Court of Appeals Nos. 13-19-00147-CR, 13-19-148-CR, 13-19-00149-CR and 13-19-00150-CR
Trial Court Cause Nos. A17597, A17598, A17599 and A17600

IN THE THIRTEENTH SUPREME JUDICIAL DISTRICT

COURT OF APPEALS

CORPUS CHRISTI, TEXAS

AMANDA KRISTENE HAWKINS

v.

THE STATE OF TEXAS

APPEAL FROM THE 216TH JUDICIAL DISTRICT COURT,
KERR COUNTY, TEXAS
Honorable N. Keith Williams, Presiding

APPELLANT'S AMENDED BRIEF

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AMANDA KRISTENE HAWKINS

v.

THE STATE OF TEXAS

IDENTITY OF PARTIES & COUNSEL

Appellant certifies that the following is a complete list of the parties, attorneys, and any other person who has any interest in the outcome of this appeal:

Appellant:	Amanda Kristene Hawkins
Appellee:	The State of Texas
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Trial Judge:	Hon. N. Keith Williams 216th Judicial District Judge 700 Main Street Kerrville, Texas 78028

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STATEMENT OF THE CASE

Appellant's two daughters died as a result of being left in an automobile for several hours and not receiving prompt medical attention. Appellant was indicted on four criminal offenses. There are two Indictments for each child. Two Indictments for Abandoning/Endangering Child Imminent Danger Bodily Injury and Two Indictments for Injury to a Child Serious Bodily Injury (CR 11 in all four cases). Appellant pled guilty to all four indictments.

However, Appellant preserved for review the following issues—a) trial court's denial of her pretrial motion to suppress her two confessions; b) trial court's "deadly weapon" finding in cause no. A17597; and c) the trial court's cumulative sentencing finding that cause nos. A17597 and A17599 will run consecutively with cause Nos. A17598 and A17600. Appellant appeals the trial court's judgments and sentences (CR 58; 59; 60; 56) rendered herein on December 12, 2018 and the denial of her motion to suppress.

APPELLANT'S ISSUES PRESENTED FOR REVIEW

I. APPELLANT'S TWO CONFESSIONS WERE ILLEGALY OBTAINED AND SHOULD HAVE BEEN SUPPRESSED.

A) THE FIRST CONFESSION WAS UNWARNED AND THE PRODUCT OF CUSTODIAL INTERROGATION.

B) THE SECOND CONFESSION, ALTHOUGH WARNED, SHOULD HAVE BEEN SUPPRESSED, BECAUSE:

1. IT WAS TAINTED BY AND THE RESULT OF THE ILLEGALLY OBTAINED FIRST CONFESSION.

2. APPELLANT REQUESTED AND HAD BEEN APPOINTED AN ATTORNEY. APPELLANT INVOKED HER RIGHT TO COUNSEL AT COMMENCEMENT OF CUSTODIAL INTERROGATION.

II. TRIAL COURT ERRED IN MAKING A DEADLY WEAPON FINDING, AS IT WAS NOT APPELLANT'S ACTIONS CAUSING THE VEHICLE TO BECOME A DEADLY WEAPON.

III. CUMULATIVE SENTENCING AND HAVING SENTENCES RUN CONSECUTIVELY, VIOLATES DOUBLE JEOPARDY PROHIBITION.

****** For purposes of reference in the Appellant's Brief, the following will be the style used in referring to the record:

1. Reference to any portion of the Court Reporter's Statement of Facts will be denoted as "(RR____, ____)," representing volume and page number, respectively.

2. Reference to an Exhibit will be denoted as "(State's/Defendant's Exhibit ___)".

3. The Transcript containing the District Clerk's recorded documents will be denoted as "(CR___, ___)," and listing said references to the

respective cases chronologically, i.e. trial court Cause No. A17597/98/99/00.

SUMMARY OF THE ARGUMENT

On Thursday, June 8, 2017 Appellant was subjected to an unwarned videotaped interrogation by law enforcement officers, in a police station interview room (State's Exhibit E). This interrogation quickly became custodial. Appellant was driven to and from the interrogation by police officers. Appellant was the prime suspect when interrogated. The interrogation lasted approximately one and one-half hours. The unwarned interrogation produced a detailed confession.

Appellant was not advised of the Article 38.22 TEX. C. CRIM. PROC. warnings at any time before or during the interrogation. Throughout the interrogation law enforcement manifested to Appellant their belief that she was lying and that she was responsible for the crimes.

Appellant made several pivotal admissions during the unwarned interrogation, admitting her untruthfulness and responsibility for the crimes. Appellant was also confronted with statements of others implicating her guilt. It was from this unwarned confession that law enforcement drafted their probable cause affidavit for Appellant's arrest. Appellant was soon formally arrested and never left the care, custody and control of law enforcement.

The next day, Friday, June 9, 2017, while in jail, Appellant was asked if she wanted an attorney. She said yes and expressly requested an attorney (State's Exhibit F). That afternoon, counsel was appointed to represent Appellant. An order

appointing the undersigned was entered and forwarded to the jail and District Attorney's office (Defendant's Exhibit No. 1).

Early the next business day, Monday, June 12, 2017, Appellant was pulled from her cell at law enforcement's request and taken to an interrogation room. Appellant did not initiate this contact. Appellant had already requested counsel and had an attorney appointed on these charges. Appellant was aware of this fact and on at least two occasions during the interrogation asked for her attorney. Although the Art. 38.22 warnings were given, Appellant's two requests for counsel were disregarded and ignored. As a result, Appellant made another confession substantially the same as the first (State's Exhibit F). Both confessions should have been suppressed.

As to the trial court's "deadly weapon" finding, Appellant submits that it was not her actions, but the independent acts of another, which caused the vehicle to be a deadly weapon. The method and manner of Appellant's use of the vehicle, did not render it capable of causing death or serious bodily injury.

Appellant admits leaving the children in the vehicle at night with the windows rolled down. A third party, Kevin Franke, rolled up the windows and turned off the engine and air conditioning. This interviewing independent and distinct act of Franke resulted in the children's death.

Finally, the cumulative sentencing (i.e. running two 20-year sentences consecutively) punishes Appellant twice for the same criminal episode and act, being violative of the prohibition against double jeopardy.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that this brief contains 7970 words (counting all parts of the document and relying upon the word count feature in the software used to draft this brief). The body text is in 14 point font and the footnote text is in 12 point font.

KURTIS S. RUDKIN
ATTORNEY FOR APPELLANT

STATEMENT OF FACTS

During the evening of June 7, 2017, Appellant, who was 19 years of age, and her two daughters visited a friend's home in Kerrville, Texas. Throughout most of the evening and night, the two girls stayed in Appellant's automobile. Both were in car seats. The girls were checked on periodically. The vehicle had a full tank of gas and engine running with air conditioning on. Both children were fine and slept most of the time. The children exhibited no signs of distress.

During the night, Appellant went into the home to get some sleep. The children were sleeping in the car and Appellant chose not to wake them. Appellant anticipated sleeping a few hours and getting back to the girls at dawn.

Before Appellant went into the house, Kevin Franke asked if he could sleep in Appellant's vehicle. Franke said he had to get up early for work and would wake Appellant before he left. Franke assured Appellant that he would have the engine and air conditioner running and/or the windows down. He also assured Appellant that he would wake her early, so she could care for the children. Contrary to his assurance, Franke kept none of these promises.

Franke rolled up all of the windows, then later turned off the engine and air conditioner. He also forgot to wake Appellant.

Later that morning, the children were found unconscious in the vehicle. Appellant and her friends tried to revive the children, not knowing how serious the

situation had become. Efforts to resuscitate the children failed and Appellant took the children to Sid Peterson Hospital in Kerrville, Texas. Attempts to treat the children were unsuccessful. The children were airlifted to University Hospital in San Antonio.

Appellant drove directly to the hospital in San Antonio to be with her children. Appellant went immediately to her children and remained with them throughout most of the day, sharing time between both girls in separate hospital rooms. Appellant was not honest with the treating physician and did not accurately recite how the girls got in their condition. However, the doctors do not believe that a prompt and accurate reporting would have altered the eventual outcome. Both children would have likely died, even had Appellant promptly and accurately reported the days' events.

During the afternoon at the hospital, law enforcement arrived. A Texas Ranger, Kerr County Sheriff's Office Investigator and a CPS investigator, wanted to question Appellant. While Appellant was at the hospital in San Antonio, law enforcement had been investigating the case and questioning witnesses in Kerrville, compiling incriminating information and evidence against Appellant.

Instead of asking Appellant questions at the hospital, law enforcement insisted that Appellant be transported in a patrol car to the police station. Prior to the interrogation, Appellant was a suspect in a serious crime.

Appellant and three law enforcement officers were in the interrogation room for approximately one and a half hours. The interrogation was videotaped. Appellant did not leave the interrogation room throughout the entire process. The interrogation room had no windows, one door and was in the interior of the police station. The officers were armed. During this interrogation, Appellant was never given the Art. 38.22 warnings.

Although the interrogation may have commenced as non-custodial, it quickly became a custodial environment, eventually leading to Appellant's full confession. Once the interrogation began, Appellant was never again free from the accompaniment, care and control of law enforcement.

During this interrogation, the officers repeatedly told Appellant that they believed she was lying and dishonest about her rendition of the preceding 24-hour events. Officers expressly manifested their disbelief of Appellant's story and told her that her situation would be much worse for her if she did not tell them the truth.

Officers made it objectively and abundantly clear to Appellant that she was in serious trouble and was only making matters worse. Officers also confronted Appellant with facts and evidence that they had accumulated during the preceding 12-14 hours. This information established Appellant's culpability.

Eventually, Appellant began to reveal that she was not being honest with the officers and began making critical pivotal admissions as to her guilt. Even after

being confronted with the evidence against her, being told she was lying and admitting criminal responsibility, law enforcement still did not provide the required warnings.

After the unwarned interrogation, Appellant was accompanied back to the hospital by law enforcement in a patrol car. Appellant remained in close proximity of the officers until both children died.

While Appellant was being interrogated and during the time Appellant was at the hospital, law enforcement prepared a probable cause affidavit for Appellant's arrest. Most of the facts in the affidavit for arrest came directly from Appellant during her unwarned interrogation. Immediately upon the last child dying, Appellant was arrested and taken to the Bexar County Jail.

On June 9, 2017, while Appellant was an inmate at the Bexar County Jail, she requested legal counsel and advised that she could not afford to hire an attorney. This request was verbal and written.

A Kerr County District Court Judge granted Appellant's application for court-appointed counsel and appointed the undersigned to represent her on these charges. The order appointing counsel was entered the afternoon of Friday, June 9, 2017, and faxed to the Kerr County Jail, the District Attorney's office and the undersigned that same afternoon. Appellant had specifically requested counsel and an attorney had been appointed (CR 5-9 in all four cases).

Notwithstanding this fact, law enforcement again interrogated Appellant early the next business day Monday, June 12, 2017. Appellant was in custody and taken to the interrogation room at the Kerr County Sheriff's office. Law enforcement initiated this contact.

Appellant, knowing that she had just recently requested counsel and actually had an attorney appointed, invoked her right to counsel by asking when her attorney would appear. Although requesting her attorney's presence on more than one occasion, these requests were ignored and effectively denied.

The Art. 38.22 warnings were read to Appellant. However, her two requests for counsel were completely disregarded and Appellant confessed a second time. The second confession was largely a repeat of the first, except with more detail.

After Appellant was indicted in these four cases, Appellant filed and the trial court heard Appellant's motion to suppress the two confessions (CR 18; 21; 21; 18). The grounds for Appellant's suppression motion are set out in this brief.

After a lengthy hearing, the trial court denied the motion to suppress, ruling that the two interrogations and resulting confessions were properly conducted and admissible in evidence (RR Vol. 3).

With her confessions not being suppressed, Appellant pleaded guilty to all four Indictments and a Presentence Investigation ("PSI") conducted. Appellant's sentencing hearing was set on December 12, 2018.

Pursuant to a plea bargain, Appellant preserved for appellate review the admissibility of her two confessions and the trial court's denial of her motion to suppress. Appellant also maintained her right to appeal the trial court's ruling on a "deadly weapon" finding, in the event such a finding was made. Finally, Appellant retained her right to appeal any cumulative sentencing, in the event the trial court rendered consecutive sentences.

On December 12, 2018, the trial court conducted a sentencing hearing. The trial court ordered the maximum sentence allowable under the terms of the plea agreement. Appellant was sentenced to the full range of punishment in all four second-degree felonies and found that two of the sentences would run consecutive with the other two, thereby stacking those sentences. In one case, the court entered a deadly weapon finding, namely an automobile. Appellant timely filed her motion for new trial, which was denied. This appeal followed.

ARGUMENT AND AUTHORITIES

ISSUE I:

APPELLANT'S TWO CONFESSIONS WERE ILLEGALY OBTAINED AND SHOULD HAVE BEEN SUPPRESSED.

A) THE FIRST CONFESSION WAS UNWARNED AND THE PRODUCT OF CUSTODIAL INTERROGATION.

B) THE SECOND CONFESSION, ALTHOUGH WARNED, SHOULD HAVE BEEN SUPPRESSED, BECAUSE:

1. IT WAS TAINTED BY AND THE RESULT OF THE ILLEGALLY OBTAINED FIRST CONFESSION.

2. APPELLANT REQUESTED AND HAD BEEN APPOINTED AN ATTORNEY. APPELLANT INVOKED HER RIGHT TO LEGAL COUNSEL AT COMMENCEMENT OF CUSTODIAL INTERROGATION.

Facts Relevant to the First Confession

The initial questioning of Appellant had a voluntary beginning. Although transported by law enforcement in a patrol car from the hospital to the police station interrogation room, Appellant had not been formally placed in custody and was not under arrest.

Appellant was taken to a small interrogation room, in the interior of the police station. The room had no windows and one door. Both officers were armed and

made it clear to Appellant that she was being questioned about her children's severe medical condition and her possible wrongdoing.

The questioning began with telling Appellant that she was not under arrest and that she could leave at any time. However, these words were never repeated throughout the lengthy interrogation. In fact, Appellant never left that room, except while accompanied by law enforcement after the interrogation was concluded. The Art. 38.22 warnings were not given at any time during this interrogation.

The June 8, 2017 interrogation began with general questions, but quickly led to pointed interrogation and accusations about the crime. Appellant was asked by the officer to "tell us what you know" and to give a timeline.

Appellant told the officers that she had taken her girls to Flat Rock Park near Kerrville with a guy named Kevin. Appellant was questioned as to whether or not she took photos while at the park. She said she had not taken any photos. The officer expressed doubt as to Appellant's story, questioning why there were no photos of a three-hour trip to the park. Officers indicated that they thought Appellant was being deceptive. Appellant was upset and crying and said that she was about to vomit.

Appellant advised that, while at the park, the girls got hot and had red checks. Appellant also advised that she asked Kevin to start the car and turn on the air conditioner.

Officers pressed Appellant and confronted her about not calling an ambulance and/or "911" to help her children. Appellant advised that she took the children from the park directly to the hospital in Kerrville.

The interrogating officer challenged Appellant's timeline of events and clearly indicated that he did not believe her story. Officers told Appellant that they were investigating this as a possible "homicide" and accidental injury/deaths. Officers urged that Appellant needed to be honest with them. Appellant was advised that this was a very important day for her and that she needed to be truthful.

The officer questioning Appellant began rebutting her story and told Appellant that he knew facts and things that contradicted her version of events. The officer told Appellant to tell him "what really happened".

Appellant was told that this was her time to be honest and that this was her opportunity to tell the truth. Appellant was told that law enforcement had talked to everybody involved, including Kevin, and that law enforcement "knows more than you think we know." The officer told Appellant that "we know what happened, you need to tell us. Kevin has told us everything. He does not go along with your story." At this point in the interrogation, Appellant broke-down and was sobbing.

Appellant knew she was in serious trouble and said "I'm so sorry" and that she needed to ask for forgiveness. Appellant was asked to tell officers what really

happened and Appellant replied that she did not want to get in trouble. Appellant was told that this was either an accident or done on purpose.

Appellant was questioned about drug use that evening and marijuana bongs. Appellant told the officers that, during the night in question, Kevin was to remain in the car and leave the motor running and the radio on. Kevin was supposed to have the windows down and/or the air conditioner on.

Appellant was told that "as soon as you clear this up for us [law enforcement]—we'll take you over there [hospital where the children are located]."

Appellant continued with her incriminating admissions. She admitted that she had passed out in the house, but didn't mean to. That she had passed out and went to sleep. Appellant admitted that she had left the girls in the car from dark to daylight. That Kevin got out of the car and turned the car off. She further admitted that when she discovered the children, they were pale and moaning. She put cool towels on the children. Appellant was told by the others not to call "911", because one of their family members was on probation. Appellant admitted that she did not call for help and conceded that she waited to seek medical attention. Appellant admitted not getting help for the children.

Appellant admitted to criminal negligence and that she didn't mean to fall asleep. Furthermore, Appellant admitted lying to law enforcement and medical staff.

She admitted lying about going with the children to Flat Rock Park. Appellant admitted to sleeping in the house with a juvenile named Lane in Lane's room.

Officers told her that there should be no more lying and that Appellant "needed to come clean" with them. Appellant admitted to sleeping with Lane, while Kevin was in her car with the kids. Appellant states that she is admitting to everything and not holding anything back. She said that the park story was all made-up and that she and Kevin made it up together.

Officers responded "we know everything and giving you an opportunity to tell us." Appellant was told "Don't dishonor the memory of your daughters." Appellant responded, "I just want to be with my babies. I'm not a bad mom."

From that point, the interrogator essentially walked Appellant through the elements of the charged offenses. Appellant admitted that she made a mistake and was reckless. That she recklessly put the children in danger and had not sought proper medical care.

Officers told Appellant that she was lying about not having sex that night with 16 year old Lane and that, by doing so, she was dishonoring her daughters' memory.

Appellant admitted to the delay in getting medical attention for at least 30 minutes and up to one hour. Appellant admitted putting cool rags and water on the children, which seemed to last "forever".

Officers reminded Appellant that they were talking to everyone and that their stories were different from hers. Officers told Appellant that she was trying to minimize her involvement and make it sound better than it really was. Appellant was again confronted with the delay in seeking medical care and that it was inexcusable delay. Appellant was told to tell the truth, because it would help her. The interrogating officer went so far as to tell Appellant that this would/could end up before a jury, trial and a judge—"What do you want them to see?"

Appellant was told that people were saying it was her that didn't want to call "911" because CPS would take the kids. Appellant was told that "You're lying to us. . . We know what happened." Appellant responded "I'm so scared."

The officer took Appellant's phone(s) and told her "technology will tell us a lot" and that "we can pull things off snap-chat." Officers indicated that inculpating material would be found on her phone.

Appellant then admitted that she, Kevin and Raven (another minor) conspired together, coming up with the same story. Reference was made to phone texts between Appellant and the others. These texts were incriminating. Appellant admitted that the children were breathing and trying to cry on the way to the hospital.

Appellant again admitted in response to the unwarned interrogation, that the kids were in the car from dark until daylight. Appellant also confessed to potentially incriminating material on the phone, which the police had just taken.

Ultimately, after Appellant was thoroughly interrogated and giving a full confession, she was driven back to the hospital by police in a patrol car to be with her children. Appellant remained at the hospital under police observation, until she was arrested a short time later.

The highly incriminating admissions gleaned from Appellant's unwarned interrogation provided the probable cause necessary for the affidavit and arrest warrant prepared while Appellant was being interrogated and/or at the hospital. Appellant was served with the arrest warrant and formally taken into custody immediately upon the children dying.

Standard of Review

When reviewing a trial court's ruling on a motion to suppress, the appellate court applies a bifurcated standard. *State v. Kelly,* 204 S.W.3d 808, 818-19 (Tex. Crim. App. 2006); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). When a question turns on credibility and demeanor, the court views the evidence in the light most favorable to the trial court's ruling and gives "almost total deference to a trial court's determination of the historical facts that the record supports." *Guzman v. State,* 955 S.W.2d at 89; *Montanez v. State,* 195 S.W.3d 101, 106 (Tex. Crim. App. 2006). The court reviews other mixed questions of law and fact and questions of law de novo. *Guzman v. State*, 955 S.W.2d at 89; *Montanez v. State*, 195 S.W.3d 106. When custody attaches is a mixed question of law and fact.

Herrera v. State, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007); *Garza v. State*, 34 S.W.3d 591, 593 (Tex. App. – San Antonio 2000, pet. ref'd.

In this issue of error, Appellant asserts that the trial court erred when it decided that at the time Appellant was confronted by law enforcement and made pivotal admissions early in the interrogation, custody had not attached and the officers had no probable cause to arrest her.

A. Applicable Law

A voluntary, non-custodial, oral statement is admissible against an accused without the warnings otherwise required by Article 38.22 and *Miranda.* *See Espinoza v. State,* 185 S.W.3d 1, 3 (Tex. App. – San Antonio 2005, no pet.); *State v. Waldrop*, 7 S.W.3d 836, 839 (Tex. App. – Austin 1999, no pet.). However, an unwarned statement obtained from a custodial interrogation is inadmissible. TEX. CRIM. PROC. ANN. Art. 38.22 (West 2005); *see Jones v. State,* 119 S.W.3d 766, 772 (Tex. Crim. App. 2003). What begins as a voluntary, noncustodial interview may escalate into custodial interrogation, and thus invoke Article 38.22 and *Miranda* requirements. *Dowthitt v. State,* 931 S.W.2d 244, 255 (Tex. Crim. App. 1996); *Ussery v. State,* 651 S.W.2d 767, 770 (Tex. Crim. App. 1983); *Xu v. State,* 100 S.W.3d 408, 413 (Tex. App. – San Antonio 2002, pet. ref'd); *see also Turner v. State,* 685 S.W.2d 38, 43 (Tex. Crim. App. 1985).

Custody attaches to an interviewee when "there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave." *Dowthitt,* 931 S.W.2d at 255; *Xu,* 100 S.W.3d at 413. If an interviewee voluntarily discusses the circumstances surrounding a crime being investigated and makes a "pivotal admission" that would lead a reasonable person to believe that the interviewee had committed a crime, the admission supports probable cause. *See Dowthitt,* 931 S.W.2d at 255; *Turner,* 685 S.W.2d at 43; *Xu,* 100 S.W.3d at 413. Custody attached "if the manifestation of probable cause [such as an inculpating admission by the interviewee], combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest." *Dowthitt,* 931 S.W.2d at 255; *see Turner,* 685 S.W.2d at 41-42; *Xu,* 100 S.W.3d at 413.

B. Probable Cause to Arrest Appellant

In reviewing whether or not the officers had probable cause to arrest Appellant, we must objectively consider the reasonably trustworthy information known to interrogating officers and law enforcement, and the totality of the circumstances surrounding their investigation and Appellant's interview. *See Amador v. State,* 275 S.W.3d 872, 878 Tex. Crim. App. 2009); *Hughes v. State,* 24 S.W.3d 833, 838 (Tex. Crim. App. 2000). In their investigation of the subject crimes, the officers knew and had access to several key facts pertaining to the events leading up to the children being brought to Sid Peterson Hospital in Kerrville.

The officers interrogating Appellant had access to facts and information which incriminated Appellant. Investigators in Kerrville were interviewing witnesses who established that Appellant had left the children in the car for at least 10-12 hours, while Appellant was at a party. Appellant was in the house while the children had been left in the car. That Appellant had delayed medical attention, while she and others concocted the story about the park. Appellant had intentionally delayed treatment and medical attention for the children and that Appellant had lied to medical staff and law enforcement. These facts were made known to the officers prior to and during the interrogation. Interrogating officers relayed these facts to Appellant.

Prior to the interview, the interrogating officers believed that Appellant was a suspect and was at least partly responsible for her daughters' "grave condition".

Considering the facts and specific circumstances, the evidence clearly supports the conclusion that when Appellant gave her confession—when she admitted she had lied, left the children in the car from dark until dawn, and delayed treatment, even though she insisted it was an accident--the officers had probable cause to arrest Appellant. *See Dowthitt,* 931 S.W.2d at 255 ("After [the interviewee's] admission, especially in light of appellant's earlier evasions and inconsistencies, the police had probable cause to arrest."); *Turner,* 685 S.W.2d at 43 (indicating that when the appellant made a statement in which he did not admit

culpability for the offense but in which he provided information that tied him to evidence at the crime scene, officers had probable cause to arrest him).

C. Custody Attached upon Appellant's Initial Admission

Appellant's "interview" changed into custodial interrogation when she offered her confession. The circumstances surrounding Appellant's questioning, shows that a reasonable person would have believed "he [was] under restraint to the degree associated with an arrest." *See Dowthitt,* 931 S.W.2d at 255; *Turner,* 685 S.W.2d at 42; *Xu,* 100 S.W.3d at 413. Some of the factors to be considered are the length of Appellant's interrogation, the degree of police control exercised over her and her inculpating admission. *See Dowthitt,* 931 S.W.2d at 257; *Turner,* 685 S.W.2d at 41-42; *Xu,* 100 S.W.3d at 413.

1. Length of Appellant's Interrogation

The officers questioned Appellant for about one hour and thirty minutes while her children lay dying in the hospital. During that time, Appellant was in a small, secure room inside the police station with the officers and there were no breaks in the interrogation. Appellant's interrogation up to the point of her initial confession was shorter than the comparable periods in *Dowthitt* or *Xu*—where confessions caused custody to attach—but longer than the periods in *Beheler* or *Mathiason*—where voluntary confessions did not cause custody to attach. *Compare Dowthitt,* 931 S.W.2d at 256 (at least six hours' interrogation before confession) *and Xu,* 100

S.W.3d at 413 (approximately six hours interrogation before confession), *with California v. Beheler*, 463 U.S. 1121, 1122 (1983) (less than thirty minutes before confession) *and Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) about five minutes before confession). The length of Appellant's interrogation weighs in favor of custody attaching at the point that she offered her confession.

2. Degree of Officers' Control over Appellant

In considering whether a reasonable person would have believed she was not free to leave the interrogation after her initial confession, the following factors indicate that Appellant was not free to leave. *See Dowthitt*, 931 S.W.2d at 255; *Turner*, 685 S.W.2d at 41-43; *Xu*, 100 S.W.3d at 413.

a. Free to Leave Factors

It is undisputed that Appellant was driven to and from the police station interrogation room by police officers in a patrol car at law enforcement's insistence. Appellant had no way to go back to the hospital, except with a police escort. At the beginning of the interview, Appellant was advised that she was not under arrest. However, these words were never spoken again throughout the interrogation. There was no break during the interrogation.

Appellant asked to return to the hospital to see her babies. Officers advised her that she could go back to the hospital when the interview was finished and we clear this up. Appellant was stuck, with no way to leave.

b. Restraint Commensurate with Arrest Factors

From the time the interview began until she offered her confession, Appellant was in a small, secure room inside the police station. The room had no windows and only one door. No other people transited the interview room. No other business or activities were taking place in the room. The officers were present during the entire time, with the officers facing her and with both officers positioned so that Appellant could not leave the room. Both officers wore visible sidearms.

3. Inculpating Admission

Approximately 20-25 minutes into the interview, Appellant admitted that her story about the park was a lie. She and the others had made it up, so they wouldn't get into trouble. Appellant confessed to leaving the children in the car from at least dark to daylight, while she was "passed-out" in the house. She further admitted to sleeping with a minor, while the children were in her car. She also admitted purposefully delaying treatment because she didn't want to get in trouble. Appellant admitted lying to the doctors as to the cause of the children's condition.

Appellant repeatedly said that she "was sorry" for what she did and begged for "forgiveness". Appellant asked "what will happen to me now." Appellant admitted to the elements of the charged offenses, which comprised the majority of the facts set out in the probable cause affidavit.

4. Reasonable Person's Belief

Because custody attaches when a reasonable person would believe that he is not free to leave, we consider what information a reasonable person in Appellant's circumstances knew. Appellant knew how the children had been severely harmed and that they were in grave condition. Appellant knew law enforcement and CPS were involved and that they believed she was responsible for the crimes. Appellant was told that her story about the park was a lie and that officers had already interviewed witnesses who contradicted her story. Appellant knew that officers believed she had left the children in the hot car and that she had delayed/denied them medical attention.

Appellant knew that the investigation conducted thus far, laid the blame squarely at her feet. She was advised that this case would ultimately go before a judge, court and jury. Appellant was advised that she would go back to the hospital only upon finishing the interrogation and coming clean with her accountability and guilt.

A reasonable person would have known that officers had evidence establishing her involvement in the crimes and that she had just confessed to the crimes. All of which occurred with two armed law enforcement officers and a CPS investigator, in a small interrogation room inside the police station.

A reasonable person, based upon these objective facts disclosed to them, would know or have reason to believe that they were under restraint to a degree associated with an arrest. See *Dowthitt*, 931 S.W.2d at 257; *Xu*, 100 S.W.3d at 415. While Appellant did not admit purposefully committing the offenses, her admission of extreme reckless behavior was incriminating. A reasonable person would have realized the incriminating nature of the detailed admission.

Immediately upon Appellant making her inculpating, pivotal admission—leaving children in the car and delaying medical attention—the officers had probable cause to arrest Appellant. The initial voluntary questioning became a custodial interrogation.

Facts Relevant to the Second Confession

Within 60-90 minutes of giving her unwarned confession, Appellant was formally arrested at the hospital. The arrest warrant was based upon fact known to officers at the time of Appellant's first confession and her admissions made during the first confession.

Appellant was arrested and taken to Bexar County Jail. That same day, Friday, June 9, 2017, Appellant was magistrated. During the magistrate process, Appellant made a verbal and written request for counsel. This request was honored and Appellant was appointed an attorney. The written request for counsel and the

order appointing an attorney was sent to the 216th Judicial District District Attorney's office and the Kerr County Jail. This occurred the afternoon of Friday, June 9, 2017.

The following Monday morning, June 12, 2017, Kerr County Investigator Carol Twiss, discussed the case with the 216th District Attorney and then requested that Appellant be brought to the interrogation room. Appellant did not instigate this contact. Appellant knew that counsel had been appointed pursuant to her unequivocal request for an attorney.

Prior to Investigator Twiss reading Appellant her 38.22 warnings, Appellant asked "when do I get my attorney." This request was ignored. After the warnings were given Appellant again stated, when do I get my attorney—I've already requested/asked for one. This too was ignored and a second interrogation took place, resulting in another confession. The second confession was nearly identical to the first, as to the material admissions.

Appellant complains that the trial court erred in not suppressing the second confession for two reasons—first, it was tainted by and the product of the illegally obtained first confession; second, Appellant had an attorney and invoked her right to counsel at commencement of the warned interrogation. If the first confession should have been suppressed, the second should be suppressed as well.

The threshold question on this issue is whether or not the later, properly warned statement was voluntarily made. See *Jones v. State,* 119 S.W.3d 776, 773

(Tex. Crim. App. 2003); *Missouri v. Seibert*, 542 U.S. 600, 611-12 (2004). If there is a question first warn later situation, the issue is whether it would be reasonable to find that in these circumstances, the warnings could function "effectively" as *Miranda* requires. Critical to this analysis is the entire course of police conduct with respect to the suspect.

Soon after Appellant's unwarned confession, she was arrested. The brief gap between the unwarned confession and Appellant's arrest, was spent at the hospital with her dying children and law enforcement ever present.

After her arrest, Appellant requested and was appointed counsel. Appellant was aware that she had legal counsel. The State was also aware of this fact.

Nonetheless, the next business day, Appellant was interrogated without counsel. Appellant asked when her attorney would be present. This request was not honored. After the warnings were given, Appellant again inquired about her attorney and stated that she had requested an attorney.

Appellant submits that the second confession is the product of the illegally obtained first confession and is the inadmissible "fruit of the poisonous tree".

The second confession is essentially a repeat of the first, with the interrogator following up with the same information. No curative measures were taken by law enforcement to cure or attenuate the taint of the first. Thus, the second confession is inadmissible as well.

In addition to the second confession being improperly acquired as set out above, the confession is inadmissible because Appellant invoked her right to counsel. Appellant had requested and been appointed counsel on Friday afternoon and was approached by law enforcement for a second interrogation early Monday. Appellant's request for counsel and notice of appointed counsel had been sent to the District Attorney and Kerr County Jail Friday afternoon.

Appellant knew that she had requested an attorney and that she had an attorney. The evidence indicates that law enforcement was aware of this fact as well. Prior to and during the second interrogation, Appellant requested the presence of her attorney—not just "a" attorney, but her attorney. Appellant twice told the interrogator when do I get the attorney, and the second time adding that she had already requested an attorney. This request was ignored.

Appellant concedes that requesting counsel and having counsel appointed, OR asking when I get my attorney in an interrogation—each standing alone--would likely not be sufficient to establish an unequivocal invocation of right to counsel. However, it is the combination and totality of these facts, which give rise to invoking the right to legal counsel.

When combining: 1) Appellant's written and oral request for counsel; 2) counsel actually being appointed; 3) notice of such request and appointment being provided to law enforcement; and 4) requesting legal counsel before and after the

warnings were given--advising the interrogating officer that Appellant had requested and been appointed counsel—these four undisputed facts taken together are a clear and unequivocal invocation of Appellant's right to counsel.

At that time, the custodial interrogation should have stopped until there was compliance with Appellant's request. Such request was ignored and the interrogation conducted. As such, Appellant's second confession was illegally obtained and should have been suppressed.

ISSUE II:

TRIAL COURT ERRED IN MAKING A DEADLY WEAPON FINDING, AS IT WAS NOT APPELLANT'S ACTIONS CAUSING THE VEHICLE TO BECOME A DEADLY WEAPON.

The undisputed evidence shows that, although Appellant had left the children in her car overnight, she had left the windows down. In addition to leaving the windows down, Appellant had also left the keys in the car. The car had a full tank of gas and operable air conditioner.

In the early morning hours, Appellant went in the house to sleep. The car windows were down and the children were fine. Kevin Franke asked if he could sleep in Appellant's car until he had to go to work in a few hours.

Appellant agreed and allowed Franke to remain in the car, as long as he had the windows down and/or started the car with the air conditioner on. Franke agreed. Franke and the children slept in the car until Franke awoke later that morning.

Prior to getting out of the car, Franke had rolled up the windows and started the car with the air conditioner running. When he got out of the car, he turned off the engine, but neglected to roll the windows back down. Franke rolling up the windows and turning off the engine and air conditioner, caused the vehicle to become a deadly weapon. Appellant's actions did not result in the car becoming capable of causing death or serious bodily injury.

Appellant's actions alone did not culminate in the tragic result. But for the reckless actions of Mr. Franke, the vehicle would not have become a deadly weapon. The independent conduct of Franke transformed the automobile into an instrument capable of causing the deaths.

Section 1.07(17) TEX. PENAL CODE defines "Deadly Weapon" as "a firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury; or (B) anything that in the *manner of its use or intended use* is capable of causing death or serious bodily injury." (emphasis added).

"Serious bodily injury" is defined as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Sec. 1.07(46) TEX. PENAL CODE.

Arguably, nearly any instrument can be transformed into a "deadly weapon", depending on the method and manner of the defendant's use or intended use. Innocuous objects (e.g. hammer, screwdriver, baseball bat or automobiles) may become deadly weapons, based upon the intended actions of the person controlling said object.

To be legally sufficient to sustain a deadly weapon finding, the defendant must have "used or exhibited the deadly weapon while committing the crime for which he was convicted." *Dana v. State,* 420 S.W.3d 158 (App. 9 Dist. 2012) pet. ref'd. It must be the "manner in which the defendant used the weapon." *Wilson v. State,* 391 S.W.3d 131 (App. 6 Dist. 2012).

Automobiles, depending upon the method and manner of their use and operation, may become deadly weapons. A 3,000 pound hunk of metal going 75 m.p.h. down a public roadway can be a deadly weapon. The method and manner of its use or intended use makes it such.

However, there is not a single reported Texas case which indicates that a stationary, safely-parked, ignition-off vehicle is or can be used as a deadly weapon. This is an issue of first impression.

Had Appellant shut the children in the car with the windows up and the ignition off, this argument would likely fail. However, Appellant's use and intended use—i.e. her method/manner of use—did not result in the children's death or serious

bodily injury. The separate independent acts and omissions of Mr. Franke resulted in this catastrophe.

Simply put, Appellant's actions did not result in the deaths. The reckless acts of another did. Appellant was not even in possession of the vehicle or using the vehicle when the injuries occurred. Mr. Franke had the sole use, control and possession of the car.

The critical inquiry is the specific "manner" in which the Appellant utilized the vehicle, not what Mr. Franke did hours later. Franke's acts of rolling up the windows and turning off the engine and air conditioner directly and independently resulted in the vehicle becoming a weapon.

The evidence was insufficient to establish the trial court's deadly weapon finding beyond a reasonable doubt. Thus, the deadly weapon finding is error and should be reversed.

ISSUE III:

CUMULATIVE SENTENCING AND HAVING SENTENCES RUN CONSECUTIVELY, VIOLATES DOUBLE JEOPARDY PROHIBITION AND IS ERROR.

Appellant received multiple and cumulative sentences for a single act and criminal episode. The punishment assessed by the trial court violated the prohibition against double jeopardy, with Appellant being punished twice for the same crime.

The undisputed facts show that the acts and omissions attributable to Appellant, were a single continuous transaction. There is no doubt that the material events comprised a singular criminal episode.

The constitutional prohibition against double jeopardy protects against multiple punishments for the same offense. *Speights v. State*, 464 S.W.3d 719 (Tex. Crim. App. 2015). The constitution also protects against multiple punishment from a single prosecution. *Ex Parte Chaddock*, 369 S.W.3d 880 (Tex. Crim. App. 2012).

The elements in the cases which the trial court ordered consecutive punishments are identical in nature and arise from the same statute. The cumulative sentences were derived from the essential facts of the cases involving the same core operative facts, same evidence and same statute or authority.

Appellant was punished twice for the same crime. The consecutive sentences should be vacated, with all sentences running concurrently.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Honorable Court reverse the ruling of the trial court denying Appellant's motion to suppress, vacate the trial court's judgment regarding the complained of deadly weapon finding and consecutive sentences herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of Appellant's Amended Brief to counsel for the State, Hon. Lucy Wilke, via electronic transmission to lwilke@co.kerr.tx.us, and whose address is 402 Clearwater Paseo, Suite 400, Kerrville, Texas 78028 on this the 15th day of July, 2019.

/s/ Kurtis S. Rudkin

KURTIS S. RUDKIN