

67327-1

67327-1

NO. 67327-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RASHAD SWANK,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2019 FEB 13 PM 3:54

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIAN M. McDONALD
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH WPIC 1.02.....	3
a. Relevant Facts	4
b. WPIC 1.02 Is A Correct Statement Of The Law	5
c. Even If The Court Erred In Giving The Standard WPIC 1.02 Instruction, Any Error Was Harmless.....	7
D. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Rogers v. United States, 422 U.S. 35,
95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975)..... 6

Shannon v. United States, 512 U.S. 573,
114 S. Ct. 2419, 129 L. Ed. 2d 459 (1994)..... 6

Washington State:

State v. Harris, 74 Wash. 60,
132 P. 735 (1913)..... 3

State v. Hicks, 163 Wn.2d 477,
181 P.3d 831 (2008)..... 7

State v. Mason, 160 Wn.2d 910,
162 P.3d 396 (2007)..... 7

State v. Murphy, 86 Wn. App. 667,
937 P.2d 1173 (1997)..... 6, 7

State v. Todd, 78 Wn.2d 362,
474 P.2d 542 (1970)..... 6

State v. Townsend, 142 Wn.2d 838,
15 P.3d 145 (2001)..... 6, 7

State v. Vander Houwen, 163 Wn.2d 25,
177 P.3d 93 (2008)..... 5

Rules and Regulations

Washington State:

CrR 7.4..... 5
CrR 7.5..... 5
CrR 7.8..... 5
CrR 8.3..... 5

Other Authorities

11A Washington Practice: Washington Pattern
Jury Instructions: Criminal (3rd ed. 2008)..... 3
WPIC 1.02..... 1, 3, 4, 5, 6, 7, 8

A. ISSUE PRESENTED

1. Jury instructions are proper when they permit a defendant to argue his theories of the case, do not mislead the jury, and correctly inform the jury of the applicable law. In this case, the trial court gave Washington Pattern Jury Instruction -- Criminal (WPIC) 1.02, which instructs the jurors that they should not consider the fact that punishment *may* follow conviction except insofar as it may tend to make them careful. Given that punishment does not automatically follow a guilty verdict and given that the jury is to disregard sentencing considerations in deliberations, does WPIC 1.02 correctly state the law?

B. STATEMENT OF THE CASE

On May 28, 2010, at approximately 7:14 p.m., Clyde Hill Police Officer Isaiah Harris observed a car driving in a marked bicycle lane and going over the posted speed limit. RP 88-93. At an intersection with a stop sign, the car failed to stop and made a left turn without signaling. RP 89-90. Officer Harris stopped the vehicle, and the driver and sole occupant, defendant Rashad Swank, exited the car. RP 90-92, 115-16. The officer instructed Swank three or four times to go back to his car before Swank complied. RP 92-93.

Officer Harris asked Swank to roll down his window, but Swank fumbled with his car key and could not get it in the ignition. RP 94-95. Swank stated that he did not have a license and thought that he was in Seattle. RP 96-97. He admitted that he had smoked marijuana but denied that he had consumed any alcohol. RP 97-98. After Swank performed poorly on the field sobriety tests, the officer arrested him and transported him to the precinct. RP 116-33.

At the precinct, an officer trained in drug recognition evaluated Swank. RP 271-307. The officer observed vertical and resting nystagmus, which suggested that Swank had ingested PCP. RP 285-92. The police arranged to take a sample of Swank's blood. RP 140-42, 192-95. His blood tested positive for the presence of PCP and diazepam (commonly known as Valium). RP 377-96.

Swank's license was revoked in the first degree due to his status as a habitual offender. RP 360-61. He had four prior convictions for driving under the influence ("DUI") and one prior vehicular assault conviction. RP 362, 416-23.

The State charged Swank with Felony DUI and Driving While Licensed Suspend/Revoked ("DWLS") in the First Degree. CP 1-2. The matter went to trial in February of 2011. After approximately one hour of deliberations, the jury found Swank guilty as charged.

CP 9-10; RP 473-75. The trial court imposed a standard range sentence on the felony conviction. CP 236-44.

Additional relevant facts are set forth below.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH WPIC 1.02.

Swank's sole claim on appeal is that the trial court committed reversible error by instructing the jury with WPIC 1.02.¹ He argues that the instruction is erroneous because it states that "punishment *may* follow conviction," rather than "punishment *will* follow conviction." Because WPIC 1.02 correctly states the law, and because any error was harmless in any event, the Court should affirm Swank's convictions.

¹ The Washington Supreme Court Committee on Jury Instructions suggests that WPIC 1.02 be used in every case. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal at 15 (3rd ed. 2008). Trial courts in Washington have instructed juries with the language at issue for at least one hundred years. State v. Harris, 74 Wash. 60, 63, 132 P. 735 (1913).

b. WPIC 1.02 Is A Correct Statement Of The Law.

Jury instructions are proper if they do not prohibit the defendant from arguing his theories of the case, do not mislead the jury, and correctly inform the jury of the applicable law. State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008). On appeal, this Court reviews alleged errors of law in jury instructions de novo. Id. Here, the trial court properly instructed the jury pursuant to WPIC 1.02 that it was not to consider any punishment that "may" follow conviction.

Swank contends WPIC 1.02 is a misstatement of the law because if the jury returns a verdict of guilty, punishment will always be imposed. This is incorrect. A defendant may move for an arrest of judgment under CrR 7.4, a new trial under CrR 7.5, relief from judgment under CrR 7.8, or even a dismissal under CrR 8.3. These motions, if successful, may ultimately result in no punishment being imposed upon a conviction. Therefore, it is not a misstatement of the law to say that punishment may be imposed upon a conviction because, in fact, in some cases, punishment will not be imposed following a conviction. Accordingly, the punishment

language in WPIC 1.02 is a correct statement of the law since punishment does not necessarily follow a guilty verdict.

Second, even if punishment is certain to follow a conviction, WPIC 1.02 is still proper because the jury's duty is to refrain, in most cases, from considering punishment altogether. With the exception of the death penalty, punishment is irrelevant to the jury's task. State v. Murphy, 86 Wn. App. 667, 670, 937 P.2d 1173 (1997) (citing State v. Todd, 78 Wn.2d 362, 474 P.2d 542 (1970)). Thus, "when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'" State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001) (quoting Shannon v. United States, 512 U.S. 573, 579, 114 S. Ct. 2419, 2424, 129 L. Ed. 2d 459 (1994) (quoting Rogers v. United States, 422 U.S. 35, 40, 95 S. Ct. 2091, 2095, 45 L. Ed. 2d 1 (1975))). Given that the jury is not to consider sentencing consequences during the deliberative process, the trial court was not required to modify WPIC 1.02 and tell the jury that Swank would, indeed, be punished if convicted. The trial court did not err in giving this instruction.

c. Even If The Court Erred In Giving The Standard WPIC 1.02 Instruction, Any Error Was Harmless.

In reviewing alleged errors in jury instructions, "Washington courts apply a harmless error test, assessing the impact of instructional error on the outcome of the case: . . ." State v. Murphy, 86 Wn. App. at 671. Instructional error requires reversal of the conviction unless it affirmatively appears that the error was harmless. Id. An instructional error is harmless if it is "*trivial, or formal, or merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case.*" Id. at 671-72 (emphasis in the original). The Washington Supreme Court has repeatedly recognized that errors in instructing the jury about punishment can be harmless. State v. Hicks, 163 Wn.2d 477, 488, 181 P.3d 831 (2008); State v. Mason, 160 Wn.2d 910, 930-31, 162 P.3d 396 (2007); Townsend, 142 Wn.2d at 848-49. The alleged error in this case is certainly harmless.

First, the alleged instructional defect in WPIC 1.02 is insignificant considering that, unlike instructions defining reasonable doubt or the elements of the offense, the language at issue does not address fundamental aspects of the applicable law

or the deliberative process. The fact that punishment may or may not follow a particular conviction is legally irrelevant to the jury's consideration of whether the State has proven the elements of the crime beyond a reasonable doubt. Because the jury is not to consider punishment, an instructional error about whether punishment will be imposed is trivial.

Second, the evidence to support both charges was strong, thereby substantially reducing any prejudice resulting from the alleged instructional error. The evidence supporting the DWLS in the First Degree charge was not disputed. The evidence as to the Felony DUI was overwhelming; Swank was observed driving in a reckless manner, he behaved oddly after he stopped driving, he performed poorly during field sobriety tests and his blood tested positive for the presence of PCP. The three officers who had contact with Swank all testified that he was too impaired to drive safely. RP 131, 252-53, 346. Given the facts in this case and the trivial nature of the alleged error, any error in giving the standard WPIC 1.02 instruction was harmless.

D. CONCLUSION

For the reasons cited above, this Court should affirm Swank's convictions.

DATED this 13th day of February, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

BRIAN M. McDONALD, WSBA #19986
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RASHAD SWANK, Cause No. 67327-1-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Broman

Name

Done in Seattle, Washington

2/13/12

Date