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RECENT DEVELOPMENT

GORDON V. STATE: ADMISSIBILITY OF EVIDENCE UNDER THE ADOPTIVE ADMISSION BY A PARTY-OPPONENT HEARSAY EXCEPTION IS A PRELIMINARY DETERMINATION FOR THE TRIAL COURT; ADMISSION OF DETECTIVE'S TESTIMONY NOT CLEARLY ERRONEOUS.

By: Stephanie Lurz

The Court of Appeals of Maryland held that whether a declarant manifested an adoption or belief in the truth of the statements of another, constituting an adoptive admission, was a preliminary question of fact to be decided by the trial court. *Gordon v. State*, 431 Md. 527, 550, 66 A.3d 647, 660 (2013). The court ruled it was not clearly erroneous for the trial court to permit the arresting detective to testify regarding the defendant's age based on the defendant's driver's license under the adoptive admission hearsay exception because of his belief in the truth of the information on the license. *Id.*

On January 14, 2010, Detective Kenneth Klezia questioned Michael Gordon ("Gordon") about allegations of inappropriate sexual contact with a fourteen-year-old girl, which had recently occurred at a Pacific Sunwear store. At Detective Klezia's request, Gordon provided his Florida driver's license. He had produced the same license to the detective in an unrelated incident on January 9, 2010. Detective Klezia did not recall specifically asking Gordon his age.

In the Circuit Court of Charles County, Gordon was charged with sexual solicitation of a minor and third-degree sex offense. To prove a third-degree sex offense, the State was required to establish that Gordon was at least twenty-one years old when the offense occurred. Detective Klezia testified at trial that the license showed Gordon's age to be twenty-seven years old. This was the sole evidence of his age produced by the State. Gordon objected to this testimony on the grounds that it was hearsay. The State argued that the testimony was permissible under Rule 5-803(a)(2), which provides a hearsay exception for an adoptive admission by a party-opponent. Because Gordon twice provided the license to Detective Klezia, the State argued he manifested a belief that the license was a truthful document. The trial court overruled Gordon's objection and the jury subsequently found Gordon guilty on both counts.

The Court of Special Appeals affirmed Gordon's convictions pursuant to Rule 5-803(a)(2). Gordon then filed a petition for a writ of certiorari, which was granted by the Court of Appeals of Maryland. The court was asked to determine whether an individual's use of a driver's license manifested an

adoption or belief of the truth of the information contained therein for the purposes of the adoptive admission hearsay exception.

The Court of Appeals of Maryland first addressed the appropriate standard of review, and reviewed the trial court's determination under the abuse of discretion standard. *Gordon*, 431 Md. at 532-33, 66 A.3d at 650 (citing *Hopkins vs. State*, 352 Md. 146, 158, 721 A.2d 231, 237 (1998)). A hearsay exception determination, however, is reviewed *de novo*. *Gordon*, 431 Md. at 533, 66 A.3d at 650 (citing *Bernadyn v. State*, 390 Md. 1, 8, 887 A.2d 602, 606 (2005)). Neither party contested these points, but they nevertheless disagreed on which standard should apply to the instant case. *Gordon*, 431 Md. at 533, 66 A.3d at 650.

The court stated that there were two components to a ruling on a hearsay exception, each with a different standard of review. *Gordon*, 431 Md. at 533, 66 A.3d at 650. The court clarified that the determination of whether a hearsay exception applied was reviewed *de novo*, but the findings of fact made to reach that conclusion were reviewed under the more deferential abuse of discretion standard. *Id.* at 538, 66 A.3d at 653. The question in *Gordon*, therefore, was whether the trial court made a legal or factual determination when it concluded that Gordon made an adoptive admission by handing over his driver's license. *Id.*

The court noted that most trial court decisions regarding adoptive admissions required an examination of facts, including verbal and non-verbal conduct. *Gordon*, 431 Md. at 539-40, 66 A.3d at 654. The court found this applied in *Gordon*, because the facts were not in dispute but the circumstances allowed for multiple inferences to be made. *Id.* at 540, 66 A.3d at 654-55. Thus, the court reviewed the evidence that the trial court used to determine whether or not the adoptive admission hearsay exception applied. *Id.* at 542-550, 66 A.3d at 655-660.

The evidentiary record showed Gordon was not asked about his age. *Gordon*, 431 Md. at 542-43, 66 A.3d at 656. Rather, he was asked to produce identification from which the detective made an inference about his age. *Id.* The court recognized that under Rule 5-803(a)(2), a manifestation of an adoption or belief must not be ambiguous. *Id.* at 544, 66 A.3d at 655-66. It rejected, however, the argument that Gordon's actions were ambiguous because he was not asked about his age. *Id.* at 545, 66 A.3d at 658. By giving Detective Klezia the license, he effectively acknowledged his age to be twenty-seven years old. *Id.* at 548, 66 A.3d at 659. He also did not dispute the age on the license at the time he showed it to the detective. *Id.* Further, the use of his driver's license involved what the court described as a "customary" or "typical exchange," in which one would reasonably expect the information provided to be accurate. *Id.* at 549, 66 A.3d at 660.

The court concluded that the trial court made a preliminary factual finding, thus a "straightforward application of Rule 5-803(a)(2)" was required to determine the admissibility of Detective Klezia's testimony. *Gordon*, 431 Md. at 549, 66 A.3d at 660. The court held that the testimony

was properly admitted, therefore, it was not an abuse of discretion, and the court affirmed the convictions. *Id.* at 550, 66 A.3d at 660.

In *Gordon*, the Court of Appeals clarified its previous holdings on the standard of review for hearsay rulings and exceptions. While rulings on the admissibility of hearsay must be reviewed *de novo*, the supporting factual findings made by the trial court will be reviewed under the more deferential abuse of discretion standard. Because factual findings frequently underpin a trial courts decisions on whether to admit evidence based on the hearsay exceptions, such decisions will likely be analyzed under the abuse of discretion standard. *Gordon* could demonstrate a precedent allowing the use of legal or other identifying documents when used in a customary manner as an adoptive admission under the Rule 5-803(a)(2) hearsay exception.