IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-0372

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CLARK ANDREW BREWSTER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HONORABLE JANE F. SPANDE JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

The defendant asks this Court to retain the appeal to overrule or abrogated a published Court of Appeals decision, *State v. McBride*, 625 N.W.2d 372 (Iowa Ct. App. 2001). As identified in this brief, the Court of Appeals has revisited *McBride* on multiple occasions and expressly rejected calls to overturn the decision. *See State v. Dumerauf*, No. 04-0155, 2005 WL 67584, at *1 (Iowa Ct. App. Jan. 13, 2005) ("We see no reason to depart from *McBride*."); *State v. Allen*, No. 00-1014, 2001 WL 1658789, at *4 (Iowa Ct. App. Dec. 28, 2001) ("This argument was rejected in [*McBride*]. We decline defendant's invitation to overrule *McBride* and affirm on this issue."). This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Clark Andrew Brewster, appeals his conviction for operating while intoxicated — second offense, an aggravated misdemeanor in violation of 321J.2 (2013). The defendant was convicted following trial by jury in the Linn County District Court, the Hon. Jane E. Spande presiding.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

The State accepts the defendant's rendition of the facts. *See* Iowa R. App. P. 6.903(3). The legal issues raised on appeal solely concerns the post-guilt-phase colloquy regarding an enhancement based on the defendant's prior conviction.

ARGUMENT

I. The Defendant Failed to Preserve Any Challenge to the Colloquy. But Even If He Did Preserve Error, the Colloquy Was Sufficient.

Preservation of Error

In his brief, the defendant seems to rely on an unreported 2012 Court of Appeals decision to argue that he was not required to

preserve error because the district court did not advise him concerning a motion in arrest during the enhancement-stipulation colloquy. Defendant's Proof Br. at 15 (citing *State v. Peterson*, No. 11-1409, 2012 WL 3860730, at *4 (Iowa Ct. App. Sept. 6, 2012)). A more recent Court of Appeals decision acknowledges *Peterson* but holds that failure to advise a defendant concerning a motion in arrest of judgment to challenge a stipulated enhancement does *not* allow the defendant to bypass error preservation on appeal. *State v. Harrington*, 2016 WL 3556375, at *3 (Iowa Ct. App. June 29, 2016). *Harrington* is a correct statement of the law and the defendant's challenge cannot be heard as a preserved error because he failed to file a motion in arrest of judgment. This Court should proceed to the ineffective-assistance analysis contained in Division II.

Standard of Review

If error had been preserved, review would be for correction of errors at law. Iowa R. App. P. 6.907.

Merits

If this Court reaches the merits, the gist of the defendant's argument is that he asks this Court to overturn *State v. McBride*, 625 N.W.2d 372 (Iowa Ct. App. 2001), a published Court of Appeals

decision, and hold that a district court must conduct a full Rule-2.8(2)(b) guilty-plea colloquy every time a defendant stipulates to a prior offense. *See* Defendant's Proof Br. at 21–22. The defendant's primary contention is that with "the principles underlying" cases like *Kukowski* and *Brady* are "inconsistent" with *McBride*. Defendant's Proof Br. at 22. This argument is without merit. *Kukowski*, a 2005 Supreme Court decision, favorably cites to both *McBride* and *Brady* in the same sentence. *See State v. Kukowski*, 704 N.W.2d 687, 692 (Iowa 2005). If *McBride* was inconsistent with *Kukowski* and *Brady*, the Supreme Court would have said so.

Moreover, if this Court were inclined to revisit precedent, it should hesitate to do so in light of the Court of Appeals previously declining to overrule *McBride* on multiple occasions, when given the opportunity. *See State v. Dumerauf*, No. 04-0155, 2005 WL 67584, at *1 (Iowa Ct. App. Jan. 13, 2005) ("We see no reason to depart from *McBride*."); *State v. Allen*, No. 00-1014, 2001 WL 1658789, at *4 (Iowa Ct. App. Dec. 28, 2001) ("This argument was rejected in [*McBride*]. We decline defendant's invitation to overrule *McBride* and affirm on this issue.").

"It nearly goes without saying that the doctrine of *stare decisis* is one of the bedrock principles on which this court is built." *Kiesau v. Bantz,* 686 N.W.2d 164, 180 (Iowa 2004) (Cady, J., dissenting). This Court will "depart from stare decisis . . . [only] under the most cogent circumstances." *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013). In short, Iowa's appellate courts "do not overturn [their] precedents lightly and will not do so absent a showing the prior decision was clearly erroneous." *McElroy v. State*, 703 N.W.2d 385, 394 (Iowa 2005). The defendant has not carried his heavy burden to prove that *McBride* is clearly erroneous and therefore it must remain the law.

What the defendant really seeks is for this Court to judicially re-write Iowa Rule of Criminal Procedure 2.19(9) [enhancements], such that it is a mirror of Rule 2.8(2)(b) [guilty pleas]. *See* Defendant's Proof Br. at 20–21. There are mechanisms to accomplish this goal: the rule-making process or legislation. Separation of powers prohibits this Court from writing the law or usurping the legislative function. By the defendant's own admission, Rule 2.8(2)(b) "does not expressly apply to enhancements." Defendant's Proof Br. at 20–21

(emphasis omitted). This ends the analysis because the plain language of the rule does not support the defendant's argument.

Contrary to the rule proposed by the defendant, the appellate courts have concluded that a guilty-plea colloquy is adequate where the "[t]here is nothing in the record to indicate [the defendant] failed to understand the nature of an habitual offender decree, or the significance of his admission[.]" *See State v. Oetken*, 613 N.W.2d 679, 688 (Iowa 2000); *see, e.g.*, *State v. Claytor*, No. 12-2228, 2013 WL 5291956, at *3 (Iowa Ct. App. Sept. 13, 2013). There is no record testimony from the defendant suggesting that the defendant did not understand the enhancement or otherwise made an unknowing stipulation. Therefore the stipulation was adequate, even if error was preserved. The defendant was given an adequate "opportunity to affirm or deny the allegations the State is obligated to prove at the second trial." *Kukowski*, 704 N.W.2d at 692; *McBride*, 625 N.W.2d at 374.

Finally, even when error is preserved as to an alleged defect in the enhancement colloquy, reversal is not automatic. *See State v. Lipsey*, No. 13–1062, 2014 WL 3931434, at *3 (Iowa Ct. App. Aug. 13, 2014) ("Lipsey cannot show prejudice because he had notice of the

convictions on which the State intended to rely, the minutes of testimony listed the clerk of court as a witness and set forth the prior felony convictions, and Lipsey testified to his prior convictions"). Just like in *Lipsey*, the defendant here cannot show prejudice because the minutes provided sufficient notice and the defendant admitted to the conviction, and therefore any alleged error is harmless and this Court should not reverse. *See* Minutes; App. 8–10; Iowa Code §§ 619.16, 624.15 (2013).

II. Counsel Was Not Ineffective. There Is No Reason to Think That the Defendant's Prior Convictions Were Not Eligible for Enhancement.

Preservation of Error

The defendant asserts counsel was ineffective, which is an exception to the rules of error preservation. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

Standard of Review

Constitutional claims, including allegations of ineffective assistance, are reviewed de novo. *Wills*, 696 N.W.2d at 22.

Merits

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having

produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant claiming ineffective assistance must prove both that counsel breached an essential duty and that prejudice resulted. *Id.* at 687.

Under the first prong, the defendant must show counsel's representation fell below an objective standard of reasonableness. *Id.* at 687–88. The reviewing court must be highly deferential to counsel's performance, avoid judging in hindsight, and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. To prove the second prong, "[t]he defendant 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.

The defendant's second claim on appeal is that his trial attorney was ineffective in handling the enhancement colloquy. His claim specifically is that "there was insufficient evidence that Brewster was either represented by counsel or knowingly waived counsel on his previous conviction." Defendant's Proof Br. at 31. This claim is without merit. The defendant cannot prove counsel had an essential

duty to place this information in the record and there is no reason to think there is a reasonable probability of a different outcome.

First, there is no authority that holds trial counsel has an essential duty to place on the record that his client had counsel (or knowingly waived counsel) for his prior convictions. As discussed in Division I, the enhancement colloquy is not the equivalent of a guilty-plea colloquy and the current case law—including *McBride*—would find the colloquy adequate. *See State v. McBride*, 625 N.W.2d 372, 375 (Iowa Ct. App. 2001).

Second, the defendant cannot show prejudice because there is no reasonable probability of a different outcome.[1] The Court of Appeals has, on many occasions, turned back similar challenges on prejudice grounds, sometimes preserving the claims for postconviction relief to explore whether any prior convictions were uncounseled. *See State v. McBride*, 625 N.W.2d 372, 375 (Iowa Ct. App. 2001) (affirming based on minutes of testimony and defendant's admission); *State v. Vesey*, 482 N.W.2d 165, 168 (Iowa Ct. App. 1991)

[1] At one point, the defendant suggests that prejudice is presumed and cites *Schminkey*, a factual-basis case. *See* Defendant's Proof Br. at 33. No Iowa court has ever applied the factual-basis presumed-prejudice standard to the prior-conviction enhancements, nor does the defendant cite any other legal authority supporting his claim. *See* Defendant's Proof Br. at 33.

(affirming when "[t]he defendant admitted to what the state was ready and able to prove … [and t]he State had the ability to prove all the facts necessary to show the defendant's habitual offender status"); *see, e.g.*, *State v. Kohlmeyer*, No. 15-0135, 2016 WL 1133730, at *2 (Iowa Ct. App. March 23, 2016) (preserving claim); *State v. Davenport*, No. 14-1375, 2015 WL 7075704, at *4 (Iowa Ct. App. Nov. 12, 2015) (affirming based on detailed minutes of testimony concerning prior convictions); *State v. Braden*, No. 13–2014, 2015 WL 359454, at *3 (Iowa Ct. App. Jan. 28, 2015) (affirming where State was "prepared to offer appropriate testimony proving the prior convictions"); *State v. Doty*, No. 14–0249, 2014 WL 5249761, at *3 (Iowa Ct. App. Oct. 15, 2014) (affirming where the defendant did not "deny the validity of the prior conviction(s) as set forth in the minutes of testimony"); *State v. Lipsey*, No. 13–1062, 2014 WL 3931434, at *3 (Iowa Ct. App. Aug. 13, 2014) ("Lipsey cannot show prejudice because he had notice of the convictions on which the State intended to rely, the minutes of testimony listed the clerk of court as a witness and set forth the prior felony convictions, and Lipsey testified to his prior convictions"). In fact, the Court of Appeals has previously rejected this exact argument:

> Even if the trial court could have done more to ensure [the defendant] had knowingly and voluntarily stipulated to the prior conviction, a defendant is not prejudiced when the minutes of testimony reveal that the State is prepared to offer appropriate testimony proving the prior convictions. *See State v. McBride,* 625 N.W.2d 372, 375 (Iowa Ct. App. 2001). [The defendant] contends that it is not enough that the State is prepared to prove his conviction, but the State must also be prepared to prove he had counsel when the convictions were entered. [The defendant] cites no authority for that assertion.

State v. Braden, No. 13-2014, 2015 WL 359454, at *3 (Iowa Ct. App. Jan. 28, 2015). For the reasons contained in *Braden* and the other cases, the defendant cannot prove the reasonable probability of a different outcome because he has offered no evidence that his prior conviction was uncounseled or otherwise ineligible for use as an enhancement. Therefore the defendant's ineffective-assistance claim should be denied and his conviction affirmed.

If this Court believes the record is insufficient to deny the claim, then the defendant's conviction should be affirmed and the claim preserved for postconviction relief. "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978); *see Trobaugh v. Sondag*, 668 N.W.2d 577, 582–83 (Iowa 2003)

(discussing ineffective assistance as malpractice); Iowa R. Prof'l Conduct 32:1:1 ("A lawyer shall provide competent representation to a client.").

CONCLUSION

This Court should affirm the defendant's conviction.

REQUEST FOR NONORAL SUBMISSION

This case can be decided on the briefs. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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Dated: March 6, 2017

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