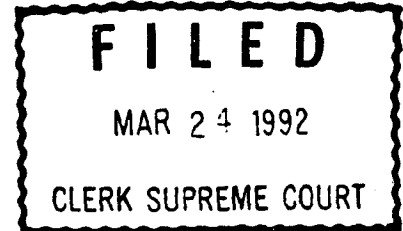


## IN THE COURT OF APPEALS OF IOWA

No. 2-016 / 91-288



STATE OF IOWA,

Plaintiff-Appellee,

vs.

JACK SPENCER EVANS,

Defendant-Appellant.

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Appeal from the Iowa District Court for Van Buren  
County, William L. Dowell, Judge.

Evans appeals from his conviction, following a jury  
trial, for first-degree murder. **REVERSED AND REMANDED.**

Amanda Potterfield of Johnston, Larson, Potterfield,  
Zimmermann & Nathanson, P.C., Iowa City, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes,  
Assistant Attorney General, Richard Lytle, County Attorney,  
and Robert Glaser, Assistant Attorney General, for  
appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

**SACKETT, J.**

Defendant-appellant Jack Spencer Evans appeals his conviction, following a jury trial, for first-degree murder. He contends the trial court should have suppressed evidence of statements he made to investigating officers. He contends the officers violated his fifth and sixth amendment rights to counsel when they questioned him. The defendant also contends his trial attorney was not effective when he did not object during trial to the defendant's exercise of his constitutional right to remain silent at the time of his arrest. The defendant further alleges his trial attorney was not effective because he failed to request an alibi instruction, he failed to object to testimony of a rebuttal witness, and he failed to object to the admission of a series of autopsy pictures. We reverse and remand for a new trial.

On Tuesday, September 11, 1990, the body of the victim, eighty-one-year-old Della Forbes, was found in her farm home by a rural mail carrier. The mail carrier became concerned when he discovered Della had not picked up her Monday's mail. He went to the door of her home, looked in and saw a form at the bottom of the door. He also observed a number of flies on the door and a rocking chair tipped over in the house. The rural mail carrier opened the door and discovered Della's body on the floor close to the front door. The house had a bad odor, and the body was covered

with flies. Della had been shot five times. Five .38 caliber special bullets were recovered from the ceiling, walls, and floor of the room where Della was found.

In investigating Della's death, law enforcement officials learned the defendant had purchased a .357 magnum gun of the type from which the .38 special bullets recovered from Della's house could have been fired. Defendant, a twenty-one-year-old man, lived with his brother and parents about a mile from Della's farm home. The defendant had a physical handicap. He was a high school graduate in special education. On September 18, 1990, the defendant and his family, at the request of DCI agents, gave them two pistols, a .357 magnum and a .22 caliber. A DCI criminalist test-fired the .357 and determined the .38 special bullets recovered from the victim's residence had been fired from the .357.

Shortly before 11:35 a.m. on September 19, 1990, DCI agents Hedlund and Mower, knowing the defendant would be home alone, went to defendant's parents' residence to interview the defendant and to execute a search warrant. Hedlund read the defendant the warning described as the Miranda warning. The defendant signed a form waiving these rights. The defendant asked if he was going to be arrested and was told he was not.

An interview was conducted by Hedlund. Mower took notes. The agent questioned the defendant about his

whereabouts on the weekend of September 8, 9, and 10, 1990. After about a half an hour, the defendant was told his gun had been identified as the murder weapon. Hedlund asked the defendant if he knew when the victim had been killed and the defendant answered "no." The defendant was then asked about where he was when the victim was killed. The defendant answered that he had been bar-hopping with his father. The defendant was told he was a suspect in the case. The defendant stopped the interview just before 12:30 p.m. Hedlund and Mower did not ask any more questions at that time. The agents said the defendant said he did not want to talk anymore. The defendant said he did not want to talk anymore without an attorney. After the questioning stopped, the agents told the defendant they had a search warrant.

Prior to conducting a search, the agents called the sheriff's office and learned the legal description on the search warrant they had was not correct. Mower went to the sheriff's office to get a corrected search warrant. Hedlund stayed at defendant's home, apparently to make sure no evidence was destroyed.

After Mower left, there was no further discussion between the defendant and Hedlund for about half an hour. Then the defendant asked Hedlund if he could ask him some questions. Hedlund told the defendant he had asked Hedlund not to ask him any more questions, and the defendant had

been given Miranda rights. Hedlund said he would only talk to the defendant if the defendant waived those rights. The defendant continued to talk to Hedlund. At one point, the defendant told Hedlund he did not want to answer any more questions without talking to a lawyer. Hedlund said at that point he walked away from defendant.

About 2:30 p.m. on that day, law enforcement officials returned with a search warrant and started to search the home.

The county sheriff arrested the defendant at 3:00 p.m. The warrant for the defendant's arrest had issued about 2:00 p.m. After the sheriff arrested the defendant the sheriff took defendant to the sheriff's car, again read defendant his rights, and had the defendant sign a waiver of rights.

#### I.

The defendant at trial sought to suppress any evidence of his conversations with the two agents. The trial court did not suppress the evidence. The defendant contends this was error. The defendant is alleging the violation of constitutional rights. Our review is de novo. See Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

Defendant contends Hedlund and Mower violated his constitutional right to counsel, and only obtained involuntary statements during the two interviews at his home.

The defendant contends his incriminating statements were made after 2:00 p.m. during the second stage of the interrogation when the forces of the State had solidified in a position adverse to him. He said the sheriff said the decision to arrest him was made around 2:00 p.m. and was based on the identification of his gun as the murder weapon. The defendant was not arrested until about 3:00 p.m.

The right to counsel under the sixth amendment attaches when formal charges are initiated against an accused. See Moran v. Burbine, 475 U.S. 412, 431, 106 S. Ct. 1135, 1146, 89 L. Ed. 2d 410, 425 (1986); State v. Jackson, 380 N.W.2d 420, 423 (Iowa 1986). "After the sixth amendment right to counsel attaches, the State is precluded from attempting to 'deliberately elicit' incriminating statements from the defendant, absent the presence of counsel or a valid waiver." State v. Nelsen, 390 N.W.2d 589, 592 (Iowa 1986). Once attached, interrogation may not occur unless (1) the accused initiates the discussion about the crime, and (2) the accused waives any sixth amendment right. State v. Swaim, 412 N.W.2d 568, 577 (Iowa 1987) (citing Michigan v. Jackson, 475 U.S. 625, 632, 106 S. Ct. 1404, 1409, 89 L. Ed. 2d 631, 640-42 (1986)).

The defendant argues he was arrested about 2:00 p.m. The State argues he was not. The State points out he was not restrained, was able to walk about his house, and had

no restrictions until the sheriff arrived at the home after the questioning and arrested him. The defendant from about 11:35 a.m. was under the watchful eyes of one or more law enforcement officers. Hedlund directed defendant to leave the door open when he went to the bathroom and followed defendant to his mail box when defendant went to get the mail. The question is whether there was a restraint on the defendant's freedom of movement of a degree associated with an arrest. State v. Davis, 446 N.W.2d 785, 788 (Iowa 1989). We determine there was a restraint on the defendant's personal freedom when the agents came to the defendant's home. Their intention was not to leave until the defendant was arrested, as evidenced by the one agent's decision to stay after it became evident the search warrant was defective.

The State has a heavy burden to prove the defendant initiated further conversations and knowingly and intelligently relinquished the traditional benefits associated with the right to counsel. Absent this proof, the fruits of such conversations are inadmissible as evidence on behalf of the State in direct proof of its case. State v. Newsom, 414 N.W.2d 354, 359 (Iowa 1987). We find the defendant's sixth amendment rights to counsel were violated, and the statements he made in the second interview should have been suppressed. We reverse on this basis. We disagree with defendant that his fifth amendment

rights were violated during the initial questioning. The statements made when the conversation was resumed should be suppressed.

The defendant next contends his trial attorney should have objected to (1) autopsy pictures, (2) testimony he exercised his right to silence, and (3) inadmissible hearsay.

Assistance of counsel is ineffective for sixth amendment purposes only if the party claiming it shows (1) counsel's performance was deficient, and (2) actual prejudice resulted. See State v. Munz, 355 N.W.2d 576, 584 (Iowa 1984); Hinkle v. State, 290 N.W.2d 28, 33-34 (Iowa 1980).

During trial Hedlund was asked about statements made when the defendant was outside his house. Hedlund said the defendant said he wanted to talk to an attorney. The defendant's trial attorney did not object to this testimony. The defendant contends his exercise of his right to remain silent should not have been admissible, and an objection should have been taken. We agree. An accused's right to remain silent without fear of being chided at trial for doing so is a fundamental right. State v. Porter, 283 N.W.2d 351, 352 (Iowa 1979); State v. Kyseth, 240 N.W.2d 671, 674 (Iowa 1976). Because we have reversed on other grounds, we need not determine whether the defendant has shown the required prejudice to be successful on this contention.

## II.

The defendant contends his trial counsel should have requested an alibi instruction. The defendant had filed a notice of an alibi instruction. A focal issue in the trial was the time of Della's death. The State's theory was the murder occurred between 10:30 p.m. and midnight Saturday night. The State's case focused on the defendant's ability to commit the murder in that time frame. At trial, the State introduced evidence to support its theory Della died Saturday night. The evidence was Della (1) had talked to relatives on the phone on Saturday, September 8, (2) did not answer the phone when called several times on Sunday, September 9, (3) did not go to church on Sunday even though she regularly did, (4) had locked her chickens in the coop as she did at night, (5) had an unmade bed when her bed was generally made during the day, and (6) had spoiled fruit in her house.

The State's theory of time of death was weakened by evidence Della's home was visited twice on Monday by two Jehovah's Witnesses doing neighborhood visitations. The Jehovah's Witnesses left literature at Della's house without opening the door. The Jehovah's Witnesses looked in the house. But, unlike the rural mail carrier, they did not observe flies on the door, the body, or the overturned rocking chair.

The defendant presented a witness, Becky Meyer, who said she saw a woman she thought was Della in her garden on Monday morning, September 10.

The medical evidence left uncertainty as to the time of death. After being taken from the house, Della's body was autopsied by the state medical examiner. His initial report established the time of her death as 11:00 a.m. on Monday, September 10. At trial, the medical examiner testified death could have occurred as early as Saturday. He testified he had determined the time of death to be 11:00 a.m. on Monday, September 10, because he thought the Jehovah's Witnesses had seen Della alive on Monday morning. The time of Della's death has never been clearly established. There is evidence in the record to support a finding Della could have been killed on Saturday or Sunday or Monday. The State's theory was the defendant committed the murder on Saturday night between 10:30 p.m. and midnight. The defendant did not introduce evidence of an alibi for that time frame. The defendant centered his defense on showing Della was killed on Monday. The State did not attempt to show the defendant could have killed Della on Monday.

The defendant presented witnesses who were with him until about 10:30 p.m. on Saturday evening and from midnight Saturday evening until 2:00 a.m. Sunday morning. The defendant also introduced evidence to account for his

presence on Saturday during the day, on Sunday and Monday. Without deciding whether the facts in this record would have supported the giving of an alibi instruction, we do not find defendant's attorney ineffective for not having requested one.

The time of Della's death was the focal and unresolved issue. Defendant's attorney had the right to argue about time of and defendant's presence during the time frame. The interjection of an alibi issue could well have diluted and confused defendant's position on time of death.

### III.

The defendant next contends his trial counsel should have objected to testimony of Becky Meyer's mother-in-law, Juanita Meyer. A very important part of the defendant's case was the testimony of Becky Meyer. Becky, called as a witness for the defendant, testified she thought she saw Della alive on Monday morning. In rebuttal, the State called Becky's mother-in-law, Juanita, as a witness. Juanita was asked:

Q. Did she (Becky) ever tell you whether or not she had concerns about changing her testimony (about seeing Della Forbes on Monday morning)?  
A. Well, she wanted to change it. She said she didn't really want to testify, and that since she wasn't absolutely positive it was that Monday, that she would prefer to change it.

The parties agree that Juanita could testify for impeachment purposes to a prior inconsistent statement made by Becky. The question is was Juanita's testimony that

Becky had made a prior inconsistent statement? The defendant correctly points out Becky was not asked if she had ever made any statements to Juanita.

Before evidence can be admitted for impeachment purposes, there must be a foundation laid that adequately calls the attention of the witness to the time, place and circumstances of the alleged prior inconsistent statement and allows the witness an opportunity to admit, deny, or explain any inconsistencies between the two statements. State v. Hill, 243 N.W.2d 567, 570 (Iowa 1976). The State argues, among other things, there was little prejudice because Juanita's testimony was substantially the same as Becky's. Because we have reversed on other grounds, we need not determine whether the defendant was prejudiced by the testimony. On retrial, the State can follow the directive of Hill, 243 N.W.2d at 570, to establish a foundation for impeachment and avoid the possibility of a problem on this issue.

#### IV.

The last contention was the admission of pictures. It was never disputed Della had been shot five times. While the manner of death was not questioned, the time of death was questioned. Autopsy photographs are admissible to illustrate medical testimony and demonstrate viciousness in connection with a State's claim of malice. State v. Hickman, 337 N.W.2d 512, 516 (Iowa 1983); State v. Plowman,

386 N.W.2d 546, 551 (Iowa App. 1986). A number of pictures taken of her body when found and during the autopsy were introduced in evidence. The condition of the body and the presence of a large number of flies on the body rendered the photographs particularly gruesome. We agree with the defendant, a number of these pictures introduced were cumulative and, on proper objection, should have been excluded. We have reversed on other grounds. We, therefore, need not decide if the defendant has shown the required prejudice to succeed on a claim on ineffectiveness of counsel on this issue, and we decline to do so.

**REVERSED AND REMANDED.**

Schlegel, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent. I do not concur with the majority that the defendant's sixth amendment right to counsel was violated. I would affirm his conviction.