

plea and after the prescribed hearing, the district court denied Wabaunsee's motion. Wabaunsee appeals the district court's order and asks this Court to grant certiorari and allow him to withdraw his plea.

Wabaunsee raises the following issues:

- (1) whether his convictions subject him to multiple punishments requiring the dismissal of Counts II, IV, and VI;
- (2) whether there was evidence to prove actual loss and support the restitution order;
- (3) whether his pleas were knowingly and intelligently entered or made with inadvertence and by mistake;
- (4) whether he received effective assistance of counsel;
- (5) whether he should be granted a new hearing on his motion to withdraw plea; and
- (6) whether his sentences are excessive and should be modified.

1.

We find no multiple punishment violation under 21 O.S.2001, § 11 or under the Double Jeopardy Clauses of the state (Okla. Const. art. 2, 21) and federal (U.S. Const. amend V) constitutions for Counts I and II and V and VI.¹ See *Davis v. State*, 1999 OK CR 48, ¶¶ 4 & 13, 993 P.2d 124, 125-26. In Counts I and II Wabaunsee was convicted of burglary for breaking into a residence and a secured outbuilding next to the residence, two separate structures. The breaking and entering of each building, therefore, was a

¹ The State maintains that this claim is waived because Wabaunsee did not raise it below. This Court, however, has reviewed double jeopardy claims in many certiorari appeals in the past. See e.g. *Lozoya v. State*, 1996 OK CR 55, 932 P.2d 22, *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *May v. State*, 1990 OK CR 14, 788 P.2d 408; *Ocampo v. State*, 1989 OK CR 38, 778 P.2d 920.

separate act of burglary in the second degree under 21 O.S.2001, § 1435. If the criminal acts are separate and distinct, there is no multiple punishment violation under Section 11. See *Logsdon v. State*, 2010 OK CR 7, ¶ 17, 231 P.3d 1156, 1165 (Section 11 is not violated where there is a series of separate and distinct acts).

Nor is there a multiple punishment violation for Wabaunsee's simultaneous convictions for resisting and obstructing the officers. Wabaunsee is being punished for resisting the officers' attempts to handcuff him and take him into custody (resisting an officer) and for refusing to identify himself once he was in custody (obstructing an officer). Though these crimes occurred during the same criminal episode, they are separate and distinct acts for purposes of multiple punishment analysis. *Id.*

Wabaunsee's argument—that simultaneous convictions for possession of a firearm during the commission of a felony (Count III) and felon in possession (Count IV) violate 21 O.S.2001, § 11—has merit under the unique facts of this case.

The proper analysis of a multiple punishment claim under 21 O.S.2001, § 11(A) is to focus on the relationship between the crimes. *Davis*, 1999 OK CR 48, ¶ 13, 993 P.2d at 126. "If the crimes truly arise out of one act..., then Section 11 prohibits prosecution for more than one crime." *Id.* "One act that violates two criminal provisions cannot be punished twice, absent specific legislative intent." *Id.*

This Court has considered multiple punishment claims involving convictions for felon in possession in several unpublished cases. We generally find no Section 11 violation for felon in possession and other crimes in which the gun was later used. *E.g. Evans v. State*, Case No. F-2007-848 (unpublished)(Dec. 19, 2008)(finding no multiple punishment violation and upholding convictions for felon in possession and robbery with a firearm) and *Hamilton v. State*, Case No. F-2005-1085 (unpublished)(Mar. 30, 2007)(finding no multiple punishment violation and upholding convictions for felon in possession and felony murder based on robbery with a firearm.)² This is so because the defendant is guilty of felon in possession (a status crime) the moment he comes into possession of the weapon. Later use of the gun to commit another crime is a separate act from the preceding unlawful possession.

The facts of this case are unusual. The record shows that Wabaunsee broke and entered the residence without a weapon, and while rummaging about, took three of the homeowner's guns and placed them around him in the living room. The State alleged the moment Wabaunsee came into possession of the guns in this case that he was not only committing the crime of felon in possession but also the crime of possessing a gun while in the commission of

² *But see Moore v. State*, Case No. F-2004-1081 (unpublished)(Mar. 28, 2006)(Appellant's convictions for possession of a firearm after former felony conviction and robbery with firearms violate Section 11) and *Potts v. State*, Case No. F-99-127 (unpublished)(June 9, 2000)(simultaneous convictions for Shooting with Intent to Kill and felon in possession violate Section 11).

the felony of second degree burglary.³ The acts were not separate and distinct because there was no temporal break between Wabaunsee's possession of the gun and use of the gun to facilitate another crime. Hence, Wabaunsee's single act of possessing the homeowner's guns resulted in multiple punishment in this case. Reversing Wabaunsee's conviction for possession of a firearm in the commission of a felony with instructions to dismiss remedies the multiple punishment problem under § 11. We grant certiorari in part and remand this case to the district court for dismissal of Count III.

2.

Wabaunsee's claim challenging the restitution order is waived and not reviewable in this appeal. See Rule 4.2 (B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010) ("No matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea..."); *Cox v. State*, 2006 OK CR 51, ¶ 4, 152 P.3d 244, 247 (review in certiorari appeals is limited to "two inquiries: (1) whether the guilty plea was made knowingly and voluntarily; and (2) whether the district court accepting the guilty plea had jurisdiction to accept the plea.")

³ It also appears there is a proof problem as well with Wabaunsee's conviction for possession of a firearm during commission of a felony. Under our case law, a burglary is completed once the defendant breaks and enters with the intent to steal. Arguably, Wabaunsee was not in possession of a firearm during the commission of the second degree burglary as alleged in the Information in this case. See *Ziegler v. State*, 1980 OK CR 23, 610 P.2d 251, 254 (convictions for first degree burglary, rape, sodomy and unauthorized use of a motor vehicle do not violate Section 11 because the burglary was complete upon the forced entry with the intent to commit a crime and the crimes committed inside the residence were not necessary elements of burglary) The analysis in *Ziegler* was cited with approval in *Davis*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126 (providing proper analysis of Section 11 claim). The State also notes in its brief that the burglary was completed once Wabaunsee broke and entered the house with the intent to steal. *Appellee Brief* at 8.

The statute governing restitution provides a remedy for Wabaunsee to petition the trial court to amend the restitution order. 22 O.S.2001, § 991f(J).⁴ If Wabaunsee believes the amount of restitution was calculated in error, he may petition the trial court to amend the restitution order to reflect an accurate amount of loss.

3.

The district court's decision that Wabaunsee entered his plea knowingly, voluntarily and with a full understanding of the consequences is supported by the record. We therefore find no abuse of discretion in the district court's ruling denying Wabaunsee's motion to withdraw plea. See *Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251.

4.

Wabaunsee has not shown that he received ineffective assistance of counsel. *Wiley v. State*, 2008 OK CR 30, ¶ 4, 199 P.3d 877, 878; *Lozoya v. State*, 1996 OK CR 55, ¶ 27, 932 P.2d 22, 31.

5.

We reject Wabaunsee's claim that he is entitled to a new hearing on his motion to withdraw plea because his counsel did not adequately represent him

⁴ Section 991f(J) provides:

The court shall conduct such hearings or proceedings as it deems necessary to set restitution and payment schedules at the time of sentencing or may bifurcate the sentencing and defer the hearing or proceedings relating to the imposition of restitution as justice may require. Amendments or alterations to the restitution order may be made upon the court's own motion, petition by the crime victim or petition by the offender.

and he did not waive the assistance of counsel. The record shows that Wabaunsee's lawyer called him to testify and questioned him about his reasons for seeking withdrawal of his plea and possible defenses. Wabaunsee's testimony left counsel little to argue in support of granting his motion. There is no evidence of an apparent conflict of interest or evidence that counsel acted against his client's interests. Furthermore, Wabaunsee fails to identify specific evidence and argument counsel could have presented to support his motion and achieve a different outcome. This claim is denied.

6.

Wabaunsee's sentence does not shock our conscience. See *Gomez v. State*, 2007 OK CR 33, ¶ 18, 168 P.3d 1139, 1146; *Rea v. State*, 2001 OK CR 28, ¶ 5, n.3, 34 P.3d 148, 149 n.3. His sentence is within the range of punishment provided by law. The sentence is based on the facts of the case and Wabaunsee's record. We find Wabaunsee's claim to be without merit.

DECISION

The Petition for a Writ of Certiorari is **GRANTED IN PART AND DENIED IN PART**. The Judgment and Sentence of the district court on Counts I, II, IV, V and VI is **AFFIRMED**. The Judgment and Sentence of the district court on Count III is **Reversed and Remanded to the district court with Instructions to Dismiss**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY
THE HONORABLE RONALD G. FRANKLIN, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT

APPEARANCES ON APPEAL

GREG CAMP
2901 S. VAN BUREN
ENID, OK 73701
ATTORNEY FOR DEFENDANT

KATRINA CONRAD-LEGLER
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR PETITIONER

TALLENA MCMICHAEL
ASSISTANT DISTRICT ATTORNEY
GARFIELD COUNTY COURTHOUSE
114 W. BROADWAY
ENID, OK 73701
ATTORNEY FOR STATE

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL
DONALD D. SELF
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: A. JOHNSON, P.J.
LEWIS, V.P.J.: Concur in Results
LUMPKIN, J.: Concur in Results
C. JOHNSON, J.: Concur
SMITH, J.: Concur