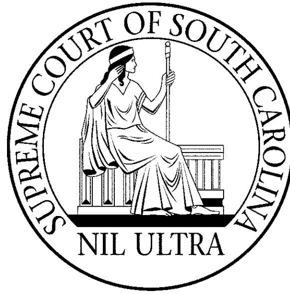

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17
May 31, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Najjar De'Breece Byers, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
Lee S. Alford, Circuit Court Judge

Opinion No. 26976
Heard March 16, 2011 – Filed May 23, 2011

REVERSED

Robert A. Muckenfuss, of McGuire Woods, of Charlotte, for Petitioner.

Attorney General Alan Wilson, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William Blitch, Jr., all of Columbia, and Solicitor Kevin Scott Brackett, of York, for Respondent.

CHIEF JUSTICE TOAL: Najjar De'Breece Byers (Petitioner) appeals the decision of the court of appeals upholding the circuit court's denial of Petitioner's motion to strike a witness's testimony. We reverse.

FACTS/ PROCEDURAL BACKGROUND

On the evening of June 10, 2005, at approximately 10:10 p.m., the Fort Rock Bingo Hall, located in Rock Hill, South Carolina, was robbed at gunpoint. At approximately 11:15 p.m. that same evening, a Mecklenburg County police officer stopped a blue Nissan Altima in downtown Charlotte after noticing its occupants were not wearing seat belts. Petitioner was a passenger in this vehicle, along with William Crisco, Woodrow Thompson, and Jamie Harris. Thompson gave the officer consent to search the vehicle, and that search yielded a cash register till, two handguns, and two ski masks. The officer testified the local police department notified him that a police division near the South Carolina-North Carolina border was on the lookout for a blue vehicle occupied by four black males who committed an armed robbery where a cash till was taken. The officer arrested Petitioner, along with the other three passengers, in connection with the armed robbery reported in Rock Hill. According to the police report, Petitioner was the only sober passenger. Two of the passengers, Crisco and Thompson, pled guilty to the armed robbery charges. Thompson is Petitioner's cousin. Several witnesses testified that Petitioner did not know the other two passengers, Crisco and Harris.

The key issue in this case is whether or not Petitioner was a passenger in the vehicle at the time the robbery occurred. At trial, the State of South Carolina (State) presented the testimony of Crisco and Thompson. Crisco's testimony was somewhat contradictory. He testified he had been using cocaine and drinking alcohol since noon on the day of the robbery with Harris, so he had a foggy recollection of the events that occurred that day. In fact, Crisco was treated at the hospital for dehydration following his arrest. Crisco initially testified just he,

Harris, and Thompson drove to Rock Hill and robbed the bingo hall. Shortly after making that statement, he testified that two people, whom he thought were Harris and Petitioner, stayed in the car while he and Thompson robbed the bingo hall; confirming there was "no question" there were four people in the car in Rock Hill. Defense counsel pointed out that on the night of his arrest Crisco told the investigator that only Harris and Thompson accompanied him to Rock Hill. When defense counsel pressed him about exactly who was in the car in Rock Hill, Crisco responded:

> We all came, but the only ones that really had something to do with the robbery was me, Jamie, and Woodrow. We was the only ones that had something to do with the robbery, 'cause Jamie knew about [the bingo hall], and me and Woodrow went in and done it.

When defense counsel asked Crisco whether he knew Petitioner, the following exchange took place:

> Counsel: But you're testifying today after pleading guilty yesterday that that person was Najjar Byers?
>
> Crisco: That's what they said in the motions that it was Najjar Byers.
>
> Counsel: When you say that's what they said in the motions, what do you mean?
>
> Crisco: In the motion of discovery. They had his name in it.
>
> Counsel: Who had his name in it?
>
> Crisco: The police and Woodrow Thompson. So I know [Woodrow] wasn't high on no drugs, so I know he know who he is.

Counsel: So what you're saying is the reason you think that was Najjar Byers is because that's what the police put in their report?

Crisco: Yes, sir; yes, sir.

Counsel: Your Honor, I would move to strike any of his testimony about Najjar Byers. He's been relying on the police report.

Court: Counsel, denied. That's not a proper motion. His testimony stands for itself.

Counsel: Okay. But you have no other independent recollection of Najjar Byers being in the car?

Crisco: No, sir.

The testimony of Thompson, Petitioner's cousin, was less than enlightening. Thompson refused to testify about any events that occurred in South Carolina. Thompson did state, however, that he drove around with his girlfriend in Charlotte earlier that day, but that Harris, Crisco, and Petitioner got in the car with him when it was getting dark. Thompson also confirmed he was arrested with the same people he had been riding with earlier that evening, and at the time the police officer stopped him, no one had gotten in or out of his car within at least the past fifteen minutes.

The investigator to the crime did not find any fingerprints linking Petitioner to the crime. The State presented three eye witnesses who worked at the bingo hall. Two of these witnesses were inside the bingo hall at the time of the robbery and both testified one man went behind the counter to take the cash till, while another man stood at the door. Neither witness could identify the men. The third witness testified he was outside the bingo hall parking cars and a man held a gun to his back and told him to get on his knees. Similarly, that witness could not identify the gunman.

Petitioner's mother (Ms. Johnson), father (Mr. Byers), and ex-girlfriend testified for Petitioner as alibi witnesses. Ms. Johnson stated she was at home with Petitioner until approximately 8:45 p.m. on the evening of his arrest when she left her home to visit her sister. She stated Petitioner and his girlfriend were at the house when she left. Ms. Johnson testified she spoke to Petitioner several times during the evening on his cell phone and, at approximately 9:30 p.m., Petitioner told her he was at his father's house. Petitioner's ex-girlfriend testified Petitioner left his home shortly after 9:00 p.m. She stated she did not know where he was going but he did not indicate he was going anywhere with Crisco, Harris, or Thompson. Mr. Byers testified he went to his girlfriend's house at approximately 9:45 that evening and Petitioner was waiting for him on the front porch. Mr. Byers testified he dropped Petitioner at a bar in downtown Charlotte around 10:00 p.m.

Defense counsel moved for a directed verdict after the State presented its case, and again after at the close of all the evidence. The circuit court judge denied both motions. The jury found Petitioner guilty of armed robbery and criminal conspiracy, but acquitted him on the charge of possession of a firearm during the commission of a violent crime. The circuit court judge sentenced Petitioner to concurrent terms of twelve years imprisonment for armed robbery and five years imprisonment for criminal conspiracy.

The court of appeals affirmed the circuit court in a Rule 220(b)(2), SCACR, per curiam opinion. This case is before the Court pursuant to Rule 242(a), SCACR.

ISSUES

I. Whether Petitioner's objection to the circuit court's admission of hearsay testimony was timely and specific.

II. Whether it was harmless error for the circuit court to admit certain hearsay testimony.

STANDARD OF REVIEW

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict. *Id.*

ANALYSIS

I. Whether Petitioner's Objection was Timely and Specific

Petitioner argues the motion to strike Crisco's hearsay testimony was timely and specific and therefore, preserved for review. We agree.

For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented, *State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996), and with sufficient specificity to inform the circuit court judge of the point being urged by the objector, *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). When a witness answers a question before an objection is made, the objecting party must make a motion to strike the answer to preserve the issue of that statement's admissibility. *See State v. Saltz*, 346 S.C. 114, 129, 551 S.E.2d 240, 248 (2001) (finding a motion to strike was unnecessary because the objection to the hearsay testimony had been overruled).

In this case, defense counsel motioned to strike Crisco's statement immediately after Crisco represented he was relying on a discovery motion to identify Petitioner. With the greatest respect for the learned opinion of the court of appeals, we do not understand the basis for its

conclusion that counsel's motion to strike was not contemporaneously made.

In upholding the circuit court's decision to deny Petitioner's motion to strike, the court of appeals quoted the proposition from *State v. Rice*, "[u]nless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review." 375 S.C. at 322–23, 652 S.E.2d at 419. In that case, trial counsel motioned to strike certain testimony immediately after the witness made the alleged hearsay statement. *Id*. The court of appeals determined the objection was untimely by placing emphasis on the manner in which trial counsel raised issue with the statement: "Trial counsel did not object when Officer Smith made the alleged hearsay statement. Instead, counsel made a motion to strike . . . . Here, trial counsel never actually made an objection, only a motion to strike." *Id.*

In this case, the State argues because Petitioner's motion to strike was not preceded by an objection, there was no contemporaneous objection. The rationale behind the requirement of a contemporaneous objection is to "enable[] trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition." *State v. Torrence*, 305 S.C. 45, 67, 406 S.E.2d 315, 327 (1991). In our opinion, defense counsel's purpose would not have been made clearer had he used the word "objection" before making a motion to strike. Moreover, the South Carolina Rules of Evidence state that an error may not be found for the wrongful admission of evidence unless "a timely objection *or* motion to strike appears of record." Rule 103(a)(1), SCRE (emphasis added). Under the Rules of Evidence, Petitioner clearly preserved the issue of admissibility by moving to strike the hearsay testimony. To the extent *State v. Rice* stands for the proposition that preservation of an error in admitting evidence can only be accomplished if trial counsel follows the precise procedure of making an objection followed by a motion to strike, we overrule that proposition.

At oral argument, the State argued defense counsel's motion to strike was not timely because prior to Crisco making the statement at

issue, he twice stated he was relying on other documents to recall the events of that evening. The two prior statements to which the State refers do not relate to the identification of Petitioner, which was crucial to Petitioner's guilt. Rather, those statements referred to the amount of the robbery proceeds Crisco gave Harris, and the time Crisco believed he robbed the bingo hall. This information was not the primary piece of evidence Petitioner was seeking to elicit from Crisco. Therefore, we do not accept the State's argument that Petitioner's failure to object to those statements renders Petitioner's motion to strike untimely. The first time Crisco made a hearsay statement that was prejudicial to Petitioner, defense counsel motioned to strike. For this reason, we find the objection was timely.

Additionally, we find defense counsel's motion to strike Crisco's testimony was sufficiently specific to preserve the issue of admissibility for review.[1] For an admissibility error to be preserved, the objection

[1] The court of appeals did not rule on whether defense counsel's motion to strike was specific, but instead focused on the timeliness of the motion. Petitioner's primary argument to the court of appeals was that the motion to strike was specific. In a Petition for Rehearing, Petitioner again asked the court to determine the issue of specificity, but that petition was denied. Therefore, the specificity issue is preserved for our review. As an additional issue, Petitioner argues that because the timeliness of Petitioner's motion was not raised to the court of appeals, the court erred in ruling the issue unpreserved on the ground of timeliness. We disagree. An appellate court may affirm a judgment upon any ground appearing in the record on appeal, Rule 220(c), SCACR; and likewise, a respondent may ask the court to affirm on any ground appearing therein. Rule 208(b)(2), SCACR. Although neither party specifically argued Petitioner's motion to strike was untimely, the State supported its preservation argument with a factual comparison to *State v. Rice*, 375 S.C. at 302, 652 S.E.2d at 419, where the court of appeals found an objection unpreserved due to an untimely objection. Because the timeliness issue was reasonably clear from the State's brief before the court of appeals, we believe the court of appeals was at liberty to rule the objection was unpreserved on the basis of timeliness.

must include a specific ground "if the specific ground was not apparent from the context." Rule 103(a)(1), SCRE. When supported by context, "[a] party need not use the exact name of a legal doctrine . . . , but it must be clear the argument has been presented on that ground." *State v. Stahlnecker*, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010). In this case, Crisco admitted on the stand he relied on a discovery motion for the identification of Petitioner. Defense counsel moved to strike all of Crisco's testimony about Petitioner on the ground that "[h]e's been relying on the police report."

The State analogized this case to *State v. Rice* where trial counsel made a motion to strike, stating "[h]e's talking about what someone else did." 375 S.C. at 322, 652 S.E.2d at 419. The court of appeals in that case found the ground for objection was not apparent from the context because it appeared that trial counsel was concerned with whether the testifying officer's testimony was based on personal knowledge. *Id.* The determination of whether an objection is apparent from the context of witness examination is factually driven. Therefore, we do not believe *State v. Rice* is a measuring stick for judging the specificity of the motion to strike in this case. Although defense counsel did not state his ground for objection as hearsay, we believe it was apparent from the context of the cross-examination that defense counsel was objecting to the hearsay nature of Crisco's statement under Rule 802, SCRE. Thus, we conclude Petitioner's motion to strike Crisco's testimony was preserved for our review because it was both timely and specific. Accordingly, the circuit court's denial of Petitioner's motion to strike was error under Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

II. Harmless Error

Petitioner argues the admission of Crisco's hearsay testimony was prejudicial because Crisco's testimony comprised the State's only evidence placing Petitioner in the vehicle at the time of the robbery. We agree that without Crisco's testimony, the jury had little evidence from which to conclude Petitioner was in the vehicle at the time of the

robbery. Therefore, we find it was prejudicial error to admit Crisco's testimony, and we reverse the conviction on that ground.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). Where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached," an insubstantial error that does not affect the result of the trial is considered harmless. *Id.* A harmless error analysis is contextual and specific to the circumstances of the case: "No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990).

In our opinion, Crisco's testimony concerning Petitioner reasonably affected the result of the trial. Without Crisco's testimony, the jury was left to consider the following evidence: Police stopped the vehicle approximately one hour after the robbery occurred, and it is undisputed Petitioner was in the car. Thompson testified Petitioner was with him in the car when it was "getting toward dark," and no one got in or out of the car for at least fifteen minutes before being stopped by the police officer. Still, the State was unable to elicit any direct statement from Thompson that Petitioner was in the car with him at the time of the robbery. The officer who stopped the vehicle testified he was told a precinct on the South Carolina-North Carolina border was on the lookout for a "blue unknown type vehicle occupied by four black males that committed an armed robbery." However, the State produced the testimony of three witnesses to the crime, and their cumulative testimony only identified three actors in the robbery—two men entered the bingo hall, while one man held an employee at gunpoint in the parking lot. The on-scene investigator could not link any fingerprints to Petitioner. Lastly, Mr. Byers provided Petitioner an alibi, stating he dropped Petitioner off at a bar in downtown Charlotte around 10:00 p.m.

On balance, we believe that without Crisco's testimony, another rational conclusion could have been reached by the jury. We find it telling that during deliberation the jury asked for a replay of all of Crisco's testimony, but only the testimony of Thompson that related to events in North Carolina. Therefore, we hold the wrongful admission of Crisco's hearsay testimony was prejudicial to Petitioner, and we reverse on that ground.

CONCLUSION

In sum, we hold that Petitioner's objection to Crisco's testimony was properly preserved for our review, and further find the court of appeals erred in affirming the circuit court judge's admission of Crisco's hearsay testimony. Because we believe the admission of this testimony was prejudicial to Petitioner, we reverse Petitioner's conviction.

REVERSED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Terrence Edwards, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Abbeville County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 26977
Submitted September 23, 2010 – Filed May 23, 2011

AFFIRMED

Appellate Defender LaNelle C. DuRant, South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott,

Assistant Attorney General Ashley McMahan, all of Columbia, for Respondent.

JUSTICE HEARN: We granted certiorari to review the circuit court's denial of post conviction relief (PCR) to Terrance Edwards (Petitioner). Petitioner asserts the circuit court erred in finding his trial counsel's decision to not interview and call as a witness Petitioner's co-defendant was not deficient performance or prejudicial. We disagree.

FACTUAL/PROCEDURAL BACKGROUND

An Abbeville County grand jury indicted Petitioner and Sergio Marshall on the following charges: (1) murder of Jonathan Blackston; (2) armed robbery of Blackston; (3) grand larceny of a motor vehicle; (4) possession of a firearm by a person under twenty-one years of age; and (5) possession of a firearm during the commission of a violent felony. Marshall pled guilty to all five charges. Petitioner proceeded to trial, during which he was represented by counsel. Prior to Petitioner's trial, defense counsel did not interview Marshall. Additionally, counsel did not call Marshall to testify during the trial itself.

The evidence introduced at Petitioner's trial showed Marshall shot Blackston twice, once in the head and once in the arm. At some point during the altercation, but before he died, Blackston also received strong blows to his face that were likely from a hand or a foot. Petitioner admitted to law enforcement he helped Marshall hide Blackston's body under a nearby pile of logs in the field where he was shot. Afterwards, Petitioner was found with cash from Blackston's wallet on his person, some of which he had already spent at the county fair, Blackston's wallet in the trunk of his car, and Blackston's breath spray hidden under his mattress. The Solicitor did not try Petitioner's case on the theory of principal liability, nor did he suggest that Petitioner was the shooter. Instead, he presented the case on the theory of accomplice liability based on the indisputable evidence of Petitioner's involvement in at least some aspects of the crimes. The jury returned a

verdict of guilty on all five charges.[1] The court of appeals affirmed Petitioner's convictions on direct appeal. *State v. Edwards*, Op. No. 2005-UP-256 (S.C. Ct. App. filed Apr. 7, 2005). This court denied certiorari to review the convictions.

In his PCR application, Petitioner alleged his attorney was ineffective for failing to interview Marshall and call him as a witness. To support his argument, Petitioner called three witnesses to testify at the PCR hearing: Marshall, Petitioner himself, and his attorney. Marshall testified that despite being the only surviving witness to the crimes other than Petitioner, he was not called as a witness during Petitioner's trial. Marshall also testified that had he been called as a witness during Petitioner's trial, he would have told the jury the shooting was an accident, he alone was the shooter, and Petitioner had no involvement in, and indeed was shocked by, the murder. During Petitioner's testimony, Petitioner accepted responsibility for some wrongdoing on the day of Blackston's murder but was steadfast in his denial of any participation in the murder itself. He further testified that he believed Marshall's testimony would have made a "big difference" at Petitioner's trial and he never told his attorney that he did not want Marshall to testify.

Petitioner's trial counsel admitted that he did not interview Marshall before Petitioner's trial. However, he was present at Marshall's guilty plea, giving him an opportunity to observe Marshall in court, and retained a copy of Marshall's plea transcript. During his plea, Marshall was consistent in his denial of Petitioner's involvement in the murder, but his version of the rest of the events changed no less than three times during his statement to the court.

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[1] The circuit judge sentenced Petitioner to fifty-five years imprisonment, while Marshall received a total sentence of thirty-five years imprisonment following his guilty plea to the same offenses. Although we are troubled by the disparate sentences these co-defendants received from the same circuit judge, we have no power to address that disparity. *See State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("[T]his Court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive.").

In fact, the plea court seemed poised to reject Marshall's plea as to the murder charge because he was unable to give a consistent recitation of the facts. It was only when he finally was able to do so—after being instructed to ignore any prior statements he made in court or to the police—that the court accepted his plea. According to Petitioner's attorney, this final version of the facts, highlighting the accidental nature of the crimes and Petitioner's lack of involvement, was wholly consistent with the version given to law enforcement by Petitioner and introduced at Petitioner's trial through the testimony of a SLED agent.

Defense counsel testified that his decision to not call Marshall was a strategic one he made for two reasons. First, he testified that he actually disagreed with Marshall's version of the facts presented at the plea hearing, stating, "[I]t wasn't an accident if he's pleading guilty to murder." Second, he expressed serious concerns about Marshall's ability to withstand cross examination by the Solicitor were he to testify. Although trial counsel did state that "in retrospect" and in "hindsight" he would want to reconsider calling Marshall, this belief had two important caveats: that Marshall's testimony at trial would be the same as it was at the PCR hearing and it would be tested with the same "limited cross-examination." However, he then went on to state that in reality there would have been "a lot of room on cross-examination" had Marshall actually testified at Petitioner's trial.

The PCR judge determined that the attorney's decision to not call Marshall was "a planned and calculated" one and "[o]nly in hindsight[] can the failure to call Mr. Marshall seem as an error." He also determined that Petitioner failed to establish any resulting prejudice from his attorney's actions. Accordingly, he denied and dismissed with prejudice Petitioner's application. We granted certiorari.

STANDARD OF REVIEW

In reviewing a PCR court's decision, an appellate court is concerned only with whether there is any evidence of probative value that supports the decision. *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). The

appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law. *Id.* In performing this analysis, the appellate court is to give great deference to the PCR court's findings of fact and conclusions of law. *Id.*

LAW/ANALYSIS

In order to receive relief for ineffective assistance of counsel, a defendant must make two showings. First, he must show that his trial counsel's performance was deficient, meaning that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, he must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial whose result is reliable. *Id.*

I. Deficient Performance

Counsel's performance under the first prong of the *Strickland* test is judged under the standard of "reasonableness under prevailing professional norms." *Id.* at 688. This Court has stated previously that criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); *see also McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) ("A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.").

However, "[t]here is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (citing *Strickland*, 466 U.S. at 689). "[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not

be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. *Strickland*, 466 U.S. at 689. Accordingly, we must be wary of second-guessing trial counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

While our case law does provide that defense counsel must, at a minimum, interview potential witnesses, a strict adherence to that rule loses sight of the controlling standard for counsel's duty to investigate: reasonableness. Indeed, it would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to. When counsel makes such a reasonable decision, he will have fulfilled the duty he owes to his client. Petitioner would have this Court raise the duty to conduct a reasonable investigation to include creating "a simulated trial situation" for every witness, subjecting them all to mock cross-examination. Our case law has never required so much of defense counsel, and we decline to so extend it. So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient. Other states are in accord. *See, e.g., Murray v. Griffith*, 416 S.E.2d 219, 222 (Va. 1992) (finding counsel's failure to interview a particular witness not deficient where the witness's testimony would have been cumulative and witness himself could have been harmful to the defense); *Daniels v. State*, 676 S.E.2d 13, 18 (Ga. Ct. App. 2009) (holding counsel's failure to interview witnesses did not amount to deficient performance where he had read their prior statements, reviewed the state's file in the matter, was experienced in trying similar cases, was familiar with the applicable law, and was not surprised by other evidence adduced at trial); *People v. Caballero*, 459 N.W.2d 80, 82-83 (Mich. Ct. App. 1990) ("Even the failure to interview witnesses does not itself establish inadequate preparation. It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused.").

Although Petitioner's attorney admittedly did not interview Marshall, he did observe Marshall at the plea hearing. Based on this observation, counsel concluded as a strategic matter that he was not going to call Marshall as a witness. Chief among the reasons for that decision were Marshall's ability to withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony. Additionally, Petitioner's attorney knew entirely consistent evidence would be presented through Petitioner's statement to the police. A witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions, even if that witness is a co-defendant. *See Jackson v. State*, 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (1998) (holding counsel had a valid strategic reason for not calling a co-defendant as a witness where the co-defendant's credibility was a concern and the same evidence would be presented through another witness); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (finding counsel's decision to not call witnesses reasonable where their testimony would have been of no value to the case and they made inconsistent statements in the past).

Given this Court's admonition against second-guessing counsel's trial strategy, Marshall's performance and the cumulative nature of his testimony provide probative evidence under our prevailing law to support the PCR court's determination that Petitioner's attorney articulated a valid trial strategy when he chose not to call Marshall as a witness. Because Petitioner's attorney had valid reasons for not calling Marshall to testify, it would be futile and unreasonable to also require defense counsel to interview him to satisfy the Sixth Amendment because doing so would serve no purpose in connection with Petitioner's defense. To achieve our goal of "eliminat[ing] the distorting effects of hindsight," we must disregard the attorney's statements that he would now reconsider calling Marshall. Focusing our attention on what Petitioner's counsel knew at the time he made his decisions to neither interview nor call Marshall, we find ample probative evidence to sustain the PCR court's ruling that he did not render deficient performance.

II. Prejudice

Moreover, even were we to hold that Petitioner's counsel's performance was deficient, Petitioner suffered no prejudice. To establish the requisite prejudice necessary to prove a claim of ineffective assistance of counsel, Petitioner must demonstrate that his attorney's errors had an effect on the judgment against him. *See Strickland*, 466 U.S. at 691. A PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In other words, he must show that "the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. We previously have held where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward. *See Jackson*, 329 S.C. at 350-51, 495 S.E.2d at 770-71; *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995); *Cherry v. State*, 300 S.C. 115, 118-19, 386 S.E.2d 624, 625-26 (1989).

Petitioner alleges that he was prejudiced because if the jury heard Marshall's testimony that Marshall was the lone gunman and Petitioner had no involvement whatsoever, there is a reasonable probability that the jury would have had a reasonable doubt as to Petitioner's guilt.[2] However, this argument belies the evidence that the facts proffered by Marshall at the PCR hearing are wholly consistent with the evidence presented at Petitioner's trial. As his attorney acknowledged, the statement Petitioner gave to the police, and introduced at trial through a SLED agent, details the purported accidental nature of the shooting and Petitioner's lack of involvement. The case before

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[2] Petitioner also alleges that had this evidence been presented, the Solicitor would not have had the opportunity to argue to the jury that Petitioner was the shooter as opposed to Marshall. After a thorough review of the record, we find no evidence to support Petitioner's contention that the Solicitor argued Petitioner shot Blackston. Rather, the record clearly shows the Solicitor argued the case on a theory of accomplice liability, not principal liability.

us today is not one where the proffered evidence would have exonerated Petitioner had it been presented. Instead, Marshall's testimony simply would have been cumulative to evidence already introduced through other witnesses. While Petitioner's attorney did believe that Marshall's testimony probably would have affected the jury's decision, that belief was premised on the conditions that the testimony would be the same as it was during the PCR hearing and subject to the same "limited cross-examination." However, counsel later conceded that he truly believed Marshall's testimony at Petitioner's trial would open the door for "a lot" of cross-examination, thereby seriously undermining the chance that the jury would have been persuaded by his story.

In *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998), we considered a set of facts strikingly similar to those before us today. In *Jackson*, the PCR applicant claimed his trial counsel was deficient for failing to call the applicant's co-defendants as witnesses. *Id.* at 350, 495 S.E.2d at 770. On appeal, the State challenged the PCR court's finding of prejudice resulting from this decision. *Id.* The evidence showed that counsel reviewed the co-defendants' statements, the co-defendants' version of the evidence was the same as the applicant's, and this evidence was presented separately at trial through the testimony of a police officer. *Id.* at 350, 495 S.E.2d at 770-71. In the end, counsel made the decision to not call the co-defendants because he "didn't want to run the risk of calling them and having something go wrong." *Id.* at 350, 495 S.E.2d at 771. This Court reversed the PCR court, finding there was no probative evidence of prejudice because the applicant failed to show that the proffered testimony would have provided the jury with any additional information. *Id.* at 351, 495 S.E.2d at 771. Here, Petitioner's counsel attended Marshall's plea and kept a copy of the transcript, Marshall's testimony was consistent with evidence already introduced at trial through a police officer, and the attorney had legitimate concerns about Marshall's performance as a witness.

While Marshall's statements may have served to corroborate Petitioner's testimony concerning the degree of his involvement in the crime, this benefit must be evaluated against the legitimate concerns regarding

Marshall's credibility and the strong evidence of Petitioner's guilt. Those concerns run directly counter to the possibility that the jury would have reached a different result had Marshall testified. With that and our limited "any evidence" standard of review in mind, it is readily apparent from the record that there is probative evidence to support the PCR court's conclusion that Petitioner failed to establish the requisite prejudice for a claim of ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, we affirm the ruling of the PCR court.

TOAL, C.J. and KITTREDGE, J., concur. BEATTY, J., concurring in a separate opinion. PLEICONES, J., dissenting in a separate opinion.

JUSTICE BEATTY: I concur in result only. In my view trial counsel was clearly deficient in his representation of petitioner. Counsel's failure to call co-defendant as a witness is irrational. Co-defendant testified at his guilty plea that petitioner had nothing to do with the murder and was shocked by it. It is unreasonable to conclude that co-defendant's testimony would not have been very beneficial to petitioner. Moreover, in my view it is unreasonable to classify counsel's deficient performance as a reasonable trial strategy.

Defense counsel gave two reasons for his strategic decision not to call co-defendant as a witness. The first reason was that he did not believe co-defendant's version of the facts because co-defendant gave several versions of the facts. However, neither version alleged that petitioner participated in the murder. The second reason was that he was concerned about co-defendant's ability to withstand cross-examination. Assuming that to be true, how does this concern outweigh the exonerating testimony of the only eyewitness to the crime? Further, trial counsel's deficient performance is not ameliorated by arguing that co-defendant's exonerating testimony was merely cumulative to evidence presented by a policeman. It should be noted that the policeman's testimony was not corroborative, it merely restated petitioner's statement given at time of arrest.

In my view, trial counsel's performance was clearly deficient. However, I concur in the result reached by the majority because I do not believe that the trial results would be different given the amount of circumstantial evidence against petitioner.

JUSTICE PLEICONES: I agree with Justice Beatty that trial counsel's performance was deficient, but unlike him, and the majority, I cannot agree there was sufficient circumstantial evidence that petitioner was an accomplice to murder such that I am confident that the jury's verdict would not have been affected by Marshall's testimony. Instead, in my view, the evidence that petitioner helped hide the victim's body, that he had the victim's wallet in his car, had spent some of the victim's money and still had some on his person, and had the victim's breath spray under his mattress is evidence that petitioner may have been an accessory after the fact, and circumstantial evidence that petitioner had engaged in an armed robbery, but not sufficient evidence of murder to find that conviction reliable.

I would grant petitioner post-conviction relief on the murder charge.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Martha Lewin Argoe, Appellant,

v.

Three Rivers Behavioral Health, L.L.C., Psychiatric Solutions, Inc., Phyllis Bryant-Mobley, MD, Glenn Hooker, MD, Aiken Regional Medical Center, Aurora Pavilion, David Steiner, MD, Cheryl C. Dodds, MD, Doris Ann Burrell, RN, Carolina Care Plan, James F. Walsh, Jr., G. Lewis Argoe, Jr. and George L. Argoe, III, Defendants,

Of whom Psychiatric Solutions, Inc. is the Respondent.

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 26978
Heard April 20, 2011 – Filed May 31, 2011

AFFIRMED

Charles M. Black, Jr., Mitchell C. Payne, of Warner, Payne & Black, of Columbia, for Appellant.

Weston Adams, III, Trippett Boineau, III, and Helen F. Hiser, of McAngus Goudelock & Courie, of Columbia, for Respondent.

JUSTICE BEATTY: This case arises out of the involuntary commitment of Martha Lewin Argoe (Appellant) to Three Rivers Behavioral Health, L.L.C., a psychiatric, inpatient facility that was subsequently purchased by Psychiatric Solutions, Inc.[1] (Respondent). Appellant appeals the circuit court's order granting summary judgment in favor of Respondent as to her causes of action for false imprisonment, defamation, and intentional infliction of emotional distress. We affirm.

I. Factual/Procedural History

Pursuant to section 44-17-410 of the South Carolina Code,[2] Appellant's husband (Husband) filed an Application for Involuntary Emergency Hospitalization for Mental Illness with the Orangeburg County Probate Court on June 6, 2005.

On June 6, 2005, Probate Court Judge Pandora L. Jones-Glover issued an Order of Detention that referenced section 44-17-430[3] of the South Carolina Code and provided that an "officer of the peace take the person [Appellant] alleged to be mentally ill into custody for a period of [time] not to exceed twenty-four (24) hours, during which detention said person shall be examined by a licensed physician."

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[1] On December 15, 2006, Respondent's wholly-owned subsidiary, Premier Behavioral Solutions, Inc., entered into a stock sale purchase of Three Rivers Healthcare Group, L.L.C., Three Rivers SPE Holding, L.L.C., and Three Rivers SPE Manager, Inc., L.L.C.

[2] S.C. Code Ann. § 44-17-410 (2002 & Supp. 2010).

[3] S.C. Code Ann. § 44-17-430 (Supp. 2010).

On June 7, 2005, deputies with the Orangeburg County Sheriff's Department transported Appellant to the emergency room of The Regional Medical Center of Orangeburg (TRMC). At 3:35 p.m., Appellant was given a physical and mental evaluation. Appellant was discharged at 5:13 p.m. with a diagnosis of "Altered Mental Status" and instructions for her to return the following day for further evaluation. Subsequently, Appellant was driven home by law enforcement.

On June 8, 2005 at 3:00 p.m., Dr. Glenn Hooker, who evaluated Appellant at the Orangeburg Area Mental Health Center, completed Part II of the Certificate of Licensed Physician Examination for Emergency Admission pursuant to section 44-17-410(2) of the South Carolina Code. In this document, Dr. Hooker certified that inpatient psychiatric hospitalization was medically necessary for Appellant and identified Aurora Pavilion Behavioral Health Services (Aurora), a division of the Aiken Regional Medical Center, as the facility that would accept Appellant for further treatment. Appellant's medical records verify that she was involuntarily admitted to that facility on June 8, 2005 at 5:45 p.m. An attending physician at Aurora completed the requisite Physician Certification form stating that he certified that "the inpatient psychiatric hospital admission was medically necessary for psychiatric treatment, which could reasonably be expected to improve the patient's condition."

On June 9, 2005, due to health insurance constraints, Appellant was transferred and admitted to Three Rivers Behavioral Health, L.L.C. (Three Rivers). Based on her initial psychiatric evaluation, which was conducted by Dr. Phyllis Bryant-Mobley, a provisional diagnosis was made that Appellant was suffering from bipolar disorder with manic and psychotic features. On June 10, 2005, Three Rivers completed the Notification of Emergency Admission and Appointment of Designated Examiners.

On June 13, 2005, Darlington County[4] Probate Court Judge Marvin Lawson issued an Order for Continued Hospitalization and for Hearing to be

[4] Prior to this decision, a change of venue was made from Orangeburg County to Darlington County.

held on June 21, 2005. That same day, Judge Lawson appointed Dr. Bryant-Mobley and Doris Ann Burrell, a registered nurse, as designated examiners. On June 14, 2005, Appellant was notified of the hearing and the name of her court-appointed counsel.[5]

On June 21, 2005, Judge Lawson conducted a hearing at which the court-appointed examiners presented their findings regarding Appellant's mental health. Appellant and her attorney were in attendance and participated in the hearing. On that same day, Judge Lawson issued an Order for Continued Treatment with mandatory outpatient treatment to follow at the Orangeburg County Mental Health Facility for a period not to exceed twelve months.[6]

On July 8, 2005, Probate Court Judge Jones-Glover issued an order appointing Dr. Cheryl Dodds, one of Appellant's treating physicians at Three Rivers, to examine Appellant as to whether she needed a guardian and/or a conservator. Although Dr. Dodds believed Appellant to be an "incapacitated person" and in need of a guardian/conservator, she could not definitively determine whether Appellant's condition was temporary or permanent.

On July 20, 2005, Appellant was discharged into the care of her son after receiving treatment at Three Rivers and consenting to voluntarily taking her prescribed medication. Dr. Dodds's discharge diagnosis was "bipolar disease, manic with psychosis."

On June 13, 2007, Appellant filed suit against Husband and her son as well as the hospitals, physicians, and nurses involved in the involuntary commitment proceedings. Appellant asserted causes of action against Respondent for intentional infliction of emotional distress, false imprisonment, conspiracy, defamation, invasion of privacy, and public disclosure of a private fact.

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[5] S.C. Code Ann. § 44-17-550 (2002).

[6] S.C. Code Ann. § 44-17-580 (Supp. 2010).

Respondent filed a motion for summary judgment as to all causes of action with the exception of conspiracy. In support of its motion, Respondent initially claimed that it was not a proper party to the lawsuit as the December 2006 Purchase Agreement required Three Rivers to indemnify Respondent and hold harmless from any and all liabilities occurring before January 1, 2007. Additionally, Respondent claimed that the doctrine of *res judicata* precluded Appellant from challenging the validity of the June 6, 2005 commitment order as Appellant failed to appeal this order. Accordingly, Respondent asserted it was justified in relying on the probate court order.

As to Appellant's specific causes of action, Respondent asserted that it was entitled to summary judgment with respect to false imprisonment and intentional infliction of emotional distress because the actions of Three Rivers were based upon the execution of a valid involuntary commitment order of the probate court. In terms of Appellant's claims of defamation and invasion of privacy/public disclosure of a private fact, Respondent contended that any disclosure of Appellant's psychiatric information was authorized and done in accordance with the judicially-mandated involuntary commitment order and proceedings.

Following a hearing, Circuit Court Judge R. Knox McMahon granted summary judgment to Respondent as to Appellant's claims for false imprisonment, intentional infliction of emotional distress, and defamation.[7]

Appellant appealed Judge McMahon's order to the Court of Appeals. This Court certified this appeal pursuant to Rule 204(b), SCACR.

[7] Prior to the summary judgment hearing, Appellant agreed to dismiss her causes of action for public disclosure of a private fact and invasion of privacy. Judge McMahon also denied summary judgment as to Respondent's claim that it was not a proper party and its reliance on the doctrine of *res judicata*.

II. Discussion

A.

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Fleming, 350 S.C. at 493-94, 567 S.E.2d at 860.

B.

All of Appellant's arguments emanate from the following two theories: (1) the Order of Continued Hospitalization (June 13, 1005) and the Order for Continued Treatment (June 21, 2005) were invalid as they were based on the void initial Order of Detention (June 6, 2005); and (2) there was no factual basis to substantiate the findings underlying the Order for Continued Treatment (June 21, 2005). Without a "lawful" probate court order, Appellant claims Respondent was not justified in detaining her, no privilege attached to Respondent's communications about Appellant, and it was not reasonable for Respondent to detain her.

As will be discussed, we find that Appellant is procedurally barred from challenging the validity of the underlying orders. Based on the valid orders, we conclude that the circuit court judge correctly granted summary judgment in favor of Respondent.

C.

We find Appellant's challenge to the validity of the underlying commitment orders was not only untimely but also barred by the doctrine of *res judicata*.

On March 25, 2008, Appellant filed a Petition to Vacate Commitment Proceedings. In this Petition, Appellant contended the June 6, 2005 Order of Detention was rendered "invalid" after she was discharged on June 7, 2005 from TRMC of Orangeburg. Because the parties could not "re-use" the June 6, 2005 Order of Detention to transport her to Aurora on June 8, 2005, Appellant asserted that the probate court lacked jurisdiction over her and the subject matter of the proceedings.

By order dated August 25, 2008, Probate Court Judge Tiffany Provence denied Appellant's Petition. Judge Provence rejected Appellant's contention that the parties "re-used" the June 6, 2005 Order of Detention. Instead, she found that Dr. Hooker's Certificate of Licensed Physician Examination for Emergency Admission "trigger[ed] S.C. Code Ann. § 44-17-440, which grants state or local law enforcement three days from the date of said certification to transport the person to the hospital designated by the certificate." Referencing the applicable code provisions, Judge Provence found that "no procedural error existed under the S.C. Probate Code."

Appellant appealed Judge Provence's order to the circuit court. By order dated August 18, 2009, Judge Diane S. Goodstein affirmed Judge Provence's order in its entirety.

As outlined above, Appellant's challenge to the commitment proceedings was clearly beyond the statutorily-mandated, fifteen-day time period. See S.C. Code Ann. § 44-17-620 (2002) ("The petitioner or the person shall have the right to appeal from any order of the probate court issued pursuant to Section 44-17-580 to the court of common pleas of the county where the probate court is situated. The notice of intention to appeal together with the grounds for the appeal shall be filed in the probate court and the court of common pleas within fifteen days of the date of the order issued

pursuant to Section 44-17-580."); Mims v. Alston, 312 S.C. 311, 440 S.E.2d 357 (1994) (holding that fifteen-day limit provided under section 44-17-620 sets forth the procedure to appeal any order of involuntary commitment from the probate court). Accordingly, we find Appellant was precluded from collaterally attacking the underlying commitment orders. See In re Webber, 689 S.E.2d 468 (N.C. Ct. App. 2009) (recognizing that failure to timely appeal involuntary civil commitment order precluded collateral attack on alleged erroneous underlying order), cert. denied, 699 S.E.2d 925 (N.C. 2010).

Furthermore, there is no evidence that Appellant appealed Judge Goodstein's order. Because Judge Goodstein's order constitutes a final adjudication regarding the validity of the commitment proceedings, the doctrine of *res judicata* precludes Appellant from asserting any challenge to the commitment orders.[8] See Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992) (recognizing that in order to bar subsequent lawsuit based on *res judicata*, the following elements must be proven: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit).[9]

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[8] Given the procedural history, Appellant's counsel conceded the validity of the initial commitment orders at oral argument before this Court.

[9] In an attempt to circumvent these procedural bars, Appellant claims the alleged procedural errors divested the probate court of subject matter jurisdiction. We find this claim to be meritless as any alleged procedural error would not affect the subject matter jurisdiction of the probate court as all of the proceedings involved involuntary commitment issues for which the probate court is statutorily authorized to adjudicate. See S.C. Code Ann. § 62-1-302(a)(6) (2009) ("To the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to the involuntary commitment of persons suffering from mental illness . . . ."); Boan v. Jacobs, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct. App. 1988) ("The concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular

Additionally, we disagree with Appellant's assertion that her involuntary commitment was without a factual basis. In support of this assertion Appellant directs this Court's attention to numerous documents, including Dr. Leonhardt's consulting opinion dated June 14, 2005, which was requested by Dr. Bryant-Mobley and reviewed by Dr. Dodds. It was indicated in the opinion that Appellant's condition was the result of "marital conflict" as she was an "alleged victim of abuse."

Initially, we would note that Judge Lawson presumably took into consideration Dr. Leonhardt's opinion as the court-appointed examiners presented their findings to Judge Lawson during the June 21, 2005 hearing. Furthermore, the remaining documents offered by Appellant are depositions and affidavits that post-date the involuntary commitment proceedings. These after-the-fact documents cannot operate to retroactively invalidate the commitment orders that were procedurally proper and factually substantiated by court-appointed medical personnel. To find otherwise, we would undermine the probate court's authority in involuntary commitment proceedings.

D.

Having found that the underlying commitment orders were valid, the question becomes whether Judge McMahon correctly granted summary judgment in favor of Respondent as to Appellant's claims of false imprisonment, defamation, and intentional infliction of emotional distress.

1. False Imprisonment

In granting summary judgment to Respondent, Judge McMahon found that Appellant's claim of false imprisonment could not be maintained because Respondent took Appellant into custody and detained her pursuant to a lawful order of the probate court.

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action (subject matter jurisdiction), but the concept does not refer to the validity of the claim on which an action against a person is based.").

"False imprisonment is the deprivation of one's liberty without justification." Jones by Robinson v. Winn Dixie Greenville, Inc., 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct. App. 1995). "In order to recover under a theory of false imprisonment, the complainant must establish (1) the defendant restrained him; (2) the restraint was intentional; and (3) the restraint was unlawful." Id.

"If a hospital fails to follow the statutory requirements for the commitment of a person to a hospital or mental facility, it may be liable for false imprisonment." 18 S.C. Jur. Hospitals § 21 (2011). "If these statutory guidelines are not followed, the hospital may face liability for false imprisonment because any detainment would be unlawful." Id.

As previously discussed, Appellant was lawfully taken into custody and detained pursuant to valid probate court orders. It is generally accepted that:

> A person confined pursuant to an authorized mental health commitment proceeding or process may not recover damages in a false imprisonment action. In accordance with the general rule dealing with confinement under process, even where the order of commitment is erroneously made, but is valid on its face and issued by a court of competent jurisdiction, the detention is not false imprisonment.
>
> State hospital officials have no duty to examine the form of the report of the examining psychiatrists upon which an order of commitment was based, nor is there any duty to examine or investigate a commitment order valid on its face, unless there is knowledge that there was, in fact, no basis for implementing the order.

32 Am. Jur. 2d False Imprisonment § 33 (2007).

Accordingly, Appellant cannot maintain a claim of false imprisonment against Respondent. See Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987) (concluding involuntary commitment of mother, who claimed she was not mentally ill, was pursuant to a lawful order of the

probate judge and, thus, was not a basis for recovery on a claim of false imprisonment against former husband, two adult children, and psychiatrist).

2. Defamation

In granting summary judgment to Respondent, Judge McMahon found the treatment provided by Three Rivers: (1) was confined to that ordered by the probate court; (2) was not disclosed to any party other than was ordered; and (3) any reports issued by Three Rivers were qualifiedly privileged and, thus, could not be defamatory. Additionally, Judge McMahon found that statutory exceptions allowed the disclosure of privileged psychiatric information in involuntary commitment proceedings.

"The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff." Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006) (citing Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998)).

"In order to prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." Id. "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Fleming, 350 S.C. at 494, 567 S.E.2d at 860.

We find that summary judgment was properly granted to Respondent as any communications issued by Three Rivers' employees were qualifiedly privileged as they were done in effectuating the lawful orders of the probate court. See Manley, 291 S.C. at 330-32, 353 S.E.2d at 315 (concluding mother, who was involuntarily committed, could not maintain action for defamation against former husband, two adult children, and psychiatrist where assertions made in connection with the involuntary commitment were qualifiedly privileged as they did not exceed their proper scope).

Furthermore, sections 44-22-90 and 44-22-100 of the South Carolina Code authorized Three Rivers' employees to disclose Appellant's mental health records within the confines of the involuntary commitment proceedings. See S.C. Code Ann. § 44-22-90(A)(2), (4) (2002) (providing exceptions to the disclosure of privileged mental health records, including in involuntary commitment proceedings and information related through the course of a court-ordered psychiatric examination); id. § 44-22-100(A)(2), (4), (5) (permitting disclosure of confidential mental health records where disclosure is necessary: for the conduct of proceedings before a court and that failure to make the disclosure is contrary to the public interest; to cooperate with law enforcement, health, welfare, and other agencies or to further the welfare of a patient; and to carry out the statutory provisions for involuntary commitment proceedings).

3. Intentional Infliction of Emotional Distress

In granting summary judgment in favor of Respondent, Judge McMahon found that the actions of Three Rivers could not be regarded as so extreme and outrageous to allow Appellant to recover for intentional infliction of emotional distress because Three Rivers did not participate in procuring the initial commitment order and the treatment of Appellant was conducted in a reasonable manner. Additionally, Judge McMahon held that Three Rivers was entitled to quasi-judicial immunity as it was treating Appellant pursuant to the involuntary commitment order.

In order to recover for intentional infliction of emotional distress, a plaintiff must establish the following:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;
>
> (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"

(3) the actions of the defendant caused plaintiff's emotional distress; and

(4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it."

Hansson v. Scalise Builders of S.C., 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007).

We hold that Appellant could not, as a matter of law, maintain a claim for intentional infliction of emotional distress against Respondent as Respondent's conduct towards Appellant was reasonable and in accordance with the valid probate court orders. See Manley, 291 S.C. at 329-30, 353 S.E.2d at 314 (concluding mother, who was involuntarily committed to psychiatric facility, could not maintain cause of action for intentional infliction of emotional distress against former husband, two adult children, and psychiatrist, where defendants "acted in good faith and in a reasonable manner" regarding the involuntary commitment proceedings).

III. Conclusion

Because Appellant failed to timely and properly challenge the probate court's orders, they are presumed valid. Based on these valid orders, we find that Respondent's conduct toward Appellant was lawful, justified, and reasonable. Thus, Appellant cannot maintain causes of action for false imprisonment, defamation, or intentional infliction of emotional distress against Respondent. Accordingly, we affirm the decision of the circuit court granting summary judgment in favor of Respondent.

AFFIRMED.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Horry County Magistrate James Oren Hughes, Jr., Respondent.

Opinion No. 26979
Submitted April 19, 2011 – Filed May 31, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Keith M. Babcock, of Lewis & Babcock, LLP, of Columbia, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR. In addition, respondent agrees to neither seek nor accept any judicial position in South Carolina without the express written permission of the Court after due notice of seeking permission in writing to Disciplinary Counsel. The facts as set forth in the agreement are as follows.

FACTS

Respondent attended an Horry County Bar reception in Myrtle Beach, South Carolina. At the reception, respondent made an inappropriate comment to a law student attending the reception. In addition, respondent had a cell phone at the reception which contained an inappropriate image that was viewed by the law student and others attending the reception. Respondent regrets his conduct.

On August 2, 2010, the Court placed respondent on interim suspension as a result of his conduct at the reception. Respondent has since retired from his judicial position.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall act at all times in a manner that promotes public confidence in the integrity of the judiciary); and Canon 4A(2) (judge shall conduct all of the judge's extra-judicial activities so that they do not demean the judicial office). Respondent further admits that his conduct constitutes grounds for discipline pursuant to Rule 7(b)(1) (it shall be a ground for discipline for judge to violate or attempt to violate the Code of Judicial Conduct), and Rule 7(b)(9) (it shall be ground for discipline for judge to violate the Judge's Oath of Office contained in Rule 502.1, SCACR), RJDE, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand.[1] Further, respondent shall neither seek nor accept any judicial position in South Carolina without the express written permission of the Court after due notice of seeking permission in writing to Disciplinary Counsel. Accordingly, respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, and KITTREDGE, JJ., concur. HEARN, J., not participating.

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[1] Since respondent no longer holds judicial office, a public reprimand is the most severe sanction the Court can impose. In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Richard Miles, Petitioner,

v.

Theodora Miles, Respondent.

Appeal From Greenwood County
Brian M. Gibbons, Family Court Judge

Opinion No. 26980
Heard December 1, 2010 – Filed May 31, 2011

REVERSED AND REMANDED

Matthew P. Turner and Michael Turner, Sr., both of Laurens, for Petitioner.

C. Rauch Wise, of Greenwood, for Respondent.

JUSTICE HEARN: In this appeal from the family court, we are asked to determine whether an agreement between the parties for the provision of

health insurance is a modifiable form of support. We hold that unless the agreement provides otherwise, the obligation to maintain health insurance is an incident of support. Because there is no language in this agreement limiting the court's power to modify it, we find a modification is warranted based on a substantial change in circumstances. We remand this case to the family court for a determination of what form this modification is to take and whether the party receiving the modification is entitled to reimbursement for excess support paid during the pendency of this appeal.

FACTUAL/PROCEDURAL BACKGROUND

In March 2000, Theodora Miles ("Wife") petitioned for a divorce from James Richard Miles ("Husband") on the ground of adultery and sought custody of the couples' two minor children, child support, equitable division of the marital assets, alimony, and attorney's fees. Prior to the final hearing, the parties reached an agreement as to many of the issues, which provided in pertinent part:

> 5. [Husband] shall continue to maintain health and dental insurance on [Wife] through his place of employment until such time as [Wife] remarries or until [Wife] attains employment which provides health insurance to employees as part of its fringe benefits package; both [Husband] and [Wife] waive alimony.

The remainder of the agreement divided the parties' property, determined custody and visitation of their children, established child support, and awarded attorney's fees. The family court approved the agreement, and by order dated August 16, 2000, granted Wife a divorce and incorporated the parties' agreement. The following language is contained in the order:

> 5. [Husband] is hereby ordered to cover [Wife] through his place of employment with health and dental insurance until such time a[s Wife] remarries or obtains employment which provides such coverage to [Wife] as a fringe benefit.
>
> 6. Alimony is denied to each party.

The agreement contained no language limiting or otherwise restricting modification of its terms.

Six years later, Husband filed this action seeking to modify various aspects of the final order. Specifically, he sought a reduction in his child support obligation, attorney's fees, and the termination of the requirement that he maintain health and dental insurance on Wife due to a substantial change in circumstances.[1] The parties did agree to a reduction in Husband's child support obligations, but the remaining issues were left for the court to decide.[2] At the time of the proposed modification, Wife did not have insurance coverage through her employer and had not re-married, both of which would terminate Husband's obligation by the terms of the agreement and the court's order. Therefore, the issue before the court was whether the agreement to provide health insurance was a modifiable support obligation or a non-modifiable agreement similar to a property division.

The family court found the fact that Wife waived alimony in the agreement "unambiguously shows the intent of the parties that the health insurance maintenance provision was not in the form of support." Further, the court held "the language of the parties' agreement is plain, unambiguous, and I therefore decline to construe that the maintenance [of] the health insurance pursuant to this agreement is actually support. The parties further clarified their intent when they inserted the sentence that both parties waive alimony." Accordingly, the court denied Husband the modification he sought. The court of appeals affirmed, agreeing the agreement unambiguously did not create a support obligation. *Miles v. Miles*, Op. No. 2009-UP-007 (S.C. Ct. App. filed Jan. 7, 2009). We granted certiorari.

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[1] To demonstrate a substantial change in circumstances, Husband established he underwent a triple bypass, tore his rotator cuff, and was diagnosed with colon cancer, all of which resulted in a total of seven surgeries; is no longer employed and is totally disabled; his income has been halved; and his own and his children's health insurance premiums have increased.

[2] The issue of attorney's fees is not before the Court.

ISSUE PRESENTED

Did the court of appeals err in affirming the family court's conclusion that the parties' agreement unambiguously did not create a support obligation and therefore Husband's obligation to maintain health insurance is non-modifiable?

STANDARD OF REVIEW

In an appeal from a decision of the family court, this Court may find facts in accordance with its own view of the preponderance of the evidence. *Rutherford v. Rutherford*, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). Thus, our review of a family court's order on whether to modify support awards is *de novo*.

LAW/ANALYSIS

I. Whether Agreement Is Modifiable

Husband argues the court of appeals erred in affirming the determination his obligation to provide insurance benefits to Wife was unambiguously not a form of support. We agree.

We encourage litigants in family court to reach extrajudicial agreements on marital issues. The interpretation of such agreements is a matter of contract law. *Hardee*, 348 S.C. at 91-92, 558 S.E.2d at 267. Where an agreement is clear on its face and unambiguous, "the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001). However, if the agreement is ambiguous, it is the court's duty to determine the intent of the parties. *Id.* It may do so by examining extrinsic evidence. *McKinney v. McKinney*, 274 S.C. 95, 97, 261 S.E.2d 526, 527 (1980). An agreement is ambiguous if it is susceptible to more than one interpretation or its meaning is unclear. *Smith-Cooper*, 344 S.C. at 295, 543 S.E.2d at 274. The interpretation of an unambiguous contract is a question of law. *S.C. Dep't of Natural Res. v. Town of*

McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001). Similarly, whether a contract is ambiguous is a question of law. *Id.* at 617, 550 S.E.2d at 302-303. If the court finds it necessary to examine extrinsic evidence to discern the intent of the parties, the determination of intent is a question of fact. *Id.* at 617, 550 S.E.2d at 303.[3]

Initially, we note that because the agreement is silent as to the family court's power to modify it, it remained modifiable by the court. *See Moseley v. Mosier*, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983) ("[U]nless the agreement unambiguously denies the court jurisdiction, the terms will be modifiable by the court . . . ."). As to whether Husband's obligation is an incident of support, the maintenance of health insurance has the hallmark of spousal support: it provides the receiving spouse a benefit which is normally incident to the marital relationship. *See Craig v. Craig*, 365 S.C. 285, 292, 617 S.E.2d 359, 362 (2005). Additionally, our courts have previously awarded health insurance as a form of support. *Sharpe v. Sharpe*, 307 S.C. 540, 542, 416 S.E.2d 215, 216 (Ct. App. 1992); *Wood v. Wood*, 292 S.C. 43, 48-49, 354 S.E.2d 796, 799-800 (Ct. App. 1987).[4] Awards of spousal support do not become property divisions, and therefore non-modifiable, absent something more. *See Mattox v. Cassidy*, 289 S.C. 57, 62, 344 S.E.2d 620, 623 (Ct. App. 1986) ("To show that the alimony award was part of a property settlement agreement, it must be shown that the wife surrendered property rights in return for the husband's agreement to pay the stated sums.").

Here, the agreement simply states Husband will provide health and dental insurance for Wife. It does not indicate Wife surrendered property rights in exchange for it, nor does the agreement provide any indication that

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[3] Although the family court here undertook to receive evidence on intent, it ultimately determined that the agreement was unambiguous.

[4] Wife argues *Sharpe* and *Wood* are distinguishable because the family court in both of those cases specifically included the insurance award as alimony and there was no agreement between the parties. While Wife is correct factually, we do not agree these facts make those cases inapplicable. We believe they actually counter Wife's position: they demonstrate the family court found health insurance to be a form of support and nothing else.

Husband's obligation is anything *other* than support. Additionally, this requirement terminates automatically upon Wife's remarriage or her obtaining employment that provides similar coverage, both instances in which she would be able to obtain this benefit through means other than Husband. The language creating Husband's obligation in the agreement even appears in the same paragraph as the language pertaining to alimony. In fact, it is in the same sentence. Looking squarely at the face of the agreement, we cannot find it is unclear or susceptible to more than one interpretation. Therefore, although we agree with the family court and the court of appeals that the agreement is unambiguous, we hold that it unambiguously creates a support obligation. *See In re Marriage of Johnson*, 781 N.W.2d 553, 557 (Iowa 2010) ("[W]e conclude as a matter of law that a provision in a dissolution decree requiring one spouse to provide medical support in the form of health insurance payments to the other spouse is modifiable spousal support . . . .").

Wife argues that her decision to waive alimony unambiguously demonstrates the insurance obligation is not an incident of support. However, alimony is not the only form of support available in a divorce. *See* S.C. Code Ann. § 20-3-130 (Supp. 2009) (discussing the different forms of alimony and "[s]uch other form of spousal support . . . as appropriate under the circumstances"); *Whitfield v. Hanks*, 278 S.C. 165, 165, 293 S.E.2d 314, 315 (1982) (holding an award of possession of the marital home is an incident of support). Wife and the family court have placed too much emphasis on the language that the parties "waive[d] alimony." Such semantic distinctions have been abolished in family law. *Moseley*, 279 S.C. at 352-53, 306 S.E.2d at 627. As we said in *Moseley*,

> [t]he parties' intent is rarely revealed from the agreement's words of art. Generally, those terms are used without intending or implying any particular legal consequences. Later, courts impose the consequences upon the unsuspecting parties. Today, we overrule those cases which hold that words of art make a major distinction in the operation of divorce law.

Id. The mere fact the parties waived alimony—i.e., permanent and periodic, lump sum, rehabilitative, and reimbursement alimony—does not lead to the inescapable conclusion they accordingly waived all other forms of support. Such a result is contrary to the common sense approach to extrajudicial agreements advocated in *Moseley*.

Therefore, we hold the agreement unambiguously provides a modifiable incident of support in the form of health and dental insurance as a matter of law. Thus, the family court committed an error of law in denying Husband a modification.[5]

II. Substantial Change In Circumstances

Next, it must be determined whether Husband has presented a substantial change in circumstances that would entitle him to a modification of his support obligation. A party is entitled to such a modification if he can show an unanticipated substantial change in circumstances. *Butler v. Butler*, 385 S.C. 328, 336, 684 S.E.2d 191, 195 (Ct. App. 2009). "The party seeking modification bears the burden to show by a preponderance of the evidence that the unforeseen change has occurred." *Id.* (quotations omitted). This burden is always a high one, hence the requirement that the change in circumstances be "substantial." Prior case law has indicated that a party faces a heightened burden when seeking to prove a substantial change in circumstances from a court order approving an agreement. *See Floyd v. Morgan*, 383 S.C. 469, 475, 681 S.E.2d 570, 573 (2009) (holding there is an increased burden to modify a child support obligation based on substantial change in circumstances where an agreement is involved); *Upchurch v. Upchurch*, 367 S.C. 16, 26, 624 S.E.2d 643, 648 (2006) ("The party seeking modification has the burden to show changed circumstances. This burden is increased where the child support award is based on a settlement agreement."); *Townsend v. Townsend*, 356 S.C. 70, 73-74, 587 S.E.2d 118, 120 (Ct. App. 2003) ("Where the amount of child support is based on a

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[5] Because we answer the question before us as a matter of law, we need not reach the factual determinations of the parties' intent based on the extrinsic evidence received by the family court.

settlement agreement, the party requesting modification has an even heavier burden."). This principle has had the effect of chilling the litigants' desire to resolve their disputes by agreement, which is contrary to this Court's longstanding preference in favor of settlement. Accordingly, we take this opportunity to expressly disavow the line of cases that articulate an even higher burden on the party seeking modification when an agreement is involved. Today, we clarify that while the burden to prove entitlement to a modification of spousal or child support is a substantial one, the same burden applies whether the family court order in question emanated from an order following a contested hearing or a hearing to approve an agreement.

In the instant case, the family court took evidence regarding changes in circumstances in the event the judge found Husband's obligation to be an incident of support. Because he concluded otherwise, he did not reach the issue of Husband's change in circumstances in his order. However, the parties had a full opportunity to develop the record and present evidence on this issue. Therefore, in keeping with our standard of review in equity matters, we will take our own view of the preponderance of the evidence presented to the family court. *See Rutherford*, 307 S.C. at 204, 414 S.E.2d at 160. It is undisputed that the following events have occurred in Husband's life since the entry of the final decree in 2000: he underwent a triple bypass, tore his rotator cuff, and was diagnosed with colon cancer, all of which required seven operations; as a result of his medical conditions, he is no longer employed and is totally disabled; the income he receives on disability of $1,830 gross per month is less than half of his former earnings as a police officer; and the insurance premiums he pays pursuant to his child support obligations have increased.[6] Wife does not allege any of these events could have been anticipated at the time of their agreement. Husband further

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[6] As a result of his rotator cuff injury, he received a workers' compensation payment of $102,000. It appears from Husband's testimony much of this payment was used to pay his associated medical bills, while a portion of it was used to make a donation to his church and purchase his new wife a car. Husband also argues his own health insurance premiums have increased due to his ailments. However, he testified his former employer pays, and will continue to pay, his personal premiums.

testified the insurance premiums he pays for Wife are approximately $370 per month. As for Wife during this time period, her income has increased from $28,000 per year at the time of the divorce to $45,000 per year.[7]

Based on the evidence before us, we find that Husband has demonstrated a substantial change in circumstances that merits a modification in his support obligation to provide health and dental insurance coverage for Wife. While Husband's earning capacity and health have significantly deteriorated since the time of his divorce from Wife, Wife finds herself in improved economic conditions. *See Miles v. Miles*, 355 S.C. 511, 519, 586 S.E.2d 136, 140 (Ct. App. 2003) ("Many of the same considerations relevant to the initial setting of an alimony award may be applied in the modification context as well, including . . . each party's earning capacity[] and the supporting spouse's ability to continue to support the other spouse."). However, the record is not complete enough for us to determine the precise extent and mechanics of the modification and whether Husband is entitled to reimbursement for the excess support he paid between the time the family court denied Husband's modification and the entry of final judgment following this appeal. Accordingly, a remand is in order.

CONCLUSION

We reverse the decision of the court of appeals and remand this matter to the family court for proceedings not inconsistent with this opinion.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

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[7] We note that Wife also receives $632 per month from Husband's retirement benefits. However, because this was part of the equitable division in the final decree, it is not a change in circumstances for us to consider.

JUSTICE PLEICONES: I concur in part and dissent in part. We granted certiorari to review the Court of Appeals' decision which upheld the family court's finding that the insurance requirement here was not a modifiable form of support. I agree with the majority that this finding is an error of law, one which we should reverse. I dissent, however, from that portion of the majority opinion which undertakes to review the record and to make the factual determination that petitioner demonstrated a substantial change of circumstances. In my opinion, this factual determination is beyond our authority on certiorari. See Lewis v. Lewis, Op. No. 26973 (S.C. Sup. Ct. filed May 9, 2011)(Pleicones, J., dissenting).

I concur in the decision to remand the matter to the family court, but would leave the issues of changed circumstances and further relief to that tribunal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,	Respondent,
v.	
Lawrence Phillips,	Appellant.

Appeal From Colleton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 4833
Heard April 5, 2011 – Filed May 25, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Appellate Defenders M. Celia Robinson and Breen Stevens, both of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Deborah R.J. Shupe, all

of Columbia; and Solicitor Issac McDuffie Stone, III, of Beaufort, for Respondent.

CURETON, A.J.: Lawrence Phillips appeals his conviction and sentence for second-degree arson, arguing the trial court erred in refusing to direct a verdict of acquittal and in sentencing him to life imprisonment without the possibility of parole (LWOP). We affirm the refusal to direct a verdict but reverse the LWOP sentence and remand for resentencing.

FACTS

Phillips lived in a double-wide mobile home he rented from James Cook. On September 14, 2007, Phillips packed his belongings in his car and drove away. Within minutes, the mobile home burned.

Phillips was indicted and tried for second-degree arson. The State notified him it intended to seek a sentence of LWOP based upon a 1979 conviction from South Carolina for "burning" and a 1985 conviction from Florida for second-degree burglary. Phillips had pled guilty to the 1979 offense and received a youthful offender sentence. Prior to trial, Phillips moved to "disqualify" the State's LWOP notice. He argued that neither of the listed offenses was a serious or a most serious offense for sentence enhancement purposes. The State submitted a copy of the 1979 indictment, which stated Phillips burned "a building, the property of Laurens County School District #56." The trial court determined the 1979 conviction for burning contained the same elements as second-degree arson, a serious offense. Furthermore, the trial court found the 1985 second-degree burglary conviction from Florida constituted a serious offense. Accordingly, the trial court did not preclude the State from pursuing an LWOP sentence.

Phillips was tried in July 2008. Lori Joslin, Phillips's next-door neighbor, recalled that at approximately 7:00 a.m. on September 14, 2007, Phillips visited her to retrieve a rifle she had stored for him and to leave a lawnmower at her home. According to Joslin, Phillips stated he was leaving

town and wondered aloud how his house would look in flames. Joslin watched as Phillips packed many of his personal belongings into his car and left. She did not believe he intended to return. Within thirty minutes after their conversation, Joslin looked out her window and saw flames and smoke coming from Phillips's home. Joslin called 911 and reported the fire.

Emergency personnel arrived and extinguished the fire. A paramedic who responded to the call testified he found two fires inside the home. The South Carolina Law Enforcement Division (SLED) investigated the fires and determined they had been intentionally set, originating in the living room and the master bedroom.

Phillips's sister, Rhonda Wilson, testified she went to her brother's house on the day it burned to feed his animals. She added that Phillips regularly asked her to feed his animals when he went out of town. Wilson testified that when she arrived, the fire had been extinguished, but she found her brother's pit bull, rabbits, and quail at the house. While there, Wilson retrieved their father's golf clubs, a rake, a shovel, a garden hose, and some gas cans.

Phillips moved the trial court to direct a verdict in his favor, arguing that because he left the house without intending to return, the house did not qualify as a dwelling. According to Phillips, arson in the third degree, rather than in the second degree, was the appropriate charge because the house was an unoccupied building instead of a dwelling. The trial court denied the motion and submitted the issue to the jury. However, the trial court charged the jury on both second-degree and third-degree arson.

Shortly after beginning deliberations, the jury sent the trial court a note asking for the definition of reasonable doubt and whether someone must actually live in a house for it to be considered a dwelling. The trial court provided the jury with a written copy of the jury charge. The jury returned a verdict of guilty of second-degree arson. Based upon the 1979 and 1985 convictions for burning and second-degree burglary, respectively, the trial court sentenced Phillips to LWOP. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.

LAW/ANALYSIS

I. Directed Verdict on the Charge of Second-Degree Arson

Phillips first argues the trial court erred in refusing to direct a verdict on the charge of second-degree arson. He contends that when he departed from the home, it no longer qualified as a dwelling house. We disagree.

A. Directed Verdict

"A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged." State v. Heath, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006). A trial court considering a motion for directed verdict is concerned with the existence or nonexistence of evidence, not with its weight. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing the denial of a directed verdict, the appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. An appellate court may reverse the trial court's denial of a directed verdict motion only if no evidence supports the trial court's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). If any direct evidence or substantial circumstantial evidence reasonably tends to prove the guilt of the accused, this court must find the case was properly submitted to the jury. Weston, 367 S.C. at 292-93, 625 S.E.2d at 648.

B. Arson Statutes

In 2007, the South Carolina Code defined second-degree arson as follows:

> A person who wilfully and maliciously causes an explosion, sets fire to, burns, or causes to be burned or aids, counsels, or procures the burning that results in damage to a dwelling house, church or place of worship, a public or private school facility, a manufacturing plant or warehouse, a building where business is conducted, an institutional facility, or any structure designed for human occupancy to include local and municipal buildings, whether the property of himself or another, is guilty of arson in the second degree . . . .

S.C. Code Ann. § 16-11-110(B) (Supp. 2007).

For the purposes of the arson and burglary statutes, a "dwelling house" is "any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property." S.C. Code Ann. § 16-11-10 (2003). In addition, "all houses, outhouses, buildings, sheds and erections which are within two hundred yards of [any dwelling house] and are appurtenant to it" constitute parcels of the dwelling house. Id.

We affirm the trial court's refusal to direct a verdict of acquittal on the charge of second-degree arson because the evidence adduced at trial required that the issue be submitted to the jury. Phillips contends his abandonment of the mobile home prior to Joslin's observing the fire changed its status as a dwelling. This argument is meritless. In State v. Glenn, Glenn and her husband purchased and lived in a mobile home until her husband died. 297 S.C. 29, 30, 374 S.E.2d 671, 671 (1988). After holding a wake for her

husband in the mobile home, Glenn learned the home might be repossessed. Id. at 30-31, 374 S.E.2d at 671. She announced to family members that the home would burn before she allowed it to be repossessed. Id. at 31, 374 S.E.2d at 671. A few days after the funeral, Glenn stopped by the home and retrieved her Bible; shortly thereafter, a witness found the home in flames. Id. at 31, 374 S.E.2d at 671-72. Glenn was tried for second-degree arson and sought a directed verdict based on her contention the mobile home was not a "dwelling" because no one lived there at the time of the fire. Id. at 31, 374 S.E.2d at 672. Our supreme court affirmed the denial of a directed verdict, holding that despite Glenn's departure and removal of her belongings, "ample evidence existed that . . . Glenn did not vacate her mobile home but left with the intention of returning." Id. at 32, 374 S.E.2d at 672.

In the case at bar, Phillips avers he "left" the mobile home on the morning of the fire, intending never to return. He retrieved his gun from Joslin's care and loaded his car with most of his belongings. However, he left his lawnmower with Joslin, his father's golf clubs in his mobile home, and several live animals at his home. Phillips's leaving his lawnmower with Joslin was an ambiguous act that could support either Phillips's abandonment of the home or his intent to return.[1] Leaving his father's golf clubs and his rake, shovel, garden hose, and gas cans in the mobile home would suggest Phillips intended to return only if he valued those items. Certainly, his sister did; she retrieved them after the fire. However, Phillips's leaving his dog, rabbits, and quail at the mobile home is evidence he intended to return as he had done often before. Wilson testified her brother regularly asked her to feed his animals when he went out of town, and she went to his house the day of the fire to feed them.

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[1] The record is notably bereft of evidence Phillips took steps to vacate the property permanently. For example, no evidence indicates Phillips removed furniture from the home, discontinued any utilities to the mobile home, secured another dwelling for himself, provided a forwarding address to the post office, or notified his landlord of his intent to vacate the property.

Viewed together, this evidence supports a finding that Phillips "left with the intention of returning," certainly to care for his animals and possibly to resume living in the home. See id. Consequently, the trial court did not err in refusing to direct a verdict of acquittal on the issue of second-degree arson.

II. LWOP

Phillips next argues the trial court erred in sentencing him to LWOP based upon his 1979 conviction.

A. Sentence Enhancement

In South Carolina, a trial court must sentence a person convicted of a serious offense to LWOP if he has two or more prior convictions for: "(1) a serious offense; (2) a most serious offense; (3) a federal or out-of-state offense that would be classified as a serious offense or most serious offense under this section; or (4) any combination of the offenses listed in items (1), (2), and (3) above." S.C. Code Ann. § 17-25-45(B) (Supp. 2010). A "serious" offense is "any offense which is punishable by a maximum term of imprisonment for thirty years or more which is not referenced in subsection (C)(1)." S.C. Code Ann. § 17-25-45(C)(2) (Supp. 2010). Second-degree arson is listed as a serious offense. Id. Third-degree arson is not. Id.

In seeking an LWOP sentence based upon section 17-25-45, the State bears the burden of establishing the defendant's prior convictions for serious or most serious offenses. State v. Johnson, 350 S.C. 543, 547-48, 567 S.E.2d 486, 488 (Ct. App. 2002). When a prior conviction is for an offense not contemplated by section 17-25-45, the trial court should examine the elements of the offense and determine whether they are equivalent to any current offenses classified as "serious" or "most serious." State v. Washington, 338 S.C. 392, 397-98, 526 S.E.2d 709, 711 (2000).

B. Burning and Second-Degree Arson

In 1979, the South Carolina Code contained a provision addressing the offense of burning:

> Any person who (a) wilfully and maliciously sets fire to or burns or causes to be burned or (b) aids, counsels or procures the burning of:
>
> (1) Any barn, stable, garage, or other building, whether the property of himself or of another, not a parcel of a dwelling house;
>
> (2) Any shop, storehouse, warehouse, factory, mill or other building, whether the property of himself or of another; or
>
> (3) Any church, meetinghouse, courthouse, workhouse, school, jail or other public building or public bridge;
>
> Shall, upon conviction thereof, be sentenced to the Pentitentiary for not less than one nor more than ten years.

S.C. Code Ann. § 16-11-120 (1976) (repealed 1982).

This court's opinion in In Re Terrence M., 317 S.C. 212, 214 n.1, 452 S.E.2d 626, 627 n.1 (Ct. App. 1994), explained how the General Assembly restructured the arson statutes in 1982:

> Prior to the 1982 Act, South Carolina had two arson statutes relating to buildings: (1) S.C. Code Ann. § 16-11-110 (1976) (later amended), which

> made it unlawful to wilfully and maliciously set fire to a dwelling house or associated building; and (2) S.C. Code Ann. § 16-11-120 (1976) (repealed), which made it unlawful to wilfully and maliciously set fire to other kinds of buildings. These statutes did not describe the offense in terms of degrees of arson.
>
> The 1982 Act amended § 16-11-110 to set forth three degrees of arson. The 1982 Act added the offense of first degree arson under § 16-11-110(A) and recodified the earlier version of § 16-11-110 as second degree arson under § 16-11-110(B) with the same punishment of two to twenty years. It repealed § 16-11-120 but essentially recodified it as § 16-11-110(C) (third degree arson) with the same punishment of one to ten years. The distinguishing difference between subsections (B) and (C) is whether the building was a "dwelling house" or associated building, this being the same distinguishing difference that existed between the former version of § 16-11-110 and the repealed version of § 16-11-120.

In 2007, the South Carolina Code continued to define arson in terms of three degrees. First-degree arson resulted, "either directly or indirectly, in death or serious bodily injury to a person" and mandated a sentence of between ten and thirty years' imprisonment. S.C. Code Ann. § 16-11-110(A) (Supp. 2007). Second-degree arson applied to buildings "designed for human occupancy," including dwellings:

> A person who wilfully and maliciously causes an explosion, sets fire to, burns, or causes to be burned or aids, counsels, or procures the burning that results in damage to a dwelling house, church or place of worship, a public or private school facility, a

> manufacturing plant or warehouse, a building where business is conducted, an institutional facility, or any structure designed for human occupancy to include local and municipal buildings, whether the property of himself or another, is guilty of arson in the second degree . . . .

§ 16-11-110(B). A conviction of second-degree arson carried a sentence of five to twenty-five years' imprisonment. Id. Third-degree arson addressed "damage to a building or structure other than those specified in subsection (A) or (B)." S.C. Code Ann. § 16-11-110(C) (Supp. 2007). The sentence for third-degree arson was from one to ten years' imprisonment. Id.

We reverse the trial court's determination that Phillips's 1979 conviction for burning contains the same elements as the 2007 second-degree arson statute and therefore qualifies as a serious offense for sentence-enhancement purposes. See Washington, 338 S.C. at 397-98, 526 S.E.2d at 711 (requiring a court considering sentence enhancement based upon an archaic offense not listed in section 17-25-45 to compare the elements with modern offenses). The 1982 restructuring of the arson statutes resulted in the repeal of the former burning statute, but the offense of burning was effectively revived as third-degree arson. Terrence M., 317 S.C. at 214 n.1, 452 S.E.2d at 627 n.1. However, by 2007, some of the elements of third-degree arson had been elevated to second-degree arson. Other elements remained in third-degree arson only. We find the State failed to prove Phillips was convicted of those elements belonging to second-degree arson. See Johnson, 350 S.C. at 547-48, 567 S.E.2d at 488 (placing on the State the burden of establishing convictions used for sentence enhancement purposes).

In 1979, Phillips was convicted of "burning," in which a person (1) willfully and maliciously (2) sets fire to (3) any building other than a dwelling, including schools and publicly owned buildings. See § 16-11-120. In 2007, all three degrees of arson included the first two elements of the offense, willful and malicious burning. S.C. Code Ann. § 16-11-110 (Supp. 2007). However, the third element, identifying the type of building burned,

had changed. The statute in effect in 1979 distinguished between dwellings and non-dwellings and established a lighter penalty for offenses against non-dwellings, including places of business. § 16-11-120. By 2007, schools, churches, businesses, and any other "structure designed for human occupancy" received the same protection as dwellings under the second-degree arson statute. § 16-11-110(B). Consequently, due to the broadened scope of the second-degree arson statute, a conviction for burning a building owned by the local school district could qualify as a serious offense analogous to second-degree arson, but only if the affected building were one designed for human occupancy.

The State contends the term "public or private school facility" contained in the 2007 version of section 16-11-110(B) is sufficiently broad to encompass any building owned by a school district. Although the applicable statutes do not define this term, we find the plain meaning instructive. Webster's dictionary defines a "facility" as "a building . . . that facilitates or makes possible some activity." Webster's New World College Dictionary 508 (4th ed. 2008). A "public or private school facility," then, is a building that makes possible public or private education. It does not necessarily include every structure a school district may own. At Phillips's sentencing, the State presented only the 1979 indictment in support of its request for an LWOP sentence. In doing so, it failed to present evidence that the building Phillips burned in 1979 was a school facility. See Johnson, 350 S.C. at 547-48, 567 S.E.2d at 488 (noting the State bears the burden of establishing convictions used for sentence enhancement purposes).

Having determined the State failed to prove Phillips burned a school facility, this court next addresses whether the State proved Phillips's 1979 conviction was for burning a "structure designed for human occupancy." The 1979 indictment states Phillips burned "a building, the property of Laurens County School District #56." In addition to schools and office buildings, school districts may own structures such as storage sheds, garages for school vehicles, and abandoned buildings located on district-owned property slated for future development. While schools and office buildings clearly are designed for human occupancy, the same cannot be said for sheds, garages,

and abandoned buildings. Again, the evidence in the record does not indicate which type of building Phillips burned to merit the 1979 conviction. Consequently, we must find the State did not bear its burden of proof, and the trial court erred in holding Phillips's 1979 conviction was for a serious offense.

CONCLUSION

We conclude the mobile home in which Phillips lived qualified as a dwelling under the applicable law. Consequently, we affirm the trial court's refusal to direct a verdict of acquittal as to second-degree arson.

Additionally, we find the State failed to establish Phillips's 1979 conviction was for a serious offense such as second-degree arson. Therefore, we reverse the trial court's imposition of a sentence of LWOP and remand for resentencing. Accordingly, the decision of the trial court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FEW, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Law
Enforcement Division, Appellant,

v.

1-Speedmaster S/N 00218, Respondent.

Appeal From Cherokee County
J. Derham Cole, Circuit Court Judge

Opinion No. 4834
Heard September 15, 2010 – Filed May 25, 2011

AFFIRMED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General T. Stephen Lynch, Assistant Attorney General Mary Francis Jowers, and Assistant Attorney General Geoffrey K. Chambers, all of Columbia, for Appellant.

Wade S. Weatherford, of Gaffney, for Respondent.

KONDUROS, J.: The South Carolina Law Enforcement Division (SLED) appeals the circuit court's affirmance of the magistrate's order finding a Speedmaster machine confiscated from a convenience store was not an illegal gaming device pursuant to section 12-21-2710 of the South Carolina Code (2000). We affirm.

FACTS

The Speedmaster machine that is the subject of this action was seized by SLED agents from the Cherokee Food Mart on February 13, 2007, for being an illegal gaming device. SLED took the Speedmaster to Cherokee County's chief magistrate, who issued an Order of Destruction/Notice of Post-Seizure Hearing. The magistrate conducted a post-seizure hearing and concluded the Speedmaster was not an illegal gaming device as contemplated by section 12-21-2710 of the South Carolina Code. He held SLED failed to produce evidence the Speedmaster was used in gambling endeavors or that the game constituted a game of skill as opposed to a game of chance. SLED filed a motion to alter or amend the judgment, which was denied. The circuit court affirmed the magistrate's order, determining the order was legally and factually correct. This appeal followed.

STANDARD OF REVIEW

"When there is any evidence, however slight, tending to prove the issues involved, [the appellate court] may not question a magistrate court's findings of fact that were approved by a circuit court on appeal." Allendale Cnty. Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 585, 606 S.E.2d 471, 473 (2004).

LAW/ANALYSIS

I. Free Play Feature

In its first issue on appeal, SLED urges us to adopt an interpretation of section 12-21-2710 of the South Carolina Code (2000) that would make any machine with a free play feature illegal. This issue is not preserved for our review. SLED raised this issue at the hearing before the magistrate, but the magistrate failed to address this argument in its final order. SLED raised the issue again in its motion to alter or amend the judgment, which was summarily denied. The filing of the motion to alter or amend with the magistrate preserved the issue for review by the circuit court. See Pye v. Estate of Fox, 369 S.C. 555, 565-66, 633 S.E.2d 505, 510-11 (2006) (holding an issue is preserved for appellate review, even if it is not ruled upon, provided it was raised at trial and raised to the court in a post-trial motion). However, the circuit court's order does not specifically address the free play feature argument. It confirms the magistrate's final order, finding the order was "legally and factually correct." However, as previously stated, the magistrate's order failed to address the free play feature argument. No motion to alter or amend the circuit court's order is contained in the record on appeal, and therefore we have no ruling from the circuit court as to this issue. Consequently, the issue is not properly preserved for our review. See Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 22 n.11, 698 S.E.2d 612, 623 n.11 (2010) ("[T]he circuit court has the authority to hear motions to alter or amend when it sits in an appellate capacity and such motions are required to preserve issues for appeal where the circuit court fails to rule on an issue."); see also City of Rock Hill v. Suchenski, 374 S.C. 12, 16, 646 S.E.2d 879, 880 (2007) (interpreting United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 107, 413 S.E.2d 866, 869 (Ct. App. 1992) (the "circuit court sitting on appeal did not address an issue and Wal-Mart made no motion pursuant to Rule 59(e), SCRCP[,] to have the court rule on the issue; thus, the allegation was not preserved for further review by the Court of Appeals.").

II. Game of Skill or Game of Chance

SLED also contends the magistrate erred in finding the game on the Speedmaster constituted a game of skill as opposed to a game of chance. We disagree.

SLED advocates adoption of the "dominant factor test," which is discussed at some length in Johnson v. Collins Entertainment Co., 333 S.C. 96, 508 S.E.2d 575 (1998). There, the court was asked to determine whether video poker machines, legal at the time, constituted lotteries as prohibited by the South Carolina Constitution. Id. at 98, 508 S.E.2d at 577. The dissent opined South Carolina should apply the dominant factor test in determining whether something was a lottery involving chance. Id. at 113, 508 S.E.2d at 584 (Burnett, J. dissenting). The dominant factor test provides when "the dominant factor in a participant's success or failure in a particular scheme is beyond his control, the scheme is a lottery, even though the participant exercises some degree of skill or judgment." Id. "If a participant's skill does not govern the result of the game, the scheme contains the requisite chance necessary to constitute a lottery." Id.

In contrast, under the "pure chance doctrine," founded in British law, "any skill, however minimal, is sufficient to remove a scheme from the definition of lottery." Id. Neither test has been judicially adopted in South Carolina.[1] However, based on our standard of review, we need not adopt a test. In this case, under either standard, at least slight evidence tended to prove the game at issue was one of skill. See Allendale Cnty. Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 585, 606 S.E.2d 471, 473 (2004) (holding this court will not disturb the magistrate's findings of fact affirmed by the circuit court if any evidence supports them).

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[1] We are aware of a case currently under consideration by the South Carolina Supreme Court, Town of Mt. Pleasant v. Chimento (heard October 19, 2010), which may address this issue.

Jay Blair was a technician who worked on the Speedmaster. According to the record, at the hearing before the magistrate, he played several games and won them all. Then, the magistrate requested he play more. Blair won fifteen out of sixteen games with the one loss being due to player error. Even a player adept at playing a game will not always win if an element of the game is beyond his or her control. Such is the case with card games in which a good player cannot win every hand simply because the cards they are given are determined by chance. Here, the evidence showed a good player could win every game. Therefore, based on our standard of review, we affirm the circuit court's affirmance of the magistrate's determination that the only game on the Speedmaster was a game of skill.

III. Used for Gambling/Evidence of Gambling

In its next argument, SLED maintains the magistrate erred in finding the statute contained a requirement that a machine must be used for gambling to be illegal. SLED further contends if the statute contained such a requirement, the magistrate erred in finding it presented no evidence of gambling. We disagree.

The question presented combines two standards of review. The interpretation of a statute is a question of law for the court and may be decided with no particular deference to the circuit court. Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Regarding questions of fact, as previously stated, if "there is any evidence, however slight, tending to prove the issues involved, [the appellate court] may not question a magistrate court's findings of fact that were approved by a circuit court on appeal." Two Chess Challenge II, 361 S.C. at 585, 606 S.E.2d at 473.

Section 12-21-2710 provides:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or

> operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different picture, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

(emphasis added).

SLED is correct that the statute contains no specific "used for gambling" requirement for machines hosting the specifically enumerated games (poker, blackjack, keno, lotto, bingo, or craps) or for punch boards, pull boards, and other games of chance.[2] However, machines licensed pursuant to section 12-21-1720 of the South Carolina Code (2000), if "used for gambling," constitute illegal gaming devices. The devices listed in section 12-21-2720(A) include:

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[2] Our determination of Issue II removes Speedmaster from the purview of "games of chance."

> (1) a machine for the playing of music or kiddy rides operated by a slot or mechanical amusement devices and juke boxes in which is deposited a coin or thing of value. . . .
>
> (2) a machine for the playing of amusements or video games, without free play feature, or machines of the crane type operated by a slot in which is deposited a coin or thing of value and a machine for the playing of games or amusements, which has a free play feature, operated by a slot in which is deposited a coin or thing of value, and the machine is of the nonpayout pin table type with levers or "flippers" operated by the player by which the course of the balls may be altered or changed. . . .
>
> (3) a machine of the nonpayout type, or in-line pin game, operated by a slot in which is deposited a coin or thing of value except machines of the nonpayout pin table type with levers or "flippers" operated by the player by which the course of the balls may be altered or changed.

The Speedmaster, according to the plain language of the statute, does not fall within categories one or two. However, it does appear to fall within the third category as a "machine of the nonpayout type . . . operated by a slot in which is deposited a coin of thing of value." If so, the Speedmaster is prohibited by section 12-21-2710 if it is "used for gambling."

The phrase "used for gambling" is not defined in the statute. However, in the recent case of <u>Ward v. West Oil Co.</u>, this court cited with approval the following definition: "[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of <u>chance</u>, no matter how small the intrinsic value." 387 S.C. 268, 278, 692 S.E.2d 516, 522 (2010) (quoting C.J.S. <u>Gaming</u> § 10 (Supp. 2010)) (emphasis added). The <u>Ward</u>

opinion also provided: "The three elements of gambling – consideration, chance and reward – are thus clearly present in a device which, for a price, and based upon chance, offers a monetary or merchandise reward to the successful player." Id. (quoting State v. 158 Gaming Devices, 499 A.2d 940, 951 (Md. 1985)) (emphasis added).

Additionally, gambling and gaming are defined in the treatise South Carolina Jurisprudence. "As legal terms, 'gaming' and 'gambling' are the same and involve either fraud, or cheating or chance applied in a situation of agreement between two or more persons in which, in accordance with certain rules, the parties play a game or contest, or await the outcome of some event that will determine one or more winners or losers." 7 S.C. Jur. Gaming § 3 (1991) (citing Am. Jur. 2d Gaming § 10 (1967)) (emphasis added). Gambling is also defined in section 3-11-100(2) of the South Carolina Code (Supp. 2010) governing gambling cruises. "'Gambling' or gambling device' means any game of chance and includes, but is not limited to, slot machines, punchboards, video poker or blackjack machines, ke[]no, roulette, craps, or any other gaming table type gambling or poker, blackjack, or any other card gambling game." Id. (emphasis added).

The common thread in all these definitions is the element of chance. As previously discussed, we affirm the magistrate's ruling that the Speedmaster was not a game of chance. However, consideration of this issue reveals an apparent contradiction in the statute. Devices licensed pursuant to section 12-21-2720 are largely what would be considered games of skill, not chance; for example, a traditional pinball machine game or arcade game. If so, under the aforementioned definitions of gambling, such a device could never be "used for gambling," although section 12-21-2710 obviously contemplates that it could. The seeming contradiction can be reconciled, however, if we apply the definition of gambling previously cited from South Carolina Jurisprudence. That definition contemplates two parties betting or wagering on a game.[3] The record reveals no evidence of parties wagering on

[3] When parties wager on a game of skill, the element of chance is injected back into the game. For example, if Player A bets Player B $10 he can get a higher score in pinball, Player A has left to chance how Player B will

the Speedmaster game. Therefore, we conclude the circuit court properly affirmed the magistrate's ruling the Speedmaster was not "used for gambling" under the statute.

IV. Lost Post-Seizure Hearing Tapes

Finally, SLED contends if the arguments set forth above are not persuasive, it is entitled to a new post-seizure hearing because the tapes of the original proceeding were lost. We disagree.

SLED's argument on this point is not preserved for our review. SLED began its argument before the circuit court by seeking a new trial based on the lost tapes. The circuit court then inquired of SLED if the record of the post-seizure hearing might be reconstructed. SLED did show some apprehension at this point, but moved forward by going through a list of evidentiary items it considered important that were not reflected in the magistrate's order or return. Speedmaster and SLED were in agreement with respect to most items with the exception of what denominations of currency the machine would accept. SLED stated, "I mean, in terms of the currency, we think that - I mean, I don't want to stop the whole thing just for that. So I can go - I'll be glad to go forward on the merits." Because SLED proceeded with its case and did not reserve any objection regarding which currency the Speedmaster would accept, the issue of lost post-seizure hearings should not be considered by this court. See In re Estate of Boynton, 355 S.C. 299, 305, 584 S.E.2d 154, 157 (Ct. App. 2003) (citing 4 C.J.S. Appeal & Error § 185 (1993)) ("A party who voluntarily acquiesces in or takes a position inconsistent with the right to appeal impliedly waives or is estopped to assert his right to appellate review.").

Based on all of the foregoing, the circuit court's affirmance of the magistrate's ruling is

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perform. Even though Player A controls his own score, he does not control Player B's performance, and therefore, Player A does not control the outcome of the wager.

AFFIRMED.

WILLIAMS and PIEPER, JJ., concur.