IN THE IOWA SUPREME COURT

NO. 15-1515
CRIMINAL

STATE OF IOWA

APPELLEE,

V.

EDDIE TIPTON

APPELLANT.

APPEAL FROM THE IOWA DISTRICT COURT OF POLK COUNTY
HONORABLE JEFFREY FARRELL

APPELLANT'S FINAL BRIEF AND ARGUMENT

STOWERS & SARCONE PLC
Dean Stowers
West Glen Town Center
650 S. Prairie View Drive, Suite 130
West Des Moines, IA 50266
Telephone: (515) 224-7446
Fax: (515) 225-6215
Email: dean@stowerssarcone.com
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

STATEMENT OF THE ISSUES

I. Was there insufficient evidence on attempting to redeem or passing a lottery ticket, Count 1, where there was no attempt to redeem by the Defendant or evidence of fraudulent intent was presented, and where no evidence of passing or how the ticket came to be in the hands of the unrelated parties who attempted to redeem it was presented, and was there insufficient evidence on tampering with lottery equipment, Count 2, where no evidence of tampering was presented, and the lack of evidence was the only theory upon which the State based its case?

State v. Walker, 856 N.W.2d 179 (Iowa 2014)

State v. Whistler, 231 Iowa 1216 (1942)

State v. Perry, 69 N.W.2d 412 (Iowa 1995)

II. Should both Counts have been dismissed where they were committed outside the applicable limitations period and the State took over a year to pursue a diligent investigation after inquiry notice, and, in the alternative, should the jury have been instructed on the statute of limitations where one was requested by the Defendant and there was a factual issue to consider?

Grunewald v. U.S., 353 U.S. 391 (1957)

State v. Wilson, 573 N.W.2d 248 (Iowa 1998)

Sparks v. Metalcraft, 408 N.W.2d 347 (Iowa 1987)

State v. Compiano, 154 N.W.2d 845 (Iowa 1967)

III. Should a ruling be reversed where there were numerous trial errors, including allowing evidence to be presented about what unavailable witnesses would have said if they had been called, failing to allow evidence that no future tampering had been done on the computers after the alleged commission date which would have cast doubt on the State's theory, and failing to instruct the jury correctly on a number of key issues?

ROUTING STATEMENT AND REQUEST FOR ORAL ARGUMENT

Edward Tipton requests that this case be transferred to the Court of Appeals. This case presents application of existing legal principles, including the start date of the statute of limitations and inquiry notice as enunciated in State v. Wilson, 573 N.W. 248, 253 (Iowa 1998). Tipton requests 15 minutes at oral argument.

STATEMENT OF THE CASE

A. Nature of the Case

Tipton appeals the denial of a motion in arrest of judgment based on sufficiency of the evidence, the denial of a motion in arrest of judgment and motion to dismiss regarding the statute of limitations, and several erroneous evidentiary rulings and jury instructions given by the district court.

B. Course of Proceedings and Disposition in the District Court

On January 15, 2015, trial information was filed charging that between December 2010 through January 17, 2012, Tipton, either himself or through others, passed or attempted to redeem a lottery ticket purchased on December 23, 2010 with the intent to defraud in violation of Iowa Code § 99G.36(1). On Count 2, the trial information alleged that Tipton tampered with lottery equipment on November 20, 2010 with intent to influence the winning of the prize in violation of Iowa Code § 99G.36(2). Because the State lacked sufficient evidence, the court dismissed with prejudice the State's claim that Tipton aided and abetted another in committing these offenses. (TT[1]538). Although there was no evidence that Defendant tampered with any computer or personally attempted to redeem or pass the lottery ticket, the jury returned a verdict of guilty on July 20, 2015. Defendant was sentenced to two five-year consecutive prison terms.

[1] "TT" refers to Trial Transcript.

Defendant timely and repeatedly raised the statute of limitations defense because the offenses were committed more than three years prior to the filing of the January 15, 2015 Trial Information. The District Court repeatedly denied those motions, finding the date the State actually discovered the offense began the running of the statute of limitations. Tipton maintained the date that investigators were on notice of the need to investigate—not the date of actual discovery—triggered the commencement of the one-year fraud extension under Iowa Code § 802.5. Since the investigation started no later than November of 2011, the fraud extension does not extend the three-year general limitations period.

The sentence was imposed on Sept. 9, 2015. The notice of appeal was filed timely on Sept. 9, 2015.

STATEMENT OF THE FACTS

The prosecution called 12 witnesses to establish the charges; for convenience, a summary of the relevant testimony is laid out as presented.

Michael Boardman worked for the Maine lottery as the marketing manager, and saw the online video released by the DCI in October 2014 showing the December 23, 2010 Hot Lotto ticket purchase. (A[2]85-89). He did not know where this video came from nor who the purchaser was, but he thought it could be Eddie Tipton based upon the voice. (A84, 91-94). Boardman worked with Tipton on a project in Maine for approximately 4 or 5 days in June 2004 and again in May 2014, and over that same 10-year period talked to Tipton a few times on the phone. (A88-89, 90). Boardman admitted he could not visually identify the person in the video. (A94). On December 19, 2014, when interviewed by the DCI, he said he was not sure it was Tipton, but it's "something that needs to be investigated." (A92-93).

Kathleen Cubit worked at the Iowa Lottery. (A99). She watched and listened to the video released in October 2014. (A103). Cubit testified she was familiar with the Defendant's voice from having worked with him for a number of years and talked to him over a lengthy time period. (A99-100). She was certain the voice she heard was Tipton's, and claimed Defendant's distinctive words were the words "thank you" and "hello." (A98, 104). Cubit said she was so certain the voice she heard was

[2] "A" refers to Appendix.

Tipton, "if we had evidence that he was on the moon at the time, [she] would still believe that was his voice." (A104). The video/audio clip Cubit listened to, however, shows that the store clerk—not the customer—spoke the distinctive hello, and the customer said "no thanks," not "thank you." (A436, Trial Exhibit A-1, A132-133).

Steve Bogle worked for the DCI from 1988 to May 2011, then he joined the Iowa Lottery as the head of security and met Tipton. (A105-106, 129). When Bogle started working at the Lottery, an employee had already acquired, as of January 2011, an "initial video" from the QuikTrip recording January 23, 2010, and Bogle collected two other clips recording January 24. (A109-110, 130). Bogle admitted he did not know how any of the QuikTrip videos were prepared and selected; he merely "collected" them. (A111). None of the videos have any time or date stamping and no QuikTrip personnel testified at trial, but the court overruled a foundation objection. (A111-112). Bogle reviewed the videos by early 2012, and admitted it did not even "cross his mind" the person in the videos was Tipton. (A131).

Bogle testified someone claiming to be Philip Johnston of Quebec, Canada contacted the Lottery by phone on November 9, 2011 and provided the unique 15-digit serial code for the winning lottery ticket, stating he had purchased the ticket while in the area doing business. (A123). The hearsay objection was overruled when the prosecutor asserted, "it's not offered for the truth, your Honor." (A123). Bogle concluded the caller was lying based on the appearance and age of a Phillip Johnston

of Canada who he identified. (A124). Crawford Shaw, of New York, then became involved in claiming the ticket on behalf of Hexham Investments Trust—a trust of which he was president and the only officer identified in legal documents—and travelled to Des Moines for a January 17, 2012 meeting with Lottery officials. (A125-126). Unable to identify the purchaser and subsequent possessors of the ticket, the Lottery would not pay out the winnings, and on January 26 or 27, the claim for the prize was unconditionally withdrawn. (A126).

Bogle testified, over objection, that, at an unidentified time, he interviewed Johnston in Quebec, Canada, and attempted to interview Robert Rhodes and Robert Sonfield in Houston, Texas. (A127-128). Bogle stated Johnston answered his questions. (A127). However, Bogle testified to never receiving communication from Rhodes or Sonfield after leaving messages, going to their homes, and travelling to their offices. (A128).

Matt Anderson was an agent with the DCI who was assigned to criminally investigate the Hot Lotto claim on November 15, 2011, some six days after Johnston had contacted the Lottery. (A136). Anderson, over objection, testified he interviewed Johnston in Quebec City, Canada, at an unspecified time when Johnston was "under a cooperation agreement," and stated he was "cooperative." (A138-139). Anderson also testified, over objection, to the efforts he made to interview Rhodes and Sonfield and making a trip to Texas at an unspecified time. (A139-141).

Anderson testified his work as the lead agent ended in May 2014, when he transferred departments. (A144-145). Anderson was the lead agent on the Hot Lotto investigation for 30 months. After the release of the partial video in mid-October 2014, a different agent, Don Smith, took over the investigation. (A143). As a result of the video release, over 300 tips were submitted. (A142). Anderson followed up on just one identification tip. (A142).

Don Smith testified he was first assigned to the Hot Lotto investigation on October 30, 2014, some five months after Agent Anderson's involvement as lead agent ended and two weeks after the video was released to the public. (A146-147). There is no evidence of any lead agent between May and October 30 of 2014. Smith testified he acquired voluminous cell phone records for Defendant and others, and identified phone calls between Tipton's cell phone number and Rhodes' phone number. (A152, 155, 401-413). He testified he participated in a surprise, recorded interview of Tipton on November 7, 2014, which was played for the jury. (A148-149, 166, Trial Exhibit 7).

Smith was asked on cross-examination what the records showed concerning Defendant's whereabouts on December 23, 2010, the day the ticket was purchased at 3:24 p.m. (A159-165). Defendant resided in Norwalk, Iowa, and cell phone records showed on the morning of December 23 he was southeast of his home, in Prole, Iowa. (A159-160, 471-475). At 12:41, Defendant made a purchase at the

Walmart store in far West Des Moines, and by 1:55 p.m. Defendant was back in Prole, Iowa. (A161-162, 471-475). Defendant's next location was in Gardener, Kansas, at 7:19 p.m.—a 3 hour and 32 minute drive from the QuikTrip where the ticket was purchased. (A154, 163). The records showed Defendant continued to Texas on the afternoon of December 23, 2010, and was there through the New Year, including on December 29, 2010, when the winning numbers were drawn. (A163, 169, 471-475). Smith agreed the records would have required Defendant to travel from Prole, Iowa sometime after 1:55 p.m. on December 23, 2010, to the QuikTrip store on Northeast 14th 3:24 p.m., only to turn around and start his drive to Texas. (A165).

Smith agreed Tipton looked bigger and taller than the man in the QuikTrip video, and tried to meet with Tipton at the QuikTrip to see if Tipton fit the video-customer in terms of size, but could not get it arranged because Tipton had been placed on leave and he was trying to reach Tipton at the MUSL office, his work cell phone, and a landline that had no answering system. (A167-168, 282-283). It was only before Tipton's January 14, 2015 arrest that he tried Tipton's personal cell phone and received a call from Tipton's counsel, which Smith did not return. (A283-284, 156-158).

Michelle Krueger worked as a draw room manager at the Multistate Lottery Association (MUSL) and with Tipton for 10 years. (A174). She listened to a

recording that may have been from YouTube in the fall of 2014 at the request of a coworker and identified the voice on the recording as Tipton's. (A171-172, 175). She told Smith during an interview the detail she relied on in identifying Tipton was the dark navy Carhartt-type coat worn by the person in the video; she had seen Tipton wear such a coat before. (A176-178). But in her deposition, she testified she was not sure he owned such a coat. (A178). She then testified she believed the coat's material in the video was black leather, and she knew Tipton had a black leather coat. (A179). She claimed she could also identify Tipton based on the shoes, which appeared to be brown in color, even though they appeared to be "like any old pair of brown leather shoes" and the shoes cannot be identified in the video. (A179-180, Trial Exhibit A-1).

As to the voice, in her deposition Krueger identified the phrases "no sir," and "hello," which was spoken in a drawn out manner, and as distinctive. (A173, 181-183). The customer in the public release QuikTrip video does not, however, say "no, sir" and the more drawn out "hello" is the store clerk. (A436, Trial Exhibit A-1). On the public release video/audio, the customer spoke 9 words to the store clerk: "hello", "yes sir", "I do", "two tickets", and "no thanks". (A436, Trial Exhibit A-1).

Ed Stefan worked at MUSL from 2000 to April 2014 and was the Chief Information and Security Officer. (A186). He knew Tipton since the early 1990s,

lived next door to Tipton, and even referred him for employment at MUSL. (A187, 189-190, 206). Tipton's position before starting at MUSL in 2003 was at a consulting firm in Houston, Systems Evolution, owned by Robert Rhodes, who was also a good friend of Tipton. (A190, 196-197).

Stefan opined it would be "possible" for a person to install a program on one of the RNG computers at MUSL that dictated what numbers were picked for the lottery. (A194). He explained this could be a rootkit, but that a rootkit was really a term for a malicious software program installed on a computer secretly, and could be programmed to "do whatever you want." (A192-194). On cross-exam he admitted he never wrote a rootkit program, and his alleged knowledge only came from "tinkering with them" and seminars about them. (A199-200). He stated a rootkit could be installed remotely by hacking into a computer connected to the internet, or by directly installing such a program on the computer such as via a thumb drive, but the RNG computers were "stand alone" – never connected to the internet, and could not be accessed by the internet, when in the draw room. (A199-201, 204). In his deposition, he admitted without internet connectivity the person installing the rootkit "was done." (A204-205).

Although it was possible to insert a thumb drive on one of the RNG computers in the draw room, he explained it was impossible to know if a rootkit was installed in November 2010 because the computers were taken out of service and completely

wiped clean. (A192, 209-211). However, the software programs loaded onto the RNG computers at that time were certified by a third party and the third party verified that the "hash" or digital signature on the programs was identical to the version of the program loaded onto the RNG computers. (A202-203). Any change to the program of any kind would change its digital signature or hash, even a change so little as a period. (A203).

Stefan testified when he first saw the released video he was "literally sick to [his] stomach and could not stand erect after watching…" because he recognized the person as Tipton; however, in his March deposition, "when he was originally watching" the video, "no thought occurred in [his] brain that this was Tipton," and the inability to identify Tipton from the video "continue[d] to be correct." (A194, 207). He testified he had never seen Tipton wearing a black leather jacket like the customer in the video, and everything he knew about Tipton "screamed" it could not be him. (A205, 208).

Stefan admitted he co-owned a patent with Tipton that he valued in the millions of dollars. (A214-215). Stefan was contemplating ways to divest Tipton of ownership in the patent so he could be the sole owner. (A215).

Chuck Strutt was the Executive Director of MUSL before Tipton was hired in 2003 to enforce the general security standards applied to members of the MUSL Association and write code/programs for games. (A216, 218-219). He testified

Tipton's job included being up-to-date on computer security threats and malicious software threats, and Tipton would make presentations on such threats at seminars and conferences, materials from which Strutt found and explained. (A221-222, 225-226). Strutt viewed the video after he was aware DCI questioned Tipton at the MUSL offices on the 7th, and believed the person in the video was Tipton. (A227-228). After seeing the video clip, Strutt left Tipton in his job and went to a conference in Baltimore. (A227).

Jerry Bossard was the MUSL system administrator from 2008 to November 20, 2014, and explained in 2010 there were two computers in two separate acrylic cases that were specially designed to hold each computer tower turned sideways (the rear cable ports and connections to the right). (A229, 240-243). In the back of the case sat monitors for each computer fastened to the inside of the door, a keypad attached to the door, and a mouse. (A240-243). Each of the acrylic cases were under seal and dual lock and key, keys to which were held by the draw room manager and an outside auditor. (A233). The RNG computers were completely isolated, did not have internet access, were not connected to any network, and had not ever been out of the draw room—to Boussard's recollection—before being retired from service. (A234-237).

Bossard explained the software loaded onto the computers was sent to an outside firm to verify the software had nothing wrong and would generate random

numbers for the games. (A237). Then, the software, with its unique signature or hash, would be loaded onto each of the RNG computers. (A238-239). Every time the computer was accessed, including for clock times changes, the hash and digital signature for the game software was verified by using a software program provided by a third party vendor that performed that check. (A239).

Bossard confirmed because the computers were not connected to the internet, the clocks on the computers had to be adjusted periodically, which would be requested by draw room staff. (A244-246). The steps to change the clock took "maybe a minute," and included breaking the seal on the case, opening it using the manager and auditor's keys, logging on using an administrator password, opening the clock function that would appear on the monitor, resetting the time, closing the time program, and logging off. (A245-246). Then the draw staff logged on and recertified that the programs were the certified versions, which made the total process take about 3-5 minutes. (A246). All events were also logged by the draw room staff, as would be every instance where the seal on a case was broken and the computer accessed. (A246-247). To insert a thumb drive, someone would have to reach their arm in to the right rear of the acrylic box when opened, and reach around a narrow space, and when inserted a menu screen would appear on the RNG monitor. (A241-242). There was a camera system set up recording what appeared on the

computer screen monitor and also showing two separate angles of the activity in the draw room. (A243-244).

Chris Ruttencutter started working at MUSL part-time in the fall of 2014 and was asked to review and locate certain videos and draw room records dating back to 2010. (A249, 253-254). The MUSL log showed Tipton had been furnished access to the sealed RNG computer(s) in the draw room on November 20, 2010 for the purpose of making a clock change. (A250). Video was introduced from November 13, 2010 as an example of the equipment operating in an expected fashion, continuously recording the computer screen and movements in the room, and November 20, 2010, the date when Tipton allegedly tampered with an RNG computer. (Trial Exhibit 14, A251). There was an error with the DVR video recording system that caused previously unknown sporadic anomalies and errors in the recording operation of the system according to Ruttencutter's review of the archives. (A252-253).

Defendant introduced Exhibits G and G-1, a recording capturing of images 1 minute and 19-20 second apart, to show the precise time period on the MUSL system on November 20, 2010 between 20:45:48 and 20:52:26, when Tipton was in the draw room to change the clock. (A255-256). These images show the computer monitors and the two camera angles in the draw room. The first image at 20:45:48 shows Tipton standing near the doorway and the RNG cases are both closed, and the

first image with the left case open is at 20:48:27, but Tipton is still near the doorway. (A257, 452-458, Trial Exhibit G-1). The next image, at 20:49:48 seconds, shows Tipton near the doorway and the left computer case and door closed. (A257-258). At 20:51:06, Tipton is at the right-sided RNG computer, his left hand is in his pocket, his right hand near the keypad and mouse, and the computer screen shows the date and time settings program is open. (A258-259). The next image is at 20:52:26 (1 minute 20 seconds later) and shows Tipton left the draw room and logged out of the computer. (A259-260). Ruttencutter confirmed what was in the images was consistent with a clock change on the right-sided RNG computer. (A260).

Ruttencutter also introduced Exhibit H and H-1, which are images of Tipton in the draw room on the night of December 18, 2010, showing Tipton clean-shaven. (A261, 459-461, Trial Exhibit H-1). This was less than 5 full days before the ticket was purchased at the QuikTrip by a customer who appears to have a beard. There is nothing to indicate Tipton touched the RNG computers on December 18, and the marshalling instruction was specific that the State had to prove the tampering occurred on November 20, 2010. (A262).

Jason Maher worked in the IT department of MUSL since 2008 and was a friend of Tipton. (A263). He saw the publicly released QuikTrip video on November 11, 2014, and believed the voice and some characteristics resembled Tipton. (A264-265, 270). The clothing on the customer was not familiar to him and

he could not identify Tipton from the face in the video, but he identified the phrase, "ah, thank you." (A271). However, the words spoken by the customer on the public release video were "hello", "yes sir", "I do", "two tickets", and "no thanks." (A436, Trial Exhibit A-1).

At one point Tipton showed Maher an example of what a rootkit could do, but anyone, including Tipton, could go on the internet and figure out how to write one. (A268). MUSL did not check its RNG computers for rootkits in 2010. (A268). Maher explained it was part of Tipton's job to protect against the threat of things like rootkits and it would not be abnormal for him to know about them. (A269).

On cross-exam, Maher explained each draw was verified by an outside auditor and the draw manager in the draw room. (A272). There were no exceptions or deviations from procedures or requirements for a valid draw on December 29, 2010, as per the audit trail and the certified draw results. (A273-274, 462-470). The audit trail also shows the hash for the Hot Lotto program was checked before and after it selected the winning numbers on December 29, 2010 and the hash/digital signature matched the verified/certified version of the Hot Lotto software, which indicates there was no problem with the software run. (A274, 462-470).

Julie Johnson McLean has been an attorney with the Davis Brown Law Firm in Des Moines since 1994, and was contacted by Phillip Johnston on November 16, 2011 in connection with collecting on the ticket. (A287). On December 27, 2011

Crawford Shaw contacted her, and she later received a package from Shaw containing the ticket. (A288). She had no contact with Tipton and never met him before her deposition. (A301). After obtaining a conflict of interest waiver from the Iowa Lottery (who is also a client of the firm), the ticket was presented on December 29, 2011. (A289, 295). However, the Lottery would not pay the claim because it took the position internal security procedures were not satisfied. (A289). On January 17, 2012, Shaw traveled to Iowa and met with the Lottery, but no resolution was reached and the claim was subsequently withdrawn. (A290).

On cross, Johnson admitted the beneficiary of the trust was Hexham Investments Ltd, of which Crawford Shaw was the Trustee and Phillip Johnston was President. (A292). Johnson explained she did not make any false statements to the Lottery in connection with the claim, never intended to defraud the Lottery, and at all times acted "in the good faith belief that [she] had a bonafide right to pursue this claim on behalf of her clients." (A292). Iowa law provided a lottery ticket was a bearer instrument, and the person in possession was presumed to be the owner. (A293). A lottery ticket presumptively could be passed just like US currency, but to transact the ticket, it needed to be signed when submitted. (A294). She explained the Trust had provided all the information about the ticket it knew and was required by law to provide. (A294-295). Although the Lottery authority had the right and power to investigate, she and her clients provided everything required of them to

satisfy the requirements of a claim. (A294-295, 299-300). In addition to the Trust claiming the money, it proposed as an alternative that the money be paid to charity, but the Lottery declined. (A296).

When the Lottery refused to pay, consideration was given to filing a lawsuit for declaratory relief and a judicial order to pay the winnings. (A297). Although the outcome was uncertain, the Davis Brown Firm felt they could have filed a lawsuit, and that it had had a good faith basis for its position. (A297). The lawsuit was not pursued in part because the Firm requested $50,000 be paid in advance as suit fees and proposed in a written fee contract that Shaw, as Trustee, agree to a 1 million dollar contingent fee on any recovery. (A297-298).

After Johnson McLean testified, the State rested. (A301).

Defendant called five witnesses during his case.

Mike Kircher with the DCI examined a number of Tipton's work cell phones. (A329). He located photos with data concerning location from November 24, 2010 and January 1, 2011 that depicted Tipton clean shaven. (A330-331, 448-451).

Kathy Renaud testified that she worked at MUSL as the part-time drawing manager and was in the draw room on November 20, 2010. (A332, 452-458). During the time Tipton was in the draw room, Renaud, MUSL draw manager Sue Dooley, and an outside auditor were also in the small room, with Dooley and the

auditor looking directly at Tipton when he was at the computer. (A333-336, 452-458).

Renaud measured the size of the acrylic case that housed the computer tower with one of the towers set where it would have been in late 2010. When opened, the depth of the case was a little over 15 inches, meaning a person would have to extend their forearm into the case to reach the tower located tight against the rear. (A337). When the computer tower was set all the way to the left of the case, there was just 3.5 inches between the back of the tower where the USB port was located and the acrylic case. (A337). Renaud also produced some photos of Tipton at the January 16, 2011 Christmas party showing he was clean shaven, and stated Defendant was known to have facial hair 50% of the time. (A338-339). The customer in the QuikTrip video from December 23, 2010 appears to have a full beard and mustache. She could not recognize the person in the QuikTrip publicly released video as Eddie, but she believed the voice was him. (A340-342).

Delma Tipton is defendant's sister. She reviewed the publicly released video and audio and testified it was not her brother in that video because the size was wrong and her brother had never had a beard like the man in the video. (A343-344).

Steven Tipton is Tipton's younger brother. (A346). He reviewed both the short, public release QuikTrip video as well as the full length video with audio and said his brother was bigger than the guy in the video and could not grow a full beard

because he had bald spots on his cheeks. (A345-347). He also pointed out the video customer was left-handed, and his brother was right-handed. (A347). He said the video customer did not sound like his brother. (A347).

Tommy Tipton was a police officer for over 20 years and was serving his fourth four year term as a Judge in Texas. (A348). He testified it took 28 minutes to drive from his brother's residence to the QuikTrip on NE 14th Street and the distance was 22.5 miles. (A350). He located family photos of Tipton that show him clean-shaven from Christmas Day 2010, just two days after the ticket was purchased. (A351-353, 437-447). Tipton's size in the photos is enormous compared to the video customer. (A354, 437-447). After viewing both videos, Tommy described the person smaller than his brother, his brother being left-handed, and his voice being different. (A357). Although he paused when he heard the voice say the first "hello," when he listened further, it was not his brother speaking—it was the store clerk. (A355-356).

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUBMIT COUNT 1 AND 2 TO THE JURY ON EITHER THEORY THAT ULTIMATELY WAS SUBMITTED.

1. Preservation of Error

Defendant moved for judgment of acquittal on Count 1 and 2 at the close of the State's case and renewed that motion at the close of the evidence, but the court

denied the motions. (A302-309, 318-319, 358). In denying the motion, the court found Defendant "had access to and opportunity to be in a position to tamper with the lottery equipment" on November 20, 2010, and he had an "opportunity" without being seen to insert a thumb drive into the computer. (A318). The Court elaborated:

> Now, for him to have done it with three other people in the room would have been probably something out of a movie scene of *Mission Impossible* or something like that, but that opportunity did exist…There's no evidence that the rootkit was installed, but, again, due to the nature of the evidence that we have heard, that rootkit could be such where it would be wiped from the computer based upon the programming of this rootkit. So the evidence is such where it shows where it may not be able to be detected thereafter.

(A318-319). The Court ultimately denied the motion for acquittal saying:

> With regard to that tampering, the evidence is with regard to a motion of judgment acquittal I guess I would say on the thinner side. That's about as close as I have come in my time on the bench, which isn't that long, but to granting a motion for judgment of acquittal. But I do think that based upon all the evidence in the light most favorable to the State and drawing those reasonable inferences, that the State has cleared that hurdle, although barely, I guess, is what I will say.

(A319).

2. Standard of Review

> We review sufficiency-of-the-evidence claims for correction of errors at law. *State v. Webb,* 648 N.W.2d 72, 75 (Iowa 2002). We will uphold a verdict if it is supported by substantial evidence. *Id.* at 75. When a rational fact finder is convinced by the evidence that the defendant is guilty beyond a reasonable doubt, the evidence is substantial. *Id.* at 75–76. "The evidence is reviewed in the light most favorable to the State, and all of the evidence presented at trial, not just evidence that supports the verdict, is considered." *State v. Kemp,* 688 N.W.2d 785, 789 (Iowa 2004). However, it is the State's

> "burden to prove every fact necessary to constitute the crime with which the defendant is charged, and the evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *Id.*

State v. Brubaker, 805 N.W.2d 164, 171 (Iowa 2011). A verdict based on mere suspicion, speculation, or conjecture must be reversed. State v. Brown, 569 N.W.2d 113, 115 (Iowa 1997). "Guilt cannot be foundationed upon lack or absence of evidence….reasonable doubt may arise from evidence presented as well as absence thereof." State v. Franklin, 163 N.W.2d 437, 441 (Iowa 1968). Furthermore,

> the rule is well settled that the state must prove defendant's guilt by evidence, not by a lack thereof. Lack of evidence of guilt may be considered only as a basis for a reasonable doubt of guilt. Such a doubt may only lead to an acquittal, not a conviction.

State v. Perry, 69 N.W.2d 412, 416 (Iowa 1955).

3. Argument

A. The Evidence Was Insufficient to Submit Count 1 to the Jury.

As submitted, the jury was instructed the State was required to prove the following on Count 1:

> 1. On or about December 23, 2010 to January 17, 2012, defendant passed a lottery ticket or attempted to redeem a lottery ticket;
> 2. At the time the defendant passed or attempted to redeem a lottery ticket, the defendant acted with the specific intent to defraud;
> 3. One or more of the above elements occurred in the State of Iowa.

(A397).

Because the alternative theories of passing and attempting to redeem were submitted in one instruction and a general verdict was returned, even if the evidence was sufficient to submit on one theory, a new trial is required because the basis for the verdict is unknown. State v. Smith, 739 N.W.2d 289, 295 (Iowa 2007). If the evidence was insufficient to support both the alternatives, then the Court must direct entry of a judgment of acquittal.

1. *Insufficient Evidence Was Presented That Defendant Himself Attempted to Redeem the Lottery Ticket.*

On Count 1, there was no evidence Defendant ever took any action himself to attempt to redeem the ticket. Purchasing the ticket was not sufficient to prove this theory because that initial step was not legally sufficient to constitute an "attempt to redeem." In State v. Walker the Iowa Supreme Court explained what constituted an attempt:

> When our criminal law penalizes an "attempt," without a statutory definition, we have previously required
>
> (1) an intent to do an act or bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which ... goes beyond mere preparation.
>
> State v. Spies, 672 N.W.2d 792, 797 (Iowa 2003) (internal quotation marks and citations omitted).
>
> . . .

> The [overt] act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. While it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. 194 Iowa 1032, 1043, 188 N.W. 709, 714 (1922) (internal quotation marks and citations omitted).

State v. Walker, 856 N.W.2d 179, 187 (Iowa 2014).

Any "attempt to redeem" was shown to be the acts done by Johnston, Shaw, and the Davis Brown Firm who sought to claim the prize. The allegation Defendant aided and abetted Shaw, Johnston or the Davis Brown Firm in attempting to redeem the lottery ticket was dismissed due to lack of evidence and not submitted to the jury; therefore, their actions could not form the basis for Defendant's conviction. There was no evidence defendant himself attempted to redeem the lottery ticket.

In addition to the lack of evidence Defendant personally committed any act constituting an attempt, those who actually attempted to claim the prize were shown to have acted in good faith, in reliance on counsel, and without the necessary intent to defraud. The lawyers making the claim for the ticket, including Shaw, were advised the ticket was a bearer instrument owned by the possessor and signor of the ticket such that the history of the ticket did not prohibit them from ownership. They believed they could claim the prize rightfully, and that the ticket

was allegedly purchased by a prohibited player was unknown. It is plausible that a prohibited player would divest himself of any involvement in claiming the ticket as the product of sound legal advice based on bearer instrument theory; this negates fraudulent intent. As a result, Count 1 should never have been submitted to the jury on the attempt to redeem theory.

2. *Insufficient Evidence Was Presented that Defendant Passed the Lottery Ticket or That Any Passing Occurred Within the State of Iowa.*

As far as the alternative "passing" the ticket, there needed to be some evidence Defendant did so knowingly and intentionally with the intent to defraud through some voluntary act. Again, the State only showed the purchaser had the ticket on December 23, 2010, and that somebody tried to claim it 12 months later. The evidence revealed no contact or connection between Defendant and Johnston, between Defendant and Shaw, or between Defendant and the Davis Brown Firm. There was no evidence of Defendant passing the ticket; the only evidence was Shaw mailing the ticket to the Davis Brown Firm on December 29, 2011.

It is unknown how the ticket came to be in the possession of a New York attorney a year after it was purchased. Under the state's theory, Defendant bought the ticket and drove immediately to Texas, staying there until the New Year. The State's theory was Defendant deliberately gave the ticket to somebody in Texas who, perhaps through others, passed the ticket to Shaw. The State's theory was nothing but speculation and conjecture. There was no evidence showing when,

where, how, let alone any of the circumstances, under which possession of the ticket by the purchaser was lost. There was no evidence of any specific intent to defraud contemporaneous with the alleged passing. The State failed to prove the ticket was not lost, stolen, or otherwise transferred without the Defendant's knowledge or under innocent circumstances. Further, the State was required to prove beyond a reasonable doubt the act of passing with the intent to defraud occurred within the territorial boundaries of Iowa. State v. Liggins, 524 N.W.2d 181, 184 (Iowa 1994). Their own theory was the fraudulent passing occurred in the State of Texas.

B. The Evidence was Insufficient to Prove that Defendant Tampered with the RNG Computer on November 20, 2010 As Alleged in Count 2.

On Count 2, the State was required to prove the following:

1. On November 20, 2010, Defendant intentionally tampered with a computer that housed the random number generator program for the Hot Lotto game;
2. That computer was lottery equipment;
3. That Defendant intended to influence the winning of the Hot Lotto prize.

(A400). Tampering was further defined as "unauthorized alterations or changes interfering with the proper functioning of the computer." (A400).

The undisputed evidence showed nothing other than the possibility that Defendant could have installed some hypothetical program on one of the two RNG

computers on November 20, 2010 in an effort to influence the December 29, 2010 draw. The only evidence on that, however, is the following:

a. Video evidence showing Defendant performed a clock time change on the right-side RNG computer on November 20, 2010, which is consistent with a clock change being done;
b. No evidence indicating Defendant touched the left computer on November 20, 2010;
c. Both RNG computers having been fully and deeply wiped years after such that no evidence existed of any thumb drive or mystery software being installed;
d. No evidence of Defendant having the mystery program that would do what was claimed possible and no evidence anyone had ever attempted to replicate it;
e. Defendant being watched by 3-4 people on November 20, 2010 in the draw room with no one seeing anything other than a clock change;
f. No indication either computer was working abnormally after November 20, 2010; and
g. Evidence showing, on the December 29, 2010 draw, the Hot Lotto program operated correctly, the HASH matched properly, and the results were reviewed by an auditor. The evidence does not show which RNG computer was used for the draw on December 29, 2010. (A462-470).

Tampering was the corpus deliciti of the crime. Corpus delicti is translated as "body of the offense." State v. Millmeier, 102 Iowa 692 (1897). "The term means, when applied to any particular offense, that the particular crime committed has actually been committed by someone." *Id.* Corpus delicti requires proof of: 1. A result has been produced, such as the killing of a human being or commission of a crime, and 2. Someone is criminally responsible for the result. Calaway v. State,

No. 07-1072, 2008 WL 5412262, at *3 (Iowa Ct. App. Dec. 31, 2008)(citing State v. Stamper, 195 N.W.2d 110, 112-13 (Iowa 1972)). Proof may rest on circumstantial evidence alone; however, inferences drawn from the evidence must still "raise a fair inference of guilt on each essential element." State v. Brubaker, 805 N.W.2d 164, 172 (Iowa 2011). "An inference must do more than create speculation, suspicion, or conjecture," and "[e]vidence that allows two or more inference to be drawn, without more, is insufficient to support guilt." *Id.* (quoting State v. Trusdell, 679 N.W.2d 611, 618 (Iowa 2004)).

In State v. Whisler, the Iowa Supreme Court discussed the doctrine of corpus delicti in relation to arson. 231 Iowa 1216 (1942). The State had to prove not only that the building was burned, but that it was a "willful and malicious" burning and not accidental. *Id.* (citing State v. Millmeier, 102 Iowa 692 (Iowa 1897)). The court stated,

> The mere fact that the building was burned and that its origin is unknown or involved mystery is not evidence that it was feloniously ignited. In addition to the fact of destruction, it must appear by the evidence beyond a reasonable doubt that the fire was caused by the willful act of some person criminally responsible for it. In the absence of some such proof the presumption obtains that the fire was accidental, or at least that it was not of criminal origin.

Id. (quoting State v. Cristani, 185 N.W. 111, 112 (Iowa 1921)). In Whisler, although there was evidence of an insurance policy and troublesome financial status on the part of the Defendant, this was not sufficient to satisfy corpus delicti.

Id. at 1225. The court pointed out, "[T]he mere fact that a man is in financial straits, or is doing a losing business, and that by the commission of a crime he might hope to better his condition, is not any evidence whatever that he is guilty of such a crime. Motive is not a crime, nor is it an essential element of a crime." *Id.* at 1225-26.

The mere fact that a winning lottery ticket was drawn is not in itself evidence of a crime, in the same way that "the mere fact that the building was burned" is not evidence of a crime. *Id.* at 1220.

The jury was led to believe because the prosecutor called this a "21st Century crime," there did not need to be any actual evidence because, as we know from fictional movies, like *Mission Impossible*, computer crimes occur without any trace left behind. Since there was no evidence the computer was ever tampered with, the crime must be proven by the lack of evidence. According to the State, proof there was no evidence of actual tampering was actually proof the tampering occurred. The State's argument treats the lack of evidence and the absence of proof as sufficient evidence to establish its burden. The prosecutor was the equivalent of a ghost hunter called to the scene of a possible ghost sighting who, upon finding nothing after thorough investigation, declared that a ghost must have been there because ghosts leave no trace behind.

The absence of evidence is a failure of proof, not proof itself. State v. Perry, 69 N.W.2d 412, 416 (Iowa 1955); State v. Franklin, 163 N.W.2d 437, 441 (Iowa 1968). The absence of evidence tending to prove the elements of the offense, rather than establishing guilt, mandates this Court reverse Defendant's conviction on Count 2 and direct a judgment of acquittal be entered.

II. THE STATE FAILED TO ESTABLISH THAT THE OFFENSES, WERE COMMITTED WITHIN THE LIMITATIONS PERIOD; HOWEVER, IF THERE WAS A FACT ISSUE, THE COURT ERRED IN FAILING TO INSTRUCT THE JURY.

1. Preservation of Error.

This issue was first raised by a timely motion to dismiss filed on March 23, 2015, with briefing by the Defendant on March 26, 2015, April 1, 2015, and April 11, 2015. (A1-20, 53-59). The trial court's ruling denying dismissal based on the pleadings was made on April 12, 2015. (A60-68). Following the court's approval of the Amended Trial Information, which back-dated the claim of computer tampering to November 20, 2010, defendant renewed his earlier motions on Statute of Limitations, and the court denied that renewal by order dated May 6, 2015. (A69-72). At the close of the State's case, and at the close of all evidence, Defendant again moved for dismissal or acquittal based on the limitations period. (A309-312, 358). The trial court denied these motions. (A319-320, 358). Defendant requested the jury be instructed on the statute of limitations defense, but the court refused. (A372-373, 363-364). Defendant raised the statute of

limitations again in his combined motion for new trial and in arrest of judgment filed and briefed on August 28, 2015. Those motions were denied prior to sentencing and in a subsequent written ruling. (A476-478, 494-510).

2. Standard of Review.

The standard of review is for correction of errors at law. State v. Burgess, 639 N.W.2d 564, 567 (Iowa 2001).

3. Argument.

The trial court took the position the offenses of attempting to redeem or pass the lottery ticket were somehow continuing offenses that continued until Shaw and the Davis Brown Firm withdrew their claim the prize in January 2012 and that the crime of tampering with the computer on November 20, 2010 similarly continued until the claim was withdrawn. The court further took the position the fraud extension of 802.5 did not begin to run until the investigators identified defendant as the ticket purchaser in October 2014 and thereupon had probable cause to charge defendant for the first time.

The court rejected defendant's argument the one-year statutory extension under 802.5 began to run when authorities were on "inquiry notice" of the need to commence a diligent investigation into possible fraud. Authorities were on such inquiry notice at the time Shaw and Johnston were attempting to redeem the ticket with the Davis Brown Firm in late 2011/early 2012. For reasons not credibly

explained, the authorities did not release the QuikTrip video to the public for help in identifying the person until October 2014, delaying the release for almost three years, even though authorities claim they were trying to "diligently" identify him.

A. Count 2- Tampering.

Defendant will first address what should be a simple issue: the statute of limitations application to Count II, the tampering count. As tried and submitted to the jury, the Count 2 verdict states on November 20, 2010, the defendant tampered with an RNG-computer at MUSL with the intent to influence the winning of the December 29, 2010 Hot Lotto drawing. No element of this offense involved any conduct or act subsequent to November 20, 2010; all elements were committed—pursuant to the instructions given—on November 20, 2010. (A400). Because the statute of limitations begins to run when an offense is committed, and an offense is committed when all elements of the offense are complete, the statute of limitations applicable to this offense started to run on November 20, 2010 and expired on November 20, 2013. IOWA CODE § 802.3 (2014); 22 C.J.S. CRIMINAL LAW § 255; MODEL PENAL CODE § 1.06(4); *see, e.g.* U.S. v. Gonzales, 495 F.3d 577, 580 (8th Cir. 2007)("Typically, an offense is committed when it is completed, that is, when each element of the offense has occurred.").

The State contends evidence of subsequent acts that arguably tends to prove an earlier committed offense, including the mens rea required, somehow makes the

offense a continuing one, or somehow extends the statute of limitations such that it does not begin until the last point of evidence that the State relies upon. However, the fact there are activities and acts committed by a Defendant after the offense that may tend to prove the elements of the earlier offense is of no legal significance to the statute of limitations. Grunewald v. U.S., 353 U.S. 391, 401-02 (1957)(subsequent acts to conceal after the main purpose of the conspiracy has been accomplished cannot extend the statute of limitations). Further, the fact the requisite mens rea may continue after the offense does not make the offense a continuing one. In construing a statute of limitations' application to a completed offense of contempt, the Supreme Court has stated: "As we have said, once the 'misbehavior' occurs in the 'presence' of the court, the crime is complete. . . . The mere continuance of a fraudulent intent after an act of 'misbehavior' in the 'presence' of the court does not make that 'misbehavior' a continuing offense." Pendergast v. U.S., 317 U.S. 412, 420-21 (1943). Because the offense was completed more than three years prior to January 15, 2015, Defendant cannot stand convicted.

B. Count 1- Passing or Attempting to Redeem with Intent to Defraud.

Count 1 as submitted alleged the Defendant passed or attempted to redeem a lottery ticket at some point between December 23, 2010 and January 17, 2012, and that he did so with the intent to defraud. Again, the charge Defendant aided and

abetted some other person in passing or attempting to redeem the lottery ticket was dismissed and not submitted to the jury; therefore, any theory Defendant could have been convicted based upon some other person's passing of the lottery ticket or attempting to redeem the lottery ticket could not be sustained. To support the verdict, the evidence would have to show the Defendant personally attempted to redeem or personally passed the ticket, and the Defendant personally at that time had the intent to defraud. Defendant's personal act of passing or attempting to redeem had to occur within three years of the January 15, 2015, trial information unless the State proved the fraud exception extended the limitations period to January 15, 2015 or after.

In its prior ruling, the court analogized this offense to a conspiracy, a continuing crime, based on the aider and abettor theory. (A64-65 (citing State v. Olson, 86 N.W.2d 214, 223-24 (Iowa 1957))). The Court's ruling was correct to the extent that the statute of limitations on a charge of aiding and abetting does not begin to run until after the substantive crime is completed by the principals of the offense. U.S. v. Erb, 543 F.2d 438, 446 (2d Cir. 1976); U.S. v. Rastelli, 870 F.2d 822, 839 (2d Cir. 1979); U.S. v. Kale, 661 F. Supp. 724, 726 (E.D. Pa. 1987). That makes sense because one element of aider and abettor liability is that the principal commit the crime, meaning the crime was not complete until committed. *See id.* In the same way, the statute of limitations on a conspiracy charge does not begin to

run until the completion of the last act in furtherance of the conspiracy. Olson, 86 N.W.2d at 224; Grunewald, 353 U.S. at 397 (must be shown that at least one overt act in furtherance of the conspiratorial agreement was performed within limitations period).

However, this is no longer a case analogous to conspiracy law on statute of limitations, let alone aider and abettor law on statute of limitations. The State dismissed its aider and abettor theory before submitting the offense in Count I. As submitted to the jury, Defendant was not charged as an aider and abettor, but rather was charged with the discrete acts of passing or attempting to redeem the ticket as a principal, which required him to personally commit the specific conduct or actus reus of the crime while having the requisite intent to defraud. This is confirmed by the relevant jury instruction on Count I, which stated: "On or about December 23, 2010 to January 17, 2012, *defendant* passed a lottery ticket or attempted to redeem a lottery ticket." (A397 (emphasis added)). Because there are no aiders and abettors to the crime, the statute of limitations began to run when all elements of the crime were completed *by the defendant* as the principal. *See* IOWA CODE § 802.3 (2014); 22 C.J.S. CRIMINAL LAW § 255; Gonzales, 495 F.3d at 580 (8th Cir. 2007)("Typically, an offense is committed when it is completed, that is, when each element of the offense has occurred."). Any conduct by the Defendant—if it

occurred at all—is alleged by the State to have occurred well before January 15, 2012, the expiration of the applicable three-year limitations period.

The simple fact is Defendant's alleged passing of the ticket, according to the State, must have occurred in late December 2010, as it argued to the jury. The evidence conclusively established the Iowa Lottery received the ticket from the Davis Brown Firm on December 29, 2011, and the Davis Brown Firm itself received the ticket from Crawford Shaw that same day. Consequently, there could have been no "passing" of the ticket by *Defendant* under any stretch of facts after the ticket went into the possession of the Iowa Lottery on December 29, 2011. Although there was evidence Shaw and Philip Johnston took steps to pursue their claim for the winning ticket after December 29, 2011, their actions have no bearing on the application of the statute of limitations.[3]

As to the theory Defendant attempted to redeem the ticket—a theory unsupported by any evidence—that also must necessarily have occurred prior to December 29, 2011. There is no evidence defendant attempted to redeem the ticket

[3] In resisting the motion in arrest of judgment the State conceded Johnston and Shaw could not be principals because "there was insufficient proof that Johnston or Shaw were more than unwitting agents in Defendant's attempt to redeem the ticket." (A482). The State actually tacitly conceded the insufficiency of the evidence to establish Defendant attempted to redeem the ticket in its post-trial brief by arguing for the first time that the verdict could be upheld on an agency liability theory that was never advanced or instructed upon. The sole theory that this case was submitted upon was that Defendant personally did all the acts himself as the principal.

personally on or after January 15, 2012, within the three-year limitation period. The only evidence of an event after that date is a meeting on January 17, 2012 attended by Shaw and lawyers at Davis Brown with the Lottery. Again, this meeting is of no consequence because the State abandoned the allegation Defendant aided and abetted Shaw in Shaw's allegedly fraudulent attempt to redeem the lottery ticket.

There was no act shown in the evidence committed personally by defendant within the three-year limitations period that would allow for prosecution, unless the three-year period was extended by Iowa Code § 802.5. Consequently, the only issue for the Count I statute of limitations is the application of 802.5 to that offense in this case.

C. Applicability of the Fraud Extension

Iowa Code Section 802.5 provides:

> If the periods prescribed in sections 802.3 and 802.4 have expired, prosecution may nevertheless be commenced for any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved party or by a person who has legal duty to represent an aggrieved party and who is not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.

In evaluating § 802.5, the Iowa Supreme Court in State v. Wilson said the statute begins to run, just as it does in civil cases, on the date the state was on "inquiry notice" of the offense. 573 N.W.2d 248, 253 (Iowa 1998). Wilson stated:

> Both parties want us to enunciate a discovery rule and to fix the date upon which the fraud was discovered and limitations period clock began to tick.
>
> In civil cases, under the discovery rule, the statute of limitations begins to run when the injured party has actual or imputed knowledge of the facts that would support a cause of action. However, it is not necessary that the injured party know these facts are actionable. In addition, the injured party is charged on the date of the accident with knowledge of what a reasonable investigation would have disclosed. The period of limitations is the outer time limit for making the investigation and bringing the action. The statute begins to run when the person gains knowledge of facts sufficient to put him on inquiry. On that date, he is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigator.
> Moreover, once a person is aware a problem exists, he has a duty to investigate even though he may not have exact knowledge of the nature of the problem that caused the injury. Thus, the civil discovery exception to the statute of limitations incorporates an objective, due or reasonable diligence investigation requirement.

Id. at 253-54 (internal citations omitted). Ultimately, the court held the discovery requirement imposed by § 802.5 was to be read "in harmony with our civil discovery rule." *Id.* Thus, the statute of limitations begins to run when a party is put on "inquiry notice"— the date which a party gains sufficient knowledge that would alert a reasonable person of the need to investigate. *See id.* (citing Sparks v. Metalcraft, 408 N.W.2d 347, 351 (Iowa 1987)).

This position is supported by the court's citation to State v. Young, an Ohio Appeals Court case that also uses the inquiry notice requirement. 440 N.E.2d 1379, 1380-81 (Ohio App. 1981). The court in that case indicated the running started when the State had "some awareness" of the fraudulent practices. *Id.* In so holding, the court reasoned a state agency should not be allowed to "procrastinate with

impunity when they had in their possession information and/or materials which indicated fraud." *Id.* Thus, from its reference to Young, the Wilson court intended the extension to run from the date of inquiry notice of the offense. Wilson, 573 N.W.2d at 254.

In its rulings, the trial court took the view the fraud extension statute did not begin to run until October of 2014, because that is when the State began to suspect Tipton, after the video was released. However, the Defendant reiterates the criminal discovery rule has been interpreted by the Iowa Supreme Court to be *in harmony* with the civil discovery rule. State v. Wilson, 573 N.W.2d 248, 254 (Iowa 1998). As instructed by the Court,

> The statute [of limitations] *begins to run* when the person gains knowledge sufficient to put him on inquiry. On that date, he is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation. Moreover, once a person is aware a problem exists, he has a duty to investigate even though he may not have exact knowledge of the nature of the problem that caused the injury.

Id. (citing Sparks v. Metalcraft, Inc., 408 N.W.2d 347, 351-52 (Iowa 1987))(emphasis added). Therefore, the pertinent date of discovery is not when probable cause was *actually* developed by the State; rather, the pertinent date of discovery is when the State was placed on notice of the need to investigate. *Id.* From the point of this notice onward—just as in the civil discovery rule—the statute of limitations begins to run. *See* Sparks, 408 N.W.2d at 351-52; *see also*

Ranney v. Parawax Co., 582 N.W.2d 152, 155 (Iowa 1998)(explaining how inquiry notice operates under civil discovery rule).

Under the State's interpretation of the discovery rule, after the authorities discover the need to investigate, they could take an endless amount of time—indeed, as they did in this case, years—in order to develop probable cause, before the statute of limitations would commence. The State's argument necessarily includes the position that its investigation after notice of the need to investigate need not be diligent or of limited duration prior to determining probable cause. This would extend the limitations period indefinitely in the case of a lengthy, drawn-out investigation by law enforcement, which is contrary to the intent of the Iowa Supreme Court when adopting the discovery rule. In fact, the Court's intent was to impose a one-year extension in order to "discourage inefficient or dilatory law enforcement." Wilson, 573 N.W.2d at 254. In accordance with this purpose, law enforcement only has one year from the date of notice—the date upon which authorities became aware of the need for investigation—to obtain probable cause and charge the Defendant.

The uncontested evidence in this case is the State commenced a criminal investigation for fraud concerning the winning lottery ticket in January or February 2012. The State concedes they were on inquiry notice in early 2012, although exact knowledge of what happened was lacking. The State chose to delay releasing the

video identifying the purchaser for 32 months, and proffers no reasonable explanation for doing so. This cannot be considered a "diligent" investigation to identify the purchaser, and is irrelevant because the State had just 12 months from the notice of *the need* to investigate to conclude investigation and bring any charges. The State chose to take the risk of delaying the video even despite knowing the need for investigation.

In order for § 802.5 to extend the three-year statute, the State would have had to have been put on inquiry notice of the need to investigate less than a year before January 15, 2015—the date of filing. In this case, the State was on notice of the need to conduct a diligent fraud investigation and was in fact conducting a fraud investigation in 2012—well beyond a year before filing. The statute of limitations is specifically designed as an outer boundary for prosecutions to commence, even in cases alleging fraud; therefore, Tipton should not stand convicted of the offense.

Although the Defendant finds the application of the civil discovery rule and inquiry notice doctrine to be more on point, another potential source the court should look in construing the due diligence requirement of Wilson is the due diligence requirement imposed upon a defendant's motion for a new trial based on newly discovered evidence. The commonly cited rule requires, among other things, that the evidence could not "have been discovered before the conclusion of the trial in the exercise of *due diligence*" of the defendant. State v. Compiano, 154 N.W.2d

845, 518 (Iowa 1967)(emphasis added). The Iowa Supreme Court provided this guidance:

> He must exhaust all probable sources of information concerning his case; he must use that of which he knows, and he must follow all clues which would fairly advise a diligent man that something bearing upon his litigation might be discovered or developed.

Id. (quoting Westergard v. Des Moines Ry. Co., 52 N.W.2d 39, 44 (Iowa 1952); *see also* State v. Van Wheelden, 829 N.W.2d 589, *5 (Iowa Ct. App. 2013)(quoting the above passage as the still-applicable rule).

Even under this construction, the State did not meet its due diligence burden. The State possessed the video that was used to identify the alleged purchaser as early as January of 2011; however, it did not release this video until October of 2014. Sitting on, but not using, a critical piece of evidence for over almost three years after suspecting fraud certainly does not meet the requirement of "exhaust[ing] all probable sources of information" or "follow[ing] all clues which would fairly advise a diligent man that something bearing upon his litigation might be discovered."

Relatedly, even assuming the statute did not run on all of the conduct in broadly worded Count I, it did run on some. Only a general verdict was returned, so it's unclear whether some jurors convicted on conduct barred by statute of limitations. Therefore, the verdict has to be set aside. Grunewald, 353 U.S. at 415 ("[s]ince, under the judge's charge, the convictions might have rested on an

impermissible ground . . . they cannot stand); State v. Martens, 569 N.W.2d 482 (Iowa 1997)(stating that general verdict must be reversed because "the validity of a verdict based on facts legally supporting one theory for conviction of a defendant does not negate the possibility of a wrongful conviction of a defendant under a theory containing legal error."); *see also* State v. Gansz, 376 N.W.2d 887, 891 (Iowa 1985)(setting aside jury verdict because court erred in giving jury instructions for an offense outside the limitations period).

Defendant believes the record on this issue is so clear that no judgment of conviction may be imposed upon him for Count I because the period of limitations expired for that offense and the evidence. However, if the Court finds there is a fact question on this point, Defendant believes the Court clearly erred in failing to submit the statute of limitations issue to the jury because the jury was the finder of fact.

D. Jury Instruction Error on Statute of Limitations

Defendant had a right to jury determinations of statute of limitations. *See* State v. Rains, 574 N.W.2d 904, 915 (Iowa 1998)("If substantial evidence exists, the district court has a duty to give the requested [affirmative defense] instruction."); *see also* U.S. v. Edwards, 968 F.2d 1148, 1153 (11th Cir. 1992)(holding it was error to refuse to instruct the jury on the limitations period because "once the conflicting evidence was presented, the question . . . became an

issue for the jury to determine."); U.S. v. Wilson, 26 F.3d 142, 158 (D.C. Cir. 1994)(finding the court cannot refuse to charge jury with determining whether offense committed in limitations period after conflicting evidence is presented).

Defendant requested that the issue be submitted to the jury. Defendant's proposed instructions No. 38 and 39 were modeled after California Criminal Jury Instruction No. 3410. Defendant's instructions provided:

> Defendant may not be convicted of Count 1 [2] unless the prosecution began within 3 years of the date the crime was committed or within 1 year of the date the crime should have been discovered, whichever is later. The present prosecution began January 15, 2015.
>
> A crime should have been discovered when law enforcement was aware of the facts that would have alerted a reasonably diligent law enforcement officer in the same circumstances to the fact that a crime may have been committed.
>
> The State has the burden of proving by a preponderance of the evidence that prosecution of this case began within the required time. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the State must prove that it is more likely than not that prosecution of this case began within the required time. If the State have not met this burden, you must find the defendant not guilty.

(A363-364). Defendant also suggested if the Court believed the instructions were incorrect, the Court should "modify them according to whatever the Court determines the appropriate instructions would be." (A372).

The Court took the position it should be the determiner of the statute of limitations issue. Defendant believes the law is to the contrary and also believes he

has a fundamental right under the Sixth Amendment and the corresponding section of the Iowa Constitution to a jury trial on all fact issues that the State must prove at the time of trial, which would include its burden to prove the offense occurred within the limitations period. *See* Grunewald, 353 U.S. at 396 (stating it is incumbent upon the Government to prove that acts occurred within the limitations period); State v. Kraklio, 695 N.W.2d 503, at *8 n. 1 (Iowa Ct. App. 2005)(statute of limitations issue was "one to be determined by the finder of fact at trial and not by the court upon its own motion or by [Defendant]"); U.S. v. Johnson, 239 F. Supp. 2d 897, 907 (N.D. Iowa 2002)(holding question of whether Defendant committed overt act during limitations period was for the jury); *see also* 75A Am. Jur. 2d *Trial* § 702 ("A statute of limitations defense may pose a question of law, but, if there is any issue as to whether any crimes that defendant may have committed occurred before the limitations period, a question of fact to be determined by the jury is involved.").

III. NUMEROUS TRIAL ERRORS REQUIRE REVERSAL

A. Evidentiary Errors.

1. The trial court erred in allowing incriminating assumptions from facts not in evidence, namely, the unavailability and inadmissible statements of Sonfield, Johnston, Rhodes, and Shaw.

a. Preservation of Error.

Defendant filed a pretrial motion in limine to exclude this evidence, and outside the presence of the jury further objected that the State was trying to use the course of investigation exception to establish what people told investigators and that it was not relevant, unfairly prejudicial, and hearsay. (A38-46, 113-121). The trial court reserved ruling on both these occasions. (A121). During the trial Defendant made objections to testimony on this subject. (A127-128, 138-141). The Court overruled those objections. Defendant moved to strike the evidence because it had no relevance and urged the Court to restrict the prosecution's closing argument to prohibit incriminating conclusions about Rhodes and Sonfield's unavailability or hypothetical, inadmissible hearsay testimony. (A358-360). The Court denied these requests. (A373). During closing argument the prosecutor argued:

> Now, who, what, where, when. He didn't contact Phillip Johnston. He didn't contact Crawford Shaw. Where is this attempt to collect? Where's the evidence? Well, his helpers weren't here. Phillip Johnston isn't here to tell you he got the ticket from Robert Sonfield or Robert Rhodes. And Crawford Shaw is not here to tell you who he got the ticket from.

(A383). The Court sustained Defendant's objection to this improper argument. (A383). Defendant also objected to the following argument immediately after the prior argument:

> Ladies and gentlemen, keep this in mind too. If the defendant didn't buy the ticket, why is Robert Rhodes not talking to DCI? How, out of everybody in this country and in Canada, does it just so happen to be Robert Rhodes that

> they're trying to talk to before they know the defendant is a suspect who has been identified as the purchaser.

(A384). The Court overruled the objection. (A384). And the prosecutor continued to argue:

> So, again, I say, if you think it's a coincidence that just so happens for two unrelated reasons that both those men are involved in this case, that's up to you. I tell you it's not a coincidence. There's one explanation.

(A384). Defendant moved for a mistrial based on the State's argument about what witnesses would say if they had been called to testify, or what they did say in investigatory interviews. (A387-389). The Court denied the motion. (A390).

b. Standard of Review.

The court does not blindly accept the State's explanation that challenged evidence was offered for the purpose of explaining responsive conduct. Rather, the court reviews the relevant record to determine if the purpose voiced by the State can reasonably be found to be the real purpose for the challenged testimony. *See* Sowder, 394 N.W.2d at 371; State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979).

"For us to conclude the State's purpose in offering challenged testimony was in fact to explain certain responsive conduct, not only must the offered statement actually tend to explain the responsive conduct, but that conduct must itself be relevant to some aspect of the State's case. If the statements in issue are relevant only if accepted as true, the statements are hearsay and, unless subject to some

other applicable exception, are inadmissible." State v. Hollins, 397 N.W.2d 701, 705-06 (Iowa 1986).

c. Argument

The Court allowed evidence that police interviewed Johnston in Canada, that he "cooperated," and that the investigators went to Texas to interview Rhodes and Sonfield thereafter. Evidence was allowed that the efforts to interview Rhodes and Sonfield were unsuccessful. No connection between Rhodes and Sonfield was shown, nor was there any evidentiary connection to Shaw, Johnston, or the lottery ticket. The Court properly excluded as hearsay what Johnston said when he was cooperative with investigators. Johnston, like Shaw, did not testify at trial. No evidence showed Tipton had any contact with Johnston, Shaw or Sonfield. This evidence was subject to relevancy and Rule 403 objections as well as a motion to strike and the Court overruled all. Objections to arguing inferences from investigator contacts and attempts were also overruled. The prosecutor argued that investigators were led to Rhodes by Johnston based on the investigative sequence.

The evidence was the type of evidence that should have been excluded because the fact Johnston was "interviewed" and "cooperated" was itself not relevant to any issue in the case. Nor was the fact that unsuccessful efforts were made to interview Sonfield and Rhodes. Defendant was not charged in the end with aiding or abetting any of those persons, nor were they coconspirators;

Rhodes' and Sonfield's mental states were not probative of defendant's personal mental state nor did that tend to establish anything done by defendant personally. Allowing evidence that Johnston gave an interview only allowed the State to indirectly suggest that Johnston had identified Rhodes and Sonfield as involved with the ticket. However, the evidence could not be admitted for establishing those assertions because the statements were hearsay and would have violated the Confrontation Clause.

It is hard to imagine more prejudicial error than the admission of the evidence in this case, and in allowing the argument, and a new trial should be ordered.

2. The trial court erred in prohibiting evidence that there were no instances of unauthorized or unaccounted for insertions of external drives or devices on the RNG computers after December 2010.

a. Preservation of Error.

The State filed a motion in limine to prohibit Defendant from introducing evidence that the random number generator computers in service in 2011 and 2012 had not been tampered with in any way. (A78-79). Defendant resisted the State's motion and argued that the absence of evidence of tampering was just as probative as would be evidence of tampering if the State had found such evidence. (A73-76, 80-81). Defendant asked the Court to reconsider its prior ruling during the trial

and made an offer of proof. (A321-327). The Court denied the offer of proof and found the evidence was not relevant. (A327-328).

b. Standard of Review.

The standard of review regarding the failure to admit evidence is abuse of discretion. State v. Spargo, 364 N.W.2d 203, 209 (Iowa 1985).

c. Argument

According to Iowa Rule of Evidence 404(b), evidence of other acts is admissible only to prove, inter alia, motive, opportunity, intent, preparation, plan, or knowledge. IOWA R. EVID. 404(B). The court may admit evidence of both subsequent and prior acts. State v. Larsen, 512 N.W.2d 803, 807 (Iowa Ct. App. 1993). In determining whether to admit evidence, a court must determine whether that evidence is relevant to a legitimate, disputed factual issue. See State v. Sullivan, 679 N.W.2d 19, 25 (Iowa 2004).

Here, the disputed factual issue is whether the Defendant tampered with the old RNG computer. The old RNG computers were wiped clean and could not be forensically examined. The State tried to develop evidence that the Defendant tampered with the old RNG computers by examining RNGs that were in service in 2011 and 2012, the time period of the charges in the trial information. The evidence of the State's own examination showed no tampering on the new RNGs. The State understandably did not want the jury to know the negative results of their

investigation, which cast doubt on the theory that the Defendant tampered with the RNG computers on November 20, 2010. However, that the RNG computers were untampered with in 2011 and 2012 is just as relevant to the disputed issue as any tampering evidence would have been. The Court should have admitted the evidence as relevant.

B. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY IN SEVERAL RESPECTS.

1. Standard of Review.

An appellate court reviews "alleged error regarding the submission of or refusal to submit jury instructions for corrections of errors at law." State v. Rains, 574 N.W.2d 904, 915 (Iowa 1998). Jury instructions which are given to the jury must be reviewed to "determine whether they correctly state the law and are supported by substantial evidence." State v. Thompson, 570 N.W.2d 765, 767 (Iowa 1997). The standard of review is "whether prejudicial error by the trial court has occurred." Thavenet v. Davis, 589 N.W.2d 233, 236 (Iowa 1999). Error in jury instructions "is presumed prejudicial unless the contrary appears beyond a reasonable doubt from a review of the whole case." State v. Bone, 429 N.W.2d 123, 127 (Iowa 1988). Jury instructions are to be considered as a whole and not individually. Anderson v. Webster City Community School Dist., 620 N.W.2d 263, 268 (Iowa 2000).

While courts "should generally adhere to the uniform instructions . . . [t]rial courts have discretion to modify or rephrase the uniform jury instructions to meet the precise demands of each case as long as the instructions fully and fairly embody the issues and applicable law." Dudley v. GMT Corp., 541 N.W.2d 259, 261 (Iowa App. 1995). A court must give instructions on all material issues, State v. Broughton, 425 N.W.2d 48, 51 (Iowa 1988), and as long as a requested instruction is applicable to the case, correctly states the law, and is not covered by another instruction, the court must give the requested instruction. State v. Kellogg, 542 N.W.2d 514, 516 (Iowa 1996). "The district court must instruct on a defendant's theory of defense provided the defendant makes a timely request, the requested theory of defense instruction is supported by the evidence, and the requested instruction is a correct statement of the law." State v. Ross, 573 N.W.2d 906, 913 (Iowa 1998); See also State v. McFarland, 598 N.W.2d 318, 321 (Iowa App. 1999); and State v. Johnson, 534 N.W.2d 118, 124 (Iowa App. 1995).

"A new trial may be granted when the trial court has misdirected the jury in a material matter of law or has improperly instructed the jury." State v. Lindsey, 302 N.W.2d 98, 101 (Iowa 1981).

2. The Court erred in failing to instruct the jury that facts are not proven by evidence requiring speculation or conjecture, or merely raising a suspicion.

a. Preservation of Error.

Defendant requested this language be added to instruction number 5, the model direct and circumstantial evidence instruction. (A366). It is a correct statement of law that facts are not proven by evidence that requires speculation or conjecture, or that merely raises a suspicion. State v. Brown, 569 N.W.2d 113, 115 (Iowa 1997); State v. Kemp 688 N.W.2d 785, 789 (Iowa 2004). The Court denied the request solely because it was not model instruction language. (A366-367). This was error in this case warranting reversal.

3. The Court erred in instructing the jury on Count 1 in Instruction No. 20 that the offense was a continuing offense occurring "on or about December 23, 2010 to January 17, 2012".

a. Preservation of Error.

In pretrial motions and in the instructions to the jury the Defendant repeatedly argued that the charge of "passing" or "attempting to redeem" could not be charged as if it were a continuing offense because the offense was to be proven by specific instances of conduct that allegedly constituted an act of "passing" or an act of "attempting to redeem" coupled with the requisite fraudulent intent. (A368-369). The Court overruled the objection. (A369).

Under the break-in-the-action and the series of acts tests, "passing" and "attempting to redeem" are separately punishable acts that should have been separately proven by specific instances of conduct. Courts have used the break-in-the-action test to define whether a defendant committed singular or separate acts.

State v. Velez, 829 N.W.2d 572, 582 (Iowa 2013). In Spencer v State, the court ruled that a defendant may be convicted of more than one count of a crime if the defendant's actions are sufficiently separate in time and location to constitute distinct acts. Id. (quoting Spencer v State, 868 A.2d 821, 823 (De. 2005)). Even a small temporal separation was sufficient for a trier of fact to find that the defendant had formed two separate intents and committed two separate acts. Id. at 583. Here, the State argues that on December 23, 2010 Defendant passed the ticket, and on December 28, 2011, Shaw allegedly redeemed the ticket. A break of action occurred between "passing" and "redeeming." They are separate acts and offenses.

Under the series of acts test, "passing" and "redeeming" are separate acts as well. In Velez, the court ruled that acts are punishable separately if the statute prohibits individual acts instead of the course of action. Id. at 581. Here, the statute is written in the present tense and disjunctively provides alternative means for its violation instead of prohibiting one course of action. IOWA CODE § 99G.36; see State v. Miller, No. 0-385, 2000 WL 1421414, at *2 (Iowa Ct. App. Sept. 27, 2000). "Passing" and "redeeming" are separate acts.

In Iowa, the jury must be unanimous on whether a defendant committed a crime. Gavin v. State, 425 N.W.2d 673, 678 (Iowa Ct. App. 1988). If a defendant committed two offenses, the jury must reach two unanimous guilty verdicts on whether the defendant committed the first offense and the second offense. Here,

"passing" and "attempting to redeem" constitute two separate offenses. Accordingly, to find the Defendant guilty, the State needed two unanimous guilty verdicts. Because the State failed to do that, defendant was deprived of his right to a unanimous jury verdict.

4. *The court's instruction that an attempt means to "try to do something" was erroneous, and the Court should have given Defendant's instruction, which properly set forth Iowa law.*

a. Preservation of Error.

Defendant submitted Proposed Instruction No. 32 based upon definitions of attempt set forth in State v. Walker, 856 N.W.2d 179, 187 (Iowa 2014), providing:

> The alternative charge in Count 1 of the Trial Information is an attempt to falsely redeem a lottery ticket with the specific intent to defraud. In order to commit an attempt, the defendant must specifically intend to defraud the Iowa Lottery by falsely redeeming a ticket and he must commit an act in furtherance of that intent beyond mere preparation. The act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. While it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.

(A362). The Trial Court refused to give this instruction, and instead instructed that an attempt means "to try to do something." (A370-371, 399).

b. Argument.

Iowa Code § 99G.36(1) criminalized an "attempt to redeem" a lottery ticket. That required proof of an attempt to cash in the ticket. The statute does not define

attempt, meaning the Walker definition controls. The definition of what constitutes an attempt is recited in the Walker case: an attempt is an act beyond mere preparation and something near the completion of the object of the attempt. Here, that would mean submission of the ticket as part of the claim. It would not include the earlier act of purchasing the ticket at the QuikTrip and likely would not include earlier unproven speculative acts in the year prior to the submission of the ticket. The failure to instruct was prejudicial error.

CONCLUSION

Because there was insufficient evidence to support the verdicts on Counts 1 and 2, and because both crimes were barred by the three-year statute of limitations, the motion in arrest of judgment should have been granted. In addition, the erroneous evidence rulings and jury instructions prejudiced Defendant. Therefore, Counts 1 and 2 should be reversed, with instructions to the District Court to dismiss, or, in the alternative, a new trial should be granted.

By /s/ Dean Stowers
Dean Stowers
Stowers & Sarcone PLC
West Glen Town Center
650 S. Prairie View Drive, Suite 130
West Des Moines, IA 50266
Telephone: (515) 224-7446
Fax: (515) 225-6215
Email: dean@stowerssarcone.com

CERTIFICATE OF FILING

The undersigned does hereby certify that she electronically filed Appellant's Final Brief and Argument with the Clerk of the Iowa Supreme Court by using the EDMS filing system on the 1st day of April, 2016.

CERTIFICATE OF SERVICE

On the 1st day of April, 2016, the undersigned party served Appellant's Final Brief and Argument on all other parties to this appeal by using the EDMS filing system.

Louis Sloven

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,852 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman in 14 point font size.

STOWERS & SARCONE PLC
West Glen Town Center
650 South Prairie View Drive, Suite 130
West Des Moines, IA 50266
Phone: (515) 224-7446
Fax: (515) 225-6215

By: /s/ Amy Pille
Amy Pille
Legal Assistant