

**IN THE TEXAS COURT OF APPEALS
FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT
CORPUS CHRISTIE – EDINBURG, TEXAS**

* * *

FILED IN
13th COURT OF APPEALS
CORPUS CHRISTI/EDINBURG, TEXAS

9/16/2019 9:58:11 AM

DORIAN E. RAMIREZ

Clerk

**AMANDA KRISTENE HAWKINS,
APPELLANT**

V.

**THE STATE OF TEXAS,
APPELLEE**

No. 13-19-00147-CR

No. 13-19-00148-CR

No. 13-19-00149-CR

No. 13-19-00150-CR

* * *

**BRIEF OF APPELLEE
THE STATE OF TEXAS**

* * *

**Appeal from the 216th Judicial District Court
of Kerr County, Texas
Trial Court Cause Numbers A17597, A17598, A17599, and A17600**

* * *

**LUCY WILKE
SBN 00797184
District Attorney
By John Hoover
SBN 24080660
Assistant District Attorney
402 Clearwater Paseo, Suite 400
Kerrville, Texas 78028
830.896.4744 (telephone)
830.869.2620 (fax)
jhoover@co.kerr.tx.us**

ORAL ARGUMENT NOT REQUESTED

IDENTITY OF THE PARTIES AND COUNSEL

Trial Court: Honorable N. Keith Williams, Presiding Judge of the 216th Judicial District Court of Kerr County, 700 Main St, Second Floor, Kerrville Texas, 78028

Appellant: Amanda Kristene Hawkins

Attorney for the State at Trial: John Hoover, Assistant District Attorney, 402 Clearwater Paseo, Suite 400, Kerrville, Texas 78028

Lucy Wilke, District Attorney, 402 Clearwater Paseo, Suite 400, Kerrville, Texas 78028

Attorney for the State on Appeal: John Hoover, Assistant District Attorney, 402 Clearwater Paseo, Suite 400, Kerrville, Texas 78028

Attorney for the Appellant at Trial and on Appeal: Kurtis S. Rudkin, 616 E. Blanco Rd., Suite 202B, Boerne, Texas, 78006

<u>TABLE OF CONTENTS</u>	<u>PAGE</u>
IDENTITY OF PARTIES AND COUNSEL	i
INDEX OF AUTHORITIES	iii-vi
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2-10
APPELLANT’S ISSUES PRESENTED:	5
Issue One: <u>Appellant’s two confessions were illegally obtained and should have been suppressed.</u>	
Issue Two: <u>The trial court erred in making a deadly weapon finding, as it was not Appellant’s actions causing the vehicle to become a deadly weapon.</u>	
Issue Three: <u>Cumulative sentencing and having sentences run consecutively, violates double jeopardy prohibition.</u>	
SUMMARY OF ARGUMENT	10-11
ARGUMENT	12-38
PRAYER	39
CERTIFICATE OF COMPLIANCE	40
CERTIFICATE OF SERVICE	41

INDEX OF AUTHORITIES

PAGE

FEDERAL CASE AUTHORITIES

<i>Brown v. Illinois</i> , 422 U.S. 590 (1975)	22
<i>California v. Beheler</i> , 463 U.S. 1121 (1983)	15
<i>Davis v. United State</i> , 512 U.S. 452 (1994)	26
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	21
<i>Missouri v. Seibert</i> , 542 U.S. 600 (2004)	24
<i>Montejo v. Louisiana</i> , 566 U.S. 778 (2009)	29
<i>Oregon v. Eldstad</i> , 470 U.S. 298 (1985)	25

STATE CASE AUTHORITIES

<i>Anderson v. State</i> , 932 S.W.2d 502 (Tex. Crim. App. 1996)	16
<i>Blackman v. State</i> , 350 S.W.3d 588 (Tex. Crim. App. 2011)	30
<i>Brister v. State</i> , 449 S.W.3d 490 (Tex. Crim. App. 2014)	30-31
<i>Carter v. State</i> , 309 S.W.3d 31 (Tex. Crim. App. 2010)	24-25
<i>Davis v. State</i> , 313 S.W.3d 319 (Tex. Cim. App. 2010)	26
<i>Dinkins v. State</i> , 894 S.W.2d 330 (Tex. Crim App. 1995)	26
<i>Dowthitt v. State</i> , 931 S.W.2d 244 (Tex. Crim. App. 1996)	14,17,19,21
<i>Ervin v. State</i> , 333 S.W.187 (Tex. App. – Houston [1 st Dist.] 2010, pet. ref'd)	19

<i>Estrada v. State</i> , 313 S.W.3d 274 (Tex. Crim. App. 2010)	19
<i>Ford v. State</i> , 158 S.W.3d 488 (Tex. Crim. App. 2005)	12
<i>Gutierrez v. State</i> , 221 S.W.3d 680 (Tex Crim. App. 2007)	10
<i>Guzman v. State</i> , 955 S.W.2d 85(Tex. Crim. App. 2007)	13
<i>Herrera v. State</i> , 241 S.W.3d 520 (Tex. Crim. App. 2007)	13
<i>Hubert v. State</i> , 312 S.W.3d 554 (Tex. Crim. App. 2010)	12
<i>Hughen v. State</i> , 297 S.W.3d 300 (Tex. Crim. App. 2009)	29
<i>Hunt v. State</i> , No. PD-0152-12, 2013 WL 3282973 (Tex. Crim. App. June 26, 2013)(not designated for publication)	24
<i>McCain v. State</i> , 22 S.W.3d 497 (Tex. Crim, App. 2000)	35
<i>Mechell v. State</i> , 374 S.W.3d 454 (Tex. App. – Waco 2011, pet. ref’d)	30-33, 36
<i>Owen v. State</i> , 13-12-00374-CR, 2014 Tex. App. LEXIS 5680 (Tex. App – Corpus Christie – Edinburg May 29, 2014, no pet.) (memp. op., not designated for publication)	28
<i>Phillips v. State</i> , 787 S.W.2d 391 (Tex. Crim. App. 1990)	38
<i>Powell v. State</i> , 898 S.W.2d 821 (Tex. Crim. App. 1994)	10
<i>Romero v. State</i> , 800 S.W.2d 539 (Tex. Crim. App. 1990)	12
<i>Saenz v. State</i> , 411 S.W.3d 488 (Tex. Crim. App. 2013)	17
<i>Stanley v. State</i> , No. 04-13-00663-CR, 2015 WL 358524 (Tex. App. – San Antonio January 28, 2015, pet. ref’d) mem. op., not designated for publication)	26-27

<i>State v. Dixon</i> , 206 S.W.3d 587 (Tex. Crim. App. 2006)	12
<i>State v. Flores</i> , 392 S.W.3d 229 (Tex. App. – San Antonio 2012, pet. ref’d)	12
<i>State v. Johnson</i> , 871 S.W.2d 744 (Tex. Crim. App. 1994)	22,24
<i>State v. Rodriguez</i> , 521 S.W.3d 1 (Tex. Crim. App. 2017)	13
<i>State v. Saenz</i> , No. 13-11-00328-CR, 2014 WL 3542092 (Tex. App. – Corpus Christie – Edinburg July 17, 2014, pet. ref’d) (mem. op.)	14
<i>St. George v. State</i> , 237 S.W.3d 720 (Tex. Crim. App. 2007)	12-13
<i>Tucker v. State</i> , 369 S.W.3d 179 (Tex. Crim. App. 2012)	18
<i>White v. State</i> , 395 S.W.3d 828 (Tex. App. – Fort Worth 2013, no pet.)	19
<i>Wiede v. State</i> , 214 S.W.3d 17 (Tex. Crim. App. 2007)	12
<i>Wilson v. State</i> , 442 S.W.3d 776 (Tex. App. – Fort Worth 2014, pet. ref’d)	20
<i>Xu v. State</i> , 100 S.W.3d 408 (Tex. App. – San Antonio 2002, pet. ref’d)	19

STATUTES

Tex. Code Crim. Proc. Ann art. 38.23	24
Tex. Penal Code Ann. §1.07(17)(B)	30
Tex. Penal Code Ann. §3.03(a)	38
Tex. Penal Code Ann. §22.04(h)	38

RULES

Tex. R. App. P. 38.2(a)(1)(B)	1
Tex. R. App. P. 38.2(a)(1)(C)	25

**IN THE TEXAS COURT OF APPEALS
FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT
CORPUS CHRISTIE – EDINBURG, TEXAS**

* * *

**AMANDA KRISTENE HAWKINS,
APPELLANT**

V.

**THE STATE OF TEXAS,
APPELLEE**

No. 13-19-00147-CR

No. 13-19-00148-CR

No. 13-19-00149-CR

No. 13-19-00150-CR

BRIEF OF THE STATE OF TEXAS

TO THE HONORABLE JUDGES OF SAID COURT:

STATEMENT OF THE CASE

The State is satisfied with the Appellant’s statement of the case. *See* Tex. R. App.

P. 38.2(a)(1)(B).

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

ISSUES PRESENTED

Issue One:

Appellant’s two confessions were illegally obtained and should have been suppressed.

Issue Two:

The trial court erred in making a deadly weapon finding, as it was not Appellant’s actions causing the vehicle to become a deadly weapon.

Issue Three:

Cumulative sentencing and having sentences run consecutively, violates double jeopardy prohibition.

STATEMENT OF THE FACTS

A. Facts relevant to the Appellant's motion to suppress her two statements.

i. Appellant's interview at the hospital police substation

On June 8, 2017, Investigator Carl Arredondo (*Inv. Arredondo*) with the Kerr County Sheriff's Office received a referral from CPS regarding a welfare concern for two young children, B.H. and A.E-O., who were in the hospital in grave condition. RR V. 2, p. 90.¹ Inv. Arredondo was directed to go to University Hospital in San Antonio where the children were receiving treatment to interview hospital staff and the Appellant. RR V. 1, p. 90. The Appellant is the mother of B.H and A.E-O. Inv. Arredondo was sent to the hospital for the purpose of figuring out what happened to the children. RR V. 2, p. 91. The Appellant had driven herself to, and was already at the hospital, by the time Inv. Arredondo arrived. RR V. 2, pp. 92-93.

Inv. Arredondo talked to the attending physician, Dr. Daniel Gebhard, and the social worker at the hospital about B.H. and A.E-O.'s condition. RR V. 2, p. 91 and p. 94. Inv. Arredondo also briefly spoke with the Appellant while she was in one of the children's rooms and in the hallway of the hospital. RR V. 2, p. 93 and p. 96. Texas Ranger Kevin Wright (*Ranger Wright*) arrived at the hospital to assist Inv.

¹ The notation *CR* will refer to the Clerk's Record, and the notation *RR* will refer to the Reporter's Record.

Arredondo with the investigation. RR V. 2, p. 31 and p. 112. The Appellant was not guarded, being watch, or surveilled by any law enforcement officers while Inv. Arredondo and Ranger Wright were at the hospital talking to staff. RR V. 2, p. 113.

After two or three hours of gathering information, Inv. Arredondo asked the Appellant if she was willing to accompany him to a separate location to be interviewed so he could gain information about what happened to her children. RR V. 2, pp. 97-98. Inv. Arredondo did not communicate or convey to the Appellant that she was a suspect in a criminal offense. RR V. 2, p. 97 and p. 114. The Appellant agreed to speak with Inv. Arredondo at the University Hospital Police substation. RR V. 2, p.113. Inv. Arredondo made arrangements to use an interview room at the University Hospital Police substation so the Appellant's statement could be audio/video recorded per Kerr County Sheriff's Office policy. RR V. 2, p. 96. It took Inv. Arredondo about 45 minutes to coordinate with hospital police to use one of the interview rooms at the substation. RR V. 2, p. 96 and p. 113.

Inv. Arredondo was unfamiliar with the location of the substation, so the Appellant was given a courtesy ride by a hospital police officer to the location of the interview room. RR V. 2, p. 99 and 113. Inv. Arredondo and Ranger Wright followed the Appellant to the police substation separately. RR V. 2, p. 114. Once the Appellant, Inv. Arredondo, and Ranger Wright arrived at the substation they walked

through a briefing room and in to the interview room. RR V. 2, pp. 114-115. During this time the Appellant was never handcuffed, denied the ability to communicate with her family, restricted access to the exits of the building or the interview room, and the interview room was never locked. RR V. 2, pp. 114-115. The Appellant was also asked if she needed to use the restroom, given a bottle of water, and was not promised anything for her statement. RR V. 2, p. 116.

The entire interview with the Appellant was audio and video recorded and lasted approximately one hour and ten minutes. RR V. 2, p. 115-116 and RR V. 5 Supp., State's Exhibit 1. Inv. Arrendondo, Ranger Wright, and an investigator with CPS were inside the interview room with the Appellant when she gave her statement. RR V. 5 Supp., State's Exhibit 1. At the beginning of the interview, Inv. Arredondo told the Appellant that she was not under arrest, there voluntarily, could walk out at any time, and that she would be taken back to her children after the interview. RR V. 2, p. 117 and RR V. 5 Supp., State's Exhibit 1.

The Appellant told the investigators a story at first about how B.H. and A.E-O. became sick after playing at the park. RR V. 5 Supp., State's Exhibit 1. Inv. Arredondo knew this version of events was not true because he was made aware by another law enforcement officer who had interviewed the Appellant's co-defendant

that the children had been left inside the Appellant's vehicle through the night and in to several hours of the day. RR V. 2, p. 101 and p. 117. About 30 minutes in to the interview, Inv. Arredondo asked the Appellant to be honest about what happened to her children because he knew the girls had not become sick from playing at the park. RR V. 5 Supp., State's Exhibit 1. The Appellant then changed her story and admitted that she had left B.H. and A.E-O. inside her car overnight while at a party. RR V. 5 Supp., State's Exhibit 1.

The Appellant asked Inv. Arredondo what was going to happen to her after she admitted to what really happened to B.H. and A.E-O. RR V. 5 Supp., State's Exhibit 1. Inv. Arredondo told the Appellant that he wasn't sure what would happen to her but that she would be taken back to the hospital to be with her children and family. RR V. 5 Supp., State's Exhibit 1. After the interview, the Appellant was taken back to the hospital and went her separate way from Inv. Arredondo and Ranger Wright. RR V. 2, p. 121.

Inv. Arredondo and Ranger Wright went to a different part of the hospital to continue talk to hospital staff. RR V. 2, pp. 120-121. No law enforcement officer guarded, surveiled, or monitored the Appellant after she was dropped off. RR V. 2, pp. 120-121. Unbeknownst to the Appellant, investigators applied for and secured an

arrest warrant for the Appellant's arrest. RR V. 2, p. 122. None of the statements the Appellant made during her interview were included in the arrest warrant affidavit. RR V.5 Supp., State's Exhibit 4 and 5. The Appellant was arrested at the hospital about an hour and a half after she was taken back to her children's hospital rooms. RR V. 2, p. 122. B.H. and A.E-O. both died that day at the hospital.

ii. *Appellant's interview at the Kerr County jail*

The Appellant was taken to the Bexar County jail after she was arrested and given the magistrate warnings. RR V. 4, Defendant's Exhibit 1. On June 9, 2017, a Kerr County District Judge appointed an attorney to represent the Appellant. RR V. 4, Defendant's Exhibit 1. On June 12, 2017, the Appellant was transferred from the Bexar County jail to the Kerr County jail. RR V. 2, p. 126. Captain Carol Twiss (*Capt. Twiss*) with the Kerr County Sheriff's Office requested that the Appellant be brought to an interview room so she could be interviewed again before the Appellant was formally booked in to the jail. RR V. 2, p. 126.

The Appellant was brought to an interview room where she gave another statement to Capt. Twiss about what happened to B.H. and A.E-O. RR V. 2, p. 128. Prior to giving her statement, the Appellant was advised of her rights pursuant to art. 38.22 of the Code of Criminal Procedure. The Appellant understood her rights, waived them

in writing, and agreed to speak with Capt. Twiss. RR V. 2, p. 130 and RR V. 5, State's Exhibit 3.

The Appellant basically recounted the events to Capt. Twiss (with more detail) that she told Inv. Arredondo. RR V. 5 Supp., State's Exhibit 2. At the beginning of the interview, and before the Appellant was advised of her rights, the Appellant asked Capt. Twiss "when do I get an attorney?" RR V. 5 Supp., State's Exhibit 2 at 1:35². Capt. Twiss told the Appellant that she would get an attorney when one was appointed to her and then asked her if she wanted to continue to talk.³ RR V. 5 Supp., State's Exhibit 2. The Appellant then proceeded with the interview. RR V. 5 Supp., State's Exhibit 2 at 2:19.

At another point in the interview the Appellant asked Capt. Twiss again "when do I get an attorney?" RR V. 5 Supp., State's Exhibit 2 at 12:10. Capt Twiss again told her that she would get an attorney when one was appointed to her and then sought clarity about whether the Appellant wanted to continue with the interview. RR V. 5 Supp., State's Exhibit 2. The Appellant decided to continue speaking with Capt. Twiss about what happened. RR V. 5 Supp., State's Exhibit 2. The interview ended

² This indicates the time stamp on State's Exhibit 2 that pinpoints the relevant portion.

³ At the time of the interview, Captain Twiss was not actually aware that an attorney had already been appointed to represent the Appellant. *See* RR V. 2, pp. 130-131 and CR Supp. V. 1, p.10.

after about an hour and the Appellant was booked in to the jail. RR V. 5 Supp., State's Exhibit 2.

B. Facts relevant to the finding of a deadly weapon.

The Appellant committed the offenses by leaving her two children –one-year old B.H. and two-year old A.E-O.– strapped in their car seats inside of her vehicle for period of 10-15 hours. RR V. 4, Stipulated Evidence A, G, H, K, and L. The children were left inside of her car which was parked in the driveway of a friend's house so the Appellant could hang out and smoke marijuana. RR V. 4, Stipulated Evidence A.

The Appellant, her co-defendant Kevin Franke, and the other people at the house stayed up late in to the night smoking a large amount of marijuana between them in a shed next to the house. RR V. 4, Stipulated Evidence A. As the night was winding down (at around 4:00-5:00 a.m.), the Appellant gave Kevin Franke the keys and allowed him to sleep in her car with the children while she went to sleep inside the house. RR V. 4, Stipulated Evidence A. The Appellant did not provide B.H. and A.E-O. food or water throughout the night and did not come back to check on her children after she went inside of the house to sleep. RR V. 4, Stipulated Evidence A. Kevin Franke was 16 at the time of the offense.⁴ RR V. 4, Stipulated Evidence A.

⁴ Kevin Franke was also charged with offenses arising out of this incident. A Kerr County Juvenile Court waived its jurisdiction and ordered his case(s) transferred to district court so he could be tried as an adult.

There was more than one version of the exact condition of the car when the Appellant abandoned the children to go to sleep in the house. The Appellant and other witnesses told law enforcement that she left the car running with the windows down, but Kevin Franke told law enforcement that he turned the car on when he got in it to go to sleep. RR V. 5 Supp, State's Exhibit 2 and RR V. 4, Stipulated Evidence A. Kevin Franke also told law enforcement that he rolled the car windows up so he could use the air conditioner while sleeping. RR V. 4, Stipulated Evidence A. When Kevin Franke woke up at around "daylight" the next morning he turned the car off and left B.H. and A.E-O. inside with the windows up. RR V. 4, Stipulated Evidence A. The Appellant got up at around 12:30 p.m. the next day to find Kevin Franke just waking up inside the shed they were smoking marijuana in the night before and B.H. and A.E-O. inside of the car unconscious and barely alive. RR V. 4, Stipulated Evidence A.

The Appellant was sentenced by the trial court on December 12, 2018. Dr. Daniel Gebhard, the physician who treated B.H. and A.E-O. at University Hospital, testified at the sentencing hearing. RR V. 3, p. 61. Per agreement, the State only sought a deadly weapon finding in the abandoning a child offense involving B.H. in cause A17597.

Dr. Gebhard testified that B.H. was at risk of severe dehydration under the

circumstances in which the Appellant intended to use her vehicle and that severe dehydration placed B.H. in danger of kidney and other organ failure, cell death, seizures, and blood clotting in the brain. RR V. 3, pp. 76-78 and pp. 106-107. Additionally, Dr. Gebhard testified that A.E-O. was physically capable of getting out of her car seat – and assisting B.H. out of her’s – which placed them both at risk of falling out of the car window or potentially moving or operating the vehicle with them inside. RR V. 3, 79-80 and 107-108. In Dr. Gebhard’s opinion, the way in which the Appellant intended to use or used her vehicle made it capable of causing death or serious bodily injury to B.H. RR V. 3, pp. 99-100.

SUMMARY OF ARGUMENT

The Appellant’s first statement to law enforcement was not the product of a custodial interrogation. The Appellant voluntarily accompanied Inv. Arredondo and Ranger Wright to the interview room at the hospital police station so her statement could be audio/video recorded. The Appellant was not physically deprived of her freedom of action in any significant way or told she could not leave. Additionally, the Appellant was never handcuffed, denied the ability to use the restroom, blocked from exiting the unlocked interview room or substation, provided a bottle of water, and taken back to her family after the interview. Law enforcement also did not make any manifestations of probable cause to the Appellant before, during, or after her

statement. Under these circumstances, a reasonable person would not believe they were under arrest.

The Appellant's second statement was not tainted by her first statement because her first statement was not the product of a custodial interrogation. Moreover, the Appellant's questions regarding when she would be appointed counsel did not amount to an unequivocal invocation of her rights to counsel.

The trial court did not err by making a deadly weapon finding because there was sufficient evidence for the trial court, as the trier of fact, to have found beyond a reasonable doubt that the Appellant's motor vehicle was a deadly weapon.

Lastly, the trial court did not err in cumulating the Appellant's sentences. The Appellant was convicted of offenses committed against two different victims, namely B.H. and A.E-O. The sentences involving different victims were ordered to run consecutively but the sentences alleging the same victim were ordered to run concurrently. The convictions involving different victims were not the same offense for double jeopardy purposes because each charge required proof the other did not, particularly, the identity of the victim. The trial court's order cumulating the Appellant's sentences did not violate double jeopardy.

ARGUMENT AND AUTHORITIES

Issue One:

Appellant's two confessions were illegally obtained and should have been suppressed.

A.

Standard of Review

The standard of review of a trial court's ruling on a motion to suppress evidence is abuse of discretion on a bifurcated basis, where the appellate court will give almost total deference to the facts found by the trial court and review de novo the trial court's application of the law. *Hubert v. State*, 312 S.W.3d 554, 559 (Tex. Crim. App. 2010); *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007); *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006); and *Ford v. State*, 158 S.W.3d 488, 493 (Tex. Crim. App. 2005). The trial judge is the sole and exclusive trier of fact and judge of the credibility of the witnesses as well as the weight to be given to their testimony at a hearing on a motion to suppress. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Wiede v. State*, 214 S.W.3d 17, 24-25 (Tex. Crim. App. 2007). If the trial court makes findings of fact, the appellate court determines whether the evidence supports those findings. *State v. Flores*, 392 S.W.3d 229, 233 (Tex. App. – San Antonio 2012, pet. ref'd). Appellate courts give almost total deference to a trial court's determination of historical facts, particularly when the trial court's findings

are based on an evaluation of credibility and demeanor. *State v. Rodriguez*, 521 S.W.3d 1, 8 (Tex. Crim App. 2017). *St. George*, 237 S.W.3d 725; *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 2007). Moreover, appellate courts afford the same deference to mixed questions of law and fact if resolving those questions turn on an evaluation of credibility and demeanor. *Guzman*, 955 S.W.2d at 89.

B.

Analysis

I. The Appellant's statement at the hospital police station was not the product of a custodial interrogation.

The Appellant bears the burden of establishing that her statement was the product of a custodial interrogation.

The mere filing of a motion to suppress does not thrust a burden on the State to show compliance with *Miranda*...unless and until the defendant proves that the statements he wishes to exclude were the product of custodial interrogation. Thus, the State has no burden at all unless the record as a whole clearly establishes that the defendant's statement was the product of custodial interrogation by an agent for law enforcement. It is the defendant's initial burden to establish those facts on the record.

Herrera v. State, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007) (quoting *Wilkerson v. State*, 173 S.W.3d 521, 532 (Tex. Crim. App. 2005)).

“A person is in custody only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated

with a formal arrest.” *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996) (citing *Stansbury v. California*, 511 U.S. 318, 318 (1994)). The Court of Criminal Appeals has identified four situations which may constitute custody:

- (1) when a suspect is physically deprived of his freedom of action in any significant way,
- (2) when a law enforcement officer tells the suspect that he cannot leave,
- (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, or
- (4) 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; *see also State v. Saenz*, No. 13-11-00328-CR, 2014 WL 3542092, at *11 (Tex. App. – Corpus Christie – Eindburg July 17, 2014, pet. ref’d) (mem. op.). The first three situations require the restriction on a suspect’s freedom of movement must amount to ‘the degree associated with an arrest’ as oppose to an investigative detention.” *Dowthitt*, 931 S.W.2d at 255. The fourth situation requires an officer’s knowledge of probable cause to be manifested to the suspect. *Id.*

The trial court denied the Appellant’s motion to suppress her statement at the hospital because it found she failed to establish the statement was the product of a custodial interrogation. CR Supp. V1. The trial court’s findings are supported by the

record.

1. The Appellant was not physically deprived of her freedom of action in any significant way and was not told she could not leave.

The evidence at the suppression hearing showed that the Appellant voluntarily agreed to be interviewed at the police substation, she was not ordered by law enforcement to give a statement, and that law enforcement advised her that she was not under arrest and that she was free to leave any time. CR Supp. V.1, pp.6-7. Ranger Wright and Inv. Arredondo testified that the Appellant was never handcuffed before, during, or after her statement. RR V. 2, p. 114, p. 68, p. 72. The videotape of her statement also shows that the Appellant was never handcuffed or in any other way deprived of her freedom of action. Accordingly, the first two situations in which the Appellant may have been in custody do not apply.

2. Law enforcement did not create a situation that would lead a reasonable person to believe their freedom of movement has been significantly restricted.

There isn't any evidence in the record that indicates that law enforcement created a situation that would lead a reasonable person in the Appellant's position to believe their freedom of movement was significantly restricted. Station house questioning does not, in and of itself, constitute custody. *See California v. Beheler*, 463 U.S. 1121, 1125 (1983). A person is not in custody when they are transported to a law

enforcement facility by an officer during an investigation, if the person was acting on an invitation or request of the officer, there were no threats that they would be taken forcibly, and the person accompanies the officer voluntarily. *See Anderson v. State*, 932 S.W.2d 502, 505 (Tex. Crim. App. 1996).

The Appellant was not guarded or surveilled by law enforcement while she was at the hospital. Inv. Arredondo requested – not ordered or commanded – the Appellant speak with him so he could find out what happened to B.H. and A.E-O. The Appellant voluntarily agreed to go the hospital police station to be interviewed and was never handcuffed, threaten with any of the officer’s sidearms, told she could not leave, or forcibly taken to the interview room. She was also offered to use the restroom and provided a bottle of water. Lastly, after the interview, the Appellant was returned to the hospital to be with her children where she and Inv. Arredondo and Ranger Wright parted ways. The record does not support a finding that the Appellant’s freedom of movement was restricted to the degree associated with a formal arrest.

3. Inv. Arredondo and Ranger Wright never manifested probable cause to arrest the Appellant nor were there any other circumstances that would lead a reasonable person to believe they were under arrest.

The Appellant places the most emphasis on the fourth situation in which a person

may be in custody to support her claim the hospital statement was the product of a custodial interrogation. Custody is not established under the fourth situation unless law enforcement manifest to the suspect their knowledge of probable to arrest combined with other circumstances (such as the duration of the interview and the exercise of control the officers have over the suspect) that would lead a reasonable person to believe they were under arrest. *Dowthitt*, 931 S.W.2d at 255.

The Appellant claims the interview turned in to a custodial interrogation when she admitted to what really happened to B.H. and A.E-O. Her argument fails for a couple of reasons. First, the Appellant focuses on what Inv. Arredondo and Ranger Wright *knew* and when they *thought* they had probable to arrest rather than what they actually conveyed to the Appellant. An officer's knowledge of probable cause to arrest does not by itself create a situation classified as custodial interrogation. *See Saenz v. State*, 411 S.W.3d 488, 497 (Tex. Crim. App. 2013). The subjective beliefs of the officer regarding probable cause are irrelevant unless those beliefs are manifested by words or actions to the suspect. *See Dowthitt*, 931 S.W.2d at 254. It is only when an officer manifests the knowledge of probable cause to the suspect –combined with other factors – that can turn a situation in to a custodial interrogation. *Saenz*, 411 S.W.3d at 496-497.

Here, the record supports the trial court's finding that Inv. Arredondo and Ranger

Wright did not manifest probable cause to arrest the Appellant. CR Supp. V1., p. 6. Inv. Arredondo and Ranger Wright both testified that they never told the Appellant they had probable cause to arrest her, that she was going to jail, or that they were going to get a warrant for her arrest. Inv. Arredondo even stated at the motion to suppress that he didn't think he had enough information to arrest the Appellant until the interview was over and the Appellant was taken back to the hospital. RR V. 2, p. 109. The Appellant claims that she was "pressed," "confronted," and "challenged" by law enforcement during her interview. However, the videotape of her statement shows the tone of the interview was rather calm and respectful.⁵ See RR V.5 Supp., State's Exhibit 1. Lastly, when the Appellant asked "what's going to happen to me?" after she gave her statement Inv. Arredondo told her "we don't know." RR V.5 Supp., State's Exhibit 1 at 18:43.

Second, there is an absence of "other factors" that courts have found turn a situation in to a custodial interview. These factors include the duration of the interview, whether the suspect arrived at the place of interrogation voluntarily, whether the suspect's request to see relatives and friends are refused, and the degree

⁵ The calm, nonaggressive nature of the interview was noted by the trial court at the motion to suppress (and presumably played a factor in its decision). RR V. 2, pp. 149 and 153. See *Tucker v. State*, 369 S.W.3d 179, 185 (Tex. Crim. App. 2012) (holding that appellate courts should afford great deference to a trial court's determination of historical facts when that determination is based on a videotape recording admitted into evidence at the suppression).

of control exercised over the suspect. *See Dowthitt*, 931 S.W.2d at 254; and *Xu v. State*, 100 S.W.3d 408, 413 (Tex. App. – San Antonio 2002, pet. ref'd).

The Appellant's one hour and ten minute interview was not unreasonably long given the facts and complexity of the investigation and her voluntary participation. Moreover, the length of the interview was the time necessary for law enforcement to receive the information from the Appellant. *See Estrada v. State*, 313 S.W.3d 274, 294-295 (Tex. Crim. App. 2010) (holding that defendant was not in custody when he went to the police station voluntarily, was told he was free to leave, and willingly stayed for a five-hour interview); *Ervin v. State*, 333 S.W.3d 187, 208 (Tex. App. – Houston [1st Dist.] 2010, pet. ref'd) (finding that a four hour time period at the police station did not constitute custody because that length of time was necessary due to the amount information being received from the suspect); and *White v. State*, 395 S.W.3d 828, 836 (Tex. App. – Fort Worth 2013, no pet.) (determining defendant was not in custody when he voluntarily went to the police station for an interview which lasted approximately one hour, was asked if he needed the restroom or water, and did not ask to see anyone).

Inv. Arredondo and Ranger Wright also did not deny the Appellant access to her family and friends nor would they have refused the Appellant's request to have family or friends come with her to the interview. RR V. 2, p. 114. Further, after the interview

the Appellant “went back in to spend time with her family.” RR V. 2, p. 80.

Lastly, as discussed above, Inv. Arredondo and Ranger Wright did not exercise any degree of control over the suspect. The Appellant was not handcuffed, was told she could leave at any time, the door to the interview was unlocked and unobstructed, and she had free access to exit the police station at any time. The Appellant points out that the interview was in a small interrogation room, in the interior of the police station, with one door, no windows, and with two officers. These circumstances, however, do not rise to the degree associated with formal arrest. *See Wilson v. State*, 442 S.W.3d 776, 785 (Tex. App. – Fort Worth 2014, pet. ref’d) (holding defendant not restrained to the degree of formal arrest when interview was conducted in room with no windows, door shut, and in close quarters with two officers).

Based on all of the above reasons, the trial court did not abuse its discretion in denying the Appellant’s motion to suppress her hospital statement because she failed to establish the statement was the product of a custodial interrogation.

II. The Appellant’s statement at the Kerr County jail was not tainted by her first statement and her questions to Capt. Twiss did not amount to an unequivocally invocation of her right to counsel.

The Appellant contends that her second statement should have been suppressed for two reasons. First, she claims her statement made at the Kerr County jail was

tainted by her statement at the hospital because the hospital statement was the product of an unwarned custodial interrogation. Second, she argues that her questions to Capt. Twiss regarding when she would get an attorney amounted to an unequivocal invocation of her right to counsel.

1. The Appellant's second statement at the jail was not tainted by her first statement at the hospital.

The Appellant's statement at the Kerr County jail was not tainted by the her statement at the hospital because, as fully discussed in Section I above, the statement at the hospital was not the product of a custodial interrogation. *Miranda* prohibits the use of oral statements of an accused made as a result of ***custodial interrogation*** unless the accused is given the statutory warnings and knowingly and voluntarily waives the rights set out in the warnings. *Miranda v. Arizona*, 384 U.S. 436, 478 (1966)(emphasis added). *Miranda* and article 38.22 apply only to custodial interrogation. *Id.* at 444; and *Dowthitt*, 931 S.W.2d at 263. Law enforcement was not required to advise the Appellant of the *Miranda* warnings because she was not in custody. Thus, there wasn't any taint connected to the Appellant's statement at the hospital.

2. Whatever taint there **may have been** was sufficiently attenuated

Even if the Appellant's statement at the hospital was the product of a custodial interrogation and therefore subject to suppression – which the State expressly does not concede – her second statement at the jail was sufficiently attenuated from any alleged illegal conduct on the part of law enforcement. To determine whether a confession has been tainted by illegal police conduct, appellate courts are to utilize the four-part test established in *Brown v. Illinois*. See *State v. Johnson*, 871 S.W.2d 744, 750 (Tex. Crim. App. 1994). The *Brown* factors are:

- (1) whether *Miranda* warning were given;
- (2) the temporal proximity of the [illegal conduct] and the confession;
- (3) the presence of intervening circumstances; and
- (4) the purpose and flagrancy of the official misconduct.

Brown v. Illinois, 422 U.S. 590 (1975); and *Johnson*, 871 S.W.2d at 751. “The attenuation doctrine is applicable to article 38.23's prohibition against evidence “obtained” in violation of law because evidence sufficiently attenuated from the violation of law is not considered to be ‘obtained’ therefrom.” *Johnson*, 871 S.W.2d at 750. “If the evidence is not obtained in violation of the law, then its admission into

evidence is not in contravention of article 38.23.” *Id.* at 751.

All four of the *Brown* factors weigh heavily in support of the conclusion that the Appellant’s second statement at the jail was sufficiently attenuated from whatever illegal taint there may have been attached to her statement at the hospital.

The Appellant was advised of, and waived, her *Miranda*/art. 38.22 rights prior to giving her statement to Capt. Twiss. There is nothing in the record that suggests the Appellant did not fully understand those rights or that she did not waive them voluntarily and intelligently. The statement at the jail was four days later, at a different location, and with a different officer than her statement at the hospital. The Appellant’s statement at the jail was made after law enforcement procured a warrant for her arrest from a neutral and detached magistrate days earlier. None of the Appellant’s statements made to law enforcement during the hospital interview were included in the warrant’s probable cause affidavit.⁶ RR V. 5, State’s Exhibit 4 and 5.

Finally, there wasn’t official misconduct because law enforcement did not intend to create a custodial situation before, during, or after the hospital interview. The Appellant was never handcuffed and was told she was free to leave. Inv. Arredondo

⁶ The affidavit for probable cause references a conversation the affiant had with CPS Special Investigator Randy Herrera. This conversation took place the day before the Appellant’s hospital interview and CPS Special Investigator Randy Herrera was not the same CPS investigator in the interview room with the Appellant, Inv. Arredondo, and Ranger Wright. RR V. 2, p. 89 and p. 91.

testified that he didn't think he had probable cause to arrest the Appellant until after she was taken back to the hospital. Lastly, when the decision was made to arrest the Appellant, law enforcement obtained a warrant.

Considering all of the factors together, the Appellant's statement at the jail was sufficiently attenuated from whatever taint there may have been connected to her statement at the hospital such that it was not "obtained" for purposes of art. 38.23. *See Johnson*, 871 S.W.2d at 750-751; and Tex. Code Crim. Proc. Ann. art. 38.23.

3. The Appellant's "question-first, warn-later" argument is not founded in the record

The facts and circumstances of the Appellant's interviews do not support her claim that law enforcement engaged in "question-first, warn-later." The issue of "question-first, warn-later" arises when a defendant is given the *Miranda* warnings "midstream." *See Carter v. State*, 309 S.W.3d 31, 35-42 (Tex. Crim. App. 2010). This happens when the police elicit an unwarned confession from a suspect in custody, and then the interrogating officer warns the suspect and "leads the suspect to cover the same ground a second time," resulting in a second, *Mirandized*, confession. *See Missouri v. Seibert*, 542 U.S. 600, 604 (2004); and *Hunt v. State*, No. PD-0152-12, 2013 WL 3282973, at *12 (Tex. Crim. App. June 26, 2013)(not designated for

publication). Law enforcement was not required to give the Appellant the *Miranda* warnings during the hospital interview because she was not in custody, so her “question-first, warn-later” analysis is irrelevant to her case.

In any event, assuming⁷ the Appellant’s hospital interview was a custodial interrogation, there is no evidence in the record that law enforcement engaged in a deliberate “question-first, warn-later” tactic. The voluntariness of her statement should therefore be analyzed under the factors stated in *Oregon v. Elstad*⁸ to see if it was the product of inadvertent “question-first, warn-later” police conduct. Here, all three *Elstad* factors support the trial court’s finding that the Appellant’s statement at the jail was voluntary. There were days between statements and the interview was at a different location with a different interrogator. Whatever taint there may have been from any inadvertent “question-first, warn-later” conduct was sufficiently cured.

4. The Appellant’s questions to Capt. Twiss regarding when she would get an attorney did not amount to an unequivocal invocation of her right to counsel

The Appellant’s questions regarding an attorney was not a clear request for

⁷ See Tex. R. App. P. 38.2(a)(1)(C) (... the appellee’s brief should respond to the appellant’s issues and points...).

⁸ The *Elstad* factors used to determine whether there was taint from the unwarned statement on the warned statement are: “the time that passes between the confessions, the change in place of interrogations, and the change in identity of the interrogators.” See *Oregon v. Elstad*, 470 U.S. 298, 310 (1985); and *Carter*, 309 S.W.3d at 40.

counsel. A request for counsel must be unambiguous and sufficiently clear such that a reasonable officer would understand the statement to be a request for an attorney. *Davis v. United States*, 512 U.S. 452, 459 (1994); and *Davis v. State*, 313 S.W.3d 317, 339 (Tex. Crim. App. 2010). If an accused makes an ambiguous or equivocal statement, a police officer is under no obligation to seek clarity or ask questions about whether she really wants an attorney. *Davis*, 313 S.W.3d at 339. Whether the accused actually invoked her right to counsel is an objective inquiry. *Id.* To determine if an accused invoked her right to counsel, appellate courts look at the totality of the circumstances surrounding the interrogation in combination with the accused's statements. *See Dinkins v. State*, 894 S.W.2d 330, 351 (Tex. Crim. App. 1995).

The facts in the Appellant's case are similar to those in *Stanley* and the *Stanley* court's reasoning should be persuasive. In *Stanley* the 18 year-old defendant was arrested pursuant to a warrant and interviewed at the police station. *Stanley v. State*, No. 04-13-00663-CR, 2015 WL 358524, at *6 (Tex. App. – San Antonio January 28, 2015, pet. ref'd) (mem. op., not designated for publication). Before the interview, the detective removed the defendant's handcuffs and read him the *Miranda* rights, which the defendant understood. *Id.* The detective asked the defendant to tell his side of the story regarding the offense. *Id.* The defendant then told the detective that his mom

told him to wait for an attorney and then asked to call his mother to see if she was obtaining an attorney. *Id.* The detective told the defendant he could call his mom, but that he was old enough to speak with the detective. *Id.* at *16. The defendant then paused and the detective asked him what he would like to do. *Id.* The defendant then proceeded to give a statement regarding the offense. *Id.*

The defendant argued on appeal that he invoked his right to counsel when he asked the detective if he could speak to his mom about an attorney. *Id.* at *11. The court disagreed. *Id.* at *12. The court found, based on the totality of the circumstances, that the defendant's comments about trying to secure an attorney did not amount to an unambiguous request for counsel. *Id.* at *16. The court pointed to the fact that after the defendant's comments about an attorney the detective sought clarity by asking him what he wanted to do. *Id.* at *17. The defendant considered his options and then decided to move forward and provide a statement. *Id.* The court held the defendant did not invoke his right to counsel because his ambiguous questions about calling his mother to inquire about the status of counsel was followed by his unambiguous decision to continue to discuss the offense with the detective. *Id.* at *18.

The Appellant's questions to Capt. Twiss about when she would get a lawyer

were ambiguous and did not clearly invoke her right to counsel.⁹ This is demonstrated by the fact that Capt. Twiss had to seek clarity after both questions. Capt. Twiss did more than was required by asking the Appellant if she wanted to continue to talk. This gave the Appellant the opportunity twice to clarify and invoke her right to counsel. This is especially true since the Appellant was specifically told by Capt. Twiss that she had the right to have an attorney present during the interview. RR V. 5 Supp., State's Exhibit 2. The Appellant considered her options and proceeded with the interview after waiving her right to have an attorney present in writing. RR V. 5 Supp., State's Exhibit 2. Like in *Stanley*, the Appellant's ambiguous questions about when she would get an attorney was followed by the unambiguous decision to continue to discuss the offense with Capt. Twiss. Based on the totality of the circumstances viewed objectively, the Appellant did not invoke her right to counsel.¹⁰

⁹ In her brief, the Appellant claims that she knew she had an attorney when she was interviewed by Capt. Twiss. If the Appellant knew she had an attorney then why did she need to ask Capt. Twiss *when* she would get one?

¹⁰ This Court has noted similar examples in which a suspect did not unambiguously invoke their right to counsel. See *Owen v. State*, 13-12-00374-CR, 2014 Tex. App. LEXIS 5680, at *n. 9 (Tex. App.—Corpus Christi—Edinburg May 29, 2014, no pet.) (mem. op., not designated for publication) (citing *Davis v. United States*, 512 U.S. 452, 462 (1994) (holding that statement, "Maybe I should talk to a lawyer" was not request for counsel); *Davis v. State* 4, 313 S.W.3d 317, 341 (Tex. Crim. App. 2010) (holding that statement, "I should have an attorney" was not unambiguous request for counsel); *Mbugua v. State*, 312 S.W.3d 657, 665 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (holding that question, "Can I wait until my lawyer gets here?" was not unambiguous request for counsel); *Gutierrez v. State*, 150 S.W.3d 827, 832 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (deciding that question, "Can I have [my attorney] present now?" was ambiguous question about counsel); *Halbrook v. State*, 31 S.W.3d 301, 302 (Tex. App.—Fort Worth 2000, pet. ref'd) (determining that statement, [*26] "Do I get an opportunity to have my attorney present?" did not constitute clear and unambiguous invocation of counsel); *Flores v. State*, 30 S.W.3d 29, 34 (Tex. App.—San Antonio 2000, pet. ref'd) (continued...)

Lastly, the fact that the Appellant requested an attorney at magistration and was appointed one – per the *Sixth Amendment* – days before is irrelevant to whether she invoked her right to counsel at the jail interview. *See Montejo v. Louisiana*, 556 U.S. 778 (2009). This is true whether or not law enforcement is actually aware of the existence of appointed counsel. The *Sixth Amendment* does not bar police-initiated interrogation of a suspect who has previously asserted the right to counsel (e.g. at magistration) so long as they are given and waive the *Miranda* warning before the statement – which happened here. *Hughen v. State*, 297 S.W.3d 300, 335 (Tex. Crim App. 2009). The Appellant’s reliance on her request for counsel at magistration, that request being provided to law enforcement, and being appointed counsel is misplaced because it has no bearing on whether her questions to Capt. Twiss amounted to an invocation of her right to counsel.

¹⁰ (...continued)
(holding that question, "Will you allow me to speak to my attorney before?" was not clear and unequivocal invocation of right to counsel).

Issue Two:

The trial court erred in making a deadly weapon finding, as it was not Appellant's actions causing the vehicle to become a deadly weapon.

A.**Standard of Review**

Appellate courts “review the record to determine whether, after viewing the evidence in the light most favorable to the [verdict], any rational trier of fact could have found beyond a reasonable doubt that the [vehicle] was used or exhibited as a deadly weapon.” *Brister v. State*, 449 S.W.3d 490, 493 (Tex. Crim. App. 2014) (citing *Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003)). Reviewing courts should not ask whether it believes that the evidence at trial established beyond a reasonable doubt that a deadly weapon was used. *See Blackman v. State*, 350 S.W.3d 588, 595 (Tex. Crim. App. 2011). Instead, the reviewing court must view all of the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found beyond a reasonable doubt that a deadly weapon was used or exhibited during the commission of the offense. *See id.*; and *Mechell v. State*, 374 S.W.3d 454, 456-457 (Tex. App. – Waco 2011, pet. ref’d).

“In order to sustain a deadly weapon finding, the evidence must demonstrate that: 1) the object meets the definition of a deadly weapon; 2) the deadly weapon was used

or exhibited during the transaction of which the felony was based; and 3) other people were put in danger.” *Brister*, 449 S.W.3d at 494. A deadly weapon is anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. Tex. Penal Code. Ann. §1.07 (17)(B).

B.

Analysis

The facts in the Appellant’s case are similar to those in *Mechell*. In *Mechell*, the defendant was charged with abandoning a child (among other things) for kidnapping and abandoning her friend’s seven-day old baby in a gas station dumpster. *Mechell*, 374 S.W.3d. at 455. At trial, the State alleged the use or exhibition of the dumpster at as a deadly weapon. *Id.*

The evidence at trial showed that the defendant’s friend was napping at home with her new born baby when the defendant came over to her house unannounced. *Id.* The defendant told her friend to keep resting and that she would watch the baby for her. *Id.* When the friend woke up she found the defendant and her baby gone. *Id.* The friend immediately called the police who then developed the defendant as a suspect. *Id.* at 456. During an interview with law enforcement, the defendant confessed that she had taken the baby and hid him in a dumpster. *Id.* Law enforcement went straight

to the dumpster to look for the baby. There they found the baby still alive, pink, hot, with scrapes and abrasions, at the bottom of the dumpster covered in trash and debris. *Id.* The temperatures reached 89 degrees by 12:40 p.m. the day of the offense. *Id.*

The State called the treating pediatric critical care doctor at trial to discuss the baby's injuries. *Id.* at 457. The medical evidence revealed that the baby's blood oxygen level was lower than normal and he was dehydrated. *Id.* at 461. The doctor stated that the baby was in shock which, in turn, could cause death. *Id.* at 457. The doctor also testified that by leaving the baby in the dumpster it exposed him to the elements and placed his life at risk. *Id.* at 461. Particularly, the doctor believed the baby was at risk of death because of exposure to heat during the day, cold after nightfall (had the baby not been found), suffocation, or had the dumpster been emptied with the baby inside. *Id.* at 461. At the close of evidence, the jury found the defendant used the dumpster as a deadly weapon. *Id.* at 455.

The defendant appealed the jury's finding of a deadly weapon. The court noted that an object is a deadly weapon if the actor *intends a use* of the object in which it would be capable of causing death or serious bodily injury. *Id.* at 458 (*citing McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000) (emphasis added)). "The placement of "capable" is crucial to understanding the method of determining deadly

weapon status.” *Id.* at 458-459 (citing *Tucker v. State*, 274 S.W.3d 688, 691 (Tex. Crim. App. 2008)). The State is not required to show that the “use or intended use causes death or serious bodily injury” but that the “use or intended use is capable of causing death or serious bodily injury.” *Id.* Even the passive use or intended use of an object can be sufficient to support a deadly weapon finding. *Id.* at 459. The court found that it was undisputed the defendant used the dumpster to hide the baby and that the doctor based his conclusions on how the dumpster could cause death or serious bodily injury on that particular use or intended use. *Id.* at 461. Therefore, it held a rational jury could have found beyond a reasonable doubt that the manner in which the defendant used the dumpster, it was capable of causing death or serious bodily injury. *Id.*

The facts in *Mechell* are similar to the facts here. It is undisputed that the Appellant intended to leave B.H. strapped in her car seat inside of her car with the windows down when she went inside the house to sleep. It is also undisputed that after the Appellant went to sleep inside she did not go back out to check on B.H. until she woke up at around 12:30 p.m. when the temperature was around 90 degrees. RR. V. 4, Stipulated Exhibit 1. The Appellant’s car did not move from where she parked it before she went to bed. The car was parked in such a way that it was exposed to

direct sunlight when the sun came up. RR V. 4, Stipulated Exhibit C at 00:05.¹¹

Lastly, it is undisputed that before she went to sleep the Appellant allowed a highly intoxicated juvenile to sleep in the car with her children and after giving him the ability to operate the vehicle. RR V. 4, Stipulated Evidence A.

Like the doctor in *Mechell*, Dr. Gebhard's testimony, when viewed in the light most favorable to the prosecution, gave the trial court sufficient evidence to conclude that the way in which the Appellant *intended* to use her vehicle, it was capable of causing death or serious bodily injury to B.H. (notwithstanding Kevin Franke's actions). Dr. Gebhard testified that even with the windows rolled down and the car off,¹² B.H. was in actual danger of dehydration under these circumstances. RR V. 3, p. 77. Dehydration leads to organ failure, cell death, seizures and strokes from blood clotting in the brain, all of which can lead to serious bodily injury or death. RR V. 3, p. 78 and p. 99. Dr. Gebhard also testified that A.E-O. and B.H. were capable of getting out of their car seats. RR V. 3, p. 79. This placed B.H. at risk of falling out of the car window which could cause unconsciousness and brain bleeding, and in turn

¹¹ This time stamp on a Kerrville Police Officer's body worn camera shows her black SUV exactly as it was when she left her children inside of it to go to sleep in the house.

¹² One way in which the evidence in the record shows how the Appellant left the car with her children inside was with the windows down and the car turned off. RR V. 4, Stipulated Evidence A.

death. RR V. 3, p. 80. Additionally, Dr. Gebhard believed that A.E-O. had the strength and ability move the gear shifter, work the windows, and turn the car off.¹³ This placed the children in actual danger of crashing the vehicle or rolling the windows up with them inside, both scenarios are capable of causing death or serious bodily injury to B.H. Applying the court's reasoning in *Mechell*, Dr. Gebhard's conclusions were supported by the evidence as it relates to how the Appellant intended the use her of vehicle during the commission of the offense.

The Appellant also intended to use and used her vehicle during the abandoning offense by allowing Kevin Franke to have access to B.H. while giving him the ability to operate the car in his intoxicated state. The evidence supports the trial court's deadly weapon finding because the vehicle was capable of causing death or serious bodily injury under these circumstances. B.H. was at risk of death or serious bodily injury from being involved in a motor vehicle accident had Kevin Franke decided to drive away in his intoxicated state. There was also the risk that B.H. could have gotten out of her car seat and fallen out of the car while Kevin Franke was high and inattentive or asleep. Lastly, as we now tragically know, the Appellant's use of her

¹³ Another version of how the Appellant left the car with the children inside was with the windows down and the car turned on. RR V. 4, Stipulated Evidence A

car during the course of abandoning B.H. – after giving a person the Appellant knew was a juvenile and highly intoxicated the ability to roll up the windows and turn the car off – was a way in which the car would be (and was) capable of causing death or serious bodily injury to B.H. *See McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000) These were all actual risks to B.H. grounded in the evidence.

The Appellant stresses that it wasn't her actions that resulted in the death of B.H. However, the State is not required to prove the way in which she used or intended to use her car caused death or serious bodily injury to B.H., only that it was capable of causing death or serious bodily injury. The Appellant also argues that but for the actions of Kevin Franke the vehicle would not have been a deadly weapon.¹⁴ This isn't true because, according to Dr. Gebhard, had B.H. stayed in the car with windows down and the car off (or on) as the Appellant intended to leave her had Kevin Franke not been involved, she was still at actual risk of death or serious bodily injury from dehydration, renal failure or injury, falling out of the car, or being involved in a crash. RR V. 3, p. 80 and pp. 106-107.

The trial court did not err in finding a deadly weapon because the manner in which

¹⁴ The Appellant asserts that there isn't "a single reported Texas case" that supports the passive use of her "stationary, safely-parked, ignition-off vehicle" as a deadly weapon. The parallel between the vehicle in the Appellant's case and the dumpster in *Mechell* indicates otherwise. *See Michell*, 374 S.W.3d at 459 (even the passive use or intended use of an object can be sufficient to support a deadly weapon finding).

the Appellant intended to use and did use her vehicle was in a way that made it capable of causing death or serious bodily injury to B.H. The evidence supports this conclusion with or without Kevin Franke's actions.

Issue Three:

Cumulative sentencing and having sentences run consecutively, violates double jeopardy prohibition.

The Appellant alleges that she was punished twice for the same crime in violation of double jeopardy. She supports her position by claiming the "elements in the cases which the trial court ordered consecutive punishments are identical in nature." The trial court did not err, however, because the Appellant's unlawful acts against each child constituted separate and distinct offenses.

The cases were not prosecuted in a single criminal action because they were indicted separately and the plea and punishment hearings involving the cases against B.H. was separate and distinct from the plea and punishment hearings involving the cases against A.E-O. RR V. 3, pp. 7-9. It was also an explicit term of the plea agreement between the State and the Appellant that the court would retain its ability to order consecutive sentences between the offenses that allege B.H. and A.E-O. as

victims.¹⁵ CR V. 1, p. 47. The purpose of this was to avoid automatic concurrent sentences per §3.03(a) of the Penal Code. *See* Tex. Penal Code Ann. §3.03(a).

The Court of Criminal Appeals has long recognized that the protection against double jeopardy is inapplicable where separate and distinct offenses occur during the same transaction. *Phillips v. State*, 787 S.W.2d 391, 394 (Tex. Crim. App. 1990). “Cumulative punishment, consistent with double jeopardy may be imposed where separate offenses occur in the same transaction, as long as each conviction requires proof of an additional element which the other does not.” *Id.* Offense involving different victims are separate and distinct from each other because one conviction requires proof of fact the other does not, i.e. the identity of each victim. *Id.* This is true even if a defendant’s underlying unlawful act that caused the injury to each victim is the same. *Id.* Therefore, cumulative punishment of offenses involving different victims do not implicate double jeopardy considerations. *Id.*

Here, even though the Appellant’s underlying unlawful acts that formed the basis of the charges were the same, the offenses were not because each required the State to prove a fact that other did not – the identity of B.H. and A.E-O. The trial court’s

¹⁵ The Appellant was charged with four offenses, two for each child. The causes which allege the same child as the victim were ordered to run concurrently with each other by operation of law. *See* Tex. Penal Code §22.04(h)

order does not implicate double jeopardy because it only ordered the offenses that were separate and distinct to run consecutively. Accordingly, the Appellant was not punished twice for the same crime.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas, respectfully prays that the decision of the trial court below be in all things affirmed, and that the State be granted all such other and further relief to which it may be justly entitled.

Respectfully submitted,
LUCY WILKE
State Bar Card Number 00797184
District Attorney

/s/ John Hoover
Assistant District Attorney
State Bar Card Number 24080660
200 Earl Garrett Street, Suite 202
Kerrville, Texas 78028
830.896.4744 (telephone)
830.896.2620 (facsimile)
jhoover@co.kerr.tx.us
ATTORNEY FOR THE STATE

CERTIFICATE OF COMPLIANCE

I certify that according to the WordPerfect word count tool this document contains 10,458 words.

/s/ John Hoover
Assistant District Attorney
216th Judicial District Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document was served on the following parties by the method stated below on September 16, 2019:

Kurtis Rudkin,
616 E. Blanco Road, Suite 202B
Boerne, Texas 78028
ksrlaw@gvtc.com
Ph: 830.249.8472
via email transmission

/s/ John Hoover
Assistant District Attorney
216 Judicial District Attorney's Office