COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1824-CR **Cir. Ct. No. 2012CF89**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE T. HENNINGFIELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 NEUBAUER, C.J. Bruce T. Henningfield appeals from a judgment entered after a jury found him guilty of operating a motor vehicle while intoxicated (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC), both as his tenth offense and subsequent offense, and

resisting an officer. He further appeals from an order denying his motion for postconviction relief. On appeal, he argues that his trial counsel rendered ineffective assistance by implying during opening statements that Henningfield had multiple prior convictions for OWI, that he did not validly waive the element regarding his countable prior convictions, suspensions, or revocations under WIS. STAT. § 343.307(1) (2015-16)[1] so as to lower his PAC to .02, and that his plea and sentence in 2011 to OWI as a fifth offense should have precluded the State from charging him, and the circuit court from sentencing him, to OWI as his tenth and subsequent offense. We reject Henningfield's arguments and affirm.

BACKGROUND

The Charges

¶2 Henningfield was charged with OWI, as his tenth and subsequent offense, contrary to WIS. STAT. § 346.63(1)(a). The criminal complaint was subsequently amended, adding a charge of operating a motor vehicle with a PAC of 0.02 or more, as Henningfield's tenth and subsequent offense, contrary to § 346.63(1)(b).[2] The amended complaint identified Henningfield's prior convictions.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Henningfield was charged, convicted, and sentenced on a charge of resisting an officer, but he raises no challenge to that conviction.

Pretrial Stipulations

¶3 Prior to trial, the parties agreed to stipulate that Henningfield had three prior convictions, suspensions, or revocations under WIS. STAT. § 343.307(1) (hereinafter ***Alexander***[3] stipulation), which prohibited him from operating a vehicle with a PAC above .02. Because the ***Alexander*** stipulation kept one of the elements from the jury (the status element[4]), the prosecutor asked the circuit court to inquire of Henningfield whether his waiver was knowing, voluntary, and intelligent. Henningfield was sworn in and acknowledged that he understood that the State must prove three prior convictions, but the State was being relieved of that burden. Henningfield was shown a copy of the list of his prior convictions, which was attached to the amended criminal complaint. Henningfield said he was willing to waive that requirement. The written stipulation provided, among other things, that as a result of the stipulation the State was precluded from introducing evidence of those three prior convictions to prove that Henningfield's PAC was .02.

¶4 Later, the court ruled that if Henningfield chose to testify, he could be generally impeached with his past convictions, which the court concluded were nineteen. The court permitted the following questions and answers: "Have you ever been convicted of a crime? Yes. How many times? 19."

[3] ***State v. Alexander***, 214 Wis. 2d 628, 637, 571 N.W.2d 662 (1997).

[4] The status element refers to the element that the defendant has "3 or more prior convictions, suspensions or revocations, as counted under [WIS. STAT. §] 343.307(1)," which prohibits a person from operating a vehicle if his or her alcohol concentration is more than .02. WIS. STAT. § 340.01(46m)(c); *see* ***Alexander***, 214 Wis. 2d at 644.

Voir Dire

¶5 During voir dire, the prosecutor told the panel that "for this particular case Mr. Henningfield was prohibited from driving with a blood alcohol concentration of over .02." "The legal limit varies with the situation," the prosecutor added, but "[t]he normal limit is .08." The evidence would show that Henningfield's blood alcohol level was .278, said the prosecutor.

Opening Statements

¶6 During the State's opening statement, the prosecutor told the jury that Henningfield's "limit is .02."

¶7 During trial counsel's opening statement, he told the jury:

> 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. There's no excuse for that, but that's not a crime in Wisconsin … [T]he one thing [the State is] 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.

Trial Testimony

The State's Case

¶8 At trial, testimony was presented that around 1:00 a.m. on January 22, 2012, Lilly Jones was driving along County Highway H with two passengers, Brittany Callaway and Ryan Pierce, when she saw a truck in a ditch on the opposite side of the road. Jones testified that she saw one other person—she assumed the driver—outside of the truck. Jones called the police, and an officer

responded in about five or six minutes. In the meantime, Pierce went over to the truck to assist the driver by pushing the vehicle while the driver attempted "to drive it out," but without success.

¶9 At 1:10 a.m., police officer Robert Karasek of the Village of Sturtevant Police Department responded to the area of County Highway H and Durand Avenue where he found a vehicle in a ditch about seven or ten feet from the road. Karasek testified that two people were near the vehicle, one of whom was Henningfield. Karasek asked Henningfield how the accident occurred, and he said he lost control of the vehicle and it went into the ditch. Henningfield said he had just come from work. Henningfield denied that he had been drinking alcohol. Karasek, however, did not believe Henningfield because his balance was poor, his eyes were glassy, and the other person at the scene, Ryan Pierce, indicated that Henningfield had been drinking. Karasek then conducted field sobriety testing on Henningfield, after which Karasek concluded that Henningfield was intoxicated and placed him under arrest.

¶10 Karasek observed that there was damage to the front of Henningfield's vehicle and the rear passenger tire was severely shredded. On the ground behind the truck was a sign with the posted speed limit. Following tire prints to the intersection of County Highway H and Durand Avenue, about one hundred and fifty feet away from the truck, Karasek saw that a "do not enter sign" had been struck. Henningfield was transported to the hospital.

¶11 At the hospital, Henningfield consented to have his blood drawn, saying that "he had not been drinking, [and had] nothing to hide." At one point, Karasek overhead Henningfield tell hospital staff that he had three drinks. When Karasek confronted Henningfield about what he had heard, Henningfield called

him "a [expletive] idiot," which he repeated several times. Karasek asked Henningfield if he had been operating a motor vehicle "on today's date," and Henningfield said "no."

¶12 The parties stipulated that Henningfield had a PAC of .278.

The Defense's Case

¶13 In his own defense, Henningfield testified that on January 21, 2012, at 4:30 p.m., he reported for work as a waiter at Olive Garden. At 11:05 p.m., Henningfield clocked out of work. He left in his red Ford 250 pickup truck, going "straight home." He took a different route home than normal because it had snowed the night before and he thought this route might be better plowed. However, as Henningfield was trying to make a left-hand turn, the rear of his vehicle "slid out" and "the rear end slid into the ditch." Henningfield stepped on the accelerator in the hope that the "momentum [of the vehicle] and the power of [the] wheels" would get him out of the ditch, but the vehicle would not come out of the ditch and, instead, he hit the posted speed limit sign. The rear tire caught something in the ditch and it went flat. At that point, Henningfield realized that the vehicle was stuck.

¶14 Henningfield "looked at [his] options." He was still in his work uniform, which was not appropriate for the weather conditions, his shoes were wet, and he was starting to get cold. Henningfield's cell phone had "launched between the passenger seat and the console," and he was unable to retrieve it at that time. He saw that the Hiawatha Ballroom was about a quarter mile east, so he walked there seeking help.

¶15 At the Hiawatha Ballroom, Henningfield washed his hands and then sat at the bar, telling the bartender his vehicle had just slid into a ditch. Henningfield ordered a beer. Up until that time, a little after 11:00 p.m., Henningfield had not been drinking, he testified. While Henningfield was at the Hiawatha Ballroom, he consumed a number of drinks, including eight ounces of high proof liquor.

¶16 Around 1:00 a.m., Henningfield was starting to be concerned about getting home and getting his truck out of the ditch because he had to work the next day. A man at the bar had offered to drive Henningfield, but the man said he would not be leaving for a while. Henningfield decided to return to his vehicle in order to retrieve his cell phone and some work items.

¶17 Once Henningfield was near his vehicle, he saw that Jones was stopped across the road, and Pierce asked if he could help. Pierce thought he could push the vehicle out of the ditch, but, with the flat tire, Henningfield told him "there was no way … [and] so I declined his offer to help push it out." Henningfield noted that, at the suggestion of the man at the bar who offered to give him a ride, he had left the keys to his vehicle at the bar. A few minutes later, Karasek arrived at the scene.

¶18 Henningfield told Karasek that he had "just got off work," and was on his way home when he slid into the ditch. Henningfield assumed, when Karasek asked if he had been drinking, Karasek meant when Henningfield was driving the vehicle. Henningfield denied at trial that he had been drinking when his vehicle went into the ditch.

¶19 Henningfield admitted during direct examination that he has nineteen criminal convictions.

¶20 During cross-examination, Henningfield said he "never really got a chance" to tell Karasek that he went to the Hiawatha Ballroom. He acknowledged, however, that when Karasek asked him what happened nothing prevented him from saying that the vehicle went into the ditch and then he went to the Hiawatha Ballroom.

¶21 Also on cross-examination, Henningfield said that Pierce "went behind the truck and pushed, but it wasn't going anywhere." When the prosecutor asked, "[s]o he was pushing," Henningfield answered, "[h]e offered to push, and it never—it never became enough."

The State's Summation, Jury Instructions, and Verdict

¶22 During the prosecutor's summation to the jury, he argued that even if the jury believed Henningfield's story that he had not been drinking when his vehicle first went into the ditch, Jones' testimony that Henningfield tried to drive the vehicle out the ditch established that Henningfield had operated the vehicle when, undisputedly, he was intoxicated.

¶23 During the circuit court's instruction to the jury, it advised them of the meaning of operate and that the PAC for Henningfield was .02.

¶24 The jury returned a verdict finding Henningfield guilty of OWI and PAC.

Sentencing

¶25 At sentencing, the State argued that Henningfield should be sentenced as if he had ten prior convictions, suspensions, or revocations as counted under WIS. STAT. § 343.307(1). Trial counsel responded that there were

two convictions that did not qualify. The circuit court agreed with the State and adjudicated Henningfield as having ten prior convictions, suspensions, or revocations as counted under § 343.307(1). The court sentenced Henningfield on the OWI count to seven-and-one-half years of initial confinement, followed by five years of extended supervision.[5]

Henningfield's Motion for Postconviction Relief

¶26 Following his conviction, Henningfield filed a motion for postconviction relief, alleging that (1) trial counsel rendered ineffective assistance by implying during his opening statement that Henningfield had multiple OWI convictions, particularly when trial counsel had stipulated to the existence of those prior convictions in order to avoid having the jury hear about them; (2) for the same reason, the real controversy was not tried; (3) Henningfield did not knowingly, voluntarily, and intelligently waive his right to a jury trial on the status element; and (4) a 2011 plea and sentence to OWI, which adjudicated Henningfield as having five prior convictions, suspensions, or revocations under WIS. STAT. § 343.307(1), operated as res judicata and, thus, precluded the circuit court from adjudicating Henningfield as having ten such prior convictions, suspensions, or revocations.

The Hearing

¶27 At the hearing, trial counsel testified that during his opening statement he was implying that Henningfield had a lower restriction on his PAC

[5] Pursuant to WIS. STAT. § 346.63(2)(am), Henningfield was not sentenced on the PAC count.

because of prior convictions, although trial counsel never actually said to the jury that Henningfield had prior convictions. Trial counsel disagreed with postconviction counsel that "the whole point of that stipulation was to prevent [his prior OWI convictions from] coming before the jury." Even with the ***Alexander*** stipulation, trial counsel said, "it's still going to come before the jury." By disclosing it to the jury, he wanted to earn credibility with them and do it before the State disclosed it. Trial counsel also wanted to avoid having the State present testimony on Henningfield's prior OWI convictions and to keep the jury from speculating about why Henningfield's PAC was .02. In other words, trial counsel testified, his decision to make this disclosure to the jury was a matter of strategy. Trial counsel wanted to keep the jury's "focus" away from Henningfield's past and on the defense's claim that Henningfield was not driving when intoxicated that night. In any case, trial counsel noted, when Henningfield testified "the amount of his convictions came out," although "there was nothing about prior [OWI] convictions."

¶28 Trial counsel discussed with Henningfield that by entering into the ***Alexander*** stipulation, he would be waiving an element that the State would ordinarily have to prove beyond a reasonable doubt. Trial counsel believed this conversation occurred in the courtroom prior to the commencement of the trial. Trial counsel advised Henningfield that "the State was going to be able to prove [Henningfield's PAC] and [the defense] didn't need to have the jury dwelling on the alcohol content or the prior convictions." This "was, again, a strategic decision."

¶29 Trial counsel testified that he had represented Henningfield in 2011 on a prior OWI case where he pleaded to OWI as a fifth offense. During cross-

examination, trial counsel testified that during Henningfield's 2011 plea, the issue of the number of his prior convictions was not litigated in court.

¶30 Henningfield testified that he did not fully understand the ***Alexander*** stipulation. Henningfield was "simply told through a jail door slot prior to the hearing that we were going to plead to three priors and that was [trial counsel's] recommendation because it would be … the best thing to do strategically." Henningfield had only a brief conversation with trial counsel in court about this issue before signing the ***Alexander*** stipulation. Henningfield thought he had read the ***Alexander*** stipulation or went "over it quickly" before he signed it. He was "told to sign it and [he] signed it." There was no detailed discussion about why it would be a good idea strategically to agree to the ***Alexander*** stipulation. Henningfield did not know "the elements of a DWI case," that the State had several elements that it had to prove before he could be found guilty, and that the State's burden was proof beyond a reasonable doubt.

¶31 Regarding his 2011 plea, Henningfield testified that he pleaded to "DWI fifth." In court, trial counsel and the district attorney agreed that Henningfield had "four priors and that it was DWI fifth." In fact, the circuit court judge told Henningfield the same thing in court.

¶32 As part of the defense case, Henningfield submitted the transcripts from his 2011 plea and sentence. During the plea, the court said that Henningfield was pleading guilty to OWI as "a fifth offense," and outlined four of Henningfield's prior OWI convictions, which he agreed were on his criminal record. During sentencing, the court said "this is a fifth offense," and then noted that Henningfield had "implied consent violations in Colorado in '91, again in '94, again in '95. Then … you had an OWI in Florida … [in] '01. Then you … had an

OWI [in Minnesota] in … ’03 … [and] an implied consent violation in … ’04 in Minnesota. Another OWI December of ’04 in Minnesota. Another violation, prohibited alcohol concentration January of ’06 in Minnesota and finally OWI in March of ’08 in Minnesota.”

The Circuit Court’s Decision on the Motion for Postconviction Relief

¶33 The circuit court denied Henningfield’s motion for postconviction relief. The circuit court concluded that trial counsel’s disclosure to the jury during opening statements was part of a “logical” defense.[6] Regarding the stipulation as to Henningfield’s prior convictions, the circuit court credited trial counsel’s account and discredited Henningfield’s account. The circuit court pointed out that Henningfield was present in court when the stipulation was discussed and, thus, either Henningfield’s recollection was wrong or his testimony was tailored to benefit his position. Finally, Henningfield was not entitled to resentencing.

DISCUSSION

Ineffective Assistance: Trial Counsel’s Opening Statement

¶34 Under both the Wisconsin and United States Constitutions, in order for a court to find that counsel rendered ineffective assistance, a defendant must show that counsel’s performance was deficient and that, as a result of that deficient performance, the defendant was prejudiced. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665

[6] In recounting Henningfield’s defense at trial, the circuit court misstated some of the facts, among other things, indicating that Henningfield claimed that he had loaned his vehicle to an unknown individual who drove it into the ditch, and that the police did not believe Henningfield’s story that he had loaned his vehicle.

N.W.2d 305. Counsel's performance is "constitutionally deficient if it falls below an objective standard of reasonableness." ***Thiel***, 264 Wis. 2d 571, ¶19. Counsel's deficient performance is constitutionally prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at ¶20 (citation omitted). The defendant bears the burden on both of these elements. ***State v. Roberson***, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111. Conversely, if a defendant fails to make an adequate showing on one element, the other element need not be addressed. ***State v. Harbor***, 2011 WI 28, ¶67, 333 Wis. 2d 53, 797 N.W.2d 828.

¶35 A claim of ineffective assistance of counsel is a mixed question of law and fact. The circuit court's findings of fact will be upheld unless they are clearly erroneous. ***Thiel***, 264 Wis. 2d 571, ¶21; ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. "Findings of fact include the circumstances of the case and the counsel's conduct and strategy." ***Thiel***, 264 Wis. 2d 571, ¶21 (citation omitted). The determination of counsel's effectiveness, in contrast, is a question of law, which is reviewed de novo. ***Kimbrough***, 246 Wis. 2d 648, ¶27.

¶36 Since the State, in response, addresses only the prejudice prong of ***Strickland***, we limit our discussion to that element only. Henningfield argues that under ***Alexander***, trial counsel's disclosure during opening statements was "*presumptively* prejudicial" and "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." Had the jury not heard trial counsel's opening statement, "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." We disagree.

¶37 As the State persuasively argues, Henningfield has failed to show that trial counsel's statements prejudiced Henningfield. This was a case where the jury heard from Henningfield himself that he had nineteen prior convictions. While the nature of those nineteen convictions was not revealed during Henningfield's testimony, it would not have been much of a leap for the jury to have inferred that at least some of those nineteen convictions were for OWI given the sheer number of them, Henningfield's extremely high level of intoxication, and that his PAC was restricted to .02. On the latter, the prosecutor advised a venire of potential jurors during voir dire that the normal limit is .08. Henningfield does not claim that this disclosure was error. Indeed, the circuit court instructed the jury that Henningfield's PAC was .02. In other words, trial counsel's preemptive disclosure added little to what the jury likely concluded after hearing all the evidence. *See* ***State v. Alexander***, 214 Wis. 2d 628, 648, 571 N.W.2d 662 (1997) ("[J]urors … bring their experiences, philosophies, and common sense to bear in their deliberations." (citation omitted)).

¶38 Further, in large measure, Henningfield's testimony was simply not credible. First, Henningfield's testimony was generally impeached with his nineteen prior convictions. *See* ***State v. Gary M.B.***, 2004 WI 33, ¶21, 270 Wis. 2d 62, 676 N.W.2d 475 ("[A]ny prior conviction is relevant to a witness' character for truthfulness because Wisconsin law presumes that criminals as a class are less truthful than persons who have not been convicted of a crime." (citation omitted)); ***Nicholas v. State***, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971) ("[T]he more often one has been convicted, the less truthful he is presumed to be.").

¶39 Second, the jury had already heard evidence that Henningfield had lied to the police. He denied multiple times to the police that he had been drinking, even going so far as to brazenly tell them, just prior to a blood draw, that "he had not been drinking, [and had] nothing to hide." When Karasek overheard Henningfield tell hospital staff that he had been drinking, and Karasek confronted Henningfield about it, Henningfield replied by shouting expletives at Karasek. Henningfield also denied that he had even operated a vehicle on the date in question, which was contrary to his defense at trial.

¶40 Third, Henningfield's testimony was directly contradicted by other witnesses. Henningfield claimed that he never operated the vehicle once he returned from the Hiawatha Ballroom and that, in fact, he left his keys at the bar. Jones, however, testified that Henningfield tried "to drive it out." Henningfield claimed that he declined Pierce's request to help by pushing the vehicle out of the ditch, but Jones said that Pierce was pushing the vehicle.

¶41 Fourth, Henningfield's testimony was internally inconsistent. For example, Henningfield testified that he left work at 11:00 p.m., yet he also admitted that he told Karasek that he had just gotten off work. Henningfield said that he "never really got a chance" to tell Karasek the story he told at trial, but he also acknowledged that when Karasek asked him what happened nothing prevented him from saying that the vehicle went into the ditch and then he went to the Hiawatha Ballroom. Presumably he would have been highly motivated to set the record straight when questioned by Karasek, and ultimately, when taken to the hospital for a blood draw. But that did not occur, resulting in a new narrative at trial. Indeed, the jury might reasonably question that someone would walk to a bar at that hour after such a significant accident and drink heavily, rather than addressing the situation. Additionally, during direct examination, Henningfield

said that he declined Pierce's offer to push the vehicle, but, then, on cross examination, Henningfield said that Pierce "went behind the truck and pushed."

¶42 In sum, trial counsel's statements added little to what the jury would have inferred anyway given Henningfield's nineteen prior convictions, his high level of intoxication, the lower restriction on his PAC, and his new narrative at trial that was inconsistent with the events of the incident and the aftermath, as well as internally inconsistent. We reject Henningfield's contention that the jury discredited Henningfield's story because he was a habitual drunk driver, rather it found him unbelievable. In other words, trial counsel's opening statement implying that Henningfield had prior OWI convictions does not shake our confidence that the jury reached a reliable result.[7]

Waiver

¶43 Henningfield argues that he did not knowingly, voluntarily, and intelligently waive his right to a jury trial on the status element.

¶44 We need not address Henningfield's contention because any alleged error in this regard would be harmless. Pursuant to WIS. STAT. § 346.63(2)(am), if a defendant is convicted of both OWI and PAC, "there shall be a single conviction for purposes of sentencing," meaning "the defendant is to be sentenced on one of the charges, and the other charge is to be dismissed." ***Town of Menasha v. Bastian***, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993). The circuit court, here, dismissed the PAC count. PAC has as one of its elements the status

[7] We reject Henningfield's related claim that trial counsel's statement to the jury resulted in the real controversy not being tried for the same reasons already discussed.

element, but OWI does not. *See* ***State v. McAllister***, 107 Wis. 2d 532, 535, 319 N.W.2d 865 (1982) (stating that OWI consists of two elements: driving or operating a motor vehicle, and doing so while under the influence of an intoxicant); *see also* ***State v. Matke***, 2005 WI App 4, ¶6, 278 Wis. 2d 403, 692 N.W.2d 265 (noting that a defendant's prior OWI convictions is not an element of the offense of OWI). Therefore, removing the status element from the jury's consideration did not affect their verdict on the OWI count. In other words, any error was harmless beyond a reasonable doubt because the error did not contribute to the jury's finding that Henningfield was guilty of OWI. *See* ***State v. Eison***, 2011 WI App 52, ¶11, 332 Wis. 2d 331, 797 N.W.2d 890.

Issue Preclusion

¶45 "[I]ssue preclusion forecloses relitigation of an issue that was litigated in a previous proceeding involving the same parties or their privies." ***Masko v. City of Madison***, 2003 WI App 124, ¶4, 265 Wis. 2d 442, 665 N.W.2d 391. For issue preclusion to limit subsequent litigation, the question of fact or law must have been actually litigated and necessary to the judgment. ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54. "An issue is 'actually litigated' when it is 'properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'" ***Randall v. Felt***, 2002 WI App 157, ¶9, 256 Wis. 2d 563, 647 N.W.2d 373 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. d (1980)). If the question of fact or law has been actually litigated and is necessary to the judgment, then the court must "conduct a fairness analysis to determine whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand." ***Mrozek***, 281 Wis. 2d 448, ¶17.

¶46 The party asserting issue preclusion bears the burden of demonstrating that it applies. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999). The issue of whether a question of fact or law was actually litigated is one of law, which, on appeal, is reviewed de novo, while the issue of fundamental fairness involves the exercise of discretion, which, on appeal, will not be disturbed unless that discretion is erroneously exercised. ***Mrozek***, 281 Wis. 2d 448, ¶15; ***Paige K.B.***, 226 Wis. 2d at 225.

¶47 In ***Mrozek***, the plaintiff sued her former attorney, Mallery, for legal malpractice. ***Mrozek***, 281 Wis. 2d 448, ¶12. The plaintiff had previously been charged under Wisconsin law with thirteen counts of willfully failing to disclose material facts in connection with efforts she made to construct a hotel with the assistance of Mallery. ***Id.***, ¶9. Ultimately, the plaintiff pleaded guilty to two counts of felony securities fraud and three counts of misdemeanor theft by fraud. ***Id.*** The plaintiff sued Mallery, and Mallery moved for summary judgment, which was granted and which we affirmed on appeal on the ground that the plaintiff's guilty pleas resulted in issue preclusion of any issues of fact or law necessarily encompassed by the plaintiff's criminal convictions. ***Id.***, ¶¶12-13. The supreme court reversed. It held that a guilty plea should not be given preclusive effect because the decision to plead guilty often involves "reasons having little or nothing to do with the nature of the issues." ***Id.***, ¶21 (citation omitted). For example, the State may be seeking to conserve its scarce resources or the defendant may be attempting to secure a reduced term of incarceration. ***Id.*** Therefore, the supreme court held, "Mrozek's guilty pleas do not fulfill the 'actually litigated' requirement for issue preclusion." ***Id.***

¶48 Henningfield argues that ***Mrozek*** is limited to its facts, hinging his argument on the supreme court's statement that "Mrozek's guilty pleas do not

fulfill the 'actually litigated' requirement for issue preclusion." ***Id.*** In other words, Henningfield argues, if the supreme court intended to make a broad pronouncement beyond the confines of that particular case, the court would have used broader language. Henningfield cites nothing to support such a proposition, and nothing in ***Mrozek*** or since suggests that it is limited to its facts. Thus, ***Mrozek*** is controlling.

¶49 Consequently, we hold that Henningfield's guilty plea to OWI as a fifth offense did not actually litigate whether he had ten prior convictions, suspensions, or revocations under WIS. STAT. § 343.307(1). Therefore, Henningfield's guilty plea to OWI as a fifth offense did not preclude the State from charging him with OWI as a tenth and subsequent offense nor the circuit court from sentencing him as such.

¶50 In light of our determination, we do not reach the question of whether it would be fundamentally fair to employ issue preclusion to the particular circumstances of this case. ***Mrozek***, 281 Wis. 2d 448, ¶17; ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 698, 495 N.W.2d 327 (1993); *see also* ***Randall***, 256 Wis. 2d 563, ¶9 (stating that the "actually litigated" question is a "threshold prerequisite for application" of issue preclusion).[8]

CONCLUSION

¶51 Henningfield's claim of ineffective assistance based on trial counsel's opening statement fails for lack of prejudice, any invalidity in his waiver

[8] Henningfield does not argue that the circuit court erred in determining that he had ten prior qualifying convictions, suspensions, or revocations under WIS. STAT. § 343.307(1).

of the status element was harmless error, and his 2011 plea and sentence to OWI as a fifth offense did not preclude the State from charging Henningfield with OWI as a tenth and subsequent offense and the circuit court from sentencing him to that charge.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.