

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Friday the 8th day of October, 2010.*

Daryl Lamonte Graves, Appellant,
against Record No. 100209
Circuit Court No. CL08-1940
Commonwealth of Virginia, Appellee.

Upon an appeal from a
judgment rendered by the Circuit
Court of the City of Portsmouth.

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

The appellant, Daryl Lamonte Graves, was civilly committed as
a sexually violent predator pursuant to Code § 37.2-908(D). See
also Code § 37.2-900. He now claims the circuit court erred by
admitting into evidence a statement made to an officer with the
Portsmouth Police Department by a now-deceased, then-nine-year-old
boy regarding Graves' request that the boy undress when he and
other members of a youth baseball league went to Graves' house to
try on baseball uniforms. Graves asserts that the admission of the
statement into evidence violated his confrontation rights under the
Sixth Amendment and, further, that the statement was inadmissible
hearsay.

The Court rejects Graves' Sixth Amendment objection. As
relevant to this appeal, the Sixth Amendment states: "In all
criminal prosecutions, the accused shall enjoy the right . . . to
be confronted with the witnesses against him." U.S. Const. amend.

VI. This Court has held that "[e]ven though involuntary civil commitment is a significant deprivation of liberty to which federal and state procedural due process protections apply, persons subject to these commitment proceedings do not enjoy the same rights attendant to a criminal proceeding." Smith v. Commonwealth, 280 Va. 178, 182, 694 S.E.2d 578, 580 (2010) (quoting Jenkins v. Director, Virginia Ctr. for Behav. Rehab., 271 Va. 4, 15, 624 S.E.2d 453, 460 (2006)); see also Shivae v. Commonwealth, 270 Va. 112, 125-26, 613 S.E.2d 570, 577-78 (2005) (holding that commitment proceedings under the Sexually Violent Predators Act do not violate the prohibitions against double jeopardy and ex post facto laws because the Act is a "non-punitive, civil commitment statute," rather than a criminal proceeding). Because the Sixth Amendment is expressly limited to criminal prosecutions, the rights afforded a criminal defendant under the Confrontation Clause do not extend to a prisoner subject to civil commitment proceedings under the Sexually Violent Predators Act, Code §§ 37.2-900 through -921.

Graves is correct, however, that the statement was inadmissible hearsay. Therefore, the circuit court erred by admitting it into evidence. "[A] trial court has no discretion to admit clearly inadmissible evidence because admissibility of evidence depends not upon the discretion of the court but upon sound legal principles." Commonwealth v. Wynn, 277 Va. 92, 97-98, 671 S.E.2d 137, 139-40 (2009) (internal quotation marks and citations omitted).

Even so, the evidentiary, nonconstitutional error was harmless. The Court has adopted the following test for nonconstitutional harmless error:

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but slight effect, the verdict and the judgment should stand But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. . . . If so, or if one is left in grave doubt, the conviction cannot stand."

Clay v. Commonwealth, 262 Va. 253, 260, 546 S.E.2d 728, 731-32 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 764-65 (1946)).

Upon considering "'all that happened without stripping the erroneous action from the whole,'" it remains abundantly clear that the Commonwealth proved by clear and convincing evidence, see Code § 37.2-908(C), that Graves qualified as a sexually violent predator under Code § 37.2-900. Clay, 262 Va. at 260, 546 S.E.2d at 731-32 (quoting Kotteakos, 328 U.S. at 765). The jury had before it the following evidence: Graves' repeated sexual offenses against minors; Graves' probation violations, including signing a lease to reside with a convicted sex offender and associating with young boys by volunteering at a youth baseball league; Graves' history of alcohol and substance abuse; the licensed clinical psychologist's diagnosis of Graves for "pedophilia nonexclusive type, attracted to males," and a personality disorder, both of which increase the likelihood of recidivism; and Graves' actuarial scores on various tests, as performed by the psychologist, who concluded with "psychological certainty" that Graves was at "a high risk of reoffending."

Graves offered no evidence to rebut these facts. Instead, he testified that he did not believe his involvement with the youth baseball league was inappropriate, and argued that his risk assessment on the Static-99 should have been a few percentage points lower. He also claims on appeal that the inadmissible hearsay statement was the only non-circumstantial evidence that he engaged in "an act of sexual impropriety with children" after his release from confinement. This argument overlooks that Graves volunteered at a youth baseball league for children under the age of 13 and signed a lease to reside with a convicted sex offender. According to the psychologist, both actions were clinically significant because they were indicative of Graves' "lack of volitional control."

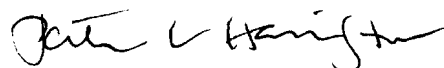
In view of this evidence, the Court concludes that "the error did not influence the jury, or had but slight effect." Clay, 262 Va. at 260, 546 S.E.2d at 731 (quoting Kotteakos, 328 U.S. at 764). Therefore, the circuit court's judgment is affirmed.

This order shall be certified to the Circuit Court of the City of Portsmouth. The appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

Justice Mims took no part in the consideration of this case.

A Copy,

Teste:



Clerk