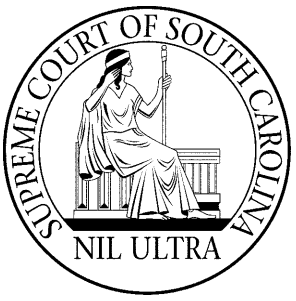

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34
October 3, 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.

William O. Dickerson, Appellant.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 27048
Heard May 24, 2011 – Filed October 3, 2011

AFFIRMED

Chief Appellate Defender Robert M. Dudek, and Appellate Defender Kathrine H. Hudgins, South Carolina Commission on Indigent Defense, of Columbia, and Jeffrey P. Bloom, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant

Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General Melody J. Brown, Office of the Attorney General, of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

JUSTICE HEARN: A jury convicted William Dickerson of first degree murder, kidnapping, and criminal sexual conduct, and he was sentenced to death. Dickerson now appeals his sentence pursuant to Section 16-3-25(A) of the South Carolina Code (2003). He argues the circuit court erred: (1) in not excusing a juror for cause; (2) in limiting the cross-examination of the pathologist called by the State; (3) in not charging the jury on the law of accessory after the fact; and (4) in limiting the testimony of Dickerson's cousin during the penalty phase of his trial. We affirm and further find that Dickerson's sentence is proportional, supported by the evidence, and not the result of passion, prejudice, or any other arbitrary factor.

FACTUAL/PROCEDURAL BACKGROUND

Dickerson and Gerard Roper had been friends, even best friends, since childhood. On the morning of March 6, 2006, Roper went to his friend, Ben Drayton's, house to play video games. Around the same time, Dickerson went to his friend, Antonio Nelson's, house asking for a ride to his brother, Armon Dickerson's, house. Nelson was unable to give Dickerson a ride at that time and told him to come back later. When Dickerson returned later that afternoon, he was carrying a gun.

En route to Armon's house, however, Dickerson began calling Roper from his cell phone. After receiving no answer, Dickerson asked if they could make a stop at Drayton's house so he could "get some money." When they arrived at Drayton's home, Dickerson entered brandishing his weapon and asking for money. Roper told Dickerson "I got your money," begging "don't shoot me" and "please don't kill me." Dickerson nevertheless fired a

shot at Roper but missed. He then struck Roper in the head with the gun, dragged him out of the house, and forced him into Nelson's car. Dickerson then took Roper to Armon's house.[1]

Armon and Dickerson brought Roper inside and systematically tortured him over approximately thirty-six hours. It started with Dickerson continuing to hit Roper with the gun, knocking out some of his teeth. Armon then left to retrieve Dickerson's car and some drugs, and blood covered the inside of the house when he returned. Dickerson then called another friend of his, Rashid Malik, and threatened him with death if he did not come to Armon's house.[2] When Malik arrived, Roper was still conscious but clothed only in his T-shirt, and Armon was attempting to clean up the blood covering the house. Malik then joined Armon and Dickerson.

Although Dickerson, Armon, and Malik all tortured Roper to varying degrees, Dickerson appeared to be the primary actor.[3] Through this entire ordeal, Roper suffered the following at the hands of Dickerson alone: choking, being tied up and placed in a closet, being sodomized with a gun and a broomstick, having his scrotum burned, being hit with a heavy vase and a mirror, and generalized beating and cutting. At one point, Roper began asking that they just let him die.

All told, Roper received over 200 individual wounds to the outside of his body, including lacerations to his anus. He also received several internal injuries, including various broken bones in his face that caused it to appear

---

[1] After dropping Dickerson and Roper off, Nelson left and did not return. There is no suggestion he knew of Dickerson's plans beforehand or had any involvement in the subsequent events.

[2] Malik attempted to bring Dickerson's mother to Armon's house to calm Dickerson down. When Dickerson learned of this, he threatened to kill Malik's mother and cut the baby out of Malik's pregnant girlfriend.

[3] Armon's girlfriend, Selena Rouse, was in and out of the house during that evening, along with her young son. At some point, Dickerson asked her whether he should let Roper live or die. However, there is no evidence that she actually participated in the torture.

misshapen, blunt force trauma to his neck resulting in the breaking of various structures, a broken tibia, broken fingers and wrist, brain swelling, and bleeding into the internal structures around his rectum as the result of objects being inserted into it. Although there is no definite timeline of events, Roper survived for eighteen to twenty-four hours after the sodomy occurred, and none of these wounds were inflicted post-mortem. No single wound was fatal. Instead, Roper died from the sum total of his injuries, apparently shortly after he was struck with the mirror and the vase on the morning of March 8.

As these events transpired, Dickerson made several phone calls to various people during which he discussed what he was doing to Roper. Many of them were to Dickerson's girlfriend, and she managed to record one of them containing his description of the sodomy and even Roper's own confirmation of what was happening. Dickerson also confirmed the sodomy, as well as the burning of Roper's scrotum, over the phone to another friend. In a later call to that same friend, he said that Roper was "gone." However, he told a different friend that Roper was all right but that Dickerson needed to run.

Dickerson and Armon wrapped Roper's semi-clothed body in a blanket and dumped it in the vacant townhouse next to Armon's. Dickerson then changed clothes and fled. Armon and Rouse attempted to clean Armon's house, but they abandoned it upon realizing their efforts would be futile. That same day, a woman who was planning to rent the vacant townhouse entered and discovered Roper's bloodied and mutilated body.

Dickerson was arrested on March 11, 2006, and indicted for murder, kidnapping, and criminal sexual conduct. During voir dire, Juror 370 was the second venireman to be called. He initially identified himself as the type of juror who was able to recommend a sentence of death or life without parole in the appropriate circumstances. The following exchanges then occurred between Juror 370 and the circuit judge:

Q. I would also instruct you that the only party which has any burden of proof in this proceeding is the State. Mr. Dickerson doesn't have to prove anything, he doesn't have to -- he doesn't have to present any evidence, he has no obligation whatsoever. Would you have any problem following that presumption?

A. No sir.

. . . .

Q. . . . I would tell you that if the jury were to conclude beyond a reasonable doubt that there were aggravating circumstances, that does not mean that that jury has to return a death sentence, only that it is a potential sentence; do you understand that?

A. Yes, sir.

Q. Because the jury would have the right, notwithstanding the conclusion of aggravating circumstances to find that the appropriate sentence would be life imprisonment without the possibility of parole. I would give you an instruction as to that. You could make that consideration, as well; is that correct?

A. Yes, sir.

When questioned by Dickerson, Juror 370 made the following statements:

Q. Let me just kind of start off with, what is your opinion of the death penalty?

A. I am -- I think it needs to be there but there are certain situations that -- I mean, I am not too up-to-date on this whole system but I feel like a lot of people get the death penalty when it is not deserved. People die all the time, I mean get put to death, when they're innocent. So -- I don't know. It's a big thing.

. . . .

Q. In those types of situations, now that you know what the term "murder" is, not accident, self-defense, manslaughter or insanity, would you always automatically vote for [the death penalty] if the person who did it meant to do it and they had the right person?

. . . .

A. I would still have to hear all of the evidence, everything behind it.

Q. Okay.

A. When, how, where, all that stuff.

Q. Okay. So even if there is no accident, self-defense, manslaughter, insanity, the State has proved it beyond a reasonable doubt, did it, meant to do it and they had the right person; in those cases you're not going to automatically vote for the death penalty?

A. I guess -- I guess I would. If it was absolute, then definitely.

Q. When you say "absolutely", you mean ---

A. Exactly what you just said, all those.

However, in response to further questioning by Dickerson, Juror 370 stated, "That's why -- all those situations, like who he is, like -- that kinds of stuff is what I'd want to hear before I just say 'give them the death penalty.'" He then said he would "certainly" listen to mitigating evidence presented by the defense.

Before turning Juror 370 over to the State, Dickerson pressed the juror on his belief regarding the defendant's burden of proof during the sentencing phase of a capital trial:

> Q. . . . [W]ould you expect the defendant or his attorney to present something to you to give you a reason not to vote for death? To kind of convince you, 'Okay, I found him guilty of murder, I've heard all this other stuff but I[']m for death.' Would you expect the defense to show, 'you need to show me stuff that would convince me otherwise, to vote for life'?
>
> A. (No verbal response).
>
> Q. Is that what you're telling me?
>
> A. I -- yeah, isn't that what you've got to do?
>
> . . . .
>
> Q. And all that bad stuff in there and they just argue for mercy, that is not something that is going to persuade you?
>
> A. No.
>
> Q. So you would be looking at the defense to kind of convince you that a death penalty wasn't the right sentence?

A. Yeah. Just to represent him, show something -- I mean, something had to happen.

During rehabilitation, the State informed Juror 370 that the judge would in fact instruct him that it was improper to hold a defendant's decision to not present any evidence against him. The following exchange then occurred:

Q. Because just a minute ago you were saying that you would expect the defendant to put something up.

A. Well, I mean -- I thought that was kind of how it worked. But if -- (pause).

Q. Well, the Judge would tell you that it works differently and ---

A. If he told me that, yeah, then I wouldn't expect it.

Q. You wouldn't consider that, the fact that he didn't put anything up -- any evidence?

A. Yeah.

Q. So you could follow the Judge's instructions?

A. Yes, ma'am.

The State then confirmed that Juror 370 would in fact be able to consider a sentence of life without parole even if the State proved aggravating circumstances.

During follow-up questioning by the court, the circuit judge repeated the State's question of whether Juror 370 would have any trouble abiding by the court's instruction that Dickerson would have nothing to prove, to which

Juror 370 reiterated that he would not. However, Dickerson again asked whether Juror 370 would look to Dickerson to prove why the death penalty was not appropriate, to which Juror 370 said "yes," but Juror 370 then told the State once again that he would follow whatever the judge instructed him. Dickerson then moved to have Juror 370 disqualified because he was a "burden shifter" who would require the defense to prove that death should not be imposed. The court disagreed, finding Juror 370's statements that he would follow the law as instructed and he would want to hear all of the circumstances demonstrated he was not a burden shifter.

During the guilt phase, one of the many witnesses called by the State was Dr. Cynthia Schandl, the pathologist who performed Roper's autopsy. On direct examination, she testified that the blood toxicology report on Roper was negative, which demonstrated he did not have any drugs in his system when he died. On cross examination, Dickerson attempted to inquire about an initial urine screen test performed by Dr. Shandl that would show whether there were drugs present in Roper's system up to two days prior to his death. The State objected under Rule 403, SCRE. In her proffer, Dr. Shandl testified that this test was "presumptively positive" for cocaine metabolites, but Dr. Schandl never ordered confirmatory testing. According to her, these initial screening tests produce a large number of false positives and are very unreliable absent any sort of confirmation. Dickerson, however, argued the State's question about the blood toxicology results opened the door for this line of questioning as it left the jury with the misleading impression that Roper had not used cocaine. Finding the proffered testimony itself was actually misleading, the possibility of prejudice from excluding it was remote, it did not challenge any of Dr. Schandl's findings, and it would only serve to confuse the jury, the court refused to permit this line of questioning.

At the close of evidence, Dickerson requested the jury be charged on the law of accessory after the fact. The court, however, denied this request because accessory after the fact is not a lesser-included offense of murder. The jury subsequently convicted Dickerson on all charges. In the sentencing phase, the State proceeded under three aggravating factors: criminal sexual conduct, kidnapping, and torture, also highlighting Dickerson's prior criminal

history and adaptability to prison life. Dr. Shandl testified again during the sentencing phase, repeating much of her testimony from the guilt phase. In particular, she emphasized that none of Roper's wounds were inflicted post-mortem, and he died from the totality of his injuries rather than from any single blow.

In mitigation, Dickerson called several witnesses from the Charleston County Detention Center, where he was being held pending trial, who testified he was a model prisoner. He also called several witnesses who testified extensively regarding his drug use, childhood trauma, and mental problems. These witnesses further opined that he suffered from cocaine psychosis and attendant paranoia. Additionally, Dickerson's cousin, Johnette Watson, testified on his behalf. She stated he had always been like a brother to her, a good person who just got mixed up in the wrong things and with the wrong people. However, the court did not permit her to testify as to what impact his execution would have on her family, chiefly that her family would be devastated as it had already lost two close members to homicide.

Ultimately, the jury recommended the court impose a sentence of death, finding the State proved all three aggravating circumstances beyond a reasonable doubt. The court followed the jury's recommendation. This appeal followed pursuant to section 16-3-25.

ISSUES PRESENTED

Dickerson raises four issues on appeal:

I. Did the circuit court err in qualifying Juror 370?

II. Did the circuit court err in not permitting Dickerson to cross examine Dr. Schandl regarding the urinalysis screen results?

III. Did the circuit court err in not charging the jury on the law of accessory after the fact?

IV. Did the circuit court err in not permitting Watson to testify regarding the impact Dickerson's potential execution would have on her family?

LAW/ANALYSIS

I. JUROR QUALIFICATION

Dickerson first argues the court erred when it found Juror 370 qualified to serve on the panel because he was a burden shifter, meaning he improperly placed the burden on the defense to show why death would not be an appropriate punishment. We disagree.

A juror must be excused from service if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)); *see also State v. Green*, 301 S.C. 347, 354, 392 S.E.2d 157, 160 (1990).

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. . . . If even one such juror is empaneled and the death sentence is imposed, the state is disentitled to execute the sentence.

Morgan v. Illinois, 504 U.S. 719, 729 (1992). General protestations that the juror will follow the law, without the opportunity for further inquiry by the defendant, are not sufficient for "[i]t may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so." *Id.* at 734-36; *see also State v. Bennett*, 328 S.C. 251, 257-58, 493 S.E.2d 845, 848 (1997) (holding that a juror's general statements he could be fair and impartial and follow the law were not sufficient in light of his later, unequivocal statement that he would just "go with the majority").

This inquiry, however, "cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Wainwright*, 469 U.S. at 424. Thus, the record may not be entirely clear to the point of "unmistakable clarity" as to the juror's views, and situations will arise where a circuit court simply is left with a "definite impression" of a juror's qualifications following voir dire. *Id.* at 425-26. "[T]his is why deference must be paid to the trial judge who sees and hears the juror." *Id.* at 426. Therefore, determinations of whether a juror is qualified to serve on a panel are left to the sole discretion of the circuit court. *Green*, 301 S.C. at 354, 392 S.E.2d at 160. In reviewing the circuit court's decision, we must examine the juror's responses in light of the entire voir dire and will not reverse the court's decision unless it is wholly unsupported by the evidence. *Id*. at 354, 392 S.E.2d at 160-61.

Although Juror 370 unquestionably displayed some equivocation on how he might vote should the State prove an aggravating circumstance, the State's rehabilitation revealed this was more the result of a misunderstanding of the trial process than any firmly held belief that he would automatically vote for the death penalty. For example, after stating that he would expect the defense to put forth evidence in mitigation, Juror 370 stated, "isn't that what you've got to do" and "I thought that was kind of how it worked." He went on to state, however, if the court instructed him that the defense bore no burden, he "wouldn't expect it." He also stated he "would have to hear all of the evidence" before he would say "give them the death penalty." Although similar exchanges occurred throughout the voir dire, the one thing he was unequivocal about was that he would follow the law as it was instructed to him by the court. Consistent with *Morgan*, Dickerson was allowed to probe the true nature of Juror 370's beliefs, and that examination produced nothing resembling either a deep-seeded preference for the death penalty or a true belief Dickerson must prove that death is not appropriate.

After a review of the entire voir dire, the salient portions of which are reproduced above, this in-depth examination produced evidence to support the court's ruling that Juror 370 could be a fair and impartial juror, acting in

accordance with the court's instructions and not merely blindly professing that he would do so. The circuit judge was more persuaded by the juror's consistent affirmation he would follow the law and wait to hear all of the evidence than by his apparent confusion over the State's burden, and we believe his ultimate determination of Juror 370's qualification to serve is supported by the record.

II. CROSS EXAMINATION OF DR. SCHANDL

Next, Dickerson argues the circuit court erred in preventing him from asking Dr. Schandl about the urine screen test she performed on Roper in conjunction with the autopsy. We disagree.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

On direct examination, Dr. Schandl testified that Roper's blood toxicology report was negative, meaning there were no drugs in his system when he died. On cross examination, Dickerson attempted to elicit the results of a preliminary urinalysis test that would show whether Roper used cocaine within two days prior to his death. In her proffer in response to the State's objection under Rule 403, SCRE, Dr. Schandl stated that while the urine screen test performed was "presumptively positive," that test alone is unreliable and no confirmatory testing was done. The circuit court refused to admit this evidence, agreeing this form of testing was inherently unreliable and therefore would be misleading, would confuse the jury, and actually did not challenge any of Dr. Schandl's conclusions. We agree.

The relevance of whether the *victim* had used cocaine within the two days prior to his death is dubious, at best, under the facts of this case.

Dickerson calls this presumptive test "an inconvenient truth for the [S]tate," but we fail to see in what way it is inconvenient; it does not challenge any of Dr. Schandl's findings regarding Roper's cause of death and would only have injected irrelevant considerations into the trial. Therefore, there is little, if any, probative value to this evidence, and it would only serve to confuse the jury and distract it from the case at hand.

Dickerson turns to Rule 608(c), SCRE, to supply the requisite relevance and probative value, arguing this testimony demonstrates Dr. Schandl's bias, prejudice, or motive to lie. "[A]nything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony. On cross-examination, any *fact* may be elicited which tends to show interest, bias, or partiality of the witness." *State v. Saltz*, 346 S.C. 114, 131-32, 551 S.E.2d 240, 250 (2001) (quotations omitted). However, the proffered cross examination did not elicit a single fact that might shed any light on a potential motive or bias for Dr. Schandl to misrepresent. Although Dickerson is correct that Dr. Schandl was the key witness for the State regarding cause of death and torture, that fact alone certainly does not establish a reason for her to lie, and the proffered testimony does not complete the circle.

Similarly, we reject Dickerson's argument that the evidence must be available to rebut the "false impression" created by the State when Dr. Schandl testified that Roper's blood toxicology report was negative. A defendant generally is entitled to rebut false impressions created by the State's evidence. *See State v. Northcutt*, 372 S.C. 207, 221, 641 S.E.2d 873, 880 (2007). Dickerson argues the false impression he is entitled to rebut is that Roper did not use cocaine. Even assuming Dr. Schandl's testimony did create this impression, Roper's drug use is irrelevant in this case. Therefore, this plainly is not a situation where the false impression created is at all prejudicial to the defendant. Permitting Dickerson to respond would only take her testimony further down that rabbit hole.

Accordingly, we hold the circuit court did not abuse its discretion in excluding this evidence.[4]

III. ACCESSORY AFTER THE FACT

Dickerson next argues the circuit court erred in failing to charge the jury on the law of accessory after the fact. We disagree.

In a capital case, a defendant is entitled to a charge on any lesser-included offenses of murder when supported by the evidence. *See Beck v. Alabama*, 447 U.S. 625, 635-38 (1980). A lesser-included offense is one whose elements are wholly contained within the crime charged. *Northcutt*, 372 S.C. at 215, 641 S.E.2d at 877. Stated differently, if the offense contains any elements that are not part of the crime charged, then it is not a lesser-included offense. *Id.* However, even if an offense does not meet the elements test, it will be considered a lesser-included offense if it "has traditionally been considered a lesser included offense of the greater offense charged." *Id.* at 216, 641 S.E.2d at 877-78. The Supreme Court of the United States stated the rationale for requiring charges on lesser-included offenses as follows:

> For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Beck, 447 U.S. at 637. A court must therefore charge on lesser-included offenses that are supported by the evidence in order to enhance the reliability of guilt determinations. *Id.* at 638.

[4] We emphasize that there is absolutely no suggestion, let alone evidence, that Dr. Schandl or the State purposefully failed to run confirmatory tests in order to exclude the evidence Dickerson sought to introduce.

It is well-settled that accessory after the fact is not a lesser-included offense of murder in this State.[5] *State v. Fuller*, 346 S.C. 477, 481, 552 S.E.2d 282, 284 (2001). Therefore, *Beck* standing alone does not require a court to charge the jury on accessory after the fact. Dickerson, however, argues that accessory after the fact is a "lesser-related offense" of murder and *Beck*, when combined with our decision in *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005), mandates a charge on it when requested.

In *Gentry*, we held that the concepts of subject matter jurisdiction and sufficiency of an indictment are distinct. 363 S.C. at 101, 610 S.E.2d at 499. A court therefore has subject matter jurisdiction to hear cases even if the indictment fails to allege all the elements of the offense. *See id.* Accordingly, if the defendant fails to challenge the sufficiency of the indictment prior to the jury being sworn, he waives that challenge. *Id.* at 102, 610 S.E.2d at 500.

Dickerson extrapolates from this the ability to charge a lesser-related offense because the court would still have subject matter jurisdiction over the claim, and it is therefore inconsequential that he was not indicted as an accessory. Thus, a defendant should be able to request a charge on any related offense supported by the evidence, regardless of whether it is included within the ones for which he was indicted.[6] We do not read *Gentry* so

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[5] The elements of accessory after the fact are that the felony has been completed, the accused had knowledge that the principal felon committed the felony, and the accused harbored or assisted the principal. *Fuller*, 346 S.C. at 480, 552 S.E.2d at 283. Murder is simply defined as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003).

[6] Under Dickerson's view, only the defendant would have the option of requesting this additional charge. The Supreme Court of California resoundingly rejected this very point. *Birks*, 960 P.2d at 1084-86. Following *Hopkins*, questions concerning the right to a charge on a lesser-related offense are of course questions of state law. However, we find the California court's reasoning on this point persuasive. *Birks* was re-examining the court's prior decision in *People v. Geiger*, 674 P.2d 1303 (1984), which held in part that only the defendant could request a charge on a lesser-related offense. *See*

Birks, 960 P.2d at 1083. In reversing this portion of *Geiger*, the *Birks* court found that such a rule created

> an unfair one-way street where lesser related offenses are at issue. On the one hand, the defendant's right to notice of the charges limits the circumstances in which a jury, over the *defendant's* objection, may receive instructions on lesser offenses which are not necessarily included in those to which a plea was entered. On the other hand, if a lesser offense is related to the charge, as *Geiger* defines that term, *Geiger* gives the *defendant an absolute entitlement* to such instructions on request, regardless of notice or prejudice to the People, and even over their objection.
>
> . . . .
>
> Where lesser related offenses are concerned, the *Geiger* rule therefore may actually permit and encourage a one-sided use of the "gambling hall" strategies we have consistently denounced. If the evidence suggests the possibility of a related lesser offense neither charged nor tried by the prosecution, the defendant either may demand that instructions on that offense be given, or may raise notice objections which, if successful, will prevent such instructions from being given at the prosecution's behest. *Geiger* thus affords the defense a superior right at trial to determine whether the jury will consider a lesser offense alternative, or instead will face an all-or-nothing choice between conviction of the stated charge and complete acquittal. Such a rule is neither just nor rational.

Id. at 1085. Contrary to the concurrence's view, *Gentry*'s holding—that an indictment is a notice document that must be challenged prior to the swearing of the jury—is unaffected by our decision today. *See* 363 S.C. at 102, 610 S.E.2d at 500. Here, we merely find that a defendant's ability to waive notice of a particular charge does not also grant him an unqualified, non-reciprocal

broadly. While the circuit court may have had subject matter jurisdiction to try Dickerson as an accessory after the fact, *Gentry* merely held that a defendant must challenge an indictment prior to the swearing of the jury. Because the sufficiency of the indictment is not at issue here, *Gentry* is inapposite.

The Supreme Court of the United States has held that, unlike lesser-included offenses under *Beck*, there is no constitutional requirement to charge a jury on lesser-related offenses. *Hopkins v. Reeves*, 524 U.S. 88, 90-91 (1998); *see also People v. Birks*, 960 P.2d 1073, 1087-88 (Cal. 1998) (finding the analysis in *Reeves* "utterly convincing" and rejecting a charge on lesser-related offenses). Such a requirement would be "unprecedented" and "unworkable" because there would be no real basis for determining when such charges would be warranted. *Hopkins*, 524 U.S. at 97. Furthermore, charging on lesser-related offenses, which by their nature generally contain elements that are not included within the crimes for which the defendant was charged and tried, would permit the jury "to find beyond a reasonable doubt elements that the State had not attempted to prove, and indeed that it had ignored during the course of the trial. This can hardly be said to be a reliable result." *Id.* at 99.

We agree with the Supreme Court's reasoning in *Hopkins* that permitting such a charge does not further the policy behind charging lesser-included offenses. The core of *Beck*'s requirement was to ensure reliability in the proceedings by giving the jury a third option beyond acquittal or conviction so that its verdict will better conform to the evidence presented. The *Hopkins* Court, on the other hand, believed that charging on lesser-related offenses would diminish the proceeding's reliability by permitting the

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right to request any charge supported by the evidence, for to do so would grant him an unfair tactical advantage that interferes with the State's prerogative of deciding on which charges to try a defendant. *See State v. Thrift*, 312 S.C. 282, 291-92, 440 S.E.2d 341, 346 (1994) ("Both the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands.").

jury to convict the defendant of a crime the State never even sought to prove at trial.

Therefore, we adopt the Supreme Court's holding in *Hopkins* and hold that a defendant is not entitled to a charge on lesser-related offenses. Here, permitting the jury to convict Dickerson as an accessory after the fact would permit the jury to find beyond a reasonable doubt elements of a crime the State never sought to prove and Dickerson was not on notice he had to defend against. Accordingly, we affirm the circuit court's denial of Dickerson's request to charge.

IV. EXECUTION IMPACT EVIDENCE

Finally, Dickerson argues the circuit court erred in preventing his cousin, Johnette Watson, from testifying as to what effects Dickerson's execution would have on her family. We disagree.

During the sentencing phase of a capital trial, the defense must be able to present mitigating evidence on "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality)); *Northcutt*, 372 S.C. at 221, 641 S.E.2d at 880. The jury is entitled to hear this evidence so that it may "give a 'reasoned *moral* response to the defendant's background, character, and crime'" and prevent it from reacting out of an "unguided emotional response." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (O'Connor, J., concurring)), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (1989). However, *Eddings* does not limit a court's ability to exclude evidence not bearing on the defendant's character, his prior record, or the circumstances of the crime as being irrelevant. 438 U.S. at 604 n.12.

For example, "[a] capital defendant is prohibited from directly eliciting the opinion of family members or other penalty-phase witnesses about the

appropriate penalty. Such questions go to the ultimate issue to be decided by the jury—life in prison versus the death penalty—and are properly reserved for determination by the jury." *State v. Wise*, 359 S.C. 14, 27, 596 S.E.2d 475, 481 (2004). A capital defendant also cannot present witnesses who will testify as to what punishment the jury "ought" to recommend. *Id.* However, defense witnesses who know the defendant well can beg for mercy on his behalf. *Id.* Whether certain evidence is a plea for mercy versus an opinion of what is the appropriate penalty can be a close call and thus is left to the discretion of the trial judge; that decision will not be disturbed absent an abuse of discretion. *Id.* at 21, 596 S.E.2d at 478.

The thrust of Dickerson's argument is that the emotional impact an execution would have on his family members demonstrates that he has the ability to form cohesive, lasting relationships with others, a trait that reflects positively on his character. We agree that evidence of a defendant's ability to form positive relationships with others is evidence that *Eddings* renders admissible. And here, Watson testified without objection to the close bond she shared with Dickerson and how he was like a brother to her. However, execution impact evidence can easily cross the line from illuminating a defendant's character or a plea for mercy to an opinion of what is the proper punishment.

Had the court permitted Watson to testify as planned, she would have testified her family lost two members to homicide: her brother as well as another cousin of Dickerson's. Dickerson's execution would therefore exacerbate the suffering her family has already endured. This evidence no longer concerns Dickerson's character but rather borders on an opinion that Dickerson should not be executed in order to spare her family the suffering. Watson's proferred testimony thus strayed from relevant considerations into the realm of an opinion regarding which punishment the jury ought to recommend. Under our standard of review, we find the circuit court did not abuse its discretion in sustaining the State's objection in this case.[7]

[7] We recognize that the vast majority of jurisdictions to address this issue have found execution impact evidence to be inadmissible. *See Woods v. State*, 13 So. 3d 1, 33 (Ala. Crim. App. 2007); *State v. Chappell*, 236 P.3d

V. PROPORTIONALITY REVIEW

Pursuant to section 16-3-25(C), we must conduct a review of Dickerson's sentence. In doing so, we must determine whether the sentence was the result of passion, prejudice, or any other arbitrary factor; whether there is evidence to support the jury's findings; and whether the sentence is excessive or disproportionate to the sentences imposed in similar cases. *See id.*

First, we cannot find anything demonstrating that the sentence was the result of passion, prejudice, or any other arbitrary factor. Although Dickerson's attorneys did a commendable job representing him during both phases of trial, the gruesome nature of Dickerson's acts fits squarely within the aggravating circumstances for which the jury recommended the death penalty. Furthermore, there is no indication that the proceedings were tainted in any way or that the sentence was anything other than a rational response to the evidence presented.

Second, and similarly, we hold evidence exists to support the jury's finding that the State met its burden with respect to all three aggravating circumstances. The record readily demonstrates Dickerson kidnapped Roper,

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1176, 1185 (Ariz. 2010); *People v. Vieira*, 106 P.3d 990, 1009 (Cal. 2005); *Bruns v. State*, 699 So. 2d 646, 654 (Fla. 1997); *People v. Armstrong*, 700 N.E.2d 960, 971 (Ill. 1998); *Ross v. State*, 954 So. 2d 968, 1013 (Miss. 2007); *Williams v. State*, 168 S.W.3d 433, 445 (Mo. 2005); *State v. Loftin*, 680 A.2d 677, 713 (N.J. 1996); *State v. Hale*, 892 N.E.2d 864, 893 (Ohio 2008); *Commonwealth v. Harris*, 817 A.2d 1033, 1054 (Pa. 2002); *Roberts v. State*, 220 S.W.3d 521, 532 (Tex. Crim. App. 2007); *State v. Stenson*, 940 P.2d 1239, 1282 (Wash. 1997). *But see State v. Stevens*, 879 P.2d 162, 168 (Or. 1994). However, we decline to adopt a categorical rule. If the proffered evidence fits within the boundaries discussed in *Wise* and goes to the defendant's character, it is admissible. While we are cognizant of the reasons why these courts declined to permit this evidence, we are confident that our existing framework is sufficient to ferret out problematic testimony.

committed criminal sexual conduct on him, and tortured him. Indeed, the jury separately convicted Dickerson of kidnapping and criminal sexual conduct during the guilt phase of the trial. We can find nothing reflecting an absence of proof as to any of these aggravating factors.

Finally, we believe Dickerson's sentence is neither excessive nor disproportionate in light of the results in similar cases. In capital cases where the State proceeded on the aggravating circumstances of kidnapping, criminal sexual conduct, torture, or any combination thereof, this Court has routinely affirmed the sentence of death. *See State v. Stanko*, 376 S.C. 571, 573, 579, 658 S.E.2d 94, 95, 98 (2008) (affirming death penalty where defendant strangled girlfriend and attempted to murder her daughter during the course of a robbery and sexual assault); *State v. Evins*, 373 S.C. 404, 410-11, 422, 645 S.E.2d 904, 907, 913 (2007) (affirming death sentence where defendant kidnapped victim, sexually assaulted her, and stabbed her twelve times); *State v. Simmons*, 360 S.C. 33, 37, 46, 599 S.E.2d 448, 449-50, 454 (2004) (affirming death sentence where defendant robbed the victim, beat her with a stick, strangled her, and sexually assaulted her while she was "half and half" alive); *State v. Stokes*, 345 S.C. 368, 371, 377, 548 S.E.2d 202, 203, 206-07 (2001) (affirming death sentence where the defendant had sex with the victim, stabbed her, continued to have sex with her, shot her in the head, and then mutilated her body); *State v. Johnson*, 338 S.C. 114, 120-21, 130, 525 S.E.2d 519, 521-22, 527 (2000) (affirming death sentence where the defendant robbed the victim at knifepoint, kidnapped her, tied the victim up, and sliced her multiple times with a machete); *State v. Whipple*, 324 S.C. 43, 46, 54, 476 S.E.2d 683, 685, 689 (1996) (affirming death sentence where defendant stabbed victim multiple times, beat her with a lamp and an iron, strangled her with a lamp cord, stuck a dish towel in her mouth, and sexually assaulted her).[8]

[8] Before the circuit court, Dickerson argued that our current proportionality review is deficient because it fails to examine cases where death was not imposed and cases where death was not even sought. *See State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982). He primarily relied upon Justice Stevens's statement regarding the denial of certiorari in *Walker v. Georgia*, 129 S. Ct. 453 (2008) (memorandum opinion), in which he wrote

Accordingly, we find that the death penalty was warranted in this case.

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that examining similar cases "assume[s] that the court would consider whether there were 'similarly situated defendants' who had *not* been put to the death because that inquiry is an essential part of any meaningful proportionality review." *Id.* at 454. In his view, this analysis is "judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court." *Id.* Justice Stevens noted,

> Had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment. If the Georgia Supreme Court had expanded its inquiry still further, it would have discovered many similar cases in which the State did not even seek death. Cases in both of these categories are eminently relevant to the question of whether a death sentence in a given case is proportionate to the offense. The Georgia Supreme Court's failure to acknowledge these or any other cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations.

Id. at 455-56 (citations omitted). This issue is not before us on appeal, and it would require us to overrule our prior decision in *Copeland*. However, we note our concern that restricting our statutorily-mandated proportionality review to only similar cases where death was actually imposed is largely a self-fulfilling prophecy as simply examining similar cases where the defendant was sentenced to death will almost always lead to the conclusion that the death sentence under review is proportional.

CONCLUSION

For the foregoing reasons, we affirm Dickerson's conviction for murder and the circuit court's sentence of death.

BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the decision to affirm this capital appeal and sentence, but write separately to address both the lesser-included issue and the majority's suggestion in footnote 8 that we should consider altering our approach to proportionality review.

I agree with the majority that appellant has no constitutional right to a charge on a lesser-related offense. Hopkins v. Reeves, 524 U.S. 88 (1998). Rather, the question of a defendant's right to such a charge is a matter of state law. Id.; see e.g., Sheffield v. State, 64 So.3d 529 (Miss. Ct. App. 2011). In my opinion, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), fundamentally altered state law by converting an indictment, which theretofore had been a jurisdictional document, into a mere notice document. Id. at 102-103, 610 S.E.2d at 500. Since the notice is directed only to the defendant, in my opinion, it is within his sole prerogative to waive such notice.

Unlike the majority, I find nothing in People v. Birks, 960 P.2d 1073 (Cal. 1998) which conflicts with my view that a court may authorize a criminal defendant to request a jury charge on a lesser-related offense. In Birks, the California Supreme Court held it had created a state constitutional problem by extending to the defendant alone the right to request such a charge on state due process grounds, and reversed its earlier decision. If the Court agrees with Birks that it is a constitutional violation to give only one party in a criminal proceeding the right to request such a charge, then the problem can be remedied by overruling Gentry.

On the merits, I find no reversible error in the circuit court's decision not to charge the jury on the lesser-related offense of accessory after the fact because such a charge was not supported by the evidence. See State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998) (elements of accessory after the fact explained).

I believe that when S.C. Code Ann. § 16-3-25(C)(3) (2003) requires us to determine whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the

defendant," and to refer to the similar cases that we considered, we should confine our review to only those cases in which a death sentence was imposed.[9] State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982)(only review of appeals where death sentence was imposed satisfies both state statute and constitution). As Copeland explains, to include in our review cases where a capital sentence was sought but not imposed requires us to speculate on, among other things, the solicitor's decision-making process, the strength of the State's case, and/or upon the jurors' or trial judge's decision to exercise mercy. Moreover, our reference for proportionality extends only to cases which are appealed, and thus is not truly representative of all cases where the death penalty was or could have been sought. Experience teaches that many of these cases where a lesser sentence is imposed are never appealed.

On the merits, I agree that the death sentence imposed upon appellant is not disproportionate.

For the reasons given above, I concur.

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[9] Like the majority, I have enormous respect for Justice Stevens. If we were to be true to his views on capital sentencing, however, we would join his minority view that imposition of the death sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment. Baze v. Rees, 553 U.S. 35 (2008) (decided the term before he issued his Walker v. Georgia statement). While perhaps Justice Stevens would find our practice of reviewing only other capital cases violative of the Eighth Amendment, the fact remains that proportionality review is a requirement only of state law, not the Constitution. Pulley v. Harris, 465 U.S. 37 (1984).

The Supreme Court of South Carolina

In the Matter of Chad Brian Hatley,

Respondent.

ORDER

On September 23, 2011, respondent was arrested and charged with two (2) counts of evasion of a tax, property assessment, or payment for tax years 2005 and 2006 in violation of S.C. Code Ann. § 12-54-44(B)(1) (2000), two (2) counts of failure to pay taxes, file a return, and keep records for tax years 2007 and 2009 in violation of S.C. Code Ann. § 12-54-44(B)(3) (2000) and, six (6) counts of failure to collect, account for, or pay over state income taxes for employees during the 2005 through 2009 time frame in violation of S.C. Code Ann. §12-54-44(B)(2) (2000).

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, and requesting the Court appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Hal LaVaughn Beverly, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Beverly shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Beverly may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Hal LaVaughn Beverly, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Hal LaVaughn Beverly, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Beverly's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

September 28, 2011

The Supreme Court of South Carolina

In the Matter of Michael Davis Moore, Petitioner.

ORDER

Respondent was suspended on March 21, 2011, for a period of six (6) months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

October 3, 2011

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
Withdrawn, Substituted, and Refiled September 27, 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).

[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 agree in part and disagree in part.

In Ward v. West Oil Co., the supreme 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 chance, no matter how small the intrinsic value." 387 S.C. 268, 278, 692 S.E.2d 516, 522 (2010) (quoting C.J.S. Gaming § 10 (Supp. 2010)) (emphasis added). The Ward 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).

SLED is correct that section 12-21-2710 does not specifically require that an illegal gaming device be used for gambling. However, we have affirmed the magistrate's ruling that the Speedmaster was not a game of chance. According the authorities previously cited, the term gambling necessarily encompasses the element of chance. Therefore, we conclude the circuit court properly affirmed the magistrate's ruling the Speedmaster was not "used for gambling."

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

AFFIRMED.

WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rawlinson Road Homeowners Association, Inc., Appellant,

v.

Ronald D. Jackson, and PHH Mortgage Corporation as successor in interest to Coldwell Banker Mortgage, Defendants,

of whom Ronald D. Jackson is Respondent.

Appeal From York County
S. Jackson Kimball, III, Master-in-Equity

Opinion No. 4893
Heard September 13, 2011 – Filed September 28, 2011

AFFIRMED

D. Ryan McCabe, of Columbia, for Appellant.

Thomas B. Roper, of Rock Hill, for Respondent.

PER CURIAM: The Rawlinson Road Homeowners Association (Association) appeals from the master-in-equity's order granting Ronald D. Jackson's motion for summary judgment and denying the Association's request for injunctive relief. We affirm.

FACTS

In 2006, Jackson purchased property in Phase I of the Brewington Park subdivision. Property in that neighborhood was subject to restrictive covenants outlined in the Declaration of Restrictive Covenants for Brewington Park Phase I (Declaration), dated October 11, 2000, and recorded the following day.

I. Declaration and By-laws

The Declaration provided that all owners of property located in the subdivision would be members of the Association and must "abide by such rules and regulations as may be promulgated by [the Association] for holding, maintaining and upkeeping the amenities and common areas conveyed to the [Association]." It authorized the Association to levy annual assessments upon its members and to enforce the collection of those annual assessments through the imposition of interest, creation of a lien against the property, foreclosure, and "by any other legal proceeding." According to the Declaration, the Association could pursue "unpaid dues and accrued interest, [as well as] all costs of collection, including reasonable attorney fees."

With regard to individual lots, Paragraph Eleven of the Declaration mandated:

> Each owner shall keep his lot in an orderly condition and prevent it from becoming unkempt, unsightly, or unclean. Garbage receptacles, cans, and/or areas shall be constructed in accordance with standards established by the Architectural Control Committee. No lot shall be used, in whole or part,

> for the storage of rubbish of any kind. No trash, rubbish, stored materials, wrecked or inoperable vehicles, or similar unsightly items shall remain on any lot outside an enclosed structure; provided however, that the foregoing shall not be construed to prohibit temporary deposits of trash, rubbish, or similar items, or garbage receptacles for the purpose of removal. . . .

The Declaration contemplated a transfer of enforcement rights from the Developer to an Architectural Control Committee, the Association, and individual property owners. Furthermore, the Declaration provided that its restrictive covenants, which would run with the land and bind successive owners, could be "amended, in whole or in part, at any time" by a written and notarized document signed by the owners of a majority of the subdivision's lots.

Shortly after execution of the Declaration, the Association filed its by-laws (By-laws). Both the stated purpose and the terms of the By-laws contemplated the Association would address its attention to the common areas and amenities. Nonetheless, in addition to the annual assessments identified in the Declaration, the By-laws purported[1] to empower the Association to impose fines for violations of the terms of the Declaration, By-laws, or "regulations promulgated pursuant thereto," and to treat those fines as assessments. Furthermore, the By-laws purported to increase the interest rate on unpaid assessments from eight percent to ten percent and provided for late charges of $25 for unpaid assessments but $50 to $100 per week for unpaid fines.

[1] Neither the By-laws nor a November 2007 amendment to them was notarized or subscribed by a majority of property owners. Consequently, the authority of those documents to alter the scope of the Declaration's restrictive covenants is questionable.

In March 2002, the subdivision's developer recorded a document applying the Declaration's restrictive covenants to specific lots in the subdivision, including the one Jackson later purchased. The record does not indicate whether any similar document notified purchasers of the By-laws.

II. The Boat, the Lien, and Procedural History

At the time Jackson purchased the property, no existing restrictive covenant specifically addressed parking a boat and trailer on a privately owned lot. However, on January 2, 2007, the Association, citing its authority to regulate the use of common areas and amenities under the Declaration and By-laws, adopted a set of rules and regulations (Rules). The Rules imposed new restrictions, including one that "[n]o . . . trailers, . . . boats, boating equipment (to include boat hitch or trailer) . . . shall be parked on a homeowner's lot" or anywhere else within the subdivision. The Association notified Jackson that the parking of his boat and trailer constituted a violation of the Rules. After he failed to remove his boat and trailer, the Association imposed an initial fine of $50 and subsequent fines of $25 per week thereafter.

Later in January 2007, the Association recorded a Notice of Lien against Jackson's property for the unpaid fines. Jackson did not pay the fines. On November 30, 2007, the Association filed an amendment to the By-laws purportedly enabling the Association to promulgate rules governing the use of privately owned property within the subdivision.

In August 2008, the Association filed suit against Jackson and his mortgage lender, seeking to enforce the "no boats" rule and to foreclose on its purported lien against the property. Specifically, the Association sought: (1) injunctive relief requiring Jackson to remove the boat and trailer and preventing him from placing any boat or trailer on his property; (2) a determination of the exact amount Jackson owed the Association, including interest, late charges, attorney's fees, and costs of suit; (3) foreclosure of the Association's lien and sale of the property; and (4) an order empowering the sheriff "to place the successful purchaser at said foreclosure sale in

possession of the [p]roperty." Jackson answered and counterclaimed, seeking dismissal of the complaint, a declaratory judgment of his and the Association's rights under the restrictive covenants, and an award of attorney's fees.

In early 2009, the Association filed a motion for an injunction requiring Jackson to remove his boat from his lot, and Jackson filed a motion for summary judgment. On March 25, 2009, at the hearing on both motions, the Association advised the master it had withdrawn and wished to dismiss its foreclosure claim.

The master first heard arguments on the Association's motion for an injunction. At the commencement of its argument, the Association called Diane Neville as a witness, and Jackson objected. The master explained he did not generally permit witness testimony at hearings on motions. The Association stated "the reason [it] wanted to introduce a witness [was] to put in the record the documents used and to get in the [Rules]. Those documents are not filed as a matter of public record." However, the Association had provided copies of the documents as attachments to its motion, and Jackson stipulated to the authenticity of the documents the Association presented except for the Rules.[2] The master entered a signed copy of the Rules into evidence as the court's exhibit, stating he "would permit testimony for the limited purpose of [identifying] these [documents] as the signed copy of the same thing." After Jackson stated he would accept opposing counsel's authentication of the signed copy of the Rules without the need for testimony, the Association conceded it had no other purpose in offering witness testimony, and Neville did not testify.

On the merits of the motion, the Association urged the master to construe the "no boats" rule as a restrictive covenant itself, a limitation and definition of the Declaration's covenant that property owners must prevent their lots from becoming "unkempt, unsightly, or unclean." Subsequently, in

[2] Jackson had received an unsigned copy of the Rules. The Association provided both Jackson and the master with a signed copy at the hearing.

a colloquy with the master, the Association conceded, "You can't use a rule and regulation . . . to expand obligations on a lot owner beyond what's included in the [D]eclaration."

Jackson argued the Association's Complaint sought to enforce the Rules, not the restrictive covenants from the Declaration, and that the Rules exceeded the scope of the Association's authority to regulate common areas and amenities as established by the Declaration. Furthermore, he challenged the Association's authority to impose fines as having no basis in the Declaration. Finally, Jackson contended the question of whether the boat was "unsightly" under Paragraph Eleven of the Declaration was not properly before the master because the Association's Complaint omitted any allegation that the boat was unsightly.

Turning to the motion for summary judgment, Jackson highlighted some of the statements in his affidavit supporting the motion, including (1) he relied upon the restrictions in force at the time he purchased the property to permit him to store the boat and trailer he already owned and (2) although he refused to pay the fines relating to his boat, he was current in paying annual assessments levied by the Association. In addition, he argued the Association lacked the authority to create a lien by imposing fines. The Association noted its earlier argument that it promulgated the Rules under the authority of the Declaration. It further asserted the language in the Declaration pertaining to amenities and common areas did not limit the Association's regulatory authority only to those areas. The Association argued whether the boat was "unsightly" and whether Jackson misunderstood the prohibition against parking a boat on his property when he purchased the lot were issues of fact.

The master denied the Association's motion for an injunction and granted summary judgment to Jackson. In his order, the master found the restrictive covenants in place when Jackson purchased his property neither expressed nor implied a prohibition against boats or authorization for the Association to impose fines. He declared the restrictive covenants did not authorize the Association "to adopt rules and regulations relating to conduct on an individual lot." Finally, he declared the By-laws and Rules "null and

void as they relate to the impositions of fines or assessments upon individual lot owners based on the use of their respective lots" and vacated the Association's lien against Jackson's property.

The Association filed a motion to reconsider, which, after a hearing, the master denied in a Form 4 order. This appeal followed.

LAW/ANALYSIS

I. Summary Judgment

The Association asserts the master erred in granting summary judgment to Jackson despite finding that "factual issues arose" from the language in the Declaration. We disagree.

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the trial court. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

Summary judgment is appropriate when "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. With the trial court's permission, parties may supplement or oppose affidavits using "depositions, answers to interrogatories, or further affidavits." Rule 56(e), SCRCP. However:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If

> he does not so respond, summary judgment, if appropriate, shall be entered against him.

Id.

In ascertaining whether any triable issue of fact exists, the trial court must view all evidence and all inferences that can be reasonably drawn from it in the light most favorable to the non-moving party. Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

In the case at bar, none of the evidence properly before the master on summary judgment supported the Association's contention that a genuine issue of material fact existed. The record indicates Jackson filed a motion for summary judgment supported by an affidavit. The Association failed to file any opposing affidavits or to seek permission to oppose Jackson's affidavit in any other manner. Therefore, under Rule 56, only the pleadings[3] and Jackson's affidavit were available for the master's consideration.

An examination of the pleadings reveals the Complaint's allegations of Jackson's wrongdoing rested entirely upon a violation of the Rules. The

[3] We note the Complaint incorporated a number of exhibits, including, for example, Jackson's deed and mortgage, the Declaration, the By-laws, and the Rules. Therefore, these documents were also properly before the master.

Complaint stated that "Jackson . . . violated the Rules . . . of the Association" and specifically recited the provision banning boats. Although the Complaint incorporated the Declaration by reference, it failed to allege any violation of the terms of the Declaration. Instead, after stating Jackson's property was "expressly subject to those restrictive covenants set forth in the Declaration," the Association shifted focus to its authority to promulgate the January 2007 Rules. The Association claimed its authority derived from the November 2007 amendment to the By-laws, which purported to extend the Association's power to regulate "the use and enjoyment of any Lot."[4]

Jackson filed an Answer and Counterclaim, and the Association filed a Reply. However, neither document challenged the material facts.

In his affidavit supporting summary judgment, Jackson affirmed his ownership of the property and the applicability of restrictive covenants to it. He further stated he relied upon the fact that no covenant restricted the presence of a boat or trailer on private property at the time of his purchase.

Neither the pleadings nor Jackson's affidavit raised either the narrow question of whether a boat and trailer qualified as unsightly or even the broader question of whether Jackson violated any of the restrictive covenants in the Declaration. Although the Association argued both of these issues at the hearing, its failure to file a responsive affidavit disputing any factual issues precluded the master from denying summary judgment based upon any facts the Association purported to challenge. See Rule 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

[4] As the master recognized, the amendment that purportedly authorized regulation of private property was enacted several months after the Association promulgated the Rules and began imposing fines on Jackson.

The material facts recited in the documents properly before the master were unchallenged: in 2006, Jackson purchased a lot that was subject to restrictive covenants that did not restrict the presence of a boat or trailer on a privately owned lot; Jackson immediately began storing a boat and trailer on his lot; in 2007, the Association promulgated rules prohibiting boats and trailers on private lots; and, after receiving notice of a purported violation, Jackson did not remove his boat or trailer. Accordingly, the master did not err in finding no genuine issue of material fact existed and granting summary judgment to Jackson.

II. Injunction

In view of our determination that the master did not err in entering summary judgment, we need not reach the Association's issues relating to injunctive relief. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal). Even so, we address the merits of these issues so as to clarify the requirements for a motion for injunctive relief.

A. Improper Analysis

First, the Association asserts the master erred in applying a summary judgment analysis to its motion for an injunction. We agree but affirm the denial of injunctive relief on other grounds appearing in the record.

An order granting or denying an injunction is reviewed for abuse of discretion. Cnty. of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002). An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. Id.

A party seeking injunctive relief "must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. An injunction is a drastic remedy issued by the court in its discretion to

prevent irreparable harm suffered by the plaintiff." Denman v. City of Columbia, 387 S.C. 131, 140-41, 691 S.E.2d 465, 470 (2010) (internal citations and quotation marks omitted).

The master's order denying injunctive relief included neither facts nor law supporting the denial. However, the hearing transcript demonstrates the master incorrectly focused his analysis on the existence of an issue of fact. He reasoned:

> I think at this stage I have to treat the motion for an injunction by the standard that would apply to motions for summary judgment because one generally is entitled to have a trial on an injunction on whether [i]njunctive relief is to be granted. I think that the argument of the [A]ssociation begs the resolution of certain issues of fact[,] not the least of which [is] what is unsightly[,] and thus I find that a motion – the motion for an injunction based on the record must be denied because in that connection there are – forget the issues of law for the moment – there is a factual issue . . . as to what is unsightly and why so I deny the motion for an injunction.

Because the master did not apply the proper test to the Association's motion for an injunction, his decision was controlled by an error of law.

Nonetheless, we affirm because the record supports the denial of an injunction. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). To succeed in its motion, the Association had to establish that it would suffer irreparable harm without an injunction, lacked an adequate remedy at law, and would likely succeed on the merits. See Denman, 387 S.C. at 140-41, 691 S.E.2d at 470 (outlining criteria for injunctive relief). It failed to establish any of these three elements. Despite making both oral and written presentations of its motion for an injunction, the

Association made no argument supporting either irreparable harm or a lack of an adequate remedy at law. Instead, it concentrated on validating the Rules and the Association's authority to enforce them. As to the third element, the master's grant of summary judgment effectively determined the Association had no likelihood of success on the merits. See Brandt v. Gooding, 368 S.C. 618, 625, 630 S.E.2d 259, 262 (2006) (holding because a trial court considering a motion for summary judgment examines both law and facts, the grant of summary judgment constitutes an adjudication on the merits). Because the Association failed to establish the three required elements for injunctive relief, it was not entitled to an injunction. Accordingly, we affirm the master's denial of injunctive relief on this basis.

B. Exclusion of Testimony

Next, the Association asserts the master erred in refusing to permit it to introduce witness testimony at the injunction hearing. We disagree.

Generally, the admission or exclusion of testimony is a matter within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. Pike v. S.C. Dep't of Transp., 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000); see also Rule 43(e), SCRCP ("When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but may direct that the matter be heard wholly or partly on oral testimony or depositions."). An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. Simpkins, 348 S.C. at 668, 560 S.E.2d at 904.

When a trial court excludes evidence, the presenting party may proffer it to the court:

> The failure to make a proffer of excluded evidence will preclude review on appeal. . . . It is well settled that a reviewing court may not consider error claimed in the exclusion of testimony unless the record on

> appeal shows fairly what the rejected testimony would have been. However, this rule regarding proffers has been relaxed where the appellate court is able [to] determine from the record what the testimony was intended to show and that prejudice clearly exists.

Jamison v. Ford Motor Co., 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007).

Here, the Association failed to proffer the excluded testimony after the master sustained Jackson's objection. Nonetheless, we find the intended content of the testimony is sufficiently clear from the record to affirm on the merits. The Association attempted to present one witness, Diane Neville, for the purpose of having a signed copy of the Rules, which was "not filed as a matter of public record," admitted at the hearing. The master stated his "usual practice [wa]s not to permit testimony in motion hearings for the simple reason that it afford[ed] no opportunity for the other side to respond." Thereafter, Jackson stipulated to the authenticity of the signed copy of the Rules, and the master received all of the Association's documents as exhibits. Once the master had accepted the documents, he asked the Association for what other purpose it intended to offer testimony. The Association responded, "I think that's it. The remaining issues, Judge, are legal and I think you can boil this case down." By the Association's own admission, Neville's proposed testimony would have related only to the authentication of one document. That document was admitted by stipulation of the parties, rendering Neville's testimony needless. Accordingly, the master did not abuse his discretion by excluding it.

CONCLUSION

We find the material facts that were properly before the master at the summary judgment hearing were undisputed. Accordingly, we affirm the master's grant of summary judgment.

We further find the master erred in evaluating the Association's motion for injunctive relief under a summary judgment standard. However, we find the Association failed to satisfy any of the three elements required for a grant of an injunction. As a result, we affirm on other grounds appearing in the record the master's denial of an injunction.

Finally, we find that although the Association failed to proffer Neville's testimony after the master sustained Jackson's objection to it, the record is sufficient to indicate what the content of that testimony would have been. In addition, we find the Association conceded that the parties' stipulation obviated the need for Neville's testimony. Therefore, we find the master's exclusion of that testimony was not an abuse of discretion. Accordingly, the master's decision is

AFFIRMED.

SHORT and WILLIAMS, JJ., and CURETON, A.J., concur.