RECEIVED
04-26-2016
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Appeal No. 2015AP001824-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

BRUCE T. HENNINGFIELD,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR RACINE COUNTY
THE HONORABLE ALLAN B. TORHORST PRESIDING

Hans P. Koesser,
State Bar #1010219

Attorney for Defendant-Appellant

Koesser Law Office, S.C.
Post Office Box 941
Kenosha, Wisconsin 53141-0941
Telephone & Fax No.: (262) 654-4864

TABLE OF CONTENTS

Table of Contents……...i

Table of Authorities……...ii

Statement of the Issues……..vi

Necessity of Oral Argument & Publication……..vii

Statement of the Case……1

Argument……8

I. HENNINGFIELD IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY WAS MADE AWARE OF THE FACT THAT HENNINGFIELD HAD PRIOR CONVICTIONS FOR OPERATING A MOTOR VEHICLE WHILE INTOXICATED ONLY BECAUSE OF THE IMPROVIDENT REMARKS OF HIS OWN ATTORNEY DURING OPENING STATEMENTS…...8

A. Ineffective Assistance of Counsel……..18

1. Standard of Review……19

2. Legal Principles……...19

3. Trial counsel should not have told the jury that his client had prior drunken driving convictions and Henningfield was prejudiced thereby……20

B. New Trial in the Interest of Justice……22

1. Standard of Review……22

2. Legal Principles……...22

3. Trial counsel's revelation to the jury that his client had prior drunken driving convictions prevented the jury from fairly and impartially deciding the case…….24

II. THE DEFENDANT DID NOT KNOWINGLY VOLUNTARILY AND INTELLIGENTLY WAIVE HIS RIGHT TO A JURY TRIAL ON THE STATUS ELEMENT OF THE OFFENSE OF OPERATING A MOTOR VEHICLE WITH A PROHIBITED BLOOD ALCOHOL CONTENT……24

1. Standard of Review……..24

2. Henningfield did not knowingly, voluntarily and intelligently waive his right to a jury trial on the status element…….. 25

III. THE DOCTRINE OF ISSUE PRECLUSION BARRED THE STATE FROM CHARGING HENNINGFIELD WITH DWI-10TH OR GREATER IN THIS CASE BECAUSE HE WAS FOUND TO BE ONLY A FIFTH-TIME OFFENDER IN HIS PREVIOUS RACINE OWI CASE…….33

1. Standard of Review……...33

2. The State was precluded from charging Henningfield with anything more than an OWI 6th.....34

Conclusion……42

Certifications……...43-44

Index to Appendix……44

Appendix……at end of paper brief

TABLE OF AUTHORITIES

Cases Cited

***Cromwell v. Heritage Mut. Ins. Co.*,**
118 Wis. 2d 120,
346 N.W.2d 327 (Ct. App. 1984)……36

Masko v. City of Madison,
2003 WI App 124,
265 Wis. 2d 442,
665 N.W.2d 391……33

***Michelle T. v. Crozier*,**
173 Wis. 2d 681,
495 N.W.2d 327 (1993)……..34,35,41

***Mrozek v. Intra Financial Corp.*,**
2004 WI App 43,
271 Wis. 2d 485,
678 N.W.2d 264……..34,36

***Mrozek v. Intra Financial Corp.*,**
2005 WI 273
281 Wis. 2d 448,
678 N.W.2d 264……...35,37

***Mulkovich v. State*,**
73 Wis. 2d 464,
243 N.W.2d 198 (1976)……21

***Nash v. United States*,**
54 F.2d 1006 (2nd Cir. 1932)……21

***Northern States Power Co. v. Bugher*,**
189 Wis. 2d 541,
525 N.W.2d 723 (1995)……35

***Paige K.B. v. Steven G.B.*,**
226 Wis. 2d 210,
594 N.W.2d 370 (1999)……..34,35,36

***Prudential Prop. & Cas. Ins. Co. v. Kollar*,**
578 A.2d 1238
(N.J. Super. Ct. App. Div. 1990)……..39

***Schwigel v. Kohlmann*,**
2002 WI App 121,
254 Wis. 2d 830,
647 N.W.2d 362……21

***State v. Alexander*,**
214 Wis. 2d 628,
571 N.W.2d 662 (1997)…….....8,9,10,11,24

***State v. Anderson*,**
2002 WI 7,
249 Wis. 2d 586,
638 N.W.2d 301…….24,30,38

***State v. Bangert*,**
131 Wis. 2d 246,
389 N.W.2d 12 (1986)……30

***State v. Barton*,**
2006 WI App 18,
289 Wis. 2d 206,
709 N.W.2d 93……23

State v Burns,
2011 WI 22,
332 Wis. 2d 730,
798 N.W.2d 166, 174……..22

***State v. Cooks*,**
2006 WI App 262,
297 Wis. 2d 633,
726 N.W.2d 322…….....19

***State v. Dillard*,**
2014 WI 123,
358 Wis. 2d 543,
859 N.W.2d 44……19

***State v. Grant*,**
230 Wis. 2d 90,
601 N.W.2d 8 (Ct. App. 1999)…….30

State v. Hajicek,
2001 WI 3,
240 Wis. 2d 349,
620 N.W.2d 781……25

***State v. Hampton*,**
2004 WI 107,
274 Wis. 2d 379,
683 N.W.2d 14……..31

***State v. Hicks*,**
202 Wis. 2d 150,
549 N.W.2d 435 (1996)……23,24

***State v. Hirsch*,**
2014 WI App 39,
353 Wis. 2d 453,
847 N.W.2d 192……35

***State v. Mayo*,**
2007 WI 78
301 Wis. 2d 642,
734 N.W.2d 115……20

***State v. Truax*,**
151 Wis. 2d 354,
444 N.W.2d 432 (Ct. App. 1989)……22

***State v. Verhagen*,**
2013 WI App 16,
346 Wis. 2d 196,
827 N.W.2d 891……11

***State v. Warbleton*,**
2009 WI 6,
315 Wis. 2d 253,
759 N.W.2d 557……30

Statutes Cited

Wis. Stat. § 343.307(1)(b)……..8

Wis. Stat. § 343.307(1)……..8,9,10,34

Wis. Stat. § 343.307(3)……...8

Wis. Stat. § 346.63(1)(a)……1

Wis. Stat. § 346.63(1)(b) ……..2,12

Wis. Stat. § 752.35……23

Wis. Stat. § 946.41(1)……1

Wis. Stat. § 971.08(1)……..38

Wis. Stat. § 972.02(1)……...30

Constitutional Provisions

U.S. Const. amend. VI……19

U.S. Const. amend. XIV……19

Wis. Const. art. 1, § 7……..19

Other Authorities

Restatement (Second) of Judgments § 85,
comment B at 296 (1980)……..36

Wis. JI-Criminal 157……...21,22

STATEMENT OF THE ISSUES

1A. Was trial counsel ineffective for revealing to the jury during his opening statement that the defendant had prior drunken driving convictions, despite the fact that trial counsel had a stipulation from the state that those convictions would not be revealed to the jury?

Trial Court Answer: No. Trial counsel not ineffective, but it is uncertain that the trial court understood the argument.

1B. Should the defendant be given a new trial in the interest of justice due to the fact that the jury was erroneously made

aware of the defendant's prior drunken driving convictions when that information should not have been given to them?

Trial Court Answer: Not directly answered by trial court. The issue was presented to the trial court in the postconviction motion and at the postconviction hearing.

2. Did the defendant validly waive his right to a jury trial on the status element of the offense and was the trial court's colloquy with the defendant sufficient?

Trial Court Answer: Not directly answered by the trial court. The issue was presented to the trial court in the postconviction motion and at the postconviction hearing.

3. Did the doctrine of issue preclusion estop the state from charging the defendant with anything greater than an OWI-6th because in the defendant's previous OWI case before the Racine County Circuit Court he was found to be only a fifth-time offender?

Trial Court Answer: Not answered by the trial court. The issue was presented to the trial court in the postconviction motion and at the postconviction hearing.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication. This case can be decided on the basis of the briefs and the record.

STATEMENT OF THE CASE

On January 23, 2012 a criminal complaint (R1) was filed in the Racine County Circuit Court charging the Defendant with (Count One) Operating While Intoxicated-10th and Subsequent Offence, contrary to Wis. Stat. § 346.63(1)(a), and (Count Two) Resisting an Officer, contrary to Wis. Stat. § 946.41(1).

The complaint alleged that on January 22, 2012 at approximately 1:00 a.m., Officer Karasek of the Sturtevant Police Department was dispatched to the area of County Highway H and Durand Avenue in the Village of Sturtevant for a person stuck in a ditch. The caller indicated that that the driver of the vehicle was on the scene and was "staggering" around and believed he may be intoxicated. The caller was identified as Lillie J. Jones.

Upon arrival at the scene, the defendant told Officer Karasek that he had been driving the truck and lost control of the vehicle and slid into the ditch after someone had crossed the centerline which forced him off the road. Officer Karasek noticed that the defendant's eyes were very glassy and his speech was slurred, but the defendant denied drinking any intoxicated beverages. Officer Karasek asked the defendant to perform a horizontal gaze nystagmus test, but the defendant was unable to perform the test because he continually moved his head rather than following the pen with his eyes. The defendant also refused to try the walk and turn test or the one-leg stand, claiming he had a leg injury. (R1:2)

The complaint further alleged that the defendant was placed under arrest and placed in Officer Karasek's squad car. Officer Karasek left the squad for a short period of time and when he returned, he found the defendant passed out and lying down in the squad. He transported the defendant to the hospital. The defendant

admitted to hospital staff that he had three drinks, but then denied that he had said that. While at the hospital, the defendant repeatedly called Officer Karasek a "fucking idiot" and repeatedly referred to other people present as "fucking idiots." At one point hospital staff performed a preliminary breath test on the defendant which showed a breath alcohol concentration of .20. (R1:2)

At some later point during his hospital stay, the defendant took out an item out of his pocket that he described as a "crumb scraper." Officer Karasek ordered the defendant to give him the item, but the defendant refused. At that point Officer Karasek grabbed the defendant's right arm while Officer Jaramillo grabbed his left arm. The defendant began to resist by tensing his arms and making it difficult to place his hands behind his back. The officers were eventually able to place the defendant's hands behind his back and secure them in handcuffs.

On February 9, 2012 the state filed an amended criminal complaint adding one count (Count Three) of Operating a Motor Vehicle With Prohibited Alcohol Concentration-10th and Subsequent, contrary to Wis. Stat. § 346.63(1)(b). (R2)

On February 16, 2012 the defendant appeared before the Honorable Allan B. Torhorst for a preliminary examination. (R46) The court found probable cause and bound the defendant over for further proceedings. (R46:11) An information (R3) was filed containing the same charges as listed in the criminal complaint. The defendant was arraigned and he entered pleas of not guilty. (R46:11)

On May 14, 2012[1] a status hearing was held before Judge Gaskiorkiewicz. The court also inquired whether there had been any changes in the plea offer "since April" [2012]. (R48:2). Assistant District Attorney ("ADA") Newlun indicated "I did come down one year on the initial confinement on May 14 or 4-13." (R48:2)

The defense also requested a special hearing prior to the trial on the issue of the defendant's prior convictions. (R49:9) The court advised defense counsel that he was not prohibited from collaterally attacking those convictions. (R49:9) ADA Newlun noted that if necessary, the state would be required to prove each of the prior convictions to the jury. (R49:10) The court suggested that it might be better to work out a stipulation because "I have to tell you in the matters that I've tried where there's a large number of prior convictions, most defendants do not want that number before the jury, and there is an agreement made prior to that time to avoid that problem." (R49:10-11) Defense counsel noted that the defendant's last DWI conviction occurred in June 2011 where the defendant was found guilty of only a "misdemeanor fifth plus." (R49:11)[2]

On September 17, 2012 a final pretrial was held before the Honorable Allan B. Torhorst. (R50). The state indicated it would be filing a motion *in limine* and proposed jury instructions. Defense counsel indicated that there would be a stipulation between the

---

[1] The transcript of the proceeding erroneously lists the date of the proceeding as occurring on May 14, 2013. The record (R48) contains the accurate date of May 14, 2012.

[2] One of the defendant's arguments on this appeal is that the state was collaterally estopped from charging him with more than an OWI-6th because in the OWI case in Racine County (Racine County Circuit Court Case No. 96CT48) immediately preceding the instant case, a Racine County Circuit Court Judge found that he had only five prior offenses. Additional facts relevant to this issue will be discussed below and in the Argument section of this brief.

parties as to the legality of the blood draw and the test results. (R50:2) See Appendix at A11.

On September 24, 2012 a status hearing was held before Judge Torhorst. (R51) Defense counsel indicated that the defense would agree to at least three prior OWI related convictions. (R51:4) ADA Newlun noted that by stipulating to the three priors, the defendant would be relieved of having that information presented to the jury. However, by stipulating to them, the defendant would be relieving the state of proving one of the elements. ADA Newlun advised the court that a colloquy with the defendant would be necessary. (R51:4-5) Defense counsel indicated that as a strategic matter, the defendant would stipulate to the three priors for purposes of trial, but reserved the right to challenge any and all priors at the time of sentencing. (R51:6) The court then proceeded to engage the defendant in a personal colloquy[3] concerning the defendant's stipulation to an element of the offense and relieving the state from proving that element. (R51:7-12)

On September 25, 2012 a hearing was held before Judge Torhorst. (R52) The state filed an amended information (R4) adding the third count contained in the amended complaint-Operating a Motor Vehicle With Prohibited Alcohol Condsentration-10th and Subsequent. (R52;8). The defendant entered a plea of not guilty. (R52:9)

On December 18, 2012 the parties appeared before Judge Torhorst for the jury trial. (R53). The parties then advised the court that an additional stipulation concerning the number of the

[3] One of the issues on this appeal is whether the colloquy was adequate. The defendant asserts that it was not. Additional facts concerning this issue will be discussed in the Argument section of this brief.

defendant's prior convictions for general impeachment would be needed should the defendant choose to testify. (R53:3-4) The court then considered ADA Newlun's recitation of twenty prior criminal convictions. (R53:4-6) Defense counsel argued that the court should follow the "federal 10-year rule" (R53:5) and only count convictions going back to the year 2000. (R53:7) If that standard applied, the defendant would only have seven prior convictions. (R53:7) The court adopted a hybrid approach, following the defense suggestion by only going back to the year 2000, but adopting the state's methodology of counting the priors. The court concluded that the appropriate number of priors for general impeachment would be 19. (R53:5-9)

On December 19, 2012, the case was tried to a jury. The defendant testified on his own behalf. He indicated that he got off work at the Olive Garden in Racine at approximately 11:00 p.m. (R54:141) and proceeded to drive home. When he approached the intersection of Durand Avenue and Highway H, he attempted to turn left (southbound) onto Highway H. He explained the accident as follows:

> I know it as Highway H southbound. I was turning left and I tried to kind of slant in, not taking a real sharp turn. There was a car coming up H though that was turning left and kind of nosed up far, and so I kind of went around him. At that point my rear end slid out, at which time the rear end slid into the ditch. I made a decision then to punch it to give it gas hoping that my momentum and the power of wheels would pull me out. Unfortunately, there's a bit of a drop-off, and one of the front tires was already down off the roadway and it just wouldn't come back up, and so I went to try to accelerate out and went at an angle with the road and then hit the 55 mile an hour speed limit sign.

(R54:141)

The defendant testified that this occurred at approximately 11:10 p.m. and that at the time this happened, he had not been drinking and he was sober. (R54:141-42)

He was beginning to get cold so he left his truck and walked east on Durand Avenue to the Hiawatha Ballroom. (R54:142-43) He ordered a Miller Lite. (R54:144). The defendant testified that sitting to his right at the bar were six patrons that he waited on at the Olive Garden – a couple he knew and their family, and they were there celebrating the mother's birthday. (R54:145) Although these people did not know the defendant by name, he knew they recognized him. The defendant testified that he explained to both the bartender and the patrons on his right that he had just slid into a ditch on his way home from the Olive Garden, and that he had walked to the Hiawatha. (R54:145)

The defendant indicated that the patrons on his right began buying shots of Goldschläger, a 100 proof liquor, and that he consumed "probably a good eight ounces total of that. Maybe five shots that are an ounce and two thirds or so full of alcohol." (R54:146)

The defendant testified that he was concerned about getting home at that point and explained his situation to two gentlemen at the bar. One of the men offered to give him a ride home, but the man was not ready to leave. (R54:146) After much rumination, the defendant decided to walk back to his truck and retrieve his cell phone and other items. (R54:146). At approximately 1:00 a.m., the defendant began walking back to his truck and as he approached the intersection, he noticed a car parked in the roadway next to his truck. (R54:147)

The defendant testified that he met up with a man and a woman. The man offered assistance. The defendant indicated to the man that if he were willing to give him a ride home, he would accept that assistance. (R54:147) The defendant indicated that the man was "a very large, strong, young man and he thought he could push it out, but it was –with the flat tire there was no way it would come out of there, so I declined his offer to push it out." (R54:148) The defendant indicated that he did not have his keys at the time because he had left them at the bar with the two gentlemen who offered to assist him. (R54:148).

The jury ultimately returned verdicts of guilty on all counts. (R54:215-16). The defendant moved for judgment notwithstanding the verdict, which the court denied. (R54:218)

On January 8, 2013 a hearing was held before Judge Torhorst on the defense counsel's motion to withdraw from representation. (R55) The motion was denied. (R55:6) The court indicated that if the defense wished to collaterally attack any of the defendant's prior convictions the defense could file a motion prior to sentencing. (R55:6-7)

On March 4, 2013 a motion and sentencing hearing was held before Judge Torhorst. (R57) The court considered the defendant's collateral attack on some of his prior convictions. (R57:1-16) The court heard arguments from the parties concerning an appropriate sentence. (R54:16-22) The defendant also addressed the court. (R57:22-26) The court then sentenced the defendant to the absolute maximum sentence of 12 years and 6 months to the Wisconsin State Prisons (Count One). On Count Two - - Resisting, the court imposed the maximum penalty of 9 months, but ordered that to run

concurrent to his prison sentence. See Judgment of Conviction. (R34,R35)

Thereafter the defendant filed a Motion for Postconviction Relief (R38). The court held a hearing on the defendant's motion on August 20, 2015. On August 25, 2015 the trial court entered a written decision denying the defendant's motion. (R42)(See Appendix at A1-A7). On September 2, 2015 the defendant filed a Notice of Appeal from his judgment of conviction and from the decision denying his postconviction motion. (R43). The evidence and testimony developed at the postconviction hearing and the court's findings will be discussed below in connection with each issue.

ARGUMENT

I. HENNINGFIELD IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY WAS MADE AWARE OF THE FACT THAT HENNINGFIELD HAD PRIOR CONVICTIONS FOR OPERATING A MOTOR VEHICLE WHILE INTOXICATED ONLY BECAUSE OF THE IMPROVIDENT REMARKS OF HIS OWN ATTORNEY DURING OPENING STATEMENTS

In *State v. Alexander*, 214 Wis. 2d 628, 571 N.W.2d 662 (1997), the defendant was charged with a Operating a Motor Vehicle with a Prohibited Alcohol Concentration of 0.08 or greater, in violation of Wis. Stat. § 346.63(1)(b) (1993-94).[4] *Id.* at 633 I, 640-41. That offense had three elements: (1) that the defendant drove or operated a motor vehicle on a highway; (2) that at the time the defendant had two or more prior convictions, suspensions, or revocations under Wis. Stat. § 343.307(1); and (3) that the defendant

[4] Alexander was charged under the 1993-94 version of the Wisconsin Statutes. See *Alexander*, 214 Wis. 2d at 633, fn.1

had a prohibited alcohol concentration at the time he operated the vehicle. *Id*. at 640. Under Wisconsin law at that time, if a defendant had only one or no prior convictions, suspensions, or revocations, the prohibited alcohol concentration was 0.10 or more of alcohol in 210 liters of the person's breath, or 0.10 percent or more by weight of alcohol in the person's blood. *Id*. at 640-41.

Prior to the pretrial conference, Alexander's attorney filed a motion in which the defendant offered to stipulate that his driving record correctly sets forth that he had two prior OWI convictions. *Id*. at 637. With this offer to stipulate the defendant also filed a motion *in limine* requesting that the court order the state to refrain from introducing any evidence regarding the defendant's prior OWI convictions. Alexander also moved to modify the substantive jury instructions. *Id*. The thrust of the defendant's proposals was to eliminate the element regarding his prior convictions as a matter for the jury to determine at trial, and to have this element considered only by the court at sentencing. *Id*. The state agreed to stipulate to the existence of the defendant's prior OWI convictions, but refused to waive that portion of the jury trial which would be relevant to making a finding on that element. *Id*.

The trial court denied Alexander's motion and concluded that the state was required to stipulate to the fact that the defendant has two prior convictions, suspensions, etc., under Wis. Stat. § 343.307(1), but that the state could not be forced to waive any portion of the jury trial. *Id*. at 637-38. After the judge's ruling, the parties agreed to the judge's proposed jury instruction regarding their stipulation to the prior convictions. They stipulated to the following facts:

> Evidence has been received that the defendant has two or more convictions, suspensions or revocations as counted under section 343.307(1) of the statutes. This evidence is received solely because it bears upon the second element that the State must prove for the offense of driving with a prohibited alcohol concentration. It must not be used for any other purpose and, particularly, you should bear in mind that conviction, suspension or revocation as counted under section 343.307(1) at some previous time is not proof of the guilt of the offense now charged.

Id. at 638.

The Wisconsin Supreme Court stated that the issue presented by the case was whether the circuit court erroneously exercised its discretion when it admitted evidence of the element of two or more prior convictions, suspensions or revocations under Wis. Stat. § 343.307(1) and submitted the element to the jury when the defendant fully admitted to the element and the purpose of the evidence was solely to prove that element. *Id*. at 639-40. The court held:

> Accordingly, we hold that when the sole purpose of introducing any evidence of a defendant's prior convictions, suspensions, or revocations under Wis. Stat. § 343.307 is to prove the status element and the defendant admits to that element, its probative value is far outweighed by the danger of unfair prejudice to the defendant. We hold that admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury in this case was an erroneous exercise of discretion.

Id. at 651.

The Supreme Court explained that in cases where a defendant is charged with driving with a prohibited alcohol concentration and the jury is informed that the defendant has prior convictions,

suspensions or revocations, it is highly probable that the jury will infer that the prior offenses are driving offenses and likely OWI offenses. *State v. Alexander*, 214 Wis. 2d 628, 644, 571 N.W.2d 662 (1997):

> Evidence of prior convictions may lead a jury to convict a defendant for crimes other than the charges crime, convict because a bad person deserves punishment rather than based on the evidence presented, or convict thinking that an erroneous conviction is not so serious because the defendant already has a criminal record.

Id. at 643. See also *State v. Verhagen*, 2013 WI App 16, ¶ 33, 346 Wis. 2d 196, 215, 827 N.W.2d 891.

The *Alexander* court concluded that where a jury is informed that a defendant has two or more prior convictions, suspensions, or revocations, "it is highly probable that the jury will infer that the prior offenses are driving offenses and likely OWI offenses." *Alexander*, 214 Wis. 2d at 644; *Verhagen*, 346 Wis. 2d at 215-16. In turn, this evidence would raise the inference that the defendant "has a bad character and a propensity to drink and drive. . ." *Alexander*, 214 Wis. 2d at 650; *Verhagen*, 346 Wis. 2d at 216.

As noted previously, Henningfield's case was tried to a jury on December 19, 2012. The State presented the defendant with two proposed stipulations: (1) a stipulation as to the blood draw and that the results indicated a blood alcohol concentration of 0.278 grams per 100 milliliters of blood. See: (R39 Exhibit A1; (R50:2); supra., p.9; and Appendix at A12); and (2) a stipulation by the defendant that he had at least three prior convictions See: (R39: Exhibit A2); supra., pp. 10-11; and Appendix at A11. Concerning the second stipulation, it was specifically noted in the stipulation that:

> It is further understood that by stipulating to the three prior convictions, the defendant is stipulating to an element of the offense and removing the state's burden to prove that element, and further preventing the state from introducing evidence of those prior convictions to prove said element.

During opening statements, both the prosecutor and defense attorney referred to the applicable blood alcohol level that applied to the defendant. The prosecutor stated in pertinent part:

> So the defendant is transported to the hospital for a blood test. The defendant agreed to a blood test, and once again lied to the officer because he said they wouldn't find anything in his blood. Well, they were wrong—he was wrong because eventually his blood was tested by the crime lab, and we will—there is a stipulation that he had a blood alcohol concentration of .278 grams per 100 milliliters of the defendant's blood. *The defendant's limit is .02. So he was almost fourteen times his legal limit. Over three times even the .08 standard that people talk about.*

(R54:62) Although the prosecutor stated that Henningfield's blood alcohol limit was .02, he did <u>not</u> state *why* his limit was .02.

Defense counsel, on the other hand, also told the jury that the defendant's personal legal blood alcohol limit was less than the standard that applied to other people. However, he took the additional step of inviting the jurors to speculate *why* that might be. Defense counsel stated in pertinent part:

> I will try to keep this more to what is at issue here today. My client, ***basically it's out of the bag, he had a lower alcohol expectation, a .02. This is an intelligent jury. I heard what you do, what you—you're professional, some of you married, some of you not. I know you can put two and two together,*** but the issue is not that was he drunk or was he not drunk. He was drunk . . . but the one thing they're going to be

> lacking throughout the whole thing is evidence that my client was in the vehicle driving, operating the vehicle while he was intoxicated.

(R54:66-67)

At the postconviction hearing, trial counsel was asked why he made the above comment. Trial counsel admitted, quite bluntly, that in making the statement, it was his specific intent to communicate to the jury that his client did, in fact, have prior drunken driving convictions. (R58:5) Conversely, he also testified that his reason for entering into the stipulation in the first place was to prevent the jurors from finding out about that. (R58:5) Trial counsel explained his strategy further by stating that the fact of the defendant's prior OWIs would have come out anyway during the course of the trial:

> APPELLATE COUNSEL: Okay, so what reason would you have had to tell the jury or imply that he had prior convictions for drunk driving?
>
> TRIAL COUNSEL: Well as I discussed with Mr. Henningfield at the time, it would have – we felt it would have been a low bar to go over for the District Attorney to prove three priors, so my reasoning was let's be the ones to bring it out rather than it be a "gotcha" moment. That way we could get it out early and not – that it wouldn't be a big issue to dwell on that, we could just move forward from it.
>
> APPELLATE COUNSEL: But the whole point of that stipulation was to prevent that evidence coming before the jury.
>
> TRIAL COUNSEL: Well, I don't know if I agree with you completely because it's – even with a stipulation it's still – it's still going to come before the jury. I just didn't – I wanted it to be a feather in our cap rather than the District Attorney's that we were being forward –straightforward.

> APPELLATE COUNSEL: How would that come before the jury?
>
> TRIAL COUNSEL: Well, if – if there's a stipulation – is that what you mean?
>
> APPELLATE COUNSEL: Well, you entered into the stipulation that he had at least three priors. So that evidence of the priors wouldn't come before them, correct? Wouldn't come before the jury.
>
> TRIAL COUNSEL: Well, I still think it was going to be – it could be visited by the District Attorney even if with the stipulation.
>
> APPELLATE COUNSEL: You're saying that the District Attorney could bring out the fact that he had prior convictions for drunk driving even with the stipulation?
>
> TRIAL COUNSEL: Well, the stipulating to the three priors was just a matter of – of cutting it off at the pass where he wouldn't have to bring it out in front of the jury.

It is evident that trial counsel had a profound misunderstanding of the underlying reason for entering into the stipulation in the first place. In order to have the defendant subject to the lower blood alcohol level of .02, the state would normally have to prove to the jury that the defendant had at least three prior OWI convictions. Normally, a defendant would not want that information to come before the jury and would enter into an *Alexander* stipulation.[5] The stipulation is not to be presented to the jury.

[5] Counsel will refer to the stipulation as an "Alexander stipulation" as a shorthand reference.

Instead, it is an agreement between the defense and the prosecution, whereby the defense agrees to relieve the state of proving the "status" element of the offense, and in exchange, the defendant does not have to bear the consequences of having the jury discover that he has prior drunken driving convictions. The plain language of the stipulation prevents the state from introducing evidence of those prior convictions. See stipulation. (R39, Exhibit A2)

Thus, trial counsel's belief that the district attorney could "visit" or otherwise introduce evidence of the defendant's prior OWI convictions, despite the stipulation, was erroneous.[6] In fact, had the district attorney done that at any point during the trial, any defense attorney worth his salt would have objected and moved for a mistrial.

In fact, during voir dire, a juror did ask ADA Newlun why the limit was a .02. (R54:29) ADA Newlun carefully and artfully avoided giving even the slightest hint as to why that might be:

> MR. NEWLUN: Now, in this particular case the particular alcohol concentration is a level of .02, not the .08 that you normally hear about. Anyone have a problem with it being illegal to drive at a .02 for this defendant? Okay, Then anyone else? Mr. _____? [male juror]

---

[6] Perhaps trial counsel was confusing his *Alexander* stipulation with the other two stipulations he entered into with the state. As previously noted, the defense also stipulated to 19 priors for purposes of general impeachment, i.e., if Henningfield chose to testify, he could be asked the question: "Have you ever been convicted of a crime? If Henningfield then replied: Yes, 19 times," then there could be no further questioning as to the nature of the underlying convictions, including whether any of the 19 priors were for drunk driving. The other stipulation he entered into was for the blood draw and his blood alcohol level. (R39: Exhibit A1). Unlike his *Alexander* stipulation, this stipulation was presented to the jury in the jury instructions. (R39: A1 and R54:190-91)

> JUROR: I don't understand why it would be that, but if that's what it is, that's what it is.
>
> THE COURT: Mr. _____, you think that's too low?
>
> JUROR: Just understanding the question, what was the ruling on the .08?
>
> MR. NEWLUN: Well, right now for this particular case Mr. Henningfield was prohibited from driving with a blood alcohol concentration of over .02, do you think that's too low?
>
> JUROR: And the legal limit is?
>
> MR. NEWLUN: The legal limit varies with the situation. The normal limit is .08.
>
> JUROR: And he is .02, so he was under that?
>
> MR. NEWLUN: The legal limit for him was .02. The evidence is going to show that he was actually .278, about fourteen times his legal limit.
>
> JUROR: Okay.
>
> MR. NEWLUN: Knowing that, does the fact that the legal limit was .02, would that affect your ability to find him guilty?
>
> JUROR: No.

(R54:29-30)

ADA Newlun's explanation that "[t]he legal limit varies with the situation" was, in undersigned counsel's opinion, a perfect explanation. A lay juror might interpret that to mean a number of other reasons for a lower blood alcohol limit, such as the defendant being a commercial truck driver, or perhaps having some sort of medical condition.

In its written decision denying the defendant's postconviction motion, the trial court stated in relevant part:

> …Gamez testified that the theory of defense was not denying Henningfield had a blood alcohol at the level that the test resulted; but to show that Henningfield was not the driver of the vehicle. Gamez testified this was their defense strategy and decision.
>
> Gamez's testimony is logical with regards to the suggested defense and decision surrounding it. The facts and evidence at trial were that Henningfield stated he had loaned his vehicle to an unknown individual who apparently drove it into the ditch where it was found by the officers. The officers, upon locating the vehicle, without a driver, and a short distance from the Hiawatha bar, located Henningfield in the bar. He was arrested as the officers did not believe Henningfield had loaned his vehicle but had driven it off the road and proceeded to the bar. These facts together with background information caused the arrest of Henningfield and the jury was presented with that defense.

(R42:4). See Appendix at A4.

The jury was not presented with that defense. Counsel is uncertain how the trial court arrived at these erroneous factual findings. [7] The defense presented at trial was <u>not</u> that he loaned his

---

[7] The trial court also found that the "facts and evidence at trial" showed that upon arrival at the scene, the officers found an empty vehicle without a driver. They then went down to the Hiawatha and located Henningfield inside the bar, and that he was then arrested because the officers did not believe his story that he loaned the car to another person. Counsel has no clue where the trial court got this information. Perhaps the trial court was confusing Henningfield's case with another.

The trial court also mistakenly believed that the jury was given an instruction concerning the parties' stipulation to three priors to establish the status element of the offense. In its decision at p. 3, the trial court

vehicle to an unknown person, who then drove it into a ditch. Rather, the defense presented was that as Henningfield was driving home from work, he slid off the road. He was sober at the time this happened. He then went to the Hiawatha, got drunk, then returned to his vehicle a couple of hours later, but he did not operate it at that time. See defendant's testimony above at pp. 10-11, supra.,and (R54:141-48). See also defense counsel's opening statement (R54:64-67) and closing argument (R54:203-08)

Perhaps the trial court misinterpreted trial counsel's testimony at the postconviction hearing. At the hearing, while explaining why he made the "cat out of the bag" statement, trial counsel stated: "I wanted to completely focus the jury not so much on his past but I wanted to change – keep the focus on that *he was not driving that night.*" (emphasis added)(R58:16,24). Perhaps what trial counsel meant to say was that Henningfield was driving that night and did drive the car into the ditch, but *at no time was he driving the vehicle that night while he was intoxicated*.

Alternatively, Gamez did mistakenly believe that his theory of defense at trial was that it was another individual who drove the car into the ditch after borrowing it from Henningfield. This would call into question trial counsel's memory of the trial, which would affect the reliability and weight of his testimony.

A. Ineffective Assistance of Counsel.

---

mistakenly believed that Henningfield stipulated to a jury instruction like the one the Wisconsin Supreme Court struck down in *Alexander*. The trial court then went on to recite the instruction struck down in *Alexander*, thinking it was the instruction given in Henningfield's case.

1. Standard of Review.

Whether or not a defendant receives effective assistance of counsel is a question of constitutional fact. *State v. Dillard*, 2014 WI 123, ¶ 86, 358 Wis. 2d 543, 859 N.W.2d 44, 56-57. An appellate court upholds the circuit court's findings of fact unless they are clearly erroneous. Findings of fact include the circumstances of the case and trial counsel's conduct and strategy. An appellate court independently determines whether those historical facts demonstrate that defense counsel's performance met the constitutional standard for ineffective assistance of counsel, benefiting from the analysis of the lower court. *Id*.

2. Legal Principles.

Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the Wisconsin Constitution. *State v. Cooks*, 2006 WI App 262 ¶ 32-33, 297 Wis. 2d 633, 649-50, 726 N.W.2d 322 (Ct. App. 2006)(citations omitted). The right to counsel includes the right to effective counsel. *Id*. The standard for determining whether counsel's assistance is effective under the Wisconsin Constitution is the same as under the Federal Constitution. *Id*. To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. *Id*.

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. A defendant must establish that counsel's conduct

falls below an objective standard of reasonableness. *Id*. However, every effort is made to avoid determinations of ineffectiveness based on hindsight and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id*.

To prove constitutional prejudice, the 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*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. The issue of whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. *State v. Mayo*, 2007 WI 78 ¶ 32, 301 Wis. 2d 642, 661, 734 N.W.2d 115 (2007).

3. Trial counsel should not have told the jury that his client had prior drunken driving convictions and Henningfield was prejudiced thereby

The main reason why Henningfield stipulated to having at least three prior drunken driving convictions was to conceal that very same evidence from the jury. Defense counsel then sabotages the stipulation during his opening statement by clearly and unambiguously hinting to the jury that the reason for Henningfield's lower blood alcohol limit was precisely due to the fact that Henningfield was an habitual drunken driver. It was trial counsel's specific intent to communicate that to the jury. Under *Alexander*, this revelation is *presumptively* prejudicial and undersigned counsel can think of no valid strategic reason why defense counsel would do this. This amounts to deficient performance.

The state will likely argue that opening statements are not evidence. Although it may be generally true that opening statements are not evidence[8] and that jurors are presumed to follow instructions the trial court gives,[9] the defendant asserts that this presumption cannot and should not apply under the particular facts here. An admission by the defendant's attorney that the defendant has prior drunken driving convictions, even if made during his opening statement, is not something that any jury could likely ignore or set aside, for once the bell has rung, it is not possible to unring it:

> In a doubtful case even the trained judicial mind can hardly exclude the fact of previous bad character of criminal tendency, and prevent its having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect.

Mulkovich v. State, 73 Wis. 2d 464, 472, 243 N.W.2d 198 (1976). Or, as Learned Hand once observed, asking jurors to "ignore" and not "consider" something they have already heard may be: "a mental gymnastic which is beyond, not only their powers, but anybody else's." *Nash v. United States*, 54 F.2d 1006, 1007 (2nd Cir. 1932).

Of course, there was no curative instruction in Henningfield's case, but even if one had been given, it would have only made the problem worse. The trial court could have admonished the jury: "You are to disregard defense counsel's statements and insinuations during his opening statement that Henningfield has prior drunken driving convictions." However, such an instruction would likely

---

[8] See *Schwigel v. Kohlmann*, 2002 WI App 121, ¶ 13, 254 Wis. 2d 830, 647 N.W.2d 362.

[9] In this case, the jurors were given Wis. JI-CRIMINAL #157: "Remarks of the attorneys are not evidence. If the remarks suggest certain facts not in evidence, disregard the suggestion."

have drawn attention to and compounded the problem. Although it is generally true that juries are presumed to follow instructions, (see *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989)), it is not likely that WIS JI-CRIMINAL #157 (see footnote 3, supra.), or any other instruction, would have cured the problem.

As in *Alexander*, it is highly probable that the jury inferred that Henningfield's prior offenses were likely OWIs, and that Henningfield had a bad character and a propensity to drink and drive. *Alexander*, 214 Wis. 2d at 650. Consequently, Henningfield was prejudiced by his attorney's deficient performance. Had the jury not known that Henningfield had prior drunken driving convictions, there is a reasonable probability that they would have believed his defense that at the time he drove his car into the ditch, he was sober. Rather than being a "feather in the defendant's cap," trial counsel's revelation of Henningfield's priors was more like a nail in his coffin.

B. New Trial in the Interest of Justice.

1. Standard of Review.

When the contention is made that the real controversy has not been fully tried, an appellate court determines whether to exercise its discretionary power of reversal independently of lower court decisions. *State v Burns,* 2011 WI 22, ¶ 22, 332 Wis. 2d 730, 798 N.W.2d 166, 174. The appellate court is to exercise its discretionary reversal powers only in exceptional cases and should be exercised sparingly and with great caution. *Id.* at ¶ 25. It appears that the court should apply a "totality of the circumstances" analysis in determining whether a new trial is necessary. Id. at ¶¶ 25, 58.

2. Legal Principles.

Sec. 752.35, Wis. Stats., provides:

> 752.35 Discretionary reversal. In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

A new trial may be ordered in either of two ways: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried. *State v. Hicks*, 202 Wis. 2d 150, 159-160, 549 N.W.2d 435 (1996). Separate criteria exist for determining each of these two distinct situations. *Id*.

This court may exercise its' power of discretionary reversal under the first part of sec. 752.35, without finding the probability of a different result on retrial when it concludes that the real controversy has not been fully tried. *Id*. See also *State v. Barton*, 2006 WI App 18, ¶ 6, 289 Wis. 2d 206, 709 N.W.2d 93 (Ct. App. 2006).

The case law reveals that situations in which the controversy may not have been fully tried have arisen in two factually distinct ways: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue in the case;

and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *Hicks*, 202 Wis. 2d at 159-60.

3. Trial counsel's revelation to the jury that his client had prior drunken driving convictions prevented the jury from fairly and impartially deciding the case

This case involves the second situation-the jury was made aware of the fact that Henningfield had prior drunken driving convictions. The jury should not have known this.

The totality of the circumstances suggests that a new trial should be ordered in the interest of justice because the jury had evidence before it that was not properly admitted, i.e., trial counsel's remark about the "cat out of the bag." This implied that Henningfield had prior drunken driving convictions. The jury was not supposed to know this. As explained in *Alexander,* this information is so prejudicial that it likely "clouded" the jury's ability to decide the case fairly and impartially.

II. THE DEFENDANT DID NOT KNOWINGLY VOLUNTARILY AND INTELLIGENTLY WAIVE HIS RIGHT TO A JURY TRIAL ON THE STATUS ELEMENT OF THE OFFENSE OF OPERATING A MOTOR VEHICLE WITH A PROHIBITED BLOOD ALCOHOL CONTENT

1. Standard of Review

Whether Henningfield's waiver of his right to a jury trial was knowing and voluntary is a question of constitutional fact that this court reviews independently as a question of law. *State v. Anderson*, 2002 WI 7, ¶ 12, 249 Wis. 2d 586, 638 N.W.2d 301. A circuit court's finding of historical fact is reviewed under the clearly

erroneous standard. *State v. Hajicek,* 2001 WI 3, ¶ 15, 240 Wis. 2d 349, 620 N.W.2d 781.

2. Henningfield did not knowingly, voluntarily and intelligently waive his right to a jury trial on the status element.

On September 24, 2012, a hearing was held before the trial court concerning a stipulation (the same "*Alexander* stipulation" discussed in the last section) the defendant would be entering into concerning the number of prior OWI convictions. The state was required to prove, as part of its case, that Henningfield had at least three prior OWIs in order to have the lower blood alcohol limit apply, i.e., a .02 instead of a .08. The trial court engaged the defendant in a personal colloquy. (R51:7-11) A summation of the colloquy is as follows:

> THE COURT: Mr. Henningfield, do you understand what you've been arrested for, operating while intoxicated – operating a motor vehicle while intoxicated?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And part of the allegations in this case is that the event will be litigated as a third or greater tomorrow during the trial. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: The number of prior convictions must be established by the State by acceptable evidence. Do you understand that?
>
> THE DEFENDANT: Yes, sir.

THE COURT: And it's my understanding that you've reviewed the convictions that the state has put out on the second page of the Amended Complaint. Have you got a copy of it, Mr. Gamez?

MR. GAMEZ: Your Honor, no, I don't. That was going to be my next question is that there was – I have a Complaint, Information that has – it doesn't have the PAC, prohibited alcohol content on it.

THE COURT: Mr. Gamez, I'm in the middle of a colloquy right now. You don't have a copy of it?

MR. GAMEZ: No, your Honor.

THE COURT: Jim, have you got an extra copy? Otherwise I'll give him a court copy.

All right, take a look at that Mr. Henningfield. Second page – is it on the first page?

MR. GAMEZ: It's on the first.

THE COURT: What are you looking at the Complaint or the Information?

MR. GAMEZ: The Amended Complaint, Judge.

THE COURT: Amended Complaint, it's on the second page of mine. Is there one that – a list of priors?

MR. GAMEZ: It's – priors are listed on the second page.

THE COURT: All right, So what we're talking about, Mr. Henningfield, of that list the State will be relieved of having to prove that at least three of those for purposes of this proceeding exist. Do you understand that?

THE DEFENDANT: I understand.

> THE COURT: And that means that tomorrow or the next day, whatever time we get to it at the trial, the state may argue, submit, and argue again that you've been convicted of at least three priors as appropriate, necessary, and needed on proving the elements. Because the elements of this charge must, as Mr. Newlun's indicated, show at least three priors. Do you understand that?
>
> THE DEFENDANT: Yes, sir, I do.
>
> THE COURT: And you're going to waive that requirement; is that correct?
>
> THE DEFENDANT: That's correct, sir.
>
> THE COURT: Anything else you wanted, Mr. Newlun?
>
> MR. NEWLUN: No, your Honor.
>
> THE COURT: All right. I will then, based upon Mr. Henningfield's review of the Complaint as indicated, his testimony, find that he has stipulated that that element can be agreed to as part of the stipulated facts in this matter, he's waived his right to have the proofs made.
>
> MR. NEWLUN: Right.

(R51:7-11)

At the postconviction hearing, the defendant testified concerning his understanding of his stipulation with the state that he had at least three prior OWI convictions. (R58:32). Henningfield testified that he did not understand that the state had to prove that he had at least three prior OWI's as part of their burden of proof. (R58:32):

> THE DEFENDANT: I was simply told through a jail house slot prior to the hearing that we were going to plead to three priors and that was Mr. Gamez'z recommendation because it would be a straight – the best thing to do strategically.
>
> APPELLATE COUNSEL: Okay. Well what – do you know what the elements of a DWI case are, what the state has to prove?
>
> THE DEFENDANT: No, I don't.
>
> APPELLATE COUNSEL: Okay. Are you – at the time were you aware of the fact that the state has several elements that they had to prove before you could be found guilty?
>
> HE DEFENDANT: No, I didn't.
>
> APPELLATE COUNSEL: Okay. Do you know what the state's burden of proof was at the trial?
>
> THE DEFENDANT: No, I didn't.
>
> APPELLATE COUNSEL: Well, there's different burdens of proof. There's clear and convincing evidence, there's beyond a reasonable doubt, preponderance of the evidence. Do you know what burden of proof applied?
>
> THE DEFENDANT: No, I do not.

(R58:33)

On cross and redirect examination, the defendant testified that he did not understand he could have a jury trial on the issue of the three priors. (R58:54) He testified that with regard to both of the stipulations (i.e., the stipulation to three prior OWI convictions and the stipulation concerning the blood draw and the blood alcohol level), he had merely glanced over them and signed them, and that

there was no detailed discussion as to why it would be strategically sound. There was also no discussion concerning the state's burden of proof. (R58:54-56)

Trial counsel also testified about his explanations to the defendant concerning the stipulations. (R58:11-20) Trial counsel recalled that he discussed the matter with the defendant while they were in the courtroom surrounded by deputies. (R58:11) Trial counsel believed this discussion occurred just prior to the start of the trial. (R58:11) On cross examination, trial counsel testified that he explained both of the stipulations to the defendant and that he thought that the defendant understood the reason for both stipulations. (R58:17-19)

In its decision denying the defendant's postconviction motion, the trial court made the following findings concerning the stipulations:

> Henningfield also submits that [trial counsel] was ineffective in stipulating to prior convictions with regard to drunken driving……
>
> The testimony of [trial counsel] and Henningfield given at the hearing was, in certain respects, diametrically opposed. [Trial counsel] recalled , quite clearly, the basis and reasons for his comments and the testimony given. Henningfield, on the other hand, either had no recollection of talking to [trial counsel] with regard to the strategy for defense or contradicted [trial counsel's] testimony.
>
> Clearly there was a stipulation as to prior convictions.
>
> The court concludes that Henningfield's testimony and argument is not credible. However, Henningfield's position that [trial counsel] is wrong with regard to his recollection is incredulous when nothing was stated throughout the entire jury trial relative to

> Henningfield's current position. That is, Henningfield participated in the stipulations and was present when all of the arguments or facts were stated and never objected or commented. At this time his absolutely diametrically opposed position is not credible . . . Henningfield's recollection is wrong or he is testifying wrongfully to benefit his current situation/motion.

Waiver of a jury trial of one element requires the same procedure as a full jury trial waiver. *State v. Warbleton*, 2009 WI 6, ¶ 59, 315 Wis. 2d 253, 280, 759 N.W.2d 557. The procedure for waiving a jury trial is set forth in Wis. Stat. § 972.02(1). Pursuant to this section, "[e]xcept as otherwise provided in this chapter, criminal cases shall be tried by a jury . . . unless the defendant waives a jury in writing or by statement in open court or under Wis. Stat. § 967.08(2)(b), on the record, with the approval of the court and the consent of the state." Wisconsin courts interpreting § 972.02(1) have established that a jury waiver is valid only if the circuit court conducted a colloquy to ensure that the defendant "(1) made a deliberate choice, absent threats or promises, to proceed without a jury trial; (2) was aware of the nature of a jury trial, such that it consists of a panel of 12 people that must agree on all elements of the crime charged; (3) was aware of the nature of a court trial, such that a judge will make decision on whether he or she is guilty of the crime charged; and (4) had enough time to discuss this decision with his or her attorney." *State v. Anderson*, 2002 WI 7, ¶¶ 23-24, 249 Wis. 2d 586, 603, 638 N.W.2d 301.

The Wisconsin Supreme Court has set forth a two-step analysis for the sufficiency of a jury trial waiver. *State v. Grant*, 230 Wis. 2d 90, 99, 601 N.W.2d 8 (Ct. App. 1999)(citing *State v. Bangert*, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986)). First,

the defendant must show that the colloquy preceding the waiver was inadequate and that he or she did not understand an element of the colloquy. *Id.* If the defendant establishes the first step, then the burden shifts to the state to show by clear and convincing evidence that the defendant's jury trial waiver was knowing, intelligent and voluntary. *See State v. Hampton*, 2004 WI 107, ¶ 46, 274 Wis. 2d 379, 401-02, 683 N.W.2d 14.

First, it is clear that the court's pretrial colloquy with Henningfield was totally inadequate. The court made no attempt to explain whether any threats or promises had been made to Henningfield to proceed without a jury trial on the particular element at issue. The court did not explain or attempt to ascertain Henningfield's understanding of the nature of a jury trial, including that it consists of 12 people and that the jurors would have to unanimously agree beyond a reasonable doubt on each and every element before they could reach a verdict. In fact, the court misstated the burden of proof as "acceptable evidence" as opposed to "beyond a reasonable doubt." The court made no attempt to ascertain whether Henningfield had sufficient time to discuss the issue with his attorney. Consequently, the trial court's finding at the conclusion of the pretrial colloquy that the defendant validly "waived his right to have the proofs made" was erroneous.

In his postconviction motion, the defendant made a prima facie showing that the colloquy for waiver of his right to a jury trial on the status element was inadequate. Presumably, that is one of the reasons why the trial court granted a hearing on the defendant's motion. The defendant provided further evidence at the postconviction hearing that he did not understand that he had a right to a jury trial on each element of the offense.

Having made his prima facie showing, the burden then shifted to the state at the postconviction hearing to show by clear and convincing evidence that the defendant's jury trial waiver on the status element was knowing, intelligent and voluntary. The state failed to make this showing.

The state's questioning of the defendant at the postconviction hearing did not remedy the defects in the trial court's pretrial colloquy with the defendant. In questioning the defendant, the state did not make inquiry as to whether the defendant made a deliberate choice to waive a jury trial on the status element, and whether there were any threats or promises. No questions were asked nor inquiry made of the defendant's understanding of the nature of a jury trial, i.e., that it consists of a panel of twelve people that must agree unanimously that the state would have to prove the status element beyond a reasonable doubt.

The state's questioning of trial counsel also did not remedy these defects. Trial counsel simply indicated that he had discussed the stipulations with the defendant (surrounded by deputies) just prior to the beginning of the trial, and that he "thought" the defendant understood the reasons for both stipulations. However, there was no testimony that he specifically advised the defendant about the nature of a jury trial, including that all twelve jurors would have to unanimously agree beyond a reasonable doubt that the defendant had at least three priors OWI convictions.

The trial court's findings also did not remedy the defects of the pretrial colloquy. The trial court spoke generally about supposed conflicts in the testimony between the defendant and trial counsel, and indicated that it found trial counsel's testimony more believable than the defendant's. However, the trial court did not specifically

find that Henningfield's waiver of a jury trial on the status element was knowing, voluntary and intelligent. The trial court's findings did not comply with the requirements of *Anderson* and *Warbleton* discussed above. No finding was made that the defendant understood that the state would have had to prove the status element beyond a reasonable doubt (as opposed to "acceptable evidence") to all twelve jurors.

In both his affidavit and testimony at the postconviction hearing, Henningfield asserted that he did not understand that the state had to prove each element beyond a reasonable doubt. At the time, he believed that the state's burden of proof applied globally to the state's case, but not to each element. Further, he asserted that he actually disputed that the three priors cited in the stipulation were accurate. (R39: Exhibits A3-A4) He also asserted that he did not have sufficient time to discuss the matter with his attorney. (R39:Exhibits A3-A4)

Consequently, Henningfield demands that he be given a new trial.

III. THE DOCTRINE OF ISSUE PRECLUSION BARRED THE STATE FROM CHARGING HENNINGFIELD WITH DWI-10TH OR GREATER IN THIS CASE BECAUSE HE WAS FOUND TO BE ONLY A FIFTH-TIME OFFENDER IN HIS PREVIOUS RACINE OWI CASE

1. Standard of Review

When applying the doctrine of issue preclusion this court must first determine whether there is an identity of parties, which is a question of law. *Masko v. City of Madison,* 3003 WI App 124, ¶¶ 5-6, 265 Wis. 2d 442, 665 N.W.2d 391. In the instant case, the

parties to the previous action were identical as a matter of law (Henningfield and the Racine County District Attorney/State of Wisconsin). *See Michelle T. v. Crozier*, 173 Wis. 2d 681, 687-88, 495 N.W.2d 327 (1993).

The court must also determine whether the issue was "actually litigated" in the prior proceeding. *Mrozek v. Intra Financial Corporation,* 2004 WI App 43, ¶ 16, 271 Wis. 2d 485, 678 N.W.2d 264. This is an issue of law. *Paige K.B. v. Steven G.B.,* 226 Wis. 2d 210, 223, 594 N.W.2d 370.

Whether or not applying the doctrine of issue preclusion to a party comports with "fundamental fairness" is a mixed question of fact and law. *Masko,* 2003 WI App at ¶¶ 5-6.

2. The State was precluded from charging Henningfield with anything more than an OWI 6th

In Racine County Circuit Court Case No. 96CT48, Henningfield was convicted of operating while intoxicated. (R39: Exhibit A43) That conviction occurred on November 1, 2011 and was his last DWI conviction prior to getting charged in the instant case with DWI-10th. In 96CT48, Henningfield was originally charged with DWI-5th. Upon information and belief (see Henninfield's affidavit), during the plea bargaining process, Assistant District Attorney Matthew Hastings agreed that that prior allegations from Colorado and Florida, as well as one of the Minnesota convictions (8/22/2004), were not countable priors under Wis. Stat. § 343.307. In that case Henningfield pleaded to and was convicted of DWI-5th Offense. (R40). On July, 26, 2011 Henningfield appeared before the Honorable Gerald P. Ptacek for sentencing. Judge Ptacek specifically found that Henningfield was

being sentenced for OWI fifth offense and specifically communicated that to Henningfield. (R41:6). See Appendix at A13—A33.[10]

The doctrine of issue preclusion prevents the relitigation of issues decided in an earlier proceeding. *State v. Hirsch*, 2014 WI App 39, ¶¶ 13-15, 353 Wis. 2d 453, 464-65, 847 N.W.2d 192; *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). While issue preclusion was historically applied only to parties bound by a previous judgment, courts have moved away from such formalism and now apply a "looser, equities-based interpretation of the docrine." *Michelle T. v. Crozier*, 173 Wis. 2d 681, 687-88, 495 N.W.2d 327 (1993). That is not at issue here because the parties are identical (State of Wisconsin/Racine County District Attorney and Mr. Henningfield).

The Wisconsin Supreme Court established a two-step inquiry for issue preclusion. The first step requires the court to consider two threshold questions: (a) whether there exists privity or identity of interest between the party against which preclusion is asserted and a party to the prior proceeding. *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 224, 594 N.W.2d 370 (1999), and (b) whether the issue was "actually litigated" in the prior proceeding. *Mrozek v. Intra Financial Corp.*, 2005 WI 273, ¶17, 281 Wis. 2d 448, 463-64, 678 N.W.2d 264. (Hereinafter "*Mrozek II*") Both of these inquiries present questions of law. *Paige K.B.*, 226 Wis. 2d at 223. If the court finds that these threshold inquiries have been satisfied, it moves to

[10] This issue was presented to the trial court in the postconviction motion (R38) and argued at the postconviction hearing (R58:70-72), but the trial court's decision denying the postconviction motion makes no mention of it.

the second step of the inquiry, whether it is fundamentally fair to apply issue preclusion in the particular case. *Paige K. B.*, 226 Wis. 2d at 224-225.

Wisconsin courts have apparently not conclusively decided whether a conviction based on a guilty plea can preclude the State from raising issues relevant to this conviction in a subsequent criminal case. In *Cromwell v. Heritage Mut. Ins. Co.*, 118 Wis. 2d 120, 122 n.2, 346 N.W.2d 327 (Ct. App. 1984), the Wisconsin Court of Appeals stated that "[a] plea of guilty or *nolo contendere* in the criminal suit does not draw any issues into controversy and does not support the use of collateral estoppel." However, in *Michelle T.*, the Wisconsin Supreme Court dismissed this statement in dicta. *Michelle T.*, 173 Wis. 2d at 688 n. 7. Nonetheless, the court noted that the Restatement (Second) of Judgments explains that:

> The rule in this Section presupposes that the issue in question was actually litigated in the criminal prosecution…. Accordingly, the rule of this Section does not apply where the criminal judgment was based on a plea of *nolo contendere* or a plea of guilty. A plea of *nolo contendere* by definition obviates actual adjudication and under prevailing interpretation is not an admission.

Id. (quoting RESTATEMENT (SECOND) OF JUDGMENTS, § 85, comment B at 296 (1980)).

The Court of Appeals first dealt squarely with the preclusive effect of a conviction resulting from a guilty plea in *Mrozek v. Intra Financial Corp.*, 2004 WI App 43, ¶16, 271 Wis. 2d 485, 678 N.W.2d 264, *aff'd in part, rev'd in part*, 2005 WI 273, ¶17, 281 Wis. 2d 448, 463-64, 678 N.W.2d 264 (hereinafter "*Mrozek I*"). There, Mrozek, a hotel operator, pled guilty to misdemeanor theft in a prior

criminal case stemming from her management of the hotel's finances. *Mrozek*, 271 Wis. 2d 485, ¶13. In a subsequent civil suit for legal malpractice, Mrozek alleged that her reliance upon the negligent advice of her attorney caused her conviction. *Id.* The trial court dismissed her claim at summary judgment on issue preclusion grounds. *Id.*, ¶10. It determined that Mrozek's guilty plea constituted an admission that her illegal actions were intentional, and therefore, she could not allege in a later proceeding that her actions were the result of her reliance on bad legal advice. *Id.*, ¶27.

The Court of Appeals in *Mrozek I* affirmed the trial court's order for summary judgment, noting *Michelle T.*'s rejection of the *Crowall* footnote as dicta, and concluding that a conviction upon a plea of guilty *could* have a preclusive effect in a later civil proceeding. *Mrozek*, 271 Wis. 2d 485, ¶17. In so holding, the court concluded that a conviction resulting from a guilty plea constitutes "actual litigation" for purposes of issue preclusion. *Id.*, ¶1. "[T]he judicial determination of the existence of a factual basis for a guilty plea, together with a court's finding that the plea was entered knowingly and voluntarily, are sufficient to satisfy the requirement that issues be actually litigated in order for issue preclusion to be applied." *Id.*, ¶20.

In *Mrozek II*, the Wisconsin Supreme Court reversed the Court of Appeals and held that Mrozek's guilty pleas did <u>not</u> fulfill the "actually litigated" requirement for issue preclusion. In reaching this conclusion, the court first noted that there was a conflict among jurisdictions on the effect a guilty plea has on the availability of issue preclusion. *Mrozek v. Intra Financial Corp.*, 2005 WI 273, ¶19, 281 Wis. 2d 448, 465, 678 N.W.2d 264.

Jurisdictions which permit guilty pleas to serve as a basis for issue preclusion reason that before a guilty plea is accepted, the circuit court must ascertain that there is a factual basis for the plea. *Id.* at 465-66. Citing *State v. Bangert*, 131 Wis. 2d 246, 266-67, 389 N.W.2d 12 (1986) and Wis. Stat. § 971.08(1), the court recognized that Wisconsin was among those states that require the circuit court to find that there is a factual basis for the plea. *Mrozek II*, 281 Wis. 2d at 466.

Jurisdictions which do not permit guilty pleas to serve as a basis for issue preclusion reason that a plea agreement is qualitatively different from a conviction following a trial. *Id.* In support of this approach, the Court cited a Connecticut case and the quote from the Restatement (Second) of Judgments cited in averment #7, above. *Id.*

After discussing the conflict, the Court decided that its determination in the case at bar should not depend on the number of jurisdictions or authorities supporting a view, but rather on the persuasiveness of each position. The Court cited a New Jersey case to explain why applying issue preclusion should not be available based on a guilty plea:

> A guilty plea] represents the decision of the defendant "to forego such litigation and usually for reasons having little or nothing to do with the nature of the issues." . . . The motives for the State and a criminal defendant to make a plea agreement are many. The State may be seeking to conserve its scarce resources by avoiding a trial and a defendant may be attempting to secure his freedom or at least a reduced term of incarceration. Such reasons have little or nothing to do with the determination of the issues in the [later action].

Id. at 467 (*citing Prudential Prop. & Cas. Ins. Co. v. Kollar*, 578 A.2d 1238, 1240-41 (N.J. Super. Ct. App. Div. 1990)

However, when examining the Court's ultimate holding, it is clear that the Court intended that it was limiting its ruling to the facts of the case before it:

> However, after reviewing a wide range of authorities, we conclude that issue preclusion is not available based on *Mrozek's guilty pleas*.
> …..
>
> Therefore, we conclude that *Mrozek's guilty pleas* do not fulfill the "actually litigated" requirement for issue preclusion.

Id. at 465, 468 (emphasis added).

The key language used in both statements above is "Mrozek's guilty pleas." Had the Court intended to make a ruling that would have extended broadly beyond the confines of that particular case, the Court would have used much broader language, e.g., "We conclude that a guilty plea may never be used as a basis for issue preclusion." The Court's use of the term "Mrozek's guilty pleas" indicates that its ruling should be confined to the facts of that case.

Henningfield asserts that it would be absurd to apply the holding in *Mrozek II* to the facts of his case because his case presents an entirely different situation than *Mrozek*. In his OWI-5th conviction in Racine County, the fact that Henningfield had been convicted on four prior occasion was an essential element of the offense of OWI-5th. The existence of four prior OWIs was necessary to the judgment. In *Mrozek*, by contrast, the proponent of issue preclusion was asserting that it could be implied from Mrozek's

guilty plea that Mrozek acted intentionally, and therefore, Mrozek should be barred from asserting in the second action that her actions were not intentional and done only as a result of receiving bad legal advice. The fact of four prior offenses was an essential element and necessary for Henningfield's conviction of DWI-5th.

In *Mrozek*, by contrast, whether or not the law firm provided negligent or bad legal advice to Mrozek was at best an inference that might me made from Mrozek's guilty plea. The law firm's alleged non-negligence was not an essential element of the offense to which Mrozek entered a plea, nor was the law firm's alleged non-negligence a necessary part of Mrozek's judgment of conviction. Consequently, Henningfield asserts that the issue of his prior convictions was actually litigated in the Racine County case (96CT48) and was a necessary part of his judgment of conviction for OWI-5th. *Mrozek II* provides no guidance in deciding Henningfield's case.

Consequently, Henningfield asserts that his plea in 96CT48 should have preclusive effect because it was actually litigated.

The second step of the issue preclusion analysis -- whether to preclude litigation of an issue would be fundamentally unfair – is generally a discretionary decision for the trial court and will be reversed only for an erroneous exercise of discretion. *Paige K.B.*, 226 Wis. 2d at 225. Wisconsin has identified five factors for determining the fairness of applying issue preclusion:(1) could the party against whom issue preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality of extensiveness of proceedings between the two courts warrant relitigation of the

issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action? *Michelle T.*, 173 Wis. 2d at 688-89.

In its decision denying the defendant's postconviction motion, the trial court made no mention of this issue. The issue was presented to the court in the postconviction motion and counsel argued it at the postconviction hearing. See fn. 15, supra. In reviewing the five "fairness" factors listed above, the first four are actually questions of law that this court can determine independently. Rather than remanding the case back to the trial court with directions to make findings of fact and conclusions of law concerning the fifth factor, the defendant requests that this court make that determination.

In 98CT48, Henningfield was led to believe, as would any reasonable defendant under the same circumstances, by the official pronouncements of both the executive (Racine County District Attorney) and judicial (Judge Ptacek) branches of the State of Wisconsin, that he had only four prior convictions for purposes of Wisconsin law. Both the assistant district attorney (ADA Matthew Hastings) and the Judge Ptacek took the position that Henningfield had four prior countable convictions. This set of circumstances, if followed by a subsequent effort by another representative (ADA Newlun) of the same State to "correct" the defendant's status in a

new case, creates unfair prejudice because Henningfield reasonably believed that he faced a lighter penalty if convicted again.

The State's effort to renege upon its "official pronouncements" to Henningfield, i.e., its entry of a judgment of conviction for the specific charge of DWI-5th against Henningfield in Case No. 98CT48, was patently unfair. It should also be noted that another factor, the lack of differences in the quality or extensiveness of the two proceedings, demonstrates the fairness of preclusion here. Both of the proceedings against Henningfield were criminal cases arising from incidents of OWI; in both cases, Henningfield and the State were represented by counsel; in both cases, a jury trial could have resolved the relevant facts. While the prior case (98CT48) was resolved by a plea of guilty, the precluded issue was determined by a judicial inquiry that constituted actual litigation i.e., the court's explicit factual finding that Henningfield had four prior countable convictions. The message was clear to Henningfield: He was being convicted of OWI-5th and if he picked up a new case, it would be an OWI-6th.

Consequently, in the instant case. the state was precluded from charging Henningfield with anything more than an OWI-6th offense. Henningfield requests that he be granted a new sentencing hearing.

CONCLUSION

For all of the foregoing reasons, Sato asks that his judgment of conviction and the order denying his postconviction motion be reversed, and that his case be remanded to the Racine County Circuit Court for further proceedings with directions.

Dated this 22nd day of April, 2016.

_____

Hans P. Koesser, Bar #1010219

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a brief produced with a proportional serif font. The brief contains 10,992 words.

_____

Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

_____

Hans P. Koesser, Bar No. 1010219

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so produced to preserve confidentiality and with appropriate references to the record.

_____

Hans P. Koesser, Bar No. 1010219

INDEX TO APPENDIX

Trial Court's Decision and Order Denying
Motion for Postconviction Relief (R42)……..……A1-7

Judgments of Conviction (R34, R35)……A8-A10

Stipulation Concerning Blood Draw
and Blood Alcohol Level (R39Exhibit A1)……...A11
Stipulation to three prior OWI convictions (R39 Exhibit A2)…..A12

Plea Hearing Transcript 96CT48 (R40)……..A13-22

Sentencing Hearing Transcript 96CT48 (R41)…….A23-33

SPD Order Appointing Counsel……A34