

NO. 41819-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JESUS ESCOBAR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-01115-5

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

James Dixon
Ste. 3230, 601 Union St.
Seattle, WA 98101

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED February 22, 2012, Port Orchard, WA Sutton
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY1

 B. FACTS4

III. ARGUMENT.....9

 A. THE STATE DOES NOT CONTEST THAT THE
 MOTION BELOW WAS TIMELY.....9

 B. THE TRIAL COURT PROPERLY FOUND THAT
 ESCOBAR FAILED TO ESTABLISH THAT
 TRIAL COUNSEL WAS INEFFECTIVE IN
 ADVISING ESCOBAR TO PLEAD GUILTY.....10

IV. CONCLUSION.....17

TABLE OF AUTHORITIES

CASES

In re Pirtle,
136 Wn.2d 467, 965 P.2d 593 (1998)..... 11

State v. A.N.J.,
168 Wn.2d 91, 225 P.3d 956 (2010)..... 11

State v. Coles,
28 Wn. App. 563, 625 P.2d 713 (1981)..... 16

State v. Copeland,
130 Wn.2d 244, 922 P.2d 1304 (1996)..... 16

State v. Golden,
112 Wn. App. 68, 47 P.3d 587 (2002)..... 8

State v. LeFever,
102 Wn.2d 777, 690 P.2d 574 16

State v. Piche,
71 Wn.2d 583, 430 P.2d 522 (1967)..... 11

State v. Renneberg,
83 Wn.2d 735, 522 P.2d 835 (1974)..... 16

State v. Tigano,
63 Wn. App. 336, 818 P.2d 1369 (1991)..... 16

RULES

CrR 7.8..... 8

ER 403 16

ER 608(b)..... 15

I. COUNTERSTATEMENT OF THE ISSUES

Whether the trial court properly found that counsel not ineffective in advising Escobar to accept a plea essentially for time served rather than risking prison time by going to trial where it would have been Escobar's word against the victim's, and the physical and demeanor evidence observed by the police, and presumably the 911 calls, supported the victim's version of the events?

II. STATEMENT OF THE CASE

Jesus Escobar appeals the denial of his motion to withdraw his guilty plea.

A. PROCEDURAL HISTORY

Escobar was charged by information filed in Kitsap County Superior Court with one count of second-degree burglary. CP 1. A change of plea hearing was held, during which an interpreter was present. COP 3.¹ Pursuant to a plea agreement, Escobar pled guilty as charged. CP 11, 185, COP 3.

The Statement of Defendant on Plea of Guilty indicates that Escobar went over the statement with the interpreter, and that he fully

¹ A transcript of the change of plea hearing held on August 24, 2005, was appended to the motion to withdraw guilty plea as part of Attachment 4. CP 60. For ease of reference the State will cite this transcript as "COP" followed by the page number of the transcript.

understood the document. CP 17. The trial court verified this at the change of plea hearing. COP 4-5. In the statement, Escobar declined to set forth the factual basis of the crime, instead deferring to the police reports and/or the statement of probable cause. CP 17. The trial court accepted the plea. COP 5.

Before sentencing, the State followed the recommendation contained in the plea agreement, which was one month confinement. COP 5. Defense counsel also asked the court to follow the recommendation. COP 6. The trial court imposed the one-month sentence, COP 6, and judgment was entered on August 24, 2005. CP 18.

More than five years later, in November 2010, Escobar filed a motion to withdraw his plea. CP 27. The trial court entered an order to show cause, CP 165, and after the State filed its response, CP 167, held a hearing on the matter. RP 2. The court took the matter under advisement, RP 30, and subsequently issued an order denying relief. CP 201.

In its order, the trial court determined that Escobar's motion was timely because there was no evidence that he had been advised of the one-year time-limit for filing a collateral attack. CP 202. The court nevertheless denied relief because Escobar had failed to demonstrate that his counsel was ineffective for failing to adequately investigate the case

before advising him to plead guilty. CP 214.

B. FACTS

1. *The offense*

The following facts are set forth in the statement of probable cause.

CP 4.

At 11:00 pm on the evening of July 21, 2005, Cencom (Kitsap County 911 dispatch) received a call regarding a physical confrontation occurring at the home of Tracy Kepner and her roommate William Gill. The dispatcher reported to the responding deputy that one of the parties involved had left in a pick-up truck. CP 4.

When Kitsap County Sheriff's Deputies Wright and Brown arrived, Gill came running down the driveway, frantically waving his hands. Gill was out of breath and speaking so fast that Wright could not understand him at first. CP 4.

After Wright calmed Gill down, Gill told her that he and Kepner lived there with Kepner's two children. Escobar, who was the father of Kepner's younger child also used to live there. About a month earlier, Kepner had asked Escobar to move out. Gill said that Escobar drank too much and he and Kepner fought a lot. Escobar moved out in June and no longer lived there. CP 4.

Kepner also told Wright that Escobar did not have any belongings

at the house, and did not have a key. Gill stated that although Escobar had not been back since he moved out, he seemed to have a good working relationship with Kepner and the children. CP 4.

Gill stated that the evening of the incident, Escobar called and asked to speak with Kepner. They were eating dinner, and Kepner asked Gill to tell Escobar that she would call him back in 10 minutes. Escobar became angry and demanded to speak with Kepner. Gill hung up and unplugged the phone because Escobar sounded irrational. CP 4.

Shortly afterwards, Kepner left with her daughter and told Gill she would be back in a while. Gill plugged the phone back in. Escobar called and again demanded to speak to Kepner. When Gill told him that she had left, Escobar again became angry and said he would be there in two minutes. CP 4.

Gill became afraid and called 911. While he was on the phone, Gill heard Escobar's truck slide to a stop in the driveway. Gill said his heart was racing and the next thing he knew the front door flew open and Escobar came in and demanded to see Kepner and his daughter. CP 4. Gill told Escobar he was on the phone with the police. Escobar ran toward Gill, pushed him, and ripped the phone from the wall, disconnecting the 911 call. CP 5.

Escobar angrily searched the house for Kepner and the daughter. Gill plugged the phone back in and called 911 again. While Gill was speaking with the dispatcher, Escobar came back into the room and again ripped the cord out of the wall, this time disabling the phone. CP 5.

Escobar left, and on his way out, kicked the door in anger, shattering the window in the lower part of the door. Escobar jumped into his truck and sped away. Gill, using a second phone, called 911 for the third time. CP 5.

Deputy Wright confirmed that the door window was broken and that the phone cord had been violently ripped from the wall, and took photos of both. CP 5. She asked Gill if he was injured or needed medical attention. Gill responded that he was not, that he was just shaken from the ordeal. CP 5.

Escobar was located at an address provided by Kepner. When Wright attempted to speak with him, Escobar attempted to assert that he did not understand English. Kepner, however, had told Wright that he understood and spoke English well. Wright read Escobar his rights, which he indicated he understood. He agreed to speak to her. CP 5.

Escobar admitted going into the house, but asserted that Kepner had told him it was okay to come over anytime to see his daughter. He

construed this as giving him the right to enter the house without being invited or let in by Gill. Wright pointed out to him that neither Kepner nor his daughter were home when he entered the house. CP 5.

Escobar denied touching Gill and claimed that Gill had pushed him when he came into the house. He also denied touching the phone, but admitted that he told Gill there was no reason to call the police, and that he made Gill hang up the phone. Escobar could not explain how the phone cord was damaged. CP 5.

At sentencing, defense counsel noted that there was some dispute as to the facts:

He and Tracy have a daughter in common. I think it's a little unclear from the probable cause statement, but he had called to go over to see his daughter. There were concerns about drug use at the house in the past, and he knew that. He also knew there was a roommate who had lived there.

He had gone over. He went to the house, which was customary for him to do. The roommate asked him – basically said, “No, you can't come in.” He went looking for his girlfriend and his daughter.

There would be a dispute if we had gone to trial, over whether he actually pulled the phone cord out of the wall or pushed the fellow at all. Apparently there was some enmity between the two of them. So that would have been the case.

COP 6.

2. *The CrR 7.8 hearing*

At the beginning of the hearing, the State withdrew its argument that the motion was untimely, assuming that it was established that Escobar could not read English. RP 3. Escobar testified that he was illiterate in both Spanish and English. RP 5. The trial court indicated that it was inclined to find the petition timely, based on *State v. Golden*, 112 Wn. App. 68, 47 P.3d 587 (2002).² RP 11.

Escobar then turned to the merits, and argued that he was not claiming that his plea was involuntary, but that his counsel was ineffective. RP 15-16. Escobar conceded that it was not required that counsel interview every witness before advising a guilty plea, or that counsel even had to personally interview the witnesses. RP 16-17. Escobar argued that Gill and Kepner both had crimes of dishonesty and were therefore not trustworthy, and that Gill had bias against Escobar. RP 19.

The State responded that there was a lack of evidence that defense counsel, who was deceased, failed to adequately investigate the case. RP 21. Moreover, even accepting the allegations at face value, they failed to show ineffectiveness: the facts were simple, and Escobar admitted he

² The court refers to “*State v. Gordon*,” but the case discussed was clearly *Golden*.

entered the house, so there was no material dispute as to any element of the offense. RP 23. Ultimately the question became whether a jury would believe Escobar's or Gill's version of the events. RP 23. Gill's account was supported by the physical evidence observed by the deputy: the broken glass and damaged phone, as well as the 911 records. RP 23-24.

The State further pointed out that the plea agreement was for a one-month sentence. If the case had gone to trial, the charge would have been second-degree burglary, which would have carried a substantially higher penalty. RP 24.

The trial court inquired whether it needed evidence beyond Escobar's own statements to establish ineffectiveness. RP 28. Escobar's counsel responded that he (counsel) had filed a declaration based on his own review of the trial counsel's file, and that it contained no investigative notes. RP 28. Counsel also argued that there was no reason to distrust Escobar's assertions. RP 29.

III. ARGUMENT

A. THE STATE DOES NOT CONTEST THAT THE MOTION BELOW WAS TIMELY.

Escobar first presents argument as to why his motion was timely. The State does not contest the trial court's finding that the motion was

timely.

B. THE TRIAL COURT PROPERLY FOUND THAT ESCOBAR FAILED TO ESTABLISH THAT TRIAL COUNSEL WAS INEFFECTIVE IN ADVISING ESCOBAR TO PLEAD GUILTY.

Escobar claims that the trial court erred in concluding that his trial counsel was not ineffective. This claim is without merit because Escobar failed to meet his burden of establishing that counsel's performance was deficient, or that he suffered prejudice as a result.

There is no support for Escobar's claim that he is entitled to withdraw his plea because his attorney failed to adequately investigate the case. First, Escobar has not shown what investigation Mr. Knappert actually made, nor does Escobar allege, for instance, that defense counsel did not fully review the discovery in the present case. Secondly, although Escobar asserts that his attorney did not personally speak to the State's witnesses prior to the guilty plea, even if this is true Escobar, has cited no authority (and the State is aware of no such authority) that requires a defense counsel to personally interview all witnesses prior to the entry of a guilty plea. Rather, the Washington Supreme Court has held that a choice of whether or not to interview witnesses before a *trial* (as opposed to a guilty plea) may not necessarily constitute ineffective assistance. *In re*

Pirtle, 136 Wn.2d 467, 488, 965 P.2d 593 (1998). In addition, the Court specifically rejected the notion that counsel had to personally interview the witnesses to be competent:

While having formal interviews with these witnesses may have been helpful, there is no absolute requirement that defense counsel interview witnesses before trial. This court has previously held that “the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics ... [including], in some instances, whether to interview some witnesses before trial....” *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). Moreover, although there were no formal interviews, *Pirtle*'s counsel spent considerable time reviewing evidence and obtaining answers to various questions with lead Detective Grabenstein and his assistant, Detective Henderson. There has been no showing that this approach was inadequate.

Pirtle, 136 Wn.2d at 488.

More recently, the Court stated in *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010), that defense counsel cannot properly evaluate the merits of a plea offer without evaluating the State’s evidence. The Court nevertheless explained that the amount of investigation required is determined by the specific circumstances of the case:

The degree and extent of investigation required will vary depending upon the issues and facts of each case, but we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.

A.N.J., 168 Wn.2d at 111-12.

In the present case the record does not support Escobar's bald assertion that his defense counsel failed to adequately investigate the case.³ Rather, Escobar's own declaration states that his counsel went over the police report with him and "summarized it for him." Furthermore, the police report shows that the reporting party in the present case was a roommate of Escobar's ex-girlfriend, and the roommate had called the police when Escobar had come to the house and entered it without permission at a time when his girlfriend was not present, assaulted the roommate, and ripped a phone out of the wall when the roommate tried to call the police. Specifically, the roommate stated that Escobar had previously lived at the residence but had been told he had to move out, which he did, and that Escobar no longer had belongings at the residence nor did he have a key to the residence. Escobar, however, had become angry when his girlfriend had refused to talk to him on the phone and when the roommate later told him that the girlfriend had left the residence. Escobar then said he was coming over in two minutes and the roommate became afraid and called 911. Escobar then arrived and came into the house without permission. When the roommate told Escobar that he was

³ Escobar cites, as evidence of the need to investigate, trial counsel's purported motion to appoint an investigator. The cited motion, however, bears the stamp "file copy." CP 131-32. The motion does not appear in the superior court file, however, and presumably was never filed. Thus, contrary to Escobar's argument, it tends to show that counsel did not conclude he needed investigative assistance at any time before the plea was entered.

on the phone with the police, Escobar pushed him and ripped the phone out of the wall. Later, when the roommate plugged the phone in and again tried to call 911, Escobar again ripped the phone out of the wall, this time disabling the phone. The roommate also reported that Escobar broke a glass window on the door on his way out. The responding officer observed both the broken window and the broken phone cord that were consistent with the report from the witness. In addition, when Escobar was contacted, he did not deny entering the house, but claimed his girlfriend had given him permission to come over whenever he wanted and that this gave him the right to enter the house without being invited or let in by the roommate. Escobar also denied ever touching the phone, but admitted that he told the roommate that there was no reason to call the police and that he had made the roommate hang up the phone. Escobar could not, however, explain how the phone cord wire got split and frayed as if it had been ripped out of the wall.

As the plea agreement in the present case stated, by entering a guilty plea to the offense of burglary in the second degree, Escobar avoided a potential charge of burglary in the first degree (or residential burglary). Defense counsel explained at the plea hearing that at trial Escobar could have challenged whether he had assaulted the roommate or

ripped the phone cord out of the wall, but noted that if Escobar had chosen to go to trial the charge would have been burglary in the first degree. *See* RP (8/24/05) at 5.

Given these facts, the record does not support Escobar's bald claim that his trial counsel failed to adequately investigate the case or that his trial counsel's failure somehow rendered his plea involuntary. Rather, the record shows that given Escobar's own admissions in the police report, the case entered around a dispute as to whether there had been an assault and whether Escobar had ripped the phone out of the wall and broken a window in the residence.

As defense counsel acknowledged, if the case had proceeded to trial, Escobar would have contested those allegations. Nonetheless, the report itself shows that the physical evidence was consistent with the roommate's reports, and Escobar faced the prospect of having to face a much more serious charge if he chose to go to trial. Rather than facing the one-month sentence featured in the plea agreement,⁴ he would have been facing prison time had he gone to trial and been convicted of first-degree burglary. *See* App. (excerpt from 2005 Sentencing Guidelines Manual).

Escobar devotes a significant portion of his brief (and the

⁴ This sentence amounted to credit for time served, as Escobar had been in custody for a

appendices of the motion below) to assaulting the character of Gill and Kepner. He fails to show that most of this information would have been admissible at trial. Gill's forgery conviction did not occur until after Escobar's.⁵ Likewise there is no evidence of when or if⁶ Kepner was convicted of the charged misdemeanor theft.

Although Escobar argues that the facts of these alleged crimes would have been nevertheless admissible under ER 608(b), that rule specifically provides that such impeachment is not provable by extrinsic evidence. It is unlikely that these witnesses would have waived their Fifth Amendment privileges and incriminated themselves with regard to pending charges. Escobar thus fails to explain how counsel could have gotten this information before the jury.

Likewise, with regard to Gill's June 2005 theft conviction, he again fails to explain how "defense counsel could have explored" the details of that crime under existing case law. *See* Brief of Appellant, at 27. The law is quite clearly to the contrary: "cross-examination regarding prior convictions is limited to the fact of the conviction, the type of crime, and the punishment." *State v. Copeland*, 130 Wn.2d 244, 284, 922 P.2d 1304

month at the time of his plea.

⁵ Indeed, the crime itself was not committed until six months after Escobar's conviction.

⁶ The case records from Poulsbo Municipal Court are no longer available through

(1996). Further, “[t]he details of the acts leading to the prior convictions are not admissible.” *State v. Coles*, 28 Wn. App. 563, 573, 625 P.2d 713 (1981).

Finally, there is no evidence supporting the claim that Gill was arrested and spent time in jail on a drug charge in 2005. Nevertheless, even if there were, counsel could well have been concerned that it was quite likely that the testimony would have been, at the very least, tightly circumscribed under ER 403. *See State v. Renneberg*, 83 Wn.2d 735, 737, 522 P.2d 835 (1974) (evidence of drug use on other occasions, or of drug addiction, is generally inadmissible due to its prejudicial nature); *State v. Tigano*, 63 Wn. App. 336, 344-45, 818 P.2d 1369 (1991) (*citing Renneberg*, 83 Wn.2d at 737); *State v. LeFever*, 102 Wn.2d 777, 783, 690 P.2d 574 (1984) (noting that evidence of narcotics addiction can have a significant impact on a jury of laymen).

There is no evidence that counsel was not aware of Gill’s prior theft, or the alleged bias. There is evidence that Escobar was facing prison time versus a time-served sentence. There is evidence that the responding deputies found the scene and Gill’s demeanor consistent with his version of the events. The trial court did not err in rejecting Escobar’s claim.

DISCIS.

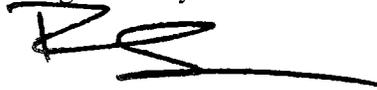
IV. CONCLUSION

For the foregoing reasons, the trial court's denial of Escobar's motion to withdraw his guilty plea should be affirmed.

DATED February 22, 2012.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R. Hauge', written over the printed name of the prosecuting attorney.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

\\CITEADVPROD-A\CITEADVVISORPROD\53093852\562E68D738CC4A5095451A915CAC1AC3-ESCOBARCOABRIEF DOC DOC

APPENDIX

BURGLARY, FIRST DEGREE

(RCW 9A.52.020)

CLASS A FELONY

BURGLARY 1 (VIOLENT)

(If sexual motivation finding/verdict for conspiracy or solicitation, use form on page III-8)

I. OFFENDER SCORING (RCW 9.94A.525(10))

ADULT HISTORY:

Enter number of serious violent and violent felony convictions x 2 = _____

Enter number of Burglary 2 or Residential Burglary convictions x 2 = _____

Enter number of other nonviolent felony convictions x 1 = _____

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions x 2 = _____

Enter number of Burglary 2 or Residential Burglary dispositions x 1 = _____

Enter number of other nonviolent felony dispositions x ½ = _____

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other serious violent and violent felony convictions x 2 = _____

Enter number of Burglary 2 or Residential Burglary convictions x 2 = _____

Enter number of other nonviolent felony convictions x 1 = _____

STATUS: Was the offender on community custody on the date the current offense was committed? (if yes), + 1 = _____

Total the last column to get the **Offender Score**
(Round down to the nearest whole number)

--

II. SENTENCE RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL VII)	15 - 20 months	21 - 27 months	26 - 34 months	31 - 41 months	36 - 48 months	41 - 54 months	57 - 75 months	67 - 89 months	77 - 102 months	87 - 116 months

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.595).
- C. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-5 or III-6 to calculate the enhanced sentence.
- D. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 18 to 36 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).

- *The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules*

KITSAP COUNTY PROSECUTOR

February 22, 2012 - 3:42 PM

Transmittal Letter

Document Uploaded: 418193-Respondents' Brief~2.pdf

Case Name: STATE V JESUS ESCOBER

Court of Appeals Case Number: 41819-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondents'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Lori A Vogel - Email: lvogel@co.kitsap.wa.us