IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JOHNNIE RAY STEIGER, Defendant-Appellant.	)))))))))	SUPREME COURT 15-1630

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE DOUGLAS McDONALD (TRIAL AND PLEA) AND
HONORABLE CHRISTINE DALTON (SENTENCING), JUDGES

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED OCTOBER 26, 2016

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CERTIFICATE OF SERVICE

On November 15, 2016, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Johnnie Ray Steiger, No. 6280708, Newton Correctional Facility, 307 S 60th Ave. West, PO Box 218, Newton, IA 50208.

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QUESTIONS PRESENTED FOR REVIEW

I. Did the district court err in accepting the defendant's stipulation in SRCR369368 to prior convictions for purposes of the sentencing enhancement as third or subsequent offense under Iowa Code section 901A.2(2)? Did the court fail to engage in a sufficient colloquy to ensure that the defendant's affirmation was entered voluntarily and intelligently?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

This case raises the question of whether the district court is *required* to comply with all of the plea-taking requirements of Rule 2.8(2)(b)(2) when accepting a defendant's stipulation to prior offenses for purposes of enhancement under Iowa Rule of Criminal Procedure 2.19(9).

A prior-offense stipulation for enhancement purposes and a guilty plea are so analogous as both involve the relinquishment of constitutional rights. Due process requires a trial court to determine the defendant made a knowing and intelligent choice to waive constitutional rights. Without a full plea-type colloquy for the stipulation, there is no other means to ensure that the defendant's admission regarding prior convictions is made voluntarily and intelligently and comports with the defendant's right to due process.

STATEMENT OF THE CASE

Nature of the Case: Defendant-Appellant, Johnnie Ray Steiger, appeals following his convictions for indecent exposure in two separate cases, SRCR369368 and SRCR369403. The Honorable Douglas McDonald presided at the bench trial in SRCR369368 and the guilty plea in SRCR369403. The Honorable Christine Dalton presided over the sentencing in both cases.

Course of Proceeding and Disposition Below: On May 20, 2015, the State filed a trial information in SRCR369368 charging Steiger with the crime of indecent exposure, third or subsequent offense, in violation of Iowa Code sections 709.9 and 901A.2(2), for acts occurring on April 15, 2015. (Trial Information SRCR369368 – 5/20/15) (App. pp. 5-7). On that same date, the State filed a trial information in a separate case, SRCR369403, charging Steiger with the same crime for acts occurring on February 27, 2015. (Trial Information SRCR369403 – 5/20/15) (App. pp. 5-7). On July 10, 2015, Steiger waived his right to a jury trial. (Stipulation on PTC –

6/10/15; Record on PTC – 6/10/15) (App. pp. 35-39).[1] A bench trial was held on July 10, 2015, on the predicate indecent exposure charge in SRCR369368. (Trial and GP Cover). The district court ruled from the bench and found Steiger guilty. (Trial and GP Tr. p. 77, L. 20-p. 79, L. 2). Steiger thereafter stipulated in open court to two prior convictions to support the

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[1] No written waiver of jury trial was filed. Further, there does not appear to be a record of an in-court colloquy. The court filings on June 10, 2015, simply indicate that Steiger waived his right to jury trial. (Stipulation on PTC – 6/10/15; Record on PTC – 6/10/15) (App. pp. 35-39). Iowa Rule of Criminal Procedure 2.17(1) provides that criminal "[c]ases required to be tried to a jury shall be so tried unless the defendant voluntarily and intelligently waives a jury trial in writing and on the record...." Iowa R. Crim. P. 2.17(1). The phrase "on the record" as used in rule 2.17(1) requires "some in-court colloquy or personal contact between the court and the defendant, to ensure the defendant's waiver is knowing, voluntary, and intelligent." State v. Liddell, 672 N.W.2d 805, 812 (Iowa 2003) A defendant claiming ineffective assistance of counsel due to counsel's failure to ensure compliance with the jury-trial waiver provisions of Iowa Rule of Criminal Procedure 2.17(1) must show, not only that counsel breached an essential duty, but must also show actual prejudice. State v. Feregrino, 756 N.W.2d 700, 708 (Iowa 2008), *overruling* State v. Stallings, 658 N.W.2d 106, 111 (Iowa 2003). Because the record on appeal is inadequate to resolve the issue of prejudice, this ineffective-assistance-of-counsel claim may be raised in postconviction relief proceedings. See Iowa Code § 814.7 (2015).

sentencing enhancement for a third or subsequent offense under Iowa Code section 901A.2(2). (Trial and GP Tr. p. 79, L. 12-p. 80, L. 18). See Iowa Code § 901A.2(2) (2015). Steiger also entered a guilty plea in court to the predicate indecent exposure charge in SRCR369403 that same day. (Trial and GP Tr. p. 82, L. 5-p. 86, L. 8; Order Accepting Plea SRCR369403 – 7/10/15) (App. pp. 40-42). His stipulation in SRCR369368 was incorporated by reference for purposes of his guilty plea in SRCR369403. (Trial and GP Tr. p. 85, L. 11-16).

Sentencing was held on September 3, 2015, in both cases. (Sentencing Order SRCR369403 – 9/03/15; Sentencing Order SRCR369368 – 9/03/15) (App. pp. 40-42, 80-83). The court sentenced Steiger to concurrent terms of incarceration not exceeding ten (10) years in SRCR369368 and one (1) year in SRCR369403. (Sentencing Order SRCR369403 – 9/03/15; Sentencing Order SRCR369368 – 9/03/15) (App. pp. 40-42, 88-83). Pursuant to Iowa Code section 903B.2, the court additionally imposed the special sentence of ten (10) years of parole supervision to commence upon the completion of the

above sentences. (Sentencing Order SRCR369403 – 9/03/15; Sentencing Order SRCR369368 – 9/03/15) (App. pp. 40-42, 80-83). Steiger was also assessed the minimum fines (with payment suspended), surcharges on the fines, court costs, and attorney fees. (Sentencing Order SRCR369403 – 9/03/15; Sentencing Order SRCR369368 – 9/03/15) (App. pp. 40-42, 80-83).

Steiger filed timely notice of appeal on September 25, 2015, in both cases; this appeal followed. (Notice of Appeal SRCR369403 – 9/25/15; Notice of Appeal SRCR369368 – 9/25/15) (App. pp. 47, 84).

Facts: Facts pertinent to the appeal will be mentioned below.

ARGUMENT

I. The district court erred in accepting the defendant's stipulation in SRCR369368 to prior convictions for purposes of the sentencing enhancement as third or subsequent offense under Iowa Code section 901A.2(2). The court failed to engage in a sufficient colloquy to ensure that the defendant's affirmation was entered voluntarily and intelligently.

Preservation of Error: In the context of a guilty plea, a

defendant must generally file a motion in arrest of judgment to preserve a challenge to the plea on appeal. State v. Meron, 675 N.W.2d 537, 540 (Iowa 2004); see also Iowa R. Crim. P. 2.24(3)(a). However, "this requirement does not apply where a defendant was never advised during the plea proceedings, as required by Rule 2.8(2)(d), that challenges to the plea must be made in a motion in arrest of judgment and that the failure to challenge the plea by filing the motion within the time provided prior to sentencing precludes a right to assert the challenge on appeal." Meron, 675 N.W.2d at 540; see also Iowa R. Crim. P. 2.8(2)(d).

Because a defendant's admission of prior convictions for purposes of a sentencing enhancement "is so closely analogous to a plea of guilty," our courts "refer to our rules governing guilty pleas" in determining the procedure which must be followed in accepting such admissions. State v. Brady, 442 N.W.2d 57, 58 (Iowa 1989); see also State v. Kukowski, 704 N.W.2d 687, 693 (Iowa 2005) (indicating that once it is "determined that the defendant desires to admit the prior convictions" under Rule

2.19(9) the court must "make a personal inquiry" as outlined in Rule 2.8(2)(b)). Steiger contends that the stipulation of prior offenses for purposes of a sentencing enhancement should be reviewed the same as challenges to guilty plea proceedings; that is, in accordance with our motion in arrest of judgment principals. Cf. State v. Peterson, No. 11-1409, 2012 WL 3860730, *4 (Iowa Ct. App. Sept. 6, 2012) (where district court made insufficient motion in arrest of judgment advisement, challenge to prior-offense stipulation would be decided directly).

In the present case, Steiger did not file any motion in arrest of judgment challenging his stipulation to the prior offenses for purposes of the sentencing enhancement under Iowa Code section 901A.2(2). However, such failure does not preclude a challenge to his stipulation on direct appeal because the district court failed to advise Steiger either (1.) of the right to challenge defects in his stipulation by filing a motion in arrest of judgment or (2.) that the failure to file a motion in arrest of judgment would preclude him from challenging his stipulation on appeal as required under Rule 2.8(2)(d). (Trial and GP Tr. p.

79, L. 7-p. 80, L. 18).

Standard of Review: Claims of error in guilty plea proceedings are reviewed for correction of errors at law. See Iowa R. App. P. 6.907; see also Meron, 675 N.W.2d at 540. Since the prior-offense stipulation procedure is analogous to guilty plea proceedings, review is also for correction of errors at law. Cf. Brady, 442 N.W.2d at 58 (holding that a defendant's admission of prior felony convictions which provide the predicate for sentencing as an habitual offender is so closely analogous to a plea of guilty that it is appropriate to refer to our rules governing guilty pleas).

Discussion: Steiger respectfully submits that the district court erred in accepting his stipulation to prior convictions for purposes of the sentencing enhancement as a third or subsequently offense pursuant to Iowa Code § 901A.2(2). The court failed to engage in a sufficient colloquy to ensure that Steiger's affirmation was entered voluntarily and intelligently.

Where a defendant is alleged to be subject to enhanced punishment based on prior offenses, the defendant must first

be convicted of the underlying offense and then, if found guilty, is entitled to a second trial on the prior convictions. Kukowski, 704 N.W.2d at 691. The State is held to the same "beyond a reasonable doubt" burden of proof in the trial on the enhancement as in the trial on the underlying conviction. Id. In addition to establishing that "the defendant is the same person named in the convictions" the "State must also establish that the defendant was either represented by counsel when previously convicted or knowingly waived counsel." Id.

Iowa Rule of Criminal Procedure 2.19(9) provides that "the offender shall have 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). Thus, the rule "gives the defendant an opportunity to affirm or deny the allegations the State is obligated to prove at the second trial." Kukowski, 704 N.W.2d at 692.

However, "[a]n affirmative response by the defendant under [Rule 2.19(9)]... does not necessarily serve as an

admission to support the imposition of an enhanced penalty as a multiple offender." Id. Rather, "[t]he court has a duty to conduct a further inquiry, similar to the colloquy required under rule 2.8(2), prior to sentencing to ensure that the affirmation is voluntary and intelligent." Id. This is because, although Rule 2.8(2)(b) governing guilty pleas does not *expressly* apply to enhancements, a "defendant's admission of prior... convictions which provide the predicate for sentencing [enhancements] is so closely analogous to a plea of guilty that it is appropriate to refer to our rules governing guilty pleas...." Brady, 442 N.W.2d at 58. "[T]rial courts have a duty to ensure that defendants knowingly and voluntarily stipulate to having prior convictions," State v. McBride, 625 N.W.2d 372, 374-75 (Iowa Ct. App. 2001), and Iowa "Rule [of Criminal Procedure] 2.8(2)(b) codifies [the] due process mandate" courts must follow in accepting admissions of guilt, State v. Loye, 670 N.W.2d 141, 151 (Iowa 2003).

It is well-established that for an admission of guilt to be voluntary or intelligent a defendant must first be informed of

the various trial rights being given up, the nature of the offense being admitted, and the minimum and maximum punishments. See Iowa R. Crim. P. 2.8(2)(b); State v. Sisco, 169 N.W.2d 542, 546 (Iowa 1969). Before a court accepts a guilty plea, it must also ensure the plea is made with a factual basis. See Iowa R. Crim. P. 2.8(2)(b).

Steiger's case proceeded to a bench trial on the predicate offense of indecent exposure, a serious misdemeanor in violation of Iowa Code section 709.9. (Trial Information SRCR369368 – 5/20/15) (App. pp. 48-50). See Iowa Code §§ 709.9 (2015) (indecent exposure is a serious misdemeanor) and 903.1(1)(b) (2015) (for a serious misdemeanor, the defendant shall be fined at least $315 but not exceeding $625 and the defendant may be subject to imprisonment not exceeding one year). The district court ruled from the bench and found Steiger guilty of the charge. (Trial and GP Tr. p. 77, L. 20-p. 79, L. 2). Immediately thereafter, the following record was made regarding Steiger's stipulation to prior incidence exposure offenses:

[PROSECUTOR]: ....At this point, I do think because I filed prior offenses on the trial information, that it is my obligation to prove some of the priors that would be used for sentencing. I do have three certified copies of three of Mr. Steiger's prior convictions. I do not know if we – I think we maybe should have a hearing unless you want to stipulate.

[DEFENSE COUNSEL]: We'll stipulate.

[PROSECUTOR]: Okay. So I won't present those if you're going to stipulate that he does have – I have records here for three. I charged five. So I don't know if you stipulate to more than two.

[DEFENSE COUNSEL]: We'll stipulate to two.

[PROSECUTOR]: All right.

THE COURT: All right. So we're talking about one from South Carolina.

[DEFENSE COUNSEL]: We're talking about the ones in Scott County.

[PROSECUTOR]: I've got two here from Scott County and I also have a certified from Pinellas County, Florida.

[DEFENSE COUNSEL]: I'm not sure what Pinellas County, Florida's definition of indecent exposure is, but I think probably the two in Scott County are sufficient.

THE COURT: I have got notice of one in South Carolina and one in Mississippi in addition to the one here.

[PROSECUTOR]: I was unable to obtain certified copies of the convictions from Mississippi or South Carolina.

[DEFENSE COUNSEL]: Well, the government just needs two from Scott County.

THE COURT: So those have been stipulated to, their existence?

[DEFENSE COUNSEL]: Yeah.

(Trial and GP Tr. p. 79, L. 12-p. 80, L. 18).

The district court here failed to sufficiently advise Steiger of the nature of the sentencing enhancement as a third or subsequent offense pursuant to Iowa Code section 901A.2(2). More specifically, Steiger was not informed that in order for the prior convictions to qualify under Rule 2.19(9) they must have been entered with the assistance of counsel or following a valid waiver of counsel. See Iowa R. Crim. P. 2.8(2)(b)(1); see also Kukowski, 704 N.W.2d at 691 (stating in addition to establishing "the defendant is the same person named in the convictions" the "State must also establish that the defendant was either represented by counsel when previously convicted or

knowingly waived counsel."); Iowa R. Crim. P. 2.19(9) (similarly reciting requirements).

The district court further failed to inform Steiger of the applicable penalties for the sentencing enhancement under Iowa Code section 902.A.2(2). (Trial and GP Tr. p. 79, L. 12-p. 81, L. 18). See Iowa R. Crim. P. 2.8(2)(b)(2). Iowa Code section 901A.2(2) states:

> A person convicted of a sexually predatory offense which is a serious or aggravated misdemeanor, who has two or more convictions for sexually predatory offenses, shall be sentenced to and shall serve a period of incarceration of ten years, notwithstanding any other provision of the Code to the contrary. A person sentenced under this subsection shall not have the person's sentenced reduced under chapter 903A or otherwise by more than fifteen percent.

Iowa Code § 901A.2(2) (2015).

As well, the district court did not inform Steiger of the various trial rights he had and was giving up by stipulating to the sentencing enhancement. See Iowa R. Crim. P. 2.8(2)(b)(4)-(5). All the prosecutor indicated at the outset was that it was his "obligation to prove some of the priors that would be used for sentencing." (Trial and GP Tr. P. 79, L. 13-15).

Finally, the record of the stipulation did not establish that Steiger's prior convictions qualified under Iowa Rule of Criminal Procedure 2.19(9). See Iowa R. Crim. P. 2.19(9). The factual basis for a guilty plea must be disclosed in the record. State v. Rodriguez, 804 N.W.2d 844, 849 (Iowa 2011). During the court's colloquy on the stipulation, Steiger's counsel acknowledged that Steiger had the two predicate convictions out of Scott County to support the sentencing enhancement under Iowa Code section 901A.2(2). (Trial and GP Tr. p. 80, L. 14-16). However, the court did not conduct a further inquiry to determine whether those prior convictions were entered with the assistance of counsel or following a valid waiver of counsel. See Iowa R. Crim. P. 2.8(2)(b)(1); see also Kukowski, 704 N.W.2d at 691 (stating in addition to establishing "the defendant is the same person named in the convictions" the "State must also establish that the defendant was either represented by counsel when previously convicted or knowingly waived counsel."); Iowa R. Crim. P. 2.19(9) (similarly reciting requirements). While defense counsel acknowledged that Steiger was the person

previously convicted, the *validity* of those convictions was not admitted. Moreover, there was no other evidence offered at the time of the stipulation to establish that Steiger's prior convictions qualified for the sentencing enhancement.

In light of the foregoing infirmities, Steiger's stipulation was void as it was neither voluntary nor intelligent and the record on the stipulation did not establish that his prior convictions qualified under Iowa Rule of Criminal Procedure 2.19(9). Kukowski, 704 N.W.2d at 692; Loye, 670 N.W.2d at 151; Sisco, 169 N.W.2d at 546. The district court's failure to substantially comply with the requirements of Rule 2.8(2)(b)(2) constitutes reversible error. Meron, 675 N.W.2d at 542. Because the court did not advise Steiger of motion in arrest of judgment rights or obligations, reversal on direct appeal is not precluded by Steiger's failure to file such motion in the district court. Id. The proper remedy is to reverse his stipulation to the sentencing enhancement and remand to the district court for further stipulation proceedings pursuant to Rule 2.19(9) and 2.8(2)(b) or trial on Steiger's status as third or subsequent

offender. Cf. id. at 542-44.

II. The defendant's guilty plea to the offense of indecent exposure, in violation of Iowa Code section 709.9, in SRCR369403 was not entered knowingly and voluntarily because the district court did not substantially comply with the requirements of Rule 2.8(2)(b).

Preservation of Error: "Generally, a defendant must file a motion in arrest of judgment to preserve a challenge to a guilty plea on appeal." State v. Meron, 675 N.W.2d 537, 540 (Iowa 2004); see also Iowa R. Crim. P. 2.24(3)(a). Steiger did not file a motion in arrest of judgment challenging the validity of his guilty plea. However, failure to file a motion in arrest of judgment does not preclude challenging the plea on direct appeal if the district court did not properly advise the defendant of the preclusive effect of such failure, as required under Rule of Criminal Procedure 2.8(2)(d). State v. Loye, 670 N.W.2d 141, 150 (Iowa 2003); see also Iowa R. Crim. P. 2.8(2)(d).

In the present case, the district court engaged in the following colloquy regarding the motion in arrest of judgment.

> THE COURT: You want to explain to him his right to file a motion in arrest of judgment?

[DEFENSE COUNSEL]: I will.

(An off-the-record discussion was held between the Defendant and his Attorney.)

THE COURT: Have you explained his right to file the motion?

[DEFENSE COUNSEL]: I did, Your Honor.

THE COURT: Do you think he understands that?

[DEFENSE COUNSEL]: He does.

THE COURT: I think that will conclude it for this afternoon then.

(The record was closed at this time.)

(Trial and GP Tr. p. 87, L. 13-25).

Rule 2.8(2)(d) clearly imposes two requirements. Meron 675 N.W.2d at 541. First, the district court "must inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceeding must be raised in a motion in arrest of judgment." Iowa R. Crim. P. 2.8(2)(d). Second, the court must inform the defendant "that failure to so raise such challenges shall preclude the right to assert them on appeal." Id. Even considering the assurances that counsel

for Steiger explained the right to file a motion in arrest of judgment, this guarantee would be insufficient to satisfy the second element of rule. 2.8(2)(d). Meron, 675 N.W.2d at 541. The court never asked Steiger if his attorney also discussed the consequences of failing to file a motion. Accordingly, Steiger is not precluded from challenging his plea on appeal.

Standard of Review: Claims of error in guilty plea proceedings are reviewed for correction of errors at law. Iowa R. App. P. 6.907; Meron, 675 N.W.2d at 540.

Discussion: Steiger respectfully submits that his guilty plea to the offense of indecent exposure, in violation of Iowa Code section 709.9, in SRCR369403 was not entered knowingly and voluntarily because the plea colloquy did not substantially comply with Rule 2.8(2)(b).

Rule 2.8(2)(b) implements the constitutional due process standards for acceptance of a guilty plea. State v. Ramirez, 636 N.W.2d 740, 741–42 (Iowa 2001). Before accepting a plea of guilty, rule 2.8(2)(b) requires the court to determine if the plea is voluntarily and intelligently made and has made a factual

basis. State v. Kirchoff, 452 N.W.2d 801, 804 (Iowa 1990). To satisfy this requirement the court is required to make a specific inquiry into a number of matters set forth in the rule. See id. at 804-05. Absent a written guilty plea describing all the matters set forth in the rule, noncompliance with oral requirements of the rule normally constitutes reversible error. See State v. Hook, 623 N.W.2d 865, 871 (Iowa 2001), *abrogated in part on other grounds by* State v. Barnes, 652 N.W. 466, 468 (Iowa 2002).

Pursuant to rule 2.8(2)(b), the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

> (1) The nature of the charge to which the plea is offered.
>
> (2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.
>
> (3) That a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws.
>
> (4) That the defendant has the right to be tried by a

> jury, and at trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against the defendant, the right not to be compelled to incriminate oneself, and the right to present witnesses in the defendant's own behalf and to have compulsory process in securing their attendance.
>
> (5) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.

Iowa R. Crim. P. 2.8(2)(b). Additionally, the court may, in its discretion and with the approval of the defendant, waive these procedures in a plea of guilty to a serious or aggravated misdemeanor. Id.

A substantial-compliance standard is applied in determining whether a court has adequately informed a defendant of the Rule 2.8(2)(b) advisories. See State v. Loye, 670 N.W.2d 141, 151 (Iowa 2003). " 'Substantial compliance' requires at a minimum that the defendant be informed of these matters and understand them." Id. (citation omitted).

In the present case, Steiger entered a guilty plea in court to the serious misdemeanor charge of indecent exposure, a predicate offense, in SRCR369403. (Trial and GP Tr. p. 82, L.

5-p. 86, L. 8; Order Accepting Plea SRCR369403 – 7/10/15) (App. pp. 40-42). The plea proceeding was markedly abbreviated, consisting only of inquiry by defense counsel regarding a factual basis. (Trial and GP Tr. p. 82, L. 5-p. 86, L. 8; Order Accepting Plea SRCR369403 – 7/10/15) (App. pp. 40-42).

The district court did little other than to ask Steiger a few clarifying questions to establish a factual basis for the indecent exposure charge. (Trial and GP Tr. p. 82, L. 5-p. 86, L. 8). The court failed to make specific inquiry into any of the other matters set forth in rule 2.8(2)(b). For instance, the court failed to advise Steiger of the applicable penalties or the immigration consequences. See Iowa R. Crim. P. 2.8(2)(b)(2)-(3). (Trial and GP Tr. p. 82, L. 5-p. 86, L. 8). Also, the court did not inform Steiger of his right to a jury trial, the right to assistance of counsel at trial, the right of confrontation and cross-examination of the State's witnesses, the right against self-incrimination, and the right to compulsory process. See Iowa R. Crim. P. 2.8(2)(b)(4)-(5). (Trial and GP Tr. p. 82, L.

5-p. 86, L. 8). The court never explained to Steiger that he was waiving these trial rights by pleading guilty. (Trial and GP Tr. p. 82, L. 5-p. 86, L. 8). Id. Moreover, there was no written guilty plea filed to supplement the in-court plea colloquy.

Further, the record clearly suggests that Steiger felt coerced into pleading guilty. Steiger initially claimed that he had no recollection of the incident in question. (Trial and GP Tr. p. 82, L. 11-p. 83, L. 16). Defense counsel thereafter admonished Steiger, "Well, you've got to recall. Yes or no?" (Trial and GP Tr. p. 83, L. 14-16). Steiger at that point relented and responded "yes." (Trial and GP Tr. p. 83, L. 14-16). When asked if the person to whom he exposed himself was not his spouse, he replied, "I guess so." (Trial and GP Tr. p. 83, L. 17-21). Defense counsel then pressed Steiger to give a "yes" or "no" answer, to which Steiger answered "yes." (Trial and GP Tr. p. 83, L. 17-21). Steiger indicated that he was pleading guilty only because he had no other choice. (Trial and GP Tr. p. 83, L. 7-10).

The record demonstrates that the requirements of rule

2.8(2)(b) were not met. Because Steiger's guilty plea to indecent exposure in SRCR369403 was not entered knowingly and voluntarily, the judgment and sentence of the district court must be reversed and the case remanded for further proceedings to allow Steiger to plead anew. Meron, 675 N.W.2d at 544.

CONCLUSION

For the reasons stated, Defendant-Appellant Johnnie Ray Steiger, respectfully requests that this court vacate his convictions and sentences for indecent exposure and remand the case to district court for further proceedings.

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Application for Further Review was $ 3.65, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

NAN JENNISCH
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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

[X] this application contains 4,336 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or (2)

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[x] this application has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Bookman Old Style, font 14 point.

Dated: 11/14/14

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IN THE COURT OF APPEALS OF IOWA

No. 15-1630
Filed October 26, 2016

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHNNIE RAY STEIGER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Douglas C. McDonald (trial and plea) and Christine Dalton Ploof (sentencing), District Associate Judges.

Johnnie Steiger appeals two judgments for indecent exposure. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

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

Thomas J. Miller, Attorney General, and Kelli A. Huser, Assistant Attorney General, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and McDonald, JJ.

VAITHESWARAN, Judge.

Johnnie Steiger appeals two judgments for indecent exposure (third or subsequent offense). The first was entered following a bench trial. At the conclusion of trial, Steiger stipulated to two prior convictions for sentencing enhancement purposes. The second judgment was entered in connection with a guilty plea. At the end of the guilty-plea proceeding, Steiger acknowledged his stipulation to the prior convictions.

On appeal, Steiger contends the district court (I) "failed to engage in a sufficient colloquy" about his stipulation to prior convictions in the first case and (II) failed to engage in a sufficient guilty plea colloquy in the second case.

I. Colloquy on Stipulation to Prior Convictions

Where the State alleges an offender has one or more prior convictions that may subject the offender to an increased sentence, Iowa Rule of Criminal Procedure 2.19(9) authorizes a second proceeding, "[a]fter conviction of the primary or current offense," in which "the offender shall have 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." "The court has a duty to conduct a further inquiry, similar to the [guilty plea] colloquy required under rule 2.8(2), prior to sentencing to ensure that the affirmation is voluntary and intelligent." *State v. Kukowski*, 704 N.W.2d 687, 692 (Iowa 2005). Steiger challenges the district court's compliance with the obligation to conduct a rule 2.19(9) colloquy but preliminarily addresses the question of whether he preserved error.

Steiger concedes he "did not file any motion in arrest of judgment challenging his stipulation to the prior offenses." In his view, "such failure does not preclude a challenge to his stipulation on direct appeal because the district court failed to advise [him] either (1) of the right to challenge defects in his stipulation by filing a motion in arrest of judgment, or (2) that the failure to file a motion in arrest of judgment would preclude him from challenging his stipulation on appeal as required under rule 2.8(2)(d)." The State responds that "a stipulation to prior convictions is not a guilty plea" and "the rule governing the defendant's admission of prior convictions does not mention a requirement to file a motion in arrest of judgment" but "recognizes that the defendant must make some objections prior to or at the time of trial."

This court recently addressed the identical error preservation issue in *State v. Harrington*, No. 15-0308, 2016 WL 3556375, at *3 (Iowa Ct. App. June 29, 2016). There, as here, the defendant stipulated to his prior convictions and did not object to the sufficiency of the district court's rule 2.19(9) colloquy. *See Harrington*, 2016 WL 3556375, at *1-2. And there, as here, the defendant argued that this court could nonetheless review the sufficiency of the colloquy because the district court failed to advise him of his ability to challenge the colloquy by filing a motion in arrest of judgment. We stated, although

> a motion in arrest of judgment would have been an appropriate vehicle to challenge the enhancement proceedings in this case . . . the availability of that remedy [did] not mandate the district court provide a warning . . . that a failure to file a motion in arrest of judgment precludes the right to assert a challenge on appeal of a defect.

Id. at *3. Because the defendant did not alternatively raise the sufficiency of the rule 2.19(9) colloquy under an ineffective-assistance-of-counsel rubric, we concluded error was not preserved. *See id.*; *cf. State v. Peterson*, 11-1409, 2012 WL 3860730, at *4 (Iowa Ct. App. Sept. 6, 2012) (determining "the court's notice for the requirement to file a motion in arrest of judgment was insufficient" and deciding the issue on direct appeal where "the admissions at issue were made in conjunction with the guilty plea proceedings").

We find the reasoning of *Harrington* persuasive. Steiger had an obligation to object to the sufficiency of the rule 2.19(9) colloquy either by way of a motion in arrest of judgment or otherwise in order to preserve the issue for appeal. The district court's failure to advise him of the right to challenge the defects via a motion in arrest of judgment as well as the consequences of failing to file a motion did not obviate his obligation to object. Because Steiger failed to object and did not alternatively raise the issue as an ineffective-assistance-of-counsel claim, we conclude error was not preserved and we decline to address the sufficiency of the colloquy. We affirm the judgment and sentence for indecent exposure (third or subsequent offense) in the case involving the bench trial (SRCR369368).

II. Guilty Plea Colloquy

Steiger next challenges the sufficiency of the guilty plea colloquy in the second case. *See* Iowa R. Crim. P. 2.8(2)(b) (requiring the court to inform the defendant of various matters in a guilty plea proceeding). The State concedes error was preserved and concedes the guilty plea colloquy was insufficient.

We conclude the colloquy was inadequate. We reverse the judgment and sentence in the guilty plea proceeding (SRCR369403) and remand for further proceedings to allow Steiger to plead anew.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.