkis over on the charges to which he later pled. Perkis again raised this claim in a "Motion to Quash for Insufficient Evidence," filed on July 3, 2003, and the issue was argued at length by counsel for both Perkis and the State at an August 1, 2003, hearing on this motion. At the conclusion of the hearing, the motion to quash was overruled by the Honorable Richard G. Van Dyck, without comment or explanation.

[22] 97 Okla. Crim. 217, 261 P.2d 617 (1953), *rev'd on other grounds, Parker v. State*, 1996 OK CR

crimes, "that particular intent must be proved either by direct or circumstantial evidence, which would warrant the inference of the intent with which the act was done."[24] The *Vandiver* court noted, approvingly, decisions from various other states whose kidnapping statutes contained similar "secret confinement" language, in which the state's highest courts insisted that the intent alleged and proven must be not merely an intent to confine, but an intent to *secretly* confine or detain the person seized.[25]

Furthermore, the *Vandiver* court reversed the defendant's conviction for assault with intent to commit a felony—kidnapping, finding that the evidence presented at trial simply did not give the jury sufficient basis to infer that the defendant intended to secretly confine the victim.[26] The defendant in that case pulled his car up next to the victim, who was waiting for a bus at an intersection in Tulsa. When she declined his offers of either a beer or a ride, he got out of his car and physically picked her up. She struggled against him, until he put her down and chased her briefly, as persons in the area began yelling at him, whistling, and coming toward him. He then got in his car and drove off. The

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19, 917 P.2d 980, 986 n.4.

[23] *Id.* at 622-24.

[24] *Id.* at 625.

[25] *Id.* at 622-23 (noting decisions from New York, Utah, and Alabama). The *Vandiver* court noted that the Supreme Court of Alabama addressed a statute containing language identical to Oklahoma's § 741, about intent to cause the victim "to be secretly confined or imprisoned against his will," and that the Alabama court specifically held:

> [T]he adverb "secretly" qualifies each of the verbs "confined" and "imprisoned," clearly indicating a legislative purpose to denounce as a felony any surreptitious restraint of one person by another in such sort as to deprive the subject of the crime "of the friendly assistance of the law to relieve himself from captivity."

Id. at 623 (quoting *Doss v. State*, 123 So. 231, 232 (Ala. 1929) (internal citation omitted)).

[26] *Id.* at 625. Although the court concluded that the evidence was insufficient to support the

defendant told an officer afterward that he was trying to put the woman in his car, to go get a bottle of beer, and admitted this again at trial.[27] The *Vandiver* court held that this evidence was insufficient to permit an inference that the defendant specifically intended to secretly confine the victim against her will.[28]

The cases in which this Court has upheld kidnapping convictions against challenges regarding the defendant's intent to "secretly confine" the victim(s) generally involve situations in which the defendant has either forced someone to move or be taken to some other place and/or the victim has been confined in some nonpublic place, such as inside a home or apartment, where he or she cannot be easily seen or heard by other persons.[29] Upon a review of all published Oklahoma cases involving the "secretly confine" language of § 741, we could find no case upholding a kidnapping or kidnapping-related conviction in a situation analogous to the one at issue.

Although Wallis was certainly confined by Perkis and his comrades, he was confined in a flat, open field, visible to anyone who drove by or happened to look, and also visible from the Wallis home 200 yards away, at which Oleta Wallis was initially present—a fact which Perkis knew. The record in this case contains no evidence suggesting that Perkis or his co-defendants made any

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original conviction, the court modified the defendant's conviction to simple assault. *Id.* at 626.

[27] *Id.* at 620-22.

[28] *Id.* at 624.

[29] *See, e.g., Jenkins v. State*, 1973 OK CR 165, 508 P.2d 660, 661-62 (affirming kidnapping convictions where victim detained in empty apartment at gunpoint and left bound in apartment bedroom); *Pittser v. State*, 1969 OK CR 231, 461 P.2d 1015, 1016 (affirming conviction where defendant forced way into car at gunpoint and demanded that victims drive him where he wanted to go: "forcing a person to ride in an automobile is sufficient to sustain a verdict of guilty for

attempt to move Wallis from the spot in which he fell or to hide him or hinder viewing of his presence. Nor did the men cover Wallis' mouth in any manner. Although the record strongly supports an inference that the men intended to forcefully detain Wallis while they stole things from his house and shop, the record does not factually support the element that Perkis or his comrades specifically intended to *secretly* confine Wallis.

Because the record in this case does not provide a factual basis for one of the essential elements of kidnapping, the trial court should not have accepted Perkis' *nolo contendere* plea to this charge, and the court abused its discretion in doing so. Hence Perkis' conviction for kidnapping must be reversed. Furthermore, because the record does not suggest that evidence adequate to support the "secretly confine" element of kidnapping could be produced (and the State does not suggest that any such additional evidence exists), this charge against Perkis shall be remanded to the trial court with the instruction that it be dismissed.

C. Burglary in the First Degree

In Count III, Perkis was convicted of burglary in the first degree, under 21 O.S.2001, § 1431. The elements of first-degree burglary are: (1) breaking, (2) entering, (3) a dwelling, (4) of another, (5) in which a human is present, (6) with intent to commit some crime therein.[30] Perkis asserts that the factual record in his case was not adequate to support either the first element of "breaking" or the

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kidnapping").

fifth element that a human was "present" in the home. Perkis raised both of these claims twice at the trial court level.[31]

Perkis' argument regarding the "breaking" element fails.[32] Nothing in the record suggests either that the door to the Wallis home was standing wide open or that Perkis had any kind of consent to enter the home—nor does Perkis suggest that any such evidence exists. This Court will not permit Wallis to get out of his plea by simply speculating, contrary to common sense, that when Oleta Wallis left her home that day, she left the door standing wide open. The record in this case was adequate to support an inference that either Perkis or Wilkerson opened the unlocked door of the Wallis home in order to enter it. This is sufficient.[33]

Perkis' argument regarding the presence of a human in the Wallis home, however, is not so easily dismissed. The State argues that although no one was actually present in the Wallis home at the time Perkis and Wilkerson entered it, Wallis was present in the "curtilage" of his home at the time of the robbery and that the § 1431 language about "the dwelling house of another, in which there is

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[30] *See* 21 O.S.2001, § 1431; OUJI-CR (2d) 5-12 (Supp. 2003).

[31] Perkis first raised these claims at his preliminary hearing, after the State sought to have him bound over on first-degree burglary, rather than second-degree burglary, as originally charged. Yet the Honorable John E. Herndon bound Perkis over on the first-degree burglary charge without addressing these issues. Perkis again raised these challenges in his motion to quash for insufficient evidence and at the hearing on this motion. Again, the motion to quash was overruled by the Honorable Richard G. Van Dyck, without comment or explanation.

[32] This Court notes that the State failed to address this argument in any manner.

[33] *See, e.g., Sanchez v. State*, 1983 OK CR 93, 665 P.2d 1218, 1219 ("The breaking necessary to constitute the crime of burglary in the first degree may be by any act of physical force, however slight, by which obstruction is forcibly removed.") (citation omitted); *Lumpkin v. State*, 25 Okla. Crim. 108, 219 P. 157, 158 (1923) ("[T]he opening of a closed door in order to enter a building may constitute a breaking"); *see also Yeargin v. State*, 54 Okla. Crim. 34, 14 P.2d 431, 432 (1932)

at the time some human being" should be interpreted in the same manner as the Fourth Amendment's protection of a person's home "against unreasonable searches and seizures."[34] Neither of these arguments is persuasive.

First, the State fails to establish that an open field, 200 yards distant from an individual's home, constitutes part of the "curtilage" of that home, as that term is used in the Fourth Amendment context.[35] More importantly, the State fails to establish that the personal safety and security interest at stake in the first-degree burglary context is analogous to the privacy interest at stake under the Fourth Amendment. The privacy protection of the home under the Fourth Amendment does not depend upon the presence of a human being in that home. Our first-degree burglary statute, on the other hand, explicitly depends upon the actual presence of a person in the home, since the personal security/safety interest at stake in the first-degree burglary context is one of the things that distinguishes first-degree burglary from second-degree burglary.[36] Section 1431 explicitly requires the presence of a person in the home, and the factual record

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(opening closed door sufficient "breaking"); *Luker v. State*, 1976 OK CR 135, 552 P.2d 715, 718.

[34] *Compare* 21 O.S.2001, § 1431 *with* U.S. CONST. Amend IV.

[35] *See United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987) (invoking holding of *Hester v. United States*, 265 U.S. 57, 59, 44 S.Ct. 445, 68 L.Ed. 898 (1924), that Fourth Amendment does not extend to "open fields" and *Hester's* observation that "the distinction between a person's house and open fields 'is as old as the common law'"); *id.* (extent of Fourth Amendment "curtilage" focuses upon "whether the area harbors the 'intimate activities associated with the "sanctity of a man's home and the privacies of life"'") (all internal citations omitted).

[36] The elements of second-degree burglary are: (1) breaking, (2) entering, (3) a building/car [or other listed structure], (4) of another, (5) in which property is kept, (6) with the intent to steal or commit a felony. *See* 21 O.S.2001, § 1435; OUJI-CR (2d) 5-13 (Supp. 2003). It is acknowledged that the sacredness of the home, in particular, is essential to the first-degree burglary statute, since the entry of an occupied building that is not a "dwelling" does not constitute first-degree burglary under § 1431, despite the personal safety/security interest that would still be present.

in this case was inadequate to support this element of first-degree burglary.[37]

Consequently, the trial court erred in accepting Perkis' plea to first-degree burglary, and the court abused its discretion in doing so. Perkis has not, however, established that his plea was in any way involuntary. Hence he need not be allowed to withdraw his plea. Rather, Perkis' conviction for burglary in the first degree should be modified to burglary in the second degree, under 21 O.S.2001, § 1435.[38] The elements of second-degree burglary are amply supported by the factual record in this case; and the record leaves no doubt that Perkis would have voluntarily pled *nolo contendere* to second-degree burglary, rather than first-degree burglary, if his argument regarding the lack of a human in the Wallis home had been accepted at the trial court level. Under these specific circumstances, it is appropriate to modify Perkis' conviction on Count III from burglary in the first degree to burglary in the second degree. His sentence on Count III is likewise modified to imprisonment for seven (7) years and a fine of $1,000.[39] His sentences on Counts I and III shall remain consecutive sentences,

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[37] The State's reliance upon an Illinois case in which the victim fled the home at the time it was being invaded, because she believed the defendant was breaking in, is inapposite, since Mr. and Mrs. Wallis both left the home significantly before it was entered, and not as a result of fear of the defendants. *Cf. People v. Mata*, 737 N.E.2d 1120, 1125 (Ill. Ct. App. 2000). The State's further argument (without citation to authority) about Perkis "luring" Wallis outside of the home is likewise rebutted by the record. Although Perkis and his codefendants may have come to the Wallis home intending to burglarize it, there is no evidence that they "lured" the couple out of the home in order to do so. Oleta Wallis, in particular, left the home unoccupied, when she decided, on her own, to go get her daily Dr. Pepper.

[38] Perkis specifically requests in his brief that if this Court does not allow him to withdraw his pleas, that it modify his judgment and sentence to conform to the evidence in the case.

[39] The trial court sentenced Perkis to the maximum term of imprisonment permitted for first-degree burglary. Thus there can be little doubt that the trial court would have likewise sentenced him to the maximum term permitted for second-degree burglary, *i.e.*, seven (7) years, if it had concluded (correctly) that the first-degree burglary count did not apply. *See* 21 O.S.2001, § 1436. Perkis has never challenged, and does not now challenge, his fines of $1,000 on each count.

as the trial court ordered.

In Proposition II, Perkis recasts his Proposition I claim, arguing that because the factual record was insufficient to support his pleas to the counts upon which he was convicted, his sentences are excessive.[40] Perkis also challenges the trial court's decision to run his prison terms consecutively. This Court has already found that the factual record was adequate to support Perkis' Count I conviction for robbery with a dangerous weapon. Perkis admits that imprisonment for twenty-five (25) years and a fine of $1,000 on this count is within the permissible sentencing range; and this Court rejects any claim that this sentence is excessive. This Court has already reversed Perkis' Count II kidnapping conviction and modified his Count III conviction from first-degree burglary to second-degree burglary. His sentence of seven (7) years and a fine of $1,000 on Count III is not excessive; nor does the fact that the prison terms for Counts I and II will remain consecutive cause them to be excessive. Hence this claim is rejected entirely.

In Proposition III, Perkis asserts that he has been subjected to prohibited "double punishment," by the court's assessment of victim-related fees against him under two separate statutes.[41] In particular, Perkis challenges the combination of the $3,436.47 restitution assessment, for which he is jointly and severally liable, with the Victim Compensation Assessment of $1000, which he

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[40] Perkis' argument that convicting him of both robbery and kidnapping constitutes impermissible "double punishment" for a single act has been rendered moot by this Court's dismissal of the kidnapping count.

individually was ordered to pay.[42] This claim was not raised before the trial court. Hence the issue has been waived. And there is no plain error.[43]

In Proposition IV, Perkis complains that the trial court failed to properly advise him regarding: (1) the correct maximum sentence for first-degree burglary; (2) that his three counts could be ordered to run consecutively; and (3) that he would be required to serve 85% of his sentence on the robbery and first-degree burglary counts, before being considered for parole.[44] Again, Perkis waived these claims by failing to raise them at any point at the trial court level.[45] Furthermore, Perkis was correctly advised, at the time of his plea, that the maximum sentence for first-degree burglary was twenty (20) years.[46] In addition, Perkis' claims that the trial court should have informed him, at the time of his pleas, that his sentences could be run consecutively and that the "85% Rule" would apply to two of his convictions are resoundingly hollow. Perkis does not actually claim that he was unaware of these sentencing issues; and the arguments of his counsel at the time of his sentencing strongly suggest

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[41] *See* 21 O.S.2001, § 11.

[42] The Victim Compensation Assessment of $1,000 is a single assessment, not a per count assessment as Perkis asserts in his brief. The State did not challenge the structuring or total of this award at the trial court level and does not do so here. *Cf.* 21 O.S.2001, § 142.18(A).

[43] This Court notes that "restitution" for a victim is commonly recognized as having a different purpose than and being entirely distinct from the "punishment" of an offender.

[44] *See* 21 O.S.2001, §§ 12.1, 13.1.

[45] Within this section Perkis again argues that the trial court did not give him adequate credit for the mitigating factors in the case (that he turned himself in, helped them find his co-defendants, his remorse, *etc.*). This argument is irrelevant to the legal claims made in this section.

[46] The fact that at the time of his sentencing, Perkis was initially sentenced to 25 years on the first-degree burglary count, and then this error was later corrected—at the urging of the State—to a permissible sentence of 20 years on this count, is irrelevant to the validity of Perkis' plea.

that he was very much aware of these considerations.[47] Perkis fails to cite any authority requiring the specific warnings that he claims should have been given, and under the circumstances of this case, this Court declines to further address the issue.[48] There is no plain error.

In Proposition V, Perkis argues that he should be allowed to withdraw his plea to first-degree burglary because there was "confusion" regarding the proper sentencing range for this crime. Again, this claim was waived for failure to raise it any point previously. Furthermore, there was no confusion at the time of Perkis' plea, and there is no reason to allow him to withdraw it. He was properly informed of the maximum sentence for this crime at the time of his plea; and a later error, at the time of sentencing—giving him five years more than was legally permissible—was subsequently corrected, with no prejudice to Perkis.

In Proposition VI, Perkis argues that he received ineffective assistance of counsel at the time of his plea, primarily because his counsel failed to re-raise the arguments regarding the insufficiency of the State's evidence to establish all the elements for the kidnapping and first-degree burglary counts, which had been raised earlier in his case. The Court notes that it has fully addressed these arguments in connection with Proposition I, which resolves Perkis' ineffective assistance claim as well.[49]

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[47] Perkis' counsel specifically referred to the impact of the 85% Rule in his argument and asked that Perkis' sentences not be run consecutively.

[48] *Cf. Robinson v. State*, 1991 OK CR 23, ¶¶ 8-10, 806 P.2d 1128, 1130-31 (holding that where parole or probation eligibility is a "definite practical consequence" of a plea, the defendant must be informed regarding it at the time of his plea).

[49] This Court's conclusion that the record did support Perkis' conviction for kidnapping

In Proposition VII, Perkis requests that if this Court does not allow him to withdraw his plea or modify the judgment on Count III, this Court order that the Judgment and Sentence document in his case be corrected to accurately reflect the trial court's modification of his sentence on this count to twenty (20) years. This Court herein orders that Count III be modified to reflect a conviction for second-degree burglary, with a sentence of imprisonment for seven (7) years and a fine of $1,000. This resolves Perkis' claim.[50]

After thoroughly considering the entire record before us, we find that Perkis' petition for certiorari should be granted, that he should not be allowed to withdraw any of his pleas, that his conviction and sentence for robbery with a dangerous weapon should be affirmed, that his conviction for kidnapping must be reversed and remanded for dismissal, and that his conviction for first-degree burglary should be modified to a conviction for second-degree burglary, with a sentence of imprisonment for seven (7) years and a fine of $1,000. Perkis' other claims are all rejected.

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demonstrates that Perkis could not have been prejudiced by his counsel's failure to further pursue this claim. And this Court's modification of Count III from first-degree burglary to second-degree burglary fully resolves any prejudicial effect from the failure of Perkis' counsel to pursue his claim, at the time of the plea, that no human was present when the Wallis home was entered. Finally, Perkis could not have been prejudiced by the failure of his counsel to make the (herein-rejected) "no breaking" argument.

[50] In addition, the Court notes that the Record in this case already contains a First Amended Judgment and Sentence document, filed on December 8, 2003, which correctly reflects the trial court's modification of Perkis' sentence on Count III.

Decision

Perkis' petition for certiorari review is **GRANTED**. His conviction and sentence on **COUNT I**, Robbery with a Dangerous Weapon, are hereby **AFFIRMED**. Perkis' conviction on **COUNT II**, Kidnapping, is hereby **REVERSED**, and this count is hereby **REMANDED** to the district court, where it shall be **DISMISSED**. Perkis' conviction on **COUNT III**, Burglary in the First Degree, is hereby **MODIFIED** to a conviction for **BURGLARY IN THE SECOND DEGREE**, and his **SENTENCE** on this count is likewise **MODIFIED** to imprisonment for seven (7) years and a fine of $1,000. The remaining provisions of Perkis' sentence are **AFFIRMED**.

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OPINION BY: CHAPEL, J.

JOHNSON, P.J.: CONCUR

LILE, V.P.J.: CONCUR IN PART/DISSENT IN PART

LUMPKIN, J.: CONCUR IN RESULTS

STRUBHAR, J.: CONCUR

LILE, VICE PRESIDING JUDGE, CONCUR IN PART/DISSENT IN PART:

In this case the victim was lured into a field some 200 yards from his house, beaten to the ground, and taped with duct tape to prevent him from leaving. While one man stood guard, two other returned to his home and completely ransacked it in search of property to steal.

The proposed opinion would reverse the resulting kidnapping conviction on the grounds that the confinement was not secret. An essential element of our kidnapping statute is that the perpetrators act "with the intent to secretly confine or imprison" a person against their will, 21 O.S. 2001, § 741. Does the Court take the position that these facts constituted a public confinement?

This court has not adopted a definition of secret, although the common or general understanding of concealed from public or general knowledge or view complies with the long-standing rule of statutory interpretation. We construe the words of a statute in light of their "commonly-understood meaning." *State v. Bezdicek*, 2002 OK CR 28, 53 P.3d 917.

Clearly, the facts of this case satisfy the well understood meaning of secret confinement. Certainly the victim in this case would have wished that his confinement were not so concealed from public knowledge or view.

The proposed opinion states that these facts do not present a case where a person is confined in a "nonpublic place, such as inside a home or apartment, where he or she cannot be easily seen or heard by other persons." On the ground, in a field, 200 yards from anything is as secret as any apartment and most homes.

The proposed opinion states that the defendants did not "cover Wallis' mouth in any manner." Rather, one defendant stood over Wallis swinging a hammer. Wallis' silence was insured as well by the hammer, as by any gag. The issue is not whether the victim is secret; the issue is whether the confinement or imprisonment is secret. The victim can be in full view of a football stadium full of spectators, but if the fact that the victim is confined or imprisoned by physical or mental restraint is secret then the crime is kidnapping.

This conviction should be **AFFIRMED**.