

NO. 0000

STATE OF TEXAS ) IN THE DISTRICT COURT  
VS. ) 290TH JUDICIAL DISTRICT  
JO SMITH ) BEXAR COUNTY, TEXAS

**DEFENDANT’S PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I.**

**Findings of Fact  
[Proposed]**

1. William Summers has been employed by the San Antonio Fire Department for more than 27 years, the last 16 as an arson investigator. [MTS–112-13] Investigator Summers has had training and experience in interrogating people suspected of arson. [MTS–32]
2. On February 24, 2012, Investigator Summers was assigned to conduct a fire scene investigation of a fire that occurred that night at the Whisper Hollow Condominiums at 10955 Wurzbach, San Antonio, Texas. [MTS–14] He was the lead investigator in the case. [MTS–31]
3. Investigator Summers determined that the fire originated on the first floor balcony of unit 1006, which was occupied by Ms. Jane Goode and her granddaughter, Susan Atkins. Ms. Atkins told Investigator Summers that she had been having trouble with a couple of people, including Bryan Ant and possibly with his friend, Jo Smith, the defendant. [MTS–19]
4. Ms. Atkins was the first person to identify Ms. Smith to Investigator Summers, probably on March 1, 2012, at which time Ms. Smith became “a person of interest.” [MTS–33]
5. After that date, and probably before March 22, 2012, Investigator Summers went to Ms. Smith’s place of employment and took pictures of Ms. Smith’s car in the parking lot to use during his investigation. [MTS–33-34] He advised Ms. Smith on March 27, 2012, before she had made any incriminating statements to him, that he had taken these pictures. Investigator Summers “ran [Ms. Smith’s] plate in order to get an address so [he] could contact her.” [MTS–35]

6. On March 22, 2012 Investigator Summers interviewed Bryan Ant. Investigator Summers and Investigator Anthony Guerrero asked Mr. Ant “some pointed questions and he was a little offended by the questions.” [MTS–22]
7. Investigator Summers probably told Mr Ant during this interview that he was going to need to speak to Ms. Smith. After questioning Mr. Ant he “felt strongly that she may have been involved.” [MTS–37]
8. Ms. Smith showed up at the office during the interview with Mr. Ant. [MTS–18] Investigator Summers told Ms. Smith that he did want to speak to her, but could not do so then. He asked her to come back another day and she agreed. [MTS–21]
9. Ms. Smith returned to Investigator Summers’s office on March 27, 2012 and he questioned her about the fire. [MTS–21-22] Ms. Smith had obviously talked to Mr. Ant before her interview and believed that the investigators had been “a little rough” with him. Investigator Summers assured her they had not been, and that they would not be rough with her. [MTS–22]
10. Investigator Anthony Guerreo assisted Investigator Summers in interviewing Ms. Smith. [MTS–31]
11. Investigator Summers did not have a warrant for Ms. Smith’s arrest or search prior to interviewing her on March 27, 2012. [MTS–38]
12. The interview between Ms. Smith and Investigators Summers and Guerrero was recorded and introduced at the hearing on Ms. Smith’s motion to suppress as State’s Exhibits 1 and 2. [MTS–26] These recordings “fairly and accurately reflect the conversation” between Summers and Smith on March 27, 2012. [MTS–23] Everything of significance that Ms. Smith and Investigator Summers said to each other is recorded on this videotape. [MTS–43-44]
13. Investigator Summers was in law enforcement and was acting in a law enforcement capacity when he interviewed Ms. Smith, and he identified himself as such to her. [MTS–43]
14. Ms. Smith was interviewed at the fire department in a small room behind closed doors. The interview began at 10:09 am and concluded at 12:41 pm. Ms. Smith remained in the room the entire time. She did not make any phone calls during this time, and did not speak to anyone other than the two investigators, Summers and Guerrero.

15. At no time did Investigator Summers read Ms. Smith her rights as set forth in the *Miranda* decision, or in article 38.22 of the Texas Code of Criminal Procedure. [MTS–39-40]
16. Investigator Summers did not tell Ms. Smith that her interview was being recorded on videotape. [MTS–40]
17. Investigator Summers told Ms. Smith several times that she was not going to be arrested, future-tense. It was not until after she had incriminated herself, however, that he told Ms. Smith that she was not then under arrest. In fact, the first time Investigator Summers advised Ms. Smith that she was not under arrest was some nine minutes after she admitted to starting the fire, when he said this: “You know, you’re not under arrest. You were free to leave at any time, you know. I’m gonna let you leave today, you know. I’m not, you’re not under arrest.”
18. Twice *before* she incriminated herself, Ms. Smith asked Investigator Summers if she needed a lawyer. The first time he avoided the question. The second time he told her “right now you don’t, because this is just a consensual interview . . . we’re just talking.” *After* he got his confession, when Ms. Smith again asked about counsel, Investigator Summers told her “to talk to somebody that you, you trust, and see what they think you should do.”
19. Before she incriminated herself, Investigator Summers told her “this is an official interview,” and that she should tell “no lies, no omissions, no nothing,” and then he warned her concerning the law of aggravated perjury and that it applied “*if the statement is required or authorized by law, which it is, by me . . .*”
20. Before Ms. Smith admitted to starting the fire, Investigator Summers told her he was “totally convinced [that she was] responsible for this fire,” and that he had “no doubt in [his] mind you did,” and that he so believed one “hundred percent.”
21. Throughout the interview, Investigator Summers posited Ms. Smith’s guilt as a certainty, but then assured her he knew that she was not a bad person and that other people (Bryan Ant) and other circumstances (the wind) contributed to the situation and made it worse. He stated his opinion that this was a crime of passion, and that she had let her emotions get the best of her.
22. Investigator Summers told Ms. Smith that “based on where [he was] sitting right now, it was malice, it was premeditated, and [she was] trying to kill people,” that

this was her last opportunity to explain her “mindset,” and that if she failed to do so, she left him no choice. Arson, he warned, was one thing; “attempted capital murder is something totally different.” This would be her last opportunity to explain why she did this and that she was not a “monster.” He was there to help her, and she should trust him. He had every right to file the case either way, Summers told Smith, and that arson was a “much lesser charge,” but he did not know since she was not being honest with him. “They can charge you with up to 30. Whereas that’s capital murder. With arson, its just gonna be the charge of arson. You know, you’re rolling the dice, and you’re gonna lose, and you may lose really bad.”

23. Investigator Summers told Ms. Smith that it would be up to a Judge or jury to decide what happened to her ultimately, but that in his experience, a lot of people of good character who have no criminal history get probation , and “it could very well be the same way with this,” and that “it’s so much better if you’re honest and up front about what happened and about why it happened.”
24. Immediately before Ms. Smith confessed that she “set a little basket on fire,” she asked what was going to happen to her, and Investigator Summers said: “you’re gonna be okay. It can be a little intimidating now, but it’s a process. But you’ll be okay.”
25. Ms. Smith left in her own vehicle after the interview. [MTS–24]

## **II. Conclusions of Law [Proposed]**

1. The incriminating statements Jo Smith gave to Investigator Summers on March 27, 2018 were the product of interrogation. *See Rhode Island v. Innis*, 446 U.S. 291 (1980).
2. In *Dowthitt v. State*, 931 S.W. 2d 244, 255 (Tex. Crim. App. 1996), the court of criminal appeals “outlined at least four general situations which may constitute custody: (1) when the 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, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.” In the fourth

situation, the officer's probable cause belief must be "manifested to the suspect." In this case, Ms. Smith was in custody because it is unquestionable that the investigators conveyed to her their beliefs they had probable cause to arrest her and that they did not tell her she was free to go at any time before she incriminated herself.

3. When determining if a suspect is in custody "the primary question is whether a reasonable person would perceive the detention to be a restraint on his movement 'comparable to . . . formal arrest,' given all the objective circumstances." *State v. Ortiz*, 382 S.W. 3d 367, 372 (Tex. Crim. App. 2012). Under *Ortiz*, it is unquestionable that a reasonable person under the circumstances that confronted Ms. Smith could have drawn no other conclusion other than that her detention was comparable to a formal arrest.
4. At the time Ms. Smith made her incriminating statements to Investigator Summers she was deprived of her freedom of action in a significant way. *Ruth v. State*, 645 S.W.2d 432, 435 (Tex. Crim. App. 1979)(emphasis in original)(citing *Miranda v. Arizona*, 384 U.S. at 444); accord, *Melton v. State*, 790 S.W.2d 322, 325 (Tex. Crim. App. 1990) ("A person need not be under formal arrest in order to be in custody."); see generally *Miranda v. Arizona*, 384 U.S. at 444.
5. Ms. Smith was not given the warnings required by the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Texas Constitution, *Miranda v. Arizona*, 384 U.S. 436 (1966) and article 38.22 §3(a)(2) of the Texas Code of Criminal Procedure.
6. All statements Jo Smith made to Investigators William Summers and Anthony Guerrero on March 27, 2012 were the product of custodial interrogation, and because she was not given the warnings required by the federal and state constitutions and by state statute, these statements are inadmissible at trial.
7. "An inculpatory statement obtained as a result of a benefit positively promised to the defendant made or sanctioned by one in authority and of such a character as would be likely to influence a defendant to speak untruthfully is not admissible." *Hardesty v. State*, 667 S.W.2d 130, 134 (Tex. Crim. App. 1984).
8. In *Hardesty*, the court of criminal appeals reversed the trial court's decision to admit a confession. The court found that the confession had been involuntarily made because it was induced by the interrogating officer's promise not to file more than one burglary charge in Irving Texas. The same is true in Ms. Smith's case.

Summers's options to Ms. Smith – that she either allow herself to be charged as monster guilty of attempted capital murder (or capital murder) because she intended the deaths of 30 persons, or that she confess and allow herself to be charged as a mere property criminal with a good chance at probation – is, in the words of William Summers, a “no-brainer.”

9. Because Ms. Smith's statements were involuntarily made, they are inadmissible under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article 38.21 of the Texas Code of Criminal Procedure.

SIGNED this the \_\_\_\_ day of \_\_\_\_\_, 2018.

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JUDGE PRESIDING

Respectfully submitted:

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### **CERTIFICATE OF SERVICE**

I certify that a copy of Defendant's Proposed Findings Of Fact And Conclusions Of Law has been delivered to the Bexar County District Attorney's Office on this the 11th day of September, 2018.

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MARK STEVENS