[Cite as *State v. Oliver*, 2024-Ohio-4542.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY

STATE OF OHIO, Plaintiff-Appellee, - vs - RANDY A. OLIVER, Defendant-Appellant.	**CASE NO. 2023-L-110** Criminal Appeal from the Court of Common Pleas Trial Court No. 2023 CR 000736

O P I N I O N

Decided: September 16, 2024
Judgment: Affirmed

Charles E. Coulson, Lake County Prosecutor, and *Jennifer A. McGee*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Eric M. Levy, 55 Public Square, Suite 1600, Cleveland, OH 44113 (For Defendant-Appellant).

EUGENE A. LUCCI, P.J.

{¶1} Appellant, Randy A. Oliver, appeals the judgment imposing sentence following a trial where he was found guilty of operating a vehicle under the influence of alcohol ("OVI"), with a specification concerning prior felony OVI offenses; driving under OVI suspension; and open container. We affirm.

{¶2} In July 2023, Oliver was arrested on the campus of the Telshe Yeshiva, a private Jewish school in Wickliffe, Lake County, Ohio. In connection with that arrest, Oliver was subsequently charged with two counts of OVI, felonies of the third degree, in

violation of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(2), respectively, with specifications pursuant to R.C. 2941.1413 attendant to each OVI count; one count of open container, a minor misdemeanor, in violation of R.C. 4301.62(B)(4); and one count of driving under OVI suspension, a misdemeanor of the first degree, in violation of R.C. 4510.14(A).

{¶3} Oliver pleaded not guilty to the charges. Prior to trial, the parties entered two stipulations. First, the parties stipulated that Oliver had previously been convicted of violating R.C. 4511.19(A), under circumstances in which the violation was a felony. Second, the parties stipulated that Oliver previously had been convicted of five or more violations of "division (A) or (B) of R.C. 4511.19" within 20 years. The stipulations included the location of the court and case number corresponding with each of the prior convictions, but the second stipulation did not identify which division of R.C. 4511.19 was associated with each conviction.

{¶4} After a trial, the jury found Oliver guilty of the two OVI charges, the attendant specifications, and the driving under OVI suspension charge, and the trial court found him guilty of the open container charge.

{¶5} At sentencing, the parties agreed that the OVI counts merged, and the State elected to proceed to sentencing on the second count. In an entry filed on October 30, 2023, the court sentenced Oliver to 18 months of imprisonment on the second OVI count, consecutive to one year of imprisonment on the attendant specification. The court sentenced Oliver to 180 days of confinement on the driving under OVI suspension count, concurrent to the sentence imposed on the second OVI count and attendant specification.

The trial court did not reference a sentence on the open container count in the October 30, 2023 entry.

{¶6} Oliver appealed from the October 30, 2023 entry. Thereafter, on Oliver's motion, this court issued a limited remand for purposes of the trial court resolving the open container count. The trial court subsequently issued an entry ordering Oliver to serve zero days of confinement and to pay a zero dollar fine on the open container count.

{¶7} In his first and second assigned errors, Oliver contends:

> [1.] Oliver was convicted of OVI(s) and driving under suspension absent due process of law where the convictions were entered without sufficient evidentiary support.
>
> [2.] Oliver's OVI and driving under suspension convictions were against the manifest weight of the evidence.

{¶8} The question of whether sufficient evidence supports a conviction "is a test of adequacy," which we review de novo. *State v. Thompkins*, 1997-Ohio-52, 386. "In a sufficiency-of-the-evidence inquiry, the question is whether the evidence presented, when viewed in a light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *State v. Dent*, 2020-Ohio-6670, ¶ 15, citing *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶9} Unlike a review of the sufficiency of the evidence, our review of the "[w]eight of the evidence concerns 'the inclination of the *greater amount of credible evidence* . . . to support one side of the issue rather than the other.'" (Emphasis in original.) *Thompkins* at 387, quoting *Black's Law Dictionary* (6th Ed. 1990). When considering challenges to the weight of the evidence, an appellate court reviews "'the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and

determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983). "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a ""thirteenth juror"" and disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *Martin* at 175. A reviewing court's determination that a judgment is not against the manifest weight of the evidence necessarily includes the conclusion that the judgment is supported by sufficient evidence. *State v. Arcaro*, 2013-Ohio-1842, ¶ 32 (11th Dist.).

{¶10} Here, we first note that, because the first OVI count merged into the second count, no sentence was imposed on the first count, and, thus, there exists no conviction on the first OVI count. Accordingly, we proceed to review the remaining counts for which sentence was imposed. *See State v. Walker*, 2023-Ohio-1949, ¶ 12 (11th Dist.), *appeal not allowed*, 2023-Ohio-3169.

{¶11} The second count of OVI alleged a violation of R.C. 4511.19(A)(2), which provides:

> No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) of this section, or any other equivalent offense shall do both of the following:

> (a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;
>
> (b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

"The term 'under the influence' means that 'the defendant consumed some [alcohol], . . . in such a quantity, whether small or great, that it adversely affected and appreciably impaired the defendant's actions, reactions, or mental processes under the circumstances then existing[.]'" *State v. Clark*, 2007-Ohio-3777, ¶ 12 (8th Dist.), quoting 4 *Ohio Jury Instructions* 6, Section 545.25.

{¶12} In addition, Oliver was sentenced on the jury finding relative to the specification contained in R.C. 2941.1413, which provides, in relevant part:

> (A) Imposition of a mandatory additional prison term of one, two, three, four, or five years upon an offender under division (G)(2) of section 2929.13 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging a felony violation of division (A) of section 4511.19 of the Revised Code specifies that either:
>
> (1) The offender, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more equivalent offenses . . . .

For purposes of R.C. 2941.1413, an "equivalent offense" includes a violation of R.C. 4511.19(A). R.C. 2941.1413(C); R.C. 4511.181(A)(1).

{¶13} Next, although the State contends that Oliver was not sentenced on the minor misdemeanor open container count, the trial court did impose zero days of

confinement and a zero dollar fine when this matter was returned to the court on the limited remand. By its nature, this judgment has necessarily been satisfied; however, this court has held that an appeal for a misdemeanor conviction is not moot where court costs remain outstanding. *State v. Landingham*, 2021-Ohio-4258, ¶ 3-4 (11th Dist.). Here, the court ordered Oliver to pay court costs, and the docket does not reflect payment. Accordingly, we will review Oliver's argument that this conviction is unsupported by the evidence.

{¶14} The offense of open container is proscribed by R.C. 4301.62(B), which provides, in relevant part, "No person shall have in the person's possession an opened container of beer or intoxicating liquor . . . while operating or being a passenger in or on a motor vehicle on any street, highway, or other public or private property open to the public for purposes of vehicular travel or parking . . . ."

{¶15} Last, Oliver was convicted of driving under OVI suspension in violation of R.C. 4510.14(A), which provides:

> No person whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended under section 4511.19, 4511.191, or 4511.196 of the Revised Code or under section 4510.07 of the Revised Code for a conviction of a violation of a municipal OVI ordinance shall operate any motor vehicle upon the public roads or highways within this state during the period of the suspension.

{¶16} With respect to the evidence in support of these charges and specifications, as set forth in our recitation of the procedural history, we again note that the parties entered into certain stipulations. At the commencement of trial, the State made its opening statement, wherein it indicated to the jury that it would hear stipulations in regard to prior convictions, "which are elements of the charges as well." During defense counsel's

opening statement, counsel indicated to the jury, "[t]here are some aspects of what [the State] said that we don't contest, we've stipulated or agreed to Mr. Oliver's prior convictions." After opening statements, the trial court read to the jury the joint stipulations:

> No. 1, the defendant, Randy A. Oliver has previously been convicted of a violation of Division A of Revised Code Section 4511.19, under circumstances in which the violation was a felony and that being in Cuyahoga County Court of Common Pleas, case number CR-17-617872-A, dated September 18th of 2017.
>
> No. 2, the defendant, Randy A. Oliver, has been previously convicted of five or more violations of *Division A or B* of Revised Code Section 4511.19 within 20 years. It was being in the Berea Municipal Court, case number 11-TRC-04417-1, dated August 30th of 2012, in the Cleveland Municipal Court, case number 2011-REC-037159, dated March 13th of 2013 in the Lake County Court of Common Pleas, case number 14-CR-000381, dated February 5, 2015, in the Cuyahoga County Court of Common Pleas, case number, CR-14-589448-A, dated March 19, 2013, in the Cuyahoga County Court of Common Pleas, case number CR-17-617872-A, dated September 18th, 2017.

(Emphasis added.)

{¶17} Thereafter, the State presented the testimony of the director of the Telshe Yeshiva, a security guard on duty at the school on the date of the incident, several police officers employed by the City of Wickliffe Police Department, and a forensic analyst employed by the Lake County Crime Lab.

{¶18} The State's evidence indicated that the Telshe Yeshiva is a private Jewish high school and college for males. The campus is accessible from three entrances from certain roadways. Each entrance is marked with "no trespassing" signs. Students are not permitted to have vehicles on campus, and therefore the parking lots on campus are used only by staff and visitors.

{¶19} In the late hours of July 1, 2023, a fire alarm was activated in one of the campus dormitories. As a result, a large number of students gathered outside the campus buildings, and first responders were dispatched to the campus.

{¶20} Antonio Stitt, who worked part-time as a security guard at the school, and was working on the night of July 1, 2023, testified as to his history in law enforcement. Stitt testified that, prior to trial, on July 9, 2023, he had been sworn in as the police chief of the North Randall Police Department. On the night of July 1, 2023, at approximately 11:00 p.m., Stitt was in his vehicle parked by the campus administrative building, when a white Lexus pulled into the parking lot in front of him. The vehicle remained for approximately ten minutes. At that point, Stitt exited his vehicle to inquire if the driver of the Lexus needed assistance. As Stitt exited his vehicle, a man, later identified as Oliver, exited the Lexus, and stood beside it. As Stitt approached Oliver, Stitt observed Oliver was slightly staggering and trying to hold himself up against the Lexus. Stitt repeatedly told Oliver to leave the premises. Oliver responded that Stitt needed to "get out of his face," and told Stitt that, if he left Oliver alone, "there would not be a problem." Stitt maintained that Oliver's speech was slurred. Oliver stepped toward Stitt and was "stumbling, staggering." Oliver took another step toward Stitt, and, at about six feet from Stitt, Oliver "unzipped his pants, took his penis out and began to urinate on the ground." Based upon his observations, Stitt believed Oliver was inebriated.

{¶21} While Stitt was interacting with Oliver, students began gathering around them. Stitt informed Oliver that he needed to leave and took out his phone to call police. Stitt maintained that his "top priority" was getting Oliver off the campus and away from the students, but he also believed he had a responsibility to call police because Oliver

appeared to have been drinking and was driving a vehicle. As Stitt was on the phone with 9-1-1, Oliver reentered the Lexus and began to leave the parking lot.

{¶22} Meanwhile, a Wickliffe police officer, who was en route in response to the fire alarm, was notified by dispatch that Stitt had reported a drunk male in a white Lexus at the school. After the officer arrived at the campus, he saw the white Lexus driving behind him, and he maneuvered his cruiser to pull behind the Lexus. When he approached the Lexus, the driver was outside the vehicle yelling and jumping up and down in front of a crowd of approximately 30 to 40 students.

{¶23} Stitt observed the officer approaching Oliver, after Oliver made a wrong turn which led him "back up right in front of the dorm." Stitt saw that Oliver was "playing at" the students, yelling and jumping at them, but not in a threatening or harmful manner. Stitt believed the students viewed this as "a big game," like "it was entertainment to them." Because so many students were gathered, and because the officer was alone, Stitt went to the area to assist.

{¶24} The officer observed Stitt in the area, and Stitt pointed at Oliver, appearing to indicate that Oliver was the individual that Stitt had reported. When the officer neared Oliver, he observed that Oliver's clothing was soaked with some sort of liquid, and he noticed Oliver's eyes were bloodshot and watery. In addition, the officer smelled a strong odor of alcoholic beverage emanating from Oliver's breath. The officer asked Oliver to accompany him to the police car, and Oliver refused, stating "this is America." The officer then told him multiple times to go to the cruiser, and Oliver replied that he did not have to do as the officer directed. The officer then informed Oliver that if he did not do as the officer directed, the officer would detain him, and Oliver asked why. At that point, the

officer grabbed Oliver's right arm to put him in handcuffs, and Oliver pulled it away. The officer regained control of Oliver's right arm, and Stitt assisted by grabbing Oliver's left arm, and they placed Oliver in handcuffs. The officer and Stitt then walked Oliver to the officer's cruiser. Oliver resisted walking toward the cruiser and "stiffened up" and refused to get into the backseat. Once the officer and Stitt were able to place Oliver in the backseat, Oliver refused to put his legs in the cruiser. Oliver continued asking the officer why he was being detained, and the officer stated that he was trespassing. During his testimony, the officer acknowledged that he did not inform Oliver that he was being arrested for OVI at that point, although based on his observations, he had decided to investigate further for OVI.

{¶25} While Stitt and the officer were attempting to place Oliver completely within the backseat of the cruiser, another Wickliffe officer arrived at the scene. When the second responding officer arrived, he observed Oliver in the rear passenger-side of the cruiser. He further observed that the first responding officer appeared to be attempting to close the cruiser door, but Oliver was refusing to put his legs in the car to allow the door to close. Therefore, the second responding officer opened the driver-side rear door of the cruiser and pulled Oliver away from the passenger-side so the door could be closed without hitting his legs. After Oliver was secured in the police cruiser, the two officers approached the Lexus, in which they observed an oversized "Solo" cup containing liquid and four straws sitting on the front passenger seat. The officers confiscated the cup and its contents and sent a sample of the liquid to the crime lab for testing. A forensic analyst who tested the liquid testified that it contained ethanol, also known as ethyl alcohol, which is present in alcoholic beverages.

{¶26} Although the officers, who had substantial experience dealing with individuals intoxicated by alcohol, believed from their observations that Oliver was inebriated, they did not perform field sobriety tests on Oliver. The first responding officer testified that this decision was based on several factors, including that such tests required a level of cooperativeness that Oliver was not exhibiting, and because certain tests required Oliver to be outside the cruiser.

{¶27} While the two officers were searching the Lexus, a third officer responded to the scene. The officer could hear Oliver yelling in the back of the cruiser, and the officer contacted him. Oliver was screaming that he could not breathe, and he appeared to be panicking, saying that he thought he was going to die. The officer then rolled down the window of the cruiser to provide fresh air in the backseat. The officer observed that Oliver was crying and screaming, and his mood swung quickly between emotions. The officer also noted that the front of Oliver's shirt was wet, and the officer could smell an alcoholic beverage on Oliver's breath.

{¶28} After searching the Lexus, the first responding officer drove Oliver to the police station for booking. During booking, officers suggested that Oliver had urinated on himself due to his wet clothing. However, Oliver responded that dampness on his clothing was liquor. Oliver's uncooperativeness and emotional state continued during the booking process. While at the jail, an officer twice read Oliver a BMV 2255 form, which is an implied consent form that officers are required to read when an individual has been arrested for OVI. The first sentence of the form states that the individual is now under arrest for OVI. Oliver continued to act uncooperative and was yelling while the officer read

the form. However, after each reading of the form, the officer asked Oliver whether he would submit to a breath test, and Oliver responded "no" both times.

{¶29} A sergeant of the Wickliffe Police Department testified that he was in communication with the officers who responded to the scene, and he was present at the jail when Oliver was booked. When Oliver arrived at the jail, he was yelling and refusing to follow simple directions. The sergeant monitored Oliver after he was placed in a holding cell until the sergeant left at about 3:00 a.m. on July 2, 2023. During that time, Oliver took his clothes off in the cell, urinated on the floor, and fell while attempting to stand.

{¶30} On July 2, 2023, approximately 13 hours after the first officer interacted with Oliver, the same officer began his next shift. At that point, Oliver was still in custody. The officer testified that Oliver's behavior and demeanor were entirely different than they were the night prior. Oliver was not yelling, and he asked to be taken to the hospital to have an issue with his wrist checked. The officer transported Oliver to the hospital, and the officer had no issues with Oliver getting into or out of the police cruiser or any issues with Oliver's behavior at the hospital.

{¶31} Several exhibits were entered into evidence during the testimony of the State's witnesses, including copies of body-camera footage, surveillance video of the school outside the dorm, and a video recording from the jail at the time of Oliver's booking. After the State rested subject to admission of other exhibits, a discussion ensued between the court and counsel regarding a certified copy of Oliver's BMV record, which the first responding officer had identified during his testimony. The BMV record indicated that Oliver's license was suspended from OVI-related charges at the time of the incident. The court and counsel discussed this record as follows:

> [THE STATE]: . . . So Exhibit 6, is the certified BMV driving record . . . I am making a motion to admit all those, however, in regards to No. 6, I did not have the opportunity to speak to [defense counsel] about this, as a certified record, it contains all of his prior traffic convictions, which include all the OVI convictions and we have a stipulation in this case, I would propose that we just remove the convictions part of it, if [defense counsel] is okay with that, and I can show you the exhibit.
>
> [DEFENSE COUNSEL]: I object to the exhibit.
>
> THE COURT: On what basis?
>
> [DEFENSE COUNSEL]: The jury heard the testimony, we've gone to great lengths to stipulate to the prior and I don't necessarily think it's fair. There hasn't been any evidence presented to the contrary.
>
> THE COURT: What's contained in the records that is not contained in the stipulation?
>
> [THE STATE]: The OVI suspension for the driving under an OVI suspension. And so I would propose to actually remove the conviction since we have the stipulation. It's the greater half of the record, the second half to just take it out and for only it to be the part about the license status and suspensions.
>
> THE COURT: Where in the stipulation does it talk about him being under an OVI suspension?
>
> [DEFENSE COUNSEL]: The stipulation just goes to the prior.
>
> THE COURT: I'll admit it for the limited purposes of the suspension. The two of you can look at it and make sure all that's submitted under six. Okay.

{¶32} After admission of the State's remaining exhibits, defense counsel moved for acquittal under Crim.R. 29. The trial court denied the motion. Thereafter, the defense rested without putting on evidence.

{¶33} In the instructions relative to specifications to the OVI counts, the trial court instructed the jury as follows:

> If your verdict is guilty of operating a vehicle under the influence of alcohol [as contained in the first OVI count], you will decide separately whether the State proved beyond a reasonable doubt that the defendant within 20 years of this offense who was previously convicted of or pleaded guilty to five or more equivalent offenses. If your verdict is not guilty of operating a vehicle under the influence of alcohol, you will not consider it in this specification.
>
> Equivalent offenses include a violation of Division A of section 4511.19 of the Revised Code and includes a violation of a municipal OVI ordinance. With regard to stipulation No. 2. the defendant, Randy A. Oliver, has previously been convicted of five or more violations, of *Division A or B* of Revised Code 4511.19 within 20 years in the Berea Municipal Court, case number 11CRC04417-1, dated August 30, 2012, in the Cleveland Municipal Court, case number 2011CTC037159, dated March 19, 2013, in the Lake County Court of Common Pleas, case number 14-CR-000381 dated February 5, 2018, in the Cuyahoga County Court of Common Pleas, case number CR-14-58948-A, dated March 19, 2015, in the Cuyahoga County Court of Common Pleas, case number CR-17-6172872, dated September 18, 2017.
>
> . . .
>
> In regards to specification of Count Two, if your verdict is guilty of operating a vehicle under the influence of alcohol, you will separately decide whether the State proved beyond a reasonable doubt that the defendant within 20 years of this offense has been previously convicted of or pleaded guilty to five or more criminal offenses.
>
> If your verdict is not guilty of operating a vehicle under the influence of alcohol, you will not consider this specification. This specification is identical to the specification in Count One.

(Emphasis added.)

{¶34} Thereafter, during closing arguments, with respect to the specifications and the second joint stipulation, the State noted:

> Then there is a specification associated with Count One, again, you have a stipulation which is in evidence and laid out

> for you in your instructions, which you must find whether or not the defendant has been convicted of five or more violations of those code sections and they are laid out for you there.
>
> . . .
>
> Same specification with Count Two, there have been five or more violations of that code section within 20 years with the same cited priors.

{¶35} During defense counsel's closing argument, defense counsel stated, "You've heard the instruction about Mr. Oliver's prior convictions. We stipulated to those, those aren't in dispute."

{¶36} As set forth above, the jury returned guilty verdicts on the OVI counts with the attendant specifications, and the driving under OVI suspension count, and the trial court found Oliver guilty on the open container count.

{¶37} On appeal, Oliver challenges the evidence related to his impairment by alcohol, his operation of a vehicle on public roadways, his refusal to submit to a chemical test, and his prior convictions.

Impairment by Alcohol

{¶38} First, Oliver challenges the evidence of his driving while under the influence of alcohol. Oliver maintains that was no indication that his driving was erratic. Further, he maintains that he potentially could have consumed alcohol during the ten minutes that Stitt observed him parked in the school's lot prior to exiting his vehicle. In addition, Oliver maintains that there was no indication that he was driving under the influence of alcohol prior to arriving at the school. Oliver additionally contends that the odor of alcohol on his person can be explained through the alcohol spill on his clothing, and his bloodshot and watery eyes may be explained by other sources. Oliver further notes that the officers

affirmed that he was not asked to submit to field sobriety tests. Finally, Oliver contends, although the liquid in the disposable cup was tested and found to contain ethanol, there was no testimony that such a substance would cause the impairment observed by the officers.

{¶39} However, evidence of erratic driving is not required to support a conviction for OVI. *See Kirtland Hills v. Deir*, 2006-Ohio-6536, ¶ 30 (11th Dist.). Instead, the State was required to prove that Oliver operated his vehicle *while* impaired by alcohol. *See* R.C. 4511.19(A)(2) (proscribing operation of vehicle under the circumstances therein described "while under the influence of alcohol"). The witnesses testified to many indicia of impairment, including: Oliver's bloodshot, watery eyes; the smell of alcohol emanating from Oliver's breath; the spilled alcohol on Oliver's pants; the cup of alcohol in Oliver's car; Oliver's trespass at the Telshe Yeshiva; Oliver urinating in the parking lot in front of the security officer and students when the security officer approached him; and Oliver's behavior and mood swings.

{¶40} Further, although Oliver may have consumed the alcohol while in the parking lot, the evidence demonstrates that Oliver operated the vehicle both before and after entering the lot. The jury could reasonably infer from the evidence, due to Oliver's trespass in the parking lot as well as his behavior a short time after entering the parking lot, that Oliver was impaired prior to entering the campus. Further the jury could infer from the behavior and the observations of Stitt and the officers, that Oliver was impaired when operating his vehicle following his initial interaction with Stitt. *See State v. Jenks,* 61 Ohio St.3d 259 (1991), paragraph one of the syllabus ("Circumstantial evidence and direct

evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof.").

{¶41} Moreover, there is no requirement that officers perform field sobriety tests to support an OVI. Additionally, although some of Oliver's characteristics observed by the witnesses could be attributed to causes other than alcohol impairment, the State was not required to prove that the circumstantial evidence of impairment by alcohol "was irreconcilable with any reasonable theory of innocence in order to support a conviction." *Id.*

{¶42} Last, several of the State's witnesses, with training and experience relative to intoxicated individuals, testified that Oliver appeared inebriated, and the smell of alcohol emanated not just from his clothing, but from his breath. "It is established . . . that the element of being 'under the influence of alcohol' may be proven by eye-witness testimony, without recourse to field sobriety or other tests." *State v. Scandreth*, 2009-Ohio-5768, ¶ 71 (11th Dist.), citing *State v. Lee*, 2008-Ohio-343, ¶ 22 (9th Dist.); and *State v. Roskovich*, 2005-Ohio-2719, ¶ 3, 22-23 (7th Dist.). *See also Dier*, 2006-Ohio-6536, at ¶ 29 (11th Dist.).

{¶43} Accordingly, to the extent that Oliver challenges the sufficiency and weight of the evidence demonstrating that he was under the influence of alcohol while operating a vehicle, his first and second assigned errors lack merit.

Operation of a Vehicle on a Public Roadway

{¶44} Next, Oliver maintains that an individual cannot refuse a chemical test for purposes of an OVI under R.C. 4511.19(A)(2) when the vehicle operation occurred on private property. In support, Oliver cites this court's decision in *Lachowski v. Petit*, 2019-

Ohio-3328 (11th Dist.). *Lachowski* involved an appeal of a CDL disqualification. *Id.* at ¶ 1. This court noted that, in the driver's administrative license appeal case, there was an agreement "that R.C. 4511.191 did not apply because Lachowski was on private property at the time of his OVI arrest." *Lachowski* at ¶ 6. This court further noted that the driver had appealed disqualification of his CDL arguing again that he was operating his personal vehicle on private property at the time of his OVI arrest. *Id.* at ¶ 8.

{¶45} Unlike *Lachowski*, at issue in the present case is the OVI conviction under R.C. 4511.19(A)(2), which, on its face, proscribes the operation of a vehicle "within this state" while under the influence of alcohol under the circumstances therein described. R.C. 4511.19(A)(2)(a). Such circumstances include the elements contained in R.C. 4511.19(A)(2)(b). As set forth above, R.C. 4511.19(A)(2)(b) provides: "No person . . . shall . . . [s]ubsequent to being arrested for operating the vehicle. . . as described in division (A)(2)(a) of this section, *being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code*, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests." (Emphasis added.)

{¶46} Thus, to sustain a conviction under R.C. 4511.19(A)(2), the State must prove that a law enforcement officer asked the defendant to submit to a chemical test or tests under R.C. 4511.191. R.C. 4511.191(A)(2) provides:

> Any person who operates a vehicle . . . *upon a highway or any public or private property used by the public for vehicular travel or parking* within this state or who is in physical control of a vehicle . . . shall be deemed to have given consent to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine to determine the alcohol,

> drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or urine if arrested for a violation of division (A) or (B) of section 4511.19 of the Revised Code, section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance, or a municipal OVI ordinance.

(Emphasis added.)

{¶47} Despite the differences in R.C. 4511.191(A)(2) and R.C. 4511.19(A)(2)(a) regarding the location of the vehicle operation, we need not reach in this case whether R.C. 4511.191(A)(2) limits R.C. 4511.19(A)(2). Both statutes apply to the operation of a vehicle on a highway or area of public travel within the state, and, although there existed no direct evidence of Oliver's location just prior to driving into the campus parking lot, the evidence indicated that Oliver was neither a student nor a member of the school's faculty, and the campus is accessible by vehicle through three entrances from public roadways. Thus, it was reasonable to infer that Oliver operated the vehicle on a public roadway while under the influence of alcohol.

{¶48} Next, Oliver maintains that, because he was located on the school's private property his convictions for open container and driving under OVI suspension must be vacated. *See* R.C. 4301.62(B) (prohibiting operator of motor vehicle from having open container of beer or intoxicating liquor "on any street, highway, or other public or private property open to the public"); *see also* R.C. 4510.14(A) (person whose license is suspended for OVI-related offense shall not "operate any motor vehicle upon the public roads or highways").

{¶49} However, again, a reasonable trier of fact could infer that Oliver entered the campus from a public roadway prior to parking in the campus lot, and thus he was

operating his vehicle on a public roadway while under an OVI-related suspension and while possessing an open container of intoxicating liquor.

{¶50} Accordingly, to the extent that Oliver challenges the sufficiency and weight of the evidence demonstrating that he operated the vehicle on a public roadway for purposes of the applicable OVI, driving under OVI suspension, and open container statutes, his first and second assigned errors lack merit.

Refusal of Chemical Test

{¶51} Oliver further argues that he did not refuse a chemical test despite the evidence indicating that he replied "no" to the officer's requests that he submit to a breath test.

{¶52} Oliver's argument relies, in part, on R.C. 4511.191(A)(5), which provides:

> (5)(a) If a law enforcement officer arrests a person for a violation of division (A) or (B) of section 4511.19 of the Revised Code . . . and if the person if convicted would be required to be sentenced under division (G)(1)(c), (d), or (e) of section 4511.19 of the Revised Code, the law enforcement officer shall request the person to submit, and the person shall submit, to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine for the purpose of determining the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or urine. A law enforcement officer who makes a request pursuant to this division that a person submit to a chemical test or tests is not required to advise the person of the consequences of submitting to, or refusing to submit to, the test or tests and is not required to give the person the form described in division (B) of section 4511.192 of the Revised Code, but the officer shall advise the person at the time of the arrest that if the person refuses to take a chemical test the officer may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma. The officer shall also advise the person at the time of the arrest that the person may have an independent chemical test

> taken at the person's own expense. Divisions (A)(3) and (4) of this section apply to the administration of a chemical test or tests pursuant to this division.
>
> (b) If a person refuses to submit to a chemical test upon a request made pursuant to division (A)(5)(a) of this section, the law enforcement officer who made the request may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma.

{¶53} Oliver argues that he was subject to sentencing under R.C. 4511.19(G)(1)(e), implicating R.C. 4511.191(A)(5). Therefore, he maintains that police officers were authorized to use whatever means were necessary to ensure he submit to the chemical test.

{¶54} However, the officers were not required by the statute to proceed to test Oliver, nor did they proceed to test Oliver following his refusals. Instead, the officers advised Oliver in accordance with R.C. 4511.192 by reading him the BMV 2255 form, and asked Oliver to consent to a breath test, and he refused. R.C. 4511.19(A)(2)(b) does not provide that, if the police are authorized to use reasonable means to obtain a test, then a refusal to submit to the test is negated.

{¶55} In addition, Oliver contends that he was unable to refuse the chemical test based on R.C. 4511.191(A)(4), which provides:

> (4) Any person who is dead or unconscious, or who otherwise is in a condition rendering the person incapable of refusal, shall be deemed to have consented as provided in division (A)(2) of this section, and the test or tests may be administered, subject to sections 313.12 to 313.16 of the Revised Code.

{¶56} Oliver contends that, "the evidence suggests that he was unable to refuse due to his condition when the test was offered."

{¶57} However, "[f]or the purpose of R.C. 4511.191, a refusal to submit to a chemical test of the blood, breath or urine will occur where a person, by his acts, words or general conduct, manifests an unwillingness to submit to the test. Such refusal need not have been knowingly and intentionally made." *Hoban v. Rice*, 25 Ohio St.2d 111 (1971), paragraph three of the syllabus. The evidence here indicates that Oliver replied "no" after both readings of the BMV 2255 form and request of the officer to conduct a breath test. Therefore, the evidence supported that he was capable of refusing the test.

{¶58} Oliver further maintains that he was arrested for trespassing, not for OVI. Therefore, he contends that he could not have refused a chemical test when he was not arrested for OVI and the officers lack probable cause to arrest him for an OVI. However, as discussed later in our review of Oliver's third assigned error, there was probable cause to arrest Oliver for OVI. Further, despite the officer not initially informing Oliver that he was under arrest for OVI, the officer twice informed him of this fact when he read the BMV 2255 form to him at the jail. Oliver refused to submit to the chemical test after each reading of the form.

{¶59} Based on the foregoing, Oliver's first and second assigned errors lack merit to the extent that he challenges the sufficiency and weight of the evidence demonstrating his refusal to submit to a chemical test for purposes of R.C. 4511.19(A)(2)(b).

Prior Convictions

{¶60} Next, with respect to Oliver's prior convictions and the specification contained in R.C. 2941.1413, the stipulation relative to the specification provided that Oliver had five or more convictions for violations of R.C. 4511.19(A) *or* (B). Oliver maintains that, although offenses under R.C. 4511.19(A) are "equivalent offenses,"

offenses under R.C. 4511.19(B) are not "equivalent offenses," for purposes of R.C. 2941.1413. Because the parties' stipulation relevant to the specification provided no indication as to which division of R.C. 4511.19 corresponded with the prior convictions, he maintains that there was insufficient evidence to support the specification.

{¶61} Previously, an "equivalent offense" for purposes of R.C. 2941.1413 included a violation of R.C. 4511.19(A) or (B). R.C. 2941.1413(C) ("As used in this section, 'equivalent offense' has the same meaning as in section 4511.181 of the Revised Code."); former R.C. 4511.181(A) (identifying numerous categories of equivalent offenses, including offenses under R.C. 4511.19(A) or (B) or substantially equivalent offenses). However, R.C. 4511.181 was amended effective April 4, 2023, removing an offense under R.C. 4511.19(B), which pertains to the offense of operating a vehicle after underage alcohol consumption, from the definition of an "equivalent offense."

{¶62} Although the parties' stipulation relative to the specification did not identify which of the prior convictions resulted from offenses under division (A) of R.C. 4511.19, as opposed to division (B), the State maintains that the stipulation was sufficient pursuant to *State v. Nelson*, 2020-Ohio-4657 (10th Dist.). In *Nelson*, in support of the R.C. 2941.1413 specification, the State produced a certified copy of the defendant's BMV record, which indicated that the defendant had five "OVI" convictions within the last 20 years, but the record did not identify which code or ordinance section correlated with each conviction. *Nelson* at ¶ 7. The defendant argued that the BMV record did not demonstrate that the OVI offenses were "equivalent" for purposes of R.C. 2941.1413. *Nelson* at ¶ 7. The trial court disagreed, and Nelson was convicted of the underlying charges and sentenced on the specification. *Id.* at ¶ 8. On appeal, the Tenth District noted that "to

prove a prior OVI conviction, Ohio law permits the State to submit either the certified copy of the accused's record maintained by the registrar of motor vehicles or a certified copy of the entry of judgment in the prior conviction." (Footnote omitted.) *Nelson* at ¶ 14, citing R.C. 2945.75(B)(2) ("Whenever in any case it is necessary to prove a prior conviction of an offense for which the registrar of motor vehicles maintains a record, a certified copy of the record that shows the name, date of birth, and social security number of the accused is prima-facie evidence of the identity of the accused and prima-facie evidence of all prior convictions shown on the record."). Despite the failure of the BMV record to list the particular code or ordinance sections which the defendant violated with respect to each conviction, the Tenth District concluded that the OVI classification of each offense in the BMV record was sufficient to demonstrate equivalent offenses. *Nelson* at ¶ 21-22; *see also* former R.C. 4511.181 (including in the definition of an "equivalent offense" "(1) A violation of division (A) or (B) of section 4511.19 of the Revised Code; (2) A violation of a municipal OVI ordinance; . . . (8) A violation of an existing or former municipal ordinance, law of another state, or law of the United States that is substantially equivalent to division (A) or (B) of section 4511.19 . . . ; (9) A violation of a former law of this state that was substantially equivalent to division (A) or (B) of section 4511.19 . . . .").

{¶63} However, *Nelson* was decided prior to the amendment of R.C. 4511.181, which specifically removed R.C. 4511.19(B) offenses, and offenses substantially equivalent to R.C. 4511.19(B) as "equivalent offenses." Thus, it would not be reasonable to conclude from the stipulation alone that all of Oliver's stipulated prior offenses resulted from a violation of division (A) of R.C. 4511.19 and none of the stipulated prior offenses resulted from a violation of division (B).

{¶64} Nonetheless, there existed other evidence from which it could be reasonably inferred that the prior stipulated offenses did not result from violations of R.C. 4511.19(B), which addresses underage drinking and applies only to those "under twenty-one years of age . . . ." The redacted BMV record admitted at trial lists Oliver's date of birth as February 28, 1982. Thus, Oliver turned 21 on February 28, 2003. The stipulations provided that Oliver's prior convictions under R.C. 4511.19(A) or (B) were incurred on August 30, 2012, March 13, 2013, February 5, 2015, March 19, 2015, and September 18, 2017. Thus, Oliver was 30 years old on the date of the first stipulated conviction.[1] Accordingly, if the jury had been instructed on the law with respect to the distinctions between offenses resulting from violations under divisions (A) and (B) of 4511.19, the only reasonable inference that it could have reached would be that the convictions resulted from violations of R.C. 4511.19(A).

{¶65} Accordingly, it appears that the parties and the trial court were unaware of the recent statutory changes that rendered this particular stipulation itself insufficient evidence of the prior "equivalent offenses." However, when the stipulation is considered with the BMV record and the applicable law, it would be unreasonable to conclude that any of the stipulated offenses resulted from a violation of R.C. 4511.19(B), as a conviction under that division would have resulted from Oliver's behavior that occurred more than nine years prior to the date of the first stipulated conviction.

1. In addition, the BMV record lists numerous license suspensions and references the trial court case number and date of the offense relative to each suspension. Although the case numbers are not formatted in precisely the same manner as in the stipulations, three of the five stipulated cases resulted in a license suspension that is included in the redacted BMV report. Using the correlating offense dates listed on the BMV report, these stipulated convictions resulted from offenses committed well after Oliver turned 21 years of age.

{¶66} We recognize that the jury instructions did not include an explanation of division (B) of R.C. 4511.19, from which the jury could engage in the above analysis. However, this is not an evidentiary failure, but a failure of the parties to request such an instruction on R.C. 4511.19(B) due to their mutual belief and representations that the stipulation itself evidenced the five equivalent offenses. As set forth above, defense counsel conceded that the evidence relative to the prior convictions was a non-issue. Thus, an error in failing to include an instruction differentiating between divisions (A) and (B) of R.C. 4511.19 was invited by defense counsel. *See State v. Ford*, 2019-Ohio-4539, ¶ 279, quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div.*, 28 Ohio St.3d 20 (1986), paragraph one of the syllabus ("The doctrine of invited error specifies that a litigant may not 'take advantage of an error which he himself invited or induced.'"). Further, any error in failing to provide an instruction explaining the elements of R.C. 4511.19(B) was harmless, as providing such an instruction would have only supported the jury's determination that the stipulated offenses resulted from violations of R.C. 4511.19(A). *See* Crim.R. 52(A) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.). *Compare State v. Blackburn*, 2003-Ohio-605 (11th Dist.) (reversing conviction but allowing retrial where *state did not meet its burden* to prove existence of prior conviction due to *incorrect stipulation* provided by trial court, although the error was invited by defense counsel).

{¶67} Accordingly, the state presented sufficient evidence supporting the conviction on the specification, and the conviction is not against the weight of the evidence. To this extent, Oliver's first and second assigned errors lack merit.

{¶68} In his third assigned error, Oliver maintains:

{¶69} "Oliver[ ]was denied his right to effective assistance of trial counsel or the trial court otherwise committed plain error."

{¶70} To prevail on an ineffective assistance of counsel claim, "a defendant must prove that counsel's performance was deficient and that the defendant was prejudiced by counsel's deficient performance." *State v. Davis*, 2020-Ohio-309, ¶ 10, citing *State v. Bradley*, 42 Ohio St.3d 136 (1989); and *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Thus, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that there exists a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Davis* at ¶ 10, citing *Bradley* at paragraphs two and three of the syllabus.

{¶71} Alternatively, to demonstrate plain error in a criminal case, the defendant must "demonstrate plain error on the record, . . . and must show 'an error, i.e., a deviation from a legal rule' that constitutes 'an "obvious" defect in the trial proceedings[.]'" *State v. Rogers*, 2015-Ohio-2459, ¶ 22, quoting *State v. Barnes*, 2002-Ohio-68, 27 (2002); *see also* Crim.R. 52(B). "[E]ven if the error is obvious, it must have affected substantial rights," meaning "'that the trial court's error must have affected the outcome of the trial.'" *Rogers* at ¶ 22, quoting *Barnes* at 27; *see also* Crim.R. 52(B).

{¶72} Accordingly, to demonstrate either ineffective assistance of counsel or plain error, a criminal defendant must demonstrate a reasonable probability that the error affected the outcome of trial. *See Rogers* at ¶ 22.

{¶73} In his third assigned error, Oliver advances arguments with respect to ineffective assistance of counsel and plain error pertaining to the following: the failure of defense counsel to advance the defense of entrapment; the failure to include certain jury

instructions; and the failure of defense counsel to move to suppress evidence because officers lacked probable cause to arrest him for OVI.

Entrapment

{¶74} Oliver first argues that defense counsel was ineffective for failing to raise the defense of entrapment or request a jury instruction on this defense.

{¶75} "The defense of entrapment is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute." *State v. Doran*, 5 Ohio St.3d 187 (1983), paragraph one of the syllabus.

{¶76} In arguing that counsel should have raised the defense of entrapment, Oliver maintains that there was "no evidence that Oliver intended to operate/move the vehicle thereafter until he was forced to do so by Police Chief Antonio Stitt who was looking to persuade Oliver into committing an [OVI] offense."

{¶77} As set forth in our discussion of Oliver's first and second assigned errors, Stitt testified that he worked part-time as a security guard at the Telshe Yeshiva on the date of the incident. Although Oliver frames his argument in such a way as to imply that Stitt was also employed as the full-time police chief of the North Randall Police Department at the time of the offense, Stitt testified that he was sworn in as the police chief on July 9, 2023, and the present incident occurred in the late night hours of July 1, 2023. Although Stitt testified regarding his lengthy experience as a police officer dating back to 1993, it is not clear from Stitt's testimony whether he was employed in the capacity of a law enforcement officer at the time of the offense.

{¶78} Nonetheless, regardless of the capacity in which Stitt was acting at the time of the incident, as discussed in our review of Oliver's first and second assigned errors, evidence was presented supporting a reasonable inference that Oliver was driving while under the influence of alcohol *prior to* entering the parking lot where he interacted with Stitt. Based on this evidence, Oliver has not demonstrated a reasonable probability that the result of the proceeding would have been different had defense counsel argued entrapment or the jury received an instruction on entrapment. Therefore, Oliver has not demonstrated ineffective assistance of counsel or plain error with respect to the failure of defense counsel to raise, or the trial court to provide a jury instruction on, the defense of entrapment.

Jury Instructions

{¶79} Oliver next argues that defense counsel was ineffective for failing to request jury instructions regarding: "(1) private property; (2) the R.C. 4511.191(A)(5) exception to the right to refuse a chemical test; and (3) that Oliver's present condition could result in him being incapable of refusing a chemical test."

{¶80} With respect to the issue of Oliver driving on private property, as discussed in our review of Oliver's first and second assigned errors, without reaching the issue of whether an OVI under R.C. 4511.19(A)(2) can occur on private property, we note that there existed evidence that Oliver operated a vehicle on a public roadway while under the influence of alcohol and while his license was suspended for an OVI-related offense. Based on this evidence, we conclude that Oliver has not demonstrated a reasonable probability that the outcome would have been different but for defense counsel's failure to request, or the trial court's failure to give, instructions regarding private property.

{¶81} Next, with respect to Oliver's position that R.C. 4511.191(A)(5) is an "exception to the right to refuse a chemical test," on which an instruction should have been given, as also discussed in our review of Oliver's first and second assigned errors, the availability of R.C. 4511.191(A)(5) to use all reasonable measures to obtain a chemical test does not excuse a defendant's refusal of the chemical test. Accordingly, for the same reasons previously discussed, defense counsel was not deficient in failing to request an instruction consistent with Oliver's argument that a defendant "charged with an OVI and subject to being sentenced under R.C. 4511.19(G)(1)(c), (d), or (e) is not permitted to refuse a chemical test and there are no additional sanctions for an express refusal[.]" Likewise, the trial court did not commit error, much less plain error, in failing to provide such an instruction.

{¶82} With respect to Oliver's argument that the jury should have been instructed that a refusal must be intelligently given, again, as set forth in our discussion of Oliver's first and second assigned errors, such an instruction would be inconsistent with the Ohio Supreme Court's holding in *Hoban*, 25 Ohio St.2d 111, at paragraph three of the syllabus. Accordingly, defense counsel was not deficient in failing to request, and the trial court did not error in failing to provide, such an instruction.

Probable Cause for Arrest

{¶83} In the last issue presented in his third assigned error, Oliver argues that defense counsel was ineffective for failing to move to suppress evidence because officers lacked probable cause to arrest Oliver for OVI.

{¶84} "[A] police officer has probable cause to arrest for driving under the influence where the facts and circumstances within the officer's knowledge and of which

he has reasonably trustworthy information are sufficient to warrant a prudent man in believing that the accused had operated the vehicle while under the influence. In making this determination, each drunk-driving case must be decided on its own particular and peculiar facts." *State v. Hummel*, 2003-Ohio-4602, ¶ 30 (11th Dist.). "'Probable cause to arrest does not have to be based, in whole or in part, upon a suspect's poor performance on one or more field sobriety tests.'" *State v. Louis*, 2017-Ohio-8666, ¶ 42 (2d Dist.), quoting *Columbus v. Bickis*, 2010-Ohio-3208, ¶ 21 (10th Dist.). "'Rather, "[t]he totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered[.]"'" *Louis* at ¶ 42, quoting *Bickis* at ¶ 21, quoting *State v. Homan*, 89 Ohio St.3d 421, 427 (2000).

{¶85} Here, as set forth in our discussion of Oliver's first and second assigned errors, although the first responding officer did not report any signs of erratic driving and did not perform field sobriety tests, he observed several indicia of Oliver being under the influence of alcohol. When the officer approached Oliver, Oliver had exited his vehicle and was yelling and jumping up and down in front of a crowd of approximately 30 to 40 students. As the officer neared Oliver, he observed that Oliver's clothing was soaked with some sort of liquid, and as the officer spoke with him, he noticed Oliver's eyes were bloodshot and watery. In addition, the officer smelled a strong odor of alcoholic beverage emanating from Oliver's breath. Oliver was uncooperative with the officer, and while he detained Oliver and further investigated, the officer located a large "Solo" cup of liquid on the front seat of the vehicle.

{¶86} Given the foregoing, based upon the totality of the circumstances, the officer had probable cause to arrest Oliver. Accordingly, defense counsel was not ineffective for failing to move to suppress the evidence on this basis.

{¶87} Therefore, Oliver's third assigned error lacks merit.

{¶88} The judgment is affirmed.

MATT LYNCH, J., concurs,

JOHN J. EKLUND, J., concurs with a Concurring Opinion.

JOHN J. EKLUND, J., concurs with a Concurring Opinion.

{¶89} I concur in the court's judgment, but concur in the judgment only on Appellant's fifth issue under his first assignment of error challenging his conviction on Count 2 of the indictment for violating R.C. 4511.19(A)(2) and the attendant specification under R.C. 2941.1413.

{¶90} The majority opinion identifies the underlying issue here. The stipulation on which the parties agreed for facts supporting the specification ("Stipulation No. 2") contained a misstatement of the law that was in effect at the time of the alleged offenses and was not specific about the nature of his prior convictions.

{¶91} As the majority opinion points out, BMV records admitted at trial reflect Appellant's age. But it also recognizes that that information would have been useful to the jury only *"if the jury had been [correctly] instructed on the law*…under divisions (A) and (B) of 4511.19." (Emphasis added). But it was not. Likewise, the majority opinion

recognizes "when the stipulation is considered with the BMV record *and the applicable law*, it would be unreasonable to conclude" the prior convictions were under division (B). (Emphasis added). But the jury never had the chance to so consider the issue, because they did not have the applicable law. This was an error.

{¶92} The majority opinion finds, however, that the failure to give the instruction necessary to render this judgment just was "invited." The Ohio Supreme Court has found invited error "when a party has asked the court to take some action later claimed to be erroneous, or affirmatively consented to a procedure the trial judge proposed." *State v. Campbell*, 90 Ohio St.3d 320, 324 (2000).

{¶93} The origin of this error was "Stipulation No. 2." A stipulation is "a voluntary agreement, admission, or concession, made in a judicial proceeding by the parties *or their attorneys* concerning disposition of some relevant point so as to eliminate the need for proof or to narrow the range of issues to be litigated." (Emphasis in original). *Baum v. Baum,* 1997 WL 775770, *2 (9th Dist. Nov. 26, 1997).

{¶94} Both parties entered the stipulation, therefore, both parties invited this error. But only one of them, the Appellant, will suffer a consequence as a result. The State acknowledged in oral argument that it, not the Appellant, wrote "Stipulation No. 2" using an outdated, incorrect form. And, while defense counsel did not request a full, accurate jury instruction on the interplay between R.C. 4511.19(A) and (B) and R.C. 4511.181(A), neither did the State.

{¶95} The State bears the burden of proof. Although I agree with the majority that the evidence was sufficient to sustain a conviction, I again stress that the jury did not have the benefit of properly considering this evidence. The failure to give an instruction was

just as much invited by the State as by Appellant, especially since the instruction that would have avoided this whole issue would have been much more helpful to the State than Appellant.

{¶96} I understand that trial courts do, and appropriately, rely on counsel for information about the state of the law and its application. I also understand we don't want to allow a defendant to profit from an error his lawyer invited. But it gives me pause to disregard an error that the State invited along with Appellant.

{¶97} Since I am not in a policy making position, I pass no judgment on these issues, but based on the state of the law today, I concur with the result the majority opinion reaches.