IN THE SUPREME COURT OF IOWA

No. 16–0372

Filed February 9, 2018

Amended April 20, 2018

STATE OF IOWA,

Appellee,

vs.

CLARK ANDREW BREWSTER,

Appellant.

Appeal from the Iowa District Court for Linn County, Jane F. Spande, Judge.

A defendant challenges his conviction for OWI, second offense, contending his stipulation to a prior conviction was neither voluntary nor knowing. **DISTRICT COURT JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Jerry Vandersanden, County Attorney, and Monica Slaughter, Assistant County Attorney, for appellee.

HECHT, Justice.

The defendant was convicted of operating while intoxicated (OWI), second offense, after he stipulated that he had previously been convicted of OWI. On appeal, he challenges his conviction and sentence for OWI, second offense, claiming the district court failed to engage in a sufficient colloquy to ensure the stipulation was made voluntarily and intelligently and his trial counsel was ineffective in failing to challenge the factual basis for the stipulation. Upon review, we conclude the prior-conviction stipulation colloquy was insufficient to establish the stipulation was made voluntarily and intelligently. Accordingly, we reverse the judgment of conviction and sentence on the OWI-second-offense charge and remand the case for prior-offense enhancement proceedings consistent with this opinion.

I. Facts and Proceedings.

Following a traffic stop on August 4, 2015, Clark Andrew Brewster was charged with OWI in violation of Iowa Code section 321J.2. The information alleged Brewster had one previous OWI conviction.

The case was tried to a jury. After the final defense witness testified but before the case was submitted to the jury, the court conducted the following colloquy outside the presence of the jury:

> THE COURT: I do need to make a brief record, and I think this is the best time to do so.
>
> Mr. Brewster, you are charged with Operating While Under the Influence as a second offense.
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: The jury will be asked to decide in the event they find you guilty whether or not you are the same person who has previously been convicted of the offense of Operating While Under the Influence as alleged in the Trial Information unless you are willing to enter into a stipulation

with regard to that prior conviction. Have you talked to your attorney about that fact?

(A discussion was held off the record.)

THE DEFENDANT: Yes, ma'am.

THE COURT: So you and [your counsel] have discussed the fact that the separate trial will be required to determine whether or not you had the prior conviction in the event the jury finds you guilty in this case?

THE DEFENDANT: Yes, ma'am.

THE COURT: My question to you at this time is whether or not you are willing to admit that you have previously been convicted of the offense of Operating While Under the Influence in Linn County within the past 12 years or whether or not you wish the jury to find whether or not you are the same person who has that prior conviction?

THE DEFENDANT: Yes. Because — yes, ma'am.

THE COURT: You are the same person?

THE DEFENDANT: Yes, ma'am.

THE COURT: So you are willing to admit at this time that in the event the jury finds a verdict of guilty in this case, that it would be as a second offense?

THE DEFENDANT: Yes, ma'am.

THE COURT: And you do not need the jury to decide that separate element.

THE DEFENDANT: Okay.

THE COURT: Does the State wish any further record with regard to the enhancement?

[THE PROSECUTOR]: No, Your Honor.

The jury found Brewster guilty of OWI, a serious misdemeanor. *See* Iowa Code § 321J.2(2)(*a*) (2015). Based on the jury's verdict and the colloquy set forth above, the court entered the judgment of conviction as and sentenced Brewster for OWI, second offense, an aggravated misdemeanor. *See id.* § 321J.2(2)(*b*). The sentence included a term of

thirty-seven days in jail, with credit for time served and thirty days suspended; a fine of $1875; and unsupervised probation. *See id.* § 321J.2(4) (imprisonment and fine penalties for OWI, second offense); *id.* § 907.3(3)(*c*) (suspended sentences for OWI offenses).

On appeal, Brewster contends his conviction for OWI, second offense, must be reversed because the colloquy set forth above was insufficient to establish that his prior-OWI-conviction stipulation was voluntarily and intelligently made and his trial counsel was ineffective in failing to challenge the factual basis for the enhancement.

II. Scope and Standard of Review.

We review claims involving interpretation of statutes or rules for correction of errors at law. *State v. Harrington*, 893 N.W.2d 36, 41 (Iowa 2017); *see* Iowa R. App. P. 6.907. We review ineffective-assistance-of-counsel claims de novo. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012).

III. Analysis.

"When a defendant faces a charge that imposes an enhanced penalty for prior convictions, our law, in turn, imposes a two-stage trial." *State v. Kukowski*, 704 N.W.2d 687, 691 (Iowa 2005). The first stage of the trial is limited to the facts of the instant offense and omits any mention of a predicate conviction. *Id.* If the defendant is found guilty of the instant offense, the offender has "the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel." Iowa R. Crim. P. 2.19(9).[1]

[1]Rule 2.19(9) provides,

> After conviction of the primary or current offense, but prior to pronouncement of sentence, if the indictment or information alleges one or more prior convictions which by the Code subjects the offender to an increased sentence, the offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or

If the offender denies being the person previously convicted, the case proceeds to a second trial.[2] *Id.*; *Harrington*, 893 N.W.2d at 47. At the second trial, the state must prove the prior convictions beyond a reasonable doubt. *Kukowski*, 704 N.W.2d at 691.

Alternatively,

> [i]f the offender affirms that he or she is the person identified in the prior conviction records and does not object on the basis that he or she was not represented by counsel and did not waive counsel, the court must engage in the colloquy to ensure the affirmation is voluntary and intelligent.

Harrington, 893 N.W.2d at 47; *accord Kukowski*, 704 N.W.2d at 692 ("An affirmative response by the defendant under the rule, however, does not necessarily serve as an admission to support the imposition of an enhanced penalty as a multiple offender. The court has a duty to conduct a further inquiry . . . prior to sentencing to ensure that the affirmation is voluntary and intelligent.").

Brewster claims the district court's stipulation colloquy was insufficient to ensure his affirmation of the prior OWI conviction was

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> that the offender was not represented by counsel and did not waive counsel. If the offender denies being the person previously convicted, sentence shall be postponed for such time as to permit a trial before a jury on the issue of the offender's identity with the person previously convicted. Other objections shall be heard and determined by the court, and these other objections shall be asserted prior to trial of the substantive offense in the manner presented in rule 2.11. On the issue of identity, the court may in its discretion reconvene the jury which heard the current offense or dismiss that jury and submit the issue to another jury to be later impaneled. If the offender is found by the jury to be the person previously convicted, or if the offender acknowledged being such person, the offender shall be sentenced as prescribed in the Code.

Iowa R. Crim. P. 2.19(9).

[2]"[T]he right to a jury in the second trial only pertains to the issue of identity. Any claim by the offender that he or she was not represented by counsel and did not waive counsel in the prior convictions is heard and decided by the district court." *Harrington*, 893 N.W.2d at 46.

voluntary and intelligent.[3] We recently clarified the scope of the stipulation colloquy, as it applies to prior-conviction stipulations for habitual-offender enhancement purposes, in *Harrington*.

> First, the court must inform the offender of the nature of the habitual offender charge and, if admitted, that it will result in sentencing as a habitual offender for having "twice before been convicted of a felony." The court must inform the offender that these prior felony convictions are only valid if obtained when the offender was represented by counsel or knowingly and voluntarily waived the right to counsel. As a part of this process, the court must also make sure a factual basis exists to support the admission to the prior convictions.
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> Second, the court must inform the offender of the maximum possible punishment of the habitual offender enhancement, including mandatory minimum punishment. In the typical case, the court must ensure the offender understands he or she will be sentenced to a maximum sentence of fifteen years and that he or she must serve three years of the sentence before being eligible for parole. If the offender faces a greater mandatory minimum punishment or maximum possible punishment due to the present offense charged, the court must inform the offender of the specific sentence he or she will face by admitting the prior offenses.

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[3]As a threshold matter, the State contends Brewster did not preserve error on this claim because he failed to file a motion in arrest of judgment. "A motion in arrest of judgment is an application by a defendant in a criminal case that no judgment should be entered 'on a finding, plea, or verdict of guilty.' " *Harrington*, 893 N.W.2d at 41 (quoting Iowa R. Crim. P. 2.24(3)(*a*)).

In *Harrington*, we concluded "offenders in a habitual offender proceeding must preserve error in any deficiencies in the proceeding by filing a motion in arrest of judgment." *Id.* at 43. The "habitual offender proceeding" at issue in *Harrington* is functionally analogous to the proceeding at issue here—a prior-OWI-conviction stipulation proceeding under rule 2.19(9). *Id.* at 44–45. Thus the error preservation rule from *Harrington* can be read as requiring an offender in a rule 2.19(9) prior-conviction stipulation proceeding to file a motion in arrest of judgment to "preserve error in any deficiencies in the proceeding." *See id.* at 43. Because Brewster did not file a motion in arrest of judgment, under *Harrington*, error was not preserved. *See id.* Nevertheless, because in *Harrington*, we elected to apply this error preservation rule prospectively and Brewster's case was already on appeal at the time of our *Harrington* decision, we excuse Brewster's failure to preserve error. *See id.*; *see also State v. Steiger*, 903 N.W.2d 169, 170 (Iowa 2017) (per curiam) (excusing failure to follow the error preservation rule because rule established in *Harrington* was not in existence at the time).

> Third, the court must inform the offender of the trial rights enumerated in Iowa Rule of Criminal Procedure 2.8(2)(*b*)(4).[4] . . .
>
> Fourth, the court must inform the offender that no trial will take place by admitting to the prior convictions. The court must also inform the offender that the state is not required to prove the prior convictions were entered with counsel if the offender does not first raise the claim.
>
> Finally, we reiterate that the district court must inform the offender that challenges to an admission based on defects in the habitual offender proceedings must be raised in a motion in arrest of judgment. The district court must further instruct that the failure to do so will preclude the right to assert them on appeal.

Harrington, 893 N.W.2d at 45–46 (citations omitted) (quoting Iowa Code § 902.8 (2017)).

There are, of course, technical differences between the legal effect of prior felony convictions for defendants sentenced as habitual offenders under Iowa Code section 902.8 and the legal effect of prior OWI convictions for defendants convicted and sentenced under Iowa Code section 321J.2. Prior felony convictions affect the severity of the *sentence* imposed upon habitual offenders. *See* Iowa Code § 902.8 (2015); *see also Harrington*, 893 N.W.2d at 46 ("Habitual offender status is not an offense, but a sentencing enhancement."). In contrast, prior OWI convictions affect both the classification of the offense (aggravated misdemeanor for a second offense and class "D" felony for third and subsequent offenses) *and* the sentence. *See* Iowa Code § 321J.2(2)–(5) (detailing increased penalties for repeat OWI offenders). Notwithstanding these technical differences, the state must prove prior convictions in rule 2.19(9) proceedings in both habitual offender and repeat-OWI scenarios. We conclude the rationale for the rule adopted in *Harrington* applies with

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[4]As noted above, the right to a jury in the second trial is limited to the issue of identity. *See Harrington*, 893 N.W.2d at 46.

equal force to proceedings in which repeat-OWI-offender enhancements are at issue.

In this case, the rule 2.19(9) colloquy failed to establish Brewster's stipulation to the prior conviction was voluntarily and intelligently made. The court failed to inform Brewster of the result of admitting the prior conviction, specifically that he would be sentenced for OWI, second offense, instead of OWI, first offense. *See Harrington*, 893 N.W.2d at 45. The court also failed to advise Brewster the prior OWI conviction could be a basis for enhancing the classification of the crime and the sentence only if he was represented by or had properly waived counsel in connection with that prior offense. *See id.*

The prior conviction colloquy was also lacking in this case because it failed to establish Brewster was informed that an admission of a prior conviction exposed him to a maximum sentence of up to two years for OWI, second offense. *See* Iowa Code § 321J.2(2)(*b*); *id.* § 903.1(2); *Harrington*, 893 N.W.2d at 46. Nor did the court inform Brewster he would be required to serve a mandatory minimum seven days in jail upon conviction of a second offense. *See* Iowa Code § 321J.2(4)(*a*); *Harrington*, 893 N.W.2d at 46.

The prior-conviction colloquy in this case fell short of our standard for rule 2.19(9) proceedings in other particulars as well. The court did not fully inform Brewster of the waiver of trial rights enumerated in rule 2.8(2)(*b*)(4) that would result from an admission of a prior OWI conviction. *See Harrington*, 893 N.W.2d at 46. Lastly, we note that the prior-conviction colloquy in this case did not include an advisory that Brewster must file a motion in arrest of judgment should he wish to challenge the admission based on defects in the enhancement proceeding

and that failure to do so would preclude him from raising the issue on appeal. *See id.*

As in *Harrington*, the prior-conviction colloquy in this case leaves us "unable to conclude [Brewster's] admission was knowingly and voluntarily made." *See id.* at 47. Accordingly, we affirm Brewster's conviction for OWI, but we reverse the conviction and sentence for OWI, second offense, and remand for further prior-conviction proceedings pursuant to rule 2.19(9).[5]

IV. Conclusion.

We conclude the rule 2.19(9) prior-conviction stipulation colloquy was insufficient to establish Brewster's stipulation was knowingly and voluntarily made. We reverse the judgment of conviction and vacate the sentence for OWI, second offense, and remand for further rule 2.19(9) proceedings consistent with this opinion.

DISTRICT COURT JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

[5]Because we have granted the relief requested by Brewster, we need not address his claim that trial counsel provided ineffective assistance.