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DEC 23 2011

King County Prosecutor  
Appellate Unit

NO. 67327-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

RASHAD SWANK,

Appellant.

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 DEC 23 PM 3:07

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Susan Craighead, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in giving the pattern jury instruction WPIC 1.02 and rejecting appellant's proposed modifications. CP 24-27. (Instruction 1 is attached as an appendix to this brief.)

Issue Pertaining to Assignment of Error

Jury instructions must accurately state the law and must not mislead the jury. Juries are typically instructed not to consider "the fact that punishment may follow conviction" except insofar as it may make them careful. Appellant requested this instruction be modified in two places to reflect that punishment "will," rather than "may," follow conviction. The court declined appellant's request and gave the standard instruction unchanged. Is reversal required because the jury was likely to be less careful when the instruction implies there is a chance punishment will not follow conviction?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Rashad Swank with felony driving under the influence and driving while license suspended in the first degree. CP 1-2. The jury found Swank guilty on both counts, and the court imposed sentence. CP 9-10, 43-53. Notice of appeal was timely filed. CP 55.

## 2. Substantive Facts

Swank was pulled over by Clyde Hill police the evening of May 28, 2010. RP 88. He had been driving in the wide bicycle lane, and the officer saw him turn left without a signal after rolling through a four-way stop. RP 88-90. Swank pulled into a gas station, and then began to exit via the other driveway. RP 90. When the officer turned on the lights and sirens, Swank stopped and got out of his car. RP 90.

After being asked several times to get back in the car, Swank sat on the driver's seat with his feet hanging out. RP 92-93. The officer asked Swank to swing his legs inside the car and roll down the window so they could talk. RP 94-95. When he tried to turn on the ignition so he could roll down the windows, Swank had difficulty and had to make several tries. RP 95. Swank told the officer he got lost trying to go home from a friend's house and was looking for directions. RP 158. Swank denied drinking that day but admitted to smoking marijuana. RP 97-98.

Swank agreed to participate in field sobriety testing. RP 116. The officer noticed nystagmus, the involuntary, sudden eye movements used as a sign of intoxication. RP 123-26. He observed horizontal gaze nystagmus, but no vertical or resting nystagmus. RP 126, 169. Swank performed poorly on the "Nine Step Walk and Turn" test, failing to place one foot directly in front of the other and losing his balance several times. RP 129. The officer

did not ask Swank to do the “One Leg Stand” due to safety concerns. RP 130. The officer arrested Swank on suspicion of driving while under the influence of drugs or alcohol. RP 131.

Back at the station, a Drug Recognition Expert officer was called in. He observed both vertical and resting nystagmus, an indication of dissociative anesthetics such as phencyclidine (PCP). RP 286-88. Swank also performed poorly on several more tests of his ability to perform divided-attention tasks. PR 295-99. Swank’s muscle tone, nostrils, and pupil size were normal. RP 304-05. His pulse was at the high end of the normal range. RP 302-03. Swank told the drug recognition expert he had taken vicodin at three or four p.m. that day. RP 306. When asked if the marijuana he smoked could have been laced with PCP, Swank said he did not know. RP 306.

Three officers testified they believed Swank was too impaired to drive safely. RP 131, 252-53, 346. Swank’s blood was drawn and tested positive for PCP, metabolites of THC, and diazepam. RP 141-42, 206. A custodian of records for the Department of licensing testified Swank’s license was revoked in the first degree based on his designation as a habitual traffic offender. RP 361.

Defense counsel proposed an opening instruction that modified the traditional WPIC 1.02. CP 21; RP 32. WPIC 1.02 reads, “You have nothing

whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.” CP 26-27. The proposed defense instruction reads, “You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.” CP 20. The modified defense version substitutes the word “will” for the word “may” to indicate that punishment after conviction is not a mere possibility. RP 32, 403-04. The court denied counsel’s request for this instruction, so as to “tee up” the issue for the Court of Appeals. RP 409.

C. ARGUMENT

THE COURT ERRED IN FAILING TO GIVE THE DEFENSE’S  
PROPOSED OPENING INSTRUCTION.

A party is entitled to a jury instruction that accurately states the law, permits the parties to argue their theories of the case, and is not misleading. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). A jury instruction is improper if it misleads the jury. State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008). The pattern instruction misleads the jury by implying there may be no punishment. Swank was entitled to the modified instruction that would have accurately informed the jury

punishment would follow conviction. Because the instruction misled the jurors regarding punishment, thereby implicitly permitting them to exercise less care in their deliberations, Swank was deprived of a fair trial.

Under the Sentencing Reform Act, when a person is convicted of a felony, “the court shall impose punishment as provided in this chapter.” RCW 9.94A.505(1). The Legislature’s use of the term “shall” indicates punishment is mandatory. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). Types of punishment include confinement for the standard range term, sentencing enhancements for deadly weapons and firearms, exceptional sentences, community custody, fines, restitution, and crime-related prohibitions. RCW 9.94A.530; RCW 9.94A.533; RCW 9.94A.535; RCW 9.94A.550; RCW 9.94A.701; RCW 9.94A.750.

In Swank’s case, his felony DUI carries a seriousness level of five. RCW 9.94A.515. With his offender score of nine, his standard range is 72 to 96 months. RCW 9.94A.510. However, the statutory maximum confinement that may be imposed for a class C felony is five years. RCW 9A.20.021. Thus, the court’s discretion in imposing punishment on Swank was even more circumscribed than usual. The court was required to impose the 60-month sentence unless there were proven mitigating factors. RCW 9.94A.506(3).

Moreover, the mere fact of a criminal conviction, and the stigma that arises from it, constitutes punishment. State v. Womac, 160 Wn.2d 643, 656-58, 160 P.3d 40 (2007). Thus, under the law, it is correct to say that punishment “will” follow a criminal conviction. It is misleading to suggest to jurors that there is a possibility the defendant will escape punishment if convicted.

By misleading the jury about the certainty of punishment, the instruction also misleads the jury about the caution it must exercise in arriving at its verdict. The instruction tells jurors they may only consider the fact of punishment insofar as it makes them careful. CP 26-27. Yet the intended caution is undermined by the suggestion that punishment is merely a possibility. This instruction misleads the jury and discourages care in much the same way as an instruction to the jury that the death penalty is not a possibility. In non-capital cases, the jury may not be told that the case does not involve the death penalty. State v. Townsend, 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001). When the jury is told that the death penalty is not involved, jurors “may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out.” Id. at 847. Similarly, when the jury’s instructions imply there is a possibility the defendant may escape punishment even if convicted, the jury may be less attentive, less deliberative, and less inclined to hold out.

An erroneous jury instruction is presumed prejudicial unless it affirmatively appears it did not affect the outcome of the case. State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970) (quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341, 344 (1947)), overruled on other grounds by State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976); State v. Murphy, 86 Wn. App. 667, 671-72, 937 P.2d 1173 (1997). Instructional error is only 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.” State v. Smith, 131 Wn.2d 258, 264, 930 P.2d 917 (1997); see also Murphy, 86 Wn. App. at 671-72. The State bears the burden of proving the error was harmless. Id. The State cannot do so in this case.

The officers’ testimony was in conflict, with one claiming Swank had both resting and vertical nystagmus typical of PCP use and another testifying he saw neither. RP 169, 286-88. A jury that was properly encouraged to be careful may have been more critical of conflicting testimony. This error was not merely academic because it detracted from the jury’s careful assessment of the evidence, thereby depriving Swank of a fair trial. His convictions should be reversed.

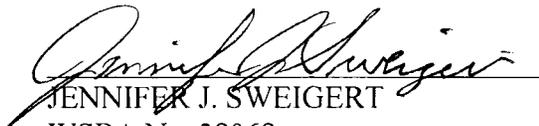
D. CONCLUSION

For the foregoing reasons, this Court should reverse Swank's convictions.

DATED this 23<sup>rd</sup> day of December, 2011.

Respectfully submitted,

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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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|----------------------------|---|-------------------|
| STATE OF WASHINGTON, DSHS, | ) |                   |
|                            | ) |                   |
| Respondent,                | ) |                   |
|                            | ) |                   |
| v.                         | ) | COA NO. 67327-1-I |
|                            | ) |                   |
| RASHAD SWANK,              | ) |                   |
|                            | ) |                   |
| Appellant.                 | ) |                   |

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23<sup>RD</sup> DAY OF DECEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RASHAD SWANK  
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WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF DECEMBER, 2011.

x *Patrick Mayovsky*