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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. AARON ARREDONDO, Appellant.	2 CA-CR 2009-0194 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20032704

Honorable Richard S. Fields, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, Aaron Arredondo was convicted of theft, fraudulent scheme and artifice, and conspiracy to commit those offenses. The trial court sentenced

him to a combination of concurrent and consecutive sentences totaling ten years' imprisonment. Arredondo argues the court violated his right to counsel when it denied his requests to replace his appointed attorney with retained counsel and continue his trial date. He also contests the admissibility of certain evidence and the imposition of consecutive terms of imprisonment. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). For several years beginning in 1999, Arredondo persuaded a number of individuals to invest money with him, promising significant returns. Investors were directed to give their money to William Randall, a California attorney, for deposit in his trust account, with the understanding that the funds would be invested at Arredondo's direction in exchange for a monthly retainer of $10,000. Instead, these funds were actually used to pay preexisting investors and to support Arredondo's lavish lifestyle.

¶3 In 2000, D.S. invested $200,000 with Arredondo. After receiving account statements showing his investment was growing rapidly, he invested another $20,000 and then one million dollars. D.S. testified he felt comfortable investing with Arredondo because Randall, an attorney, was involved and because Arredondo had represented, and Randall had verified, that Arredondo had control over the Gilbert Family Trust (Trust), whose assets purportedly served as security for the investments. D.S. later requested the

return of his investment funds, but Arredondo never complied, instead providing a number of excuses why the money was unavailable. Eventually, D.S. sued Arredondo and Randall and obtained a judgment against them.

¶4 In 2003, Arredondo and Randall were each charged with fraudulent scheme and artifice, theft, and conspiracy to commit theft and fraudulent scheme and artifice. Counsel was appointed for Arredondo in April 2004, but he retained private counsel several months later, and a jury trial was set for December 2004. In September 2004, after the parties filed a joint motion to continue the trial date due to their respective calendars and the complex nature of the case, the trial court reset the trial for May 2005. In April 2005, Arredondo's retained counsel moved to withdraw based on "conflict resulting from irreconcilable differences." The court granted the motion, vacated the trial date, and granted Arredondo thirty days in which to retain new counsel. At the ensuing status conference, Arredondo stated he had not yet retained new counsel, and the court ordered that counsel be appointed. At the same proceeding, D.S. addressed the court and requested the trial be set "as soon as possible." However, at a status conference in August 2005, Arredondo's newly appointed counsel explained he would be on medical leave for much of the rest of the year, and the trial subsequently was rescheduled for April 2006. In February 2006, Arredondo's counsel again moved for a substantial continuance due to additional medical issues. Although D.S. again addressed the court and asked that the trial not be postponed, the court granted the motion and reset the trial for June 2006.

¶5 Seventeen days before the June 29 trial date, the state filed a motion opposing Arredondo's intention to substitute retained counsel for appointed counsel. Although Arredondo had not yet filed a pleading with the court, he had notified the prosecutor on June 9 that he planned to substitute retained counsel. Thereafter, Arredondo moved for an order allowing the substitution of two newly retained attorneys.[1] In his motion, he asserted he was "at odds with his current counsel, does not trust [him], and has no relationship with [him]."

¶6 At the hearing on Arredondo's motion, retained counsel both explained they had been hired only recently, due to Arredondo's prior inability to pay their retainers. Counsel also stated they would not be ready for the impending trial date and sought another continuance. The prosecutor opposed the motion, explaining travel arrangements already had been made for eight out-of-state witnesses, the trial was less than three weeks away, appointed counsel had represented Arredondo in the case for over a year, and D.S. "strenuously oppose[d]" yet another continuance. Retained counsel offered to pay $3,000 toward changes in the witnesses' travel arrangements if the trial were continued. The court set an additional hearing on the matter for several days later.

¶7 At the second hearing, retained counsel stated they would be ready for trial in September unless they saw the need for additional discovery after reviewing the case, in which case they would be ready by October or November. The prosecutor argued the

[1]Arredondo had retained both an attorney licensed to practice in California and local counsel based in Tucson.

timing of Arredondo's request was "definitely tactical" and explained he would not be available for parts of October and November "because of obligations to his family which got sacrificed because of this trial." D.S. also appeared and, once again, opposed another continuance, and the trial court heard in-camera testimony from Arredondo regarding his conflict with appointed counsel.

¶8 The trial court ultimately denied Arredondo's motion, explaining it had given consideration to the relevant factors, including the conflict between Arredondo and appointed counsel, the timing of the motion, inconvenience to witnesses, the time period between the original offense and trial, the number of changes of counsel that already had occurred, the number of continuances that already had been granted, appointed counsel's preparedness to try the case, and the complexity of the case. Although the court granted retained counsel permission to consult with appointed counsel, they did not appear at trial. Nor did Arredondo.

¶9 At trial, D.S. and several other investors testified about their investment experiences with Arredondo. In addition, Randall pleaded guilty and testified against Arredondo. Another witness testified that Arredondo had no legal access to the Trust's assets and that a provision in Trust documents prohibited encumbrances of those assets. Finally, a Lamborghini dealer and a jeweler both testified about large purchases made by Arredondo during the time D.S. made his investments.

¶10 The jury found Arredondo guilty as charged and the trial court issued a warrant for his arrest. Following his eventual arrest two years later, Arredondo was

sentenced to a five-year term of imprisonment for the conspiracy conviction, to be served consecutively to concurrent, five-year terms for the fraudulent scheme and artifice and theft convictions. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Jurisdiction Over Appeal

¶11 As a threshold argument, the state contends this court lacks jurisdiction over this appeal pursuant to A.R.S. § 13-4033(C). That statute bars a defendant from appealing a final judgment of conviction "if the defendant's absence prevents sentencing from occurring within ninety days after conviction and the defendant fails to prove by clear and convincing evidence at the time of sentencing that the absence was involuntary." The state argues Arredondo has no right to appeal because his absence prevented his sentencing from occurring for more than two years after his conviction and he did not prove at sentencing that his absence was involuntary.

¶12 Citing *State v. Soto*, 225 Ariz. 532, ¶¶ 2, 4, 241 P.3d 896, 896 (2010), Arredondo responds that § 13-4033(C)'s prohibition does not apply to him because he was in custody within ninety days of the statute's effective date. In *Soto*, our supreme court held that § 13-4033 "does not apply to persons who were returned to custody within ninety days of September 26, 2008," the statute's effective date. *Soto*, 225 Ariz. 532, ¶ 4, 241 P.3d at 896. Arredondo asserts he was arrested on October 25, 2008, extradited to Arizona, and was in custody in Arizona when he appeared in court on December 23,

2008. Although we find no support in the record for the October 2008 arrest date, the record does indicate Arredondo was in custody on December 20, 2008, which is within ninety days of the effective date of § 13-4033. Accordingly, under the rule announced in *Soto*, § 13-4033(C) does not bar Arredondo's appeal.

Denial of Motion to Continue Trial

¶13 Arredondo first argues the trial court violated his Sixth Amendment right to obtain counsel of his choice by denying his motion to continue his trial and substitute privately retained counsel for appointed counsel. "The Sixth Amendment guarantees that, '[in] all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.'" *State v. Coghill*, 216 Ariz. 578, ¶ 40, 169 P.3d 942, 952 (App. 2007), *quoting* U.S. Const. amend. VI (alteration in *Coghill*). "That includes 'the right of a defendant who does not require appointed counsel to choose who will represent him.'" *Id.*, *quoting United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). But this right is not absolute, and "[t]rial courts retain 'wide latitude' in balancing the right to counsel of choice against the needs of the criminal justice system to fairness, court efficiency, and high ethical standards." *Id.*, *quoting Gonzalez-Lopez*, 548 U.S. at 152. We review de novo the trial court's interpretation of a constitutional right, *State v. Aragon*, 221 Ariz. 88, ¶ 4, 210 P.3d 1259, 1261 (App. 2009), and its ruling on a request for a continuance in order to substitute counsel for an abuse of discretion, *State v. Hein*, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983).

¶14 Whether the denial of a request for a continuance to substitute private counsel violates a defendant's rights depends on the circumstances of the case. *Aragon*, 221 Ariz. 88, ¶ 5, 210 P.3d at 1261. Factors relevant to that inquiry include:

> [W]hether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory.

Hein, 138 Ariz. at 369, 674 P.2d at 1367.

¶15 Applying these factors, the trial court did not abuse its discretion in denying Arredondo's request. A number of continuances already had been granted, including one when Arredondo retained his first private counsel and another when that attorney withdrew. Arredondo had competent appointed counsel who was prepared to try the case. Further, out-of-state witnesses already had made travel arrangements, the prosecutor would have had scheduling problems with a fall trial, and the victim objected to yet another continuance. Concerning the length of the requested delay, new counsel indicated they would need at least several months to prepare and might need to conduct additional discovery after reviewing the case, which was complex and had been scheduled for a multi-week trial. Finally, although the request may have been legitimate, Arredondo was dilatory in waiting until "the eve of trial," as characterized by the trial court given the complexity of the case, to request a substitution of counsel, particularly in light of the case's lengthy history. Accordingly, the court was well within its discretion in denying the motion to substitute counsel and continue the trial. *See Hein*, 138 Ariz. at

369, 674 P.2d at 1367 (no abuse of discretion in denying trial continuance to substitute counsel where trial previously continued, codefendant "anxious" for trial, many witnesses lived out of state, defendant's existing counsel prepared for trial, and counsel for state and codefendant ready for trial).[2]

¶16 In support of his argument, Arredondo primarily relies on *Aragon*, but we do not agree that case compels a conclusion the trial court erred. Although the defendant in *Aragon*, like Arredondo here, had maintained his delay in seeking substitution of counsel and a trial continuance had been caused by his previous inability to pay retained counsel, the defendant in *Aragon* had neither sought nor been granted any prior continuances, no witnesses would have been inconvenienced by a postponement, there was no victim "anxious for a resolution," and the case apparently was not complex. 221 Ariz. 88, ¶¶ 1-3, 6, 210 P.3d at 1260-61. In addition, the trial court in *Aragon* had denied the defendant's motion based, in large part, on its incorrect belief that such a continuance would violate Rule 8, Ariz. R. Crim. P., which requires cases to be tried within a defined timeframe. *Id.* ¶¶ 2-3, 7; *see also* Ariz. R. Crim. P. 8.4(a) (delays occasioned by defendant excludable under Rule 8). Thus, in contrast to the trial court's decision in *Aragon*, the denial of Arredondo's motion for a continuance did not involve "an

[2]Although Arredondo argues *Aragon* abrogated consideration of present counsel's competency and preparedness, that opinion does not reject this factor, but instead states that present counsel's readiness for trial "alone could not justify the court's denial of [a] request for a continuance" to substitute counsel. 221 Ariz. 88, ¶ 6, 210 P.3d at 1262. As noted above, this was only one of many factors supporting the trial court's decision in this case.

'unreasoning and arbitrary' adherence to [the court's] schedule without due regard for" Arredondo's request "to exercise his right to the counsel of his choice." 221 Ariz. 88, ¶ 9, 210 P.3d at 1262, *quoting Morris v. Slappy*, 461 U.S. 1, 11-12 (1983). The trial court's reasoned decision here was not an abuse of discretion.[3]

Witness Opinion Concerning Ponzi Scheme

¶17 Arredondo next argues the trial court erred in admitting a witness's opinion that Arredondo was operating "a Ponzi scheme," contending the testimony impermissibly invaded the province of the jury. During direct examination of Kenneth Johnson, the investigating officer with the Financial Investigations Unit of the Arizona Department of Public Safety, the prosecutor asked, "During your investigation of . . . the investment opportunities that were being offered by Mr. Arredondo, did you come to an opinion as to what Mr. Arredondo's operation was?" Defense counsel objected "on foundational grounds" and because "it's the ultimate legal conclusion." During the ensuing side-bar conference, the court asked whether "the opinion . . . is that this is a Ponzi scheme?" and the prosecutor responded, "No. [W]hat he's going to talk about is primal banking." The

[3]Although Arredondo strenuously protests that prior continuances were not for his benefit, as set forth above, one lengthy continuance occurred when Arredondo retained his first private counsel and another was granted when that attorney withdrew. Arredondo complains about that attorney's behavior, his distrust of his subsequently appointed counsel, and his inability to gather enough funds to pay for both a California attorney and local counsel in Tucson until several weeks before trial, but it was Arredondo who controlled the selection of his retained counsel throughout the proceedings. And, as outlined above, to the extent he was entitled to counsel of his choice, that was not the only factor at play in the trial court's exercise of its discretion. *See Hein*, 138 Ariz. at 369, 674 P.2d at 1367 (setting forth factors for determining whether request for continuance to substitute counsel violates defendant's rights).

court then directed the prosecutor to establish foundation before asking Johnson for his opinion. When the prosecutor resumed his examination, after asking Johnson to describe his training and experience, he asked, "So, what is your opinion?" Johnson responded, "It's my opinion that Mr. Arredondo's program operated as a Ponzi scheme."

¶18 Arredondo did not move to strike this answer, request a mistrial, or otherwise object, and the state maintains he therefore has forfeited review of this testimony absent fundamental, prejudicial error.[4] The state further contends that, by failing to argue in his opening brief that admission of Johnson's testimony was fundamental error, Arredondo has waived the claim on appeal. In his reply brief, Arredondo contends his earlier objection, followed by the side-bar conference, excused any need for him to object to Johnson's subsequent testimony. Alternatively, he argues this issue constitutes fundamental error.

¶19 Arredondo relies on *State v. Briggs*, 112 Ariz. 379, 542 P.2d 804 (1975), in support of his argument that he preserved this issue below. Although *Briggs* provides "the mere fact that an objection is not lodged simultaneously . . . is not determinative of the question of waiver," it further explains "[t]he essential question is whether or not the objectionable matter is brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived." *Id.* at 382, 542 P.2d at 807. In *Briggs*,

[4]Johnson thereafter testified Arredondo "appeared to be offering . . . what's referred to as a prime bank scheme or prime note bank scheme." Later, the prosecutor asked Johnson to explain what a Ponzi scheme was, and Johnson did so, again without any objection from Arredondo.

our supreme court addressed whether a pretrial motion in limine is sufficient to preserve an alleged error for appeal without the need for an objection at trial, an issue not raised here. *Id.* at 381, 542 P.2d at 806. As an initial matter, we disagree with Arredondo's contention that "the side-bar was the functional equivalent of a ruling on a motion in limine" because, based on the record, Arredondo did not seek such a ruling. Moreover, during the side-bar conference, the trial court appears to have resolved Arredondo's objections to the state's questioning, and his failure to object to or move to strike Johnson's subsequent responses did nothing "to advise the court that the [claim of] error was not waived." *Id.* at 382, 542 P.2d at 807. Accordingly, Arredondo has forfeited the right to seek relief on this ground absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d 899, 916 (2006) ("A defendant generally waives his objection to testimony if he fails either to ask that it be stricken, with limiting instructions given, or to request a mistrial.").

¶20 Additionally, Arredondo has waived our review of this claim for fundamental error by failing to assert or argue in his opening brief that the alleged error was fundamental and prejudicial. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (concluding argument waived because defendant "d[id] not argue the alleged error was fundamental"); *see also Henderson*, 210 Ariz. 561, ¶¶ 19-20, 26, 115 P.3d at 607-08 (on review for fundamental error, defendant must show error goes

to foundation of case, takes right essential to defense, denies him fair trial, and "caused him prejudice").

¶21 Although Arredondo argued in his reply brief that Johnson's testimony constituted fundamental error, we do not address issues raised for the first time in a reply brief. *See State v. Guytan*, 192 Ariz. 514, ¶ 15, 968 P.2d 587, 593 (App. 1998); *see also State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) ("'[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.'"), *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).[5] Accordingly, Arredondo has failed to demonstrate he is entitled to relief on this issue.[6]

Admission of Other-Act Evidence

¶22 Arredondo next argues the trial court abused its discretion in admitting certain other-act evidence because the state had failed to specify the prior acts it planned

[5]Arredondo cites *State v. White*, 160 Ariz. 24, 770 P.2d 328 (1989), as an example of this court's consideration of an issue even though the defendant "apparently" first alleged fundamental error in his reply brief. His reliance on that case is unavailing, however, because at the time it was decided, appellate courts had an independent duty to search the record for fundamental error. *Compare State v. Mauro*, 159 Ariz. 186, 193, 766 P.2d 59, 66 (1988) (explaining under A.R.S. § 13-4035, appellate court had duty to search record for fundamental error), *with State v. Lacy*, 187 Ariz. 340, 354-55, 929 P.2d 1288, 1302-03 (1996) (recognizing repeal of § 13-4035 in 1995).

[6]Similarly, to the extent Arredondo suggests that certain exhibits were admitted without sufficient foundation, he has failed to develop this issue with adequate argument, and we therefore decline to consider it. *See Moody*, 208 Ariz. 424, n.9, 94 P.3d at 1147 n.9.

to admit at trial, to identify each act's proper purpose under Rule 404(b), Ariz. R. Evid., and to prove the commission of each act by clear and convincing evidence. He contends that "because the court failed to require the State to identify the prior acts it was proffering, [their] proper purpose or to meet its burden of proof," the court improperly admitted unduly prejudicial other-act evidence.

¶23 Before trial, the state had moved to introduce evidence of other investors involved in the same scheme as D.S. pursuant to Rule 404(b). Under that rule, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," but may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). After a hearing, the trial court ruled that testimony from other investors about their experiences was relevant and could be presented for proper purposes under Rule 404(b) such as absence of mistake and a common plan. The court also explained that, because it could not determine until trial whether the prejudicial effect of specific testimony would outweigh its probative value, defense counsel would "have to raise his objections as they come up."

¶24 Arredondo now contends the trial court abused its discretion in "admitt[ing] several unduly prejudicial prior acts which the State had never previously mentioned, which had little probative value or proper purpose, and sometimes lacked relevance." Specifically, Arredondo challenges (1) "Randall's testimony that his guilty plea required him to pay [restitution to D.S.] and a list of several other investors"; (2) M.S.'s testimony

that Arredondo had stopped payment on a check to him and then had stopped taking his calls; and (3) admission of Exhibits 37, 67, and 84, which pertained to "attempts to collect monies owed to at least 25 other prior investors."

¶25 As the state points out, however, Arredondo did not object to Randall's testimony regarding the restitution required by his plea agreement, M.S.'s testimony about his dealings with Arredondo, or admission of the three exhibits.[7] Accordingly, he has forfeited this claim for all but fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Because he does not argue that the admission of any of this evidence constituted fundamental error, the claim is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.[8]

Bank Testimony

¶26 Arredondo next contends the trial court abused its discretion by admitting testimony about the International Trust Bank, arguing it was hearsay and violated his rights under the Confrontation Clause. At trial, the state presented evidence that Arredondo had obtained a "reserve cash certificate" purportedly issued by the

[7]Although Arredondo initially objected to Exhibit 67 on foundational and hearsay grounds and because defense counsel had "a feeling this is going to go into other bad acts evidence," the exhibit was withdrawn; when it was reintroduced, defense counsel had no objection to its admission.

[8]The same is true for Arredondo's arguments that the trial court should have precluded, as unduly prejudicial under Rule 403, Ariz. R. Evid., the testimony of another witness about amounts Arredondo owed other investors and the state's questions about Arredondo's "expensive suits, watches, [and] cars." Not only did he fail to object to these questions and testimony at trial, but he also fails to argue they amount to fundamental, prejudicial error.

"International Trust Bank" and had represented to D.S. that the certificate secured a portion of D.S.'s investment. Johnson testified he had investigated the International Trust Bank Limited of Riga, Latvia by contacting the Office of the Comptroller of the Currency Department of Treasury in Washington, D.C., "because they have records of all banks licensed to do business in the United States, and all American banks which do business here, and all foreign banks licensed to do business here." In response to the prosecutor's question, "Were you able to find the International Trust Bank Limited of Riga, Latvia?" Johnson replied, "There was no record." Defense counsel objected on hearsay grounds, and the court overruled his objection.

¶27 We need not resolve whether this testimony was erroneously admitted hearsay or violated Arredondo's confrontation rights because "Confrontation Clause and hearsay rule violations are subject to harmless error analysis." *State v. Bocharski*, 218 Ariz. 476, ¶ 38, 189 P.3d 403, 413 (2008). "'Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.'" *State v. Anthony*, 218 Ariz. 439, ¶ 39, 189 P.3d 366, 373 (2008), *quoting State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). "'The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" *State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 236 (2009), *quoting Anthony*, 218 Ariz. 439, ¶ 39, 189 P.3d at 373 (alteration in *Valverde*). "We can find error harmless when the evidence against a defendant is so

overwhelming that any reasonable jury could only have reached one conclusion." *Anthony*, 218 Ariz. 439, ¶ 41, 189 P.3d at 373.

¶28 In the face of all the evidence already discussed and upheld, Arredondo never seriously contested that he fraudulently took money from D.S. and spent it for his own purposes. His defense strategy at trial was essentially that because Randall was "gullible" and "stupid" and Arredondo was "able to use [him] []as a[n unwitting] tool," there was insufficient evidence of an agreement between them necessary to convict him of conspiracy. In support, Arredondo's counsel argued that Randall "bought [Arredondo's story] just like all the other alleged victims in this case," "[a]nd if he's not guilty, then Mr. Arredondo's not guilty, because there needs to be this agreement." Accordingly, on this record we conclude Johnson's testimony about the results of his investigation would not have affected the jury's determination, and therefore the error was harmless. *See State v. Moody*, 208 Ariz. 424, 457, 94 P.3d 1119, 1152 (2004) (error harmless where defendant "never seriously contested that he killed the victims" and sole defense was that he was insane).

Consecutive Sentences

¶29 Finally, Arredondo argues the trial court erred when it ordered his conspiracy sentence to be served consecutively to his sentences for theft and fraudulent scheme and artifice, contending both below and on appeal that a consecutive sentence violates the double-punishment statute. Section 13-116, A.R.S., prohibits the imposition

of consecutive sentences for offenses arising out a single "act or omission."[9] We review de novo whether consecutive sentences are permissible under § 13-116. *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

¶30 To determine whether conduct constitutes a single act for purposes of § 13-116, we apply the following test set forth by our supreme court in *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989):

> [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.

[9]It is arguable that no analysis is necessary under this statute when a defendant is convicted of both conspiracy to commit an offense and the underlying offense itself, because the evidence necessarily would demonstrate that two distinct crimes were committed by two different sets of acts. At the very least, such analysis would appear inapplicable where the conspiracy involves overt acts and separate crimes that are not inextricably bound up in one factual transaction. However, in *State v. Roseberry*, 210 Ariz. 360, ¶¶ 57-62, 111 P.3d 402, 412-13 (2005), our supreme court addressed an analogous conspiracy situation under the § 13-116 framework, and neither the state nor Arredondo disputes that this framework should apply here as well.

State v. Anderson, 210 Ariz. 327, ¶ 140, 111 P.3d 369, 400 (2005), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (alterations in *Anderson*).

¶31 Under the first part of the *Gordon* analysis, we initially determine whether conspiracy, theft, or fraudulent scheme and artifice is "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.'" *Urquidez*, 213 Ariz. 50, ¶ 7, 138 P.3d at 1179, *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. The parties agree conspiracy is the ultimate offense in this case. *See State v. Roseberry*, 210 Ariz. 360, ¶ 59, 111 P.3d 402, 413 (2005) (designating conspiracy as ultimate charge).

¶32 We next subtract the evidence necessary to convict on that charge and determine whether the remaining evidence is sufficient to obtain convictions for theft and fraudulent scheme and artifice. *See State v. Carreon*, 210 Ariz. 54, ¶ 104, 107 P.3d 900, 920 (2005); *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. To convict Arredondo of theft, the state was required to prove he knowingly "[c]onvert[ed] for an unauthorized term or use services or property of another entrusted to [him] or placed in [his] possession for a limited, authorized term or use." A.R.S. § 13-1802(A)(2). The offense of fraudulent schemes and artifices required proof that Arredondo "knowingly obtain[ed] any benefit" pursuant to "a scheme or artifice to defraud" by means of "false or fraudulent pretenses, representations, promises or material omissions." A.R.S. § 13-2310(A). And to convict Arredondo of the offense of conspiracy to commit theft and fraudulent scheme and artifice, the state was required to prove that he, "with the intent to promote or aid the

commission of" these offenses, "agree[d] with one or more persons that at least one of them . . . will engage in conduct constituting" these offenses and that one of them committed "an overt act in furtherance of" the offenses. A.R.S. § 13-1003(A).

¶33 Arredondo argues there is insufficient evidence of either theft or fraudulent scheme and artifice after subtracting the evidence necessary for conspiracy because "the only way that the government could prove that [he] received and converted the funds (theft) and prove that he obtained a benefit (fraud schemes) was with evidence of the agreement between Randall and Arredondo to deposit [D.S.]'s money in Randall's account and transfer it to Arredondo." He contends that "[s]ubtracting that agreement, which was the foundation of the conspiracy, the State could not prove that [he] had even received the funds, let alone converted them."

¶34 Even if we accept Arredondo's argument, however, he ignores the fact that D.S. invested with Arredondo, through Randall, on three different occasions. Accordingly, evidence of any one of these investments with Randall (and the subsequent transfer to Arredondo) supports the conspiracy offense, and the evidence of the other two transactions remains to satisfy the elements of theft and fraudulent scheme and artifice. Thus, the first *Gordon* factor suggests the offenses constituted multiple acts, and consecutive sentences would be permissible. *See Roseberry*, 210 Ariz. 360, ¶ 60, 111 P.3d at 413 (concluding consecutive sentences not precluded because "the evidence established two distinct crimes that were committed by two entirely different sets of acts," one of which was conspiracy).

¶35 Proceeding to the next part of the *Gordon* test, we consider whether "'it was factually impossible to commit the ultimate crime without also committing the secondary crime.'" *Anderson*, 210 Ariz. 327, ¶ 140, 111 P.3d at 400, *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Considering the factual episode as a whole, the evidence demonstrated that Arredondo and Randall could have conspired to defraud D.S. and take his funds without ever actually obtaining them. Accordingly, it was possible for Arredondo to commit conspiracy to commit theft and fraudulent scheme and artifice without committing theft and fraudulent scheme and artifice. *See Roseberry*, 210 Ariz. 360, ¶ 61, 111 P.3d at 413 (defendant "could have conspired to transport the drugs without ever actually transporting them"). This factor, too, supports the imposition of consecutive sentences.

¶36 There is no need to proceed to the third *Gordon* factor because our analysis of the first two factors has demonstrated that Arredondo's conduct constituted multiple acts. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (if analysis of first and second factors indicates single act under § 13-116, court "will then consider" third factor); *see also Anderson*, 210 Ariz. 327, ¶ 143, 111 P.3d at 400 (determining offenses were not single act under § 13-116 after completing second part of *Gordon* analysis); *Carreon*, 210 Ariz. 54, ¶¶ 104-06, 107 P.3d at 920-21 (same); *State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993) (explaining *Gordon* does not require reaching third factor if consecutive sentences permissible under first two factors). *But see Roseberry*, 210 Ariz. 360, ¶¶ 58-62, 111 P.3d at 412-13 (reaching third part of *Gordon* analysis

without discussion even though first two factors supported consecutive sentences); *Anderson*, 210 Ariz. 327, ¶ 144, 111 P.3d at 400-01 (same). We therefore conclude consecutive sentences were permissible under *Gordon* and § 13-116, and the trial court committed no error.

Disposition

¶37 For the foregoing reasons, Arredondo's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge