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RECENT DEVELOPMENT

STODDARD v. STATE: WHEN DECIDING IF AN IMPLIED ASSERTION IS HEARSAY, THE INTENT OF THE DECLARANT IS IRRELEVANT IF THE STATEMENT IS OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED

By: Lee Wheeler

In a case of first impression, the Court of Appeals of Maryland held that the intentions of the declarant are irrelevant when considering the admissibility of an implied assertion. *Stoddard v. State*, 389 Md. 681, 887 A.2d 564 (2005). The Court determined that a declarant's lack of intent to communicate a particular belief does not increase the reliability of the declarant's words, thus it remains inadmissible hearsay.

In the Circuit Court for Baltimore City, Erik Stoddard ("Stoddard") was convicted of second-degree murder and child abuse resulting in death. Jennifer Pritchett ("Pritchett"), Stoddard's girlfriend at the time, was the mother of the eighteen-month old victim. Pritchett testified at trial that her older daughter came to her one evening after the killing and asked, "Is Erik going to get me?" The Defendant objected to this portion of the mother's testimony arguing it was inadmissible hearsay.

At trial, the state argued that the child's question was not hearsay because it was a question being offered to demonstrate that the child feared the Defendant and it was not being offered to prove that the child witnessed the Defendant murder the victim. The trial judge overruled the Defendant's objections and allowed the testimony into evidence.

The Court of Special Appeals affirmed the trial court's determination that the child's statement was not hearsay, reasoning that the question, "Is Erik going to get me?" was a non-assertive verbal utterance. The intermediate court reasoned that the question was not an assertion because it was unintentional and circumstantial evidence of the declarant's state of mind, which is nonhearsay under Md. Rule 5-801. The Court of Appeals granted certiorari to address

the issue of whether a declarant's intentions are relevant when deciding if an implied assertion is hearsay. *Stoddard*, 389 Md. 681, 687, 887 A.2d 564, 567-68.

The Court began by reviewing the doctrine of implied assertions in Maryland. *Id.* at 688-90, 887 A.2d at 568-70. The Court also defined implied assertions as "implications or inferences contained within or drawn from an utterance." *Id.* The Court reviewed the often-cited case of *Wright v. Tatham*, 112 Eng. Rep. 488 (Exch. Ch. 1837), in which a will was contested on the basis of incapacity. *Stoddard*, 389 at 689-93, 887 A.2d at 570. In *Wright*, the defendant sought to introduce letters written to the testator to prove that the authors of the letters believed the testator to be of sound mind. *Stoddard*, 389 at 691, 887 A.2d at 570 (citing *Wright*, 112 Eng. Rep. 488). These letters were nonetheless excluded as hearsay because they were offered to show that the testator was competent and thus, offered to prove the truth of the matter asserted. *Id.* In *Wright*, Baron Parke, writing for the court, relied on the illustration of a sea captain who was seen inspecting a ship and then later embarked on a voyage with his family. *Stoddard*, 389 at 691-92, 887 A.2d at 570 (citing *Wright*, 112 Eng. Rep. 488). According to Baron Parke, if the Captain's actions were thought to demonstrate the seaworthiness of the ship, it would be hearsay. *Id.* The English court noted in *Wright* that the intent of the declarant was irrelevant as "declarant's intent beliefs communicated accidentally by implication are as much 'implied assertions' as beliefs expressed purposefully in an indirect manner." *Stoddard*, 389 Md. at 692-93, 887 A.2d at 571 (citing *Wright*, 112 Eng. Rep. 488).

The Court then examined Federal Rule of Evidence 801(a) and its accompanying Advisory Committee note that distinguishes between hearsay and non-hearsay by looking at the intent of the declarant. *Id.* at 693, 887 A.2d at 571. Several jurisdictions have adopted the language of the Advisory note while others have held that intent of the declarant is irrelevant when considering whether a statement is hearsay. *Id.* at 693-94, 887 A.2d at 571-72.

The Court continued its analysis by reviewing the corresponding Maryland Rule of Evidence 5-801. *Id.* at 695, 887 A.2d at 572-73. The Committee note of Maryland Rule 5-801 departs substantially from the Advisory note of the Federal Rule. *Id.* The Committee note does not define assertion and states that the definition is best left to the development of case law. *Id.* at 696, 887 A.2d at 572.

The Court continued by listing the dangers associated with hearsay in general and specifically with implied assertions. *Id.* at 696, 887

A.2d at 573. The four hearsay dangers are: sincerity, narration, perception, and memory. *Id.* These dangers arise because the statement is made out of court and not under oath or subject to cross-examination. In turn, the jury does not have the ability to evaluate or observe demeanor, circumstances, or other relevant facts that would assist it in its evaluation of the declarant's statement. *Id.*

As for implied assertions, although the Court stated the danger with this type of statement is the risk of *insincerity*, it noted the other hearsay dangers are implicated as well. *Id.* at 698, 887 A.2d at 574 (emphasis added). The State used the Advisory Committee note to the Federal Rule of Evidence 801(a) to support its argument that the danger of insincerity is diminished because if a declarant does not intend to make an assertion, then he cannot intend to make a misrepresentation. *Id.* The Court, however, disagreed citing several scholars who have examined implied assertions and reliability. *Id.* at 698-701, 887 A.2d at 574-75. The Court noted the theory of Professor Ronald Bacigal who argued that implied assertions are not reliable because there is no effort to "avoid ambiguity;" therefore, the interpretation of the meaning is inherently unreliable. *Id.* (citing Ronald J. Bacigal, *Implied Hearsay: Defusing the Battle Line Between Pragmatism and Theory*, 11 S. Ill. U. L.J. 1127, 1132 (1987)). The Court also cited Professor Michael Graham's theory that the danger of insincerity exists with implied assertions because truth of the implication itself must be assumed. *Stoddard*, 389 at 702, 887 A.2d at 576 (citing Michael H. Graham, *Handbook of Federal Evidence* Section 801.7, at 73-77 (5th ed. 2001)).

Ultimately, the Court held that the declarant's lack of intent to communicate a particular idea through an implied assertion was irrelevant to the inquiry of whether or not the assertion was hearsay. *Id.* at 703, 887 A.2d at 577. In making this decision, the Court admittedly joined a minority of other jurisdictions in disallowing an inquiry into the intentions of a declarant who made an implied assertion. *Id.*

The Court of Appeals adopted the Third and Sixth Circuit's holdings, regarding implied assertions, that an inquiry into the intentions of the declarant is unnecessary. *Id.* at 704-7, 887 at 577-79. In *U.S. v. Reynolds*, 715 F.2d 99, 104 (3d Cir. 1983), the Third Circuit held that a co-defendant's statement, "I didn't tell them anything about you," was hearsay when offered to prove that the defendant was a co-conspirator in the crime. *Stoddard*, 389 at 704-5, 887 A.2d at 578. In *U.S. v. Palma-Ruedas* the statement, "nice to meet you," was hearsay

when offered to show that the declarant had not previously met the listener. 121 F.3d 841, 857 (3d Cir. 1997), rev'd on other grounds, 526 U.S. 275 (1999) (cited in *Stoddard*, 389 Md. at 706, 887 A.2d at 578-79).

The Court of Appeals also cited the Sixth Circuit opinion of *Lyle v. Koehler*, 720 F.2d 426, 432-33 (6th Cir. 1983) which held that a letter requesting a defendant to give a false alibi for a co-defendant was an implied assertion and hearsay when offered to prove that the defendant was guilty. *Stoddard*, 389 Md. at 706, 887 A.2d at 578-79. The Court of Appeals also referenced the Iowa Supreme Court, which stated, "Implied assertions can be no more reliable than the predicate expressed assertion." *Stoddard*, 389 Md. at 703, 887 A.2d at 577 (quoting *State v. Dullard*, 668 N.W.2d 585, 594 (Iowa, 2003)).

In the remainder of its decision, the Court determined that the form of an assertion, in this case, a question, is not determinative of whether or not a statement is hearsay because the declarant "potentially communicated a factual proposition." *Id.* at 710, 887 A.2d at 581-82. The Court reasoned that a question could be just as insincere as a statement similar in kind. *Id.*

In the majority's holding, the Court rejected the idea that a lack of intention on the part of a declarant who makes an implied assertion reduces the hearsay dangers. In so doing, the Court of Appeals joined a minority of jurisdictions and narrowed the admissibility of implied assertions. While the Court's holding protects against the dangers of hearsay, it further limits the evidence that a jury is allowed to evaluate and expands the role of a judge.