

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 23-0819
BLACK HAWK COUNTY NO. SRCR246554

STATE OF IOWA,
Plaintiff / Appellee

vs.

SARAH RAE BERG,
Defendant / Appellant

APPEAL FROM BLACK HAWK COUNTY DISTRICT COURT

THE HONORABLE PATRICK WEGMAN, JUDGE

**APPLICATION FOR FURTHER REVIEW
AND
BRIEF IN SUPPORT OF APPLICATION FOR FURTHER REVIEW**

**FROM THE IOWA COURT OF APPEALS DECISION JANUARY 24,
2024**

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QUESTIONS PRESENTED FOR REVIEW

Did the district court and the Iowa Court of Appeals err in denying Berg's motion to dismiss for violation of her right to speedy indictment?

Specifically:

Did the district court and the Iowa Court of Appeals err in finding that the theft in the 4th degree charge and the unauthorized use of a credit card charge constitute different offenses for the purposes of speedy indictment?

Did the district court and the Iowa Court of Appeals err in finding that the evidence is sufficient to show Berg committed unauthorized use of a credit card?

Specifically:

Did the district court and the Iowa Court of Appeals err in finding Berg's testimony is corroborated by other material evidence connecting her to the offense?

Did the district court and the Iowa Court of Appeals err in finding the gift card that was used and the gift card that was purchased are the same?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	2
TABLE OF CONTENTS.....	3
TABLE OF AUTHORITIES	5
STATEMENT SUPPORTING FURTHER REVIEW	8
BRIEF	9
STATEMENT OF THE FACTS AND PROCEEDINGS.....	9
ARGUMENT	11
I. THE COURT ERRED IN DENYING DEFENDANT’S MOTION TO DISMISS FOR LACK OF SPEEDY INDICTMENT	11
A. Error Preservation	11
B. Scope and Standard of Appellate Review	12
C. Argument.....	15
i. Under the Same Evidence Test, the Theft in the 4th Degree Charge and the Unauthorized Use of a Credit Card Charge Constitute the Same Offense.....	13
ii. In Order to Adequately Protect Berg’s Constitutional Right to Speedy Trial, This Case Must be Dismissed	19
II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE VERDICT	23
A. Error Preservation	23
B. Scope and Standard of Appellate Review	24
C. Argument.....	24

i. The Evidence Is Insufficient to Show Berg Committed Unauthorized Use of a Credit Card Because the Sole Evidence of the Offense Is Berg’s Uncorroborated Testimony..... 26

ii. The Evidence Is Insufficient to Show Berg Committed Unauthorized Use of a Credit Card Because the State Failed to Show the Gift Cards Used and Purchased are the Same..... 29

CONCLUSION..... 31

CERTIFICATE OF COST 31

CERTIFICATE OF COMPLIANCE..... 32

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

CASES

<i>Ennenga v. State</i> , 812 N.W.2d 696 (Iowa 2012).....	20
<i>In re Winship</i> , 397 U.S. 358 (1970)	23, 24
<i>Opper v. United States</i> , 348 U.S. 84 (1954)	25
<i>Smith v. Under Armour, Inc.</i> , 593 F. Supp. 2d 1281 (S.D. Fla. 2008)	29
<i>State v. Abrahamson</i> , 746 N.W.2d 270 (Iowa 2008)	12, 13, 19, 20, 21
<i>State v. Bash</i> , 670 N.W.2d 135 (Iowa 2003)	23
<i>State v. Berg</i> , No. 23–0819 (January 24, 2024)	12, 15, 26, 27, 28, 29
<i>State v. Bruegger</i> , 773 N.W.2d 862 (Iowa 2009)	11
<i>State v. Crone</i> , 545 N.W.2d 267 (Iowa 1996)	22
<i>State v. Douglas</i> , 675 N.W.2d 567 (Iowa 2004)	25
<i>State v. Hill</i> , 140 N.W.2d 731 (Iowa 1966)	24
<i>State v. Huffman</i> , 752 N.W.2d 452, 2008 WL 2039300 (Iowa Ct. App. 2008)	13
<i>State v. Johnson</i> , 217 N.W.2d 609 (Iowa 1974)	19, 20, 22
<i>State v. Liggins</i> , 524 N.W.2d 181, 187 (Iowa 1994)	7, 26
<i>State v. Moritz</i> , 293 N.W.2d 235 (Iowa 1980)	7, 13, 19
<i>State v. Polly</i> , 657 N.W.2d 462 (Iowa 2003).....	25, 26
<i>State v. Schuessler</i> , 561 N.W.2d 40 (Iowa 1997)	11, 12
<i>State v. Williams</i> , 895 N.W.2d 856 (Iowa 2017)	11

CONSTITUTIONS

United States Constitution, Amendment 6 11, 23

United States Constitution, Amendment 14 21

Iowa Const. Art. I, § 9 11, 23

Iowa Const. Art. I, § 10 21

STATUTES

Iowa Code § 714.16

Iowa Code § 714.2(4) 9, 14, 15

Iowa Code § 714.2(5) 16, 17, 18

Iowa Code § 715A.1(a) 14

Iowa Code § 715A.6 19, 30, 31, 36

Iowa Code § 715A.6(1)(c)..... 14

Iowa Code § 715A.6(2) 9, 10

COURT RULES

Iowa R. Crim. P. 2.17 24

Iowa R. Crim. P. 2.17(2) 24

Iowa R. Crim. P. 2.33(2)(a) 11

Iowa R. Evid. 2.21 25, 26

STATEMENT SUPPORTING FURTHER REVIEW

This case warrants further review because the Iowa Court of Appeals' decision conflicts with several Iowa Supreme Court cases regarding speedy indictment dismissals, including *State v. Abrahamson* and *State v. Moritz*, by applying the "same elements" test that the Supreme Court explicitly rejected, rather than the approved "same offense" test. 746 N.W.2d 270, 275 (Iowa 2008); 293 N.W.2d 235, 239 (Iowa 1980).

The Court of Appeals' decision also conflicts with Iowa Supreme Court case law stating that a criminal defendant's confession is insufficient to sustain a conviction unless it is corroborated by other material evidence connecting the defendant to the offense. *State v. Liggins*, 524 N.W.2d 181, 187 (Iowa 1994).

BRIEF

STATEMENT OF FACTS AND PROCEEDINGS

On July 21, 2022, police were dispatched to a Casey's General Store regarding an employee theft allegation. (Confidential App. at 11). The officer met with the manager, Brandi Dobbs, and Sarah Berg. *Id.* Dobbs stated that video and receipt records showed that the Berg had, while working at Casey's, activated three gift cards without paying for them. *Id.*

Berg provided a written statement, which said:

I took 2 gift cards. I panicked because I needed to buy groceries for my kids and didn't know what else to do. It was dumb and I shouldn't have done it, but I did it to feed my kids. After I did it, I tried to void it but it didn't work I didn't tell anyone.

Id at 20.

The police report attached to the Minutes of Testimony indicates Berg admitted she had activated three gift cards without paying for any of them. *Id* at 11. This includes a Casey's gift card worth \$75.00, a Visa gift card worth \$200.00 and an Amazon gift card worth \$425.00. *Id.* The report states Berg admitted that she did not pay for the cards and used them to purchase merchandise elsewhere. *Id.* Included in the Minutes of Testimony is a document showing that a Casey's gift card in the amount of \$75.00 with an account ending in number 7247 was approved on July 12, 2022, by a cashier named "Sarah." *Id* at 18. Also included in the Minutes of Testimony is a

document which shows that on July 13, 2022, a Casey's gift card, ending in number 7247, was used to purchase grocery items and gas in the amount of \$59.67. *Id* at 16. There was a remaining balance on the Casey's gift card of \$15.33. *Id*.

The district court found “[t]he document shows that the defendant had used the card and the card had a remaining balance of \$15.33 after the purchase.” (App. at 26). However, the record contains no admissions that Berg used any of the cards she obtained at Casey's, nor any evidence that the card used on July 13, 2022 had the same first 15 digits as the card that was activated on July 12, 2022. *See* (Confidential App. at 6-22). It also does not contain any evidence of Berg having been the person who purchased the card. *See id*.

On July 22, 2022 a complaint was filed accusing Berg of Theft in the 4th Degree, in violation of Iowa Code § 714.2(4). (App. at 6). On August 9, 2022, Berg had an initial appearance. (App at 8). On October 3, 2022, Berg filed a motion to dismiss. (App at 11-12). On October 12, 2022, the State filed a Trial Information charging Berg with Unauthorized Use of a Credit Card Under \$1,000, in violation of Iowa Code § 715A.6(2). (App. at 13). On October 21, 2022, Berg's motion to dismiss was denied. (App. at 15). Berg filed a motion to reconsider denial of the motion to dismiss. (App. at 17-22).

The motion to reconsider was also denied. (App. at 23). Berg subsequently waived her right to a jury trial and proceeded to a trial on the minutes of testimony.

On January 11, 2023, following trial, Berg was convicted of Unauthorized Use of a Credit Card Under \$1,000, in violation of Iowa Code § 715A.6(2). (App. at 27). She was sentenced to 120 days in jail, with all days suspended; \$855 fine suspended; 15% surcharge; and restitution. (App. at 30-31). Judgment and sentence were entered on May 17, 2023. *Id.* The Iowa Court of Appeals affirmed the decision of the district court on January 24, 2024.

ARGUMENT

I. THE COURT ERRED IN DENYING DEFENDANT’S MOTION TO DISMISS FOR LACK OF SPEEDY INDICTMENT

A. Error Preservation

The issue was preserved because Berg filed a motion to dismiss for lack of speedy indictment and also a motion to reconsider the denial of that motion. (App. at 11-12; 17-22). Both were denied by the court. (App. at 15-16; 23-45).

B. Scope and Standard of Appellate Review

Courts “review interpretations of the speedy indictment rule for errors at law.” *State v. Williams*, 895 N.W.2d 856, 860 (Iowa 2017).

Constitutional claims are reviewed de novo. *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009).

C. Argument

The right to a speedy trial is protected by both the Iowa and federal Constitutions. U.S. Const. Amend. VI; Iowa Const. Art. I, § 10. “The speedy indictment rule gives effect to the constitutional guarantee of speedy trial.” *Williams*, 895 N.W.2d at 866 (citing *Wing*, 791 N.W.2d at 246; Iowa Const. Art. I, § 10). “As a part of the broader right to a speedy trial in all criminal cases, the rule specifically addresses the time frame in which formal charges must be brought against an accused and requires the case be dismissed for noncompliance.” *Id* at 860; Iowa R. Crim. P. 2.33(2)(a).

The speedy indictment rule implements the long-standing public policy of the state of Iowa that “ ‘criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties.’ ” *State v. Schuessler*, 561 N.W.2d 40, 41–42 (Iowa 1997) (citing *State v. Davis*, 525

N.W.2d 837, 839 (1994) (quoting Iowa R.Crim. P. 27(2))). Specifically, as the Iowa Supreme Court has explained:

The purpose of these protections, both constitutional and statutory, is to relieve one accused of a crime of the hardship of indefinite incarceration awaiting trial or the anxiety of suspended prosecution, if at liberty on bail, and to require courts and peace officers to proceed with the trial of criminal charges with such reasonable promptness as proper administration of justice demands.

Id (citing *State v. Allnutt*, 261 Iowa 897, 901, 156 N.W.2d 266, 268 (1968), *overruled on other grounds in Gorham*, 206 N.W.2d at 913; *Penn-Kennedy*, 862 N.W.2d at 387).

i. Under the Same Evidence Test, the Theft in the 4th Degree and the Unauthorized Use of a Credit Card Charges Constitute the Same Offense

In this case, the Iowa Court of Appeals properly found that no trial information was filed within 45 days of Berg’s initial appearance. The question here is “whether the subsequent charge is for the ‘same offense’ previously dismissed on speedy trial grounds.” *Abrahamson*, 746 N.W.2d at 273.

The Court of Appeals held “[T]he forty-five-day period to bring an indictment applies only to the public offense for which the defendant was arrested and any lesser included offenses.” *State v. Berg*, No. 23–0819 * 4

(January 24, 2024) (citation omitted). This echoes the trial court’s holding that “the 45-day rule only applies to the charge arrested for or its lesser included.” (Tr of Hearing on Motion to Dismiss at 10).

However, the Court of Appeals’ ruling contravenes the prior holdings of the Iowa Supreme Court that “rejected the State’s argument the appropriate analysis for speedy trial ‘same offense’ issues requires a ‘same elements’ analysis.” *State v. Huffman*, 752 N.W.2d 452, 2008 WL 2039300 (Iowa Ct. App. 2008) (citing at *Abrahamson*, 746 N.W.2d at 276).

For more than 40 years, in determining whether a person’s right to speedy trial has been violated, Iowa courts use the “same offense” test, not a same elements test. *State v. Moritz*, 293 N.W.2d 235, 239 (Iowa 1980). As the Iowa Supreme Court explained, “the ‘same offense’ test applied in the speedy trial context focuses on whether the “ ‘two offenses are in substance the same, or of the same nature, or same species, so that the evidence which proves one would prove the other.’ ” *Abrahamson*, 746 N.W.2d at 275 (quoting *State v. Moritz*, 293 N.W.2d at 238-39) (Iowa 1980). In this case, the same evidence would be used to prove both Theft in the 4th Degree and Unauthorized Use of a Credit Card.

In order to convict Berg of Unauthorized Use of a Credit Card, the State must prove the following:

1. a. A person commits a public offense by using a credit card for the purpose of obtaining property or services with knowledge of any of the following:
 - (1) The credit card is stolen or forged.
 - (2) The credit card has been revoked or canceled.
 - (3) For any other reason the use of the credit card is unauthorized.

Iowa Code § 715A.1(a).

The level of the offense is determined by the dollar amount of the property or services obtained. Iowa Code § 715A.6. in this case, Berg was convicted of Unauthorized Use of a Credit Card Under \$1,500. Iowa Code § 715A.6(1)(c).

The complaint did not specify the subsection of Iowa Code § 714.1 Berg was arrested for allegedly violating. *See* (App at 6). However, it does allege “[o]n or about the above stated date and time, the Defendant did commit theft in the fourth degree by taking property, gift cards belonging to Caseys, said property having a value exceeding \$300 but not exceeding \$750” [sic]. *Id.* It also alleges “Defendant was an employee of Caseys. She activated three gift cards from the store without paying for the cards. Total for cards was \$700. Defendant than used the cards to purchase merchandise elsewhere. Defendant admitted to doing this.” *Id.* The complaint does specify Berg is alleged to have committed Theft in the 4th Degree, which requires, “[t]he theft of property exceeding three hundred dollars in value

but not exceeding seven hundred fifty dollars in value”. Iowa Code § 714.2(4).

The Court of Appeals completely failed to address the basis for the theft charge. Its sole reference to the basis for the theft charge was a single sentence that made no findings whatsoever about what the State would have to prove in order to sustain a conviction for Theft in the 4th Degree. *Berg*, No. 23–0819 * 5 (January 24, 2024) (stating “The complaint largely focused on the unlawful activation of the gift cards at Casey’s and employee theft.”) The Court of Appeals then makes the unsupported, conclusory statement that “[t]he evidence is being used to prove different acts even though they stem from the same incident.” *Id.*

However, when the facts necessary to prove both Theft in the 4th Degree and Unauthorized Use of a Credit Card Under \$1,500 are compared, it is clear they are the same. For each charge, the State must prove that Berg 1) obtained property of another 2) by using the credit card.

It is clear from the record that Berg was charged with theft based on the allegation that she used the card to obtain property, not simply that she obtained the card itself. In order for Berg to be convicted of Theft in the 4th Degree, the State must prove she took property exceeding \$300 in value. The card itself is of *de minimus* value. The money loaded onto an activated

gift card is retained by the company until the card is used. Therefore, a charge based on theft of the card would have been Theft in the 5th degree. Berg was charged with Theft in the 4th Degree. Accordingly, the theft charged in this case had to have been of the items purchased with the cards – not of the cards themselves. It is the use of more than \$300 that has been loaded onto the card that constitutes the offense of Theft in the 4th Degree, rather than Theft in the 5th Degree. Accordingly, the State would have to prove Berg used the card and that the merchandise she purchased with the card exceeded \$300. If the State did not intend to prove that, the most Berg could have been charged with would be the lesser included offense of Theft in the 5th Degree. Iowa Code § 714.2(5).

Moreover, the minutes of testimony only include receipts of purchases from Casey's General Store on a Casey's General Store Gift Card. (App. at 16). There is no evidence that Berg, or anyone else, ever used the Amazon card or Visa card that are alleged to have been stolen. If the purchases occurred on the Casey's gift card, then activating and taking the card would have deprived Casey's of the card itself, but not of the value of the money loaded onto the card. The money loaded on the card would have been retained by Casey's until such time as the card was used. Even then, Casey's would retain the monetary value of the money loaded onto the card, but

would be deprived of the merchandise the card was used to purchase. Under the specific allegations in this case, there could be no theft of more than \$300 unless and until the credit card was used to obtain property. Accordingly, for both Theft in the 4th Degree and Unauthorized Use of a Credit Card, the State would have to prove that Berg took property from Casey's *by using* the gift card.

During the hearing on Berg's motion to dismiss, the State argued "[t]he first crime, theft fourth, punishes the act of taking or of manifesting some sort of control over property belonging to another. The offense that's set forth in the trial information is a Chapter 715A claim for unauthorized use of an electronic card. It punishes the use of a card when it's knowingly stolen or when there's no authorization to do so. That's a crime, an offense that occurs at the time of use rather than the time of the theft. They're distinct charges. So the defense has not met its burden to establish either it's the same offense or that what's being charged is a lesser included." (Tr of Hrg on Motion to Dismiss at 6).

As discussed above, the State's argument is belied by its own decision to charge Theft in the 4th Degree. *See* (App at 8). Theft in the 5th Degree could be accomplished by the theft of the physical card. *See* Iowa Code § 714.2(5). In contrast, Theft in the 4th Degree could only occur if the card is

used to purchase merchandise valued at over \$300. *See* Iowa Code § 714.2(5). Because Berg was charged with Theft in the 4th Degree based on the value of the merchandise the card is used to purchase, and not the value of the card itself, the State would be required to prove Berg actually used the card in order for it to meet its burden of proving her guilty beyond a reasonable doubt of Theft in the 4th Degree.

The Court of Appeals erred in failing to conduct an analysis of the facts the State must prove for both the charge of Theft in the 4th Degree and Unauthorized Use of a Credit Card. Had the court done so, it would have found the same proof necessary to sustain both charges. Berg is requesting the Iowa Supreme Court reaffirm the use of the “same offense” test, analyze the proof necessary in both cases, recognize it is the same, and find that Berg’s case should have been dismissed for failure to indict within 45 days of her arrest and initial appearance.

ii. In Order to Adequately Protect Berg’s Constitutional Right to Speedy Trial, This Case Must be Dismissed

Speedy trial rules must be vigorously enforced in order to ensure a criminal defendant’s constitutional rights are fully protected. As the Iowa Supreme Court has warned, “[i]f the State is free to commence repeated prosecutions for the same offense following undue delay in going to trial,

subject only to the running of the statute of limitations, there is nothing to deter delays at prosecution's convenience in pushing forward to trial, and defendant's constitutional right to a speedy trial is rendered largely meaningless." *State v. Johnson*, 217 N.W.2d 609, 612 (Iowa 1974) (citations omitted).

In rejecting the "same elements" test in favour the more lenient "same offense" standard articulated in *Moritz*, the Iowa Supreme Court was very concerned about the potential infringement on a defendant's constitutional rights if the test were too rigid. Specifically, the court was concerned that:

[i]t would permit, if not encourage, the piecemeal prosecution of drug trafficking charges as a means of avoidance of the time-honored constraints of our speedy trial rule. For example, under the State's interpretation, the dismissal of the conspiracy charge as a penalty for violation of Abrahamson's right to a speedy trial would be of insubstantial consequence to the State because the manufacturing charge would stand in ready reserve to be charged as a separate offense. Such an interpretation would undermine the salutary purposes of the speedy trial rule.

Abrahamson, 746 N.W.2d at 277 (citing *Johnson*, 217 N.W.2d at 612 ("noting the remedy afforded by a dismissal with prejudice for violation of the speedy trial rule assures that the rule will not be rendered meaningless"))).

Likewise, "it is conceivable that the State could, as a matter of strategy, file an information but hold in reserve several alternative offenses

in cases involving alleged manufacturing, possession and delivery of controlled substances. In drug trafficking cases involving multiple individuals, the potential array of such offenses available ‘in reserve’ would of course be even greater under the State’s interpretation of the rule, as a conspiracy offense might have been committed in such cases.” *Abrahamson*, 746 N.W.2d at 277 n. 7.

Although *Abrahamson* specifically addressed the drug trafficking statute, the same reasoning applies here. The State would still be able to strategically circumvent a criminal defendant’s constitutional rights by “piecemeal prosecution” without substantial consequence. *Id.*

The purpose of both the criminal procedural rules and the constitutional provisions is to “relieve an accused of the anxiety associated with a suspended prosecution and provide reasonably prompt administration of justice.” *Ennenga v. State*, 812 N.W.2d 696, 703 (Iowa 2012) (citing *State v. Wing*, 791 N.W.2d 243, 246–47 (Iowa 2010) (citations omitted)). Allowing the State to engage in “piecemeal prosecution” would thwart the very purpose of a criminal defendant’s right to speedy trial.

Moreover, “[t]he speedy indictment and speedy trial rules also aim to prevent the harm that arises from the “possible impairment of the accused’s defense due to diminished memories and loss of exculpatory evidence.”

Id. This type of harm is the “most serious,” because “the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Id.* This also implicates a criminal defendant’s due process rights under United States Constitution, Amendment 14 and Iowa Constitution, Article I, § 9.

Given the compelling need to protect a criminal defendant’s State and federal constitutional rights to a speedy trial, dismissal for a speedy trial violation is absolute. *See e.g. Abrahamson*, 746 N.W.2d 270; *see also Johnson*, 217 N.W.2d at 612. “A dismissal for failure to provide a speedy trial is an absolute dismissal, a discharge with prejudice, prohibiting reinstatement or refiling of an information or indictment charging the same offense.” *Abrahamson*, 2008, 746 N.W.2d 270; *see also Johnson*, 217 N.W.2d 612 (stating that allowing the State to refile the same charges following a speedy trial violation would “drain [the speedy trial rule] of its force and effectiveness in protecting the accused’s right to a speedy trial.”)

Accordingly, courts must carefully consider whether allowing the State to refile charges for the same conduct is consistent with a criminal defendant’s right to speedy trial.

In this case, the State did not take any action on the charges against Berg until Berg filed a motion to dismiss based on the violation of her right

to speedy trial. The State never put forth any good cause for its delay. Berg did nothing to delay her case being brought before the court. The new charge of Unauthorized Use of a Credit Card requires the same proof as the initial charge of Theft in the 4th Degree. Under these circumstances, it is clear the State filed new charges for the same conduct in order to circumvent Berg's right to a speedy trial. This constitutes a fundamental violation of Berg's right to speedy trial and due process of law. Accordingly, the Court should vacate Berg's conviction and order dismissal of this case.

II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE VERDICT

A. Error Preservation

The issue was preserved because Berg argued at trial that the evidence presented by the State was insufficient to establish beyond a reasonable doubt that Berg failed to pay for the gift cards or that Berg had used the cards to obtain goods or services. (Tr. of Trial p. 7-10). In an order dated March 3, 2023, the court found Berg guilty of Unauthorized Use of a Credit Card. (App. at 27).

Berg specified which elements of the crime were insufficiently supported by the evidence. (Tr. of Trial p. 7-10). Therefore, Berg preserved

error on her challenge to the sufficiency of the evidence. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996).

B. Scope and Standard of Appellate Review

The standard of review for challenges to the sufficiency of the evidence is for errors at law. *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). The Court will uphold a verdict if substantial evidence supports it. *Id.* Evidence is considered substantial “if it would convince a rational fact finder the defendant is guilty beyond a reasonable doubt.” *Id.* The Court reviews the evidence, including legitimate inferences and presumptions that may fairly be deduced from the evidence, in the light most favorable to the State. *Id.* The State has the burden to prove each fact necessary to constitute the crime with which the defendant is charged. *Id.* In order to be considered sufficient, “[t]he evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.” *Id.*

C. Argument

The Sixth Amendment of the United States Constitution and Article 1, § 9 of the Iowa Constitution guarantee a criminal defendant’s right to due process of law. It is one of the basic principles of criminal law that “the Due

Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970).

Likewise, the Iowa Supreme Court has long held that it “will not let a finding of guilt stand where there is an absence of proof of any essential element of the crime charged.” *State v. Hill*, 140 N.W.2d 731, 733 (Iowa 1966) (citing *State v. Stodola*, Iowa, 134 N.W.2d 920, 921; *State v. Myers*, 253 Iowa 271, 274, 111 N.W.2d 660, 662). “A conviction notwithstanding such absence of proof amounts to denial of a fair trial” and accordingly must be reversed. *Id* (citations omitted).

This case proceeded to trial on the minutes of testimony. Iowa R. Crim. P. 2.17(2); (App at 25). When a trial on the minutes is held, the parties may choose to stipulate to inclusion of additional evidence in the record. Iowa R. Crim. P. 2.17. In this case, the parties did not stipulate to inclusion of any additional evidence. Accordingly, the sole evidence available to the court in this matter were the minutes of testimony and attached evidence.

Here the minutes do not present sufficient evidence to prove Berg guilty beyond a reasonable doubt of each element of unauthorized Use of a

Credit Card. Accordingly, this case must be reversed and remanded for a new trial.

i. The Evidence Was Insufficient to Show Berg Committed Unauthorized Use of a Credit Card Because the Sole Evidence of the Offense Is Berg’s Uncorroborated Testimony

Under Iowa law, “a confession standing alone will not warrant a criminal conviction unless other proof shows the defendant committed the crime.” *State v. Douglas*, 675 N.W.2d 567, 568–69 (Iowa 2004) (citing *State v. Polly*, 657 N.W.2d 462, 466 (Iowa 2003)); Iowa R. Evid. 2.21. “[W]hen the prosecution relies on [such] proof, corroborating evidence independently linking the defendant to the offense is required. *Id* (citing *Polly*, 657 N.W.2d at 466)).

Likewise, under federal law, “our concept of justice that finds no man guilty until proven has led our state and federal courts generally to refuse conviction on testimony concerning confessions of the accused not made by him at the trial of his case. *Opper v. United States*, 348 U.S. 84, 89 (1954) (citations omitted).

In this case, the only evidence that Berg obtained a card that had not been paid for is that she stated she had done it. (Confidential App at 6-21).

There is no other evidence that she used a card she had not paid for. *Id.* Berg's confession would need to be corroborated by independent evidence in order to sustain a conviction. *See* Iowa R. Evid. 2.21; *Polly*, 657 N.W.2d at 466. Because it is not, there is insufficient evidence to sustain a conviction.

A confession can sustain a conviction when it is "accompanied with other proof that the defendant committed the offense." Iowa R. Evid. 2.21. "Corroboration need not be strong nor need it go to the whole of the case so long as it confirms some material fact connecting the defendant with the crime." *State v. Liggins*, 524 N.W.2d 181, 187 (Iowa 1994) (citing *State v. White*, 319 N.W.2d 213, 214 (Iowa 1982)). However, under Iowa law, it is "necessary that the 'other proof' connect the defendant with the offense." *Id.* (citing *State v. Schomaker*, 303 N.W.2d 129, 130 (Iowa 1981)). Accordingly, if the other evidence is not material to the offense or does not connect the defendant with the offense, it is insufficient to corroborate a defendant's confession when that is the sole evidence. *Id.*

In this case, no evidence proves a material fact related to the offense or connects Berg to the offense.

The Court of Appeals erroneously found there was adequate corroboration of Berg's statement, stating:

Two July 12, 2022 receipts from Casey's confirmed a cashier named "Sarah" approved the activation of the three cards. A third Casey's receipt dated July 13 showed a purchase of groceries and gas. The last four digits of the Casey's gift card activated on July 12 match the last four digits of the card used to purchase merchandise on July 13. The police complaints and investigation verify these transactions. Combined, these documents corroborate Berg's confession to both activating and using the cards to purchase other items.

Berg, No. 23–0819 * 6 (January 24, 2024).

The Court of Appeals decision implies that the police reports and complaints, which quote Berg's statements, can be used to corroborate those statements. The simple expedient of writing down a Defendant's statement in a report cannot be used to circumvent the requirement of corroborating evidence.

The other evidence cited by the Court of Appeals shows that cards were activated by a cashier named Sarah. It does not show that the cards were not lawfully purchased or activated. The minutes do contain receipts from the purchase of the cards, but nothing in the receipts shows that the cards weren't lawfully purchased. (App at 18). In fact, the receipts included in the minutes appear to show that the cards were paid for at the time of activation. *Id.* Accordingly, there is no evidence other than Berg's admission that she did not lawfully purchase the cards. *Id.* This cannot establish a material element of the offense.

Furthermore, the Court of Appeals' finding that a "Casey's receipt dated July 13 showed a purchase of groceries and gas" and that "the police complaints and investigation verify these transactions" does not show that the card used on that date was not lawfully purchased. *Berg*, No. 23–0819 * 6 (January 24, 2024).

Likewise, despite the fact that "[t]he last four digits of the Casey's gift card activated on July 12 match the last four digits of the card used to purchase merchandise on July 13", there is no evidence that the cards were the same. *Berg*, No. 23–0819 * 6 (January 24, 2024). The limitation of credit card numbers on the receipts to the last four digits prevents the fact finder from positively identifying the owner or user of the card. Therefore, it is impossible to ascertain whether the gift card purchased on July 12, 2022 is the same card as the one used on July 13, 2022. Accordingly, the minutes do not contain any evidence that Berg ever used the activated cards, or that they were used on July 13. *Id.*

There is no other evidence to corroborate Berg's confession and find her guilty beyond a reasonable doubt of each element of Unauthorized Use of a Credit Card. Accordingly, Berg' conviction must be vacated.

ii. The Evidence Is Insufficient to Show Berg Committed Unauthorized Use of a Credit Card Because the State Failed to Show the Gift Cards Used and Purchased are the Same

The evidence is also insufficient to show Berg committed Unauthorized Use of a Credit Card because the State failed to show that the gift card that was used and the gift card that was purchased are the same. In its decision, the Court of Appeals stated, “[t]he last four digits of the Casey’s gift card activated on July 12 match the last four digits of the card used to purchase merchandise on July 13.” *Berg*, No. 23–0819 * 6 (January 24, 2024). The court further found “these documents corroborate Berg’s confession to both activating and using the cards to purchase other items.” *Id.* However, the fact that the last four numbers of two 19-digit card numbers match does not prove that the cards are the same.

The Court of Appeals’ analysis ignores the fact that the last four digits of a credit card are used on receipts *because* it is impossible to identify the card based solely on those numbers. In fact, the Fair and Accurate Credit Transactions Act prohibits businesses that accept credit cards or debit cards from printing more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction. 15 U.S.C.A. § 1681c.(g)(1). “Congress’s aim in passing FACTA was to reduce the chance that a consumer would be injured (usually through

identity theft) by virtue of the inclusion of sensitive information on a credit/debit card receipt.” *Smith v. Under Armour, Inc.*, 593 F. Supp. 2d 1281, 1283 (S.D. Fla. 2008) (citations omitted)). The limitation of credit card numbers on receipts to the last five digits prevents identity theft and other crimes involving credit or debit cards by ensuring that the information on the receipt cannot identify the owner or user of the card. *See id.* Likewise, it is impossible to determine whether that the gift card purchased on July 12, 2022 is the same card as the one used on July 13, 2022. Therefore, the receipts from those transactions do not constitute material proof connecting Berg to the charged offense.

Accordingly, the court improperly found that the matching last four digits of the two receipts met the State’s heavy burden of proof beyond a reasonable doubt that the gift card purchased on July 12, 2022 is the same card that was used on July 13, 2022. Likewise, the court also erroneously found that Berg used the gift card that was activated on July 12, 2022.

There is not sufficient evidence to find Berg guilty beyond a reasonable doubt of each element of Unauthorized Use of a Credit Card. Accordingly, Berg’ conviction must be vacated.

CONCLUSION

Berg's speedy trial rights were violated, which requires a complete dismissal of all charges. The State failed to file a trial information within 45 days of Berg's initial appearance. The State then filed a new charge for the same offense. Accordingly, the Court should reverse Berg's conviction and remand for entry of an order of dismissal.

Alternatively, the Court should find there was insufficient evidence to convict Berg, both insufficient evidence of Berg having failed to pay for the gift cards and insufficient evidence of Berg having used a card that was not lawfully purchased. Accordingly, the Court should reverse the conviction for the charge and remand for entry of an order of dismissal.

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost incurred by Benzoni & Maffitt Law Office, P.L.C., for printing the attached Appellant's Brief was \$3.30.

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VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND
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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 5,467 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. 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 it has been prepared in a proportionally spaced typeface using WordPerfect X3 in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE AND FILING

I, Jessica Maffitt, hereby certify that on the 3rd day of February, 2024, I served the attached Application For Further Review And Brief In Support Of Application For Further Review on the Court and each other party by electronic service or through mailing one copy thereof to the following party:

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