

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 3rd day of December, 2020.

Present: All the Justices

Aaron Louis Goldberg, Appellant,

against Record No. 191701
Court of Appeals No. 0007-19-1

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no error in the judgment of the Court of Appeals.

Aaron Lewis Goldberg appeals from a judgment of the Court of Appeals affirming his conviction for driving under the influence (“DUI”), third conviction within ten years, in violation of Code §§ 18.2-266 and -270. *Goldberg v. Commonwealth*, Record No. 0007-19-1, 2019 WL 6120611 (Va. Ct. App. Nov. 19, 2019) (unpublished). Goldberg asserts on appeal that the admission of evidence of the horizontal gaze nystagmus (“HGN”) test performed on him was not harmless error, that the Court of Appeals applied the wrong standard for harmless error, and that the Court of Appeals erred by failing to address whether HGN tests are scientific, were supported by sufficient foundational evidence of reliability, and were unfairly prejudicial.

The Court of Appeals correctly applied the non-constitutional harmless error standard. Evidentiary errors are analyzed under the standard for non-constitutional harmless error. *See Clay v. Commonwealth*, 262 Va. 253 (2001); Code § 8.01-678. A non-constitutional error is

harmless “[i]f when all is said and done . . . the error did not influence the jury, or had but slight effect.” *Clay*, 262 Va. at 260 (quoting *Kotteakos v. United States*, 328 U.S. 750, 764 (1946)).

The Court of Appeals assumed, “without deciding, that the evidence of HGN testing was scientific, not supported by sufficient foundational evidence of reliability, and unfairly prejudicial compared to its probative value in this case.” *Goldberg*, 2019 WL 6120611 at *4. Disregarding the HGN test, the evidence showed that Goldberg was seen driving his vehicle on the shoulder, drifting repeatedly in and out of the oncoming lane of traffic, and driving down the center of two lanes. Goldberg radiated a strong odor of alcohol, had bloodshot eyes, occasionally slurred his words, and was unable to walk or stand without swaying. He admitted to drinking alcohol earlier in the evening. Specifically, Goldberg stated to the officer that “the higher alcohol content of the malt liquor got [him].” A breathalyzer test conducted over an hour after Goldberg was stopped by the arresting officer, showed that his blood alcohol content remained over the legal limit. Due to the overwhelming evidence of Goldberg’s guilt, the Court of Appeals found that any error in the admission of HGN testing was harmless and affirmed Goldberg’s conviction.

The Court agrees with the Court of Appeals’ opinion and affirms.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of the City of Virginia Beach.

A Copy,

Teste:

A handwritten signature in blue ink, appearing to read "John B. R. [unclear]". The signature is fluid and cursive, with a long horizontal stroke at the end.

Clerk