IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee/Cross-Appellant, v. THOMAS DALE GRABINSKI, Appellant/Cross-Appellee.	1 CA-CR 06-0835 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2001-006183

The Honorable Kenneth L. Fields, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED

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W I N T H R O P, Judge

¶1 Thomas Dale Grabinski appeals from his convictions and the sentences imposed 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 the convictions and sentences, but vacate the restitution order and remand for a hearing on the amount to be paid.

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. Grabinski was hired in 1988 by William Crotts, the president of BFA, to work in the BFA legal department. Grabinski subsequently rose to senior

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[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.").

vice president and general counsel of BFA and held those positions 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 bankruptcy and its assets and those of the BFA-managed companies were liquidated as part of the bankruptcy proceedings resulting in substantial losses to investors.

¶3 On April 24, 2001, a state grand jury indicted Grabinski 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 Grabinski participated 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 Crotts, 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 Crotts and Grabinski.

¶4 Following a nine-month jury trial, Crotts 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 multiplicious. The trial court thereafter sentenced Grabinski to concurrent aggravated terms of imprisonment of six years on the one remaining fraud count and five years on the count of illegally conducting an enterprise and ordered that he pay $159 million in restitution. Grabinski 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

¶5 The evidentiary phase of the trial began on September 27, 2005, and continued through June 9, 2006. As part of its

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

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 pled guilty pre-indictment to two counts of fraudulent schemes and artifices for his role in the BFA operation and agreed to cooperate with the State in the investigation and prosecution of others associated with BFA.

¶6 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.

¶7 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 had been 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.

¶8 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 Grabinski contends the trial court erred in denying the motion for mistrial. In its cross-appeal, the State argues 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 violated its disclosure obligation. Nevertheless, we hold that there was no abuse of discretion by the trial court in ruling that the 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 particular evidence at issue was presented to the jury by the State. Thus, even assuming Deardoff's admission to lying in his prior statements is of a level of materiality as to fall within *Brady*'s purview, because this information was revealed at trial, no *Brady* violation occurred. *See Agurs*, 427 U.S. at 107 (noting *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 asserts that because Grabinski was well aware Deardoff had taken inconsistent positions in pleading guilty and in the deposition and pretrial interviews, he therefore knew Deardoff had lied in one or the other and had that information available for impeachment purposes 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 interview. This argument, however, ignores the substantial qualitative difference between mere inconsistent statements and the 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 by the State 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 was timely disclosed to defense counsel.

¶15 Grabinski's claim that the State's disclosure violation prejudiced his trial preparation and opening statement is baseless. The record is undisputed that Deardoff did not make his admission to the prosecutor about his prior lies until after the trial had commenced. Grabinski's contention that the untimely disclosure deprived him of the opportunity to call different witnesses is similarly without substance. The disclosure of the admission occurred two months before the State concluded its case-in-chief. Thus, Grabinski had ample opportunity to arrange for whatever witnesses he wished to call in his defense. Finally, to the extent Grabinski asserts he was prejudiced by holding off on cross-examining witnesses who testified prior to Deardoff about matters that could impeach him, those witnesses could have been recalled if Grabinski believed they had helpful testimony.

B. Sufficiency of Evidence

¶16 Grabinski next argues that the trial court erred in not granting his motion for judgment of acquittal. Specifically, he contends there is insufficient evidence that he obtained a benefit from the fraud scheme. He additionally argues that in the absence of evidence establishing that the fraud scheme resulted in him receiving a benefit involving financial gain, the conviction for illegally conducting an enterprise must be vacated. Finally, he asserts that BFA cannot be the subject of racketeering because it was a non-profit enterprise. 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 establish 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). Thus, to sustain the conviction on this offense, there must be evidence that the

benefit Grabinski obtained as a result of the fraud scheme involved financial gain.

¶20 The record contains sufficient evidence from which the jury could reasonably find that Grabinski obtained a benefit from the BFA fraud scheme and that the benefit involved financial gain. Although neither Crotts nor Grabinski directly pocketed the funds obtained from the investors, each personally benefited by keeping BFA in operation through their fraud. Among the benefits received were continued employment with salaries and other employment compensation including health insurance, life insurance, retirement benefits, a vehicle, and cash bonuses.

¶21 Grabinski argues that his compensation does not qualify as a "benefit" under A.R.S. § 13-2310 because he would have been entitled to the compensation for the work he performed for BFA irrespective of the fraud. There was testimony presented, however, that the only way BFA could continue in existence during the 1990's -- and therefore the only way Grabinski could continue to be employed and paid by BFA -- was by continuing to acquire investment funds. There was also evidence that Grabinski was aware of this. When confronted about the failure by Crotts and him to make full financial disclosure in 1996, Grabinski acknowledged his belief that such

disclosure would lead to the collapse of BFA. The accuracy of this belief is confirmed by the fact that three months after BFA stopped soliciting investments in 1999, the entire operation collapsed. Based on this evidence, the jury could reasonably find that the salary and other compensation paid by BFA was a direct financial benefit he knowingly obtained as a result of the fraud scheme.

¶22 There is equally no merit to Grabinski's contention that his conviction for illegally conducting an enterprise is improper because BFA was a non-profit company. As defined in A.R.S. § 13-2301(D)(2), "enterprise" means "any corporation, partnership, association, labor union or other legal entity or any group of persons associated in fact although not a legal entity." Contrary to Grabinski's contention, there is no requirement that the enterprise itself be operated for financial gain for commission of the offense of illegally conducting an enterprise. A.R.S. § 13-2301(B). The requirement of financial gain applies solely to the underlying act of racketeering. A.R.S. § 13-2301(D)(4). There was no error by the trial court in denying the motion for judgment of acquittal based on insufficient evidence.

C. Statute of Limitations

¶23 After the State rested, Grabinski moved to dismiss all counts of the indictment, arguing that the charges were barred by the seven-year statute of limitations in A.R.S. § 13-107(B) (Supp. 2008). The motion was based on testimony by a BFA investor regarding his efforts in attempting to obtain financial statements from BFA and his subsequent contact with the Attorney General's Office and the Arizona Corporation Commission in 1992. The trial court found that the information provided by the investor was sufficient to permit the State to discover the alleged offenses in 1992 with the exercise of reasonable diligence and dismissed four theft counts alleged to have been committed in 1992 and 1993, but denied the motion as to all other counts.

¶24 Grabinski argues that the finding by the trial court that the offenses were discoverable more than seven years prior to his 2001 indictment mandated dismissal of all counts. In response, the State contends the information provided to the State by the investor in 1992 was not sufficient to constitute constructive notice of the accounting fraud and, in any event, the offenses not dismissed by the trial court occurred within seven years of the 2001 indictment. We review a trial court's ruling on a motion to dismiss charges based on the statute of

limitations for abuse of discretion. *State v. Jackson*, 208 Ariz. 56, 59, ¶ 12, 90 P.3d 793, 796 (App. 2004). Interpretation of a statute, however, is subject to *de novo* review. *Id.* at ¶ 13.

¶25 The statute of limitations in effect at the time of the charged offenses reads, in relevant part:

> **§ 13-107. Time limitations**
>
> . . . .
>
> B. Except as otherwise provided in this section, prosecutions for [] offenses [other than homicide, misuse of public monies, or falsification of public records] must be commenced within the following periods after actual discovery by the state or the political subdivision having jurisdiction of the offense or discovery by the state or such political subdivision which should have occurred with the exercise of reasonable diligence, whichever first occurs:
>
> 1. For a class 2 through a class 6 felony, seven years.
>
> . . . .

¶26 Because Grabinski was convicted only on the charges of fraudulent schemes and illegally conducting an enterprise, we limit our analysis of the statute of limitations to these two offenses. Even assuming without deciding that the State received information placing it on constructive notice of the ongoing accounting fraud in 1992, the trial court properly denied the motion to dismiss as to these two counts. As

Grabinski concedes, both are continuing offenses. "[A] 'continuing offense' endures over a period of time, and its commission is ongoing until cessation of the proscribed conduct." *State v. Helmer*, 203 Ariz. 309, 310, ¶ 8, 53 P.3d 1153, 1154 (App. 2002). Thus, the statute of limitations does not begin to run on such offenses until they are completed. *State v. Barber*, 133 Ariz. 572, 574, 653 P.2d 29, 31 (App. 1982), *aff'd*, 133 Ariz. 549, 653 P.2d 6 (1982). Here, the indictment alleged and the evidence established that the proscribed conduct and the benefit obtained giving rise to the two charges continued through 1999. Accordingly, prosecution of these charges was commenced well within the seven-year statute of limitations.

¶27 We reject Grabinski's contention that the addition of the discovery rule to the statute of limitations in 1978 should be construed in a manner that would allow the limitations period to run before an offense is completed. In construing statutes, "our primary goal is to discern and give effect to the legislature's intent." *State v. Fell*, 203 Ariz. 186, 188, ¶ 6, 52 P.3d 218, 220 (App. 2002). "[T]he best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction." *State v. Aguilar*, 209 Ariz. 40, 48, ¶

26, 97 P.3d 865, 873 (2004) (quoting *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991)). But, if "the statute's language is not clear, we determine legislative intent by reading the statute as a whole, giving meaningful operation to all of its provisions, and by considering factors such as the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose." *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996).

¶28 Prior to 1978, Arizona's criminal statute of limitations commenced to run when the offense was committed, not when it was discovered. *See* former A.R.S. § 13-106(B) (repealed in 1986). Under this prior statute, an offense was not deemed committed for purposes of the running of the limitations period until the offense was completed. *Barber*, 133 Ariz. at 574, 653 P.2d at 31. In enacting A.R.S. § 13-107 with the discovery rule, the clear intent of the legislature was to avoid the situation of the limitations period for an offense expiring before the State was aware of its commission. Considering the discovery provision together with the lengthening of the limitations period for felonies from five to seven years, the clear thrust of enacting A.R.S. § 13-107(b) was to expand the period for commencing prosecution beyond that available under the prior statute.

¶29 The construction suggested by Grabinski runs counter to the purpose behind A.R.S. § 13-107 given that it would permit the statute of limitations to run earlier than under former A.R.S. § 13-106(B). Further, it would allow for the absurd result of the limitations period for an offense expiring while the offense was still ongoing. Indeed, under Grabinski's interpretation, assuming the correctness of the trial court's ruling that the State had constructive notice of the charged offenses in 1992, he would have been free to continue to commit the offenses indefinitely after 1999 without fear of prosecution because the limitations would have run. We will not construe a statute in a manner that will lead to an absurd result. *See State v. Barr*, 217 Ariz. 445, 450, ¶ 20, 175 P.2d 694, 699 (App. 2008) ("In construing statutes, we presume that the legislature did not intend an absurd result."). Because both the fraudulent schemes and artifices and conducting an illegal enterprise offenses were ongoing until 1999, there was no error by the trial court in ruling that their prosecution was not time-barred.

D. Vague Indictment and Verdict Forms

¶30 Grabinski claims the indictment was unconstitutionally deficient because it failed to provide him with sufficient notice of the charges against him. This issue was raised twice

in the trial court: once after the original indictment and again after the second, identical indictment. In both instances, the trial court denied Grabinski's motions to dismiss. We review a trial court's ruling on a motion to dismiss for abuse of discretion. *State v. Rodriguez*, 205 Ariz. 392, 395, ¶ 7, 71 P.3d 919, 922 (App. 2003).

¶31 An indictment must give the defendant notice of the crimes charged. *State v. West*, 176 Ariz. 432, 442, 862 P.2d 192, 202 (1993), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998); *see also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."). In accordance with this requirement, the Arizona Rules of Criminal Procedure provide:

> The indictment or information shall be a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged.

Ariz. R. Crim. P. 13.2(a). However, "[t]here is no requirement that the defendant receive notice of how the State will prove his responsibility for the alleged offense." *State v. Arnett*, 158 Ariz. 15, 18, 760 P.2d 1064, 1067 (1988). "All that is necessary is that the [defendant] have actual notice of the underlying charges." *State v. Bailey*, 125 Ariz. 263, 266, 609 P.2d 78, 81 (App. 1980); *see also State v. Van Vliet*, 108 Ariz.

162, 163, 494 P.2d 34, 35 (1972) (stating test is whether charging document "sets forth the offense in such manner as to enable person of common understanding to know what is intended").

¶32 The indictment in the present case provides sufficient notice of the offenses charged. Grabinski claims the allegations of the charges of fraudulent schemes and artifices are inadequate because they fail to identify the transactions involved. The various theft counts alleged in conjunction with the fraud counts, however, clearly specify each of the transactions by both dates and investment names. The lack of particulars with respect to the investors participating in each offering does not render the allegations unduly vague as the essence of the fraud offenses is the misrepresentations made and benefit received. *See* A.R.S. § 13-2310(B) ("Reliance on the part of any person shall not be a necessary element of the offense . . . ."). As for the contention that the charge of illegally conducting an enterprise fails to indicate the methods by which the "racketeering offenses" were perpetrated, Count Thirty-One plainly and unambiguously states: "The racketeering offenses included theft and fraudulent schemes and artifices, as more particularly described in the other counts of this indictment." Allegations in one count are properly incorporated

by reference in another count. Comment to Ariz. R. Crim. P. 13.1(a).

¶33 Moreover, in ruling on the adequacy of the notice, the court may also consider the content of the grand jury transcripts, *State v. O'Brien*, 123 Ariz. 578, 583, 601 P.2d 341, 346 (App. 1979), and the availability of discovery under Rule 15 of the Criminal Rules of Procedure. *West*, 176 Ariz. at 443, 862 P.2d at 203; *Bailey*, 125 Ariz. at 266, 609 P.2d at 81. In its order denying the second motion to dismiss based on lack of notice, the trial court explained:

> It does not appear to this Court that, with the grand jury transcript as well as the discovery by the State, understanding the nature and the theory of the State's case, as to any of the defendant's, is so difficult that any defendant's fundamental rights are being abridged. The Court notes that two of the defendants, Grabinski and Rolfes, testified before the grand jury and, having read their testimony, it seems clear to the court that those defendants comprehended, to some degree even then when testifying, the nature and focus of the grand jury's inquiry and what kind of evidence each of them might give in their defense to hopefully persuade the jury to not indict.

The record fully supports this conclusion by the trial court. There was no abuse of discretion in the denial of the motions to dismiss the indictment for lack of sufficient notice.

¶34 Grabinski also claims that the lack of specificity in the indictment resulted in vague verdict forms being submitted to the jury. He argues that the vagueness of the verdict forms created the possibility of confusion and non-unanimous verdicts.

¶35 The record does not show Grabinski raised this objection to the verdict forms in the trial court. Thus, our review of this claim is limited to fundamental error. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). A challenge to verdict forms will rarely result in a reversal absent an objection. *State v. Davis*, 206 Ariz. 377, 390, ¶ 63, 79 P.3d 64, 77 (2003).

¶36 Arizona Rule of Criminal Procedure 23.2(a) provides for use of a general verdict form. The comment to Rule 23.2 states, "The general verdict gives the jury a discretion over the disposition of the case which it would not have if restricted to finding particular facts in special verdicts." This general form of verdict has long been approved in Arizona. *See State v. Lamb*, 17 Ariz. App. 246, 249, 497 P.2d 66, 69 (1972).

¶37 A defendant is not entitled to jury unanimity on the precise manner in which an offense was committed. *State v. Ramsey*, 211 Ariz. 529, 536, ¶ 18, 124 P.3d 756, 763 (App. 2005).

Furthermore, an omission from a verdict form will not be reversible error unless the omission prejudices the defendant's rights. *State v. Sanchez*, 135 Ariz. 123, 124, 659 P.2d 1268, 1269 (1983). Grabinski has presented nothing other than speculation to support his claim that the failure to include specifics regarding the particulars of the offenses submitted to the jury in the verdict forms created juror confusion or lack of unanimity. "Mere speculation that the jury was confused is insufficient to establish actual jury confusion." *State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994). There was no error in the forms of verdict.

E. Prosecutorial Misconduct Claims

¶38 Grabinski next contends the trial court erred in failing to dismiss the indictment for misconduct by the Attorney General's Office at the grand jury. This claim of prosecutorial misconduct in the grand jury proceedings was raised by Grabinski in the trial court by motion for dismissal of indictment or remand for new determination of probable cause pursuant to Arizona Rule of Criminal Procedure 12.9. The trial court denied the motion, finding that none of the defendants was denied a substantial procedural right in the state's presentation to the grand jury.

¶39 Generally, review of challenges relating to grand jury proceedings must be sought by special action prior to trial. *State v. Gortarez*, 141 Ariz. 254, 258, 686 P.2d 1224, 1228 (1984). "Absent an indictment that the state knew was partially based on perjured, material testimony, defendant may not challenge matters relevant only to the grand jury proceedings by appeal from conviction." *State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995). No claim is made here of perjured testimony. Grabinski is therefore precluded from raising this issue on direct appeal. *Id.*

¶40 Grabinski also contends the trial court erred in failing to disqualify the Attorney General's office for having a conflict of interest in the prosecution of this case. This court previously considered and rejected this same claim when raised by special action. *Grabinski v. Superior Court*, 1 CA-SA 02-0297 (Ariz. App. Jan. 7, 2003) (mem. decision). Grabinski does not present any basis for reconsidering that decision, and we decline to do so. *See State v. Wilson*, 207 Ariz. 12, 15, ¶ 9, 82 P.3d 797, 800 (App. 2004) (noting court has discretion under law of the case doctrine to refuse to reopen questions previously decided in same case by same court).

F. Failure to Sever

¶41 Grabinski argues that his constitutional right to due process was violated by the trial court's failure to sever his trial from that of co-defendant Crotts. Because Grabinski did not move to sever, we review for fundamental error only. *See* Ariz. R. Crim. P. 13.4(c) ("Severance is waived if a proper motion is not timely made and renewed."); *State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). Before we engage in fundamental error review, however, we must first find that error occurred. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991).

¶42 Grabinski does not dispute that he was properly joined with Crotts as a co-defendant in the indictment. *See* Ariz. R. Crim. P. 13.3(b) (providing for joinder "when each defendant is charged with each offense included, or when the several offenses are part of a common conspiracy, scheme or plan"). Rather, his claim of error is predicated on Arizona Rule of Criminal Procedure 13.4(a), which states:

> Whenever 2 or more offenses or 2 or more defendants have been joined for trial, and severance of any or all offenses, or any or all defendants, or both, is necessary to

> promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on motion of a party, order such severance.

¶43 Grabinski fails to cite any authority requiring a trial court to *sua sponte* sever defendants. Indeed, Arizona law is to the contrary. This court has previously held that "[Arizona Rule of Criminal Procedure 13.4] does not require the court to order a severance; it only gives it the discretion to do so on its own initiative." *State v. Longoria*, 123 Ariz. 7, 10, 596 P.2d 1179, 1182 (App. 1979); *see also* cmt. to Ariz. R. Crim. P. 13.4(a) ("The two standards - 'the court may on its own initiative, and shall on motion of a party' - are intended to indicate the court's power to act on its own authority to sever, but to remove any implication that it has a duty to search out all severance issues on its own, for fear of creating fundamental error."). Therefore, assuming without deciding that Grabinski may have been entitled to severance had he properly moved to sever, he has failed to meet his initial burden of establishing error because the trial court was not required to *sua sponte* order severance. Accordingly, we find no fundamental error.

¶44 As part of his argument on this issue, Grabinski requests that we find his trial counsel's failure to move for

severance to constitute ineffective assistance of counsel, claiming that the failure to do so under the circumstances of this case is grossly deficient performance. Our supreme court has held that claims of ineffective assistance are not to be addressed on direct appeal, regardless of merit, but must be brought in a post-conviction relief proceeding pursuant to Rule 32, Arizona Rule of Criminal Procedure. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). We therefore decline to address this claim.

G. Motion for Mistrial

¶45 Grabinski argues that the trial court erred by denying his motion for mistrial based on a statement made by a witness at trial. The witness had pled guilty to three counts of facilitation of conducting an illegal enterprise for his role in the BFA operation. During cross-examination by defense counsel regarding the benefits of the plea agreement, the witness stated, "But I don't know that they [Crotts and Grabinski] couldn't have done the same thing. I don't know." Defense counsel objected and moved for a mistrial. The trial court denied the motion and, instead, instructed the jury to disregard the comment.

¶46 A mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will

otherwise be thwarted. *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). When a witness volunteers an inadmissible statement, the remedy rests largely within the discretion of the trial court. *Id.* The trial judge is given broad discretion in deciding whether a mistrial is necessary "because he is in the best position to determine whether the evidence will actually affect the outcome of the trial." *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). Thus, we review a trial court's denial of a motion for mistrial under an abuse of discretion standard. *State v. Gulbrandson*, 184 Ariz. 46, 62, 906 P.2d 579, 595 (1995).

¶47 The statement by the witness was clearly unresponsive to any question posed by defense counsel and implied the defendants should have pled guilty. However, the issue on appeal is not whether the comment was improper, but whether the comment so infected the proceedings as to deny Grabinski a fair trial. *See State v. Marshall*, 197 Ariz. 496, 500, ¶ 13, 4 P.3d 1039, 1043 (App. 2000) ("[A] mistrial based upon a claim of evidentiary error is warranted only when the jury has been exposed to improper evidence and the error might have affected the verdict."). Here, the trial court viewed the comment in the context of the trial as a whole and concluded that the comment would not so infect the trial as to require a mistrial.

¶48 The trial court further instructed the jury to disregard the comment and not to infer anything from it. When an improper comment is made by a witness, we allow trial courts to give curative instructions and presume that jurors follow them. *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996). There is nothing in the record indicating the jury did not follow their instructions. Consequently, we find no abuse of discretion by the trial court in denying the motion for mistrial.

H. Request for Restitution Hearing

¶49 Grabinski challenges the restitution order, arguing that the trial court erred in ordering restitution without holding a hearing. He also contends the amount of restitution was improperly calculated in that it used deflated values for offsets and included losses not causally related to his conduct. The State responds that Grabinski waived appellate review of the trial court's failure to hold a restitution hearing, that the holding of a restitution hearing is discretionary, and that the award is fully supported by the record.

¶50 This court has long recognized that a defendant has a due process right to contest the information on which a trial court's restitution order is based. *State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992). This includes the

right to present relevant evidence and to be heard. *State v. Fancher*, 169 Ariz. 266, 268, 818 P.2d 251, 253 (App. 1992). Restitution is normally determined at sentencing, and "that is where the objection may be made, or a restitution hearing requested." *Steffy*, 173 Ariz. at 93, 839 P.2d at 1138. Of course, a defendant may waive the right to a hearing by failing to object or request a hearing. *Id.*; *cf. State v. Lewus*, 170 Ariz. 412, 414, 825 P.2d 471, 473 (App. 1992) (defendant does not waive due process right to contest amount when he is not present when order is entered).

¶51 There was no waiver by Grabinski of his right to an evidentiary hearing on restitution. In his pre-sentence memoranda, Grabinski raised issues with respect to the amount of restitution proposed by the State. At sentencing, Grabinski's counsel objected to the State's proposed restitution amount and requested a hearing to establish the actual values to be used in calculating the amount. The trial court ignored the request and ordered that Grabinski pay $159 million in restitution as part of his sentence.

¶52 The State's reliance on *State v. Lujan*, 136 Ariz. 326, 666 P.2d 71 (1983), as support for its waiver claim is misplaced. The holding in *Lujan* is based on the well settled rule that "an alleged error that is not objected to at trial

will not be considered on appeal." 136 Ariz. at 328, 666 P.2d at 73. In *Lujan*, our supreme court addressed an adjunct to this rule that an issue "is preserved for purposes of appeal without the need for a specific objection at trial" when it is raised in a properly made and ruled on motion in limine. *Id.* Because there was no record of the trial court ruling on a pre-trial motion seeking preclusion of reference to certain matters, the court held that the motion in limine did not preserve the issue for appeal and therefore the defendant waived the claimed error by failure to object at trial. *Id.*

¶53 The State here asserts the lack of an explicit ruling by the trial court denying Grabinski's request for a restitution hearing should likewise result in forfeiture of appellate review of his claim of error. The flaw in the State's argument is that Grabinski made an objection to the restitution award and requested a hearing at the appropriate time at sentencing. Waiver occurred in *Lujan* "by failing to make a record as to the disposition of their motion in limine and *failing to object at trial.*" *Id.* (emphasis added). A party preserves an issue for review by timely raising it at the applicable court proceeding. *See State v. Fulminante*, 193 Ariz. 485, 503, ¶ 64, 975 P.2d 75, 93 (1999) ("An objection is sufficiently made if it provides the judge with an opportunity to provide a remedy."). By requesting

a restitution hearing at sentencing, the issue was "brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived." *State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975). Accordingly, there has been no forfeiture by Grabinski of his claim that the trial court violated his due process right to a restitution hearing.

¶54 We likewise find no merit to the State's contention that A.R.S. § 13-804(G) (2001) makes granting a request for a hearing on restitution discretionary. This statute reads:

> If the court does not have sufficient evidence to support a finding of the amount of restitution or the manner in which the restitution should be paid, it may conduct a hearing upon the issue according to the procedures established by rule of court.

This provision merely authorizes the trial court to hold a hearing if it does not have sufficient information to order restitution. We perceive nothing in its language that would permit the trial court to decline a requested hearing. Even if the trial court believes it has sufficient evidence to make the necessary findings for a restitution order, due process requires that, upon request, the defendant be given the opportunity to present evidence to contest the award. *Steffy*, 173 Ariz. at 93, 839 P.2d at 1138.

¶55 A person convicted of an offense is required to make restitution to the victims for the full amount of economic loss. A.R.S. § 13-603(C) (Supp. 2008). Thus, where error occurs in the entry of a restitution order, the proper remedy is to vacate the order and remand the matter to the trial court for a restitution hearing to determine the amount of restitution. *State v. Scroggins*, 168 Ariz. 8, 9, 810 P.2d 631, 632 (App. 1991). Because the restitution order must be vacated, we do not address the arguments made by the parties regarding the propriety of the amount awarded.

I. Cross-Appeal

¶56 The jury found Grabinski 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 trial court's ruling and seeks reinstatement of the two dismissed convictions and remand for sentencing on those counts.

¶57 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.2d 668, 670 (App. 2007), *aff'd*, 200 Ariz. 363, 26 P.3d 1134 (2001).

¶58 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.

¶59 The present situation is readily distinguishable from that in *Via*. The indictment in the instant case charges Grabinski with three counts of fraudulent schemes and artifices. Count One alleges 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.

¶60 Count Two alleges 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.

¶61 Count Three alleges 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.

¶62 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 includes 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 includes within it the specific allegations directed at these firms in the other two fraud counts. Thus, unlike in *Via*, the allegations of the fraud counts in this case create 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 can 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.").

¶63 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 Crotts and Grabinski based on their positions with BFA. The State does not contend on appeal, nor did it present evidence at trial, that Crotts 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."

¶64 When a defendant suffers a conviction 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 882. Thus, there was no error by the trial court in dismissing two of the fraud counts as multiplicitous and sentencing Grabinski 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 principle 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").

¶65 The State further argues 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

¶66 For the foregoing reasons, we affirm the convictions and sentences, but vacate the restitution order and remand for further proceedings consistent with this decision.

Lawrence F. Winthrop

LAWRENCE F. WINTHROP, Judge

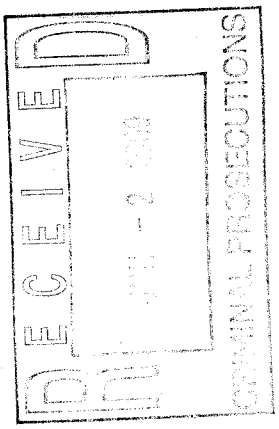
CONCURRING:

Diane M. Johnsen

DIANE M. JOHNSEN, Presiding Judge

Daniel A. Barker

DANIEL A. BARKER, Judge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