No. 42509-2-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MAUA SIAMUPENI MUASAU,
Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

Under Law of the Case Doctrine, the State Failed to Prove the Harassment Charge When It Did Not Establish a Threat To Cause Harm in the Future

Law of the case doctrine required the State to prove Mr. Muasau had "the intent to cause bodily injury in the future" because that was the language contained in the jury instruction defining "threat." CP 60 (Jury Instruction No. 17). Because the State did not object to this instruction, law of the case required it to prove Mr. Muasau intended to cause bodily injury in the future.

It is well-established that unobjected-to jury instructions become the law the State must prove at trial. "Right or wrong, an instruction becomes the law of the case and is binding upon the jury . . . as well as on the court and counsel." 75A Am. Jur. 2d Trial § 1251. In Washington, this doctrine has "roots reaching back to the earliest days of statehood." State v. Hickman, 135 Wn.2d 97, 101, 954 P.2d 900 (1998).

Notably, Mr. Muasau is not objecting to the jury instruction defining threat. Instead, he is asking the

Court to hold the State to the definition set forth in the unobjected-to instruction. *Cf.* Brief of Respondent at 35-36. While, in criminal cases, the doctrine has generally applied to "to-convict" instructions, counsel found no case that limited the doctrine to such instructions. Indeed, the Supreme Court has applied this rule to jury instructions other than "to convict" instructions and this Court has applied the doctrine to definitional instructions.

In State v. Willis, the Supreme Court relied on Hickman to hold that the failure to include the phrase "or an accomplice" in the jury instruction regarding a firearm enhancement, required the State to prove the defendant himself was armed. State v. Willis, 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005). In addition, in State v. Bradley, the Court held a jury instruction limiting the use to which the jury could put evidence regarding checks "became the law of the case" even though the State argued the instruction gave an advantage to the defendant not found in the applicable

law. State v. Bradley, 190 Wn. 538, 542, 69 P.2d 819 (1937).

This Court, moreover, has applied law of the case doctrine to definitional instructions. In State v. Bowen, this Court relied on Hickman to declare an unobjected-to jury instruction explaining constructive possession "became part of the law of the case." State v. Bowen, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010). Similarly, in State v. Beaton, when discussing a jury instruction defining deadly weapon, the Court stated, "[t]his instruction, not objected to by either party, became the law of the case." State v. Beaton, 34 Wn. App. 125, 130, 659 P.2d 1129 (1983).

Further, the Supreme Court frequently states the general rule of law of the case in broad terms, not limiting its application to "to convict" instructions in criminal cases. For example, in State v. Lee, the Court noted that "[a]dded elements become the law of the case . . . only when they are *included in instructions to the jury*." 128 Wn.2d 151, 159, 904 P.2d 1143 (1995) (emphasis added). In Hickman, 135 Wn.2d 97,

102, the Court stated, "[u]nder the [law of the case] doctrine jury instructions not objected to become the law of the case." Similarly, in State v. Salas, the Court broadly stated, "[n]ormally, if no exception is taken to jury instructions, those instructions become the law of the case." 127 Wn.2d 173, 182, 897 P.2d 1246 (1995).

Significantly, when the Supreme Court has discussed the doctrine, it has relied on civil cases — cases notably lacking a "to convict" instruction — for the statement of the rule. In Hickman, 135 Wn.2d at 103, and State v. Schelin, 147 Wn.2d 562, 600 n.10, 55 P.3d 632 (2002), for example, the Court relied on Tonkovich v. Department of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948), for the proposition that the sufficiency of the evidence to sustain a criminal verdict is normally to be determined by the application of the jury instructions.[1] *Accord* Noland v. Dep't of Labor & Indus., 43 Wn.2d 588, 590, 262 P.2d 765 (1953)

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1 In Hickman, the Court also cited two civil cases in its discussion of the roots of the law of the case doctrine. Hickman, 135 Wn.2d at 101 n.2.

("No assignments of error being directed to any of the instructions, they became the law of the case on this appeal, and the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge."). When the general rule of law of the case as explained by the Supreme Court and as applied by this Court does not limit the doctrine to "to convict" instructions, the State's argument that the doctrine does not apply in this context lacks merit. *See* Brief of Respondent at 36-37.

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Mr. Muasau relies on Appellant's Brief for the remainder of his arguments.

II. CONCLUSION

For all of these reasons and the reasons set forth in Appellant's Brief, Maua Siamupeni Muasau respectfully requests this Court to reverse his convictions or, in the alternative, to reverse his sentence and remand for resentencing.

Dated this 13th day of September 2012.

Respectfully submitted,

/s/ *Carol Elewski*
Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 13th day of September 2012, I caused a true and correct copy of Appellant's Reply Brief to be served, by e-filing, on:

Respondent's Attorney

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and, by U.S. Mail, on:
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/s/ *Carol Elewski*
Carol Elewski

ELEWSKI, CAROL ESQ

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