

¶1 William Pierre Crofts appeals his convictions on one count of fraudulent schemes and artifices and one count of illegally conducting an enterprise. The State cross-appeals from the post-trial dismissal of convictions on two other counts of fraudulent schemes and artifices and the giving of a *Willits* instruction.¹ For reasons that follow, we affirm.

I. BACKGROUND

¶2 The Baptist Foundation of Arizona (BFA) was a Southern Baptist non-profit, tax-exempt charitable corporation that invested in real estate using funds obtained by selling investment products to the general public. Crofts assumed the presidency of BFA in 1982 and held that position until he and other senior management personnel stepped aside in August 1999 pending an investigation of BFA commenced by the Securities Division of the Arizona Corporation Commission and the Arizona Attorney General's Office. Three months later, BFA filed for

¹ The State's cross-appeal also raises an issue regarding the trial court's finding of a *Brady* violation. See *Brady v. Maryland*, 373 U.S. 83 (1963). Because a decision in favor of the State on this issue would not result in the State obtaining relief above and beyond the judgment that is the subject of the appeal, it is properly considered a cross-issue rather than a cross-appeal. See *Town of Miami v. City of Globe*, 195 Ariz. 176, 177-78 n.1, ¶ 1, 985 P.2d 1035, 1036-37 n.1 (App. 1998) ("When a successful party seeks only to uphold the judgment for reasons supported by the record, but different from those relied upon by the trial court, its arguments may not be raised by a cross-appeal, as it is not an 'aggrieved' party, but are more properly designated as cross-issues.").

bankruptcy and its assets and those of BFA-managed companies were liquidated as part of the bankruptcy proceedings, resulting in substantial losses to investors.

¶13 On April 24, 2001, a state grand jury indicted Crofts on three counts of fraudulent schemes and artifices, each a class 2 felony; twenty-seven counts of theft, each a class 2 felony; and one count of illegally conducting an enterprise, a class 3 felony. The gist of the charges was that Crofts engaged in an accounting fraud in the operation of BFA and its managed companies and thereby defrauded more than 11,000 investors in BFA and two related entities, Arizona Southern Baptist New Church Ventures, Inc., and Christian Financial Partners, Inc., of approximately \$460 million between 1994 and 1999. The indictment also charged co-defendants Thomas Grabinski, Lawrence Hoover, Harold Friend and Richard Rolfes with the same offenses for their participation in the fraud. Hoover, Friend and Rolfes resolved the charges against them by plea agreement, and Friend and Rolfes testified for the State in the prosecution of Crofts and Grabinski.

¶14 Following a nine-month jury trial, Crofts and Grabinski were found guilty on the three counts of fraudulent schemes and artifices and the one count of illegally conducting an enterprise, but acquitted on the theft counts. The trial

court granted a post-trial motion for judgment of acquittal on two of the three convictions for fraudulent schemes and artifices based on a finding that the fraud counts were multiplicitious. The trial court thereafter sentenced Crotts to an aggravated eight-year term of imprisonment on the one remaining fraud count and a concurrent, aggravated seven-year term of imprisonment on the count of illegally conducting an enterprise. Crotts timely appealed, and the State cross-appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), 13-4032 (Supp. 2008)² and 13-4033(A) (Supp. 2008).

II. DISCUSSION

A. Disclosure Violation

¶15 The evidentiary phase of the trial began on September 27, 2005, and continued through June 9, 2006. As part of its case-in-chief, the State presented testimony from Donald Deardoff, a vice president and chief financial officer for BFA and a member of the senior management team with Crotts and Grabinski. Deardoff had pled guilty pre-indictment to two counts of fraudulent schemes and artifices for his role in the

² We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

BFA operation and agreed to cooperate with the State in the investigation and prosecution of others associated with BFA.

¶16 During the first day of his testimony on April 5, 2006, Deardoff testified that incomplete and inaccurate accounting statements were included by BFA in audits and offering circulars presented to the public. The accounting statements did not reflect the true finances of BFA in that they failed to include the activities of its managed companies and subsidiaries. Assets held by BFA that could be potentially written down were moved to these interrelated companies to avoid having BFA's financial statements show a loss. Deardoff explained these companies were in substance "all BFA," but that including such losses on the BFA financial statements would have had a negative impact on its ability to continue to borrow money from the public.

¶17 Deardoff also testified at length about the truthfulness of prior statements he made regarding his belief in the legality of the BFA operation. Following his plea agreement, Deardoff was deposed in a civil suit against an accounting firm arising out of the collapse of BFA. He also provided statements to investigators about his role in the BFA operation and gave a pretrial interview to counsel for Crotts and Grabinski in the criminal prosecution. At trial, Deardoff

acknowledged that he lied when he stated during the deposition and interviews that he believed the BFA financial statements were being presented fairly when they were prepared. Defense counsel objected and moved for a mistrial or to strike Deardoff's testimony on the grounds that the admission that the prior statements were lies had not been disclosed by the State. After the prosecutor confirmed that Deardoff had informed him of his prior lies, the trial court ordered defense counsel to re-interview Deardoff to determine when the State first learned that he would admit to lying when he was questioned on earlier occasions.

¶18 Deardoff stated during the re-interview that he informed the prosecutor of his prior lies during trial preparation meetings after trial had commenced. He could not recall when the meeting occurred, but placed it somewhere between September or October 2005 and January 2006. After further discussion, the trial court ordered that defense counsel be given additional time during the next week to complete a re-interview of Deardoff, with the issue of prejudice and further sanctions to abide the parties' briefing. Following briefing and argument, the trial court ruled the State's non-disclosure constituted *Brady* and discovery violations, but found that the re-interview of Deardoff remedied the prejudice of the non-

disclosure and denied the defense requests for mistrial or witness preclusion.

¶9 Crotts argues that the trial court erred in denying the motion for mistrial. In its cross-appeal, the State asserts that the trial court erred in finding that the State committed a *Brady* violation. Though we agree with the State that no *Brady* violation occurred, the trial court could properly conclude that the State failed to comply with disclosure obligations mandated by the Rules of Criminal Procedure. Nevertheless, we hold there was no abuse of discretion by the trial court in ruling that the disclosure violation did not necessitate a mistrial.

¶10 A trial court's ruling on the adequacy of disclosure is reviewed for abuse of discretion. *State v. Roque*, 213 Ariz. 193, 205, ¶ 21, 141 P.3d 368, 380 (2006). The Arizona Rules of Criminal Procedure require the State to disclose all material tending "to mitigate or negate the defendant's guilt as to the offense charged." Ariz. R. Crim. P. 15.1(b)(8). A criminal defendant's due process rights are violated if, after the defense's disclosure request, the prosecution suppresses evidence favorable to the defendant which would have affected the jury's determination of guilt. *Brady*, 373 U.S. at 87; see also *United States v. Agurs*, 427 U.S. 97, 112 (1976) ("[I]f the omitted evidence creates a reasonable doubt that did not

otherwise exist, constitutional error has been committed."). However, our supreme court has held that "[w]hen previously undisclosed exculpatory information is revealed at the trial and is presented to the jury, there is no *Brady* violation." *State v. Jessen*, 130 Ariz. 1, 4, 633 P.2d 410, 413 (1981); see also *State v. Bracy*, 145 Ariz. 520, 528, 703 P.2d 464, 472 (1985).

¶11 Here, the evidence at issue was presented to the jury. Thus, even assuming that Deardoff's admission to lying in his prior statements rises to the level of materiality that falls within *Brady's* purview, because this information was revealed at trial, no *Brady* violation occurred. See *Agurs*, 427 U.S. at 107 (providing *Brady* rule deals with due process right to fair trial rather than discovery).

¶12 Although there was no *Brady* violation, the State's duty of disclosure under Rule 15 is broader than that required by *Brady*. *Jessen*, 130 Ariz. at 4, 633 P.2d at 413. This rule imposes on the State a continuing duty to "make additional disclosure, seasonably, whenever new or different information subject to disclosure is discovered." Ariz. R. Crim. P. 15.6(a). The State argues that because Crotts was aware Deardoff had taken inconsistent positions in pleading guilty and in the deposition and pretrial interviews, he therefore knew that Deardoff had lied in one or the other proceedings and had

that information available for impeachment at trial. Thus, the State reasons, it had no further disclosure obligation with respect to the admission made by Deardoff about lying during the deposition and pretrial interviews. This argument, however, ignores the substantial qualitative difference between mere inconsistent statements and a specific admission to committing perjury in a court proceeding (the civil deposition). The trial court could reasonably conclude such an admission should have been promptly disclosed by the State, particularly when it also included the making of misleading statements to defense counsel in the pretrial interview conducted in this matter. See *United States v. Bagley*, 473 U.S. 667, 676 (1985) (holding impeachment evidence falls within category of "evidence favorable to an accused"). Accordingly, we find no error by the trial court in concluding that the State failed to comply with its continuing disclosure obligation under Rule 15.

¶13 We turn next to the matter of sanctions. The imposition of sanctions for a disclosure violation is a matter left to the sound discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion. *State v. Armstrong*, 208 Ariz. 345, 353-54, ¶ 40, 93 P.3d 1061, 1069-70 (2004). "The trial court has great discretion in deciding whether to sanction a party and how

severe a sanction to impose," and we give considerable deference to the trial court's perspective and judgment. *State v. Meza*, 203 Ariz. 50, 55, ¶ 19, 50 P.3d 407, 412 (App. 2002). In applying sanctions, the trial court should seek to affect the evidence at trial and the merits of the case as little as possible. *State v. Schrock*, 149 Ariz. 433, 436, 719 P.2d 1049, 1052 (1986).

¶14 There was no abuse of discretion by the trial court in denying the defense requests for mistrial or witness preclusion. After Deardoff's admission to lying was revealed on the first day of his testimony, the trial court recessed the trial for ten days to permit defense counsel the opportunity to re-interview him and to readjust their approach to and preparation for cross-examination. The trial court could reasonably conclude that such action alleviated any prejudice resulting from the State's lack of prompt disclosure of Deardoff's admission. See *Roque*, 213 Ariz. at 210, ¶ 50, 141 P.3d at 385 (granting of continuance appropriate sanction for State's disclosure violation); *State v. Lawrence*, 123 Ariz. 301, 303-04, 599 P.2d 754, 756-57 (1979) (holding no prejudice where trial court allowed four-day continuance to permit interview of witness). As the trial court noted in denying the motions for sanctions, the disclosure violation was an isolated incident and the substance of

Deardoff's trial testimony was consistent with the written statement he adopted as part of his plea agreement, which had been timely disclosed to defense counsel.

¶15 Crofts' claim that the State's late disclosure resulted in loss of the opportunity to cross-examine other witnesses who had previously testified regarding Deardoff's new testimony lacks substance. No showing is made why those witnesses could not have been recalled for further questioning or what additional testimony they could have provided that would support his defense. Accordingly, we hold there was no error by the trial court in deciding against imposing further sanctions for the disclosure violation. See *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996) (noting denial of sanctions is not abuse of discretion if trial court believes defendant will not be prejudiced).

B. Sufficiency of Evidence

¶16 Crofts argues that the trial court erred in denying his motion for judgment of acquittal. Specifically, he argues that the evidence was insufficient to establish the element of "benefit" for the fraud count. Crofts further contends that in the absence of evidence establishing the predicate fraud offense, the conviction for illegally conducting an enterprise must also be vacated. We review a claim of insufficient

evidence *de novo*. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶17 Reversible error based on insufficiency of the evidence occurs only if there is a complete absence of "substantial evidence" to support the conviction. *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996); see also Ariz. R. Crim. P. 20(a) (requiring trial court to enter judgment of acquittal "if there is no substantial evidence to warrant a conviction"). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). In reviewing a claim of insufficient evidence, "[w]e construe the evidence in the light most favorable to sustaining the verdict[s], and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

¶18 Fraudulent schemes and artifices is committed when a person, "pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions." A.R.S. § 13-2310(A) (2001). The term "benefit" means "anything of value or advantage, present or prospective." A.R.S. § 13-105(3) (Supp.

2008). This definition of "benefit" is very broad and encompasses both pecuniary and non-pecuniary gain. *State v. Henry*, 205 Ariz. 229, 233, 68 P.3d 455, 459 (App. 2003).

¶19 To convict on the offense of illegally conducting an enterprise, the State must prove that the defendant "is employed by or associated with any enterprise and conducts such enterprise's affairs through racketeering or participates directly or indirectly in the conduct of any enterprise that the person knows is being conducted through racketeering." A.R.S. § 13-2312(B) (2001). "Racketeering" is defined as including fraudulent schemes and artifices if "committed for financial gain." A.R.S. § 13-2301(D)(4) (2001). Consequently, to sustain the conviction on this offense, there must be evidence that the benefit obtained by Crotts as a result of the fraud scheme involved financial gain.

¶20 The record contains sufficient evidence from which the jury could find Crotts obtained a benefit from the fraud scheme and that the benefit involved financial gain. Although he did not directly pocket funds obtained from investors, Crotts received a portion of the investment funds in the form of his salary and other financial compensation including health insurance, life insurance, retirement benefits, a vehicle, and cash bonuses. The evidence included testimony that the only way

BFA could continue in existence -- and therefore the only way Crofts could continue to be employed and paid by BFA -- was by acquiring additional investment funds. Based on this evidence, the jury could reasonably conclude that, but for the fraud scheme, Crofts would not have obtained the salary and other compensation he received from BFA.

¶21 The acquittal of Crofts on the twenty-seven theft counts does not provide grounds for concluding that insufficient evidence exists on the charges of fraudulent schemes and artifices and illegally conducting an enterprise. Although the theft counts dealt with the same investment funds that were the subject of the fraud counts, they involve separate charges with separate elements. Arizona permits inconsistent verdicts on separate counts. *State v. Zakhar*, 105 Ariz. 31, 32-33, 459 P.2d 83, 84-85 (1969). As our supreme court reasoned in *Zakhar*, any inconsistency in verdicts may simply be the result of leniency. *Id.*

¶22 In light of our holding that sufficient evidence exists to support the conviction for fraudulent schemes and artifices, the challenge to the conviction for illegally conducting an enterprise based on lack of proof of the predicate fraud likewise fails.

C. Constructive Amendment of Indictment

¶23 In connection with his challenge to the sufficiency of the evidence, Crofts argues that the trial court's denial of his motion for judgment of acquittal on the fraud counts resulted in a constructive amendment of the indictment in violation of the state and federal constitutions. Crofts claims that by permitting these counts to go to the jury on the issue of benefits other than the specific amounts alleged in the indictment, the trial court amended the factual allegations of the indictment and subjected him to conviction on charges not presented to the grand jury.

¶24 The indictment returned by the grand jury alleged that Crofts and his co-defendants obtained monetary benefits totaling approximately \$466 million on the three fraud counts. Although the indictment specified the amounts alleged to have been obtained, the State was not required to prove the alleged amounts. *State v. Suarez*, 137 Ariz. 368, 374, 670 P.2d 1192, 1198 (App. 1983).

¶25 In *Suarez*, the defendant was charged with fraudulent schemes and artifices, and the indictment specified a benefit of \$6,000. In rejecting the defendant's argument that the trial court erred in failing to instruct the jury that the State was required to prove a benefit of \$6,000, we explained that the

specific amount of "benefit" alleged was "surplusage" to the charge:

The language in the indictment alleging a \$6,000 benefit flowing to defendant-appellant pursuant to the scheme and artifice was surplusage inasmuch as the dollar value of the benefit obtained pursuant to a fraudulent scheme or artifice is irrelevant for purposes of determining whether a fraudulent scheme or artifice has occurred. A.R.S. § 13-2310(A). All that is required is that the defendant obtain "any benefit".

Id.

¶26 As discussed above, there was sufficient evidence that Crofts obtained a financial benefit in the form of continued employment with salary and other compensation derived from the ongoing operation of BFA to support the convictions on the charges of fraudulent scheme and artifices and illegally conducting an enterprise. This evidence of financial benefit is entirely consistent with the legally-required allegations of benefit in the indictment. Thus, the trial court's denial of the motion for judgment of acquittal did not effect an amendment, constructive or otherwise, of the indictment.

D. Fraud Instruction

¶27 Finally, Crofts claims error in the jury instructions on fraudulent schemes and artifices. In particular, Crofts contends the trial court erred by refusing to give his requested

instruction requiring a finding of specific intent to defraud. We review *de novo* whether jury instructions properly state the law. *State v. Johnson*, 212 Ariz. 425, 431, ¶ 15, 133 P.3d 735, 741 (2006).

¶28 "The primary test for jury instructions is whether the instructions considered as a whole, sufficiently instructed the jury on the proper rule of law." *State v. Bridgeforth*, 156 Ariz. 60, 64, 750 P.2d 3, 7 (1988). When the substance of a proposed jury instruction is adequately covered by other instructions, the trial court is not required to give the proposed instruction. *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000); see also *State v. Royer*, 150 Ariz. 501, 505, 724 P.2d 587, 591 (App. 1986) ("Where the refused instructions relate to matters that are adequately covered by other instructions pertaining to the legal issues, there is no error in refusing the specific instructions offered by the defense.").

¶29 The trial court instructed on the elements of fraudulent schemes and artifices as follows:

The crime of fraudulent schemes and artifices requires proof of the following four things:

1. The defendant used false or fraudulent pretenses, representations, promises, or material omissions, and

2. The defendant acted pursuant to a scheme or artifice to defraud, and

3. The scheme or artifice was devised with the intent to defraud; and

4. As a result the defendant knowingly obtained any benefit.

A scheme or artifice to defraud is a plan to mislead another person for the purpose of gaining some material benefit or for the purpose of inducing any person to part with property or to change position.

An intent to defraud is an intent to mislead another person for the purpose of gaining some material benefit or for the purpose of inducing any person to part with property or to change position.

The instructions further included the definitions set forth in A.R.S. § 13-105(9)(a)-(b) to define the terms "intentionally" or "with the intent to" and "knowingly."

¶130 Crotts contends the instructions were deficient because they told the jury it could convict if he "merely acted 'pursuant to a scheme' *regardless of whether he knew it to be fraudulent, and regardless of whether he intended to defraud.*"

Crotts relies on *Bridgeforth* as support for his argument that the trial court's instructions were deficient on the element of intent. In *Bridgeforth*, our supreme court considered whether specific intent to defraud is an element of A.R.S. § 13-2310.

156 Ariz. at 61, 750 P.2d at 4. After first noting that the Arizona Criminal Code has abandoned the terms "specific and

general intent" and adopted the four culpable mental states defined in A.R.S. § 13-105, our supreme court, based on the language of the statute, held that to convict a defendant of violating A.R.S. § 13-2310, the State must prove: "1) that a plan or scheme existed; 2) that the purpose of such plan or scheme was to defraud others; 3) that, knowing the purpose of the scheme, the defendant pursuant to the scheme obtained a benefit; 4) by means of false pretenses, representations, promises or material omissions." *Bridgeforth*, 156 Ariz. at 64, 750 P.2d at 7. In other words, this statute "is violated by one who makes false representations to obtain a benefit with knowledge of the fraudulent scheme and in furtherance of it." *Id.* Thus, the State need not prove the defendant intended to defraud anyone; what is required is that "the person charged knew that there was a scheme or artifice to defraud and acted pursuant to the scheme to obtain a benefit." *Id.* at 63-64, 750 P.2d at 6-7.

¶31 The instructions given, though not in the same order, include all of the *Bridgeforth* requirements. First, "that a plan or scheme existed" was described in section two of the first instruction: "defendant acted pursuant to a scheme or artifice to defraud." *Id.* (emphasis added). The second requirement "that the purpose of such plan or scheme was to

defraud others" is encompassed in the second instruction, which defines a scheme or artifice to defraud as "a plan to mislead another person for the purpose of gaining some material benefit or for the purpose of inducing any person to part with property or to change position." *Id.* (emphasis added). The third *Bridgeforth* requirement, that "knowing the purpose of the scheme, the defendant pursuant to the scheme obtained a benefit" can be gleaned from sections two and three of the first instruction, which provide that "the defendant knowingly obtained any benefit" and "acted pursuant to a scheme or artifice to defraud." *Id.* And *Bridgeforth's* fourth requirement that the defendant procure the benefit "by means of false pretenses, representations, promises or material omissions" is encompassed in the first section of that instruction: "defendant used false or fraudulent pretenses, representations, promises, or material omissions." *Id.*

¶132 Because the *Bridgeforth* elements are covered by the instructions given, there was no need for the specific intent instruction proposed by Crotts. Accordingly, there was no error by the trial court in refusing the requested instruction.

E. Cross-Appeal

¶133 The jury found Crotts guilty on the three counts of fraudulent schemes and artifices alleged in the indictment, but

the trial court dismissed two of the counts as multiplicitous. The State cross-appeals from the trial court's ruling and seeks reinstatement of the two dismissed convictions and remand for sentencing on those counts.

¶34 An indictment is multiplicitous if it charges a single offense in multiple counts. *State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985). Multiplicity raises the potential for multiple punishments, which implicates double jeopardy concerns. *State v. Brown*, 217 Ariz. 617, 620, ¶ 7, 177 P.3d 878, 881 (App. 2008). Whether counts are multiplicitous is therefore subject to *de novo* review. *State v. Powers*, 200 Ariz. 123, 125, ¶ 5, 23 P.3d 668, 670 (App. 2001), *aff'd*, 200 Ariz. 363, 26 P.3d 1134 (2001).

¶35 In determining whether charges for the same offense are multiplicitous, the inquiry is whether the conduct underlying the multiple charges involves separate and distinct acts or courses of conduct. *Via*, 146 Ariz. at 116, 704 P.2d at 246. In *Via*, the defendant challenged two counts of fraudulent schemes and artifices on grounds of multiplicity. One count alleged a scheme or artifice to defraud Arizona Bank, and the second charged the same crime was committed against Great Western Bank. The fraud consisted of using stolen credit cards

obtained from a murder victim. In rejecting the defendant's claim, our supreme court explained:

Admittedly, the removal of the victim's credit cards constituted only one act. Defendant, however, subsequently embarked upon what could only be construed as two separate courses of conduct, each involving a distinct scheme to defraud a bank using a different credit card. The crime of fraudulent schemes and artifices requires that a defendant act with the specific intent to defraud. *State v. Haas*, 138 Ariz. 413, 418, 675 P.2d 673, 678 (1983). Defendant may have had the same general intent in each count--to defraud banks using stolen credit cards. There was, however, a specific and separate victim, as well as a specific and separate credit card, in each count. There was then specific intent to defraud twice, once as to each card and bank. Charging under two counts was not, therefore, multiplicitous.

Id.

¶36 The present situation is readily distinguishable from that in *Via*. The indictment in the instant case charged Crotts with three counts of fraudulent schemes and artifices. Count One alleged that the fraudulent conduct involved obtaining a benefit consisting of approximately \$345 million in investment funds from individuals in the period between approximately January 1, 1994 and August 31, 1999,

by falsely representing or omitting material information regarding one or more of the following: (a) the true financial condition of the Baptist Foundation of Arizona, its subsidiaries and affiliates; (b) how Baptist

Foundation of Arizona investor funds would be used; (c) the true nature of the relationship between the Baptist Foundation of Arizona, Arizona Southern Baptist New Church Ventures, Inc., Christian Financial Partners, Inc., A.L.O., Inc., and E.V.I.G., Inc.; or (d) investments (except Investment Agreements) with the Baptist Foundation of Arizona were backed by adequate specific collateral.

¶37 Count Two alleged that the fraudulent conduct involved obtaining a benefit consisting of approximately \$35 million in investment funds from individuals in the period between approximately January 1, 1994 and August 31, 1999,

by falsely representing or omitting material information regarding one or more of the following: (a) the true financial condition of Arizona Southern Baptist New Church Ventures, Inc.; (b) how Arizona Southern Baptist New Church Ventures, Inc. investor funds would be used; (c) the true nature of the relationship between the Baptist Foundation of Arizona, Arizona Southern Baptist New Church Ventures, Inc., Christian Financial Partners, Inc., A.L.O., Inc., and E.V.I.G., Inc.; or (d) investments with Arizona Southern Baptist New Church Ventures, Inc. were backed by adequate collateral.

¶38 Count Three alleged that the fraudulent conduct involved obtaining a benefit consisting of approximately \$86 million in investment funds from individuals in the period between approximately October 16, 1996 and August 31, 1999,

by falsely representing or omitting material information regarding one or more of the following: (a) the true financial condition

of Christian Financial Partners, Inc.; (b) how investor funds received by Christian Financial Partners, Inc. would be used; (c) the true nature of the relationship between the Baptist Foundation of Arizona, Arizona Southern Baptist New Church Ventures, Inc., Christian Financial Partners, Inc., A.L.O., Inc., and E.V.I.G., Inc.; or (d) investments with Christian Financial Partners, Inc. were backed by adequate collateral.

¶139 While the three fraud counts in the instant case include differing amounts alleged to have been obtained by the fraudulent conduct, they do not identify "specific and separate" victims. *Via*, 146 Ariz. at 116, 704 P.2d at 246. Moreover, the allegations of fraudulent conduct in the first count overlap those alleged in the second and third counts. All three counts set forth the alleged misrepresentations in the disjunctive and each included that the offense involve misrepresenting "the true nature of the relationship between the Baptist Foundation of Arizona, Arizona Southern Baptist New Church Ventures, Inc., Christian Financial Partners, Inc., A.L.O., Inc., and E.V.I.G., Inc." Additionally, because both Arizona Southern Baptist New Church Ventures, Inc., and Christian Financial Partners, Inc., are subsidiaries and affiliates of BFA, the allegation of misrepresentation of "the true financial condition of the Baptist Foundation of Arizona, its subsidiaries and affiliates" in Count One included within it the specific allegations directed at these entities in the other two fraud counts. Thus,

unlike in *Via*, the allegations of the fraud counts in this case created the clear potential of multiple convictions for the same offense based on the same act or course of conduct, i.e., obtaining investment funds from non-specific individuals through the same misrepresentations. Because proof for conviction on each count could be established with exactly the same facts, the counts as alleged are multiplicitous. See *Merlina v. Jejna*, 208 Ariz. 1, 4, ¶ 12, 90 P.3d 202, 205 (App. 2004) ("Offenses are not the same, and therefore not multiplicitous, if each requires proof of a fact that the other does not.").

¶40 Furthermore, the evidence presented at trial does not support a finding of more than one fraudulent scheme. The State's theory was that the benefit sought to be obtained through the fraudulent scheme was the ongoing operation of BFA and the salaries and other compensation that accrued to Crofts and Grabinski based on their continued employment and elevated positions with BFA. The State does not contend on appeal, nor did it present evidence at trial, that Crofts and Grabinski obtained separate benefits that could be allocated among the three counts. Thus, we conclude the trial court was correct in ruling that the various corporate entities and multiple methods (investment vehicles and misrepresentations) employed in the fraud "were an integral part of one scheme and not three

separate courses of conduct involving distinct scheme[s] to defraud."

¶41 When a defendant is convicted on more than one count for the same offense, double jeopardy principles dictate that only one conviction be allowed to stand. *Brown*, 217 Ariz. at 621, ¶ 13, 177 P.3d at 982. Accordingly, there was no error by the trial court in dismissing two of the fraud counts and sentencing Crofts solely on the conviction on Count One. See *Merlina*, 208 Ariz. at 4 n.4, 90 P.3d at 205 n.4 (noting "[t]he principal danger in multiplicity--that the defendant will be given multiple sentences for the same offense--can be remedied at any time by merging the convictions and permitting a single sentence").

¶42 The State further argues on cross-appeal that the trial court erred by giving a *Willits* instruction. See *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). A *Willits* instruction is proper when the State destroys or loses evidence potentially helpful to the defendant. *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). The State contends the evidence did not support a *Willits* instruction because there was no showing that the box of files that was the subject of the instruction was potentially exculpatory. Given that we are affirming the convictions, it is not necessary to address this

issue. *State v. Barger*, 167 Ariz. 563, 564-65, 810 P.2d 191, 192-93 (App. 1990).

III. CONCLUSION

¶43 For the foregoing reasons, the convictions and sentences imposed are affirmed.

Lawrence F. Winthrop

LAWRENCE F. WINTHROP, Judge

CONCURRING:

Diane M. Johnsen

DIANE M. JOHNSEN, Presiding Judge

Daniel A. Barker

DANIEL A. BARKER, Judge

R E C E I V E D
JUN - 2 2000
CRIMINAL PROSECUTIONS