

FILED  
July 8, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 73564-1-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

ROBERT TYLER,

Appellant.

---

---

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

The Honorable Thomas J. Wynne, Judge

---

---

SUPPLEMENTAL BRIEF OF APPELLANT

---

---

JENNIFER L. DOBSON  
DANA M. NELSON  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>SUPPLEMENTAL ARGUMENT</u> .....	1
MUSACCHIO IS INAPPLICABLE TO THIS CASE BECAUSE APPELLANT RAISES A MATTER INVOLVING ONLY STATE LAW.....	1
B. <u>CONCLUSION</u> .....	5

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

<u>Lutheran Day Care v. Snohomish Cty.</u> 119 Wn.2d 91, 829 P.2d 746 (1992) .....	2
<u>Pepperall v. City Park Transit Co.</u> 15 Wash. 176, 45 P. 743, 46 P. 407 (1896) .....	2
<u>Roberson v. Perez</u> 156 Wn.2d 33, 123 P.3d 844 (2005). .....	1
<u>State v. Hayes</u> 164 Wn. App. 459, 262 P.3d 538 (2011) .....	1, 3, 5
<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998) .....	2, 4
<u>State v. Ortega–Martinez</u> 124 Wn.2d 702, 881 P.2d 231 (1994). .....	4
<u>State v. Owens</u> 180 Wn.2d 90, 323 P.3d 1030 (2014). .....	4
<u>State v. Salas</u> 127 Wn.2d 173, 897 P.2d 1246 (1995) .....	3
<u>State v. Smith</u> 159 Wn.2d 778, 154 P.3d 873 (2007) .....	5
<u>York v. Wahkiakum Sch. Dist. No. 200</u> 163 Wn.2d 297, 178 P.3d 995 (2008) .....	1, 3

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Erie R.R. v. Tompkins  
304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) ..... 1

Griffin v. United States  
502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) ..... 4

Musacchio v. United States  
\_\_\_ U.S. \_\_\_, \_\_\_, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016)..... 1, 3, 5

RULES, STATUTES AND OTHER AUTHORITIES

15 L. Orland & K. Tegland, Wash.Prac., Judgments § 380  
(4th ed. 1986)..... 2

Joan Steinman  
Law of the Case: A Judicial Puzzle in Consolidated  
and Transferred Cases and in Multidistrict Litigation  
135 U. Pa. L. Rev. 595 (1987)..... 2

A. SUPPLEMENTAL ARGUMENT

MUSACCHIO<sup>1</sup> IS INAPPLICABLE TO THIS CASE BECAUSE APPELLANT RAISES A MATTER INVOLVING ONLY STATE LAW.

As argued previously, this Court's decision in State v. Hayes<sup>2</sup> is directly on point and compels reversal of appellant Robert Lee Tyler's conviction. Brief of Appellant (BOA) at 7. Nothing in Musacchio changes this.

Hayes' holding is predicated upon the Washington (WA) Supreme Court's interpretation of the state constitution and upon its application of state common law. Federal cases addressing only federal matters do not control how the WA Supreme Court interprets the state constitution, and they do not override state common law. York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 303, 178 P.3d 995, 999 (2008); Erie R.R. v. Tompkins, 304 U.S. 64, 78-79, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Because Musacchio is a federal case addressing only federal criminal matters, it is inapplicable here.

The law of the case doctrine derives from common law. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844, 848 (2005).

---

<sup>1</sup> Musacchio v. United States, \_\_\_ U.S. \_\_\_, \_\_\_, 136 S.Ct. 709, 713, 193 L.Ed.2d 639 (2016).

<sup>2</sup> State v. Hayes, 164 Wn. App. 459, 262 P.3d 538 (2011).

In Washington, the law of the case doctrine is an established common law doctrine “with roots reaching back to the earliest days of statehood.” State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900, 902 (1998) (citing Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896)).

The law of the case doctrine is multifaceted. Joan Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U. Pa. L. Rev. 595, 602 (1987). One common facet of this doctrine is the rule that an appellate court will not depart from a ruling it made in a prior appeal in the same case. Id. A rarer facet is the rule that in certain circumstances, the appellate court limits review of an issue adjudicated in the trial court in the same case. Id.

The WA Supreme Court embraces the fact that the law of the case doctrine is multifaceted. Lutheran Day Care v. Snohomish Cty., 119 Wn.2d 91, 113, 829 P.2d 746, 756 (1992). It recognizes as one facet the “rule that the instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law.” Id. (citing 15 L. Orland & K. Tegland, Wash.Prac., Judgments § 380, at 55-56 (4th ed. 1986)). In other words, under Washington common law, jury instructions not objected to become

the law of the case. State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995).

In Musacchio, the United States (U.S.) Supreme Court rejected the rarer facet of the law of the case doctrine embraced by Washington. 136 S.Ct. at 715-16. It held that in federal courts the law of the case doctrine does not bear on how to assess a sufficiency challenge when a jury convicts a defendant after being instructed without objection on all elements of the charged crime plus an additional element. Id. at 716. In other words, it held that federal common law does not recognize as law the case additional elements that make their way into the to-convict instructions.

Musacchio is not applicable in Washington cases that involve only matters of state constitutional concern, such as this here. Erie, 304 U.S. at 78-79; York, 163 Wn.2d at 303. As was the case in Hayes, Tyler asserts the verdict cannot be sustained here because (1) the jury was instructed on alternative means which became law of the case, and (2) one of the means identified in the to-convict instruction was not supported by sufficient evidence. BOA at 5-9. This is a not even remotely a federal matter.

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. 1, § 21. As part of this

protection, the Washington Supreme Court has held that where the jury is instructed as to an alternative means in the to-convict instruction, and the State does not object, that instruction becomes the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). If the evidence is insufficient as to whether the defendant committed the crime by any one of the instructed means submitted to the jury, the conviction will not be affirmed. State v. Ortega–Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994).

By contrast, under federal law, jury unanimity is not required as to the means by which a defendant commits a crime, regardless of whether there is insufficient evidence to support one of the alternative means. Griffin v. United States, 502 U.S. 46, 56, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). The WA Supreme Court recently refused to modify its approach to alternative means crimes to be parallel to the federal standard, instead recognizing that an independent state approach is necessary under Washington's unique constitutional provision for unanimity. State v. Owens, 180 Wn.2d 90, 96, n. 2, 323 P.3d 1030, 1033 (2014). As such, the issue raised by Tyler is unquestionably a state constitutional matter to which the relevant State common law doctrine applies.

This Court's decision in Hayes correctly recognized the same instructional unanimity issue raised by Tyler is one grounded in Washington constitutional law. Hayes, 164 Wn. App. at 473 (citing State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007)). This Court correctly applied the WA Supreme Court's interpretation of Const. art. 1, § 21 and the state common law regarding the law of the case when it reversed Hayes's conviction. Musacchio in no way diminishes Hayes' reasoning or conclusion. As such, this Court should apply the law as it did in Hayes and reverse Tyler's conviction.

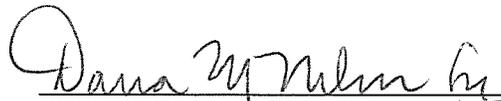
B. CONCLUSION

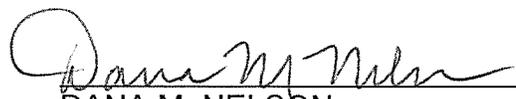
Musacchio is inapplicable.

DATED this 8<sup>th</sup> day of July, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
JENNIFER L. DOBSON,  
WSBA 30487

  
DANA M. NELSON,  
WSBA 28239  
Office ID No. 91051  
Attorneys for Appellant