NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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MAY 22 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2005-0409
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
MARYANNE CHISHOLM,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20013189

Honorable Christopher C. Browning, Judge

AFFIRMED IN PART;
REVERSED AND REMANDED IN PART

Terry Goddard, Arizona Attorney General
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E S P I N O S A, Judge.

¶1 This case arises from a scheme devised by appellant Maryanne Chisholm to defraud the investors of her company, Safari Media, Inc. (SMI). Appellant was convicted

after a jury trial of one count of illegally conducting an enterprise in violation of A.R.S. § 13-2312, three counts of fraudulent schemes and artifices in violation of A.R.S. § 13-2310, and fifty-four counts of sale of unregistered securities in violation of A.R.S. § 44-1841. The trial court sentenced her to a combination of concurrent and consecutive prison terms totaling 27.25 years. On appeal, Chisholm contends her double jeopardy rights were violated when the state charged her with violations of § 13-2310 and § 44-1841 in addition to § 13-2312; her due process rights were violated when the state charged her with three violations of § 13-2310 instead of one; and her consecutive sentences constitute double punishment in violation of A.R.S. § 13-116. She also claims there was insufficient evidence to support two of the convictions under § 13-2310 or, alternatively, the charges underlying those convictions were multiplicitous. For the reasons below, we affirm Chisholm's convictions but remand for resentencing.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the convictions. *See State v. Cheramie*, 217 Ariz. 212, ¶ 2, 171 P.3d 1253, 1255 (App. 2007). Briefly, the evidence so viewed established the following facts.

¶3 In 1996, Chisholm incorporated SMI as a Delaware corporation. Soon thereafter, she began to sell shares of SMI stock, telling investors that SMI designed and marketed CD-ROM titles and provided consulting services for website design. In 1999, she provided investors with a series of forged documents she had created on her computer, which purported to have come from a large Japanese technology company and from a well-known

accounting firm. The documents stated the Japanese company intended to purchase SMI as part of a merger and SMI had been audited in anticipation of the merger. Chisholm told investors that SMI stock, which she offered at one dollar per share, would be worth thirty-three dollars per share after the merger. Several hundred new investors purchased SMI stock after Chisholm's announcement.

¶4 In 1999, the Arizona Corporation Commission (ACC) ordered Chisholm to stop selling SMI stock in Arizona on the ground she had been selling unregistered securities. Chisholm continued, however, until June 2000, when the ACC filed a civil racketeering action against her and SMI was placed into receivership.[1] From 1997 to 2000, approximately one thousand investors had purchased more than $24 million in shares of SMI stock. SMI, however, was a sham corporation; it had never conducted legitimate business or had any significant business income, and nearly 100% of its revenues had come from shareholder investments. Of course, Chisholm had never been contacted by any Japanese company about a merger with SMI.

¶5 The evidence also showed that, in 1999, Chisholm had applied to Philadelphia Indemnity Insurance Company (Philadelphia Indemnity) and Fireman's Fund Insurance Company (Fireman's Fund) for insurance coverage for SMI's officers and directors. In the applications submitted to both companies, Chisholm included financial statements she represented as independently audited financial records showing SMI was earning millions

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[1]That lawsuit eventually resulted in the entry of summary judgment in favor of the ACC for $24 million.

of dollars. In fact, SMI had not been independently audited. Moreover, Chisholm failed to disclose that in 1997 the State of Washington Securities Division had ordered her to stop selling unregistered securities to Washington residents and that the ACC had started an investigation into her activities the same year. Philadelphia Indemnity issued a policy that provided $3 million in coverage, and Fireman's Fund issued a policy that provided $2 million in excess coverage.

¶6 In 2001, Chisholm was charged in a fifty-eight-count indictment with one count of illegally conducting an enterprise, three counts of fraudulent schemes and artifices, and fifty-four counts of selling unregistered securities. She was convicted and sentenced, as noted earlier, and this appeal followed.

Fraudulent Schemes and Artifices

¶7 Counts two through four of the indictment read as follows:

> **Count 2** . . .
>
> From on or about the 1st day of January, 1996 to on or about the 30th day of June, 2001, MARYANNE CHISHOLM, pursuant to a scheme or artifice to defraud, knowingly obtained a benefit, $24,000,000 from investors in Safari Media, Inc. as set forth in Attachment A, by means of false or fraudulent pretenses, representations, promises or material omissions. All in violation of A.R.S. 13-2310(A)(C) . . . .
>
> **Count 3** . . .
>
> From on or about the 2nd day July of 1999, to on or about the 23rd day of June 2000, MARYANNE CHISHOLM, pursuant to a scheme or artifice to defraud, knowingly obtained a benefit, insurance for the Directors and Officers of Safari Media Inc., from Fireman's Fund Insurance Policy #CXD 600-02-25, by means of false or fraudulent pretenses, representations, promises

> or material omissions. All in violation of A.R.S. 13-2310(A) . . . .
>
> **Count 4** . . .
>
> From on or about the 28th day of June, 1999, to on or about the 23rd day of June 2000, MARYANNE CHISHOLM, pursuant to a scheme or artifice to defraud, knowingly obtained a benefit, insurance for the Directors and Officers of Safari Media Inc, from Philadelphia Indemnity Insurance Company #HFP003193, by means of false or fraudulent pretenses, representations, promises or material omissions. All in violation of A.R.S. 13-2310(A) . . . .

¶8 Chisholm contends the "multiple charging of fraudulent schemes and artifice" was improper and two of the three counts must be vacated. She argues she "may have defrauded these three entities, but it was part of only one scheme" to defraud SMI's shareholders and the "'scheme' actually included all counts." Chisholm maintains the frauds perpetrated against Fireman's Fund and Philadelphia Indemnity should not have been charged as separate offenses because she obtained the insurance policies only to "maintain the status quo relating to the fraudulent scheme perpetrated upon" SMI investors. The state responds the charges were proper because Chisholm "clearly committed three separate schemes." Because Chisholm failed to raise this issue in the trial court, we review only for fundamental error. *See State v. Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d 945, 958 (App. 2007).

¶9 Chisholm essentially claims counts two through four are multiplicitous. "Multiplicity occurs when an indictment charges a single offense in multiple counts." *State v. Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d 668, 670 (App. 2001). "Multiplicity raises the

potential for multiple punishments, which implicates double jeopardy." *Id*. A violation of double jeopardy constitutes fundamental error. *See State v. McGill*, 213 Ariz. 147, ¶ 21, 140 P.3d 930, 936 (2006). Whether one or more offenses occurred here requires us to examine the fraudulent schemes and artifices statute, § 13-2310, and determine what constitutes that offense. *See Powers*, 200 Ariz. 123, ¶ 8, 23 P.3d at 671.

¶10 Section 13-2310 provides that a person violates that statute if he or she, "pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions." To establish a violation of § 13-2310, the state must first prove the existence of a scheme to defraud, *i.e.*, "some 'plan, device, or trick' to perpetrate a fraud." *State v. Haas*, 138 Ariz. 413, 423, 675 P.2d 673, 683 (1983), *quoting State v. Stewart*, 118 Ariz. 281, 283, 576 P.2d 140, 142 (App. 1978). It must then prove that the defendant, knowing the purpose of the scheme, obtained a benefit pursuant to the scheme by means of false or fraudulent pretenses. *State v. Bridgeforth*, 156 Ariz. 60, 64, 750 P.2d 3, 7 (1988). The criminal conduct punishable under § 13-2310 is the scheme to defraud, not any acts committed in furtherance of the scheme. *See State v. Suarez*, 137 Ariz. 368, 373, 670 P.2d 1192, 1197 (App. 1983). If the state alleges more than one scheme to defraud, each scheme requires evidence of a "specific intent" to defraud a "specific and separate victim." *State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985).

¶11 In this case, Chisholm may have been motivated by an overarching intent to defraud SMI's investors generally, but she devised three distinct schemes to defraud separate

victims. The first was the scheme to induce investors to purchase shares of SMI stock by misrepresenting material facts about SMI's business; the second, the scheme to fraudulently obtain an insurance policy from Philadelphia Indemnity by filing an application for insurance that contained false information and omitted material facts about SMI; the third, a scheme to fraudulently obtain a secondary insurance policy from Fireman's Fund, again by submitting an application for insurance that contained misrepresentations and material omissions. Chisholm knowingly obtained a benefit from each of these schemes, and she had a specific, separate intent to defraud each of these victims, or in the case of SMI shareholders, this group of victims. Therefore, these fraudulent acts were not, as Chisholm suggests, merely acts committed in furtherance of a single scheme but were three separate schemes.[2] *See Via*, 146 Ariz. at 116, 704 P.2d at 246.

¶12 Relying on *Suarez* and *State v. Schneider*, 148 Ariz. 441, 715 P.2d 297 (App. 1985), Chisholm contends "a scheme to defraud . . . implies a plan, and numerous acts may be committed in furtherance of that plan." *Suarez*, 137 Ariz. at 373, 670 P.2d at 1197. We agree this is true. Indeed, Chisholm committed multiple acts in furtherance of each of the three schemes to defraud. As explained above, however, Chisholm devised three separate schemes, tailored for three separate purposes, and we therefore find no basis for vacating any

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[2]We note that "scheme" is an imprecise word. The United States Supreme Court has observed "'scheme' is hardly a self-defining term. A 'scheme' is in the eye of the beholder, since whether a scheme exists depends on the level of generality at which criminal activity is viewed." *See H.J. Inc. v. Nw. Bell Tele. Co.*, 492 U.S. 229, 241 n.3 (1989). Viewing Chisholm's criminal conduct at the most general level, we agree that her three fraudulent plans may arguably be characterized as parts of one "overall scheme." For purposes of § 13-2310, however, Chisholm devised and carried out three schemes to defraud.

of Chisholm's convictions for violating § 13-2310. *See Via*, 146 Ariz. at 116, 704 P.2d at 246.

¶13 Chisholm argues in the alternative that counts three and four were multiplicitous because she "undertook one endeavor to obtain insurance." She claims that she filed an application with Philadelphia Indemnity for insurance coverage and that "it was not [she] who sought out Fireman's Fund for insurance, but Philadelphia Indemnity. Thus, assuming there was a fraud involved, it was only towards Philadelphia Indemnity." Hence, she argues, count three "must be dismissed." We disagree.

¶14 The record reflects that, in June 1999, Chisholm submitted an application for insurance with Philadelphia Indemnity, which issued a policy providing SMI's officers and directors with $3 million in coverage. Apparently, Philadelphia Indemnity then contacted Fireman's Fund about the possibility of the latter's providing excess insurance coverage. A representative from Fireman's Fund testified that her company received "a faxed copy of the [application Chisholm] sent to Philadelphia as the underlying insurance policy." She added, however, that Chisholm then filed a separate application for insurance with Fireman's Fund, following which Fireman's issued a secondary policy that provided $2 million in excess coverage. In applications to both Philadelphia Indemnity and Fireman's Fund, Chisholm made several misrepresentations and omissions concerning SMI's finances and business history. Accordingly, "[t]here was then specific intent to defraud twice, once as to each [insurance company]. Charging under two counts was not, therefore, multiplicitous." *Via*, 146 Ariz. at 116, 704 P.2d at 246.

Sufficiency of the Evidence

¶15 Chisholm next contends there was insufficient evidence to support her convictions on counts three and four. "In considering a claim of insufficient evidence, we construe the evidence in the light most favorable to sustaining the verdicts, and resolve all reasonable inferences against the defendant." *State v. Jensen*, 217 Ariz. 345, ¶ 5, 173 P.3d 1046, 1049 (App. 2008).

¶16 As outlined above, counts three and four alleged Chisholm fraudulently obtained insurance policies from Philadelphia Indemnity and Fireman's Fund. Chisholm concedes in her opening brief that, in the applications filed with both companies, she omitted material information about SMI. But, she contends, "the ramifications for such non-disclosure were indicated in the application; that claims arising from the omissions were excluded from the proposed insurance." She thus maintains there was no scheme to defraud the companies because she "merely obtained an insurance policy in which no claims could be made which related to the omissions."

¶17 Chisholm's argument is based on the mistaken premise that, to be convicted under § 13-2310, a defendant must have sought or successfully obtained a financial gain from the scheme to defraud. Although § 13-2310 requires proof that the defendant "knowingly obtains a benefit," we have previously determined that the benefit need not be pecuniary, but can be "'anything of value or advantage.'" *State v. Henry*, 205 Ariz. 229, ¶ 15, 68 P.3d 455, 459 (App. 2003), *quoting* A.R.S. § 13-105. Testimony at trial showed that Chisholm obtained the insurance policies only after being questioned about SMI's lack of insurance by

a member of SMI's board of directors, who had a professional background in insurance. The insurance policies were therefore a benefit to Chisholm, even if she were unable to receive compensation under them, because they allowed her to inform members of SMI's board of directors and SMI's investors that she had obtained necessary insurance, which in turn enabled her to perpetuate the scheme to defraud its investors. We therefore conclude there was sufficient evidence to support Chisholm's convictions for knowingly obtaining benefits by false or fraudulent pretenses pursuant to her schemes to defraud Philadelphia Indemnity and Fireman's Fund.

Double Jeopardy

¶18 Chisholm next contends that charging her with fraudulent schemes and artifices under § 13-2310, selling unregistered securities in violation of § 44-1841, and illegally conducting an enterprise in violation of § 13-2312(B) violated her double jeopardy rights because, she claims, §§ 13-2310 and 44-1841 constitute the "same offense" as § 13-2312(B) for purposes of double jeopardy. Because a double jeopardy violation constitutes fundamental error, we consider this issue even though Chisholm failed to raise it below. *See McGill*, 213 Ariz. 147, ¶ 21, 140 P.3d at 936.

¶19 The double jeopardy clauses of the Arizona and United States Constitutions protect a person against, *inter alia*, multiple convictions and punishments for the "same offense."[3] *State v. Nunez*, 167 Ariz. 272, 275, 806 P.2d 861, 864 (1991). To determine

[3]Although Chisholm contends her double jeopardy rights were violated when "she was charged" with the "same offense" in separate counts of the indictment, in the present context double jeopardy does not protect a person from being charged and tried for the "same

whether offenses are the "same offense" for purposes of double jeopardy, we apply the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). *See Lemke v. Rayes*, 213 Ariz. 232, ¶ 16, 141 P.3d 407, 413 (App. 2006). Under that test, two offenses may constitute the "'same offense' unless each provision requires proof of a fact that the other does not." *Id*. This analysis emphasizes the elements of the two crimes. If each "'requires proof of a fact that the other does not, the *Blockburger* test is satisfied.'" *Id.*, *quoting Iannelli v. United States*, 420 U.S. 770, 786 n.17 (1975).

¶20 We begin with the elements of illegally conducting an enterprise. Section 13-2312(B) provides: "A person commits illegally conducting an enterprise if such person is employed by or associated with any enterprise and conducts such enterprise's affairs through racketeering." "Racketeering" is defined in A.R.S. § 13-2301(D)(4)(b) as any act "that is chargeable or indictable under the laws of the state or country in which the act occurred . . . and that would be punishable by imprisonment for more than one year under the laws of this state and . . . involves" any one of thirty listed acts, if "committed for financial gain." Among the thirty listed acts are "[a] scheme or artifice to defraud," § 13-2301(D)(4)(b)(xx), and the "[i]ntentional or reckless sale of unregistered securities or real property securities," § 13-2301(D)(4)(b)(xix).

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offense"—only from multiple convictions and punishments for that offense. *See United States v. Carpenter*, 422 F.3d 738, 747 (8th Cir. 2005); *see also Merlina v. Jejna*, 208 Ariz. 1, ¶ 14, 90 P.3d 202, 205 (App. 2004). Because Chisholm was in fact convicted and sentenced for each charge in the indictment, we address her claim accordingly.

¶21 Chisholm was convicted of illegally conducting an enterprise "as set forth in Counts 2-58" of the indictment. Counts two through four of the indictment alleged fraudulent schemes and artifices in violation of § 13-2310, and counts five through fifty-eight alleged separate sales of unregistered securities in violation of § 44-1841. Chisholm was therefore convicted of illegally conducting an enterprise based on fraudulent schemes and numerous sales of unregistered securities, pursuant to § 13-2312(B) and § 13-2301(D)(4)(b)(xix) and (xx).[4]

¶22 Division One of this court has determined that, for purposes of double jeopardy, the offense of selling unregistered securities in violation of § 44-1841 constitutes the "same offense" as illegally conducting an enterprise based on the sale of unregistered securities. *See State v. Cook*, 185 Ariz. 358, 364, 916 P.2d 1074, 1080 (App. 1995). In *Cook*, the court stated:

> Section 44-1841 simply prohibits the sale or offer to sell any unregistered security. Because a violation of section 13-2312 through section 13-2301(D)(4)[(b)(xix)] requires the preparatory or completed offense of selling unregistered securities, section 44-1841 is a lesser-included offense of sections 13-2312 and 13-2301(D)(4)[(b)(xix)]. In other words, there is no element in section 44-1841 that is not an element of 13-2301(D)(4)[(b)(xix)]; one could not violate sections 13-2312 and 13-2301(D)(4)[(b)(xix)] without also violating section 44-1841. They are the same offense under the federal Double Jeopardy Clause.

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[4]The state argues the "predicate felony supporting [Chisholm's] conviction for illegally conducting an enterprise was *either* fraudulent scheme and artifice *or* the sale of unregistered securities." However, Chisholm was charged with illegally conducting an enterprise through racketeering based on both of these offenses, and the jury found her guilty as charged.

Id. For purposes of this decision, we will treat a fraudulent scheme or artifice in violation of § 13-2310 as a lesser-included offense of illegally conducting an enterprise based on a scheme or artifice to defraud. Therefore, for present purposes, the two constitute the "same offense" under the double jeopardy clauses.

¶23 In the context of a single trial, however, "even if statutory provisions do constitute the same offense, we will not conclude that multiple punishments are prohibited if we can discern that the legislature clearly intended otherwise." *State v. Siddle*, 202 Ariz. 512, ¶ 13, 47 P.3d 1150, 1155 (App. 2002). To determine legislative intent, "we examine the language of the statute at issue, 'the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose.'" *Greenwood v. State*, 217 Ariz. 438, ¶ 16, 175 P.3d 687, 691 (App. 2008), *quoting In re Estate of Jung*, 210 Ariz. 202, ¶ 12, 109 P.3d 97, 99 (App. 2005). In the absence of a clear indication to the contrary, "we presume that the legislature did not intend to authorize multiple punishments for a violation of two statutory provisions that are the same offense for double jeopardy purposes." *Siddle*, 202 Ariz. 512, ¶ 9, 47 P.3d at 1154.

¶24 To commit illegally conducting an enterprise, a person must conduct an enterprise "through racketeering." § 13-2312(B). Racketeering, by definition, requires the commission of an offense that would constitute a felony in Arizona. § 13-2301(D)(4). Thus, "[b]y enacting § [13-2312(B)], which by its express terms requires the commission of another felony offense, the legislature clearly intended to permit multiple punishments." *Siddle*, 202 Ariz. 512, ¶ 14, 47 P.3d at 1155.

¶25 Moreover, the offense of illegally conducting an enterprise normally constitutes a class three felony. § 13-2312(D). Several of the thirty acts listed in the racketeering statute, however, constitute more serious offenses in Arizona. For example, racketeering may be based on the underlying offenses of terrorism, homicide, or kidnapping. § 13-2301(D)(4)(a) and (b)(i) and (iii). Each of these acts, when charged as a separate offense, constitutes at least a class two felony. *See* A.R.S. § 13-2308.01(C) (terrorism a class two felony); A.R.S. § 13-1103 through § 13-1105 (manslaughter a class two felony, first- and second-degree murder class one felonies); A.R.S. § 13-1304(B) (kidnapping a class two felony). If a charge of illegally conducting an enterprise is based on one of these underlying offenses, to treat the underlying offenses as lesser-included offenses of illegally conducting an enterprise "would actually reduce the penalties for the [underlying] offenses. We presume the legislature did not intend this." *Siddle*, 202 Ariz. 512, ¶ 14, 47 P.3d at 1155. Accordingly, we conclude that, in the context of a single trial, double jeopardy does not preclude separate convictions and sentences for violations of § 13-2310, § 44-1841 and § 13-2312(B). Therefore, Chisholm's convictions for those offenses were proper.[5]

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[5]In *State v. Cook*, Division One of this court found double jeopardy precluded the defendant's being prosecuted under § 13-2312(B) by way of § 13-2301(D)(4)(b)(xix) when he had previously been punished in an administrative action by the ACC for violating § 44-1841. *See Cook*, 185 Ariz. at 359-60, 363-64, 916 P.2d at 1075-76, 1079-80. Our decision here is not at odds with *Cook* because that case addressed the double jeopardy protection against second prosecutions after a conviction, *see id.*, not the protection against multiple punishments and convictions for the same offense in the context of one trial, as here.

A.R.S. § 13-116

¶26 Chisholm was sentenced to presumptive prison terms of 3.5 years for count one, illegally conducting an enterprise; five years each for counts two and three, fraudulent schemes and artifices; 9.25 years for count four, fraudulent scheme and artifice; and 4.5 years each for counts five through fifty-eight, sale of unregistered securities. The trial court ordered counts one through four to be served consecutively and counts five through fifty-eight to be served concurrently with each other but consecutively to the sentences on counts one through four. After Chisholm moved to modify her sentence claiming all fifty-eight counts should be served concurrently, the trial court reduced the term for count fifty-eight to 3.5 years and ordered it to run concurrently with count one. On appeal, Chisholm claims "A.R.S. § 13-116 requires the sentences imposed in counts 2-58 to be concurrent."

¶27 Section 13-116 provides that "[a]n act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Essentially, § 13-116 prohibits consecutive sentences for a "single act." *State v. Hampton*, 213 Ariz. 167, ¶ 64, 140 P.3d 950, 965 (2006). To determine whether a defendant's conduct is a single act, we apply the following test:

> [W]e will . . . judge a defendant's eligibility for consecutive sentences by considering the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework,

> however, we will then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. § 13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences.

State v. Gordon, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989).

¶28 Chisholm contends that illegally conducting an enterprise was the "ultimate crime" in this case. However, there were three victims of Chisholm's criminal activities: the investors of SMI, Philadelphia Indemnity, and Fireman's Fund. When there are multiple victims, "our definition of 'ultimate crime' varies by victim." *State v. Carreon*, 210 Ariz. 54, ¶ 103, 107 P.3d 900, 920 (2005). The "ultimate crimes" against Philadelphia Indemnity and Fireman's Fund were Chisholm's schemes to fraudulently obtain insurance policies from those companies. And the "ultimate crime" against SMI's investors was Chisholm's fraudulent scheme to obtain $24 million. Therefore, consecutive sentences were permissible under § 13-116 for counts two through four. *See State v. Henley*, 141 Ariz. 465, 467, 687 P.2d 1220, 1222 (1984) (consecutive sentences permissible for counts punishable under same section of law).

¶29 We must next determine whether the "ultimate crime" against SMI's investors and the sale of unregistered securities were a "single act" for purposes of § 13-116. *Hampton*, 213 Ariz. 167, ¶ 64, 140 P.3d at 965. Applying the first prong of the *Gordon* test, we subtract the evidence necessary to convict Chisholm of count two. The state showed that

Chisholm received $24 million from investors to whom she sold shares of SMI stock by means of false or fraudulent pretense, pursuant to a scheme or artifice to defraud. Subtracting this evidence from the factual transaction, the remaining evidence would be insufficient to support her convictions for sale of unregistered securities. And, applying the second prong of the *Gordon* test, Chisholm could not have obtained the benefit required to commit the fraudulent scheme against SMI's investors without selling unregistered securities. Furthermore, her conduct in committing the lesser crime did not cause SMI's investors "to suffer an additional risk of harm beyond that inherent in the ultimate crime." *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Therefore, the trial court erred by requiring counts five through fifty-eight to be served consecutively to count two.

¶30 Finally, we consider the sentence for illegally conducting an enterprise. Subtracting from the factual transaction the evidence necessary to convict Chisholm of all three ultimate crimes, the fraudulent schemes and artifices, the remaining evidence is insufficient to support her conviction for illegally conducting an enterprise. Indeed, the three "ultimate crimes" were essential elements of illegally conducting an enterprise as that offense was charged in the indictment. Chisholm could not have committed the ultimate crimes without also committing the lesser crime, and her conduct in committing the lesser crime did not cause the victims to "suffer an additional risk of harm beyond that inherent in the ultimate crime[s]." *Id*. The trial court erred, therefore, by requiring the sentence imposed on count one to be served consecutively to the sentences imposed on counts two through four.

Disposition

¶31 For the foregoing reasons, Chisholm's convictions are affirmed, but we remand the case for resentencing on count one and counts five through fifty-eight.

_____
PHILIP G. ESPINOSA, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge