**IN THE COURT OF APPEALS OF IOWA**

No. 8-523 / 07-1406
Filed August 27, 2008

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**TAMMY LYNN SMITH,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Humboldt County, Allan L. Goode, Judge.

Tammy L. Smith appeals her conviction, following jury trial, for child endangerment resulting in serious injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellee.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Jennifer A. Benson, County Attorney, for appellant.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

**MILLER, P.J.**

Tammy L. Smith appeals her conviction, following jury trial, for child endangerment resulting in serious injury. She contends there was insufficient evidence to support her conviction, the district court erred in denying her motion to suppress, and her trial counsel was ineffective. We affirm.

## I. BACKGROUND FACTS AND PROCEEDINGS.

The record reveals the following facts. On January 30, 2006, Humboldt County Deputy Sheriff Brian Ricklefs and an Iowa Department of Human Services (DHS) employee, Kay Paulson, went to Tammy Smith's (Smith) residence to speak with Smith regarding her four-year-old son Gabriel's fracture to his arm which had occurred on January 24, 2006. Gabriel is developmentally delayed.

Smith told Deputy Ricklefs she was at home with Gabriel and her two-year-old son John Ross on the date in question. She stated she was washing dishes in her kitchen when John Ross started flipping the basement lights on and off. The light switch was located at the top of the stairs leading to the basement. Smith closed the door to the basement and took John Ross into the bedroom. When she returned she heard a whimper and when she opened the door to the basement she discovered Gabriel standing there. Smith stated she could tell that his arm was injured because it was "just hanging." This incident happened at approximately 7:00 p.m.

While at Smith's residence Deputy Ricklefs took photographs of the basement steps and floor. He later described the basement floor as uneven.

The photographs show the basement stairway is an open, wooden stairway. Smith's education consisted of attending the twelfth grade but not graduating high school. She described herself as being a slow learner and Deputy Ricklefs agreed it was obvious she was somewhat slow. Her IQ was later determined to be eighty-five.

Smith told Ricklefs that after discovering Gabriel injured she used a rag to help support Gabriel's arm and called her husband, John Smith (John), who was at work at Godfather's Pizza. John was on a delivery at the time but returned her call when he arrived back at the restaurant and immediately left work, telling his boss one of his children was hurt. When John arrived home Smith dialed 911. Smith first spoke to the dispatcher, then at some point she gave the phone to John and he spoke to the dispatcher.

John carried Gabriel into the emergency room at the Trimark Physician's Group on the evening of January 24, 2006. Dr. Sarmini Suriar, internist and pediatrician, treated Gabriel in the emergency room. She observed that his right forearm was deformed and obviously injured. After ordering x-rays and administering pain medication, Dr. Suriar tried to determine what had happened. Because Gabriel is developmentally delayed and non-communicative he was unable to tell the doctor what happened. Smith thus gave Dr. Suriar Gabriel's history, stating that she had been in the basement getting clothes out of the dryer with Gabriel standing next to her. The next thing she knew he was on the floor crying and she knew his right forearm was hurt because it was swollen. Smith stated she did not see what happened because she had been distracted by John

Ross flipping the lights off and on from the stairway. She denied that Gabriel tripped on anything.

The x-ray Dr. Suriar ordered showed three fractures of Gabriel's right forearm. Fractures included a comminuted fracture to the outer bone, near the elbow; a fracture to the outer bone near the hand; and a fracture to the inner bone. Gabriel also had an open wound related to the arm fractures. Suriar transferred Gabriel to an orthopedic surgeon in Des Moines. Dr. Suriar was suspicious of the story Smith told about how Gabriel got hurt because it was not consistent with the type of injuries he had sustained. Thus, a nurse reported the injuries to DHS.

Dr. Cassim Igram is an orthopedic surgeon who was on-call at Mercy Hospital in Des Moines when Gabriel arrived. Again, because Gabriel could not communicate with Dr. Igram, the doctor took Gabriel's history from Smith. She told him Gabriel sustained injuries from a fall in the basement. Igram referred the case to his colleague who specialized in pediatric orthopedics because the break was so severe. Dr. Igram was also suspicious of Smith's explanation of how the injuries occurred because they were not consistent with a slip and fall.

Dr. James Metts is the pediatric physician who attended to Gabriel's pain management at Mercy. Smith told Metts that Gabriel fell on the cement floor when he tried to take clothes out of the dryer.

Dr. Jeffrey Farber is the pediatric orthopedist who operated on Gabriel's arm on January 26, 2006. Prior to surgery, Farber met with Gabriel but he also could not communicate with him. Thus, Dr. Farber took Gabriel's history from his

parents, who told him Gabriel was injured by falling down the stairs. Farber testified that Gabriel had breaks in both the radius and the ulna, consisting of two breaks in the distal forearm and one break in the proximal forearm; had one dislocation in the proximal forearm; and also had a fracture of the humerus, the upper arm. He further stated it was unusual to see a four-year-old suffer all of these breaks in one arm due to a slip and fall. He testified that to a reasonable degree of medical certainty (1) breaks such as Gabriel's could happen from an adult applying physical force to a child's arm, (2) it was not likely for such types of injuries to happen from a mere slip and fall, and (3) it was not likely for such types of injuries to happen from falling down stairs. Either Dr. Farber or the pediatric nurse reported the injuries to DHS.

Deputy Ricklefs became aware of the incident and Gabriel's injuries on January 30, 2006, and, as noted above, went to the Smith home with DHS worker Kay Paulson to talk to Smith about the incident. When Paulson confronted Smith with the fact that at the hospital she had told a different story of what had happened, Smith explained she had done so because she was fearful her children would be taken away and that her husband might leave her. After speaking with Smith regarding the incident Ricklefs arrested her for child endangerment resulting in serious injury.

Counselor and social worker Jill Coleman met Gabriel when she assisted in placing him in foster care after Smith's arrest, and also supervised visits between Gabriel and Smith. Coleman described Gabriel as the "the most unsocialized child" she had ever met and described him as an "animal child"

because he was not verbal, but only grunted, moaned and pointed to communicate.

DHS sought, and the court ordered, psychological and parental evaluations of Smith. Dr. Amy Mooney, Ph.D., met with Smith twice in July 2006 to complete the evaluations. When asked about how Gabriel broke his arm, Smith told Mooney he broke his arm in a front loading washing machine when the washer was on the spin cycle and that she just "froze up" when he hurt his arm. She further stated to Mooney that the lock on the washer did not work but her son could not open it. Mooney agreed she did not know whether Smith actually witnessed the incident.

The State charged Smith, by trial information, with child endangerment resulting in serious injury, in violation of Iowa Code sections 726.6(1)(a) and 726.6(5) (2005). Smith filed a motion to suppress, asserting the statement she made to Dr. Mooney regarding how Gabriel was injured should not be allowed into evidence because the statement was not voluntary as it was the product of threats. A hearing was held on the motion shortly before trial. During trial the court denied the motion on the record, concluding the statements Smith made to Mooney were voluntary and admissible. The jury found Smith guilty as charged.

Smith appeals, contending there was insufficient evidence to support her conviction, the district court erred in failing to grant her motion to suppress, and her trial counsel was ineffective for failing to timely file a meritorious motion to suppress.

## II. MERITS.

### A. Sufficiency of the Evidence.

Our scope of review of sufficiency-of-evidence challenges is for correction of errors at law. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000). In reviewing such challenges we give consideration to all the evidence, not just that supporting the verdict, and view such evidence in the light most favorable to the State. *Id*. A jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006). If a rational trier of fact could conceivably find the defendant guilty beyond a reasonable doubt, the evidence is substantial. *Lambert*, 612 N.W.2d at 813.

Smith first claims there was insufficient evidence to support her conviction. More specifically, she contends the State failed to prove beyond a reasonable doubt that she "knowingly acted in a manner creating a substantial risk to [Gabriel's] physical, mental, or emotional health or safety." For the following reasons, we conclude there is sufficient evidence for a rational jury to find beyond a reasonable doubt that Smith, the only adult at home when the injuries occurred, did knowingly act in a manner that created such a substantial risk.

As set forth above, Smith provided a total of *five different* versions of how Gabriel sustained his injuries. A defendant's inconsistent statements are probative circumstantial evidence from which the jury may infer guilt. *State v. Blair*, 347 N.W.2d 416, 422 (Iowa 1984); *see also State v. Mayberry*, 411 N.W. 2d 677, 682 (Iowa 1987) *overruled on other grounds by State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006) (finding "the three separate statements made by

defendant to the police evidence a pattern of withholding important information and changing the facts only when confronted with inconsistencies between his story and the physical evidence.″).

Smith initially told Dr. Suriar in the emergency room that she was removing clothes from the dryer with Gabriel next to her and the next thing she knew he was on the floor with an obviously injured arm, but he had not tripped on anything. She then told Dr. Metts that Gabriel sustained his injuries while *Gabriel* was attempting to take some clothes out of the dryer. She turned to see what was going on with her other child and when she turned back Gabriel had fallen and hurt his arm. Next, she told Dr. Farber that Gabriel was hurt when he fell down the stairs. When Deputy Ricklefs came to speak with Smith in her home she told him that while she was washing dishes in her kitchen her youngest son was flipping the lights on and off so she took him into the bedroom. When she returned she heard a "whimper" and when she opened the door leading to the basement Gabriel was standing there and she knew his arm was hurt because it was just hanging there. Finally, while undergoing the psychological evaluation with Dr. Mooney she told her Gabriel hurt his arm when he put it in a front loading washing machine while it was on the spin cycle.

In addition to all of the discrepancies in Smith's explanations of how the injuries occurred, many of the medical experts who treated Gabriel testified they believed Smith's explanations to be inconsistent with the nature and extent of the injuries, which included four fractures and a dislocation to three separate bones in one arm. Dr. Suriar testified at trial that it "was not easy to really connect the

story with the injury. The degree and the severity of the injury, it raised our suspicion." Suriar further stated that a four-year-old falling to a floor would not generate enough force to cause the types of breaks Gabriel sustained, and that in her medical opinion his injuries were not consistent with Smith's explanation. Dr. Ingram also testified Gabriel's injuries were inconsistent with a slip and fall by a four-year-old. He was also concerned about the fracture pattern because he believed "a fair amount of force had been exerted to this arm in order to sustain the fracture pattern that I noted on x-ray." Finally, Dr. Farber, the pediatric orthopedic surgeon who operated on Gabriel, also found the severity of Gabriel's injuries to be highly unusual. He testified he rarely sees four or five breaks in one arm of a four-year-old, and when he does so it is usually from severe trauma, like getting hit by a car. He testified to a reasonable degree of medical certainty that Gabriel's injuries were not the type a four-year-old would likely receive from a fall down stairs or a slip and fall, and that such injury could happen from "an adult applying physical force to a child's arm."

Smith asserts the record does not establish a "definite" cause of Gabriel's injuries, and emphasizes that Drs. Igram and Farber also testified that his injuries could possibly have been caused by a fall. However, "[i]nherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence." *State v. Arne*, 579 N.W.2d 326, 328 (Iowa 1998). "A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive." *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996).

Direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.14(6)(*p*); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). Inferences are a staple of our adversary system of fact-finding. *State v. Rinehart*, 283 N.W.2d 319, 321 (Iowa 1979) (quoting *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)). Clearly the jury here did not find any of Smith's conflicting explanations of how Gabriel was injured convincing, and instead put greater weight on the medical experts' testimony as to how injuries of the nature and extent Gabriel sustained most likely do and do not occur. Accordingly, we conclude there is sufficient evidence for a rational jury to find beyond a reasonable doubt that Smith did knowingly act in a manner that created a substantial risk to Gabriel's physical health or safety, and thus was guilty of child endangerment resulting in serious injury.

**B. Motion to Suppress.**

As set forth above, Smith filed a motion to suppress the statement she made to Dr. Mooney during her psychological evaluation concerning how Gabriel sustained his injuries, contending the statement was involuntary as the product of threats. At the hearing on the motion the State entered into evidence a juvenile court order filed February 22, 2006, in which the court adjudicated Gabriel and his brother to be children in need of assistance (CINA). The order also required the parents to participate in all mental health treatment recommendations and to enter into a contract of expectations with the DHS. It also contained a warning to the parents, as required by Iowa Code section 232.96(10)(b), that "the consequences of a permanent removal may include termination of the parent's

rights with respect to the child in interest." The record shows that the parents entered into the required contract of expectations with DHS on February 27, 2006, and underwent the court-ordered psychological and parental evaluations with Dr. Mooney over two different sessions in July 2006.

John Smith testified at the hearing on the motion to suppress. He stated that approximately a week or two before their evaluations with Dr. Mooney he and Smith met with Jennifer Pischke and Doug Koons of the DHS, among others, for a "child action team meeting." Pischke was the DHS case worker assigned to the CINA cases of Gabriel and his brother.[1] John testified that when outside after the meeting, Koons spoke with him and "he told me flat out that unless we were willing to accept responsibility and accountability for what happened to Gabriel, he would see to it that our children never came home." He stated Smith was close by in the car with the windows down, and that they discussed Koon's' statement afterward.

Pischke also testified at the motion hearing. She stated Smith was never told that at the evaluations she would be required to disclose what happened to Gabriel, or that if she did not do so there would be negative consequences regarding getting her children back. She further testified there was a meeting of herself, Koons, the parents, and others on July 6, 2006, but that services provided to the children was all that was discussed at that meeting. Pischke stated that at no point during the July meeting was it relayed to the Smiths they

[1] Doug Koons was apparently Pischke's supervisor at DHS. However, it is not clear from the record what level of direct involvement Koons had in the Smith children's CINA cases, but it seems clear his involvement was more limited than Pischke's. Koons did not testify at the suppression hearing or at trial.

had to “confess” or come up with an explanation of what happened to Gabriel if they wanted to get their children back. However, she did testify that at a meeting on November 9, 2006, well after the July 2006 evaluations by Dr. Mooney, it was stated to the parents that if DHS did not have a “plausible explanation of what happed” to Gabriel they could not ensure safe return of the children to the home, and if they did not have a plausible explanation they would be moving to permanency.

Dr. Mooney testified at the motion hearing as well. She stated that Smith and John drove to the counseling session together for the evaluations. The center where the evaluations took place is over 1000 square feet with waiting rooms and testing rooms. There is a coffee bar where clients are free to make their own drinks. Mooney stated she informed Smith she was free to take breaks or leave whenever she wanted, including leaving the center for lunch. Smith and John did in fact leave for lunch during both sessions with Mooney. Mooney told Smith she would make no judgments and that she was unbiased. Dr. Mooney further testified she does not require a client to disclose what happened regarding the incident leading to the required assessment. She stated she did not “feel it is my job to be an investigator and require them to tell me things.”

In a ruling on the record during trial, the district court denied Smith’s motion to suppress, finding Smith’s statements were voluntary and admissible. In so ruling, the court found John’s testimony regarding the alleged threatening remark was not convincing or credible.

Smith contends the statement she made to Dr. Mooney regarding how Gabriel sustained his injuries was involuntary because she was forced to cooperate with the evaluations or face the risk of losing her children. Thus, she argues the statement should have been suppressed as it was made in violation of her Fifth Amendment privilege against self-incrimination.

Initially, the parties disagree as to the correct standard of review we should apply in reviewing the district court's determination that Smith's statement was voluntary and admissible. Smith contends our review should be de novo, while the State argues it is an evidentiary matter and thus should be reviewed for an abuse of discretion. We agree with Smith that our review should be de novo.

"[W]here there is no dispute as to the words used or their obvious meaning and the circumstances surrounding the expressions, then it is a matter of law upon which the court must pass. . . ." *State v. Mullin*, 249 Iowa 10, 15, 85 N.W.2d 598, 601 (1957). Subsequent to *Mullin*, our supreme court has made it clear that under circumstances such as described in *Mullin* (i.e. no dispute as to the words used, their meaning, and the surrounding circumstances) admissibility is decided on an evidentiary basis and not a constitutional basis. *See State v. McCoy*, 692 N.W.2d 6, 27-28 (Iowa 2005).

In the present case neither the alleged threat by the DHS worker nor the interviews with Mooney were recorded. In addition, there is a dispute as to the exact words used by the DHS workers, the specific context in which they were made, and when precisely they were made. Accordingly, we do not believe the record is sufficiently clear regarding what, if anything, precisely was said by DHS

personnel to analyze this issue on an evidentiary basis as a matter of law. *See e.g., Mullin*, 249 Iowa at 14, 85 N.W.2d at 600 ("[I]f it clearly appears the confession was induced by force, threats, promises, or other inducements, the question is one of law for the court. . . ."). We therefore review Smith's claim, that her statement to Mooney regarding how Gabriel received his injuries was involuntary because it was induced by threats, by making an independent de novo review of the totality of the relevant circumstances. *State v. Rhiner,* 352 N.W.2d 258, 262 (Iowa 1984); *State v. Dhondt*, 325 N.W.2d 761, 762 (Iowa Ct. App. 1982). This "is in turn determined by 'the facts surrounding the inculpatory statement . . . their psychological impact on [the] defendant, and . . . the legal significance of defendant's reaction.'" *Dhondt*, 325 N.W.2d at 762 (quoting *State v. Cullison*, 227 N.W.2d 121, 127 (Iowa 1975)). In our review of the district court's ruling on a motion to suppress we consider both the evidence presented during the suppression hearing and that introduced at trial. *State v. Jackson*, 542 N.W.2d 842, 844 (Iowa 1996). We give deference to the district court's findings, but are not bound by them. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001).

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This privilege applies not just to criminal trials, but also allows a person "'not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S. Ct. 1136, 1141, 79 L. Ed. 2d 409, 418 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.

Ct. 316, 322, 38 L. Ed. 2d 274, 281 (1973)). The question of the voluntary nature of the statement requires sorting out the impetus for the inculpatory statement. *State v. Hodges*, 326 N.W.2d 345, 348 (Iowa 1982); *State v. McKowen*, 447 N.W.2d 546, 547 (Iowa Ct. App. 1989).

When the State compels information by threatening to inflict potent sanctions, that information is obtained in violation of the Fifth Amendment. *See In re E.H. III*, 578 N.W.2d 243, 249 (Iowa 1998) (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 805, 97 S. Ct. 2132, 2135, 53 L. Ed. 2d 1, 7 (1977)). Pischke and Mooney both testified no such threats were made here, and Pischke testified the only statements made that were even remotely close to the alleged threat were made several months after Smith's evaluations by Mooney. The only evidence there was such a threat made prior to Smith's sessions with Mooney was the testimony of John. The district court found his testimony on this issue was not convincing or credible. To the contrary, the court found the

> greater weight of the evidence shows that there were no threats that the Defendant would lose custody of her children or have her parental rights terminated if she failed to participate in the evaluation or give a reasonable explanation of how the injury occurred.

We, like the district court, find John's testimony to be unconvincing and less credible than Pischke's, especially with regard to the timing of the meetings and statements in question. Pischke testified that according to her notes the team meeting in July was only to discuss services provided to the children, nothing was said at that time regarding the Smiths having to come up with an explanation for Gabriel's injuries if they ever wanted their children back. The first

time anything was stated to Smith regarding the fact the DHS needed a plausible explanation for the injuries was not until November of 2006, several months after Smith's meeting with Mooney. In addition, Mooney testified she never told Smith she had to disclose to Mooney, or to anyone else, what had happened to Gabriel or there would be negative consequences. The State has the heavy burden of establishing that defendant's statements were voluntary and not induced by threat or promise of leniency. *Rhiner*, 352 N.W.2d at 263. This burden was arguably met by the credible testimony offered by the State. *See McKowen*, 447 N.W.2d at 547.

However, the totality of the circumstances also requires review of the context in which the statements were made and the characteristics of the accused. *Hodges*, 326 N.W.2d at 347-48; *McKowen*, 447 N.W.2d at 547. Smith had nearly completed high school. She was thirty-three at the time she made the statements in question. Although the record reflects she is in the low range of average intelligence, it does not show her intelligence quotient is so low that her will was overborne or her capacity for self-determination was impaired at the time of her visits with Dr. Mooney. There is no indication her somewhat below average intelligence in any way interfered with her ability to function normally or to complete the tests that were administered as part of the evaluations, or had any affect on her ability to understand the nature of the pending CINA case and the potential consequences of statements to Mooney.

The setting in which the statement to Mooney was made was relaxed and open and there was no deprivation of food, water, or breaks. To the contrary,

Mooney told Smith she was free to take breaks or leave the premises any time she wanted. Smith in fact did leave for lunch during both sessions with Mooney. Mooney told Smith she was unbiased and nonjudgmental. Mooney testified she never asks her clients to tell her what happened with their children to lead to the required assessments. Furthermore, even assuming the alleged threat was made and was made at the time suggested by John, it was made a week or two prior to Smith's meetings with Dr. Mooney and at a completely separate location. Thus, assuming without deciding such a threat was actually made and that it was made prior to the meeting with Mooney, we believe any compulsion or pressure it may have exerted on Smith to make the challenged statement to Dr. Mooney would have been lessened by time and distance as well as the very relaxed setting of Mooney's office.

The district court concluded,

> The Order did not state, nor was Defendant told, what would happen or that she would lose her children if she refused to cooperate in the evaluation. If she had any beliefs or expectations in that regard, it was not the result of coercion, statements, or threats by the DHS to inflict potent sanctions unless she surrendered her Constitutional rights. Directing a parent to complete an evaluation or participate in treatment that does not require an admission of wrongdoing does not violate the Fifth Amendment even though a refusal to complete the evaluation may have potential adverse consequences in regaining custody of the children.
>
> [R]equiring the Defendant to complete a parental evaluation to assist the juvenile court to determine what is in the best interests of her children is neither a threat or a penalty imposed by the State. If the mere requirement of a parental evaluation would be held to violate the Defendant's Fifth Amendment rights, it would seriously impair the ability of the juvenile court to determine what is in the best interests of the minor children.

We agree with these findings and conclusions of the court and adopt them as our own. Smith was not compelled by the threat of potent sanctions, either in the juvenile court order, by the DHS, or by Dr. Mooney, to make the statement in question.[2] Based on our de novo review of the totality of the circumstances, we find the district court did not err in denying Smith's motion to suppress the challenged statement.

**C. Ineffective Assistance of Counsel.**

As set forth above, Smith filed a motion to suppress on May 23, 2007. In order to be timely filed the motion had to be filed no later than forty days after the written arraignment was filed. Iowa R. Crim. P. 2.11(4). Smith's written arraignment was filed December 15, 2006. Thus, the motion was clearly untimely. On appeal Smith claims her trial counsel was ineffective for failing to timely file her motion to suppress.

When there is an alleged denial of constitutional rights, such as ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). An ineffective assistance claim may be disposed of if the defendant fails to prove either of the two prongs of such a claim. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we need not

[2] Although not necessary to our decision, we note that the *content* of Smith's statement to Mooney was in fact *exculpatory*. Its arguably inculpatory nature arises only because it is one more of a list of several inconsistent and conflicting statements by Smith concerning how Gabriel became injured.

determine whether counsel's performance is deficient before undertaking the prejudice determination. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). In order to prove prejudice, Smith must show there is a reasonable probability that but for her counsel's unprofessional errors the result of the proceeding would have been different. *Ledezma v. State*, 626 N.W.2d 134, 143-44 (Iowa 2001).

The State filed a resistance to Smith's motion and the district court denied the motion on the merits for the reasons discussed in detail above. However, neither the State in its resistance nor the court in its ruling on the motion ever mentioned the fact the motion was not timely filed. It is clear from the court's ruling on the motion that the court considered and denied the motion to suppress solely on its merits. There is no indication the late filing of the motion was a factor in the court's denial of the motion. Therefore, Smith cannot show that but for counsel's late filing of the motion the court's ruling on the motion would have been any different. Because Smith cannot demonstrate she was prejudiced by the late filing of the motion, her ineffective assistance of counsel claim must fail.

## III. CONCLUSION.

For the reasons set forth above, we conclude there was sufficient evidence for a rational jury to conclude beyond a reasonable doubt that Smith knowingly acted in a manner creating a substantial risk to Gabriel's physical health or safety and thus was guilty of child endangerment resulting in serious injury. We further conclude the district court did not err in denying Smith's motion to suppress, because her statement to Dr. Mooney was voluntary and not compelled in any manner by threats of potent sanctions. Smith was not

prejudiced in any way by her trial counsel's late filing of her motion to suppress and thus she did not meet her burden to prove she received ineffective assistance of counsel.

**AFFIRMED.**