

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI

**v.
GARY PRESTON BROWNING JR.**

RESPONDENT,

APPELLANT.

DOCKET NUMBER WD76144

DATE: January 6, 2015

Appeal From:

Clay County Circuit Court
The Honorable Anthony R. Gabbert, Judge

Appellate Judges:

Division Three: Karen King Mitchell, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Attorneys:

Richard A. Starnes, Jefferson City, MO, for respondent.

James R. Brown, Kearney, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

RESPONDENT,

v.

GARY PRESTON BROWNING JR.,

APPELLANT.

No. WD76144

Clay County

Before Division Three: Karen King Mitchell, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Gary Browning appeals his conviction of driving while intoxicated as an aggravated offender following a jury trial. He complains that there was insufficient foundation to permit the admission of testimony about the results of administration of the horizontal gaze nystagmus test. Browning also questions the adequacy of the approved verdict director for driving while intoxicated, MAI-CR 3d 331.02, though he concedes that the trial court committed no error in tendering the instruction.

AFFIRMED

Division Three holds:

1. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. We will not reverse a conviction based on the erroneous admission of evidence unless prejudice is demonstrated, established by proof that the admission of the evidence was outcome-determinative. Browning challenges about the admission of testimony regarding the results of the HGN field sobriety test, but does not challenge the admission of substantial other evidence Browning concedes was sufficient to support his conviction. There is no reasonable probability that the jury would have acquitted Browning but for the trial court's admission of testimony about the results of the HGN test.

2. Browning does not claim trial court error, but instead questions whether the Supreme Court should re-evaluate the adequacy of MAI-CR 3d 331.02, the approved verdict director for driving while intoxicated. Because Browning claims no error in the trial court's use of the approved verdict director for driving while intoxicated, there is nothing for this court to review.

Majority Opinion by Cynthia L. Martin, Judge
Concurring Opinion by Gary D. Witt, Judge

January 6, 2015

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