No. 32684-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DENNIS WAYNE JUSSILA,
Defendant/Appellant.

APPEAL FROM THE KLICKITAT COUNTY SUPERIOR COURT
Honorable Randall Krog, Judge Pro Tem

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ADDITIONAL ISSUE PRESENTED

The Court has requested supplemental briefing regarding the following issue:

> Should this court follow the lead of Division I in *State v. Tyler*, No. 73564-1, 2016 WL 4272999 (Div. I Aug. 15, 2016), and determine that the case of *State v. Hickman*, 136 Wn.2d 979 (1988) is no longer good law in light of the U.S. Supreme Court's decision in *Musacchhio v. United States*, 136 S.Ct. 709 (2016)? If *Musacchio* does overrule *Hickman*, how does that impact Mr. Jusilla's claims for relief?

B. ANSWER TO ISSUE PRESENTED

Musacchio v. United States, 577 U.S. ——, 136 S. Ct. 709, 193 L.Ed. 2d 639 (2016), is inapplicable to this case because it does not reach appellant's issue that raises a matter involving only state law.

C. SUPPLEMENTAL ARGUMENT

As argued previously, the decision in *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998) and progeny compel reversal of appellant Dennis Wayne Jussila's convictions based on the law of the case doctrine. Brief of Appellant (BOA) at 10–15. Nothing in *Musacchio* changes this.

The law of the case doctrine is a long-standing, well-established common law doctrine in Washington State. The Washington (WA) Supreme Court established the doctrine more than 100 years ago under the Court's inherent authority to govern court procedures. The law of the case

doctrine applies in all kinds of cases—both criminal and civil. It applies to all kinds of jury instructions, not just "to-convict" instructions in criminal cases. The law of the case doctrine is not a constitutional doctrine that arises from the Fourteenth Amendment's Due Process Clause. The application of the doctrine in Washington State is governed by the WA Supreme Court's case law. It is not governed by the United States Supreme Court's interpretation of the Fourteenth Amendment. For these reasons, Division One's conclusion that *Hickman* is no longer good law in light of the United States Supreme Court's decision in *Musacchio* is erroneous and this Court should decline to follow its recent decision in *State v. Tyler.*[1]

In *Musacchio*, the United States Supreme Court addressed only whether the Fourteenth Amendment's Due Process Clause requires the State to prove beyond a reasonable doubt any unnecessary non-statutory elements set forth in the jury instructions. *Musacchio*, 136 S. Ct. at 715. The Court reiterated that, when a court reviews a sufficiency of the evidence challenge on appeal, due process requires only that the court view the evidence in the light most favorable to the prosecution and

[1] *State* v. Tyler, No. 73564-1, 2016 WL 4272999 (Div. I Aug. 15, 2016). It is undersigned counsel's understanding after speaking to Mr. Tyler's appeal attorneys that a petition for review will be filed once the court addresses a pending motion for reconsideration relating to award of appeal costs.

determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 314-15, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The reviewing court assesses whether the evidence is sufficient to prove the elements as set forth in the statute, not the jury instructions. *Musacchio*, 136 S. Ct. at 715.

Thus, *Musacchio* addresses only what the federal Due Process Clause requires. It does not address what Washington State's law of the case doctrine requires. The *Musacchio* Court specifically recognized that, "[w]hen an appellate court reviews a matter on which a party failed to object below, its review may well be constrained by other doctrines such as waiver, forfeiture, and estoppel." Id. at 716. Washington's law of the case doctrine is based on principles of waiver and estoppel and not the Due Process Clause. Whether and how it applies in any given Washington case is not controlled by the United States Supreme Court's interpretation of the federal constitution.

The law of the case doctrine in Washington is based on principles of waiver and estoppel. The doctrine provides that "jury instructions not objected to become the law of the case." *Hickman*, 135 Wn.2d at 102. In *Hickman,* the Court explained "the law of the case doctrine benefits the

system by encouraging trial counsel to review all jury instructions to ensure their propriety before the instructions are given to the jury." *Id.* at 105. In criminal cases, the doctrine is "encapsulated in criminal rule CrR 6.15(c), which requires all objections to jury instructions be made before the instructions are given to the jury." *Id.*

Because of the beneficial effects of the law of the case doctrine and because it is so well established, the Court refused to abandon the doctrine despite the State's urging in *Hickman*. *Id.*

The law of the case doctrine derives from common law. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844, 848 (2005). In Washington, the law of the case doctrine is more than 100 years old. *See Hickman,* 135 Wn.2d at 101 n.2 ("In 1896, this court held 'whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case.'") (quoting *Pepperall v. City Park Transit Co.*, 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896)). By 1917, the Court "declared the law of the case doctrine to be 'so well established that the assembling of the cases is unnecessary.'" *Hickman*, 135 Wn.2d at 101 n.2 (quoting *Peters v. Union Gap Irr. Dist.*, 98 Wash. 412, 413, 167 P. 1085 (1917)).

The WA Supreme Court has applied the law of the case doctrine in numerous cases over the ensuing decades. *See, e.g.*, *State v. France*, 180 Wn.2d 809, 814, 329 P.3d 864 (2014) ("'jury instructions not objected to become the law of the case.'") (quoting *Hickman,* 135 Wn.2d at 102); *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) ("[I]f no exception is taken to jury instructions, those instructions become the law of the case."); *State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988) (because the State failed to object to the jury instructions they "are the law of the case and we will consider error predicated on them"); *State v. Hames,* 74 Wn.2d 721, 725, 446 P.2d 344 (1968) ("'The foregoing instructions were not excepted to and therefore, became the law of the case.'") (quoting *State v. Leohner*, 69 Wn.2d 131, 134, 417 P.2d 368 (1966)); *State v. Holbrook*, 66 Wn.2d 278, 281, 401 P.2d 971 (1965) ("Defendant took no exception to these instructions or those pertaining to presumption of innocence, reasonable doubt or burden of proof. Thus they became the law of the case."); *Agranoff v. Morton*, 54 Wn.2d 341, 345, 340 P.2d 811 (1959); *Tonkovich v. Dept. of Labor & Indus.,* 31 Wn.2d 220, 225, 195 P.2d 638 (1948) ("It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions where, as here, the charge is approved by counsel for each party, no

objections or exceptions thereto having been made at any stage."); *Schatz v. Heimbigner*, 82 Wash. 589, 590-91, 144 P. 901 (1914) ("These alleged errors are not available to the appellants, because they are at cross-purposes with the instructions of the court to which no error has been assigned. There is but one question open to them; that is, is there sufficient evidence to sustain the verdict under the instructions of the court?").

The law of the case doctrine applies not only in criminal cases but also in civil cases. *See, e.g, Agranoff*, 54 Wn.2d at 345; *Tonkovich*, 31 Wn.2d at 225; *Schatz*, 82 Wash. at 590-91. In criminal cases, it applies not only to to-convict instructions, but also to other types of instructions. *See, e.g., France*, 180 Wn.2d at 816 ("France is correct that the law of the case doctrine applies to all unchallenged instructions, not just the to-convict instruction."); *Ng*, 110 Wn.2d at 39 ("because the State failed both at trial and on this appeal to challenge the applicability of the duress defense to felony murder the instructions, as given, are the law of the case and we will consider error predicated on them").

To-convict jury instructions that are not objected to become the law of the case under a common law doctrine that applies to all kinds of jury instructions in all kinds of cases. A subset of the doctrine provides

that when an unnecessary non-statutory element is included in a to-convict instruction that is not objected to, the element becomes the law of the case that must be proved by the State in the same manner as other necessary elements. *See State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995) ("Added elements become the law of the case . . . when they are included in instructions to the jury."). The question on appeal is whether the evidence was sufficient to prove the added element beyond a reasonable doubt. *Hickman*, 135 Wn.2d at 103. To answer this question, the reviewing court applies the sufficiency of the evidence standard as set forth in *Jackson v. Virginia*, 443 U.S. at 319, and *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). *Hickman,* 135 Wn.2d at 103.

Thus, the reviewing court applies the same harmless error standard that applies when deciding whether the evidence was sufficient to satisfy the proof-beyond-a-reasonable-doubt requirement of the Due Process Clause. *See Musacchio*, 136 S. Ct. at 715; *Jackson*, 443 U.S. at 319. But that does not mean the error is an error of constitutional due process governed by United States Supreme Court case law. The error is a procedural error governed by Washington State common law.

The law of the case doctrine is a procedural rule adopted by this Court under its inherent rule-making power. *See Agranoff*, 54 Wn.2d at

345. The Court has inherent power to govern court procedures, stemming from article four of the state constitution. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006); *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); Const. art. IV, § 1.[2] "The prime object of all procedural law is the just, speedy, economical and final determination of litigation." *Agranoff*, 54 Wn.2d at 345. The law of the case doctrine serves these purposes by requiring counsel to promptly call the court's attention to any error in the jury instructions. *Id.* at 346.

The law of the case doctrine is a matter of court procedure, not constitutional law. Therefore, application of the doctrine is governed by the WA Supreme Court's case law, not the case law of the United States Supreme Court.

In sum, the *Tyler* Court erred in concluding that Mr. Tyler's case is controlled by the United States Supreme Court's interpretation of the Due Process Clause in *Musacchio*. The court's opinion in effect overturned over 100 years of the WA Supreme Court's common law without legal basis. The function of overruling a prior precedent is reserved for the

[2] Const. art. IV, § 1 provides: 'The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide."

court that made the earlier decision, or a higher court. Mark DeForrest, In the Groove or in A Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level, 48 Gonz. L. Rev. 455, 487 (2013). Once the WA Supreme Court has decided an issue of state law, "that interpretation is binding on all lower courts until it is overruled by this court. *Godefroy v. Reilly,* 146 Wash. 257, 262 P. 639 (1928); *cf. Hutto v. Davis,* 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) ('unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts')." *State v. Gore,* 101 Wn.2d 481, 487, 681 P.2d 227 (1984), *superseded on other grounds by* RCW 9.41.040(3). Division One was therefore without authority to adopt *Musacchio* based on what it perceived to be the overriding of established application of Washington's common law.

The *Hickman* Court properly applied well-established state common law regarding the law of the case when it reversed Hickman's conviction. *Musacchio* in no way diminishes *Hickman*'s reasoning or conclusion. As such, this Court should apply the controlling law of *Hickman* and reverse Mr. Jussila's convictions.

D. CONCLUSION

For the reasons stated, *Musacchio* is inapplicable.

Respectfully submitted on September 29, 2016.

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PROOF OF SERVICE

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 29, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of supplemental brief of appellant:

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